SECONDARY DEBT PREVENTION MEASURES IN TERMS OF THE NATIONAL CREDIT ACT 34 OF 2005.

by

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ACKNOWLEDGMENTS

I am indebted to the following persons:

1. My supervisor, Dr Renke, thanks for your guidance and support.

2. My parents Alex and Joyce, thank you for all your support. Only you know that this dissertation cost me more than money.
This dissertation discusses in general, a historical overview of progressive development of consumer credit legislation that laid the foundation for the National Credit Act.

It constitutes of an overview of consumer credit legislation that governed credit agreements prior to the National Credit Act. It investigates secondary debt prevention measures as stipulated in the National Credit Act that influence a consumer's decision in regards to credit spending and over-indebtedness, more specifically debt prevention measures such as advertising, credit marketing practices and the disclosure of information by the credit provider.

The rationale being that if a consumer is provided with understandable information in regards to credit agreements and he can compare one credit provider's services with another, and he will be put in a position to make a better decision when it comes to credit spending and thereby reducing or eliminating careless credit spending and subsequently over-indebtedness.
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1 General Introduction

1.1 Introduction

On 1 June 2007\(^1\) the National Credit Act 34 of 2005\(^2\) came into full effect and the purpose of this Act as set out in section 3 thereof is, amongst others, “to 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.”\(^3\) The pre-amble to the Act reads as follows:

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 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-organization in cases of over-indebtedness; to regulate credit information; to provide for the registration of credit bureaux, credit providers and debt-counseling services; to 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 Credit Tribunal; to repeal the Usury Act, and the Credit Agreements Act, 1980; and to provide for related incidental matters.

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\(^1\) S 172(4) of the National Credit Act repealed the Usury Act 73 of 1968 and the Credit Agreements Act 1980. See also Scholtz in Scholtz ed (2008) para 2.2.

\(^2\) Hereafter the “National Credit Act” or the “Act”.

\(^3\) S 3 of the Act, also discussed in Otto and Otto (2013) 6-7. See further Van Heerden and Boraine (2009) PER / PELJ 22/161, where the aims of the National Credit Act were discussed. One of the abovementioned aims were to resolve over-indebtedness by utilizing the principle of the consumer’s ability to satisfy all debt obligations as and when they are due.
The National Credit Act was introduced after it transpired that, among other factors, credit consumers were more concerned about obtaining credit\textsuperscript{4} at any cost, thereby disregarding the terms and conditions of the credit agreement which resulted in an increase of over-indebtedness.\textsuperscript{5} The National Credit Act aimed at addressing the rising numbers of over-indebted consumers in South Africa.\textsuperscript{6} The government of South Africa was concerned about the effectiveness of mechanisms in place to ensure consumer credit protection of disadvantaged individuals that fell within the scope of low income groups and the increasing rate of over-indebtedness, taking into consideration the reckless behavior of consumers and credit providers.\textsuperscript{7} This lead to a review of the credit market situation in South Africa at the time and the results of this review proposed that the country needed new legislation that would be as unique to South Africa as its history and background but still consistent with international credit market practices.\textsuperscript{8} This meant that, among others policy objectives, the most important objective was to regulate the full disclosure of the actual cost of credit to enable consumers to make informed decisions.\textsuperscript{9} Although some consumers took the time to scrutinise the information that was provided by credit providers and were unhappy with the contents of the information, there were some consumers that did not question the cost of credit itself

\textsuperscript{4} The term “credit” is defined by Grové and Jacobs (1993) \textsuperscript{1} as the “[t]rade practice according to which goods and services are supplied to a receiver and where the parties agree that the receiver is entitled to pay for such goods and services at a future date.” Sometimes these parties may agree that due to this delay in payment, an additional amount known as interest must also be payable. Grové and Jacobs further state that there are various factors that affect the granting of credit, such as the credit reputation of the consumer, the consumer’s reality such as affordability based on employment or access to fixed income.
\textsuperscript{5} Summary of Findings Credit Law Review (2003) \textsuperscript{5}. The consumer exhibited this type of attitude but at the same time blamed the legislature for the lack of sufficient protective mechanisms which also needed to address the consumer’s frustration with regard to lack of information.
\textsuperscript{6} S 3(c)(i) and (ii).
\textsuperscript{7} Summary of Findings Credit Law Review (2003) \textsuperscript{4}.
\textsuperscript{8} Summary of Findings Credit Law Review (2003) \textsuperscript{7}.
\textsuperscript{9} Summary of Findings Credit Law Review (2003) \textsuperscript{8}. If one considers the term “full disclosure” in the broad sense of the word, advertising and marketing practices would be included as these disclosures are necessary when the consumer make a decision to enter into a credit agreement as discussed in par 4.
from the little information that was provided. As a result of the investigations and reviews into the fundamental causes of over-indebtedness of credit consumers by the government, the effectiveness of consumer credit protection became a major concern, especially in the case of low income individuals who rely on credit for basic necessities.

The statutes that regulated the credit market at the time of the abovementioned investigation were the Credit Agreements Act 75 of 1980, the Usury Act 73 of 1968 and the Usury Act Exemption Notice. The history of consumer credit can be traced back to a less civilized time, whereby individuals needed the use of property that belonged to a supplier or manufacturer but the consumer was not in a financial position to be able to afford the purchase price. When considering the background of consumer credit legislation and within the limitations of this dissertation, one of the earlier pieces of consumer credit legislation in South Africa was the Hire-Purchase Act which passed in order to protect hire-purchasers. The Hire-Purchase Act was repealed by the Credit Agreements Act on 2 March 1981 due to the rapid developments in the credit industry which resulted in new forms of credit agreements. At that time, the Credit Agreements Act and the Usury Act regulated a large portion of the credit industry, however, these Acts had their own shortcomings and were both replaced by the National Credit Act which

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11 Summary of Findings Credit Law Review (2003) 8. Special attention must be taken when one takes into account the extent of sophistication in the credit industry.
12 Hereafter the “Credit Agreements Act”.
13 Hereafter the “Usury Act”.
16 36 of 1942.
bears little resemblance to its predecessors.\textsuperscript{19} An overview of the South African credit legislation will be discussed in greater detail below.\textsuperscript{20}

As mentioned above, the National Credit Act introduced new mechanisms for consumer protection in the credit market.\textsuperscript{21} These mechanisms are contained in the Act and they provide solutions for consumer that are overburdened and that are being exploited by creditor providers.\textsuperscript{22} That said and taking into consideration that there are valid advantages of consumer credit legislation, it must be noted that consumer credit legislation will be unable to protect individuals or consumers that become over-indebted due to special circumstances such as unemployment or lack of finances.\textsuperscript{23} The National Credit Act regulates the credit market through measures that prevent over-indebtedness and these measures may be divided into primary and secondary measures or alternatively direct and indirect debt prevention measures.\textsuperscript{24} For the purpose of this dissertation, Renke’s classification of debt prevention measures, which divides the measures that influence over-indebtedness into primary and secondary debt prevention measures, will be used.\textsuperscript{25} Roestoff and Renke discussed the classification as it is an important aspect that shows the kind of impact debt prevention measures may have on a consumer.\textsuperscript{26} The distinction is

\textsuperscript{20} See par 2.
\textsuperscript{21} Otto and Otto (2010) 4. Take note that the predecessors of the Act had measures in place that were directed at the prevention of over-spending.
\textsuperscript{22} Grové and Jacobs (1993) 2. See also Otto and Otto (2013), where it was discussed that the protection of consumers isn’t unique to South Africa but is considered to be a global phenomenon.
\textsuperscript{23} Grové and Jacobs (1993) 2. Reconstruction of debt cannot even assist these consumers as they have no inflow of income. See further Roestoff and Renke (2003) \textit{Obiter} 5 were they take note of these socio-psychological aspects taking into consideration that these include the health of the consumer, divorce, drug addiction and any other social factors that may affect the consumer’s ability to acquire a steady income.
\textsuperscript{26} Roestoff and Renke (2003) \textit{Obiter} 17 and 18 in their discussion of the measures that prevented over-indebtedness as per the Credit Agreements Act. See further Stoop (2009) \textit{SA Merc LJ}.
based on the type of influence that the measures have on the prevention of over-indebtedness or overspending, for example primary measures are aimed at preventing reckless credit granting and over-indebtedness. Secondary measures are indirectly aimed at reducing or preventing over-indebtedness through measures such as the education of consumers in regard to how the credit industry operates and the actual cost of credit, cooling-off from credit agreements as stipulated in the National Credit Act and the full disclosure of information as required by the said Act. Other authors prefer to classify debt prevention measures by describing them as direct and indirect measures as opposed to primary and secondary measures. In his thesis, Renke used the former classification and stipulates that primary debt prevention measures include but are not limited to assessments in respect of a consumer’s credit-worthiness, limiting the consumer’s credit allowance, interest rate caps and consumer protection in respect of credit costs after the conclusion of the credit agreement. According to Renke the disclosure of the full cost of credit and the cooling-off right are regarded as secondary debt prevention measures.

Debt prevention measures, whether primary or secondary, can be understood better once one understands the meaning of over-indebtedness. Over-indebtedness is defined by the Act as the inability to fulfil all debt obligations as and when they are payable based on the information provided at a given moment and taking into consideration the consumer’s financial means, obligations, prospects and the probability of

27 Renke LLD Thesis (2012) 13 as well as Stoop (2009) SA Merc LJ 272. These measures can be found between s78 and s88 of the National Credit Act. The headings of these sections deal with the application of the Act, over-indebtedness, reckless credit and its prevention, assessments, debt review, including the re-arrangement of debt and the suspension of credit agreements.
The reasons for over-indebtedness may differ from one consumer to another and may include irresponsible borrowing, loss of employment or having to deal with an unexpected expense. Over-indebtedness may be prevented or resolved by debt prevention measures which may have a primary effect on the consumer’s debt obligations or over-indebtedness, such as the assessment of a consumer’s creditworthiness or the limitation of interest that may be charged by credit providers. Secondary measures have an ancillary effect on the consumer’s debt circumstances and include disclosure of information and educating the consumer in order to make better and informed decisions, thereby promoting responsible and honest credit practices. This results in the protection of consumers and creating a balanced negotiating ground within the credit industry between the consumer and the credit provider.

1.2 Research Statement

The aim of this dissertation is to investigate and critically evaluate secondary debt prevention measures under the National Credit Act, which

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32 S 79 of the Act. See also Renke LLD Thesis (2012) 4 which provides a definition of over-indebtedness by the Disney, Bridges and Gathergood Report (2008) which made reference to a consumer’s ability of maintaining the minimum living standard. See also Renke (2011) THRHR 222.
34 Renke LLD Thesis (2012) 13. Debt review is also seen as a means to reduce over-indebtedness. This is done through the reconstruction of the consumer’s debts thereby making it less burdensome for the consumer. See Van Heerden and Boraine (2009) PER /PELJ 22/161 in this regard.
35 S 3. See also Renke LLD Thesis (2012) 6, where reference was made to the protection of consumers and fighting overspending and over-indebtedness. Stoop (2009) SA Merc LJ 367.
36 Stoop (2009) SA Merc LJ 367. See further Grové and Jacobs (1993) 2 where credit legislation is discussed as being able to provide a neutral ground whereby credit providers can be more fair to desperate consumers seeking credit.
are aimed at encouraging consumer credit education and responsible borrowing, thereby reducing the consumer’s ultimate debt obligations.

