

# What Does the National Credit Regulator Regulate?

ML VESSIO\*  
*University of Pretoria*

## 1 Introduction

The National Credit Act, 34 of 2005,<sup>1</sup> replaced the previous consumer-credit dispensation in South Africa established by the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980.<sup>2</sup> While the new Act is quite far-reaching,<sup>3</sup> the administrative task of coordinating the implementation of this new piece of legislation is a rather mammoth one.

In terms of its pre-amble, the Act is to promote a fair and non-discriminatory marketplace for access to consumer credit<sup>4</sup> 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 reorganisation 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 and to promote a consistent enforcement framework relating to consumer credit. Section 3 of the Act further sets out its purposes: to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry; and to protect consumers.<sup>5</sup> The following comment from the Chairperson of the National Credit Regulator (the 'NCR') is relevant in this regard:<sup>6</sup>

'The National Credit Act seeks to make a fundamental change to the way in which the South African credit market operates, with specific provisions intended to address undesirable practices and improve transparency and fairness.'

---

\* BA LLB (Rhodes) LLM (Pretoria). Lecturer, Department of Private Law, Faculty of Law, University of Pretoria.

<sup>1</sup> The National Credit Act was assented to on 15 Mar 2006. There are various dates of commencement for different sections: 1 Jun 2006 for ss 1-11 (ch 1); 12-25, 35-38 (ch 2, part A, C & D); 39-59 (ch 3); 69, 73, 134-142 (ch 7), 153-162, 164-170 (ch 8, excluding s 163), 171-173 (ch 9), and sched 1-3; 1 Sep 2006 for ss 26-34 (ch 2, part B), 67-68, 70 and 72; and 1 Jun 2007 for ss 60-66 (ch 4, part A), 71, 74-88 (ch 4, part C and D), 89-123 (ch 5), 124-133 (ch 6), and 163.

<sup>2</sup> The Usury Act and Credit Agreements Act 'have together regulated consumer credit in South Africa for more than a quarter of a century, [but now the] legislature has considered it wise to replace them with one piece of legislation': see JM Otto *Credit Law Commentary* (2006) at v.

<sup>3</sup> The Act has been estimated to affect more than 4,200 credit providers, including banks, micro lenders, retailers, furniture stores and insurance companies: see the *National Credit Regulator Annual Report 2007* at 3.

<sup>4</sup> The South African credit market is currently estimated to be worth R800 billion: *ibid*.

<sup>5</sup> This section also includes a list of *how* the Act will protect consumers.

<sup>6</sup> See P Tlakula, statement in the *NCR Annual Report* op cit note 3 at 3.

But how will these formidable goals be attained, enforced, sustained and managed?<sup>7</sup>

Section 12 of the Act establishes the NCR to act as supervisory watchdog, administrator, regulator, and finder and keeper of information.<sup>8</sup> In broad terms, the NCR is responsible for the regulation of the South African credit industry as a whole.<sup>9</sup> It is further tasked with carrying out education, research, policy development, the registration of industry participants, the investigation of complaints, and ensuring enforcement of the Act. Clearly the Regulator is faced with no small mission. However, its strategy appears to involve a touch-and-go approach:<sup>10</sup>

'As questions come up – ones needs to – as the National Credit Regulator representative – say, “what is the reasonable interpretation of the applicable section?”'

## 2 What Is the National Credit Regulator?

The NCR is an independent juristic body that is, like all other entities in South Africa, subject to the Constitution and the law. It has jurisdiction throughout South Africa.<sup>11</sup> At present it has its offices in Midrand.<sup>12</sup> While this may well remain its head office, the NCR may have to open satellite offices throughout the country not only because of the extensive duties conferred on it by the Act but also to deal with anticipated administrative matters arising in each specific province, especially in the light of provincial demographic variances.

<sup>7</sup> The Act makes provision for various administrative bodies, quasi-judicial institutions, individuals and functionaries which are to be involved in the credit-regulation process. These bodies may also be provided with statutory powers to make orders to ensure compliance with the Act: see CJ Nagel et al *Commercial Law* 3 ed (2006) at 245. The NCR's Board, the functions of which are delineated in s 19, has established a number of committees to oversee specific areas, including the Audit Committee, Remuneration Committee, and Policy and Strategy Committee: see Tlakula op cit note 6 at 4. For the constitution and functioning of the Board, see par 2 below.

<sup>8</sup> Otto op cit note 2 at 3 observes that '[t]he National Credit Act introduces new forms of protection for debtors in South Africa. Examples are procedures aimed at preventing reckless credit and assistance to debtors who are over-committed. New administrative and quasi-judicial bodies are introduced to oversee the application of the Act. In fact, the Private and Commercial-Law dimensions of the Acts are not as dominant as they used to be in legislation of this nature in the past. The Formal Law is certainly putting up its hand.'

<sup>9</sup> Costs that banking institutions are unlikely to be crippled by. In fact, it is likely that the banking institutions will be, in the initial stages, eager to proceed to court in order to gain clarity in terms of the effects of the Act.

