

**MEASURES TO PROTECT AND ASSIST LOW-INCOME CONSUMERS AGAINST
RECKLESS LENDING AND OVER-INDEBTEDNESS**

by

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CHAPTER 1: INTRODUCTION

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1.1 Research motivation

The South African financial sector has not always been equally accessible to all South African citizens.¹ Prior to 1994, the South African credit market was characterised by a lack of access to reasonably priced credit for the majority of the population.² In addition, low-income consumers had little access to credit products such as mortgages, credit cards or overdraft facilities and had to make use of informal loans and other marginal credit products like micro loans, which were available at high costs.³ Since 1994, historically disadvantaged consumers, who had little financial experience or education and who never had access to credit in the formal financial market, suddenly obtained such access. However, the consumer credit legislation that applied at the time, was fragmented and outdated and characterised by a lack of transparency and inadequate consumer protection.⁴ Consumers did not have a true picture of the cost of credit and could not make informed decisions in this regard. Credit providers also offered many consumers, particularly from the middle- and low-income

¹ Kelly-Louw M with input from Stoop PN *Consumer Credit Regulation in South Africa* (2012) 13.

² Department of Trade and Industry South Africa *Consumer Credit Law Reform – Policy Framework for Consumer Credit/Making credit markets work – A Policy Framework for Consumer Credit* August 2004 <https://static.pmg.org.za/docs/2005/050608consumer.pdf> (accessed 16 April 2020). Hereinafter referred to as 'Policy Framework for consumer Credit (2004)'.

³ *Policy Framework for consumer Credit* (2004) 12.

⁴ *Policy Framework for consumer Credit* (2004) 16.

group, credit which they could not really afford.⁵ Mechanisms to prevent reckless lending and over-indebtedness were non-existent and the debt relief measures offered to over-indebted consumers were inadequate.⁶ It was clear that there was a desperate need for a closer examination of previous consumer credit legislation, the available mechanisms aimed at preventing and relieving over-indebtedness and the consumer-credit market in general.⁷

In 2001 the South African Department of Trade and Industry⁸ set in motion a process to overhaul the existing consumer credit legislation in South Africa. In March 2002, the DTI appointed a task team to review legislation affecting consumer credit and to develop proposals for a new regulatory framework.⁹ The review was informed by several other reports, including the 1992 South African Law Commission review of the Usury Act, the 1995 South African Law Commission report on debt collection, the 2001 investigation into SME finance conducted by a task group of the Policy Board for Financial Services and Regulation, and Ntsika's 1999 National Small Business Regulatory Review.¹⁰ In October 2003, a comprehensive report outlining the weaknesses in the consumer credit market, along with recommendations for new legislation and reforms to the regulatory framework, was published and handed to the DTI.¹¹ In August 2004 the DTI published a Policy Framework for Consumer Credit and subsequently, in March 2005, tabled the National Credit Bill in Parliament.¹² The Bill was adopted in the National Assembly and the National Council of Provinces in December 2005¹³ and assented to by the President on 10 March 2006.¹⁴ Thereafter the National Credit Act 34 of 2005¹⁵ was promulgated¹⁶ and, to ensure its seamless operation, put into implementation on three different dates.¹⁷ The coming into

⁵ *Policy Framework for consumer Credit* (2004) 7.

⁶ Boraine A 'Some thoughts on the reform of administration orders and related issues' (2003) *De Jure* 222.

⁷ *Policy Framework for consumer Credit* (2004) 34.

⁸ Hereinafter referred to as 'the DTI'.

⁹ *Policy Framework for consumer Credit* (2004) 8.

¹⁰ *Ibid.*

¹¹ The Department of Trade and Industry South Africa *Credit Law Review Summary of Findings of the Technical Committee* (August 2003).

¹² Kelly-Louw M 'The Prevention and Alleviation of Consumer Over-Indebtedness' (2008) *South African Mercantile Law Journal* 207.

¹³ *Ibid.*

¹⁴ Government Notice 230, GG 28619, 15 March 2006.

¹⁵ Hereafter referred to as 'the Act' or 'the NCA'.

¹⁶ Proclamation 22, GG 28824, 11 May 2006.

¹⁷ 1 June 2006, 1 September 2006 and 1 June 2007.

operation of this piece of legislation was a landmark achievement, and introduced a new era in credit regulation in South Africa.¹⁸ One of the aims of the Act is to promote the development of a credit market that is accessible to all South Africans¹⁹ and in particular those who has historically been unable to access credit.²⁰ A further aim of the Act is to prevent consumers from becoming over-indebted.²¹ To secure this objective, the Act has, among others, introduced the concept of reckless credit.²²

The reckless credit provisions in the Act requires credit providers to take certain steps to ensure that consumers can afford to repay their loans and that consumers understand the risks, costs and obligations thereof before entering into a credit agreement. In this respect, the obligation to conduct an pre-agreement affordability assessment is of primary importance.²³ The Act provides in section 81(2) that a credit provider must not enter into a credit agreement without first taking reasonable steps to assess the proposed consumer's understanding and appreciation of the risks and costs as well as the rights and obligations of the consumer under the credit agreement.²⁴ The debt repayment history²⁵ of the consumer as well as the consumer's existing financial means, prospects and obligations²⁶ must be considered as well as whether there is a reasonable basis to conclude that any commercial purpose may be successful, if the consumer applies for credit for that purpose.²⁷ The Act specifically prohibits reckless lending²⁸ and imposes serious consequences on credit providers engaging in this conduct.²⁹

When the Act was first introduced,³⁰ it provided that credit providers could determine their own criteria in meeting their pre-agreement assessment obligation in terms of the

¹⁸ *Policy Framework for consumer Credit* (2004) 22.

¹⁹ S 3 of the NCA.

²⁰ S 13 of the NCA.

²¹ S 3 of the NCA.

²² S 80 of the NCA.

²³ S 81 of the NCA.

²⁴ S 81(2)(a)(i) of the NCA.

²⁵ S 81(2)(a)(ii) of the NCA.

²⁶ S 81(2)(a)(iii) of the NCA.

²⁷ S 81(2)(b) of the NCA. *Absa Bank Ltd v Kganakga* [2016] ZAGPJHC 59 (18 March 2016). *Wiese and Another v Absa Bank Ltd* [2017] 2 All SA 322 (WCC).

²⁸ S 81(3) of the NCA.

²⁹ S 83(3) of the NCA.

³⁰ The Act was introduced by Government Notice 230, GG 28619, 15 March 2006. The commencement of the Act was announced in Proclamation 22, GG 28824, 11 May 2006.

Act, provided that such criteria resulted in a fair and objective assessment.³¹ Therefore, the assessment standards used to determine whether a consumer qualifies for credit, should have been determined objectively, looking at the facts and circumstances of each case.³²

The Act also provided that the National Credit Regulator³³ could pre-approve or publish guidelines that credit providers could use when conducting the assessments as required by the Act.³⁴ However, the guidelines were not binding on credit providers. The National Consumer Tribunal,³⁵ a statutory body instituted in terms of section 26 of the Act, could also step in if a credit provider repeatedly failed to comply with section 81 or used unfair assessment methods. In such cases, the NCT could order the use of NCR guidelines or industry-standard alternatives. However, from the commencement of the Act until early 2013, no such guidelines were issued. As a result, no Tribunal cases addressed non-compliant assessment models and very few reckless lending cases were reported. This lack of regulatory guidance meant credit providers had significant freedom in how they conducted affordability assessments, undermining the effectiveness of section 81.³⁶

Despite the noble aims of the Act to promote responsible borrowing and to prevent reckless lending,³⁷ allegations of reckless lending were difficult to prove. Even though the Act placed an assessment obligation on the credit provider, it provided that the

³¹ Before s 82(1) of the NCA was amended by the National Credit Amendment Act 19 of 2014 it read as follows:

(1) Subject to subsections (2)(a) and (3), a credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment.

³² Van Heerden CM and Steennot R 'Pre-agreement Assessment as a Responsible Lending Tool in South Africa, the EU and Belgium: Part 1' (2018) *PELJ* 1 and Van Heerden CM and Renke S 'Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice' (2015) *International Insolvency Review* 67.

³³ Hereinafter referred to as 'the Regulator' or 'the NCR'.

³⁴ Before s 82(2) was amended by the National Credit Amendment Act 19 of 2014 it read as follows

(2) The National Credit Regulator may-

(a) pre-approve the evaluative mechanisms, models and procedures to be used in terms of section 81 in respect of proposed developmental credit agreements; and publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81, applicable to other credit agreements.

³⁵ Hereinafter referred to as 'the Tribunal' or 'the NCT'.

³⁶ Van Heerden and Steennot Part 1 (n 32) 13.

³⁷ Ss 3(c)(i) and (ii) of the NCA.

credit provider himself could determine the evaluative models and procedures to be used in meeting this obligation.³⁸ Therefore, even superficial compliance with the Act would absolve credit providers from their assessment obligation in terms of the Act. As a result, credit could have been granted to consumers who could not afford it, without the credit provider technically being in breach of the Act.³⁹

The Act facilitated credit booms from 2005 to 2008 and again, on a smaller scale, from 2010 to 2014.⁴⁰ One of the important aims of the Act, namely to correct the injustices of the Apartheid era by making credit available to low-income, historically disadvantaged persons, were therefore seemingly achieved. Ellyne and Jourdan point out that, in fact, the extension of unsecured credit more than tripled from the inception of the Act in 2007 to the last quarter of 2012⁴¹ with the majority of unsecured lending

³⁸ S 81(1) read with 82(1) of the NCA.

³⁹ The 'Drive a new car for R699 a month' deal offered by the Satinsky group of companies to South African consumers is an example of how credit providers side-stepped the affordability assessment provisions in the Act and extended credit to consumers who could not afford it. Satinsky offered a deal to prospective car owners to own a new car. The arrangement involved two agreements: The first was with a credit provider who would fully finance the transaction and who would receive payment in monthly instalments. The second agreement was with a Hong Kong-based entity, in terms of which the new car owner received a monthly payment for using the car's back window as a moving billboard. The scheme worked well until the payment received for the advertising was suddenly lowered. This resulted in many of the car owners falling in arrears with their monthly instalments. The credit providers proceeded with legal action against the car owners on the basis that the advertising agreement was a separate agreement and that the affordability criteria set by the Act were met when they applied for finance. The National Credit Regulator received complaints against one of the credit providers from various consumers alleging reckless lending and unlawful credit granting. The Regulator investigated the complaints and found that the credit provider did contravene the Act by granting credit to consumers recklessly, which resulted in their over-indebtedness in contravention of ss 80(1)(b)(ii), 81(2) and 81(3) of the Act. The credit provider denied the allegations and the matter was referred to the Tribunal. At the hearing, the Regulator argued that the utilisation of the consumers' bank statements was an appropriate method to calculate the consumer's affordability and the credit provider's failure to do so amounted to reckless credit granting. The credit provider argued that it was entitled to rely on declarations by consumers of their expenses in terms of the Act. It further said that apart from it being impractical to assess consumers' expenses from their bank statements, due to the high volumes of applications it receives, it was not a requirement of the Act for consumers to provide their bank statements when applying for credit. The Tribunal found that the credit provider complied with its assessment obligation in terms of the Act as there was no provision in the Act that required it to utilise the consumer's bank statements to determine affordability. *National Credit Regulator v Standard Bank of South Africa Limited* [2017] ZANCT 118.

⁴⁰ Ellyne MJ and Jourdan BM 'Did the NCA of 2005 facilitate a credit boom and bust in SA?' (Paper presented at the African Finance Journal Conference, May 2015, Cape Town, South Africa. See also NCR Press release 'Strong growth in unsecured personal loans'. http://www.ncr.org.za/press_release/Strong%20growth%20in%20unsecured%20personal%20loans (accessed 16 April 2020); NCR Report 'Research on the increase of unsecured personal loans in South Africa's credit market'. https://static.pmg.org.za/docs/120803UPLExecSum_0.pdf (accessed 16 April 2020).

⁴¹ Ellyne MJ and Jourdan BM (n 40) 5.

consumers being those earning below R3 500 per month.⁴² Because unsecured credit agreements have no collateral in terms whereof an asset is used to secure the value of the loan in instances where the consumer defaults, it is trite that credit providers compensate for the heightened risk by increasing interest rates and fees on such loans. Regulation 42(1) prescribes the following maximum rates of interest:

Table A: Maximum Prescribed Interest Rates

Credit type	Maximum Prescribed Interest Rate
1. Mortgage agreements	RR + 12% per year
2. Credit facilities	RR + 14% per year
3. Unsecured credit transactions	RR + 21% per year
4. Developmental credit agreements	RR + 27% per year
4.1 Small business	
4.2 Low-income housing	
5. Short-term transactions	5% per month on the first loan and 3% per month on the subsequent loans within a calendar year
6. Other credit agreements	RR + 17% per year
7. Incidental credit agreements	2% per month

Consequently, in comparison with secured debt, unsecured lending thus proved to be expensive credit. The increase in the extension of unsecured lending coincided with an increase in unemployment figures.⁴³ Resultantly, by the end of 2012, the number of consumers who had not made payments on their unsecured loans for 120 days or longer soared.⁴⁴ It is hypothesised by Ellyne and Jourdan that from 2007 to 2012 distressed borrowing was taking place by South Africa's lowest income populations as these populations' income was constrained from an increasing loss of employment.⁴⁵

⁴² Ellyne MJ and Jourdan BM (n 40) 15.

⁴³ Ellyne MJ and Jourdan BM (n 40) 18.

⁴⁴ *Ibid.*

⁴⁵ Ellyne MJ and Jourdan BM (n 40) 42.

Thus, the massive upsurge in credit extension to especially the low-income consumer soon proved to be a double edged sword.

Regrettably, South African debt relief measures have not evolved with the ever-increasing percentage of over-indebted low-income consumers. It is argued by Coetzee that the lack of targeted debt relief mechanisms responsive to the needs of financially vulnerable consumers has contributed to the deepening of economic inequality.⁴⁶ Without proper debt relief procedures, debt enforcement mechanisms, such as emoluments attachment orders,⁴⁷ which are notorious for its abuse and exploitation of especially low-income consumers,⁴⁸ continued unhindered.⁴⁹ Rising

⁴⁶ Coetzee H 'Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable? A South African Exposition' (2016) *International Insolvency Review* 42 – 43.

⁴⁷ An emoluments attachment order is a court order made in terms of section 65 J of the Magistrates' Court Act 32 of 1944. It grants the creditor the opportunity to receive weekly or monthly instalments from the debtor through a process of monthly deductions made from the debtor's wage or salary by the debtor's employer before the debtor receives such wage or salary. The debtor's employer is obligated by court order to make such deductions, and in this instance is referred to as the garnishee-employer. Deductions made by the garnishee-employer are paid directly to the creditor or his representative who can be an attorney or debt collector. See Harms DR 'Civil Procedure: Superior Courts' in JA Faris (ed) *The Law of South Africa* (2021) para 636. See also Broodryk T *Eckard's Principles of Civil Procedure in the Magistrates' Courts* (2019) 317 - 324. Coetzee H and Van Sittert C 'Reflections on recent developments regarding wage garnishments in South Africa' (2018) *International Journal of Private Law* 111. Van Loggerenberg DE *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* (2019) 439.

⁴⁸ Coetzee H and Van Sittert C 'Reflections on recent developments regarding wage garnishments in South Africa' (2018) *International Journal of Private Law* 107. See also Van der Merwe S *Developing a procedural framework for advanced debtor protection: the case of emolument attachment orders* (LLD thesis, Stellenbosch University 2022). Swana AA *Emoluments Attachment Orders: In Light of the Widespread Fraudulent and Undesirable Practices in Emoluments Attachment Orders Should This Debt Collection Mechanism Continue to Exist?* (LLM dissertation, University of KwaZulu Natal 2015). Haupt F and Coetzee H 'The Emoluments Attachment Order and the Employer' in Crous E (ed) *Employee Financial Wellness: A Corporate Social Responsibility* (Deutsche Gesellschaft für Technische Zusammenarbeit 2008) 81 - 92. Haupt F et al 'The incidence of an the undesirable practices relating to garnishee orders in South Africa' (2008) <https://www.up.ac.za/media/shared/165/garnishee-orders-study-report-erratum-7-december-2022.zp234295.pdf> (accessed 12 February 2020). Van Sittert C and Haupt F 'The Incidence of and Undesirable Practices relating to Garnishee Orders – a follow up report' (2013) <https://www.adraonline.co.za/file/5e0b80159406fe9270c9415d60db0d64/2013-garnishee-orders-follow-up-report.pdf> (accessed 12 February 2020). See also Van der Merwe S 'Traversing the South African emolument attachment order legal landscape post-2016: Quo vadis?' (2019) *SLR* 77. Van der Merwe S 'Paid in Full: The Enduring Battle for Advanced Emolument Attachment Order Debtor Protection in South Africa' (2023) *SLR* 137. Van der Merwe S 'Responding for the call for legislative development to alleviate the challenges with wage deduction as civil debt enforcement mechanism in South Africa: formulating a cohesive emoluments attachment order act' (2023) *TSAR* 60.

⁴⁹ In South Africa, over-indebted consumers have three statutory debt relief remedies at their disposal, namely sequestration under the Insolvency Act 32 of 1936, administration orders under section 74 of the Magistrates' Courts Act 32 of 1949 and debt review in terms of section 86(6) of the NCA. All three remedies have shortcomings and none of them provide a viable option for over-indebted consumers resorting under the low-income or no income category of debtors.

indebtedness among South Africa's poorest citizens was widely reported as one of the primary reasons for the demands for better pay and for labour strikes that led to the Marikana mine massacre in August 2012, when police officers killed 34 protesting miners.⁵⁰ It was clear that credit growth in South Africa far exceeded economic growth and that credit expansion was fast turning into a credit bust.

Government became increasingly concerned about the growing levels of household debt and over-indebtedness as well as about persistent reports of credit providers engaging in reckless lending practices. In an effort to provide relief to consumers listed at credit bureaus, Government issued regulations pertaining to the Removal of Adverse Consumer Credit Information and Information relating to Paid-up Judgments.⁵¹ In terms of the regulations, from 1 April 2014 onward, consumers no longer needed to go to court to rescind a judgment granted against them as the regulations provided for procedures which would allow credit bureaus to remove listings for paid up judgments.⁵² Government also acknowledged that it was time for a re-evaluation of the Act's reckless credit provisions.⁵³ As a result, the National Credit Amendment Act of 2014 was promulgated on 19 May 2014.⁵⁴

Fortunately, the National Credit Amendment Act 7 of 2019 was enacted in August 2019 to assist such debtors. In terms of this legislation, provision will be made for debt intervention as a debt relief mechanism for consumers with an income below R7 000. The Act is not operational yet and no regulations to the Act was published as yet. It is unclear how debt intervention will find application in practice.

⁵⁰ Mail and Guardian *Marikana Miners in debt sinkhole* <https://mg.co.za/article/2012-09-07-00-marikana-miners-in-debt-sinkhole/> (accessed 12 February 2020); Daily Maverick *Marikana the debt hole that fuelled the fire* <https://www.dailymaverick.co.za/article/2012-10-12-marikana-the-debt-hole-that-fuelled-the-fire/> (accessed 12 February 2020); Moneyweb *Financially illiterate miners debt shocker* <https://www.moneyweb.co.za/archive/financially-illiterate-miners-debt-shocker-fraud-a/> (accessed 12 February 2020); Mail & Guardian *Worker debt is key to wage talks* <https://mg.co.za/article/2015-07-02-worker-debt-is-key-to-wage-talks/> (accessed 12 February 2020).

⁵¹ Government Notice R 144, GG 37386, 26 February 2014.

⁵² South African Government 'Media statement by Minister Rob Davies: Removal of adverse credit information and information on paid up judgments' <https://www.gov.za/removal-adverse-consumer-credit-information-and-information-relating-paid-judgements> (accessed 4 November 2018). The rationale behind the credit amnesty, as outlined in the media statement, was not to remove consumers' obligation to repay their debts to credit providers. Rather, it aimed to create an incentive for consumers to repay their debts more efficiently and on time. Additionally, the process sought to encourage consumers to engage with credit bureaus to check their credit records and to act swiftly in settling judgment debts, thereby enabling the immediate restoration of a clean credit record.

⁵³ National Treasury and Department of Trade and Industry 'Media statement: Government moves to protect consumers and assist over-indebted households' http://www.treasury.gov.za/comm_media/press/2013/20131212%20-%20Household%20overindebtedness.pdf (accessed 4 November 2018).

⁵⁴ Act 19 of 2014. Hereinafter referred to as 'the 2014 NCAA'.

One of the amendments introduced to curb reckless lending effected changes to section 42 of the NCA.⁵⁵ This amendment made it obligatory for all credit providers entering into credit agreements governed by the NCA to register as such at the NCR. With this amendment, legislators bolstered their supervisory functions to, among others, improve the regulation of reckless lending. A further amendment to the Act⁵⁶ permitted the Tribunal, in addition to a court, to also declare a credit agreement reckless in accordance with the Act.⁵⁷ In terms of section 83(1) of the Act, the court or Tribunal can *suo moto* take cognisance of the fact that a credit agreement is reckless and declares it as such. If entering into the particular credit agreement caused the consumer's over-indebtedness,⁵⁸ the court or the Tribunal will exercise its powers in terms of section 83(3)(b)(i) and (ii) to provide relief to the consumer provided that the consumer is still over-indebted at the time of the court or Tribunal proceedings.⁵⁹ Prior to the amendment, only a court could have made such order in terms of section 83 of the Act. The introduction of the Tribunal as a forum to make a declaration of reckless lending ensured a cheaper alternative to obtain relief from reckless credit. Low-income consumers, in particular, could not afford the costly and protracted court process to have their agreements declared reckless.⁶⁰

The amendment of section 136 of the Act made provision for any person to submit a complaint concerning an alleged contravention of the Act or a complaint concerning an allegation of reckless lending to the Regulator in the prescribed manner and form.⁶¹ However, in practice, consumers, and especially low-income consumers with no other way to turn, generally do not report reckless lenders, because such consumers perceive those lenders as their last resort to much needed credit.⁶²

⁵⁵ S 11 of the 2014 NCAA.

⁵⁶ S 25 of the 2014 NCAA.

⁵⁷ S 83(1) of the NCA.

⁵⁸ Constituting reckless lending in terms of section 80(1)(b)(ii) of the NCA.

⁵⁹ Ss 83(3)(a) and (b).

⁶⁰ Parliamentary Monitoring Group 'National Credit Amendment Bill [B47 – 2013]: summary of submissions for the National Credit Amendment Bill' [B47-2013] <https://pmg.org.za/files/140207summary.doc> (accessed 10 January 2021).

⁶¹ S 136 of the Act was amended by section 36 of the 2014 NCAA.

⁶² Submission by Microfinance South Africa on National Credit Amendment Bill [B47-2013] <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/140128mfsasub.pdf> (accessed 10 January 2021).

As was stated above, prior to the 2014 amendments to the Act, credit providers could determine their own assessment mechanisms.⁶³ Therefore, a further and perhaps the most important amendment⁶⁴ to the Act's reckless credit provisions relates to the introduction of pre-agreement affordability assessment regulations to avoid consumers entering credit agreements they could not afford to repay by way of the final National Credit Regulations including Affordability Assessment Regulations that came into operation on 13 March 2015.⁶⁵ Failure to adhere to these regulations would amount to reckless lending.⁶⁶ The affordability regulations provide specific instructions, depending on the relevant consumer's circumstances, which the credit provider must follow during the pre-agreement assessment process. In terms of the Regulations a credit provider must take practicable steps to assess the consumer's 'discretionary income'⁶⁷ to determine whether the consumer has the financial means and prospects to meet his payment obligations in terms of the credit agreement he intends entering into.⁶⁸ To meet this obligation the credit provider is required to take practicable steps to validate the consumer's gross income⁶⁹ by requesting proof of income in the form of payslips, bank statements⁷⁰ or other documented proof of income.⁷¹

The pre-agreement affordability regulations and in particular the provision in the Regulations requiring self-employed and informally employed consumers⁷² to provide proof of income in the form of financial statements or bank statements when applying for credit, were considered by the court in the matter of *Truworths v Minister of Trade and Industry*.⁷³ The applicants argued that self-employed and informally employed consumers would not be able to comply with the form of validation of income, namely

⁶³ Prior to its amendment by the 2014 NCAA, s 82(1) read as follows:

(1) Subject to subsections (2)(a) and (3), a credit provider may determine for itself the evaluative mechanisms for models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment.

⁶⁴ S 24 of the 2014 NCAA.

⁶⁵ Reg 23A.

⁶⁶ S 80(1)(a) of the NCA.

⁶⁷ See Chapter 5 para 5.3.

⁶⁸ Reg 23A(3).

⁶⁹ Reg 23A(4).

⁷⁰ Reg 23A(4)(a).

⁷¹ Reg 23A(4)(b).

⁷² Reg 23A(4)(c) also refers to consumers who are employed in such a way that they do not receive a salary slip or proof of income as contemplated in reg 23A(4)(a) and (b).

⁷³ 2018 3 SA 558 (WCC).

‘financial statements’ as prescribed by the regulation. In its judgment, the court agreed that excluding this group of consumers from obtaining credit in order to protect them against reckless lending, had the potential of denying them access to any form of credit.⁷⁴ Therefore, so it was argued, the relevant regulation’s effect of excluding a certain group of people lacks rationality and fails the legality principle.⁷⁵ Consequently, the court ruled that Regulation 23A(4) should be set aside.⁷⁶ It should however be noted that the court’s decision does not eliminate the need to determine ‘gross income’⁷⁷ as a step towards calculating discretionary income.⁷⁸ Therefore, the consumer would still be required to provide authentic documentation to the credit provider to enable the credit provider to conduct the affordability assessment (as required by Regulation 23A(7)) and, if the consumer’s gross monthly income shows material variance, the credit provider may request the necessary authentic documentation to assess the consumer’s average income over the last 3 months as per Regulation 23A(5).

Accordingly, the ruling does away with the requirement for formal bank or financial statements since the court acknowledged that ‘there is a significant portion of the South African population that does not have bank accounts’.⁷⁹ With this ruling, the emphasis was again placed on the delicate balance between two important aims of the Act, namely facilitating access to credit to all consumers versus protecting consumers against reckless lending. Responsible lending and responsible borrowing go hand in hand and form the core of a sustainable credit market and industry. Credit providers and consumers are dependent upon each other and that is why their respective rights and responsibilities need to be balanced.⁸⁰

In August 2019, a further National Credit Amendment Act⁸¹ was enacted by Parliament, which to date is not yet in operation. The 2019 NCA, added amendments

⁷⁴ *Truworths v Minister of Trade and Industry* (n 73) para 52.

⁷⁵ *Ibid.*

⁷⁶ *Truworths v Minister of Trade and Industry* (n 73) para 55.

⁷⁷ See Chapter 4 para 4.3.3.2 and Chapter 5 para 5.3.

⁷⁸ Government Notice 224, GG 41604, 4 May 2018, (Proposed Guidelines for ascertaining consumer’s gross incomes and discretionary incomes for the purposes of Regulation 23A of the National Credit Regulations including the Affordability Assessment Regulations).

⁷⁹ *Truworths v Minister of Trade and Industry* (n 73) para 64.

⁸⁰ *SA Taxi Securitisation v Mbatha* 2011 1 SA 310 (GSJ).

⁸¹ Act 7 of 2019. Hereinafter referred to as ‘the 2019 NCA’.

to the Act's reckless credit provisions that will further strengthen measures to prevent reckless credit granting. Among others, the 2019 NCAA provides for the compulsory investigation of reckless lending matters by debt counsellors, even in instances where consumers do not request it.⁸² Regulations to the 2019 NCAA has not been published at the time of writing. It thus remains to be seen whether this amendment to the Act will alleviate the plight of the low-income consumer or present new challenges to the credit industry.

Despite the comprehensive provisions in the Act addressing the prevention of reckless lending, the Act also provides mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.⁸³ Under section 86 of the Act, read with regulations 24 to 27, a novel debt review procedure (not previously available under earlier credit legislation) is established to enable over-indebted consumers to seek relief for their over-indebtedness. This procedure involves a debt counsellor evaluating the consumer's financial position and negotiating with the consumer's credit providers to restructure debt obligations. It is submitted that debt review ensures that consumers can meet their financial obligations responsibly while maintaining access to essential resources.

Debt relief may also follow when, during any court or Tribunal proceedings the court or the Tribunal pro-actively *suo motu* takes cognisance of the fact that a credit agreement is reckless and declares it to be so.⁸⁴ A consumer may also avail him- or herself of section 85 of the Act to obtain debt relief by alleging in any court proceedings in which a credit agreement is being considered that he or she is overindebted.⁸⁵

Chapter 7 of the Act further provides for dispute settlement other than debt resolution by alternative dispute resolution,⁸⁶ initiating to⁸⁷ and investigation of⁸⁸ such complaints

⁸² S 10 of the 2019 NCAA introduces s 82A to the NCA.

⁸³ S 3(g) of the NCA.

⁸⁴ S 83(1) of the NCA.

⁸⁵ Renke S and Coetzee H 'The circumstances under which section 85(a) of the National Credit Act 34 of 2005 can be utilised as an avenue to access or re-access the debt relief measures in terms of the Act' (2018) *De Jure* 235.

⁸⁶ Part A, Ss 134 – 135 of the NCA.

⁸⁷ Part B, Ss 136 – 138 of the NCA.

⁸⁸ Part C, Ss – 141A of the NCA.

by the Regulator, as well as complaints to Consumer Courts and the ombud with jurisdiction.

It is essential for the provisions in the Act aimed at the prevention of reckless lending, the resolution of over-indebtedness and dispute settlement to be accessible to low-income consumers in South Africa, because this group is particularly vulnerable to exploitative credit practices and financial instability. Low-income consumers often rely on credit to meet basic needs, making them more susceptible to over-indebtedness and the consequences of reckless lending. If these consumers are unable to access the protections offered by the Act, they may face severe financial hardship, including loss of assets, inability to cover essential expenses, and dependence on unregulated or predatory lenders. Accessibility to the Act's dispute resolution mechanisms is equally critical for low-income consumers. Without affordable and straightforward measures to address grievances, it is submitted that these consumers are likely to be excluded from seeking justice or achieving debt relief. The absence of accessible remedies may thus perpetuate cycles of poverty and financial exclusion, further marginalizing vulnerable groups.

Moreover, ensuring accessibility aligns with the Act's broader objectives of promoting equity, fairness, and responsible credit practices in South Africa. By safeguarding low-income consumers through effective and inclusive provisions, it is submitted that the Act can contribute to a more equitable financial system where all consumers, regardless of income level, are protected from exploitative practices and empowered to manage their financial obligations responsibly.

1.2 Research objective

The primary objective of this research is to assess whether the reckless lending provisions in the Act, and more specifically the provisions relating to the assessment of the consumer's affordability to enter into and repay credit agreements, have improved the position of the low-income consumer, or whether it introduced new challenges to this group. To achieve this, the research will examine the evolution of the credit provider's pre-agreement affordability assessment obligation, with a specific focus on the affordability assessment regulations introduced by the Minister under

Regulation 23A through the 2014 amendments to the Act. A comprehensive analysis of Regulation 23A, along with relevant case law will inform the investigation.

A further objective of the research is to evaluate the effectiveness of the debt review process established under section 86 in providing meaningful relief to low-income consumers who have fallen victim to reckless lending despite the preventative provisions in the Act. In conjunction with the aforesaid further objective, the research will also evaluate the accessibility of alternative dispute resolution mechanisms, as well as the roles of the Regulator, the Tribunal, Consumer Courts and the ombud with jurisdiction, in addressing grievances and ensuring equitable outcomes for low-income consumers affected by reckless lending. It is submitted that only considering the reckless credit provisions in isolation without also considering the aforementioned other provisions in the Act that are relevant to the low-income consumer's position will compromise the ability to make informed recommendations to improve the dire situation of low-income consumers in South Africa.

These aims collectively focus on examining the challenges and opportunities for ensuring that the Act fulfils its intended role in safeguarding vulnerable consumers and fostering a fair credit system.

1.3 Delineation and limitations

It is important to understand that the NCA does not provide all consumers with an automatic right to credit. Even though the Act provides that every adult person has a right to apply to a credit provider for credit,⁸⁹ being granted the credit is not an automatic right. Very important to note for purposes of this research is that 'low-income consumer' does not mean 'poor consumer'. Low-income consumers for the purposes of this research are consumers who earn an income and would be able to pay back the credit provider. The income for low-income consumers in terms of this research, would be defined by the LSM 5 – 7 categories, which earns an income of R4 465 to R11 263 per month.⁹⁰

⁸⁹ S 60 of the NCA.

⁹⁰ Egan P 'The South African Consumer Landscape' in Lappeman J, Egan P, Rightford G and Ramogase T (eds) *Marketing to South African Consumers* UCT Liberty Institute of Strategic Marketing (2021) 80. See also 'How SEM Supergroups help delve deeper and deliver granular

The Living Standards Measure (LSM) is a marketing segmentation research tool utilised in South Africa to categorise the population. This tool organises individuals into ten distinct LSM groups, with a score of ten representing the highest wealth level and a score of one indicating the lowest socioeconomic status, characterised by a lack of measurable wealth. The LSM focuses on a standard of living metric rather than income, using various criteria such as urbanisation level, ownership of vehicles and significant appliances, and access to essential services like water and electricity as key indicators.⁹¹

This corresponds with a study by Eighty20⁹² published in 2024, in terms whereof this category is referred to as the 'Mass Credit Market'. In terms of this study this consumer class consist of consumers who are primarily employed but with lower to middle income levels.⁹³ Most individuals in this segment are banked, but their credit products are typically unsecured loans and store cards. Nearly one-fifth of this group receive government grants, and they have high loan default rates. This group also struggles with debt management, dedicating a substantial portion of their income to servicing debt. The research by the Eighty20 group indicates that economic pressures have heightened this segment's vulnerability, particularly in maintaining spending on necessities and financial obligations.

While emoluments attachment orders will be referenced in this research, this debt enforcement mechanism will not be discussed in detail as it is not the focus of this research. Certain principles of this debt enforcement mechanism may however inform recommendations, but a comprehensive analysis of its application falls outside the scope of this research. Similarly, the 2019 NCAA and in particular the proposed debt

information' <https://www.bizcommunity.com/Article/196/19/195896.html> (accessed 27 January 2025).

⁹¹ The Global Agricultural Information Network 'Understanding the Living Standards Measure Segmentation in South Africa November 2020 <https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Understanding%20the%20Living%20Standards%20Measure%20Segmentation%20in%20South%20AfricaPretoria%20South%20Africa%20-%20Republic%20of%2011-13-2020> (accessed 27 January 2025).

⁹² Eighty20 is a Cape Town-based consumer analytics and research consultancy in South Africa, renowned for its expertise in data-driven customer insights and strategic marketing solutions.

⁹³ Eighty20 'Understanding South African Consumer Segments 2024' https://www.eighty20.co.za/app/uploads/2024/08/SACSC_Research-Report_Eighty20.pdf (accessed 27 January 2025).

intervention process proposed in terms of this Act will be discussed where necessary to provide context. However, the research does not provide an extensive evaluation of the proposed mechanism or its practical implementation, as such a discussion goes beyond the intended scope of this study.

1.4 Methodology

A doctrinal approach, largely based on a desktop literature study, will be followed. The evolution of reckless credit provisions, since the inception of the Act, will be investigated to assess whether it has brought about a better dispensation for the South African low-income consumer. The research will consider and criticise the reckless lending provisions in the Act particularly with the low-income consumer in mind. The pre-agreement affordability assessment measures in the Act will be evaluated to determine whether it prevents the low-income consumer from obtaining credit recklessly or whether it has the unintended consequence of preventing this group of consumers from obtaining any credit at all. The research will further evaluate whether the relief offered to consumers who fell victim to reckless lending is readily available to low-income consumers.

A detailed analysis of the legislative framework governing the debt review process under section 86 of the Act will be conducted to determine whether the process provides meaningful relief to low-income consumers who, despite the measures in the Act to prevent it, still fell victim to reckless lending. The legislative framework governing alternative dispute resolution agents, as well as the roles of the Regulator, the Tribunal, Consumer Courts and the ombud with jurisdiction⁹⁴ in addressing grievances and promoting equitable outcomes for low-income consumers will be investigated to determine whether these entities are reasonably accessible to low-income consumers and effective in providing this group of consumers with relief in the event of over-indebtedness.

⁹⁴ The commencement of the National Financial Ombud Scheme South Africa on 1 March 2024 marks a shift in jurisdictional authority under the National Credit Act. In terms of sections 134 and 136, this consolidated scheme now handles all new complaints, whereas matters filed before this date continue to be processed by the previously recognised industry ombuds. See Chapter 6 and Chapter 7 for a discussion of the Ombud with jurisdiction.

To provide context to the research, the South African pre-agreement affordability assessment measures and policy considerations will be benchmarked against some of the most pertinent and recent international principles, standards and guidelines relating to pre-agreement assessment and relief mechanisms available to consumers who fell victim to reckless lending and became over-indebted as a result thereof. The recommendations of international bodies, such as the World Bank, the Group of Twenty, the Organisation for Economic Co-operation and Development and International Federation of Insolvency Professionals' International Consumer Debt Report will be considered. The position in the European Union as well as the renowned academic, Therese Wilson's criteria of responsible lending regime as discussed in her excellent book titled '*International responses to issues of credit and over-indebtedness in the wake of crisis*'⁹⁵ will also be used as a yardstick to evaluate whether the South African reckless lending policy adheres to the recommendations made by the international community.

Even though it is necessary to ensure that South African policy and legislative measures relating to reckless lending adheres to international standards and best practices, these measures have to be developed against the background of the financial climate and socio-economic challenges facing South Africans and has to meet the idiosyncrasies of South Africa's credit market and credit consumers. South Africa's unemployment rate is one of the highest in the world. Two of the country's further great socio-economic challenges, namely poverty and inequality, further fuels the crisis of over-indebtedness. In the South African context, it is absolutely necessary that policy and measures relating to reckless lending, as well as recommendations for possible reform, has to take cognisance of the plight of low-income consumers.

1.5 Selection of comparative jurisdictions

In this thesis a comparative study will be conducted to examine key aspects of consumer credit legislation in the United Kingdom and Australia. Australia and the United Kingdom were chosen as comparative jurisdictions in this thesis due to their well-developed regulatory frameworks for consumer credit, particularly in the

⁹⁵ Wilson T *International responses to issues of credit and over-indebtedness in the wake of crisis* Ashgate (2013).

assessment of affordability and the prevention of reckless lending. Both these jurisdictions also have support measures available to consumers who have become over-indebted due to irresponsible lending practices.

The United Kingdom has a well-established framework for consumer credit regulation, particularly in the area of pre-agreement assessments designed to prevent over-indebtedness. This regulatory framework has its roots in the Consumer Credit Act 1974, which received Royal Assent on 31 July 1974. The act repealed all existing credit legislation at the time and marked the introduction of the UK's first exclusive legislation governing consumer credit. Since then, the regulatory environment has undergone significant development over the past few decades, with a particular focus on protecting vulnerable consumers, including those with low incomes. The introduction of the Consumer Duty in 2023, as discussed in Chapter 8, represents the latest advancement in this regulatory journey, setting higher expectations for credit providers to prioritize consumer welfare and ensuring that credit products are suitable for consumers' individual circumstances.

Australia was chosen as a comparative jurisdiction for this thesis due to its comprehensive approach to consumer credit regulation and responsible lending, particularly regarding protection measures for low-income consumers. Over the past few decades, Australia has developed a robust regulatory framework for consumer credit, with strong emphasis on the protection of low-income and vulnerable consumers. Prior to the introduction of the Uniform Consumer Credit Code in 1996, the regulatory landscape was fragmented and inconsistent, with different laws applying across states and territories. The introduction of a uniform national approach marked a turning point, paving the way for further reforms aimed at enhancing responsible lending practices and ensuring more consistent consumer protection. Key features of Australia's approach include rigorous pre-agreement affordability assessments, specific protections for vulnerable consumers, and product-specific regulations for high-risk credit products such as small amount credit contracts and consumer lease agreements. These measures are particularly relevant for low-income consumers, who are often most at risk of over-indebtedness. Australia's use of clear suitability and affordability requirements, combined with accessible redress mechanisms, offers a well-established model for addressing reckless lending.

By comparing these regulatory approaches, this research aims to identify best practices and potential gaps that can inform South Africa's consumer credit framework, with a particular focus on safeguarding low-income consumers from over-indebtedness and financial exclusion

1.6 Chapter overviews

Chapter 1 provides background information and illustrates the need for further research in this field. The research objectives, delineations and limitations of the study as well as the method in which the research is conducted is set out in this chapter. The chapter also sets out the reference methods used. The chapter further sets out the motivation for using the UK and Australia as comparative jurisdictions.

Chapter 2 considers some of the most pertinent and recent international principles, standards and guidelines relating to pre-agreement assessment. The principles and guidelines will be evaluated to determine whether it can be of any value in the South African consumer credit context and specifically for the consumer that forms the subject of this study, namely the low-income consumer.

Chapter 3 deliberates the purpose and application of the NCA in detail to serve as a basis and to provide much-needed context before embarking on matters more closely related to the research topic in later chapters.

Chapter 4 examines the reckless lending provisions in the Act and analyses the concepts of reckless credit and over-indebtedness. The chapter also explains how pre-agreement assessment acts as a safeguard against reckless lending and reviews section 80, which outlines three scenarios where credit extension is deemed reckless, along with their consequences for consumers. It also discusses the defence available to credit providers in cases of reckless lending allegations and concludes by emphasizing the limited application of these provisions. The chapter then shifts focus to the assessment obligations imposed on credit providers by the Act and Regulations. It traces the evolution of affordability assessment from a tick-box approach to a consumer-focused process and provides a detailed analysis of Regulation 23A, which guides credit providers in evaluating whether consumers can afford the credit they apply for.

Chapter 5 explains the limitations regarding the affordability assessment provisions in the Act to support the argument that the provisions in the Act aimed at preventing reckless lending has the effect that it limits low-income consumers from having access to credit.

Chapter 6 examines legislative measures for resolving over-indebtedness and addressing reckless lending disputes, laying the foundation for further research on whether low-income consumers can effectively access available remedies. In this chapter, a detailed overview of the debt counselling process assesses its suitability for low-income consumers seeking debt relief. Additionally, the role of the Magistrate's Court, Tribunal, Regulator, and other dispute resolution bodies is explored to determine their effectiveness in handling reckless lending complaints. This analysis will provide background for the next chapter, which will evaluate whether these mechanisms offer adequate recourse for affected consumers.

Chapter 7 critically evaluates the debt counselling process as both a debt relief mechanism and a vehicle for addressing reckless lending – particularly for low-income consumers. It also addresses whether the procedures prescribed by the Magistrate's Court, the Tribunal, the Regulator as well as alternative dispute resolution agents, ombudsmen and consumer courts are sufficiently accessible and effective in resolving disputes involving reckless lending. By exploring these aspects, this chapter aims to determine whether the current framework adequately serves the needs of low-income consumers or whether reforms are necessary to improve accessibility and fairness in addressing over-indebtedness and reckless lending practices.

Chapter 8 presents a comparative analysis between South Africa and the United Kingdom, two jurisdictions that emphasize affordability assessments in consumer credit regulation but differ significantly in their implementation. It further examines the UK's legislative framework on reckless lending, tracing the historical development of its credit laws and the integration of affordability assessments to prevent over-indebtedness. It explores the obligations placed on UK credit providers to conduct thorough affordability assessments and the relief mechanisms available to consumers affected by reckless lending. The comparative analysis highlights the effectiveness of

consumer protection measures in both the UK and South Africa, identifying best practices that could guide future reforms in South Africa's credit legislation.

Chapter 9 provides a comparative analysis of affordability assessments in consumer credit regulation between South Africa and Australia, highlighting their shared emphasis on responsible lending while exploring key differences in implementation. It examines Australia's legislative framework on reckless lending, tracing the development of its credit laws and the role of affordability assessments in preventing over-indebtedness. The obligations imposed on Australian credit providers to conduct thorough affordability assessments are analysed, along with the relief mechanisms available to consumers affected by reckless lending. By comparing consumer protection measures in both jurisdictions, the chapter aims to identify best practices that could inform future reforms in South Africa's credit legislation, balancing enhanced protections for low-income consumers with continued access to credit.

Chapter 10 provides a comprehensive conclusion to the research by evaluating whether the relevant provisions on affordability assessment as it has evolved through amendments of the NCA, effectively prevent over-indebtedness and curb reckless lending. It also reflects on the effectiveness and accessibility of measures available to provide relief to low-income consumers who find themselves over-indebted. In this chapter, relevant lessons from earlier discussions are extracted for South Africa and, most importantly, concrete recommendations for the way forward are made.

1.7 Reference methods

The sources referenced in the footnotes are set out comprehensively the first time that I refer to that particular source in each chapter. Subsequent footnotes referencing the same source refer to the first footnote with the full reference in brackets, for example, *Van Heerden and Steennot (n 32)*.

For the sake of convenience, the masculine form is used throughout, unless specifically indicated otherwise. The law as stated in this thesis reflects the position as on 16 June 2025.

CHAPTER 2: POLICY CONSIDERATIONS INFORMING PRE-AGREEMENT ASSESSMENT

- 2.1 Introduction**
- 2.2 World Bank**
- 2.3 Group of Twenty**
- 2.4 The Organisation for Economic Co-operation and Development**
- 2.5 International Federation of Insolvency Professionals International Consumer Debt Report**
- 2.6 The European Union Directives on Consumer Credit and Mortgage Credit**
- 2.7 Scholarly views**
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- 2.9 Relief mechanisms available to consumers who fell victim to reckless lending**
- 2.10 Conclusion**

2.1 Introduction

Consumer credit is an integral part of the global economy and has been described as the ‘lubricant’ of economic life.¹ In the August 2004 policy framework of the Department of Trade and Industry, credit is also described as a ‘double edged sword’ because as much as it enables consumers to acquire goods they would not be able to acquire without having access to credit, it is unfortunately also the cause of many of their woes, because many consumers end up being over-indebted and unable to repay the credit

¹ Ramsay I ‘Consumer credit regulation after the fall: international dimensions’ (2012) *Journal of European Consumer and Market Law* 24.

on the agreed terms and conditions.² This is particularly true for vulnerable consumers as highlighted by the policy document:

‘Credit cannot therefore be seen as a universal basic service to which access should be extended in the same way as access to water, health care and electricity. There is a greater need to balance access to credit with protection for consumers, especially the vulnerable.’³

The decision to enter into a credit agreement can have extensive ramifications for the consumer, the credit provider and, indirectly, the economy as a whole. It is submitted that it is a decision that must be made responsibly to prevent consumers from becoming over-indebted. On the other hand, if the scale is tipped in favour of overtly stringent regulation, it might have an unduly adverse effect on access to credit – especially for the low-income consumers. As a result, responsible lending principles have become an important priority for credit regulators across the globe.

Van Heerden and Steennot point out that responsible lending practices can cover a wide array of measures such as consumer education and the promotion of financial literacy, responsible marketing, the provision of information, explanation and advice to consumers before the conclusion of the contract, the regulation of the cost of credit, the prohibition of certain lending practices and the pre-agreement screening of consumers to determine their ability to repay the debt as per the terms and conditions of the agreement (that is, creditworthiness or affordability).⁴ A feature common to the lending regimes of various jurisdictions is the use of ‘pre-agreement assessment’ as a tool to filter out instances where credit should not be granted based on a consumer’s creditworthiness or ability to repay.⁵

The aim of this chapter is firstly to consider some of the most pertinent and recent recommendations of international bodies, such as the World Bank, the Group of Twenty, the OECD and INSOL. The position in the European Union as well as Wilson’s

² Department of Trade and Industry South Africa *Consumer Credit Law Reform – Policy Framework for Consumer Credit/Making credit markets work – A Policy Framework for Consumer Credit* August 2004 <https://static.pmg.org.za/docs/2005/050608consumer.pdf> (accessed 16 April 2020). Hereinafter referred to as ‘*Policy Framework for consumer Credit* (2004)’ 6. See also Van Heerden CM and Steennot R ‘Pre-Agreement Assessment as a Responsible Lending Tool in South Africa, the EU and Belgium: Part 1’ (2018) *PELJ* 2.

³ *Policy Framework for consumer Credit* (2004) 7.

⁴ Van Heerden and Steennot Part 1 (n 2) 2.

⁵ *Ibid.*

criteria for a responsible lending regime as discussed in her book titled '*International responses to issues of credit and over-indebtedness in the wake of crisis*'⁶ will also be considered. These principles and guidelines will be evaluated to determine whether it can be of any value in the South African consumer credit context and specifically for the consumer that forms the subject of this study, namely the low-income consumer.

The focus of the chapter then shifts to an investigation of policy measures in the international arena that focus on relief to consumers who want to obtain relief from their over-indebtedness that was caused by reckless lending. The perspectives of the same international bodies as well as the principles set out in the European Union's *CCD 2023*, as discussed hereinafter, are considered in the remainder of the chapter with a summary of best practices in this area concluding the chapter.

2.2 World Bank

The World Bank supports the idea that affordability assessment is a critical safeguard against reckless lending. The 2013 World Bank Report on Responsible Lending⁷ provides valuable insights regarding pre-agreement assessment as a tool to assess affordability. It provides an overview of key regulatory actions a government may implement to support responsible lending.⁸

2.2.1 Evaluate affordability

The 2013 World Bank Report states that the ultimate goal of the affordability assessment should be the verification that the consumer has sufficient assets or income to pay back the relevant loan.⁹ Income verification is reported to be the primary tool most lenders use when assessing the riskiness of a potential client and his ability to repay the loan.¹⁰ In more formal economies, lenders require more formal confirmation of a borrower's income such as for example tax returns and pay slips whereas less formal economies use other sources of information to confirm the

⁶ Wilson T *International responses to issues of credit and over-indebtedness in the wake of crisis* Ashgate (2013).

⁷ World Bank 'Responsible Lending, Overview of Regulatory Tools' (October 2013) <http://documents1.worldbank.org/curated/en/596151468336064796/pdf/832840WPOGFDR00Box0382083B00PUBLIC0.pdf> (accessed 10 October 2023). Hereinafter referred to as the 'World Bank Report on Responsible Lending (2013)' or 'the 2013 World Bank Report'.

⁸ World Bank Report on Responsible Lending (2013) 2.

⁹ World Bank Report on Responsible Lending (2013) 34.

¹⁰ World Bank Report on Responsible Lending (2013) 32.

creditworthiness of a borrower such as witnesses or neighbours or assessment of the borrower's property.¹¹ The credit provider must determine whether the consumer's income will be sufficient to cover the instalments in terms of the credit agreement, or, in case his income diminishes whether the assets he has on hand is sufficient to be used as collateral to the lender. Hence, the World Bank is of the view that the creditworthiness assessment can be described as a 'creditor-focused' test, looking at the probability that the creditor will be repaid in full.¹² The 2013 World Bank Report further advised that when determining whether the consumer can afford to repay the credit agreement, all the costs associated with the credit agreement should be included in the calculation of affordability. For example, whether the consumer will be able to afford to repay a mortgage bond together with the associated credit insurance costs, estates taxes and duties and other related costs.¹³

An additional important point discussed in the 2013 World Bank Report is that, although collateral or security plays a significant role in assessing the risk associated with a consumer's ability to repay, the repossession of such collateral or security is not viewed as a favourable outcome in the context of responsible lending.¹⁴ The 2013 World Bank Report indicates that, although the credit provider can reduce the risks arising from unpaid credit agreements by selling the item used as collateral/security, the long-term negative effects for the consumer should dissuade credit providers from doing this.¹⁵ The 2013 World Bank Report further states that if a credit provider is experiencing an above-average number of repossessions compared to their industry peers, this will often point to a failure of the credit provider's affordability assessment.¹⁶

2.2.2 Credit History

The 2013 World Bank Report further emphasizes the importance of verifying a consumer's credit history. In countries with a reliable credit bureau, lenders can verify the credit history of potential consumers as part of the client assessment process.¹⁷

¹¹ *Ibid.*

¹² World Bank Report on Responsible Lending (2013) 34.

¹³ World Bank Report on Responsible Lending (2013) 35.

¹⁴ World Bank Report on Responsible Lending (2013) 35.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ World Bank Report on Responsible Lending (2013) 33.

Credit information sharing systems¹⁸ recently also started collecting data on the use of and payment reliability for other services provided on credit, such as utilities or phone services. Lending decisions can therefore be based on information about a consumer's failure to pay his mobile phone or utility bill on time as well. Even where there are no credit bureaus or when financial institutions are not required to report to credit bureaus, credit providers such as microfinance institutions base their lending decisions on a credit history of the client with that institution. New clients will therefore be eligible only for smaller loans while consumers with a proven repayment track record with the institution will qualify for higher loans.¹⁹

2.2.3 Strong regulatory enforcement

The World Bank calls for strong regulatory enforcement and further advises that, to ensure proper enforcement of its responsible lending policies, the credit regulator should be 'as specific as possible' in defining the list of information the lenders should request when assessing a loan application.²⁰ The credit regulator should also regularly monitor compliance with these provisions.²¹ Lending institutions should know that lending files will be inspected by the regulatory authority and that they should keep all documentation of the client's affordability assessment to proof adherence to responsible lending policy.²² According to the World Bank, failure to adhere to pre-agreement affordability testing should have consequences for lenders. In countries where the pre-agreement affordability check is required, supervisory action against the financial institution can be a consequence of failure to perform an affordability check.²³ Where the income or credit history assessment is based on information provided by the consumer, the credit institution should have policies and procedures in place to verify that the information is true and correct. If there are more than one credit bureau, these bureaus should share information between them, or lenders should be required to utilise information from all the bureaus.²⁴

¹⁸ Institutions collecting and sharing information about credit history are called 'credit information sharing systems'.

¹⁹ World Bank *Report on Responsible Lending* (2013) 34.

²⁰ World Bank *Report on Responsible Lending* (2013) 36.

²¹ World Bank *Report on Responsible Lending* (2013) 38.

²² World Bank *Report on Responsible Lending* (2013) 38. Note that no guidance on the prescribed duration of the retention period is prescribed.

²³ *Ibid.*

²⁴ World Bank *Report on Responsible Lending* (2013) 39.

The drafters of the 2013 World Bank Report acknowledge that consumers may be tempted to provide false information about income or credit history to ensure a loan approval. They thus recommended that this type of fraud should be discouraged by active prosecution.²⁵ Consumers should also be made aware that the evaluation of credit history can be used for other purposes, such as employee selection. Responsible credit use may therefore have a wider impact on consumers and consumers should be made aware of the extent of this impact.²⁶

The World Bank emphasises that a policy focused on access to consumer credit should ensure that the credit is offered and used responsibly.²⁷ This emphasises the World Bank's view that consumer protection should be balanced with financial inclusion because when affordability assessments are too strict, it may reduce credit access for low-income consumers which may force them to seek unregulated lending alternatives.²⁸

2.2.4 Suitability testing

The 2013 World Bank Report also addresses the concept of suitability testing that is included in certain jurisdictions' affordability assessment rules. Understanding the limits of reasonable decision making, some regulators go further than merely testing the consumer's affordability by requiring the financial institution to ensure that the product that they offer is also suitable to the consumer.²⁹

The assessment of affordability is a creditor focused test because the credit provider tests whether the consumer can afford the credit product under consideration and evaluates the risks posed should the credit agreement not be paid in full and on time. The suitability test is however 'consumer-focused' as it assesses the consumer's individual circumstances, his life situation and how the loan will impact his financial security to determine whether the product is suitable for his needs.³⁰

²⁵ World Bank Report on Responsible Lending (2013) 40.

²⁶ World Bank Report on Responsible Lending (2013) 40.

²⁷ World Bank Report on Responsible Lending (2013) 8.

²⁸ World Bank Report on Responsible Lending (2013) 13.

²⁹ World Bank Report on Responsible Lending (2013) 40.

³⁰ World Bank Report on Responsible Lending (2013) 40.

The 2013 World Bank Report recommends that a credit product's suitability should be evaluated by three tests: the consumer's best interest, understanding of the product and long-term affordability. The best interest test verifies whether the lender adequately understands the consumer's situation and future plans. This test requires that the financial institution needs to look at the consumer's whole financial portfolio and understand how the loan may interact with the consumer's financial stability and long-term goals. While the final decision will always remain with the customer, the lender should be able to evaluate the consumer's situation and advise which product, if any, is the most suitable to fulfil the specific needs of the consumer. This test is also referred to as the 'Know-your-customer principle' (KYC).³¹ The same term is used in the anti-money laundering context where it applies to the need of the financial institution to know the identity of the client. In the consumer protection context, the term applies to the need of the financial institution to know the situation and understand future goals of the client sufficiently to be able to select an appropriately suitable financial product from the available options.³²

The test to understand a consumer's comprehension of the product evaluates whether the consumer understands all product features, benefits and risks. Key information about the loan, such as the volume of credit, interest rate, total cost of credit, and instalment payments is presented to the consumer by way of information sheets (often called key fact statements). The design of these key fact statements is important because the way the information is presented substantially influences the consumer's understanding of the product and helps inform his decisions.³³ Oral disclosure of information by sales staff is equally important and regulators should ensure that any design of disclosure should ensure that there are not only requirements for what information should be provided in writing but also what must be presented to clients face to face.³⁴ It combines the need for adequate information disclosure with the need for adequate explanation and guidance provided by the sales staff as the oral presentation may significantly influence how the consumer understands and uses presented information.³⁵

³¹ World Bank *Report on Responsible Lending* (2013) 42.

³² *Ibid.*

³³ World Bank *Report on Responsible Lending* (2013) 17.

³⁴ World Bank *Report on Responsible Lending* (2013) 19.

³⁵ World Bank *Report on Responsible Lending* (2013) 43.

The test of long-term affordability looks at how any long-term risks the consumer may face, could influence his capacity to repay the loan. While the first two tests are rather straightforward, the test for long-term affordability requires the lender to make various assumptions about the consumer's future as well as to consider the potential impact of general economic development on the consumer's ability to repay the loan.³⁶

The 2013 World Bank Report recognises that requiring suitability testing by law, and regulating such a requirement, is a complex issue that requires detailed supervisory guidance.³⁷ To adequately test the suitability of loans, lenders need a framework to model typical consumers. Some credit providers will rely upon historical data which might be risky should they start offering new products or if they enter new market segments or when the overall economic situation significantly changes.³⁸ Other credit providers may rely upon national-level data, however, this tends to be too general and lacking the details to allow for adequate modelling of the consumer's long term ability to repay the credit agreement.³⁹ Thus, the regulator may support the collection and distribution of more detailed data for the development of models that credit providers could use with sufficient confidence.⁴⁰ A further challenge identified by the 2013 World Bank Report relates to the fact that adequate suitability testing requires the credit provider to consider where the credit agreement was concluded and implement behavioural psychology insights.⁴¹

This will often be the case where a credit agreement is concluded to finance the immediate purchase of a specific item, as such consumers may focus solely on acquiring the underlying product and disregard any information provided to them by the credit provider about the credit agreement.⁴² This will *especially* be the case in

³⁶ World Bank Report on Responsible Lending (2013) 43.

³⁷ World Bank Report on Responsible Lending (2013) 43.

³⁸ World Bank Report on Responsible Lending (2013) 43.

³⁹ World Bank Report on Responsible Lending (2013) 44.

⁴⁰ World Bank Report on Responsible Lending (2013) 44.

⁴¹ World Bank Report on Responsible Lending (2013) 45. Behavioural psychology insights refers to understanding how people make financial decisions. For example, it shows that people do not always process information rationally; they may ignore fine print, underestimate future payments or be persuaded by how information is portrayed ('only R99/month' v 'R2 376 over two years'). See Lea SEG 'Debt and Overindebtedness: Psychological evidence and its policy implications.' *Social issues and Policy Review* 146 – 179 (January 2021) <https://doi.org/10.1111/sipr.12074> (accessed 3 October 2023).

⁴² World Bank Report on Responsible Lending (2013) 45.

situations where the attention of the consumer is limited, in which instance insights from behavioural psychology should be given specific attention to help find tools to communicate credit-related information more effectively to the consumer.⁴³

2.3 Group of Twenty

The G20⁴⁴ adopted the Principles for Innovative Financial Inclusion in 2010 highlighting the necessity for an inclusive approach to the protection of consumers in financial markets.⁴⁵ These principles are primarily aimed at fostering access to financial services for underserved populations and emphasised the importance of consumer protection as part of financial inclusion efforts. In a related but separate development, the G20 High-Level Principles on Financial Consumer Protection were endorsed by G20 leaders in November 2011 and subsequently adopted on 17 July 2012.⁴⁶ These High-Level Principles set out the elements of an effective and comprehensive financial consumer protection framework.

For purposes of this research, Principle 6 of the High-Level Principles is of particular importance. This principle provides that credit providers should undertake a proper pre-agreement assessment of the consumer's creditworthiness when extending credit that would significantly increase the consumer's existing debt, or when offering new credit. Such assessments are essential to enabling consumers to make informed financial decisions and to reduce the risk of consumer over-indebtedness⁴⁷ Moreover, financial services providers are required to assess their consumers' financial capacity, situation and needs, primarily based on information provided by consumers, before

⁴³ World Bank *Report on Responsible Lending* (2013) 45.

⁴⁴ Hereinafter referred to as 'the G20'. The G20 is an international forum for the governments and central bank governors from 19 countries (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, and United States) and two regional bodies, namely the European Union (EU) and African Union (AU). It was founded in 1999 with the aim of studying, reviewing and promoting the high-level discussion of policy issues pertaining to the promotion of international financial stability – see G20 South Africa 2025 <https://g20.org/about-g20/overview/> (accessed 30 January 2025).

⁴⁵ G20 *Principles for Innovative Financial Inclusion* – Executive Brief <https://www.gpfi.org/publications/g20-principles-innovative-financial-inclusion-executive-brief> (accessed 30 January 2025).

⁴⁶ G20 *High level principles* (2012) <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0394> (accessed 30 January 2025). Hereinafter referred to as the 'G20 High-Level principles (2012)' or 'the High-Level Principles'.

⁴⁷ G20 *High level principles* (2012) principle 6.

agreeing to provide them with a product, service or advice.⁴⁸ Principle 6 also stipulates that financial products and services offered to consumers should meet the particular needs of every individual consumer.⁴⁹ Sufficient information must be provided to the consumers to place them in a position where they are able to choose the most suitable and affordable product or service.⁵⁰ To assist consumers in making appropriate decisions on their financial needs and essentially to curb consumer over-indebtedness, credit providers should also properly assess the consumer's creditworthiness when offering new credit or extending credit that significantly increases the debt amount assumed by the consumer.⁵¹ This requirement is said to have triggered a wave of new regulations on responsible lending around the world as it serves a double function: preventing consumer over-indebtedness and promoting a sound financial system.⁵²

The High-Level Principles were subsequently revised and updated in 2021-2022, following a comprehensive and inclusive review conducted by the G20/OECD Task Force on Financial Consumer Protection, in collaboration with the Global Partnership for Financial Inclusion.⁵³ The Revised Principles contain important guidelines for legal policy and are particularly important for this research.

Amongst other innovations, the Revised Principles emphasizes the need for a robust legal, regulatory and supervisory framework that equips regulators and supervisors with an appropriate regulatory toolkit to address emerging risks, including changes to the regulatory perimeter.⁵⁴ A key component of the updated framework is the participation of non-governmental stakeholders – including industry (also including small business) and consumer organisations, professional bodies and academic and research institutions – in the formulation and review of financial consumer protection and financial education policies. In order to ensure meaningful participation, the Revised Principles emphasise the need to facilitate access to these processes,

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Wilson 2009 (n 6) 111.

⁵³ G20 High Level Principles (2022) <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/financial-consumer-protection/G20-OECD-FCP-Principles.pdf> (accessed 30 January 2025). Hereinafter referred to as G 20 High Level Principles (2022) or 'the Revised Principles'.

⁵⁴ G20 High Level Principles (2022) principle 1.

particularly for consumer organizations.⁵⁵ Furthermore, regulators must be empowered with the necessary tools and powers to carry out their role.⁵⁶ The Revised Principles also highlight the importance of financial literacy initiatives that provide accessible, clear and timely information on consumer rights and responsibilities, with targeted efforts to assist vulnerable consumers.⁵⁷ Recognizing that consumer vulnerability can arise from personal, economic, and market-related factors, the Revised Principles encourage regulatory frameworks to incorporate appropriate support mechanisms such as the provision of impartial debt advice for consumers facing financial hardship due to over-indebtedness.⁵⁸

Additionally, consumers should have access to independent redress mechanisms when internal dispute resolution mechanisms fail, and information on complaints and resolutions should be made public. Oversight bodies should also have access to consumer complaints data to support their supervisory and enforcement functions ensuring greater accountability and consumer protection.⁵⁹

2.4 The Organisation for Economic Co-operation and Development

In support of the implementation of the High-Level Principles, the Organisation for Economic Co-operation and Development⁶⁰ released an updated report in September 2013 aimed at providing practical guidance on implementing these principles.⁶¹ The

⁵⁵ G20 *High Level Principles* (2022) principle 1.

⁵⁶ G20 *High Level Principles* (2022) principle 2.

⁵⁷ G20 *High Level Principles* (2022) principle 4.

⁵⁸ G20 *High Level Principles* (2022) principle 6.

⁵⁹ G20 *High Level Principles* (2022) principle 12.

⁶⁰ Hereinafter referred to as the 'OECD'. The OECD is an international organisation which was established in 1961 and currently consists of 29 Member States. The OECD serves the main purpose of contributing to the economic and social well-being of all people around the world. It achieves this function through the development of a diverse set of policies and has developed influential guidelines for consumer protection and competition policy – see, e.g. the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders (2013) https://www.oecd.org/en/publications/2003/06/oecd-guidelines-for-protecting-consumers-from-fraudulent-and-deceptive-commercial-practices-across-borders_g1gh3811.html (accessed 30 January 2025), OECD Report on Competition Law and Institutions (2004) https://www.oecd.org/content/dam/oecd/en/publications/reports/2004/01/oecd-journal-of-competition-law-and-policy_g1gh320d/clp-v5-3-en.pdf (accessed 30 January 2025) and OECD Workshop on Consumer Dispute Resolution and Redress in the Marketplace (2005) https://www.oecd.org/en/publications/oecd-workshop-on-consumer-dispute-resolution-and-redress-in-the-global-marketplace_232427700758.html (accessed 30 January 2025).

⁶¹ G20/OECD Task Force on Financial Consumer Protection (2013) <https://web.archive.org/temp/2022-12-13/234777-g20-oecd-task-force-financial-consumer-protection.htm> (accessed 30 January 2025). Hereinafter referred to as 'the OECD Task Force on Financial Consumer Protection Report (2013)'.

OECD Task Force on Financial Consumer Protection Report (2013) contains recommendations on how to effectively deal with the High-Level Principles on financial consumer protection relating to the responsible business conduct of financial services providers and their intermediaries.⁶² The OECD Task Force on Financial Consumer Protection Report (2013) reinforced the G20's objective that financial services providers should act in the best interests of consumers and be held accountable for upholding financial consumer protection.⁶³ To achieve this, the OECD Task Force on Financial Consumer Protection Report (2013) recommended that providers offer adequate, clear and objective information and advice to consumers. It further advised that, where appropriate, financial institutions should assess consumers' needs, financial circumstances, attitude to risk and interests at the outset of any relationship, before offering financial products or services.⁶⁴ Regarding consumer credit in particular, the OECD Task Force on Financial Consumer Protection Report (2013) highlighted the importance of applying responsible lending criteria as a protective measure against consumer over-indebtedness and related financial hardship. It asserted that such criteria assist in avoiding irresponsible credit provision by requiring credit providers to evaluate the terms and purpose of the proposed credit agreement, the consumer's financial situation and other relevant circumstances.⁶⁵

2.5 International Federation of Insolvency Professionals International Consumer Debt Report

2.5.1 General background

The International Federation of Insolvency Professionals⁶⁶ published its first Consumer Debt Report in 2001 and the second in 2011.⁶⁷ The second report served as an expansion and clarification of the first report. Even though the economic climate changed dramatically in the period between the two reports, the principles and recommendations made in the first report, has been kept largely unchanged in the

⁶² G20/OECD Task Force on Financial Consumer Protection Report (2013) 12-17. See also International Financial Consumer Protection Organisation *FinCoNet Report on Responsible Lending: Review of Supervisory Tools for Suitable Consumer Lending Practices* (July 2014) 21.

⁶³ G20/OECD Task Force on Financial Consumer Protection Report (2013) 12.

⁶⁴ G20/OECD Task Force on Financial Consumer Protection Report (2013) 12.

⁶⁵ G20/OECD Task Force on Financial Consumer Protection Report (2013) 14.

⁶⁶ Hereinafter referred to as 'INSOL'.

⁶⁷ INSOL *International Consumer Debt Report: Report of findings and recommendations* London (2011). Hereinafter referred to as 'INSOL International Consumer Debt Report (2011)'.

second report.⁶⁸ Coetzee notes that this underlines the credibility of the principles set out in these two reports.⁶⁹ Both reports set out four principles and various recommendations under each principle. The first three principles in both reports concern remedial measures to alleviate natural person insolvency. The fourth principle in both reports, which concerns preventative measures to reduce natural person insolvency, is relevant for this research.⁷⁰

2.5.2 The fourth principle

The fourth principle in the INSOL International Consumer Debt Report (2011) provides that the solution to over-indebtedness is to be found in the idea that prevention is better than cure.⁷¹ Van Heerden and Renke argues that ‘*ex ante*’ responsible lending practices - such as pre-agreement assessment - as preventative measures to avoid reckless credit granting and over-indebtedness are arguably more important tools in establishing a healthy credit market than *ex post* measures. Resultantly *ex post* measures merely serve as attempts to restore the health of a credit market plagued by irresponsible lending – thus, addressing the causes of over-indebtedness are to be preferred over merely treating the symptoms of irresponsible lending practices, which practices are often the root cause of such over-indebtedness.⁷²

Three recommendations are discussed under the fourth principle. The first recommendation is:

‘[g]overnments, semi-governmental or private organisations should set up educational programs and improve information and advice on the risk attached to consumer credit.’⁷³

Consumers should be advised of the risks involved in taking on credit before the conclusion of the agreement. This corresponds with the recommendations of the European Union and the World Bank relating to disclosure.⁷⁴ Further resonating

⁶⁸ See Van Apeldoorn JC in the foreword to INSOL *International Consumer Debt Report* (2011).

⁶⁹ Coetzee H A *comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis University of Pretoria 2015) 64.

⁷⁰ INSOL *International Consumer Debt Report* (2011) 23.

⁷¹ *Ibid.*

⁷² Van Heerden CM and Renke S ‘Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice’ (2015) *International Insolvency Review* 69.

⁷³ INSOL *International Consumer Debt Report* (2011) 23.

⁷⁴ See para 2.2.4.

recommendations by other international bodies, INSOL also recommends implementation of financial literacy programs focusing on vulnerable groups such as the young, elderly and minority groups to enable them to function effectively in a world where credit is part of everyday life.

The second recommendation under the fourth principle provides that:

[L]enders should observe the way credit is made available to consumers and small businesses, information is presented and the way these credits are collected.⁷⁵

INSOL recommends that credit providers should review how, to whom and under which conditions credit is made available to consumers to ensure that consumers can afford to repay debt. Lenders should also regularly review the marketing of credit products as well as debt collection tactics used to recover outstanding payments.⁷⁶ This recommendation again corresponds with recommendations made by other international bodies.

The third recommendation under the fourth principle provides that:

[O]rganisations of lenders and consumer should set up joint programs to monitor consumer loan delinquencies.⁷⁷

INSOL recommends that consumers with problematic debts should be monitored by a body controlled by representatives of both lenders and consumers organisations that operates under strict conditions and guarantees the privacy of consumers.⁷⁸ These bodies should provide information to lenders about previous delinquencies of consumers.⁷⁹ Again this view by INSOL is shared by other international bodies involved in the protection of consumers entering into financial agreements.

⁷⁵ INSOL *International Consumer Debt Report* (2011) 23.

⁷⁶ *Ibid.*

⁷⁷ INSOL *International Consumer Debt Report* (2011) 24.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

2.6 The European Union Directives on Consumer Credit and Mortgage Credit

2.6.1 General background

Consumer credit in the EU⁸⁰ is regulated both at national and EU level.⁸¹ Legal agreements or treaties between members of the EU, are implemented through various legal instruments which differ in legal force. Certain legal instruments carry binding authority, while others serve purely advisory functions. A directive constitutes a binding legislative instrument that obliges member states to achieve specific outcomes, albeit granting them discretion regarding the form and means of implementation through domestic legislation. By contrast, a resolution typically embodies a non-binding expression of political will, often framed as a recommendation or opinion, and does not impose legal obligations on member states.⁸² The first venture to regulate consumer credit in the EU was the development of the Council Directive 87/102/EEC for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit in 1986.⁸³ This directive did not contain any provisions regarding reckless lending, but because it was based on the principle of minimum harmonization which implies that the directive determines only the minimum level of protection that must be offered to consumers in each member state and does not prohibit member states from maintaining or introducing rules offering additional protection to consumers.⁸⁴ In terms of this principle, member states are

⁸⁰ The European Union (hereafter referred to as the EU) is a unique economic and political union between 27 EU countries that together cover much of the continent. The predecessor of the EU was created in the aftermath of the Second World War. The first steps were to foster economic cooperation; the idea being that countries that trade with one another become economically interdependent and so more likely to avoid conflict. On 31 January 2020 the United Kingdom left the EU. See European Commission https://commission.europa.eu/strategy-and-policy/relations-united-kingdom_en (accessed 30 January 2025).

⁸¹ European Parliamentary Research Service Members' Research Service PE 698.054 – April 2023. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698054/EPRS_BRI-\(2021\)698054_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698054/EPRS_BRI-(2021)698054_EN.pdf) (accessed 30 January 2025).

⁸² The aims set out in the EU treaties are achieved by several types of legal act. Some are binding and others are not. A directive is a binding legislative act that sets goals for Member States, which must be achieved through national legislation. A resolution is often in the form of a recommendation or an opinion and is non-binding, expressing political intent or guidance without legal obligation. See 'European Union: Types of Legislation' https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en (accessed 30 January 2025).

⁸³ Council Directive 87/102/EEC of 22 December 1986 for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit. Hereinafter referred to as 'the CCD'. See also Van Heerden and Steennot 'Pre-Agreement Assessment as a Responsible Lending Tool in South-Africa, the EU and Belgium: Part 2' (2018) *PELJ* 2.

⁸⁴ Van Heerden and Steennot Part 2 (n 83) 1.

however not barred from including provisions offering additional protection to consumers.⁸⁵

On 26 November 2001 the council of the EU passed a Resolution on consumer credit and indebtedness.⁸⁶ In this resolution the council acknowledged that the extension of credit can be dangerous, as it can cause consumers to become over-indebted.⁸⁷ It also noted that a significant number of consumers in all the member states were affected by over-indebtedness and that the number of such consumers was on the increase.⁸⁸ In the majority of cases consumers' over-indebtedness could be attributed to uncertainty caused by fluctuations in income and debts linked to the existence of consumer credit.⁸⁹ The council identified the need to implement measures at community level to prevent over-indebtedness and invited the member states and the European commission to consider ways and means to prevent consumer over-indebtedness at European level.⁹⁰ After several proposals and draft directives,⁹¹ Directive 87/102/EEC was finally replaced in 2008 by Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 1987/102/EEC.⁹²

2.6.2 Consumer Credit Directive 2008/48/EC

The principle of responsible lending was introduced at EU community level for the first time by the CCD 2008. It imposes two primary responsible lending obligations on credit providers. Firstly, they are required to ensure that consumers receive complete and

⁸⁵ Van Heerden and Steennot Part 2 (n 83) 2.

⁸⁶ EU Council Resolution of 26 November 2001 on consumer credit and indebtedness <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001G1220%2801%29> (accessed 30 January 2025). Hereinafter referred to as 'Council Resolution (2001)'.
⁸⁷ Council Resolution (2001) resolution 5.

⁸⁸ Council Resolution (2001) resolution 6.

⁸⁹ Council Resolution (2001) resolution 7 and 8.

⁹⁰ Council Resolution (2001) resolution 12 and 15.

⁹¹ EU Credit Agreements for Consumers Council Directive 93/13/EC [COM (2002) 443 final] (2005) 483 final] <https://eur-lex.europa.eu/legal-content/BG/ALL/?uri=LEGISSUM:l32051> (accessed 30 January 2025).

⁹² Hereinafter referred to as 'the CCD 2008 or Consumer Credit Directive 2008/48/EC'. See also Asheela NV *Towards responsible lending in Namibian consumer credit law: a comparative investigation* (LLD thesis University of Pretoria 2017) 38.

relevant information before the conclusion of the contract.⁹³ Secondly, credit providers must assess the creditworthiness of consumers before providing them with credit.⁹⁴

Asheela explains that the first obligation serves the purpose of enabling the consumer to compare different credit offers more easily before committing to a credit agreement.⁹⁵ A credit provider therefore is required to provide pre-contractual information on standardised sheets in good time before the consumer is bound by any credit agreement or offer.⁹⁶ A credit provider is further required to provide adequate explanations to the consumer at pre-contractual stage about the characteristics of the proposed credit agreement and its inherent potential risks. The consumer ultimately carries the responsibility of deciding whether to conclude the credit agreement based on the information provided to him.⁹⁷

Article 8 of the CCD 2008 deals with the credit provider's obligation to assess the creditworthiness of the consumer, and provides as follows:

'Member states shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database.'

It is evident from the foregoing that credit providers in EU Member States are required to conduct affordability assessments prior to entering into credit agreements. Sadly, the CCD 2008 states nothing more about affordability assessments. Regarding affordability assessments, the only guarantee is that the credit provider can obtain the necessary data from customers and/or a pertinent database. Apart from that, it is up to each member state to decide on and implement the actual criteria and process for the affordability assessment. Ramsay and Williams contend that this indicates that the overall goal of credit policy driven by this directive, and global credit policy at the time the directive was formulated, was the promotion of access to credit and the creation of confidence in an expanding and competitive consumer credit market.⁹⁸

⁹³ Recital 24. Art 4 and 19 of the CCD 2008 contains provisions concerning completeness of information that is to be provided to the consumer at different stages of the contractual process.

⁹⁴ Art 8(1) of the CCD 2008.

⁹⁵ Asheela NV *et al* 'Leading international best regulatory principles in responsible lending policy: lessons for Namibia.' (2019) *International Journal of Private Law* 160.

⁹⁶ Asheela *et al* (n 95) 161.

⁹⁷ *Ibid.*

⁹⁸ Van Heerden and Steennot Part 2 (n 83) 5.

It is also noteworthy that no specific sanctions are specified to be applied in the event of a breach of the duty to conduct the assessment in terms of article 8. Article 23 however provides that Member States can impose their own penalties applicable to infringements of the provisions adopted pursuant to the CCD 2008 and should take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.⁹⁹

2.6.2.1 Amendment and repeal of the CCD 2008

Directive 2008/48/EC was subsequently reviewed and amended by Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.¹⁰⁰ As far as the creditworthiness assessments are concerned, CCD 2014 prescribes a strict creditworthiness assessment and verification of the credit consumer's ability and propensity to repay the credit before a credit agreement is concluded.¹⁰¹ This assessment should consider the consumer's regular expenditure, debts and other financial commitments, as well as income, savings and assets.¹⁰² CCD 2014 asserts that although the value of the secured property is important in the assessment of the amount that may be granted to the consumer the main focus should be on the ability of the consumer to repay.¹⁰³ In addition, CCD 2014 contains an explicit prohibition on credit providers from extending credit to the consumer if the outcome of the credit assessment indicates that the consumer is not likely to meet the obligations arising from that credit agreement.¹⁰⁴ However, it lacks a provision on the legal consequences of the credit provider's failure to deny credit in the case of a negative outcome of the creditworthiness assessment.¹⁰⁵

⁹⁹ Art 23 of the CCD. See also Van Heerden and Steennot Part 2 (n 83) 13.

¹⁰⁰ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010. Hereinafter referred to as 'CCD 2014'.

¹⁰¹ 2014 Directive recital 55.

¹⁰² 2014 Directive recital 55.

¹⁰³ 2014 Directive recital 55 read with art 18(3).

¹⁰⁴ 2014 Directive art 5(a). See also Asheela *et al* (n 95) 162.

¹⁰⁵ Van Heerden and Steennot Part 2 (n 83) 37.

However, although the CCD 2014 has led to improvements in enforcing consumer protection, deficiencies have been detected and highlighted in a series of reports published by the European Commission since 2014.¹⁰⁶ As a result, the European Commission again launched an evaluation of the CCD 2014 with a view to a possible revision in 2019.¹⁰⁷

In 2020, a new evaluation showed significant fragmentation across the EU jurisdictions, demonstrating that CCD 2014 had been only partially effective in ensuring high standards of consumer protection and fostering the development of a single credit market.¹⁰⁸ Additionally, a report produced by the European Parliamentary Research Service in 2021 noted that the digital transformation had imposed significant changes in the credit market and led to new challenges for customer protection that required a new regulatory approach.¹⁰⁹

To respond to such needs, on 18 October 2023, the European Parliament and the Council of the European Union (Council) adopted a new directive, which was published in the Official Journal on 30 October 2023, and entered into effect on the 20th day after its publication. The name of this directive is: Directive 2023/2225/EU of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC.¹¹⁰

¹⁰⁶ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2008/48/EC on credit agreements for consumers <https://perma.cc/K3A8-G3CJ> (accessed 30 January 2025).

¹⁰⁷ Council of the EU 'Council and European Parliament agree to improve protection for consumers applying for credit' <https://www.consilium.europa.eu/en/press/press-releases/2022/12/02/council-and-european-parliament-agree-to-improve-protection-for-consumers-applying-for-credit/> (accessed 30 January 2025).

¹⁰⁸ European Commission Staff Working Document Executive Summary of the Evaluation on Directive 2008/48/EC on credit agreement for consumers <https://perma.cc/DY2A-WAZT> (accessed 30 January 2025).

¹⁰⁹ European Parliamentary Research Service Report of Directive 2008/48/EC on credit agreements for consumers <https://perma.cc/3CGJ-XJWU> (accessed 30 January 2025).

¹¹⁰ Directive 2023/2225/EU of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC. Hereinafter referred to as 'CCD 2023'. Also see EU Council Press Release 'Asking for a loan will be safer in the EU after the Council's final approval of the Consumer Credit Directive' <https://www.consilium.europa.eu/en/press/press-releases/2023/10/09/asking-for-a-loan-will-be-safer-in-the-eu-after-the-council-s-final-approval-of-the-consumer-credit-directive/> (accessed 30 January 2025).

CCD 2023 will improve the creditworthiness assessment rules, by which the creditor assesses whether a consumer is able to repay its loan. Similar to the CCD 2008, CCD 2023 provides that before concluding a credit agreement, creditors must carry out a thorough assessment of the consumer's creditworthiness.¹¹¹ However, unlike CCD 2008, CCD 2023 imposes a limit on credit granting, prescribing that credit will be accessible only when the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met.¹¹² This will protect consumers from becoming over-indebted as a result of receiving credit they cannot repay. The new directive will also apply to certain risky credit products like loans below €200 and buy-now-pay-later products that were excluded from the scope of the CCD 2008.¹¹³ European countries now have two years to transpose and implement the CCD 2023's provisions into national law.¹¹⁴ Notably, the CCD 2008 is repealed with effect from 20 November 2026, but will continue to apply to any credit agreements concluded between the date CCD 2023 entered into force and 20 November 2026.¹¹⁵

2.6.3 The Mortgage Credit Directive

In the examination of international principles and guidelines related to pre-agreement assessments and the relief mechanisms available to consumers who have become over-indebted due to reckless lending, the provisions of the Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010,¹¹⁶ were also considered. This directive, proposed by the European Commission on 31 March 2011, aimed to establish a more transparent, efficient and competitive internal market for credit agreements related to residential property.¹¹⁷ It promotes sustainable lending

¹¹¹ Art 18, para. 1 of CCD 2023.

¹¹² Art 18, para. 6 of CCD 2023.

¹¹³ Recital 16, art 2 of CCD 2023

¹¹⁴ Art 28 of CCD 2023. Also see EU Council Press Release 'Consumers get extra protection when taking out a loan <https://www.beuc.eu/press-releases/consumers-get-extra-protection-when-taking-out-loan> (accessed 30 January 2025).

¹¹⁵ Art 47 of CCD 2023.

¹¹⁶ Hereinafter referred to as 'the MCD'.

¹¹⁷ Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011PC0142> (accessed 30 January 2025). Hereinafter referred to as 'the MCD'.

and borrowing, financial inclusion and a high level of consumer protection.¹¹⁸ Chapter 6 of the MCD, titled 'Creditworthiness Assessment' sets out general provisions regarding creditworthiness when applying for mortgages.

In June 2022, the European Banking Authority¹¹⁹ recommended that certain aspects of the MCD should be revised.¹²⁰ The review process of the Directive was launched by the European Banking Commission in its 2019-2024 mandate. At the time of writing this thesis, no revised directive had been published.

Although the MCD was considered in this thesis, it was not examined in detail, as its relevance to the subject matter is limited given that this thesis focuses on low-income consumers, a group that is unlikely to engage in mortgage credit agreements. Thus, a more detailed analysis of the MCD's provisions were deemed less pertinent to the central research questions.

2.7 Scholarly views

Wilson made some important comments about responsible lending practices that can be used to measure the effectiveness of lending regimes in the ongoing fight against irresponsible lending in the excellent book titled '*International responses to issues of credit and over-indebtedness in the wake of crisis*.'¹²¹ In this book, Wilson considers the responsible lending regulatory regimes enacted in Australia, South Africa, the United States and Europe and argues that they have been developed in a system that values free markets and limited government involvement, which is why they tend to react to problems only after they happen.¹²² She argues that ideally a responsible

¹¹⁸ Recital 6 of the MCD.

¹¹⁹ The European Banking Authority is an independent European Union agency established in 2011 that forms part of the European System of Financial Supervision and plays a central role in ensuring effective and consistent prudential regulation and supervision across the European banking sector. Hereinafter referred to as 'the EBA'. See Gortsos CV 'The European Banking Authority (EBA) and its (Significant) Role in the Law-Making Process' in *The European Banking Regulation Handbook*, Volume 1, Springer (2023).

¹²⁰ EBA Report in Response to the European Commission Request for technical advice on issues related to the Mortgage Credit Directive EBA/REP/2022/15 https://www.eba.europa.eu/sites/default/files/document_library/Publications/Opinions/2022/Opinion%20on%20MCD%20review%20%28EBA-Op-2022-07%29/1036068/EBA%27s%20response%20to%20the%20EC%20Call%20for%20advice%20on%20the%20review%20of%20MCD.pdf (accessed 30 January 2025).

¹²¹ Wilson 2009 (n 6) 108.

¹²² Wilson 2009 (n 6) 109.

lending regime should show evidence of a proactive rather than a reactive regulatory approach.

In describing a proactive responsible lending regime, she suggests that any responsible lending practice should aim to protect consumers from the negative effects of irresponsible lending, preventing both personal over-indebtedness and the wider economic repercussions of that over-indebtedness, such as financial crisis.¹²³

A significant drawback of a responsible lending regime, according to her, is that it might be construed in a way that results in restrictive lending practices, which aggravate financial marginalization.¹²⁴ In this regard, she rightly warns that responsible lending regimes should not promote restrictive lending practices any more than they should allow for lax lending practices, pointing out that the primary cause of excessively restrictive lending practices appears to be rigid credit assessment methods.¹²⁵ She adds that there is proof that people with low incomes can repay loans if given the chance to do so through a 'fair, individualised' credit assessment procedure and if the loan duration and repayment schedule are set up such that borrowers can make payments without experiencing undue hardship.¹²⁶ As a result, she makes the observation that if a responsible lending regime is not set up to promote individualised credit evaluation, it will probably result in overly rigid lending practices and increased over-indebtedness.¹²⁷

Wilson also notes that a logical regulatory response might seem to be to punish such behaviour in cases where problems with over-indebtedness and financial crisis are attributed to a failure on the part of consumers to behave responsibly in relation to the credit contracts into which they choose to enter, such as by failing to make full and

¹²³ Wilson 2009 (n 6) 126.