1.3 Research Objectives

The following research objectives have been formulated with the intention of outlining and restricting the scope of this dissertation in regard to the research statement referred to in sub-paragraph 1.2 above:

a) Consumer credit legislation has been part of South Africa’s customs for decades. A historical overview of the progressive development of consumer credit legislation will show the development of secondary debt prevention measures in terms of consumer credit law, the degree of protection consumers were entitled to, the issues under the National Credit Act’s predecessors that resulted in the lacuna that called for reform and whether consideration of the secondary debt prevention measures of the Act’s predecessors could result in the enhancement of the National Credit Act.

b) In order to test the effectiveness of the National Credit Act, a brief overview of the National Credit Act’s field of application will be discussed and an investigation of secondary debt prevention measures that influence a consumer’s decision in regard to credit spending and over-indebtedness, more specifically debt prevention measures such as advertising, credit marketing practices and the disclosure of information by the credit provider will be investigated. The aim is also to recognise issues that may limit the purpose of these measures and to provide recommendations in order to fill any gaps that may be identified.

37 See par 2.1 below.
c) A review was conducted in terms of the National Credit Act which resulted in the National Credit Act Amendment Act 19 of 2014 which was assented to by the President. However, as these amendments do not affect secondary debt prevention measures significantly, to the shortcomings that have not been addressed by the National Credit Amendment Act will be addressed.

1.4 Delineation and Limitations

In respect of delineation and limitations, this dissertation will deal with debt obligations arising from consumer credit agreements only and although the abovementioned measures may be divided into primary and secondary debt prevention measures, this dissertation is limited to the discussion of secondary debt prevention measures and their influence on over-indebtedness. Any reference to credit agreements will be deemed to be consumer credit agreements as defined in the National Credit Act and will therefore fall within the application of the Act. This dissertation will discuss consumer credit agreements in general and specific sub-categories that are stipulated in section 8 of the Act. Debt prevention measures that influence a consumer’s debt obligations after breach of the credit agreement has occurred will be excluded from the scope of this study.

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39 1 March 2006.
40 This section divides credit agreements that fall within the scope of the National Credit Act into credit facilities, credit transactions, credit guarantees and any combination of these agreements. S 8(2) also states which agreements are not governed by the National Credit Act, “irrespective of its form”, such as insurance policies and leases of immovable property.
1 5 Structure of the Dissertation

The structure of this dissertation consists of five paragraphs. Paragraph one refers to the general introduction of the topic, it provides background information, the problem statement and the research objectives. Paragraph two will deal with the history and development of consumer credit legislation over the years that preceded the National Credit Act in respect of secondary debt prevention measures that influenced credit over-indebtedness. Paragraph three will discuss the scope of application of the National Credit Act. Paragraph four will discuss the secondary debt prevention measures aimed at consumer protection prior to the conclusion of the agreement. This includes advertising and credit marketing practices in terms of the National Credit Act. Paragraph five will focus on secondary debt prevention measures aimed at consumer protection during and after the existence of the credit agreement. This includes the disclosure of information, thereby *inter alia* dealing with the education of the consumer and empowering him to make informed decisions with regard to credit spending which may lead to over-indebtedness. Lastly, paragraph six will conclude the dissertation and contain recommendations that will strive to enhance consumer protection and provide further suggestions that will indirectly prevent over-indebtedness.

1 6 Key References, Terms and Definitions

For the sake of clarity it is necessary to define the following terminology that will be used throughout this dissertation:

(a) “consumer”,⁴¹ is defined amongst others as the party to whom goods or services are sold, to whom or at whose direction money is

⁴¹ See s 1 for definition of consumer. And will also include any reference to any individual utilising credit services and products of a credit provider. Take note that this may in the
advanced or credit granted in respect of a credit agreement to which the National Credit Act applies.

(b) “credit agreement” means an agreement that meets all the criteria set out in section 8 of the National Credit Act.42

(c) “credit provider”43 is defined as a party who inter alia advances money, supplies goods or services to another in respect of a credit agreement to which the National Credit Act applies.44

1 7 Referencing Techniques

a) For the sake of convenience the masculine form is used in this dissertation to refer to a natural person.

b) The full titles of the sources referred to herein are provided in the bibliography, together with an abbreviated "mode of citation". This mode of citation is used to refer to a particular source in the footnotes. However, legislation and court decisions are referred to in full.

c) The law as stated in this dissertation reflects the position as on 1 March 2014.

42 See s 1 for definition of credit agreement.
43 This definition includes definitions of someone supplying credit to consumers in terms of the Usury Act, the Credit Agreements Act as well as the Hire-Purchase Act. The credit grantor, for example, in terms of the Credit Agreements Act will for the purposes of this dissertation be referred to as the credit provider in the name of consistency. See further Jordaan (2007) 1 where he stipulated that a credit provider is any person, juristic or natural that provides goods, services or money on credit and defers such payment.
44 See s 1 for definition of credit provider.
The Development of Consumer Credit Legislation in South Africa

2.1 Introduction

When one takes a look at statistical data in South Africa in terms of the credit market, it is noticed that there are a number of different entities collecting data for different aspects of the credit market focusing on which ever factors they view as important.\(^{45}\) This resulted in inaccuracy of these statistics as the Micro Finance Regulatory Council, for example, focused on micro lenders while the South African Reserve Bank focused on banking institutions and other institutions that conducted bank-related activities. Lastly, Statistics South Africa concentrated on retailers and the sales accounts that are activated by consumers.\(^{46}\) As a result of the above statistics it has been projected that the credit market is estimated to be an industry worth R800 billion.\(^{47}\) Taking into consideration that the above information was inaccurate, there was some difficulty in terms of assessing the levels of over-indebtedness precisely and, that said, the government had difficulties introducing protective mechanisms without understanding the true extent of the problem.\(^{48}\) This impreciseness of information has been remedied by section 18 of the National Credit Act,\(^{49}\)


\(^{46}\) The Micro Finance Regulatory Council was established in 1999 with the assistance of the South African Reserve Bank in order to prevent economical lost from unfair terms and conditions when businesses entered into credit agreements. See also www.mfrc.co.za for its history and scope of application. For further reference consult Kelly-Louw (2008) SA Merc LJ 200.

\(^{47}\) Kelly-Louw (2008) SA Merc LJ 200. The bigger the size of the credit industry, the more beneficial it is to credit providers because they make a lot of money from consumer over-indebtedness and the longer consumers are in debt, the more profit the credit provider will make as explained in Campbell and Logan (2008) 1.

\(^{48}\) Kelly-Louw (2008) SA Merc LJ 200. Otto and Otto (2013) 2 claim that the credit industry is growing rapidly and has now hit the trillion rand mark and is constantly growing.

\(^{49}\) S 18(1)(c) provided that “the National Credit Regulator is responsible to report on the volume and costs of different types of consumer credit products, and market practices relating to those products and the implications for the consumer choice and competition in the consumer credit market”. This will keep the minister aware of developments in the industry and solutions can be provided sooner if necessary.
by placing an obligation on the National Credit Regulator and thereby demanding that this office reports on the status of the credit market to the Minister of Trade and Industry annually.\(^{50}\)

Most Acts are enacted to protect the majority of the people, and the National Credit Act is no exception.\(^{51}\) In some cases the majority of people are the ones that do not have the resources to protect themselves from corporate giants and they therefore require the protection from the legislature.\(^{52}\)

A brief overview of the history of consumer credit legislation will be discussed below in order to understand the contextual settings of the birth of the National Credit Act. Renke followed Grove and Otto’s classification of consumer credit legislation.\(^{53}\) The same classification of consumer credit legislation into first-generation, second-generation and third generation will be used.\(^{54}\)

The first-generation of consumer credit legislation was in force during the times of the past South African colonies.\(^{55}\) The first consumer credit enactment worth mentioning came in the form of Act 41 of 1908\(^{56}\) (Natal) that was meant to protect consumers from the exploitation of credit providers and that regulated claims of excessive interest.\(^{57}\) The Usury Act

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\(^{50}\) Kelly-Louw (2008) *SA Merc LJ* 200. The information contained in these reports includes monitoring the situation and reviewing the effectiveness of measures that are already in place.

\(^{51}\) Scholtz in Scholtz *ed* (2008) par 1.1. See also par 11 above where the purpose of the Act has been discussed in greater detail. See further Roestoff and Renke (2003) 16 who also concur with the view of Grové and Otto with regard to the protection of consumers from exploitation by credit providers.


\(^{54}\) Renke LLD Thesis (2012) 325. This distinction was used by Grové and Otto.


\(^{56}\) Prior to Act 41 of 1908, there was Act 6 of 1858 which also regulated Natal.

23 of 1908\textsuperscript{58} of the Cape, also enacted during the times of the colonies, had as its main purpose the regulation of interest rates for loans.\textsuperscript{59}

Unlike the first-generation of consumer credit legislation, the second-generation consumer credit legislation resulted in the nationalisation of consumer credit laws.\textsuperscript{60} Second-generation consumer credit legislation such as the 1926 Usury Act\textsuperscript{61} was in force and had a scope of application limited to money lending transactions.\textsuperscript{62} Certain transactions such as instalment transactions had no statutory protection and were regulated by common law.\textsuperscript{63} However, the Insolvency Act of 1916, section 71 in particular, contained measures to protect buyers in hire-purchase agreements.\textsuperscript{64} There were obvious gaps in consumer credit legislation, especially for the regulation of hire-purchase agreements.\textsuperscript{65} On 1 May 1942, the Hire-Purchase Act 36 of 1942 became effective and regulated credit agreements that were not regulated by the 1926 Usury Act.\textsuperscript{66}

The Limitation and Disclosure of Finance Charges Act 73 of 1968\textsuperscript{67} replaced the 1926 Usury Act which was later amended and renamed the

