

THE NATIONAL CREDIT ACT: NEW PARAMETERS FOR THE GRANTING OF CREDIT IN SOUTH AFRICA

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SUMMARY

The National Credit Act, which repeals and replaces the Credit Agreements Act and the Usury Act, has been assented to by the President on 10 March 2006. The Act is designed to prohibit certain unfair credit and credit marketing practices and to protect consumers. A further objective is to promote responsible credit granting and use. The Act therefore prohibits reckless credit granting, regulates credit information and also provides for debt-reorganisation in cases of over-indebtedness by consumers.

The purpose of this article is to provide an overview of the provisions of the Act and at the same time to provide an explanation of, and a commentary on the provisions discussed. In conclusion it is suggested that the Act introduces extensive changes to South African consumer credit law and that participants in the South African consumer credit market will have to review their credit practices and documentation to ensure compliance. Moreover, the Act sets out new parameters for the granting of credit as credit providers will in future have to assess a consumer's credit worthiness before granting credit. It is pointed out that the Act has a wide field of application as it applies to a far greater number of contracts than the repealed legislation. Except for the few transactions specifically excluded from its ambit, the Act applies to all credit agreements irrespective of the type of movable goods or the amount of money involved. Consequently a large group of consumers, including the low-income consumers, will enjoy the protection of the Act.

It is our submission that the Act will result in improved consumer protection, especially with regard to certain areas where protection of the consumer was lacking. We suggest that the success of the Act in practice depends on effective enforcement thereof and on consumer education. On the negative side we feel that the legislature perhaps tries to over-regulate the credit industry.

1 INTRODUCTION

The need for legislative reform in the field of consumer credit law arose *inter alia* because of the ineffectiveness of previous consumer credit legislation¹ to deal with the demands of a complex consumer market.² As a result the National Credit Act³ had been assented to by the President on 10 March 2006. Thereafter he signed a proclamation⁴ in order to put the Act into operation at different stages.⁵ The Act⁶ repealed and replaced the Credit Agreements Act and the Usury Act.⁷

The purpose of the Act is to create a single system to regulate credit. The Act seeks to promote a fair and non-discriminatory marketplace for access to consumer credit. It furthermore also seeks to promote black economic empowerment and ownership within the consumer credit industry. The Act is designed to prohibit certain unfair credit and credit marketing practices and to protect consumers. A further objective is to promote responsible credit granting and use. The Act therefore prohibits reckless credit granting, regulates credit information and also provides for debt re-organisation in cases of over-indebtedness by consumers.⁸

The purpose of this article is to provide an overview of the provisions of the Act and at the same time to provide an explanation of, and a commentary on, the provisions discussed.

2 FIELD OF APPLICATION OF THE ACT

2.1 General

The Act, as a general rule, applies to basically every credit agreement between parties⁹ dealing at arm's length¹⁰ and made within, or having an effect within, the Republic.¹¹

¹ The Credit Agreements Act 75 of 1980 (hereinafter "the Credit Agreements Act"), the Usury Act 73 of 1968 (hereinafter the "Usury Act") and the exemption notice in terms of the Usury Act.

² See "New Law to Help Consumers" 2006-05-03 *Business Day*. Also see the Department of Trade and Industry South Africa *Consumer Credit Law Reform: Policy Framework for Consumer Credit 2004* (hereinafter "Policy Framework") 11ff that states various reasons for the need to reform *eg*, an outdated and ineffective regulatory framework, inadequate mechanisms to promote the rehabilitation of consumers or to assist already over-indebted consumers to deal with their debt.

³ 34 of 2005 (hereinafter "the Act").

⁴ See Proc 22 in GG 28824 of 2006-05-09.

⁵ The Act was put into operation on 2006-06-01, 2006-09-01 and 2007-06-01.

⁶ See s 172 which came into operation on 2006-06-01.

⁷ And thereby addressed one of the needs for reform of consumer credit legislation to wit a single law that treats transactions equivalently – see Policy Framework 23.

⁸ See the preamble to the Act.

⁹ The "consumer" and the "credit provider". "Consumer" in respect of a credit agreement to which the Act applies, in essence means the party to whom goods or services are sold, to whom money is paid or credit granted *etc*. The "credit provider" is the party who supplies goods or services or advances money or credit to another under different types of credit

2.2 Credit agreements in terms of the Act

An agreement constitutes a credit agreement for the purposes of the Act if it qualifies as a credit facility, credit transaction, credit guarantee or a combination thereof.¹²

An agreement¹³ constitutes a credit facility¹⁴ if a credit provider undertakes

- (a) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to a consumer;¹⁵ and
- (b) to either
 - (i) defer the consumer's obligation to pay any part of the cost of such goods or services or to repay to the credit provider any part of such amount; or
 - (ii) bill the consumer periodically for any part of such costs or amount;¹⁶ and
- (c) any charge, fee or interest¹⁷ is payable to the credit provider in respect of such deferred payment or amount billed and not paid within the time provided in the agreement.¹⁸

The definition of a credit facility¹⁹ therefore first of all provides for a contract of purchase and sale of movable goods on credit.²⁰ But so does the definition of an instalment agreement.²¹ The difference between these two contracts of purchase and sale lies in the transfer of ownership to the buyer (consumer). An instalment agreement as per the definition thereof²² has to contain a clause regarding the ownership of the property.²³ As this is not the

agreements. It includes a person who acquires the rights of a credit provider under a credit agreement after it has been entered into – see s 1.

¹⁰ See the discussion in par 2.3 below.

¹¹ S 4(1). See par 2.3 below for the exclusions from the ambit of the Act.

¹² S 8(1).

¹³ Irrespective of the form of the agreement. This means that a credit agreement may be concluded orally or in writing in terms of the Act. Agreements contemplated in s 8(2) are excluded and do not constitute a credit facility – see par 2.3 below.

¹⁴ S 8(3).

¹⁵ Or on behalf of or at the direction of a consumer.

¹⁶ This is an indirect undertaking to defer the consumer's payment or repayment obligation.

¹⁷ See with respect to the consumer's liability, interest, charges and fees par 8 below.

¹⁸ See the discussion below regarding the deferral of the consumer's obligation to pay any part of the cost of the goods or services or to repay any part of the amount borrowed and the payment of a charge, fee or interest in respect of such deferred payment or amount billed as essential elements of a credit facility.

¹⁹ An undertaking by the credit provider to supply goods to the consumer.

²⁰ Eg, the purchasing of goods by means of in store cards in which event credit is being extended to the consumer. In order for such a transaction to qualify as a credit facility (as for any other agreement) a charge, fee or interest has to be paid by the consumer – see the discussion below.

²¹ See the discussion of this type of credit transaction below.

²² In s 1.

²³ See below.

case in terms of the definition of a credit facility (as contract of purchase and sale of movable goods), it is our opinion that the agreement between the parties does not address the question of transfer of ownership of the property.²⁴ The common law rules would therefore be applicable in terms whereof ownership of the property will pass to the buyer immediately upon delivery thereof to the buyer.²⁵

Agreements in terms whereof services are supplied to consumers (as credit facilities) also fall within the ambit of the Act.²⁶ The definition of a credit facility²⁷ also encompasses money-lending transactions.²⁸

The following agreements²⁹ constitute credit transactions:³⁰

- (a) A pawn transaction which is an agreement in terms of which one party advances money or grants credit to another and takes possession of goods as security for the money advanced or credit granted. Either the estimated resale value of the goods exceeds the value of the money advanced or credit granted or a charge, fee or interest is imposed. On expiry of a defined period the party who took possession of the goods as security is entitled to sell the goods and retain the proceeds of the sale in settlement of the consumer's obligations under the agreement.³¹

²⁴ The definition of a credit facility (as contract of purchase and sale) can be compared to the first part of the definition of "credit transaction" in terms of the Credit Agreements Act which dealt with the sale of movable goods on instalments. This definition also did not address the transfer of ownership – see Grové and Otto *Basic Principles of Consumer Credit Law* (2002) 14.

²⁵ Nagel *et al Commercial Law* (2006) 186. Also see Grové and Otto 14.

²⁶ Regarding the Act's predecessors the situation with respect to the rendering of services was as follows: the Credit Agreements Act which in essence regulated the contractual aspects of the agreements to which it applied (agreements in terms of which movable goods were bought or leased on credit) did not apply to the rendering of services. The regulations giving effect to that Act's application omitted the rendering of services. However, the Usury Act which regulated the financial aspects (*eg*, finance charges) of the same contracts and of money-lending transactions applied to the rendering of services on credit – see Grové and Otto 16-18 and 22. As the Act consolidates the laws repealed by it the Act affords protection to consumers regarding both the contractual and financial aspects of agreements in terms of which services are rendered.

²⁷ The part dealing with an undertaking by a credit provider to pay an amount (or amounts) of money to a consumer or on behalf of or at the direction of a consumer.

²⁸ The Act applies to all forms of money lending (as long as the obligation to repay the amount borrowed is deferred and interest or another *quid pro quo* is payable for this privilege). This includes money loans in the ordinary sense of the word whereby one person lends a sum of money to another person who undertakes to repay an equivalent sum, credit card transactions in terms whereof goods are purchased, services are paid for or cash is obtained by means of a credit card (depending of course whether there is a debit or credit balance on the credit card), personal loans granted by financial institutions, overdrawn cheque accounts *etc.* Transactions that are intended to be money-lending transactions but are disguised as something else ought to be covered by the Act as money-lending contracts as well. See Otto 1991 *Credit Law Service* par 10 and Grové and Otto 17-18 for a discussion and examples of genuine and disguised money-lending transactions.

²⁹ Irrespective of its form – see above.

³⁰ S 8(4). S 8(2) agreements are again excluded.

³¹ S 1. The Act therefore applies to normal pawnbroker transactions. See in this regard Nagel *et al* 336ff.

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- (b) A discount transaction, meaning an agreement in terms of which goods or services are to be provided to a consumer over a period of time and where a lower and higher price is quoted for the goods or services. If the account is settled on or before a determined date, the lower price is payable. If payment occurs after that date, or is paid periodically during the period, the higher price(s) will apply.³²
- (c) An incidental credit agreement³³ in terms whereof an account was tendered for goods or services³⁴ that have been provided to the consumer³⁵ and either or both of the following conditions apply:
- (i) a fee, charge or interest became payable when payment of any amount charged in terms of the account was not made on or before a determined period or date; or
 - (ii) a lower or higher price is quoted for settlement of the account. If the account is settled on or before a determined date, the lower price applies. After that date, the higher price will be payable.³⁶
- (d) Instalment agreements, that is to say agreements which entail the sale of movable property where payment of the price or part thereof is

³² S 1. Prepayment of the debt (payment on or before a determined date) and a discount that is given with respect to the prepayment that is encountered in the definition of a discount transaction are essential elements of certain credit agreements – see below.

³³ The Act only has limited application to incidental credit agreements – see s 5.

³⁴ An agreement in terms whereof a supplier of a utility or other continuous service will defer payment by the consumer until the supplier has provided a periodic statement of account (for the utility or other continuous service) and will not impose a charge contemplated in terms of s 103 in respect of the deferred amount unless the consumer fails to pay the full amount due within at least 30 days after the date of delivery of the statement to the consumer, is not a credit facility. Any overdue amount in terms of such agreement constitutes incidental credit – s 4(6)(b). “Utility” is defined in s 1 as the supply to the public of an essential commodity (eg, water or electricity) or service (eg, waste removal or access to telecommunication networks). S 1 defines “continuous service” as the supply for consideration of a utility or service (which can also be combined with the supply of any goods that are essential for the utilization of that utility or service by the consumer) other than credit or access to credit. The service (or utility) is made available by the supplier on a continuous basis as long as the agreement remains in force.

³⁵ Or for goods or services that are to be provided to a consumer over a period of time.

³⁶ S 1. In terms of s 5(2) the parties to an incidental credit agreement are deemed to have made that agreement on the date that is 20 business days after a late payment fee or interest in respect of the account is first charged or a predetermined higher price for full settlement of the account first becomes applicable. The levying of a fee or interest or the payment of the higher price quoted is therefore a *sine qua non* for the coming into existence of an incidental credit agreement. When a number of business days is provided for between two events, the number of days must be calculated by excluding the day on which the first event occurs and by including the day on or by which the second event is to occur. Any public holidays, Saturdays or Sundays are also to be excluded – s 2(5). An example of an incidental credit agreement would be a doctor who renders services and sends an account to the client. Should the account specify that interest, a fee or charge only becomes payable if the account is not settled on or before a determined period or date, incidental credit is only granted 20 business days after the date upon which the doctor first charges any interest or late payment fee. Municipalities that provide electricity and water on a similar basis than in the example of the doctor also grant incidental credit. Incidental credit can aptly be named “overdue accounts” in layman’s terms.

deferred and is to be paid by periodic payments. Possession and use of the property is transferred to the consumer immediately. The contract however either contains an ownership reservation clause in terms whereof the consumer only becomes the owner of the property once the contract is fully complied with or it allows for ownership to pass to the consumer immediately subject to a right of the credit provider to repossess the property³⁷ if the consumer fails to satisfy all his or her financial obligations under the agreement. Interest, fees or other charges are payable to the credit provider in respect of the agreement, or the deferred amount.³⁸

- (e) A mortgage agreement which means a credit agreement that is secured by a pledge of immovable property.³⁹
- (f) Secured loans. A secured loan is an agreement (excluding an instalment agreement) in terms of which a person advances money or grants credit to another and retains, or receives a pledge or cession of the title to movable property or other thing of value as security for all amounts due under that agreement.⁴⁰
- (g) Leases.⁴¹

³⁷ See in this regard Diemont and Aronstam *The Law of Credit Agreements and Hire-purchase in South Africa* (1982) 272.