¹²⁴ Wilson 2009 (n 6) 126.

¹²⁵ Wilson 2009 (n 6) 127.

¹²⁶ Wilson 2009 (n 6) 127.

¹²⁷ Wilson 2009 (n 6) 128. In this regard, Wilson also refers to Ramsay I 'From truth in lending to responsible lending' in G Howells, A Janssen and R Schulze (eds) *Information rights and obligations: a challenge for party autonomy and transactional fairness* Ashgate (2005) 59, where he noted a conflict between standardised models of credit scoring and truly responsible lending and stated '[t]he responsible lending standard envisages a more individualised lending process, perhaps based on a meeting with the borrower. Credit scoring, however, permits a lender to grant credit without ever meeting the borrower.'

true disclosure of their financial positions to credit providers.¹²⁸ This, however, probably ignores a structural factor that contributes to excessive debt, namely, the lack of access to mainstream loan providers and the lack of meaningful choice in the contracts that consumers sign.¹²⁹

Wilson makes use of four criteria to evaluate the likely efficacy of responsible lending regimes, which she rightly asserts should be demonstrated by a proactive, as opposed to a reactive, regulatory approach.¹³⁰ These criteria are as follows: (a) a focus on responsible lending in order to avoid over-indebtedness, rather than responsible borrowing; (b) a focus on consumer credit in general, not limited to residential mortgage loans; (c) an encouragement of flexible, individualised credit assessment practices, or at least not an encouragement of rigid and inflexible credit assessment practices; and (d) the existence of a regulatory agency charged with enforcement, which is adequately resourced to properly monitor and enforce compliance with market conduct regulation, including responsible lending obligations. Wilson then proceeds to evaluate South Africa's responsible lending regime and concludes that it includes an 'unfortunate' focus on responsible borrowing which can reduce the availability of credit in the low-income market specifically.¹³¹

2.8 Best practices relating to affordability assessment

The analysis of international best practices confirms that affordability assessment is an essential pillar of a responsible consumer credit market. As emphasized by the World Bank, G20, OECD, INSOL and the EU Directives, lenders must evaluate a consumer's ability to repay before granting credit, ensuring that borrowing remains sustainable and does not lead to financial distress.

A comprehensive affordability assessment framework requires a combination of traditional credit bureau data and alternative financial indicators to accurately assess a consumer's repayment capacity. Relying solely on rigid credit scoring models can be exclusionary, particularly for low-income consumers who may have limited formal

¹²⁸ Wilson 2009 (n 6) 123.

¹²⁹ Wilson 2009 (n 6) 123.

¹³⁰ Wilson 2009 (n 6) 128.

¹³¹ Wilson 2009 (n 6) 119 and 128.

credit histories. To address this concern, suitability testing is recommended to ensure that affordability requirements do not unintentionally restrict access to credit for low-income consumers who can afford to borrow.¹³²

Furthermore, a strong regulatory framework is crucial for enforcing affordability assessments requirements and to prevent reckless lending. Policymakers must ensure that credit providers comply with affordability requirements, provide clear and transparent information to consumers, and adopt lending practices aligned with responsible credit principles. In addition, education programs play a key role in helping consumers understand how affordability assessments impact borrowing decisions, thereby promoting more informed financial participation.¹³³

However, as pointed out by Wilson, overly strict affordability requirements may have unintended consequences. If lending criteria become too restrictive, vulnerable consumers could be excluded from formal credit markets, forcing them to turn to unregulated and predatory lenders. Therefore, it is submitted that a well-calibrated affordability assessment framework must balance consumer protection with financial inclusion, ensuring that credit remains accessible, responsible and sustainable.

2.9 Relief mechanisms available to consumers who fell victim to reckless lending

2.9.1 Group of Twenty¹³⁴

The G20 emphasises that jurisdictions must establish accessible, affordable, and efficient complaints handling and redress mechanisms to assist over-indebted consumers.¹³⁵ These mechanisms should be fair and timely ensuring that consumers facing financial distress can seek relief without unnecessary costs, delays or burdens.

¹³² Para 2.2.4.

¹³³ Para 2.3.

¹³⁴ Hereinafter referred to as the 'G20'. The G20 is an international forum for the governments and central bank governors from 19 countries (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, and United States) and two regional bodies, namely the European Union (EU) and African Union (AU). It was founded in 1999 with the aim of studying, reviewing and promoting the high-level discussion of policy issues pertaining to the promotion of international financial stability – see G20 South Africa 2025 <https://g20.org/about-g20/overview/> (accessed 30 January 2025).

¹³⁵ G20 *High Level Principles* (2022) principle 12, para 33.

Leveraging technology can enhance the efficiency of the redress processes, making them more responsive to consumer needs, particularly for vulnerable groups.¹³⁶ Financial service providers and credit intermediaries are required to implement internal complaints handling and redress mechanisms that not only resolve disputes but also implement internal complaints handling and redress mechanisms that not only resolve disputes but also help identify systemic issues contributing to over-indebtedness.¹³⁷ Where internal resolution fails, consumers must have recourse to an independent dispute resolution process to ensure impartial outcomes.¹³⁸ Additionally, regulatory oversight is essential – supervisory bodies should monitor complaints data to detect reckless lending practices and enforce consumer protection laws.¹³⁹ To promote transparency and accountability, jurisdictions should require financial institutions to publicly disclose aggregate data on consumer complaints and resolutions, allowing policymakers and enforcement agencies to assess trends and improve financial consumer protection.¹⁴⁰ By implementing these measures, the G20 advocates for a structured, transparent and consumer-centric redress framework, ensuring that over-indebted consumers receive fair treatment while fostering accountability within the financial sector.

2.9.2 The OECD

In 2019, the OECD Council adopted the Recommendation on Consumer Protection in the field of Consumer Credit¹⁴¹ highlighting the need for responsible lending practices to safeguard consumers from excessive debt and financial instability. A key policy consideration is the establishment of accessible, cost effective, and efficient redress mechanisms to resolve disputes related to consumer credit. Ensuring that consumers have inexpensive and effective means of redress strengthens financial stability by promoting fairness and accountability in credit markets. By implementing these measures, the OECD seeks to enhance consumer protection, prevent reckless

¹³⁶ *Ibid.*

¹³⁷ G20 *High Level Principles* (2022) principle 12, para 34.

¹³⁸ G20 *High Level Principles* (2022) principle 12, para 35.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ OECD 'Recommendation of the Council concerning Consumer Protection in the Field of Consumer Credit' <https://legalinstruments.oecd.org/public/doc/177/177.en.pdf> (accessed 1 February 2025).

lending, and support responsible credit access, ultimately fostering a more resilient and transparent consumer credit market.

2.9.3 The CCD 2023

To further assist over-indebted consumers, the CCD 2023 stresses the importance of debt advisory services. It provides that consumers struggling with financial commitments should have access to specialized debt assistance, which includes legal counselling, financial planning, and psychological support.¹⁴² These services must be independent of creditors, credit intermediaries, and servicers, ensuring unbiased guidance.¹⁴³ Moreover, creditors are encouraged to implement early detection mechanisms to identify at-risk consumers and refer them to accessible debt advisory services before enforcement proceedings commence.¹⁴⁴ The CCD 2023 states that only limited charges should be payable for these services and that these services should be easily accessible to consumers.¹⁴⁵ The Commission shall, by 20 November 2028, present a report providing an overview of the availability of debt advisory services across Member States and identifying best practices for the further development of such services. Member States shall, by 20 November 2026, and every year thereafter, report to the Commission on available debt advisory services.¹⁴⁶

2.9.4 INSOL

In the INSOL International Consumer Debt Report (2011), it recommends that legislators should enact laws that ensure a fair, cost-effective, and accessible system for settling and discharging consumer debts.¹⁴⁷

The law may provide for different routes to a discharge depending on the specific situation of the debtor and the nature of the debtor's financial difficulties. A debtor who has no redemption capacity, who suffers from survival debts and who has no prospects of improving his financial situation within a reasonable period (possibly due to prolonged dependence upon social security benefits, permanent unemployment or

¹⁴² Recital 81 and Art 3(27) of CCD 2023.

¹⁴³ Recital 81 of CCD 2023.

¹⁴⁴ Recital 81 of CCD 2023.

¹⁴⁵ Art 36 of CCD 2023.

¹⁴⁶ Art 36 of CCD 2023.

¹⁴⁷ INSOL *International Consumer Debt Report* (2011) 14.

disability), will require a different approach to a debtor with only accommodation debts.¹⁴⁸

Governments, quasi-governmental or private organisations should ensure the availability of professional and independent debt counsellors. The problems a consumer debtor faces are often complex and usually not only of a legal but of a socio-psychological nature. This requires the input of professional independent debt counsellors, specialised in negotiating arrangements with creditors and knowledgeable about the specific problems of consumer debtors. Their work requires expertise in the legal, financial and social aspects of consumer debt problems and they should be able to give information and advice on all aspects of budgeting-aid, debt settlement and welfare laws. Governments, quasi-governmental or private organisations should create bodies to train, finance and supervise these professionals, to develop standardized norms and practices and codes of conduct, against which the assistance is tested. This requires licensing and supervision by the court or an independent body. INSOL also advises that it is important to carefully consider how trustees, administrators and debt counsellors are compensated, so they have enough time to properly support debtors. Given that consumer debtors often face vulnerable and disadvantaged circumstances, they are particularly susceptible to exploitation by unqualified and unethical debt counsellors.¹⁴⁹

Governments, quasi-governmental or private organisations should set up educational programmes and improve information and advice on the risks attached to consumer credit. Educational programmes may be a compulsory element of a debt relief programme or may be offered on a voluntary basis, either before or after the conclusion of the programme. INSOL emphasises that financial literacy is essential for successful functioning in our world's economy, where money is the key factor and lack of money is regarded as failure. Education is therefore an integral part of any debt relief programme as it enables the debtor to function more effectively in society.¹⁵⁰

¹⁴⁸ INSOL *International Consumer Debt Report* (2011) 18.

¹⁴⁹ INSOL *International Consumer Debt Report* (2011) 22.

¹⁵⁰ INSOL *International Consumer Debt Report* (2011) 23.

2.9.5 Best practices relating to debt relief measures

International bodies, including the G20, OECD, the European Union and INSOL share common recommendations for providing relief to consumers over-indebted due to reckless lending, focusing on accessible, cost effective and efficient mechanisms. The G20 and OECD emphasize the importance of fair, independent and transparent complaint handling systems, which should be timely and responsive, leveraging technology to enhance accessibility for vulnerable groups. INSOL and the *CCD 2023* further advocate for independent, professional debt advisory services, which are easily accessible to consumers at a minimal charge. The G20 and INSOL also emphasize the importance of financial literacy programs to empower consumers to manage their finances effectively and to prevent over-indebtedness. INSOL also considers financial education as an integral part of debt relief programs. Regulatory oversight is considered critical, with the G20 advocating for the public disclosure of consumer complaint data by financial institutions to improve transparency and accountability. Overall, these recommendations aim to create a consumer credit landscape that not only provides relief for over-indebted consumers, but also enhances financial stability and fosters better accountability in the credit market.

2.10 Conclusion

This chapter aimed to investigate and critically analyse the most relevant and contemporary international principles and guidelines relating to pre-agreement affordability assessments and the relief mechanisms available to consumers who become over-indebted as a result of reckless lending. In doing so, the recommendations of international bodies, including the World Bank, the Group of Twenty, the OECD, INSOL, and the European Union, were considered. In addition, the criteria formulated by Wilson in her examination of responsible lending regimes in the aftermath of financial crises, as outlined in her book *'International Responses to Issues of Credit and Over-Indebtedness in the wake of crisis'*, provided a scholarly lens through which these international developments were contextualised. The aim was to evaluate the potential value of these international instruments for the South African credit landscape, particularly in so far as they relate to the low-income consumer who constitutes the primary subject of this study.

The first major thematic focus of the chapter concerned best practices in the field of affordability assessments. A comparative analysis confirmed that affordability assessments are considered by all reviewed bodies as a foundational component of a responsible and sustainable credit system. According to the World Bank,¹⁵¹ G20,¹⁵² OECD,¹⁵³ EU Directives,¹⁵⁴ and INSOL,¹⁵⁵ lenders have an obligation to assess a consumer's repayment capacity before extending credit. This assessment must ensure that any credit granted will not place the consumer at risk of financial distress or over-indebtedness. Central to this assessment is the requirement that a combination of data sources, including both traditional credit bureau records and alternative financial indicators, be utilised to evaluate a consumer's financial standing. Relying exclusively on rigid credit scoring models is considered insufficient and, in many instances, exclusionary, particularly with respect to low-income consumers who may not have formal credit histories. Consequently, international best practice encourages the implementation of suitability testing, which aims to prevent the exclusion of creditworthy but financially marginalised individuals.¹⁵⁶

The chapter also highlighted the central role of regulatory frameworks in ensuring compliance with affordability assessment requirements.¹⁵⁷ These frameworks must compel credit providers to assess affordability in a manner that is reasonable and proportionate to the nature and risk of the proposed credit.¹⁵⁸ Transparency, fairness and clear communication of credit terms are also key regulatory expectations.¹⁵⁹ Financial literacy programs were identified as a further critical component of a well-functioning affordability regime.¹⁶⁰ By enhancing consumers' understanding of their financial responsibilities and the implications of credit decisions, such programs enable more informed participation in the credit market.¹⁶¹ Nonetheless, the chapter also drew attention to Wilson's concern that overly rigid lending thresholds may have

¹⁵¹ Para 2.2.

¹⁵² Para 2.3.

¹⁵³ Para 2.4.

¹⁵⁴ Para 2.5.

¹⁵⁵ Para 2.6.

¹⁵⁶ Para 2.2.4.

¹⁵⁷ Para 2.2.3.

¹⁵⁸ Para 2.6.2.

¹⁵⁹ Para 2.9.1 and para 2.9.2.

¹⁶⁰ Para 2.3; para 2.5.2 and para 2.8.

¹⁶¹ Para 2.3 and para 2.8.

the unintended consequence of excluding vulnerable consumers from the formal credit sector.¹⁶² In such cases, consumers may be forced to seek credit from informal or unregulated lenders, thus exposing themselves to further risk. Accordingly, the chapter concluded that affordability assessments must strike a careful balance between consumer protection and financial inclusion. This balance is essential to ensuring that credit remains both accessible and sustainable.¹⁶³

The second area of inquiry in this chapter focused on international best practices relating to debt relief for consumers who have fallen victim to reckless lending. International consensus, as demonstrated by the G20,¹⁶⁴ OECD,¹⁶⁵ European Union¹⁶⁶ as well as INSOL¹⁶⁷ supports the provision of accessible, cost-effective and efficient debt relief mechanisms. Key recommendations included the establishment of independent and fair dispute resolution bodies,¹⁶⁸ the provision of accessible and professional debt advisory services,¹⁶⁹ and the integration of financial literacy education into debt relief strategies.¹⁷⁰ Particular emphasis was placed on the use of technology to improve access to debt relief mechanisms for vulnerable consumers.¹⁷¹ The G20 and INSOL further recommended the public disclosure of complaint data by financial institutions, thereby promoting transparency and accountability in the credit market.¹⁷² The integration of financial education into both debt prevention and debt relief strategies was repeatedly identified as a foundational pillar for long-term financial resilience.¹⁷³

It is also important to note that while the comparative exercise revealed a strong degree of consensus on certain normative principles—such as transparency, fairness, inclusion, and accessibility—it also revealed the limits of a purely comparative or transnational approach to consumer credit regulation. Drawing on Trubek’s

¹⁶² Para 2.7.

¹⁶³ Para 2.8.

¹⁶⁴ Para 2.9.1.

¹⁶⁵ Para 2.9.2.

¹⁶⁶ Para 2.9.3.

¹⁶⁷ Para 2.9.4.

¹⁶⁸ Para 2.3; para 2.9.1; para 2.9.3; para 2.9.4 and para 2.9.5.

¹⁶⁹ Para 2.9.3; para 2.9.4 and para 2.9.5.

¹⁷⁰ Para 2.9.4 and para 2.9.5.

¹⁷¹ Para 2.9.1; para 2.9.2 and 2.9.4.

¹⁷² Para 2.9.1; 2.9.4 and 2.9.5.

¹⁷³ Para 2.9.1; 2.9.4 and 2.9.5.

scholarship, the chapter acknowledged that economic institutions are inherently socially embedded, and that policies effective in high-income jurisdictions may not be appropriate in the context of middle- and low-income countries.¹⁷⁴ Trubek cautioned that adopting a 'one size fits all' approach to regulatory design carries substantial risks, particularly when governments attempt to transplant institutions without due regard for local socio-economic realities.¹⁷⁵ It is submitted that this insight is especially relevant in the South African context, where high levels of financial exclusion, income inequality and over-indebtedness present complex challenges for credit regulation. Any attempt to import international best practices must therefore be tempered by careful consideration of the country's unique circumstances.

The chapter concludes that while international guidelines and principles offer important lessons and best practices, the success of any consumer credit policy depends on its contextual adaptability. A legal framework that fails to consider the economic vulnerability of the majority of its target population is unlikely to achieve its intended outcomes, no matter how well it aligns with global standards.¹⁷⁶ Nevertheless, it remains useful, and necessary, for South African policymakers and scholars to engage with comparative models in order to critically assess the strengths and limitations of existing frameworks.¹⁷⁷

The next chapter will turn to the South African consumer credit regime, with specific reference to the circumstances leading to the adoption of the National Credit Act 34 of 2005 which came into full operation on 1 June 2007. The chapter will examine the objectives and application of the NCA and consider the extent to which South African policymakers and legislators have interpreted and implemented the international principles discussed in this chapter. This analysis will lay the groundwork for subsequent chapters, which will assess whether the South African legal framework effectively balances the goals of preventing reckless lending with those of promoting

¹⁷⁴ Trubek D 'Developmental States and the Legal Order: Towards a New Political Economy of Development and Law' (2008). *Univ. of Wisconsin Legal Studies Research Paper No. 1075*, <https://ssrn.com/abstract=1349163> (accessed 1 February 2025).

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Otto J 'The history of consumer credit legislation in South Africa' (2010) 16(1) *Fundamina* 259.

financial inclusion, and whether the debt relief measures available under the NCA are accessible and effective for low-income consumers.

CHAPTER 3: PURPOSE AND APPLICATION OF THE NATIONAL CREDIT ACT

- 3.1 Background
- 3.2 Purpose of the Act
- 3.3 Application of the Act
- 3.4 Exemptions
- 3.5 Conclusion

3.1 Background

As previously highlighted, consumer credit enables the smooth functioning of market systems by facilitating access to recourses and promoting transactional fluidity.¹ Towards the end of the 19th century, consumers in South African did not have equal access to credit.² The primary form of credit available to the low income, mainly the black contingent of South African consumers, was hire purchase agreements.³ This form of credit enabled consumers to purchase goods like furniture and appliances and pay the purchase price by way of instalments. A condition of the sale was that ownership of the property was reserved by the credit provider (the called 'credit grantor') until payment of the last instalment was received. This form of credit had a very limited application because it only applied to a small number of transactions and only applied to credit agreements with a value at or below R4 000.⁴ 'Credit apartheid' or the 'dual economy of credit' are terms used to characterize the exclusion suffered by low-income consumers during this time.⁵

¹ Ramsay I 'Consumer credit regulation after the fall: international dimensions' (2012) *Journal of European Consumer and Market Law* 26. See chapter 2 para 2.1.

² Kelly-Louw M with input from Stoop PN *Consumer Credit Regulation in South Africa* (2012) 11.

³ *Ibid.*

⁴ Section 2(1)(a) of Act 36 of 1942.

⁵ James D 'Deeper into a Hole? Borrowing and Lending in South Africa' (2014) *Current Anthropology* S17 – S29. According to James, 'credit apartheid' refers to the systemic exclusion of historically disadvantaged groups, particularly Black South Africans, from formal financial services, resulting in enduring inequalities in access to affordable credit. The 'dual economy of credit' describes the coexistence of formal credit markets serving middle- and high-income earners, and informal or high-cost lenders targeting low-income consumers, thereby reinforcing inequality.

In 1994 a new political dispensation which ended racial discrimination was introduced in South Africa. One of the aims of the new democratic government was to bring an end to 'credit apartheid' and to transform the South African economy to a single economic framework.⁶ Under the new dispensation, the civil service was transformed and with the introduction of affirmative action,⁷ the flow of income to the previously disadvantaged and mainly black population was increased.⁸ The fall of 'credit apartheid' enabled consumers to embrace the long awaited opportunity to obtain credit - not only for materialist consumerism but also to satisfy the desire for what was regarded necessary for a good life.⁹ During the early 1990's the world also experienced major advances in technology with the introduction of the world wide web and the internet. This allowed increasing sophistication and complexity in the global credit market which also stimulated the South African economy and increased the need for credit.¹⁰ James observes that this demand for credit was met with a burgeoning supply.¹¹

At the time of the first democratic elections in South Africa, consumer credit was regulated by the Usury Act,¹² the Credit Agreements Act¹³ and the Usury Act

⁶ Kelly-Louw (n 2) 13. See also Department of Trade and Industry South Africa *Consumer Credit Law Reform – Policy Framework for Consumer Credit/Making credit markets work – A Policy Framework for Consumer Credit* August 2004 <https://static.pmg.org.za/docs/2005/050608consumer.pdf> (accessed 16 April 2020). Hereinafter referred to as 'Policy Framework for consumer Credit (2004)' 12. See also Goodwin-Groen RP with input from Kelly-Louw M (prepared for FinMark Trust, South Africa) 'The National Credit Act and its regulations in the context of access to finance in South Africa' (2006) http://www.finmark.org.za/wp-content/uploads/2016/01/Rep_NCA_AccesstoFinance_2006.pdf (accessed 16 April 2024) 8. See also Department of Trade and Industry South Africa Media Statement 2003, *Credit law review: Setting the scene* https://www.ncr.org.za/documents/pages/background_documents/Introduction-RevNo1.pdf (accessed 16 April 2024).

⁷ Affirmative action in South Africa is a redress mechanism aimed at correcting historical injustices caused by apartheid and colonialism. It involves targeted policies, such as the Employment Equity Act and the Broad-Based Black Economic Empowerment, to promote equitable representation of historically disadvantaged groups, particularly Black South Africans, in employment, education and economic participation. See Burger R *et al* 'The Effectiveness of Affirmative Action Policies in South Africa' in *Handbook on Economics of Discrimination and Affirmative Action* Springer (2023).

⁸ James (n 5).

⁹ *Ibid.*

¹⁰ Goodwin-Groen with input from Kelly-Louw (n 6) 12.

¹¹ James D 'Undoing apartheid? From land reform to credit reform in South Africa' in Christophers B, Mann G and Leyshon A (eds.) *Money and Finance After the Crisis: Critical Thinking for Uncertain Times* (2016) 4.

¹² 73 of 1968.

¹³ 75 of 1980.

Exemption Notices.¹⁴ Although these legislative instruments sought to regulate credit relationships between consumers and providers, they fell short of offering substantive protection to consumers.¹⁵ As noted by Renke, Roestoff and Haupt, these frameworks provided only limited remedies and lacked the comprehensiveness necessary to safeguard consumer interests effectively.¹⁶ Vulnerable borrowers—particularly those engaging with micro-lenders—were frequently exposed to exploitative practices, including reckless lending, excessive interest rates, and punitive consequences for non-repayment.¹⁷

The original Usury Act of 1926 regulated the charges credit providers could impose, along with associated financial obligations.¹⁸ Its complexity led to its replacement with the Limitation and Disclosure of Finance Charges Act 73 of 1968, subsequently renamed the Usury Act 73 of 1968.¹⁹ The Usury Act of 1968 was however characterised by procedural complexity and did not advance the ideal of fairness within the credit market.²⁰

Although intended to operate concurrently and complement one another, the Usury Act and Credit Agreements Act proved difficult to apply in practice—often requiring supplementary reliance on common law and additional statutes.²¹ Following the adoption of the South African Constitution,²² the country faced increasing pressure to reform its economic policies and address the inefficiencies embedded in its consumer credit laws. The prevailing statutory framework, while aiming to regulate credit, continued to perpetuate disparities in consumer protection, facilitating irresponsible lending and contributing to widespread over-indebtedness.²³

¹⁴ Government Notice 3451, GG 14498, 31 December 1992 'Usury Act Exemption Notice', Government Notice 713, GG 20145, 1 June 1999 'Usury Act Exemption Notice' and Government Notice 1407, GG 27889, 8 August 2005 'Usury Act Exemption Notice'.

¹⁵ Adewale AR 'Financial Regulation, Credit Consumption And Economic Growth – An Analysis Of The National Credit Act In South Africa' (2014) 30 *Journal of Applied Business Research* 376.

¹⁶ Renke, Roestoff and Haupt 'The National Credit Act: New parameters for the granting of credit in South Africa' 2007 *Obiter* 28.

¹⁷ *Ibid.*

¹⁸ Otto JM 'The History of consumer credit legislation in South Africa' (2010) 16(1) *Fundamina* 266.

¹⁹ *Idem* 261.

²⁰ *Idem* 262.

²¹ *Ibid.*

²² The 1996 Constitution of the Republic of South Africa.

²³ Otto (n 18) 262.

In practice, both Acts needed to be applied to certain credit agreements, yet their divergent scopes complicated legal interpretation.²⁴ This fragmented approach left consumers dependent on an inconsistent legal patchwork. Ultimately, the need for a unified and coherent regulatory framework became evident, prompting the development of the NCA to systematically address the shortcomings of the previous legislative regime.²⁵

By the late 1990's and early 2000's it became clear that whilst credit can create wealth, it can also be a dangerous instrument that can lead to high levels of debt and indebtedness.²⁶ It also became evident that the levels of over-indebtedness of South African consumers were increasing significantly. An unfortunate spin-off of this situation was that the number of administration orders increased rapidly and the administration of debt became an industry in itself. Abusive practices by debt administrators further aggravated consumers' situation.

In contrast to consumers who had access to credit, a large portion of historically disadvantaged consumers were still excluded from access to credit because they had no assets and/or a very low income. This excluded them from the formal financial market and forced them to obtain expensive credit from micro-lenders and loan sharks.²⁷

It was clear that the credit market in South Africa reflected and reinforced the existence of two economies in South Africa – one for the 'have's' and one for the 'have nots'. This stood in stark contrast with the political, social and economic context of a democratic South Africa.²⁸ In place of the earlier oppressive and disadvantageous practices it had replaced, indebtedness resulting from increased access to credit had the potential to create new ones. A fundamental review of the South African credit market and its regulation was therefore critically necessary.

²⁴ Otto and Otto *The National Credit Act Explained* (2013) 4.

²⁵ The Department of Trade and Industry South Africa *Credit Law Review Summary of Findings of the Technical Committee* (August 2003) 22.

²⁶ *Policy Framework for consumer Credit* (2004) 6.

²⁷ Kelly-Louw (n 2) 13.

²⁸ *Policy Framework for consumer Credit* (2004) 7.

In March 2002, the Director-General of the Department of Trade & Industry,²⁹ Dr Alistair Ruiters, requested the Micro Finance Regulatory Council³⁰ to co-ordinate a review of the existing credit legislation in South Africa and to make proposals for a new regulatory framework. The Committee appointed to do the review, considered reports regarding weaknesses in the South African consumer credit landscape and researched consumer credit reforms in Europe and certain other countries.³¹ It also consulted widely with various stakeholders in the South African credit industry. A detailed report – the Credit Law Review Summary of Findings of the Technical Committee - on the weaknesses in the consumer credit market, also containing recommendations regarding new legislation and changes to the regulatory framework, was published and handed to the DTI in October 2003.³² The Committee proposed that the focus of consumer credit legislation should be shifted from price control to protection against over-indebtedness and the regulation of predatory lending practices.³³ Predatory lending refers to unfair, deceptive or fraudulent practices by lenders that exploit vulnerable consumers – often those with limited financial literacy or access to mainstream credit. These practices typically involve excessive interest rates, hidden fees, aggressive marketing and loan terms designed to trap borrowers in cycles of debt. Predatory lenders may target low-income communities, elderly individuals or people with poor credit histories, offering loans that appear helpful but ultimately undermine financial stability.³⁴

In August 2004 the DTI followed up the work of the Committee with the publication of the Policy Framework for Consumer Credit.³⁵ With regards to the credit legislation in

²⁹ Hereinafter referred to as 'the DTI'.

³⁰ The Micro Finance Regulatory Council (MFRC) is a community of individuals and organizations dedicated to enhancing consumer confidence in micro-finance by ensuring professional, legal and ethical conduct. <https://www.mfsa.net/> (accessed 16 April 2024).

³¹ These include (a) the Law Commission's 1994 review of the Usury Act; (b) the 1996 Strauss Report on Rural Finance; (c) the National Small Business Regulatory Review by Ntsika Enterprise Promotion Agency in 1999 and; (d) the Policy Board Report on SME Finance (Falkena Report, 2001).

³² The Department of Trade and Industry South Africa *Credit Law Review Summary of Findings of the Technical Committee* (August 2003).

³³ Department of Trade and Industry South Africa *Memorandum on the Objects on the National Credit Bill 2005*.

³⁴ Engel KC and McCoy PA 'A Tale of Three Markets: The Law and Economics of Predatory Lending' (2001) *Texas Law Review* 1255. See also Schmulow AD 'Curbing reckless and predatory lending: A statutory analysis of South Africa's National Credit Act' (2016) *Competition and Consumer Law Journal* 224.

³⁵ *Policy Framework for consumer Credit* (2004).

place at the time, the drafters of the policy document stated that South African law offers limited protection against consumer over-indebtedness and lacks adequate mechanisms to support the rehabilitation of individuals who have fallen into over-indebtedness.³⁶

The policy framework introduced various recommendations aimed at addressing the problem of over-indebtedness. This research focusses on a selection of these recommendations and their eventual incorporation in South African consumer credit legislation. One of the central proposals was the introduction of a general requirement that all credit providers should conduct pre-affordability assessments prior to approving any credit facility to ensure that consumers can afford the credit they apply for.³⁷ According to the drafters of the policy document, over-indebtedness results from factors such as reckless lending and borrowing, low levels of consumer awareness, and a lack of enforcement. They noted that over-indebtedness occurs when a borrower can no longer service all debts or when debt repayments erode household income and basic consumption capacity. To combat this, the policy proposed a range of corrective measures, including a mandatory pre-agreement affordability assessment for all credit providers prior to the approval of any credit facility.³⁸ Credit providers' compliance with these responsible credit standards would be closely monitored, and will be subject to significant penalties if they were found guilty of reckless credit provision – at the time, it was postulated that it could potentially even include suspension of the credit agreement.³⁹

In addition to recommending stronger preventative measures against reckless lending, the drafter of the policy also recommended the introduction of a new legislative measure specifically aimed at providing relief to over-indebted consumers. Unlike the more rigid and punitive debt relief measures that existed at the time – such as

³⁶ *Policy Framework for consumer Credit* (2004) 30.

³⁷ Chapter 1 para 1.1.

³⁸ Para 6.9.1 of the *Policy Framework for consumer Credit* (2004) makes specific reference to a 'credit facility'. Given that a credit facility constitutes a type of credit agreement in terms of section 8(1)(a) of the NCA, it is submitted that the use of the broader term 'credit agreement' might have been more appropriate in this context.

³⁹ *Policy Framework for consumer Credit* (2004) 31.

insolvency and administration⁴⁰ – the policy envisaged a more flexible and accessible alternative. As the document explained:

- '6.10 However, there is still a need to make provision for some form of relief, other than more extreme measures such as debt administration, for those who are unable to repay their debts.
- 6.11 This policy framework envisages that a national network of regulated debt counsellors will be created, and that appropriate enabling legislation will be introduced. This framework will enable debt counsellors to renegotiate debt commitments on behalf of consumers in order to provide relief in cases where clients are over-indebted. Debt counselling should accommodate mechanisms to enable rescheduling of debt as well as debt reduction.'⁴¹

The drafters of the policy further recognised the need for effective enforcement of consumer credit legislation as well as measures to ensure effective access to redress. To achieve this policy objective, improvements in the regulatory infrastructure in the consumer credit market was recommended.⁴²

The policy framework formed the basis for the National Credit Act 32 of 2005, which came into full operation on the 1st of June 2007. This comprehensive Act heralded a new era in credit legislation in South Africa and repealed the inadequate credit regulation framework provided by its predecessors.⁴³ It also introduced a wide range of regulatory measures, which either directly or indirectly function as mechanisms to prevent and resolve consumer over-indebtedness.⁴⁴ In this research, the focus will be on the measures in the Act aimed at preventing reckless credit granting, as well

⁴⁰ Boraine A, Van Heerden CM and Roestoff M 'A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform Part 2' (2012) *De Jure* 254.

⁴¹ *Policy Framework for consumer Credit* (2004) 31.

⁴² *Policy Framework for consumer Credit* (2004) 34.

⁴³ Boraine A 'The Reform of Administration Orders within a New Consumer Credit Framework' in: Kelly-Louw M, Nehf JP and Rott P (eds) *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (2008) 204-7. Also see Stoop P 'South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-indebtedness' (2009) *Mercantile Law Journal* 366.

⁴⁴ S 79 of the NCA provides that:

'(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to the consumer's –
(a) financial means, prospects and obligations; and
(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment'.

providing debt-relief to over-indebted consumers as set out in sections 78 to 88 of the Act.⁴⁵

The aim of this research is firstly to determine whether the measures in the Act aimed at the prevention of reckless lending has improved the position of low-income consumers, or whether it has presented this group of consumers with new challenges leaving them in an even more dire financial situation. Furthermore, the debt review (debt counselling) process as a debt relief measure introduced by the Act will be scrutinized to determine whether the process provides a suitable debt relief measure for low-income consumers. The suitability of the debt counselling process as a vehicle to address reckless lending to low-income consumers will be considered specifically. Lastly, the effectiveness of the regulatory infrastructure to provide redress to low-income consumers who fell victim to irresponsible lending will be considered.

To set the stage and provide much-needed context before delving into topics more directly linked to the research topic in subsequent chapters, the purpose and application of the Act will be set out in detail in paragraph 3.2 and 3.3 of this chapter. In paragraph 3.4 certain exclusions from the application of the Act are discussed. Instances where the Act finds limited application is also pointed out in this paragraph. The purpose of this chapter is to provide a contextual background for the next chapter where the reckless lending provisions in the Act will be discussed.

3.2 Purpose of the Act

The foundational objectives of the NCA underscore its consumer-centred approach to credit regulation. The preamble to the Act already sets the scene for a consumer-focused legislative framework albeit that section 3(d) also mentions balancing the rights and obligations of credit providers and consumers:

‘To promote a fair and non-discriminatory marketplace for access to consumer credit, and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use, and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to

⁴⁵ Stoop (n 43) 367.

establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act (1968) and the Credit Agreements Act (1980), and to provide for related incidental matters.'

Section 2(1) states explicitly that the Act must be applied *in a manner that gives effect to the purposes as set out in section 3*.⁴⁶

In turn, section 3 reaffirms the Act's objectives by stating the following purposes:

'[t]o promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.'⁴⁷

These purposes are to be attained by:

- a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions,⁴⁸
- b) ensuring consistent treatment of different credit products and different credit providers;⁴⁹
- c) promoting responsibility in the credit market⁵⁰ by
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers⁵¹ and
 - (ii) *discouraging reckless credit granting by credit providers* and contractual default by consumers.⁵²
- d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;⁵³
- e) addressing and correcting imbalances in negotiating power between consumers and credit providers by
 - (i) providing consumers with education about credit and consumer rights⁵⁴

⁴⁶ S 2(1) (own emphasis). *National Credit Regulator v Standard Bank of South Africa Limited* 2019 (5) SA 512 (GJ) para 62.

⁴⁷ S 3 of the NCA.

⁴⁸ S 3(a) of the NCA.

⁴⁹ S 3(b) of the NCA.

⁵⁰ S 3(c) of the NCA.

⁵¹ S 3(c)(i) of the NCA.

⁵² S 3(c)(ii) of the NCA (own emphasis).

⁵³ S 3(d) of the NCA.

⁵⁴ S 3(e)(i) of the NCA.

- (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices;⁵⁵ and
- (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;⁵⁶
- f) improving consumer credit information and reporting and regulation of credit bureaux;⁵⁷
- g) *addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness* based on the principle of satisfaction by the consumer of all responsible financial obligations;⁵⁸
- h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements,⁵⁹ and
- i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.⁶⁰

3.3 Application of the Act

One of the biggest problems with the credit legislation that preceded the Act, was its failure to protect consumers against over-indebtedness and reckless lending.⁶¹ The majority of consumers in South Africa use some form of credit – therefore Government intended to ensure that effective consumer protection is provided by the Act.⁶² To achieve this aim, the Act was drafted with a broader scope and application than its predecessors.⁶³ The Act regulates all forms of consumer credit, irrespective of the amount of credit applied for⁶⁴ and it is not limited in regard to certain goods or services

⁵⁵ S 3(e)(ii) of the NCA.

⁵⁶ S 3(e)(iii) of the NCA.

⁵⁷ S 3(f) of the NCA. The legislation that came before the NCA had a number of issues, one of which was that it did not safeguard customers from excessive debt.

⁵⁸ S 3(g) of the NCA (own emphasis).

⁵⁹ S 3(h) of the NCA.

⁶⁰ S 3(i) of the NCA.

⁶¹ Van Heerden CM and Steennot R 'Pre-Agreement Assessment as a Responsible Lending Tool in South-Africa, the EU and Belgium: Part 2' (2018) *PELJ* 1.

⁶² *Policy Framework for consumer Credit* (2004) 39.

⁶³ Kelly-Louw (n 2) 28.

⁶⁴ This is in contrast with its predecessor the Usury Act 73 of 1968 which were only applicable where the principal debt did not exceed R500 000. See Kelly-Louw (n 2) 28.

only.⁶⁵ Furthermore, it tasks the Regulator to support and promote a credit market and industry that serves the needs of historically disadvantaged⁶⁶ and low income⁶⁷ and isolated persons and communities.⁶⁸ These provisions aim to level the playing field between a relatively indigent and unsophisticated consumer and a deep-pocketed and well-advised credit provider, in order to limit the financial harm that the consumer may suffer if he is unable to perform in terms of the credit agreement.⁶⁹ As a result, the Act constitutes a piece of consumer legislation which provides protection to consumers across the socio-economic spectrum including affluent and poor consumers.⁷⁰

The scope of application of the Act is set out in section 4, which states that the Act applies to every credit agreement concluded between parties dealing at arm's length⁷¹ and either made within or having an effect in the Republic, subject to certain exemptions.⁷² To determine whether the Act applies to a specific agreement, Kelly–Louw proposes a four-question test. The first inquiry is whether the agreement qualifies as a credit agreement defined in the Act. This is followed by an assessment of whether the parties were dealing at arm's length. It is also necessary to establish whether the agreement was concluded in South Africa or whether it has an effect in the country.

⁶⁵ The Credit Agreements Act 75 of 1980, another predecessor of the National Credit Act, only covered contractual aspects of credit agreements in connection with the sale and lease of movable goods. See Otto (18) 266.

⁶⁶ S 13(a)(i) of the NCA.

⁶⁷ S 13(a)(ii) of the NCA.

⁶⁸ S 13(a)(iii) of the NCA.

⁶⁹ *ABSA Bank Limited v Myburgh* (31827/2007) [2007] ZAGPHC 366 (7 November 2007) para 42.

⁷⁰ *Firststrand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ).

⁷¹ The Act does not explain what arm's length transactions are, but list a number of transactions that are not considered to be arm's length transactions in s4(2)(b) namely:

- (i) a shareholder loan or other credit agreement between a juristic person as consumer and a person who has a controlling interest in that juristic person, as credit provider.
- (ii) 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.
- (iii) a credit agreement between natural persons who are in a familial relationship and -
 - (aa) are co-dependant on each other or
 - (bb) one is dependent upon the other; and
- (iv) any other arrangement –
 - (aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or
 - (bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length.

⁷² S 4(1) of the NCA.

Finally, one must consider whether any of the statutory exemptions provided for in the Act apply to the agreement.⁷³

Below, each component of this test will be covered in further detail.

3.3.1 Credit agreements

Section 1 of the Act defines a credit agreement as an agreement that meets all the criteria set out in section 8. In terms of section 8 credit agreements can be divided into four types, namely credit facilities, as described in subsection (3);⁷⁴ credit transactions, as described in subsection (4);⁷⁵ credit guarantees, as described in subsection (5);⁷⁶ or any combination of the aforementioned.⁷⁷ In what follows, each of these different types of credit agreements will be discussed in more detail.

3.3.1.1 Credit facility

Section 8(3) describes a credit facility as:

- ‘(3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)(b), constitutes a credit facility if, in terms of that agreement –
- a) a credit provider undertakes –
 - (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
 - (ii) either to–
 - (aa) defer the consumer’s obligation to pay any part of the cost of goods or service, or to repay to the credit provider any part of an amount contemplated in sub-paragraph (i); or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in sub-paragraph (i); and
 - b) any charge, fee or interest is payable to the credit provider in respect of
 - (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or
 - (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.’

An example of a credit facility would be a store card.

⁷³ Kelly-Louw (n 2) 31. See also Kelly-Louw M *Consumer Credit Law of South Africa* Volume 5 Part 1, Second Edition, Replacement Volume (2010) para 6.

⁷⁴ S 8(1)(a) of the NCA.

⁷⁵ S 8(1)(b) of the NCA.

⁷⁶ S 8(1)(c) of the NCA.

⁷⁷ S 8(1)(d) of the NCA.

3.3.1.2 Credit transaction

In turn, a credit transaction could be any one of eight types of transactions listed in section 8(4) of the Act. These agreements constitute credit agreements, irrespective of their form,⁷⁸ but do not include an agreement explicitly excluded in terms of subsection (2).⁷⁹ Agreements constituting credit transactions are set out below.

3.3.1.2.1 Pawn transaction

This type of credit transaction is an agreement in terms of which one party advances money or credit to another and at the same time takes possession of goods as security for the money advanced or credit granted. In terms of this agreement, either the estimated resale value of the goods must exceed the value of the money provided or the credit granted or a charge, fee or interest must be imposed in respect of the agreement or in respect of the amount loaned or the credit granted. On expiry of a certain period, the party advancing the money or credit may sell the goods held in security and retain the full proceeds of the sale if the consumer did not fulfil his obligations in terms of the agreement.⁸⁰

An example of a pawn transaction would be where consumer A takes his furniture, worth R8 000 to a pawnbroker B, the credit provider. A borrows R6 000 from B and the agreement stipulates that A must repay the amount within six months, otherwise the furniture will be sold and the proceeds will be for B's pocket. A fails to repay the debt. B consequently sells the goods for R7 500 and is entitled to the whole amount.⁸¹

⁷⁸ Renke S, Roestoff M and Haupt F (n 16) 229. The writers are of the opinion that this means that the agreement may be concluded orally or in writing. However, Kelly-Louw (n 2) 52 points out that the Act requires all credit agreements to be in writing. This is because section 93(1) provides that a consumer credit agreement must be recorded on paper or electronically. In terms of section 93 and regulations 30 and 31 all forms of credit agreements must comply with the prescribed forms and contain the prescribed information published in GN R489 in GG 28864 of 31 May 2006. The Act also provides that a credit provider must deliver to the consumer, without charge, a copy of a document that records their agreement, transmitted to the consumer in a paper form, or in a printable electronic form. Failure to comply with these formalities does not affect the validity of the agreement, nor does it constitute an offence. However, it may render the credit provider liable for a fine and the credit provider also runs the risk that his or her registration with the NCR might be cancelled in terms of section 57.

⁷⁹ See para 4.1 below dealing with agreements that are excluded from the ambit of the Act.

⁸⁰ S 1 of the NCA.

⁸¹ Otto and Renke Scholtz *ed* (2024) para 8.2.3.1.

Pawn transactions are exempted from sections 81 to 84 and any provision in part D of the Act to the extent that they relate to reckless credit.⁸² Also, the provision in the Act dealing with unlawful credit agreements does not apply to pawn transactions.⁸³

3.3.1.2.2 Discount transaction

A discount transaction is an agreement in terms whereof goods or services are provided to a consumer over a period of time and more than one price is quoted. The lower price will be applicable if the account is paid on or before a certain date. The higher price will be applicable if the account is paid after the determined date or if the account is paid off in instalments over a period of time.⁸⁴

An example of a discount transaction would be when A, the consumer, buys goods from shop B, the credit provider. The cash price of the goods is R7 000 provided A pays the price within six months. If he pays the amount after the six-month period, the price becomes R8 400 to account for the interest due to the account not being paid within the 6-month limit.⁸⁵

3.3.1.2.3 Incidental credit agreement

An incidental credit agreement is an agreement in terms whereof an account is rendered for goods or services already supplied to the consumer, or for goods or services to be provided to a consumer over a period of time subject to either or both of the following conditions: first, a fee, charge or interest becomes payable if payment is not made on or before a specified date, and second, two prices are quoted for settlement of the account – one being a lower price applicable if payment is made on or before a determined date, and the other a higher price applicable if payment is not made by that date.⁸⁶

An example of an incidental credit agreement is for instance where a cell phone company enters into a contract with a consumer, A. In terms of the contract, the

⁸² S 78(2) of the NCA.

⁸³ S 89(1) of the NCA.

⁸⁴ S 1 of the NCA.

⁸⁵ Otto and Renke in Scholtz *ed* (2024) para 8.2.3.2.

⁸⁶ S 1 of the NCA. Renke S 'Aspects of Incidental Credit in terms of the National Credit Act 34 of 2005 (2011) *Journal of Contemporary Roman-Dutch Law* 464.

company provides its services over a period. A receives monthly statements. The agreement provides that, if the amount debited to the account is not paid within 30 days from the date of the account, interest will be charged on the amount owed at a rate stipulated in the agreement. This rate may not be more than 2% per month.⁸⁷ In terms of the Act, the agreement will thus only become an incidental credit agreement when the consumer does not pay his debt on the agreed date. Interest is levied to compensate the credit provider for late payment.

The incidental credit agreement is a novel creation of the Act and was not known to the South African legal landscape prior to 2007.⁸⁸ The definition of an incidental credit agreement has been dubbed 'rather meaningless',⁸⁹ 'a strange creature'⁹⁰ and 'an unhappy one'.⁹¹ The reason for this is that the definition creates confusion as it overlaps with the definitions of discount transactions⁹² and credit facilities.⁹³

Incidental credit agreements are subject to section 5(2) of the Act, which determines that the parties to an incidental credit agreement are deemed to have made that agreement 20 business days after the supplier first charges a late-payment fee or interest, or after a pre-determined higher price for full settlement becomes applicable, unless the consumer has fully settled the account before 'that date'.⁹⁴ The reason for the 20 days' gestation period is not known.⁹⁵

⁸⁷ Otto and Renke in Scholtz *ed* (2024) para 8.2.3.3.

⁸⁸ Otto JM 'The Incidental Credit Agreement' (2010) *JCRL* 649 refers to the incidental credit agreement as 'a new animal on the legal landscape'.

⁸⁹ *Idem* 638.

⁹⁰ Otto JM 'The distinction between a Credit Facility and an Incidental Credit Agreement' (2011) *Journal of South-African Law* 548.

⁹¹ *JMV Textiles (Pty) Ltd v De Chalain Spareinvest* 14 CC 2010 6 SA 173 (KZD) par 19.

⁹² Both include an agreement for the provision of goods or services over a period of time in terms of which agreement a lower price applies if the account is paid before a certain date, after which a higher price applies. The only, rather dubious, difference between these transactions is that an account is tendered in the case of an incidental credit agreement. Also see Otto and Renke Scholtz *ed* (2024) para 8.2.2.

⁹³ In *JMV Textiles (Pty) Ltd v De Chalain Spareinvest* 2010 6 SA 173 (KZD) the differences between an incidental credit agreement and a credit facility were authoritatively decided. The court held that the basic difference between the two categories of credit agreements is that a fee, charge or interest only becomes payable in the case of an incidental credit agreement if the consumer does not pay his debt on the agreed date, whereas in the case of a credit facility interest runs *ab initio*. See Otto (n 88) 640.

⁹⁴ The date described in s 5(2) of the NCA.

⁹⁵ Otto (n 88) 647. Otto JM 'The history of consumer credit legislation in South Africa' (2010) *Fundamina* 259.

3.3.1.2.4 Instalment agreement

An instalment agreement is a type of credit agreement in terms whereof movable property is sold to a consumer.⁹⁶ The payment of the price or a part thereof is deferred and is to be paid in periodic payments, that is instalments.⁹⁷ However, possession and use of the property are transferred to the consumer immediately. Ownership of the property can either pass to the consumer when the agreement is fully complied with or it can pass to the consumer immediately subject to the credit provider's right to repossess the property if the consumer fails to satisfy all his financial obligations under the agreement. The consumer must pay interest, fees or other charges to the credit provider in respect of the agreement itself or in respect of the amount deferred.⁹⁸ In practice almost all credit providers reserve ownership in the goods until all payments due in terms of the agreement have been made.

An example of an instalment sale agreement is where a person, A sells a motor vehicle to B. In terms of the agreement between the parties, B will pay the purchase price in monthly instalments over a period of 48 months. The motor vehicle is delivered to B, but he does not become the owner immediately. This is because of a clause in the agreement, which states that ownership remains with A until the B has fulfilled all his financial obligations in terms of the agreement.

Section 127 which deals with voluntary surrender of movable goods applies to instalment agreements as this section creates a process in terms whereof a consumer who entered into an instalment agreement may unilaterally terminate the agreement and surrender the movable goods that form the subject of the agreement to the credit provider.⁹⁹ Section 121 of the Act also applies to instalment agreements, in that it provides that a consumer who entered into an instalment agreement has a certain period to withdraw from that agreement without giving any reason therefor and without such withdrawal constituting breach of contract. This right is known as a 'cooling-off

⁹⁶ S 1 of the NCA. Renke S 'Apects of Incidental Credit in terms of the National Credit Act 34 of 2005 (2011) *Journal of Contemporary Roman-Dutch Law* 464.

⁹⁷ The instalments need not be of equal size, even though in practice they will probably be. For example, with a vehicle finance agreement, a particular deposit may be required, certain instalments will be paid monthly and the final instalment will be a balloon payment. See Kelly-Louw (n 2) 62 and Otto and Renke in Scholtz *ed* (2024) para 8.2.3.4 n 28.

⁹⁸ S 1 of the NCA.

⁹⁹ Kelly-Louw (n 2) 62.

right'.¹⁰⁰ It is only available to a consumer who concluded the agreement at a location other than the registered business premises of the credit provider.¹⁰¹

3.3.1.2.5 Mortgage agreement

A mortgage agreement is a type of credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property – usually of the debtor.¹⁰² Otto and Renke submit that a debt in terms of a so-called 'housing loan' that is secured by the registration of a mortgage bond over the property concerned, is a typical example of a mortgage agreement.¹⁰³ The definition of a mortgage agreement in the Act makes no mention of the charging of interest, fees or charges as a requirement for such an agreement to be subject to the Act's field of application. The effect hereof is that even if no interest is charged, the transaction can still qualify as a mortgage. However, in practice, interest, fees and charges are the rule rather than the exception.¹⁰⁴

3.3.1.2.6 Secured loan

A secured loan is a type of credit agreement in terms whereof a person advances money or grants credit to another and retains or receives a pledge to any movable property or other thing of value as security for all amounts due under that agreement.¹⁰⁵

A notarial bond serves as an example of a secured loan.¹⁰⁶ In *National Credit Regulator v Allied Capital (Pty) Ltd*,¹⁰⁷ the Tribunal considered whether or not transactions concluded under the 'pawn your car and still drive it' scheme constitute secured loans, which are subject to the provisions of the Act. The Tribunal held that, if one considers the real nature and implementation of the contracts in question, it became apparent that they were secured loans in terms whereof the consumers' vehicles served as collateral to secure the debt.¹⁰⁸

¹⁰⁰ *Ibid.*

¹⁰¹ S 121(1) of the NCA.

¹⁰² S 1 of the NCA.

¹⁰³ Otto and Renke in Scholtz *ed* (2024) para 8.2.3.5.

¹⁰⁴ *Ibid.*

¹⁰⁵ S 1 of the NCA.

¹⁰⁶ Otto and Renke in Scholtz *ed* (2024) para 8.2.3.6.

¹⁰⁷ NCT/41672/2016/140 [2017] ZANCT 77 (28 April 2017).

¹⁰⁸ *National Credit Regulator v Allied Capital (Pty) Ltd* para 69 and 75.

As is the case with instalment agreements and lease transactions, a consumer under a secured loan may unilaterally terminate the agreement and surrender the movable goods that form the subject of the agreement to the credit provider.¹⁰⁹

3.3.1.2.7 Lease

A lease of movable¹¹⁰ property is another type of credit agreement in terms of the Act. In terms of this type of credit agreement, temporary possession of, or the right to use movable property is given to the consumer. Payment for the possession or use of the property is made on an agreed or determined periodic basis during the life cycle of the agreement or it can be deferred in whole or in part for any period during the life cycle of the agreement. Interest, fees or other charges are payable to the credit provider in respect of the agreement or in respect of the deferred amount. At the end of the term of the agreement, ownership of the property can pass to the consumer absolutely or it can pass to the consumer upon satisfaction of specific conditions set out in the agreement.¹¹¹

Because the definition of 'lease' in terms of the Act provides for the transfer of ownership, it differs from the common-law concept of a lease.¹¹² In terms of the common law, payments in terms of a lease are made in monthly instalments and ownership of the property remains with the lessor once the lease period has run out. In terms of the common law, no fee, interest or charges are paid by the lessee. A common law lease does not resort under the auspices of the Act.¹¹³ To determine whether the Act is applicable, it would therefore be necessary to test the particular agreement against the definition of a lease in terms of the Act.¹¹⁴

¹⁰⁹ S 127 of the NCA.

¹¹⁰ A lease transaction of immovable property falls outside the scope of the Act.

¹¹¹ S 1 of the NCA.

¹¹² Otto and Renke in Scholtz *ed* (2024) para 8.2.3.7.

¹¹³ *Absa Technology Finance Solutions Ltd v Viljoen t/a Wonderhoek Enterprises* 2012 (3) SA 149 (GNP) and *Absa Technology Finance Solutions Ltd v Michael's Bid a House CC* 2013 (3) SA 426 (SCA).

¹¹⁴ Otto and Renke in Scholtz *ed* (2024) para 8.2.3.7.

3.3.1.2.8 Any other agreement (catch all agreement)

Where an agreement is not included in the above list of credit transactions and it is not a credit facility or a credit guarantee, it will still constitute a credit transaction if the agreement is characterised by a deferral of payment and the levying of a charge, fee or interest.¹¹⁵ Otto and Renke call this type of credit transaction the ‘extended credit agreement’.¹¹⁶ An example of a credit agreement constituting a credit transaction resorting under the auspices of section 8(4)(f) is an acknowledgment of debt where interest, a fee or a charge is levied in respect of the deferred payment.¹¹⁷

3.3.1.3 Credit guarantee

The third type of credit agreement is a credit guarantee. An agreement constitutes a credit guarantee if, in terms of the agreement, a person 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.¹¹⁸

Notably, the agreement to which the guarantee applies must itself be subject to the Act.¹¹⁹ For example, if a member of a small¹²⁰ close corporation gives a guarantee in respect of a lease entered into by such close corporation and the principal debt equals or exceeds R250 000, the underlying agreement is not subject to the Act and therefore, the accessory agreement, namely the credit guarantee likewise falls outside the scope of the Act.¹²¹ This is because large credit agreements entered into by small juristic persons are excluded from the application of the Act.¹²²

An ordinary suretyship in terms of which a person provides personal security for another person’s debts arising out of an overdrawn cheque account, or for the payment

¹¹⁵ S 8(4)(f) of the NCA.

¹¹⁶ Otto and Renke in Scholtz *ed* (2024) para 8.2.3.8.

¹¹⁷ *Ibid.* Also see *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP).

¹¹⁸ S 8(5) of the NCA.

¹¹⁹ Otto and Renke in Scholtz *ed* (2024) para 8.2.4.

¹²⁰ Asset value or annual turnover of less than R1 million.

¹²¹ Otto and Renke in Scholtz *ed* (2024) para 8.2.4.

¹²² S 4(1)(b) read with s 9(4) of the NCA. Van Heerden in Scholtz *ed* (2024) para 11.2 remarks that section 4(2)(c) of the Act stipulates that the Act applies to a credit guarantee only insofar as it applies to the underlying credit facility or credit transaction to which the guarantee relates. Accordingly, if the principal credit agreement falls outside the scope of the Act, the accessory credit guarantee is likewise excluded. As a result, sureties cannot invoke the debt relief mechanisms provided under the Act.

of the instalments in terms of an instalment sale, meets the definition of 'credit guarantee'.¹²³

3.3.1.3.1 A combination of agreements

Lastly, the Act also applies to any combination of a credit facility, credit transaction or credit guarantee.¹²⁴ An example of such a combination is an instalment sale of goods in respect of which payments are affected by means of a credit card over a period of time 'on budget'.¹²⁵ A further example of such a combination would be where there is an access bond facility available on a mortgage agreement.¹²⁶

3.3.2 Developmental and public interest credit agreements

The Act makes provision for two types of credit agreements with more 'altruistic motives', namely developmental credit agreements and public interest credit agreements.¹²⁷ Credit providers who want to provide developmental credit must apply for supplementary registration in terms of section 41. From the wording of section 10¹²⁸ it appears that developmental credit focuses on providing historically disadvantaged persons, low-income persons and communities and remote, isolated or low-density populations and communities, with better access to credit in order to improve their access to housing, education and business opportunities. This gives effect to the

¹²³ Otto and Renke in Scholtz *ed* (2024) para 8.2.4 This was confirmed by the court in the matter of *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T).

¹²⁴ S 8(1)(d) of the NCA.

¹²⁵ Otto and Renke in Scholtz *ed* (2024) para 8.2.5.

¹²⁶ Kelly-Louw (n 2) 89. An example of this product is the Access Bond facility offered by Standard Bank. <https://www.standardbank.co.za/southafrica/personal/products-and-services/borrow-for-your-needs/existing-home-loan/access-bond> (accessed 17 April 2024).

¹²⁷ Otto and Otto (n 24) 25.

¹²⁸ S 10(1) of the NCA describes a developmental credit agreement as:
'A credit agreement, irrespective of its form, type or category, is a developmental credit agreement if -

- (a) at the time the agreement is entered into, the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in section 41; and
- (b) the agreement is -
 - (i) between a credit co-operative as credit provider, and a member of that credit co-operative as consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under that agreement does not exceed the prescribed maximum amount;
 - (ii) an educational loan; or
 - (iii) entered into for any of the following purposes-
 - (aa) development of a small business;
 - (bb) the acquisition, rehabilitation, building or expansion of low-income housing; or
 - (cc) any other purpose prescribed in terms of subsection (2)(a).

Section 10 should be read with s 13 of the NCA.

purpose of the Act to make credit available to those who have historically been unable to obtain credit.¹²⁹

The Act has special provisions relating to developmental credit. These include certain marketing and sale of credit practices,¹³⁰ leniency in advertising practices,¹³¹ prescribed pre-agreement statements and quotations,¹³² a prescribed agreement format,¹³³ and specified provisions regarding the prescribed interest rate and cost of credit.¹³⁴

With regards to the cost of credit, it is notable that the maximum prescribed interest and initiation fees that can be levied for developmental credit are generally higher than those for other categories of credit agreements.¹³⁵ This is presumably to incentivise credit providers to provide this form of credit and also to compensate credit providers for advancing credit to potentially 'high risk' consumers.

The Act does not expressly exclude developmental credit agreements from the reckless lending provisions in the Act. Section 78 however excludes school loans or student loans from the provisions in section 80 to 84 relating to reckless credit. The aforementioned are sub-categories of educational loans,¹³⁶ which fall within the definition of developmental credit agreements.¹³⁷ This inconsistency was rectified when the 2014 National Credit Amendment Act introduced Regulation 23A as discussed in more detail hereinafter.¹³⁸ Regulation 23A(2)(a) expressly excludes developmental credit agreements from the application of the affordability assessment regulations. In theory this would make it easier for low-income consumers who have no credit history to apply for this type of credit. Research however indicates that despite the legislative provision, financial institutions still use information on consumers' debt repayment history when assessing an application for developmental

¹²⁹ S 3(a) of the NCA.

¹³⁰ S 75(5) of the NCA.

¹³¹ S 76(6) of the NCA.

¹³² S 92(5) of the NCA.

¹³³ S 93(5)(a) of the NCA.

¹³⁴ S 103(7) and s 105 read with reg 42. See Kelly-Louw (n 2) 91 – 92.

¹³⁵ Reg 42 of the NCA.

¹³⁶ S 1 of the NCA.

¹³⁷ S 10(1)(b)(ii) of the NCA.

¹³⁸ Act 19 of 2014. Hereinafter referred to as the '2014 NCA'.

credit. Madalane is of the opinion that this can have an adverse effect on consumer's access to developmental credit because it effectively disqualifies the very individuals the developmental credit framework seeks to empower.¹³⁹

In terms of section 11, the Minister may, by declaration¹⁴⁰ or regulation,¹⁴¹ declare credit agreements entered into in specified circumstances, or for specified purposes, during a specific period or until the declaration or regulation is repealed, as public interest credit agreements. The aim with this type of credit agreement is to promote the availability of credit in all or part of the Republic in circumstances of natural disaster, such as drought or floods or any other emergency necessitating the declaration of public interest credit agreements by the Minister.¹⁴² A public interest credit agreement is exempted from the provisions in the Act dealing with reckless lending.¹⁴³

From the Act's inception to date, the Minister has however not declared any credit agreements as public interest credit agreements.

3.3.3 Categories of credit agreements

The Act further provides that every credit agreement can be characterised as a small,¹⁴⁴ intermediate¹⁴⁵ or large agreement.¹⁴⁶ This classification depends on certain

¹³⁹ Madalane Z *Rules and Rands: Credit Legislation and Developmental Credit to Micro and Small Enterprises in South Africa*. (LLM Dissertation, Thesis University of Pretoria) <https://open.uct.ac.za/items/cc543345-65a1-4eff-ba6b-f6a2633769f3> (accessed 16 June 2024) ii.

¹⁴⁰ S 11(1)(a) read with s 11(2) of the NCA.

¹⁴¹ S 11(1)(b) read with s 11(3) of the NCA.

¹⁴² Otto and Renke in Scholtz *ed* (2024) 8.5.2.

¹⁴³ S 11(5) read with s 78(2)(c) of the NCA. This is consistent with the affordability assessment requirements in regulation 23A(2)(c).

¹⁴⁴ In terms of s 9(2) an agreement qualifies as a small credit agreement if it is a pawn transaction, a credit facility with a credit limit at or below R15 000, or any other credit transaction, except a mortgage agreement or a credit guarantee, where the principal debt falls at or below R15 000.

¹⁴⁵ In terms of s 9(3) an agreement constitutes an intermediate credit agreement if it is a credit facility with a credit limit above R15 000 or credit transaction, except a pawn transaction or a mortgage agreement or a credit guarantee, where the principal debt in terms of that transaction or guarantee falls between R15 000 and R250 000.

¹⁴⁶ In terms of s 9(4) an agreement qualifies as a large credit agreement if it is a mortgage agreement or any other credit transaction, except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above R250 000.

monetary thresholds¹⁴⁷ determined by regulation as well as the type of credit agreement that is involved.

According to Kelly-Louw, the categorisation is made in order to subdivide the consumer credit market by size and to facilitate effective regulation.¹⁴⁸ One of the reasons for the categorisation, according to her, is that different sized credit agreements have different pre-agreement disclosure requirements.¹⁴⁹ Whilst pre-agreement assessment of a consumer's affordability is a direct measure to prevent over-indebtedness and reckless lending, disclosure is described as an indirect measure to achieve the laudable aims of the Act to prevent over-indebtedness.¹⁵⁰

Stoop also emphasises the importance of disclosure as an indirect measure to prevent over-indebtedness and reckless lending. He asserts that before the Act came into force, very few consumers were aware of the total cost, fees and charges of credit. Improved disclosure can make it easier for consumers to make good credit decisions and can also encourage them to consider the possible negative consequences of entering into a credit agreement they cannot afford.¹⁵¹ Stoop however admits that, in a country like South Africa, where many consumers are illiterate and financially unsophisticated, disclosure on its own, will not prevent over-indebtedness. In combination with other measures, like regulatory limits on credit and limits on how much a particular consumer can borrow it can however indirectly prevent consumers against taking up credit that they cannot afford and prevent them from becoming over-indebted. Stoop however warns that low-income consumers, which forms the subject

¹⁴⁷ S 7(1)(b) read with s 7(3) provides that the Minister must at intervals of not more than five years determine an applicable threshold. Any new threshold will take effect six months after the date of publication thereof in the Government Gazette. The current thresholds were published in GenN 713 in GG 28893 of 1 June 2006. It has therefore been more than 5 years since the thresholds were last determined.

¹⁴⁸ Kelly-Louw M 'Categorising Credit Agreements, Particularly Credit Guarantees, as Small, Intermediate or Large Agreements under the National Credit Act 34 of 2005' (2012) *South African Mercantile Law Journal* 211.

¹⁴⁹ Part B of Chapter 5 of the Act deals specifically with the disclosure requirements. Section 92 specifies certain mandatory pre-agreement disclosures that must be made by the credit provider before entering into a credit agreement with a consumer. Section 92(1) provides that, for small credit agreements these disclosures entail a pre-agreement statement and a quotation in a prescribed (standardised) form. Section 92(2) provides that for large and intermediate agreements the credit provider must also provide the consumer with a pre-agreement statement (no form is prescribed but all the information to be specified is indicated in regulation 31) as well as a quotation in the prescribed form.

¹⁵⁰ Stoop (n 43) 365.

¹⁵¹ *Ibid.*

of this research, are however prone to succumb to aggressive marketing and may not benefit as much from the disclosure requirements in the Act as high-income consumers.

3.3.4 Arm's length transactions

In terms of section 4(1) – and Kelly-Louw's four question assessment - the applicability of the Act will further depend on whether the parties to the agreement are dealing at arm's length.¹⁵² With the promulgation of the NCA, new concepts were introduced into the South African consumer credit landscape.¹⁵³ One of these was the arm's length principle introduced by section 4 of the Act.

Du Preez¹⁵⁴ explains that arm's length is an English idiomatic phrase that uses the metaphor of the distance between a hand and a body to explain that something is at a certain distance – not too close and not too far away. This expression is used in the law of contract to explain that the parties to an agreement are independent and negotiate on equal footing. In the context of credit agreements the credit provider will facilitate the necessary distance by levying a business-related percentage of interest that will not create the impression of there being no formal distance between the contracting parties.

In the context of consumer credit legislation, arm's length transactions refer to transactions in the open market between a willing seller and a willing purchaser.¹⁵⁵ With arm's length transactions, each party is independent of the other and will consequently strive to get the utmost possible advantage out of the transaction for himself.¹⁵⁶

The Act does not define arm's length transactions. Instead, it gives a list of transactions that are not considered to be arm's length transactions.¹⁵⁷ Section 4(2)(b) provides:

¹⁵² See par 3.3.

¹⁵³ New concepts like 'reckless credit' and 'over-indebtedness' were also introduced by the Act.

¹⁵⁴ Du Preez AC *The Interpretation of the Arm's Length Principle in the National Credit Act* (LLM Dissertation, University of Pretoria 2016) 6.

¹⁵⁵ *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C).

¹⁵⁶ *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A).

¹⁵⁷ S 4(2)(b) of the NCA.

- (b) in any of the following arrangements, the parties are not dealing at arm's length:
- (i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider;¹⁵⁸
 - (ii) 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;
 - (iii) A credit agreement between natural persons who are in a familial relationship and
 - (aa) are co-dependant on each other; or
 - (bb) one is dependent on the other; and¹⁵⁹
 - (iv) any other agreement
 - (aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction;¹⁶⁰ or
 - (bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length.¹⁶¹

From the wording of section 4(2)(b)(iv)(aa) and (bb) it is clear that the list of transactions not considered at arm's length, is not exhaustive. Du Preez states that this is an indication that the legislator is endeavouring to cast its net as wide as possible.¹⁶²

3.3.5 Credit transactions concluded within the borders of South Africa

Section 4(1) further provides that the Act will apply to a credit agreement if it was concluded within, or if it has an effect in the Republic of South Africa.¹⁶³ This provision in the Act prevents parties from deliberately circumventing the Act's application by concluding agreements offshore. This was confirmed in *Sunrock Limited v Louis*.¹⁶⁴ In his decision, Binns Ward J used the example of an instalment sale agreement concluded in Namibia in terms of which the goods concerned were to be supplied to, used by, and paid for by the consumer in South Africa. He held that, even though the agreement was concluded in Namibia, the material effect of the agreement in the country was the same as if it would have been had it been concluded in South Africa. He added that the objectives of the Act would be easily undermined if credit

¹⁵⁸ S 4(2)(b)(i) and 4(2)(b)(ii) of the NCA.

¹⁵⁹ S 4(2)(b)(iii) of the NCA. This provision was considered by the court in the matter of *Beets v Swanepoel* [2010] ZANCHC 55 (5 October 2010). The court held that it is possible for family members to enter into an arm's length transaction and that not all transactions between family members are *per se* within arm's length.

¹⁶⁰ S 4(2)(b)(iv)(aa) of the NCA.

¹⁶¹ S 4(2)(b)(iv)(bb) of the NCA.

¹⁶² Du Preez (n 154) 9.

¹⁶³ The third question in *Kelly-Louw's* four question assessment relates to this issue.

¹⁶⁴ (3863/2015) [2016] ZAWCHC 7 (5 February 2016) para 28.

agreements concluded outside the country were excluded from the application of the Act.¹⁶⁵ Section 4(3)(a) further provides that the Act will apply to a credit agreement irrespective of whether the credit provider resides or has its principal office in or outside South Africa. If the Act applies to a credit agreement, it applies to every transaction, act or omission in respect of that agreement, regardless of whether it occurs within or outside South Africa.¹⁶⁶ The Act continues to apply to that agreement even if both parties cease to reside or have their principal offices in South Africa.¹⁶⁷

3.4 Exemptions

As discussed in the preceding paragraphs of this chapter, the Act has a wide field of application as it applies to every credit agreement¹⁶⁸ between parties dealing at arm's length,¹⁶⁹ made within or having an effect within the Republic of South Africa.¹⁷⁰ In this regard, the Act is a definite improvement on its predecessors. The extended field of application of the Act ensure that more consumers can enjoy the protection offered by the Act. Low-income consumers, which forms the subject of this research, are included in this extended group enjoying the protection of the Act. The Act introduced a new era for this group of consumers who previously had only limited access to regulated credit.¹⁷¹ Despite the aforementioned, the application of the Act is limited in respect of certain credit agreements.¹⁷² Furthermore, certain consumers, credit providers and credit agreements are excluded from the application of the Act.¹⁷³ Determining whether the agreement in question is one that is exempt from the Act or one that has restricted application under the Act will therefore be the last of Kelly-Louw's four question test to determine whether and how the Act applies to it. The limitations and exemptions from the Act's application are addressed below to set the stage for the remainder of the research's content. A detailed discussion of the limitations and exceptions are limited to those provisions with direct application to the subject of the research.

¹⁶⁵ *Ibid.*

¹⁶⁶ S 4(4)(a) of the NCA.

¹⁶⁷ S 4(4)(b) of the NCA.

¹⁶⁸ Par 4.1, 4.2, 4.3.

¹⁶⁹ Par 4.4.

¹⁷⁰ Par 4.5.

¹⁷¹ Renke, Roestoff and Haupt (n 16) 270.

¹⁷² Ss 5 and 6 of the NCA. See also Schedule 3 item 4(2) of the NCA.

¹⁷³ Ss 4(1)(a – d); 4(2)(c); 4(5); 4(6) and 8(2) of the NCA.

3.4.1.1 Credit agreements excluded from the application of the Act

In terms of section 8(2), certain agreements are not considered to be credit agreements. Since the Act applies specifically to credit agreements, this will have the effect that the Act is not applicable to these agreements. As this research concerns low-income consumers, one of the exceptions in section 8, warrants specific attention, namely stokvels.¹⁷⁴ The market research and insights company African Response, adopted the following very general definition of a stokvel for their quantitative survey of the South African market:

'Stokvels are group saving schemes providing for mutual and financial wellbeing as well as social and entertainment needs.'¹⁷⁵

The members of a stokvel are mainly low-income consumers and consumers who would not be able to obtain credit from a formal financial institution.¹⁷⁶ Stokvels are legally allowed to function as the informal economy's banks because the Act does not apply to them. Hutchinson explains that stokvels tend to be formed between friends, family, and neighbours, and because there is a relationship between the members of the trust it provides the trust and accountability to make this system workable. Stokvels is a highly successful form of financial arrangement in South Africa. In 2021, African

¹⁷⁴ A stokvel is described in section 1 of the NCA as:

'A formal or informal rotating financial scheme with entertainment, social or economic functions, which –

- (a) 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;
- (b) establishes a continuous pool of capital by raising funds by means of the subscriptions of the members;
- (c) grants credit to and on behalf of members;
- (d) provides for members to share in profits from, and to nominate management of, the scheme; and
- (e) relies on self-imposed regulation to protect the interest of its members'

¹⁷⁵ African Response 'Stokvels – A Hidden Economy. Unpacking the Potential of South African Traditional Saving Schemes' (2012) <https://www.africanresponse.co.za/assets/press/2012StokvelHiddenEconomy.pdf> (accessed 18 February 2021).

¹⁷⁶ Hutchinson A 'Third Sector Finance in Indigenous Economies' (2022) *Journal of Commonwealth Law* 26. Mashigo P and Schoeman C 'Stokvels as an instrument and channel to extend credit to poor households in South Africa' (2012) *Journal of Economic and Financial Sciences* 49. News 24 'The R45bn stokvel industry is evolving into something more than just savings clubs' <https://www.news24.com/fin24/companies/the-r45bn-stokvel-industry-is-evolving-into-something-more-than-just-savings-clubs-20230219> (accessed 29 October 2023). Ngcobo L 'Financial literacy and Stokvels Savings of low-income households in South Africa' *International Journal of Economics and Business Administration* 130. Mkhwanazi N 'Accelerating financial inclusion in South Africa: Are online stokvels the answer?' *Management Review*. (2020) https://www.usb.ac.za/usb_insights/accelerating-financial-inclusion-in-south-africa-are-online-stokvels-the-answer/ (accessed 29 October 2023). Matuku S and Kaseke E 'The role of stokvels in improving people's lives: The case in Orange Farm, Johannesburg, South Africa.' (2014) *Stellenbosch Online* 504.

Response estimated that there were about 550 000 stokvels in South Africa, collectively holding R49,5 billion in capital representing the investments of 11.6 million people.¹⁷⁷

The Act also lists other credit agreements that are excluded from its application. Firstly, debt resulting from a dishonoured cheque that was presented for payment for goods and services, provided the transaction does not involve moneylending.¹⁷⁸ Secondly, the Act excludes debt resulting from a payment that was made through a charge against a credit facility, such as a credit card, where the credit provider is the third party and the charge was refused.¹⁷⁹ Thirdly, it excludes debt arising from the supply of a utility¹⁸⁰ or the provision of a continuous service¹⁸¹ where the supplier defers payment and does not impose any charge on the deferred amount.¹⁸²

Other exclusions relate to the consumer himself. In South African law, every human being is recognised as a person, but not every legal person is a human being. The distinction is best understood with reference to the two classes of persons recognised by the law, namely natural persons and juristic persons.¹⁸³ A natural person is a living, breathing human being. A juristic person is a legal person existing separately from the persons who created it. For example, in the case of a company, the directors (natural

¹⁷⁷ Hutchinson (n 176) 30.

¹⁷⁸ S 4(5)(a) of the NCA. It is submitted that this provision has become redundant, given that South African banks ceased accepting cheques for deposit or encashment after 31 December 2020. <https://www.gov.za/news/media-statements/south-african-reserve-bank-discontinuation-cheques-18-nov-2020> (accessed 17 April 2024).

¹⁷⁹ S 4(5)(b) of the NCA.

¹⁸⁰ Utility is defined in s 1 of the NCA as:

‘The supply to the public of an essential-

(a) commodity, such as electricity, water or gas; or

(b) service, such as waste removal, or access to sewage lines, telecommunication networks or any transportation infrastructure.’

¹⁸¹ Continuous service is defined in s 1 of the NCA as:

‘The supply for consideration of a utility or service, other than credit or access to credit, or the supply of such a utility or service combined with the supply of any goods that are essential for the utilisation of that utility or service by the consumer, with the intent that, so long as the agreement to supply that utility or service remains in force, the supplier will make the service continuously available to be used, accessed or drawn upon –

(a) from time to time as determined by the consumer; and

(b) with any frequency or in any amount as determined, accessed, required, demanded or drawn upon by the consumer, subject only to any total use or cost limits set out in the agreement.’

¹⁸² S 4(6)(b) of the NCA.

¹⁸³ Kleyen D and Viljoen F *Beginner’s Guide for Law Students* (2004) 112-113.

persons) act on behalf of the juristic person (the company).¹⁸⁴ It can therefore be said that the Act always protects natural persons as consumers, but will protect juristic persons as consumers only to a limited extent as set out in section 6 of the Act.

Notably, the term 'juristic person', as defined in section 1 of the Act¹⁸⁵ has a broader application than its meaning under the common law. In essence, the section defines a *juristic person* (own emphasis) to include a partnership, association, or other body of persons – whether corporated or unincorporated – as well as a trust that either has three or more individual trustees *or* (own emphasis) itself a juristic person, but the definition expressly excludes a stokvel.

However, where a consumer qualifies as a juristic person in terms of the Act, certain credit agreements entered by such juristic person are excluded from its application. These include, firstly, a credit agreement where the consumer is a juristic person whose asset value or annual turnover - combined with that of all related juristic persons,¹⁸⁶ - at the time the agreement is made, equals or exceeds one million rand.¹⁸⁷ Secondly, a large credit agreement¹⁸⁸ is excluded where the consumer is a juristic person whose asset value or annual turnover, at the time the agreement is made, is below one million rand.¹⁸⁹

The Act applies to credit agreements in terms of which the consumer is a juristic person only if the consumer's asset value is less than R1 million and the credit agreement entered into qualifies as a small or intermediate agreement.¹⁹⁰ However, even where the Act applies to a juristic person consumer, it has limited application. The provisions

¹⁸⁴ Du Plessis L *An Introduction to Law* (1999) 124.

¹⁸⁵ S 1 of the NCA 'juristic person' includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if-
(a) there are three or more individual trustees; or
(b) the trustee is itself a juristic person,
but does not include a stokvel.

¹⁸⁶ In terms of s 4(2)(d) of the NCA a juristic person is related to another juristic person if-
(i) one of them has direct or indirect control over the whole or part of the business of the other; or
(ii) a person has direct or indirect control over both of them.

¹⁸⁷ S 7(1)(a) of the NCA.

¹⁸⁸ S 9(4) of the NCA describes a large credit agreement as a mortgage agreement or any other agreement except a pawn transaction or a credit guarantee, and the principle debt under that guarantee is above or at R250 000 as established by the threshold in section 7(1)(b).

¹⁸⁹ S 4(1)(b) read with s 7(1)(a) of the NCA.

¹⁹⁰ See para 3.3.3.

of the Act dealing with *over-indebtedness and reckless credit*,¹⁹¹ marketing practices,¹⁹² and the measures in the Act protecting the consumer against the financial implications of credit agreements,¹⁹³ do not apply where the consumer is a juristic person.¹⁹⁴ Other instances where the Act's protection does not apply due to the type of consumers are where the consumer is the state¹⁹⁵ or an organ of state.¹⁹⁶

There are also instances in which the Act's application is excluded due to the identity of the credit provider. In instances where the credit provider is the Reserve Bank of South Africa¹⁹⁷ or where the credit provider is situated outside the Republic and the consumer has successfully applied to the Minister to be exempted from the application of the Act,¹⁹⁸ the Act will not apply.

3.4.1.2 *Credit agreements with limited application in terms of the Act*

In terms of section 5, the Act will have limited application if the credit agreement in question is an incidental credit agreement.¹⁹⁹ A credit provider in terms of an incidental credit agreement is exempt from compliance with the Act's provisions in respect of:

- a. registration as a credit provider;²⁰⁰
- b. record-keeping obligations;²⁰¹
- c. statutory reporting;²⁰²
- d. *reckless credit*;²⁰³
- e. unlawful credit agreements and unlawful provisions in credit agreements;²⁰⁴
- f. pre-agreement disclosure;²⁰⁵

¹⁹¹ S 6(a) of the NCA (own emphasis).

¹⁹² S 6(b) of the NCA.

¹⁹³ S 6(c) of the NCA.

¹⁹⁴ Renke S and Coetzee H 'Can the National Credit Act by Agreement Be Made Applicable to (Excluded) Juristic Persons?' (2014) *Journal of Contemporary Roman-Dutch Law* 571.

¹⁹⁵ S 4(1)(a)(ii) of the NCA.

¹⁹⁶ S 4(1)(a)(iii) of the NCA.

¹⁹⁷ S 4(1)(c) of the NCA.

¹⁹⁸ S 4(1)(d) of the NCA read with reg 2.

¹⁹⁹ See the discussion of incidental credit agreements in para 3.3.1.2.3.

²⁰⁰ S 40 of the NCA.

²⁰¹ S 69(2) of the NCA.

²⁰² Reg 62.

²⁰³ S 80 of the NCA read with s 1 (own emphasis).

²⁰⁴ Ss 89 and 90 of the NCA.

²⁰⁵ S 92 of the NCA.

- g. the form and contents of credit agreements;²⁰⁶
- h. credit marketing practices;²⁰⁷
- i. disclosure of goods;²⁰⁸ and
- j. surrender of goods.²⁰⁹

Furthermore, the Act has limited application in respect of credit guarantees. That is because it applies to a credit guarantee only to the extent that it applies to the primary debt secured by the guarantee.²¹⁰ If the Act does not apply to the credit facility or credit transaction in respect of which the guarantee is granted, it will also not apply to the credit guarantee.²¹¹ Therefore, the Act does not apply to a suretyship granted by a person for the debt of a small juristic person, which concluded a large credit agreement for purposes of the Act.²¹²

Lastly, the Act has limited application in respect of pre-existing credit agreements.²¹³ In terms of item 4(2) of Schedule 3 to the Act, the provisions in Part D of Chapter 4 are applicable to pre-existing credit agreements – credit agreements concluded before 1 June 2007 – only insofar as they do not relate to reckless credit. Van Heerden clarifies that while a natural person who is over-indebted may qualify for debt relief under such an agreement, they cannot invoke the protection provided by the Act against reckless lending. Van Heerden further explains that this exclusion stems from the fact that, before the Act came into effect, credit providers were not legally obliged to conduct affordability assessments prior to entering into credit agreements.²¹⁴

3.5 Conclusion

This chapter laid the foundation for understanding the NCA by tracing its historical development and legislative intent. The analysis positioned the Act within South Africa's socio-economic landscape, with particular emphasis on its relevance to low-

²⁰⁶ S 93 of the NCA.

²⁰⁷ Ss 74 - 77 of the NCA.

²⁰⁸ S 97 of the NCA.

²⁰⁹ S 127 of the NCA.

²¹⁰ S 4(2)(c) of the NCA.

²¹¹ *Firststrand Bank v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) para 18.

²¹² Renke S and Coetzee H (n 193) 571.

²¹³ Schedule 3 Item 1 of the NCA describes a 'pre-existing credit agreement' as an agreement that was made before the effective date, and to which this Act applies.

²¹⁴ Van Heerden in Scholtz *ed* (2024) para 11.1.

income consumers—many of whom have historically been excluded from formal financial systems or subjected to exploitative lending practices. The broader aim of the chapter was to provide the necessary context for the subsequent examination of the Act's provisions on reckless credit and the debt review process introduced as a mechanism of consumer redress since this is essential background knowledge to understand the last-mentioned concepts.

The chapter began by outlining the credit landscape prior to the NCA's promulgation. It was shown that earlier credit legislation, including the Usury Act and the Credit Agreements Act, was limited both in scope and accessibility. These laws typically applied only to certain types of credit or specific goods and services and failed to offer adequate protection against over-indebtedness and reckless lending. Despite the political transformation following the first democratic elections in 1994, the credit market continued to reflect the dual economy of South Africa—one serving the affluent and another excluding or marginalising the poor. This imbalance stood in stark contrast to the democratic values underpinning the new constitutional order and necessitated a comprehensive regulatory overhaul, culminating in the introduction of the NCA.²¹⁵

An analysis of the purpose of the Act reveals a dual mandate. On one hand, the Act aims to broaden access to credit—particularly for historically disadvantaged individuals and communities, including low-income consumers, who are the focus of this thesis. On the other hand, it acknowledges that expanded credit access must be carefully regulated to prevent adverse outcomes such as over-indebtedness and financial exploitation. The Act therefore places equal emphasis on responsible lending practices, striving to balance its developmental objectives with robust consumer protections. These two goals are not mutually exclusive but are pursued in tandem to ensure that increased access to credit does not undermine financial sustainability or consumer wellbeing.²¹⁶

A key area of focus in the chapter was the broad field of application of the Act.²¹⁷ By regulating a wide range of credit agreements, the NCA brings a substantial number of

²¹⁵ Para 3.1.

²¹⁶ Para 3.2.

²¹⁷ Para 3.3.

consumers under the protective umbrella of consumer credit legislation.²¹⁸ This inclusivity represents a marked departure from earlier frameworks and extends important legal protections to consumers who were previously unprotected under the law.

With a focus on low-income consumers, the chapter further examined the role of developmental and public interest credit agreements as mechanisms for advancing financial inclusion. Developmental credit agreements are specifically tailored to promote access to credit for the purposes of education, small business development, and low-income housing. Providers of such credit are required to obtain supplementary registration, and these agreements are subject to unique regulatory requirements regarding marketing, cost structures, and pre-agreement disclosures.²¹⁹

While developmental credit is incentivised through higher permissible interest and initiation fees—intended to compensate for the elevated risk of lending to financially marginalised groups—such agreements are not entirely exempt from the Act’s reckless lending provisions. One notable exception is student loans, which are expressly excluded from the reckless lending provisions. These inconsistencies were addressed through the 2014 amendments to the Act, particularly with the introduction of Regulation 23A, which exempts developmental credit agreements from the affordability assessment regulations.²²⁰ However, research suggests that credit providers often continue to rely on conventional credit histories when evaluating developmental credit applications, thereby undermining the very objective of these legislative provisions—to increase access to credit for those historically excluded from formal financial systems.²²¹

Public interest credit agreements, in contrast, are designed to respond to exceptional circumstances such as natural disasters or national emergencies. These agreements are fully exempt from the reckless lending provisions of the Act. However, as

²¹⁸ Para 3.3.1.

²¹⁹ Para 3.3.2.

²²⁰ The 2014 amendment of the NCA as well as the introduction of the affordability assessment regulations in terms of regulation 23A is discussed in detail in Chapter 4.

²²¹ *Ibid.*

highlighted in this chapter, no such classification of agreements have been declared to date.