\textsuperscript{58} Hereafter referred to as the 1908 Usury Act.
\textsuperscript{59} Renke LLD Thesis (2012) 325.
\textsuperscript{60} Renke LLD Thesis (2012) 326.
\textsuperscript{61} Hereafter the 1926 Usury Act which became effective in Jun 1926. This Act repealed the 1908 Usury Act in terms of s 15(1). See further Otto and Otto (2013) 3.
\textsuperscript{64} Renke LLD Thesis (2012) 326.
\textsuperscript{65} The 1926 Usury Act had its limitations and was later drastically amended in 1980. See Scholtz in Scholtz ed (2008) para 1.3.1. Renke LLD Thesis (2012) 326. At the time, regulation of these types of credit agreements was limited.
\textsuperscript{66} Hereafter referred to as the Hire-Purchase Act which was based on the British Hire-Purchase Act. See further Renke LLD Thesis (2012) 326.
\textsuperscript{67} Hereafter referred to as the LADOFCA or the 1968 Usury Act. Refer also to in Renke LLD Thesis (2012) 327. This regulated the financial aspects of instalment agreements and agreements for movable goods. Renke LLD Thesis (2012) 327 stated that the contractual aspects of instalment agreements and agreements were regulated by the Hire-Purchase Act. See also Grové and Jacobs (1993) 2 where it was discussed that this repeal was due to the recommendations brought forward by the First Franzsen Report. In 1980 further amendments were made to the LADOFCA based on the Second Franzsen Report.
1968.\textsuperscript{68} The Credit Agreements Act came into effect on the 2\textsuperscript{nd} March 1981 as the first of the third-generation of consumer credit legislation.\textsuperscript{69} As party of the third-generation consumer credit legislation, the LADOFCA was also amended to be in harmony with the Credit Agreements Act.\textsuperscript{70}

The National Credit Act is considered to be the fourth-generation of consumer credit protection and has a vast scope of application compared to its predecessors.\textsuperscript{71}

The purpose of this paragraph is to discuss the progressive development of the secondary debt prevention measure under the National Credit Act’s predecessors, the extent of protection afforded to consumers by each consumer credit enactment, the scope of application of each Act, the reasons for enactment of each Act and to make recommendations for amendments of and improvements to the National Credit Act.\textsuperscript{72}

\textbf{2 2 Act 41 of 1908 (Natal)}\textsuperscript{73}

Act 41 of 1908 (Natal) dealt with money lending transactions whereby credit providers charged interest for loans provided.\textsuperscript{74} The only secondary debt prevention measure worth mentioning is disclosure of the borrower’s obligations in writing which affected the enforceability of the agreement.\textsuperscript{75}

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\textsuperscript{69} Renke LLD Thesis (2012) 327.
\textsuperscript{70} Mentioned above.
\textsuperscript{71} This Act repealed the Hire-Purchase Act and came into operation 1981. See further Renke LLD Thesis (2012) 328.
\textsuperscript{72} Renke LLD Thesis (2012) 328.
\textsuperscript{73} The Act’s predecessors were the Free State Law Book and Act 6 of 1858 (Natal) which dealt with loans with interest payable.
\textsuperscript{74} Renke LLD Thesis (2012) 330.
\textsuperscript{75} S 2 and further Renke LLD Thesis (2012) 330.
2 3 The 1908 Usury Act (Cape)

The scope of application of this Act was limited largely to money lending agreements.\(^76\) In regard to secondary debt prevention measures consumers had to rely on the element of disclosure.\(^77\) Each credit agreement had to disclose to the consumer the capital amount advanced, the interest rate and the period of the credit agreement.\(^78\) It was considered an offence for credit providers to enter into credit agreements without disclosing material facts of the agreement.\(^79\)

2 4 The 1926 Usury Act

The Usury Act\(^80\) was introduced in South Africa in 1926 and was intended to be the first national Act to regulate consumer credit agreements.\(^81\) Its scope was limited to money lending agreements that did not exceed R500 000 in terms of the principal debt.\(^82\) The Usury Act was aimed at, among others, the limitation of the cost of credit as well as the regulation of the disclosure of information provided to the consumer.\(^83\) The Act introduced interest rate caps and made it an offence for credit providers to charge interest above these caps, thereby protecting the consumer against high interest rates.\(^84\)

\(^{76}\) S 1 of the Act.
\(^{77}\) S 3 of the Act and also Renke LLD Thesis (2012) 332.
\(^{78}\) S 4 and Renke LLD Thesis (2012) 332.
\(^{80}\) 37 of 1926. See Kelly–Louw and Stoop (2012) 7.
\(^{83}\) Roestoft and Renke (2003) 19. See the reference with regard to the disclosure of the debtor’s obligations to enable him to make an informed decision with full knowledge of his obligations and the risk involved.
\(^{84}\) Kelly-Louw and Stoop (2012) 7.
One of the secondary debt prevention measures in terms of this consumer credit enactment was the standardisation of information that needed to be disclosed to consumers. Credit providers needed to set forth clearly the amount advanced, the amount that needed to be paid to the credit provider and the interest rate charged in terms of an agreement.

Although the consumer did not have as much protection in 1926 against the abuse of credit providers, consumers were entitled to a copy of the signed agreement in terms of section 8(1) and failure of the credit provider to abide by this provision resulted in limitations in regard to the interest that the credit provider could charge. The credit provider could not charge more than 10 percent of interest. Credit providers were also obligated in terms of the 1926 Usury Act to provide credit quotations to enable consumers to be aware of the terms contained in the agreement should they decide to enter into same after the pre-contractual disclosure stage. This provided basic disclosure to the consumer and Kelly-Louw and Stoop reckon that, although credit providers did not disclose the full cost of credit, there were no consequences for their actions. Credit providers were selective in terms of the information they provided thereby concealing the actual cost of credit.

The consumer could also demand that a statement be supplied by the credit provider containing details of the outstanding debt, the interest payable and other applicable information. If the consumer demanded a

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86 According to Kelly-Louw and Stoop (2012) 7, disclosure was only limited to interest rates and no sanctions were included in the Act for non-compliance. Renke LLD Thesis (2012) 335.
87 S 8(2) and further Renke LLD Thesis (2012) 335.
92 Renke LLD Thesis (2012) 335 stipulated that the credit provider could not recover or charge more than 10 per cent per annum in interest.
statement, the credit provider needed to supply a statement within seven days.\textsuperscript{93} This statement needed to contain the amount advanced, the interest rate, the amount of interest already accrued, the amount already paid off and amount still outstanding.\textsuperscript{94} Failure to comply with the above request meant that the credit provider’s rights were limited in that the credit provider could not enforce the credit agreement and furthermore could not charge interest for the period of the default.\textsuperscript{95}

The introduction of marketing practices in regard to consumer credit was first introduced in terms of the 1926 Usury Act.\textsuperscript{96} Credit providers were not allowed to invite consumers to enter into credit agreements in a circular or document, except with a written request from the consumer.\textsuperscript{97} This meant that credit providers were prohibited from placing invitations in newspapers.\textsuperscript{98} Any form of invitation to enter into credit agreements was prohibited, including that credit providers could not employ agents to invite people to enter into credit agreements with the credit provider.\textsuperscript{99}

The 1926 Usury Act’s scope of application excluded hire-purchase agreements and consumers therefore had to rely on the limited protection offered by the common law.\textsuperscript{100} The Hire-Purchase Act was enacted to protect consumers in this regard.\textsuperscript{101}

\begin{itemize}
\item \textsuperscript{93} S 9(2) and Renke LLD Thesis (2012) 335.
\item \textsuperscript{94} Renke LLD Thesis (2012) 335.
\item \textsuperscript{95} S 9(2) and Renke LLD Thesis (2012) 336.
\item \textsuperscript{96} Renke LLD Thesis (2012) 336.
\item \textsuperscript{97} S 7(1)(b) and further Renke LLD Thesis (2012) 336.
\item \textsuperscript{98} S 7 of the Act and see further Renke LLD Thesis (2012) 336. Grové and Otto (2002) 85 view this as the initial stage of disclosure. Advertising practices enable credit providers to inform consumers about their credit products and services prior to the conclusion of the agreement.
\item \textsuperscript{99} See s 7(2). Contravention of this section was regarded as an offence in terms of s 7(3). See also Renke LLD Thesis (2012) 336.
\item \textsuperscript{100} Renke LLD Thesis (2012) 337.
\item \textsuperscript{101} Renke LLD Thesis (2012) 337.
\end{itemize}
25 The Hire-Purchase Act

The hiring and purchasing industry was popular internationally and consumers needed protection as a result of this. South Africa was introduced to this type of credit agreement in the nineteenth century.\(^{102}\) This type of credit agreement was governed by the Hire-Purchase Act.\(^{103}\) The scope of the Hire-Purchase Act was limited to purchase contracts that did not exceed R4000.\(^{104}\) The Hire-Purchase Act made provision for instalment agreements\(^{105}\) and regulated hire-purchase agreements\(^{106}\) with regard to movable goods.\(^{107}\)

The Hire-Purchase Act prohibited, as a secondary debt prevention measure, and in terms of section 8 (1) credit providers are prohibited from promising the consumer any benefit as a means of luring the consumer to enter into a credit agreement.\(^{108}\) However, contravention of this provision did not affect the validity of the agreement.\(^{109}\)

Section 3 obligated credit providers to comply with formalities prior to entering into a credit agreement which included disclosing to the consumer the cash price of the goods purchased on credit.\(^{110}\) This cash price was stated in a statement that also contained the amount of

\(^{102}\) Scholtz in Scholtz ed (2008) par 1.2.2.
\(^{103}\) Otto and Otto (2013) 2 were they discuss the history of this Act and the fact that it was promulgated in 1942 in order to protect consumers that entered into hire-purchase agreements.
\(^{104}\) Scholtz in Scholtz ed (2008) par 1.3.3.
\(^{105}\) Instalment agreements were defined as agreements where ownership of the goods was transferred on delivery before the consumer had paid the outstanding balance of the purchase price. See Renke LLD Thesis (2012) for a detailed explanation.
\(^{106}\) As opposed to instalment sale agreements, ownership passed once the full purchase price was paid and delivery of the goods did not affect the transfer of ownership.
\(^{108}\) Renke LLD Thesis (2012) 337. S 8(2) stipulated that benefit could still be offered if it was offered as per the ordinary course of business.
\(^{110}\) S 3(1)(a) and further Renke LLD Thesis (2012) 342.
instalments required to settle the balance.\textsuperscript{111} Section 4(2) also required that the credit provider make available copies of the agreement as a disclosure mechanism.\textsuperscript{112}

2.6 The LADOFCA

2.6.1 General

This Act was amended to coordinate the provisions of the Credit Agreements Act and the 1986 Usury Act. The amended version of the LADOFCA\textsuperscript{113} was later renamed the Usury Act 73 of 1968.\textsuperscript{114} Its scope included the financial aspects related to purchase and sales, lease of movables and money lending transactions which was widely defined in the Act.\textsuperscript{115} Agreements that are entered into that involved the Land and Agricultural Bank of South Africa, the South African Reserve Bank, lending money to financial institutions, money lending or credit transactions that where above the R500 000 threshold and three month leasing agreements which were renewed and the credit provider charged financial fee that was payable on expiry of the lease agreement.\textsuperscript{116}

\textsuperscript{111} S 5(1)(b) and Renke LLD Thesis (2012) 342.
\textsuperscript{112} Renke LLD Thesis (2012) 342.
\textsuperscript{113} This regulated the financial aspects instalment of agreements and credit agreements for movable goods, Renke LLD Thesis (2012) 327 stated that the contractual aspect of instalment agreement and credit agreements were regulated by the Hire-Purchase Act. See also Grové and Jacobs (1993) 2 where it was discussed that this repeal was due to the recommendations brought forward by the First Franzsen Report. In 1980 further amendments were made to the Limitations and Disclosure Act based on the Second Franzsen Report.
\textsuperscript{115} Scholtz in Scholtz ed (2008) par 1.3.1. Other types of agreements covered by the scope of application included contacts of sale of immovable property and credit agreements entered into for the purpose of improving and altering immovable property.
Secondary debt prevention measures in terms of the 1968 Usury Act involved the disclosure of information at all states of the contractual relationship between the parties. However it must be noted however that the primary aim of this Act was the regulation of the cost of credit to consumers in the form of controlling finance charges.\textsuperscript{117}

The disclosure measures in terms of the 1968 Usury Act could be divided into three stages, namely pre-contractual disclosure, disclosure in the contract and post-contractual disclosure.