³⁸ S 1. This definition is similar to the definition of an instalment-sale transaction in terms of the Credit Agreements Act. It seems that, in contrast with the definition of instalment-sale transaction in the Credit Agreements Act, the Act's definition only provides for periodic payments and not for a lump sum payment in future as well. See with regard to the payment requirement in the definition of instalment-sale transactions in the Credit Agreements Act *Ukubona 2000 Electrical CC and Abb South Africa (Pty) Ltd v City Power Johannesburg (Pty) Ltd* 2004 6 SA 323 (SCA) and the discussion thereof by Renke "Credit Agreements: Lump Sum Payment or Payments by Way of Instalments in Future Required?" 2004 *THRHR* 710.

³⁹ S 1. "Mortgage" is defined as a pledge of immovable property that serves as security for a mortgage agreement. The terminology used by the legislature is unfortunate as in terms of South African law only movable property may be pledged. "Hypothecation" of immovable property would have constituted a better choice of words. However, it ought to be clear that the Act also applies in cases where, *eg*, a bond is registered over immovable property to serve as security for repayment of an amount of money lent.

⁴⁰ S 1. Certain notarial bonds ought to qualify as secured loans.

⁴¹ Defined in s 1 as leasing transactions of movable property. Payment for the possession or use of the property is made on an agreed or determined periodic basis during the life of the agreement or deferred in whole or in part for any period during the life of the agreement. Interest, fees or other charges are payable to the credit provider in respect of the agreement or deferred amount. At the end of the term of the agreement, ownership of the property either passes to the consumer absolutely (*eg*, where the lessee of a cell phone in terms of the leasing contract merely becomes the owner of the cell phone upon expiry of the contract) or upon satisfaction of specific conditions set out in the agreement (*eg*, in terms of a residual value financial lease where the lessee has to pay the residual value of the vehicle to become the owner thereof on expiry of the lease). The situation was different in terms of the Credit Agreements Act. In terms of the definition of leasing transaction in s 1 of the Credit Agreements Act if the goods automatically become the property of the lessee at the expiration of the lease, the transaction is not regarded as a lease. See Grove and Otto 11 and Otto 1991 *Credit Law Service* par 7.

- (h) Other agreements (except a credit facility or credit guarantee) in terms of which payment of an amount owed by one person to another is deferred and a fee, charge or interest is payable to the credit provider in respect of the agreement or deferred amount.⁴²

An agreement⁴³ constitutes a credit guarantee if a person in terms thereof undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies.⁴⁴

From the above definitions of the agreements to which the Act applies it ought to be clear that in order for any agreement to qualify as a credit agreement for purposes of the Act, two elements have to be present. First of all the consumer's obligation to pay the cost or part of the cost (of goods or services) or to repay an amount borrowed (or part thereof) or credit to the credit provider is deferred, or provision is being made for some form of prepayment. Secondly there is a fee, charge or interest imposed with respect to the deferred payment (or repayment) or a discount is granted where prepayments are effected.

For the sake of completeness it needs to be mentioned that two new categories of agreements are provided for in the Act namely "developmental credit agreements"⁴⁵ and "public interest credit agreements."⁴⁶ It also needs to be mentioned that every credit agreement is characterized⁴⁷ as a small,⁴⁸

⁴² S 8(4)(f). *Eg*, P buys land from S for residential purposes. The parties agree that the purchase price will be payable in monthly instalments over a period of two years. Interest is levied by S. In this instance the Alienation of Land Act 68 of 1981 applies to the contract as well – see Grové and Otto 104-106. Should there be any conflict (*eg*, regarding the interest payable by the buyer) between the provisions of the Act and of Chapter 2 of the Alienation of Land Act (that deals with the sale of land on instalments), the provisions of the Act prevail to the extent of the conflict – see Schedule 1 to the Act.

⁴³ Irrespective of its form – see above. S 8(2) agreements are excluded.

⁴⁴ S 8(5). Also see s 4(2)(c) which makes it clear that the Act applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. The Act therefore applies to suretyships as well.

⁴⁵ S 10. Subject to certain conditions educational loans, money provided for the development of a small business, low-income housing *etc* are included. Supplementary registration is required to provide developmental credit – s 41.

⁴⁶ S 11. In order to promote the availability of credit in circumstances of natural disaster or similar emergent and grave public interest or in any circumstances that the relevant Minister considers to be in the public interest, the Minister may declare agreements to be public interest credit agreements. These credit agreements are exempted from Part D of Chapter 4 of the Act to the extent that it concerns reckless credit – s 11(5).

⁴⁷ Ss 7(1)(b) and 9 read with GN 713 in GG 28893 of 2006-06-01 (hereafter "Threshold Regulations, 2006").

⁴⁸ A credit agreement is a small agreement if it is a pawn transaction, a credit facility with a credit limit of R15 000 or below, any other credit transaction (except a mortgage agreement) with a principal debt of R15 000 or below or a credit guarantee with respect to any such agreement – s 9(2). "Principal debt" means the amount calculated in accordance with s 101(1)(a) and is the amount being deferred in terms of the agreement – s 1. Also see GN R 489 in GG 28864 of 2006-05-31 (hereafter "National Credit Regulations, 2006") reg 39 for the definition of "deferred amount" namely any amount payable in terms of a credit agreement, the payment of which is deferred and upon which interest is calculated, or any fee, charge or increased price is payable by reason of the deferment.

an intermediate⁴⁹ or a large agreement.⁵⁰ The purpose of this classification is to facilitate effective regulation of the credit industry.⁵¹ The classification has an influence on the Act's field of application in that all the provisions of the Act do not apply to all sized agreements.⁵² The classification also has an effect on the Act's field of application with respect to one of the exceptions thereto.⁵³

Finally, before the exclusions to the Act's field of application are considered, take note that the Act applies to a (proposed) credit agreement⁵⁴ irrespective of whether the credit provider

- (a) resides or has its principal office within the Republic or not;⁵⁵
- (b) is an organ of state;⁵⁶
- (c) is an entity controlled by an organ of state;
- (d) is an entity created in terms of any public regulation; or
- (e) is the Land and Agricultural Development Bank.⁵⁷

2 3 Exclusions from the ambit of the Act

As was stated above, the Act only applies to credit agreements between parties dealing at arm's length.⁵⁸ In the following instances the parties are not dealing at arm's length (and logically the Act does not apply to these agreements):

⁴⁹ A credit agreement is an intermediate agreement if it is a credit facility with a credit limit above R15 000 or any credit transaction (except a pawn transaction or a mortgage agreement) with a principal debt above R15 000 and below R250 000 or a credit guarantee with respect to any such agreement – s 9(3).

⁵⁰ Mortgage agreements or any other credit transaction (except a pawn transaction) with a principal debt of R250 000 or above or a credit guarantee with respect to any such agreement constitute large agreements – s 9(4).

⁵¹ Different pre-agreement disclosure requirements (s 92) apply to different sized agreements. Also see the National Credit Regulations, 2006 reg 28 and 29. The same holds true for post-contractual disclosure by means of statements of account – s 107 read with reg 35 of the National Credit Regulations, 2006.

⁵² *Eg*, the provisions of the Act relating to reckless credit and unlawful credit agreements do not apply to pawn transactions – see ss 78(2) and 89(1) respectively.

⁵³ See par 2 3 below.

⁵⁴ S 4(3)(a)-(b).

⁵⁵ However, see the exception in terms of s 4(1)(d) below. Once the Act applies to a credit agreement, it continues to apply to that agreement even if a party thereto ceases to reside or have its principal office within the Republic. It also applies in relation to every transaction, act or omission under such agreement, whether such transaction, act or omission occurs within the Republic or not – s 4(4)(a)-(b).

⁵⁶ As defined in s 239 of the Constitution – see s 1. The scope of application of consumer protection legislation is thus extended. The Credit Agreements Act (see s 2(1)) did not apply to agreements where credit was provided by the state.

⁵⁷ However, the Act does not apply if the credit provider is the Reserve Bank of South Africa – s 4(1)(c). The Usury Act (s 15) did not apply to Land and Agricultural Development Bank transactions.

⁵⁸ Par 2 1.

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- (a) A shareholder loan or other credit agreement between a juristic person,⁵⁹ as consumer, and a person who has a controlling interest in that juristic person, as credit provider.⁶⁰
- (b) A loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer.⁶¹
- (c) A credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other.⁶²
- (d) Any other arrangement in which each party is dependent on the other.⁶³

Credit agreements in terms of which the consumer is the state⁶⁴ or an organ of state⁶⁵ are not subject to the provisions of the Act. The same applies to credit agreements in terms of which the credit provider is the Reserve Bank of South Africa⁶⁶ or in respect whereof the credit provider is located outside the Republic.⁶⁷

Where the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons,⁶⁸ at the time the agreement is made,⁶⁹ equals or exceeds R1 million, the credit agreement is also excluded from the ambit of the Act.⁷⁰ A large agreement⁷¹ in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below R1 million, is likewise excluded.⁷² In instances where the Act does apply to (proposed) credit agreements in terms of which the consumer is a juristic person (in summary where the consumer is a juristic person with

⁵⁹ Juristic person, for purposes of the Act, includes a partnership, association or other body of persons corporate or unincorporated. It also includes a trust if there are three or more individual trustees or if the trustee itself is a juristic person. However, the concept juristic person does not include a stokvel – s 1.

⁶⁰ See s 4 (2)(b).

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ And consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction. Arrangements of a type that has been held in law to be between parties who are not dealing at arm's length are included as well – s 4(2)(b).

⁶⁴ S 4(1)(a)(ii).

⁶⁵ S 4(1)(a)(iii).

⁶⁶ S 4(1)(c).

⁶⁷ Approved by the Minister on application by the consumer in the prescribed manner and form – s 4(1)(d).

⁶⁸ A juristic person is related to another juristic person if one of them has direct or indirect control over the whole or part of the business of the other or if a person has direct or indirect control over both of them – s 4(2)(d).

⁶⁹ In other words the value stated as such by that juristic person at the time it applies for or enters into that agreement – s 4(2)(a).

⁷⁰ S 4(1)(a)(i) read with the Threshold Regulations, 2006.

⁷¹ See the discussion in par 2 2 above.

⁷² S 4(1)(b), read with the Threshold Regulations, 2006.

an asset value or annual turnover of less than R1 million and it concludes a small or intermediate agreement)⁷³ it only has limited application.⁷⁴

If a person sells goods or services and accepts, as full payment for those goods or services a cheque⁷⁵ upon which payment is subsequently refused, the resulting debt owed to the seller by the issuer of the cheque does not constitute a credit agreement for any purpose of the Act.⁷⁶ Consequently the Act does not apply.

The following agreements do not constitute credit agreements and therefore the Act does not apply to such agreements:

- (a) A policy of insurance.⁷⁷
- (b) A lease of immovable property.⁷⁸
- (c) A transaction between a stokvel⁷⁹ and a member of that stokvel in accordance with the rules of that stokvel.⁸⁰

Lastly, it needs to be mentioned that certain parts of the Act only has a limited application.⁸¹

It can be concluded that, except for the few transactions specifically excluded from its ambit, the Act (or a part or parts thereof) applies to all credit agreements⁸² whether small or large and irrespective of their form, the type of movable goods (or services) or the amount of money involved.⁸³

⁷³ See par 2 2 above.

⁷⁴ S 6.

⁷⁵ Or similar instrument.

⁷⁶ S 4(5)(a). In terms of s 4(5)(b) the situation is the same where the seller accepts, as full payment for the goods or services, a charge by or on behalf of the buyer against a credit facility (eg, a credit card) in terms of which a third person (eg, a financial institution) is the credit provider, and that credit provider subsequently refuses the charge for any reason. The resulting debt owed to the seller by the issuer of that charge does not constitute a credit agreement. S 4(6)(a) determines that if a consumer pays fully or partially for goods or services through a charge against a credit facility that is provided by a third party, the person who sells the goods or services must not be regarded as having entered into a credit agreement with the consumer merely by virtue of that payment.

⁷⁷ Or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance – s 8(2)(a).

⁷⁸ S 8(2)(b).

⁷⁹ Defined in s 1 as a formal or informal rotating financial scheme with entertainment, social or economic functions. It consists of two or more persons in a voluntary association each of whom has pledged mutual support to the others towards the attainment of specific objectives. It also establishes a continuous pool of capital by raising funds by means of the subscription of its members, grants credit to and on behalf of members, provides for members to share in profits from, and to nominate management of the scheme and relies on self-imposed regulation to protect the interest of its members.

⁸⁰ S 8(2)(c).

⁸¹ Eg, the Part in the Act concerning over-indebtedness and reckless credit does not apply to all credit agreements. See s 78.

⁸² As discussed in par 2 2 above.

⁸³ As long as it is concluded at arm's length – see above.