The NCA also categorises credit agreements into various types, each subject to distinct disclosure requirements.²²² Disclosure functions as a soft regulatory tool intended to empower consumers to make informed decisions and avoid unmanageable debt.²²³ Scholars such as Stoop, have underscored the significance of enhanced transparency, arguing that pre-agreement disclosures can help consumers assess the affordability and long-term consequences of credit.²²⁴ Nevertheless, this approach presumes a level of financial literacy that is not universally present in South Africa—especially among low-income consumers.²²⁵ For this group, the effectiveness of disclosure as a protective measure is limited, particularly when combined with aggressive marketing tactics that target financially vulnerable individuals.²²⁶

The chapter also outlined that certain credit providers, credit agreement types, and consumer categories fall outside the ambit of the Act.²²⁷ One such example is stokvels, which is described as an informal group savings scheme.²²⁸ Stokvels are deeply embedded in the South African financial landscape, especially among low-income consumers who often lack access to formal banking services. Although stokvels are not regulated under the NCA, they play an essential role in promoting financial inclusion by offering accessible and community-based savings and lending mechanisms. Their reliance on mutual trust and community accountability makes them more approachable than formal credit institutions, especially for individuals who might be excluded due to rigid affordability assessments or lack of formal credit histories.

Importantly, the Act avoids the creation of what Justice Willis, in *FirstRand Bank Ltd t/a First National Bank v Seyffert*,²²⁹ termed a ‘debtor’s paradise’. While the Act is undeniably consumer-focused, it seeks to preserve the viability and competitiveness

²²² Para 3.3.3.

²²³ Stoop (n 43) 365. Stoop describes disclosure as an ‘indirect measure’ to achieve the laudable aims of the Act to prevent over-indebtedness.

²²⁴ Stoop (n 43) 373.

²²⁵ Stoop (n 43) 382.

²²⁶ Stoop (n 43) 366.

²²⁷ Para 3.3.6. Ss 4(1)(a – d); 4(2)(c); 4(5); 4(6) and 8(2) of the NCA.

²²⁸ Para 3.3.6.1.

²²⁹ 2010 (1) SA 143 (GSJ).

of the credit market by maintaining a balance between consumer protection and responsible lending as evidenced by section 3(d). This equilibrium is essential for ensuring the legitimacy and effectiveness of the regulatory framework.

This chapter thus provided a critical foundation for understanding the history, the purpose and the application of the NCA. In doing so, it set the stage for a deeper examination of the Act's mechanisms designed to address reckless lending and over-indebtedness, which will be explored in the next chapter. While the Act significantly expands protection for low-income consumers and broadens access to formal credit, this chapter also revealed some tensions and shortcomings. These include the ongoing reliance of credit providers on credit histories for developmental loans, the limited practical impact of disclosure for financially unsophisticated consumers, as well as the exclusion of informal institutions such as stokvels from the formal consumer credit landscape. The chapter concludes that although the Act is not without flaws, it represents a substantial improvement over its legislative predecessors.

CHAPTER 4: THE CONCEPT OF RECKLESS LENDING AND THE EVOLUTION OF THE AFFORDABILITY ASSESSMENT

4.1 Introduction

4.2 Over-indebtedness and reckless credit under the NCA

4.3 The evolution of the affordability assessment

4.4 Conclusion

4.1 Introduction

As indicated earlier, one of the biggest problems with the credit legislation that preceded the Act, was its failure to protect consumers against over-indebtedness and reckless lending.¹ Due to the significant power imbalance and information asymmetry between credit providers and consumers, coupled with low education levels, insufficiently informed consumers, inadequate disclosure and misleading marketing practices, numerous South African consumers have entered into unaffordable credit agreements, resulting in widespread over-indebtedness and associated social issues.² Given that most consumers in South Africa use some form of credit, government has ensured that the NCA implements measures to prohibit, mitigate and provide redress in respect of reckless lending and to also provide a debt relief mechanism for consumers who, despite the Act's provisions designed to prevent over-indebtedness, still become over-indebted. The Act also addressed the power imbalance between consumers and credit providers by providing for a consistent and accessible system of consensual resolution of disputes arising from credit

¹ Van Heerden CM and Steennot R 'Pre-Agreement Assessment as a Responsible Lending Tool in South-Africa, the EU and Belgium: Part 2' (2018) *PELJ* 1.

² Stoop PN 'South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-Indebtedness' (2009) *South African Mercantile Law Journal* 366.

agreements.³ This research aims to determine whether these measures benefit low-income consumers or whether it presented additional obstacles for this demographic.

In this chapter, the reckless lending provisions in the Act are examined to provide a contextual foundation for the rest of the thesis. Paragraph 4.2 is structured to provide a comprehensive analysis of the provisions in the Act designed to prevent reckless credit. It begins by introducing the concepts of ‘reckless credit’ and ‘over-indebtedness’ which was a new addition to the South African consumer credit framework. The paragraph explains how pre-agreement assessment serves as a filter to rule out reckless lending that can lead to over-indebtedness. It then examines the three scenarios outlined in section 80 where credit extension is deemed reckless and explores how different forms of reckless lending result in varying consequences for consumers. Additionally, paragraph 4.2 addresses the complete defence that can be raised by a credit provider in the event of an allegation of reckless lending. Finally, paragraph 4.2 concludes by highlighting the limited application of the reckless lending provisions in the Act, thereby providing context to further discussions regarding reckless lending.

Paragraph 4.3 of this chapter concerns a key aspect of this research, namely the way in which the credit provider should meet the assessment obligation imposed in terms of the Act. In this part of the research the evolution of the assessment from a tick box exercise to a comprehensive consumer-focused assessment is set out. In this paragraph, Regulation 23A that sets out guidelines for credit providers when assessing whether a consumer can afford the credit that they apply for, is set out and discussed in detail.

By unpacking the provisions in the Act aimed at the prevention of reckless lending and the resolution of over-indebtedness, a foundation for the rest of the thesis will be provided. Against this background any criticism of the value of these provisions for the low-income consumer will be better understood. It will also provide context for recommendations for policy and legislative reform.

³ S 3(h) of the NCA.

4.2 Over-indebtedness and reckless credit under the NCA

‘Over-indebtedness’, just like ‘reckless credit’, were concepts not previously encountered in South African consumer credit legislation. Both concepts were introduced into the South African legislative framework for the first time in Part D⁴ of Chapter 4⁵ of the Act.

Although over-indebtedness is not defined in the definition section⁶ of the Act, section 79(1) provides a definition of the concept. It determines that:

‘[a] consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party ...’

Reckless lending is explicitly prohibited by section 81(3) of the Act. The concept of reckless credit generally refers to a situation where the consumer becomes over-indebted as a result of the granting of credit albeit that consumers can also become over-indebted for other reasons such as loss of employment. Reckless credit can only be raised in relation to credit agreements to which the Act applies.⁷ Section 1 of the NCA defines ‘reckless credit’ as ‘credit granted to a consumer under a credit agreement concluded in circumstances described in section 80’. In turn, section 80 of the Act describes the circumstances in terms whereof a credit agreement to which the Act applies, will be considered reckless. Section 80 describes three scenarios where the extension of credit will be reckless. The determination of whether a credit agreement resorts under one of the three possible instances of reckless credit should be conducted with reference to the time that the agreement is entered into.⁸

To prevent the consumer from becoming over-indebted, the mandatory pre-agreement assessment as described in section 81(2) of the Act should be applied.⁹ Van Heerden

⁴ Part D of the NCA is titled ‘Over-indebtedness and reckless credit’.

⁵ Ch 4 of the NCA is titled ‘Consumer credit policy’.

⁶ S 1 of the NCA.

⁷ In the matter of *Standard Bank of South Africa Ltd v Dankie Beleggings (Pty) Ltd* [2020] ZAGPHC (15 May 2020) par 30 it was confirmed that if the NCA does not apply to a credit agreement, the provisions of the Act relating to reckless credit also do not apply.

⁸ S 80(2) of the NCA.

⁹ S 81(2) of the NCA provides that:

‘A credit provider must not enter into a credit agreement with a consumer without first taking reasonable steps to assess -

and Renke describe pre-agreement assessment as a ‘filter’ to prevent reckless lending, which is one of the root causes of consumer over-indebtedness.¹⁰ From the discussion of the instances of reckless lending below, the application of the pre-agreement assessment as a filter to prevent over-indebtedness will be clear.

4.2.1 Instances of reckless credit

As mentioned, section 80 of the Act describes the circumstances in terms whereof a credit agreement to which the Act applies, will be considered reckless. From the wording of this section, one can deduce three possible instances of reckless lending provided for by the Act.¹¹

The first instance is when, at the time the credit agreement was entered into, or at the time when the amount approved in terms of the agreement is increased, other than an increase of a credit limit in terms of section 119(4),¹² the credit provider failed to carry out the pre-agreement assessment as required by section 81(2), *irrespective* of what the outcome of such an assessment might have been at the time.¹³ Thus, failure to conduct the pre-agreement assessment will render the credit agreement under consideration *per se* reckless, irrespective of the outcome of the assessment.¹⁴

(a) the proposed consumer's-

- (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
- (ii) debt repayment history as a consumer under credit agreements;
- (iii) existing financial means, prospects and obligations; and
- (iv) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

¹⁰ Van Heerden CM and Renke S ‘Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice’ (2015) *International Insolvency Review* (21).

¹¹ Section 88(4) of the NCA makes provision for a further instance of reckless credit that is not provided for in section 80. This type of reckless lending occurs when the credit provider enters into a credit agreement with a consumer who is subject to a debt re-arrangement order in terms whereof a clearance certificate was not yet issued.

¹² S 119(4) of the NCA refers to the position where the consumer, at the time of applying for the credit, requested the option of having the credit limit automatically increased from time to time.

¹³ S 80(1)(a) of the NCA (own emphasis). See *ABSA Bank v COE Family Trust and Others* 2012 (3) SA 184 (WCC) and *De Paul Albert and Another v Standard Bank of South Africa Ltd* [2015] ZAGPPHC 727 (11 September 2015) para 4.

¹⁴ Van Heerden in Scholtz *ed* (2024) para 11.6.2. See also Boraine A and Van Heerden C ‘Some Observations Regarding Reckless Credit in terms of the National Credit Act 34 of 2005’ (2010) JCRL 650.

The second instance of reckless credit occurs when the credit provider carried out an assessment as is required by section 81(2) and then proceeds to enter into a credit agreement with the consumer notwithstanding the fact that the preponderance of information available to the credit provider indicates that the consumer does not generally understand or appreciate the risks, costs and obligations under the proposed credit agreement.¹⁵ With this type of reckless lending, the credit provider conducted the required assessment of the consumer's ability to afford the credit, but failed to advise the consumer about the financial implications of the credit agreement.¹⁶ This type of reckless lending can also occur when, despite the credit provider's best efforts to advise the consumer, the latter still lacked an understanding or appreciation of his or her risks, costs or obligations under the proposed credit agreement. In this instance, the credit provider's disregard of the consumer's ignorance results in the credit being granted recklessly.¹⁷

The third and last instance of reckless credit occurs where the credit provider carried out the assessment as is required by section 81(2) and then proceeds to enter into a credit agreement with the consumer, resulting in the consumer becoming over-indebted.¹⁸ The credit agreement will be reckless, because it caused the consumer, who was not over-indebted when he applied for the credit, to become over-indebted as a result of entering into that particular credit agreement.¹⁹

4.2.2 The consequences of reckless lending

Before credit extended under the circumstances discussed in paragraph 2 can be considered as 'reckless', it must be declared as such by a court or the Tribunal.²⁰ As

¹⁵ S 80(1)(b)(i) of the NCA.

¹⁶ Van Heerden in Scholtz *ed* (2024) para 11.6.2. See also *ABSA Ltd v Kganakga* [2016] ZAGPJHC 59 (18 March 2016).

¹⁷ Van Heerden in Scholtz *ed* (2024) para 11.6.2.

¹⁸ S 80(1)(b)(ii) of the NCA. See *Dormell Properties 521 (Pty) Ltd v Ellis* [2016] ZAGPPHC 226 (23 March 2016) where credit was extended to a consumer who could not repay a previous loan made by the same credit provider and where the court referred to the matter as a 'classic case of reckless lending'. In *National Credit Regulator v A-Z Micro Loans CC* [2018] ZANCT 3 (28 February 2018) various credit loans were extended to a consumer who was under debt review and the Tribunal remarked at par 25 that: 'The Respondent literally plunged Manyosi into a situation where he had become a habitual borrower who got trapped in a debt web.' Also see Van Heerden in Scholtz *ed* (2024) para 11.6.2.

¹⁹ Van Heerden in Scholtz *ed* (2024) para 11.6.2

²⁰ S 83(1) of the NCA.

mentioned,²¹ initially only the courts had this power but since the 2014 amendment of the Act,²² the Tribunal shares the exact same powers provided for in section 83.²³ Notably the Tribunal actually possesses not only the civil powers mentioned in section 83 in relation to reckless credit, but it can also cancel a credit provider's registration and impose an administrative fine.²⁴

If the court or Tribunal, whether based on a claim, a defence, a complaint or *suo moto*, finds that the credit was extended recklessly, as described in section 80 (1)(a)²⁵ or in terms of 80 (1)(b)(i),²⁶ it may, if deemed just and reasonable in the circumstances, issue an order setting aside all or part of the consumer's rights and obligations under the credit agreement.²⁷ Alternatively, the court or Tribunal may suspend the force and effect of the credit agreement in terms of subsection (3)(b)(i) read with section 84 of the Act that sets out the effect of such suspension.²⁸

The Act is however silent on specifically how the court or Tribunal should go about deciding whether all or part of the consumer's rights and obligations should be set aside. Boraïne and Van Heerden submit that where performance in terms of the contract has not yet occurred, a ruling by the court or Tribunal that the consumer has no further rights and obligations may be 'just and reasonable in the circumstances'.²⁹ However, where one or both of the parties have already performed, the question of restoration arises. Boraïne and Van Heerden submit that when setting aside a credit agreement in respect of which credit was extended recklessly, the credit provider will be entitled to restoration of his security, for instance on the basis of unjustified enrichment.³⁰

²¹ See Chapter 1 para 1.1.

²² National Credit Amendment Act 19 of 2014 (hereinafter referred to as 'the 2014 NCAA').

²³ Ss 83(2) and 83(3).

²⁴ Ss 83(2), 83(3), 150 and 151.

²⁵ No credit assessment was done.

²⁶ A credit assessment was done, but the consumer did not understand the risks, costs and obligations under the agreement.

²⁷ S 83(2)(a) of the NCA.

²⁸ S 83(2)(b) of the NCA.

²⁹ Boraïne and Van Heerden (n 14) 652.

³⁰ Boraïne and Van Heerden (n 14) 654. See also Van Heerden in Scholtz *ed* (2024) para 11.6.7.1.

However, in contrast with its lack of guidance on the setting aside of a reckless credit agreement, the Act contains detailed provisions, in section 84, on the effect of the suspension of a credit agreement. Section 84(1) provides that during the period that the force and effect of a credit agreement are suspended in terms of the Act,

- 'a) the consumer is not required to make any payment required under the agreement;
- b) no interest, fee or other charge under the agreement may be charged to the consumer; and
- c) the credit provider's rights under the agreement or under any law in respect of that agreement, are unenforceable, despite any law to the contrary.'

If a credit agreement is declared reckless in terms of section 80(1)(b)(ii),³¹ the court or Tribunal:

- 'a) must further consider whether the consumer is over-indebted at the time of those proceedings;³² and
- b) if the court or Tribunal, as the case may be, concludes that the consumer is over-indebted, the said court or Tribunal may make an order³³ –
 - (i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension;³⁴ and
 - (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.³⁵

Before making such an order, the court or Tribunal must consider 'the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made' as well as 'the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order'.³⁶

An order for credit agreement debt³⁷ restructuring can be made in terms of section 86(7)(c)(ii) and allows the court to re-arrange the consumer's obligations as follows:

- '(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
- (bb) postponing during a specified period the dates on which payments are due under the agreement;

³¹ The credit provider, having conducted the assessment required by s 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that entering into the agreement would make the consumer over-indebted.

³² S 83(3)(a) of the NCA.

³³ S 83(3)(b) of the NCA.

³⁴ S 83(3)(b)(i) of the NCA.

³⁵ S 83(3)(b)(ii) of the NCA.

³⁶ S 83(4) of the NCA.

³⁷ Only debt to which the Act applies can be restructured. See para 4.2 fn 7.

- (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
- (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.'

It must be noted that section 86(7)(c) only relates to applications to Magistrate's Courts established in terms of the Magistrates' Courts Act, not to applications to the Tribunal.³⁸ It is clear that the circumstances under which the reckless lending occurred will determine the type of order made by the court or Tribunal.

4.2.3 The credit provider's complete defence to an allegation of reckless lending by a consumer

The Act also aims to encourage consumers to use credit responsibly.³⁹ The Act provides that when a consumer applies for credit, he must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required in terms of section 81(2).⁴⁰

Because consumers are not always honest about their financial position when applying for credit, it was necessary to include measures to prevent the abuse of the defence of reckless lending into the Act.⁴¹ Section 81(4) therefore provides that if the consumer alleges that credit was granted recklessly and the credit provider can prove that the consumer failed to provide true and complete information to enable the credit provider to do its assessment in terms of section 81 *and* (own emphasis) it can be proved that the consumer's failure to disclose the information materially affected and influenced the ability of the credit provider to conduct a proper and accurate assessment, it will be a complete defence to an allegation of reckless lending by the consumer.⁴² This defence is only available to credit providers if they are able to prove that both requirements in terms of section 81(4) of the Act have been met.⁴³ Due to the Act not defining the meaning or scope of the word 'materially', it is submitted that

³⁸ *NCR v SA Alexanderson* [2019] ZANCT 75 para 25.

³⁹ Preamble to the NCA.

⁴⁰ S 81(1) of the NCA. This provision was confirmed in regulation 23A(6) and (7) when the Act was amendment to provide for affordability assessment regulations.

⁴¹ S 81(4) of the NCA.

⁴² *Horwood v Firststrand Bank Ltd* 2011 ZAGPJHC 121 (21 September 2011) para 6.

⁴³ *Horwood* (n 42) para 7.

the facts and the extent of the consumer's untruthfulness should be assessed and considered on a case to case basis.⁴⁴

In *Molefe v Firstrand Bank Ltd* the court rejected the consumer's allegation of reckless credit determining that she deliberately provided misleading information regarding debt re-arrangement to influence the credit provider's decision to grant the credit and upheld the credit provider's section 81(4) defence.⁴⁵

In *Mahomed v Standard Bank of South Africa Ltd and Another* the consumer was a 62-year-old self-employed entrepreneur who did not disclose in his loan application his intention to retire at the age of 65. The court held that his non-disclosure was material and that it afforded the credit provider a complete defence against reckless credit as contemplated in section 81(4) when he later sought to base his allegation of reckless credit extension on his alleged retirement at the age of 65.⁴⁶

4.2.4 Limited application of the reckless lending provisions in the NCA

The limited application of the reckless lending provisions in the Act corresponds with the aim of the Act to protect vulnerable consumers by ensuring access to credit in a well-regulated credit environment where the playing field between the consumer and credit provider is more even.⁴⁷ Also in line with the Act's objective of extending its generous protection to the most vulnerable, Part D of Chapter 4 does not apply to a credit agreement in terms whereof the consumer is a juristic person.⁴⁸ This means that only natural persons enjoy the protection of the reckless credit and over-indebtedness provisions in the Act. The exclusion of juristic persons from the protective scope of the Act was constitutionally challenged in the matter of *Standard Bank of South Africa Ltd v Hunkydory Investments 196 (Pty) Ltd*⁴⁹ and *Standard Bank of South Africa v Hunkydory Investments 188 (Pty) Ltd*.⁵⁰ The challenge was based on the argument that the distinction drawn in the Act between juristic and natural persons – resulting in

⁴⁴ *Horwood* (n 42) para 15.

⁴⁵ [2018] ZAGPJHC 556 (11 October 2018). See also Van Heerden in Scholtz *ed* (2024) para 11.6.5.

⁴⁶ [2019] ZAGPPHC 241 (26 June 2019) See also Van Heerden in Scholtz *ed* (2024) para par 19.

⁴⁷ S 3(d) and (e) of the NCA. See also the discussion in Ch 2 para 2.2.

⁴⁸ S 78(1) of the NCA.

⁴⁹ 2010 (1) SA 634 (WCC).

⁵⁰ 2010 (1) SA 627 (C).

certain juristic persons being denied protection – constitutes a violation of their constitutional right to equality. Both the Supreme Court of Appeal and the Constitutional Court dismissed the application for leave to appeal, concluding that the matter lacked reasonable prospects of success.⁵¹

Although the Act actively promotes responsible lending the legislature realised there was also need to exempt certain agreements from the onerous reckless lending provisions in the Act. Section 78(2) provides that the reckless credit provisions in the Act do not apply to the following credit agreements:

- 'a) a school loan⁵² or student loan;⁵³
- b) an emergency loan;⁵⁴
- c) a public interest credit agreement;⁵⁵
- d) a pawn transaction;⁵⁶

⁵¹ Van Zyl in Scholtz *ed* (2024) para 4.3.

⁵² S 1 of the NCA 'school loan' is defined as: a credit agreement in terms of which-

- (a) money is paid to a primary or secondary school on account of school fees or related costs for the benefit of the consumer's child or other dependant; or
- (b) a primary or secondary school defers payment of all or part of the school fees or related costs for the consumer's child or other dependant.

⁵³ S 1 of the NCA defines 'student loan' as a credit agreement in terms of which –

- (a) money is paid by the credit provider to an institution of tertiary education on account of education fees or related costs for the benefit of the consumer or a dependant of the consumer; or
- (b) an institution of tertiary education defers payment of all or part of the consumer's education fees or related costs.

⁵⁴ S 1 of the NCA 'emergency loan' is defined as a credit agreement entered into by a consumer to finance costs arising from or associated with –

- (a) a death, illness or medical condition;
- (b) unexpected loss or interruption of income; or
- (c) catastrophic loss of or damage to home or property due to fire, theft, or natural disaster, affecting the consumer, a person who is dependent upon the consumer or a person for whom the consumer is financially responsible.'

⁵⁵ S 1 of the NCA 'public interest credit agreement' is defined as a credit agreement that meets all the criteria prescribed in terms of section 11, and which is therefore exempt from the application of provisions of this Act concerning reckless credit'.

⁵⁶ S 1 of the NCA 'pawn transaction' is defined as an agreement, irrespective of its form, in terms of which –

- (a) one party advances money or grants credit to another, and at the time of doing so, takes possession of goods as security for the money advanced or credit granted; and
- (b) either -
 - (i) the estimated resale value of the goods exceeds the value of the money provided or the credit granted; or
 - (ii) a charge, fee or interest is imposed in respect of the agreement, or in respect of the amount loaned or the credit granted; and
- (c) the party that advanced the money or granted the credit is entitled on expiry of a defined period to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement'. Also see the matter of *National Credit Regulator v The Loan Company* NCT/140518/2019/140(1) [2021] ZANCT 24 (21 July 2021) where the Tribunal confirmed that the credit provider who extended loans by means of pawn agreements where it took movable property as security for the credit, did not need to conduct a pre-agreement affordability assessment.

- e) an incidental credit agreement;⁵⁷ and
- f) a temporary increase in the credit limit under a credit facility.⁵⁸

As pointed out by Van Heerden, is important to note that this exclusion applies to reckless credit only and *not* (own emphasis) to over-indebtedness.⁵⁹ Consequently, a pre-agreement assessment will not be conducted in relation to such credit agreements. There is, however, a condition to certain of these exclusions. Section 78(2) provides that the reckless credit provisions do not apply to the specified credit agreements provided that any credit extended in terms of a school loan or student loan, or in terms of an emergency loan or public interest credit agreement is reported to the national credit register in the prescribed manner and form, and that, in respect of any credit extended in terms of an emergency loan, reasonable proof of the existence of the emergency as defined in section 1 is obtained and retained by the credit provider.⁶⁰ The Act does not specify who must report this. Vessio submits, however, that it is likely that the onus will be on the credit provider given that it will be the credit provider which is otherwise at risk of lending recklessly.⁶¹ In May 2020 the Regulator issued guidelines on what constitutes reasonable proof of the existence of an emergency.⁶²

⁵⁷ S 1 of the NCA 'incidental credit agreement' means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

- (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or
- (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.'

⁵⁸ S 119(2) of the NCA: An increase in the credit limit under a credit facility is temporary if –

- (a) 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; or
- (b) the credit provider agrees to raise the credit limit in response to a request from the consumer in order to accommodate a particular transaction, on condition that the preceding credit limit will again apply within a specified period, or after a specified occurrence has taken place.

⁵⁹ Van Heerden in Scholtz *ed* (2024) para 11.4, See also Van Heerden and Borraine 'The Money or the Box: Perspective on Reckless Credit in terms of the National Credit Act 34 of 2005 (2011) *De Jure* 396; Otto and Otto *The National Credit Act Explained* (2013) 77 – 79, Stoop and Kelly-Louw 'The National Credit Act Regarding Suretyships and Reckless Lending' (2011) *Potchefstroom Electronic Law Journal* 67/86; Renke 'Measures in South African Consumer Credit Legislation Aimed at the Prevention of Reckless Lending and Over-Indebtedness: An Overview Against the Background of Recent Developments in the European Union' (2011) *JCRL* 208.

⁶⁰ Van Heerden and Borraine (n 59) 396.

⁶¹ Vessio ML 'Beware the provider of reckless credit' (2009) *JCRL* 278.

⁶² National Credit Regulator *Circular 05 of 2020 Guideline on what constitutes the reasonable proof of the existence of an emergency, for purposes of an emergency loan as defined in section 1 read with section 78(2) and regulation 23 of the National Credit Act 34 of 2005*.

Further, the provisions of Part D of Chapter 4 do not apply to a consumer who applies for or enters into a credit agreement contrary to the provisions of section 88.⁶³ This limitation pertains to consumers who enters into new credit agreements, while they are still under debt review.

4.3 The evolution of the affordability assessment

4.3.1 Affordability assessment prior to 2014

When the Act was introduced in 2007, there was no uniformity in the way affordability assessments were undertaken by credit providers, because no standard format for assessment was prescribed.⁶⁴ Section 82(1) allowed credit providers to determine for themselves the evaluative mechanisms or models and procedures to be used in meeting their assessment obligations under section 81. The only provision was that the evaluative mechanisms or models and procedures used when doing the assessment ‘must result in a fair and objective assessment’.⁶⁵

The Act allowed the Regulator to pre-approve the criteria to be used when credit providers assessed credit applications and also authorised the Regulator to publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81.⁶⁶

⁶³ S 88(5) of the NCA.

⁶⁴ Kawadza H ‘Remarks on lending reforms ushered in by regulation 23A of the Affordability Assessment Regulations’ (2018) *De Jure* 11.

⁶⁵ Before s 82(1) was amended by the 2014 NCAA it read as follows:

- (1) Subject to subsections (2)(a) and (3), a credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, *provided that any such mechanism, model or procedure results in a fair and objective assessment* (own emphasis).
- (2) The National Credit Regulator may-
 - (a) pre-approve the evaluative mechanisms, models and procedures to be used in terms of section 81 in respect of proposed developmental credit agreements; and
 - (b) publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81, applicable to other credit agreements.

⁶⁶ Before s 82(2) was amended by the 2014 NCAA it read as follows:

- (2) The National Credit Regulator may-
 - (a) pre-approve the evaluative mechanisms, models and procedures to be used in terms of section 81 in respect of proposed developmental credit agreements; and
 - (b) publish guidelines proposing evaluative mechanisms, models and procedures to be used in terms of section 81, applicable to other credit agreements.

However, these guidelines were not binding on credit providers and no guidelines were issued nor was pre-approval done by the Regulator, even though the Act permitted it.⁶⁷ As a result, the Act thus allowed credit providers to determine their own evaluative mechanisms and models in meeting their assessment obligations under the Act. As no specific set of 'rules' existed for assessing the affordability of a consumer, credit providers still complied with the statutory obligation even if they conducted a relatively superficial assessment of the consumer's financial situation.

The lack of detail relating to how the affordability of the consumers should be determined, made it difficult for consumers to prove allegations of reckless lending. The 'Drive a new car for R699 a month' deal offered by the Satinsky group of companies to South African consumers illustrates this.⁶⁸ In this matter, the Satinsky group offered a deal to prospective car owners to own a new car.⁶⁹ The arrangement involved two agreements. The first was with a credit provider who would fully finance the transaction and who would receive payment in monthly instalments. The second agreement was with a Hong Kong based entity, and provided that the new car owner would receive a monthly payment for using the car's back window as a moving billboard. The scheme worked well, until the Hong Kong based entity suddenly unilaterally cancelled payment for the advertising. This resulted in many of the car owners falling in arrears with their monthly instalments, because they no longer received the income from the advertising company and could no longer afford the instalments. The credit providers eventually proceeded with legal action against the defaulting consumers.

⁶⁷ Before s 82(3) was amended by the 2014 NCAA it read as follows:

(3) Subject to subsections (2)(a) and (4), a guideline published by the National Credit Regulator is not binding on a credit provider.

⁶⁸ Chapter 1 para 1.1.

⁶⁹ See *Businesstech* 'The inside story of the R699 car scheme' <https://businesstech.co.za/news/trending/62203/the-inside-story-of-the-r699-car-scheme/> (accessed 6 March 2020). *Legalbrief* 'Wheels come off for 'R699-a-month' car deal victims' <https://legalbrief.co.za/diary/legalbrief-forensic/story/wheels-come-off-for-r699-a-month-car-deal-victims/print/> (accessed 6 March 2020). News 24 'Wheels come off on 'Drive a new car for R699' <https://www.news24.com/fin24/wheels-come-off-on-drive-a-new-car-for-r699-20140703> (accessed 6 March 2020). *BusinessDay* 'End of the road for 'drive a new car for R699 a month' deal' <https://www.businesslive.co.za/bd/companies/2014-07-04-end-of-the-road-for-drive-a-new-car-for-r699-a-month-deal/> (accessed 6 March 2020). *Fin 24* 'R699' car drivers moving forward' <https://www.fin24.com/Companies/Advertising/R699-car-drivers-moving-forward-20140713> (accessed on 10 January 2021). *Independent online* 'R699' car deal owners in despair' <https://www.iol.co.za/motoring/industry-news/r699-car-deal-owners-in-despair-1707476> (accessed on 10 January 2021).

The Regulator received complaints from various consumers alleging reckless lending and unlawful credit granting against one of the credit providers in particular.⁷⁰ After the complaints were investigated it was found that the credit provider granted the credit in contravention of sections 80(1)(b)(ii), 81(2) and 81(3) of the Act. The credit was therefore granted recklessly and led to the over-indebtedness of the consumers in question.⁷¹ The credit provider however denied the allegations and the matter was referred to the Tribunal for resolution.⁷² From the evidence led at the hearing, it was clear that there was a fundamental disconnect between the manner in which the Regulator and the credit provider approached the assessment in terms of section 81(2).⁷³ The major difference between the methodologies applied by the respective parties related to the use of bank statements to verify the expenses of the consumer.⁷⁴

The Regulator argued that the utilisation of the consumers' bank statements was essential when calculating the consumer's affordability and that the credit provider's failure to do so amounted to reckless credit granting.⁷⁵ It contended that the credit provider could not obtain an accurate picture of the consumer's affordability by basing the surplus available on the gross income and expenditure disclosed by the consumer himself. To add to this, some consumers consistently used their overdraft facilities to their maximum, which may be an indication of over-indebtedness.⁷⁶ The Regulator was further of the opinion that by perusing the bank statements of the consumer, a more realistic picture of the consumer's affordability would have ensued, because debit orders and service fees are indicated on the statements.⁷⁷

The credit provider in turn argued that it was entitled to rely on declarations by consumers of their expenses in terms of section 81(1) and (4) of the Act.⁷⁸ Despite it being impractical to assess consumers' expenses from their bank statements due to the high volumes of applications it receives, there was no requirement in the Act that

⁷⁰ *National Credit Regulator v Standard Bank of South Africa Limited* (NCT/29041/2015/140(1) NCA) [2017] ZANCT 118 para 6.

⁷¹ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 8.

⁷² *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 10.

⁷³ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 10.

⁷⁴ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 10.

⁷⁵ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 94.

⁷⁶ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 95.

⁷⁷ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 88.

⁷⁸ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 93.

consumers should provide their bank statements when they apply for credit.⁷⁹ The bank based its argument on the provisions of section 81(2)(a):

'A credit provider must not enter into a credit agreement without first taking reasonable steps to assess.....the proposed consumer's—

- (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
- (ii) debt repayment history as a consumer under credit agreements;(and)
- (iii) existing financial means, prospects and obligations; ...'

As the above requirements were met according to the evidence before court,⁸⁰ the Tribunal was unable to make a finding of reckless lending.⁸¹

From the above, it is clear that a lack of specific requirements, other than the broad guidelines laid down by section 81(2), made superficial compliance with the Act attainable and thus did not prevent credit providers from extending credit to consumers who could not afford it.

The assistance of the courts was sought to provide direction on when it can be said that proper assessment, for purposes of section 81, have been conducted. Ever conscious of the Act's purpose to provide access to credit,⁸² the courts were reluctant to be overly prescriptive as can be seen from the case law discussed below.

In the matter of *Horwoord v Firststrand Bank Ltd*,⁸³ the court held that a determination of whether a credit provider has taken the required steps to meet its assessment obligation in terms of section 81 should be determined objectively, by the facts and circumstances of any given case. In the matter of *SA Taxi Securitisation v Mbata*,⁸⁴ the court held that being too strict when evaluating reckless credit and imposing too heavy penalties on credit providers who provided credit recklessly, will have a diverse effect on access to credit for low-income consumers.

⁷⁹ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 100.

⁸⁰ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 107.

⁸¹ *National Credit Regulator v Standard Bank of South Africa Limited* (n 70) para 110.

⁸² S 3 of the NCA. See also Van Heerden and Renke (n 10) 67.

⁸³ 2011 ZAGPJHC 121 (21 September 2011).

⁸⁴ 2011 (1) SA 310 (GSJ) 36.

In the matter of *Absa Bank v Trustees for the time being of the Coe Family Trust*,⁸⁵ summons was issued after the consumers defaulted on a mortgage agreement. The consumers raised a defence of reckless credit on the premise that the credit provider did not conduct an assessment, as required in terms of the Act. It was submitted on behalf of the credit provider that the mortgage agreement contained provisions stating that the consumers understood the risks, costs, rights and obligations in terms of the agreement as well as a provision in terms whereof the consumers declared that entering into the agreement would not cause them to become over-indebted. Further, the credit provider argued that, because the consumers failed to fully and truthfully answer requests for information made by the credit provider, the consumers could not raise a defence of reckless credit. The court acknowledged the complete defence available to a credit provider on an allegation of reckless lending in terms of section 81(4), but held that this defence *only applies*⁸⁶ if the credit provider actually conducted an assessment in the first place. The court held that there was no evidence before it that the credit provider assessed the debt repayment history or the existing financial means, prospects and obligations of the consumers. Because there was no real assessment, the court held that the defence in terms of section 81(4) was not available to the credit provider.⁸⁷ Unfortunately, the court did not provide further guidance on how the assessment had to be conducted.

4.3.2 The effect of the affordability assessment on low-income consumers

One of the main reasons for the introduction of the Act, was to give lower income groups, the rural population and those who had been excluded from equal rights during the apartheid era, access to credit. Unsecured credit became popular as a consequence of exactly this legal reform, which was implemented to remedy the exclusion of large parts of the South African citizenship from lending services in the first place.⁸⁸ Unsecured credit can be described as a loan which has no collateral mechanism, which means that the borrower does not need to provide any tangible guarantee to satisfy the debt in the event of non-payment.⁸⁹ Low-income consumers

⁸⁵ 2012 (3) SA 184 (WCC).

⁸⁶ S 81(4) of the NCA (own emphasis).

⁸⁷ *ABSA v COE* (n 84) 18.

⁸⁸ Schraton J 'The transformation of the South African credit market' (2014) *Transformation* 1.

⁸⁹ Ellyne MJ and Jourdan BM 'Did the NCA of 2005 facilitate a credit boom and bust in SA?' (Paper presented at the African Finance Journal Conference, May 2015, Cape Town, South Africa. See

who do not qualify for secured credit due to a lack of collateral or good credit history, normally make use of unsecured lending financial products.⁹⁰ Because unsecured credit agreements requires no collateral in terms whereof an asset is used to secure the value of the loan in instances where the consumer defaults, credit providers compensate for the heightened risk by increasing interest rates and fees on such loans. The NCA regulates the costs that may be charged by credit providers in relation to credit agreements.⁹¹ Compared to other types of credit, the costs of unsecured credit are high.

Despite this, the market for unsecured credit products increased rapidly after the inception of the NCA. The unifying theme within the marketing of these products was that it enables one to 'get ahead' in life or overcome an apparent urgent financial need (so-called 'emergency loans'⁹²).⁹³ This marketing strategy proved to be effective. According to data published by the Regulator, quarterly values of unsecured and short-term credit extended to consumers grew by 260% to a peak of R28,3bn between 2008 and 2012. In 2014 the Regulator reported growth in unsecured lending from 40 billion in 2008 to a staggering 172 billion in 2014.⁹⁴

The expansion of the credit industry however came at a cost. In June 2013 the level of household indebtedness in South Africa has risen to 76 percent of disposable

also Did the National Credit Act of 2005 Facilitate a Credit Boom and Bust In South Africa? <https://catalog.ihnsn.org/index.php/citations/59037> (accessed 16 April 2020).

⁹⁰ Differential Capital 'Unsecured lending has consumers sliding towards financial ruin - how do we reverse course?' August 2019 https://docs.wixstatic.com/ugd/590fa5_23827be6c9bf472d976af4512578e11a.pdf (accessed 11 August 2021).

⁹¹ Ss 101 – 106 and regs 42 – 48 of the NCA.

⁹² S1 of the Act defines an 'emergency loan' as follows:

'a credit agreement entered into by a consumer to finance costs arising from or associated with –

- (a) a death, illness or medical condition;
- (b) unexpected loss or interruption of income; or
- (c) catastrophic loss of or damage to home or property due to fire, theft, or natural disaster, affecting the consumer, a person who is dependent upon the consumer or a person for whom the consumer is financially responsible;

⁹³ Differential Capital (n 90) 8.

⁹⁴ See also NCR 'Consumer credit market report, fourth quarter 2014' <http://www.ncr.org.za/press-release/CCMR.pdf> (accessed 16 April 2020); NCR Press release 'Strong growth in unsecured personal loans' <http://www.ncr.org.za/press-release/Strong%20growth%20in%20unsecured%20personal%20loans>. (accessed 16 April 2020); NCR Report 'Research on the increase of unsecured personal loans in South Africa's credit market'. <http://www.ncr.org.za/Annual%20Report/UPL%2047> (accessed 16 April 2020).

income compared to 50 percent in 2003.⁹⁵ The economic slowdown after the 2008 Global Financial Crisis⁹⁶ resulted in many households falling into arrears and/or defaulting or deleveraging.⁹⁷ The number of customers in arrears for more than three months or more was 4.2 million out of 20 million credit-active customers at the end of 2013.⁹⁸ Considering that at least 40 percent of the monthly income of SA workers were directed towards the repayment of debt, the load on consumers was very high.⁹⁹

Regrettably, South African debt relief measures failed to provide relief to the ever-increasing percentage of over-indebted low-income consumers. Prior to the NCA, over-indebted consumers had only two statutory debt relief remedies at their disposal, namely sequestration under the Insolvency Act 32 of 1936, and administration orders under section 74 of the Magistrates' Courts Act 32 of 1944.¹⁰⁰ The NCA introduced debt review as a further statutory debt relief remedy.¹⁰¹ All these remedies however have shortcomings preventing them to provide a viable debt relief option for over-indebted consumers resorting under the low-income or no income category of debtors.¹⁰² Without proper debt relief remedies, debt enforcement mechanisms, such as emoluments attachment orders,¹⁰³ which are notorious for its abuse and exploitation of especially low-income consumers,¹⁰⁴ continued unhindered. The abuse of EAO's, also known as 'garnishee orders', were first uncovered in a report by the University of Pretoria Law Clinic in 2008.¹⁰⁵ In 2013, the writer hereof conducted follow

⁹⁵ Department of Trade and Industry 'Government moves to protect consumers and assist over-indebted households' http://www.treasury.gov.za/comm_media/press/2013/20131212%20-%20Household%20overindebtedness.pdf (accessed 4 November 2018).

⁹⁶ Mishkin F 'Over the Cliff: From the Subprime to the Global Financial Crisis' (2011) *Journal of Economic Perspectives* 49-70.

⁹⁷ Department of Trade and Industry 'Government moves to protect consumers and assist over-indebted households' (n 95) 2.

⁹⁸ *Ibid.*

⁹⁹ *Moneyweb* 'Financially illiterate miners' debt shocker' <https://www.moneyweb.co.za/archive/financially-illiterate-miners-debt-shocker-fraud-a/> (accessed 12 February 2020).

¹⁰⁰ Borraine A Van Heerden CM and Roestoff M 'A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform Part 2' (2012) *De Jure* 254.

¹⁰¹ *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* 2011 (2) SA 266 (SCA) at 272D.

¹⁰² *Ibid.*

¹⁰³ Hereinafter referred to as 'EAO's'.

¹⁰⁴ Coetzee H and Van Sittert C 'Reflections on recent developments regarding wage garnishments in South Africa' (2018) *International Journal of Private Law* 107.

¹⁰⁵ Haupt F et al 'The incidence of an the undesirable practices relating to garnishee orders in South Africa' (2008) <https://www.up.ac.za/media/shared/165/garnishee-orders-study-report-erratum-7-december-2022.zp234295.pdf> (accessed 12 February 2020).

up research into the abuses surrounding this debt collection method.¹⁰⁶ The research highlighted the prevalence of reckless lending to consumers who had EAO's issued against their salaries.¹⁰⁷ The research team found that credit providers were granting credit or entering into new credit agreements with consumers who could clearly not afford the credit.¹⁰⁸ The presence of stable employment for these consumers provided a sense of security for credit providers, as it facilitated their ability to obtain an EAO to recover any outstanding judgment debt in the event of default.¹⁰⁹ The devastating effects of the vicious debt spiral created as a result, are illustrated by the tragic events of the 'Marikana massacre' that took place in 2012.

Lonmin platinum mine near Marikana, with its large pool of workers, created a fertile breeding ground for microlenders and banks willing to offer unsecured loans to these consumers. Similar to the situation reported on by the Law Clinic, many of the lenders failed to conduct thorough pre-agreement assessments to ascertain affordability. In some cases, even borrowers who had a history of default and who were defaulting on existing debt, have been provided with new unsecured credit facilities. The lenders granted the credit because the consumers' secure employment at the mine enabled them to ensure repayment of the debt through EAO's. This created fertile ground for unscrupulous debt collectors and attorneys to prey on the over-indebted mineworkers and push them into a debt spiral where lenders incurred further debt to try to escape their woes. Because the mineworkers were receiving very little in wages at the end of the month, they struggled to make ends meet and insisted that their wages be increased. After the mine management refused to give in to their commands, they embarked on a violent strike. The strike left 40 mineworkers killed.¹¹⁰

¹⁰⁶ Van Sittert C and Haupt F 'The Incidence of and Undesirable Practices relating to Garnishee Orders – a follow up report' (2013) <https://www.adraonline.co.za/file/5e0b80159406fe9270c9415d60db0d64/2013-garnishee-orders-follow-up-report.pdf> (accessed 12 February 2020).

¹⁰⁷ *Idem* 56.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Mail and Guardian* Marikana Miners in debt sinkhole <https://mg.co.za/article/2012-09-07-00-marikana-miners-in-debt-sinkhole/> (accessed 12 February 2020); *Daily Maverick* Marikana the debt hole that fuelled the fire <https://www.dailymaverick.co.za/article/2012-10-12-marikana-the-debt-hole-that-fuelled-the-fire/> (accessed 12 February 2020); *Moneyweb* Financially illiterate miners debt shocker <https://www.moneyweb.co.za/archive/financially-illiterate-miners-debt-shocker-fraud-a/> (accessed 12 February 2020); *Mail & Guardian* Worker debt is key to wage talks <https://mg.co.za/article/2015-07-02-worker-debt-is-key-to-wage-talks/> (accessed 12 February 2020). SAHRC: *Human Rights Impact of Unsecured Lending and Debt Collection Practices in*

The link between reckless lending and EAO's was also pointed out by the court in the matter of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*.¹¹¹ In this matter, the court considered various credit agreements in terms whereof payment was conducted through EAO's. The court found that in all matters considered, pre-agreement assessment was either not conducted, or it was not conducted properly by the credit provider when the consumer applied for the loan.¹¹² The court also remarked that it was not surprising that the consumers eventually defaulted as credit was granted recklessly.¹¹³

It was evident that South Africa's credit boom was rapidly leading to a credit bust and that credit growth had significantly outpaced economic development. Government became increasingly concerned about the growing levels of household debt and over-indebtedness as well as about persistent reports of credit providers engaging in reckless lending practices.¹¹⁴ This necessitated, among others, a re-evaluation of the provisions in the Act relating to pre-agreement assessment as a tool to prevent reckless lending.¹¹⁵ As a result, the National Credit Amendment Act of 2014 was promulgated on 19 May 2014.¹¹⁶

4.3.3 Regulation 23A – criteria to conduct affordability assessment

One of the amendments introduced to curb reckless lending effected changes to section 42 of the NCA.¹¹⁷ This amendment made it compulsory for all credit providers (except providers of incidental credit) entering into credit agreements, regardless of the amount involved, to register as such with the NCR. With this amendment, the

South Africa. <https://www.sahrc.org.za/home/21/files/SAHRC%20BHR%20RA%203%20-v3.pdf> (accessed 12 August 2021). Mail and Guardian *NCR raises alarm at unsecured lending in Marikana*. <https://mg.co.za/article/2012-10-11-ncr-raises-alarm-at-unsecured-lending-in-marikana/> (accessed 06 November 2023).

¹¹¹ 2015 (5) SA 221 (WCC).

¹¹² *University of Stellenbosch Legal Aid Clinic and others* (n 111) para 33.

¹¹³ *University of Stellenbosch Legal Aid Clinic and others* (n 111) para 38.

¹¹⁴ Government Notice R 144, GG 37386, 26 February 2014. See also 'Regulations for the Removal of adverse credit information and information relating to paid up judgments' <https://www.gov.za/removal-adverse-consumer-credit-information-and-information-relating-paid-judgements> (accessed 4 November 2018).

¹¹⁵ Department of Trade and Industry 'Government moves to protect consumers and assist over-indebted households' (n 95) 1. See also Van Heerden CM and Steenot R 'Pre-Agreement Assessment as a Responsible Lending Tool in South Africa, the EU and Belgium – Part 1' (2018) *PELJ* 21.

¹¹⁶ 19 of 2014. Hereinafter referred to as 'the 2014 NCAA'.

¹¹⁷ S 11 of the 2014 NCAA.

supervisory function of the Regulator was strengthened to, among others, improve the regulation of reckless lending. A further amendment to the Act by the 2014 NCAA, allowed the Tribunal and not only a court, to declare a credit agreement reckless in accordance with the Act.¹¹⁸ Prior to the amendment, only a court could have made such order. The introduction of the Tribunal as a forum to make a declaration of recklessness ensured a cheaper alternative to obtain relief from reckless credit. Low-income consumers in particular could not always afford the court process to have their agreements declared reckless.¹¹⁹ Consequently reckless lending would often only be raised as a defence once credit providers already proceeded with enforcement action.

The amendment of section 136 of the Act made provision for any person to submit a complaint concerning an alleged contravention of the Act or a complaint concerning an allegation of reckless lending to the Regulator in the prescribed manner and form.¹²⁰ It would thus be possible for a third party, like a debt counsellor, to lodge the complaint on behalf of the consumer, provided that the complaint be accompanied by a written consent signed by the consumer.¹²¹ However, in practice, consumers, and especially low-income consumers with no other way to turn, generally do not report reckless lenders, because such consumers perceive these lenders as their last resort to much needed credit.¹²²

As alluded to earlier, credit providers were free to determine their own affordability assessment mechanisms prior to the amendment of the Act in 2014.¹²³ Whilst the Act stipulated that the Regulator may advise the industry on pre-agreement evaluation procedures, it also stated that credit providers were not required to follow these

¹¹⁸ S 25(b) of the 2014 NCAA.

¹¹⁹ Department of Trade and Industry 'Summary of submissions for the National Credit Amendment Bill [B47-2013]' https://www.thedti.gov.za/parliament/2014/Final_responseNC.pdf (accessed 10 January 2021).

¹²⁰ S 136 of the Act was amended by section 36 of the 2014 NCAA.

¹²¹ Reg 50(3).

¹²² Microfinance South Africa 'Submission on National Credit Amendment Bill [B47-2013]' <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/140128mfsasub.pdf> (accessed 10 January 2021).

¹²³ Prior to its amendment by the 2014 NCAA, s 82(1) of the NCA read as follows:

(1) Subject to subsections (2)(a) and (3), a credit provider may determine for itself the evaluative mechanisms for models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment.

recommendations.¹²⁴ Therefore, a further and perhaps the most important amendment to the Act's responsible lending provisions was made with the amendment of section 82.¹²⁵ In terms of this amendment, a credit provider may still determine its own evaluative mechanisms and procedures, provided it results in a fair and objective assessment, *and provided that is not inconsistent with the affordability assessment regulations published by the Minister*.¹²⁶

This amendment required the Minister to issue the criteria to enable credit providers to conduct pre-agreement assessments in a conformed manner. This was done by amending section 48 to introduce section 48(1A) which authorises the Minister to prescribe criteria and measures to determine the outcome (*sic*) of affordability assessments.¹²⁷

The effect of the amendment was that the said affordability assessment regulations became binding on credit providers as it was issued as regulations (thus subordinate legislation) and not mere non-binding 'guidelines'.¹²⁸ In August 2014, a comprehensive set of draft regulations, which included regulations on the assessment of affordability, were published for public comment.¹²⁹ On 13 March 2015, after three sets of Draft Regulations were published for comment and considered, the final National Credit Regulations including Affordability Assessment Regulations were published and came

¹²⁴ Prior to its amendment by the 2014 NCAA, s 82(3) of the NCA read as follows:

(3) Subject to subsections (2)(a) and (4) a guideline published by the National Credit Regulator is not binding on a credit provider.

¹²⁵ S 24 of the 2014 NCAA provides as follows:

Section 82 of the principal Act is hereby amended—

(a) by the substitution for subsections (1) and (2) of the following subsections, respectively:

(1) [Subject to subsections (2)(a) and (3), a] A credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment and must not be inconsistent with the affordability assessment regulations made by the Minister.

(2) The Minister must, on recommendation of the National Credit Regulator, make affordability assessment regulations; and

(b) by the deletion of subsections (3) and (4).

¹²⁶ Own emphasis.

¹²⁷ Van Heerden and Renke (n 10) fn 67. Van Heerden is of the opinion that this was an unfortunate choice of words. The minister cannot determine the outcome of the assessment, but merely how the assessment must be conducted.

¹²⁸ Prior to the amendment s 82(3) provided:

(1) Subject to subsections (2)(a) and (4), a guideline published by the National Credit Regulator is not binding on a credit provider.

¹²⁹ Government Notice R 597, GG 37882, 1 August 2014.

into effect concurrently with the 2014 NCAA.¹³⁰ The amended Regulations introduced Regulation 23A titled 'Criteria to conduct affordability assessment'.¹³¹

Regulation 23A constitutes the minimum standards that credit providers have to comply with when conducting a pre-agreement assessment as required in terms of section 81.¹³² Apart from introducing affordability regulations, the Regulations also introduced definitions to assist credit providers in determining whether the consumer can afford the instalments in terms of the credit agreement.¹³³

Regulation 23A sets out guidelines for credit providers when assessing whether a consumer can afford the credit that they apply for. The different parts of the affordability assessment that should be followed by the credit provider, as set out in regulation 23A, will now be discussed in more detail.

4.3.3.1 Application

Regulation 23A (sub-regulation (1) and (2)) sets out the field of application of the regulation. Sub-regulation 1 outlines the regulation's application. It provides that it applies to:

- (a) current, prospective and joint consumers;
- (b) all credit providers;
- (c) all credit agreements subject to which this Act applies, subject to Regulation 2.

Sub-regulation 1 is subject to regulation 23A (2), which determines which credit agreements are not subject to regulation 23A.¹³⁴ The same persons and credit

¹³⁰ Government Notice 756, GG 39127, 21 August 2015, suspended the affordability assessment regulations for a period of six calendar months effective from 13 March 2015.

¹³¹ Refer to para 4.3.3 as well as Ch 5 for a detailed discussion of the affordability assessment criteria.

¹³² Van Heerden and Renke (n 10) 16.

¹³³ Chapter 1 of the *National Credit Regulations including Affordability Assessment Regulations* published in terms of Government Notice R202, GG 38557, 13 March 2015.

¹³⁴ Reg 23A (2) These regulations do not apply to a credit agreement in respect of which the consumer is a juristic person and do not apply to –

- (a) a developmental credit agreement;
- (b) a school loan or a student loan;
- (c) a public interest credit agreement;
- (d) a pawn transaction;
- (e) an incidental credit agreement;
- (f) an emergency loan;

agreements that are exempted from the reckless provisions of the Act, are also not subject to regulation 23A. Consequently, an affordability assessment will not be conducted in relation to such consumers and credit agreements. It should however be noted that regulation 23A(2)(a) exempts developmental credit agreements from the application of the affordability assessment regulations specifically. This is seemingly inconsistent with section 78 of the NCA which does not provide for the same blanket exclusion for developmental credit agreements, and only expressly excludes developmental credit agreements from affordability assessments insofar as they are school loans or student loans, the aforementioned being sub-categories of educational loans, which fall within the definition of developmental credit agreements. It is submitted that this apparent inconsistency should not be construed as an indication that the provisions of the NCA in relation to reckless credit do not apply to developmental credit agreements. It is submitted that it will always be prudent for credit providers to conduct an enquiry into the consumer's financial affairs similar to an affordability assessment in order to mitigate its own risk.

This was confirmed in the matter of *Chaity Investments CC v Schoombie*¹³⁵ where the court also considered the extent to which credit providers have an obligation to conduct affordability assessments and determine whether a consumer understands the agreement they are about to enter into. In this matter, the court had to consider whether the credit agreement constituted reckless credit. The credit provider argued that it conducted an assessment as required in terms of the Act and believed that the consumers had the means to repay the loan and also understood the transaction and its associated risks and costs. In contrast, the consumers claimed to be pensioners with limited income from social grants who previously defaulted on repayment to another credit provider. This created a factual dispute about whether a proper assessment was conducted by the credit provider and whether the consumers

-
- (g) a temporary increase in the credit limit under a credit facility;
 - (h) a unilateral credit limit increase in terms of sections 119(1)(c); 119(5) of the Act under a credit facility;
 - (i) a pre-existing credit agreement in terms of Schedule 3 item 4(2) of the Act;
 - (j) any change to a credit agreement and/or any deferral or waiver of an amount under an existing credit agreement in accordance with section 95 of the Act; and
 - (k) mortgage credit agreements that qualify for the Finance Linked Subsidy Programs developed by the Department of Human Settlements and credit advanced for housing that falls within the threshold set from time to time.

¹³⁵ Case number 26100/2017 Johannesburg High Court 7 September 2023.

provided accurate information prior to entering into the loan. At the time of writing this no information on the outcome of the factual dispute was available. The matter however again emphasises the importance of determining whether both parties have fulfilled their obligations, as it ensures fairness, responsible lending practices and the protection of consumers from over-indebtedness. Understanding of, and adhering to, these practices is essential in a healthy credit ecosystem.

4.3.3.2 *Existing financial means and prospects*

The manner in which a prospective consumer's existing financial means and prospects must be assessed is addressed in the second part of regulation 23A (thus, sub-regulations 3 to 7). It provides that the credit provider must take practical steps to assess the consumer's (or joint consumers')¹³⁶ discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.¹³⁷ The Regulations define 'discretionary income' as follows:

'Gross Income less statutory deductions such as, income tax, unemployment insurance fund, maintenance payments and less Necessary Expenses (at a minimum as defined herein); less all other committed payment obligations as disclosed by a consumer including, such as may appear from the applicant's credit records as held by any Credit Bureau which income is the amount available to fund the proposed credit Instalment'

From this definition it is clear that a calculation of the discretionary income is not possible without a determination of the gross income of the consumer. Gross income is defined as:

'all income earned without deductions from whatever source'

This regulation places an obligation on a credit provider to validate the consumer's gross income.¹³⁸ The Regulations further prescribe how this should be done, the method depending upon the category the consumer falls into. The first category is consumers who receive a salary from their employer.¹³⁹ The Regulations prescribe that this category of consumer should provide the latest three payslips¹⁴⁰ or (own

¹³⁶ Reg 1 of the *National Credit Regulations including Affordability Assessment Regulations* (n 133) defines 'joint consumers' as 'consumers that are co-principal debtors who are jointly and severably liable with regard to the same credit agreement and apply jointly for the credit agreement excluding the surety or a credit guarantor under a credit guarantee;'

¹³⁷ Reg 23A (3).

¹³⁸ Reg 23A (4).

¹³⁹ Reg 23A(4)(a).

¹⁴⁰ Reg 23A(4)(a)(i).

emphasis) latest bank statements showing the latest three salary deposits as proof of gross income.¹⁴¹ The second category is made up of consumers who do not receive a salary from an employer.¹⁴² In such instances, the three latest documented proof of income¹⁴³ or the latest three months' bank statements are required as proof of income.¹⁴⁴ The last category consists of consumers that are self-employed, informally employed or employed in a way through which they do not receive a payslip or proof of income.¹⁴⁵ Here, the latest three months' bank statements¹⁴⁶ or latest financial statements are required to prove income.¹⁴⁷ The Regulations further provide that where the consumer's monthly gross income varies materially, the average gross income over a period of not less than three payment periods preceding the credit application must be used to determine the average monthly income.¹⁴⁸ The Regulations places an obligation on the consumer to accurately disclose all financial obligations to the credit provider¹⁴⁹ which includes the provision of authentic documentation.¹⁵⁰

4.3.3.3 Existing financial obligations

Regulation 23A (8 – 12) sets out how the consumer's existing financial obligations must be calculated. Sub-regulation 8 determines that the credit provider must calculate the consumer's existing financial means, prospects and obligations as envisaged in sections 78(3) and 81(2)(a)(iii) of the Act. The minimum expense norm table is introduced by sub-regulation 9 and set out as follows in Table 1:

¹⁴¹ Reg 23A(4)(a)(ii).

¹⁴² Reg 23A(4)(b).

¹⁴³ Reg 23A(4)(b)(i).

¹⁴⁴ Reg 23A(4)(b)(ii).

¹⁴⁵ Reg 23A(4)(c).

¹⁴⁶ Reg 23A(4)(c)(i).

¹⁴⁷ Reg 23A(4)(c)(ii).

¹⁴⁸ Reg 23A (5).

¹⁴⁹ Reg 23A (6).

¹⁵⁰ Reg 23A (7). Reg 23A (4), (5) and (7) were challenged by the court in the matter of *Truworths Limited v Minister of Trade and Industry* 2018 (3) SA 558 (WCC). The case will be discussed in detail in Ch 5 para 5.3.1.

Minimum	Maximum	Minimum monthly Fixed Factor	Monthly Fixed Factor = % of Income Above Band minimum
R0.00	R800.00	R0.00	100%
R800.01	R6 250.00	R800.00	6.75%
R6 250.01	R25 000.00	R1 167.88	9.00%
R25 000.01	R50 000.00	R2 855.38	8.20%
R50 000.01	Unlimited	R4 905.38	6.75%

This table¹⁵¹ serves as a guide for calculating a consumer's necessary expenses.¹⁵² The minimum expense norm table prevents consumers from under-declaring their monthly living expenses to improve their chances of qualifying for a loan. Sub-regulation 11 however states that a credit provider may, on an exceptional basis and where justified, accept the consumer's declared minimum expenses which are lower than those provided for in the table, provided that the consumer completes a questionnaire as set out in the Schedule to determine his living expenses.¹⁵³

4.3.3.4 Debt re-payment history as a consumer under credit agreements

Sub-regulation 13 places an obligation on the credit provider to take the consumer's debt re-payment history under all other credit agreements into account. This requirement must be performed:

- (a) within seven (7) business days immediately prior to the initial approval of credit or the increasing of an existing credit limit; and
- (b) within fourteen (14) business days with regards to mortgages.

¹⁵¹ Reg 23A (10) The methodology of the table requires for:

- (a) credit providers to ascertain gross income;
- (b) statutory deductions and minimum living expenses to be deducted to arrive at a net income, which must be allocated for payment of debt instalments; and
- (c) when existing debt obligations are considered the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt.

¹⁵² In terms of Chapter 1 of the *National Credit Regulations including Affordability Assessment Regulations* (n 133), 'necessary expenses' means the consumer's minimum living expenses including maintenance payments if applicable as determined in accordance with regulation 23A (9) excluding monthly debt repayment obligations in terms of credit agreements as reflected on the prospective consumer's credit profile held by a credit bureau.

¹⁵³ This questionnaire is included in Annexure A to the *National Credit Regulations including Affordability Assessment Regulations* (n 133).

4.3.3.5 *Avoid double counting in calculating discretionary income*

Sub-regulation 14 is applied in instances where the credit agreement is entered into on a substitutionary basis to set off one or more existing credit agreements. In this instance, a credit provider must record that the credit being applied for is to replace other existing credit agreements¹⁵⁴ and such credit provider must take practical steps to ensure that such credit is properly used for these purposes.¹⁵⁵

4.3.3.6 *Disclosure of the credit cost multiple and the total cost of credit*

Sub-regulation 15 places an obligation on a credit provider to disclose the credit cost multiple and the total costs of credit in the pre-agreement statement and quotation.¹⁵⁶ 'Credit Cost Multiple' means the ratio of the total cost of credit to the advanced principal debt, that is, the total cost of credit divided by the advanced principal debt expressed as a number to two decimal places; This should be based on one year of full utilisation up to the credit limit proposed.¹⁵⁷ It also places an obligation on the credit provider to ensure that the consumer's attention is drawn to the credit cost multiple and that the cost of credit as disclosed, is understood by the consumer.¹⁵⁸ A non-exhaustive list of cost of credit is also provided.¹⁵⁹

4.3.3.7 *Outcome of affordability assessment*

The last part (sub-regulations 16 to 20) of the assessment regulation empowers a consumer who is aggrieved by an outcome of the affordability assessment, to lodge a complaint in terms of section 134 or 136 of the Act for dispute resolution. A complaint can be submitted to a credit ombud with jurisdiction, a consumer court or an alternative dispute resolution agent in terms of section 134 of the Act.¹⁶⁰ The consumer can also

¹⁵⁴ Reg 23A(14)(a).

¹⁵⁵ Reg 23A(14)(b). Reference is made to so called 'consolidation loans'. A consolidation loan is an agreement in terms whereof a consumer borrows an amount from a credit provider to consolidate and pay off his existing credit agreement debt. After settling his consolidated debt, the consumer will no longer be over-indebted and will be able to pay off the consolidation loan over an agreed period of time. It is submitted that consolidation loans should not constitute reckless credit as these types of loans can be viewed as debt relief measures in themselves in those instances where they cure the consumer's over-indebtedness. Van Heerden in Scholtz *ed* (2024) para 11.6.2.

¹⁵⁶ Reg 23A(15)(a).

¹⁵⁷ Reg 23A(15)(b).

¹⁵⁸ Reg 23A(15)(c).

¹⁵⁹ Reg 23A(15)(d) (i – v).

¹⁶⁰ S 134 of the NCA provides that:

initiate a complaint with the Regulator in terms of section 136 of the Act.¹⁶¹ The credit provider must attempt to resolve the complaint within 14 business days after notification of the complaint from a credit ombud in terms of section 134.¹⁶² Where a credit provider fails to address the complaint within the specified timeframe, the consumer can approach the Regulator who must resolve the complaint within 7 business days.¹⁶³ The Regulations further provide that a consumer may approach the Tribunal directly if the Regulator issues a notice of non-referral in respect of a complaint.¹⁶⁴

4.4 Conclusion

The aim of this chapter was to provide the necessary context to the discussion of pre-agreement assessment, a core element in the regulatory framework governing consumer credit. To this end, the chapter examined the provisions in the Act and Regulations dealing with over-indebtedness and reckless credit.

In paragraph 2 of this chapter, a general overview of the statutory framework designed to prevent reckless credit was provided.¹⁶⁵ This included an explanation of how pre-agreement assessment operates as a preventative mechanism, serving as a filter to

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- (1) As an alternative to filing a complaint with the National Credit Regulator in terms of section 136, a person may refer a matter or dispute following an allegation of a reckless credit agreement that could be the subject of such a complaint as follows:
- (a) If the credit provider concerned is a financial institution as defined in the Financial Sector Regulation Act, 2017, the matter –
- (i) may be referred only to the ombud with jurisdiction to resolve a complaint or settle a matter involving that credit provider, as determined in accordance with that Act; and
 - (ii) must be procedurally resolved as if it were a complaint in terms of that Act; or
- (b) If the credit provider is not a financial institution, as defined in the Financial Sector Act, 2017, the matter may be referred to either –
- (i) a consumer court, for resolution in accordance with this Act and the provincial legislation establishing that consumer court; or
 - (ii) an alternative dispute resolution agent, for resolution by conciliation, mediation or arbitration.

¹⁶¹ S 136 of the NCA provides that:

- (1) Any person may submit a complaint concerning an alleged contravention of this Act or a complaint concerning an allegation of reckless credit to the National Credit Regulator in the prescribed manner and form.

- (2) The National Credit Regulator may initiate a complaint in its own name.

¹⁶² Reg 23A (17).

¹⁶³ Reg 23A (18) and (19).

¹⁶⁴ Reg 23A (20).

¹⁶⁵ Para 4.2.

identify and exclude credit applications that would likely result in over-indebtedness.¹⁶⁶ By requiring credit providers to assess a consumer's ability to meet repayment obligations, the legislature aims to minimise the risk of reckless lending.

The discussion further elaborated on the different categories of reckless lending, including instances where a credit provider fails to conduct an assessment, conducts the assessment as required and enters into the agreement despite the consumer not fully comprehending the risks, costs and obligations of the agreement, as well as instances where the credit provider enters into a credit agreement despite clear indications that the consumer will be over-indebted after concluding the agreement.¹⁶⁷ The consequences associated with each category were analysed, with particular attention to the remedies available to consumers and the potential sanctions imposed on credit providers.¹⁶⁸ Additionally, the statutory defence available to a credit provider in the event of an unsubstantiated allegation of reckless lending was also outlined. This defence, if successfully raised, allows the credit provider to rebut the allegation of reckless lending by demonstrating compliance with the Act's assessment requirements.¹⁶⁹ Importantly, paragraph 2 concluded by setting out the limited scope of application of the reckless lending provisions in the Act, highlighting that certain types of credit agreements and credit providers fall outside the ambit of these regulatory safeguards.¹⁷⁰ This limitation is particularly significant when considering the extent to which low-income consumers are actually protected under the current legislative framework.

Paragraph 3 of this chapter turned to a critical aspect of this research, namely the practical implementation of the assessment obligation imposed on credit providers. This part of the analysis traced the evolution of the assessment process - from a largely procedural or 'tick box' exercise to a more substantive, consumer-focused assessment.¹⁷¹ The intention of the legislature appears to be to encourage credit providers to look beyond formal compliance and engage meaningfully with a consumer

¹⁶⁶ *Ibid.*

¹⁶⁷ Para 4.2.1.

¹⁶⁸ Para 4.2.2.

¹⁶⁹ Para 4.2.3.

¹⁷⁰ Para 4.2.4.

¹⁷¹ Para 4.2.3.

in that consumer's financial reality. This shift is crucial for ensuring that assessments are not merely perfunctory, but that it fulfil its intended role as a safeguard against reckless lending. The discussion in paragraph 3 also provided insight into the challenges faced by credit providers in giving effect to this obligation, particularly in cases where consumers may lack formal documentary proof of income, as is often the case with low-income individuals who are self-employed.¹⁷²

By unpacking the reckless lending provisions in the Act, this chapter laid the foundation for the remainder of the thesis. Understanding the legislative intent, operational scope and practical challenges associated with the prevention of reckless lending is essential when the strengths and shortcomings of these provisions are investigated. Against this background, the critique of the provisions in the Act aimed at preventing reckless lending, set out in the next chapter, will be better understood. It will also provide context for recommendations for policy and legislative reform made in later chapters.

¹⁷² Para 4.3.3.1 – 4.3.3.7.

CHAPTER 5: A CRITICAL EVALUATION OF THE AFFORDABILITY ASSESSMENT REGULATIONS

- 5.1 Introduction**
- 5.2 Regulation 23A(1) and (2)**
- 5.3 Regulation 23A(3) to (7)**
- 5.4 Regulation 23A(8) to (10)**
- 5.5 Regulation 23A(11)**
- 5.6 Regulation 23A(13)**
- 5.7 Regulation 23A(14) to (20)**
- 5.8 Conclusion**

5.1 Introduction

The preceding chapters established the context for explaining how the NCA intended to safeguard low-income consumers from over-indebtedness and reckless credit granting by credit providers. In this chapter the provisions of the affordability assessment regulations will be scrutinised to determine whether these regulations indeed assist in improving the position of the low-income consumer who wants to apply for credit.

5.2 Regulation 23A(1) and (2)

Sub regulations 1 and 2 set out the field of application of the affordability assessment regulations. Sub regulation 1 provides that the regulations apply to:

- (a) current, prospective and joint consumers;
- (b) all credit providers;
- (c) all credit agreements subject to which this Act applies, subject to Regulation 2.

In line with the provisions of section 78(2) of the Act,¹ sub-regulation 2 provides that the affordability assessment regulations do not apply to a school loan or a student loan; a public interest credit agreement; a pawn transaction; an incidental credit agreement; an emergency loan; a temporary increase under a credit facility. In addition to these exceptions, sub regulation 2 also excludes developmental credit agreements², a unilateral credit limit increase in a credit facility in terms of section 119(1)(c), 119(4) and 119(5) of the Act; a pre-existing credit agreement in terms of schedule 3 Item 4(2) of the Act; any change to a credit agreement and/or any deferral or waiver of an amount under an existing credit agreement in accordance with section 95 of the Act and mortgage credit agreements that qualify for the Finance Linked Subsidy Programs developed by the Department of Human Settlements and credit advanced for housing that falls within the thresholds set from time to time.³

In terms of section 78(2), credit extended in terms of a school loan or a student loan, an emergency loan; or a public interest credit agreement must be reported to the National Credit Register⁴ in the 'prescribed manner and form'. Regulation 23 provides that these types of credit should be reported to the National Credit Register within 30 business days of signature thereof, alternatively at the end of the month in which the agreement was concluded, by completing and submitting Form 15.⁵ Van Heerden submits that, as the National Credit Register is not established yet, a credit provider can be regarded as having complied with this requirement if it reported the information on Form 15 to the National Credit Regulator.⁶

Section 78(2) further provides that, in the respect of credit extended in terms of an emergency loan, reasonable proof of the existence of the emergency must be obtained and retained by the credit provider. In 2020 the Regulator published a guideline on

¹ See the discussion and definitions of agreements excluded in terms of section 78(2) in Chapter 4 para 4.2.4.

² See the discussion and definition of developmental credit agreements in Chapter 3 para 3.3.2.

³ Van Heerden in Scholtz *ed* (2024) para 11.2 fn 21.

⁴ It is noteworthy that section 78(2) as well as regulation 23 mention a reporting obligation to the National Credit Register.

⁵ Form 15 serves as a formal notice by a registered credit provider declaring specific credit agreements as exempt from the Act's reckless lending provisions. The form requires disclosure of the consumer's identity and the nature of the exempted credit and must be duly signed and dated by the credit provider or his authorized representative.

⁶ Van Heerden in Scholtz *ed* (2024) para 11.6.6(f).

what constitutes reasonable proof of the existence of an emergency, for purposes of an emergency loan as defined in section 1.⁷

5.2.1 Critical evaluation of Regulation 23A(1) and (2)

The exclusions listed in section 78(2) and regulation 23A(2) are consistent with the provisions in the Act requiring the Regulator to promote the development of an accessible credit market⁸ and, in particular, to address the needs of historically disadvantaged persons,⁹ low-income persons,¹⁰ and remote, isolated or low-density populations and communities.¹¹ The exclusions also align with the policy objective of economic growth and access to credit.¹²

The policy objectives of economic growth and improving access to credit is sound and when considering the figures released by the NCR it appears that these policy objectives are being met. During the first quarter of 2008, 57.7% of the total adult population in South Africa (29.9 million at the time) were credit active.¹³ By the end of the first quarter in 2021, the relative share of the credit active population in South Africa had increased to 69% (of a total of 39.9 million adults at the time).¹⁴

From the figures released by the Regulator for the second quarter of 2023, it appears that consumers falling in the income bracket earning below R10 000 per month favoured secured credit and unsecured credit.¹⁵ Vehicles as a form of security dominated the secured credit market.¹⁶ The figures does not specify what unsecured credit is used for, but research indicates that this type of credit is most likely used to

⁷ NCR Circular 05 of 2020 *Guideline on what constitutes the reasonable proof of the existence of an emergency, for purposes of an emergency loan as defined in section 1 read with section 78(2) and regulation 23 of the National Credit Act 34 of 2005.*

⁸ S 13(a) of the NCA.

⁹ S 13(a)(i) of the NCA.

¹⁰ S 13(a)(ii) of the NCA.

¹¹ S 13(a)(iii) of the NCA.

¹² *Policy Framework for consumer Credit* (2004) para 1.

¹³ NCR Credit Bureau Monitor First Quarter March 2008
https://www.ncr.org.za/documents/pages/research_stats/NCR%20CB%20Monitor-Q3.pdf
(accessed 1 February 2022).

¹⁴ NCR Credit Bureau Monitor First Quarter March 2021.
<https://www.ncr.org.za/documents/CBM/CBM%20Q1%202021.pdf> (accessed 1 February 2022).

¹⁵ NCR Consumer Credit Market Report 2nd quarter 2023
(<https://www.ncr.org.za/documents/CCMR/CCMR%202023Q2.pdf> (accessed 1 March 2024).

¹⁶ *Ibid.*

finance daily living costs and essential consumer goods.¹⁷ While the policy of improving access to credit is sound, and the figures indicate that consumers in South Africa has indeed experienced increased access to credit since the incorporation of the Act in 2007, the type of credit accessed by low income consumers does not allow them to create wealth over time.

A further analysis of the figures indicate that the uptake of developmental credit is very low for all income brackets. While data for other forms of credit is available from the fourth quarter of 2007, the uptake of developmental credit was only registered five years later, in the fourth quarter of 2012.¹⁸ Figures indicate that the uptake of this type of credit has been relatively lower than other forms of credit with an average uptake of 1.8% of the total credit granted between 2013 and 2019.¹⁹ Even though this type of credit was intended to make credit accessible to consumers who previously had no such access, it appears that, despite the legislation, this form of credit is not being utilised to the extent initially envisaged.

There can be various reasons for this phenomenon. Firstly, the Regulator confirmed that from the 6880 credit providers registered on the 22 of November 2023, only 160 (0.02%) were registered to provide developmental credit.²⁰ 90% of these credit providers were located in Gauteng which would make it costly for consumers from other provinces in the country to access them to apply for credit.²¹ Furthermore, research indicates that the majority (152) of developmental credit providers are relatively small, while only eight are larger credit providers like commercial banks.²² Applicants seeking developmental credit often avoid online application channels due to limitations in effectively conveying their business concepts, strategic plans and

¹⁷ Devnomics Research and Surveys 'Literature Review on the Impact of the National Credit Act (NCA) Has Had on South Africa's Credit Market' (2012) https://www.ncr.org.za/documents/pages/researchreports/jun13/NCR_NCA%20IMPACT%20LITERATURE%20REVIEW_FINAL%20REPORT_260612.pdf (accessed 2 March 2024) 109.

¹⁸ Correspondence on file with writer.

¹⁹ Madalane Z *Rules and Rands: Credit Legislation and Developmental Credit to Micro and Small Enterprises in South Africa*. (LLM Dissertation, University of Cape Town 2021) <https://open.uct.ac.za/items/cc543345-65a1-4eff-ba6b-f6a2633769f3> (accessed 16 June 2024) 27.

²⁰ Correspondence on file with writer.

²¹ Correspondence on file with writer.

²² Madalane (n 19) 59.

entrepreneurial intentions through standardised digital forms.²³ It is submitted that, in a country like South Africa where there was an estimated 2.6 million large, micro and small enterprises in 2022,²⁴ the number of developmental credit providers is thus not adequate to improve access to this type of credit. To ensure adequate provision of developmental credit, more credit providers should be registered and actively providing developmental credit. Access to developmental credit remains limited, particularly for aspiring entrepreneurs, due to procedural and regulatory barriers that complicate the application process. In the light of these challenges, Madalane's recommendation to simplify the application process is endorsed, as a more streamlined framework would enable consumers to present their business plans and models with greater clarity and confidence.²⁵ It is submitted that credit providers should be better equipped to extend developmental credit, which may warrant a reassessment of the existing legislative framework to promote both accessibility for consumers and efficiency in credit delivery within this segment of the credit market.

A further reason for the low uptake of developmental credit is the fact that, despite regulation 23A exempting it from the application of the reckless lending provisions in the Act, developmental credit providers still look at a consumer's credit record when evaluating the credit application. This is contrary to the intention with this type of credit as the high interest rate charged, namely Reserve Bank Repurchase Rate (repo rate) plus 27%,²⁶ was intended to serve as compensation for the risk of the credit provider.²⁷

In his research, Madalane points out a further reason why the uptake of this form of credit is so low. He is of the opinion that consumers are simply not aware of the existence of developmental credit.²⁸ He links this to the low levels of financial literacy in South Africa. This view is shared by other researchers and indeed seems

²³ Madalane (n 19) 66.

²⁴ OECD Financing SMEs and Entrepreneurs 2022: An OECD Scoreboard March 2022 https://www.oecd.org/en/publications/financing-smes-and-entrepreneurs-2022_e9073a0f-en.html (accessed 21 August 2024).

²⁵ Madalane (n 19) 66.

²⁶ Reg 42 Table A.

²⁷ Madalane (n 19) 60.

²⁸ Madalane (n 19) 57. See also Devnomics Literature Review (n 17) 109. Also see Reg 42 Table A for Maximum Prescribed Interest Rates.

plausible.²⁹ Madalane further reports that many consumers do not know that this type of credit is available because the marketing strategies of the credit providers who provide this specific type of credit, is not good enough.³⁰

Although the need to protect illiterate and financially unsophisticated consumers will always be strong, there is evidence that some consumers use the protection of the Act to 'game the system'. It is a known fact that some consumers take out exempt loans listed in section 78 read with regulation 23A and then use it for consumption.³¹

To enhance the capacity of consumers, particularly those from marginalised or low-income backgrounds, to access formal financial services, it is submitted that it may be essential to pursue political will and intervention aimed at driving reforms or innovations within the financial sector. This approach could include legislative changes, subsidies, public-private partnerships, or policy frameworks designed to foster inclusive financial systems. Although existing regulations in credit markets are intended to prevent exploitation and over-indebtedness, they may inadvertently exclude specific groups, such as grant recipients or informal workers, through stringent affordability assessments. Gaining political support may facilitate the development of alternative models that strike a balance between consumer protection and financial inclusion, thereby improving accessibility to financial services without compromising consumer safety. It is thus submitted that there is a pressing need for political advocacy to create and develop alternative financial solutions that more effectively broaden access to credit and financial services, as the current regulatory framework may inadvertently limit access due to its emphasis on consumer protection over inclusion.

5.3 Regulation 23A(3) to (7)

The manner in which a prospective consumer's existing financial means and prospects must be assessed is addressed in sub-regulations 3 to 7. Regulation 23A(3) requires

²⁹ Eniola A, Entebang H and Ley Sy Law K 'Financial literacy and SME firm performance' (2015) *International Journal of Research Studies in Management* 31. See also Ye J and Kulathunga K 'How does Financial Literacy Promote Sustainability in SMEs? A Developing Country Perspective (2019) *Sustainability* 1.

³⁰ Madalane (n 19) 57.

³¹ Devnomics Literature Review (n 17) 109.

a credit provider to take practicable³² steps to assess the consumer's, or joint consumers'³³ discretionary income to determine whether the consumer has the financial means and prospects to pay the proposed credit instalments.³⁴ The Regulations define 'discretionary income' as follows:

'Gross Income less statutory deductions such as, income tax, unemployment insurance fund, maintenance payments and less Necessary Expenses (at a minimum as defined herein); less all other committed payment obligations as disclosed by a consumer including, such as may appear from the applicant's credit records as held by any Credit Bureau which income is the amount available to fund the proposed credit Instalment'

From this definition it is clear that a calculation of the discretionary income is not possible without a determination of the gross income of the consumer. 'Gross' income is defined as:

'all income earned without deductions from whatever source'

The regulation places an obligation on a credit provider to validate the consumer's gross income.³⁵ The Regulations further prescribe how this should be done, the method depending upon the category the consumer falls into. The categories of consumers, and the criteria for their verification are described in regulation 23A(4). These categories of consumers, and the criteria for their verification are described as follows in regulation 23A(4):

- '(4) (a) consumers that receive a salary from an employer:
- (i) latest three (3) payslips; or
 - (ii) latest bank statements showing latest three (3) salary deposits;
- (b) consumers that do not receive a salary as contemplated in (a) above by requiring:
- (i) latest three (3) documented proof of income; or

³² S 81(2) of the NCA refers to 'reasonable' steps. Van Heerden in Scholtz ed para 11.6.6(g) notes that Regulation 23A(3) has been 'toned down' to provide that a credit provider must 'take practicable steps to assess the consumer or joint consumer's discretionary income ...' Renke also discuss the use of the word 'practicable' in the affordability assessment regulations in his article 'Die nuwe bekostigbaarheidsassesseringsregulasies ingevolge die Nasionale Kredietwet 34 van 2005 van naderby beskou' (2015) *LitNet Akademies* 442 It is submitted that the use of the term 'practicable' in the regulations reflects an attempt to strike a balance between safeguarding consumers and maintaining the efficiency of credit markets. This phrasing recognises the operational constraints faced by credit providers, and ensures that minimum safeguards are enforced without imposing undue administrative burdens.

³³ 'Joint consumers' are defined in Chapter 1 of the *National Credit Regulations including Affordability Assessment Regulations* published in terms of Government Notice R202, GG 38557, 13 March 2015 as consumers that are co-principal debtors who are jointly and severally liable with regard to the same credit agreement and apply jointly for the credit agreement excluding the surety or a credit guarantor under a credit guarantee.

³⁴ Reg 23A(3).

³⁵ Reg 23A(4).

- (ii) latest three (3) months bank statements;
- (c) consumers that are self-employed, informally employed or employed in a way through which they do not receive a payslip or proof of income as contemplated in (a) or (b) above by requiring:
 - (i) latest three (3) months bank statements; or
 - (ii) latest financial statements.’

To assist the credit provider in performing this duty, the consumer is mandated to accurately disclose all financial obligations and to provide authentic documentation to the credit provider to enable the credit provider to conduct the affordability assessment.³⁶

The Regulations further provide that where the consumer’s monthly gross income varies materially, the average gross income over a period of not less than three payment periods preceding the credit application must be used to determine the average monthly income.³⁷ The Regulations place an obligation on the consumer to accurately disclose all financial obligations to the credit provider³⁸ which includes the provision of authentic documentation.³⁹

5.3.1 Critical evaluation of Regulation 23A(3) to (7)

It was the plight of the group of consumers described in regulation 23A(4)(c), namely consumers that are self-employed, informally employed or employed in a way through which they do not receive a payslip or proof of income that caused a group of clothing retailers to challenge the validity of regulation 23A(4) in court in 2018. In the matter of *Truworths Limited v Minister of Trade and Industry*⁴⁰ the applicant (Truworths) and two other clothing retail companies sought a court order reviewing and setting aside regulations 23A(4), (5) and (7). The applicants however focussed its arguments on the provisions of regulation 23A(4).

The applicant’s argument that regulation 23A(4) constituted unfair discrimination and unreasonableness was based on the fact that the category of consumers mentioned

³⁶ Reg 23A(6) and (7).

³⁷ Reg 23A(5).

³⁸ Reg 23A(6).

³⁹ Reg 23A(7). Reg 23A(4), (5) and (7) were challenged by the court in the matter of *Truworths Limited v Minister of Trade and Industry* 2018 (3) SA 558 (WCC). The case was referred to in Ch 4 para 4.3.3.2.

⁴⁰ 2018 (3) SA 558 (WCC).

in regulation 23A(4)(c), largely consisted of the poorer and less privileged members of society.⁴¹ Since persons in this category did not ordinarily have banking accounts or financial statements, the required form of validation of their gross income (bank statements or financial statements) was inappropriate and, in most cases, impossible for them to comply with.⁴² Evidence was presented that an estimated 20 percent of the South African population did not have bank accounts.⁴³ It was further argued that the relevant provision constitutes an insurmountable obstacle to obtaining even relatively small amounts of credit, even if affected consumers are earning a reasonable amount each month.⁴⁴

The respondents denied the claim that regulation 23A(4)(c) was discriminating against unbanked and informally or self-employed persons and stated that in drafting the regulations they bore in mind the 'unbanked', thus consumers that do not have bank accounts.⁴⁵ The respondents argued that letters and affidavits from employers could also serve as acceptable proof of income and that 'financial statements' referred to in regulation 23A(4) does not necessarily require such statements to be audited.⁴⁶ The court rejected this argument as absurd in relation to self-employed persons. It questioned whether self-employed persons should write themselves letters confirming their gross income.⁴⁷

Further, the court noted that, although regulation 23A is aimed at preventing reckless lending, regulation 23A(4) undermines the purpose of the Act to promote the development of a credit market that is accessible to *all* South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions. It held that regulation 23A(4) has the potential to eliminate *any* credit being granted to many consumers who resort under the category described in regulation 23A(4)(c) instead of merely preventing reckless credit from being granted.⁴⁸ The court

⁴¹ *Truworths v Minister of Trade and Industry* (n 40) para 45.

⁴² *Ibid.*

⁴³ *Truworths v Minister of Trade and Industry* (n 40) para 64 fn 8.

⁴⁴ *Truworths v Minister of Trade and Industry* (n 40) para 46.

⁴⁵ *Truworths v Minister of Trade and Industry* (n 40) para 47.

⁴⁶ *Truworths v Minister of Trade and Industry* (n 40) para 49.

⁴⁷ *Truworths v Minister of Trade and Industry* (n 40) para 50.

⁴⁸ *Truworths v Minister of Trade and Industry* (n 40) para 52.

subsequently ruled that regulation 23A(4) be set aside. Sub regulations 5 and 7 were however not set aside.

The fact that regulation 23A(4) was set aside by the court, does not mean that credit providers are absolved from having to take practical steps to verify a consumer's gross or discretionary income. It simply means that credit providers have to find other ways of verifying the gross income of a consumer where that consumer cannot produce standard documentation like payslips, bank statements or financial statements.⁴⁹

This contention is supported by the 'Guidelines for ascertaining consumer's gross incomes and discretionary incomes for the purposes of Regulation 23A of the National Credit Regulations including the Affordability Assessment Regulations' that was issued by the Department of Trade and Industry after the *Truworths* judgment.⁵⁰ These draft guidelines are intended to provide direction to credit providers on how to conduct the affordability assessments in light of the *Truworths* decision. From the wording of the guidelines it is clear that the Regulator is of the opinion that the setting aside of regulation 23A(4) in the *Truworths* judgment must not be interpreted as absolving credit providers from having to verify a consumer's gross and discretionary income during the affordability assessment.⁵¹ The Regulator bases this argument on the fact that regulation 23A(3)⁵² as well as regulations 23A(9),⁵³ 23A(10)(a)⁵⁴ and 23A(12)(a)⁵⁵ were not set aside as well. This is consistent with one of the important aims of the Act, namely to safeguard consumers against reckless lending practices and the risk of over-indebtedness.