\textbf{2.6.2 Pre-agreement Disclosure}

Advertising practices were not regulated in terms of this Act. However, the credit provider was prohibited from entering into credit agreements without first providing the consumer with a written credit quotation for each credit agreement containing details of the cost of credit.\textsuperscript{118}

\textbf{2.6.3 Disclosure in the Contract Document}

Credit providers had the obligation to disclose information prior to the conclusion of the credit agreement, if requested by the consumers, as well as in the credit agreement.\textsuperscript{119} Information that needed to be included in the credit agreement was the cost of credit, the principal debt and the interest rate.\textsuperscript{120} In lease agreements, the value of the leased property needed to be disclosed in terms of section 3.\textsuperscript{121}

\textsuperscript{118}Renke LLD Thesis (2012) 365. This meant that consumers were thus able to shop around for the best possible deal.
\textsuperscript{120}S 3(1) of the 1968 Usury Act contains provision in regard to the information that must be disclosed in the credit agreement. Cost of credit needed to be disclosed separately so that the borrower is aware of the cost.
264 Post-agreement Disclosure

In terms of section 10 of the 1968 Usury Act, a credit provider needed to issue the consumer with a free true copy of the contractual document within 14 business days of conclusion of the agreement. Should a consumer request another copy at a later stage, the creditor may issue another copy at a charge. Credit providers also needed to issue statements periodically with intervals no longer than three months. Statements needed to reflect the amount paid in regard to the credit agreement and the amount outstanding. Consumers could request statements in writing in terms of section 10(2).

27 The Credit Agreements Act

In this third-generation consumer credit Act, the Credit Agreements Act, the term credit agreements refers to agreements for the purchase and lease of movables. The Usury Act and the Credit Agreements Act had to be read and applied together and this resulted in confusion in the credit industry, especially taking into consideration that there was an overlap in some of the subject matter of the legislation. Although the two Acts were meant to function as one, they were administered by two separate government departments which resulted in the isolation of functions. This resulted in problems for the consumer as well as the credit industry as a whole. This was due to the fact that some of the sections in the Usury

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122 Refer to s 10(2) where the legislature made provision for the information that needed to be included in the debt instrument after a written demand for disclosure has been issued to the lender by the borrower.
123 Scholtz in Scholtz ed (2008) par 1.3.3.
125 Grové and Jacobs (1993) 5.
Act needed to be read with sections contained in the Credit Agreements Act in order to solve or regulate the agreement in question.\textsuperscript{126}

\textbf{2.7.1 Protection Prior to Entering into the Credit Agreement}

Section 7 of the Credit Agreements Act prohibited credit providers from directly or indirectly influencing a consumer enter into a credit agreement by promising any kind of benefit.\textsuperscript{127} Consumers must enter into credit agreements freely and without feeling obliged to enter into an agreement simply because they will receive a benefit afterwards.\textsuperscript{128} The Minister further had the authority to prohibit advertising which he in his capacity as the minister thought was contrary or was in contravention of the Credit Agreements Act.\textsuperscript{129}

Section 5(1)(a) required that all credit agreements had to must be in writing and signed by the parties and in terms of section 5(1)(h) credit agreements needed to be provided to consumers in the official language chosen by the consumer.\textsuperscript{130}

\textbf{2.7.2 The Consumer’s Right to Rescind a Credit Agreement}

Cooling-off is regarded as a secondary debt prevention measure as it indirectly influences the consumer’s spending and therefore over-indebtedness.\textsuperscript{131} Cooling-off refers to an opportunity that is provided to the consumer to terminate the credit agreement especially in situations where

\textsuperscript{126} Kelly-Louw and Stoop (2012) 11 and further refer to Grové and Jacobs (1993) 5.
\textsuperscript{127} See further, s 7 mentioned in Renke LLD Thesis (2012) 379.
\textsuperscript{128} Inducement by the credit provider was prohibited by this Act. Renke LLD Thesis (2012) 379.
\textsuperscript{129} See s 3(1)(c) of the Act and in terms of Grové and Jacobs (1993) 20.
\textsuperscript{130} Refer to s 5 of the Credit Agreements Act. And further see Renke LLD Thesis (2012) 379.
\textsuperscript{131} Renke LLD Thesis (2012 14).
he was approached by the credit provider.\textsuperscript{132} Section 13 was only applicable to credit agreements that fell within the scope of the Credit Agreements Act and the initiative that lead to the conclusion of the credit agreement must have originated from the credit provider. Furthermore, such agreement needed to have been concluded outside the credit provider’s ordinary place of business.\textsuperscript{133} This was especially relevant to door to door sales. Consumers were afforded a five day cooling off period as there was normally pressure inflicted on weak consumers when the credit provider’s agents entered the home or workplace of the consumer or agreements entered into at any other place other than the normal place of the credit provider’s place of business.\textsuperscript{134} Credit providers must by law inform the consumers of this right prior to the conclusion of the agreement.\textsuperscript{135}

\begin{flushleft}
\textsuperscript{132} Refer to s 13(a) of the Act for further requirements before a consumer can exercise his right to rescind the agreement. See further Renke LLD Thesis (2012) 380.
\textsuperscript{133} Renke LLD Thesis (2012) 380.
\textsuperscript{134} Grové and Jacobs (1993) 21.
\textsuperscript{135} Renke LLD Thesis (2012) 381.
\end{flushleft}
3 An Overview of the Scope of Application of the National Credit Act

3.1 Introduction

The National Credit Act repealed the Usury Act and the Credit Agreements Act\(^{136}\) and introduced South Africa consumers to new mechanisms that protect their interaction with credit providers in the credit industry.\(^{137}\) The National Credit Act needed to be as sophisticated as the modern credit market taking into consideration the dramatic change in the profile of credit consumers.\(^{138}\)

Before one can discuss the secondary debt prevention measures in terms of the National Credit Act in detail, one needs to understand the Act’s scope of application. This will assist in the investigation of the extent of consumer protection afforded in terms of the National Credit Act.\(^{139}\)

The point of departure in ascertaining the field of application of the National Credit Act is section 4(1). In terms of this section the National Credit Act applies to every credit agreement between parties dealing at arm’s length when made within, or having an effect within the Republic of South Africa, subject to certain exclusions.\(^{140}\)

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\(^{136}\) See s 172(4) and further Otto and Otto (2013) 3.
\(^{140}\) See s 4 for full provision of the application of the Act and Renke LLD Thesis (2012) 384 for a discussion.
3.2 Credit Agreements in terms of the National Credit Act

3.2.1 General

The National Credit Act provides for four main categories of credit agreements, namely the credit facility,\(^{141}\) credit transaction, credit guarantee\(^{142}\) or a combination of the aforesaid.\(^{143}\)

3.2.1.1 Credit facilities\(^{144}\)

An agreement irrespective of form constitutes a credit facility if the credit provider agrees to on behalf of the consumer or at the instruction of the consumer supply goods or services or to pay out money and either to defer the consumer's obligation to pay for the goods or services or repay money in terms of the credit facility.\(^{145}\) All credit facilities include a charge, fee or interest that the consumer must pay in terms of the deferred payment.\(^{146}\) Examples of credit facilities include contracts of purchase and sale of movable goods whereby payment is deferred and revolving credit is involved.\(^{147}\) An example of money loan is credit facility.

3.2.1.2 Credit Transactions\(^{148}\)

Section 8(4) of the National Credit Act makes a distinction of eight forms of credit transactions subject to the section 8(2) exclusions.\(^{149}\)

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\(^{142}\) As defined in s 8(5).
\(^{143}\) Definition in s 8. See also Kelly-Louw and Stoop (2012) 28 and further Scholtz in Scholtz ed (2008) para 4.2.
\(^{144}\) S 8(3) of the Act.
\(^{147}\) Renke LLD Thesis (2012) 385. An example of revolving credit transactions is the clothing account whereby when disbursements are made by the consumer fresh credit for the consumer to use is created.
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32121 Pawn Transaction

Pawn transactions are credit transactions whereby a credit provider enters into a credit agreement with a consumer and advances money or grants credit and takes control of the consumer’s property as security. When the period of the credit agreement lapses, the credit provider may sell the goods should there be any amounts unpaid.

32122 Discount Transaction

Discount transaction is a type of credit agreement whereby goods or services are rendered and two prices are quoted for the goods supplied or the services rendered. One price is higher than the other and the parties will agree on the payment due date. Should payment be tendered after the agreed payment date, the consumer will have to pay a higher price but if the consumer settles the outstanding amount prior to the payment due date, the consumer can tender the lesser price.

32123 Incidental Credit Agreement

Incidental credit agreements are similar to discount transactions except that the National Credit Act is only applicable once incidental credit is

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149 See s 1 for definition and Renke LLD Thesis (2012) 387.
150 Defined in s 1.
152 See Otto and Otto (2013) 21 were it was highlighted that pawn transactions were exempt from some provisions of the National Credit Act, such as provisional that deal with reckless credit and unlawful agreements. See further Renke LLD Thesis (2012) 387.
153 Defined in s 1.
156 Refer to Kelly-Louw and Stoop for a discussion in regards to discount transactions and further see Renke LLD Thesis (2012) 388.
granted and this is supposedly after payment of the higher amount after the due date.\textsuperscript{158}

3 2 1 2 4 Instalment Agreement\textsuperscript{159}

Credit transactions whereby ownership of the goods\textsuperscript{160} in terms of the credit agreement is retained by the credit provider until such time as the purchase price is paid in full.\textsuperscript{161} Although ownership is reserved by the credit provider, the goods will be delivered to the consumer immediately for use and enjoyment.\textsuperscript{162}

3 2 1 2 5 Mortgage Agreement\textsuperscript{163}

Section 1 of the National Credit Act defines a mortgage as a pledge of immovable property that serves as security for a mortgage agreement and a mortgage agreement is defined as a credit agreement that is secured by a pledge of immovable property.\textsuperscript{164}

3 2 1 2 6 Secured Loan\textsuperscript{165}

Secured loans are similar to mortgage agreements except the security for all amounts are movables.\textsuperscript{166}