3 CONSUMER-CREDIT INSTITUTIONS

A body to be known as the National Credit Regulator⁸⁴ is established by section 12 of the Act. The Regulator will be responsible to *inter alia* promote and support the development of an accessible credit market and industry and to serve the needs of historically disadvantaged persons and low income persons and communities in a manner consistent with the purposes of the Act.⁸⁵ In addition, the Regulator will also be responsible to regulate the consumer-credit industry by registering credit providers, credit bureaux and debt counsellors.⁸⁶ The Regulator is furthermore also responsible for the enforcement of the Act by *inter alia* receiving complaints concerning alleged contraventions of the Act.⁸⁷ In terms of section 16 the Regulator is responsible to increase knowledge of the nature and dynamics of the consumer-credit market and industry and to promote public awareness of consumer-credit matters. Section 26 establishes a body to be known as the National Consumer Tribunal.⁸⁸ The Tribunal may adjudicate in relation to any application in terms of the Act and also make any order provided for in the Act in respect of such an application. It may also adjudicate in relation to any allegations of prohibited conduct and also impose a remedy provided for in the Act.⁸⁹

4 CONSUMER-CREDIT INDUSTRY REGULATION

The Act requires the registration⁹⁰ of credit providers,⁹¹ credit bureaux,⁹² and debt counsellors⁹³ in order to facilitate regulation of the consumer-credit industry.⁹⁴ A person must apply⁹⁵ to be registered with the Regulator as credit provider if

⁸⁴ Hereinafter "the Regulator" – see ss 12-25.

⁸⁵ S 13.

⁸⁶ S 14. Also see s 45. Par 4 below deals with registrations.

⁸⁷ S 15.

⁸⁸ Hereinafter "the Tribunal". Also see ss 26-34.

⁸⁹ S 27. Also see ss 142-148, dealing with Tribunal consideration of complaints, applications and referrals and ss 149-152, dealing with Tribunal orders.

⁹⁰ See ss 39-59 in this regard.

⁹¹ Ss 40-42.

⁹² S 43. Only a registered credit bureau may conduct business as a credit bureau – s 43(2). A natural person may not be registered as a credit bureau – s 46(1). Prior to the coming into operation of the Act, credit bureaux had never been regulated by means of consumer credit legislation.

⁹³ S 44. The "debt counsellor" is a new role player in the credit industry introduced by the Act. See par 5 4 5 below regarding the role the debt counsellor has to play in debt review. Only registered persons may act as debt counsellors – s 44(2).

⁹⁴ In terms of s 46 certain natural persons are disqualified to register as credit bureaux, credit providers or debt counsellors. S 47 deals with the disqualification of juristic persons.

⁹⁵ However, the Act waives the national registration requirements for a credit provider who operates only within one province, and who is registered in terms of applicable provincial legislation – s 39(1).

- (a) that person⁹⁶ has concluded at least 100 credit agreements;⁹⁷ or
- (b) the total principal debt⁹⁸ owed to that credit provider under all outstanding credit agreements⁹⁹ exceeds R500 000.¹⁰⁰

If a person who is required to be registered as credit provider, is not registered, such person may not enter into a credit agreement or offer or extend credit.¹⁰¹ An agreement entered into by a credit provider who is required to be registered, but who is not, is unlawful and void in terms of section 89.¹⁰²

If a person that is engaging in an activity that requires registration in terms of the Act, is not registered to engage in that activity, the Regulator may issue a notice requiring that person to stop engaging in that activity.¹⁰³ Failure to comply with such notice constitutes an offence.¹⁰⁴ The Regulator may also issue a compliance notice¹⁰⁵ to a person whom the Regulator believes has failed to comply with a provision of the Act or is engaging in an activity in a manner that is inconsistent with the Act. A notice may also be issued to a registrant who has failed to comply with a condition of registration.¹⁰⁶ If the requirements of a compliance notice have been satisfied, the Regulator must issue a compliance certificate.¹⁰⁷ If a person fails to comply with a compliance notice¹⁰⁸ the Regulator may refer the matter to the National Prosecuting Authority if failure constitutes an offence, or otherwise, to the Tribunal.¹⁰⁹

The Tribunal, on request by the Regulator, may cancel a registration in terms of the Act if the registrant repeatedly fails to comply with any condition

⁹⁶ Alone or in conjunction with any associated person. "Associated person" of a credit provider who is a natural person includes the credit provider's spouse or business partners. If the credit provider is a juristic person "associated person" *inter alia* includes any person that has a direct or indirect controlling interest in the credit provider and *vice versa* – s 40(2)(d). Each associated person that is a credit provider in its own name and complies with the requirements for registration has to register in its own name – s 40(2)(b).

⁹⁷ S 40(1)(a). Incidental credit agreements are excluded. In terms of s 40(6)(b) credit guarantees to which the credit provider is a party are also disregarded.

⁹⁸ See par 2 2 above.

⁹⁹ Incidental credit agreements are again excluded. In terms of s 40(6)(a) the credit limit under credit facilities have to be used when determining whether a credit provider has to register and in terms of s 40(6)(b) credit guarantees are also disregarded.

¹⁰⁰ S 40(1)(b) read with s 42(1) and the Threshold Regulations, 2006. As stated in par 2 2 above, supplementary registration is required to provide developmental credit – s 41.

¹⁰¹ S 40(3).

¹⁰² S 40(4). See par 6 1 below regarding unlawful credit agreements.

¹⁰³ S 54(1). In terms of s 54(4) such a notice remains in force until a registration certificate is issued to that person or until the notice is set aside in terms of s 59 (discussed below).

¹⁰⁴ S 54(5).

¹⁰⁵ Such a notice remains in force until it is set aside in terms of s 59 or the Regulator issues a compliance certificate – s 55(4).

¹⁰⁶ S 55(1).

¹⁰⁷ S 55(5).

¹⁰⁸ Without raising an objection to the Tribunal regarding the notice in terms of s 56. The Tribunal may confirm, modify or cancel all or part of the notice – s 56(2).

¹⁰⁹ S 55(6).

of its registration or contravenes the Act repeatedly.¹¹⁰ Similarly, registration may be cancelled by the Tribunal on request by the Regulator where the registrant repeatedly fails to meet commitments regarding black economic empowerment or the reduction of over-indebtedness made by the registrant when upon registration.¹¹¹ It is important to note that the obligations of a consumer and credit provider registered in terms of the Act, survive any cancellation or suspension of registration.¹¹² The Act also provides for the voluntary cancellation of registration.¹¹³ Section 59 provides for the review of a decision¹¹⁴ of the Regulator by the Tribunal. A decision by the Tribunal may furthermore be appealed against or taken on review to the High Court in certain circumstances.¹¹⁵

The purpose of the registration requirements, criteria and procedures in the Act is to regulate the consumer credit industry.¹¹⁶ As the Act also applies to credit providers who don't have to register as credit providers in terms of its provisions, the question may well be asked why it is not compulsory for all credit providers to register in terms of the Act. This, in our opinion, would have made the Regulator's task to regulate the credit industry a much easier one.

5 CONSUMER-CREDIT POLICY

5.1 Consumer rights

The Act recognizes the following consumer rights:

- (a) A right to apply to a credit provider for credit.¹¹⁷
- (b) A right to protection against discrimination in credit granting.¹¹⁸ Unfair discrimination in terms of section 9(3) of the Constitution or Chapter 2 of

¹¹⁰ In terms of s 48(1). See s 48 regarding conditions of registration and s 49 regarding variation of conditions of registration.

¹¹¹ S 57(1).

¹¹² S 57(9).

¹¹³ S 58.

¹¹⁴ In terms of Chapter 3 of the Act which deals with registrations, compliance procedures *etc.*

¹¹⁵ S 59(3).

¹¹⁶ See the main heading to Chapter 3 Part A. The regulation of the consumer credit industry is effected by *inter alia* requiring credit providers to submit prescribed information to the Regulator (s 45(1)), by the imposing of conditions of registration, if any, by the Regulator (s 48), *etc.* S 52(5)(c) determines that a registrant has to comply with its conditions of registration, and the provisions of the Act. S 52(5)(f) requires a registrant to file prescribed reports with the Regulator.

¹¹⁷ S 60(1). Every natural or juristic person has a right to apply for credit. However, nobody has an absolute right that credit being extended to him/her as credit may be refused on reasonable commercial grounds that are consistent with its customary risk management and underwriting practices – s 60(2). The Act does not establish a right to require a credit provider to enter into a credit agreement. The only condition is that no discrimination takes place – s 60(3).

¹¹⁸ S 61. Discrimination by credit bureaux and debt counsellors is also prohibited – s 61(2).

the Promotion of Equality and Prevention of Unfair Discrimination Act¹¹⁹ is prohibited when assessing a person's credit worthiness, determining the cost of the agreement, requiring compliance with the terms of the agreement, *etcetera*.¹²⁰

- (c) A right to be given reasons for credit being refused or discontinued, for refusal to increase the credit limit under an existing credit facility *etcetera*.¹²¹
- (d) A right to information relating to the agreement, disclosure and account statements in a plain and understandable official language.¹²²
- (e) A right to protection against discrimination against or penalizing of the consumer in instances where the consumer seeks to exercise or amend his or her rights set out in the Act or in a credit agreement.¹²³
- (f) A right to confidential treatment of information pertaining to a consumer.¹²⁴
- (g) Various other rights regarding personal information and consumer credit records.¹²⁵

5 2 National register of credit agreements

Section 69 provides that the Minister may require the Regulator to establish and maintain a national register of credit agreements based on information¹²⁶ that a credit provider is obliged to provide to the national register or to a credit bureau upon entering or amending a credit agreement.¹²⁷

¹¹⁹ 4 of 2000.

¹²⁰ S 61(1).

¹²¹ S 62. On request from the consumer, he/she must be informed in writing of the dominant reason for the refusal, *etc*.

¹²² Ss 63-65.

¹²³ S 66(1). A credit provider is also prohibited from taking adverse actions if a credit agreement (or a provision thereof) to which the credit provider is a party, is declared to be unlawful or is severed from the agreement – s 66(2).

¹²⁴ S 68.

¹²⁵ S 70(2) places important obligations on credit bureaux, *eg*, to promptly expunge from its records consumer credit information (defined in s 70(1)) that, in terms of the regulations, is not permitted to be entered in its records or is required to be removed from its records). A credit bureau is also prohibited from drawing a negative inference about, or issue a negative assessment, of a person's creditworthiness due to the fact that the credit bureau has no credit information concerning that person. S 72 bestows a right on consumers to access and challenge credit records and information.

¹²⁶ *Eg*, information pertaining to the credit provider and consumer, the credit limit under a credit facility, the principal debt and other information regarding credit transactions *etc*.

¹²⁷ Excluding pawn transactions and incidental credit agreements.

5 3 Credit-marketing practices

One of the policy considerations that gave rise to the Act was to deal with consumer debt more effectively, *inter alia* by addressing unsolicited credit. A manner in which the legislator seeks to achieve this objective is to require, prohibit or curb certain credit marketing practices.¹²⁸ These practices include

- (a) negative option marketing which is an offer to enter into a credit agreement¹²⁹ on the basis that the agreement will automatically come into existence unless the consumer declines the offer;¹³⁰
- (b) opting out requirements;¹³¹
- (c) marketing and sales of credit at a consumer's home or workplace is also being restricted. There are exceptions for instance where the consumer pre-arranged the visit for that purpose;¹³²
- (d) advertising of credit¹³³ by a person who is required to be registered as credit provider, but who is not so registered, is prohibited;¹³⁴
- (e) fraudulent, misleading or deceptive advertising or advertising that promotes a form of credit that is unlawful is also prohibited;¹³⁵
- (f) it is required that a solicitation by¹³⁶ a credit provider for the purpose of inducing a person to apply for or obtain credit has to contain prescribed information.¹³⁷

¹²⁸ See Policy Framework 29-30.

¹²⁹ Or inducing a person to enter into a credit agreement.

¹³⁰ See s 74(1) which prohibits this form of negative option marketing. In terms of s 74(4) a credit agreement entered into in spite of this prohibition is unlawful and void – see par 6 1 below regarding unlawful credit agreements. S 74(2), subject to s 119(4), prohibits a credit provider from making an offer to increase the credit limit under a credit facility (or from inducing a person to accept such an increase) on the basis that is being prohibited in terms of s 74(1). S 74(3) similarly prohibits a proposal by a credit provider to alter or amend a credit agreement, or induce a person to accept such alteration or amendment (except as contemplated in ss 104, 116(a), 118(3) and 119(4)). S 74(5) read with s 90 renders a provision of a credit agreement entered into as a result of an offer or proposal contemplated in s 74(2) or (3) unlawful and void – see par 6 2 below in connection with unlawful provisions in credit agreements.

¹³¹ S 74(6) compels a credit provider, when entering into a credit agreement, to present a consumer with certain options (eg to be excluded from mass distribution of email or sms messages) and to afford the consumer an opportunity to opt out of those options. A credit provider must maintain a register of all options selected by consumers in terms of s 74(6).

¹³² S 75. In summary, the initiative for the sale and marketing of credit at home or work has to be the consumer's. The consumer is in any event in certain circumstances protected by the so called cooling-off right in terms of s 121 – see par 11 1 below.

¹³³ Or of goods or services to be purchased on credit.

¹³⁴ S 76(3).

¹³⁵ S 76(4).

¹³⁶ Or on behalf of.

¹³⁷ S 77.