⁴⁹ Kelly-Louw M and Stoop P Chapter 4: 'Alternative methods of validating unbanked consumers' income and assessing their 'creditworthiness' and 'affordability' of repayments' in Van der Merwe, D (ed) *Magister: Essays vir/for Jannie Otto* (2020) LexisNexis ISBN 978 0 6390 1222 3 54.

⁵⁰ Department of Trade and Industry '*Guidelines for ascertaining consumer's gross incomes and discretionary incomes for the purposes of Regulation 23A of the National Credit Regulations including the Affordability Assessment Regulations*' Government Notice 224, GG 41604, 4 May 2018. Hereinafter referred to as 'Draft Guidelines'. Comments should have been submitted to compliance@ncr.org.za by 31 May 2018. These guidelines have not yet been finalised.

⁵¹ Draft Guidelines (n 50) par 1.6.

⁵² This sub regulation makes it compulsory for a credit provider to take practicable steps to verify the discretionary income of the consumer.

⁵³ Reg 23A(9) requires a credit provider to use the minimum expense norm table, broken down by monthly gross income when calculating the existing financial obligation of consumers.

⁵⁴ Reg 23A(10)(a) requires a credit provider to ascertain gross income.

⁵⁵ Reg 23A(12)(a) requires a credit provider to calculate the consumer's discretionary income.

Paragraph 2 of the guidelines is titled 'Ascertaining consumers' gross income and calculating consumers' discretionary income'. It provides as follows:

- 2.1 Credit providers should ascertain consumers' gross incomes and discretionary incomes before extending credit to consumers. This is required by the regulations.
- 2.2 The gross income of a consumer who is employed in the formal sector should be ascertained with reference to such consumer's payslip. If the consumer has a bank account into which the consumer's salary is deposited, the consumer's income can be ascertained with reference to the consumer's bank statement. Living expenses and debt obligations will then be deducted from the consumer's net income to ascertain the discretionary income. In order to establish the consistency of the consumer's income, three (3) months bank statements or payslips should be obtained by credit providers. For this category of consumers, credit providers can use either payslips or bank statements to calculate the consumer's discretionary income.
- 2.3 Where the consumer has been employed for less than three (3) months, the credit provider should obtain the consumer's latest payslips at the time of the credit application, or a letter of employment confirmation from the employer detailing the salary and its frequency of payment or a bank statement showing the latest salary deposit.
- 2.4 For consumers who are self-employed, informally employed or consumers that have income other than from formal employment and which is not evidenced by payslips or bank statements, credit providers should use *such other verification of the consumer's income that will provide validation of income* (own emphasis) sufficient to meet the consumer's payment obligations in respect of the proposed credit. The credit provider must submit its affordability assessment models, procedures and mechanism in respect of this category of consumers to the NCR.⁵⁶
- 2.5 For consumers referred to in paragraph 2.4, the credit provider should ascertain from the consumer whether the consumer has a bank account through which their income flows.'

The absence of a definition for the term 'such other verification of the consumer's income that will provide validation of income' in the guidelines is unfortunate. Even clarification by way of an example would have prevented uncertainty and a lack of uniformity akin to the position before the amendment of the Act.⁵⁷ It is also not clear why the Minister chose to follow the path of guidelines, as opposed to amended regulations. Although section 16 of the Act permits the Regulator to provide guidance to the credit market and industry by issuing explanatory notices, the purpose of such notices is to outline the Regulator's procedures, or its non-binding opinion of any provision of the Act.⁵⁸ Van Heerden and Coetzee argue that explanatory notices also include guidelines.⁵⁹ Guidelines are non-binding and do not constitute substantive law.

⁵⁶ When the writer hereof enquired at the NCR whether this is done, it was confirmed that no such record exists for this category of consumers. Correspondence on file with writer.

⁵⁷ See Chapter 4, para 4.3.1 for the position prior to the amendment of the Act.

⁵⁸ S 16(1)(b)(i) of the NCA.

⁵⁹ Van Heerden and Coetzee (2019) *PELJ* 21 fn 81.

As a result, it cannot authorise or allow anything that the Act, in terms of which they are issued, does not permit.⁶⁰ Therefore, instead of providing clarity, the guidelines may lead to further uncertainty and ultimately litigation on this issue. One has to agree with Kelly-Louw and Stoop that:

‘... the proposed Draft Guidelines to verify gross and discretionary incomes of self-employed, informally employed and unbanked consumers offer no proposals for alternative methods that can be used to determine the income of this group of consumers. The Draft Guidelines merely shift the responsibility to credit providers to find alternative ways in which to verify income, with no guidance on how and what should or could be used.’⁶¹

From the above it appears that regulation 23A, aside from the apparent weaknesses insofar it concerns the calculation of living expenses, simply does not serve the admirable purposes it was intended for. One has to agree with Kawazda when he questions whether the NCA and its regulations were successful in serving its purposes, especially since the World Bank in 2015, rated South African consumers as the biggest borrowers in the World.⁶²

While regulation 23A and the broader NCA framework represent important steps toward responsible lending, their implementation has fallen short in addressing real-world financial vulnerabilities. The persistence of high levels of indebtedness underscores the need for regulatory reform.

5.4 Regulation 23A(8) to (10)

Regulation 23A(8) to (10) builds on the provisions in sub regulation 3 to 7 and provides that the lender must not only assess the consumer’s income, but also the consumers existing financial means, prospects and obligations as envisaged in section 78(3) and 81(2)(a)(iii) of the Act.⁶³ To assist in this regard, sub regulation 9 introduces a template– the minimum expense norms table – in Table 1 of sub regulation 10. The methodology to use the table is set out in sub regulation 10 which reads as follows:

⁶⁰ Van Heerden CM and Coetzee H ‘Unintentionally Trapped by Debt Review: Procedural Inadequacies in the National Credit Act 34 of 2005 Relating to Withdrawal from the Debt Review Process’ *PELJ* (2019) 21.

⁶¹ Kelly-Louw and Stoop (n 49) 61.

⁶² World Bank Global index database 2014 <https://documents1.worldbank.org/curated/en/187761468179367706/pdf/WPS7255.pdf>.

(accessed 31 July 2025). Kawazda H ‘Remarks on lending reforms ushered in by regulation 23A of the Affordability Assessment Regulations’ (2018) *De Jure* 11.

⁶³ Reg 23A(8).

‘(10) The methodology in the table requires for:

- (a) credit providers to ascertain gross income;
- (b) statutory deductions and minimum living expenses to be deducted to arrive at a net income, which must be allocated for payment of debt instalments; and
- (c) when existing debt obligations are taken into account, the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt.’

Table 1: Minimum Expense Norms

Minimum	Maximum	Minimum monthly Fixed Factor	Monthly Fixed Factor = % of Income Above Band Minimum
R0.00	R800.00	R0.00	100%
R800.01	R6 250.00	R800.00	6.75%
R6 250.01	R25 000.00	R1 167.88	9.00%
R25 000.01	R50 000.00	R2 855.38	8.20%
R50 000.01	Unlimited	R4 905.38	6.75%

The utilisation of the minimum expense norm table is mandatory when credit providers consider granting credit to a consumer.⁶⁴ The intention with the table was to prevent consumers from understating their expenses, and thereby portraying their financial position in an overly favourable light, to ensure that the credit provider will grant the loan. By setting a minimum expense norm, the consumer who is desperate to obtain credit, is thus protected against himself.⁶⁵

Despite the noble aim with the regulation, the table presents several problems as explained below.

⁶⁴ Reg 23A(9) use the word ‘must’.

⁶⁵ Department of Trade and Industry ‘DTI publishes Affordability Assessment Regulations for Public Comment 5 August 2014 <https://www.gov.za/news/media-statements/dti-publishes-affordability-assessment-regulations-public-comment-2014-08-05> (accessed 4 November 2021).

5.4.1 Critical evaluation of Regulation 23A(10)

5.4.1.1 Complicated calculation of minimum expense norm table

The minimum expense norm table in regulation 23A(10) provides as follows:

Minimum	Maximum	Minimum monthly Fixed Factor	Monthly Fixed Factor = % of Income Above Band Minimum
R0.00	R800.00	R0.00	100%
R800.01	R6 250.00	R800.00	6.75%
R6 250.01	R25 000.00	R1 167.88	9.00%
R25 000.01	R50 000.00	R2 855.38	8.20%
R50 000.01	Unlimited	R4 905.38	6.75%

The regulations do not provide any explanation as to how the table should be used and how the minimum expenses of a consumer falling into a particular income band should be calculated. Further, the Regulator did not issue any guideline to solve this problem. The draft 2013 *Guidelines* explained the application of the minimum expense norm table, by way of an example.⁶⁶ However, the table published in the 2013 *Guidelines*, differ materially from the table in the regulations. The 2013 table was based on annual income and expenses, whereas monthly income and expenses are used in the table in the final regulations as indicated below.

⁶⁶ Draft Guidelines (n 50) para 1.2. Three sets of Draft Regulations were published and considered before the final National Credit Regulations including Affordability Assessment Regulations were published and came into effect on 14 September 2015.

The 2013 table used in the 2013 *Guidelines* provided as follows:

Minimum	Maximum	Annual Fixed Factor (food, transport, accommodation)	Annual Fixed Factor + % of Income Above Band Minimum
R0.00	R14 400.00	R0.00	100%
R14 400.01	R75 000.00	R14 400.00	6.75%
R75 000.01	R300 000	R18 500.00	9.00%
R300 000.01	R600 000.00	R40 500.00	8.20%
R600 000.01	High	R65 00.00	6.75%

An example to explain the application of the table was included in the guidelines providing that:

‘... should the prospective consumer have an annual gross income of R24 000 the credit provider may not accept annual necessary expenses of less than R14 400 plus R648 (being 6.75% of R9 600⁶⁷) unless same is evidenced as required in these affordability guidelines.’

An online search using the phrase ‘*how to calculate the minimum expense norms in terms of Regulation 23A(10)*’ delivered a different result. Esselaar⁶⁸ provides the following scenario for a calculation of the minimum expenses of a consumer:

Joe Soap earns R5000 per month as a gross income. This places him in the R800.01 to R6250.00 bracket (row 2 in the Regulation 23A(10) table). The norm for a person in Joe Soap’s position is for him to have R800 worth of expenses (the minimum monthly fixed factor) PLUS a percentage of the remaining income over the minimum income. In this case this means that his expenses are:

$$\begin{aligned}
 &R800 + (6250.00 - R800 \times 6.75\%) \\
 &= R800 + (5450 \times 6.75\%) \\
 &= R800 + R367.88 \\
 &= R1167.88
 \end{aligned}$$

⁶⁷ The amount of R9 600 is calculated by subtracting the annual fixed factor of R14 400 for this income band from R24 000, the latter being the annual gross income of the consumer.

⁶⁸ Esselaar P ‘Novation Consulting: How to calculate minimum expense norms’ <https://novcon.co.za/2016/11/16/how-to-calculate-minimum-expense-norms/> (accessed 4 November 2021).

If the above calculation is done in accordance with the example given in the first draft of the regulations, the result will however be different:

$$\begin{aligned} & R800 + (R5000 - R800.01 \times 6.75\%) \\ &= R800 + (R4199.99 \times 6.75\%) \\ &= R800 + R283.50 \\ &= \text{The amount of R1 083.50 will be the consumer's minimum expenses.} \end{aligned}$$

Esselaar does however not refer to the example in the first draft of the regulations and it can be assumed that he did not base his calculation on it. It further appears that Esselaar used the band maximum (R6 250) instead of the *actual salary* of Joe Soap (R5 000) to do his calculation. A calculation done by Ithuseng Debt Solutions delivered the same result.⁶⁹

In 2023 Esselaar wrote a further article on the subject.⁷⁰ This time the calculation corresponded with the method used in the draft regulations. To demonstrate the perplexity of the calculation, it is worth mentioning that Esselaar unfortunately used the wrong income band to do the calculation.⁷¹ Apart from using the wrong income band to do his calculation, the calculation corresponds with the example in the original regulations. He aptly concludes the article with the following remark:

'Finally, if this article seems complicated that is because it actually is (and that is the fault of the Regulations!).'

5.4.1.2 *Simplistic use of minimum expense norm table by credit providers*

In Esselaar's 2023 article he also elaborates on an argument already presented in the 2021 article, namely that the last column of Table 1 of regulation 23A(10) contains a typing error. He argues that the column reading:

'Monthly Fixed Factor = % of Income Above Band Minimum'

should instead read:

'Monthly Fixed Factor + % of Income Above Band Minimum'.

⁶⁹ Correspondence on file with writer. See also 'New Affordability Guidelines to force consumers to declare minimum monthly expenses' <https://www.facebook.com/profile/100063526181493/search/?q=minimum%20expense%20norms> (accessed 27 March 2025).

⁷⁰ Esselaar P 'NCA Minimum Expense Norms: When = equals?' <https://esselaar.co.za/nca-minimum-expense-norms-when-equals/> (accessed 4 November 2021).

⁷¹ *Ibid.* Correspondence on file with writer.

He reasons that the 'equal to/=' should be replaced with a 'plus/+'. This is to prevent credit providers from relying on the Minimum Monthly Fixed Factor alone without adding the Monthly Fixed Factor percentage.⁷²

This argument is supported by reports from industry role players that the lack of guidance on the practical application of the table creates a loophole for some credit providers who use the minimum monthly fixed factor in the table as the set expense for consumers falling in a particular income bracket.⁷³ These credit providers, so it is alleged, use the minimum monthly fixed factor indicated in the table as the (*only*) norm to determine affordability, instead of obtaining details of the consumer's actual monthly living expenses.⁷⁴ It is submitted that this will not give an accurate account of the consumer's financial position, because the amount set out in the table constitutes the smallest amount that may be used in affordability calculations, unless the consumer completes the prescribed questionnaire to justify lower expenses.⁷⁵ The apparent manipulation of the expense norm tables in this way could indicate that consumers have a bigger portion of their discretionary income available to repay debt, than what is truly the case. This can lead to consumers obtaining credit that they cannot afford.⁷⁶

Even though the outcome of such a simplistic assessment method would yield unrealistic results, it would discharge the credit provider of its obligation to adhere to the provisions of the Act in respect of conducting an affordability assessment. The credit provider would not be guilty of reckless lending, because he conducted the affordability assessment as required in terms of the Act.⁷⁷ However, even though the credit provider may technically not be in breach of the provisions of the Act, it will not

⁷² Esselaar Minimum Expense Norms (n 70).

⁷³ Debt Counsellors Association of South Africa 'Reckless Credit Practical Guideline for Debt Counsellors' (2016) <https://www.dcasa.co.za/wp-content/uploads/2017/06/DCASA-Reckless-Credit-Practical-Guideline-for-Debt-Counsellors.pdf> (accessed 4 February 2020). Maya on Money Caught up in a debt cycle <https://mayaonmoney.co.za/2023/05/caught-up-in-a-debt-cycle> (accessed 4 February 2020).

⁷⁴ *Ibid.* See also Esselaar Minimum Expense Norms (n 70).

⁷⁵ Reg 23A(11).

⁷⁶ This behaviour of credit providers was predicted by the writers Van Heerden CM and Steennot R 'Pre-Agreement Assessment as a Responsible Lending Tool in South Africa, the EU and Belgium: Part 1' (2018) *Potchefstroom Electronic Law Journal* 21.

⁷⁷ S 81(2) of the NCA.

be acting in the best interest of the consumer who may as a result, be granted credit he cannot afford.⁷⁸

5.4.1.3 Minimum expense norm table do not take different circumstances of consumers into account

The mentioned simplistic use of the income bands is further problematic, because it does not consider that consumers falling into a particular income band may have different profiles. As pointed out by Van Heerden and Beyers, a 40-year-old male with three dependants living in a mortgaged property will have a different expense profile from a 24-year-old unmarried man who lives with his parents. According to the current regulations these two persons will have the same minimum living expense profile, as long as their income resorts under the same band of uniformity.⁷⁹

This problem was also pointed out by HomeChoice, a retailer operating in the unsecured credit space, when it commented on the then proposed affordability assessment regulations in 2013.⁸⁰

Nel further highlighted that, similar to the current regulations' omission of variations in household expenditure profiles, they also fail to account for contributions from other income-generating household members. This oversight has the potential to substantially influence a consumer's overall financial position.⁸¹

5.4.1.4 Minimum monthly expenses in minimum expense norm table too low

When measured against the national poverty lines published annually by Statistics South Africa⁸² the minimum monthly expenses allowed for the different income bands listed in the regulation, is very low. The annual report distinguishes between three

⁷⁸ Maya on Money Caught up in a debt cycle <https://mayaonmoney.co.za/2023/05/caught-up-in-a-debt-cycle> (accessed 4 February 2020).

⁷⁹ Van Heerden CM and Beyers C 'Dynamic Affordability Assessment in the Context of the South African National Credit Act 34 of 2005' (2016) *Journal of International Banking Law and Regulation* 476.

⁸⁰ Correspondence from HomeChoice to NCR dated 14 June 2013 on file with writer.

⁸¹ Nel IR *Affordability Assessments in South African Law* (LLD thesis, University of Johannesburg 2020) 376.

⁸² Hereinafter referred to as 'STATS SA'.

different poverty categories.⁸³ A person falling in the first category, the so-called ‘food poverty line’, will require R796 per month (R25.70 per day) to buy basic foods required to survive every month. People falling in this category will only have enough money to buy food and nothing else.⁸⁴

The lower⁸⁵- and upper-bound poverty⁸⁶ lines both makes provision for the inclusion of non-food items. However, in the lower measure a person would need to ‘*sacrifice food in order to obtain these*’.⁸⁷ At the upper poverty line, people are able to ‘purchase both adequate food and non-food items’.⁸⁸ A person falling in the lower bound food poverty line will require R1 109 per month (R35.77 per day) to survive. People falling in this category will only have money available for essentials such as clothing if they sacrifice money they would have used for nutrition. A person in the upper bound poverty line will need R1 634 (R52.70 per day) to survive. This amount will enable them to buy basic food and essentials, such as clothing.

The amount of R800 per month allowed in terms of regulation 23A(10) as the minimum expenses of a person falling in the second income band (earning between R800.01 and R6 250 per month), allows expenses of R25.80 per day. When measured against the poverty line values for 2024, this amount falls between the food poverty line (extreme poverty) and the lower bound food poverty line. As a result, consumers, who barely can afford basic food items, are allowed to obtain credit. When the cost of credit and interest are added to the monthly instalment, any unforeseen expense can cause the consumer to end up lending from Peter to pay Paul.

⁸³ STATS SA *National Poverty Lines 2024* <https://www.statssa.gov.za/publications/P03101/P031012024.pdf> (accessed 19 May 2025). Hereinafter referred to as ‘*National Poverty Lines 2024*’.

⁸⁴ *National Poverty Lines 2024 3: Food poverty line* – R561 (in May 2024 prices) per person per month. This refers to the amount of money that an individual will need to afford the minimum required daily energy intake. This is also commonly referred to as the ‘extreme’ poverty line. People falling into this category will only have enough money for basic nutrition and no other essentials. The food poverty line is based on the daily calories a person needs to survive. The threshold that STATS SA uses is 2 100 calories per day, which is based on the United Nations’ minimum daily consumption requirement in emergency situations.

⁸⁵ *National Poverty Lines 2024 3: Lower-bound poverty line* – R1 109 (in May 2024 prices) per person per month. People falling into this category will only have enough money available for essentials such as clothing if they sacrifice money they would have used for nutrition.

⁸⁶ *National Poverty Lines 2024 3: Upper-bound poverty line* – R1 634 (in May 2024 prices) per person per month. People falling into this category will have just enough money for basic nutrition and other essentials such as clothing.

⁸⁷ *National Poverty Lines 2024 11.*

⁸⁸ *Ibid.*

5.4.1.5 Minimum expense norm table does not exclude grant beneficiaries

The Act does not prescribe who can or cannot apply for credit. It only prescribes that an affordability assessment must be done.⁸⁹ This means that even SASSA social grant⁹⁰ beneficiaries can apply for credit.

Financial inclusion of the poor, measured by the extent to which they have access to and make use of financial products, was boosted greatly in South Africa by the decision to distribute grant payments digitally in 2012.⁹¹ The digitisation of the social grant system introduced this group of consumers to the formal financial services sector and allowed them access to financial products such as bank accounts, savings products, credit and insurance. In their report on the financial inclusion brought about by the digitisation of the social grants in South Africa, Finmark Trust reported that social grant recipients' access to credit has skyrocketed in 2016 when compared to the position in 2004.⁹² Unfortunately, the report also identified a worrying trend in the increasing levels of over indebtedness of SASSA grant recipients. The proportion of grant recipients accessing credit has shot up from 20% in 2012 to 41% in 2016.⁹³

When it commented on the proposed amendment of the Act in 2014, Blacksash⁹⁴ drew the Department of Trade and Industry's attention to the plight of grant beneficiaries who had become trapped in a debt spiral.⁹⁵ Blacksash pointed out that a significant portion of the growth in indebtedness among social grant recipients was driven by formal credit and warned that grant beneficiaries was fast becoming the new market for these credit products.⁹⁶

⁸⁹ S 82(1) of the NCA.

⁹⁰ A social grant is money paid by the government via the South African Social Security Agency (SASSA) to vulnerable people such as children, disabled people and the elderly. These grants are referred to as 'SASSA grants'.

⁹¹ Finmark Trust 'Digitisation of social grant payments and financial inclusion of grant recipients in South Africa – Evidence from FinScope Surveys (May 2017) https://finmark.org.za/system/documents/files/000/000/249/original/Social-grants-and-contribution-to-financial-inclusion_Final.pdf?1602597880 (accessed 25 May 2020) 2.

⁹² According to a FinMark Trust 'Digitisation of social grant payments' (n 91) 7, only 44% of the general population and 36% of grant recipients had bank accounts as recently as 2004.

⁹³ *Ibid.*

⁹⁴ Black Sash is a South African Human Rights organisation. <https://www.blacksash.org.za> (accessed 31 July 2025).

⁹⁵ Black Sash 'Submission on National Credit Amendment Bill [47-2013]' <https://pmg.org.za/committee-meeting/16903/> (accessed 25 May 2020).

⁹⁶ Black Sash (n 95) 12.

In order to prevent social assistance grants from being seen as income, Blacksash started a campaign to the Social Assistance Act 13 of 2004 to make it illegal for lenders to use social assistance issued by the South African Social Security Agency as collateral. The campaign also advocated for amendments to the NCA that explicitly provide that social grants are not to be regarded as income.⁹⁷ They contended that social grants are intended to cover the recipient's basic needs such as food, clothing, rent and transportation. It should not, and was not, intended to pay off accumulated interest or to benefit private business by charging interest and other fees.⁹⁸

Although no legislative amendments have yet been enacted to reflect this ideal, the Tribunal has adjudicated the issue on multiple occasions. In the matter of *National Credit Regulator v Aristoscan CC t/a JMK Cash Loans*⁹⁹ the Tribunal made a finding that child support and foster care social grants are income to be used for the benefit of third parties and cannot be deemed to be the consumer's income.¹⁰⁰ However, in the matter of *National Credit Regulator v Titusg Traders (Pty) Ltd*¹⁰¹ the Tribunal apparently did not find any fault in the Regulator's inspector reporting that credit was extended to SASSA grant beneficiaries who received old age and disability grants.¹⁰²

Van Heerden submits that as long as the grant is for the own benefit of the person applying for credit, it can serve as a source of income for purposes of applying for credit.¹⁰³ Failure to permit these consumers receiving this type of grants could constitute unfair discrimination based on disability and age.¹⁰⁴ In the matter of *National Credit Regulator v Blue Magnolia Trading 463 CC*,¹⁰⁵ the Regulator assisted the South African Police Services Directorate for Commercial, Financial and Cyber Crime Intelligence to investigate the unlawful lending of money by unregistered credit providers to SASSA grant beneficiaries. The credit provider offered short term loans to employed consumers as well as SASSA grant beneficiaries and retained the

⁹⁷ Black Sash (n 95) 14.

⁹⁸ Black Sash (n 95) 17.

⁹⁹ (NCT/128380/2019/140(1)) [2019] ZANCT 103 (1 July 2019).

¹⁰⁰ *National Credit Regulator v Aristoscan* (n 99) para 34.

¹⁰¹ (NCT/182923/2021/57(1)) [2022] ZANCT 16 (27 March 2022).

¹⁰² *National Credit Regulator v Titusg Traders* (n 101) para 11.7.7.

¹⁰³ Van Heerden in Scholtz *ed* (2024) para 11.6.3.

¹⁰⁴ S 61 of the NCA read with s 9(3) of the Constitution of the Republic of South Africa, 1996. See also Van Heerden in Scholtz *ed* (2024) para 11.6.3.

¹⁰⁵ (NCT/257512/2023/57(1)) [2023] ZANCT 19 (6 April 2023).

consumers' identity documents, bank cards and SASSA grant beneficiary cards. The credit provider alleged that it conducted pre-agreement assessments but no documentation to support this allegation could be found.¹⁰⁶ The Tribunal imposed a fine of R500 000 and also set aside all the rights and obligations of the consumers in respect of the credit agreements identified in the investigation.¹⁰⁷ In the matter of *National Credit Regulator v FC African Trading Enterprises Solutions (Pty) Ltd*¹⁰⁸ the Regulator investigated credit providers as part of its mandate to detect, prevent and prosecute prohibited conduct. It found that the credit provider in this matter extended credit to SASSA child grant recipients by means of short terms loans ranging from R100 to R1 200.¹⁰⁹ The Regulator found that the credit provider did not conduct the necessary pre-agreement assessments prior to granting the credit. The Tribunal imposed an administrative fine and stated that:

'These consumers belong to the most vulnerable sectors of our population and the provisions of the NCA are designed specifically for them.'¹¹⁰

In *National Credit Regulator v Renene t/a Kwa-Whity*¹¹¹ the National Regulator for Consumer Specifications requested the NCR's involvement in a consumer protection initiative in the Eastern Cape. During the operation, the Regulator carried out a preliminary investigation and received anonymous tip-offs indicating that the credit provider (who was unregistered) had, among other things, confiscated SASSA cards.¹¹² This credit provider had extended loans to vulnerable groups including pensioners, individuals with disabilities and recipients of child support grants. As part of the loan pre-agreement process, the credit provider required consumers to submit their identity documents, recent bank statements and payslips. Despite declaring the conduct of the credit provider as prohibited, the Tribunal did not rule on whether the credit provided was reckless.¹¹³

¹⁰⁶ *National Credit Regulator v Blue Magnolia Trading* (n 105) para 20.

¹⁰⁷ *National Credit Regulator v Blue Magnolia Trading* (n 105) para 31.

¹⁰⁸ (NCT/267015/2023/57(1) [2024] ZANCT 4 (16 January 2024).

¹⁰⁹ *National Credit Regulator v FC African Trading Enterprises Solutions* (n 108) para 15.

¹¹⁰ *National Credit Regulator v FC African Trading Enterprises Solutions* (n 108) para 72. See also Van Heerden in Scholtz *ed* (2024) para 11.6.3.

¹¹¹ (NCT/321461/2024/140(1) [2024] ZANCT 71 (5 December 2024).

¹¹² *National Credit Regulator v Renene t/a Kwa-Whity* (n 111) para para 27.

¹¹³ *National Credit Regulator v Renene t/a Kwa-Whity* (n 111) para 46.

The digitisation of the grant system, while aligned with the government's National Development Plan to promote financial inclusion, has inadvertently exposed low-income consumers to risks of over-indebtedness. By enabling easier access to credit, the system has facilitated economic participation but has also created vulnerabilities among grant recipients, who may lack the financial literacy or resources to manage debt responsibly. This highlights the tension between promoting access to credit and protecting vulnerable consumers from predatory lending practices.

Blacksash's proposal to ban the use of social grants as collateral for credit raises complex constitutional and economic issues. It may be argued that such a ban could infringe on parties' rights to freedom of trade, occupation, and profession as protected under section 22 of the Constitution.¹¹⁴ The ability to leverage income, even in the form of grants, as collateral is perceived as a means of enabling economic activity and empowerment. It is submitted that restricting this could be viewed as paternalistic and potentially limiting to the economic agency of grant recipients.

However, in terms of section 36(1) of the Constitution, the general requirements for the limitation of any right are that it may be limited only in terms of law of general application 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. It should thus be considered if it is 'reasonable and justifiable' to prevent certain consumers from obtaining credit. In this context, a ban on using social grants as collateral may be justified by the need to safeguard consumers from predatory lending practices and cycles of over-indebtedness, which undermine their long-term financial stability and human dignity. It is submitted that such a restriction would align with the constitutional imperative to protect those who are most vulnerable, particularly where the systemic risks of exploitation outweigh the benefits of economic freedom.

Paternalistic intervention by the government is therefore justified when it serves to promote substantive equality and prevent economic harm. The principle of 'Ubuntu', embedded in South Africa's constitutional framework, further reinforces the rationale for protective measures that prioritise the well-being of the vulnerable over strict

¹¹⁴ The Constitution of the Republic of South Africa Act 200 of 1993.

adherence to formalistic notions of freedom.¹¹⁵ Grant recipients often rely on this income for survival, and allowing its use as collateral jeopardises their ability to meet basic needs, ultimately perpetuating cycles of poverty and inequality.

It is submitted that such intervention need not be absolute but could be reinforced by measures that promote financial literacy and responsible lending practices. Regulatory mechanisms, including reformed affordability assessments and stricter oversight of micro-lenders, could help balance consumer protection with financial empowerment, ensuring that access to credit does not lead to economic vulnerability.

In conclusion, it is submitted that the proposed ban can withstand constitutional scrutiny if it is shown to be a reasonable and justifiable limitation on economic freedom, aimed at addressing systemic inequality and protecting vulnerable consumers from exploitation. This approach aligns with the transformative vision of the South African Constitution and reflects the state's duty to balance freedom with fairness in the pursuit of social justice. A comprehensive investigation of this issue falls beyond the scope of this study. However, reference is made to it, as it represents a contributing factor to the over-indebtedness of low-income consumers. While not examined in full detail, its relevance to the broader discussion is underscored by the potential impact on the financial situation of low-income consumers.

5.4.1.6 Purpose of minimum fixed factor percentages unclear

Lastly, Van Heerden and Beyers observe that the precise meaning of the 'minimum fixed factor' percentages remains unclear. They ask the following questions:

'[D]oes it reflect a natural progression relating to expenditure as a person's income within the bracket increases? (e.g. a person who, for example, earns R5000 per month can usually be expected to have higher living expenses than a person who earns R2500 per month) Or does this minimum fixed factor or part thereof fulfil the role of an adversity buffer to some or other extent?'¹¹⁶

Thus, it is plain that the minimum expense norm table, which forms an integral part of the affordability assessment model imposed by the Regulations, is vague and

¹¹⁵ Himonga C, Taylor M and Pope A 'Reflections on Judicial Views of Ubuntu' (2013) *PELJ* 376. The writers describe Ubuntu as an age-old and traditional African world-view, a set of values or a philosophy of life which plays a strong and defining role in influencing social conduct.

¹¹⁶ Van Heerden and Beyers (n 79) 476.

susceptible to manipulation by credit providers. Because the minimum expenses allowed are very low, consumers can also still manipulate the outcome of an application for credit by understating their expenses and over stating their after expenses income. Nel's proposal to eliminate the Minimum Expense Norm Table from the Regulations therefore warrants further consideration.¹¹⁷

5.5 Regulation 23A(11)

In terms of regulation 23A, the credit provider must not only assess the consumer's income, but also calculate the consumer's existing financial means, prospects and obligations. To assist the credit provider in fulfilling this obligation, regulation 23A(10) provides the credit provider with a 'formula' to do the calculation. Firstly, the credit provider must ascertain the consumer's gross income.¹¹⁸ Secondly, statutory deductions and minimum living expenses should be deducted to arrive at a net income, which must be allocated for payment of debt instalments.¹¹⁹ To assist the credit provider to calculate the minimum living expenses of the consumer, a formula is set out in Table 1. Lastly, the formula provides that when existing debt obligations are considered, the credit provider must calculate discretionary income to enable the consumer to satisfy any new debt.¹²⁰

In essence, therefore, regulation 23A strengthens section 81(2)(a)(iii) by providing a standardised method which assists in determining credit affordability. Notably, in order to avoid the unfair exclusion of consumers with exceptional circumstances from access to credit, regulation R23A(11) makes provision for credit providers to deviate from the minimum expense norms table set out in regulation 23A(10). Regulation 23A(11) provides as follows:

'(11) The credit provider may however on an exceptional basis, where justified, accept the consumer's declared minimum expenses which are lower than those set out in table 1 provided the questionnaire set out in the Schedule, as issued from time to time, is completed by the consumer or joint consumers.'

Regulation 23A(11) allows the credit provider, on an exceptional basis and where the same is warranted, to accept declared minimum expenses which are lower than those

¹¹⁷ Nel LLD (n 81) 375.

¹¹⁸ Reg 23A(10)(a).

¹¹⁹ Reg 23A(10)(b).

¹²⁰ Reg 23A(10)(c).

set out in the Minimum Expense Norms table from the consumer. This is permissible as long as the prescribed questionnaire as set out as Annexure A in Schedule 1 to the affordability assessment regulations are satisfactorily answered by the consumer.¹²¹ The purpose of the questionnaire is to assist the credit provider in determining whether the consumer would be able to afford the credit. In the same way it serves as an evaluative mechanism to avoid a situation where the consumer attempts to under-declare his expenses to create an impression that he is credit-worthy.

The questionnaire requires details relating to the credit provider as well as the consumer applying for the credit to be completed. Details of the monthly expenses of the consumer, as well as the income band the consumer will fall in in terms of the Table in regulation 23A(10) must be provided. A detailed declaration by the consumer of his monthly expenses in respect of accommodation;¹²² transport;¹²³ food;¹²⁴ educational costs;¹²⁵ medical expenses;¹²⁶ water and electricity;¹²⁷ and maintenance expenses must also be provided.¹²⁸ Insofar as any of the aforesaid expenses are paid by the consumer's employer, family members or friends, the name and contact details of such persons should be recorded in the questionnaire.¹²⁹ The questionnaire further makes provision for a 'Consumer Declaration' drawing the attention of the consumer to the provisions of section 81(4) which provide the credit provider with a complete defence against any allegation of reckless lending in the event of the consumer not being truthful with the information provided in terms of the questionnaire.¹³⁰ The consumer is also requested to sign the questionnaire.¹³¹

Evident from the below discussion, the provisions in regulation 23A(11) are still circumvented and do not offer sufficient protection against over-indebtedness and reckless lending. It is suggested that it be considered to do away with the tables

¹²¹ Van Heerden in Scholtz *ed* (2024) para 11.6.6.

¹²² Section 3.1 Annexure A to the Affordability Assessment Regulations.

¹²³ Section 3.2 Annexure A to the Affordability Assessment Regulations.

¹²⁴ Section 3.3 Annexure A to the Affordability Assessment Regulations.

¹²⁵ Section 3.4 Annexure A to the Affordability Assessment Regulations.

¹²⁶ Section 3.5 Annexure A to the Affordability Assessment Regulations.

¹²⁷ Section 3.6 Annexure A to the Affordability Assessment Regulations.

¹²⁸ Section 3.7 Annexure A to the Affordability Assessment Regulations.

¹²⁹ Section 3.1 – 3.7 Annexure A to the Affordability Assessment Regulations.

¹³⁰ Consumer Declaration para 1 Annexure A to the Affordability Assessment Regulations.

¹³¹ Section 1 Annexure A to the Affordability Assessment Regulations.

completely and to follow a more principles-based approach as in the UK instead of a rule-based approach that prescribes this type of strict tables.¹³² The focus would then be on the fact that the credit provider should not grant credit recklessly and not so much on how it should be done.

5.5.1 Critical evaluation of Regulation 23A(11)

5.5.1.1 Abuse of questionnaire

Summit Financial Services approached the Tribunal for relief on two occasions where it was alleged that credit providers use regulation 23A(11) as a standard practice to adjust the consumer's expenses when doing an affordability assessment calculation.¹³³ Various examples of how the questionnaire was used to lower consumer's expenses to enable them to qualify for credit were presented to the Tribunal.¹³⁴ In each of these instances it was clear that the credit provider routinely used regulation 23A(11) to lower expenses, whereas the regulation was only intended to be used on *an exceptional basis, where justified*.¹³⁵

As a result of this practice, there was continuous under-reporting of consumers' living expenses leading them to obtain credit they could not afford. The applicant presented details from assessments done by the credit providers from which the use of regulation 23A(11) was evident, and contended that this assessment method was the norm with these credit providers, rather than the exception. The applicant argued that this business model effectively constituted reckless lending and resulted in consumers being unable to fulfil their credit commitments which resulted in them becoming over indebted and eventually being placed under debt review. The applicant also presented the Tribunal with examples to proof its allegations.¹³⁶

¹³² See Chapter 8 for a discussion of the UK consumer credit legislation.

¹³³ *Summit Financial Partners (Pty) Ltd and Others v Direct Axis SA (Pty) Ltd, A Subsidiary of Firststrand Bank Limited and Others* [2022] ZANCT 59 (24 November 2022) and *Summit Financial Partners (Pty) Ltd v Direct Axis Sa (Pty) Ltd and Others* [2022] ZANCT 69 (17 November 2022).

¹³⁴ *Summit Financial Partners (Pty) Ltd and Others v Direct Axis SA (Pty) Ltd, A Subsidiary of Firststrand Bank Limited and Others* [2022] ZANCT 59 (24 November 2022) para 20. *Summit Financial Partners (Pty) Ltd v Direct Axis Sa (Pty) Ltd and Others* [2022] ZANCT 69 (17 November 2022) paras 36;37;42;43 and 44.

¹³⁵ *Summit Financial Partners (Pty) Ltd and Others v Direct Axis SA (Pty) Ltd, A Subsidiary of Firststrand Bank Limited and Others* [2022] ZANCT 59 (24 November 2022) para 22. *Summit Financial Partners (Pty) Ltd v Direct Axis Sa (Pty) Ltd and Others* [2022] ZANCT 69 (17 November 2022) para 46 and 47 (own emphasis).

¹³⁶ Applicant's heads of argument on file with writer.

Even if the outcome of such a simplistic assessment approach would produce unrealistic results, it is submitted that it would relieve the credit provider of its need to follow the Act's restrictions about conducting an affordability assessment. The credit provider would not be guilty of irresponsible lending because he did the affordability assessment as required by the Act. However, even if the credit provider is not technically in violation of the Act, as previously stated, it will not be acting in the best interests of the client, who may be granted credit he cannot afford.

5.5.1.2 Difficulty verifying third party contributions

A further way in which the protection offered by regulation 23A(11) was circumvented, was illustrated by another practice by credit providers and consumers exposed in the matters of *Summit v Direct Axis* alluded to earlier.¹³⁷ As explained above, insofar as any of the aforesaid expenses are paid by the consumer's employer, family members or friends, the name and contact details of any third party paying any expenses regarding food, transport, accommodation etc on behalf of the consumer, should be recorded in the questionnaire.

The Tribunal was presented with evidence from credit applications by consumers where it was alleged that expenses were paid by third parties. Despite the fact that the regulation 23A(11) questionnaire requires that the identity of the persons making the payment of the consumer's living expenses on their behalf be recorded, it was rarely done.¹³⁸

In their defence the Respondents relied on the provisions of section 81(4). The respondents contended that there was no legal basis on which they could be expected to independently verify information regarding living expenses provided by the consumer. They could accept the information given by the consumer and where there has not been a complete and truthful provision of information by a consumer as part of the required affordability assessment process, section 81(4) would protect the credit provider against any allegation of reckless lending. The Tribunal agreed with this argument and the applications was rejected.

¹³⁷ *Summit v Direct Axis* (n 133).

¹³⁸ *Summit Financial Partners (Pty) Ltd v Direct Axis Sa (Pty) Ltd and Others* [2022] ZANCT 69 (17 November 2022) para 38.

It is submitted that this argument is misplaced. In *Horwood v Firstrand Bank*¹³⁹ the court indicated that where a credit provider has taken the required ‘reasonable steps to assess’ the relevant matters referred to in s 81(2), the credit agreement is not a reckless one in terms of s 80(1), whether or not the assessment was tainted by a consumer’s incomplete or untruthful answers. The court further remarked that the complete defence provided for in s 81(4) is a defence which may be raised in addition to one that the credit provider’s assessment obligations under s 81 have been met.¹⁴⁰ In *Absa Bank Ltd v COE Family Trust and Others*¹⁴¹ the court held that s 81(4) must be read in conjunction with section 81(2). Van Heerden submits that the effect of this interpretation is that, where no assessment as envisaged by section 81(2) was conducted, section 81(4) becomes inapplicable.¹⁴² Van Heerden further emphasises that the mere fact that an assessment was undertaken does not, in itself, qualify the credit provider to rely on section 81(4) as a defence. It is only where the assessment complies with the substantive requirements of section 81(2) that the credit provider may validly invoke the provisions of section 81(4).¹⁴³

5.6 Regulation 23A(13)

The affordability assessment regulations further prescribe that a credit provider must consider the consumer’s debt repayment history.¹⁴⁴ The Act provides that a consumer’s debt repayment history will be reflected in his credit bureau report. Credit bureaus are strictly regulated in terms of the Act and the Regulations.¹⁴⁵ An entity that is a juristic person for purposes of the NCA,¹⁴⁶ and that behaves in a manner that is set out in section 43(1),¹⁴⁷ must request the Regulator to register it as a credit

¹³⁹ 2011 ZAGPJHC 121 (21 September 2011) at para 7.

¹⁴⁰ Kelly-Louw M *Consumer Credit Regulation in South Africa* (2012) para 12.2.2.

¹⁴¹ 2012 (3) SA 184 (WCC) at 189.

¹⁴² Van Heerden in Scholtz *ed* (2024) para 11.6.5.

¹⁴³ *Ibid.*

¹⁴⁴ Reg 23A(13).

¹⁴⁵ Boraine A and Van Wyk J ‘Credit bureaus in South Africa and Namibia: a comparative analysis of the regulatory frameworks evaluated against the World Bank’s principles for credit reporting – Part I’ *Comparative and International Law Journal of Southern Africa* 50.

¹⁴⁶ S 46(1) of the NCA prohibits a natural person from registration as a credit bureau. There are also instances where the natural persons that have core functions within the entity can impact the viability of the entity for registration or continued registration—see s 47 of the NCA. See Boraine A and Van Wyk J (n 145) 303.

¹⁴⁷ S 43(1) provides: ‘A person must apply to be registered as a credit bureau if that person engages for payment, other than as a credit provider or an employee of a credit provider, in the business of-

bureau.¹⁴⁸ The regulation of credit bureaus ensure that more accurate information is held by these bureaux.¹⁴⁹ Credit bureaus sell reports containing consumer credit information to lenders and other companies for assessment of risk in the provision of credit and for other purposes permitted and prescribed in terms of the Act.¹⁵⁰ Consumer credit information is defined in section 70(1)(a) of the Act as information concerning:

- '70(1)(a) a person's credit history, including applications for credit, credit agreements to which the person is or has been a party, pattern of payment or default under any such credit agreements, debt re-arrangement in terms of this Act, incidence of enforcement actions with respect to any such credit agreement, the circumstances of termination of any such credit agreement, and related matters;
- (b) a person's financial history, including the person's past and current income, assets and debts, and other matters within the scope of that person's financial means, prospects and obligations, as defined in section 78(3), and related matters;
- (c) a person's education, employment, career, professional or business history, including the circumstances of termination of any employment, career, professional or business relationship, and related matters; or
- (d) a person's identity, including the person's name, date of birth, identity number, marital status and family relationships, past and current addresses and other contact details, and related matters.'

Section 70(1) is supplemented by regulation 18(6), which authorises accumulation, retention and distribution of data on debts owed to creditors¹⁵¹ or debts obtained from credit providers,¹⁵² fraudulent behaviour related to credit matters¹⁵³ or other information in respect of which the bureau has obtained the permission of the consumer for use in a specific manner.¹⁵⁴

-
- (a) receiving reports of, or investigating-
 - (i) credit applications;
 - (ii) credit agreements;
 - (iii) payment history patterns; or
 - (iv) consumer credit information as defined in section 70(1), relating to consumers or prospective consumers, other than reports of court orders or reasons for judgment or similar information that is in the public domain;
 - (b) compiling and maintaining data from reports contemplated in subparagraph (i); and
 - (c) issuing reports concerning consumers or other natural persons based on information or data referred to in this paragraph.

¹⁴⁸ Ss 14(a) and 43 of the NCA.

¹⁴⁹ Kelly-Louw M (n 140) 170.

¹⁵⁰ S 43(2)(g) of the NCA.

¹⁵¹ Reg 18(6)(a).

¹⁵² Reg 18(6)(b).

¹⁵³ Reg 18(6)(c).

¹⁵⁴ Reg 18(6)(d).

The Act further provides that a credit bureau must comply with certain prescribed standards when maintaining a consumer's credit information. So, for example, maximum retention periods for displaying a consumer's credit bureau information are prescribed.¹⁵⁵ The Act provides that inadmissible information relating to race, political affiliation, medical status or history, religion or thought, belief or opinion, section orientation and membership of a trade union may not be contained in the records of a credit bureau.¹⁵⁶ The Act further provides that any inadmissible information must be promptly expunged from its records.¹⁵⁷ In South Africa, credit bureaus hold both positive and negative information about a consumer's credit behaviour.¹⁵⁸ Positive information includes, for example, on-time loan repayments whilst negative information refers to defaults on payments, judgments and other adverse behaviour.

The Act further provides that credit bureaus may only accept consumer credit information from specific sources.¹⁵⁹ Even though the Act does not specifically prescribe that credit providers must report information to *all* (own emphasis) credit bureaus, this is implied with an amendment of the Act in 2015 that introduced regulation 19(13).¹⁶⁰ This regulation provides that all credit providers must submit credit information to credit bureaus in a manner and form specified by the Regulator through conditions of registration and any guidelines that may be issued by the Regulator from time to time. The guideline that prescribes how the submission of data should be conducted, was released in 2017.¹⁶¹

¹⁵⁵ S 70(2)(d) read with Reg 17.

¹⁵⁶ Reg 18(3).

¹⁵⁷ S 70(2)(f).

¹⁵⁸ According to research done by the European Credit Research Institute 'The European Credit Information Landscape – An analysis of a survey of credit bureaus in Europe' (January 2016) https://aei.pitt.edu/33375/1/ACCIS-Survey_FinalReport_withCover.pdf (accessed 25 August 2020), some countries like for example Denmark, Finland, Iceland and Norway do not store positive information. This is because stringent legislative frameworks in several countries implies restricted possibilities to store positive information.

¹⁵⁹ S 70(2)(a) and (b), 70(3)(b) read with reg 18(7).

¹⁶⁰ Subreg. (13) added by GN R202 of 13 March 2015. Boraine A and Van Wyk J (n 145) differ from this view on 329. Their article was however published before the National Credit Regulator *Guideline for the submission of credit information in terms of Regulation 19(13) of the National Credit Act 003/2017* was published by the Regulator.

¹⁶¹ National Credit Regulator *Guideline for the submission of credit information in terms of Regulation 19(13) of the National Credit Act 003/2017*.

To assist with the implementation of the regulation the Regulator has entered into an agreement with the South African Credit & Risk Reporting Association¹⁶² and the Credit Bureau Association,¹⁶³ as co-owners of the Data Transmission Hub.¹⁶⁴ The DTH refers to an encrypted data transfer interface managed by SACRRA through which credit information is submitted to credit bureaux.¹⁶⁵ In terms of the guideline credit providers and other providers of consumer credit information must extract their data into a specific SACRRA format and submit the data to the DTH. The data will be filtered to ensure accuracy and distributed to *all* registered credit bureaux. This will ensure that *all* registered credit bureaux receive information from data suppliers and not from only one or two suppliers. Evidently this will enhance the accuracy of credit bureau information.¹⁶⁶

Besides the information set out in section 70(1), a consumer's credit bureau report also contains a payment profile.¹⁶⁷ The payment profile relates to a consumer's history of payment of a particular transaction. The payment profile of a consumer is depicted by way of codes or numerals.¹⁶⁸

A credit bureau report will also reflect a consumer's credit score. The credit score is reflected as a number that falls within a particular credit score band. A consumer's credit score is determined by a credit scoring model applied by the particular credit bureau. This model uses algorithms to analyse a consumer's credit information and

¹⁶² The South African Credit & Risk Reporting Association is a non-profit voluntary industry association facilitating the sharing of credit and risk information to enable members to make informed credit and risk decisions pertaining to credit and other service applications by consumers. <https://sacra.org.za/> (accessed 1 August 2025). Hereinafter referred to as 'SACCRA'.

¹⁶³ The Credit Bureau Association is a voluntary association of registered credit bureaux in South Africa and is funded by its members. <https://www.cba.co.za/home> (accessed 1 August 2025). Hereinafter referred to as 'the CBA'.

¹⁶⁴ Hereinafter referred to as 'the DTH'.

¹⁶⁵ South African Credit & Risk Reporting Association 'Reporting of Credit Information in terms of Regulation 19(13)' https://sacra.org.za/wp-content/uploads/2024/05/Overview_ReportCreditInfo_Reg_19_13.pdf (accessed 25 August 2020) 2.

¹⁶⁶ South African Credit & Risk Reporting Association 'Reporting of Credit Information in terms of Regulation 19(13)' https://sacra.org.za/wp-content/uploads/2024/05/Overview_ReportCreditInfo_Reg_19_13.pdf (accessed 25 August 2020).

¹⁶⁷ Reg 17(3).

¹⁶⁸ Kelly-Louw M 'The 2014 credit information amnesty regulations: what do they really entail?' 2015 *De Jure* 6. Kelly-Louw M and Stoop P (n 49) 73.

then assigns a score to the consumer. Every credit bureau uses its own methods and numerals to determine the credit score band of a particular consumer. Therefore, even though the same information is sent to credit bureaus in accordance with regulation 19(13), it is possible that a consumer's credit score can differ from bureau to bureau. A consumer's credit score improves or deteriorates depending on his credit behaviour. The more positive the information in a consumer's individual credit report, the higher his credit score. And the higher the consumer's credit score, the more likely he is to successfully apply for credit.¹⁶⁹

Credit bureau information is an important tool to reduce information asymmetry in the consumer credit landscape. Information asymmetry refers to an imbalance between two negotiating parties in their knowledge of relevant factors and details. Typically, that imbalance means that the side with more information enjoys a competitive advantage over the other party. Information provided by borrowers on their loan applications are often unreliable and incomplete and can result in information asymmetry. As consumers know that credit providers do not have complete, authentic information about them, they may choose to take undue advantage and apply for loans which they cannot afford eventually resulting in default on repayments. This situation is called 'moral hazard'. Stiglitz and Weiss explain that due to this information gap, credit providers regard every consumer at average risk and charge interest accordingly.¹⁷⁰ In the absence of detailed and complete credit data, lenders cannot distinguish different types of borrowers (good borrower, bad borrower etc.) and essentially can only observe the average risk of borrowers. This leads to a situation where lenders over-charge low risk borrowers and under-charge high risk borrowers - a phenomenon known as 'adverse selection'.¹⁷¹

¹⁶⁹ Experian Why are my credit scores different? <https://www.experian.com/blogs/ask-experian/why-do-i-have-so-many-credit-scores/> (accessed 4 February 2020).

¹⁷⁰ Stiglitz, JE and Weiss A 'Credit rationing in Markets with Imperfect Information' (1981) *American Economic Review* 343-410.

¹⁷¹ Barron JM and Straten ME *The Value of Comprehensive Credit Reports: Lessons from the U.S. Experience - Credit Reporting Systems and the International Economy*, edited by Margaret J. Miller, The MIT Press, (2003). See also Reserve Bank of India *Report of the High-Level Task Force on Public Credit Registry for India 2018* <https://www.crifhighmark.com/media/1907/pcrrr09cf7539ac3e48c9b69112af2a498efd.pdf> (accessed 4 February 2020) para 1.6.

5.6.1 Critical evaluation of Regulation 23A(13)

It is evident that a consumer's credit report is vital information for a credit provider to be able to conduct a proper affordability assessment that meets the requirements of the Act and the affordability assessment regulations. Though credit bureau reports play an important role to determine the creditworthiness of consumers, it is not without flaws as can be seen from the discussion below.

5.6.1.1 *Credit bureau information can be incorrect*

The correctness and reliability of information seems to be a concern irrespective of the risk profile of the consumer. According to Credit Bureau Monitor¹⁷² data for the second quarter of 2020, there were 29,017 disputes lodged in respect of the accuracy of the information recorded on consumer credit records in the quarter ended June 2020. More disputes were resolved in favour of complainants (9,978) as compared to disputes where credit records remained unchanged (2,704).¹⁷³

5.6.1.2 *Credit bureau information not indicative of affordability*

As mentioned above, credit scores are calculated using various scoring models. Using factors like the consumer's payment history, type and number of accounts; length of credit history and credit history to available credit ratio, sophisticated algorithms are applied to calculate a number representing the likelihood of a consumer defaulting on a credit agreement. These algorithms and how they are used to arrive at their predictions on consumer behaviour, are not made public and differ from credit bureau to credit bureau. Accordingly, a consumer can have a different score band at different credit bureaus. Furthermore, credit scores are determined by predictions regarding a consumer's behaviour and are not indicative of whether a consumer can afford the credit or not. Given the limitations outlined above, Nel's recommendation that affordability assessments should be done by credit bureaus cannot be supported.¹⁷⁴

¹⁷² The Credit Bureau Monitor is a quarterly publication by the Regulator reflecting data held by registered credit bureaus in terms of the NCA.

¹⁷³ Barron and Straten *The Value of Comprehensive Credit Reports* (n 173).

¹⁷⁴ Nel LLD (n 81) 364 and 365.

5.6.1.3 Credit bureau information is automatically updated in terms of section 71A

Section 71A of the Act provides that, upon settlement of a credit agreement that was previously associated with adverse credit information – such as a default, enforcement action, or judgment – the credit provider is obliged to notify all registered credit bureaux of settlement within seven business days.¹⁷⁵ Upon receiving this notification, the credit bureau is required to remove the relevant adverse listing within a further seven-day period.¹⁷⁶ The aim of this provision is to facilitate credit rehabilitation by ensuring that once a consumer has satisfied their credit obligations, the associated negative listing no longer prejudices their credit profile. Where a credit provider fails to submit the necessary notification, the consumer may lodge a complaint with the Regulator, which is empowered to investigate and take enforcement action if necessary.¹⁷⁷

The Act further clarifies the types of adverse classifications that must be removed, including those relating to consumer behaviour,¹⁷⁸ (such as ‘default’, ‘slow payer’ or ‘absconded’) enforcement actions,¹⁷⁹ (such as ‘handed over for collection’, ‘legal action’ or ‘write-off’) listings regarding the payment profile of the consumer¹⁸⁰ and judgment debts.¹⁸¹ These provisions promote fairness and transparency in the credit reporting system and reflect the Act’s broader consumer protection objectives.

Read with regulation 19(10) and (11), section 71A further provides that information relating to adverse information, administrations and judgments must be automatically removed from the consumer’s credit bureau history upon payment of the relevant amounts. While this legislative development significantly reduces the burden and cost previously faced by consumers in clearing their credit records, it presents challenges for credit providers. In particular, the automatic removal of negative credit information makes it more difficult to assess a consumer’s full debt repayment history and differentiate between low-risk and high-risk borrowers.¹⁸²

¹⁷⁵ S 71A(1).

¹⁷⁶ S 71A(2).

¹⁷⁷ S 71A(3).

¹⁷⁸ S 71A(1)(a).

¹⁷⁹ S 71A(1)(b).

¹⁸⁰ S 71A(1)(c).

¹⁸¹ S 71A(1)(d).

¹⁸² Kelly-Louw M ‘The 2014 credit information amnesty regulations: what do they really entail?’ 2015 *De Jure* 6.

5.6.1.4 Credit bureaus hold limited information

Credit bureaus collect credit information from various types of data sources as permitted in section 70(2)(a) and (b), section 70(3)(b) and regulation 18 (7). As mentioned, credit information includes both negative and positive information about a consumer, and includes, but is not limited to: information relating to identity and contact details, account information, payments and repayments, microloans, previous enquiries conducted on a consumer, information available publicly (such as court judgments), accounts which are in default, other adverse behaviour, collection efforts, debt restructuring or rescheduling information, disputes, fraudulent behaviour, property or deeds data and/or other assets held.¹⁸³

Other types of data, that are not housed within a credit bureau environment are generated by consumers every day. This 'alternative data' can also be indicative and predictive of credit behaviour by consumers. There are many alternative data sources in South Africa that are not currently shared with credit bureaus. Examples are mobile phone data, municipal account data, and data on lay-buys at retailers.¹⁸⁴

5.6.1.5 Credit bureaus hold no or insufficient information for self-employed, informally employed and unbanked consumers

A further problem with using credit bureau reports as part of the assessment of a consumer's affordability lies in the fact that credit bureaus do not hold any or enough information for self-employed, informally employed and unbanked consumers.

It is a reality that South Africa has a very high unemployment rate. Also, a high number of consumers are not formally employed and receive payment in cash. In the *Truworths* case,¹⁸⁵ it was mentioned that 20% of the South African population do not have bank accounts. In its Global Findex Database 2017 the World Bank reported that half of consumers in South Africa receiving payments from self-employment received

¹⁸³ Bureau Association Code of Conduct [https://info regulator.org.za/wp-content/uploads/2022/10/Code%20of%20Conduct%20for%20the%20Credit%20Bureau%20As%20socialtion%20\(CBA\).pdf](https://info regulator.org.za/wp-content/uploads/2022/10/Code%20of%20Conduct%20for%20the%20Credit%20Bureau%20As%20socialtion%20(CBA).pdf) (accessed 4 February 2020).

¹⁸⁴ The World Bank Group in Partnership with National Credit Regulator 'Diagnostic Alternative Data Landscape in South Africa (June 2021) <https://ncr.org.za/documents/Alternative%20Data%20Landscape%20in%20South%20Africa%2024.6.21.pdf> (accessed 25 August 2020).

¹⁸⁵ Para 5.3.1.

payment directly into an account.¹⁸⁶ The *Truworths* case¹⁸⁷ illustrated that this group of consumers, who often also has a low income, had no way of submitting proof to credit providers to validate their income, which initially in terms of the provisions of regulation 23A(4) prevented credit providers from granting them credit.

A further difficulty facing this group of consumers is that their inability to obtain credit, means that they are also unable to build a record of past borrowing behaviour, which is a further requirement to obtain credit in terms of regulation 23A(13). This creates a chicken-egg conundrum:¹⁸⁸ without access to credit, they cannot establish a credit history, and without a credit history, they are unlikely to be granted credit. As a result, this group of consumers effectively remain credit invisible¹⁸⁹ or credit underserved.¹⁹⁰ Also in this context, Nel's recommendation that affordability assessments should be conducted by credit bureaus cannot be supported.¹⁹¹ Credit bureaus rely heavily on historical credit data to assess consumer risk, and in the absence of such data, consumers with no or limited credit history are either scored inaccurately or excluded from meaningful assessment altogether. It is submitted that approach would therefore perpetuate exclusion rather than promote responsible and inclusive credit access.

5.7 Regulation 23A(14) to (20)

Regulation 23A is concluded with measures to regulate the credit provider's obligation to take the consumer's debt repayment history in terms of credit agreements into consideration and with measures to regulate a number of miscellaneous aspects. Included under the latter are measures aimed at avoiding double counting in

¹⁸⁶ World Bank Group 'Global finindex database' (2017) <https://documents1.worldbank.org/curated/en/332881525873182837/pdf/126033-PUB-PUBLIC-pubdate-4-19-2018.pdf> (accessed 26 August 2020) 49.

¹⁸⁷ *Truworths v Minister of Trade and Industry* (n 40) para 46.

¹⁸⁸ A 'chicken-egg' situation refers to a scenario in which it is inherently difficult to determine the causal relationship between two interdependent factors – it is unclear which factor originated first or which one is the consequence of the other.

¹⁸⁹ Transunion Report: Empowering Credit Inclusion: A Deeper Perspective on Credit Underserved and Unserved Consumer released April 2022 defines credit underserved consumers as: Consumers who have never had an open traditional product (i.e., are invisible on the credit file).

¹⁹⁰ Transunion Report: Empowering Credit Inclusion: A Deeper Perspective on Credit Underserved and Unserved Consumer released April 2022 defines credit underserved consumers as individuals who are credit-visible – meaning they have two or more years of credit history and have held at least one traditional credit account. These consumers typically have no more than two currently active credit accounts and have historically held only one type of credit product.

¹⁹¹ Nel LLD (n 81) 364 and 365.

calculating the discretionary income and to provide a consumer, who feels aggrieved by the outcome of the affordability assessment, with a grievance procedure.¹⁹²

5.7.1 Critical evaluation of Regulation 23A(14) to (20)

Van Heerden and Renke point out that it might be argued that this provision is contrary to the clear provisions of section 60 of the Act, which gives the consumer a right to apply for credit, and section 62, which gives the consumer the right to reasons for refusal of credit but neither of which gives the consumer a right to acquire credit. In any event, this provision may likely also not serve the interests of the consumers whom it seeks to protect as they may become embroiled in lengthy proceedings during which period, they are in any event without the credit they sought.¹⁹³

5.8 Conclusion

In this chapter, the provisions of the affordability assessment regulations were analysed to determine their effectiveness in improving access to credit for low-income consumers.¹⁹⁴

Regulation 23A(1) and (2), read with section 78(2) of the Act were specifically introduced to advance access to credit for historically disadvantaged groups, low-income earners, and under-served communities, thereby aligning with broader policy objectives of promoting economic growth and financial inclusion.¹⁹⁵ Although these exclusions have contributed to increased credit access, as seen in the growth of credit-active adults from 57.7% in 2008 to 69% in 2021, the type of credit accessed remains problematic. Low-income consumers largely rely on secured and unsecured credit, often used for consumables rather than wealth creation. Equally concerning is the persistently low uptake of developmental credit, which regulation 23A was designed to facilitate. Between 2013 and 2019, developmental credit constituted only 1.8% of total credit granted, despite its potential to support income-generating activities. This

¹⁹² Renke S 'Die nuwe bekostigbaarheidsassesseringsregulasies ingevolge die Nasionale Kredietwet 34 van 2005 van naderby beskou' (2015) *LitNet Akademies* 432.

¹⁹³ Van Heerden CM and Renke S 'Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice' (2015) *International Insolvency Review* 93.

¹⁹⁴ Para 5.1.

¹⁹⁵ Para 5.2.1.

low uptake is attributable to several structural and regulatory shortcomings. Notably, it was pointed out that only 160 of the 6,880 registered credit providers (as of November 2023) were authorised to offer developmental credit, with the majority located in Gauteng, making access difficult for consumers in other provinces. Additionally, despite regulation 23A's intent to relax affordability requirements for developmental credit, most providers still conduct conventional credit checks, undermining accessibility. A further impediment is the lack of public awareness and insufficient marketing by developmental credit providers, compounded by generally low financial literacy levels.¹⁹⁶ While the exclusions under regulation 23A(1) and (2) are theoretically sound and align with the policy goal of financial inclusion, their practical implementation has not translated into meaningful access for the intended beneficiaries. It is therefore submitted that legislative reform, political will, and targeted interventions are necessary to address these shortcomings. Without such efforts, the regulatory framework risks entrenching financial exclusion under the guise of consumer protection.

Regulations 23A(3) to (7), which guide credit providers on verifying a consumer's existing financial means and prospects, have been the subject of criticism and legal challenge, particularly due to its impracticality in addressing the realities of South Africa's informal and self-employed workforce.¹⁹⁷ In the matter of *Truworths Ltd v Minister of Trade and Industry*¹⁹⁸ the fundamental shortcomings of regulation 23A(4) in particular were addressed. This regulation required formal proof of income (such as bank statements or financial statements) from consumers who, by the nature of their employment, often lack such documentation. It was argued that this provision disproportionately excluded informal and self-employed individuals—who are often poorer and historically disadvantaged consumers—from accessing even small amounts of credit, despite having stable, albeit undocumented, incomes. The court ultimately set aside regulation 23A(4), deeming it inconsistent with the Act's objective to facilitate broad and inclusive credit access.¹⁹⁹

¹⁹⁶ *Ibid.*

¹⁹⁷ Para 5.3.

¹⁹⁸ 2018 (3) SA 558 (WCC).

¹⁹⁹ Para 5.3.1.

Nevertheless, the setting aside of regulation 23A(4) by the court should not be construed as relieving credit providers from their obligation to take practical steps to verify a consumer's gross or discretionary income. Rather, it necessitates the employment of alternative methods of verification in instances where consumers are unable to provide conventional documents like payslips, bank statements or financial statements.²⁰⁰ It is submitted that exempting credit providers from the duty to do an assessment of the consumers affordability would be contrary to the aim of the Act to protect consumers from reckless lending and over-indebtedness.

While post-judgment draft guidelines attempted to clarify how credit providers might ascertain income in the absence of formal documentation, the lack of statutory force and definitional clarity rendered them ineffective. The guidelines merely shift the burden of devising alternative verification methods onto credit providers without specific guidance. This regulatory gap undermines both financial inclusion and consumer protection. It is submitted that the affordability assessment must be reformed by adopting real-time data analytics to replace outdated expense benchmarks and by enabling more accurate assessments of consumers' financial situations. Introducing alternative credit models, like state-backed social credit schemes, can provide safer, low-interest credit options for grant recipients and informally employed consumers. At the same time, the NCR's enforcement capabilities must be strengthened to address non-compliance and reckless lending more effectively. Clearer, more flexible regulations are needed to make affordability assessment both inclusive and protective. Together these reforms will help balance access to credit with safeguards against over-indebtedness.²⁰¹

Building on the provisions in regulation 23A(3) to (10), regulation 23A(8) to (10) provides for the verification of the consumer's existing financial obligations. The minimum expense norm table set out in regulation 23A(10) plays a central role to ensure that consumers do not paint a positive but untrue picture of their expenses to

²⁰⁰ Kelly-Louw M and Stoop P (n 49) 54.

²⁰¹ Para 5.3.1.

ensure that the credit provider grants the loan. Despite the noble aim of this provision, it has serious limitations.²⁰²

First, the formulation of the minimum expense norm table under regulation 23A(10) is both technically ambiguous which opens the door to inconsistent interpretations and potential abuse.²⁰³ The simplistic use of the table by some credit providers—who rely solely on the Minimum Monthly Fixed Factor without adding the Monthly Fixed Factor percentage—undermines the reliability of affordability assessments and can lead to credit being granted to consumers who cannot afford it.²⁰⁴ Furthermore, the table fails to accommodate the diverse financial realities of consumers within the same income band, effectively applying a ‘one-size-fits-all’ approach that ignores dependants, location, and other socioeconomic factors.²⁰⁵ The table’s lowest income bracket sets a minimum expense level that is below the national poverty lines, thereby allowing extremely vulnerable consumers—such as social grant recipients—to qualify for credit on paper despite their precarious financial status.²⁰⁶ A further aspect, which is relevant to the focus group of this research, namely low-income consumers, concerns the fact that grant beneficiaries are not excluded from the minimum expense norm table. From a constitutional perspective, section 36 allows for the limitation of rights (such as freedom of economic activity and trade under section 22) if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In this context, prohibiting the use of certain social grants as collateral can be viewed as legitimate.²⁰⁷ Legislative reform to ensure that credit is accessed responsibly, without compromising the survival and dignity of grant recipients, is therefore warranted. The reform should however be accompanied by enhanced financial literacy programs and robust enforcement of responsible lending practices.²⁰⁸ Lastly, it is agreed with Van Heerden and Beyers that the purpose of the minimum fixed factor percentages is unclear.²⁰⁹ In its current form it is vague and susceptible to manipulation. When credit providers assess whether a consumer can afford a loan,

²⁰² Para 5.4.

²⁰³ Para 5.4.1.1.

²⁰⁴ Para 5.4.1.2.

²⁰⁵ Para 5.4.1.3.

²⁰⁶ Para 5.4.1.4.

²⁰⁷ Van Heerden in Scholtz *ed* (2024) para 11.6.3.

²⁰⁸ Para 5.4.1.5.

²⁰⁹ Van Heerden and Beyers (n 79) 476.

the regulations require them to use fixed tables and general estimations to determine consumers' expenses. This is not realistic as a consumer's actual spending habits can be different from what is estimated. This raises questions about the relevance of the minimum expense norm table and whether real-time data and advanced data tools, capable of assessing actual spending behaviour, income fluctuations and financial obligations, might provide a more accurate picture of a consumer's ability to take on new debt.²¹⁰

Regulation 23A(11) permits a credit provider, in exceptional circumstances, to accept a consumer's declared expenses even if it falls below the minimum amount specified in the minimum expense norm table.²¹¹ Evidence brought before the Tribunal by Summit Financial Services however shows that such adjustments are made routinely instead of exceptionally, which contradicts the intent of the regulation.²¹² A further weakness in the regulatory framework is the difficulty in verifying third party contributions to household expenses. Although the questionnaire referred to in terms of regulation 23A(11) requires disclosure of the identity of any third party assisting a consumer with monthly expenses, credit providers fail to capture or verify this information. In defending their practices, credit providers rely on section 81(4) of the Act, which protects them if the consumer supplies incomplete or untruthful information.²¹³ Without reform, the regulations fail to protect consumers effectively and leave the door open for reckless lending practices under a façade of compliance.

Regulation 23A(13) emphasises the importance of a consumer's credit bureau report when a credit provider assesses a consumer's affordability.²¹⁴ Credit bureau reports however present various problems. Firstly, the information reflected on the report can be incorrect or outdated.²¹⁵ Furthermore, a consumer's credit score can differ from bureau to bureau because algorithms used to determine the likelihood of a consumer defaulting on a credit agreement are not made public and differ from bureau to bureau. Moreover, credit scores are based on predictions of consumer behaviour rather than

²¹⁰ Para 5.4.1.6.

²¹¹ Para 5.5.

²¹² Para 5.5.1.1.

²¹³ Para 5.5.1.2.

²¹⁴ Para 5.6.

²¹⁵ Para 5.6.1.1.

accurate information about their ability to afford credit. As a result a consumer may fall into different score bands across various credit bureaus.²¹⁶ Credit bureaus update information automatically and remove vital information from consumers' records at regular intervals which make accurate assessments of payment behaviour difficult.²¹⁷ Currently only limited information is shared with credit bureaus.²¹⁸ Consideration should be given to whether alternative data, like mobile phone data, municipal account data as well as data on lay-buy's should also be shared with credit bureaus to give a more comprehensive view of consumer's repayment behaviour.²¹⁹ This could enable self-employed, informally employed and unbanked consumers to also build a credit record.²²⁰ The final provisions of regulation 23A, namely sub regulations 14 to 20, aim to reinforce the integrity of affordability assessments by mandating credit providers to consider a consumer's debt repayment history and to prevent double counting in the calculation of discretionary income. These provisions also introduce a grievance procedure for consumers dissatisfied with the outcome of an affordability assessment.²²¹ While these measures appear to enhance consumer protection and procedural fairness, they have not escaped criticism. Van Heerden and Renke points out that the grievance procedure introduced under these sub-regulations may be misinterpreted as implying a right to receive credit which can foster unrealistic expectations among consumers. Furthermore, the grievance mechanism may be ineffective in practice as it could result in protracted disputes that leave consumers without access to credit during the resolutions process, thereby undermining the regulation's intent to enhance access.²²²

Even though the regulations are subject to criticism, it undoubtedly also brought positive change to the credit industry in South Africa. The idea of a uniform process all credit providers should adhere to when doing assessment is positive. However, it appears that the regulations in their current format is subject to different interpretations. It is important to remember, as cautioned by Kawadza, that 'regulation

²¹⁶ Para 5.6.1.2.

²¹⁷ Para 5.6.1.3.

²¹⁸ Para 5.6.1.4.

²¹⁹ Para 5.6.1.4

²²⁰ Para 5.6.1.5.

²²¹ Para 5.7.

²²² Para 5.7.1.

without necessary enforcement capacity can hinder and damage nascent credit markets in developing countries by causing further fragmentation'.²²³

The examination of the shortcomings in the current affordability assessment regulations provides a foundation for exploring comparative jurisdictions in subsequent chapters, where potential solutions to the issues identified in this chapter will be investigated.

²²³ Kawadza H 'Remarks on lending reforms ushered in by regulation 23A of the AffordabilityAssessment Regulations' (2018) *De Jure* 11.

CHAPTER 6: MEASURES IN THE ACT AIMED AT RESOLVING OVER-INDEBTEDNESS AND ADDRESSING DISPUTES RELATING TO RECKLESS LENDING

6.1 Introduction

6.2 The debt counselling process

6.3 Measures in the Act aimed at addressing disputes relating to reckless lending

6.4 Conclusion

6.1 Introduction

The NCA directly addresses the critical issue of over-indebtedness by imposing stringent requirements on credit providers to prevent reckless lending. The provisions under section 79 to 84 of the NCA, which define over-indebtedness, establish the criteria for reckless lending and outline the consequences of such practices stand central to this objective. As indicated, this research aims to determine whether the measures in the Act aimed at the prevention of reckless lending has improved the position of low-income consumers, or whether it has presented this group of consumers with new challenges. In Chapter 4 of this research the reckless lending provisions in the Act were examined and an analysis of the concepts of reckless credit and over-indebtedness were provided. The chapter also explains how pre-agreement assessment acts as a safeguard against reckless lending and reviews section 80, which outlines three scenarios where credit extension is deemed reckless, along with their consequences for consumers. It also discusses the defence in accordance with section 81(4) that is available to credit providers in cases of reckless lending allegations and concludes by emphasising the limited application of these provisions. The chapter then shifts focus to the assessment obligations imposed on credit providers by the Act and Regulations. It traces the evolution of affordability

assessment from a tick-box approach to a consumer-focused process and provides a detailed analysis of regulation 23A, which guides credit providers in evaluating whether consumers can afford the credit they apply for. In chapter 5 the limitations regarding the affordability assessment provisions in the Act were explained to support the argument that, although these provisions are aimed at preventing reckless lending, it inadvertently limits low-income consumers from having access to credit.

In addition to promoting access to credit, a further core aim of the Act is to protect consumers by:

‘addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations.’¹

Under section 86 of the Act a debt review procedure is established to enable over-indebted consumers to seek relief. This procedure involves a debt counsellor evaluating the consumer’s financial position and negotiating with credit providers to restructure debt obligations. It provides an opportunity to a consumer to apply to a debt counsellor to have himself declared over-indebted. It is submitted that debt review ensures that consumers can meet their financial obligations responsibly while maintaining access to essential resources.

Over-indebtedness is not always the result of credit being extended recklessly. For instance, where a consumer is retrenched, it may result in his over-indebtedness, although he could have afforded the credit at an earlier stage (before his retrenchment). In such instance, over-indebtedness is not linked to reckless credit extension.² It is however possible, and very often happens, for reckless credit and over-indebtedness to coincide and therefore a debt counsellor is authorised to investigate, as part of the debt review process, whether any of the consumers credit agreements was extended recklessly and make a recommendation in this regard to the court or Tribunal.³ In Chapter 4 of this research, the possible forms of civil relief

¹ S 3(g) of the NCA.

² Vessio ML ‘Beware the Provider of Reckless Credit’ (2009) *Tydskrif vir Suid-Afrikaanse Reg* 280.

³ See Chapter 4 para 4.2.1 and para 4.2.2.

that may be awarded to a consumer who was the victim of reckless credit was discussed.⁴

Debt relief may also follow when, during any court or Tribunal proceedings the court or the Tribunal *suo motu* takes cognisance of the fact that a credit agreement is reckless and declares it to be so.⁵ A consumer may also avail himself of section 85 of the Act to obtain debt relief by alleging in any court proceedings in which a credit agreement is being considered, that he is over-indebted.⁶ The Act also aims to protect consumers by:

- '(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements;'⁷

Chapter 7 of the Act provides for dispute settlement other than debt resolution by alternative dispute resolution,⁸ initiating to,⁹ and investigation of¹⁰ complaints by the Regulator and the Tribunal, as well as complaints to Consumer Courts and the ombud with jurisdiction.

The object of the research in this chapter is to investigate the legislative measures in place to resolve over-indebtedness and to address disputes relating to reckless lending. This will lay the groundwork for further research to determine whether the low-income consumer, who claims that credit was extended to him recklessly, can successfully avail himself of the remedies offered in the Act. Paragraph 2 of this chapter will provide a detailed outline of the debt counselling process. This will provide the necessary background information to determine whether the debt counselling process is suitable for low-income consumers seeking a declaration of over-indebtedness and relief in the event of possible reckless lending.

⁴ S 83(2) – (3) of the NCA. See also Chapter 4 para 4.2.2.

⁵ S 83(1) of the NCA.

⁶ Renke S and Coetzee CM 'The circumstances under which section 85(a) of the National Credit Act 34 of 2005 can be utilised as an avenue to access or re-access the debt relief measures in terms of the Act' (2018) *De Jure* 234-250.

⁷ S 3(h).

⁸ Part A, Ss 134 – 135 of the NCA.

⁹ Part B, Ss 136 – 138 of the NCA.

¹⁰ Part C, Ss 139 – 141A of the NCA.

Secondly, the suitability of the Magistrate's Court, Tribunal, and the Regulator as well as alternative dispute resolution agents, ombudsmen and consumer courts will be investigated to determine how complaints of reckless lending can be brought to the attention of these authorities. Again, this will serve as background information to further research on whether these bodies offer sufficient recourse to low-income consumers who are over-indebted or fell victim to reckless lending – a matter which will be discussed in the next chapter.

6.2 The debt counselling process

6.2.1 Background

With the promulgation of the NCA, 'debt counselling' as a debt relief measure, as well as the office of a 'debt counsellor' was introduced into the consumer credit landscape of South Africa. Prior to the NCA, consumers in financial difficulty could only avail themselves to the sequestration and administration process. Debt counselling was introduced to relieve consumers of credit agreements to which the NCA is applicable, of their over-indebtedness.¹¹

The concept 'debt counselling' is defined in regulation 1:

'debt counselling' means performing the functions contemplated in section 86 of the Act'.

'Debt counsellor' is defined in regulation 1 as:

'a neutral person who is registered in terms of section 44 of the Act offering a service of debt counselling'

The debt review process is set out in section 86 of the Act read together with regulations 24 to 27. Upon reading these provisions, it is clear that a practical procedure for conducting the process of debt review, is lacking. This shortcoming in the Act was discovered soon after the Act became effective and the Regulator embarked on various measures to address the problem. The first was to appoint a Task Team consisting of representatives of various industry stakeholders in 2009 to identify the different challenges and blockages in the debt review process and to make suggestions on how they could be solved. The Task Team published their final report

¹¹ See Chapter 3 para 3.3 where the application of the NCA was discussed in detail.

in 2010. This report, referred to in industry as the 'Task Team Agreements', purported to curb confusion in the debt counselling industry, especially to simplify the procedures of how the debt counsellor and a consumer can approach the court for a hearing to take place. In October 2014, the Regulator through the Credit Industry Forum¹² initiated a review process of the Task Team Agreements of 2010 to align them with the current debt review processes. Following an intensive review process with industry stakeholders, the NCR issued the revised Task Team Agreement as guidelines to be applied by all industry participants in January 2015.

Secondly, the NCR approached the (then) Transvaal Provincial Division of the High Court in 2008 in terms of section 16(1)(b) of the Act for a declaratory order regarding the proper interpretation of mainly sections 86 and 87 of the same Act. The matter of *NCR v Nedbank* 2009 (6) SA 295 (GNP) was heard in the High Court (TPD) on 02/03/2009 and judgment was handed down by Du Plessis J on 21/08/2009.¹³ The court's decision provided important direction on how matters relating to, amongst others, jurisdiction and the form of the debt review application should be addressed.

At this point it is important to understand that there are different specialised software options¹⁴ available in South Africa to help debt counsellors to manage the debt counselling process effectively. The software is developed to assist debt counsellors to capture relevant information about the client and the client's financial details, as well as to obtain and send information to role-players such as the different credit providers, the credit bureaus, payment distribution agencies, the NCR, the Tribunal as well as the consumer himself.

¹² In 2014, the Regulator established the Credit Industry Forum (hereinafter referred to as 'the CIF') with the aim of fostering strategic collaboration among key stakeholders in the credit sector. The CIF convenes quarterly to facilitate roundtable discussions addressing challenges in the implementation of the Act, particularly those related to the debt review process. These engagements are intended to generate practical solutions, enhance operational efficiency, and provide greater clarity on various aspects of credit industry practices. The CIF comprises representatives from a broad spectrum of industry bodies, including the Banking Association of South Africa, Micro-Finance South Africa, debt counselling associations, Payment Distribution Agents, the South African Credit Risk and Reporting Association, the Credit Bureau Association and consumer advocacy groups. See National Credit Regulator *Debt Counselling Training Programme Learner Guide* 32.

¹³ *National Credit Regulator v Nedbank* 2009 (6) SA 295 (GNP).

¹⁴ Examples of debt counselling software programs are: Maximus, Simplicity, Finwise and Slipstream. The list is not exhaustive.

The NCR, through its database called the NCR Debt Help System ,¹⁵ keeps record of consumers who applied for and are using debt counselling as a debt relief remedy as well as the status and progress of their debt review process. The Regulator describes the NCRDHS as ‘an on-line database, accessible to each Debt Counsellor by a unique username and password. Debt Counsellors will log onto the system and load new clients and/or update the status of existing clients, using a standard set of status codes.’¹⁶ As part of a debt counsellor’s conditions of registration, a debt counsellor is required to keep this database up to date throughout the process.¹⁷ The NCRDHS also shares information of consumers who are under debt review with various credit bureaus. While the Act requires debt counsellors to inform credit bureaus when a consumer applies for debt review, it does not specify how this requirement must be met.¹⁸ The NCRDHS portal solved this problem and also assists the Regulator to adhere to its research and public information function under section 16 of the Act by enabling the Regulator to present real time data on the status of consumers in the debt review process.¹⁹

To assist debt counsellors to calculate their proposals more effectively and to help credit providers to process the debt counsellors’ proposals more effectively, industry developed the Debt Counselling Rules System .²⁰ This system allows debt counsellors and credit providers to communicate in a standardised way. The system uses formulas to submit affordability assessments and restructure proposals to be sent to credit providers, who then can log on from their side and check if the system has approved

¹⁵ Hereinafter referred to as ‘the NCRDHS’.

¹⁶ National Credit Regulator *Debt Counselling Training Programme Learner Guide* (May 2024) 183.

¹⁷ Paragraph A.4 of the National Credit Regulator *General Conditions of Registration as a Debt Counsellor* (on file with writer) states that:

‘The Debt Counsellor must comply with the requirements specified by the NCR in respect of registering consumers who apply for debt review on the specified database. The Debt Counsellor must update such consumer records with the status of the review and post review performance from time to time.’

¹⁸ Reg 24(2).

¹⁹ The National Credit Regulator *Debt Help User Guide* (on file with writer) provides:

‘This database will automatically be downloaded to each of the bureaux every day, allowing them to automatically update their database. This will greatly enhance the accuracy and accessibility of the data to credit providers. Finally, the database will be a key oversight tool for the NCR, giving the Regulator an accurate overview of debt counselling volumes and activities.’

²⁰ Hereinafter referred to as ‘the DCRS’.

the proposal or not. This allows for standardisation and means the debt counsellor must follow certain principles.²¹

In terms of regulation 11 of the Act, debt counsellors are not allowed to receive and distribute any monies on behalf of a consumer. This allowed for the creation of Payment Distribution Agencies.²² Section 44A makes provision for the registration of PDA's. PDA's make use of software to communicate with debt counsellors and credit providers. The software updates debt counsellors on payments made by the PDA and will also inform the debt counsellor if the consumer has missed a payment. The software is also connected with the different credit providers to ensure that each credit provider receive the payment that was agreed in terms of the repayment plan that was made an order of court.²³

As will appear from the debt review procedure set out below, the Magistrate's Court as well as the Tribunal has the authority to make an order for debt review. In an effort to streamline applications, the Tribunal has developed an online system to submit applications. This system, called the Case Management System,²⁴ was launched on the 1st of August 2019 and seamlessly connects with any of the debt counselling software systems available to ensure that debt counsellors can submit their applications to the Tribunal.²⁵

6.2.2 Application for debt review

The Act provides that the consumer must make an application for debt review by filling out Form 16.²⁶ The application of the consumer will also be captured by the debt counsellor on the NCRDHS. The consumers status will be reflected as 'status code A' which indicates that the consumer applied for debt counselling and that his application

²¹ National Credit Regulator *Debt Counselling Training Programme Learner Guide* 217.

²² Section 1 defines a payment distribution agent as 'a person who on behalf of a consumer, that has applied for debt review in terms of this Act, distributes payments to credit providers in terms of a debt re-arrangement, court order, order of the Tribunal or an agreement;' Hereinafter referred to as 'a PDA'.

²³ National Credit Regulator *Debt Counselling Training Programme Learner Guide* 237.

²⁴ Hereinafter referred to as 'the CMS'.

²⁵ Consultation with Nastashia Cloete from IPDA on 12 Sept 2024. See also National Consumer Tribunal *Case Management System User Guide – Debt Counsellor Version: 1.6* (12 May 2021) https://www.thenct.org.za/wp-content/uploads/2021/05/User-Guide-Debt-Counsellor_1.6.pdf (accessed 12 September 2024).

²⁶ S 86(6) of the NCA read with reg 24(1)(a).

is being assessed. This form, together with the information prescribed in regulation 24(1)(b) must be provided to the debt counsellor to assist him in determining whether the consumer is over-indebted and whether any of the consumer's credit agreements appear to be reckless. The debt counsellor will then register the details of the consumer who applied for debt review on the NCRDHS with the relevant status code reflecting that the consumer applied for debt review.²⁷

6.2.3 Form 17.1

Within five business days of receiving the application for debt review in terms of section 86(1), the debt counsellor must inform all creditor providers listed in the application that the consumer applied for debt review.²⁸ This is done by delivering a completed Form 17.1²⁹ to all the consumer's credit providers.³⁰ The different software systems used by debt counsellors will facilitate the delivery of the Form 17.1 to the credit providers.

The debt counsellor must also inform every registered credit bureau of the consumer's application for debt review.³¹ As mentioned, the credit bureaus will be notified of the consumer's application by the NCRDHS. By updating credit bureau records, it means that other credit providers that are not already in a relationship with the consumer, will know not to grant credit to the consumer when a credit check is done.

The credit provider will deliver a certificate of balance verifying the outstanding balance on the credit agreement with the consumer within 5 days from receiving the Form 17.1.³² If the credit provider fails to deliver this information within the required 5 days, the debt counsellor can accept the information provided by the consumer as correct.³³ The debt counsellor will also check the outstanding balances against the consumer's credit bureau records to determine whether the consumer is over-indebted.

²⁷ National Credit Regulator *Debt Counselling Training Programme Learner Guide* 184.

²⁸ S 86(4)(b)(i) of the NCA read with reg 24(2).

²⁹ Form 17.1 advises the credit providers and the credit bureaus that the consumer has applied for debt review and requires the credit bureaus to list the consumer as having applied for debt review, within 5 days of receipt of the said form.

