

THE NATIONAL CREDIT ACT – an overview

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Disclaimer

This summary of the Act has been published for general information only and is not a comprehensive analysis of the legislation. It is therefore not a substitute for professional advice and should not be acted upon without first consulting your BDO Spencer Steward partner or client adviser.

Context

Currently consumer credit to households is estimated at R760bn with 14 million active credit consumers and 50 million open accounts. The average % of debt to income is 73%. There are 80,000 judgements for debt per month. 11% of households have debt > 20% of disposable income

The Act brings into existence the National Credit Regulator (NCR) which is responsible for the regulation of the consumer credit industry. A National Consumer Tribunal exists to deal with matters relating to the Act

The Act aims to protect the consumer, to eliminate various undesirable credit practices and to regulate consumer credit agreements, credit providers and credit bureaus, as well as to provide mechanisms for debt rehabilitation.

Registration and Application

The Act requires the registration of credit providers, credit bureaus and debt counselors. Credit providers must register if they have at least 100 credit agreements (excluding incidental credit agreements); or total principal debt >R500,000

The Act applies to all credit agreements (as defined), whether or not the credit provider is registered, but the failure to register as required is unlawful and has voidable consequences for credit agreements entered into in these circumstances.

The protection that the Act extends to consumers does not apply to juristic persons with assets or turnover in excess of R1m, or where assets or turnover are less than R1m, the transaction itself is greater than R250,000 or is a mortgage agreement.

Only certain sections of the new Act apply retrospectively. In general, transactions entered into before 1 June 2007 are subject to the legislation prevailing at the time.

Credit agreements

The Act applies to all credit agreements. These are defined in Sections 8 and 9 to include:

1. Credit facility

Supply of goods or services or payment of an amount to a consumer and where repayment is deferred and a charge, fee or interest is payable to the credit provider

2. Credit transaction

Pawn or discount transaction; incidental credit agreement; installment agreement; mortgage agreement or secured loan; lease, other

3. Credit guarantee

A person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or credit transaction

The Act specifically excludes insurance policies, leases of immovable property and stokvel transactions

Incidental credit agreements and trade accounts

The Act has limited application to so-called 'incidental' credit agreements. These are defined as goods or services provided to the consumer whereby interest becomes payable only when payment is not made on or before a predetermined period.

The providers of such types of credit do not have to register in terms of the Act.

An incidental credit agreement is distinguished from a trade account. A trade account is one where a credit limit is set for a customer. This is not the same thing as a credit facility. Provided interest is not charged on any overdue amount, the agreement to provide credit does not fall within the ambit of the Act.

Reckless credit and over-indebtedness

A consumer is over-indebted when, according to available information, the consumer will be unable to satisfy in a timely manner all the agreements to which the consumer is a party

Credit is reckless when

- No assessment was made of the consumer's ability to pay
- The consumer did not understand his obligations
- The specific agreement caused the consumer to become over-indebted

The Act requires credit providers to do an assessment before entering into any credit agreement. The consumer must disclose information fully and truthfully at the time the agreement is made

If reckless credit has been extended, a debt counselor may recommend that the debt be cancelled or restructured. A court may suspend or reduce obligations. A lender has no recourse against another lender who extends credit recklessly, with the result that responsible lenders then suffer.

Employee loans

These fall under the jurisdiction of the Act unless the loan is not an arms length transaction. There is a danger in incorrectly assuming that employee loans are not credit agreements. Registration by the employer as a credit provider would only be necessary if the employer had over 100 loans on the books and/or these were in excess of R500,000 in total. However even if the employer is not registered, the provisions of the Act apply.

Debt counseling

If a consumer is in default of a credit agreement, the credit provider must advise the consumer in writing and propose that the consumer refers the credit agreement to a debt counselor. No legal proceeding may be instated against a consumer before the proper counseling procedures have been observed.

The debt counselor will assess whether the consumer is over-indebted or not, and if so, will propose a debt re-arrangement. The debt counselor cannot write off the debt. The full debt must be repaid, but according to terms agreed to by all parties. Once consent has been reached between the parties, a member of the Tribunal may confirm the order. If no consent is reached, the matter must be taken to court. Until the debt is paid off the consumer may not take on more debt.

Debt counselors must have appropriate training and must be registered with the Regulator. Debt counselors will be able to charge a fee for their services. This fee will be combined with other costs when determining the total amount of the debt to be settled.

Debt collection

In cases where the credit provider approaches the court to enforce a credit agreement, the court will consider whether due process has been observed and whether the credit agreement was reckless before making an order. The so-called '*in duplum*' rule has been amended so that outstanding interest, all costs and charges that accrue during the time that a consumer is in default under a credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.