5 4 Over-indebtedness and reckless credit

5 4 1 General

The Department of Trade and Industry¹³⁸ highlighted,¹³⁹ as a reason for the need to reform existing consumer credit legislation, an over-supply of credit to those considered creditworthy which resulted in heavy debt burdens for a large number of consumers. According to the DTI¹⁴⁰ another shortcoming of “[t]he mechanisms currently in place ...” is to assist already over-indebted consumers to deal with their debt. As a result, for the first time in the history of South African consumer-credit legislation, specific provision¹⁴¹ is being made for measures to combat reckless credit lending and over-indebtedness.¹⁴²

The Part¹⁴³ in the Act, dealing with over-indebtedness and reckless credit, does not apply to a credit agreement in respect of which the consumer is a juristic person.¹⁴⁴ The provisions in the Act dealing with reckless credit also do not apply to¹⁴⁵

- (a) a school or student loan;¹⁴⁶
- (b) an emergency loan;¹⁴⁷
- (c) a public interest credit agreement;¹⁴⁸
- (d) a pawn transaction;¹⁴⁹
- (e) an incidental credit agreement;¹⁵⁰

¹³⁸ Hereinafter “the DTI”.

¹³⁹ See Policy Framework 13.

¹⁴⁰ *Ibid.*

¹⁴¹ Ss 78-88. One of the purposes of the Act is to *inter alia* protect consumers by addressing and preventing over-indebtedness and by providing mechanisms for resolving over-indebtedness – s 3(g).

¹⁴² See Policy Framework 29-32; Roestoff and Renke “Solving the Problem of Overspending by Individuals: International Guidelines” 2003 *Obiter* 1; Roestoff and Renke “A Fresh Start for Individual Debtors: The Role of South African Insolvency and Consumer Protection Legislation” 2005 14 *International Insolvency Review* 93; Renke and Roestoff “The Consumer Credit Bill – A Solution to Over-indebtedness?” 2005 *THRHR* 115; Roestoff and Renke “Debt Relief for Consumers – The Interaction Between Insolvency and Consumer Protection Legislation (Part 1)” 2005 *Obiter* 561; Roestoff and Renke “Debt Relief for Consumers – The Interaction Between Insolvency and Consumer Protection Legislation (Part 2)” 2006 *Obiter* 98; and Renke, Roestoff and Bekink “New Legislative Measures in South Africa Aimed at Combating Over-indebtedness – Are the New Proposals Sufficient Under the Constitution and Law in General?” 2006 15 *International Insolvency Review* 91.

¹⁴³ Chapter 4 Part D.

¹⁴⁴ S 78(1). See par 2 3 above.

¹⁴⁵ S 78(2).

¹⁴⁶ See s 1.

¹⁴⁷ *Ibid.*

¹⁴⁸ See par 2 2 above.

¹⁴⁹ See par 2 2 above.

¹⁵⁰ See par 2 2 above.

- (f) a temporary increase in the credit limit under a credit facility.

5 4 2 *Over-indebtedness*

A consumer is over-indebted in terms of the Act if he or she is or will not be able to satisfy in a timely manner all the obligations under all the credit agreements to which he or she is a party.¹⁵¹

The determination whether the consumer is over-indebted or not, is done on the preponderance of available information at the time the determination is made. Regard is had to the consumer's financial means, prospects and obligations¹⁵² and probable propensity to satisfy in a timely manner all his or her obligations under all his or her credit agreements taking into consideration the consumer's history of debt repayment.¹⁵³ Should a consumer be over-indebted, the consumer may apply to a debt counsellor to be declared over-indebted.¹⁵⁴

It should be clear that the provisions prohibiting certain marketing practices¹⁵⁵ are aimed at preventing over-indebtedness as they prevent consumers from taking up credit that they cannot afford. The provisions of the Act regarding pre-agreement disclosure,¹⁵⁶ form of credit agreements,¹⁵⁷ statements of account,¹⁵⁸ alteration of credit agreements¹⁵⁹ and the consumers right to rescind¹⁶⁰ or terminate the agreement¹⁶¹ clearly have a similar aim. The same holds true for the statutory *in duplum* rule.¹⁶²

5 4 3 *Prevention of reckless credit*

When regard is had to the measures in the Act regarding the prevention of reckless credit, it is notable that the Act abolishes the compulsory payment of prescribed deposits and prescribed maximum periods of payment provided for in the repealed Credit Agreements Act.¹⁶³ The underlying philosophy of the deposit requirement was that only consumers who were able to pay the prescribed deposit should be allowed to buy or lease goods

¹⁵¹ S 79(1).

¹⁵² "Financial means, prospects and obligations" *inter alia* include income or a right to receive income, shared income with an immediate family or household member (if obligations are mutually borne as well), *etc* – s 78(3).

¹⁵³ S 79(1). When making such determination, the settlement value at that time of eg the credit facility is used – s 79(3).

¹⁵⁴ See par 5 4 5 below.

¹⁵⁵ See par 5 3 above.

¹⁵⁶ S 92. See par 7 1 below.

¹⁵⁷ S 93. See par 7 2 below.

¹⁵⁸ Ss 107-115. See par 9 below.

¹⁵⁹ Ss 116-120. See par 10 below.

¹⁶⁰ S 121. See par 11 1 below.

¹⁶¹ S 122. See par 11 2 below.

¹⁶² See par 8 below.

¹⁶³ See s 6(5) and 6(6)(a) and (b) of the Credit Agreements Act.

on credit,¹⁶⁴ while the prescribed maximum periods of payment helped to prevent consumers from binding themselves for an extended period of indebtedness.¹⁶⁵ These provisions were clearly aimed at preventing overspending and over-indebtedness. The legislature presumably regarded the new measures in the Act, discussed below, as sufficient to prevent reckless credit.

Before a credit agreement is entered into, a credit provider has to take reasonable steps to assess a proposed consumer's

- (a) general understanding and appreciation of the risks and costs of the proposed credit, and of the consumer's rights and obligations under the agreement;
- (b) the consumer's debt re-payment history under credit agreements;
- (c) existing financial means, prospects and obligations; and
- (d) if a consumer has a commercial purpose for applying for credit, whether there is a reasonable basis to conclude that such purpose may prove to be successful.¹⁶⁶

A credit agreement is reckless if, at the time the agreement was made,¹⁶⁷ the credit provider failed to conduct the required assessment in terms of section 81¹⁶⁸ or entered into the agreement despite the fact that the preponderance of information available to him indicated that the consumer did not understand or appreciate the nature of the risks, costs or obligations¹⁶⁹ or that entering into the agreement would make the consumer over-indebted.¹⁷⁰

A credit provider is prohibited from entering into a reckless agreement with a prospective consumer.¹⁷¹

5 4 4 Suspension of reckless credit agreements

In any court proceedings in which a credit agreement is being considered, the court may declare the credit agreement reckless.¹⁷² If it is declared reckless because of the credit provider's failure to conduct the required assessment¹⁷³ or because he entered into an agreement despite the fact

¹⁶⁴ Otto 1991 *Credit Law Service* par 22.

¹⁶⁵ *Ibid.*

¹⁶⁶ S 81(2).

¹⁶⁷ Or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of s 119(4).

¹⁶⁸ S 80(1)(a).

¹⁶⁹ S 80(1)(b)(i).

¹⁷⁰ S 80(1)(b)(ii).

¹⁷¹ S 81(3).

¹⁷² S 83(1).

¹⁷³ S 80(1)(a).

that there were indications that the consumer did not understand the nature of the risks, costs or obligations,¹⁷⁴ the court may make an order

- (a) setting aside all or part of the consumer's rights and obligations under such agreement;¹⁷⁵ or
- (b) suspending the force and effect of the agreement.¹⁷⁶

However, when the agreement is found to be reckless because there were indications that the conclusion thereof would make the consumer over-indebted,¹⁷⁷ the court must further consider whether the consumer is over-indebted at the time of the court proceedings. If so, the court may make an order suspending the force and effect of that agreement and restructuring the consumer's obligations under any other credit agreements in accordance with section 87.¹⁷⁸

During the period that the force and effect of a credit agreement is suspended

- (a) the consumer is not required to make any payment in terms of the agreement;
- (b) no interest, fee or other charge under the agreement may be charged; and
- (c) the credit provider may not enforce any of his rights under the agreement or under any law in respect of the agreement.¹⁷⁹

After suspension of a credit agreement ends, all the rights and obligations of the credit provider and the consumer under the agreement are revived and are fully enforceable. No amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that were unable to be charged during the suspension.¹⁸⁰

5 4 5 Application for debt review

The Act introduces measures aimed at resolving over-indebtedness in that it allows for debt restructuring if a consumer is over-indebted.

A consumer may apply to a debt counsellor to have the consumer declared over-indebted.¹⁸¹ However, if the credit provider under a credit agreement has proceeded to take steps in terms of section 129 to enforce the agreement¹⁸² an application in terms of section 86 may not be made in

¹⁷⁴ S 80 (1)(b)(i).

¹⁷⁵ As the court determines just and reasonable in the circumstances.

¹⁷⁶ S 83(2). Suspension takes place in accordance with s 84 – see the discussion below.

¹⁷⁷ S 80(1)(b)(ii).

¹⁷⁸ S 83(3). Restructuring or re-arrangement of debt is discussed in par 5 4 5 and 5 4 6 below.

¹⁷⁹ S 84(1).

¹⁸⁰ S 84(2).

¹⁸¹ S 86(1). The consumer may also seek a declaration of reckless credit – s 86(6)(b).

¹⁸² See the discussion in par 14 below.

respect of such an agreement.¹⁸³ If the debt counsellor concludes that the consumer is over-indebted, the debt counsellor may recommend that the Magistrate's Court make an order that one or more of the consumer's credit agreements be declared to be reckless credit and/or that one or more of the consumer's obligations be re-arranged or restructured.¹⁸⁴ Debt re-arrangement may be done by extending the period of the agreement and thereby reducing the amount of each payment due accordingly, or by postponing the dates on which payments are due under the agreement for a specified time (or by doing both).¹⁸⁵ If the counsellor concludes that the consumer is not over-indebted the application must be rejected.¹⁸⁶ The consumer, with leave of the magistrate's court, may then directly apply to the said court for the necessary relief.¹⁸⁷ However, if the counsellor concludes that, although the consumer is not over-indebted, the consumer is nevertheless experiencing¹⁸⁸ difficulty to satisfy his obligations under credit agreements in a timely manner, the counsellor may recommend that the consumer and his credit providers voluntarily consider and agree on a plan of re-arrangement.¹⁸⁹ If all the parties accept the proposal the counsellor must record the proposal in the form of an order and file it as a consent order in terms of section 138.¹⁹⁰ Otherwise the counsellor must refer the case to the Magistrate's Court with the recommendation.¹⁹¹

It may also be alleged¹⁹² in any court proceedings in which a credit agreement is being considered that the consumer under that agreement is over-indebted. The court may then

- (a) refer the matter directly to a debt counsellor with a request to make a section 86(7)¹⁹³ recommendation to the court; or
- (b) declare the consumer over-indebted and make any order in terms of section 87.¹⁹⁴

The magistrate's court, acting on the debt counsellor's proposal¹⁹⁵ or the consumer's application,¹⁹⁶ must conduct a hearing, having regard to the

¹⁸³ S 86(2).

¹⁸⁴ S 86(7)(c).

¹⁸⁵ S 86(7)(c)(ii). Another possibility of re-arrangement is provided for, namely by recalculating the consumer's obligations. However, this may only occur because of contraventions of certain Parts of the Act to wit the Parts dealing with unlawful agreements and provisions, disclosure, form and effect of credit agreements and collection and repayment practices.

¹⁸⁶ Even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into - s 86(7)(a).

¹⁸⁷ S 86(9).

¹⁸⁸ Or is likely to experience.

¹⁸⁹ S 86(7)(b).

¹⁹⁰ If consented to by the consumer and every credit provider concerned - s 86(8)(a).

¹⁹¹ S 86(8)(b). It is uncertain what the debt counsellor will recommend in this instance because the consumer is not over-indebted yet. However, the magistrate's court, upon receipt of the debt counsellor's recommendation, may act in accordance with s 87 discussed below.

¹⁹² In terms of s 85.

¹⁹³ As discussed above.

¹⁹⁴ Discussed below.

proposal and the information before it and the consumer's financial means, prospects and obligations.¹⁹⁷ The court may then

- (a) reject the recommendation or application, as the case may be;¹⁹⁸ or
- (b) make an order declaring any credit agreement to be reckless,¹⁹⁹ or an order re-arranging²⁰⁰ the consumer's obligations.²⁰¹

5 4 6 *Effect of debt review or re-arrangement*

A consumer who has filed an application for debt review²⁰² or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement²⁰³ with any credit provider until the matter has been finalised.²⁰⁴

A credit provider who receives a notice of an application for debt review or of court proceedings in terms of section 83²⁰⁵ or section 85²⁰⁶ may not exercise or enforce by litigation²⁰⁷ any right or security under that credit agreement until²⁰⁸

- (a) the consumer is in default under the agreement; and
- (b) the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired; or
- (c) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or

¹⁹⁵ In terms of s 86(8)(b). The legislature omitted in s 87(1) to refer to a s 86(7)(c) proposal by a debt counsellor. It is submitted that this is an oversight which will have to be amended by the legislature.

¹⁹⁶ In terms of s 86(9).

¹⁹⁷ S 87(1).

¹⁹⁸ S 87(1)(a).

¹⁹⁹ In which case the reckless credit orders in terms of s 83(2) or (3) (discussed in par 5 4 4 above) may be made.

²⁰⁰ Discussed above.

²⁰¹ Or both orders – s 87(1)(b).

²⁰² In terms of s 86(1).

²⁰³ Other than a consolidation agreement. "Consolidation agreement" is not defined in the Act but it is submitted, as the name indicates, that it is an agreement whereby the consumer's debts are consolidated. Conclusion of a consolidation agreement is therefore permissible as a consolidation agreement does not create new debt for the consumer.