³⁰ S 86(4)(b) of the NCA read with reg 24(2). See also National Credit Regulator *Debt Review Task Team Agreement 2 of 2015* (Hereinafter referred to as 'the TTA') Annexure A 3.

³¹ S 86(4)(b)(ii) of the NCA.

³² Reg 24(4). See also TTA Annexure A 3.

³³ Reg 24(4). See also TTA Annexure A 4.

6.2.4 Over-indebtedness assessment

The debt counsellor must then, in accordance with the provisions of section 86(6)(a) determine whether the consumer who applied for debt review is over-indebted. When assessing the consumer's application in accordance with section 86(6)(a) for determining whether he is over-indebted, the debt counsellor must refer to section 79 and consider the following:

- '(a) A consumer is over-indebted if his/her total monthly debt payments exceed the balance derived by deducting his/her minimum living expenses from his/her net income.
- (b) Net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment.
- (c) Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator.'

6.2.5 Reckless credit assessment

Section 86(6)(b) further provides that a debt counsellor must determine whether any of the consumer's credit agreements appear reckless, when a consumer requests the debt counsellor to do so. Even though the wording of the Act creates the impression that there is no obligation on the debt counsellor to do so, the Regulator 'obliges and encourages' debt counsellors to investigate lending as part of the financial assessment when a consumer applies for debt review.³⁴ The NCR fee guidelines applicable to debt review, also provide for a fee to be charged by the debt counsellor if he conducted a reckless credit assessment.³⁵

It is to the advantage of the consumer as well as other credit providers to investigate whether an agreement was reckless or not because if the debt counsellor finds that one or more credit agreements were granted recklessly, and as a result they are set aside or suspended, then the consumer might not be over-indebted anymore. Furthermore, if some agreements are reckless and suspended or set aside, the over-indebted consumer will have more money available to pay other credit providers and so the consumer can meet his payment obligations easier. Lastly, it would be unfair to allow credit providers who do not grant reckless credit to be prejudiced by those who do grant reckless credit.

³⁴ TTA Annexure B 12.

³⁵ National Credit Regulator *Debt Counselling Fee Guidelines Circular 1 of 2018*. Hereinafter referred to as 'the NCR fee guidelines'.

In terms of the 2019 NCAA debt counsellors are obliged to investigate reckless lending regardless of whether the consumer makes such a request.³⁶ Regulation 24(6) provides that the determination in terms of section 86(6) must be made within 30 business days after the debt counsellor receives the application for debt review.

When making a determination that a particular debt is reckless, section 86(6)(b) of the Act provides that a debt counsellor must refer to section 80 read with regulation 24(8) of the Act and consider the following:

- '(a) the level of indebtedness of the consumer after that particular agreement was entered into; and
- (b) whether, when that particular credit agreement was entered into, the total debt obligations including the new agreement exceeded the net income reduced by minimum living expenses;
- (c) the consumer's bank statement, salary or wage advice and records obtained from a credit bureau;
- (d) any guidelines published by the National Credit Regulator proposing evaluative mechanisms, models and procedures in terms of section 82 of the Act.'

6.2.6 Form 17.2

Form 17.2 is used to inform credit providers of the outcome of the consumer's application for debt counselling.³⁷ Section 86(7) provides for three possible findings that can be made by the debt counsellor. Firstly, the debt counsellor can find that the consumer is not over-indebted. In this instance, the debt counsellor must reject the consumer's application to be declared over-indebted.³⁸ If a consumer's application was rejected, the consumer may still approach the Magistrate's Court directly, in the prescribed manner and form, for an order to the effect that one or more of the consumer's credit agreements are reckless and for an order that his obligations be re-arranged.³⁹ Therefore, the consumer is not without redress if his application for debt review in terms of section 86(6) is unsuccessful. It is noteworthy that, although the Act provides that the consumer can approach the court directly if his application for debt review was rejected, no provision is made for a consumer to approach the Tribunal directly.⁴⁰ For low-income consumers, a court application can be too costly, thereby

³⁶ S 12(a) of the 2019 NCAA.

³⁷ National Credit Regulator *Debt Counselling Training Programme Learner Guide* 202.

³⁸ S 86(7)(a) of the NCA read with reg 25.

³⁹ S 86(9) read with s 86(7)(c) of the NCA. Form 18 facilitates this process.

⁴⁰ See para 6.3.

restricting possible relief for the group of consumers that the Act deems most worthy of protection.

The second finding that can be made by the debt counsellor is set out in section 86(7)(b). In terms of this section the debt counsellor may find that, although the consumer is not over-indebted, he is 'nevertheless experiencing, or is likely to experience, difficulty satisfying all his or her obligations under his or her credit agreements in a timely manner. Upon such an event, the debt counsellor 'may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement'.⁴¹ If all the credit providers consent to a re-arrangement plan, the plan can be confirmed by the court or the Tribunal in terms of section 138 of the Act.

The third possible finding that the debt counsellor can make is that the consumer is indeed over-indebted. Having found that the consumer is over-indebted, the debt counsellor may recommend that the Magistrate's Court makes an order to declare one or more of the consumer's credit agreements reckless and that one or more of the consumer's credit obligations be restructured in one of the manners listed in section 86(7)(c)(ii).⁴² It is important to note that the debt counsellor does not have the authority to declare a credit agreement reckless. The debt counsellor is merely tasked to make a recommendation to the court or Tribunal to make such a finding.

In all three instances set out above, the credit providers will be notified via Form 17.2.⁴³ The debt counsellor will also inform the credit bureau of the outcome of the

⁴¹ *Ibid.*

⁴² S 86(7)(c) of the NCA provides that the debt counsellor may issue a proposal recommending that the Magistrate's Court make an order declaring one or more agreements reckless and re-arranging one or more of the consumer's obligations. It is unsure why the 2019 NCAA did not amend this section to give the Tribunal the same powers as the Magistrate's Court as it did with the amendment of sections 87, 89 and 90.

⁴³ Form 17.2 is a form that advises the credit providers and credit bureaus that a. the consumer's debt review application was rejected; or b. the consumer's application for debt review was successful and his debt obligations are in the process of being restructured; or c. his debt obligations have been restructured and a court/Tribunal order has been issued in a specific Magistrate's Court or the Tribunal.

assessment via the NCRDHS.⁴⁴ The credit bureaus will update their records accordingly.

6.2.7 Repayment plan proposal

At this stage the debt counsellor will prepare a proposal of repayments to be sent to the credit providers. This document will set out the amounts that each credit provider will receive monthly during the debt review.⁴⁵ The credit provider will analyse the proposal to determine if it is fair (and equal) to all credit providers shown, if the debt solves in the required timeframe, if balances are correct, if interest shown is correct, if cascade is included, and that the affordability assessment is correct (that expenses have not been inflated, etc.). From this determination the credit provider can elect to either accept or reject the proposal.⁴⁶ The aim of both credit providers and debt counsellors is to negotiate on the terms of the proposal until both parties are satisfied and a credit debt re-arrangement agreement is reached.

Therefore, the credit provider will normally make a counterproposal if he is not satisfied with the proposal made by the debt counsellor or the parties will use the DCRS⁴⁷ to rework the proposal. If the parties however cannot reach an agreement, the credit provider will reject the proposal in writing, give reasons for having rejected it and also give notice of the intention to oppose the application in court.⁴⁸

6.2.8 Acceptance and court order

Two possibilities exist with the debt counselling proposal made by the debt counsellor. The first possibility is that all the credit providers can accept the proposal and the restructuring plan made by the debt counsellor. If this is the case, the restructuring plan must be made an order by the Magistrate's Court or the Tribunal in terms of section 138(1) of the Act. If the debt counsellor chooses to make use of the Tribunal as a forum to record the credit providers' consent to the repayment proposal, the CMS

⁴⁴ Status code C will reflect that the consumer's assessment resulted in a decision that the consumer is over-indebted.

⁴⁵ TTA Annexure A 4.

⁴⁶ TTA Annexure A 5.

⁴⁷ See para 6.2.1 above.

⁴⁸ National Credit Regulator *Debt Counselling Training Programme Learner Guide* 227.

will be used to process the application.⁴⁹ An advantage of bringing consent applications before the Tribunal is that it may be less expensive. In accordance with the NCR's Fee Guidelines, a debt counsellor may charge a fee of R500 for submitting an application through the CMS. When submitting a section 138(1) debt rearrangement application, the Tribunal will charge a filing fee of R621.14 per application.⁵⁰ The Magistrate's Court can also be approached to make the consent order in terms of section 55. In both instances the credit providers' consent to the repayment proposal should be provided. When compared to an application for consent brought in the Magistrate's Court by a legal representative who will charge a professional fee for the court appearance, the cost of bringing the application for consent before the NCT can be considerably lower.

In terms of section 86(7)(b) of the Act, a consumer may not (yet) be over-indebted, but nevertheless be experiencing difficulty making debt repayments in a timely manner. When this is the case, the debt counsellor may recommend and facilitate a voluntary payment agreement as part of the statutory debt review process. The guidelines provide:

'Where all parties have agreed to a repayment plan the Debt Counsellor must refer the Consent Order to the Magistrate Court with a recommendation for approval (Section 86(8)(a)). This Consent Order must be prepared in the prescribed fashion by the Debt Counsellor and should be filed with the Clerk of the Civil Court who will allocate a case number. It must contain the agreement/acceptance letter (there could be separate agreement/ acceptance letters from each Credit Provider) and acceptance from the Debt Counsellor (in his capacity as Debt Counsellor and on behalf of the Consumer who mandated the Debt Counsellor to negotiate a repayment plan) and a coversheet requesting the Consent Order to be made in terms of Section 138 read with Section 86(8)(a) of the Act. The file is then forwarded to a Magistrate like a Default Judgment Application for consideration. The Magistrate notes the Consent Order. Consent Orders should not be considered and noted by Clerks of the Civil Court.'⁵¹

Section 86(7)(c) provides as follows:

- '(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that
 - (c) the consumer is over-indebted; the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

⁴⁹ *Ibid.*

⁵⁰ The National Consumer Tribunal <https://www.thenct.org.za/> (accessed 12 September 2024).

⁵¹ National Credit Regulator *Debt Review Court Application Guidelines 001/2016* <https://www.dcasa.co.za/wp-content/uploads/2017/06/Debt-Review-Court-Application-Guidelines-Ncr.pdf> (accessed 12 September 2024) 20.

- (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
- (ii) that one or more of the consumer's obligations be re-arranged by-
 - (aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
 - (bb) postponing during a specified period the dates on which payment are due under the agreement;
 - (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
 - (dd) recalculating the consumer's obligations because of contraventions of Part A or B or Chapter 5, or Part A of Chapter 6.'

Although the debt counsellor plays a significant role in the restructuring process, the debt counsellor merely makes a recommendation on how the consumer's debt must be restructured. The Magistrate's Court has the final decision on whether the consumer is over-indebted and how the debt should be restructured.⁵² In the matter of *The National Credit Regulator v Nedbank and Others*, as alluded to above, it was decided that debt review should follow the application procedure as regulated by Rule 55 of the Magistrate's Courts Rules.⁵³

6.2.9 Rehabilitation

After the court made the repayment order, the consumer will proceed with payments in accordance with the repayment plan as ordered by the Tribunal or the court. During the period of repayment, the debt counsellor still has a role to fulfil. The debt counsellor will monitor repayments and communicate with the credit providers should the consumer not be able to keep up with payments. As mentioned, the debt counsellor is prohibited from collecting and distributing monies on behalf of the consumer.⁵⁴ Payment Distribution Agencies perform this task. The consumer can also make the payments to the credit providers himself.⁵⁵ The aftercare function of the debt counsellor, amongst others, entail that the debt counsellor monitors regular payments. The fee guidelines make provision for an aftercare fee.⁵⁶

⁵² S86(8)(b) of the NCA.

⁵³ *National Credit Regulator v Nedbank* (n 13) para 46.

⁵⁴ Reg 11. Also see para 6.2.1.

⁵⁵ Otto JM 'Payment distribution agents' role in the consumer credit industry' (2016) *Journal of South African Law* 519.

⁵⁶ In terms of the NCR fee guidelines (n 35)

(a) the fee is equal to 5% of the distributable amount or a maximum fee of R450 (b) whichever is the lesser amount.

6.2.10 Clearance certificate

A clearance certificate issued in terms of section 71(1) of the Act signals the end of the debt review process for a consumer whose debt has been rearranged under Part D of Chapter 4 of the Act. Regulation 27 provides that a debt counsellor, and not the court or the Tribunal, must issue a clearance certificate in accordance with Form 19. Form 19 is a standard form certifying that the consumer has discharged all his obligations in terms of the debt re-arrangement order granted by the court and listing the specific debt that were included under the rearrangement order and which have been settled in full.⁵⁷ In terms of section 71(4)(a) a debt counsellor must file a certified copy of the clearance certificate with all registered credit bureaus. In practice debt counsellors send e-mails with the clearance certificate as well as all confirmation from the different credit providers to the credit bureaus.⁵⁸ The process is also facilitated through the NCRDHS through status code D4, F1 and G.

6.2.11 Termination and withdrawal from debt review

The Act does not prescribe a specific time period within which the debt review process, from application for debt review to the issuing of a clearance certificate, should be finalised.⁵⁹ The process handled by the debt counsellor, from the date of the application for debt review until the stage where the matter is referred to court for a consent order or for the court to make a debt restructuring order, should however be completed within 60 days from the date of the debt review application.⁶⁰

⁵⁷ Van Heerden CM and Coetzee H 'Unintentionally Trapped by Debt Review: Procedural Inadequacies in the National Credit Act 34 of 2005 Relating to Withdrawal from the Debt Review Process' (2019) *PELJ* 22.

⁵⁸ Telephonic consultation with Inge Van Der Merwe, debt counsellor with registration number NCRDC374 on 13 August 2024.

⁵⁹ *Coetzee and Another v Nedbank Ltd* [2010] JOL 26260 (KZD). For a contrary opinion, see *Pelser v Nedbank Ltd* (unreported GNP case no. 14160/2009); Roestoff M and Smit AR 'Non-Compliance with Time Periods—Should the Debt Review Procedure Lapse Once a Reasonable Time Has Expired?' (2011) *Journal of Contemporary Roman-Dutch Law* 501. See Van Heerden in Scholtz *ed* (2024) para 11.3.3.3.

⁶⁰ S 86(10). See also Van Heerden CM and Coetzee H 'Termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005' (2011) *De Jure* 226. Van Heerden and Coetzee argue that while section 86(10) of the National Credit Act permits a credit provider to terminate a debt review after sixty business days if no court referral has been made, this right is not absolute. A credit provider who deliberately fails to engage in the debt review process—such as by ignoring requests for account balances or refusing to consider restructuring proposals—acts in *bad faith* and undermines the objectives of the Act. In such cases, the court may, under section 86(11), order the resumption of the debt review, thereby reinforcing the principle that cooperative participation is essential to the integrity of the process.

Where a debt review application before a debt counsellor exceeds this time period and the consumer is still in default, a credit provider may terminate the debt review process in accordance with section 86(10) of the Act. The Act prescribes that notice of the termination must be given to the consumer, the debt counsellor and the Regulator.⁶¹ The effect of the termination of the debt review in terms of section 86(10) is that the debt review process and the statutory function of the debt counsellor in respect of that particular credit agreement comes to an end and the credit provider may proceed with enforcement of the agreement. Provision is also made in section 86(11) for a terminated debt review to resume on any conditions that an enforcement court may deem just.⁶² The procedure outlined in section 86(10) appears to be a unilateral process available to the credit provider. However, a consumer whose pending debt review has been terminated still has recourse, as section 86(11) stipulates that if a credit provider issues a notice to terminate a debt review under section 86(10) and subsequently seeks to enforce the credit agreement per Part C of Chapter 6, the Magistrate's Court hearing the matter may order the debt review to resume under conditions deemed just by the court. Therefore, a notice of termination in accordance with section 86(10) is essential for the enforcement of section 86(11). It is important to note that the wording of section 86(11) implies that this section can only be invoked after the credit provider has initiated enforcement of the credit agreement, and the appropriate court for this action would be the one in which the credit agreement is being enforced.⁶³

Notably, the Act however does not contain any specific provision that allows a consumer or a debt counsellor to withdraw from the debt review process. As mentioned in paragraph 2.10 above, a clearance certificate issued by the debt counsellor will signal the end of the debt review process. Initially section 71(1) of the Act provided that a debt counsellor who received an application for a clearance certificate had to investigate the circumstances of the particular debt rearrangement,

⁶¹ Van Heerden in Scholtz *ed* (2024) para 11.3.3.3.

⁶² Van Heerden in Scholtz *ed* (2024) para 11.3. Also see Van Heerden CM and Coetzee H 'Perspectives on the Termination of Debt Review in terms of Section 86(10) of the National Credit Act 34 of 2005' (2011) *PELJ* 37; Van Heerden and Coetzee (n 60) and Van Heerden and Coetzee (n 57) 15.

⁶³ Van Heerden and Coetzee (n 60) 10.

and if he was satisfied that the consumer had *fully satisfied* all the obligations under all the credit agreements made subject to the debt review order, he could issue a clearance certificate. If this was not the case, the debt counsellor was obligated to refuse to issue the clearance certificate.

In terms of this provision a consumer would thus be subject to the restraints of debt review until all the debts subject to the debt review have been paid. A consumer can thus be 'locked-in' by debt review for many years. However, where a consumer has a long-term agreement such as a mortgage bond, the consumer could thus not obtain a clearance certificate until the agreement is repaid even though the consumer may have been able to afford the original instalment or even a higher instalment.

Although the policy regarding the purpose of debt review is to assist the consumer to satisfy his obligations, it was realised that consideration should be given to earlier rehabilitation of a consumer at a determined point in time where a debt counsellor can provide a clearance certificate at a stage prior to satisfying all the debts. In the light thereof section 71 of the Act was amended to provide:

- '(1) A consumer whose debt has been re-arranged in terms of Part D of Chapter 4 must be issued with a clearance certificate by a debt counsellor within seven days after the consumer has—
- (a) satisfied all the obligations under every credit agreement that was subject to that debt re-arrangement order or agreement, in accordance with that order or agreement; or
 - (b) demonstrated –
 - (i) financial ability to satisfy the future obligations in terms of the rearrangement order or agreement under –
 - (aa) a mortgage agreement which secures a credit agreement for the purchase or improvement of immovable property; or
 - (bb) any long term agreement as may be prescribed;
 - (ii) that there are no arrears on the re-arranged agreements contemplated in subparagraph (i); and
 - (iii) that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full.'

Section 71(2) now provides that for the purposes of the demonstration envisaged in section 71(1)(b), a debt counsellor may apply such measures as may be prescribed. The amended section 71(3) provides that if a debt counsellor 'decides not to issue or fails' to issue a clearance certificate, the consumer may apply to the Tribunal to review that decision and if the Tribunal is satisfied that the consumer is entitled to the

clearance certificate it may order the debt counsellor to provide same. Section 71(4), as amended, provides that a debt counsellor must within seven days after the issuance of a clearance certificate, file a certified copy thereof with the national credit register and all registered credit bureaux.⁶⁴

In March 2017, the Regulator issued a circular addressing various challenges associated with the interpretation and implementation of the amended section 71.⁶⁵ The Circular clarified that, for the purpose of section 71, the term 'agreement' should be understood as referring to the debt counselling proposal rather than a contractual agreement.⁶⁶ Furthermore, it was affirmed that vehicle finance agreements should not be categorised as 'long-term agreements' within the context of this section.⁶⁷ The NCR also confirmed that the rescission of a debt counselling order is not a prerequisite for the issuance of a clearance certificate.⁶⁸

The circular further elucidated the scope of ministerial discretion under section 71(2), specifically in relation to the phrase 'measures as may be prescribed'. According to the NCR, this wording enables the Minister of Trade and Industry to introduce further regulatory measures in the future if deemed necessary.⁶⁹ In the absence of such measures, debt counsellors are expected to apply existing methodologies for assessing over-indebtedness when evaluating the consumer's financial capacity to meet future obligations under section 71.⁷⁰ With regard to disputes over outstanding balances, the circular indicated that, where a credit provider disputes the issuance of a paid-up letter by a debt counsellor, both parties are required to follow a standardised, industry-agreed process – still to be formally issued – for resolving such discrepancies.⁷¹ Lastly, the NCR clarified that it could not have been the intention of the legislature for the credit provider to continue to receive payments on the mortgage agreement as per the debt counselling proposal until the entire agreement is fully settled. Instead, the consumer is entitled to benefit from the concessions outlined in

⁶⁴ Van Heerden in Scholtz *ed* (2024) para 11.4.

⁶⁵ National Credit Regulator *Interpretation of section 71 of the NCA Circular 6 of 2017*.

⁶⁶ NCA Circular 6 of 2017 (n 65) para 1.

⁶⁷ NCA Circular 6 of 2017 (n 65) para 2.

⁶⁸ NCA Circular 6 of 2017 (n 65) para 3.

⁶⁹ NCA Circular 6 of 2017 (n 65) para 4.

⁷⁰ *Ibid.* See Van Heerden and Coetzee (n 57) 13.

⁷¹ NCA Circular 6 of 2017 (n 65) para 5.

section 71 for the duration of the repayment period specified in the debt restructuring agreement. After this period, the contractual obligations would be reinstated.⁷²

Despite the industry having developed various processes to ensure the proper functioning of the debt counselling process, many challenges still face the low-income consumer who wants to make use of a debt counsellor to approach the court for relief in the event of reckless credit being granted to him. It is submitted that these challenges hamper the effectiveness of the remedy provided by the reckless lending provisions in the Act for low-income consumers in particular.

6.3 Measures in the Act aimed at addressing disputes relating to reckless lending

It would be impossible to discuss the Act's provisions on reckless lending without taking into account the following question: to whom may a consumer who believes he was the victim of reckless lending turn in order to relief offered by the Act's provisions on reckless lending? The following options are available:

6.3.1 Debt counselling

From the discussion in paragraph 2 above, it is clear that the debt counsellor can, as part of the debt review process prescribed in section 86 of the Act, approach the court or the Tribunal to declare an agreement reckless.⁷³ The debt counsellor will bring the matter before the court or Tribunal, through the debt review process.

6.3.2 Section 83

Section 83 gives a court or Tribunal the discretion, despite any provision of law or agreement to the contrary, in any court or Tribunal proceedings in which a credit agreement is being considered, to declare a credit agreement to be reckless.⁷⁴ In terms of section 83, a court or Tribunal may *suo motu* declare a credit agreement

⁷² NCA Circular 6 of 2017 (n 65) para 6. See also Van Heerden and Coetzee (n 57) 13.

⁷³ S 86(6) of the Act reads as follows:

'A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-

(a) whether the consumer appears to be over-indebted; and
(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.'

⁷⁴ S 83(1).

reckless, without an allegation that the consumer is over-indebted.⁷⁵ If entering into the particular credit agreement caused the consumer's over-indebtedness, the court or the Tribunal will exercise its powers in terms of section 83(3)(b)(i)⁷⁶ and (ii)⁷⁷ to provide relief to the consumer provided that the consumer is still over-indebted at the time of the court or Tribunal proceedings.⁷⁸ In terms of section 83, it is thus not a prerequisite for a consumer to allege that the particular credit agreement constituted reckless lending; the court may on its own discretion raise the question whether the credit agreement was granted recklessly by the credit provider. This discretion of the court to act *suo motu* is even extended to the clerks of the court as was illustrated by the court in the matter of *African Bank Ltd v Myambo NO and Others*.⁷⁹ In the *Myambo* matter it was decided that if a clerk of the court has reason to believe that a particular credit agreement may have been granted recklessly, the case must be referred to the court for consideration and possible judgment.

6.3.3 Section 85

Renke and Coetzee investigated section 85 as a further avenue to provide relief from reckless lending to a consumer.⁸⁰ Section 85 provides that:

'Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that a consumer under a credit agreement is over-indebted, the court may:

- (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
- (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.'

They contemplated whether section 85 would provide an opportunity for a consumer to raise the issue of reckless lending if the court did not *suo moto* take notice of it as

⁷⁵ S 83(1) of the NCA; Otto and Otto *The National Credit Act Explained* (2013) 78; Vessio (n 2) 282; Van Heerden in Scholtz *ed* (2024) para 11.4.5; see also Van Heerden CM and Boraine A 'The Money or the Box: Perspective on Reckless Credit in terms of the National Credit Act 34 of 2005 (2011) *De Jure* 407; Van Heerden CM and Boraine A 'The Interaction between the Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law' (2009) *PEJL* 34.

⁷⁶ S 83(b)(i) of the NCA provides that the court or Tribunal may order the suspension of the credit agreement until a specific date in the future.

⁷⁷ S 83(b)(ii) of the NCA provides that the court or Tribunal may restructure the consumer's obligations in accordance with section 87.

⁷⁸ S 80(1)(b)(ii) of the NCA.

⁷⁹ *African Bank Ltd. v Myambo NO and Others* 2010 (6) SA 298 (GNP).

⁸⁰ Renke and Coetzee (n 6) 234.

provided for in section 83. They argue that, as the credit agreement would at that stage already be before a court, it would no longer be possible for the consumer to apply for a declaration of reckless credit by a debt counsellor via section 86.⁸¹ They then concluded that a consumer may utilise the provisions of section 85 and allege that credit was granted recklessly to him, in spite of the fact that section 85 makes no provision for such an allegation.⁸² They based their contention on section 85(a), read with section 86(7), which provides that a debt counsellor may make recommendations to the court in connection with reckless credit.⁸³ Therefore, they submitted that it may be argued that the legislature intended reckless credit to be included in the context of section 85.⁸⁴

6.3.4 National Credit Regulator

In terms of section 136(1) 'any person' may submit a complaint concerning an alleged contravention of the Act or a complaint concerning an allegation of reckless credit to the Regulator in the prescribed manner and form.⁸⁵ Also, the Act authorises the Regulator to, of its own accord, initiate an investigation into alleged reckless lending.⁸⁶

Initiating or accepting a complaint can have one of the following outcomes: firstly, the Regulator can issue a notice of non-referral if it is of the opinion that there are no merits in the complaint.⁸⁷ In this instance, the complainant will not be left without recourse, because the Act provides the complainant himself can directly approach the relevant consumer court⁸⁸ or the Tribunal.⁸⁹

⁸¹ S 86(6)(b) of the NCA provides that a consumer who has applied for debt review in terms of s 86(1), may also seek a declaration of reckless credit, where any of the consumer's credit agreements appear to be reckless. See also Renke and Coetzee (n 6) 243.

⁸² Renke and Coetzee (n 6) 245, 246 and 248.

⁸³ S 86(7)(c)(i) of the NCA provides that a debt counsellor may issue a proposal recommending that the Magistrate's Court *inter alia* makes an order that one or more of the consumer's credit agreements be declared to be reckless credit. See also Renke and Coetzee (n 6) 247, 248.

⁸⁴ Renke and Coetzee (n 6) 248.

⁸⁵ A complaint can also be lodged on behalf of a consumer, i.e. by a debt counsellor on behalf of a consumer. In the event of submitting a complaint on behalf of a consumer, the debt counsellor has to attach a written consent signed by the consumer in terms of reg 50(4) and (5) to the prescribed complaint initiation form (NCR Form 29).

⁸⁶ S 136(2) of the NCA.

⁸⁷ S 139(1)(a) of the NCA.

⁸⁸ S 141(1)(a) of the NCA provides that the relevant consumer court will be the consumer court of the province within which the complainant resides, or in which the respondent has its principal place of business, subject to the provincial legislation governing the operation of that consumer court.

⁸⁹ S 141(1)(b) of the NCA.

Secondly, section 139 provides that the Regulator can refer the matter to –

- ‘(b)(i) a debt counsellor, if the matter appears to concern either reckless credit or possible over- indebtedness of the consumer;⁹⁰ or
- (ii) the ombud with jurisdiction, consumer court or an alternative dispute resolution agent for the purposes of assisting the parties to resolve the dispute in terms of section 134;⁹¹ or
- (iii) direct an inspector to investigate the complaint as quickly as practicable, in any other case.’⁹²

The Act bestows the Regulator with the authority to designate one or more persons to assist the inspector with the investigation.⁹³ The Regulator is also authorised to summon any person who it believes is able to furnish any information on the subject of the investigation, or to be in possession of documentation that can assist the inspector with his investigation, to appear before the Regulator to be interrogated⁹⁴ or to deliver the documents to the Regulator.⁹⁵ A person interrogated by an inspector of the Regulator must answer questions truthfully and to the best of his ability,⁹⁶ but need not answer self-incriminating questions.⁹⁷ The person being questioned by an inspector appointed by the Regulator must be informed of his right not to answer self-incriminating questions.⁹⁸

After the investigation of the matter, the Regulator may issue a notice of non-referral to the complainant, if the outcome of the investigation indicates that there are no merits in pursuing the matter any further,⁹⁹ or refer the matter to the Tribunal.¹⁰⁰ If the matter

⁹⁰ S 139(1)(b)(i) of the NCA. See also Scholtz in Scholtz *ed* (2024) para 13.4 where section 139 to 141 of the NCA is discussed. See also Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) para 3.2.9.4; para 12.2.4.1; para 14.3.2.1.

⁹¹ S 139(1)(b)(ii) of the NCA. See Kelly-Louw *Consumer Credit Regulation in South Africa* (n 90) para 3.2.9.4.

⁹² S 139(1)(c) of the NCA. See Kelly-Louw *Consumer Credit Regulation in South Africa* (n 90) para 3.2.9.4; para 14.3.2.1.

⁹³ S 139(2) of the NCA. See Kelly-Louw *Consumer Credit Regulation in South Africa* (n 90) para 14.3.2.1.

⁹⁴ S 139(3)(a) of the NCA.

⁹⁵ S 139(3)(b) of the NCA.

⁹⁶ S 139(4) of the NCA. See Kelly-Louw *Consumer Credit Regulation in South Africa* (n 90) para 14.3.2.1.

⁹⁷ S 139(4)(a) of the NCA. See Kelly-Louw *Consumer Credit Regulation in South Africa* (n 90) para 14.3.2.1. See also Scholtz in Scholtz *ed* (2024) para 13.4.

⁹⁸ S 139(4)(b) of the NCA.

⁹⁹ S 140(1)(a) of the NCA. See Van Heerden in Scholtz *ed* (2024) para 11.3.2.3.

¹⁰⁰ S 140(1)(b) and 140(2)(b). See Van Heerden in Scholtz *ed* (2024) para 11.3.2.3.

is referred to the Tribunal, the Tribunal must conduct a hearing into the matter.¹⁰¹ At the conclusion of the hearing, the Tribunal may make an order in terms of section 150, which order can include imposing an administrative fine in terms of section 151 with or without the addition of any other order in terms of this section.¹⁰² An administrative fine imposed in terms of the Act is limited to the greater of:

- '(a) 10 per cent of a respondent's annual turnover¹⁰³ during the preceding financial year;¹⁰⁴ or
- (b) R1 000 000.'¹⁰⁵

The Act guides the Tribunal on how to determine an appropriate fine by listing factors that must be considered by the Tribunal.¹⁰⁶ An order by the Tribunal may be served, executed and enforced as if it were an order of the High Court.¹⁰⁷

¹⁰¹ S 141(4) of the NCA. See Van Heerden in Scholtz *ed* (2024) para 11.3.2.3.

¹⁰² S 150 of the NCA provides:

'Other orders that can be made in terms of section 150 includes:

- (a) declaring conduct to be prohibited in terms of the Act;
- (b) interdicting prohibited conduct;
- (c) imposing an administrative fine in terms of section 151 with or without the addition of any other order in terms of this section;
- (d) confirming a consent agreement in terms of this Act or the Consumer Protection Act, 2008 as an order of the Tribunal;
- (e) condoning any non-compliance of its rules and procedures on good cause shown;
- (f) confirming an order against an unregistered person to cease engaging in any activity that is required to be registered in terms of this Act;
- (g) suspending or cancelling the registrant's registration, subject to section 57(2) and (3);
- (h) requiring repayment to the consumer of any excess amount charged, together with interest at the rate set out in the agreement; or
- (i) any other appropriate order required to give effect to a right, as contemplated in this Act or the Consumer Protection Act, 2008.'

¹⁰³ In terms of s 151(4) of the NCA, the annual turnover of a credit provider at the time an administrative fine is assessed, will be the total income of that credit provider during the immediately preceding year under all credit agreements to which the NCA applies, less the amount of that income that represents the repayment of the principal debt under those credit agreements.

¹⁰⁴ S 151(2)(a) of the NCA.

¹⁰⁵ S 151(2)(b) of the NCA. See Van Zyl in Scholtz *ed* (2024) para 17.5.

¹⁰⁶ S 151(3) of the NCA provides that:

- (3) When determining an appropriate fine, the Tribunal must consider the following factors:
 - (a) the nature, duration, gravity and extent of the contravention;
 - (b) any loss or damage suffered as a result of the contravention;
 - (c) the behaviour of a respondent;
 - (d) the market circumstances in which the contravention took place;
 - (e) the level of profit derived from the contravention;
 - (f) the degree to which a respondent has co-operated with the National Credit Regulator, or the National Consumer Commission, in the case of a matter arising in terms of the Consumer Protection Act, 2008, and the Tribunal; and
 - (g) whether the respondent has previously been found in contravention of this Act or the Consumer Protection Act, 2008 as the case may be.

¹⁰⁷ S 152 of the NCA. See Scholtz in Scholtz *ed* (2024) para 13.6.

6.3.5 Proceedings in civil court

Reckless credit can also be raised as a defence by a consumer in civil proceedings instituted by a credit provider to enforce a credit agreement.¹⁰⁸ It can however also serve as a cause of action where a consumer approaches a court for a declaration of reckless credit or where the consumer files a counterclaim – although this very seldom occurs.¹⁰⁹ As consumers are often too out of pocket to institute legal proceedings themselves, reckless lending matters will most often be brought to the attention of the court when it is raised as a defence by the consumer. Vague and bold allegations of reckless lending would however not convince the court to accept this defence. In *SA Taxi Securitization v Mbatha*¹¹⁰ Levenberg AJ noted with concern that there was a tendency amongst consumers to make bald allegations that they are ‘over-indebted’ or that there has been ‘reckless-credit’.¹¹¹ He held that a bald allegation that there was ‘reckless-credit or there is ‘over-indebtedness’ will not suffice.¹¹² Brits submits that using reckless lending as a defence has rarely been successful on trial in our courts because consumers struggle to prove that the credit provider did not do a pre-agreement affordability assessment.¹¹³

6.3.6 Alternative dispute resolution mechanisms

The alternative dispute resolution mechanisms contained in the Act also provide relief to a consumer involved in a dispute following an allegation of reckless credit. Section 134 provides an aggrieved person with the following options:

- ‘a. referring the complaint to the ombud with jurisdiction¹¹⁴ in circumstances in which the credit provider concerned is a financial institution as defined in the Financial Sector Regulation Act, 2017.¹¹⁵

¹⁰⁸ Van Heerden in Scholtz *ed* (2024) para 11.6.1.

¹⁰⁹ *Ibid.*

¹¹⁰ 2011 (1) SA 310 (GSJ).

¹¹¹ *SA Taxi Securitization v Mbatha* (n 110) para 26.

¹¹² *Ibid.*

¹¹³ Brits R ‘The National Credit Act’s remedies for reckless credit in the mortgage context (2018) *PELJ* 3.

¹¹⁴ Scholtz in Scholtz *ed* (2024) para 13.2 defines ‘Ombud with jurisdiction’ as:

‘[an ombud scheme], in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a ‘financial institution’, as defined in the Financial Sector Regulation Act. In terms of section 301(6) of the Financial Sector Regulation Act, an industry ombud scheme that was recognised under the Financial Services Ombud Schemes Act, 2004 prior to its repeal will be regarded as an ‘ombud scheme’ for the purposes of the Financial Sector Regulation Act. Therefore, an ‘ombud with jurisdiction’ under the Act will continue to be the Ombudsman for Banking Services and the Credit Information Ombud.

¹¹⁵ S 134(1)(a)(i) of the NCA. See also Scholtz in Scholtz *ed* (2024) para 13.2.

- b. lodging a complaint with a consumer court for resolution in terms of the National Credit Act and the provincial legislation establishing the consumer court concerned;¹¹⁶ or
- c. requesting that the matter be referred to an alternative dispute resolution agent¹¹⁷ for conciliation, mediation or arbitration'.¹¹⁸

If the matter is resolved by the consumer court, ombud or alternative dispute resolution agent, the matter can be referred to the court or Tribunal for a consent order in terms of section 138.¹¹⁹

In what follows the different alternative dispute resolution mechanisms are discussed in more detail.

6.3.6.1 *The ombud with jurisdiction*

In terms of section 134(1)(a)(i) a person may refer a matter or a dispute following an allegation of a reckless credit agreement that could be the subject of such a complaint to the ombud with jurisdiction, in circumstances in which the credit provider concerned is a financial institution as defined in the Financial Sector Regulation Act.¹²⁰ The Act further provides that the Regulator may, upon acceptance of a dispute, refer such dispute to an ombud with jurisdiction for the purpose of assisting the credit provider and consumer to resolve the dispute.¹²¹ The term 'ombud with jurisdiction' is defined in section 1 of the NCA as:

'in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a 'financial institution' as defined in the Financial Sector Regulation Act, 2017, means an 'ombud scheme', as that term is defined in that Act, that has jurisdiction in terms of that Act to deal with a complaint against that financial institution'.

On the 1st of March 2024 the National Financial Ombud Scheme South Africa ¹²² started operations. This scheme is an amalgamation of the previous Banking, Long-Term Insurance, Short-Term Insurance and Credit Ombudsman offices, all of which

¹¹⁶ S 134(1)(b)(i) of the NCA.

¹¹⁷ The term 'alternative dispute resolution agent' is defined in s 1 of the NCA as: 'a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration'.

¹¹⁸ S 134(1)(b)(ii) of the NCA.

¹¹⁹ S 135(1)(a) and (b) of the NCA.

¹²⁰ Act 9 of 2017. Hereinafter referred to as 'the Financial Sector Regulation Act'.

¹²¹ S 139(1)(b)(ii) of the NCA.

¹²² Hereinafter referred to as 'the NFO'.

were recognised as industry ombud schemes for purposes of the Financial Sector Regulation Act by the Ombud Council in May 2022. For complaints received from 1 March 2024, the ‘ombud with jurisdiction’ as referred to in section 134 and 136 of the NCA will therefore be the NFO. Complaints submitted before that date will be handled by the relevant industry ombud.¹²³

6.3.6.2 Consumer courts

In terms of the Act, consumer courts may be approached for purposes of dispute settlement other than debt enforcement in terms of section 129(1)(a) read with section 134(1)(b)(i) and section 134(4)(b)(ii)(aa). Consumer courts are set up in terms of provincial legislation and are really tribunals, as their orders cannot be enforced and executed as orders of ordinary courts.¹²⁴

6.3.6.3 Alternative dispute resolution agent

As an alternative to filing a complaint with the Regulator in terms of section 136, a person may refer a dispute following an allegation of reckless credit to an alternative dispute resolution agent for resolution by conciliation, mediation or arbitration.¹²⁵ The term ‘alternative dispute resolution agent’ is defined in section 1 of the Act as ‘a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration’. A respondent in a matter that was referred to an alternative dispute resolution agent for intervention, is under no obligation to accept the determination as final and conclusive and may object to such referral¹²⁶ and

¹²³ National Financial Ombud Scheme Annual Report 2024 <https://nfosa.co.za/download/nfo-annual-report-2024/?wpdmdl=8200&refresh=688e535fde2021754157919> (accessed 1 August 2025) 36, 44. Also see Ombud Council Explanatory Note: Background to the Establishment of the National Financial Ombud Scheme South Africa https://www.ombudcouncil.org.za/wp-content/uploads/2024/02/NFO-Recognition_Background-to-the-NFO.23-February-2024.pdf (accessed 1 August 2025). National Treasury Media Statement A simpler, stronger Financial Sector Ombud System https://www.treasury.gov.za/comm_media/press/2024/2024022901%20MEDIA%20STATEMENT-A%20SIMPLER%20STRONGER%20FINANCIAL%20SECTOR%20OMBUD%20SYSTEM.pdf (accessed 1 August 2025).

¹²⁴ Naudé T and Barnard J ‘Enforcement and Effectiveness of Consumer Law in South Africa.’ In Micklitz HW and Saumier G (eds) *Enforcement and Effectiveness of Consumer Law. Ius Comparatum - Global Studies in Comparative Law* (2018) 565 – 590.

¹²⁵ S 134(1)(b)(ii) of the NCA.

¹²⁶ S 134(2) of the NCA.

approach the Regulator¹²⁷ or the Tribunal¹²⁸ to finally resolve the matter in compliance with the provisions of the Act.

6.4 Conclusion

The object of this chapter was to investigate the legislative measures in place to resolve over-indebtedness and to address disputes relating to reckless lending. This was done to lay the groundwork for further research to determine whether the low-income consumer, who claims that credit was extended to him recklessly, can successfully avail himself of the remedies offered in the Act.

The debt counselling process established under section 86 of the NCA offers a structured approach to assist consumers who face financial hardship. Through enabling debt restructuring and repayment plans, this process prioritises the ultimate fulfilment of all responsible consumer obligations under credit agreements, ensuring that consumers can meet their commitments while avoiding default.

In paragraph 2 of this chapter, a detailed outline of the debt counselling process was provided. The purpose of the discussion of the debt counselling process was to provide the necessary background information to determine whether the debt counselling process is suitable for low-income consumers seeking a declaration of over-indebtedness and relief in the event of possible reckless lending.

Paragraph 2 started with a general background of the introduction of the debt review process into the South African credit landscape. The use of software to manage the debt counselling process was also explained.¹²⁹

Debt counselling, as regulated under the NCA, offers a structured avenue for over-indebted consumers to reorganise their debt obligations in a sustainable and legally supervised manner. The process begins when a consumer voluntarily applies for debt review by submitting Form 16 to a registered debt counsellor. This application is

¹²⁷ S 134(2)(a) of the NCA.

¹²⁸ S 134(2)(b) of the NCA. See also Scholtz in Scholtz *ed* (2024) para 13.2.

¹²⁹ Para 6.2.1.

captured on the NCRDHS, which flags the consumer's application status and alerts all credit providers and registered credit bureaus.¹³⁰

Credit providers are notified via Form 17.1 and are then required to furnish a certificate of balance detailing the consumer's obligations.¹³¹ Based on this and other supporting documents like salary statements and bank statements, the debt counsellor conducts a financial assessment in line with the statutory definition of over-indebtedness in section 79 of the NCA.¹³² The debt counsellor must also assess whether any of the credit agreements the consumer is a party to, was granted recklessly.¹³³ After evaluating the consumer's financial situation, the debt counsellor will issue a Form 17.2, indicating the outcome of the over-indebtedness assessment. If the consumer is not over-indebted, his application will be rejected. If the consumer is not over-indebted, but struggling with repayments, the debt counsellor may proceed with a voluntary process of debt rearrangement. If all the credit providers accept the debt counsellor's repayment proposals, the proposal can be made an order of court or an order of the Tribunal in terms of section 138 of the Act.¹³⁴ If the debt counsellor finds the consumer to be over-indebted, a formal debt repayment proposal will be made to the credit providers.¹³⁵ If all credit providers agree to the proposed repayment plan, it is confirmed as a consent order by the Tribunal or the Magistrate's Court. If consensus cannot be reached, the matter will be referred to the Magistrate's Court for a formal hearing and judgment.¹³⁶ Once the consumer fulfils the obligations in terms of the restructuring plan in accordance with section 71 of the Act, a clearance certificate is issued and the consumer's credit record will be updated accordingly to show that he is no longer under debt review. This will mark the end of the debt counselling process.¹³⁷

The Act does not set a fixed timeframe for completing the debt review process but requires the debt counsellor to refer the matter to court within business sixty days. If

¹³⁰ Para 6.2.2.

¹³¹ Para 6.2.3.

¹³² Para 6.2.4.

¹³³ Para 6.2.5.

¹³⁴ Para 6.2.6.

¹³⁵ Para 6.2.7.

¹³⁶ Para 6.2.8.

¹³⁷ Paras 6.2.9 and 6.2.10.

this is not done, credit providers may terminate the debt review in terms of section 86(10). Courts may however allow resumption under section 86(11). Originally consumers remained under debt review until all debts were paid, but amendments to section 71 now allow a debt counsellor to issue a clearance certificate when the consumer has paid all his short terms credit obligations and are only left with long terms credit obligations, like a mortgage agreement. The Act also does not contain any provisions allowing a consumer or a debt counsellor to withdraw from the debt review process.¹³⁸

This points to the conclusion that debt counselling serves as a critical mechanism to rehabilitate over-indebted consumers by ensuring responsible debt restructuring under judicial or administrative oversight. It balances the interests of consumers and credit providers while protecting consumers from reckless lending practices. Importantly, the process promotes financial recovery and reintegration into the credit market, as demonstrated by the issuance of a clearance certificate. When effectively implemented, debt counselling can prevent defaults, reduce reliance on unregulated lenders, and restore long-term financial stability. The question is however whether the low-income consumer, who forms the subject of this research, can successfully avail himself of this mechanism.

In paragraph 3 the legislative provisions regulating relief available to a consumer who believes that he was the victim of reckless lending was considered.¹³⁹ Apart from the debt counselling process which was discussed at length in paragraph 2, the Act also provides other avenues through which a consumer who alleges reckless lending may seek relief.¹⁴⁰ Sections 83 and 85 of the Act provide consumers with vital relief mechanisms where reckless lending is suspected. Section 83 empowers a court or the Tribunal to declare a credit agreement reckless during any proceeding in which the agreement is being considered—even if the consumer does not raise the issue. This means the court may act *suo motu* (on its own initiative), and does not require the consumer to allege over-indebtedness or reckless lending as a prerequisite.¹⁴¹

¹³⁸ Para 6.2.11.

¹³⁹ Para 6.3.

¹⁴⁰ Para 6.3.1.

¹⁴¹ Para 6.3.2.

Section 85 allows consumers to allege over-indebtedness and potentially brings issues of reckless lending into the court process through a referral to a debt counsellor. Although section 85 does not explicitly mention reckless lending, legal scholars such as Renke and Coetzee, argue that it could implicitly accommodate such claims.¹⁴² They suggest that if a court refers a matter to a debt counsellor under section 85(a), that counsellor could include a recommendation concerning reckless lending based on section 86(7)(c)(i), which deals specifically with reckless credit.¹⁴³

The Regulator is empowered by section 136 (1) to receive complaints from any person regarding alleged reckless credit, and may also initiate investigations on its own. Following a complaint, the Regulator may issue a notice of non-referral, refer the matter to a debt counsellor, ombud, consumer court or alternative dispute resolution agent, or direct an inspector to investigate the matter. If a contravention is confirmed, the matter may be referred to the Tribunal, which can issue orders under section 150 and impose administrative fines up to the greater of 10% of a respondent's annual turnover or R1 million. The Tribunal's orders are enforceable as High Court orders.¹⁴⁴ Civil courts may also play a crucial role in resolving reckless lending. A consumer can raise reckless credit as a defence in enforcement proceedings, or as a cause of action or counterclaim. However, courts require more than vague claims – consumers must substantiate allegations with evidence, particularly regarding the credit provider's failure to conduct a pre-agreement affordability assessment. Courts are reluctant to accept unsubstantiated allegations, as seen in the matter of *SA Taxi Securitization v Mbata*,¹⁴⁵ where bald allegations of reckless lending were dismissed as a defence.¹⁴⁶ Alternative dispute resolution mechanisms under section 134 offer accessible, non-litigious routes for consumers.¹⁴⁷ These include referral to the ombud with jurisdiction, particularly when the credit provider is a financial institution under the Financial Sector Regulation Act. As of 1 March 2024, the NFO is the single point of entry for such disputes.¹⁴⁸ A consumer court, established under provincial legislation, may also act

¹⁴² Para 6.3.3. See also See Renke and Coetzee (n 6) 243.

¹⁴³ *Ibid.*

¹⁴⁴ Para 6.3.4.

¹⁴⁵ 2011 (1) SA 310 (GSJ).

¹⁴⁶ Para 6.3.5.

¹⁴⁷ Para 6.3.6.

¹⁴⁸ Para 6.3.3.1.

as a tribunal to facilitate resolution of disputes relating to reckless lending.¹⁴⁹ Lastly, an ADR agent can assist a consumer who claims to be the victim of reckless lending through conciliation, mediation or arbitration. While helpful, determinations made by ADR agents are not binding.¹⁵⁰

It is evident that the Act offers a multi-layered framework to address reckless lending. The information presented in this chapter provides essential context for the central research question of this thesis, namely whether these mechanisms offer adequate recourse to low-income consumers who are over-indebted or have been subjected to reckless lending – an issue which will be explored in detail in the next chapter.

¹⁴⁹ Para 6.3.3.2.

¹⁵⁰ Para 6.3.3.3.

CHAPTER 7: LIMITATIONS OF THE PROVISIONS IN THE ACT AIMED AT PROVIDING RELIEF TO CONSUMERS WHO FELL VICTIM TO RECKLESS LENDING

7.1 Introduction

7.2 Reasons for exclusion of low-income consumers

7.3 Investigation of reckless lending by the National Credit Regulator

7.4 Investigation of reckless lending by alternative dispute resolution agents

7.5 Investigation of reckless lending by the ‘ombud with jurisdiction’

7.6 Investigation of reckless lending by consumer courts

7.7 Investigation of reckless lending by the Tribunal

7.8 Conclusion

7.1 Introduction

This chapter is best understood when read in conjunction with the preceding chapters of this thesis, which provide the necessary legal and conceptual foundation. As explained in chapter 3, one of the core objectives of the NCA, is to promote responsibility in the credit market by encouraging responsible borrowing and discouraging reckless lending practices.¹ Chapter 4 analysed key provisions in the Act introduced to give effect to these objectives, while chapter 5 highlighted how these measures, although well-intentioned, may inadvertently exclude low-income consumers from accessing credit altogether.

¹ S 3(c)(i) and (ii) of the NCA.

Chapter 6 examined how the Act prioritises the fulfilment of responsible financial obligations when addressing consumer over-indebtedness through mechanisms such as debt enforcement and debt restructuring.² The debt review process, introduced by the Act as a debt relief measure for over-indebted consumers, was discussed in detail to demonstrate how this process prioritises the ultimate fulfilment of all responsible consumer obligations under credit agreements, ensuring that consumers can meet their commitments while avoiding default and enforcement.

Additionally, the role of debt counsellors in assisting over-indebted consumers who have fallen victim to reckless lending was evaluated, including how these professionals help consumers bring such cases before the court. Provisions in sections 83 and 85 of the Act empower courts and the Tribunal to identify and address instances of reckless lending practices, even without a formal application from the consumer, thereby enhancing consumer protection.³ Further safeguards include the involvement of the Regulator, the Tribunal and the establishment of dispute resolution mechanisms such as ombudsmen and consumer courts.

This chapter builds upon the previous analysis by critically evaluating the debt counselling process as both a debt relief mechanism and a vehicle for addressing the prevention of reckless lending – specifically for low-income consumers. It will further address whether the procedures prescribed by the Magistrate's Court, the Tribunal, the Regulator as well as alternative dispute resolution agents, ombudsmen and consumer courts are sufficiently accessible and effective in resolving disputes involving reckless lending from the perspective of low-income consumers. By exploring these aspects, this chapter aims to determine whether the current framework adequately serves the needs of low-income consumers or whether reforms are necessary to improve accessibility and fairness in addressing over-indebtedness and reckless lending practices.

² S 3(g) of the NCA.

³ See Chapter 6 paras 6.3.2 and 6.3.3.

7.2 Reasons for exclusion of low-income consumers

7.2.1 Low-income consumers are not suitable clients for debt counselling businesses

With the introduction of debt review as a debt relief remedy, many South African entrepreneurs grasped the business opportunities presented by debt counselling. Debt counselling as a profession was introduced by the Act when it became fully effective in June 2007. Debt counsellors are registered and regulated by the Regulator in terms of the Act.⁴ Debt counselling has to be performed by registered debt counsellors. In order to be registered as a debt counsellor, a prospective applicant has to fulfil certain educational, experience and competency requirements.⁵

The industry consists of various types of debt counselling businesses, varying from boutique firms with one debt counsellor running one office and having less than 100 clients to national businesses having several debt counsellors serving thousands of clients in branch offices all over the country.⁶ The Regulator allows debt counsellors to charge a fee for their services. These fees are not prescribed in the Act or Regulations, but are issued by the Regulator in the form of a guideline, namely the Debt Counselling Fee Guidelines Circular 1 of 2018.⁷ The Regulator imposes adherence to this guideline as a condition of registration in terms of section 48 of the Act. Non-compliance with a condition of registration can lead to the deregistration of the debt counsellor.⁸ In terms of the fee guideline, which has not been updated since its publication in February 2018, debt counsellors are permitted to charge the following fees:

⁴ S 40 of the NCA.

⁵ Reg 10 for example provides that a prospective debt counsellor must have a grade 12 or equivalent Level 4 qualification issued by the South African Qualifications Authority. It also requires prospective debt counsellors to have a minimum of two years working experience in different fields such as legal or para-legal services, accounting and financial services etc.

⁶ See The Debt Review Industry Awards Program <https://debtreviewawards.co.za/> (accessed 20 March 2020).

⁷ National Credit Regulator *Debt Counselling Fee Guidelines Circular 1 of 2018*. Hereinafter referred to as 'the NCR fee guidelines'.

⁸ S 57 of the NCA.

Fee description	Amount	Payable
Application fee ⁹	R50	Upfront
Administration fee ¹⁰	R300	Upfront
Determination fee	The fees under this item are aligned to the outcomes of the full assessment of the consumer's financial information.	
Restructuring fee ¹¹	Single application: A fee equal to the distributable amount (the amount payable to the credit providers as per the debt re-arrangement plan) or a maximum fee of R 8 000, whichever is the lesser. For consumers married in Community of Property: (a) the fee is either equal to the distributable amount or a maximum fee of R 9 000, whichever amount is the lesser.	Payable in Month 1 after drafting and submission of the proposals.
Reckless lending fee ¹²	R1 500	Month 2 after completion of the written outcome of the reckless lending assessment.

⁹ The NCR fee guidelines allow this fee for completion and submission of the Form 16. This is the only fee relating to the debt counselling process prescribed by the Act. In terms of s 86(2) a debt counsellor may require a consumer to pay a prescribed application fee. This fee in the amount of R50 (fifty rand) is prescribed in Schedule 2 of the Act.

¹⁰ The NCR fee guidelines allow this fee for the following services: Consultation with the debt counsellor, which includes an explanation of the process and fee disclosure; the Form 17.1 process, loading the consumer onto the DHS and the rejection process as per Form 17.2(a), the latter of which includes notifying the consumer and credit providers, updating the DHS and compliance with Regulation 25.

¹¹ According to the NCR fee guidelines, the restructuring fee includes the following: Attending to the Form 17.2 (b) process, including the proposal preparation, loading the plan onto the debt counsellor's PDA (Payment Distribution Agent) profile, negotiating with credit providers, submitting the final proposal, supplying the debt counselling documents to the attorney to draft the court application, updating the DHS, transferring the consumer, instructing the attorney to draft the court application or collating and filing the NCT application and withdrawal by the consumer (Form 17.W).

¹² In September 2018, in terms of National Credit Regulator *Notice of Intention to withdraw the Reckless Lending Fee Category from the Debt Counselling Fee Guideline Circular 5 of 2018*, the Regulator gave notice of its intention to withdraw the reckless lending fee category from the Fee Guideline. The Regulator then proposed a new fee structure in terms of National Credit Regulator *Request for written comments – reckless lending fee category Circular 6 of 2018*. This proposed structure was published in Government Notice 640, GG 41953, 5 October 2018 for public comment. The industry had to submit comments by 31 October 2018. No new guidelines were published since.

Aftercare fee ¹³	For the entire debt counselling process: (a) The fee is equal to 5% of the distributable amount or a maximum fee of R450, (b) whichever is the lesser amount.	Payable in every month after Month 2 in which after care services are rendered.
NCR Submission Fee ¹⁴	R500 filing fees shall be R621.14 per application and shall be effective from 1 April 2024 to 31 March 2025 ¹⁵	Charged and payable in Month 2 after completion of the restructuring process.
Attorney fee ¹⁶	To be agreed upon upfront with the attorney and communicated in writing to the consumer when applying for debt counselling. Debt counsellors are advised to negotiate that the legal fee be aligned to the disposable income of the consumer where possible.	Month two, after: One or more credit providers has not accepted the repayment plan; The attorney has drafted the court application; and The attorney has attended to the hearing of the court application.

¹³ This fee includes the process of the Form 17.2(c), the review of the consumer's financial situation, attending to payment queries, the clearance process, including securing paid-up letters, the withdrawal from debt review (Form 17.W) and updating the DHS. This fee is payable monthly from month 2 for the entire debt counselling process and is equal to 5% of the distributable amount or a maximum fee of R450, whichever is the lesser amount.

¹⁴ This fee is paid for the submission of the application for a consent order from the NCT if there are no objections to the repayment proposal and the parties seek an order confirming the repayment plan.

¹⁵ The Department of Trade and Industry published a Notice in the Government Gazette No 42337 on 29 March 2019 to amend the Regulations for matters relating to the operations of the Tribunal. The aforesaid notice provides for the increase in the filing fees for Debt Re-arrangement applications from R200 to R300 effective from 1 April 2019 and further increased to R400 on 1 April 2020, R500 from 1 April 2021, and thereafter an increase of 7.5 % from 1 April 2022. On 1 April 2022, the filing fee increased to R537.50. On 1 April 2023 the filing fee increased to R577.81. This fee is only effective until 31 March 2024. As a result of the above, the increase in filing fees shall be from R577.81 to R621.14 per application and shall be effective from 1 April 2024 to 31 March 2025 <https://www.thenct.org.za/wp-content/uploads/2024/02/Filing-fee-increase-for-1-April-2024-.pdf> (accessed 20 March 2025).

¹⁶ The guideline further provides for an 'Attorney Fee' for the drafting of the court application, as well as the court attendance. This amount is payable in month two and is to be agreed upon upfront between the attorney and the debt counsellor and communicated in writing to the consumer when he applies for debt counselling. In terms of the guidelines, debt counsellors are advised to negotiate that the legal fee be aligned with the consumer's disposable income where possible. This amount is payable to the attorney only after one or more credit providers has not accepted the repayment plan; the attorney has drafted the court application; and the attorney has attended the hearing of the court application.

At a glance it may appear that the debt counselling process is affordable to consumers. In a Presentation to Parliament in January 2018 the National Debt Counselling Association however explained that the accessibility of debt counselling to low-income consumers is limited.¹⁷ This is because the revenue earned by a debt counsellor from a consumer who pays less than R3 500 per month towards his re-arranged debt is less than the cost of processing that consumer's debt review. In other words, any consumer who pays less than R3 500 per month to his credit providers is a loss-making endeavour for a debt counsellor. According to research conducted by the industry organisation, Debt Counsellors Association of South Africa (DCASA) in 2007,¹⁸ the minimum fixed costs to establish a debt counselling practice amount to approximately R60 000, excluding salaries and administrative expenses for staff. Ongoing monthly costs, which include office maintenance, software, utilities, marketing, and regulatory fees payable to the NCR and DCASA, were conservatively estimated at R8 600 per month. These substantial operational expenses must be recovered through the fees earned from consumers undergoing debt review.

The fee guidelines significantly constrain the revenue potential from low-income consumers. Suppose a low-income consumer approaches a debt counsellor for debt review. After assessment, the distributable amount is determined at R3 500. Debt counsellors are allowed to charge an application fee of R50 and an administration fee of R300 upfront, as well as a restructuring fee equal to the distributable amount or capped at R8 000 (or R9 000 for consumers married in community of property), and an aftercare fee of 5% of the distributable amount, capped at R450 per month starting from the third month. For a low-income consumer who has a distributable amount (the portion of income available for debt repayment after basic living expenses) of R3 500 per month available, the restructuring fee would be R3 500. The aftercare fee would fall far below the R450 cap at R175. Even if the debt counsellor does a reckless lending investigation and earn an additional R1 500, the fees generated from such a consumer would be insufficient to offset the monthly operating costs of R8 600 per month per consumer identified by DCASA, let alone recoup the initial capital investment required

¹⁷ National Debt Counselling Association Presentation to Parliament January 2018 <https://static.pmg.org.za/180131NDCA.pdf> (accessed 10 January 2025).

¹⁸ Du Plessis MA 'The National Credit Act: Debt counselling may prove to be a risky enterprise' (2007) *Journal for Juridical Science* 76-94.

to establish the debt counselling practice. Additionally, the time and resources required to assess the consumer's financial circumstances, negotiate with creditors, and manage the debt counselling process would far exceed the limited revenue generated. As a result, the combination of high operational costs outlined by DCASA and the restricted fee structure in terms of the NCR's fee guidelines makes it economically impractical for debt counsellors to assist consumers earning less than R3 500 per month through the debt review process.

A further reason why debt counsellors may opt to steer clear of this group of consumers, is that it would be difficult to make a realistic and viable repayment offer to credit providers if the amount available to distribute between credit providers, is very limited. If a re-arrangement proposal contemplates a monthly instalment which is less than the monthly interest which accrues on the outstanding balance, the proposal does not meet the purposes of the Act and an order incorporating such a proposal would be *ultra vires*. The Magistrate's Court would not have jurisdiction to grant such an order.¹⁹ It thus appears that it is possible for some consumers to be 'too poor for debt review'.

It is submitted that a solution for this problem may be to make credit providers responsible for the payment of the fee of the debt counselling process as this process is to their advantage and help them to obtain a payment from the consumer. Section 86(3)(b) however currently provides that a debt counsellor may not require or accept a fee from a credit provider in respect of a debt review application, presumably to avoid conflicts of interest. However, given that the debt review process benefits credit providers by facilitating partial repayment of otherwise defaulting debt, there is a strong policy rationale for exploring alternative funding models – particularly to make the system more accessible to low-income consumers for whom the current fee structure is prohibitive. One possible approach could be to amend section 86(3) to permit regulated contributions from credit providers toward debt counselling costs, provided that such payments are made to an independent fund administered by a neutral body, such as the Regulator, rather than directly to individual debt counsellors. This would

¹⁹ *Nedbank Limited v Norris and Others* 2016 (3) SA 568 (ECP) para 51, *Firststrand Bank Ltd v McLachlan and Others* 2020 (6) SA 46 (SCA) para 18. See also Van Heerden in Scholtz *ed* (2024) para 11.3.3.2.

allow credit providers to contribute to the sustainability of the system without compromising the independence of debt counsellors or consumer trust in the process.

It is further suggested that the fees set out in the NCR Fee Guidelines should be incorporated in the regulations to the Act and that the Minister be authorised to effect changes to the cost and fees by way of proclamation from time to time without having to go through protracted parliamentary processes.

7.2.2 Unaffordability of legal fees for low-income consumers

It is submitted that the legal fees associated with a debt counselling application render the process largely inaccessible to low-income consumers, who are often already over-indebted and unable to afford the legal representation required to navigate the court procedure. The procedural requirements for bringing a debt review application must be met in accordance with Rule 55 of the Magistrate's Court Rules, as confirmed by the court in *National Credit Regulator v Nedbank and Others*.²⁰ However, compliance with these procedural rules – particularly where the application involves an allegation of reckless lending – typically necessitates the assistance of a legal representative.²¹

The NCR's Fee Guidelines mentioned in paragraph 7.2.1 above, advises the debt counsellor to negotiate a fee with the attorney upfront and inform the consumer of the fee at the start of the process.²² In terms of these non-binding guidelines, debt counsellors are also advised to negotiate a fee with the attorney which must be aligned to the disposable income of the consumer.²³ The guidelines further provide that the

²⁰ 2009 (6) SA 295 (GNP). See also Chapter 6 para 6.2.8.

²¹ In the matter of *National Credit Regulator v Nedbank* (n 20) 23 the court held that the debt counsellor should be cited as the applicant in all debt review applications. As every person has the fundamental right to be heard in court, an applicant in a debt review matter may present its own case and bring the debt review application himself; without the assistance of a legal representative. A debt counsellor who chooses to bring the application himself, may however not charge the legal fee provided in the NCR fee guidelines for the application if he is not a registered attorney or advocate or a candidate attorney with right of appearance.

²² Although the NCR fee guidelines refer to 'attorney', an advocate or a candidate attorney with right of appearance in the Magistrate's Court will also be allowed to bring the debt review application.

²³ The Act and Regulations does not define 'disposable income'. Regulation 1 of the affordability assessment regulations describes discretionary income as the income that the consumer has to repay instalments under a credit agreement after making appropriate deductions from the consumer's gross income. It is submitted that disposable income for purposes of the Fee

attorney fee will cover the drafting of the court application and the appearance of the legal representative at the hearing of the court application.²⁴ The Regulator's intentions with the guideline for the attorney's fee is clear: the attorney should charge a fee which, together with the debt counsellors after care fee (which is limited to a maximum amount of R450), would be covered by the second month's distribution fee. When the debt counsellors fee is paid in the first month, and the attorneys fee in the second month, the credit providers will be receiving their first distribution by the third month from the date of the consumers application for debt review.

Due to the technical nature of the debt review application and complex legal arguments that can be presented by legal representatives acting for credit providers, it is however not easy to accurately determine the total legal cost of the process at the onset of the matter. Depending on the specific facts of the matter and the nature of the opposing arguments, the attorney may be instructed to do further legal work. This could include attending to a postponement of the matter, drafting of an interlocutory application to compel the credit provider to disclose documents relevant to the determination of reckless credit as well as preparing supplementary affidavits. Such services will be charged at a fee on the attorney and client scale.

Should the credit provider choose to oppose an allegation of reckless lending, the attorney acting for the consumer will have to peruse the opposing papers, take instructions on it and argue the matter in court. Postponement of the matter is also possible as some courts allocate specific days for opposed matters. This will further increase the legal costs.

As mentioned, the Act provides that a consumer whose debt review application was rejected by the debt counsellor can apply directly to the court for an order in terms of section 86(7)(c).²⁵ This includes an order declaring a credit agreement reckless.²⁶ The debt counselling regulations provide guidance on how the consumer must bring the application in terms of section 89 to institute the proceedings contemplated in section

Guidelines has the same meaning as discretionary income as it is defined in the affordability assessment regulations.

²⁴ NCR fee guidelines para 7.

²⁵ S 86(9) of the NCA. See Chapter 6 para 6.2.6.

²⁶ S 86(7)(c)(i) of the NCA.

86(7)(c).²⁷ Regulation 4(1) provides that the application must be lodged in the manner and form prescribed by Rule 55 of the Magistrate's Courts Rules. Further, the application has to meet the requirements set out in regulation 4(2)²⁸ and (3).²⁹ The technical nature of the process set out in these regulations will probably also necessitate the services of an attorney. An already debt strapped low-income consumer will very likely not be able to afford such services.

An already debt strapped low-income consumer would most probably not be able to afford an attorney's fees for further action to be taken to ensure the proper investigation of reckless credit. It is submitted that the legal cost involved in drafting the debt counselling application, the appearance in court for the hearing of the application, attending to postponements or arguing any opposition of the application, let alone the costs involved in investigating and arguing reckless lending, further prevents the low-income consumer from using debt review to solve their debt problems.

It is unsure why the legislature chose the route of a more complex process; as the draft debt counselling regulations published in 2009, contained provisions aimed at a less administrative, more expeditious resolution of matters, as noted by Roestoff *et al.*³⁰ It also contained an Annexure with standard forms the consumer could fill in which would have made the assistance of a legal representative unnecessary. So, for example, the draft guidelines provided that a consumer whose debt review application was rejected by the debt counsellor and who wanted to apply directly to court for a

²⁷ Government Notice R362, GG 35327, 10 May 2012, (Debt Counselling Regulations).

²⁸ Reg 4(2) provides:

'The application must be accompanied by –

- (a) the decision of the debt counsellor, made in terms of section 86(7)(a) of the Act;
- (b) an affidavit by the consumer annexed to the application in which reasons must be set out why leave should be granted to apply for an order contemplated in section 86(7)(c) of (the) Act;
- (c) an application for an order contemplated in section 86(7)(c); and
- (d) if required by the court, an affidavit deposed to by any person.'

²⁹ Reg 4(3) provides:

'An application referred to in regulation 4(2)(c) above must be substantiated by a founding affidavit deposed to by the consumer setting out the following:

- (a) an exposition which indicates that the consumer is over-indebted, read with sections 78(3), 79 and 80 of the Act as well as regulation 24 of the Regulations;
- (b) the relief claimed in terms of section 86(7)(c);
- (c) the full particulars of each credit provider; and
- (d) full particulars of the consumer.'

³⁰ Government Notice 503, GG 32229, 15 May 2009, (Draft debt counselling regulations).

debt review order, had to bring an *ex-parte* application in the form of Form E of the Annexure and file it in duplicate with the clerk of the court.³¹ As observed, the simple nature of the application would have made a legal representative unnecessary.

7.2.3 Lack of legislative guidance for debt counsellors to assess reckless lending

A further obstacle in the path of a consumer who wants to allege that credit was granted recklessly, exists in the form of a lack of legislative guidance for debt counsellors on how to assess reckless lending. It is common cause that the debt counsellor has a statutory obligation to conduct an investigation into suspected reckless lending for consumers who have applied for debt review and requested the debt counsellor to conduct an investigation of reckless lending in respect of specifically identified accounts.³² However, the Act does not provide a practical process to investigate suspected reckless lending by a debt counsellor and also does not specify the manner in which the interaction between the debt counsellor and the credit provider who provided the suspected reckless credit should be conducted. Courts are not *ad idem* on whether an allegation of reckless lending must be heard as part of the debt counselling process. It is reported that some magistrates accept self-standing reckless lending applications and hear the matters as part of the motion court proceedings (which they may do as they are entitled to look into reckless lending either when requested to do so or *suo moto*), while others insist that reckless lending can only be raised in an application for debt counselling, or as a defence in a summary judgment procedure.³³

In an effort to assist industry with the practical aspects of the debt review process, the Regulator issued the Debt Review Task Team Agreements in January 2015. (TTA)³⁴ The TTA also provides practical guidance on how to conduct the reckless lending investigation by listing documentation and other information that the debt counsellor

³¹ Roestoff *et al* 'The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005' (2009) *PELJ* fn 155.

³² S 86(6) of the NCA.

³³ DTI response to submissions to National Credit Amendment Bill. Submission made by Summit Financial Partners http://www.dti.gov.za/parliament/2018/Comments_NCA.pdf (accessed 25 May 2020).

³⁴ National Credit Regulator *Debt Review Task Team Agreements Circular 2 of 2015* (hereinafter referred to as 'the TTA').

should be able to obtain from the consumer and also indicating what information should be requested directly from the credit provider.³⁵ DCASA further issued a practical guideline - DCASA Reckless Credit Practical Guideline for Debt Counsellors - on 22 March 2016 providing practical advice on the type of information that a debt counsellor should request from a credit provider when reckless credit is investigated.³⁶

To provide the industry with an operational solution to the challenges set out above, the NCR – through the Credit Industry Forum³⁷ – established a reckless lending subcommittee to develop a practical process for debt counsellors and credit providers on how to attend to reckless lending allegations as well as the process to lodge complaints at the NCR regarding reckless lending allegations.³⁸ The Regulator developed a draft document titled ‘Suspected Reckless Lending Investigation Guidelines’ and invited the members of the subcommittee to provide input by no later than 4 October 2021.³⁹ After substantial amendments were suggested by members of the subcommittee in December 2023,⁴⁰ consensus on all relevant issues was reached on the 13th of May 2024 and the draft reckless lending guidelines were sent to the NCR for feedback.⁴¹ Feedback from the NCR and certain stakeholder associations were still outstanding at the time of writing this chapter.

7.2.4 Credit providers frustrate the reckless lending investigation

In Chapter 4 the instances of reckless lending were explained.⁴² It was also explained that the pre-agreement assessment as described in section 81(2) read with regulation 23A must be used by credit providers as a ‘filter’ to prevent reckless lending. The information the credit provider obtained from the consumer at the time the consumer

³⁵ TTA Annexure B Item 16.6 30.

³⁶ DCASA *Reckless Credit Practical Guideline for Debt Counsellors* (hereinafter referred to as ‘DCASA’s reckless credit guideline’) 19–20.

³⁷ National Credit Regulator *Updates from the Credit Industry Forum Circular 2 of 2019* describes the Credit Industry Forum (hereinafter referred to as ‘the CIF’) as follows: ‘The National Credit Regulator established the Credit Industry Forum to identify and address operational difficulties that come with implementation of the National Credit Act as amended (‘the Act’) and to make advisory recommendations to the NCR which, upon acceptance, will be issued as guidelines to the credit industry. The Forum, which is chaired by the NCR, consists of representatives of different stakeholders in the industry such as credit providers, payment distribution agents and debt counsellors.’

³⁸ National Credit Regulator *Updates from the Credit Industry Forum Circular 3 of 2019*.

³⁹ Correspondence on file with writer.

⁴⁰ Debt Counsellors Association of South Africa <https://www.dcasa.co.za/cif-reckless-credit/>.

⁴¹ Report of 36th CIF meeting on 7 June 2024 on file with writer.

⁴² Chapter 4 para 4.2.1.

applied for the credit is critical in assisting the debt counsellor to determine whether a proper assessment of the consumer's payment ability was conducted⁴³ and whether the consumer fully and truthfully answered all requests for information made by the credit provider as part of the assessment.⁴⁴ It can also be used to indicate if the consumer understood the risks, costs and obligations under the credit agreement⁴⁵ and whether he became over-indebted as a result of entering into that particular agreement.⁴⁶

Even though the Act places an obligation in terms of section 86(5) on credit providers to comply with reasonable requests from a debt counsellor to provide information that could assist with the evaluation of a consumer's indebtedness, the Act does not give any detail on the type of information that must be provided to assist a debt counsellor to investigate reckless lending.⁴⁷ The Act also does not set a time limit within which this information must be provided. The TTA and DCASA's reckless lending guidelines therefore provide valuable practical information on the type of information that should be requested from credit providers to prove reckless lending.⁴⁸ Although the TTA and

⁴³ S 80(1)(a) of the NCA.

⁴⁴ S 81(4) of the NCA.

⁴⁵ S 80(1)(b)(i) of the NCA.

⁴⁶ S 80(1)(b)(ii) of the NCA.

⁴⁷ S 86(5) of the NCA determines that:

'A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4)(b), must –

- (a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and
- (b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.'

⁴⁸ According to DCASA's reckless credit guideline's, debt counsellor will need information, such as pay slips and bank statements, which should be provided by the consumer, dating back to the time of the credit application to determine whether the credit was granted recklessly. Other sources of information, which are attainable from the credit provider, are:

- i) Approval date of the credit agreement;
- ii) Copy or voice recording of the application;
- iii) Detail of the credit assessment as required by section 80(1)(a);
- iv) Copy of pre-agreement statement and quotation as required in terms of section 82 and 92;
- v) Detail of how the risks, costs, as well as the rights and obligations in terms of section 81(2)(a)(i) was explained to the consumer;
- vi) Details of the payment history including the credit bureau report used to determine the consumers' debt repayment under credit agreements as required in section 81(2)(a)(ii);
- vii) Detail of the consumer's financial means, prospects and obligations in terms of section 81(2)(a)(iii) used by the credit provider in the assessment;
- viii) Details of compliance to the requirements of section 82 and regulation 23A;
- ix) Copy of the credit agreement.

DCASA's reckless credit guideline is valuable to industry, it does however not constitute substantive law and credit providers cannot be forced to adhere to the guidelines. Credit providers can thus easily frustrate reckless lending investigations by simply not providing the requested information timeously or at all.

Between 1 April and 31 July 2018, the debt counselling company, DebtSafe, investigated 5 591 credit agreements for reckless credit. They reported that the majority of the credit providers that they contacted during this period failed to provide information to enable them to conduct the investigation, despite numerous attempts.⁴⁹ Such omissions prevented the court from declaring credit agreements as reckless, because the Magistrate's Court, as creature of statute, is by its nature bound by procedural rules.⁵⁰ Unfortunately, the Magistrate's Courts do not have the same authority granted by the Act to the Tribunal to summon or order a credit provider to produce a document.⁵¹ Magistrate's Courts also do not have the authority granted by the Act to the Regulator to direct an inspector to investigate a complaint.⁵² The law of evidence dictates that he who alleges must prove.⁵³ Therefore, the debt counsellor, who will be the applicant in the debt review application containing the recommendation for a finding of reckless credit, must be able to prove the allegation of reckless lending. The court must conduct a hearing and, having regard to the proposal *and information before it* (own emphasis) and the consumer's financial means, prospects and obligations, may make an order as set out in section 87.⁵⁴ If the court does not have enough information, it would not be able to make a finding of reckless credit. The court will then either have to refrain from making an order due to lack of sufficient information, or it will have to make an order restructuring the consumer's credit agreements, including the agreement in terms whereof the allegation of reckless credit

⁴⁹ The DebtSafe Reckless Lending Indicator (April – July 2018) https://www.moonstone.co.za/upmedia/uploads/library/Moonstone%20Library/MS%20Industry%20News/The-Debtsafe-Reckless-Lending-Indicator_April-July-2018.pdf (accessed 25 February 2020).

⁵⁰ Theophilopoulos C *et al Fundamental Principles of Civil Procedure* (5th edition) LexisNexis Durban (2025) 15. A 'creature of statute' was created by law and may only entertain matters which the enabling legislation of that court specifically allows.

⁵¹ S 144 of the NCA.

⁵² S 139(1)(c) of the NCA.

⁵³ *Pillay v Krishna* 1945 AD 952 – 953. See also Theophilopoulos *Civil procedure* (n 50) 345.

⁵⁴ S 87(1) of the NCA.

was made, according to the provisions of section 86(7)(c)(ii) read with section 87(1)(b)(ii). This will not only prejudice consumers, but also innocent credit providers.

On 15 August 2019, President Cyril Ramaphosa signed the National Credit Amendment Act⁵⁵ into law, which is the second amendment Act pertaining to the NCA.⁵⁶ It is now six years later and there has been no movement on this initiative as a commencement date for the 2019 Amendment Act has not yet been announced. The amendment of the Act introduces a list of documentation that must be provided to debt counsellors to assist in investigate reckless lending. This can be seen as an attempt by the legislature to set out a process for the determination of reckless lending. The amendment introduces section 82(A)(2) which provides as follows:

‘(2) A credit provider must, within seven business days of receipt of a request and at a fee not exceeding the maximum prescribed fee, provide a debt counsellor with the following information requested in relation to the consumer concerned:

- (a) relevant application for credit;
- (b) pre-agreement statement;
- (c) quote;
- (d) credit agreement entered into with the consumer;
- (e) documentation in support of any steps taken after default by the consumer.

Section 82(A)(4) provides a sanction against credit providers for non-compliance:

The Tribunal may impose an administrative fine contemplated in section 151 where a credit provider intentionally fails to comply with subsection (2).’

Unfortunately, it is not clear how this sanction in the Act will be enforced. For example, who will report a transgression to the Tribunal? How fast will the Tribunal act upon it? If the Tribunal does not have the capacity to make an order within the 60-day period after application for debt review, what will the use of this amendment be? It is submitted that the mere reporting of transgressions will not necessarily eradicate them; proper and effective enforcement mechanisms are necessary. The Regulations will hopefully shed some light on this. However, at the time of writing this thesis, no regulations to the 2019 Amendment Act were published. In fact, as pointed out above, the provisions of the 2019 Amendment Act are not in operation at all.

⁵⁵ Hereinafter referred to as ‘the 2019 Amendment’ or ‘the 2019 NCAA’.

⁵⁶ The first amendment of the Act was in terms of the 2014 NCAA.

7.2.5 Magistrate's courts as forums to hear the reckless lending application

One of the ways in which a consumer can obtain recourse in the event of credit being extended recklessly, is by requesting the debt counsellor to do a reckless lending investigation in terms of section 86(6)(b). As explained in paragraph 3.4 above, a debt counsellor who wants to prove an allegation of reckless lending, is dependent on the information supplied to him by credit providers. The debt counsellor will make the recommendation to have a credit agreement declared reckless as part of the application for debt review in terms of section 86(7). As previously indicated, the court in the matter of *National Credit Regulator v Nedbank 2009(6) SA 295 (GNP)* held that the application procedure, as regulated by Rule 55 of the Magistrate's Courts Rules, applies when a matter is referred to the Magistrate's Court by the debt counsellor.⁵⁷

In the matter of *Firststrand Bank Ltd v Barnard*⁵⁸ the court pointed out that a magistrate presiding in a court to which a re-arrangement proposal has been referred fulfils a judicial and not an administrative role. The Magistrate's Court derives its power in this regard from the NCA and the procedure such a court must follow is set out in Magistrate's Courts Rule 55. As such, the procedural and evidentiary rules of the Magistrate's Court will apply, which means that the application will be drafted in accordance with Form 'No. 1 (Notice of Application (General Form))' that appears in Annexure 1 to the Magistrate's Court Rules and should be supported by a founding affidavit by the debt counsellor as well as a confirmatory affidavit by the consumer in terms whereof the facts in support of the application will be recorded under oath.⁵⁹ The court will then consider the contents of the affidavits in determining whether or not to grant the application. If an applicant refers to documentary evidence in the founding affidavit, such documentation has to be attached to the affidavit. Similarly, where the applicant refers to communications or actions by other persons, such reference has to be affirmed by obtaining confirmatory affidavits from the said persons and attaching it to the founding affidavit. This is necessary to comply with the evidentiary rule against hearsay evidence.⁶⁰ As stated, the complex nature of a court application to declare a

⁵⁷ See Chapter 6.2.8.

⁵⁸ 2015 JDR 1614 (GP) par 18.

⁵⁹ *National Credit Regulator v Nedbank* (n 20).

⁶⁰ Schmidt and Rademeyer *Law of Evidence* (2013) para 18.1. The term 'hearsay' refers to the situation where a witness reports, during the course of court proceedings, what he or she has heard (from another person) or read. In South African law there is a general rule that this type of

credit agreement reckless may require engaging the services of a legal representative who charges a fee to appear in court. If the credit provider does not provide the necessary information to assist the debt counsellor to investigate reckless lending, the debt counsellor will have to notify the court and request the court to, by means of an interlocutory order, direct the credit provider to provide the documentation.⁶¹ If the interlocutory order is granted, the matter will be postponed, which will further increase the legal costs. Legal costs can also increase if credit providers oppose applications for debt review, which include allegations of reckless lending, on technical arguments. In comparison with consumers who are already trapped in a debt spiral, credit providers have deep pockets and can easily out-litigate consumers who cannot afford legal representation.

Van Heerden submits that there appears to be a significant disparity in the complexity and costs of reckless lending proceedings depending on whether they are heard by the Tribunal after an investigation by the Regulator, or by the Magistrate's Court as part of an application for debt review.⁶² This begs the question whether the Magistrate's Court is the correct forum to hear reckless lending allegations at all? Consideration should be given to legislative amendment allowing for a simplified process in terms whereof the consumer can bring the reckless lending allegation to the court himself, without the necessity of a legal representative. Courts dedicated to hear these applications with presiding officers trained specifically for this purpose can also be considered.

evidence may not be accepted by the court as evidence. The reason being that this type of evidence is deemed to be unreliable because the person who witnessed the facts is not present to tell the court under oath what he or she observed. The absence of the original observer prevents the evidence from being subjected to cross-examination.

⁶¹ Uncertainty exists on whether the Magistrate's Court can make an order compelling the credit provider to provide documents to enable the debt counsellor to investigate reckless lending. It is reported that some debt counsellors refer the court to the failure of the credit provider to provide the documents and then request the court to postpone the matter pending the receipt of the documents. On receipt of the documents and completion of the investigation, the debt counsellor will file a supplementary affidavit, dealing with the reckless lending allegations. This of course points towards a protracted, and necessarily more expensive process. Interview with Sharon Grove, Magistrate, Pretoria Magistrate's Court (Pretoria, South Africa, 16 March 2020).

⁶² Van Heerden CM and Renke S 'Reckless credit: developments regarding affordability assessment and the extended powers of the National Consumer Tribunal' *University of Johannesburg Annual Banking Law Update* (2015) 252.

7.2.6 Low-income consumers can become trapped in the debt-review process

As explained previously,⁶³ section 86(10)(a) and (b) of the Act allows a credit provider to terminate a pending debt review prior to the filing of a debt restructuring application at the Magistrate's Court in certain circumstances, for example where no progress is made with the debt review and/or the restructuring proposal is not viable.⁶⁴

Section 71 provides an opportunity for consumers who are under debt review to exit the process at an earlier stage, without requiring the full repayment of long-term credit agreements.⁶⁵ The section thus provides an over-indebted consumer whose financial position remains such that he has to go through the whole debt review process in all its stages (in other words, let the process run its course) to eventually reach a situation where, as a result of this process, he is 'rehabilitated' to such an extent that he has paid off his short-term credit and can exit the process and become a responsible user of credit again.⁶⁶

A subject of concern is whether a different type of consumer, namely a consumer whose financial position has *improved* since he applied for debt review, but who do not meet the requirements for a clearance certificate – namely, that he should have repaid all his short-term restructured debt and is able to show that he has the financial ability to make timeous future payments in respect of his remaining long-term responsibilities, can be allowed to exit debt review.

Coetzee and van Heerden, after discussing a plethora of court cases where the court had different opinions on this issue, concluded that the answer to this question is 'no'. In their article they deliberate whether the mere fact that a consumer was over-indebted at one stage in his life and voluntarily chose to enter into a process devised

⁶³ See Chapter 6, para 6.2.11.

⁶⁴ For a more detailed discussion of the process, see Van Heerden in Scholtz *ed* (2024) para 11.3. Also see Van Heerden CM and Coetzee H 'Perspectives on the Termination of Debt Review in terms of Section 86(10) of the National Credit Act 34 of 2005' (2011) *PELJ* 37 and Van Heerden CM and Coetzee H 'Termination of debt review in terms of section 96(10) of the National Credit Act 34 of 2005' (2011) *De Jure* 463.

⁶⁵ Chapter 6 para 6.2.10.

⁶⁶ Van Heerden CM and Coetzee H 'Unintentionally Trapped by Debt Review: Procedural Inadequacies in the National Credit Act 34 of 2005 Relating to Withdrawal from the Debt Review Process' (2019) *PELJ* 20.

to assist in managing and overcoming such over-indebtedness should be shackled by this process and its limitations on his contractual capacity, even if he subsequently, prior to the completion of the process, reaches a stage where his financial situation has improved to such an extent that he is *de facto* no longer over-indebted. They argue that the legislature, in its focus on assisting over-indebted consumers, inadvertently created a system that traps individuals in the debt review process even when their financial circumstances improve. This oversight appears to stem from a failure to consider that some consumers might recover financially before fulfilling the requirements of section 71 of the NCA. Keeping such individuals confined to the debt review process, which restricts access to new credit agreements, is both illogical and contrary to the protective aims of the Act.

The authors suggest that allowing consumers with significantly improved financial positions to exit the debt review process, under proper regulatory conditions, would not disadvantage credit providers. On the contrary, these creditors would benefit from larger repayments aligned with the original agreements, completed over a shorter timeframe than under the restructured terms, without losing their right to collect interest. Even if these consumers were to default, credit providers would retain their ability to enforce the agreements, as no moratorium on enforcement would apply.⁶⁷

Van Heerden and Coetzee suggests that the Act should be amended to allow *bona fide* consumers, who can demonstrate that their financial circumstances have *de facto* improved, to withdraw voluntarily from the debt review process. This amendment should apply regardless of whether the improvement occurs before or after a debt restructuring order has been issued. The withdrawal should be based on evidence that the consumer is no longer over-indebted, rather than being tied to the formal status of the debt review process.⁶⁸

They emphasise that the need for a clear legislative framework to facilitate this withdrawal as the absence of such a process creates confusion and leads to unnecessary legal costs, particularly in high courts.⁶⁹ The proposed framework should

⁶⁷ Van Heerden and Coetzee (n 66) 23.