Marketing and Sales Practices

Various marketing and sales practices are regulated. In essence, the Act seeks to stop practices whereby the consumer may be misled. Full information must be disclosed – for example where monthly payment terms are offered as against a cash price, the total payable by monthly installment must receive equal prominence with the cash price

A credit provider must first provide the consumer with a pre-agreement statement and a quotation in prescribed format so as to make comparisons between different suppliers possible. The quotation is binding for a period of 5 days and the credit provider must abide by the terms in that quotation. Documentation must be in simple and understandable language and in an official language. At present, the credit provider must inform the regulator which languages he will use. A minimum of 2 languages is required.

Credit bureaus and Credit information

A National Credit Register is being set up that will constitute a national database of all credit transactions. Its sole purpose will be to enable the assessment of indebtedness.

All credit agreements must be reported either to the national credit regulator or to a credit bureau, in prescribed format. Information may be released only for specific purposes and to specific parties as set out in the Regulations. The consumer must be informed before any adverse information is supplied to a bureau. The consumer has the right of free access to records relating to him and may request information to be corrected or disputed information to be blocked.

Information compiled by credit bureaus is confidential and may not be disclosed to anyone without the consent of the consumer or by an order of court or the Tribunal.

Recourse

Normal contractual disputes still fall to the courts to settle. However the Act distinguishes between 'prohibited conduct' and 'offences'

Prohibited conduct is any contravention of the Act and recourse is had to the Tribunal. The Act defines various 'offences' and indicates whether these should be dealt with by the Magistrate's Court or the High Court. The Regulator's decisions can be appealed to the Tribunal. Tribunal determinations must be applied by the Court. A Magistrate's court may deal with a matter or refer it to the Tribunal.

Reporting

Various reports must be submitted by credit providers to the Regulator, some of which require the involvement of auditors

Return	Frequency and due date	Auditor involved?
Compliance report	1 x p.a within 6 months of financial year end	No
Statistical return	Large credit – 4 x p.a Small credit – 1 x p.a. Both due within 45 days of the period end	No, but may assist smaller credit providers
Annual financial statements	1 x p.a. within 6 months of financial year end	Yes
Annual financial and operational return	1 x p.a. within 6 months of financial year end	Yes
Assurance engagement	1 x p.a. within 6 months of financial year end	Yes

APPENDIX

Interest regulation

Credit providers may only charge

- Interest (fixed)
- Initiation fee (fixed)
- Service fee (no greater than R50 p.m.)
- Credit insurance – not regulated but must be fair
- Default administration charges (regulated)
- Collection costs

Only certain specified costs may be capitalized into sec 102

Interest and fees after default may not exceed the principal debt at the point of default (implications for collectability of debt)

No penalty interest may be incurred once a debtor is in default

Maximum interest rates are fixed by regulation as follows:

Mortgage agreements	$[(RR \times 2.2) + 5\%]$ per year
Credit facilities	$[(RR \times 2.2) + 10\%]$ per year
Unsecured credit transactions	$[(RR \times 2.2) + 20\%]$ per year
Developmental credit agreements	
For development of a small business	$[(RR \times 2.2) + 20\%]$ per year
For low income housing (unsecured)	$[(RR \times 2.2) + 20\%]$ per year
Short term credit transactions	5% per month
Other credit agreements	$[(RR \times 2.2) + 10\%]$ per year
Incidental credit agreements	2% per month

Interest calculation

Formula: $\frac{\text{deferred amount} \times \text{interest rate}}{\text{Days in year}}$

Days in year

- Deferred amount = deferred obligations (S8) + capitalized amounts + unpaid interest and fees less payments
- Interest – calculated daily, capitalized monthly
- Date on which interest and fees are added to the deferred amount – Reg 39(c); 40(1); 41(5)

Different methods are acceptable provided they fall within 0.1% of the prescribed method

Fees and insurance

Limited per regulation:

Initiation fee

Mortgages – $[R1,000 + 10\% \text{ amount} > R10,000] < R5,000$

Other – $[R150 + 10\% \text{ amount} > R1,000] < R1,000$

Always < 15% of amount deferred; and

(special rules for developmental credit)

Monthly service fee – R50

(not applicable to charges not relating to credit and does not include withdrawal fees for credit cards)

Insurance

- Only for obligations, assets or services provided per credit agreement;
- Limited to outstanding obligations;
- Monthly, not capitalized;
- Only certain items may be 'required', rest 'optional'; and
- Consumer must be given a choice of policy