²⁰⁴ *Eg*, the debt counsellor has rejected the consumer's application and the consumer has not filed a direct application in time, the court has determined that the consumer is not over-indebted, the consumer's obligations under credit agreements as re-arranged are fulfilled *etc* – s 88(1). However, if the consumer fulfills obligations by means of a consolidation agreement, the consumer may not incur further charges under a credit facility or enter into a new credit agreement with any credit provider until all the consumer's obligations under the original (or subsequent) consolidation agreement/s have been fulfilled – s 88(1) and (2).

²⁰⁵ Discussed in par 5 4 4 above.

²⁰⁶ Discussed in par 5 4 5 above.

²⁰⁷ Or other judicial process.

²⁰⁸ S 88(3).

- (d) all the consumer's obligations under re-arranged credit agreements are fulfilled;²⁰⁹ or
- (e) the consumer defaults on any obligation in terms of a re-arrangement.²¹⁰

A new credit agreement,²¹¹ entered into by a credit provider while debt re-arrangement still subsists, may be declared to be reckless credit.²¹² If a consumer applies for or enters into a new credit agreement while debt re-arrangement still subsists, the consumer will forfeit the protection afforded by the Part in the Act dealing with over-indebtedness and reckless lending.²¹³

It is important to note that section 71 allows for the removal of a record of debt adjustment or judgment.²¹⁴

6 UNLAWFUL AGREEMENTS AND PROVISIONS

6.1 Unlawful credit agreements

A credit agreement²¹⁵ is unlawful²¹⁶ if

- (a) at the time the agreement was made the consumer was an unemancipated minor,²¹⁷ subject to a court order declaring him or her mentally unfit or subject to an administration order,²¹⁸ and the administrator has not consented to the agreement;²¹⁹

²⁰⁹ Unless the consumer fulfilled the obligations by way of a consolidation agreement (discussed above).

²¹⁰ Agreed between the consumer and credit providers (as a result of a proposal in terms of s 86(7)(b)) or ordered by a court. S 88(3)(b)(ii) also mentions re-arrangement as ordered by the Tribunal. This reference to the "Tribunal" is clearly incorrect as s 87 bestows powers on the Magistrate's Court only to re-arrange obligations.

²¹¹ Or a part thereof. Consolidation agreements are excluded.

²¹² Whether or not the circumstances in s 80 apply – s 88(4).

²¹³ S 88(5).

²¹⁴ In brief, a consumer whose debts have been re-arranged may apply to a debt counsellor for a clearance certificate. If the clearance certificate is refused, the consumer may apply to the Tribunal to review the decision. If the certificate is issued, the consumer may file a certified copy with the national register (see par 5.2) or with any credit bureau. The credit bureau or national register must then expunge from its records the fact that the consumer was subject to the debt re-arrangement order or agreement, any information relating to any default by the consumer that may have precipitated the debt re-arrangement or that may have been considered in the making of the arrangement order or agreement and lastly any record that a particular credit agreement was subject to the relevant debt re-arrangement order or agreement.

²¹⁵ Except a pawn transaction – s 89(1).

²¹⁶ S 89(2).

²¹⁷ Unassisted by a guardian.

²¹⁸ In terms of s 74 of the Magistrates' Courts Act 32 of 1944.

²¹⁹ S 89(2)(a). It is required that the credit provider knew, or could reasonably have determined, that the consumer was the subject of such an order. S 89(2)(a) does not apply if the consumer or someone acting on his behalf induced the credit provider to believe that the consumer had the legal capacity to contract or attempted to obscure or suppress the fact that the consumer was subject to the order – s 89(3).

- (b) the agreement results from negative option marketing;²²⁰
- (c) it is a supplementary agreement or document that contains a provision that would be unlawful if it was included in a credit agreement;²²¹
- (d) at the time the agreement was made the credit provider was not registered;²²²
- (e) the credit provider²²³ had been ordered to stop offering, making available or extending credit under any credit agreement²²⁴ by a notice²²⁵ by the Regulator.²²⁶

If a credit agreement is unlawful²²⁷ a court must²²⁸ order that²²⁹

- (a) the credit agreement is void from the date the agreement was entered into;²³⁰
- (b) the credit provider must refund to the consumer any money paid to the credit provider under the agreement;²³¹
- (c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to the consumer in terms of the agreement are either cancelled²³² or otherwise forfeited to the State.²³³

6 2 Unlawful provisions

Standard form contracts often undermine consumers' rights by the inclusion of complicated and compromising clauses in the contract. Another problem with these contracts is that credit providers commonly attempt to reduce the consumer's common law rights through certain contractual clauses.²³⁴ These

²²⁰ In terms of s 74(1). See par 5 3 above.

²²¹ S 91(a) prohibits such supplementary agreements or documents.

²²² Under circumstances where the Act requires the credit provider to be registered. See par 4 above.

²²³ Whether or not the Act requires the credit provider to be registered in terms of the Act.

²²⁴ Or under the particular form of credit agreement used by the credit provider.

²²⁵ In respect of which no further appeal or review is available.

²²⁶ Or a provincial credit regulator.

²²⁷ In terms of s 89.

²²⁸ The court has no discretion in this regard.

²²⁹ S 89(5).

²³⁰ S 164(1) specifically requires a court to declare a credit agreement unlawful in order for the agreement to be void.

²³¹ With interest calculated at the rate set out in the agreement and for the period from the date on which the consumer paid the money to the credit provider, until the date the credit provider refunds the consumer.

²³² Unless the court concludes that doing so would unjustly enrich the consumer.

²³³ If the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer. It appears from the wording of s 89(5) that the credit provider's rights are forfeited to the State and not the credit provider's money or goods. The effect of s 89(5) is that restitution takes place from the credit provider's side but not *vice versa*.

²³⁴ See Policy Framework 26.

and other practices create an imbalance between the bargaining power of credit providers and consumers which needs to be addressed, *inter alia* by prohibiting certain clauses in contracts.²³⁵ The Act therefore prohibits a number of unlawful provisions in credit agreements.²³⁶ These include provisions²³⁷

- (a) which purport to waive consumers' rights under the Act or any common law rights that may be applicable to the agreement;
- (b) which purport to avoid a credit provider's obligations under the Act or authorising the credit provider to do anything that is unlawful under the Act ;
- (c) exempting the credit provider from certain liabilities;
- (d) expressing an agreement by the consumer to forfeit money to the credit provider if the consumer seeks to rescind the agreement in terms of section 121;
- (e) expressing
 - (i) an authorisation by the consumer to the credit provider to enter any premises for purposes of taking possession of goods to which the credit agreement relates;
 - (ii) a grant of a power of attorney in advance to the credit provider;
 - (iii) an undertaking to sign enforcement documentation in advance;
 - (iv) a consent to a pre-determined cost of enforcement;
 - (v) consent by the consumer to the High Court's jurisdiction, if the magistrate's court has concurrent jurisdiction, or the consent to the jurisdiction of any other court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept;
- (f) expressing an agreement by the consumer to deposit with the credit provider or an agent, an identity document, credit, debit or ATM card or any similar identifying document or device or to provide a personal identification number (PIN code) to access an account; and
- (g) stating that the rate of interest is variable, unless the rate is tied to a fixed reference rate, stipulated in the agreement.²³⁸

²³⁵ This is one of the objectives of consumer credit legislation – see Fleming *Krediettransaksies* (1982) 22-26; *South African Law Commission Working Paper 46 Project 67 "The Usury Act and Related Matters"* (1993) 61 (hereinafter *Working Paper 46*); and Grové and Otto 2-3.

²³⁶ S 90(1).

²³⁷ S 90(2)(a)-(o). S 90(2) corresponds to a certain extent with its predecessor s 6(1) of the Credit Agreements Act. Regard can therefore be had to *Credit Law Service* par 20 and Grové and Otto 29-31.

²³⁸ See s 103(4).

A provision in a credit agreement that is unlawful in terms of section 90 of the Act is void as from the date that the provision is purported to take effect.²³⁹ A court dealing with a matter concerning a credit agreement that contains an unlawful provision must sever that provision from the agreement or the court has to alter the provision to render it lawful, if it is reasonable to do so having regard to the agreement as a whole. Alternatively the court has to declare the entire agreement unlawful as from the date that the agreement²⁴⁰ took effect. The court also has to make further orders to give effect to the principles of section 89(5) with respect to the unlawful provision, or entire agreement, as the case may be.²⁴¹

7 DISCLOSURE AND FORM OF CREDIT AGREEMENTS

7 1 Pre-agreement disclosure

As stated above²⁴² one of the objectives of consumer credit legislation is to address the imbalance between the bargaining power of credit grantors and consumers. This is also achieved by requiring disclosure of the consumer's obligations²⁴³ which will assist the consumer in making informed choices.²⁴⁴ The Act therefore prohibits a credit provider from entering into a credit

²³⁹ S 90(3). S 164(1) specifically requires a court to declare a provision in a credit agreement unlawful in order for the provision to be void.

²⁴⁰ Or amended agreement. The reference in the context here to "amended agreement" is not clear. If the court declares the entire agreement unlawful, there could be no "amended agreement".

²⁴¹ S 90(4). The court will sever the unlawful provision from the contract if it is possible to do so without affecting the contract as a whole. The other possibility is to alter the unlawful provision to render it lawful if it is reasonable having regard to the agreement as a whole. It is suggested that only if it is not possible for the court to sever or alter the unlawful provision without affecting the agreement as a whole, the court would make use of the alternative option to declare the entire agreement unlawful – see *LAWSA* (first reissue) Vol 5(1) par 19 and *Jela v Godwana* [2000] 2 All SA 557 (E). Also see Otto 1991 *Credit Law Service* par 19. Whether the court only severs or alters the unlawful provision, or declares the entire agreement unlawful, it has to make the s 89(5) orders (regarding restitution, etc discussed in par 6 1 above) that are just and reasonable in the circumstances with respect to the unlawful provision or entire credit agreement.

²⁴² Par 6 2.

²⁴³ See *Working Paper 46* 61-62; Grové and Otto 2-3. Grové and Otto 84-89 distinguish three stages of disclosure with regard to the Usury Act, namely pre-agreement disclosure (by means of credit advertising and quotations), disclosure in the contract document and post-contract disclosure (by supplying a copy of the contract and statements of account to the consumer). Similar stages of disclosure are distinguishable in the Act. The Act also provides for credit advertising (par 5 3 above), credit quotations (par 7 1), disclosure in the contract document (reg 30 and 31 of the National Credit Regulations, 2006) and post-contract disclosure (the credit provider has to supply a copy of the contract (s 93) and statements of account to the consumer (see par 9 below)).

²⁴⁴ One of the objectives of the consumer credit policy framework was to help the consumer make informed choices by addressing certain problems of the past *eg*, outdated and ineffective disclosure requirements, weak disclosure of the full cost of credit and inadequate regulation of credit advertising and sales, allowing for incomplete or even misleading disclosure of the cost of credit - see Policy Framework 8 and 26.

agreement unless the credit provider has given the consumer a pre-agreement statement and a credit quotation.²⁴⁵

7.2 Form of credit agreements

The credit provider must deliver to the consumer²⁴⁶ a copy²⁴⁷ of their agreement in the prescribed form or if there is no prescribed form, in the form prescribed by the credit provider and which complies with any prescribed requirements for the category of credit agreement concerned.²⁴⁸

8 CONSUMER'S LIABILITY, INTEREST, CHARGES AND FEES

Section 100 that prohibits certain charges forms the crux of this Part²⁴⁹ of the Act. It is not sufficient to curb a credit provider only with regard to the maximum interest rate that may be imposed.²⁵⁰ Credit providers also need to be restricted with regard to the items or amounts that may be recovered²⁵¹ from the consumer to prevent them from claiming diverse items or amounts to increase their return. For the same reason these items or amounts need to be capped as well.²⁵²

In terms of the Act²⁵³ a credit agreement must not require payment by the consumer of any money or other consideration except the principal debt,²⁵⁴ an initiation fee,²⁵⁵ a service fee,²⁵⁶ interest, the cost of any credit

²⁴⁵ S 92. The Act's pre-agreement disclosure requirements differ with respect to small, intermediate and large agreements (see par 2.2 above for this distinction). *Eg.*, for an intermediate or large agreement a pre-agreement statement in the form of the proposed agreement (or in another form addressing all the matters required in s 93) as well as a quotation setting out the principal debt, the proposed distribution of that amount, the interest rate and other costs, the total cost of the proposed agreement *etc* is required – s 92(1) and (2). Credit quotations, with certain exceptions, remain binding on the credit provider for a period of five business days after the date on which the quotation is presented – s 92(3).

²⁴⁶ Without charge.

²⁴⁷ In paper or printable electronic form.

²⁴⁸ S 93(1)-(3). As credit agreements may be concluded orally as well (see par 2.2 above), such agreements will have to be reduced to writing in order to be able to comply with the provisions of s 93.

²⁴⁹ Chapter 5 Part C (ss 100 – 105). Also see National Credit Regulations, 2006 reg 39-48.

²⁵⁰ See s 100(1)(c) read with s 105(1)(a) that prohibits a credit provider from charging an amount to, or imposing a monetary liability on, the consumer in respect of an interest charge under a credit agreement exceeding the amount that may be charged consistent with the Act.

²⁵¹ See s 100(1)(a) read with s 101 that prohibits a credit provider from charging an amount to, or imposing a monetary liability on, the consumer in respect of a credit fee or charge prohibited by the Act.