⁶⁸ Van Heerden and Coetzee (n 66) 54.

⁶⁹ Van Heerden and Coetzee (n 66) 60.

include ‘good faith’ filters to ensure that only consumers with legitimate claims of financial recovery can exit the process. These filters would require consumers to provide clear proof that their financial position has improved sufficiently to resume normal payment under the original credit agreements.⁷⁰

Additionally, they suggest that the framework should address the payment of any outstanding debt counselling and legal fees, provided these fees are not disputed. This approach should ensure only eligible and *bona fide* consumers being able to withdraw from debt review, while simultaneously benefitting credit providers, as consumers resuming original repayment terms would align with the interests of credit providers.⁷¹

It is submitted that Van Heerden and Coetzee’s suggestions to amend the Act to allow for withdrawal from the debt review process could have significant implications for some low-income consumers. On the one hand, it could provide an opportunity for consumers who are no longer over-indebted to regain financial independence and access to credit markets without being unnecessarily constrained by the debt review process. This flexibility is particularly important for low-income individuals, who might experience fluctuations in income and may recover faster financially than anticipated.

However, it is further submitted that for low-income consumers, the implementation of such a withdrawal mechanism must be carefully designed to ensure accessibility and fairness. The requirement for ‘clear proof’ of improved financial circumstances must not impose undue administrative or financial burdens that could exclude deserving individuals. Additionally, the payment of outstanding debt counselling and legal fees should be structured in a way that does not disproportionately disadvantage low-income consumers, who may find these costs prohibitive.

A well-regulated withdrawal process, anchored in good faith and supported by legislative clarity could minimise confusion and avoid unnecessary legal expenses, which often weigh heavily on low-income individuals. By enabling *bona fide* consumers to exit the process when their financial positions have improved, the proposed

⁷⁰ Van Heerden and Coetzee (n 66) 61.

⁷¹ Van Heerden and Coetzee (n 66) 61.

amendment would promote fairness and efficiency in the debt review system while ensuring that credit providers' interests are safeguarded. This balance would ultimately benefit low-income consumers by preventing unnecessary restrictions on their economic recovery and access to credit.

7.3 Investigation of reckless lending by the National Credit Regulator

The NCA established the Regulator as the primary enforcer of the Act,⁷² and tasks it with the responsibility to create a 'fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry,'⁷³ specifically to serve the needs of those consumers who were historically disadvantaged;⁷⁴ low income consumers or communities;⁷⁵ and consumers who reside in remote, isolated or low density populations and communities.⁷⁶ The Regulator must enforce the Act by, *inter alia*, by receiving complaints of alleged contraventions of the Act,⁷⁷ monitoring the consumer credit market in order to prevent, detect and prosecute prohibited conduct.⁷⁸ The Regulator should refer anti-competitive behaviour and conduct to the Competition Commission⁷⁹ and refer contraventions to the Tribunal.⁸⁰ The Regulator can also issue and enforce compliance notices,⁸¹ investigate and evaluate contraventions of the Act⁸² and negotiate and conclude undertakings and consent orders.⁸³ The Regulator thus has extensive responsibilities and functions, making Vessio's description of the Regulator as 'an octopus with ... many tentacles' appropriate.⁸⁴ The functions and responsibilities of the Regulator with regard to investigation of reckless lending were dealt with extensively in Chapter 4.

⁷² S 12 of the NCA.

⁷³ S 13 of the NCA.

⁷⁴ S 13(a)(i) of the NCA.

⁷⁵ S 13(a)(ii) of the NCA.

⁷⁶ S 13(a)(ii) of the NCA.

⁷⁷ S 15(b) of the NCA.

⁷⁸ S 15(c) of the NCA.

⁷⁹ S 15(h) of the NCA.

⁸⁰ S 15(i) of the NCA.

⁸¹ S 15(e) of the NCA.

⁸² S 15(f) of the NCA.

⁸³ S 15(g) of the NCA.

⁸⁴ Vessio ML 'What does the National Credit Regulator regulate' (2008) *SA Merc LJ* 230.

Upon inspection of the 2019 NCAA, it is clear that this amendment extended the functions of the Regulator even further. The latest amendment to the Act introduced a new debt relief mechanism known as debt intervention.⁸⁵ The proposed debt intervention process will allow low-income consumers to apply for debt relief in the form of reduced payments and in certain circumstances even the suspension or discharge of debt.⁸⁶ The intended beneficiaries from the debt intervention process are over-indebted consumers with low-incomes who would otherwise be unable to access traditional debt relief mechanisms.⁸⁷ The amendment included the evaluation and referral of debt intervention applications as a function of the Regulator.⁸⁸ Debt intervention also added the registration and monitoring of debt intervention officers to the functions of the Regulator.⁸⁹

The amendment further introduced section 82A, which provides that, if during an assessment contemplated in section 86(6), there are reasonable grounds to suspect that a credit agreement is reckless and the debt counsellor rejected the application as contemplated in section 86(7)(a) or made a recommendation in terms of section

⁸⁵ S 13 of the 2019 NCAA introduced debt intervention.

⁸⁶ See Chapter 1. See also Boterere SG *The proposed Debt Intervention Measure* (LLM Dissertation, University of Pretoria 2019) 39. Coetzee H 'An opportunity for No Income No Asset (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure' (2018) *JCRL* 593. Coetzee H 'An Opportunity for No Income No Asset (NINA) Debtors to get out of check – An Evaluation of the Proposed Debt Intervention Measure' (2018) *JCRL* 593. Coetzee H and Roestoff M 'Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa' (2020) *International Insolvency Review* S95. Coetzee H and Brits R 'Extinguishing of debt in terms of the debt intervention procedure: some remarks on 'arbitrariness' in Van der Merwe, D (ed) *Magister: Essays vir/for Jannie Otto* (2020) LexisNexis ISBN 978 0 6390 1222 3 at 61.

⁸⁷ S 13 of the 2019 NCAA introduced debt intervention. The category of consumers that will benefit from debt intervention is low-income consumers who typically cannot afford debt review. S 1 of 2019 NCAA provides as follows:

'A debt intervention applicant means a natural person, or natural persons who own a joint estate, who on the date of submission of the application for debt intervention contemplated in section 86A –

- (a) is a consumer under unsecured credit agreements, unsecured short term credit transactions or unsecured credit facilities only;
- (b) receives no income, or if he or she, or the joint estate, receives an income or has a right to receive income, regardless of the source, frequency or regularity of that income, that gross income did not, on an average for the six months preceding the date of the application for debt intervention exceed R7500 or such an amount as may be prescribed by section 171(2A)(a), per month
- (c) is over-indebted, whether due to a change in personal circumstances or other circumstances; and
- (d) is not sequestrated or subject to an administration order.'

⁸⁸ S 3 of the 2019 NCAA provides for the insertion of: 'Section 15A: Other functions of the National Credit Regulator.'

⁸⁹ *Ibid.*

86(7)(b), the debt counsellor must report the matter to the Regulator.⁹⁰ The amendment further makes it compulsory for debt counsellors to investigate and report reckless lending to the Regulator.⁹¹ It is clear that the purpose of these amendments were to ensure that possible reckless lending matters, which prior to the amendment might have remained unreported, will now also come to the attention of the Regulator and be investigated if necessary. This will increase the workload of the already resource-constrained Regulator. According to the website of the Regulator, complaints received in terms of section 15(b) and 136(1) are dealt with by the Complaints Department of the Regulator.⁹² The department is divided into two units, namely the Call Centre and the Complaints Resolution unit.⁹³ For the period 2023/2024, the Call Centre answered 95 002 calls and received 19 290 written enquiries. Of these, 58% were handled within an average of nine days and 277 were referred to different ombudsman offices. The Complaints Department received 1 950 complaints for the same period, 47,69% of which were successfully resolved. Considering that the staff complement of the Complaints department comprises 20 persons, it indicates a very heavy workload on relatively few people.⁹⁴ The Regulator reported that Information and Communication Technology shortcomings were a significant stumbling block during this period. System downtime also affected operational efficiency and limited consumers' access to the NCR, while the lack of systems integration made complaints resolution processes unnecessarily cumbersome. The situation was further aggravated by budget constraints that prevented appointing employees in certain vacant positions. An already existing backlog, a high volume of new complaints as well as non-responsive registrants made it difficult to finalise complaints within the prescribed 90-day timeframe.⁹⁵ It is submitted that the Regulator faces serious capacity problems which will be increased when additional functions and responsibilities relating to debt intervention is placed on the Regulator. The capacity

⁹⁰ S 10 of the 2019 NCAA introduced s 82A.

⁹¹ S 12 of the 2019 NCAA amended s 86.

⁹² National Credit Regulator 'Complaints' <https://www.ncr.org.za/index.php/departments/complaints> (accessed 26 November 2024).

⁹³ National Credit Regulator 'Annual report 2023/2024' <https://www.thedtic.gov.za/wp-content/uploads/NCR-Annual-Report-2024.pdf> (accessed 26 November 2024).

⁹⁴ National Credit Regulator 'Annual report 2023/2024' <https://www.thedtic.gov.za/wp-content/uploads/NCR-Annual-Report-2024.pdf> (accessed 26 November 2024). According to the National Credit Regulator's Annual Report for the period 2023/2024 it had a total staff complement of 158 employees as at 31 March 2024.

⁹⁵ National Credit Regulator 'Annual report 2023/2024' <https://www.thedtic.gov.za/wp-content/uploads/NCR-Annual-Report-2024.pdf> (accessed 26 November 2024).

of the Regulator is further constrained by the fact that the Regulator occupies one office situated in Midrand.⁹⁶ The reporting of complaints to the Regulator will serve no purpose if the Regulator does not have the necessary human resources and capacity to investigate and properly deal with these complaints.

The Regulator has been accused of ineffectiveness in investigating reckless lending matters referred to it.⁹⁷ Scholars like Schulow, Woker and Van Heerden observe that the Regulator takes an over cautious approach and fails to take action against errant credit providers.⁹⁸ The Regulator's lack of enforcement action was blamed for a market in which microcredit institutions have operated virtually unfettered and where consumer debt, especially among the most vulnerable consumers, has grown steeply.⁹⁹ The lack of enforcement by the Regulator has also been blamed for a surge in unsecured loans in South Africa.¹⁰⁰ *Mashonisas*¹⁰¹ and payday lenders who operate under the regulatory radar due to their non-compliance with registration requirements set forth by the Act, was pointed out as a pressing concern in the area of predatory and reckless lending.¹⁰² The financial services provider, Summit Financial Partners

⁹⁶ The physical address of the Regulator was 127 15th Rd, Randjespark, Johannesburg until the 18th of July 2025. All operations will continue from the NCR's premises situated at 127 15th Rd, Randjespark Johannesburg. National Credit Regulator Office Relocation notice <https://www.ncr.org.za/> (accessed 1 August 2025).

⁹⁷ Arde A 'NCR in hot water over enforcement' Personal Finance 2 April 2016 <http://www.iol.co.za/personalfinance/ncr-in-hot-water-over-enforcement-2004166> (accessed 6 June 2020); Bateman, M. (2012, September 18). Milford Bateman: Microcredit and Marikana, how they are linked. The Star. Retrieved from <https://www.iol.co.za/the-star/microcredit-and-marikanahow-they-are-linked-1385126>; (accessed 6 June 2020); Ensor L 'Absolutely nothing happens at the NCR, says Wendy Appelbaum' BusinessDay 25 November 2016, <https://www.businesslive.co.za/bd/business-and-economy/2016-11-25-absolutely-nothing-happens-at-thencr-says-wendy-appelbaum/> (accessed 6 June 2020).

⁹⁸ Schulow *et al* 'South Africa's National Credit Act: Successes (and Failures) in Preventing Reckless and Predatory Lending' *JBL* (2019) 137.

⁹⁹ SAPA 'Half of SA is over-indebted: SAHRC' 11 March 2015 IOL Economy <https://www.iol.co.za/business-report/economy/half-of-sa-is-over-indebted-sahrc-1830518> (accessed 6 June 2020).

¹⁰⁰ James D. 'Deeper into a Hole?': Borrowing and Lending in South Africa.' *Current Anthropology* 55, no. S9 (2014): S17–29.; See also Leriba Consulting Limited 'The risk of unsecured lending in South Africa' (2013) Occasional research report available at <http://www.leriba.com/wp-content/uploads/2013/06/Leribaunsecured-lending-Report.pdf> (accessed 14 December 2023) 7.

¹⁰¹ A Zulu term for an informal credit provider who offers credit to consumers at high interest rates, without being registered with the NCR.

¹⁰² Schulow (n 98) 137.

accused the Regulator of reluctance to investigate complaints about reckless lending and slow response times to complaints.¹⁰³

Notably, the power of the Regulator is limited by the Act.¹⁰⁴ It is a creature of statute which can only do what the Act empowers it to do. The Regulator cannot resolve disputes but it can facilitate the resolution of disputes in an informal manner.¹⁰⁵ The Regulator can also not issue administrative fines. Only the Tribunal is vested with this authority.¹⁰⁶ The Regulator is not allowed to deregister registrants. Again, only the Tribunal can.¹⁰⁷ The guidelines issued by the Regulator are also not binding.¹⁰⁸ The Regulator cannot declare credit agreements reckless. This can only be done by the court or the Tribunal.¹⁰⁹ The Regulator is also not allowed to conduct proactive investigations. This was decided in the matter of *National Credit Regulator v Capitec*.¹¹⁰

Van Wyk suggests an amendment of the Act to increase the regulatory power of the Regulator.¹¹¹ The question remains whether it is necessary to give the Regulator more power in terms of the Act, or whether the problems encountered by the Regulator will be solved through increased capacity?

7.4 Investigation of reckless lending by alternative dispute resolution¹¹² agents

As an alternative to submitting a complaint to the Regulator under section 136, individuals may refer a dispute related to allegations of reckless credit to an ADR agent for resolution through conciliation, mediation, or arbitration. An ADR agent is defined

¹⁰³ Arde A 'Credit regulator to be probed for failing consumers' 26 November 2016 IOL Companies <https://www.iol.co.za/business-report/companies/credit-regulator-to-be-probed-for-failing-consumers-2093581> (accessed 6 June 2020).

¹⁰⁴ S 12–25 of the NCA.

¹⁰⁵ S 15(a) of the NCA. See also Van Wyk *Measures that enhance the independence and accountability of the South African consumer credit industry's market conduct regulators* (LLD Thesis, University of Pretoria 2018) 270.

¹⁰⁶ S 151 of the NCA.

¹⁰⁷ S 150 of the NCA.

¹⁰⁸ Van Heerden and Coetzee (n 66) 21 fn 81.

¹⁰⁹ S 83 of the NCA.

¹¹⁰ *National Credit Regulator v Capitec Bank Limited* [2014] ZANCT 14 (9 April 2014).

¹¹¹ Van Wyk (n 105) 380, 383–387. Also see Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* (LLD Thesis, University of Pretoria 2012).

¹¹² Hereinafter referred to as 'ADR'.

in section 1 of the Act as a person who provides services to assist in the resolution of consumer credit disputes via these methods. A respondent involved in a matter referred to an ADR agent for intervention is not obligated to accept the determination as final and may object to such referral, subsequently approaching the Regulator or the Tribunal for a final resolution in accordance with the provisions of the Act.

It is important to note that investigations of reckless lending by ADR agents come with certain limitations. For instance, consumers who have their disputes resolved through an ADR agent may lack motivation to seek penalties for wrongdoers. There is no obligation for ADR agents to report instances of reckless lending to the Regulator or the Tribunal. Unless a matter is escalated to the Tribunal for penalty imposition, the resolution of a matter for one complainant may conclude the issue, even if other affected consumers have not raised their concerns.

Following the 2014 NCAA, ADR agents are required to register with the Regulator and adhere to specific conditions. Registration entails an initial fee of R20,000, as well as an annual renewal fee of R20,000.¹¹³ This registration requirement enables the Regulator to ensure compliance with the Act.¹¹⁴ Consequently, non-profit organisations, such as community groups and church organisations, that have historically assisted consumers may need to exercise caution in providing such services if not registered, as they could be investigated by the Regulator and face hearings before the Tribunal, potentially resulting in administrative fines.¹¹⁵ This will have the result that these organisations would have to start charging fees which would have an impact on the ability of poor and vulnerable groups to access their rights.¹¹⁶ This outcome could contradict the legislature's intention, as the aim of consumer protection legislation is to facilitate access to justice. It is suggested by Woker that the registration fee requirement for ADR agents be re-evaluated or that exemptions be considered in appropriate circumstances in line with section 51(2) of the Act.¹¹⁷

¹¹³ Reg 3 Schedule 2 of the National Credit Regulations.

¹¹⁴ Woker T 'Consumer Protection and alternative dispute resolution' (2016) *South African Mercantile Law Journal* 30.

¹¹⁵ *Ibid.*

¹¹⁶ Woker (n 114) 31.

¹¹⁷ Woker (n 114) 47

While the registration fee for ADR agents serves to enable the Regulator to monitor compliance, it inadvertently increases the operational costs for these agents, which may lead to higher service fees. This increase can render ADR services inaccessible for low-income consumers. Therefore, it is essential to explore the establishment of publicly funded dispute resolution centres to improve accessibility to these processes. It is proposed that government funding for ADR mechanisms be considered similar to the financial support provided to the court system, as these procedures offer an alternative to traditional court processes.

Additionally, the Act does not classify debt counsellors as ADR agents; they must apply for registration based on different criteria than those required of ADR agents. Woker highlights that many consumers seeking assistance from debt counsellors often face financial issues that could be resolved through alternative dispute resolution.¹¹⁸ She advocates for the acceptance of debt counsellors as ADR agents, recommending that they receive the necessary training to identify and manage matters suitable for resolution through ADR.¹¹⁹ This recommendation is strongly endorsed.

7.5 Investigation of reckless lending by the ‘ombud with jurisdiction’

As alluded to in Chapter 6, section 134(1)(a)(i) provides that an individual may submit a matter or dispute relating to an allegation of a reckless credit agreement to the relevant ombud when the credit provider in question is classified as a financial institution under the Financial Sector Regulation Act.¹²⁰ Furthermore, the Act states that upon accepting a dispute, the Regulator may refer it to an appropriate ombud to facilitate the resolution process between the credit provider and the consumer. The definition of 'ombud with jurisdiction' is outlined in section 1 of the Act, specifying that it pertains to any dispute arising from a credit agreement where the credit provider is identified as a 'financial institution' as defined in the Financial Sector Regulation Act. This refers to an 'ombud scheme', as defined in that Act, that possesses the authority to address complaints against the specified financial institution.

¹¹⁸ Woker (n 114) n 46.

¹¹⁹ Woker (n 114) n 47.

¹²⁰ See Chapter 6 para 6.3.6.1.

Prior to 1 March 2024, submitting a complaint to the ombud with jurisdiction presented various challenges because complaints about particular products could fall within the jurisdiction of one to five ombud schemes or none. From the perspective of an unsophisticated consumer, it could be difficult to determine which ombud, if any, could be approached for a particular complaint. Bundled transactions add significant complexity for consumers, especially when multiple financial products are combined within a single financial package.¹²¹

Consider, for example, the scenario of an unsophisticated consumer who, under the advice of a broker, takes an unsecured loan from a non-bank lender. The lender includes credit insurance in the loan agreement, which is underwritten by a separate insurer. Later, the consumer faces financial difficulties after losing their job and is unable to make loan repayments. He files a claim with the credit insurance, but the insurer denies the claim. Meanwhile, the lender demands repayment, and the broker disclaims responsibility for the situation. This leaves the consumer in a vulnerable position, uncertain about where to seek assistance or hold parties accountable.

Resolving such disputes can be especially challenging due to the aforementioned fragmented redress system. For instance, if the insurer wrongfully denied the claim, the consumer might need to contact the Short-Term Insurance Ombud or, if the insurer is not a member, the Financial Advisory and Intermediary Services (FAIS) Ombud. If the lender misrepresented the insurance coverage, the FAIS Ombud may also be approached. In cases where the consumer seeks an extension on loan repayments, they would need to consult the Credit Ombud or potentially the NCR if the lender is not affiliated with the Credit Ombud. However, if the broker misled the consumer about the loan package, no ombud scheme covers this issue, leaving the NCR as the only potential avenue for redress.

As this example demonstrates, the consumer may be required to navigate multiple ombud schemes and a regulator to address a single problem. This fragmented approach places an undue burden on low-income consumers, who may already

¹²¹ World Bank Group 'South Africa Financial Ombud System Diagnostic' <https://documents1.worldbank.org/curated/en/572061623402638435/pdf/South-Africa-Financial-Ombud-System-Diagnostic.pdf> (accessed 27 November 2024) 61.

struggle to understand the complexities of bundled transactions.¹²² This may also be the reason why investigations about reckless lending comprised a very small percentage of matters investigated by the credit ombud.

In September 2017 The South African National Treasury published a policy consultation document called 'A known and trusted ombud system for all'.¹²³ The main concern raised was that the fragmentation of ombud schemes may result in confusion for the consumer on where to seek assistance. The responses to the consultation document produced no consensus on the way forward.¹²⁴

As a result, National Treasury and the Financial Sector Conduct Authority¹²⁵ appointed a World Bank Diagnostic Team to undertake a diagnostic report into the South African ombud system and to make recommendations. The World Bank Diagnostic Team published a report in July 2021 titled 'South Africa: Financial Ombud System Diagnostic' and recommended, among other reforms, that all financial sector industry ombud schemes and the statutory FAIS Ombud scheme should amalgamate to create a National Financial Ombud independent of government and industry.

Following public consultation on the report—which showed a high degree of consensus—and detailed discussions with the Ombud Council,¹²⁶ FSCA and the different financial ombud schemes, National Treasury published its policy for the reform of the financial ombud system.¹²⁷ In terms of the policy the final form of the new ombud system will be based on the combined effect of existing legislation (including the existing rule-making powers of the OC) together with new primary and subordinate legislation.

¹²² World Bank Group (n 121) 62.

¹²³ National Treasury 'A known and Trusted Ombud system for all – consultation policy document' https://www.treasury.gov.za/twinpeaks/Final%20Twin%20Peaks%20Policy%20Doc_A%20known%20and%20trusted%20ombuds%20system%20for%20all_September2017.pdf (accessed 27 November 2024).

¹²⁴ World Bank Group (n 121) 63.

¹²⁵ Hereinafter referred to as 'the FSCA'.

¹²⁶ Hereinafter referred to as 'the OC'.

¹²⁷ National Treasury 'A simpler, stronger financial sector ombud system – feedback statement February 2024' https://www.treasury.gov.za/comm_media/press/2024/A%20Simpler,%20Stronger%20Financial%20Sector%20Ombud%20System%20-%20Feedback%20statement.pdf (accessed 27 November 2024).

Awaiting legislation did not prevent significant progress taking place in the meantime. As mentioned earlier,¹²⁸ the National Financial Ombud Scheme South Africa¹²⁹ commenced operations on the 1st of March 2024. This scheme is an amalgamation of the previous Banking, Long-Term Insurance, Short-Term Insurance and Credit Ombudsman offices, each of which had been formally recognised as industry ombud schemes under the Financial Sector Regulation Act, by the OC in May 2022. In accordance with the provisions of section 134 and 136 of the NCA, complaints lodged after 1 March 2024, with the ‘ombud with jurisdiction’ will fall under the NFO. Complaints submitted before that date will be handled by the relevant industry ombud.¹³⁰

The main purpose, mission and manner of dispute resolution will not differ significantly from the way these four schemes operated in the past and the NFO will also provide their services to consumers free of charge. The NFO is governed by the National Financial Ombud Scheme South Africa Rules¹³¹ as well as a Memorandum of Incorporation as contemplated in the Financial Sector Regulation Act and approved by the OC. In terms of the Rules the NFO’s principal powers and duties are to resolve consumer complaints in a fair, effective, impartial and independent way.¹³² Complaints can be submitted to the NFO orally or in writing by using the NFO’s online complaint form, submitting the complaint by email, facsimile or post or by contacting the NFO telephonically, or in person at their offices in Johannesburg or in Cape Town.¹³³

¹²⁸ Chapter 6 para 6.3.6.1.

¹²⁹ Hereinafter referred to as ‘the NFO’.

¹³⁰ National Financial Ombud Scheme Annual Report 2024 <https://nfosa.co.za/download/nfo-annual-report-2024/?wpdmdl=8200&refresh=688e535fde2021754157919> (accessed 1 August 2025) 36, 44. Also see Ombud Council Explanatory Note: Background to the Establishment of the National Financial Ombud Scheme South Africa https://www.ombudcouncil.org.za/wp-content/uploads/2024/02/NFO-Recognition_Background-to-the-NFO.23-February-2024.pdf (accessed 1 August 2025). National Treasury Media Statement A simpler, stronger Financial Sector Ombud System https://www.treasury.gov.za/comm_media/press/2024/2024022901%20MEDIA%20STATEMENT-A%20SIMPLER%20STRONGER%20FINANCIAL%20SECTOR%20OMBUD%20SYSTEM.pdf (accessed 1 August 2025).

¹³¹ Hereinafter referred to as ‘the Rules’.

¹³² Rule 3.

¹³³ Rule 5.

Complaints are resolved through a variety of instruments such as negotiation, mediation, conciliation, investigation and where necessary the issuing a recommendation/decision and determinations.¹³⁴ If the complainant does not accept the ruling of the NFO, he is not bound thereby and may apply for leave to pursue the complaint in another forum, like the High Court.¹³⁵

The NFO is funded by credit providers and the providers of other financial services in accordance with a funding model approved by the board.¹³⁶ The rules define 'participants' as the providers of one or more financial products and services in South Africa. 'Financial products' include the provision of credit in terms of a credit agreement as defined in the NCA.¹³⁷ The NFO also adopted a policy to identify vulnerable consumers and to ensure that their specific circumstances and vulnerability is brought to the financial institution's/ participant's attention. For example, some complainants falling victim to a fraudulent scam are older than 85 or suffer from a disability.¹³⁸

The scheme aims to raise awareness on a wide range of platforms and in several South African languages, such as radio, TV, social media, and community radio stations etcetera, about the office, but also to provide information and issue warnings to consumers about matters such as risks and scams to look out for. In addition to the expected positive influence and impact of the NFO listed above, the NFO will support financial sector outcomes by detecting trends with the detailed statistics that it will be able to extract from its complaints system. The types of complaints, amounts involved, the age, geographical location, the participant/financial services provider, and other relevant information, will allow for very detailed insight into key sectors of the South African financial services industry. It will also allow the NFO to identify any problems at an early point, which matters can then be taken up with the participant/ financial institution to take preventative action. Where necessary it will be reported to the relevant regulators with whom the NFO will continue to regularly share statistics. The

¹³⁴ Rule 7.

¹³⁵ Rule 9.3.6.

¹³⁶ Rule 22.

¹³⁷ Rule 2.

¹³⁸ NFO 'Vulnerably complaints Policy' <https://nfosa.co.za/vulnerable-complainants-policy/> (accessed 28 November 2024).

scheme will work closely with the regulators and all stakeholders in respect of systemic issues and risks.¹³⁹

It is submitted that this consolidation of the previous industry ombud schemes into the NFO is a positive development. The NFO is expected to play a pivotal role in protecting the interests of consumers and other stakeholders in the financial sector. It will have a significant impact in the sector and on all affected parties, offering a mechanism for resolving disputes and ensuring fair and ethical practices. It will also lead to a higher level of accountability among financial institutions, as they will know that any misconduct can lead to a complaint being filed with the NFO. Institutions that consistently face complaints adjudicated in favour of customers are likely to face reputational damage, which can have long-term consequences. As a result, many financial institutions will continue to implement stronger internal dispute resolution mechanisms and improved customer service to minimise the likelihood of complaints escalating to the NFO. This will have a positive impact on customer service standards across the financial sector.

Furthermore, the NFO will play a role in promoting financial stability by preventing disputes from escalating into costly legal battles. By providing an alternative, cost-effective, and efficient mechanism for dispute resolution, it reduces the burden on the judicial system and minimises the time and resources spent on protracted legal proceedings. This is advantageous not only for financial participants, who can avoid expensive legal battles, but also for financial customers, who can expect quicker and more equitable resolutions to their disputes.

7.6 Investigation of reckless lending by consumer courts

In terms of the Act, consumer courts¹⁴⁰ may be approached for purposes of dispute settlement other than debt enforcement in terms of section 129(1)(a) read with section 134(1)(b)(i) and section 134(4)(b)(ii)(aa). Consumer courts are set up in terms of provincial legislation and are really tribunals, as their orders cannot be enforced and

¹³⁹ Ombud Council ‘Draft Governing Rules for NFO’ 23 November 2023 <https://ombudcouncil.org.za/wp-content/uploads/2023/11/ANNEXURE-B-Sec-214-statement-NFO-10Nov2023-FINAL.OC-final-comments.pdf> (accessed 27 November 2024).

¹⁴⁰ S 1 of the NCA defines ‘consumer court’ as a body of that name, or a consumer tribunal, established by provincial legislation.

executed as orders of ordinary courts.¹⁴¹ Naudé and Barnard point out that this confuses consumers who obtained a ruling in their favour. As consumer courts are often more accessible than ombuds and the Regulator or the Tribunal due to their location, the fact that judgments by these courts are not executable can leave consumers disillusioned with this form of redress.¹⁴²

When presenting its 2016/17 Annual Report to the Portfolio Committee meeting of the Department of Trade and Industry, the Tribunal was asked how it was bringing consumer protection to the grandmothers in the rural areas.¹⁴³ Woker suggests that the most effective way of doing this would be to ensure that there are effective consumer courts in all the provinces.¹⁴⁴ As consumer protection is an area of concurrent jurisdiction between national government and the provincial governments, it should therefore be easily achievable.¹⁴⁵ Despite this, as on the 23rd of September 2024, more than 17 years after the promulgation of the Act, only seven of the nine provinces in South Africa, being Gauteng, North West, Mpumalanga, Limpopo, KZN, Northern Cape and Eastern Cape, had consumer courts.¹⁴⁶ These courts do not sit on a regular basis.¹⁴⁷ The absence of consumer courts in the Free State and the Western Cape stands in contrast to the fact that both these provinces have consumer protectors.¹⁴⁸ It is submitted that assessing the effectiveness of these provincial offices is difficult, because very little information is available about their activities and also because they do not publish statistics about their work.

¹⁴¹ Naudé T and Barnard J 'Enforcement and Effectiveness of Consumer Law in South Africa.' In Micklitz HW and Saumier G (eds) *Enforcement and Effectiveness of Consumer Law. Ius Comparatum - Global Studies in Comparative Law* (2018) 575.

¹⁴² Naudé and Barnard (n 141) 576.

¹⁴³ National Consumer Tribunal 2016/17 Annual Report Meeting Summary <https://bit.ly/2CGSmHV> (accessed 6 June 2020). Also see Woker T 'Consumer Protection: An Overview Since 1994' (2019) *Stell LR* 109.

¹⁴⁴ Woker (n 143) 109.

¹⁴⁵ Schedule 4 to the Constitution. Also see Woker (n 143) 109.

¹⁴⁶ South Africa: Consumer Affairs Court <https://www.saflii.org/za/cases/ZACONAF/> (accessed 25 November 2024).

¹⁴⁷ South Africa: Consumer Affairs Court <https://www.saflii.org/za/cases/ZACONAF/> (accessed 25 November 2024).

¹⁴⁸ Free State Department of Economic, Small Business Development, Tourism and Environmental Affairs https://www.destea.gov.za/?page_id=1446 (accessed 17 January 2025); Western Cape Government Department of Economic Development and Tourism <https://www.westerncape.gov.za/edat/office-consumer-protector> (accessed 17 January 2025).

7.7 Investigation of reckless lending by the Tribunal

The Tribunal was established in terms of section 26 of the Act.¹⁴⁹ The Tribunal may adjudicate any allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in the Act.¹⁵⁰ Prohibited conduct is defined in the Act as ‘an act or omission in contravention of this Act’.¹⁵¹ As outlined in chapter 4, Section 80 outlines the circumstances under which credit is deemed reckless.¹⁵² These include instances where the credit provider failed to conduct an affordability assessment or extended credit despite the consumer's inability to fulfil repayment obligations. This forms the basis for cases referred to the Tribunal for adjudication. Thus, reckless lending is by implication included in the definition of prohibited conduct. The Tribunal can, where prohibited conduct occurred, impose an administrative fine upon the guilty credit provider.¹⁵³

As explained in chapter 4, originally, only the court was vested with the authority to declare a credit agreement reckless.¹⁵⁴ With the 2014 amendment of the Act, this power has been extended to the Tribunal.¹⁵⁵ In terms of section 83, the court or the Tribunal, as the case may be, can declare that a credit agreement is reckless. The Tribunal now has the same powers as the Magistrate's Court to declare a credit agreement reckless in terms of section 80(1)(a) and (b) and to make the orders provided for in terms of section 83(2) and (3) for civil relief.

The main objective for the establishment of the Tribunal had been to resolve consumer problems fairly, equitably and expeditiously.¹⁵⁶ The Tribunal should deal with the merits of each case in an informal manner, notwithstanding the legal technicalities that

¹⁴⁹ The KwaZulu-Natal Consumer Tribunal, that derives its jurisdiction from the KwaZulu-Natal Consumer Protection Act 4 of 2013 was established in 2022 and sits in Pietermaritzburg. See KwaZulu-Natal Province Economic Development, Tourism and Environmental Affairs <https://www.kznedtea.gov.za/services/Consumer-Tribunal/index.htm> (accessed 1 August 2025).

¹⁵⁰ S 27(a)(ii) of the NCA.

¹⁵¹ S 1 of the NCA.

¹⁵² Chapter 4 para 4.2.1.

¹⁵³ S 150(c) read with s 151 of the NCA.

¹⁵⁴ Chapter 4 para 4.2.2.

¹⁵⁵ S 23 of the 2014 NCA amended s 83 of the NCA to allow the Tribunal to declare a credit agreement reckless.

¹⁵⁶ In terms of s 142 of the NCA the Tribunal must conduct its hearings in public:

- (a) In an inquisitorial manner;
- (b) As expeditiously as possible;
- (c) As informally as possible; and
- (d) In accordance with the principles of natural justice.

might have arisen. Because the process is not as formal as before a court, the notion was that matters would be resolved faster and cheaper. When the Tribunal reviews complaints related to reckless lending, the Act provides individuals the opportunity to participate in a hearing either in person or through a representative. It is clear that tribunals strive to address matters as efficiently as possible in order to mitigate delays in the justice system experienced in the courts.¹⁵⁷ Despite these provisions the Tribunal has been criticised for being too involved in legal technicalities. It is reported that in matters referred to the Tribunal by the Complaints Commission, suppliers who had legal representation took advantage of legal technicalities and that it often left the consumer without redress.¹⁵⁸ The formalistic approach should not take precedence over the informal / inquisitorial approach which had been the purpose of the Tribunal.¹⁵⁹ This can have the effect that parties with deeper pockets can outlitigate consumers and defy the purpose of the process before the Tribunal.

It was also explained that, in terms of section 86(7)(b) of the Act debt counsellors may facilitate debt re-arrangement plans for debt stressed consumers which may then be made an order of the Tribunal in terms of section 138. An order made by the Tribunal has the same effect as an order made by the High Court.¹⁶⁰

The Tribunal has been criticised for being ineffective and that the turnaround time for processing of cases was too long. In 2019 it was reported that the Tribunal on average takes two to three months to finalise unopposed consent orders.¹⁶¹ In a presentation to the Portfolio Committee on Trade, Industry and Competition on 30 May 2023, it was highlighted that out of approximately 1500 registered Debt Counsellors, the Tribunal had received applications from only 198.¹⁶² This is noteworthy, considering that the Tribunal represents a more cost-effective alternative to the court application process

¹⁵⁷ S 143 of the NCA.

¹⁵⁸ Woker (n 143) 112.

¹⁵⁹ Parliamentary Monitoring Group 'Debt forgiveness engagement with National Credit Regulator' 18 October 2016 <https://pmg.org.za/committee-meeting/23436/> (accessed 6 June 2020).

¹⁶⁰ S 152(1) of the NCA.

¹⁶¹ Gardner C 'The real problem with debt relief? It's probably not what you think' BusinessDay 27 August 2019 <https://www.businesslive.co.za/bd/opinion/2019-08-27-the-real-problem-with-debt-relief-its-probably-not-what-you-think/> (accessed 29 March 2020).

¹⁶² Presentation to the Portfolio Committee on Trade, Industry and Competition by the DTIC, NCR and NCT on the implementation of the existing debt review system and challenges in this regard <https://www.thedtic.gov.za/wp-content/uploads/Debt-Review.pdf> (accessed 20 January 2025).

for debt counselling. As of 1 April 2024, the filing fee for submitting a consent order to the Tribunal is R621.14.¹⁶³ According to the Fee Guidelines, debt counsellors may charge a submission fee of R500 for applications made to the Tribunal. While Magistrate's Courts have the legal authority to adjudicate applications where all parties consent to a restructuring proposal, concerns have been raised that some debt counsellors may exploit this provision. Reports indicate that they collaborate with attorneys to impose excessive legal fees for court referrals, despite the availability of a reasonable alternative through the Tribunal. Additionally, some debt counsellors utilising the Tribunal charge disproportionately high fees, averaging around R6 000.¹⁶⁴ In the case of *Intuitive PDA (Pty) Ltd v NCR*, the Tribunal observed that the Act lacks explicit language granting the Regulator the authority to issue binding guidelines regarding Debt Counsellor Fees.¹⁶⁵ It appears that Debt Counselling fees are unique in their absence of confirmation by Ministerial regulation.

The solution proposed by the Department of Trade Industry and Competition (DTIC), the Regulator and the Tribunal – presented to the Portfolio Committee on Trade and Industry and Competition in May 2023 - to amend section 86(8) is supported. The proposed amendment would clarify that all consented restructuring proposals must be referred to the Tribunal by debt counsellors only, using a prescribed process and paying a prescribed fee.¹⁶⁶ This provision will save financial distressed consumers legal costs currently incurred to refer matters to the Magistrate's Court and position debt counselling as a viable debt relief measure.

Lastly, a further challenge is that the Tribunal sits mainly in Centurion, making access to redress for consumers coming from rural areas and other parts of the country problematic. A possible solution to enhance accessibility is the establishment of additional Tribunal offices across South Africa. However, this measure is significantly hindered by budgetary constraints, including inadequate funding for both the physical infrastructure and the human resources required to support expanded operations.

¹⁶³ National Consumer Tribunal <https://www.thenct.org.za/filing-fee-application-fee-increase/> (accessed on 20 January 2025).

¹⁶⁴ Presentation to the Portfolio Committee on Trade, Industry and Competition by the DTIC, NCR and NCT on the implementation of the existing debt review system and challenges in this regard <https://www.thedtic.gov.za/wp-content/uploads/Debt-Review.pdf> (accessed 20 January 2025).

¹⁶⁵ NCT/212225/2021/56(1) [2022] ZANCT 52 (20 September 2022) para 63.

¹⁶⁶ *Ibid.*

7.8 Conclusion

This chapter undertook a critical evaluation of the debt counselling process as both a debt relief mechanism and a means of addressing reckless lending, with particular focus on its effectiveness as it pertains to low-income consumers.¹⁶⁷ The analysis demonstrated that, despite the consumer-protective objective of the Act, various significant barriers prevent low-income consumers from effectively accessing or benefitting from the debt counselling process.

A principal impediment identified is that low-income consumers, particularly those earning less than R3 500 per month, are not viable clients for debt counselling businesses due to restrictive fee structures and high operational costs.¹⁶⁸ Furthermore, debt counsellors are often reluctant to serve this consumer group due to the practical difficulty of formulating viable repayment proposals to credit providers where disposable income is minimal.¹⁶⁹

To address this, the possibility of legislative amendment to allow credit providers – who ultimately benefit from the debt recovery through the debt counselling process, to bear the costs associated with debt review, is investigated in this chapter. Additionally, incorporating the NCR fee guidelines into the regulations and granting the Minister authority to periodically adjust these fees, was proposed to improve clarity and enforceability.¹⁷⁰ Another significant barrier identified is the unaffordability of legal representation, coupled with the technical nature of the process, exacerbating this group's marginalisation.¹⁷¹

The chapter further highlighted the absence of clear legislative guidance for debt counsellors on investigating suspected reckless lending.¹⁷² The Act neither prescribes a detailed procedure for such investigations nor clarifies the nature of engagement between the debt counsellor and the credit provider. Judicial inconsistency in

¹⁶⁷ Para 7.1.

¹⁶⁸ Para 7.2.1.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Para 7.2.2.

¹⁷² Para 7.2.3.

determining whether allegations of reckless lending must be adjudicated within the debt counselling framework adds further uncertainty. This uncertainty is compounded by credit providers' reluctance to share essential information, facilitated by the Act's failure to specify the content or timing of requests for information. Although credit industry guidelines such as those issued by the TTA and DCASA offer practical assistance, their non-binding nature limits their efficacy.

A further point of criticism against the debt counselling process as a vehicle to address reckless lending is that credit providers often frustrate the reckless lending investigation done by the debt counsellor.¹⁷³ Section 82(A)(2) of the 2019 NCAA was identified as a potential remedy, though the absence of accompanying regulations and weak enforcement undermines its impact.¹⁷⁴ Additionally, the Magistrate's Court was questioned as a suitable forum for hearing reckless lending cases due to complexity, costs and inconsistency in rulings.¹⁷⁵

A related concern is that consumers whose financial circumstances improve during the debt counselling process, but who fail to satisfy the stringent requirements prescribed under section 71 for the issuance of a clearance certificate, remain effectively trapped within the process. Scholarly suggestions for legislative reform to permit withdrawal from debt review under these circumstances, thereby restoring credit access and economic recovery, were endorsed.¹⁷⁶

The research then shifted to the role of the Regulator in investigating reckless lending. It was concluded that the Regulator's limited statutory powers and perceived inaction, especially regarding proactive enforcement and sanctioning of credit providers, significantly hinder its effectiveness. While suggestions have been made to increase the Regulator's regulatory power, it remains uncertain whether capacity building might be a more practical solution.¹⁷⁷

¹⁷³ Para 7.2.4.

¹⁷⁴ *Ibid.*

¹⁷⁵ Para 7.2.5.

¹⁷⁶ Para 7.2.6.

¹⁷⁷ Para 7.3.

Investigation of reckless lending by alternative dispute resolution agents was also considered in this chapter to determine whether alternative dispute resolution agents could provide recourse to low-income consumers who find themselves victims of reckless lending.¹⁷⁸ Limitations such as inaccessibility, high fees and lack of systemic accountability was revealed. Publicly funded ADR centres and recognising trained debt counsellors as ADR agents were suggested to improve reach and effectiveness.¹⁷⁹

The chapter further discussed the potential of the newly established NFO as a promising avenue for redress.¹⁸⁰ In contrast, consumer courts were found largely ineffective due to irregular sittings and a lack of transparency.¹⁸¹ It was concluded that while the Tribunal offers a potential avenue for redress in the event of reckless lending, its effectiveness is limited by long turnaround times, high costs and limited geographical reach.¹⁸² The study supports the recommendation by the DTI, the NCR and the Tribunal for a legislative amendment mandating that all consented restructuring proposals be referred exclusively to the Tribunal by debt counsellors via a standardised, low-cost process.¹⁸³

In conclusion, the research in this chapter revealed that, while South Africa's current framework for addressing reckless lending shows an intent to protect consumer's, it fails to effectively serve the needs of low-income individuals. Comprehensive reform is essential to improve accessibility, enforce investigative mechanisms, and empower consumers—ensuring the system meets both its protective and rehabilitative objectives. To support these reform efforts, the next chapter will analyse the legislative frameworks in the United Kingdom to identify insights and potential solutions applicable to the challenges confronting the current challenges in South Africa.

¹⁷⁸ Para 7.4.

¹⁷⁹ *Ibid.*

¹⁸⁰ Para 7.5.

¹⁸¹ Para 7.6.

¹⁸² Para 7.7.

¹⁸³ *Ibid.*

CHAPTER 8: SAFEGUARDS AND REMEDIES AGAINST RECKLESS LENDING AND OVER- INDEBTEDNESS IN THE UK

8.1 Introduction

8.2 The evolution of consumer protection in UK credit legislation

8.3 The assessment of affordability in the UK

8.4 Assistance for consumers who became over-indebted as a result of reckless lending

8.5 Conclusion

8.1 Introduction

‘... one finds a certain degree of similarity between consumer credit legislation in different parts of the world. It is therefore more than useful to compare developments in different countries.’¹

The regulation of consumer credit and the establishment of legislative mechanisms to ensure responsible lending practices are crucial for protecting low-income consumers from over-indebtedness and financial distress. To provide a comprehensive understanding of the challenges and opportunities within the regulatory frameworks governing consumer credit, it is essential to compare the approaches of different jurisdictions.

In previous chapters, the South African approach to preventing reckless lending under the NCA and its accompanying regulations was considered. Chapter 4 discussed how the Act, bolstered by the Financial Affordability Assessment Regulations captured in regulation 23A, attempts to mitigate reckless lending by mandating affordability assessments. However, Chapter 5 identified significant shortcomings in the practical application of these regulations, concluding that while they have brought positive

¹ Otto J ‘The history of consumer credit legislation in South Africa’ (2010) 16(1) *Fundamina* 257.

changes to South Africa's credit industry, they fall short of adequately protecting low-income consumers. These consumers, often excluded from formal credit due to stringent assessment criteria, are pushed towards unregulated lenders, thereby exposing themselves to heightened financial risks. Chapter 6 further explored the limitations of debt counselling as a remedy for reckless lending, particularly for low-income individuals who face barriers due to the process's cost and complexity.

Building on these findings, this chapter offers a comparative analysis of South Africa and the United Kingdom, being two jurisdictions that incorporate affordability assessments into consumer credit regulation, yet differ significantly in their approaches to regulatory design and implementation. Notably, UK credit legislation refers to 'lender', while the NCA uses the term 'credit provider'. Although both terms describe the party that extends credit to a consumer, their legal definitions differ. For the purpose of this thesis, these terminological differences are not material. Accordingly, the terms 'credit provider' and 'lender' will be used interchangeably, regardless of the jurisdiction. Where the term 'credit provider' is used in reference to UK legislation or practice, it should be understood to carry the same meaning as 'lender' in that context. Paragraph 8.2 provides an overview of the UK's legislative framework on reckless lending, including the historical development of its credit laws and the incorporation of affordability assessments to prevent over-indebtedness. In paragraph 8.3 the obligations imposed on UK lenders to ensure thorough and effective affordability assessments is investigated. Paragraph 8.4 explores the relief mechanisms available to UK consumers who fall victim to reckless lending, offering a comparative perspective on the effectiveness of consumer protection measures in both countries. This analysis aims to identify best practices that could inform future reforms in South Africa's credit legislation, with a focus on enhancing protections for vulnerable, low-income consumers while maintaining their access to credit.

8.2 The evolution of consumer protection in UK credit legislation

8.2.1 The credit market prior to Consumer Credit Act 1974

While historically, the government has been hesitant to intervene in private agreements between individuals, legislation aimed at protecting credit consumers

from exploitation has always been a key aspect of the legal landscape in the UK.² Initially, legislation focused primarily on the registration of lenders and increasing transparency for borrowers, placing the onus on individuals to carefully review and comprehend the terms of their agreements. However, it became evident in the 1960s that this approach was insufficient in safeguarding the growing number of consumers accessing credit products.³

In 1968, the Crowther Committee on Consumer Credit was appointed to investigate the prevailing state of credit law in the United Kingdom.⁴ Following extensive research, the 1971 Consumer Credit: Report of the Committee ('the Crowther Report') outlined several recommendations, including restrictions on the advertising of consumer credit products, mandatory provision of pre-contractual information, disclosure of credit costs, cancellation rights, and the implementation of a standardised licensing system for consumer credit.⁵ The Crowther Report concluded that the existing law regulating credit law was so confusing and unsatisfactory that it was not worth amending.⁶ The Crowther Report recommended the complete overhaul of consumer credit law via the repeal of all existing legislation. The Consumer Credit Act 1974 received the Royal Assent on 31 July 1974.⁷ Goode, commenting on the significance of this piece of legislation, emphasised that:

'The resulting Act, a completely non-partisan measure, is the most comprehensive and sophisticated consumer credit statute ever to have been enacted in any country.'⁸

8.2.2 The Consumer Credit Act 1974

The Consumer Credit Act 1974⁹ repealed the previous piecemeal legislation regulating consumer credit, being, *inter alia*, the Pawnbrokers Act 1960, the Moneylenders Act 1927, the Hire Purchase Act 1965 and the Advertisements (Hire-Purchase) Act 1967.¹⁰

² Gardner J *et al* 'Responsible Borrowing and Lending in UK' (2018) *International Journal on Consumer Law and Practice* 14.

³ Gardner *et al* (n 2) 18.

⁴ Goode RM 'The Consumer Credit Act 1974' (1975) *Cambridge Law Journal* 79.

⁵ Gardner *et al* (n 2) 18.

⁶ *Ibid.*

⁷ Kindgren KE 'The Consumer Credit Act 1974: Its Scope' (1977) *Modern Law Review* 159.

⁸ *Ibid.*

⁹ Hereinafter referred to as 'the CCA 1974'.

¹⁰ Whitmore J 'Consumer Credit Act 1974' (1975) *Law Teacher* 1.

In terms of section 1 of the CCA 1974 the Director General of Fair Trading was appointed as the regulatory authority. The Director General of Fair Trading was responsible for, *inter alia*, creating regulations under the Act and for the enforcement of both the Act and the regulations made thereunder. Section 1(1) listed the duties of the Director General of Fair Trading as:

‘1(1) It is the duty of the Director General of Fair Trading General (‘the Director’)-

- (a) to administer the licensing system set up by this Act,
- (b) to exercise the adjudicating functions conferred on him by this Act in relation to the issue, renewal, variation, suspension and revocation of licences, and other matters,
- (c) generally, to superintend the working and enforcement of this Act, and regulations made under it, and
- (d) where necessary or expedient, himself to take steps to enforce this Act, and regulations so made.’

In terms of the CCA 1974, credit providers had to be licenced to operate.¹¹ Licensing applications had to be directed to the Director General of Fair Trading, who had to consider whether the applicant was fit and proper to engage in the proposed credit activities.¹² The CCA 1974 prescribed the criteria to determine the fitness of the applicant.¹³

From the above it appears that the protection provided to consumers were limited to provisions regarding the licencing of credit providers and the appointment of a Regulator to ensure the creating of regulations in terms of the Act, and the

¹¹ S 21 of the CCA 1974.

¹² S 25(1) of the CCA 1974.

¹³ S 25(2) of the CCA 1974 provides:

‘In determining whether an applicant for a standard licence is a fit person to engage in any activities, the Director shall have regard to any circumstances appearing to him to be relevant, and in particular any evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the Director to be a controller of the body corporate or an associate of any such person, has-

- (a) committed any offence involving fraud or other dishonesty, or violence,
- (b) contravened any provision made by or under this Act, or by or under any other enactment regulating the provision of credit to individuals or other transactions with individuals,
- (c) practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business, or
- (d) engaged in business practices appearing to the Director to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).’

enforcement thereof. The CCA 1974 did not contain any provisions regarding reckless credit, over-indebtedness or affordability assessments. In fact, affordability assessments were not even a requirement to conclude a credit agreement.

8.2.3 The Financial Services and Markets Act 2000

The Financial Services and Markets Act¹⁴ established the Financial Services Authority¹⁵ as an integrated regulatory authority whose general functions included:

- '2(4) (a) its function of making rules under this Act (considered as a whole);
- (b) its function of preparing and issuing codes under this Act (considered as a whole);
- (c) its functions in relation to the giving of general guidance (considered as a whole); and
- (d) its function of determining the general policy and principles by reference to which it performs particular functions.'

The FSA was the primary regulator for financial services in the UK, responsible for overseeing a wide range of financial institutions, including banks, insurers, investment firms and other financial service providers. The FSMA also established the Financial Ombudsman Service¹⁶ to help settle disputes between consumers and UK – based businesses providing financial services.¹⁷

8.2.4 The Consumer Credit Act 2006

In 2006, the CCA 1974 underwent significant changes through the implementation of the Consumer Credit Act 2006.¹⁸ At this stage it is important to note that The Enterprise Act 2002¹⁹ abolished the office of the Director General of Fair Trading and transferred the duties of this office to the Office of Fair Trading.²⁰ By the time the CCA 2006 was promulgated, the OFT was the licensing authority and enforcement body for regulated consumer credit, including personal loans, credit cards and the provision of goods and services on credit as well as related activities such as debt collection and debt

¹⁴ Hereinafter referred to as 'the FSMA'.

¹⁵ Hereinafter referred to as 'the FSA'.

¹⁶ Hereinafter referred to as 'the FOS'.

¹⁷ S 225 – 234 of the FSMA.

¹⁸ Hereinafter referred to as 'the CCA 2006'.

¹⁹ S 2(1) of the Enterprise Act 2002 provides:

'The functions of the Director General of Fair Trading (in this Act referred to as 'the Director'), and his property, rights and liabilities, are transferred to the Office of Fair Trading.'

²⁰ Hereinafter referred to as 'the OFT'.

management. All amendments in the CCA 2006 referred to the OFT.²¹ The amendments in terms of the CCA 2006 granted extensive powers to the OFT to evaluate several circumstances that it might find relevant when considering a licence application. In terms of section 25(2), the OFT had to consider certain factors when deciding whether to grant a credit licence to a lender, as set out below:

- ‘(2) In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things)—
 - (a) the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit businesses;
 - (b) such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;
 - (c) practices and procedures that the applicant proposes to implement in connection with any such business;
 - (d) evidence of the kind mentioned in subsection (2A).
- (2A) That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has—
 - (a) committed any offence involving fraud or other dishonesty or violence;
 - (b) contravened any provision made by or under—
 - (i) this Act;
 - (ii) Part 16 of the Financial Services and Markets Act 2000 so far as it relates to the consumer credit jurisdiction under that Part;
 - (iii) any other enactment regulating the provision of credit to individuals or other transactions with individuals;
 - (c) contravened any provision in force in an EEA State which corresponds to a provision of the kind mentioned in paragraph (b);
 - (d) practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business; or
 - (e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not).
- (2B) For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve *irresponsible lending* (own emphasis).’

The amendments made by the CCA 2006 which introduced the concept ‘irresponsible lending’, was the first time that a concept resembling reckless credit practices was introduced in the United Kingdom.²² Unfortunately, ‘irresponsible lending’ was not defined in the CCA 2006. Despite not defining the concept, the amendment addressed

²¹ Economic and Finance Ministry *A new approach to financial regulation* July 2010 <https://assets.publishing.service.gov.uk/media/5a79a8f340f0b642860d9c63/consult_financial_regulation_condoc.pdf> (accessed 31 July 2024).

²² Nel *IR Affordability Assessments in South African Law* (LLD thesis, University of Johannesburg 2020) 236.

the consequences of credit providers giving credit in a reckless manner and introduced a variety of penalties that could be levied by the OFT to enforce compliance. Section 39A of the CCA 1974 allowed for civil fines of up to £50,000 to be levied for any violations of requirements set forth by the OFT.²³ Additionally, the OFT had the authority to change a credit provider's license to include limitations on the licensee's activities and the duration of the license.²⁴ In cases of significant or repeated violations, the OFT could choose to suspend, refuse, or revoke the credit provider's license.²⁵ With no clarity regarding what constitutes 'irresponsible lending', it was necessary to develop the concept as explained in the next paragraph.

8.2.5 The Office of Fair Trading's Irresponsible Lending Guidelines 2010

While both the OFT and FSA had roles in regulating consumer credit, the OFT's responsibilities were more specific to credit licensing and consumer protection in credit agreements. In 2010, the OFT published the 'Irresponsible lending – OFT guidance for creditors'.²⁶ The purpose of this document was set out in the foreword:

'to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (OFT) considers may constitute irresponsible lending practices for the purposes of section 25(2B) of the Consumer Credit Act 1974. It indicates types of deceitful or oppressive or otherwise unfair or improper business practices which, if engaged in by a consumer credit business, could call into consideration its fitness to hold a consumer credit licence.'²⁷

The ILG covered all stages of the lending process, from advertising and marketing through to arrears and default. The guidance also set out illustrative but non-exhaustive examples of business practices at each stage of the process that the OFT could consider as unsatisfactory or that may have constituted irresponsible lending.²⁸ Chapter 4 of the ILG specifically dealt with the assessment of affordability. In the context of the guidance, assessing affordability was described as a 'borrower-focussed test' which involved a creditor assessing a borrower's ability to undertake a

²³ *Ibid.*

²⁴ S31 of the CCA 1974.

²⁵ S32 of the CCA 1974.

²⁶ Office of Fair Trading *Irresponsible lending – OFT guidance for creditors* 2010 <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_of/business_leaflets/general/oft1107.pdf> (accessed 04 June 2024). Hereinafter referred to as 'the ILG' or 'ILG'.

²⁷ ILG (n 26) 4.

²⁸ ILG (n 26) 31.

specific credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences.²⁹

The ILG did not define the method a credit provider should use when performing an affordability assessment, instead, as the name suggested, it provided guidance to credit providers. The ILG thus did not provide a tick-box guideline to credit providers to assist them with the assessment of affordability but provided that ‘creditors should take *reasonable steps* to assess a borrower’s likely ability to be able to meet repayments under the credit agreement in a sustainable manner’.³⁰

The OFT regarded ‘in a sustainable manner’ in the context of the IGL as referring to credit that can be repaid by the borrower without undue difficulty (in particular without incurring or increasing problem indebtedness), over the life of the agreement, and out of income and/or available savings.³¹

In the context of the guideline, ‘without undue difficulty’ was intended to imply that the borrower should be able to make payments while also meeting other debt repayments and normal or reasonable expenses, without having to borrow further to meet such commitments.³² The ILG did not specify particular factors that had to be considered as part of an affordability assessment, or what types or sources of information should be used to make the assessment. However, it provided that the creditor should take a view on what is appropriate in any particular circumstance, considering the type and amount of the credit and the potential risks to the individual borrower.³³ Where appropriate, account should be taken of the borrower’s financial position and credit history, including existing and future financial commitments which may impact on ability to repay.³⁴ The guidance further provided a list of information that a credit provider could use to assess a borrowers affordability. It included records of previous dealings with the borrower; evidence of income and expenditure; a credit score and a credit report from a credit reference agency and information obtained from the

²⁹ ILG (n 26) 36.

³⁰ *Ibid.*

³¹ ILG (n 26) 37.

³² *Ibid.*

³³ ILG (n 26) 40.

³⁴ *Ibid.*

borrower, whether on an application form or separately.³⁵ The guidelines, however, made it clear that credit providers may use their own discretion when deciding on the types and sources of information used to determine affordability.³⁶

8.2.6 The Consumer Credit (EU Directive) Regulations 2010

Following the adoption of Directive 2008/48/EU of the European Parliament and the Council of 23 April 2008 on Credit Agreements for Consumers ³⁷member states were required to transpose the provisions into national law by 23 May 2010. Article 8 of the CCD deals with the credit provider's obligation to assess the creditworthiness of the consumer, and provides as follows:

'Member states shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database.'

As the UK was still a member of the EU at that stage and only exited the EU on 31 January 2020, it fulfilled its responsibility as an EU member state by enacting the Consumer Credit (EU Directive) Regulations 2010. Article 8 of the CCD was implemented in UK credit legislation in terms of regulation 5, which amended the CCA 1974 by the insertion of section 55B which provided as follows:

'Assessment of creditworthiness

- '55B (1) Before making a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the creditworthiness of the debtor.
- (2) Before significantly increasing—
- (a) the amount of credit to be provided under a regulated consumer credit agreement, other than an excluded agreement, or
 - (b) a credit limit for running-account credit under a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the debtor's creditworthiness.
- (3) A creditworthiness assessment must be based on sufficient information obtained from—
- (a) the debtor, where appropriate, and
 - (b) a credit reference agency, where necessary.
- (4) For the purposes of this section an agreement is an excluded agreement if it is—
- (a) an agreement secured on land, or
 - (b) an agreement under which a person takes an article in pawn.'

³⁵ ILG (n 26) 42.

³⁶ ILG (n 26) 43.

³⁷ Directive 2008/48/EU of the European Parliament and the Council of 23 April 2008 on Credit Agreements for Consumers. Hereinafter referred to as 'the CCD'.

As evident from the provisions of section 55B, it mandated a compulsory affordability assessment *before entering into a credit agreement*³⁸ and indicated that the debtor³⁹ and a credit reference agency⁴⁰ were the designated sources of information for this assessment. Unfortunately, no further detail or information on how the affordability assessment had to be done was provided. As a result, Garner *et al* remarks that these provisions did not provide sufficient protection to consumers.⁴¹

Despite updating the ILG to reflect amendments and additions reflecting the implementation of the CCD into UK law⁴², the ILG were disregarded by lenders in the payday and short-term lending market. Research by the OFT revealed that lenders in these markets were often more vulnerable because they had a low income.⁴³ In March 2013 the OFT published a report disclosing evidence of widespread non-compliance with the CCA 1974 as well as evidence that specifically payday borrowers are not meeting the standards set out in the ILG.⁴⁴ As the wheels were already in motion to replace the OFT with the FCA at the time of completion of the report, it was recommended that the matter should be left to the FCA to provide a better framework and more certainty as to what was expected from credit providers when they assess an application for credit.⁴⁵ In September of the same year, Aldohni also pointed out that the legislation failed to adequately protect the interests of short-term borrowers, as it permitted short-term lenders to operate in a manner that was, in effect, indistinguishable from that of loan sharks.⁴⁶

³⁸ S 55B(1) of the CCA 1974 (own emphasis).

³⁹ S 55B(3)(a) of the CCA 1974.

⁴⁰ S 55B(3)(b) of the CCA 1974.

⁴¹ Gardner *et al* (n 2) 18.

⁴² The guidelines, amongst others, incorporated provisions encouraging lenders to ensure that consumers fully understood the terms and conditions of their credit agreements, including the implications of default. Lenders were also encouraged to promote financial literacy and provide information about budgeting and managing debt. See Office of Fair Trading 'Irresponsible lending' <<https://webarchive.nationalarchives.gov.uk/ukgwa/20140402163456/http://oft.gov.uk/-about-the-oft/legal-powers/legal/cca/irresponsible#named1>> (accessed 28 June 2024).

⁴³ Office of Fair Trading 'Supplementary analysis from the OFT's consumer survey and other sources of data' (2010) <https://webarchive.nationalarchives.gov.uk/ukgwa/20140402132426/http://www.oft.gov.uk/shared_oft/reports/consumer_credit/High-cost-credit-review/OFT1232c.pdf> (accessed 28 June 2024).

⁴⁴ Office of Fair Trading 'Payday Lending Compliance Review Final Report' (2013) <<https://assets.publishing.service.gov.uk/media/532ad55eed915d0e5d00038d/oft1481.pdf>> (accessed 28 June 2024).

⁴⁵ *Ibid.*

⁴⁶ Aldohni AK 'Loan Sharks v Short-term Lenders: How Do the Law and Regulators Draw the Line?' (2013) *Journal of Law and Society* 420.

8.2.7 Financial Services Act 2012

The Financial Services Act 2012⁴⁷ reformed the UK regulatory framework by transitioning from an integrated mega-regulator model of financial regulation to a Twin Peaks model of financial regulation, leading to the replacement of the FSA with the Financial Conduct Authority⁴⁸ as market conduct regulator⁴⁹ and the Prudential Regulation Authority as prudential regulator.⁵⁰ The FSA 2012 gave the FCA more regulatory power than the FSA previously had, as the FCA was given an expanded mandate with a greater focus on consumer protection.⁵¹

As part of the transfer of regulation, parts of the CCA 1974, including section 25(2B) and section 55B, were repealed and replaced by a more agile regulatory framework in the form of rules by the FCA set out in the Consumer Credit Sourcebook. The CONC 2015 is a comprehensive set of rules and guidance that firms must adhere to when offering consumer credit products and services. The aim of the FCA with the rules and guidance in the CONC 2015 was to enhance consumer protection and ensure the fair treatment of consumers. In line with the duties as an EU member state, the CONC 2015 also included rules and guidance on assessing affordability.⁵²

8.2.8 The Consumer Credit Sourcebook 2015

As mentioned in the previous paragraph, credit providers are required to abide by a comprehensive set of guidelines and regulations set out in the CONC 2015, when providing consumer credit products and services. The affordability assessment requirements outlined in the CONC 2015 replaced the provisions of section 25(2)B⁵³ and section 55B⁵⁴ as well as the OFT's ILG. Chapter 5⁵⁵ of the CONC 2015 specifically focused on the responsible lending requirements that firms must follow to ensure that credit was provided responsibly and in the best interests of consumers.

⁴⁷ Hereinafter referred to as 'the FSA 2012'.

⁴⁸ Hereinafter referred to as 'the FCA'.

⁴⁹ Part 1 Chapter 1A of the FSA 2012.

⁵⁰ Part 1 Chapter 2A of the FSA 2012.

⁵¹ S 43 of the FSA 2012.

⁵² Financial Conduct Authority 'Policy Statement PS14/3' (2014) <https://www.fca.org.uk/publication/policy/ps14-03.pdf> (accessed 26 May 2024).

⁵³ See para 8.2.4.

⁵⁴ See para 8.2.5.

⁵⁵ Hereinafter referred to as 'CONC 5'.

Despite the protection provided to consumers in the rules set out in the CONC 5, a survey by the FCA in 2017 indicated that 75% of UK adults had one or more consumer credit products or loans in the previous 12 months; 4.1 million people were ‘in difficulty’ because they had already failed to pay domestic bills or meet credit commitments in three or more of the previous six months; and 50% of UK consumers showed one or more characteristic of potential vulnerability.⁵⁶

As a result, the FCA consulted with stakeholders in the credit industry to get feedback on proposed changes to rules and guidance on assessing creditworthiness.⁵⁷ Shortly thereafter, the final rules and guidance on the amendment of CONC 5 were published.⁵⁸ The amended rules, which became effective on 1 November 2018, are discussed in detail later in this chapter.⁵⁹

8.2.9 The Consumer Duty

On the 31st of July 2023, the FCA implemented the Consumer Duty, a regulatory mechanism that brought a new dimension into the regulatory oversight in the consumer credit industry in the UK. The Consumer Duty is a regulatory initiative proposed by the FCA to ensure that role players in the retail financial market, like credit providers, insurance companies, payment service providers and other stakeholders in the financial services sector prioritise the interests of their customers.⁶⁰ It aims to raise the standards of treatment for consumers by requiring these service providers to adhere to a set of principles regarding fair treatment, communications, product design, and customer service throughout the whole financial services industry.⁶¹ It requires service providers to put customers’ needs first and ensure good outcomes throughout

⁵⁶ Financial Conduct Authority ‘Understanding the financial lives of UK adults: Findings from the FCA’s Financial Lives Survey 2017’ (2017) <<https://www.fca.org.uk/publication/research/financial-lives-survey-2017.pdf>> (accessed 26 May 2024).

⁵⁷ Financial Conduct Authority ‘Assessing creditworthiness in consumer credit: Proposed changes to our rules and guidance Consultation Paper CP 17/27’ (2017) <<https://www.fca.org.uk/publication/consultation/cp17-27.pdf>> (accessed 26 May 2024).

⁵⁸ Financial Conduct Authority ‘Assessing creditworthiness in consumer credit’ (2018) <<https://www.fca.org.uk/publication/policy/ps18-19.pdf>> (accessed 26 May 2024). Hereinafter referred to as ‘PS18/19’.

⁵⁹ See para 9.4.2.

⁶⁰ Financial Conduct Authority ‘A new Consumer Duty: Feedback to CP21/13 and further consultation 2021’ (2021) <<https://www.fca.org.uk/publication/consultation/cp21-36.pdf>> (accessed 21 August 2024).

⁶¹ Financial Conduct Authority ‘A new Consumer Duty Policy Statement 22/9’ (2022) <<https://www.fca.org.uk/publication/policy/ps22-9.pdf>> (accessed 21 August 2024).

the lifecycle of products and services.⁶² In the words of the FCA, the Consumer Duty marks a ‘significant shift in our expectations of firms’⁶³ in that it introduces a more outcomes-focused approach to consumer protection and sets higher expectations for the standard of care that firms give customers.⁶⁴

The introduction of the Consumer Duty is indicative of a change in the way financial markets work. Because markets change, best practice in affordability is also changing. The CCA 1974 is 51 years old and the UK also left the EU.⁶⁵ Although affordability assessments are nothing new, assessments based on modelled averages were increasingly considered unsuitable and are being replaced by a regulatory regime where consumers are treated as individuals. Historic affordability assessments when offering customers new or enhanced products (up-selling and cross-selling) are unreliable and often out of date. Affordability needs to be monitored throughout the relationship with the customer not just when they apply for credit, but also to ensure the credit is still affordable and a consumer is not put in detriment.⁶⁶

8.3 The assessment of affordability in the UK

As mentioned in paragraph 8.2.8 above, the FCA’s CONC 5 was amended in 2018. The aim with the new rules was not to make fundamental changes to the original rules, but to provide clarity on the existing rules and guidance in CONC 5.⁶⁷ The outcome the FCA sought with the amendments was:

‘We want firms to make a reasonable assessment, not just of whether the customer will repay, but also of their ability to repay affordably and without this significantly affecting their wider financial situation.’⁶⁸

⁶² Financial Conduct Authority ‘Finalised guidance FG22/5’ (2022) <<https://www.fca.org.uk/publication/finalised-guidance/fq22-5.pdf>> (accessed 21 August 2024).

⁶³ Financial Conduct Authority ‘Implementing the Consumer Duty in the General Insurance and Pure Protection sectors’ (2023) <<https://www.fca.org.uk/publication/correspondence/consumer-duty-letter-general-insurance-pure-protection-firms.pdf>> (accessed 21 August 2024).

⁶⁴ Financial Conduct Authority ‘FCA Supports Firms through Transition to Implementing Consumer Duty’ (2023) <<https://www.fca.org.uk/news/press-releases/fca-supports-firms-through-transition-implementing-consumer-duty>> (accessed 21 August 2024).

⁶⁵ The UK officially left the European Union on 31 January 2020 after a referendum in 2016 when the majority of UK citizens voted to leave. This process is often referred to as ‘Brexit’. See Council of the European Union ‘Brexit: UK leaves EU after 47 years.’ <https://ec.europa.eu/newsroom/council/en/items/663312/en> (accessed 1 August 2025).

⁶⁶ Financial Conduct Authority ‘Dear CEO letter: Implementing the Consumer Duty in Mainstream Consumer Credit Lenders’ (2023) <<https://www.fca.org.uk/publication/correspondence/consumer-duty-letter-mainstream-consumer-credit-lenders.pdf>> (accessed 21 August 2024).

⁶⁷ PS18/19 (n 58) par 1.13.

⁶⁸ PS18/19 (n 58) par 1.14.

At the same time, we want to avoid being too prescriptive, as this could have harmful unintended consequences, including for the cost and availability of credit. We want firms to take a proportionate approach, taking into account the costs and risks of the credit for the individual customer.⁶⁹

To achieve this outcome the FCA amended the CONC 5 with the introduction of a new section – CONC5.2A, to provide clarity on key aspects of the assessment of affordability. These key aspects will be discussed in detail below.

8.3.1 The creditworthiness assessment

Initially CONC 5.2.1 mandated credit providers to conduct a creditworthiness assessment prior to entering into a regulated credit agreement. It provided as follows:

‘5.2.1 R (1) Before making a regulated credit agreement the firm must undertake an assessment of the creditworthiness of the customer.’

The amended rule is more specific and delineates the circumstances under which a creditworthiness assessment must be conducted. The amended rule provides that:

‘5.2A.4 R A firm must undertake a reasonable assessment of the creditworthiness of a consumer before:

- (1) Entering into a regulated credit agreement; or
- (2) Significantly increasing the amount of credit provided under a regulated credit agreement; or
- (3) Significantly increasing a credit limit for running-account credit under a regulated credit agreement.’

Rule 5.2A.4R does not explicitly define what constitutes a ‘significant’ increase in credit. Rule 5.2A.6G however clarifies that several separate increases, though individually insignificant, could collectively be significant, thereby necessitating a further affordability assessment to be performed by the credit provider.

Furthermore, the amended rules emphasise that the information used for the creditworthiness assessment must be obtained from reliable sources, such as the consumer or a credit reference agency.⁷⁰

⁶⁹ PS18/19 (n 58) par 1.15.

⁷⁰ CONC 5.2A.7R; CONC 5.2A.16G; CONC 5.5A.8R.

The 2018 amendments also introduced a crucial distinction between credit risk and affordability risk in the creditworthiness assessment process. The updated CONC 5.2A.5R provides that:

‘5.2A.5 The firm must not take a step in CONC 5.2A.4R (1) to (3) unless it can demonstrate that it has, before doing so:

- (1) undertaken a creditworthiness assessment and, where relevant, the assessment under CONC 5.2A.31R (2) (guarantors) in accordance with the rules set out in this section; and
- (2) had proper regard to the outcome of that assessment *in respect of affordability risk* (own emphasis).’

The advancement of the FCA’s consumer protection operational objective is apparent in this revision as it clarifies that a ‘creditworthiness assessment’ should not solely be focused on credit risk to the lender but also factor in affordability risk to the borrower.⁷¹ The revised rules codify a two-component view of creditworthiness – one consisting of ‘credit risk’ (i.e. the risk that the customer will not make repayments under the agreement by their due dates or, in other words, the commercial risk to the lender) and the other consisting of ‘affordability risk’ (i.e. the risk to the customer of not being able to make repayments under the agreement).

The revised CONC 5.2A.10 requires firms to evaluate not only the likelihood of repayment (credit risk) but also the potential financial strain on the consumer (affordability risk).⁷² CONC 5.2A.10R provides:

‘The firm must consider:

- (1) the risk that the customer will not make repayments under the agreement by their due dates (this is sometimes referred to as credit risk); and
- (2) the risk to the customer of not being able to make repayments under the agreement in accordance with CONC 5.2A.12R (referred to as ‘affordability risk’ in this section).’

In terms of the amended rules, credit providers are expected to balance their commercial interests with the consumer’s financial health, ensuring that while a loan may be profitable for the credit provider, it should also be manageable and sustainable

⁷¹ Petty D ‘New creditworthiness assessment rules – what has changed in practice?’ (2 November 2018) <<https://www.thecompliancecompany.co.uk/new-creditworthiness-assessment-rules-what-has-changed-in-practice/>> (accessed 21 August 2024).

⁷² CONC 5.2.10R replaces CONC 5.2.4(2)G which provided: ‘The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer’s financial situation.’ Note that CONC 5.2.4(2)G had the status of being guidance, while CONC 5.2.10R has the status of being a rule.

for the consumer. This dual focus is designed to prevent irresponsible lending practices that could lead to over-indebtedness and financial distress for consumers.⁷³

8.3.2 The determination of income

The revised rules set out detailed criteria that credit providers must consider when assessing a consumer's ability to afford credit. In terms of these provisions, lenders are required to determine whether the consumer will be able to meet repayments as they fall due over the life of the agreement – or, in the case of open-ended credit, within a reasonable period.⁷⁴ This assessment must be based on the consumer's income,⁷⁵ including income derived from savings or assets, as well as income received jointly with another person or by another person, provided it is reasonable to expect that such income will be available to the consumer for the purpose of making payments.⁷⁶ The rules further require that the consumer should be able to meet repayment obligations without needing to borrow further,⁷⁷ default on any other financial or legal obligations,⁷⁸ or experience a significant adverse impact on their financial situation.⁷⁹

The amendment to the rules thus permits credit providers to consider additional income, including income received from another individual, as long as it is anticipated that this income will be available to the consumer for the repayment of the credit.

In addition, Rule 5.2A.12 (2)(b) and (c) of the updated regulations mandate credit providers to investigate the intended purpose of any savings or assets that a customer plans to use for repaying the credit. Credit providers are required to assess the liquidity of these funds or assets, considering their availability for repayment, and determine if using them to repay the credit would negatively affect the customer's financial stability.⁸⁰

⁷³ Petty D (n 71).

⁷⁴ CONC 5.2A.12R(1).

⁷⁵ CONC 5.2A.12R(2)(a).

⁷⁶ CONC 5.2A.12R(2)(b) and (c).

⁷⁷ CONC 5.2A.12R(3).

⁷⁸ CONC 5.2A.12R(4).

⁷⁹ CONC 5.2A.12R(5).

⁸⁰ Petty (n 70).

The new rules and guidance also shed some light on how far credit providers are expected to go in identifying and verifying the consumer's income and expenditure. There is no requirement to determine /estimate the income where the credit provider can prove that the loan was obviously affordable or where the consumer indicated that he will repay the loan using savings or other assets.⁸¹ Where a credit provider opts to rely on this exception to conducting an income and expenditure assessment the burden of proof will be on the credit provider to demonstrate, if challenged (for example, by the FCA), that the absence of affordability risk to the consumer was obvious and an income and expenditure assessment would have been disproportionate.⁸² The requirement is for a credit provider to take reasonable steps to determine the amount, or make a reasonable estimate, of the customer's current income, and to take it into account.⁸³ The new guidance further specifies that income can include income other than salary and wages.⁸⁴

Where a reduction in the consumer's income during the term of the agreement (or the expected duration of the credit where the agreement is open-ended) is reasonably foreseeable and likely to have a material impact on affordability risk, the firm is required to take reasonable steps to estimate the extent of the reduction and to factor it into its assessment.⁸⁵

An estimate of the customer's income may include a minimum amount or range, provided that any assumptions on which the estimate is based are reasonable in the circumstances.⁸⁶ The FCA will prescribe the methods used to make these assumptions. These assumptions can be based on various grounds, like an assessment of the consumer's current employment status, including whether they are employed full-time, part-time, self-employed, or on a temporary contract. Temporary or seasonal employment might indicate a higher risk of income fluctuation. A review of the stability of the consumer's income sources can also be indicative of a rise or decline in the income of a consumer. For example, income from commission-based

⁸¹ CONC 5.2A.15R(1).

⁸² CONC 5.2A.16G(1).

⁸³ CONC 5.2A.15R(2).

⁸⁴ CONC 5.2A.16G(5).

⁸⁵ CONC 5.2A.15R(3).

⁸⁶ CONC 5.2A.16G(2).

jobs, freelance work, or variable hours can be less predictable and indicative of risk. An analysis of the consumer's employment sector can also indicate risk as certain industries might be more prone to downturns, layoffs, or seasonal variations. For example, jobs in retail or hospitality might be more vulnerable to economic shifts. Credit providers can also use predictive analytics and models that use historical and sector data to forecast potential changes in income. These models can analyse broader economic indicators and trends relevant to the consumer's specific circumstances.

In terms of the revised rules it is important to note that it is not generally sufficient to rely solely on a statement of current income from the customer without independent evidence, for example information supplied by a Credit Rating Agency or third-party documentation supplied by the third party or the customer.⁸⁷ A firm can only take into account an expected future increase in the income of the consumer, where it reasonably believes on the basis of appropriate evidence that the increase is likely to happen during the term of the agreement (or during the likely duration of the credit where the agreement is open-ended).⁸⁸

8.3.3 The determination of expenses

In terms of the rules, a credit provider must also assess a consumer's expenses, unless it is obvious that it is unlikely to have a material impact on affordability risk.⁸⁹

The rules specify that non-discretionary expenditure includes payments needed to meet priority debts and other essential living expenses and other expenditure which it is hard to reduce to give a basic quality of life, and payments the customer has a contractual or statutory obligation to make, such as payment obligations arising under a mortgage contract or credit agreement.⁹⁰ The FCA recognises that some obligations may be shared with another person, or arrangements may have been made for their payment (for example, through a debt management plan) which should be taken into account.⁹¹

⁸⁷ CONC 5.2A.16G(3).

⁸⁸ CONC 5.2A.16G(1).

⁸⁹ CONC 5.2A.17R(1)(b).

⁹⁰ CONC 5.2A.18G(1).

⁹¹ CONC 5.2A.18G(1).

Where it is reasonably foreseeable that there is likely to be an increase in the customer's non-discretionary expenditure during the term of the agreement (or during the likely duration of the credit where the agreement is open-ended), which could have a material impact on affordability risk, the firm must take reasonable steps to estimate the amount of the increase, and take it into account.⁹² A firm can only take into account an expected future decrease where it reasonably believes on the basis of appropriate evidence that the decrease is likely to happen during the term of the agreement or during the likely duration of the credit where the agreement is open-ended.⁹³

An estimate of the non-discretionary expenditure may include a maximum amount or range, provided that any assumptions on which the estimate is based are reasonable in the circumstances.⁹⁴ When determining/estimating non-discretionary expenditure, a firm may consider statistical data unless it knows or has reasonable cause to suspect that the expenditure is significantly higher than that described in the data, or that the data is unlikely to be reasonably representative of the customer's situation.⁹⁵ It is evident that relying on statistical data can be problematic in certain instances. Therefore, the rules provide that, where the credit provider know, or has reasonable cause to know, based on information in its possession, that the consumer's household composition, number of dependents, or level of existing debt differs significantly from the sample of people used to generate the statistical data, the credit provider will not use the statistical data.⁹⁶

8.3.4 The assessment must be proportional to the risk

The FCA's approach is to set high-level principles where credit providers should make use of their own judgment to determine what is appropriate in the circumstances, having regard to the nature of their products and consumer's and the costs and risks involved.⁹⁷ The rules provide that the extent and scope of the creditworthiness assessment, and the steps that the credit provider must take to satisfy the requirement

⁹² CONC 5.2A.17R(3).

⁹³ CONC 5.2A.17R(5).

⁹⁴ CONC 5.2A.18G(4).

⁹⁵ CONC 5.2A.19G(1).

⁹⁶ CONC 5.2A.19G(2).

⁹⁷ Walker M 'Assessing creditworthiness in consumer credit: FCA publishes final rules and guidance' (2018) <<https://www.walkermorris.co.uk/publications/assessing-creditworthiness-in-consumer-credit-fca-publishes-final-rules-and-guidance/>> (accessed 21 August 2024).

that the assessment is a reasonable one, based on sufficient information, are dependent upon, and proportionate to, the individual circumstances of the case.⁹⁸

In CONC 5.2A.20R to CONC 5.2A.25G rules and guidance are set out concerning the factors that should be considered in an individual case when deciding how much information is sufficient for the assessment, what information is appropriate and proportionate to obtain and access, and whether and how the accuracy of the information should be verified. The rules include a list of factors to which credit providers must have regard when deciding what steps are needed to make the creditworthiness assessment a reasonable one.⁹⁹ After carefully considering feedback from industry stakeholders regarding the factors influencing proportionality, the FCA emphasised that these factors may vary and firms are responsible for evaluating how

⁹⁸ CONC 5.2A.20R(1).

⁹⁹ The list of factors is found in CONC 5.2A.20R(2)-(3) and are as follows:

‘(2) The firm must consider:

- (a) the types of information to use in the creditworthiness assessment;
- (b) the content and level of detail of the information to use;
- (c) whether the information in the firm’s possession is sufficient;
- (d) whether and to what extent to obtain additional information from the customer;
- (e) whether and to what extent to obtain information from a credit reference agency;
- (f) any other sources of information to use;
- (g) whether and to what extent to verify the accuracy of the information that is used;
- (h) the degree of evaluation and analysis of the information that is used; and
- (i) the steps to take to determine or estimate the customer’s income or non-discretionary expenditure (where such a determination or estimate is required), having regard to the factors listed in (3) where applicable to the agreement.

(3) The factors to which the firm must have regard when complying with (2) and deciding what steps are needed to make the creditworthiness assessment a reasonable one include each of the following where applicable to the agreement:

- (a) the type of credit;
- (b) the amount of the credit or, where applicable, the credit limit;
- (c) the duration (or likely duration) of the credit;
- (d) the frequency of the repayments;
- (e) the amounts of the repayments;
- (f) the total amount payable;
- (g) the total charge for credit;
- (h) the annual percentage rate of charge;
- (i) whether the rate of interest or any other charge (except any charge for non-compliance with the agreement or any charge payable by the customer under a hire-purchase agreement in respect of an exercise of an option to purchase the goods to which the agreement relates) is fixed or variable;
- (j) any other costs which will or may be payable by or on behalf of the customer in connection with the agreement, including any charge for non-compliance with the agreement but excluding any charge payable by the customer under a hire-purchase agreement in respect of an exercise of an option to purchase the goods to which the agreement relates; and
- (k) any other potential adverse consequences for the customer arising under the agreement from a failure to make a repayment by the due date.’

they are relevant to their specific circumstances.¹⁰⁰ The FCA has also reiterated that firms are permitted to consider the intended purpose of the credit, as appropriate.¹⁰¹

In a decision by the Financial Ombudsman Service to determine whether credit was granted recklessly to a consumer, the presiding officer explained that a proportionate affordability check ought to be *more* thorough:

‘the lower a customer’s income (reflecting that it could be more difficult to make any loan repayments to a given loan amount from a lower level of income); ... and ... the greater the number and frequency of loans, and the longer the period of time during which a customer has been given loans (reflecting the risk that repeated refinancing may signal that the borrowing had become, or was becoming, unsustainable).’¹⁰²

8.3.5 The establishment of policies and procedures for creditworthiness assessments

Where the previous rules (CONC 5.3.2) required lenders to have creditworthiness assessment related policies and procedures, the new rules go further and contains express provisions requiring lenders to have a documented compliance framework which consists of creditworthiness assessment related policies and procedures that sets out the firm’s creditworthiness assessment process, arrangements to review and sign-off the firm’s creditworthiness assessment process and arrangements to monitor the effectiveness of the creditworthiness assessment related policies and procedures, the customer outcomes achieved and set out arrangements to address any deficiencies in the policies and procedures.

In terms of CONC 5.2A.33R credit providers are required to establish, implement, and maintain clear and effective policies outlining the key factors that will be considered during the assessments.¹⁰³ The rules also provide for the documentation of these policies and procedures, as well as their approval by the governing body or senior management of the credit provider.¹⁰⁴ The rules also provide that the effectiveness of these policies and procedures must be monitored regularly to ensure compliance with

¹⁰⁰ Walker (97).

¹⁰¹ CONC 5.2A.21G(1).

¹⁰² Financial Ombudsman Service ‘Decision Reference DRN-2399086’ <<https://www.financial-ombudsman.org.uk/decision/DRN-2399086.pdf>> (accessed 3 June 2024).

¹⁰³ CONC 5.2A.33.

¹⁰⁴ *Ibid.*

the CONC 5.2A regulations.¹⁰⁵ Any deficiencies identified during these assessments must be promptly addressed.¹⁰⁶ Credit providers must keep a record of each transaction, either on paper or in an electronic format, to demonstrate that a creditworthiness assessment was conducted and deemed reasonable.¹⁰⁷ While not required for declined credit applications, it may be beneficial for credit providers to keep records for evaluation purposes. Credit providers utilising automated processes must have appropriate policies and procedures in place to manage associated risks effectively. This also applies to firms relying heavily on data from credit reference agencies or third parties.¹⁰⁸

8.4 Assistance for consumers who became over-indebted as a result of reckless lending

8.4.1 General

As discussed in Chapter 6,¹⁰⁹ instances of reckless lending can be reported to and investigated by debt counsellors as part of the debt counselling process in South Africa. The Regulator, alternative dispute resolution agents, ombudsmen, consumer courts as well as the Tribunal can also investigate complaints about reckless lending. In Chapter 6 various difficulties with the investigation of reckless lending by these institutions were discussed. From the research conducted in Chapter 6 it was clear that the South African debt counselling process does not provide recourse for the low-income consumer who was the victim of reckless lending as the process is too expensive and the Act also does not provide clear guidelines to the debt counsellor regarding the process that has to be followed to prove that the credit was extended recklessly. Secondly, the NCR, alternative dispute resolution agents, ombudsmen and consumer courts also have limitations when it comes to providing this group of consumers with assistance when credit was extended recklessly. Lastly, the Tribunal as forum to adjudicate complaints of low-income consumers about reckless lending also has limitations and does not provide low-income consumers with redress in these circumstances. The promulgation of the National Credit Amendment Act 7 of 2019¹¹⁰

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ See Chapter 6 Para 6.2.5.