\textsuperscript{159} Refer to Otto and Otto (2013) 24.
\textsuperscript{160} Instalment agreements are limited to movable goods. For a definition of instalment agreement, refer to s 1 of the Act.
\textsuperscript{163} See s 1 for definition and further see Otto and Otto (2013) 25.
\textsuperscript{166} Excluded are instalment agreements. See s 1 for the definition and Renke LLD Thesis (2012) 391.
3 2 1 2 7 Leasing Transactions

This isn’t the usual common law lease agreement as the consumer is given temporary possession and use of the movable goods and at the end of the lease period ownership is transferred to the consumer with or without conditions.\textsuperscript{167} Interest and other charges are levied by the credit provider and payment of the goods is deferred.\textsuperscript{168}

3 2 1 3 Other Credit Agreements\textsuperscript{169}

This credit transactions type is designed as a catch all category to accommodate other credit agreements whereby payment is deferred and it does not constitute a credit facility or a credit guarantee.\textsuperscript{170}

3 2 1 4 Credit Guarantees

The National Credit Act defines credit guarantees as agreements whereby a person promises to satisfy on demand the obligation of a consumer in terms of a credit facility or a credit transaction.\textsuperscript{171}

3 3 Miscellaneous Matters

Every credit agreement is further characterised as a small, intermediate or large agreement. Some of the provisions of the National Credit Act apply to certain credit agreements depending on the classification.\textsuperscript{172}

\textsuperscript{168} Discussed in full in Otto 2011 THRHR 120. See further Renke LLD Thesis (2012) 391.
\textsuperscript{169} See s 8(4)(f) of the Act.
\textsuperscript{172} Renke LLD Thesis (2012) 397.
3.4 Exclusions from the Field of Application of the National Credit Act

3.4.1 Credit Agreements at Arm’s Length

The National Credit Act applies to credit agreements whereby the credit provider and the consumer are dealing at arm’s length. Therefore, if the parties do not deal at arm’s length, the Act is not applicable. The “within arm’s length” cases are mentioned in section 4(2)(b). An example is where the parties are family members. This will, for instance, be the case where a father who loans his dependent child money. The National Credit Act will not be applicable as there is a familial relationship and the child is dependent on the father.

3.4.2 Other Exclusions in Terms of the National Credit Act

Agreements entered into by the Reserve Bank of South Africa as the credit provider are excluded from the scope of application of the National Credit Act. The same is applicable for credit agreements whereby the state is the consumer or where the credit provider is situated outside the Republic of South Africa. This exemption is applicable upon a successful application by the consumer to the Minister of Trade and Industry.

Instances whereby the consumer who is a juristic person and has an asset value or an annual turnover of R1 million or more are excluded from the scope of the National Credit Act. Juristic persons who fall below the

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173 See s 4(1) and a discussion on Renke LLD Thesis (2012) 398.
175 S 4(1)(c) and further see Kelly-Louw and Stoop (2012) 32.
above threshold but enter into large credit agreements will also not enjoy the protection of the National Credit Act.\textsuperscript{179}

Some other agreements that are excluded from the ambit of the National Credit Act include policies of insurance, leases of immovable stokvel transactions which need to be dealt with in accordance with the stokvel rules.\textsuperscript{180}

\textsuperscript{179} See also Scholtz in Scholtz ed (2008) in para 4.5.
\textsuperscript{180} Renke LLD Thesis (2012) 401.
4 Secondary Measures in terms of the National Credit Act Prior to Conclusion of the Agreement.

4.1 Introduction

In summary, the events that lead to the birth of the National Credit Act started in March 2002. A committee was established by the Department of Trade and Industry to conduct a review of consumer credit legislation in South Africa.\textsuperscript{181} It provided a solution in order to remedy the shortcomings and recommended that South Africa needed new legislation.\textsuperscript{182} The Department of Trade and Industry issued a Policy Framework for Consumer Credit in August 2004 which led to the National Credit Bill being tabled in Parliament in March 2005.\textsuperscript{183} In June 2007, the National Credit Act became fully effective.\textsuperscript{184}

Consumers need to understand the true implications of credit as well as the costs incurred as a result of the credit. Therefore, information provided to consumers needed to be complete to enable the consumer to understand the risks involved.\textsuperscript{185} In this regard there is a distinction between disclosure prior to the signing of the agreement, disclosure during the contractual period and post-agreement disclosure. Disclosure prior to the conclusion of the credit agreement deals with the promotion of credit

\textsuperscript{181} This committee published a detailed report of its findings, specifically in respect of the consumer credit enactments’ (at the time) shortcomings. See further Renke LLD Thesis (2012) 406.
\textsuperscript{183} The aim of the consumer credit framework was to provide policy direction in terms of the regulation of the consumer credit market. See further Renke LLD Thesis (2012) 406.
\textsuperscript{184} The Usury Act of 1968 and the Credit Agreements Act were repealed as a result. See further Renke LLD Thesis (2012) 406. Some provisions of the act came into effect on 1 June 2006.
\textsuperscript{185} Kelly-Louw and Stoop (2012) 185. Renke LLD Thesis (2012) 537 discussed the standardisation of information provided by the credit providers to the consumers, this further balances the negotiating power between the two parties.
that gives rise to the credit agreement. Disclosure during the contractual period caters for the uniform contractual clauses that must be included in every credit agreement. The last form of disclosure focuses on the aftermath of the credit agreement; the consumer is in short entitled to statements of account and has the right to cooling-off. Disclosure prior to the conclusion of a credit agreement will now be discussed first. However, this will be preceded by a discussion of the mechanisms that promote the efficiency of disclosure.

4 2 Mechanisms that Promote Efficiency of Disclosure

4 2 1 Consumer Education

Before an overview with regard to the disclosure during and after a consumer has entered into an agreement, consumer education will be discussed briefly as the first tool to effective disclosure. The Department of Trade and Industry has set out a number of measures aimed at helping consumers make informed decisions. In order for consumers to be able to make informed decisions, they need the right education and skills to convert information provided by credit providers into effective knowledge which will result in the full understanding of the implications and consequences attached to the cost of credit. When credit providers see that consumers are applying their minds when deciding to take credit, credit providers may strengthen competition in the credit market by

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186 See s 75 and 76 in regard to the promotion of credit and s 92 of the National Credit Act. S 92 deals with pre-agreement disclosure. And further Renke LLD Thesis (2012) 538.
187 Chapter 5 of the National Credit Act deals with credit agreement disclosures. See further Renke LLD Thesis (2012) 538.
190 Stoop (2009) SA Merc LJ 373. Consumers must start showing interest in the agreements they conclude and not focus solely on the advantages of credit. See further Renke (2011) THRHR 218 were he discusses consumer education.
providing fewer burdens on the consumer. The National Credit Regulator supports the development of a transparent credit industry. However the Act places no obligation on credit providers and other relevant parties to provide educational workshops taking into consideration that South Africa as a developing country has many inhabitants that lack basic education. The National Credit Regulator has tackled the task of cultivating South African credit consumers by utilising the media to create awareness through workshops, advertising campaigns and the handing out of pamphlets. The provision of standardised contracts and the provision of disclosure to the consumer by credit providers on its own are not sufficient to automatically translate into knowledge. Education is a tool that can be used so that the consumer can use to understand the credit agreement concluded with him. The National Credit Act contains provisions that oblige the credit provider to ensure that the agreement is understood by the consumer. The regulator wants to create a presence of its existence as the protector of credit consumers and a watchdog of credit providers. The National Credit Regulator released an annual report in June 2007 which concluded that education and awareness of the cost of credit through disclosure are successful means of preventing or resolving over-indebtedness. As expensive as credit education is, provision must be made to include this type of education in schools to train children while they are still young.

192 S 3 of the National Credit Act. one of the purposes of the Act is to promote transparency. See further Stoop (2009) SA Merc LJ 373. Also see s 16(1). The National Credit Regulator must provide or alternatively ensure that credit providers provide consumer education in regard to credit matters.
195 Renke (2011) THRHR 219. See further s 64 of the National Credit Act and Renke LLD Thesis (2012) 555. And also discussed in para 4 2 2 below.
4.2.2 Disclosure in Plain Language

The second tool that can assist consumers in utilising the education discussed above in order to understand credit agreements is plain language. Due to the fact that South Africa is a multi-lingual nation, there are certain barriers as credit providers are only expected to provide information in plain language and in an official language that is understandable to the consumer to the extent that it is reasonably possible to do so, especially taking into consideration the practicality, population preference and other factors. In terms of section 64 of the National Credit Act the National Credit Regulator may publish guidelines with regard to drafting and the provision of information in plain language. Care must be taken when drafting in plain language so that the intended audience understands the material provided. Stoop pointed out that the National Credit Regulator had failed to provide guidelines as to what this really means and credit providers have been left to interpret plain language drafting as they see fit. Plain language as a requirement for disclosure of information is designed to increase the understanding of information credit providers disclose to the consumer and this is important for decision making when shopping around and is therefore an effective tool when one is discussing disclosure as a means to indirectly prevent over-indebtedness.

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199 S 64 of the National Credit Act. Plain language should be in a language that is understandable to the consumer.
200 Kelly-Louw (2012) 195 concluded that this means that a consumer is entitled to receive information in any one of the nation’s eleven official languages. In practice banks provide information in four of the main official languages bearing in mind the languages spoken in a certain area. S 63(1) determines that a consumer has the right to receive information in a language that he can understand.
202 Refer to s 64(3). Credit providers are still waiting for guidance from the Regulator. See further Stoop (2009) SA Merc LJ 376.
203 S 63 of the Act and also Stoop (2009) SA Merc LJ 376.
4.3 Pre-agreement Disclosure Protection: The Promotion of Credit

4.3.1 General

Due to the gap with regard to regulations that protected consumers against misleading advertising practices and incomplete disclosure of information, the National Credit Act had to close this gap as research showed that consumers entered into credit agreement without reason when they were offered credit by the credit providers. Creditors used advertising techniques such as sending mails containing loan offers and using aggressive agents that did not give consumers a chance to turn down the offer. These agents would show up at the homes of the consumers and basically harassed the consumer into entering into an agreement. Lack of information in respect of credit costs causes the consumer to enter into agreements that he cannot afford. Pre-agreement advertising protection measures include negative option marketing and opting out, entering into a credit agreement outside the place of business of the credit provider and advertising practices related to content and format of the advertising material.

4.3.2 Negative Option Marketing and Opting out

The legislature needed to effectively regulate credit marketing practices and impose rules that promoted transparency. Credit marketing and advertising practices are regulated by the National Credit Act and certain advertising methods are prohibited.