²⁵² See s 100(1)(b) read with s 105(1)(b) that prohibits a credit provider from charging an amount to, or imposing a monetary liability on, the consumer in respect of an amount of a fee or charge exceeding the amount that may be charged consistent with the Act.

²⁵³ S 101.

²⁵⁴ See par 2.2 above.

²⁵⁵ Defined in s 1 as a fee in respect of costs of initiating a credit agreement.

insurance,²⁵⁷ default administration charges²⁵⁸ and collection costs.²⁵⁹ It needs to be mentioned that the allowable costs in terms of section 101 are each subject to regulatory limits.²⁶⁰

In terms of section 102, the value of certain items, to the extent that they are applicable, may be included in the principal debt, for instance the cost of an extended warranty, delivery charges, installation charges and connection fees.²⁶¹

It is important to note that the Act allows for the payment of *mora* interest²⁶² and for variable interest rates.²⁶³ The Act also codifies and extends the *in duplum* rule.²⁶⁴ The allowable costs²⁶⁵ that accrue during the time that a consumer is in default under a credit agreement, considered together, may not exceed the unpaid balance of the principal debt under that credit agreement at the time that the default occurs.²⁶⁶

²⁵⁶ S 1 defines “service fee” as a fee that may be charged periodically by a credit provider in connection with the routine administration cost of maintaining a credit agreement.

²⁵⁷ See below.

²⁵⁸ Defined in s 1 as a charge that may be imposed by a credit provider to cover administration costs incurred as a result of a consumer defaulting on an obligation under a credit agreement. Reg 46 of the National Credit Regulations, 2006 specifies that “default administration charges” may be claimed with respect to each letter of demand written in terms of Part C of Chapter 6 (debt enforcement discussed in par 14 below).

²⁵⁹ “Collection costs” means an amount that may be charged by a credit provider in respect of enforcement of a consumer’s monetary obligations under a credit agreement (excluding a default administration charge). Also see reg 47 of the National Credit Regulations, 2006 that places a cap on the collection costs that may be charged.

²⁶⁰ See reg 39, 40, 42-44, 46-47 of the National Credit Regulations, 2006. It is interesting to note that reg 42 prescribes formulas to calculate the maximum interest rate with respect to different agreements. The Usury Act allowed for the maximum rate itself to be prescribed – see Grové and Otto 72.

²⁶¹ S 102 only applies to credit agreements that are instalment agreements, mortgage agreements, secured loans or leases.

²⁶² S 103(1). This interest rate may not exceed the highest rate applicable to any part of the principal debt under the specific agreement.

²⁶³ S 103(4). The variation has to be by fixed relationship to a reference rate (eg, prime) stipulated in the agreement.

²⁶⁴ In terms of the common law *in duplum* rule interest ceases to run once the unpaid interest is equal to the capital amount still outstanding in terms of the agreement – see Vessio “A Limit on the Limit on Interest? The *In Duplum* Rule and the Public Policy Backdrop” 2006 *De Jure* 26.

²⁶⁵ Initiation fee, service fee, interest, cost of credit insurance, default administration charges and collection costs. The inclusion of legal costs in the codification of the *in duplum* rule may prevent effective debt enforcement in practice as legal fees (together with the other allowable costs) may also only accrue until it reaches the unpaid balance of the principal debt under the credit agreement at the time that the default occurs.

²⁶⁶ S 103(5). The purpose (based on public policy) of the *in duplum* rule in terms of the common law is to protect the consumer. As was said above, it stops arrear interest from accruing when that interest has reached the unpaid capital. At the same time, the rule prevents an over-extension of a debtor’s financial resources – see Vessio 2006 *De Jure* 36. It is submitted that the statutory *in duplum* rule will offer even better protection to the consumer as it not only includes interest but all allowable costs.

Section 106 provides for credit insurance,²⁶⁷ including credit life insurance.²⁶⁸ Of importance is that the Act allows a consumer to make use of an insurance policy of his own choice.²⁶⁹

9 STATEMENTS OF ACCOUNT

The Part²⁷⁰ in the Act dealing with statements of account has limited application.²⁷¹ The Act obliges credit providers to deliver to each consumer periodic statements of account.²⁷² It therefore plays an important role in combating over-indebtedness as it helps to keep the consumer informed of the current state of his or her indebtedness and thereby prevents him or her from overburdening him or herself.

In addition credit providers must also, at the request of a consumer, provide certain additional statements, namely statements of current balance of account, amounts credited or debited during a period specified in the request and amounts currently payable or overdue.²⁷³ The Act also provides that a consumer may dispute entries in accounts²⁷⁴ and, if requested, the credit provider also has to provide a statement of the amount required to settle a credit agreement.²⁷⁵

10 ALTERATION OF CREDIT AGREEMENTS

Alterations to a credit agreement after it has been signed or delivered is void unless the change reduces the consumer's liabilities, the consumer signs or initials opposite the change,²⁷⁶ the change is recorded in writing and signed by the parties or any oral change is recorded and subsequently reduced to writing.²⁷⁷

²⁶⁷ Defined in s 1. "Credit insurance" includes a credit life insurance agreement as well as an agreement covering loss of or damage to property or loss or theft of an access card, personal information number (or similar device) or any consequential loss or theft of credit due to the loss or theft of such card or number.

²⁶⁸ In terms of s 1 "credit life insurance" includes cover payable in the event of a consumer's death, disability, terminal illness, *etc.*

²⁶⁹ S 106(4).

²⁷⁰ Chapter 5 Part D (ss 107-115).

²⁷¹ See s 107.

²⁷² S 108. The maximum period between the issuing of statements of account differs depending on the type of credit agreement – s 108(2). The consumer and credit provider may agree to reduce the frequency of statements of account referred to in s 108(2), but no such agreement may provide for more than three months between delivery of successive statements of account – s 108(3). S 109 deals with the form and content of statements of account.

²⁷³ S 110.

²⁷⁴ S 111.

²⁷⁵ S 113.

²⁷⁶ Unless it is a unilateral change allowed in terms of s 119 – see below.

²⁷⁷ S 116.

A consumer may at any time by written notice to the credit provider request that the credit limit under his or her credit facility be reduced and may stipulate a maximum credit limit.²⁷⁸ A credit provider under a credit facility²⁷⁹ may reduce²⁸⁰ the credit limit under that credit facility.²⁸¹

The credit provider may not increase a credit limit under a credit facility unless the increase is temporary,²⁸² or the consumer agrees to the increase. However, if the consumer,²⁸³ in writing has specifically requested the option of having the credit limit automatically increased from time to time, the credit provider may unilaterally increase the credit limit at stipulated intervals.²⁸⁴

11 RESCISSION AND TERMINATION OF CREDIT AGREEMENTS

11 1 Right of “cooling-off”

A consumer may rescind an instalment agreement or lease entered into at any location other than the registered business premises of the credit provider within five business days after concluding the agreement. In terms of the Act a consumer may terminate the credit agreement by delivering a notice²⁸⁵ to the credit provider and by tendering the return of any goods or money to the credit provider.²⁸⁶

11 2 Termination by consumer

A consumer may terminate a credit agreement²⁸⁷

(a) by paying the settlement amount in accordance with section 125;²⁸⁸

²⁷⁸ S 118(1).

²⁷⁹ By written notice to the consumer.

²⁸⁰ As long as it does not amount to discrimination prohibited in terms of ss 61 and 66 – see par 5 1 above.

²⁸¹ S 118(3). The reduction will take effect on delivery of the notice.

²⁸² An increase is temporary if the credit provider honours an instrument issued by the consumer, despite the fact that it results in a debt that exceeds the established credit limit under the credit facility. The increase will also be temporary if the credit provider agrees to raise the credit limit on request from the consumer to accommodate a particular transaction. The only condition is that the preceding credit limit will apply again later on.

²⁸³ At the time of applying for the credit facility or at a later time.

²⁸⁴ S 119.

²⁸⁵ In the prescribed manner – see reg 37 of the National Credit Regulations, 2006.

²⁸⁶ S 121(1) and (2). S 121(2) alternatively refers to termination of the agreement by paying in full for any services. This does not make any sense as neither an instalment agreement nor a lease encompasses the rendering of services on credit – see par 2 2 above. See Grové and Otto 24-26 with respect to s 13 of the Credit Agreements Act that provided for a similar cooling-off right. The Credit Agreements Act contained provisions to ensure that the cooling-off right comes to the consumer's attention – s 5(1)(g) and (i) and Grové and Otto 28. Reg 30 and 31 of the National Credit Regulations, 2006 require credit agreements in terms of the Act to contain information regarding the consumer's cooling-off right (if applicable).

²⁸⁷ S 122.

- (b) in the case of an instalment agreement, secured loan or lease, by surrendering the goods.²⁸⁹

11 3 Termination by credit provider

A credit provider may terminate a credit agreement before the time provided in that agreement only in accordance with section 123. If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 of the Act to enforce and terminate the agreement.²⁹⁰

In the case of a credit facility the credit provider may suspend that facility at any time the consumer is in default, or close the facility by giving written notice to the consumer at least 10 business days before the facility will be closed. The credit facility, however, remains in effect to the extent necessary until the consumer has paid all amounts lawfully charged to that account.²⁹¹

12 COLLECTION AND REPAYMENT

The consumer's²⁹² right to settle the credit agreement was discussed earlier.²⁹³ The consumer may also prepay any amount owed to a credit provider under a credit agreement at any time without notice or penalty.²⁹⁴ The Act prescribes that a credit provider must credit each such payment to the consumer²⁹⁵

- (a) firstly, to satisfy any due or unpaid interest;
- (b) secondly, to satisfy any due or unpaid fees or charges; and
- (c) thirdly, to reduce the amount of the principal debt.

²⁸⁸ S 125 allows a consumer or guarantor to settle the credit agreement at any time, with or without advance notice to the credit provider. In the case of a large agreement concluded other than at a fixed rate of interest, it is to the consumer's or guarantor's advantage to give prior notice of the intention to settle the agreement. In order to settle the agreement in this case an early termination charge equal to no more than the interest that would have been payable under the agreement for a period equal to the difference between three months and the period of notice of settlement is payable. Any prior notice period is therefore deducted from the three month period. Should the consumer (guarantor) give three months' notice in advance of the settlement, no early termination charge will be payable.

²⁸⁹ See par 13 below.

²⁹⁰ This Part concerns debt enforcement by repossession and judgment – see par 14 below.

²⁹¹ S 123(3).

²⁹² Or guarantor's.

²⁹³ See par 11 2 above.

²⁹⁴ S 126(1). The credit provider has to accept any payment when it is tendered, even if that is before the date on which the payment is due – s 126(2).

²⁹⁵ S 126(3).

13 SURRENDER OF GOODS

A consumer under an instalment agreement, secured loan or lease may give written notice to the credit provider to terminate the agreement and require the credit provider to sell the goods, if the goods are in the credit provider's possession. Otherwise, the goods may be returned to the credit provider's place of business within five business days after the date of the notice or as agreed with the credit provider.²⁹⁶ Within 10 business days after the notice to the credit provider to sell the goods, or after return of the goods,²⁹⁷ the credit provider must give the consumer written notice of the estimated value of the goods.²⁹⁸ Within 10 business days after receiving this notice the consumer may withdraw the termination and resume possession of any goods, unless the consumer is in default under the agreement.²⁹⁹ However, if the consumer does not respond to the notice, the credit provider must sell the goods for the best price reasonably obtainable.³⁰⁰ After selling any goods the credit provider must credit or debit the consumer's account with a payment or charge equivalent to the proceeds of the sale, less any reasonable expenses in connection with the sale of the goods and give the consumer a written notice of the settlement value, the gross amount realised on the sale, the net proceeds of the sale and the amount debited or credited to the consumer's account.³⁰¹ If an amount is debited or credited to the consumer's account and it is less than the settlement amount, the credit provider may demand payment of the remaining settlement value when issuing the notice in terms of section 127(5).³⁰² If the consumer fails to pay an amount within 10 business days after receiving a demand in terms of section 127(7), the credit provider may commence proceedings in terms of the Magistrates' Courts Act³⁰³ for judgment enforcing the credit agreement.³⁰⁴ If the consumer pays the amount demanded after receiving the demand notice at any time before judgment is obtained, the agreement is terminated upon remittance of that amount.³⁰⁵

²⁹⁶ S 127(1).

²⁹⁷ Whichever is the later.

²⁹⁸ S 127(2).

²⁹⁹ S 127(3).

³⁰⁰ S 127(4).

³⁰¹ S 127(5).

³⁰² S 127(7). If the amount is more than the settlement amount, the credit provider must remit the balance to the consumer whereupon the agreement is terminated – s 127(6).

³⁰³ 32 of 1944.

³⁰⁴ S 127(8)(a).

³⁰⁵ S 127(8)(b).

14 DEBT ENFORCEMENT BY REPOSSESSION OR JUDGMENT

14 1 General

The main obligation of a consumer in terms of a credit agreement is payment of the deferred amount³⁰⁶ and interest,³⁰⁷ normally by means of instalments.³⁰⁸ Consumers would therefore usually commit breach of contract in the form of *mora debitoris* by failing to pay the required instalments. The credit provider then has to elect to either enforce the payment of the arrear instalments by means of a claim for specific performance³⁰⁹ or to cancel the agreement and institute a claim to repossess the goods.³¹⁰ In both instances the credit provider may also claim damages, if any were suffered, as a combination remedy.³¹¹ The credit provider's choice of remedies would probably be influenced by the particular credit agreement.