¹¹⁰ Hereinafter referred to as 'the 2019 NCAA'.

was seen as a positive step to improve the position of low-income consumers in South Africa. The amendment of the Act introduced a list of documentation that must be provided to debt counsellors to assist them in investigating reckless lending.¹¹¹ As mentioned earlier,¹¹² the amendment also introduced debt intervention, a form of debt review, to low-income earners. The amendment included the evaluation and referral of debt intervention applications, as well as the registration and monitoring of debt intervention officers to the functions of the Regulator.¹¹³ The 2019 NCAA further make it compulsory for debt counsellors to investigate and report reckless lending to the Regulator.¹¹⁴ It is clear that the purpose of these amendments was to establish a process for the determination of reckless lending and to ensure that possible reckless lending matters, which prior to the amendment might have remained unreported, will now also come to the attention of the Regulator and be investigated if necessary. Various questions regarding the practical enforcement of these provisions are still unanswered and it is hoped that the regulations that are supposed to be issued in relation with the 2019 NCAA will shed some light on this. However, at the time of writing this thesis, no regulations to the 2019 NCAA have yet been published. A commencement date for the Amendment Act is also yet to be announced.

Chapter 6 elaborated on the predicament of the low-income consumer who wants to apply for credit in accordance with the provisions of the South African affordability assessment regulation 23A. As indicated, not only does the provisions in the Act and regulations relating to affordability assessment make it difficult for a low-income consumer to apply for credit, but this group of consumers also do not have access to relief once they find themselves over-indebted. As stated, this has the unfortunate result that these borrowers often resort to illegal lenders to obtain money to fulfil their daily needs. Because these lenders are not regulated, they charge exorbitant interest rates and often use unscrupulous collection methods if consumers are unable to pay.

¹¹¹ S 82(A)(2).

¹¹² See Chapter 7 para 7.3. See also s 13 of the 2019 NCAA.

¹¹³ S 3 of the 2019 NCAA provides for the insertion of: 'Section 15A: Other functions of National Credit Regulator'.

¹¹⁴ S 10 of the 2019 NCAA for the insertion of: 'Section 82A: 'Report and investigation of reckless credit agreement'.

Research commissioned by short-term credit provider Wonga Finance SA (Pty) Ltd and conducted by Eighty20¹¹⁵ in 2017 into the extent and characteristics of informal lending in South Africa, suggests that *mashonisas*¹¹⁶ are a far more widespread phenomenon than is often thought.¹¹⁷ Based on a physical count conducted in the streets of Enkanini, an informal settlement outside Khayelitsha,¹¹⁸ researchers conservatively estimated that there could be at least 40 000 *mashonisas* operating in South Africa. In fact, the qualitative evidence collected suggest that this is likely to be a low estimate.¹¹⁹

In this part of the comparative study the position in the UK is investigated to see how the process of reporting instances of reckless lending in the UK differs from the position in South Africa and whether the UK system offers any solutions for the South African problems explained in Chapter 5 and 6.

8.4.2 The Financial Ombudsman Service

In the UK, any complaint against a credit provider, including complaints concerning reckless lending, must first be raised by the consumer directly with the credit provider. The credit provider is afforded a period of eight weeks to investigate the consumer's concerns and provide a satisfactory resolution.¹²⁰ If the credit provider's response is deemed unsatisfactory or if he fails to respond within the stipulated eight-week period, the consumer has the right to escalate the complaint to the Financial Ombud Service.¹²¹

The FOS operates under the framework established by the FSMA 2000.¹²² Section 225 of Part XVI of the FSMA 2000 establishes the FOS as a scheme to resolve

¹¹⁵ See Chapter 1 para 1.3.

¹¹⁶ See Chapter 7 para 7.3.

¹¹⁷ Eighty20 'Informal Lending Report – Understanding the role of mashonisa's in the South African credit market' (2017) <<https://www.wonga.co.za/media/2e0nf2z5/wonga-mashonisas-brochure-2018-web-1.pdf>> (accessed 21 August 2024).

¹¹⁸ Khayelitsha is a township in Western Cape, South Africa, on the Cape Flats in the City of Cape Town Metropolitan Municipality.

¹¹⁹ Eighty20 Informal Lending report (n 116) 5.

¹²⁰ Financial Conduct Authority 'How to complain' <<https://www.fca.org.uk/consumers/how-complain>> (accessed 21 August 2024).

¹²¹ Hereinafter referred to as 'the FOS'.

¹²² Pt XVI, ss 225 – 234A.

disputes between consumers and credit providers¹²³ under Schedule 17 of the FSMA. The FCA is responsible for appointing the board of the FOS and ensuring that it operates within the regulatory framework established by the Act. In addition, the FCA has the power to set rules and guidance that the FOS must follow when handling complaints. These rules are set out in the FCA Handbook.¹²⁴

In terms of section 229 of the FOS has the power to make two different types of awards:

- '(2) If a complaint which has been dealt with under the scheme is determined in favour of the complainant, the determination may include—
 - (a) an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage (of a kind falling within subsection (3)) suffered by the complainant ('a money award');
 - (b) a direction that the respondent takes such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken).
- (3) A money award may compensate for—
 - (a) financial loss; or
 - (b) any other loss, or any damage, of a specified kind.'

Typically, when a consumer files a complaint of reckless lending with the FOS, this would result in an order that the consumer pay back the amount that was lent, without any associated interest, fees or charges. In exceptional cases, and after careful consideration of the circumstances of the particular matter, the FOS can also make an order that the credit provider write off the credit and remove any adverse listing on the consumer's credit profile.¹²⁵ In terms of section 230, the FOS can also require credit providers to pay the costs associated with handling the complaint.

¹²³ S 225 The scheme and the scheme operator.

- (1) This Part provides for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person.
- (2) The scheme is to be administered by a body corporate ('the scheme operator').
- (3) The scheme is to be operated under a name chosen by the scheme operator but is referred to in this Act as 'the ombudsman scheme'.
- (4) Schedule 17 makes provision in connection with the ombudsman scheme and the scheme operator.

¹²⁴ Financial Conduct Authority 'Dispute Resolution: complaints' <https://www.handbook.fca.org.uk/handbook/DISP/3/7.html> (accessed 6 September 2024).

¹²⁵ Financial Ombudsman Service 'Decision Reference DRN-2399086' <https://www.financial-ombudsman.org.uk/decision/DRN-2399086.pdf> (accessed 3 June 2024).

In the UK, monetary awards by the ombudsman can be for financial loss (which includes consequential and prospective loss)¹²⁶ and also for pain and suffering,¹²⁷ damage to reputation¹²⁸ or distress or inconvenience.¹²⁹ The application of this provision is illustrated by a ruling by the FOS that a credit provider should pay a consumer £800 in compensation for the substantial worry and distress caused by the irresponsible lending decision.¹³⁰ South African legislation does not provide for compensation for pain and suffering, damage to the reputation of the consumer or distress or inconvenience. Where the services provider's conduct is such that it constitutes a cause of action, that case should be adjudicated by a civil court.¹³¹ It is however submitted that the costs associated with such action will discourage most consumers to proceed with such action.

A further important difference between the South African and UK financial ombudsmen lies in the enforcement of rulings made by these bodies. In South Africa, non-compliance with an order by the National Financial Ombud Scheme will be reported to the NCR to consider further appropriate action.¹³² Because the NCR also does not have the authority to make a final ruling against a credit provider who provided credit recklessly, the matter will be referred to the Tribunal. In the UK an order by the FOS has considerably more 'teeth' because an award or a direction has the status of a court order and are enforceable in a court.¹³³

It is thus clear that the FOS is crucial in providing an accessible, independent, and impartial mechanism for resolving complaints between consumers and credit providers. Consumers can submit a complaint directly to the FOS. To facilitate the process, consumers are required to provide comprehensive details of the complaint,

¹²⁶ DISP 3.7.2R (1).

¹²⁷ DISP 3.7.2R (2).

¹²⁸ DISP 3.7.2R (3).

¹²⁹ DISP 3.7.2R (4). See also Millard D 'Bespoke justice? On financial ombudsmen, rules and principles' (2011) *De Iure* 252.

¹³⁰ Financial Conduct Authority 'Consumer complains about a loan company irresponsibly lending' <<https://www.financial-ombudsman.org.uk/decisions-case-studies/case-studies/consumer-complains-loan-company-irresponsibly-lending>> (accessed 6 September 2024).

¹³¹ Millard (n 129) 253.

¹³² Refer to Chapter 6 for a full discussion of how the National Financial Ombud Scheme investigate reckless lending and the rulings it can make against credit providers.

¹³³ S 228(5). DISP 3.7.13G.

the credit provider's response, and any supporting documentation.¹³⁴ Consumers can also authorise third parties, such as legal representatives, financial advisors, or debt advice organisations, to act on their behalf when submitting a complaint to the FOS.¹³⁵

8.4.3 The FCA

The FCA derives its authority to act against credit providers who engage in reckless lending from the FSMA 2000 and related legislation and rules. Section 1B of the FSMA 2000 outlines the FCA's operational objectives, which includes the protection of consumers. The CCA 1974, as amended, complements these powers by providing specific provisions relating to licencing¹³⁶ and fitness assessment¹³⁷ by credit providers. Together, these legislative frameworks empower the FCA to regulate credit providers, protect consumers and maintain the integrity of the financial market.

The FSMA contains several parts and sections that provide the FCA with enforcement powers. While the FSMA does not explicitly mention 'reckless' lending, it provides a broad framework for regulating conduct by financial service providers to ensure the protection of consumers. While the FSMA provides the framework, specific rules and guidance on responsible lending and affordability assessments are detailed in the FCA's CONC, which is issued under the powers granted by the FSMA. The FCA is empowered under the FSMA to act against credit providers that violate the responsible lending provisions. The FCA may apply for an injunction to stop a company from engaging in certain activities,¹³⁸ impose fines on credit providers,¹³⁹ and seek restitution orders from the court, requiring credit providers to compensate those who have suffered losses due to contraventions of the FSMA.¹⁴⁰

A significant difference between the FCA and its South African counterpart the NCR, lies in the fact that the FCA can act directly against firms for breaches of regulations, including reckless lending practices, without needing to refer cases to another body. This is different from the position in South Africa where only a court or the Tribunal

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ S 21 of the CCA 1974.

¹³⁷ S 25(1) and (2) of the CCA 1974.

¹³⁸ S 380 of the FSMA.

¹³⁹ S 205 of the FSMA.

¹⁴⁰ S 382 of the FSMA.

can declare agreements reckless, issue administrative fines and deregister registrants. This process is slower and less direct compared to the FCA's immediate enforcement capabilities. The ability to swiftly impose penalties and enforce compliance deters reckless lending practices effectively in the UK. However, it is submitted that the NCR's reliance on referrals to the NCT as well as the considerable capacity constraints suffered by the Regulator can reduce the immediacy and impact of enforcement actions, potentially making the system less effective in deterring reckless lending compared to the powers of the UK's FCA.

8.4.4 Free assistance to consumers suffering from reckless lending and over-indebtedness

The research presented in Chapters 5 and 6 indicates that reporting reckless lending in South Africa through the debt review process or by utilising alternative dispute resolution agents can often be prohibitively expensive. As a result, this leaves consumers vulnerable to such practices by credit providers. In the UK though, there is a greater availability of free assistance for consumers facing similar challenges.

8.4.4.1 Debt advice organisations

In the UK, a consumer can report a complaint of unaffordable lending to the FOS or the FCA in person or through a debt advice organisation. The services provided by debt advice organisations is a regulated activity under section 39E of Chapter 7B of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO), SI 2001/544. The services provided by debt advice organisations is referred to as 'debt counselling' and defined in section 39E(1).¹⁴¹ The Act further only allows authorised firms to carry on debt regulated activities, such as debt advice organisations, as a business.¹⁴²

Chapter 8 of the CONC¹⁴³ governs the debt advice activities that are regulated in terms of the FSMA. Therefore, firms offering debt advice services must comply with both the

¹⁴¹ S 39E (1) Debt-counselling: Giving advice to a borrower about the liquidation of a debt due under a credit agreement is a specified kind of activity.

(2) Giving advice to a hirer about the liquidation of a debt due under a consumer hire agreement is a specified kind of activity.

¹⁴² S 19 of the FSMA 2000.

¹⁴³ Hereinafter referred to as 'CONC 8'.

rules set out in CONC 8 and the overarching requirement of being authorised under section 19 of FSMA 2000.¹⁴⁴ Both provisions aim to protect consumers. Section 19 ensures that only authorised firms can operate, providing a baseline of trust and compliance. CONC 8 builds on this by ensuring that these firms adhere to specific standards and practices when dealing with consumer credit and debt management.

In terms of CONC 8.1.3 all debt advice firms must adhere to the rules set out in CONC 8, irrespective of whether the service provider charges a fee or not. If a fee is charged, the firm must explain to the consumer that similar services are offered free of charge.¹⁴⁵ If the consumer chooses to use the services of a debt advice firm that charges a fee, the details of the fees and the services offered by the firm must be explained in detail to the consumer¹⁴⁶ and the consumer must also receive a written contract setting out the terms and conditions for the provision of its services.¹⁴⁷ The rules also provide guidance on how the debt advice agent should structure the repayment offer made to the credit provider¹⁴⁸ and what information should be considered when structuring the repayment offer.¹⁴⁹

CONC 8 does not set any requirements on the training of individuals providing debt advice. An internet search however revealed several institutions providing training to individuals providing debt advice or debt counselling services.¹⁵⁰

Debt advice firms that fail to comply with the rules set out in CONC 8 may be subject to enforcement action by the FCA in accordance with the provisions set out in the

¹⁴⁴ Connelly S 'FCA Regulations for Debt Management Plan Providers' (web blog), 21 May 2024 <<https://www.cashfloat.co.uk/blog/money-saving/debt-management-protocol/>> (accessed 21 August 2024).

¹⁴⁵ CONC 8.2.4.

¹⁴⁶ CONC 8.3.1 (1) – (13).

¹⁴⁷ CONC 8.4.2 (1) – (5).

¹⁴⁸ CONC 8.5.3.

¹⁴⁹ CONC 8.5.4.

¹⁵⁰ Community Money Advice 'Generalist Debt Advice Training' <<https://www.communitymoneyadvice.com/training-and-conferences/trainingprogramme/cma-level-3-award-in-generalist-debt-advice>> (accessed 21 August 2024); Gov.UK 'Apprenticeship training course Debt Adviser (level 3)' <<https://findapprenticeshiptraining.apprenticeships.gov.uk/courses/552>> (accessed 21 August 2024); Institute of Money Advisers, 'Training' <<https://www.i-m-a.org.uk/learning-development/training/>> (accessed 21 August 2024); Money Advice Trust 'Wiseradviser' <<https://moneyadvice-trust.org/training-and-consultancy/wiseradviser/>> (accessed 21 August 2024).

FCA's Enforcement Guide.¹⁵¹ Enforcement action by the FCA includes financial penalties,¹⁵² suspension,¹⁵³ limitation¹⁵⁴ or disciplinary prohibitions or other restrictions¹⁵⁵ against debt advice companies.

Debt advice in the UK appears to be very similar to debt counselling in South Africa. The UK position however differs from the South African position as registered debt advice organisations can provide their services free of charge to consumers. This includes advice on reckless lending. The funding of these organisations is of critical importance for this research. The Money Advice Service¹⁵⁶ was established in terms of the Financial Services Act, 2010, as an independent body from the FCA, to enhance public understanding of financial matters.¹⁵⁷ In terms of the Act, the Regulator, the FSA at the time, had to establish a Consumer Financial Education Body. The Consumer Financial Education Body was later renamed to the MAS.¹⁵⁸ The MAS's statutory function is to enhance the understanding and knowledge of members of the public of financial matters and to enhance the ability of members of the public to manage their own financial affairs.¹⁵⁹ In 2012, the MAS was also given responsibilities under the Financial Services Act to improve the availability, quality and consistency of debt advice across the UK.¹⁶⁰ The MAS is entirely funded by an allocation from levies collected by the FCA from regulated financial firms.¹⁶¹

The largest and most well-known providers of free debt advice are Citizens Advice, StepChange and the Money Advice Trust which operates the National Debtline for consumers and Business Debtline for small businesses.¹⁶² Other, smaller not for profit providers also exist and are either funded through the MAS or local authority grants

¹⁵¹ EG 7.1.2.

¹⁵² EG7.1.2(1).

¹⁵³ EG7.1.2(2).

¹⁵⁴ EG7.1.2(3).

¹⁵⁵ EG7.1.2(4).

¹⁵⁶ Hereinafter referred to as 'the MAS'.

¹⁵⁷ S 6(1) of the Financial Services Act 2010. See also House of Commons 2013 *Money Advice Service Seventh Report* <<https://publications.parliament.uk/pa/cm201314/cmselect/cmtreasy/-457/457.pdf>> (accessed 12 August 2024).

¹⁵⁸ Economic and Finance Ministry Review of the Money Advice Service (2015) <https://assets.publishing.service.gov.uk/media/5a7f9e68ed915d74e622b8dc/PU1736_MAS_review_document_19_March.pdf> (accessed 7 August 2024) 7.

¹⁵⁹ S 6(2) of the Financial Services Act 2010.

¹⁶⁰ S 6 and Schedule 3. The FSA still refers to the Consumer Financial Education Body (CFEB).

¹⁶¹ Economic and Finance Ministry Review (n 158) 5.

¹⁶² Economic and Finance Ministry Review (n 158) 13.

plus private sector charitable donations (Citizens Advice and the Money Advice Trust operate this model) or through a 'fair share' arrangement with creditors in which the body receives a percentage of debt recovered through debt management repayment plans, at no cost to consumers (this provides the bulk of StepChange's funding).¹⁶³

8.4.4.2 *The Debt Relief Order*

In Chapter 6 the suitability of the South African debt counselling process as a method for low-income consumers to bring reckless lending before court was investigated. In that chapter it was pointed out that the debt counselling process excludes the low – income consumer from an effective remedy in the instance of reckless lending because low-income consumers are not lucrative clients for debt counselling businesses and because this debt relief remedy is too expensive for low-income consumers.

The law of insolvency in the UK provides for various debt relief measures for individuals.¹⁶⁴ A debtor can approach the court for a bankruptcy order,¹⁶⁵ an individual voluntary arrangement¹⁶⁶ or a county court administration order.¹⁶⁷ A fourth debt relief measure, the Debt Relief Order (DRO) procedure is also available. This procedure is regulated by part 7A of the Insolvency Act. The procedure was introduced by the Tribunals, Courts and Enforcement Act¹⁶⁸ and became fully effective on 6 April 2009.¹⁶⁹ Fletcher describes the purpose of the procedure as follows:

'The objective of the (new) procedure is to provide debt relief for people who owe relatively little, have no income and not assets to repay what they owe, and who cannot afford the cost of petitioning for their own bankruptcy adjudication.'

From a procedural perspective, in terms of the Insolvency Act the application for a DRO must be made through an approved intermediary.¹⁷⁰ An 'approved intermediary' is an individual approved by a competent authority to act as an intermediary between a person wishing to make an application for debt relief and the official receiver.¹⁷¹ A

¹⁶³ Economic and Finance Ministry Review (n 158) 17.

¹⁶⁴ Fletcher IF *The Law of Insolvency* (2009) 80.

¹⁶⁵ See pt 9 of the Insolvency Act 1986.

¹⁶⁶ See pt 8 of the Insolvency Act 1986.

¹⁶⁷ See ss 112 – 117 of the County Court Administration Act 1984.

¹⁶⁸ S 108(1) and sch 17.

¹⁶⁹ SI 2009/382, a 2(b).

¹⁷⁰ S 251 B of the Insolvency Act 1986.

¹⁷¹ S 251 U of the Insolvency Act 1986.

debt advisor is an approved intermediary and can bring a DRO on behalf of an over-indebted consumer.¹⁷²

While the DRO procedure is particularly fitting for the low-income consumer, Smith remarks that the fee to apply for a DRO, namely £90, disqualified many low-income consumers from making use of this procedure to apply for relief.¹⁷³ The announcement of amendments to DRO's in the 2024 Spring Budget of the UK Government in April 2024 to offer more support to consumers struggling with debt by abolishing this fee, was therefore met with approval.¹⁷⁴

In South Africa, debt intervention was suggested as a formal debt relief remedy specifically aimed at low-income consumers.¹⁷⁵ Despite being signed into law, this remedy is not in operation yet as it is uncertain how this relief would be funded and who would perform this service. In the UK however, free debt relief is funded by the Government. It is submitted though that to merely suggest that the same happen in South Africa would be to turn a blind eye to the reality of the South African economy. As stated, a workable alternative would be to fund debt intervention through a levy on credit providers.

8.4.4.3 *The Debt Respite Scheme*

On the 4th of May 2021 the UK Government's Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (Debt Respite Regulations)¹⁷⁶ became effective. The Debt Respite Scheme is a

¹⁷² Insolvency Service, 'DRO Guidance for Approved Intermediaries' (2024) <https://www.gov.uk/government/publications/intermediary-guidance-notes-v15-dro2-guidance-for-approved-intermediaries/dro-guidance-for-approved-intermediaries> (accessed 22 August 2024).

¹⁷³ Smith C 'Debt relief orders: Fee of £90 axed for poorest' *BBC* (29 March 2024) <https://www.bbc.com/news/business-68669762> (accessed 22 August 2024); Insolvency Service, Press release 'Changes to Debt Relief Orders will support people in financial distress' (5 April 2024) <https://www.gov.uk/government/news/changes-to-debt-relief-orders-will-support-people-in-financial-distress> (accessed 22 August 2024); also see The Woolard Review – A review of change and innovation in the unsecured credit market <https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf> (accessed: 5 June 2024) 28.

¹⁷⁴ Economic and Finance Ministry 'Spring Budget 2024' <https://www.gov.uk/government/publications/spring-budget-2024> (accessed 22 August 2024).

¹⁷⁵ See Chapter 7 para 7.3 and s 13 of the 2019 NCAA. Boterere SG *The proposed Debt Intervention Measure* (LLM Dissertation, University of Pretoria 2019) 39.

¹⁷⁶ Hereinafter referred to as 'the Debt Respite Regulations'.

legal framework introduced in England and Wales in terms of section 7(2) of the Financial and Guidance and Claims Act 2018, to support individuals experiencing problem debt.¹⁷⁷

The scheme provides two distinct types of moratoriums. The first is the Standard Breathing Space Moratorium in terms whereof consumers are protected from legal action from credit providers for a period of 60 days.¹⁷⁸ During the moratorium, any interest,¹⁷⁹ fees, penalties or charges¹⁸⁰ are frozen and the credit provider or his agent are not allowed to proceed with any enforcement action against the consumer.¹⁸¹

The aim with this moratorium is to give a consumer the opportunity to apply to a debt advice provider to access professional debt advice and work towards a sustainable debt solution.¹⁸² In terms of the Debt Respite Regulations a 'debt advice provider' is a person authorised by the FSMA to provide debt advice services.¹⁸³ The Debt Respite Regulations further provide that a debt advice provider may not charge a debtor a fee to obtain the moratorium. Under the Debt Respite Regulations, a consumer will be eligible for Breathing Space provided certain eligibility criteria are met. Only individuals¹⁸⁴ domiciled or ordinarily resident in England or Wales¹⁸⁵ can access the Scheme. Essentially all debts are included unless explicitly excluded.¹⁸⁶ Excluded debts include; debts incurred through fraudulent behaviour, court fines, child maintenance arrears, debt arising from family court proceedings, student fund loans and personal injury loans.¹⁸⁷

As this form of debt relief is provided by debt advice organisations free of charge, it is funded through the MAS, credit charities and rebates from credit providers.¹⁸⁸

¹⁷⁷ The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 No 1311 https://www.legislation.gov.uk/uksi/2020/1311/pdfs/uksiem_20201311_en.pdf (accessed 3 August 2024) para 6.1.

¹⁷⁸ Reg 26(2) of the Debt Respite Regulations.

¹⁷⁹ Reg 7(6)(a) of the Debt Respite Regulations.

¹⁸⁰ Reg 7(6)(b) of the Debt Respite Regulations.

¹⁸¹ Reg 7(6)(c) read with Reg. 7(7) of the Debt Respite Regulations.

¹⁸² Reg 23(1) of the Debt Respite Regulations.

¹⁸³ Reg 3 of the Debt Respite Regulations.

¹⁸⁴ Reg 3(a).

¹⁸⁵ Reg 3(c).

¹⁸⁶ Reg 3(b).

¹⁸⁷ Reg 5(4).

¹⁸⁸ Explanatory Memorandum to The Debt Respite Scheme (n 177) para 7.5.

Problem debt and mental health problems are often linked because the stress and pressure from unmanageable debt can worsen anxiety and depression.¹⁸⁹ As noted in the Explanatory Memorandum to the Debt Respite Scheme, people often seek advice too late – usually when creditors have commenced court or enforcement action. This increases stress and can lead to rushed decisions, like choosing the fastest rather than the best solution to the debt problem. These sub-optimal outcomes can prolong financial difficulty and further harm mental health, creating a vicious cycle.¹⁹⁰ The UK Government therefore also included special protection from credit providers for consumers receiving mental health crisis treatment in terms of the Debt Respite Regulations in the form of the Mental Health Crisis Moratorium.¹⁹¹ In terms of the regulations,¹⁹² a consumer is considered to be receiving mental health crisis treatment in a number of specified circumstances. These include situations where the individual has been detained in hospital for assessment under sections 2 or 4 of the Mental Health Act 1983,¹⁹³ or for treatment under section 3 of the same Act.¹⁹⁴ It also applies where a person has been removed to a place of safety by a police constable under sections 135 or 136 of that Act,¹⁹⁵ or detained in hospital for assessment or treatment under sections 35, 36, 37, 38, 45A, 47 or 48 of the Act.¹⁹⁶ In addition to these statutory forms of detention, the definition extends to any individual receiving any other crisis, emergency or acute care – whether in hospital or in the community - from a specialist mental health service, provided that the treatment relates to a serious mental disorder.¹⁹⁷

The consumer must provide proof that he fits the requirements and is undergoing treatment for a mental health crisis in order to apply for a Mental Health Crisis

¹⁸⁹ Economic and Finance Ministry 'Guidance on mental health crisis breathing space' (2023) <https://assets.publishing.service.gov.uk/media/64809e06b32b9e000ca96395/Guidance_on_mental_health_crisis_breathing_space_judgment_edits_final.pdf> (accessed 3 August 2024).

¹⁹⁰ Explanatory Memorandum to The Debt Respite Scheme (n 177) para7.2.

¹⁹¹ Reg 32 of the Debt Respite Regulations.

¹⁹² Reg 28 of the Debt Respite Regulations.

¹⁹³ Reg 28(a) of the Debt Respite Regulations.

¹⁹⁴ Reg 28(b) of the Debt Respite Regulations.

¹⁹⁵ Reg 28(c) of the Debt Respite Regulations.

¹⁹⁶ Reg 28(d) of the Debt Respite Regulations.

¹⁹⁷ Reg 28(e) of the Debt Respite Regulations.

Breathing Space.¹⁹⁸ An Authorised Mental Health Professional must offer this.¹⁹⁹ An Authorised Mental Health Professional is a person who has been authorised by any local social services authority in England under section 114(1) of the Mental Health Act 1983, or by any local social services authority in Wales under that subsection.²⁰⁰ For the length of the crisis treatment and for up to 30 days following its conclusion, a mental health crisis breathing space will assist in stopping any enforcement action as well as the accrual of fees and interest on outstanding debt.²⁰¹

Evidently, in South Africa, consumers are also experiencing mental health problems as a result of debt. In a NedFinHealth Monitor 2023 study, commissioned by Nedbank the impact of debt on consumers' mental well-being was highlighted. The study customised research from the Financial Health Network — a think-tank that works with several American universities — by drawing insights from a 'nationally representative sample' of 1 503 South Africans, to reflect their 'current reality', 'ambitions' and 'challenges' as they aspire to improve their financial health status. The study found that unmanageable debt has an impact on the mental health of 67% of South Africans who worry about their household debt constantly.²⁰² The study found that more than a third of South Africans spend six or more hours at work worrying about their finances and that poor financial health is linked to stress and anxiety. This lack of productivity costs the country an estimated R200 billion in losses annually.²⁰³

8.4.5 Other consumer protection mechanisms in the UK

8.4.5.1 Protection against illegal lenders

In paragraph 4.1 of this chapter, it was explained that low-income consumers often have no other option but to resort to illegal money lenders. Illegal money lending is a widespread problem, not exclusive to South Africa. Like in South Africa, credit providers in the UK must be licensed to provide credit. Unlike its South African

¹⁹⁸ Reg 31 read with reg. 29 of the Debt Respite Regulations.

¹⁹⁹ Reg 29(2)(b) of the Debt Respite Regulations.

²⁰⁰ Reg 2(1)(a) and (b) of the Debt Respite Regulations.

²⁰¹ Reg 32 of the Debt Respite Regulations.

²⁰² Nedbank Group 'The 2023 NedFinHealth Monitor Report' (2023) <https://www.moneyedge.co.za/assets/money-conversations/nedfin-health-monitor-report.pdf> (accessed 23 July 2024).

²⁰³ Comins L 'Broke and stressed, South African spiral into debt trap' *Mail&Guardian* 18 October 2023 <<https://mg.co.za/news/2023-10-18-broke-and-stressed-south-africans-spiral-into-debt-trap/#:~:text=He%20said%20the%20study%20found,R200%20billion%20in%20losses%20annually>> (accessed 23 July 2024).

counterpart, UK legislation provides that it is a criminal offence to provide credit without being licenced.²⁰⁴ According to a report published by the Centre for Social Justice in the UK in March 2022, it is estimated that as many as 1.08 million people are borrowing from illegal money lenders.²⁰⁵ This figure shows an increase of more than 700 000 from the previous estimate done in 2010.²⁰⁶

In an attempt to stop illegal lending, the Illegal Money Lending Team England²⁰⁷ was set up in 2004 under the National Trading Standards. The National Trading Standards delivers national and regional consumer protection enforcement. Its Board is made up of senior and experienced heads of local government trading standards from around England and Wales with an independent Chair. Its purpose is to protect consumers and safeguard legitimate businesses by addressing serious national and regional consumer protection issues and organised criminality.²⁰⁸ The IMLT is the primary authority responsible for prosecuting illegal money lending in England. It consists of a team of specialist investigators and liaison officers who have previously worked for the police, trading standards, and debt advice services, who now work to investigate and prosecute illegal money lenders. The IMLT differs from traditional trading standards officers because of their investigative (rather than audit) role. Since 2011, the IMLT has arrested 730 loan sharks and written off almost £90 million of debt to illegal lenders.²⁰⁹ The IMLT is recognised by and works closely with the FCA.²¹⁰

In order to support the regulatory work of the FCA and the investigative remit of the IMLT, the FSMA 2000 was amended by the Bank of England and Financial Services Act 2016 to fund the IMLT via a levy on consumer credit firms, which is collected by

²⁰⁴ S 23 of the FSMA 2000.

²⁰⁵ Centre for Social Justice 'Swimming with Sharks -Tackling illegal money lending in England' (2022) <https://www.centreforsocialjustice.org.uk/wp-content/uploads/2022/03/CSJ-Illegal-lending-paper.pdf> (accessed 22 August 2024).

²⁰⁶ *Idem* 4.

²⁰⁷ Hereinafter referred to as 'the IMLT'.

²⁰⁸ National Trading Standards 'What we do' <https://www.nationaltradingstandards.uk/what-we-do/> (accessed 2 September 2024).

²⁰⁹ *Idem* 74.

²¹⁰ Financial Conduct Authority 'Shining a light on illegal money lending' <https://www.fca.org.uk/publications/research/shining-light-illegal-money-lending-consumer-experiences-unauthorised-lending-uk> (accessed 2 September 2024).

the FCA.²¹¹ In 2022 this levy amounted to about £6.5 million pounds per annum. In addition to this, the ILMT also receives one third of the funds derived from their activities under the Proceeds of Crime Act 2002 (POCA).²¹²

8.4.5.2 *Initiatives to expand credit unions*

The ILMT use various methods to encourage victims of illegal lending to join credit unions instead of borrowing from loan sharks.²¹³ One of these efforts, called Money Buddies, led to the publication of a storybook teaching young children about personal finance and how to manage money.²¹⁴ It introduces the theme of loan sharks and encourages families to join credit unions instead. In a different awareness effort, POCA funds were used to support both awareness-raising and education within communities – via community based ‘fun and finance days’ and directly to support financial inclusion, by providing cash incentives to those who open savings accounts with credit unions.²¹⁵

In 2011 the UK Government established the Growth Fund, which was partially funded by the National Lottery and administered by the Department for Work and Pensions. The Growth Fund provides credit unions with capital for making small-sum affordable loans (typically to financially excluded people), revenue support to meet the staff costs and overheads associated with this additional lending activity; and further support for

²¹¹ The Bank of England and Financial Services Act 2016 amended the Financial Services and Markets Act 2000 by introducing pt 20(b), s 333S (2) which provides:

‘Taking action against illegal money lending includes—

- a) investigating illegal money lending and offences connected with illegal money lending;
- b) prosecuting, or taking other enforcement action in respect of, illegal money lending and offences connected with illegal money lending;
- c) providing education, information and advice about illegal money lending, and providing support to victims of illegal money lending;
- d) undertaking or commissioning research into the effectiveness of activities of the kind described in paragraphs (a) to (c);
- e) providing advice, assistance and support (including financial support) to, and oversight of, persons engaged in activities of the kind described in paragraphs (a) to (c).’

²¹² Swimming with Sharks (n 205) 3.

²¹³ Swimming with Sharks (n 205) 4.

²¹⁴ Illegal Money Lending Team ‘Storybook warns children about dangers of loan sharks’ (14 October 2019)

<https://southleedslife.com/storybook-warns-children-about-dangers-of-loan-sharks/> (accessed 26 July 2024).

²¹⁵ Ellison A *et al* ‘Interim Evaluation of the National Illegal Money Lending Projects’ (October 2010) <https://assets.publishing.service.gov.uk/media/5a798dd2e5274a3864fd7ea7/10-1186-interim-evaluation-illegal-money-lending.pdf> (accessed 22 August 2024).

training and development. The Government also made changes to increase the interest cap that credit unions are allowed to charge on their loans from 2% to 3%, to allow them to expand their customer base.²¹⁶

8.5 Conclusion

The United Kingdom was chosen as a comparative jurisdiction in this thesis because it has a well-established framework for consumer credit regulation, particularly in the area of pre-agreement assessments designed to prevent over-indebtedness.²¹⁷ This regulatory environment has undergone significant development over the past few decades, with a particular focus on protecting vulnerable consumers, including those with low incomes.²¹⁸

The aim of the comparison in this chapter was to identify best practices, and opportunities for enhancing consumer protection in South Africa, specifically for low-income individuals who are most at risk of over-indebtedness.²¹⁹

The chapter commenced with examining the development of consumer credit legislation in the UK.²²⁰ The evolution of the UK's consumer credit legislation illustrates a shift from minimal regulatory intervention²²¹ to a comprehensive and robust framework designed to ensure responsible lending.²²² Initially, consumer protection focused primarily on transparency and the licensing of credit providers, leaving much of the responsibility for managing credit risk to the consumers themselves.²²³ But, as the credit market grew and credit products became more sophisticated, it became obvious that stronger regulatory intervention was necessary to stop consumer financial loss and exploitation.²²⁴

²¹⁶ Department for Business, Innovation and Skills (2010) <<https://assets.publishing.service.gov.uk/media/5a798dd2e5274a3864fd7ea7/10-1186-interim-evaluation-illegal-money-lending.pdf>> (accessed 22 August 2024). House of Commons Briefing Paper 01034 'Credit Unions' January 2015 <https://researchbriefings.files.parliament.uk/documents/SN01034/SN01034.pdf> (accessed 1 August 2025).

²¹⁷ Chapter 1 para 1.5.

²¹⁸ Para 8.2.

²¹⁹ Para 8.1.

²²⁰ Para 8.2.

²²¹ Para 8.2.1.

²²² Para 8.2.9.

²²³ Para 8.2.1.

²²⁴ *Ibid.*

This led to the introduction of critical pieces of legislation, such as the Financial Services and Markets Act 2000, which established the Financial Services Authority (now the FCA),²²⁵ and the Consumer Credit Act 2006, which introduced the concept of 'irresponsible lending' into the regulatory lexicon of the UK.²²⁶ A pivotal development in the UK's regulatory framework was the introduction of the FCA's CONC 2015, which set out detailed rules for the assessment of affordability.²²⁷ The 2018 amendments to CONC further refined these rules, clarifying the distinction between credit risk (to the lender) and affordability risk (to the borrower). This dual focus is essential for ensuring that credit providers not only assess the likelihood of repayment but also consider the potential financial strain on the consumer.²²⁸ The introduction of the Consumer Duty in 2023 represents the latest advancement in this regulatory journey, setting higher expectations for credit providers to prioritise consumer welfare and ensuring that credit products are suitable for consumers' individual circumstances.²²⁹

Both South Africa and the UK share a commitment to responsible lending through affordability assessments designed to protect consumers from over-indebtedness. In the UK, affordability assessments are governed by the FCA's CONC 5 regulations, which were amended in 2018 to enhance clarity and ensure responsible lending.²³⁰ The rules mandate credit providers to assess both credit risk (the risk to the lender) and affordability risk (the borrower's ability to repay without financial strain).²³¹ Compared to South Africa, it is submitted that the affordability assessment process in the UK is more flexible and consumer-centric, with an emphasis on the importance of avoiding overly prescriptive rules to prevent unintended consequences, such as limiting credit access. This approach allows for a more tailored assessment of affordability, considering a wide range of income sources and adapting to the specific circumstances of individual consumers.²³² The focus on proportionality and the lifecycle of the loan further underscores the UK's commitment to ensuring that credit remains beneficial to consumers throughout the duration of the agreement.

²²⁵ Para 8.2.3.

²²⁶ Para 8.2.4.

²²⁷ Paras 8.2.7 and 8.2.8.

²²⁸ Para 8.2.8.

²²⁹ Para 8.2.9.

²³⁰ Para 8.3.

²³¹ Para 8.3.1

²³² Para 8.3.2.

In the UK, credit providers must ensure that the affordability assessment is proportionate to the individual's circumstances, balancing consumer protection with credit access.²³³ Compared to South Africa, where affordability assessments under the NCA focus on preventing reckless lending, UK regulations place stronger emphasis on affordability risk, considering future shifts in the consumer's financial position. The CONC 5.2A.33R further mandates credit providers to establish documented policies for creditworthiness assessments, ensuring regular reviews, transparency and proportionality. Firms must address any deficiencies, maintain compliance records and implement risk- management for automated processes. The goal is responsible lending through structured oversight while balancing consumer protection with operational efficiency.²³⁴ While both countries aim to ensure responsible lending, the UK'S approach is more flexible, allowing firms to determine proportionality based on product risk and consumer profile rather than relying solely on prescriptive thresholds.

This chapter also explored the relief mechanisms available to consumers who find themselves over-indebted as a result of reckless lending.²³⁵ In the UK, the FOS²³⁶ and the FCA²³⁷ play critical roles in providing recourse for consumers, offering a more immediate and accessible means of resolving disputes when compared to the South African context. The ability of the FOS to issue binding decisions, enforceable as court orders, and the FCA's direct enforcement powers, including the imposition of fines and the suspension of licenses, significantly strengthen consumer protection in the UK.²³⁸

The availability of free debt advice services, funded through levies on financial institutions and government support, underscores the UK's commitment to supporting consumers in financial distress.²³⁹ Debt relief measures like the DRO procedure, specifically designed for low-income individuals, provide a practical and accessible form of debt relief, which has been further enhanced by a recent legislative change to

²³³ Para 8.3.4.

²³⁴ Para 8.3.5.

²³⁵ Para 8.4.1.

²³⁶ Para 8.4.2.

²³⁷ Para 8.4.3.

²³⁸ Paras 8.4.2 and 8.4.3.

²³⁹ Para 8.4.4.1.

abolish the application fee.²⁴⁰ In keeping with a comprehensive approach to consumer protection, the Debt Respite Scheme (Breathing Space Moratorium) provides vital short-term protection against enforcement proceedings and further charges to customers, especially those going through mental health crises because of financial problems.²⁴¹

Providing credit without proper licensing in the UK constitutes a criminal offence, which is not currently the case in South Africa. The ILMT, in collaboration with the FCA, is responsible for prosecuting unlicensed lenders while offering support to affected consumers. The ILMT is funded through a levy imposed on consumer credit firms, which the FCA collects. Additionally, the team receives one-third of the financial proceeds recovered under the Proceeds of Crime Act, further supporting their efforts to combat illegal lending responses.²⁴²

The ILMT further uses various methods to encourage victims of illegal lending to join credit unions instead of borrowing from loan sharks. The UK Government established the Growth Fund, partially funded by the National Lottery and administered by the Department for Work and Pensions to provide credit unions with capital for making small loans as well as operational costs. The interest cap that credit unions are allowed to charge on their loans was also increased by Government to allow credit unions to expand their customer base.²⁴³

In conclusion, the UK's approach to regulating consumer credit and safeguarding against reckless lending offers a comprehensive model that balances the need for consumer protection with the realities of the credit market. The ongoing refinement of affordability assessments, the proactive role of regulatory bodies like the FCA, and the wide array of relief mechanisms available to over-indebted consumers demonstrate a commitment to ensuring that the credit market functions in a manner that is fair and sustainable for all participants. As South Africa continues to grapple with the challenges of protecting low-income consumers in its credit market, guidance from the

²⁴⁰ Para 8.4.4.2.

²⁴¹ Para 8.4.4.3.

²⁴² Para 8.4.5.1.

²⁴³ Para 8.4.5.2.

UK's experience could prove invaluable in shaping future reforms. By adopting best practices from the UK and adapting them to local conditions, South Africa has the potential to enhance its consumer protection framework, ensuring that all consumers have access to credit without the risk of exploitation and financial distress.

CHAPTER 9: SAFEGUARDS AND REMEDIES AGAINST RECKLESS LENDING AND OVER- INDEBTEDNESS IN AUSTRALIA

9.1 Introduction

9.2 The evolution of consumer protection in Australian credit legislation

9.3 The assessment of affordability in Australia

9.4 Assistance for consumers who were victim of reckless lending

9.5 Conclusion

9.1 Introduction

In recent decades, Australia has undertaken significant reforms in the realm of consumer credit legislation. From the research in this chapter, it is clear that the regulatory landscape has transitioned from a fragmented system of state-based consumer credit regulations to a cohesive national framework governed by the National Consumer Credit Protection Act 2009.

This chapter thus builds upon the findings presented in previous chapters, which identified challenges within the South African credit market, particularly concerning the assessment of affordability and its effects on low-income consumers, as well as the difficulties faced by this demographic in accessing relief remedies. It offers a comparative analysis between South Africa and Australia, two jurisdictions that prioritise affordability assessments in consumer credit regulation, yet display significant differences in their implementation.

Paragraph 9.2 of this chapter presents an overview of Australia's legislative framework regarding reckless lending, encompassing the historical evolution of its credit laws and the integration of affordability assessments designed to mitigate over-indebtedness. In paragraph 9.3, the obligations placed upon Australian credit providers to conduct

comprehensive and effective affordability assessments will be examined. Paragraph 9.4 will investigate the relief mechanisms accessible to Australian consumers who have been adversely affected by reckless lending, providing a comparative analysis of the efficacy of consumer protection measures for low-income consumers in both jurisdictions.

The objective of this comparative analysis is to identify best practices from the Australian experience that may guide future reforms in South African credit legislation, aimed at enhancing the protection of low-income consumers while simultaneously ensuring that this demographic continues to have access to credit.

9.2 The evolution of consumer protection in Australian credit legislation

9.2.1 Prior to the Uniform Consumer Credit Code 1997

Prior to the introduction of the Uniform Consumer Credit Code¹ in November 1996, consumer credit regulation in Australia was fragmented and inconsistent across different states and territories. The regulatory framework primarily involved a mix of state and federal legislation that varied significantly in scope, leading to challenges in consumer protection and credit regulation. The fragmentation of laws and the complexity of the regulatory framework led to calls for a national uniform system that could harmonise consumer credit regulation across the country, which ultimately led to the development of the UCCC.²

9.2.2 The Uniform Consumer Credit Code 1997

The Uniform Consumer Credit Code was the first major attempt to regulate consumer credit in Australia under one piece of legislation.³ In terms of the UCCC, the responsibility for consumer credit regulation was however shared between the Australian Government and the state and territory governments through their

¹ Hereinafter referred to as 'the UCCC'.

² Economics Legislation Committee 'Report: Inquiry into the National Consumer Credit Protection Bill 2009 and related bills' (2009) https://www.aph.gov.au/~media/wopapub/senate/committee/economics_ctte/completed_inquiries/2008_10/consumer_credit_09/report/report_pdf.ashx (accessed 4 August 2023).

³ Australian Government 'Financial Services and Credit Reform' (2008) https://library.bsl.org.au/jspui/bitstream/1/1982/1/Green_Paper_on_Financial_Services_and_Credit_Reform.pdf (accessed 4 August 2023).

respective Fair-Trading Offices.⁴ This means that although the UCCC was implemented and enforced differently by each state and territory, it was uniform law in Australia when it started operating on 1 November 1996.⁵ The UCCC applied to the provision of credit to natural persons where the credit was provided wholly or predominantly for personal, household, or domestic purposes, where a charge was made for providing the credit and where the credit was provided in the course of a business providing credit or as part of or incidental to any other business of the credit provider.⁶

The UCCC protected consumers in terms of credit agreements in two fundamental ways: The first was by means of disclosure regulation in terms whereof information was required to be disclosed to the consumer before the credit contract was entered into.⁷ Lenders were required to disclose key terms of the loan, including interest rates, fees, and repayment terms, so that borrowers could make informed decisions. While these provisions did not mandate a formal affordability check, the emphasis on transparency helped borrowers understand the costs involved.

Secondly the UCCC provided protection to consumers in terms of certain 'safety net' provisions.⁸ These safety net provisions generally offered avenues for addressing unjust, unconscionable, or irresponsible lending practices. For example, section 70 of the UCCC allowed courts to intervene in credit contracts if they were found to be unjust, which could occur if the terms were harsh, oppressive, or unfairly weighted against the borrower.⁹

⁴ Wilson T 'Responsible lending or restrictive lending practices? Balancing concerns regarding over-indebtedness with addressing financial exclusion' in Ramsay I (ed) *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (Routledge 2008) 91-110. See also Australian Government 'Review of Australia's Consumer Policy Framework' (2008) <<https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer1.pdf>> (accessed 4 August 2023). In Australia each state and territory has its own agency responsible for consumer protection and fair-trading practices. These agencies offer information, assistance and dispute resolution services to consumers and businesses.

⁵ Niven D and Gough T 'The operation of the Uniform Consumer Credit Code' (2004) <https://consumeraction.org.au/wp-content/uploads/2012/05/DL60.pdf>.

⁶ S 6 of the UCCC. See also Wilson T *et al* 'Protecting the most vulnerable in consumer credit transactions' (2009) *Journal of Consumer Policy* 117.

⁷ S 14 and 15 of the UCCC. See also Wilson 2009 (n 6) 120.

⁸ Wilson 2009 (n 6) 117.

⁹ S 70(7) of the UCCC.

In deciding whether a contract is unjust or not, the court could consider factors such as the bargaining power of the parties, whether the borrower was able to understand the contract, and whether the borrower was in a vulnerable position (eg due to financial illiteracy or distress). This provision acted as a ‘safety net’ for consumers by allowing courts to declare credit contracts ‘unjust’ if they were unfair or if the borrower was misled into entering into a contract they could not reasonably afford. This provision had the same purpose as an affordability assessment, because lenders could be penalised for issuing loans that were beyond a borrower’s capacity to repay.

Another safety net provision involved the prohibition of unconscionable conduct by lenders.¹⁰ The UCCC provided that a consumer could challenge the fee as unconscionable, if such fee exceeded the credit provider’s reasonable costs of determining an application for credit and the initial administrative cost of providing the credit or exceeded the credit provider’s average reasonable cost of these items.¹¹ This provision therefore implied that the credit provider should ensure that a consumer could afford the loan he applied for, because if a lender exploited a borrower’s vulnerability—for example, by lending irresponsibly to someone clearly unable to repay—the borrower could seek relief under this provision.

Protection for consumers were also included in the form of provisions in the UCCC that allowed borrowers experiencing financial hardship to apply to the lender for a variation of the terms of their loan. In terms of this provision, borrowers could request an extension of the loan term, a postponement of payments, or reduced repayments due to temporary hardship. If the lender refused, the borrower could apply to a court or tribunal for a change in the loan terms. This provision provided a safety net for consumers who found themselves in financial difficulty, offering a way to avoid default and potential legal consequences.¹²

The scope and application of the safety net provisions in the UCCC were however criticised on a number of grounds. Research conducted as part of a joint research

¹⁰ S 72 of the UCCC.

¹¹ S 72(3) of the UCCC. See also Niven (n 5) 16.

¹² SS 66 – 68 of the UCCC. See also Niven (n 5) 26.

project between the Brotherhood of St Laurence¹³ and Griffith University's Centre for Credit and Consumer Law,¹⁴ revealed that the safety net provisions provided limited protection to low-income consumers.¹⁵ With regards to the disclosure requirements in the legislation, it was found that pre-contractual disclosure documents did not assist this group of consumers to understand many of the important terms in the contract, nor did it help them to know and understand their rights in terms of the agreement. Instead, they were driven by emotions such as a desperation for money and being too humiliated to admit that they do not understand the terms of the agreement they entered into. This is because low-income consumers have limited options in the credit market, not only because they have limited products to choose from, but also because lenders have eligibility criteria that is difficult for this group of consumers to meet. Because they had limited options in the credit market and they did not have the luxury of negotiating or comparing offers from different credit providers, it would be pointless to try to understand the credit agreement. To put it simply, they had to 'take whatever credit they could get'.¹⁶

The biggest concern with the safety net provisions were the enforcement thereof.¹⁷ The safety net provisions relied on individual consumers to take legal steps to activate the protection offered. For low-income consumers this presented particular difficulties as they did not have the means to institute legal action to exercise their rights. It was found that the effectiveness of the provisions would be limited if the protections could not be accessed or enforced in practice. Wilson describes the safety net provisions in the Australian consumer credit legislation to be, to a large extent, merely 'toothless tigers'.¹⁸

¹³ The Brotherhood of St. Laurence (BSL) is a social justice organisation working to prevent and alleviate poverty across Australia.

¹⁴ The Centre for Credit and Consumer Law is an academic centre, hosted by Griffith University Law School. The Centre for Credit and Consumer Law was established in March 2004 to be a source of expertise, and a centre of excellence, on credit and consumer law issues, and it has the overall objective of promoting the attainment of a fairer, safer, and more efficient marketplace, particularly for low income and vulnerable consumers. <https://www.parliament.nsw.gov.au/lcdocs/submissions/42263/sub%2023.pdf> (accessed 1 August 2025).

¹⁵ Wilson 2009 (n 6) 117.

¹⁶ Wilson 2009 (n 6) 117.

¹⁷ Wilson 2009 (n 6) 125.

¹⁸ Wilson 2008 (n 4) 93.

In 2007 to 2008 the Productivity Commission of the Australian Government did a review of the Australian Consumer Credit Policy Framework.¹⁹ The Productivity Commission²⁰ noted that ‘there has been considerable recent concern about the extent of lending to consumers perceived to have little prospect of paying off a loan’.²¹ The Productivity Commission further noted that there was no clear provision in the UCCC that specified that a lender should consider a borrower’s ability to repay a loan and no penalty for failing to do so.²² It recommended that vulnerable and disadvantaged consumers should be protected through the introduction of generic consumer credit legislation that provided enhanced complaint mechanisms, effective and accessible disclosure of information on products and services and increased efforts to improve financial education.²³

The UCCC was subsequently repealed on the 1 July 2010 through the promulgation of the National Consumer Credit Protection Act 2009²⁴ which aimed to provide a framework to ensure adequate and necessary protection to credit consumers.²⁵

9.2.3 The National Consumer Credit Protection Act 2009

9.2.3.1 Background

The Australian Government introduced the reform of consumer credit legislation in two phases.²⁶ Phase One of the consumer credit reform project commenced on 1 July 2010, with the introduction of the NCCPA. The NCCPA centralised credit regulation at a national level in Australia and led to more consistent protection for consumers across all states and territories in Australia.²⁷

¹⁹ Productivity Commission ‘Review of Australia’s Consumer Policy Framework’ (2008) <<https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf>> (accessed 4 August 2023).

²⁰ The Productivity Commission is an independent agency that serves as the Australian Government’s principal review and advisory body on microeconomic policy and regulation matters. It conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians. *Idem* II.

²¹ *Idem* 456.

²² *Idem* 456 - 457.

²³ *Idem* 299 – 300.

²⁴ Hereinafter referred to as ‘the NCCPA’.

²⁵ Niven (n 5) 3.

²⁶ Regulation Impact Statement: Addressing Avoidance of the National Consumer Credit Protection Act 2009 <https://oia.pmc.gov.au/sites/default/files/posts/2013/01/02-Consumer-Credit-Addressing-Avoidance-RIS.doc> (accessed 4 August 2023) 4.

²⁷ *Ibid.*

9.2.3.2 Licensing

The NCCPA brought about a comprehensive licensing regime for those engaging in credit activities. The licensing provisions are primarily set out in Chapter 2 and provides that a person cannot engage in a credit activity if the person does not hold an Australian credit licence or acts as an authorised representative of a licence holder.²⁸ Section 6 of the NCCPA provides a comprehensive definition of ‘credit activity’ which encompasses various roles and actions related to credit provision. A person is considered to be engaged in a credit activity if they are a credit provider under a credit contract,²⁹ carries on business providing credit,³⁰ offer a credit service,³¹ are a lessor under a regulated consumer lease,³² or function as a mortgagee or beneficiary under a regulated mortgage or guarantee.³³ The concept of ‘credit assistance’ as defined in section 8 of the NCCPA, includes activities such as suggesting that a consumer apply for a specific credit contract³⁴ or a consumer lease with a particular provider,³⁵ assisting with credit applications,³⁶ or advising consumers to remain in an existing credit arrangement.³⁷ Furthermore, section 9 of the NCCPA introduces the term ‘acts as an intermediary’ targeting individuals involved in multi-party credit arrangements, such as finance brokers and mortgage originators, requiring them to hold an Australian credit license.

The reason why the definition of credit activity is cast so broadly is to ensure that not only credit providers, but also people who assist with the provision of credit (for example mortgage brokers) are regulated. Malbon and Nottage point out that prior to the NCCPA, people who assisted with the provision of credit were not regulated. They were often poorly trained and sometimes they engaged in inappropriate practices such as unduly pressurising consumers into obtaining loans, filling in incorrect information in credit applications, and not informing consumers of inducements they may

²⁸ S 29 of the NCCPA.

²⁹ S 6(1) item 1(a) of the NCCPA.

³⁰ S 6(1) item 1(b) of the NCCPA.

³¹ S 6(1) item 2 of the NCCPA.

³² S 6(1) item 3 of the NCCPA.

³³ S 6(1) item 4 and 5 of the NCCPA.

³⁴ S 8(a) of the NCCPA.

³⁵ S 8(f) of the NCCPA.

³⁶ S 8(d) of the NCCPA.

³⁷ S 8(g) of the NCCPA.

receive.³⁸ In this respect the licensing obligation brought about by the NCCPA is clearly a significant consumer protection measure and an improvement on the UCCC which did not mandate credit providers to be licenced, leading to variations in standards and oversight.

Under section 47 of the NCCPA, license holders are subject to a range of obligations to uphold responsible conduct in the credit industry. These include ensuring that credit activities are conducted efficiently, honestly, and fairly,³⁹ providing adequate training for representatives,⁴⁰ and implementing internal dispute resolution procedures that meet the required standards.⁴¹ Licensees are also required to participate in approved external dispute resolution schemes, such as the Australian Financial Complaints Authority.⁴² Furthermore, licensees must maintain adequate insurance to compensate for any losses or damages resulting from contraventions of the NCCPA.⁴³

9.2.3.3 *Responsible lending*

One of the most important features of the NCCPA is that it introduced a 'responsible lending regime' into the Australian consumer credit landscape for the first time.⁴⁴ The aim with the responsible lending obligations in Australian consumer credit legislation is twofold; firstly, it is designed to ensure that important information about the credit contract are disclosed to the proposed consumer, and secondly it provides for an assessment to determine the suitability of the proposed credit to the prospective credit consumer.⁴⁵

As part of the disclosure obligations, the NCCPA provides that a licensee must give a credit guide to the consumer as soon as it becomes apparent to the licensee that it is likely to provide credit assistance to a consumer in relation to a credit contract.⁴⁶ This guide contains important information about the credit assistance provider, its

³⁸ Malbon J and Nottage L *Consumer Law & Policy in Australia and New Zealand* (2013) 246.

³⁹ S 47(1)(a) of the NCCPA.

⁴⁰ S 47(1)(g) of the NCCPA.

⁴¹ S 47(1)(h)(i) of the NCCPA.

⁴² S 47 (1)(ha)(i) of the NCCPA. See also paragraph 9.4.2 for a discussion of Australian Financial Complaints Authority.

⁴³ Ss 47(1)(j) and 48 of the NCCPA.

⁴⁴ Malbon (n 38) 296.

⁴⁵ Malbon (n 38) 244; 245.

⁴⁶ S 113(1) of the NCCPA.

obligations as well as any fees payable to it by the consumer.⁴⁷ The NCCPA further requires full disclosure of the costs of the services of the credit assistance provider to the consumer in the form of a written quotation setting out all fees and charges payable to the credit assistance provider prior to entering into the credit agreement.⁴⁸

The second part of the responsible lending obligations requires the licensee to assess whether the credit contract or the increased credit limit will be 'unsuitable' to the consumer.⁴⁹ This assessment must be done not more than 90 days prior to entering into the credit contract or increasing the credit limit under that credit contract.⁵⁰ To make an assessment under section 128, the credit provider must:

- '(a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract;⁵¹ and
- (b) make reasonable inquiries about the consumer's financial situation;⁵² and
- (c) take reasonable steps to verify the consumer's financial situation;⁵³ and
- (d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations;⁵⁴ and
- (e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.'⁵⁵

Section 131 provides a detailed definition of when a credit contract is considered unsuitable. It provides that a credit contract will be unsuitable if, at the time of the assessment, it is likely that the consumer *would not be able to comply with their obligations under the contract without experiencing substantial hardship*⁵⁶ and if the contract does not meet the consumer's stated requirements and objectives.⁵⁷

The meaning of 'substantial hardship' was deliberated in court. In the matter of *Silberman v Citigroup (Pty) Ltd*⁵⁸ the court held that the term should be interpreted to convey 'something more than mere hardship'. It is therefore presumed that the

⁴⁷ S 113(2) of the NCCPA.

⁴⁸ S 114 of the NCCPA.

⁴⁹ S 128 of the NCCPA.

⁵⁰ S 128 (ba) of the NCCPA.

⁵¹ S 130(1)(a) of the NCCPA.

⁵² S 130(1)(b) of the NCCPA.

⁵³ S 130(1)(c) of the NCCPA.

⁵⁴ S 130(1)(d) of the NCCPA.

⁵⁵ S 130(1)(e) of the NCCPA.

⁵⁶ S 131 (2)(a) of the NCCPA (own emphasis).

⁵⁷ S 131 (2)(b) of the NCCPA.

⁵⁸ [2011] VSV 514. See also Malbon (n 38) 247.

consumer will be unable to comply with their financial obligations without substantial hardship if they could only meet their obligations by selling their principal place of residence.⁵⁹

In terms of the NCCPA, consumers have several remedies available if a credit provider has granted credit recklessly or in violation of the responsible lending provisions. These remedies are designed to protect consumers from the negative consequences of unsuitable or reckless credit agreements. In terms of section 178, if a consumer suffers loss or damage due to the credit provider's failure to comply with the responsible lending provisions (such as granting reckless credit), the consumer himself, or ASIC on behalf of the consumer,⁶⁰ may apply to the court for an order to grant compensation to the consumer, including financial compensation⁶¹ or a restructuring of the loan to alleviate hardship.⁶²

9.2.3.4 *The National Consumer Credit Protection Regulations 2010*

The National Consumer Credit Protection Regulations⁶³ were introduced under the NCCPA on 1 July 2010 to support and provide detailed rules for the implementation of the NCCPA. The regulations provide the specific operational details and technical rules necessary to enforce the provisions of the NCCPA. They guide how certain sections of the Act should be applied in practice, ensuring consistency and clarity in its application. Chapter 2 of the NCCPR 2010 sets out detailed rules for credit license holders such as how to obtain a licence,⁶⁴ conditions applicable to license holders⁶⁵ and the obligations on licensees.⁶⁶ The regulations also include provisions on responsible lending such as the standards that must be met by credit guides,⁶⁷ quotes⁶⁸ and disclosure documents.⁶⁹

⁵⁹ *Ibid.*

⁶⁰ Ss 178(2)(a) and (b) of the NCCPA.

⁶¹ S 179(1)(c) of the NCCPA.

⁶² S 179(1)(d) of the NCCPA.

⁶³ Hereinafter referred to as 'the NCCPR 2010'.

⁶⁴ Reg 7 of the NCCPR 2010.

⁶⁵ Reg 9 of the NCCPR 2010.

⁶⁶ Reg 10 – 15 of the NCCPR 2010.

⁶⁷ Reg 26 – 28B of the NCCPR 2010.

⁶⁸ Reg 28 C and D of the NCCPR 2010.

⁶⁹ Reg 28E – F of the NCCPR 2010.

9.2.3.5 *The National Credit Code*

The NCCPA also includes the National Credit Code⁷⁰ as Schedule 1. The NCC aims to protect consumers in credit transactions by requiring transparency and fairness in all credit dealings. It ensures that consumers are provided with essential information to make informed decisions about credit products and are protected from unfair practices. Section 17 of the NCC outlines the information that should be disclosed in a credit contract and requires credit providers to clearly state the interest rates applicable to the agreement,⁷¹ the amount and number of repayments in terms of the agreement,⁷² the fees and charges payable under the agreement,⁷³ the frequency with which statements of account should be provided⁷⁴ etcetera. This helps consumers understand their financial obligations before entering into an agreement.

9.2.3.6 *Australian Securities and Investments Commission*

A comprehensive discussion of Australia's Twin Peaks system of financial regulation, which separates prudential oversight from market conduct supervision, is beyond the scope of this thesis. However, it is important to note that under this model, the Australian Securities and Investments Commission⁷⁵ serves as the market conduct regulator, with a mandate that includes promoting market integrity and advancing consumer protection. In this capacity, ASIC plays a central role in the implementation and enforcement of the NCCPA. To assist licensees to be compliant with the NCCPA, ASIC has issued regulatory guidelines with detailed, practical guidance on the steps to apply for a license and measures regulated entities should impose to ensure compliance with their responsible lending obligations. ASIC's regulatory guideline for responsible lending is called the Regulatory Guide 209 Credit licensing: Responsible lending conduct (RG 209).⁷⁶ RG 209 sets out ASIC's interpretation of the responsible lending obligations set out in Chapter 3 of the NCCPA and provides practical guidance for credit licensees and consumers to mitigate the risk of non-compliance. Together, the NCCPA, NCCPR 2010, the NCC and the RG209 form the core framework for

⁷⁰ Hereinafter referred to as 'the NCC'.

⁷¹ S 17(4) of the NCC.

⁷² S 17(7) of the NCC.

⁷³ S 17(8) of the NCC.

⁷⁴ S 17(9) of the NCC.

⁷⁵ Hereinafter referred to as 'ASIC'.

⁷⁶ ASIC 'Regulatory Guide 209 Credit licensing: Responsible lending conduct' (2019) <https://download.asic.gov.au/media/5403117/rg209-published-9-december-2019.pdf> (accessed 15 October 2024). Hereinafter referred to as 'RG 209'.

regulating consumer credit in Australia, setting standards for responsible lending practices and safeguarding consumers against predatory lending.

9.2.4 Consumer Credit Legislation Amendment (Enhancements) Act 130 of 2012

9.2.4.1 Background

As mentioned in paragraph 9.2.3 above, consumer credit reform in Australia were implemented in two phases. Phase One of the consumer credit reform project commenced on 1 July 2010, with the introduction of the NCCPA. In terms of section 128, credit providers were required to assess the consumer's financial position to determine whether he would be able to comply with the terms and obligations of the credit agreement without substantial hardship. The aim of this provision was to prevent reckless lending that might result in excessive debt.

Phase two of the credit reform project was introduced by the Consumer Credit Legislation Amendment (Enhancements) Act 130 of 2012.⁷⁷ The Enhancements Act strengthened the responsible lending obligations put in place during phase one by introducing amendments to existing credit legislation in Australia. The Enhancement Act made amendments to the NCCPA, the NCC as well as the National Consumer Credit Protection Regulations 2010.⁷⁸

In 2012 the Minister for Financial Services and Superannuation, Bill Shorten, remarked that the Enhancements Act offered enhanced protection to vulnerable consumers. He stated that:

'These reforms will stop loan sharks from exploiting vulnerable Australians. These laws will place reasonable limits on what lenders can charge. The cap on costs appropriately balances consumer protection while still allowing lenders a return that is commercial...to reduce the financial harm caused by lenders who ruthlessly impose excessive fees and charges simply because vulnerable consumers cannot obtain alternative access to credit'.⁷⁹

⁷⁷ Hereinafter referred to as 'the Enhancements Act'.

⁷⁸ Schedule 1 to 7 of the Enhancements Act.

⁷⁹ Treasury 'Payday borrowers better protected as bill passes Parliament' (2012) <https://ministers.treasury.gov.au/ministers/bill-shorten-2010/media-releases/payday-borrowers-better-protected-bill-passes-parliament> (accessed 4 October 2024).

These reforms, some of which are discussed below, were specifically aimed at providing additional protection to low-income credit consumers who often make use of these products.⁸⁰

9.2.4.2 Enhanced protection for lessees in terms of consumer leases

Prior to the reforms enacted through the Enhancements Act, consumer leases were subjected to less stringent regulatory oversight than credit contracts. Credit providers used this loophole and classified their contracts as consumer leases rather than credit contracts to avoid the more stringent regulatory regime for credit contracts. Consumers who hire goods via consumer leases are generally low-income consumers with fewer choices and therefore the impact of poor financial decisions on this group of consumers would be more pronounced.⁸¹ The Enhancements Act introduced several reforms that imposed similar obligations on providers of consumer leases as those offering credit contracts. This had the implication that providers of consumer leases had to carry out an assessment of the suitability of the lease considering the objectives of the consumers.⁸² Providers are prohibited from unconditionally representing to a consumer that they are eligible to enter a consumer lease where the lease is presumed to be unsuitable for the consumer.⁸³

9.2.4.3 Enhanced protection for consumers of short term and small amount credit contracts

As part of Phase 2 of the Australian Government's consumer credit reform initiative, the legislation was expanded to provide specific definitions and additional protection

⁸⁰ Parliament of the Commonwealth of Australia 'Revised Explanatory Memorandum – Consumer Credit Legislation Amendment (Enhancements) Bill 2012' <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4682_ems_c32e12a9-c183-4f19-80e3-c65d5e591d71%22> (accessed 14 October 2024).

⁸¹ Revised explanatory memorandum (n 80) paras 9.42; 9.75; 9.82 and 9.101.

⁸² Ali P *et al* 'Consumer leases and Indigenous consumers' (2017) *Australian Indigenous Law Review* 158.

⁸³ Enhancements Act Sch 1 item 19.

to borrowers who make use of short-term⁸⁴ and small amount credit contracts.⁸⁵ This was necessary because research indicated that the majority of consumers using these credit products had low incomes.⁸⁶ Consumers of short-term credit also often have multiple loans at the same credit provider and often the repeated or continued use of credit provided through these products resulted in consumers having to use an increasing proportion of their income to meet the repayments, causing these consumer to become ensnared in a debt spiral.⁸⁷ Providers of these products also used different tactics to avoid regulation.⁸⁸ The protection provided to customers of these goods was inadequate, and the Australian government had to tighten lending regulations because access to these products was especially important for low-income consumers.⁸⁹

The NCCPA was further amended to introduce section 133CA in terms whereof licensees were prohibited from offering short-term credit contracts to consumers. A breach of this prohibition would carry a civil as well as a criminal penalty.⁹⁰

⁸⁴ Schedule 3 of the Enhancements Act provides that: a credit contract is a short-term credit contract if:

- (a) the contract is not a continuing credit contract; and
- (b) the credit provider under the contract is not an ADI; and
- (c) the credit limit of the contract is \$2,000 (or such other amount as is prescribed by the regulations) or less; and
- (d) the term of the contract is 15 days or less; and
- (e) the contract meets any other requirements prescribed by the regulations.

⁸⁵ Schedule 3 of the Enhancements Act provides that: a credit contract is a small amount credit contract if:

- (a) the contract is not a continuing credit contract; and
- (b) the credit provider under the contract is not an ADI; and
- (c) the credit limit of the contract is \$2,000 (or such other amount as is prescribed by the regulations) or less; and
- (d) the term of the contract is at least 16 days but not longer than 1 year (or such other number of years as is prescribed by the regulations); and
- (e) the debtor's obligations under the contract are not, and will not be, secured; and
- (f) the contract meets any other requirements prescribed by the regulations.

⁸⁶ Regulation Impact Statement: The Regulation of Short Term, Small Amount Finance (June 2011) <http://ris.finance.gov.au/files/2011/09/RIS-Short-term-small-amount-finance.pdf> (accessed 1 October 2024).

⁸⁷ Regulation Impact Statement (n 86) 6.

⁸⁸ Ali P *et al* 'The Politics of payday lending regulation in Australia' (2013) 39 (2) *Monash University Law Review* 435.

⁸⁹ Dennis R and Swann T 'Consumption smoothing with basic income: The role of administrative loans' in J Mays, G Marston & J Tomlinson (eds) *Basic Income in Australia and New Zealand* (2016) 115, 121.

⁹⁰ Ss 133CA (1) and (2) of the NCCPA. In terms of s 133CA of the NCCPA the civil penalty was set at 2000 penalty units.

The Enhancements Act also established limits on fees and charges for small amount credit contracts thereby increasing affordability and mitigating the danger of consumer over-indebtedness.⁹¹ Credit providers were also restricted from providing new small amount credit contracts to consumers who already had multiple existing small amount credit contracts, reducing the likelihood of over-indebtedness through reliance on these loans.⁹²

9.2.4.4 *Rebuttable presumption of unsuitability*

Although licensees were allowed to offer ‘small amount credit contracts’, the responsible lending obligations enshrined in the NCCPA were inadequate to protect consumers of small amount credit contracts.⁹³ As a result, the responsible lending obligations in respect of small amount credit contracts were enhanced to make provision for a presumption of unsuitability. The presumption arises in situations where the contract is a small amount credit contract, and at the time the contract is entered into or the credit limit is increased,⁹⁴ the borrower is a debtor under another small amount credit contract⁹⁵ and the consumer is in default under that small amount credit contract,⁹⁶ or in the three-month period before the time the contract is entered into or the credit limit is increased, the consumer has been a debtor under two or more small amount credit contracts.⁹⁷

This presumption also applies where the consumer is a debtor under another small amount credit contract or is in default under that small amount credit contract at the time of the preliminary assessment⁹⁸ at the time the licensee provides the credit assistance⁹⁹ and at the time of the assessment.¹⁰⁰

⁹¹ Enhancements Act Sch 4.

⁹² Enhancements Act Sch 4.

⁹³ Ali (2013) (n 88) 411.

⁹⁴ S 133(3A)(3) of the NCCPA.

⁹⁵ S 133(3A)(i) of the NCCPA.

⁹⁶ S 133(3A)(a)(ii) of the NCCPA.

⁹⁷ S 133(3A)(b) of the NCCPA.

⁹⁸ S 118(3A) (a) of the NCCPA.

⁹⁹ S 123(3A) (a) of the NCCPA.

¹⁰⁰ S 131 (3A) (a) of the NCCPA.

9.2.4.5 Price regulation

Schedule 4 of the Enhancements Act introduced caps on the charges that may be imposed on borrowers under small amount credit contracts. As a result, the NCC was amended to introduce the following restrictions on fees and charges for small amount credit contracts:

- (a) an establishment fee of up to 20 per cent of the 'adjusted credit amount';¹⁰¹
- (b) a monthly fee of up to 4 % of the 'adjusted credit amount';¹⁰²
- (c) a fee payable in the event that the consumer defaults in making repayment under the contract;¹⁰³
- (d) a government fee, charge or duty payable in relation to the credit contract;¹⁰⁴

The fee that can be charged in terms of section 31A(1)(c) in the event of a default, is capped at a maximum of twice the 'adjusted credit amount' in relation to the relevant credit contract. The Act defines 'adjusted credit amount' in section 204(1) of the NCC as 'the first amount of credit that is, or is to be, provided under the contract.'

9.2.4.6 Protected earnings

As a further protection measure, the Enhancements Act amended the NCCPA to prohibit credit providers from entering into or offering to enter into a small-amount credit contract with consumers who receive at least 50 percent of their gross income as payments under the Social Security Act of 1991.¹⁰⁵ These consumers are perceived as more vulnerable and therefore a repayment cap of 20% of the consumer's gross income were set for repayments made by this group of consumers. In other words, small amount credit contract licensed lenders are prohibited from entering into a loan agreement with these vulnerable consumers that would require them to commit more than 20% of their gross income to repaying the loan. Howell regards the 'protected earnings requirement' imposed by the Enhancements Act as an additional responsible lending obligation imposed on credit providers.¹⁰⁶

¹⁰¹ S 31A(1)(a) of the NCC read with S 31A (2) of the NCC.

¹⁰² S 31A (1)(b) of the NCC read with S 31A (3) of the NCC.

¹⁰³ S 31A(1)(c) of the NCC.

¹⁰⁴ S 31A(1)(d) of the NCC.

¹⁰⁵ S 133CC(1) of the NCCPA read with reg 28 S of the NCCPR.

¹⁰⁶ Howell N 'Interest Rates Caps and Price Regulation in Consumer Credit' in J Malbon and L Nottage (eds) *Consumer Law & Policy in Australia and New Zealand* (2013) 311, 329-330.

9.2.4.7 Warning statements

In addition to the pre-contractual disclosure requirements applicable to all consumer credit contracts, the National Consumer Credit Protection Regulations 4 of 2012 mandate that small amount credit providers must display a special warning notice at their physical premises¹⁰⁷ or on their online platforms.¹⁰⁸ The warning statement must contain a warning that borrowing small amounts of money can be expensive, and includes mandatory text which advises borrowers to consider other options before borrowing. These options include making payment arrangements with utilities providers, accessing a free telephonic financial services helpline and approaching Centrelink¹⁰⁹ for a loan. The Act prescribes that this warning statement must be displayed prominently at the front door of a lender who is approached for a loan at his place of business.¹¹⁰ Lenders offering small amount credit contracts online, must display the warning prominently on their website.¹¹¹ If a consumer applies for credit over the phone, the lender must read the warning to the borrower before providing credit or credit assistance.¹¹² The format of the warning statements is set out in Schedule 7¹¹³ and 9¹¹⁴ of the regulations. The legislated warning statement makes specific reference to the MoneySmart website: *‘the government’s MoneySmart website shows you how small amount loans work and suggests other options that might help you’*. ASIC’s MoneySmart website provides general information to consumers about credit and debt, and includes a specific page on small amount loans with helpful tools and resources to make informed financial decisions.¹¹⁵

Notably, the Australian school curriculum allow teachers to incorporate consumer and financial literacy into various subject areas at all year levels. MoneySmart also provide lesson plans to assist and support teachers to develop lessons and also provide resources to support the teaching of consumer and financial literacy. Education Zone,

¹⁰⁷ Reg 28 XXA(1)(a) of the NCCPR 2012.

¹⁰⁸ Reg 28 XXB of the NCCPR 2012 .

¹⁰⁹ Centrelink is a government agency assisting consumers who are unemployed and looking for work financially. It also provides financial assistance to consumers who are sick or injured and cannot earn a salary.

¹¹⁰ Reg 28 XXA(1)(d) and (e) of NCCPR 2012.

¹¹¹ Reg 28 XXB(a) of NCCPR 2012.

¹¹² Reg 28 XXC read with reg 124 BA and reg 133 CBA of the NCCPR 2012.

¹¹³ Attached hereto as Annexure A.

¹¹⁴ Attached hereto as Annexure B.

¹¹⁵ Australian Government ‘MoneySmart’ <<https://moneysmart.gov.au/about-us>> (accessed 10 November 2024).

an initiative by the Australian Taxation Office, provides free online resources to help teachers explain key financial concepts related to taxation and superannuation to both primary and secondary school students.¹¹⁶ Talk Money,¹¹⁷ a free, national financial literacy program developed by Ecstra,¹¹⁸ provides facilitator led workshops in financial literacy. Teachers can also use a collection of tools and calculators from MoneySmart to develop money lessons to students using interactive sources.¹¹⁹ In Australia, rather than a ‘cooling-off period’, the government thus sought to slow down a consumer decision to enter into a small loan via a warning statement that lists risks and alternatives to small amount loans.

9.2.5 The Financial Sector Reform Act 87 of 2022

9.2.5.1 Background

In May 2022 the 47th Parliament of Australia was elected with Anthony Albanese as the new Prime Minister. On 8 September of the same year the Financial Sector Reform Bill was tabled in Parliament. This Bill groups together three separate policy measures, namely the Financial Accountability Regime, the Compensation Scheme of Last Resort, and consumer credit law reforms into one piece of legislation.¹²⁰ The financial sector reform measures relating to consumer credit is set out in Schedule 4. These reforms relate particularly to small amount credit contracts and lease agreements as these are credit products that people typically turn to when they are desperate, and do not consider themselves to have many other options. For this reason, the majority of people who use these products earn lower incomes and experience some level of financial vulnerability or hardship.¹²¹ The Bill, which became the Financial Sector Reform Act 87 of 2022¹²² on the 12th of June 2023, amended the NCCPA to provide

¹¹⁶ Australian Government Australian Taxation Office <https://www.ato.gov.au/about-ato/learn-about-tax-and-the-ato/education-zone> (accessed 22 January 2025).

¹¹⁷ Talk Money with Ecstra Foundation <https://talkmoney.org.au/> (accessed 22 January 2025).

¹¹⁸ Ecstra is an independent charitable foundation building financial wellbeing of Australians. <https://www.ecstra.org.au/> (accessed 1 August 2025).

¹¹⁹ Money Smart <https://moneysmart.gov.au/teaching/teaching-consumer-and-financial-literacy> (accessed 22 January 2025).

¹²⁰ Parliament of Australia, Bills Digest No. 20, (2022–23) https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd2223a/23bd020 (accessed 15 October 2024).

¹²¹ Submission by Consumer Action Law Centre on Financial Sector Reform Bill (2022) https://consumeraction.org.au/wp-content/uploads/2022/10/221007_FSR-Bill_Senate-sub_Final.pdf (accessed 24 October 2024).

¹²² Hereinafter referred to as ‘the FSRA’.

more protection to low-income consumers entering into small amount credit contracts and lease agreements.

9.2.5.2 *Enhanced protection for licensees under consumer leases*

As mentioned,¹²³ the Enhancements Act introduced several reforms that imposed similar obligations on providers of consumer leases as those offering other types of credit contracts. This had, amongst others, the implication that providers of consumer leases had to carry out an assessment of the suitability of the lease considering the objectives of the consumers.¹²⁴ This assessment obligation was expanded by the FSRA with the introduction of section 153(1A) which requires lessors of household goods to obtain and consider a consumer's account information for the preceding 90 days in the course of verifying the consumer's financial situation. These provisions address concerns that lessors are not making adequate inquiries about a consumer's expenses and capacity to pay before entering into the lease with the consumer. It also mirrors existing provisions relating to small amount credit contracts.¹²⁵

The FSRA further introduced an amendment to the NCC to impose a cap on the total amount payable by a lessee in connection with a consumer lease.¹²⁶ The maximum amount payable under a lease will be the base price of the goods,¹²⁷ plus the permitted delivery¹²⁸ and installation fees,¹²⁹ and a charge which is calculated by multiplying the base price by 0.04 multiplied by the number of whole months of the lease (up to 48 months).¹³⁰ For a lease with an indefinite period the charge is worked out by multiplying the base price by 1.92.¹³¹ Add-on fees are also counted in the price cap.¹³² Default

¹²³ Para 9.2.4.

¹²⁴ Ali 2017 (n 82) 158.

¹²⁵ Parliament of the Commonwealth of Australia 'Explanatory Memorandum to the Financial Sector Reform Bill 2022 and others (2022) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F6909_ems_a6bed40a-6605-4ffe-a06b-ea5b14b85835%22> (accessed 15 October 2024) para 4.203.

¹²⁶ S 175 AA of the NCC.

¹²⁷ S 175 AA(5)(a) of the NCC.

¹²⁸ S 175 AA(5)(c) of the NCC.

¹²⁹ S 175 AA(5)(d) of the NCC.

¹³⁰ S 175 AA(5)(b)(i) of the NCC.

¹³¹ S 175 AA(5)(b)(ii) of the NCC.

¹³² S 175 AA(5)(e) of the NCC. Also see section 175 AA(3) which describes an add on fee as any charge, whether interest bearing or not, that the lessee must pay the lessor, where the charge relates to a product or service that complements the use of the leased goods and may affect the lessee's rights or obligations under the lease.

fees and enforcement expenses are not counted and may be charged in addition, but there will be a limit in the regulations on how much can be charged as default fees.¹³³

9.2.5.3 *Enhanced protection for consumers of short-term credit contracts*

The Enhancements Act also placed a prohibition on entering into, or increasing the repayment period, of short-term credit contracts. The civil penalty for a contravention was 2000 penalty units.¹³⁴ In terms of section 133 of the FSRA the civil penalty was increased to 5000 penalty units thereby indicating a greater emphasis on safeguarding consumers from harmful practices by credit providers and discouraging credit providers from wrongful behaviour.

9.2.5.4 *Repeal of rebuttable presumption of unsuitability*

The FSRA further introduced section 124C into the NCCPA under the heading: *‘Written documentation in relation to the preliminary assessment for a small amount credit contract’*. In terms of this section, licensees must now document in writing their preliminary assessment¹³⁵ and the inquiries and verifications made in relation to the preliminary assessment that a small amount credit contract is not ‘unsuitable’ for a consumer.¹³⁶ Previously the legislation included a rebuttable presumption that a small amount credit contract was unsuitable if the consumer had two or more other small amount credit contracts in the past 90 days or was in default under another small amount credit contract. The amendment repealed the rebuttable presumption and the NCCPA now requires licensees to document in writing their assessment that a small amount credit contract is not unsuitable for a consumer. This includes inquiries and verifications made in relation to the assessment.¹³⁷ This approach simplified the responsible lending requirements that apply specifically to small amount credit contracts.¹³⁸

¹³³ S 175 AA(4) of the NCC.

¹³⁴ See para 9.2.4.3 fn 84 and 85. Section 4 AA of the Crimes Act 1914 defines a ‘penalty unit’ as equivalent to \$330 AUD for offences committed on or after 7 November 2024.

¹³⁵ S 124 C (1)(d) of the NCCPA.

¹³⁶ S 124 C (1)(d) of the NCCPA.

¹³⁷ S 124 C (1)(a – e) of the NCCPA.

¹³⁸ Explanatory memorandum to the Financial Sector Reform Bill (n 125) par 4.50.

9.2.5.5 Price regulation

Under the reforms introduced by the FSRA, small amount credit contracts and consumer leases in Australia are subject to stricter regulations aimed at promoting transparency and protecting consumers. One key change is that small amount credit contracts must have equal repayments scheduled at regular intervals over the life of the loan, though limited exceptions may apply.¹³⁹ This adjustment ensures that payments are predictable, helping borrowers manage their finances more effectively.¹⁴⁰

Additionally, lenders can no longer charge monthly fees on small amount credit contracts for any remaining term if a borrower repays the loan early.¹⁴¹ This change supports consumers who can settle their debts ahead of schedule by eliminating unnecessary fees, ultimately making early repayment a more attractive and affordable option.

In terms of amendments to the NCCPA introduced in terms of the FSRA, the total cost of consumer leases was capped. The maximum amount payable by a lessee includes the base price of the leased goods, any allowable delivery and installation fees, and a monthly charge calculated at 4% of the base price, multiplied by the lease duration in whole months (up to a maximum of 48 months). For leases with indefinite terms, this monthly charge is set at 1.92 times the base price. Importantly, while additional fees are generally included in this price cap, default fees and enforcement expenses may still be charged separately, though regulations set a limit on these charges to protect consumers from excessive fees in cases of non-payment.¹⁴²

The reforms also mandated greater transparency for consumers by requiring lessors of household goods to disclose both the base price of the leased items and the total difference between this base price and the full amount payable over the lease period. This disclosure enables consumers to make informed comparisons between purchasing and leasing, helping them understand the true cost of financing.¹⁴³

¹³⁹ S 133 CD of the NCCPA.

¹⁴⁰ Explanatory memorandum to the Financial Sector Reform Bill (n 125) par 4.200.

¹⁴¹ S 31 C of the NCC.

¹⁴² S 175 AA of the NCC.

¹⁴³ S 174 (1A) of the NCC

Finally, consumer leases with indefinite terms, which were previously exempt from regulation, are now subject to oversight under the new rules. Only leases with terms of less than four months remain unregulated, ensuring that longer-term arrangements provide the same consumer protections, regardless of whether they have a fixed duration.¹⁴⁴

9.2.5.6 *Protected earnings*¹⁴⁵

As mentioned previously,¹⁴⁶ credit providers were prohibited from entering into small amount consumer credit agreements with consumers who received at least 50 percent of their gross income as payments under the Social Security Act of 1991. A repayment cap requiring them not to commit more than 20 percent of their gross income into repaying the loan were set in terms of the Enhancements Act.¹⁴⁷ In terms of this provision 80 percent of the consumer's gross income was protected and could not be used to repay small amount credit contracts. The protected portion of the income was referred to as the 'protected earnings amount'.

The FSRA introduced an amendment to section 133CC and section 156B of the NCCPA to enable the Government (through the National Consumer Credit Protection Regulations 2010) to set a protected earnings amount on small amount credit contract repayments and repayments under consumer leases for household goods for *all* consumers, not just consumers who receive income in terms of the Social Security Act of 1991. The main change is that regulations made for the purposes of amended subsection 133CC (1) and section 156B (1) do not need to prescribe a protected earnings amount in respect of a prescribed class of consumers. Rather, the new regulation-making power can be used to ensure all consumers are covered by a protected earnings amount (although different amounts may apply to different consumers).¹⁴⁸

¹⁴⁴ S 177 AA (2) of the NCC.

¹⁴⁵ Bills Digest (n 120) 15.

¹⁴⁶ Para 9.2.4.6.

¹⁴⁷ Revised explanatory memorandum to the Enhancements Act (n 80) par 5.2.

¹⁴⁸ Explanatory Memorandum to the Financial Sector Reform Bill (n 125) para 4.29.