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206 Flemming (2010) 123.
209 See entire para 4 for discussion.
Section 74 of the National Credit Act deals with negative option marketing and opting out requirements. Negative option marketing and opting out are provided for in the National Credit Act. The National Credit Act does not allow credit providers to place an obligation on the consumer to decline offers to enter into credit agreements that will automatically come into existence even though the consumer did not request the credit agreement.\textsuperscript{212} Put differently, a credit provider is prohibited from marketing credit agreements that will conclude automatically unless the consumer objects.\textsuperscript{213} Any agreement entered into as a result of negative marketing is unlawful and will be null and void.\textsuperscript{214}

The same is applicable to credit agreements that automatically increase the credit limit of a credit facility unilaterally unless the consumer declines the offer, or circumstances whereby the credit provider utilises tactics in order to indirectly or directly force the consumer to accept the credit limit increase.\textsuperscript{215} Furthermore, a credit provider is prohibited from proposing to change the terms of the credit agreement, induce a consumer to accept to changes in the credit agreement will automatically come to effect unless the consumer rejects the changes.\textsuperscript{216} Such provisions will be null and void from the date that the agreement came into effect.\textsuperscript{217}

Renke questions the logic of section 74(5) read with section 90(3) as the court must make a decision in terms of severing an unlawful provision in a from a credit agreement and amending the agreement in accordance with the National Credit Act or alternatively declaring the entire credit agreement null and void.

\begin{itemize}
\item S 74(1) and Kelly-Louw and Stoop (2012) 186 where they defines negative option marketing as to "induce a consumer to enter into a credit agreement, on the basis that the agreement will automatically come into existence unless the consumer declines the offer".
\item Campbell and Logan (2008) 84. This places the onus on the consumer to act in order to stop the agreement from coming into existence.
\item S 74(4) and Renke LLD Thesis (2012) 541.
\item S 74(2).
\item S 74(3). This sub-section is subject to s 104, s 116(a), s 118(3) and s 119(4).
\item S 74(5) and Renke LLD Thesis (2012) 542.
\end{itemize}
agreement unlawful from date it took effect.\textsuperscript{218} A solution is that the credit provider can take the approach of writing a proposal to the consumer informing him that the consumer may in writing consent to an increase of his credit limit.\textsuperscript{219} Juristic persons as defined in section 1 of the Act do not enjoy the protection of the Act when it comes to negative option marketing.\textsuperscript{220} Creditors that market unsolicited credit agreements result in consumers entering in to unwanted debt only because it is easily available to the consumer.\textsuperscript{221}

Credit providers must inform consumers of marketing choices available in terms of the Act on a statement detailing the available options\textsuperscript{222} and the answers selected by the consumer must be stored for record purposes.\textsuperscript{223} Opting out is exercised by consumers when they are given the options of declining pre-approved annual credit limit increases in regard to credit facilities and can request that they be excluded from telemarketing campaigns or bulk distributions of electronic mails and sms messages.\textsuperscript{224} When a consumer declines these options, the consumer is opting out. The consumer can also inform the credit provider that their information should not be sold or distributed to third parties other than as the Act requires.\textsuperscript{225}

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{218} Renke LLD Thesis (2012) 542.
  \item \textsuperscript{219} Renke LLD Thesis (2012) 541.
  \item \textsuperscript{220} S 6 of the National Credit Act limits the scope of application of the Act for jurist persons. Further see Renke LLD Thesis (2012) 541.
  \item \textsuperscript{221} Campbell and Logan (2008) 84.
  \item \textsuperscript{222} S 74(6) and Renke LLD Thesis (2012) 543. Credit providers may not act contrary to the selected options as this will be in contravention of the Act. See Flemming (2010) 124, where section 74(6) was discussed in greater detail.
  \item \textsuperscript{223} S 74(7)(a).
  \item \textsuperscript{224} S 74(6).
  \item \textsuperscript{225} S 74(6)(b).
\end{enumerate}
\end{footnotesize}
4 3 3 Visitation of the Consumer at the Workplace or Residential address\textsuperscript{226}

The National Credit Act prohibits the credit provider from harassment of the consumer in an attempt to conclude a credit agreement with the consumer.\textsuperscript{227} This means that the credit provider may not visit the consumer at his place of employment or home for the purposes of providing credit.\textsuperscript{228} Kelly-Louw takes this point one step further and states that a credit provider may not harass the consumer in respect of the application of credit itself and any related transactions. This broadens the scope in respect of which credit providers are prohibited from contacting or harassing the consumer.\textsuperscript{229} Section 75(2) prohibits the credit provider from entering into the home of the consumer and entering into a credit agreement with the consumer without a prearranged visit. Another exception to the general rule of section 75(2) is when the credit provider enters the consumer's home with the intention of selling goods and the transaction results in a credit agreement.\textsuperscript{230} The same is applicable with regard to visitation of consumers at their place of employment, unless by invitation by the consumer or if it is for purposes of entering into an agreement with the employer or the result of a formal arrangement between the credit provider, the employer and a trade union representative.\textsuperscript{231} The employer or trade union representative may not

\textsuperscript{227} S 75(1) and Kelly-Louw and Stoop (2012) 188. See also the discussion of the National Credit Act at the time that it referred to as the Consumer Credit Bill as discussed by Renke and Roestoff (2005) 118.
\textsuperscript{228} Renke LLD Thesis (2012) 543. See also Campbell and Logan (2008) 84. Renke (2011) THRHR (page) elaborates on this and states that the legislature intended that any credit agreement entered into by the consumer should be initiated by the consumer and not the credit provider by visiting the consumer at his place of residence or employment.
\textsuperscript{229} Kelly-Louw and Stoop (2012) 188.
\textsuperscript{230} Renke LLD Thesis (2012) 543. Renke is of the view that allowing credit providers to go door to door for the purpose of selling items may then result in the misuse of entering into a credit agreement incidentally.
\textsuperscript{231} S 75(3).
benefit financially or otherwise as a result of the formal arrangement. Developmental credit agreements may be concluded in the workplace in terms of section 75(5) and do not fall within the scope of the prohibition.

4 3 4 Advertising practices

The consumer is also protected in respect of certain advertising practices in general. Section 1 of the Act defines advertisement as:

any written, illustrated, visual or other descriptive material, communication, representation or reference by means of which a person seeks to bring to the attention of all or part of the public the nature, properties, advantages or the use of, conditions on, or price of- (a) goods to be purchased, leased or otherwise acquired; (b) any available services; or (c) credit to be granted.

Section 76 deals with advertising practices but is not applicable to advertising material that do not refer to a specific product and which have the main aim of promoting responsible credit practices, the general use of credit or advertisements that promote the credit provider or the brand of the credit provider. Section 76 also excludes advertising material that is in the form of a notice that states that a consumer may purchase goods sold at that premises by using a credit facility of a credit provider that is not party to the purchase and sale agreement.

Credit providers that have not complied with the Act in terms of its registration requirements are prohibited from advertising the sale of credit

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232 S 75(4).
233 S 75(5) specifically excludes provisions of s 75(2) to s 75(4). Kelly-Louw and Stoop (2012) 189. Campbell and Logan (2008) 83 also refer to the exemption of developmental credit when it comes to the advertising of interest rates.
235 S 76(1)(a).
236 S 76(1)(b).
237 S 76(1)(c).
related products or services.\textsuperscript{238} A credit provider cannot in advertising material claim that a consumer can acquire credit without undergoing credit checks or even if they are blacklisted. This is prohibited in terms of regulation 21(6) of the regulations to the National Credit Act.\textsuperscript{239}

If a credit provider wishes to advertise the accessibility of credit to consumers as well as the brand of the credit provider,\textsuperscript{240} they must comply with the requirements of this section and ensure that the information provided is not unlawful or misleading to consumers.\textsuperscript{241} Credit providers may compare credit costs by comparing the interest charged by its competitors but they must do this in a manner that has been prescribed by section 76(4)(d).\textsuperscript{242} The credit provider must while making such comparison disclose to the consumer the interest rates in respect to the credit granted as well as all other costs that are related to the cost of credit.\textsuperscript{243}

In terms of section 77 of the Act any intermediary or solicitor of the credit provider must inform the consumer of all information as prescribed by the Act and regulations\textsuperscript{244} in a statement.

\textsuperscript{238} S 76(3). See also Renke (2011) \textit{THRHR} in general.
\textsuperscript{239} This also includes the advertisement of free credit.
\textsuperscript{240} Campbell and Logan (2008) 87.
\textsuperscript{241} S 76(4). In terms of regulation 21(3) of the National Credit Regulations an advertisement that provides details of a specific product and it discloses the monthly instalment that the consumer must pay, must provide additional information, especially with regard to the amount and number of instalments, the interest rate, residual and insurance if applicable. See also Campbell and Logan (2008) 86. If a credit provider wants to give his credit services an upper hand by stating that he offers the cheapest cost of credit, he must furnish proof of such statements by providing full disclosure.
\textsuperscript{242} Regulation 21(4) deals with information that must be contained when credit providers are making a comparison of credit cost as per s 76(4)(d). This information includes the instalment amount, number of instalments, interest rate, and residual value if applicable. See further Campbell and Logan (2008) 85.
\textsuperscript{243} S 76(5).
\textsuperscript{244} Regulation 21(6) which refers to the exclusion of words like ‘no credit checks required’, ‘blacklisted consumers welcome’ and ‘free credit’
4 3 5 Content and Format for Advertising Practices

Credit marketing practices are regulated by Part C of Chapter 4 of the regulations of National Credit Regulations together with section 76 of the National Credit Act.\textsuperscript{245} More specifically regulations 21 and 22 provide for the prescribed format as well as content for advertising practices for credit purchases of goods and services.\textsuperscript{246} Regulation 21 deals with the required content for advertising practices.\textsuperscript{247} Regulation 22 deals with the format for advertising practices and requires that advertisements must not obscure the cost of credit. This is usually a trick used by credit providers whereby the entire advertisement is in bold and big font and the terms and conditions including the cost of credit are so small that the consumer can easily miss the information.\textsuperscript{248} The information that is required by law to be disclosed must be displayed together with the rest of the advertising material and be given equal prominence.\textsuperscript{249}

4 3 6 Sanctions for Non-compliance

Although some advertisements still do not provide full disclosure of information as required by the Act, there are no sanctions that are in place for non-compliance.\textsuperscript{250} Consumers can find peace in the fact that the National Credit Regulator may issue a compliance notice\textsuperscript{251} which will force the credit provider to stop any unlawful advertising practice.\textsuperscript{252}

\textsuperscript{245} Renke LLD Thesis (2012) 547.
\textsuperscript{246} Campbell and Logan (2008) 83.
\textsuperscript{247} As discussed above in para 4 3 4.
\textsuperscript{248} Renke LLD Thesis (2012) 549.
\textsuperscript{249} Campbell and Logan (2008) 86- 87.
\textsuperscript{250} Campbell and Logan (2008) 89.
\textsuperscript{251} In terms of s55 of the National Credit Act.
\textsuperscript{252} Campbell and Logan (2008) 89. A complaint can be lodged by a consumer in terms of section 136 of the National Credit Act. This section empowers consumers to report any contravention of the Act. In response to the complaint, the Regulator will react with a compliance notice in terms of s 55.
Another option is that the consumer can attempt to solve the contravention of the Act or a dispute through alternative dispute resolution with the credit provider.\textsuperscript{253} If there is no resolution, the consumer may approach the National Consumer Tribunal for a hearing to be conducted.\textsuperscript{254} It is surprising to note that although the predecessors of the National Credit Act had general penalty clauses, the National Credit Act is lacking in this respect.\textsuperscript{255}