Part C of Chapter 6³¹² of the Act sets out the requirements to be complied with in order for a credit provider to enforce the debt in terms of a credit agreement by repossession or judgment. These rules have to be read in conjunction with the rules of the civil procedure law pertaining to debt enforcement. The question is whether the phrase "debt enforcement" in terms of Part C of Chapter 6 also entails cancellation of the agreement and an accompanying claim to repossess of the goods, or does it only relate to the enforcement of the agreement by claiming arrear instalments. It is our submission that "debt enforcement" in Part C of Chapter 6 should include cancellation of the contract and a claim to repossess the goods, as well as the restrictive interpretation would mean that the credit provider does not have to comply with the Act's provisions regarding debt enforcement if he or she wants to make use of the more drastic remedies such as cancellation.³¹³

³⁰⁶ See par 2 2 above.

³⁰⁷ And other fees.

³⁰⁸ See Diemont and Aronstam 134.

³⁰⁹ Or by means of an acceleration clause, if an acceleration clause was agreed upon. By making use of an acceleration clause, instalments that are not due and payable yet could also be claimed.

³¹⁰ If the applicable credit agreement involves goods.

³¹¹ See in general with regard to the remedies available to the injured party in the event of breach of contract Nagel *et al* 118-129.

³¹² Ss 129-133.

³¹³ Support for our viewpoint is to be found in s 123. In terms of s 123(1) a credit provider may terminate a credit agreement before the time provided in the agreement only in accordance with s 123. If regard is had to the rest of s 123, it is clear that "terminate" in the context means "to end". S 123(3)(b) *inter alia* refers to the closing of a credit facility. S 123(2) then states that if a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate the agreement. The credit provider may in other words take the steps set out in Part C of Chapter 6 to cancel the agreement as well. The fact that the legislature uses the word "cancelled" in s 129(3)(a) which forms part of Part C of Chapter 6, reinforces our argument. Also see Otto *The National Credit Act Explained* (2006) 88.

14.2 Required procedures before debt enforcement

Section 129(1)(a) determines that, if the consumer is in default under a credit agreement, the credit provider *may* draw the default to the notice of the consumer in writing. The credit provider may also propose that the consumer refer the credit agreement to a debt counsellor,³¹⁴ alternative dispute resolution agent,³¹⁵ consumer court³¹⁶ or ombud with jurisdiction³¹⁷ to resolve any dispute under the agreement, or to develop and agree on a plan to bring the arrear payments up to date. However, section 129(1)(b) prohibits a credit provider from commencing legal proceedings to enforce the agreement before first providing a section 86(10) or a section 129(1)(a) notice to the consumer³¹⁸ and before meeting the further requirements set out in section 130.³¹⁹

As Otto³²⁰ correctly points out, there is a certain degree of interplay between the Act's provisions regarding the procedures for debt review³²¹ on the one hand, and debt enforcement procedures on the other. The same credit agreement cannot be subject to debt enforcement whilst debt review is ongoing.³²² Section 86(10) therefore allows a credit provider to terminate debt review if the consumer is in default under a credit agreement that is being reviewed in terms of section 86.³²³ The credit provider may then

³¹⁴ See par 4 and 5 4 5 above.

³¹⁵ Defined in s 1 as a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration. See par 16 below.

³¹⁶ Established by provincial legislation – s 1. These courts still have to be established.

³¹⁷ Meaning the ombud for financial institutions where the credit provider to the particular credit agreement is a financial institution – s 1. See par 16 below.

³¹⁸ It is therefore submitted that s 129(1)(a) should have read that the credit provider must (and not may) draw the default to the notice of the consumer in writing.

³¹⁹ Discussed below. S 129(1)(b) is subject to s 130(2). S 129(1)(a) and (b) do not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order – s 129(2).

³²⁰ Otto 85-86.

³²¹ Discussed above in par 5 4 5.

³²² Subject to s 86(9) (see par 5 4 5 above) and s 86(10), a credit provider who received a notice of court proceedings in connection with s 83 (see par 5 4 4 above) or s 85 (see par 5 4 5 above) or who receives a notice from a debt counsellor of an application for debt review may not litigate to enforce the agreement until such time as the consumer is in default and the debt counsellor has rejected the application for debt review (and the time period for direct filing in terms of s 86(9) has expired without the consumer having so applied) or the court has determined that the consumer is not over-indebted or where the court has made an order for re-arrangement and the consumer either defaults in terms of the re-arrangement or all the consumer's obligations in terms of the re-arranged debt have been fulfilled – s 88(3) discussed in par 5 4 6 above.

³²³ The debt review is terminated by giving a notice to terminate the review in the prescribed manner (at this stage the National Credit Regulations, 2006 do not contain any provisions in this regard) to the consumer, the debt counsellor and the Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review. The debt counsellor in effect only has 60 business days within which to complete the debt review. In our submission this period is perhaps too brief.

proceed to enforce the agreement in terms of Part C of Chapter 6.³²⁴ The reverse side is also true. While debt enforcement is subsisting, debt review cannot take place.³²⁵

As a section 86(10) notice is required in instances where debt review is ongoing, it should be clear that a section 129(1)(a) notice is required in those instances where the credit agreement is not subject to debt review. It should also be clear from the wording of section 129(1)(b) that a section 129(1)(a) notice³²⁶ is a *sine qua non* in order to enforce a debt by the issuing of summons against the debtor.³²⁷

A credit provider may approach the court for an order to enforce a credit agreement only if, at that time,³²⁸ the consumer is in default and has been in default for at least 20 business days and

- (a) at least 10 business days have elapsed³²⁹ since the credit provider delivered³³⁰ a notice³³¹ to the consumer,³³²

³²⁴ However, the Magistrate's Court hearing the matter may order that debt review resume on any conditions that the court considers to be just in the circumstances – s 86(11).

³²⁵ S 86(2) determines that an application for debt review in terms of s 86 may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in s 129 to enforce that agreement. We submit that s 86(2) refers to the issuing of summons to enforce the debt and not merely to the serving of the s 129(1)(a) notice when referring to "... has proceeded to take the steps contemplated in s 129 to enforce that agreement". Any other interpretation would render s 129(1)(a), read with s 86(2), nonsensical. The s 129(1)(a) notice cannot contain a proposal to the consumer to refer the credit agreement to a debt counsellor, but as soon as the s 129(1)(a) notice is served on the consumer, the consumer is prohibited from applying for debt review.

³²⁶ Or, if applicable, a s 86(10) notice.

³²⁷ The s 129(1)(a) notice will in other words serve as a letter of demand. The notice forms part of the *facta probanda* in any action instituted by the credit provider. Depending on the circumstances of the case the s 129(1)(a) notice may serve different purposes. *Eg.* if the credit provider elects to claim specific performance, the s 129(1)(a) notice will serve as a letter of demand only. Should the contract contain a *lex commissoria* the credit provider may strictly speaking cancel the agreement as soon as breach of contract occurs due to the fact that the *lex commissoria* (depending on the wording thereof) allows immediate cancellation. However, the credit provider would not be able to institute an action to repossess the goods without first complying with s 129(1). We therefore submit that the s 129(1)(a) notice in this instance is required to institute an action for the cancellation of the agreement and to repossess the goods. If the contract does not contain a *lex commissoria*, the credit provider first has to acquire a right to cancel the contract. It is submitted that the s 129(1)(a) notice may then be used as a notice of rescission (warning the consumer that the consumer is in breach of contract and that the breach of contract has to be rectified within a specified time) and to acquire the right to cancel the agreement.

³²⁸ We submit that the time of issuing of the summons is meant.

³²⁹ The 20 business days' period and the 10 business day period could run concurrently as long as at least 20 business days have lapsed since the default and at least 10 business days' notice has been given.

³³⁰ S 129(1) does not prescribe a particular method by which the consumer must be notified. The provisions of s 96(1) will thus apply. In terms of this section whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement or the Act or any other law, the party giving the notice must deliver that notice to the other party at the address of that other party as set out in the agreement or at the other party's changed address (in terms of s 96(2)).

- (b) the consumer has not responded to the section 129(1) notice, or responded by rejecting the credit provider's proposals;³³³ and
- (c) in the case of an instalment agreement, secured loan or lease, the consumer has not surrendered³³⁴ the property.³³⁵

In addition to the above circumstances, in the case of an instalment agreement, secured loan or lease, a credit provider may also approach the court for an order enforcing the remaining obligations of a consumer under the credit agreement at any time if all relevant property has been sold, pursuant to either an attachment order or a surrender of property,³³⁶ and the net proceeds of the sale were insufficient to discharge the consumer's obligations under the agreement.³³⁷

14 3 When court may determine the matter

It should further be noted that despite any provision of law or contract to the contrary, the court in any proceedings in respect of a credit agreement to which the Act applies, may determine the matter only if the court is satisfied that³³⁸

- (a) the provisions of section 127,³³⁹ 129³⁴⁰ or 131,³⁴¹ where applicable, have been complied with;
- (b) there is no matter arising under the credit agreement, and pending before the Tribunal that could result in an order affecting the issues to be determined by the court; and
- (c) the credit provider has not approached the court during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction.

The court may furthermore not determine the matter where the credit provider has approached the court in instances where the consumer has

- (a) surrendered property to the credit provider and before that property has been sold;³⁴²

³³¹ As contemplated in s 86(10) or s 129(1). S 130(1)(a) refers to s 86(9) but it is submitted that this is incorrect and that the reference has to be to s 86(10).

³³² S 130(1)(a).

³³³ S 130(1)(b).

³³⁴ As contemplated in s 127. If the property was surrendered the credit provider should follow the procedures set out in s 127 – see par 13 above.

³³⁵ S 130(1)(c).

³³⁶ In terms of s 127 discussed in par 13 above.

³³⁷ S 130(2).

³³⁸ S 130(3)(a)-(c)(i).

³³⁹ See par 13 above.

³⁴⁰ See par 14 2 above.

³⁴¹ See below.

³⁴² S 130(3)(c)(ii)(aa).

- (b) agreed to a proposal³⁴³ and acted in good faith in fulfilment of that agreement;³⁴⁴
- (c) complied with an agreed plan³⁴⁵ to bring the payments up to date,³⁴⁶ or
- (d) brought the payments up to date.³⁴⁷

If the court in any debt enforcement proceedings³⁴⁸ determines that the credit agreement was reckless³⁴⁹ the court is obliged to make an order contemplated in section 83.³⁵⁰

Should the court find that the credit provider has not complied with the relevant provisions of the Act relating to procedure³⁵¹ or has approached the court in the circumstances set out above,³⁵² the court must adjourn the matter before it and make an appropriate order setting out the steps that the credit provider must complete before the matter may be resumed.³⁵³

Similarly, the court may adjourn the matter before it, if it is determined that the credit agreement is subject to a pending debt review, or order the debt counsellor to report directly to the court, and thereafter make an order declaring and relieving the consumer's over-indebtedness.³⁵⁴

Should it appear that the matter pending before the court is the only credit agreement to which the debtor is a party the court may order the debt counsellor to discontinue the debt review proceedings and then make the appropriate order.³⁵⁵ If the court determines that a matter is pending before the Tribunal,³⁵⁶ the court may adjourn the matter before it, pending a determination of the proceedings before the Tribunal.³⁵⁷

In the event of the court finding that the credit agreement is suspended or subject to a debt re-arrangement order or agreement and that the consumer has complied with such order or agreement, the court has to dismiss the matter.³⁵⁸

³⁴³ Made in terms of s 129(1)(a).

³⁴⁴ S 130(3)(c)(ii)(bb).

³⁴⁵ As contemplated in s 129(1)(a).

³⁴⁶ S 130(3)(c)(ii) (cc).

³⁴⁷ As contemplated in s 129(1)(a) - s 130 (3)(c)(ii)(dd).

³⁴⁸ In terms of s 130.

³⁴⁹ S 80. See the discussion of reckless credit in par 5 4 4 above.

³⁵⁰ S 130(4)(a). See par 5 4 4 above.

³⁵¹ Ss 127, 129 or 131.

³⁵² In terms of s 130(3)(c).

³⁵³ S 130(4)(b).

³⁵⁴ S 130 (4)(c)(i) and (ii). See par 5 4 5 above.

³⁵⁵ As contemplated in s 85(b) – s 130(4)(c)(iii). See par 5 4 5 above.

³⁵⁶ As contemplated in s 130(3)(b) – see above.

³⁵⁷ S 130(4)(d). Alternatively the court may order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination.

³⁵⁸ S 130(4)(e).

If a court makes an attachment order with respect to property that is the subject of a credit agreement, sections 127 (2) to (9)³⁵⁹ and section 128³⁶⁰ will *mutatis mutandis* apply.³⁶¹

14 4 Conclusion

The Act, like its predecessors,³⁶² exerts a huge influence on debt enforcement in the courts. It is submitted that compliance with the provisions of sections 129 and 130 is a prerequisite irrespective of whether the credit provider elects, in the event of breach of contract by the consumer, to enforce the payment of arrear instalments,³⁶³ or to cancel the credit agreement and claim the goods back. Although the Act does not contain specific measures having an influence on claims for damages and especially on penalty clauses like the Credit Agreements Act and the Usury Act, it is submitted that should the goods be attached pursuant to an attachment order, section 131 has the effect that the credit provider is only entitled to his or her actual damages.³⁶⁴

15 THE CONSUMER'S RIGHT TO RE-INSTATE A CREDIT AGREEMENT

Section 129(3)(a) allows a consumer to re-instate a credit agreement that is in default at any time before the credit provider has cancelled the agreement.³⁶⁵ The consumer has to pay all amounts that are overdue to the credit provider, together with the credit provider's permitted default charges³⁶⁶ and reasonable costs of enforcing the agreement up to the time of the re-instatement. Thereafter the consumer may resume possession of

³⁵⁹ See the discussion on surrender of goods in par 13 above.