In terms of the explanatory memorandum this flexibility is needed as the use of these products expose all consumers to a degree of risk, regardless of the consumer's income. The regulations were also amended to provide a protected earnings amount of 10 percent of a person's net (after tax and other deductions) income for all consumers. This will mean that a licensee cannot enter into a small amount credit contract or a lease of household goods with a person if the total repayments in terms of the agreement would exceed 10 percent of the consumer's net income.¹⁴⁹

The research on protected earnings in the context of the South African debt enforcement framework, with specific reference to emoluments attachment orders, warrants further consideration and could serve as a foundation for proposals aimed at establishing fair limits on credit instalment repayments.¹⁵⁰

9.2.5.7 Warning statements

Previously licensees were required to display information (also referred to as warning statements) to warn consumers about the consequences of the small amount credit agreements they enter into.¹⁵¹ The FSRA introduced a requirement for lessors under consumer leases of household goods to provide consumers with a similar warning statement designed to assist consumers to make better decisions as to whether to enter into a consumer lease, including informing consumers of the availability of alternatives to these leases.¹⁵² Where the previous legislation were prescriptive regarding the content of the warning statement,¹⁵³ the measures introduced by the FSRA provide ASIC with the power to prescribe the requirements for the statement (including the content and when the warning statement has to be provided) to maximise the impact on consumers.¹⁵⁴ The purpose of these changes is to ensure that

¹⁴⁹ Explanatory memorandum to the Financial Sector Reform Bill (n 125) para 4.33. See also reg 28 LCA and LCB of the NCCPR.

¹⁵⁰ Coetzee H and Van Sittert C 'Reflections on recent developments regarding wage garnishments in South Africa' (2018) *International Journal of Private Law* 117. See also Van Sittert C and Haupt F 'The Incidence of and Undesirable Practices relating to Garnishee Orders – a follow up report' (2013) <https://www.adraonline.co.za/file/5e0b80159406fe9270c9415d60db0d64/2013-garnishee-orders-follow-up-report.pdf> (accessed 12 February 2020). See also Van der Merwe S *Developing a procedural framework for advanced debtor protection: the case of emolument attachment orders* (LLD thesis, Stellenbosch University 2022) 289.

¹⁵¹ S 124 B of the NCCPA.

¹⁵² S 147 A and s 156 A of the NCCPA.

¹⁵³ Para 9.2.4.7.

¹⁵⁴ S 147 A(2) and 156 A(2) of the NCCPA.

consumers receive relevant and effective information about the financial implications of entering into or using a small amount credit contract. This will assist consumers to make informed decisions about whether to enter into the credit contract. It can also assist them to understand what alternatives are available and how they can be of assistance to particular consumers.¹⁵⁵

9.2.5.8 *Anti-avoidance measures*

In Australia, there was consistent evidence of the harms caused by pawn loans.¹⁵⁶ Unlike payday loans and consumer leases, pawn loans had not been subject to any restrictions on fees or interest rates. Pawnbrokers were not required to belong to an external dispute resolution scheme, meaning their customers had to apply to a court or tribunal¹⁵⁷ to enforce their limited legal rights.¹⁵⁸ As a consequence, these rights were almost never enforced.¹⁵⁹ This encouraged unscrupulous lenders who, as a result of stricter regulation of consumer leases and small-amount credit contracts, sought to characterise themselves as pawnbrokers to evade regulation under the NCCPA.¹⁶⁰

As a further consumer protection measure, the FSRA also introduced an amendment to the NCCPA to introduce a prohibition on entering into,¹⁶¹ beginning to carry out¹⁶² or carrying out¹⁶³ a scheme for avoidance purposes. 'Avoidance purposes' is described in the Act as any of the following actions:

- '(2) Each of the following is an avoidance purpose:
 - (a) to prevent a contract from being a small amount credit contract or a consumer lease;
 - (b) to cause a contract to cease to be a small amount credit contract or a consumer lease;
 - (c) to avoid the application of a provision of this Act to a small amount credit contract or a consumer lease;

¹⁵⁵ Explanatory memorandum to the Financial Sector Reform Bill (n 125) par 4.110.

¹⁵⁶ O'Brien L *et al* 'Lending on the edge: Pawnbroking in Australia (2024) 43(1) *University of Queensland Law Journal* 1 – 39.

¹⁵⁷ A tribunal like the NSW Civil and Administrative Tribunal established in terms of the Civil and Administrative Tribunal Act can assist consumers to resolve a dispute with a pawnbroker. See NSW Civil and Administrative Tribunal <https://ncat.nsw.gov.au/about-ncat/what-is-ncat.html> (accessed 1 August 2025).

¹⁵⁸ O'Brien (n 156) 34.

¹⁵⁹ O'Brien (n 156) 34.

¹⁶⁰ O'Brien (n 156) 35.

¹⁶¹ S 323 A(1)(a) of the NCCPA.

¹⁶² S 323 A(1)(b) of the NCCPA.

¹⁶³ S 323 A(1)(c) of the NCCPA.

- (d) to avoid the application of a provision of this Act to a contract that has ceased to be a small amount credit contract or a consumer lease;
- (e) to avoid the application of a product intervention order made under Part 6-7A.'

These provisions explicitly prohibit providers of payday loans and consumer leases from structuring their products in such a way as to avoid the application of the NCCPA. Failure to comply with the prohibition attracts high penalties which reflect the serious financial impact that avoidance schemes have on consumers and regulated industry participants, and the need for a strong deterrent.¹⁶⁴ It also supports ASIC's ability to take effective enforcement action in respect of these schemes.

9.3 The assessment of affordability in Australia

9.3.1 The unsuitability test

As stated, Australian consumer credit legislation places an obligation on a licensee to assess whether a credit contract or an increased credit limit under a credit contract will be 'unsuitable' to the consumer.¹⁶⁵ In order to determine whether the credit or the credit increase is unsuitable or not, the credit provider must make certain inquiries and take certain steps to verify the consumer's financial position. Section 130 of the NCCPA requires that, before entering into a credit contract, the credit provider must conduct reasonable inquiries into the consumer's requirements and objectives in relation to the proposed credit agreement.¹⁶⁶ The credit provider is also obligated to make reasonable inquiries about the consumer's financial situation;¹⁶⁷ and take reasonable steps to verify the accuracy of that information.¹⁶⁸ In contrast, section 131 of the NCCPA prescribes the actual test for determining whether a credit agreement is unsuitable. It provides that a credit product will be unsuitable if the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship, if the contract is entered into or the credit limit is increased in the period covered by the assessment;¹⁶⁹ or if the contract will not meet the consumer's requirements or objectives if the contract is entered into or the credit limit is increased in the period covered by the assessment.¹⁷⁰

¹⁶⁴ Explanatory memorandum to the Financial Sector Reform Bill (n 125) par 4.286.

¹⁶⁵ S 128 and 129 of the NCCPA. Also see para 9.2.3.3; 9.2.4.4; 9.2.5.2.

¹⁶⁶ S 130(1)(a) of the NCCPA.

¹⁶⁷ S 130(1)(b) of the NCCPA.

¹⁶⁸ S 130(1)(c) of the NCCPA.

¹⁶⁹ S 131(2)(a) of the NCCPA.

¹⁷⁰ S 131(2)(b) of the NCCPA.

9.3.1.1 Reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract

As mentioned above, the NCCPA established ASIC as the single national regulator for consumer credit across all states and territories in Australia.¹⁷¹ To assist licensees to be compliant with the NCCPA, ASIC has issued regulatory guidelines, referred to as the RG 209,¹⁷² with detailed, practical guidance on the measures regulated entities should impose to ensure compliance with their responsible lending obligations.

In terms of the assessment obligation under section 128, credit providers have to make reasonable inquiries about the consumer's requirements and objectives for entering into the credit contract. RG 209.46 provides practical guidance to regulated entities on what these inquiries should entail and provides that it should help the credit provider to understand why a credit product is sought by the consumer, and what terms and features are important to them, so that that the credit provider can determine whether the type, length, rate, terms, credit limit, special conditions, charges and other aspects of the proposed contract meet this purpose, or suggest contracts that do match the purpose for which the consumer has sought credit.

To fulfil this obligation RG 209.51 provides that the credit provider should obtain information about:

- '(a) the amount of credit the consumer needs or the maximum amount of credit sought (e.g. the desired limit for a credit card);
- (b) the timeframe for which the credit product is required;
- (c) the purpose for which the credit product is sought;
- (d) whether the consumer seeks particular features or flexibility, the relative importance of different features to the consumer, and whether the consumer is prepared to accept any additional costs or risks associated with these features; and
- (e) whether the consumer requires any additional expenses, such as premiums for insurance related to the credit, to be included in the amount financed, and whether the consumer is aware of the additional costs of these expenses being financed.'

ASIC requires the credit provider to obtain specific information that will enable the credit provider to understand what is important to the consumer in relation to the credit

¹⁷¹ Para 9.2.3.6.

¹⁷² *Ibid.*

product.¹⁷³ A credit contract is unsuitable if the consumer's requirements and objectives are to receive a certain amount of credit, which could be provided through one credit contract, but the credit provider offers an arrangement to provide that amount through two or more small amount credit contracts or medium amount credit contracts that would be more expensive for the consumer.¹⁷⁴ It is clear that a 'tick box approach' is not prescribed, but rather a consumer focussed approach that looks at the specific requirements of the individual consumer.

9.3.1.2 *Reasonable inquiries about the consumer's income*

With regards to the requirement set out in section 130(1)(b) to make reasonable inquiries about the consumer's financial situation, RG 209 provides that the consumer's income is a key factor that affects their capacity to meet financial obligations and how sensitive they may be to errors in the assessment. The credit provider must therefore obtain information about the amount, frequency and source of income, and changes that are reasonably foreseeable.¹⁷⁵

It is, however, not sufficient to merely identify how much income the consumer has received in the last pay period. Instead, the credit provider must determine whether the income received by the consumer is consistent and likely to remain at that level for the term of the credit product being considered. If the consumer has casual or seasonal employment, information about the variations in hours and pay that may be expected is necessary.¹⁷⁶ The source of the consumer's income may also be important. For example, it may be necessary to determine whether all or part of the consumer's income is comprised of payments under the Social Security Act of 1991;¹⁷⁷ derived from assets and investments (e.g. rental income, dividends or other returns on investments or superannuation);¹⁷⁸ or dependent on third parties (e.g. maintenance or child support payments, or funds that are voluntarily made available by other persons, such as a spouse or family member, and that are dependent on the expressed willingness of that person to continue to make funds available).¹⁷⁹ If there

¹⁷³ RG 209.52.

¹⁷⁴ RG 209.227..

¹⁷⁵ RG 209.61.

¹⁷⁶ RG 209.62.

¹⁷⁷ RG 209.63(a).

¹⁷⁸ RG 209.63(b).

¹⁷⁹ RG 209.63(c).

are foreseeable reductions to the amount or frequency of income, the credit provider may also need information to assist in determining potential lower income amounts.¹⁸⁰ For example, if a consumer is approaching retirement, and will still be making repayments on the credit product after their expected retirement age, the credit provider will need to determine whether this event is likely to change their income, and information about the amount that is expected to be available.¹⁸¹

Likewise, if the income is of a kind that has a known end date which will occur during the term of the loan (e.g. family benefit payments that cease when dependants reach a certain age), the credit provider should have regard to the effect that such change to income is likely to have on the consumer's overall financial situation.¹⁸²

9.3.1.3 Reasonable steps to verify the consumer's expenses

With regards to the obligation to take reasonable steps to verify the consumer's financial situation set out in section 130(1)(c), RG 209 also provides valuable guidance. It is recognised that, whilst it is a requirement for licensees to take reasonable steps to verify information that is obtained about a consumer's financial situation, information provided as part of the application process may not, in all cases, be reliable.¹⁸³ This may be for a range of reasons, including an overstatement of income or understatement of expenses by the consumer due to a mistake or misunderstanding;¹⁸⁴ a mistake or negligence by a person who is assisting the consumer to make an application;¹⁸⁵ and deliberate fraud by the consumer or a person who is assisting the consumer to make an application.¹⁸⁶

All parties to a credit transaction are obligated to refrain from making false or misleading representations relating to matters that are material to entry into a credit product or in attempting to induce another person to enter a credit product.¹⁸⁷ When credit is granted based on false or misleading information, a provision similar to the

¹⁸⁰ RG 209.64.

¹⁸¹ RG 209.64(a).

¹⁸² RG 209.64(b).

¹⁸³ RG 209.48.

¹⁸⁴ RG 209.48(a).

¹⁸⁵ RG 209.48(b).

¹⁸⁶ RG 209.48(c).

¹⁸⁷ RG 209.49.

South African NCA's section 81(4) are available under Australian law. Specifically, sections 154 and 179U of the NCC outline protections for the lender. These provisions establish that if a consumer or broker makes a false or misleading statement to obtain credit, they may be held liable for any resulting loss or damage. In such cases, any compensation awarded to the consumer or any other remedial orders may be set aside, reflecting the consumer's or broker's contributory misconduct.¹⁸⁸

This, however, does not mean that credit providers can merely rely on the assumption that consumers provide true information about their financial situation. Reasonable steps should also be taken to ensure the information that is considered when the assessment is done, is true. For example, if other circumstances or information raise doubt about the information provided, it is reasonable to take steps to verify the true situation.¹⁸⁹ RG 209 provides that whatever amounts to taking 'reasonable steps to verify' will depend on the circumstances of the matter.¹⁹⁰ The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry also noted in its interim report at para 2.2.3 that: 'Verification calls for more than taking the consumer at his or her word.'¹⁹¹ The Royal Commission indicates that verifying a consumer's financial information is often not difficult. In most cases, individuals receive their income via direct deposit into a bank account, making bank statements a readily accessible source for confirming income. These statements are also likely to reflect the consumer's regular expenses. If the credit provider is the authorised deposit taking institution where the consumer holds his account, access to this information will even be easier.¹⁹²

Information about the consumer's current expenses and reasonably foreseeable expenses will help the credit provider to determine how much of the consumer's income is likely to be available for meeting new financial obligations; and if there is a shortfall, whether the consumer is likely to be able and willing to reduce some

¹⁸⁸ *Ibid.*

¹⁸⁹ RG 209.50.

¹⁹⁰ RG 209.51.

¹⁹¹ RG 209.50. Also The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Interim Report Volume 1 <https://www.royalcommission.gov.au/banking/interim-report> (accessed 1 August 2025).

¹⁹² The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Interim Report Volume 1 <https://www.royalcommission.gov.au/banking/interim-report> (accessed 1 August 2025) para 2.2.3.

expenditure to meet the new financial obligations.¹⁹³ Despite this recommendation, the guidelines acknowledge that some expenses are difficult to reduce or to eliminate. For example, debt obligations, such as loan repayments and taxes;¹⁹⁴ essential expenses like rent, utilities, as well as food, childcare, health services, and transport costs.¹⁹⁵ It might however not be possible to determine with certainty if a consumer's present spending on these expenses is necessary or whether they could cut back if necessary.

It is therefore necessary for credit providers to obtain further information from the consumer.¹⁹⁶ Some of these expenses may be higher because of the number and kind of dependants they support (e.g. children or adult dependants)¹⁹⁷ or because the consumer live in a location that involves higher prices for goods and services or that necessitates additional travel.¹⁹⁸ Consumers may also have higher expenses due to personal lifestyle choices or preferences. To determine whether a proposed credit product aligns with the consumer's requirements and objectives, it is often necessary to gather additional information from the consumer. This can help determine whether the consumer considers such expenditure as essential to maintain, and whether taking on new financial obligations would compromise their ability to do so, potentially making the credit unsuitable.¹⁹⁹

RG 209 further recognises that many consumers who apply for credit are in shared living situations, including spouses, partners or housemates and may share some liabilities and expenses. Credit providers should therefore ensure that they obtain the correct information from the consumers to enable them to determine the portion of expenses that the consumer who applies for the credit is responsible for.²⁰⁰ For example, the consumer could be requested to provide confirmation of their explanation of the sharing arrangements or, if this raises privacy concerns for the consumer or those other persons, the credit provider could consider whether the pattern of

¹⁹³ RG 209.65.

¹⁹⁴ RG 209.67(a).

¹⁹⁵ RG 209.67(b).

¹⁹⁶ RG 209.70.

¹⁹⁷ RG 209.71(a).

¹⁹⁸ RG 209.71(b).

¹⁹⁹ RG 209.72.

²⁰⁰ RG 209.77.

outgoings in the consumer's transaction statements supports their statement that they only need to meet a portion of larger overall outgoings.²⁰¹

From the above it is clear that Australian credit legislation does not use a minimum expense norm table like its South African counterpart to determine whether a consumer's expenses are reasonable. Instead, Australian credit legislation makes provision for the fact that different circumstances can influence expenses from consumer to consumer. The credit providers obligation to make inquiries and verify information is not limitless. The NCCPA requires credit providers to make inquiries about the consumer and to verify information about the consumer's financial situation, to a *reasonable standard*. Credit providers need to apply their own judgment in determining what is reasonable in the individual circumstances.²⁰²

9.4 Assistance for consumers who were victims of reckless lending

9.4.1 Comprehensive enforcement power of Australian credit regulator

As indicated, ASIC is the regulatory authority in Australia responsible for enforcement of the NCCPA.²⁰³ In Australia, any complaint against a credit provider, including complaints concerning reckless lending, must first be raised by the consumer directly with the credit provider.²⁰⁴ ASIC requires financial firms to have an internal complaints resolution process in place. The Regulatory Guide 271: Internal dispute resolution was updated in September 2021 and came into effect on the 5th of October 2021.²⁰⁵ In terms of the guide, credit providers must respond to general complaints, which will include complaints about irresponsible lending, within 30 calendar days from receiving the complaint.²⁰⁶ If the credit provider's response is unsatisfactory or the complaint cannot be resolved, the consumer can approach AFCA directly to act as an external dispute resolution scheme.²⁰⁷

²⁰¹ RG 209.78.

²⁰² RG 209.81.

²⁰³ Para 9.4.1.

²⁰⁴ AFCA 'Before Making a Complaint' <https://www.afca.org.au/make-a-complaint/complain> (accessed 20 October 2024).

²⁰⁵ ASIC Regulatory Guide 271 *Internal Dispute Resolution* (2021) <https://download.asic.gov.au/media/3olo5aq5/rg271-published-2-september-2021.pdf> (accessed 11 October 2024).

²⁰⁶ RG 271.56.

²⁰⁷ RG 271.111.

ASIC has the mandate to investigate breaches of consumer credit laws, including those related to irresponsible lending, misconduct by credit licensees or systemic issues in the credit industry.²⁰⁸ Complaints about breaches can be reported by consumers or stakeholders like financial counsellors. Some breaches are also discovered through ASIC's own monitoring and surveillance work.²⁰⁹

The NCCPA grants comprehensive enforcement power to ASIC to act against credit providers who fail to meet responsible lending obligations. For example, ASIC can issue a banning order to prohibit a credit provider from engaging in credit activities if it was found that the credit provider contravened credit legislation.²¹⁰ A banning order can have serious consequences for a credit provider as it prohibits engagement in any credit activity.²¹¹ The order can be for a specified period or permanently.²¹²

ASIC can further seek civil penalties in court against credit providers who breach responsible lending obligations. If a court makes a declaration that a civil penalty provision has been contravened, it may order the wrongdoer to pay a pecuniary penalty.²¹³ The responsible lending provisions in the NCCPA as well as the provisions requiring credit providers to be licensed are examples of civil penalty provisions.²¹⁴ If a court makes a declaration that a civil penalty provision has been contravened, it may order the wrongdoer to pay the Commonwealth a civil pecuniary penalty up to the maximum amount for the relevant provision. In a civil penalty proceeding, a lower standard of proof ('balance of probabilities') applies to the evidence than in criminal

²⁰⁸ S 12A of the Australian Securities and Investments Commission Act 2001.

²⁰⁹ ASIC 'Approach to enforcement' <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>> (accessed 7 November 2024).

²¹⁰ S 80 of the NCCPA. In terms of the NCCPA 'credit legislation' means:

- (a) This Act
- (b) The Transitional Act
- (c) Division 2 of Part 2 of the ASIC act and regulations made for the purpose of that Division, and
- (d) Any other Commonwealth, State or Territory legislation that covers conduct relating to credit activities (whether or not it also covers other conduct), but only in so far as it covers conduct relating to credit activities.

²¹¹ S 81(1) of the NCCPA.

²¹² S 81(2) of the NCCPA.

²¹³ S 167 of the NCCPA.

²¹⁴ Ss 29 and 128 of the NCCPA.

proceedings. However, in civil penalty proceedings the court must be satisfied to a higher degree than in other civil matters.²¹⁵

The NCCPA also empowers the court to make a range of other orders. Examples are relinquishment orders,²¹⁶ disqualification orders,²¹⁷ compensation orders²¹⁸ or orders requiring the wrongdoer to establish a compliance, education or training program to ensure future compliance.²¹⁹

Courts can also impose criminal sanctions against credit providers if breaches of responsible lending obligations involve dishonesty and fraud.²²⁰ The consequences of a criminal conviction are generally more significant than the consequences of a finding of civil liability. Serious offences (e.g. breaches of directors' duties, false or misleading disclosure, and dishonest conduct) can attract prison terms of up to 15 years or significant criminal fines. An individual convicted of a criminal offence may be prevented from performing certain roles (e.g. company director). In many cases, a recorded criminal conviction for offences involving serious misconduct that includes false or misleading disclosure and dishonest conduct cannot be expunged from a person's record. The purpose of this is to discourage future misconduct.²²¹

ASIC can also take a range of other enforcement actions designed to protect consumers. These actions do not need court intervention but at times ASIC will pursue these remedies in conjunction with court action.²²² Examples of these actions include:

²¹⁵ ASIC 'Approach to enforcement' <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/> (accessed 7 November 2024).

²¹⁶ S 167 C of the NCCPA. In terms of this section a court may order a person to pay the Commonwealth an amount equal to the benefit derived and detriment avoided because of a contravention of a civil penalty provision.

²¹⁷ S 86(2) of the NCCPA. In terms of this section a disqualification order will disqualify the wrongdoer from entering into credit agreements.

²¹⁸ S 178 of the NCCPA. This is an order by court to compensate investors or consumers who have suffered a loss as a result of the contravention.

²¹⁹ ASIC 'Approach to enforcement' <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/> (accessed 7 November 2024).

²²⁰ Ss 171, 172 and 173. See also ASIC 'Approach to enforcement' <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/> (accessed 7 November 2024).

²²¹ ASIC 'Approach to enforcement' <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/> (accessed 7 November 2024).

²²² ASIC 'Approach to enforcement' <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/> (accessed 7 November 2024).

restrictions on licensed activity,²²³ product intervention orders,²²⁴ infringement notices in the event of a breach of legislative provisions,²²⁵ as well as court enforceable undertakings.²²⁶

While both ASIC and its South African counterpart, the NCR, have regulatory powers to enforce responsible lending and penalise reckless lending practices, ASIC's direct criminal prosecution powers, banning orders, and ability to negotiate enforceable undertakings give it a more comprehensive and flexible enforcement toolkit compared to the NCR. The NCR, on the other hand, operates primarily through the Tribunal and relies heavily on debt restructuring and civil penalties.

This means that ASIC may have more direct and varied enforcement mechanisms than the NCR, especially in terms of immediate action (banning orders, criminal prosecution) and flexibility in remedies (e.g., enforceable undertakings).

9.4.2 The Australian Financial Complaints Authority²²⁷

As mentioned in paragraph 9.4.1, AFCA is an independent external dispute resolution scheme that deals with consumer and small business disputes about financial firms.²²⁸ This includes complaints about irresponsible lending which led to over-indebtedness. AFCA's purpose is to provide fair, independent and effective solutions for financial disputes. All licensed financial firms in Australia are required by law to be members of AFCA.²²⁹ AFCA commenced operation on 1 November 2018 and replaced the Financial Ombudsman Service, the Credit and Investments Ombudsman and the

²²³ In terms of Regulatory Guide 98 *ASIC's powers to suspend, cancel and vary AFS licences and make banning orders*, ASIC may suspend, cancel or vary a credit providers credit license.

²²⁴ In terms of Regulatory Guide 272 *Product intervention power* ASIC can make orders to ban financial or credit products or a feature of those products, or require product issuers to provide improved information to consumers with those products.

²²⁵ In terms of Regulatory Guide 73 *Continuous disclosure obligations: Infringement notices*, ASIC can issue infringement notices to credit providers who are in breach of legislative provisions if the alleged misconduct is relatively minor or less serious and does not indicate a broader pattern of misconduct by the entity or within the industry. See also ASIC 'Approach to enforcement' <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>> (accessed 7 November 2024).

²²⁶ In terms of Regulatory Guide 100 *Court enforceable undertakings* ASIC can accept court enforceable undertakings to improve and enforce compliance with the law. See also ASIC 'Approach to enforcement' <<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>> (accessed 7 November 2024).

²²⁷ Hereinafter referred to as 'AFCA'.

²²⁸ See para 9.4.1 above.

²²⁹ S 47 of the NCCPA.

Superannuation Complaints Tribunal.²³⁰ In terms of the Corporations Act 2001, ASIC governs AFCA in terms of AFCA's Complaint Resolution Scheme Rules.²³¹ These rules provide transparency regarding how AFCA deals with complaints.²³²

In a set of publications known as 'Approaches', AFCA describes how they handle complaints pertaining to a range of topics, including responsible lending. In January 2024, AFCA's 'Approach to Responsible Lending' was revised and released.²³³ This 69-page strategy describes how AFCA investigates complaints about responsible lending pertaining to different loan products. It was developed to ensure that, in all circumstances, AFCA's approach in this area is transparent, uniform, thoroughly recorded, and equitable. This strategy paper outlines the complaint procedure for irresponsible lending, including how the AFCA determines whether financial businesses are abiding by their duties and how responsible lending should be evaluated in accordance with industry rules, legislative requirements, and regulatory recommendations. In the case that a business breaches its responsible lending obligations, it also outlines how AFCA calculates loss and assesses benefits to determine compensation and how they consider all pertinent information to reach a decision that is fair to all parties.²³⁴

The remedies that AFCA may provide to responsible lending complaints include requiring payment of a sum of money, forgiveness (in whole or in part) or variation of a debt, release of security for a debt, repayment, waiver or variation of a fee or other amount paid to or owing to the financial firm, including a variation of the applicable interest rate on a loan, reinstatement, variation, rectification, or setting aside of a contract, a financial firm refraining from enforcing a default judgment; and/or an apology by the financial firm in the form of a letter of apology.²³⁵ The focus of AFCA's outcomes is to compensate the complainant for the loss the financial firm's error

²³⁰ ASIC 'Reporting misconduct to ASIC' <https://asic.gov.au/about-asic/contact-us/reporting-misconduct-to-asic/what-to-do-if-you-are-dissatisfied-with-a-decision-by-the-australian-financial-complaints-authority/> (accessed 16 October 2024).

²³¹ S 1052 E of the Corporations Act 2001.

²³² AFCA Complaint Resolution Scheme Rules' <https://www.afca.org.au/about-afca/rules-and-guidelines/rules> (accessed 15 October 2024).

²³³ The AFCA Approach to Responsible Lending <https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches> (accessed 15 October 2024).

²³⁴ The AFCA Approach to Responsible Lending (n 233) 4.

²³⁵ The AFCA Approach to Responsible Lending (n 233) 33.

caused them. AFCA does not award compensation to ‘punish’ an error or breach and do not impose fines or sanctions.²³⁶

If a complaint is not resolved by agreement, negotiation or conciliation, AFCA will make a decision which will reflect what is fair in all the circumstances having regard to legal principles, applicable industry codes or guidance, good industry practice and previous decisions of AFCA or predecessor schemes.²³⁷ Decisions made by AFCA are binding on the credit provider.²³⁸ Decisions are not binding on complainants and if a complainant is not satisfied with a decision made by AFCA, it can challenge the matter in court.²³⁹ AFCA may award compensation to consumers who have experienced financial loss due to a firm’s mistake or misconduct. However, it does not issue penalties or fines, nor does it award compensation as a form of punishment. This is because AFCA is a not-for-profit company and not a government body or industry regulator.²⁴⁰

In terms of regulation 11A of the NCCPR licensees must take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which the licensee is a party. Any failure by a licensee to comply with regulation 11A will constitute a breach of section 47(1)(m) of the NCCPA.²⁴¹

To provide even further protection to consumers, the Australian Parliament passed the Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Act 46 of 2023 in July 2023.²⁴² This piece of legislation established the Compensation Scheme of Last Resort designed to provide compensation to consumers and small businesses in situations where a financial firm fails to comply with AFCA determinations due to insolvency or other financial incapacity. It ensures

²³⁶ The AFCA Approach to Responsible Lending (n 233) 33.

²³⁷ The AFCA Approach to Responsible Lending (n 233) 7.

²³⁸ S 1051 (4)(e)(i) of the Corporations Act 2001.

²³⁹ S 1051 (4)(e)(ii) of the Corporations Act 2001. The credit provider may also approach a court under general contract law principles if it is believed that the decision was unreasonable or beyond the authority of AFCA.

²⁴⁰ AFCA ‘Operational Guidelines to the Rules’ <<https://www.afca.org.au/about-afca/rules-and-guidelines/rules>> (accessed 15 October 2024).

²⁴¹ Australian Securities and Investment Commission v General Commercial Group Pty Ltd [2023] FCA 24.

²⁴² Hereinafter referred to as ‘the CSLR’.

that AFCA awards can be enforced, even when the firm responsible cannot meet its obligations. The scheme can pay up to \$150,000 AUD in compensation to eligible consumers who have received an AFCA determination awarding compensation that remains unpaid in relation to complaints.²⁴³ The Australian Government financed the establishment of the Compensation Scheme of Last Resort. Additionally, from April to June 2024, they provided funding for the expenses associated with the inaugural levy period. The ten largest banking and general/life insurance groups, as determined by income in the financial year 2021-2022, were responsible for settling claims made between November 2018 and September 2022. Furthermore, such groups will also address claims submitted from July 2024 onwards. The funding for the Compensation Scheme of Last Resort is complemented by an annual levy imposed on certain sectors of the financial services industry.²⁴⁴

AFCA are obliged by legislation,²⁴⁵ the ASIC Regulatory Guide 267 Oversight of the Australian Financial Complaints Authority, and their rules to report systemic issues to the ASIC, the Commissioner of Taxation, the Office of the Australian Information Commissioner, or any other appropriate body.²⁴⁶ The primary purpose of this reporting requirement is to enable the recipient body to consider whether regulatory action is necessary. A systemic issue is one that has been raised in a complaint or several complaints to ASIC, or is otherwise identified to be likely to affect a certain class of consumers negatively.²⁴⁷ Examples of systemic issues reportable to ASIC or other regulators include issues relating to credit policy and procedures that do not meet responsible lending obligations.²⁴⁸ AFCA's South African counterpart has the same obligation.²⁴⁹

²⁴³ S 1067(a) of the Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Act 2023.

²⁴⁴ Compensation Scheme of Last Resort <https://cslr.org.au/about-us/what-cslr> (accessed 14 November 2024).

²⁴⁵ S 1052 E(1) of the Corporations Act 2001.

²⁴⁶ AFCA 'Operational Guidelines to the Rules' <https://www.afca.org.au/about-afca/rules-and-guidelines/rules> (accessed 15 October 2024).

²⁴⁷ AFCA Operational Guidelines (n 247) 87.

²⁴⁸ AFCA Operational Guidelines (n 247) 91.

²⁴⁹ National Financial Ombud Scheme South Africa 'Rules' <https://nfosa.co.za/our-rules/> (accessed 14 November 2024).

Financial firms that received four or more complaints during a specific time period appear in the AFCA Datacube.²⁵⁰ The AFCA Datacube is a public online tool provided by the AFCA that allows users to access and explore data related to financial complaints lodged with AFCA. It offers an interactive platform where anyone can view insights into the types of complaints, the financial firms involved, complaint outcomes, and other relevant statistics.²⁵¹ The public listing of non-compliant firms can create reputational risk, encouraging firms to comply with AFCA's determinations to avoid negative public perception.

9.4.3 Free assistance to consumers suffering from reckless lending and over-indebtedness

9.4.3.1 Free financial advice by ASIC through MoneySmart

The Australian government, through ASIC, offers free financial advice to help people manage their debt better. This service aims to improve the financial knowledge of Australians and support their long-term financial health. As previously noted, the MoneySmart website, operated by ASIC, offers free resources to help Australians improve their financial literacy. It provides guidance on managing money, outlines the risks associated with credit use, and shares general investment insights, along with practical tools to support informed financial decision making.²⁵² MoneySmart also shares financial advice on social media platforms like Facebook, X (formerly known as Twitter), Instagram, and through e-newsletters. Research shows that more people are using this service, and at least 50% of adult Australians consider it a reliable source of financial advice.²⁵³

9.4.3.2 Free debt counselling by financial counsellors

In Australia, debt counselling, referred to as financial counselling, is available as a curative measure to assist consumers facing financial challenges. Unlike in South Africa, debt counselling in Australia is an informal process delivered through financial

²⁵⁰ AFCA 'Datacube' https://data.afca.org.au/?_gl=1*fmpuhc*_gcl_au*MTAwMzcyOTY0OS4xNzI4-OTAxMTky (accessed 16 October 2024).

²⁵¹ AFCA 'Datacube' https://data.afca.org.au/?_gl=1*fmpuhc*_gcl_au*MTAwMzcyOTY0OS4xNzI4-OTAxMTky (accessed 16 October 2024).

²⁵² Australian Government 'MoneySmart' <https://moneysmart.gov.au/about-us> (accessed 10 November 2024).

²⁵³ ASIC 'News' <https://asic.gov.au/about-asic/news-centre/news-items/asic-s-moneysmart-is-a-trusted-source-for-1-in-2-adult-australians/> (accessed 14 November 2024).

counsellors. Since financial counselling emerged in Australia during the late 1970s and early 1980s alongside the rise of consumer credit, financial counsellors have become essential advocates for individuals struggling with debt. The establishment of the Financial Counselling Association of Australia (now Financial Counselling Australia) in 1984 created a national framework for these services, giving consumers access to qualified, not-for-profit financial counsellors who provide critical support, including information, advice, and advocacy. By 2023, Financial Counselling Australia had grown to include seven state and territory associations, with over 800 counsellors across the country.²⁵⁴

Financial counsellors in Australia are primarily regulated in term of the Corporations Regulations²⁵⁵ and the National Consumer Credit Protection Regulations 2010. In terms of regulation 7.6.01(7) of the Corporations Regulations financial counsellors offer specialised services to help individuals or small businesses resolve financial challenges. They assist clients who cannot meet ongoing expenses or debt obligations, and their services often involve reporting complaints of irresponsible lending practices to bodies like AFCA or ASIC. In terms of regulation 7.6.01(1) (zb) of the Corporations Regulations as well as regulation 20(5) of the NCCPR 2010, financial counselling agencies and services are exempt from holding an Australian Financial Service License²⁵⁶ provided they do not charge fees, maintain independence from financial services businesses, and ensure that their staff meet specific training standards.

Financial counsellors are typically based in community organisations, including local charities, community centres, and government agencies, where they work closely with clients to manage finances and negotiate with creditors.²⁵⁷ Financial counselling is funded by the government via a grant from the Federal Department of Social Services, funds from state governments as well as other sources like funds from community

²⁵⁴ Financial Counselling Australia <<https://www.financialcounselingaustralia.org.au/about-financial-counselling/>> (accessed 10 November 2024).

²⁵⁵ 193 of 2001.

²⁵⁶ In terms of s 911A(1) of the Corporations Act 2001 a license is necessary if a person or organisation wants to operate a business giving advice about financial products.

²⁵⁷ United Nations Research Institute for Social Development *Australian Money Advice and Debt Management: Alternative Approaches to Build Financial Well-being* (2023) UNRISD Working Paper No. 2023-3.

benefit payments made as part of ASIC enforceable undertakings.²⁵⁸ Financial counsellors are required to hold the CHC 51122 Diploma of Financial Counselling, a qualification that equips them with the skills to guide clients through financial crises and often includes significant in-agency placement experience. This qualification is a national qualification offered by a number of training providers in Australia. The qualification may be completed in one year of full-time study or over two years of part-time study. The course combines online learning and face-to-face lectures, and includes 220 hours of placement in a financial counselling agency.²⁵⁹

The impact of financial counselling is substantial. According to a 2023 report from the United Nations Research Institute for Social Development, these services provide essential support for individuals in financial distress.²⁶⁰ Financial counsellors manage debt negotiations, communicate with creditors and utility providers, and promote financial literacy, all of which help clients stabilise their financial situations. According to the report, Financial Counselling Australia reported that in 2018, approximately 120 000 clients were assisted through face-to-face services annually, and 160 000 calls were managed via the National Debt Helpline (NDH), coordinated by them.²⁶¹ In Financial Counselling Australia's 2019 report on financial counselling, it was highlighted that 66% of clients resolved their financial difficulties, 74% avoided legal action, and 53% avoided bankruptcy through the intervention of financial counsellors.²⁶² Moreover, 63% reported improvements in mental wellbeing, while 45% experienced better physical health.²⁶³ From a financial perspective, for every \$1 AUD invested in financial counselling, a return of \$5 AUD was realised.²⁶⁴

The aforesaid report also refers to the monetary benefits of resolving financial difficulties. A 2012/13 review by the Australian Workplace Innovation and Social Research Centre (WiSeR) in partnership with the philanthropic organisation The Wyatt Trust, indicated an average debt reduction of \$1,560 AUD per client in South Australia

²⁵⁸ Financial Counselling Australia [<https://www.financialcounsellingaustralia.org.au/about-financial-counselling/diploma-of-financial-counselling/>](https://www.financialcounsellingaustralia.org.au/about-financial-counselling/diploma-of-financial-counselling/) (accessed 10 November 2024).

²⁵⁹ Financial Counselling Australia [<https://www.financialcounsellingaustralia.org.au/about-financial-counselling/diploma-of-financial-counselling/>](https://www.financialcounsellingaustralia.org.au/about-financial-counselling/diploma-of-financial-counselling/) (accessed 10 November 2024).

²⁶⁰ United Nations Research Institute for Social Development (n 257) 1.

²⁶¹ United Nations Research Institute for Social Development (n 257) 3.

²⁶² United Nations Research Institute for Social Development (n 257) 3.

²⁶³ United Nations Research Institute for Social Development (n 257) 3.

²⁶⁴ United Nations Research Institute for Social Development (n 257) 3.

as a result of financial counselling.²⁶⁵ Financial counsellors successfully negotiated the waiving of interest payments and facilitated access to charitable grants for clients, further alleviating financial burdens. Beyond the direct monetary impact, financial counselling also helped to improve financial literacy, strengthened the ability to manage money, and stabilises housing situations.²⁶⁶

The primary aim of debt counselling in Australia is to empower consumers with knowledge and strategies for debt management without resorting to formal legal processes as is required in terms of the process in South Africa. In Australia the approach with the process is rehabilitative and educational, helping consumers to regain financial stability through proper budgeting, creditor negotiation and financial literacy support. By contrast the process in South Africa is a formal, legal remedy that offers substantial protection against legal action and provides a court-sanctioned repayment structure. One of the limitations of the South African process is that it may be less accessible to lower income consumers due to the costs associated with the process.

9.4.4 Other consumer protection mechanisms in Australia

9.4.4.1 Criminal liability of unregistered lenders

The NCCPA prohibits lenders from engaging in credit activities without holding an Australian Credit License.²⁶⁷ The NCCPA also renders it a criminal offence with a maximum penalty of two years' imprisonment to engage in credit activities without a license.²⁶⁸ The legislation aims to protect consumers from unregulated and predatory lending practices by ensuring that all lenders operate within a regulated framework. Media reports indicate that the Australian police play an active role in enforcing this provision.²⁶⁹

²⁶⁵ United Nations Research Institute for Social Development (n 257) 4.

²⁶⁶ United Nations Research Institute for Social Development (n 257) 4.

²⁶⁷ S 29 of the NCCPA.

²⁶⁸ S 29(2) of the NCCPA.

²⁶⁹ <https://www.afp.gov.au/news-centre/media-release/afp-charges-alleged-wa-loan-shark> (accessed on 22 October 2024); <https://www.abc.net.au/news/2013-04-26/four-charged-over-gold-coast-extortion-scheme/4653768> (accessed 22 October 2024); <https://thewest.com.au/news/court-justice/bentley-man-kam-chung-poon-charged-after-allegedly-providing-loans-despite-not-being-licensed-moneylender-c-7199429> (accessed 22 October 2024); <https://www.couriermail.com.au/ipad/police-arrest-alleged-gold-coast-gang-ringleader-christophe-bertomeu-wanted-on-five-charges/news-story/4cb6c6d2b1b8a65c453871028e746bf0> (accessed 22 October 2024).

9.4.4.2 *Personal liability of directors of unregistered lenders*

ASIC's dedication in the pursuit of its objective to act against unlicensed credit providers is illustrated by a decade of legal battles against two payday lenders namely BSF Solutions Pty Ltd and Cigno Australia Pty Ltd. Over the years these lenders have used several different models to structure its loans to avoid the legal requirements of the NCCPA. In May 2024 the Federal Court in Australia found that these two companies again contravened the NCCPA and the NCC with its most recent model, called the '*No Upfront Charge Loan Model*'.²⁷⁰ In terms of this model the consumer entered into two separate agreements with Cigno and BSF. The first agreement with Cigno was an agreement setting out the fees the consumer must pay to Cigno for setting up and administering the loan agreement and made provision for establishment fees, administrative fees and penalties. The second agreement with BSF set out the loan amount, the interest on the loan and when payments were made.²⁷¹ BSF and Cigno argued that their model was the same as a Buy Now Pay Later credit provider and that they do not need to be registered as a credit provider due to an exception in the NCCPA.²⁷² The court did not agree.²⁷³

The court found that both companies contravened section 29(1) of the Act by engaging in credit activities without being registered.²⁷⁴ The court also found that both companies contravened section 32(1) of the NCCPA by demanding, accepting and receiving fees without being registered as credit providers.²⁷⁵ Both these contraventions are civil penalty contraventions.

The fact that the court found that the directors of both companies, Mr Harrison (BSF) and Mr Swanepoel (Cigno) were involved in the contraventions of the NCCPA in their personal capacity is of particular importance for this research. Section 169(b) of the

²⁷⁰ *Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Liability)* [2024] FCA 553.

²⁷¹ *Australian Securities and Investments Commission v BSF Solutions* (n 270) para 118.

²⁷² *Australian Securities and Investments Commission v BSF Solutions* (n 270) para 118.

²⁷³ *Australian Securities and Investments Commission v BSF Solutions* (n 270) para 119.

²⁷⁴ *Australian Securities and Investments Commission v BSF Solutions* (n 270) para 135.

²⁷⁵ *Australian Securities and Investments Commission v BSF Solutions* (n 270) paras 137 and 139.

NCCPA provides that a person who is involved in a contravention of a civil penalty provision is taken to have contravened the provision.²⁷⁶

The determination of pecuniary penalties (if any) and the further injunctions sought by ASIC against Mr Harrison and Mr Swanepoel restraining them from engaging in any business involving credit activity were reserved.²⁷⁷ In August it was however reported that the battle is ongoing as the penalty hearing was put on ice pending an appeal against the courts finding. The message here is that ASIC will pursue directors personally where significant corporate misconduct is alleged.²⁷⁸

It is further interesting to note that the court did not make use of the avoidance provision²⁷⁹ in the NCCPA to make a ruling against Cigno and BHS. The reason for this may be that the court decided to focus on direct breaches of NCCPA provisions, such as failures in responsible lending obligations, rather than on anti-avoidance provisions, if Cigno and BSF Solutions' conduct directly contravened the NCCPA's responsible lending requirements without evidence that it attempted to circumvent the law deliberately.

9.5 Conclusion

Australia was chosen as a comparative jurisdiction for this thesis due to its comprehensive approach to consumer credit regulation and responsible lending, particularly regarding protection measures for low-income consumers against over-indebtedness.²⁸⁰

Over the past few decades, Australia has developed a robust regulatory framework, emphasising the protection of low-income and vulnerable consumers. Key features of

²⁷⁶ S 169 provides: A person who:

- (a) attempts to contravene a civil penalty provision; or
- (b) is involved in a contravention of a civil penalty provision; is taken to have contravened the provision.

See also *Australian Securities and Investments Commission v BSF Solutions* (n 270) paras 7, 8 and 20.

²⁷⁷ *Australian Securities and Investments Commission v BSF Solutions* (n 270) para 55.

²⁷⁸ <https://www.aicd.com.au/regulatory-compliance/regulations/investigation/asic-to-crack-down-on-predatory-lending.html>.

²⁷⁹ Para 9.2.5.8.

²⁸⁰ Chapter 1, para 1.5.

Australia's approach include rigorous pre-agreement affordability assessments, specific protections for vulnerable consumers, and product-specific regulations for high-risk credit products such as small amount credit contracts and consumer lease agreements. These measures are particularly relevant for low-income consumers, who are often most at risk of over-indebtedness. Australia's use of clear suitability and affordability requirements, combined with accessible redress mechanisms, offers a well-established model for addressing reckless lending.²⁸¹

The comparison sought to highlight best practices and practical insights for strengthening consumer protection and responsible lending in South Africa, with a particular focus on pre-agreement assessments designed to prevent over-indebtedness among low-income consumers.²⁸²

The chapter commenced with examining the evolution of Australia's consumer credit legislation, highlighting the significant strides made to protect consumers from reckless lending and over-indebtedness.²⁸³ The evolution of consumer credit legislation in Australia reflects a shift from fragmented, inconsistent state-level regulations²⁸⁴ to a unified national framework under the Uniform Consumer Credit Code (UCCC) in 1997.²⁸⁵ Although administered by state and territory governments, the UCCC established uniform standards requiring lenders to disclose loan terms, fees, and interest rates, which allowed borrowers to make more informed choices. It also introduced 'safety net provisions' to address unjust, unconscionable and irresponsible lending practices. However, limitations in enforcement highlighted the need for stronger measures.²⁸⁶

The introduction of the NCCPA in 2010 replaced the UCCC, centralising consumer credit regulation²⁸⁷ and establishing a licensing regime for all credit providers.²⁸⁸ The NCCPA introduced responsible lending obligations, requiring lenders to disclose

²⁸¹ Para 9.2.

²⁸² Para 9.1.

²⁸³ Para 9.2.

²⁸⁴ Para 9.2.1.

²⁸⁵ Para 9.2.2.

²⁸⁶ *Ibid.*

²⁸⁷ Para 9.2.3.1.

²⁸⁸ Para 9.2.3.2.

essential information and assess the suitability of credit for consumers.²⁸⁹ The Australian Securities and Investments Commission (ASIC) was appointed as the single national regulator, offering guidance through regulatory guidelines like RG 209, which provide practical compliance steps for credit providers.²⁹⁰

In response to the ongoing challenges faced by low-income consumers, the Enhancements Act²⁹¹ expanded the NCCPA's responsible lending provisions to provide protection to consumers of small-amount credit contracts²⁹² and consumer leases.²⁹³ Prior to reforms introduced by the Enhancements Act, these products were subject to less stringent regulatory oversight. As these products were often used by vulnerable consumers with low incomes, it was necessary to include these products under the umbrella of consumer protection measures provided for by the NCCPA.²⁹⁴ The Enhancements Act also introduced a rebuttable presumption of unsuitability preventing consumers with multiple small-amount loans to enter into further loans in certain circumstances.²⁹⁵ The aim of this enhancement to the NCCPA was to prevent consumers from becoming trapped in debt spirals. Furthermore, a protected earnings requirement capped loan repayments for consumers who relied on social security, preventing lenders from claiming more than 20% of a consumer's gross income.²⁹⁶ Furthermore, the Enhancements Act also introduced restrictions on fees and charges for small amount credit contracts²⁹⁷ as well as warning statements at the premises or on the website of small amount consumer credit providers.²⁹⁸ The warning statement must contain a warning that borrowing small amounts of money can be expensive, and includes mandatory text which advises borrowers to consider other options before borrowing.²⁹⁹

²⁸⁹ Para 9.2.3.3.

²⁹⁰ Para 9.2.3.6.

²⁹¹ Para 9.2.4.1.

²⁹² Para 9.2.4.3.

²⁹³ Para 9.2.4.2.

²⁹⁴ *Ibid.*

²⁹⁵ Para 9.2.5.4.

²⁹⁶ Para 9.2.5.6.

²⁹⁷ Para 9.2.5.5.

²⁹⁸ Para 9.2.5.7.

²⁹⁹ *Ibid.*

The FSRA built on earlier reforms by addressing remaining gaps in credit protection. It introduced price caps on consumer leases and enhanced consumer lease providers' requirements to assess the affordability and suitability of lease agreements, similar to those for credit contracts.³⁰⁰ Additionally, the FSRA repealed the rebuttable presumption of unsuitability for small-amount credit contracts, instead requiring credit providers to document suitability assessments thoroughly.³⁰¹ A further notable addition under the FSRA was the expansion of protected earnings requirements to cover all consumers, with a cap set at 10% of net income for repayments on small-amount loans or household lease agreements. In terms of this provision, a consumer may not use more than 10% of his income as repayment for small amount credit or consumer lease repayments at any time.³⁰²

When comparing the affordability assessment process in Australia and South Africa, it is evident that both countries aim to prevent over-indebtedness and protect consumers from unsustainable financial commitments, but they use different methods to achieve these objectives. Australian credit legislation requires credit providers to ensure that credit contracts are suitable by conducting 'reasonable inquiries' into the consumer's financial situation.³⁰³ The depth of this verification varies. For high-risk products, such as small-amount credit contracts and consumer leases, protected earnings amounts were set. However, for other credit products credit providers may use their own judgment in determining the extent of the verification needed allowing for a more principles-based assessment. It is evident that the Australian framework does not prescribe a tick-box methodology; instead, it promotes a consumer -focused approach that considers the specific financial realities of each applicant.³⁰⁴ This framework could offer valuable insights for South Africa in refining its credit assessment framework. Unlike the rigid minimum expense norm table used in South Africa, Australia's flexible approach recognises that individual circumstances can significantly influence a consumer's expenses. This flexibility allows credit providers

³⁰⁰ Paras 9.2.5.2 and 9.2.5.3.

³⁰¹ Para 9.2.5.4.

³⁰² Para 9.2.5.6.

³⁰³ Para 9.3.1.

³⁰⁴ Para 9.3.1.1.

to account for unique factors affecting a consumer's financial situation, rather than relying on standardised benchmarks that may not reflect real-life complexities.³⁰⁵

This chapter also explored the relief mechanisms available to consumer who find themselves over-indebted as a result of reckless lending. The investigation highlighted ASIC's comprehensive enforcement power in addressing reckless lending and ensuring consumer protection.³⁰⁶ ASIC's structured approach combines internal and external dispute resolution mechanisms, proactive regulatory investigations and strong enforcement actions, making ASIC a highly effective regulator. Unlike its South African counterpart which relies predominantly on civil penalties, ASIC can issue banning orders and has direct criminal prosecution powers which provides flexibility and immediacy in its enforcement. The ability to impose civil penalties, criminal sanctions and court-mandated compliance programs also reinforces ASIC's authority, ensuring accountability within the financial sector. Measures such as product intervention orders, licensing restrictions and infringement notices enable ASIC to swiftly respond to consumer complaints and to deter misconduct. The comparative research underscored ASIC's broad enforcement toolkit, which extends beyond traditional regulatory oversight to encompass preventative and corrective mechanisms. Ultimately the Australian position reflects a more robust and adaptable regulatory framework, positioning ASIC as a decisive and proactive entity in combating irresponsible lending while safeguarding consumer rights through effective enforcement strategies.³⁰⁷

The investigation into the role of AFCA in addressing reckless lending demonstrates its critical function in ensuring consumer protection and financial accountability. As an independent external dispute resolution scheme, AFCA provides a transparent and structured mechanism for consumers who have been affected by irresponsible lending practices. It operates under ASIC's oversight, ensuring consistency and fairness in complaint resolution. Through its Approach to Responsible Lending, AFCA ensures complaints are evaluated objectively drawing on industry regulations, legislative requirements and good financial practices, its ability to award monetary compensation,

³⁰⁵ Para 9.3.1.3.

³⁰⁶ Para 9.4.1.

³⁰⁷ *Ibid.*

debt variations, contract modifications and enforce compliance ensures effective redress for consumers, though it does not impose punitive fines or sanctions. Furthermore, binding decisions on financial firms enhance accountability, while consumers retain the right to escalate unresolved matters to court. The introduction of the Financial Services Compensation Scheme of Last Resort further strengthens consumer protection by ensuring compensation in cases where financial firms cannot fulfil AFCA's determinations due to insolvency. Additionally, AFCA's reporting of systemic issues helps drive industry-wide improvements. Overall, AFCA plays a pivotal role in safeguarding consumer rights, offering accessible and enforceable solutions against reckless lending while promoting fairness and financial stability within Australia's credit sector.³⁰⁸

The Australian Government, through ASIC, operates MoneySmart, through social media channels like Facebook, X and Instagram. MoneySmart offers tools, calculators and other resources to assist consumers with advice on how to prevent getting trapped in a debt spiral. Debt counselling as a curative measure to assist over-indebted consumers is also available free of charge to consumers. Debt counselling in Australia, unlike the process in South Africa is informal and not dependent on the courts for implementation. As a result, the costs relating to the process is low and ensure that all consumers have access to the process. The primary aim of debt counselling in Australia is to empower consumers with knowledge and strategies for debt management without resorting to formal legal processes as is required in terms of the process in South Africa. In Australia the approach with the process is rehabilitative and educational, helping consumers to regain financial stability through proper budgeting, creditor negotiation and financial literacy support. By contrast the process in South Africa is a formal, legal remedy that offers substantial protection against legal action and provides a court-sanctioned repayment structure. One of the limitations of the South African process is that it may be less accessible to lower income consumers due to the costs associated with the process.³⁰⁹

³⁰⁸ Para 9.4.2.

³⁰⁹ Para 9.4.3.

Australia enforces stricter regulations on unregistered credit providers than South Africa, treating lending by unregistered credit providers as a criminal offence punishable by up to two year's imprisonment. The NCCPA mandates licensing to prevent predatory lending, with active police enforcement, highlighting a more serious approach to consumer protection compared to South Africa.³¹⁰

The investigation of the Australian position highlighted that section 169(b) of the NCCPA imposes personal liability on directors of credit providers for breaches of credit legislation, including reckless lending and lending without being licensed. This provision underscores Australia's stringent approach to unregulated lending by promoting individual accountability as a deterrent against financial misconduct.³¹¹

To conclude, just as Chapter 8 examined the UK's approach to affordability assessment and assistance to over-indebted low-income consumers, this chapter's investigation of the Australian position has identified key differences and similarities between Australian and South African credit frameworks. These findings provide valuable insights into how each jurisdiction addresses affordability assessment and consumer protection. The next chapter will present final recommendations on how aspects of consumer credit legislation from both the UK and Australia can be adapted to address challenges in South Africa's credit market. The objective is to strengthen legislative protection for low-income consumers, ensuring fair treatment when applying for credit while also providing sufficient safeguards in the event of over-indebtedness.

³¹⁰ Para 9.4.4.1.

³¹¹ Para 9.4.4.2.

CHAPTER 10: CONCLUSION AND RECOMMENDATIONS

10.1 Principal research objectives

10.2 General conclusions

10.3 Recommendations for reform

10.4 Conclusion

10.1 Principal research objectives

The principal objective of this research was to assess whether the reckless lending provisions in the Act, and more specifically the provisions relating to the assessment of consumer affordability, had improved the position of the low-income consumer or introduced new challenges to this group.¹ To achieve this, the research examined the evolution of the credit provider's assessment obligation, with a specific focus on the Affordability Assessment Regulations introduced by the Minister under regulation 23A through amendments to the Act. A comprehensive analysis of regulation 23A which came into operation on 13 September 2015, along with relevant case law, informed the investigation.

A further objective of the research was to evaluate the effectiveness of the debt review process established under section 86 to determine whether it provides meaningful relief to low-income consumers who have fallen victim to reckless lending despite the Act's preventative provisions intended to curb such practices.² Lastly, the research

¹ Chapter 1 para 1.2.

² *Ibid.*

also evaluated the accessibility of alternative dispute resolution mechanisms, as well as the roles of the Regulator, the Tribunal, Consumer Courts, and the ombud with jurisdiction in addressing grievances and ensuring equitable outcomes for low-income consumers affected by reckless lending.³

10.2 General conclusions

10.2.1 Effectiveness of the affordability assessment in terms of Regulation 23A

The evaluation of regulation 23A in chapter 5 identified several shortcomings relating to this regulation. The exclusions listed in section 78 and regulation 23A(2) aligns with the policy objective of economic growth and access to credit.⁴ Figures released by the Regulator indicate that consumers indeed experienced increased access to credit since the implementation of the Act in 2007. The problem, however, is that the type of credit typically accessed by low-income consumers – the subject of this study - does not support the accumulation of wealth, but rather serve short-term consumption needs. Consequently, the uptake of developmental credit remains particularly low.⁵

The evaluation further revealed that regulation 23A(3) to (7) fails dismally in its purpose to assist credit providers to determine the existing financial means and prospects of consumers.⁶ Self-employed, informally employed and unbanked consumers, who often fall within the bounds of the focus group of this research, namely low-income consumers, are excluded from the guidelines set out in the regulations. Instead of providing clear guidelines as to how the existing means and prospects of these consumers should be calculated, the Regulator escaped its responsibility, by shifting the responsibility of finding alternative ways to verify income to credit providers.⁷

While regulation 23A and the broader NCA framework represent important steps toward responsible lending, their implementation has fallen short in addressing real-

³ *Ibid.*

⁴ Chapter 5 para 5.2.1.

⁵ *Ibid.*

⁶ Chapter 5 para 5.3.

⁷ Chapter 5 para 5.3.1.

world financial vulnerabilities. The persistence of high levels of indebtedness underscores the need for regulatory reform.⁸

The research further revealed that the practical application of the minimum expense norm table set out in regulation 23A(10) of the affordability assessment regulations, which contains prescribed minimum expense norms, also introduced practical challenges.⁹ The intention with the table was to prevent consumers from understating their expenses, which could result in misleadingly positive portrayal of their financial position and, in turn, influence credit providers to grant loans that may not be appropriate or sustainable.¹⁰ Despite the noble aim with the regulation, it was pointed out that the table presents several problems. As the evaluation of this regulation in Chapter 5 indicated, the rigidity of these norms does not adequately account for variations in consumer spending patterns, and credit providers may manipulate the figures to either justify or deny credit applications.¹¹

Additionally, the lack of enforcement and accountability mechanisms enables lenders to circumvent the affordability assessment requirements, resulting in reckless lending practices that continue to expose consumers to financial vulnerability. The regulation's inability to adapt to the realities of informal economies and grant-based incomes further excludes marginalised groups, who may either be denied access to formal credit or pushed into unregulated lending markets.¹²

The research further revealed that the minimum expense norm table is vague and susceptible to manipulation by credit providers.¹³ Because the minimum expenses allowed are very low, consumers can also still manipulate the outcome of an application for credit by understating their expenses and overstating their after expenses income.¹⁴

⁸ *Ibid.*

⁹ Chapter 4 para 4.3.3.3.

¹⁰ *Ibid.*

¹¹ Chapter 5 para 5.4.1.

¹² Chapter 5 paras 5.4.1.4; 5.4.1.5 and 5.4.1.6.

¹³ Chapter 5 paras 5.4.1.1 and 5.4.1.2.

¹⁴ Chapter 5 para 5.4.1.4.

With regard to the provisions in regulation 23A(13) requiring credit bureau information to conduct an assessment of the affordability of a consumer, several flaws were pointed out.¹⁵ Apart from the fact that credit bureau information can be incorrect it was also pointed out in the research that credit scores are determined by predictions regarding a consumer's behaviour and are not indicative of whether a consumer can afford the credit or not.¹⁶ Credit bureaus in South Africa also hold only specific data which can exclude consumers who are, as a result of the fact that they are unable to obtain credit in the first place, are unable to build a credit record. This causes a chicken-egg conundrum which result in this group of consumers to become credit underserved and credit invisible.¹⁷

The apparent weaknesses in regulation 23A as discussed in Chapter 5, casts doubt on the effectiveness of this regulation in its entirety. Support for this contention can be found in the High Court ruling setting aside regulation 23A(4) on the grounds that it is discriminatory and unreasonable.¹⁸ The contention is further supported by the fact that consumers are still plagued by high levels of debt despite the regulations.¹⁹

Nonetheless, the introduction of a standardised affordability assessment process has brought some positive developments within South Africa's credit industry.²⁰ However, in its current form, it is submitted that regulation 23A lacks the necessary enforcement mechanisms to prevent lenders from circumventing affordability requirements. Without stronger enforcement capacity, there is a risk that these regulations could hinder financial inclusion rather than enhance it.²¹

Ultimately, while the affordability assessment regulations were intended to protect consumers from reckless lending, their implementation has inadvertently created new barriers for low-income consumers, necessitating a reassessment of their effectiveness in achieving consumer protection and financial inclusion.

¹⁵ Chapter 5 para 5.6.

¹⁶ Chapter 5 paras 5.6.1.1 and 5.6.1.2.

¹⁷ Chapter 5 para 5.6.1.5.

¹⁸ See the discussion of the judgment in *Truworths Limited v Minister of Trade and Industry* 2018 (3) SA 558 (WCC) in Chapter 1 para 1.1, Chapter 4 para 4.3.3 and Chapter 5 paras 5.3.1 and 5.8.

¹⁹ Chapter 5 para 5.3.1.

²⁰ Chapter 5 para 5.8.

²¹ *Ibid.*

10.2.2 Effectiveness of debt review process

A further objective of the research was to evaluate the effectiveness of the debt review process established under section 86 of the National Credit Act in providing meaningful relief to low-income consumers who had fallen victim to reckless lending despite the preventative provisions in the Act.²² Various problems with the debt review process were pointed out in Chapter 6 of this research. A significant limitation highlighted in the research is the fact that a consumer can become trapped in the process leaving a consumer who can afford to repay his debt on the originally agreed terms, trapped in a process that will prevent him from obtaining further credit.²³

The formal and costly nature of the debt counselling process significantly limits access for low-income consumers.²⁴ Despite being victims of reckless lending, these individuals often find no meaningful recourse through this debt relief mechanism. The process is prohibitively expensive, and the Act also does not provide clear guidelines to the debt counsellor regarding the process that has to be followed to prove that the credit was extended recklessly.²⁵ Consequently, the debt review process does not effectively deliver relief to low-income consumers, even in cases where preventative provisions under the Act should have offered protection. In fact, the research indicates that over-indebted low-income consumers, despite the reason for their over-indebtedness, could not find recourse in this relief mechanism, as it is simply unaffordable to enter into and use this process.

10.2.3 Accessibility and effectiveness of the Regulator, ADR mechanisms, the Ombud with jurisdiction, Consumer Courts and the Tribunal, in addressing complaints and ensuring equitable outcomes for low-income consumers affected by reckless lending

The research also examined the accessibility and effectiveness of ADR mechanisms, as well as the roles of the Regulator, the Tribunal, Consumer Courts, and the relevant

²² Chapter 1 para 1.2.

²³ Chapter 6 para 6.2.10. See also Chapter 7 para 7.2.6.

²⁴ Chapter 7 paras 7.2.1 and 7.2.2.

²⁵ Chapter 7 para 7.2.3.

Ombud in addressing complaints and ensuring equitable outcomes for low-income consumers affected by reckless lending.

Findings indicate that the NCR lacks sufficient regulatory power and is not easily accessible to consumers. Despite its mandate to oversee compliance with the NCA, it is evident that its ability to intervene effectively in cases of reckless lending remains limited.²⁶

The accessibility of ADR agents is also constrained by high service costs. While the registration fee imposed on ADR agents is intended to facilitate regulatory oversight, it inadvertently increases their operational expenses. These costs are often passed on to consumers, making ADR services unaffordable for low-income individuals seeking redress.²⁷

The effectiveness of Consumer Courts remains uncertain due to a lack of publicly available data on their operations and outcomes. The absence of published statistics raises concerns regarding their efficiency and transparency in resolving consumer disputes.²⁸

A notable development, however, is the transformation of the Ombud with jurisdiction, which presents a more accessible and consumer-friendly avenue for dispute resolution. The establishment of the NFOSA signals progress toward a streamlined and effective dispute resolution system. While NFOSA is still in its early stages, its impact as highlighted by its 2024 Annual Report, demonstrates clear potential to improve consumer outcomes. Continued monitoring and research will be essential to assess its long-term impact, but early indications suggest that NFOSA is well-positioned to make a meaningful difference in the consumer credit landscape.²⁹

Regarding the accessibility of the Tribunal, evidence suggests that its collaboration with legal practitioners has led to excessive legal fees for court referrals, despite the

²⁶ Chapter 7 para 7.3.

²⁷ Chapter 7 para 7.4.

²⁸ Chapter 7 para 7.6.

²⁹ Chapter 7 para 7.5.

availability of more cost-effective alternatives. Reports indicate that certain debt counsellors charge disproportionately high fees, often around R6 000, when engaging with the Tribunal during a hearing.³⁰ In *Intuitive PDA (Pty) Ltd v NCR*,³¹ the Tribunal highlighted that the Act does not provide the NCR with the authority to issue binding guidelines on debt counselling fees, resulting in a regulatory gap that leaves consumers vulnerable to excessive charges. Furthermore, the Tribunal's primary location in Centurion presents an additional barrier to access, particularly for consumers in rural areas and other distant regions, limiting their ability to seek redress effectively.³²

Overall, the research concludes that not only do the affordability assessment provisions in the NCA create challenges for low-income consumers in obtaining credit, but these consumers also face significant obstacles in accessing dispute resolution mechanisms once they become over-indebted.³³ The existing framework, while designed to protect consumers, falls short in providing accessible and effective remedies for those most vulnerable to reckless lending practices.³⁴

The findings clearly indicate the need for regulatory reform. To inform these recommendations, guidance was drawn from principles by international standard setting bodies such as the World Bank,³⁵ the G20,³⁶ the OECD³⁷ and INSOL,³⁸ established regulatory frameworks,³⁹ and comparative analyses of best practices in other jurisdictions.⁴⁰ In particular, comparing affordability assessments and consumer credit regulation in the UK and Australia with those in South Africa provides valuable insights that can help strengthen consumer protection, refine affordability assessment methodologies, enhance regulatory enforcement, and improve debt relief mechanisms in the South African context.

³⁰ Chapter 7 para 7.7.

³¹ NCT/212225/2021/56(1)) [2022] ZANCT 52 (20 September 2022) para 63 as discussed in Chapter 7 para 7.7.

³² Chapter 7 para 7.7.

³³ Chapter 7 para 7.8.

³⁴ *Ibid.*

³⁵ Chapter 2 Para 2.2.

³⁶ Chapter 2 Para 2.3.

³⁷ Chapter 2 Para 2.4.

³⁸ Chapter 2 Para 2.5.

³⁹ Chapter 2 para 2.6.

⁴⁰ Chapter 8 and chapter 9.

10.3 Recommendations for reform

Drawing on the lessons from the UK⁴¹ and Australia,⁴² as well as research in this study on affordability assessment,⁴³ the debt review process,⁴⁴ and other mechanisms to provide protection and relief to low-income consumers in South Africa,⁴⁵ the following recommendations outline key areas where policy and legislative changes can be introduced to improve the position of the low-income consumer with regard to the challenges identified in this study.

10.3.1 Recommendation 1: Reforming affordability assessment to enhance accuracy and flexibility

The UK adopts a flexible and consumer-centric approach to affordability assessments, avoiding overly prescriptive rules that might unintentionally restrict access to credit. By contrast, South Africa's rigid, rule-based system, including the minimum expense norm table, limits adaptability to consumers' individual financial circumstances. Moreover, the UK allows a broader range of income sources in affordability calculations, including contributions from other individuals and alternative sources such as rental payments.⁴⁶

A key lesson from the UK's Consumer Duty regulations is the requirement for credit providers to monitor affordability throughout the lifecycle of a loan rather than just at the time of origination.⁴⁷ This ensures that consumers remain financially stable and are not overburdened by credit as their circumstances evolve. Overall, the UK'S approach to affordability assessment is more flexible, allowing credit providers to determine proportionality based on product risk and consumer profile rather than relying solely on prescriptive thresholds.⁴⁸

Australia's affordability assessment framework follows a principles-based approach, requiring credit providers to make reasonable inquiries into a consumer's financial

⁴¹ Chapter 8.

⁴² Chapter 9.

⁴³ Chapter 4 para 4.3 and Chapter 5.

⁴⁴ Chapter 6 para 6.2.

⁴⁵ Chapter 6 para 6.3 and Chapter 7 paras 7.3 – 7.7.

⁴⁶ Chapter 8 para 8.3.

⁴⁷ Chapter 8 para 8.2.9.

⁴⁸ Chapter 8 para 8.5.

situation. The depth of verification varies depending on the risk profile of the credit product—more stringent checks apply to high-risk loans, while credit providers have flexibility in assessing other products.⁴⁹

As already mentioned, the South African position differs from this approach as it relies on rigid affordability assessment rules, including the minimum expense norm table, which may fail to reflect real-life financial complexities.⁵⁰ This thesis therefore recommends that South Africa's rule-based and rigid affordability assessment framework, and in particular the minimum expense norm table, should be reconsidered in favour of a dynamic and adaptable evaluation model.⁵¹ This would allow credit providers to conduct more tailored affordability assessments that better reflect individual financial circumstances, while still maintaining responsible lending practices.

It is recommended that static affordability assessment benchmarks be replaced with dynamic, data-driven evaluations that incorporate real-time data analytics on spending patterns, income fluctuations, and existing financial commitments. A collaborative implementation strategy is recommended for the development and operation of the proposed data-driven affordability assessment model. The NCR, as the statutory authority responsible for enforcing responsible lending practices, would be best positioned to oversee and regulate the framework. Given the technical demands of real-time analytics, the system should be developed and maintained by a consortium of stakeholders. This may include fintech firms with expertise in financial data modelling, credit bureaus, credit providers and digital service providers, such as mobile network providers, who has access to transactional and behavioural data that can enhance the accuracy of affordability. By integrating live financial data, affordability assessments would provide a more precise measure of consumers' actual financial capacity, ensuring that lending decisions align with their real financial position. This would prevent the exclusion of self-employed, informally employed and unbanked consumers who are often disadvantaged by rigid assessment models.⁵²

⁴⁹ Chapter 9 paras 9.3.1.1; 9.3.1.2; 9.3.1.3 and 9.5.

⁵⁰ Chapter 4 para 4.3.3.3. See also Chapter 5 paras 5.4 and 5.4.1.

⁵¹ Chapter 5 paras 5.4.1.3 and 5.4.1.1.

⁵² Chapter 5 paras 5.6.1.5 and 5.8.

To enhance the accuracy of affordability assessments, the range of alternative data sources used in credit evaluations should be expanded. Municipal accounts, mobile phone bill payments, lay-buy histories, and rental payment data should be incorporated to create a more accurate picture of consumer repayment behaviour.⁵³ Relying on traditional credit bureau data alone does not adequately reflect financial responsibility, especially for consumers who have limited access to formal credit but demonstrate responsible financial management in other transactions.

Regulatory reforms should also ensure that affordability monitoring extends beyond the initial credit assessment and continues throughout the duration of the credit agreement. Instead of assessing affordability only at the loan origination stage, lenders should conduct periodic reassessments to prevent consumers from falling into financial distress due to income fluctuations and unexpected expenses. Ongoing affordability evaluations would allow for early intervention, preventing excessive debt accumulation and ensuring that repayment arrangements remain sustainable. By integrating affordability monitoring into the broader regulatory framework, credit providers would be required to assess changes in a consumer's financial position throughout the lifecycle of the loan rather than relying on a static, one-time assessment.⁵⁴ This would align South Africa's approach more closely with the UK's Consumer Duty regulations, ensuring that borrowers are not overburdened by credit as their circumstances change.

A tiered regulatory approach where affordability assessment is based on different risk levels for credit products and consumer profiles rather than a rigid, one-size-fits-all approach is recommended. By allowing credit providers to determine proportionality based on product risk and consumer profile, affordability assessments could be tailored to different income sources, spending patterns, and financial obligations, ensuring that credit remains accessible to those who need it most.

⁵³ Chapter 5 paras 5.6.1.4 and 5.8.

⁵⁴ Chapter 8 para 8.2.9.

For consumers with irregular or informal income—such as self-employed individuals or those working in the informal sector—this approach would prevent automatic exclusion from credit simply because their earnings do not fit conventional assessment models. Instead, lenders could consider a broader range of income sources, including rental payments, remittances, and seasonal earnings, allowing low-income borrowers to demonstrate their ability to meet repayment obligations.

Furthermore, flexible affordability assessments would reduce unnecessary financial barriers by ensuring that low-risk credit products—such as small, short-term loans—are not subject to overly burdensome verification requirements. This would promote financial inclusion, allowing consumers to access responsible credit without being subjected to excessive scrutiny that may discourage or exclude them from formal lending markets.

By removing rigid thresholds and replacing them with proportional assessments, low-income consumers would have a better chance of accessing credit that aligns with their financial realities. This would help them manage short-term financial needs, avoid reliance on informal lending sources, and gradually improve their financial standing while reducing the risk of over-indebtedness.

10.3.2 Recommendation 2: Enhancing the Regulator’s enforcement powers

The UK provides strong recourse mechanisms for over-indebted consumers through institutions like the FOS⁵⁵ and the FCA.⁵⁶ The FOS has the power to issue binding decisions ensuring that consumers receive swift resolutions in disputes with credit providers. The FCA strengthens consumer protection by directly enforcing compliance, imposing fines and suspending licenses for reckless lending practices. These enforcement mechanisms create an effective deterrent against irresponsible lending and ensure that credit providers uphold responsible lending practices. By providing immediate and enforceable redress mechanisms, the UK ensures that consumers are protected without lengthy and costly legal proceedings.⁵⁷

⁵⁵ Chapter 8 para 8.4.2.

⁵⁶ Chapter 8 para 8.4.3.

⁵⁷ *Ibid.*

Australia follows a similarly proactive enforcement approach, granting ASIC significant regulatory authority. ASIC can pursue court orders and injunctions against non-compliant lenders and their directors, ensuring swift enforcement. Additionally, ASIC's has direct criminal prosecution powers allowing it to take legal action against credit providers engaging in predatory lending. The ability to issue banning orders to negotiate enforceable undertakings further strengthens ASIC's oversight, enabling tailored settlements without the need for prolonged and costly litigation.⁵⁸

The NCR in comparison, lacks immediate enforcement powers, relying on referrals to the Tribunal which limits the speed and effectiveness of regulatory intervention.⁵⁹ To enhance consumer oversight, it is recommended that enforcement mechanisms similar to those employed in the UK and Australia should be employed in the South African credit landscape. This will include granting the NCR the authority to impose direct penalties, issue banning orders and pursue criminal prosecutions against reckless lenders.

The ability to negotiate enforceable undertakings, as practiced by ASIC, could also provide the NCR with greater flexibility in resolving disputes. Such agreements could enable tailored remedies, such as commitments by credit providers to implement compliance programs or compensate affected consumers, without the need for lengthy tribunal proceedings. This would not only save time and resources but also ensure more immediate redress for consumers.

By incorporating these tools into its regulatory framework, South Africa could bolster the NCR's capacity to enforce the Act effectively, enhance consumer protection, and foster greater compliance within the credit industry. This approach would contribute to a more robust and responsive credit regulatory environment, benefiting both consumers and the broader financial system.

⁵⁸ Chapter 9 para 9.2.3.6.

⁵⁹ Chapter 7 para 7.3.

10.3.3 Recommendation 3: Strengthening political advocacy for inclusive financial services

The UK supports the expansion of credit unions as an alternative to high-cost lending, ensuring access to affordable, community-based credit options.⁶⁰ The UK's approach ensures that low-income consumers have access to responsible credit, reducing their reliance on predatory lenders.⁶¹ By promoting the growth of credit unions and implementing mechanisms that support their development, the UK has created a lending environment that fosters financial inclusion while maintaining consumer protection. These initiatives provide guidance to South Africa in addressing challenges faced by low-income consumers in accessing fair and reasonable credit.

It is recommended that South African policymakers should adopt similar measures by supporting the expansion of credit unions to serve as viable alternatives to high-cost, short-term credit options. Policymakers should implement initiatives that provide financial and regulatory support to credit unions, enabling them to offer affordable credit products to underserved populations. Government subsidies or incentives for credit providers who engage in responsible lending practices could be considered. Measures such as offering tax incentives for loans that meet certain affordability criteria or supporting innovation in low-cost lending products could also promote responsible credit provision.

To ensure broader access to formal financial services, the government and key regulatory bodies must commit to driving reforms that promote financial inclusion. Political intervention should focus on initiatives that introduce subsidies, public-private partnerships, and legislative changes that promote financial inclusion. The development of alternative credit models, such as state-backed social credit schemes, would provide low-interest emergency credit to underserved populations, reducing reliance on unregulated lenders. Policies should also be implemented to balance consumer protection with financial accessibility, ensuring that regulatory measures do not unintentionally restrict credit access.

⁶⁰ Chapter 8 paras 8.4.5.2 and 8.5.

⁶¹ *Ibid.*

By securing political support for financial inclusion, key institutions such as National Treasury, the DTIC and the NCR can implement policies to ensure South Africa's credit market remains both consumer-protective and accessible. Legislative and regulatory reforms, coupled with collaboration among financial institutions and advocacy groups, will help balance responsible lending with equitable access to credit.

10.3.4 Recommendation 4: Enhancing transparency on non-compliant credit providers

The UK has taken a strong stance against unlicensed lending by criminalising unlicensed credit providers, serving as an effective deterrent to predatory lending practices.⁶² To enforce this, the UK has established the Illegal Money Lending Team, collaborates with community organisations to identify, investigate, and prosecute illegal lenders while offering support to affected consumers.⁶³ While this approach has proven effective in the UK, its implementation in South Africa presents significant challenges. Given the constraints in enforcement capacity such a recommendation may not yield the intended results within the South African context. As a result, alternative measures better suited to South Africa's regulatory framework and enforcement capabilities should be considered to address illegal lending and protect vulnerable consumers.

In Australia, the AFCA Datacube provides detailed reports on lenders with a history of complaints and regulatory violations.⁶⁴ A similar public database in South Africa could empower consumers to avoid risky lenders, deter reckless lending by increasing reputational risks for non-compliant providers, and encourage responsible lending practices through greater market transparency. By making regulatory actions more visible, South Africa could strengthen market discipline and improve consumer decision-making.

It is recommended that a publicly accessible database listing non-compliant credit providers, unlicensed lenders, and reckless lenders, similar to the AFCA Datacube in Australia, should be established in South Africa. This database should include

⁶² Chapter 9 paras 9.4.5.1 and 9.5.

⁶³ Chapter 9 para 9.4.5.1.

⁶⁴ Chapter 9 para 9.4.2.

enforcement actions taken by the NCR and allow consumers to verify the compliance status of lenders before taking out credit.

This reform would strengthen consumer empowerment by enabling individuals to make informed borrowing decisions. By increasing regulatory visibility, it would serve as a deterrent to reckless lending practices. Additionally, it would encourage greater compliance within the financial sector by imposing reputational consequences on non-compliant lenders.

10.3.5 Recommendation 5: Expanding financial education and free debt counselling services

Through their Money Advice Service, the UK offers free debt advice services funded through levies on financial institutions, ensuring that over-indebted consumers receive support without additional financial burden.⁶⁵ The Debt Relief Order in the UK provides a low-cost debt relief mechanism for financially vulnerable consumers.⁶⁶ Furthermore, the Debt Respite Scheme (Breathing Space Moratorium) in the UK offers temporary relief from enforcement proceedings, especially for those facing mental health crises.⁶⁷

Australia's MoneySmart initiative, operated by ASIC, provides free financial education and debt management resources through social media platforms and online tools.⁶⁸ Additionally, Australia offers free, informal debt counselling that helps consumers negotiate manageable repayment plans without requiring formal court intervention.⁶⁹ In contrast, South Africa's debt review process is highly formalised, legalistic, and costly, making it less accessible to low-income consumers.⁷⁰

It is recommended that South Africa should establish a state-supported financial education initiative, modelled after the UK's Money Advice Service and Australia's MoneySmart. This initiative should provide free online tools, budgeting resources, and debt management guidance. By adopting a more rehabilitative and educational

⁶⁵ Chapter 8 para 8.4.4.1.

⁶⁶ Chapter 8 para 8.4.4.2.

⁶⁷ Chapter 8 para 8.4.4.3.

⁶⁸ Chapter 9 paras 9.2.4.7 and 9.4.3.1.

⁶⁹ Chapter 9 para 9.4.3.2.

⁷⁰ Chapter 6 para 6.2.

approach to debt management, policymakers can empower consumers to make informed financial choices, reducing the risk of over-indebtedness and reckless borrowing.

In addition, debt counselling services should be made more accessible and affordable for low-income consumers. A state-supported debt advice system should be introduced and funded through levies on credit providers to ensure that low-income consumers have access to debt relief without incurring additional costs. The debt review process should also be simplified and the procedural complexities of the process should be reduced to enhance accessibility. Furthermore, debt counsellors should be formally recognised as ADR agents, allowing them to mediate financial disputes without the need for lengthy court procedures. By incorporating debt counselling into dispute resolution frameworks, consumers would gain more immediate and cost-effective access to debt relief.

It is further proposed that the implementation of debt intervention, introduced by the 2019 NCAA, must be prioritised, ensuring that it is adequately funded and efficiently managed.⁷¹ This Act should serve as a comprehensive relief mechanism for low-income consumers struggling with unmanageable debt.

Government and key regulatory bodies should further consider implementing a Debt Respite Scheme, modelled after the UK's Breathing Space Moratorium, to provide financially distressed consumers with temporary relief from enforcement actions and further interest accrual. This measure would be particularly beneficial for individuals experiencing mental health crises, acknowledging the profound impact of financial strain on well-being. By introducing such protections, undue hardship can be mitigated and vulnerable consumers can be supported to regain financial stability.

To further reduce legal costs for over-indebted consumers, the proposed amendment to section 86(8) of the Act, introduced under the 2019 NCAA, should be supported. This amendment requires that all agreed-upon debt restructuring proposals be referred to the Tribunal at a fixed fee, eliminating the need for expensive court

⁷¹ Chapter 1 para 1.1 and Chapter 8 para 8.4.1.

proceedings. By streamlining the process, debt counselling would become a more accessible and cost – effective debt relief measure for financially vulnerable consumers.

A well-regulated withdrawal process should also be introduced for debt review. By enabling *bona fide* consumers to exit the process once their financial positions improve, South Africa would ensure fairness and efficiency in the debt review system while safeguarding credit providers' interests.

10.3.6 Recommendation 6: Strengthening consumer redress and compensation mechanisms

Australia's AFCA offer stronger consumer protection mechanisms than its South African counterpart, the NFOSA.⁷² The Australian Parliament passed the Financial Services Compensation Scheme of Last Resort Act in 2023 ensuring that consumers receive compensation even if a credit provider against whom a compensation order was made becomes insolvent. This scheme is funded by the Australian government and complemented by an annual levy imposed on certain sectors of the financial services industry.⁷³

A similar scheme is recommended for South Africa to ensure that consumers who have been awarded financial compensation by NFOSA or other dispute resolution bodies, receive payment even if the credit provider has become insolvent. By strengthening consumer redress mechanisms, South Africa could enhance consumer confidence in the financial system and ensure fair outcomes for affected consumers.

10.3.7 Recommendation 7: Holding credit provider directors personally liable for reckless lending

Australia's NCCPA includes section 169(b), which establishes personally liability for directors involved in violations of credit legislation, including reckless lending and unlicensed credit provision.⁷⁴

⁷² Chapter 9 para 9.4.1.

⁷³ Chapter 9 paras 9.2.5.1; 9.4.2 and 9.5.

⁷⁴ Chapter 9 paras 9.4.4.2 and 9.5.

It is recommended that a similar approach should be considered in South Africa, introducing personal liability provisions for directors and executives of credit providers to ensure greater accountability within the industry. Holding individuals in leadership positions personally responsible for reckless lending practices would prevent them from avoiding accountability through corporate restructuring or insolvency.

Implementing such measures could serve as a deterrent to unethical lending practices while fostering a stronger culture of corporate responsibility in the South African financial sector.

10.3.8 Recommendation 8: Implementing uniform protected earnings requirements

One of the key regulatory reforms introduced under Australia's Financial Sector Reform Act (FSRA) was the protected earnings requirement, which caps small-amount loan and lease repayments at 10% of a consumer's net income.⁷⁵ This ensures that consumers retain sufficient disposable income for essential living expenses.

It is recommended that a protected earnings cap should be introduced into South African credit legislation to regulate the repayment amounts on small-amount credit agreements and consumer leases. However, rather than adopting a fixed cap model similar to Australia, it is suggested that a more flexible framework should be pursued. A flexible repayment cap that adjusts to a consumer's specific financial circumstances would protect low-income consumers from excessive debt burdens. Unlike fixed caps, this approach will ensure that a consumer can meet their essential expenses while repaying debt at a manageable rate. It would help prevent financial distress, reduce reliance on informal lending and also promote responsible credit access.

10.4 Conclusion

South Africa's consumer credit regulation framework requires significant reforms to balance responsible lending, financial inclusion, and consumer protection. Drawing, amongst others, from best practices in international responsible lending, and in particular the UK and Australia, South Africa can move toward a more balanced,

⁷⁵ Chapter 9 paras 9.2.4.6; 9.2.5.6 and 9.5.

consumer-orientated credit system that simultaneously prevents reckless lending and promotes financial inclusion. Reforms such as dynamic data-driven affordability assessments, continuous affordability monitoring, expanded consumer redress mechanisms and stronger regulatory enforcement powers for the NCR would modernise South Africa's credit industry, ensuring that vulnerable consumers receive meaningful protection while retaining access to responsible credit. While the proposed reforms may entail substantial financial and operational challenges, they remain both viable and necessary to advance a more inclusive and resilient credit landscape.

A forward-thinking approach – one that balances regulation with accessibility – is essential to achieving a stable, equitable and sustainable credit environment. Policymakers must pursue a regulatory strategy that aligns financial inclusion with consumer protection, ensuring that all borrowers, particularly low-income consumers, are safeguarded against financial exploitation while still being able to access credit that fosters long-term financial stability.

Annexure A

Schedule 7 Warning about small amount credit contracts—warning on premises

(Subparagraph 28XXA (1) (c) (i))

Do you really need a loan today? *

It can be expensive to borrow small amounts of money and borrowing may not solve your money problems

Check your options before you borrow:

- For information about other options for managing bills and debts, ring 1800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor
- Talk to your electricity, gas, phone or water provider to work out a payment plan
- If you are on government benefits, ask for an advance payment from Centrelink: 13 17 94

Go to www.moneysmart.gov.au —

MoneySmart shows you how small amount loans work and suggests other options that may help you.

* This statement is an Australian Government requirement under the *National Consumer Credit Protection Act 2009*.

Annexure B

Schedule 9 Warning about small amount credit contracts—warning on websites

(Subparagraph 28XXB (d) (i))

Do you really need a loan today? *

It can be expensive to borrow small amounts of money
and borrowing may not solve your money problems.

Check your options before you borrow:

- For information about other options for managing bills and debts, ring 1800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor
- Talk to your electricity, gas, phone or water provider to see if you can work out a payment plan
- If you are on government benefits, ask if you can receive an advance from [Centrelink](#): Phone: 13 17 94

The Government's MoneySmart website shows you how small amount loans work and suggests other options that may help you.

* This statement is an Australian Government requirement under the *National Consumer Credit Protection Act 2009*

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