4 4 Pre-agreement Disclosure Protection: The Disclosure of Information

Pre-agreement disclosure of information is still by far the most important form of disclosure as the consumer is at a stage where he can shop around compare credit costs and decide whether or not to incur the credit.\textsuperscript{256} Credit providers are prohibited by the National Credit Act to enter into credit agreements without first supplying the consumer with a pre-agreement quotation and statement drafted in a format as prescribed.\textsuperscript{257} It is important to note that a credit quotation once issued, is binding on the credit provider for a period of five business days.\textsuperscript{258}

\begin{footnotes}
\item[253] Provisions in this regard are mentioned in s 134 of the Act. See Renke LLD Thesis (2012) 325 for a discussion.
\item[255] Renke LLD Thesis (2012) 551. Penalties deter the credit provider from non-compliance.
\item[257] S 92 of the National Credit Act. See also Stoop (2009) \textit{SA Merc LJ} 380. As well as Kelly-Louw and Stoop (2012) 206 where it is stipulated that certain credit agreements must disclose information to the consumer prior the conclusion of the credit agreement. She also provides for penalties for non-compliance, this does not render the agreement null and void however the credit provider could be found to be liable to fines of the larger of R10 million or 10 per cent of the credit provider's annual turnover for the previous financial year. This type of fine could be enough to cripple the credit provider. The credit provider could also be deregistered by the National Credit Regulator in terms of s 57 of the National Credit Act.
\item[258] S 92(3) of the Act.
\end{footnotes}
The pre-agreement disclosure statement includes the main characteristics of the offered agreement and a cost quotation of credit which is a breakdown of how much the credit will cost the consumer. The legislature has provided guidelines in terms of the format and content of the pre-agreement statement based on the classification of the credit agreement. Credit providers are prohibited for example from entering into small agreements without a pre-agreement statement and quotation.

Stoop is of the view that pre-contractual disclosure encourages competition because credit providers want more consumers to utilise their services rather than the services of other credit providers. In order to achieve this, credit providers will have to lower the cost of credit as consumers will turn to credit providers that offer them the lowest rate with respect of the cost of credit. Consumers benefit by knowing and understanding the kind of agreement they are entering into as well as the cost of the credit and thereby the consumer is afforded a chance to apply his mind and ponder about the credit agreement prior to concluding the agreement.

The main reason why the legislature enacted legislation to obligate credit providers to disclose consumer obligations with regard to credit agreements was based on the fact that a consumer can weigh their options, if a consumer is well informed in respect of the actual cost of a...
credit purchase as compared to the cost of the same item when the consumer pays cash, they may opt to wait until they have saved enough money to buy that item for cash.\textsuperscript{265} The consumer can also be placed in a position whereby he can choose between one credit provider and another and this will strengthen competition in the credit market in favour of the consumer as interest rates will be kept low.\textsuperscript{266} The cost of credit is also easier to calculate once a consumer has all the facts and he can determine the actual value of the credit and if it is worth entering into an agreement or saving until he can purchase the product in cash instead of credit.\textsuperscript{267}

\textsuperscript{265} Kelly-Louw and Stoop (2012) 196, if credit providers provide full disclosure of information, the over-indebtedness can be prevented from instead of later trying to reduce it by utilising other mechanisms such as debt review. Basically, prevention is always better than cure. Renke LLD Thesis (2012) 536.
\textsuperscript{266} Renke LLD Thesis (2012) 537. See further Kelly-Louw and Stoop (2012) 196, where it was discussed that a consumer should not only realise the true extent of his credit agreement when he receives his first statement. Disclosure of information leads to informed decisions by the consumer and the strengthening of completion in terms of competitive rates in repayments and interest rates.
\textsuperscript{267} Renke LLD Thesis (2012) 537.
5 Secondary Measures in terms of the National Credit Act During and After the Existence of the Agreement

5.1 Introduction

Prior to the National Credit Act, consumers received information that was inadequate in order to properly understand the risks involved when entering into a credit agreement. Standard agreements were written in fine print and could only be understood by legal professionals as they contained complex clauses and legal jargon. Most consumers saw the credit agreement itself as a mere formality to conclude the credit agreement taking into consideration the information that would have been provided by the credit provider prior to the conclusion of the credit agreement. The National Credit Act therefore also obligates credit providers to insert certain clauses in their contracts in order to protect the consumer. Certain clauses may not be inserted in a credit agreement. Another compulsory requirement is that these contracts should be readable by the audience for which it is intended, therefore this would mean that the agreements should be in plain language.

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268 Renke LLD Thesis (2012) 534. See further the Summary of Findings Credit Law Review (2003) 12 where it was mentioned that the main focus of legislation was on the agreement itself.
270 Summary of Findings Credit Law Review (2003) 12. In terms of advertisements or prior discussions between the consumer and the credit provider.
271 Renke LLD Thesis (2012) 536. These clauses are to be included as a protective measure so that consumers are not exploited. Should they lack in education, at least the legislature has inserted mechanisms that ensure that they would not be in the worst case scenario. Credit providers are also prohibited from inserting clauses that are contrary to S 90 of the National Credit Act. See further Kelly-Louw and Stoop (2012) 197-206 where unlawful credit agreements and provisions were discussed in great detail.
272 S 90 of the Act. The reason for rendering certain clauses obligatory and for prohibiting other clauses is *inter alia* to protect the consumer in respect of the misuse of standard pro forma benefiting only the credit provider.
273 S 64 and discussion in para 4.3.5.
5.2 Disclosure in the Credit Agreement

5.2.1 Compulsory Information

As mentioned above, credit agreements may be divided into small, intermediate and large credit agreements. Small credit agreements have to be recorded in the prescribed format as per section 93(2) of the National Credit Act.\(^{274}\) In order to provide guidance to credit providers in terms of the prescribed format, regulation 30(1) of the National Credit Regulations requires that a small credit agreement must contain all the information that is recorded on Form 20.2. Some of the information that must be included is the personal details of both parties to the agreement, prescribed statutory rights and duties, of the consumer, a payment schedule, insurance information and the consumer’s right to rescind the agreement.

In respect of intermediate and large agreements, the Act empowers the minister to prescribe the form that records these agreements. Credit providers offering intermediate and large agreements have to rely on regulation 31. Regulation 31(1)(a) specifies that all intermediate and large credit agreements must be complete, clear, legible and in plain language. The credit provider is obliged to draw the consumer to important clauses, furthermore the information contained in from example the pre-agreement quotation and statement must be included in the credit agreement itself with the title ‘cost of credit” in bold on the first page of the credit agreement.

Information that must be contained in the consumer entering into an intermediate or large agreement include, \emph{inter alia}, the credit provider’s name, contact details and registration number with the National Credit

\(^{274}\) See also Renke LLD Thesis (2012) 552.
Regulator; the cost of credit, all fees levied by the credit provider; the sum of the amounts disclosed in respect of the initiation fee, service fee, interest and cost of credit insurance, provided that, to the extent that any amount is not ascertainable, the credit provider must clearly indicate the method of calculating the amount; the manner in which the statement will be provided; details of the implications of default by the consumer; details of the process that will be followed on default. The consumer also needs to be made aware of the risks, costs and obligations of the credit agreement.

In regard to sanctions, there are no specific sanctions prescribed but a consumer may lay a complaint and a compliance notice will be issued against the contravening credit consumer.

The National Credit Act does not prescribe for formalities of the credit agreements. However it does stipulate that in terms of section 93(2)(3), it is compulsory for the credit consumer to disclose certain information depending on the size of the agreement concluded. The negative impact of full disclosure is that the agreements provided to consumers tend to be long, intimidating and time consuming for consumers to read and therefore many consumers do not even bother reading them. For this reason, disclosure as an effective measure for the prevention of over-indebtedness is not sufficient and the disclosure of information should be coupled with the consideration of the audience that the agreement has been drafted. The credit provider must make sure that the consumer

275 The amount of the principal debt, the amount deferred, type of credit agreement, amount after fees and charges have been included.
277 Stoop (2009) SA Merc LJ 381. The National Credit Act distinguishes between the different types of credit agreement and Renke LLD Thesis (2012) 552 has followed the same approach and has highlighted the different regulations applicable to the type of agreement. These are divided into small, intermediate or large agreements.
278 Stoop (2009) SA Merc LJ 381.
understands what is contained in the agreement prior to signature and take the time to clearly explain the consumer’s risks and obligations. Should the credit provider neglect to comply in terms of the disclosure of compulsory information in agreements, compliance notices can be issued by the National Credit Regulator in terms of section 55 of the National Credit Act.

5 3 Post-agreement Disclosure

5 3 1 General

The last level is the post-agreement level. Credit providers must provide copies of the contract and regular statements to the consumer in the prescribed form, containing the required information as per the National Credit Act.

5 3 2 Post-agreement Disclosures: Copies of the Credit Agreement

The credit provider must send a copy of the contract to the consumer in paper form or in a manner that is printable if the credit agreement is sent in electronic format. This copy must be delivered to the consumer free of charge. The consumer may request a replacement copy at a later stage. The credit provider may charge for this replacement copy if the request is within a year of providing the original credit agreement.

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280 S 64 of the National Credit Act places an obligation on the credit provider to provide agreements that are understandable to the consumer. Refer further to Stoop (2009) SA Merc LJ 382 and Renke LLD Thesis (2012) 555.
281 S 65 of the National Credit Act and also refer to Stoop (2009) SA Merc LJ 383. See further Renke (2011) THRHR 217 and 218. Part D of the National Credit Act deals with statements of account.
282 Stoop (2009) SA Merc LJ 381. See also Renke LLD Thesis (2012) 551 where it was highlighted that not only must the credit agreement contain the relevant information, copies of the credit agreement needs to be provided to the consumer.
This type of disclosure deals with the formalities of the agreement as well as the contents of the agreement.\textsuperscript{285} The National Credit Act does not prescribe for formalities of the credit agreements. However it does stipulate that in terms of section 93(2)(3), it is compulsory for the credit consumer to disclose certain information depending on the size of the agreement concluded.\textsuperscript{286} The negative impact of full disclosure is that the agreements provided to consumers tend to be long, intimidating and time consuming for consumers to read and therefore many consumers do not even bother reading them.\textsuperscript{287} For this reason, disclosure as an effective measure for the prevention of over-indebtedness is not sufficient and the disclosure of information should be coupled with the consideration of the audience that the agreement has been drafted.\textsuperscript{288} The credit provider must make sure that the consumer understands what is contained in the agreement prior to signature and take the time to clearly explain the consumer’s risks and obligations.\textsuperscript{289} Should the credit provider neglect to comply in terms of the disclosure of compulsory information in agreements, compliance notices can be issued by the National Credit Regulator in terms of section 55 of the National Credit Act.