³⁶⁰ S 128 supply a remedy to a consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of s 127 directly with the credit provider, or through alternative dispute resolution.

³⁶¹ S 131. S 131 merely prescribes the execution and realisation procedures to be followed after the attachment of the goods pursuant to an attachment order. The s 127 procedures discussed in par 13 above apply.

³⁶² The Credit Agreements Act and the Usury Act. See Grové and Otto 41-54 for an exposition of the influence of these Acts on the credit provider's remedies in the event of breach of contract by the consumer.

³⁶³ By means of a claim for specific performance or an acceleration clause (if applicable).

³⁶⁴ This is due to the fact that the realisation procedures in terms of s 127(2)-(9) discussed in par 13 above have to be followed. The credit provider has to remit any surplus amount (if any) to the consumer and is therefore only entitled to the amount due to him in terms of the agreement.

³⁶⁵ A consumer may not re-instate a credit agreement after the sale of any property pursuant to an attachment order or surrender of property in terms of s 127, after the execution of any other court order enforcing that agreement or after the termination thereof in accordance with ss 123 and 129(4).

³⁶⁶ See par 8 above.

any property that had been repossessed by the credit provider pursuant to an attachment order.³⁶⁷

It is our submission that the legislature's use of the word "re-instate" in section 129(3) is incorrect. The consumer cannot re-instate a credit agreement that has not been cancelled yet.³⁶⁸ It is also nonsensical to provide that the consumer, after complying with the requirements in order to re-instate the contract, may resume possession of any property that had been repossessed by the credit provider *pursuant to an attachment order*.³⁶⁹ A court will only grant an attachment order after the credit agreement had been cancelled.³⁷⁰

16 DISPUTE SETTLEMENT (OTHER THAN DEBT ENFORCEMENT)

In addition to the court procedures as set out above³⁷¹ the Act seeks to provide an accessible and a consensual system of dispute resolution through alternative dispute resolution agents, the Regulator, ombuds and debt counsellors.³⁷²

An aggrieved person may thus direct his or her complaint on contravention of the Act³⁷³ to the Regulator,³⁷⁴ or in the alternative he may make use of the dispute settlement machinery created by the Act.³⁷⁵ In the case where the aggrieved person chooses to make use of alternative dispute resolution and the credit provider is a financial institution, the complaint may only be referred to the ombud with jurisdiction.³⁷⁶ In other cases the matter may be referred to either a consumer court or an alternative dispute resolution agent.³⁷⁷ Neither the Act nor the Regulations provide a list of such agents and it is submitted that any dispute resolution agent agreed upon by the parties should be used.

³⁶⁷ S 129(3)(b).

³⁶⁸ S 12 of the Credit Agreements Act bestowed a similar right on the consumer. S 12 afforded the right to the consumer to re-instate the contract even after the credit provider had cancelled the contract. The rights and duties of the parties were thus revived and the consumer had an opportunity to continue with the contract. See Grové and Otto 46-47.

³⁶⁹ S 129(3)(b).

³⁷⁰ In which event the consumer won't have the right to re-instate the agreement.

³⁷¹ See par 14.

³⁷² The whole of Chapter 7 of the Act deals with what is termed "Dispute Settlement other than Debt Enforcement".

³⁷³ Contraventions of the Act include any failure to comply with anyone of the Act's provisions *eg*, failure to provide a copy of the credit agreement to the consumer (s 93), a credit provider demanding a too high credit life insurance (s 106), a credit provider changing or terminating a credit agreement unilaterally (ss 120 and 123) *etc*.

³⁷⁴ S 136(1). In terms of s 136(2) the Regulator may initiate a complaint in its own name – see below.

³⁷⁵ In terms of s 134.

³⁷⁶ S 134(1)(a).

³⁷⁷ S 134(1)(b). See s 1 and par 14 2 above for the definitions of "ombud with jurisdiction", "consumer court" and "alternative dispute resolution agent."

The respondent need not abide by a referral to an alternative dispute resolution agent.³⁷⁸ The Regulator or Tribunal then has to deal with the matter.³⁷⁹ The general principle is that parties must attempt to resolve any dispute between themselves, or have it referred to an ombud, alternative dispute resolution agent or consumer court before they approach the Tribunal.³⁸⁰

In the event of the ombud, alternative dispute resolution agent or consumer court successfully resolving the dispute, the resolution of the dispute may be recorded in the form of an order. The parties may then agree that such an order be submitted to a court or the Tribunal to be made a consent order.³⁸¹

The Act also addresses the role of the Regulator in dealing with complaints received or initiated by it regarding contraventions of the Act. The Regulator may after receiving a complaint issue a notice of non-referral to the complainant if the complaint appears to be frivolous or vexatious or does not allege any facts, which, if true, would constitute grounds for a remedy under the Act.³⁸² The Regulator may otherwise refer such matters to a debt counsellor (in cases dealing with reckless lending and over-indebtedness), ombud with jurisdiction, consumer court, alternative dispute resolution agent or inspector³⁸³ to investigate the complaint.³⁸⁴

Upon completion of the investigation into a complaint the Regulator³⁸⁵ may amongst other refer the matter to a provincial consumer court or the Tribunal.³⁸⁶ The consumer court³⁸⁷ or the Tribunal³⁸⁸ must then conduct a hearing into the matter referred to it and make the appropriate orders.³⁸⁹ As in the case with alternative dispute resolution agents, consumer courts and ombuds who have resolved a matter, the Regulator may also, where it has investigated a matter and reached an agreement with the respondent

³⁷⁸ S 134(2) allows the respondent 10 business days to object to a referral in which case the alternative dispute resolution agent may not resolve the matter.

³⁷⁹ In terms of s 136 and 137 respectively. The Tribunal may make an exceptional order of costs against the respondent if the Tribunal considers that the matter could have been properly resolved by conciliation, mediation or arbitration – s 134(3).

³⁸⁰ See Otto 83 and s 134(4).

³⁸¹ In terms of the rules of that court or in terms of s 138 and s 135(1).

³⁸² S 139(1). In such a case the complainant concerned may refer the matter directly to the appropriate consumer court or the Tribunal, with leave of the Tribunal – s 141(1).

³⁸³ In terms of s 25(1)-(3) an inspector is an employee of the Regulator or state appointed as such by the CEO of the Regulator, and issued with a certificate of appointment. When exercising powers in terms of the Act such inspector is a peace officer as defined in s 1 of the Criminal Procedure Act 51 of 1977.

³⁸⁴ S 139(1).

³⁸⁵ If the Regulator believes that a person has engaged in prohibited conduct – s 140(1)(b).

³⁸⁶ S 140(2).

³⁸⁷ S 140(6)(a).

³⁸⁸ S 141(4).

³⁸⁹ S 150 sets out the orders the Tribunal may make. A consumer court is empowered to make the same orders the Tribunal could have made – s 140(6)(b).

regarding the proposed terms of an appropriate order, refer the agreement to the Tribunal or a court to be confirmed as a consent order.³⁹⁰

The Regulator may also refer the matter to the National Prosecuting Authority if offences have been committed.³⁹¹

The procedure to be followed in investigations, outcome of complaints referred to and hearings before the Tribunal as well as rules pertaining to procedure, witnesses, costs, appeals and review and Tribunal orders are dealt with in the Act.³⁹²

Orders of the Tribunal have the status of High Court orders.³⁹³

17 OFFENCES UNDER THE ACT

Otto rightly states that “[i]t is not unusual for consumer legislation to look at the Criminal Law for support in securing obedience with the legislation.”³⁹⁴

Whilst both the Act’s predecessors, the Usury Act³⁹⁵ and the Credit Agreements Act,³⁹⁶ had general penal provisions which declared any contravention of the Acts to be offences the Act creates, both a number of specific³⁹⁷ and offences of a general nature.³⁹⁸

A Magistrate’s Court may impose a sentence of a fine or a maximum imprisonment of 12 months or both.³⁹⁹ The fact that no maximum fine is prescribed should be welcomed as it takes cognisance of inflation and leaves the amount to the discretion of the court.

³⁹⁰ S 138(1).

³⁹¹ S 140(1)(d).

³⁹² Ss 139-151.

³⁹³ S 152(1).

³⁹⁴ Otto 99.

³⁹⁵ S 17.

³⁹⁶ S 23.

³⁹⁷ These include failure to comply with a notice issued by the Regulator ordering unregistered persons to stop engaging in activities subject to the Act (s 54(5)); failure to comply to a compliance notice issued by the Regulator to a credit bureau relating to failure to protect the confidentiality of information (s 68(2)), to fulfil its duties *eg* verifying information, issue accurate reports, expunge certain information from its records or failure to deal with a challenge by a consumer of accuracy of information held by it or the removal of the information if justified (ss 70(6), 71(7) and 72(7)); a consumer who knowingly provides false or misleading information to a credit provider or sheriff concerning, amongst others, his address, the location or possessor of goods (s 97(5)); a credit provider who acts contrary to the provisions of the Act governing the valuation, selling and accounting with regard to surrendered goods (s 127(10)); a person who engages in prohibited collection and enforcement practices (s 133(3)).

³⁹⁸ Amongst the general offences is the disclosure of confidential information in terms of the Act; obstructing, hindering or unduly influencing a person who is exercising a power or performing a duty; failure to attend a hearing when summoned; giving false evidence or failing to answer questions when under oath, or failure to comply with an order of the Tribunal – see Chapter 8 Part B.

³⁹⁹ However, a person who fails to comply with an order of the Tribunal is subject to a fine or imprisonment not exceeding 10 years or both – ss 161 and 162.

18 CONSUMER EDUCATION AND INDUSTRY RESEARCH

Consumer education⁴⁰⁰ and credit industry research and guidance⁴⁰¹ are important facets of the Act and are amongst the many functions of the Regulator. It links with one of the important purposes of the Act, namely to provide consumers with adequate information in order to help them make informed choices.⁴⁰²

19 CONCLUSION

From the above discussion it is clear that the Act introduces extensive changes to South African consumer-credit law, and participants in the South African consumer-credit market will have to review their credit practices and documentation to ensure compliance. Moreover, the Act sets out new parameters for the granting of credit. As pointed out above,⁴⁰³ credit providers will in future have to assess a consumer's credit worthiness before granting credit or otherwise stand the risk of the credit agreement being declared reckless.

It is interesting to note that the promoting of responsible credit granting is a world-wide trend.⁴⁰⁴ The consumer-debt committee of the International Federation of Insolvency Practitioners⁴⁰⁵ suggested that creditors should take greater responsibility for the negative consequences of credit granting:

“Lenders should be very much aware that they are in a position to influence the risks taken by consumers. By using accurate scoring models, lenders are capable of controlling their risks and reducing their costs. However, through aggressive marketing and sophisticated solicitation techniques, they reach less and less creditworthy debtors and higher charge-off rates.”

The Act has a wide field of application as it applies to all credit agreements except when dealing with stokvel syndicates, loans to government, loans to certain juristic persons and loans between family and friends. Credit agreements concluded by certain credit providers are also not subject to the Act's provisions. It is clear that the Act applies to a far greater number of contracts than the repealed legislation. For example, the Act applies to the rendering of services on credit, while the Credit Agreements Act did not. The application of the Act is furthermore not restricted to certain movable goods as was the position in terms of the repealed Credit Agreements Act. It is also not dependent on the amount of money involved.

⁴⁰⁰ S 3(e)(i).

⁴⁰¹ S 16(1) and (2).

⁴⁰² S 3(e)(ii).

⁴⁰³ See par 5 4 above.

⁴⁰⁴ Roestoff and Renke 2003 *Obiter* 1; and Roestoff and Renke 2005 *International Insolvency Review* 93.

⁴⁰⁵ See INSOL International consumer debt report: Report of findings and recommendations (2001) 29.

The extended field of application of the Act naturally means that more consumers will now enjoy the protection afforded by the Act. Included hereunder are the low-income consumers who *inter alia* have to rely on micro lenders to obtain credit. Prior to the coming into operation of the Act, these consumers basically had no protection. The Act therefore constitutes a single law that treats transactions equivalently.

It is our submission that the Act will result in improved consumer protection. This is especially true regarding certain areas where protection of the consumer was lacking. Prevention of over-indebtedness and reckless lending, measures to alleviate the consequences thereof and the prohibition of certain credit-marketing practices serve as example. However, whether the Act will succeed in practice depends, according to us, on two aspects, namely effective enforcement of the Act and consumer education about credit and consumer rights. The Regulator has a big responsibility in this regard.

On the negative side we feel that the legislature perhaps tries to over-regulate the credit industry. This creates a huge administrative burden for credit providers. The registration requirements in terms of the Act,⁴⁰⁶ obligation to supply reasons in writing for credit being refused,⁴⁰⁷ reporting of new or amended credit agreements to the national register or a credit bureau⁴⁰⁸ and the register that a credit provider has to maintain of all the options selected by consumers in terms of section 74(6)⁴⁰⁹ are only a few examples. The question is who, at the end of the day, is going to bear the resulting costs.

⁴⁰⁶ See par 4 above.

⁴⁰⁷ See par 5 1 above.

⁴⁰⁸ See par 5 2 above.

⁴⁰⁹ See par 5 3 above.