5.4 Unlawful Provisions in terms of the National Credit Act

Credit agreements should not contain provisions that are regarded as unlawful in terms of section 90(2) of the National Credit Act.\textsuperscript{290} An example of an unlawful provision is a provision designed to deprive the consumer of

\textsuperscript{285} Stoop (2009) \textit{SA Merc LJ} 381.
\textsuperscript{286} Stoop (2009) \textit{SA Merc LJ} 381. The National Credit Act distinguishes between the different types of credit agreement and Renke LLD Thesis (2012) 552 has followed the same approach and has highlighted the different regulations applicable to the type of agreement. These are divided into small, intermediate or large agreements.
\textsuperscript{287} Stoop (2009) \textit{SA Merc LJ} 381.
\textsuperscript{288} Stoop (2009) \textit{SA Merc LJ} 382.
\textsuperscript{289} S 64 of the National Credit Act places an obligation on the credit provider to provide agreements that are understandable to the consumer. Refer further to Stoop (2009) \textit{SA Merc LJ} 382 and Renke LLD Thesis (2012) 555.
the rights entrenched in the National Credit Act. The consequence of including unlawful provisions in a credit agreement is that the provision is void from the date it was supposed to take effect. Courts may sever the unlawful provision from the agreement if it is reasonable to do so.

5.5 Post-contractual Disclosure: Statements of Account

The credit provider is obliged to grant the consumer information orally or in writing subject to conditions such as having previously provided the statement to the consumer or a period of three years has lapsed since the consumer’s account was closed. Credit providers can by providing information to consumers in terms of a statement of account, consumers can then plan their finances better and not enter into another credit agreement prior to the finalisation of existing contracts.

5.6 The Consumer’s Cooling-off Right

The Consumer’s so called cooling-off right also offers protection to the consumer after a credit agreement has been entered into.

In terms of the National Credit Act, a consumer may, depending on the type of credit agreement entered into and the circumstances of the

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296 S 121 of the National Credit Act and Scholtz in par 9.5.2. See further Renke (2011) THRHR 217. This right is based on the unequal bargaining power that credit sales persons may have when approaching consumers at home or in their workplace.
297 Refer to section 121 of the Act. The right allows the consumer to get rid of an interest and cost bearing debt without having any reason and without breach of content.
conclusion of the credit agreement, exercise his right to cooling off the agreement.\textsuperscript{298}

Section 121 of the National Credit Act deals with the consumer’s right to rescind the credit agreement. Section 121 must be read together with regulation 37. This cooling-off right is only applicable to lease and instalment sale credit agreements that are concluded outside the business premises of the credit provider. The consumer has five business\textsuperscript{299} days from the date of conclusion of the agreement in which to notify the credit provider that he wants to terminate the credit agreement. If the consumer elects to rescind the credit agreement, full restitution takes place.\textsuperscript{300}

\textsuperscript{298} Kelly-Louw and Stoop (2012) 223.
\textsuperscript{299} For the meaning of “business day”, see s 2(5).
\textsuperscript{300} See s 121(3).
6 Conclusion and recommendations

In this dissertation, the secondary debt prevention measures in terms of the National Credit Act were investigated. Secondary measures entail all measures that have an indirect influence in the way the consumer incurs debt and therefore over-indebtedness.\textsuperscript{301}

First, the secondary measures in terms of the Act’s predecessors were considered.\textsuperscript{302} Only the Usury Act\textsuperscript{303} and the Credit Agreements Act\textsuperscript{304} contained debt prevention measures worth mentioning. The measures in the Credit Agreements Act have developed further in the National Credit Act.

Secondly, the scope of application of the National Credit Act was briefly considered.\textsuperscript{305} The reason is that the secondary debt prevention protection measures under the Act only apply if the act is applicable.\textsuperscript{306} Subject to the exclusions mentioned above, the National Credit Act is applicable to all credit agreements whether small, intermediate or large and irrespective of the purpose of the credit agreement, be it for business or personal use.\textsuperscript{307} Compared to its predecessors, the scope of application of the National Credit Act is certainly wider. This means that more credit consumers receive the Act’s protection also in respect of debt prevention.

Thereafter the secondary debt prevention measures in terms of the Act were discussed in paragraphs four and five. A three stage approach was followed. However, prior to this, the reasons for the need to enact

\begin{footnotesize}
\begin{enumerate}
\item Para 1 1.  
\item Para 2.  
\item Para 2 4 and Para 2 6.  
\item Para 2.  
\item Para 3.  
\item Para 3 1.  
\item See para 3 4.  
\end{enumerate}
\end{footnotesize}
improved provisions in the Act received attention. The same pertains to consumer education\textsuperscript{308} and disclosure of information in plain language as tools to affect improved disclosure.\textsuperscript{309}

When one takes into consideration disclosure as a secondary means of prevention of over-indebtedness in isolation, they will notice that this isn’t a measure capable of being effective without including the education of consumers so that they understand the information that has been disclosed.\textsuperscript{310} Consumers battle with the legal jargon and the lengthy agreements that are provided by credit providers.\textsuperscript{311} Ignorance is a huge obstacle in combating over-indebtedness. Individuals who take action after they have comprehensive facts usually maximise their benefits and minimise the costs of credit. It is accordingly recommended that the National Credit Act should make specific provision for learners at grade 10 Levels to be educated on consumer credit, it benefits and its dangers.

The first secondary measure that received attention was pre-agreement disclosure in the form of the promotion of credit.\textsuperscript{312} It was seen that the National Credit Act offers far more protection in this regard than its predecessors. This is to be welcomed as the consumer is protected in respect of inducement to enter into credit agreements that the consumer cannot afford. The same applies for door-to-door sales where the initiative does not come from the consumer.

The regulation and admissibility of comparable advertising in respect of credit costs\textsuperscript{313} protect and benefit the consumer. The consumer can thus

\textsuperscript{308} Para 4 2 1.
\textsuperscript{309} Para 4 2 2.
\textsuperscript{310} See above para 4 2 1.
\textsuperscript{311} See above para 4.
\textsuperscript{312} Para 4.
\textsuperscript{313} Para 4 3.
compare the credit costs of different credit providers, thereby making it easier to shop around for cheaper credit.\textsuperscript{314}

The fact that advertisements must not obscure the cost of credit, affords consumer protection that is self-explanatory. Section 92 offers by far the most important secondary debt prevention protection. This is due to the fact that a credit provider is obliged to issue a consumer with a credit quotation setting out the cost of the credit that is to be incurred, the consumer can make an informed decision to (1) to incur the credit or rather to save and pay cash; (2) which credit provider’s credit is the cheapest and therefore perhaps more suitable to the consumer’s needs and financial position; (3) perhaps not to enter into a particular (more expensive) type of credit. The consumer is further protected in that a credit quotation is binding on a credit provider for a period of five business days. This means that the consumer has an option to do business with that credit provider of the credit costs stipulated in the quotation and not at a higher cost.\textsuperscript{315}

Rendering particular provisions compulsory in credit agreements to which the Act applies and prohibiting the inclusion of provisions that protect the consumers in respect of the misuse of standard terms in credit agreements drafted to benefit the credit provider only.\textsuperscript{316} The protection is therefore welcomed.

Post-contract disclosure in the form of copies of the contract and statements of account assist the consumer to keep up to date with his debt incurred as well as the outstanding balance of his credit debt. The complete protection afforded by the Act in this regard can accordingly not be faulted.

\textsuperscript{314} Para 4 3.
\textsuperscript{315} Para 4 3.
\textsuperscript{316} See para 5 2 1.
The cooling-off right\textsuperscript{317} allows the consumer to get rid of a debt that the consumer should not have incurred in the first place and thus offers serious consumer protection. However, the scope of this right is very limited. It is recommended that this aspect receives attention by the legislature and that the right to rescind a credit agreement for the instance be made applicable also to money lending agreements.

The overall protection afforded by the National Credit Act as far as its secondary debt prevention measures are concerned is good. The Act affords far more extensive protection in this regard than its predecessors. This is in line with the Act’s main purpose, namely to protect the consumer. The National Credit Act should be praised compared to its predecessors for the protection of consumers prior to entering into a credit agreement. It must be kept in mind that secondary debt prevention measures in isolation are not effective debt preventions mechanisms and must be applied with primary debt prevention measures in order to curb over-indebtedness.

It is suggested that the legislature must include specific sanctions for contravention of specific provisions in order to deter credit providers from non-compliance. The parties to a credit agreement must have clarity on the consequences of non-compliance with a provision. Criminal sanctions should be considered as this will ensure that credit providers comply with the Act, including its secondary debt prevention measures.

\textsuperscript{317} Para 5 5.
BIBLIOGRAPHY

1. BOOKS

Campbell N and Logan S
*The Credit Guide: Manage your Money with the NCA* Cape Town Juta & Co (2008)

Flemming HCJ
*Flemming’s National Credit Act* (2nd edition) 1982 Durban Butterworths 1982

Grové NJ and Jacobs L
*Basic Principles of Consumer Credit Law* Juta Lansdowne 1993

Grové NJ and Otto
*Basic Principles of Consumer Credit Law* Juta Lansdowne 2002

Jordaan P

Kelly-Louw M and Stoop PN
*Consumer Credit Regulation in South Africa* Juta Law South Africa 2012

Nagel CJ (ed)

Otto JM and Otto R-L
*The National Credit Act Explained* (2nd edition) LexisNexis Durban 2010

MODE OF CITATION

Campbell and Logan (2008)

Flemming (1982)

Grové and Jacobs (1993)

Grové and Otto (2002)

Jordaan (2007)

Kelly-Louw and Stoop (2012)

Nagel *ed* (2011)

Otto JM and Otto R-L

Scholtz JW (ed)

**2. REPORTS**


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

**3. JOURNALS**


Otto and Otto (2013)

Scholtz ed (2008)

First Franzsen Report (1968)

Second Franzsen Report (1977)


Boraine and Van Heerden (2009) *PER / PELJ*

Kelly-Louw (2008) *SA Merc LJ*


Roestoff M and Renke S “Solving the problem of overspending by individuals: international guidelines” (2003) Obiter 1


Vessio ML “Beware the provider of reckless credit” (2009) Tydskrif vir Suid-Afrikaanse Reg 274

4. POLICY FRAMEWORKS & BILLS

The Department of Trade and Industry South Africa Consumer Credit Law Reform: Policy Framework for Consumer Credit August 2004

5. THESES AND DISSERTATIONS

Renke S An Evaluation of Debt Prevention Measures in terms

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of the National Credit Act 34 of 2005, thesis submitted for the degree Doctor Legum, University of Pretoria (2012)

6. STATUTES

Credit Agreements Act 75 of 1980
Hire-Purchase Act 36 of 1942
Hire-Purchase Amendment Act 46 of 1954
Hire-Purchase Amendment Act 30 of 1965
Limitation and Disclosure of Finance Charges Act 73 of 1968 (re-named Usury Act 73 of 1968)
Limitation and Disclosure of Finance Charges Amendment Act 90 of 1980
Limitation and Disclosure of Finance Charges Amendment Act 42 of 1986
National Credit Act 34 of 2005
Usury Act 23 of 1908 (Cape)
Usury Act 37 of 1926
Usury Amendment Act 100 of 1988