<sup>10</sup> Comment by Gabriel Davel, the current CEO of the NCR, speaking at the *New National Credit Act Seminar*, held in Aug 2006 in Rosebank, Johannesburg. What is worrying about this attitude on the part of the NCR is that it will be the courts that will be faced with the task of finding the 'reasonable interpretation of the applicable section'. And that process will be at a cost to the consumer. It will be the consumer who has to approach an attorney and pay for legal services and litigation. The NCR's reasonable interpretation will be nothing more than an educated guess, until, that is, a court rules on the matter. Some overlap may occur between the NCR and the Banking Ombudsman. I submit that it is likely that the NCR, given its mammoth to-do list, will deflect any bank-related queries and complaints, even if credit related, to the Banking Ombudsman. But it is unlikely that the Banking Ombudsman will be any better equipped to deal with the implementation and interpretation of the Act. Again, the consumer will have to incur the costs of what will at first be inevitable litigation.

<sup>11</sup> Section 12(1). It operates under the Public Finance Management Act 1 of 1999 and came into being on 1 Jun 2006: see *NCR Annual Report* op cit note 3 at 11.

<sup>12</sup> See [http://www.ncr.org.za/Contact\\_NCR.html](http://www.ncr.org.za/Contact_NCR.html) (last visited on 15 Nov 2007).

The NCR is governed by a Board, made up of up to nine members,<sup>13</sup> three of whom will be responsible for finance, housing matters, and social development affairs. The members will initially be appointed by the members of Cabinet responsible for the respective area of governance, with a view to having such members replaced by the actual Cabinet member. The Minister (that is, the member of Cabinet responsible for consumer affairs) must appoint a Chairperson, Deputy Chairperson and not more than six other members, two of whom will be required to be 'knowledgeable on consumer matters'.<sup>14</sup> The Chairperson and Deputy Chairperson may not serve for a period of longer than five years,<sup>15</sup> and are required to 'each have applicable knowledge or experience of matters connected with the purpose of the Act'.<sup>16</sup> The Minister must also appoint a suitably experienced person as Chief Executive Officer ('CEO') of the NCR, who, with the advice and subject to the oversight of the Board, will be responsible for all functions of the NCR, and who will also be accountable to the Board.<sup>17</sup> The CEO is an *ex officio* member of the Board, but may not vote at its meetings.<sup>18</sup>

The Board is tasked with guiding the strategic development of the NCR; overseeing and ensuring the effective and efficient use of resources available to the NCR; ensuring that the NCR is compliant with all its legal requirements, reporting and financial accountability obligations; and providing the CEO with advice regarding the exercise of the functions and powers of

---

<sup>13</sup> The Act specifies the qualifications for Board membership (s 20); deals with issues regarding conflicting interest of members of the Board (s 21); and regulates resignation and removal from office and vacancies on the Board (s 22).

<sup>14</sup> Section 19(1).

<sup>15</sup> Section 19(2).

<sup>16</sup> Section 19(3).

<sup>17</sup> Section 23(1).

<sup>18</sup> Section 23(2). Section 25 authorizes the CEO to appoint any 'suitable' person employed by the NCR or the State as an inspector. Once issued with a certificate of appointment, such an inspector in terms of the Act, specifically s 139 and ch 8, vested with somewhat extensive powers of investigation, including the power to enter and search premises and people, albeit in strict compliance with the requirements of the Act. For example, any person who registers as a credit lender, has to understand that it is a condition of registration with the NCR that he or she must permit the NCR or any person authorised by the NCR to enter any premises at or from which the registrant conducts the registered activities during normal business hours, and to conduct reasonable enquiries for compliance purposes: see s 50(2)(a). Such 'reasonable enquiries' include, in terms of s 154(1)(d)-(h), the power to examine any article or document on or in these premises that has a bearing on the investigation; to request any information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information; to take extracts from, or make copies of, any book or document on or in the premises that has a bearing on the investigation; to use any computer system on the premises, or require assistance of any person on the premises to use the computer system, to search any data contained in or available to that computer system and to reproduce any record from that data; and to seize any output from that computer for examination and copying. These investigative powers are not frivolous; in fact they are quite onerous. Attorneys and legal advisers will have to ensure that their credit-lender clients are aware of the investigative enquiries which the NCR is entitled to conduct. In turn, companies should advise their employees of what the NCR officials may or may not do. It is to be hoped that the NCR will exercise these powers with care. Whether they may cause conflict between rights of privacy and consumer rights remains to be seen.

the NCR.<sup>19</sup> The Board may refer any matter concerning the operation of the NCR to the Minister.<sup>20</sup>

### 3 The Duties of the National Credit Regulator

The duties of the NCR are provided for throughout the Act and the tasks for which it is responsible are extensive.<sup>21</sup> One could broadly catalog its duties as educating; collating industry information; regulating; registering; and enforcing. An octopus with its many tentacles comes to mind.<sup>22</sup>

The Act requires the NCR amongst other things to promote the development of an accessible credit market,<sup>23</sup> and particularly to address the needs of historically disadvantaged persons, low-income persons, and remote, isolated or low-density communities. The NCR is also tasked with the registration of credit providers, credit bureaux and debt counsellors; and with the enforcement of compliance with the Act.<sup>24</sup> The Act makes specific reference to the NCR's responsibility to set appropriate conditions for the supplementary registration of credit providers wishing to enter into developmental credit agreements, in order to promote access to credit.<sup>25</sup>

Furthermore, the NCR must monitor and report on an annual basis to the Minister in respect of all matters relating to the credit industry, including on credit availability; price and market conditions, conduct and trends; market share, market conduct and competition within the consumer credit industry; the credit-industry structure including extent of ownership, control and

<sup>19</sup> Section 19(4). The Chairperson of the National Credit Regulator, P Tlakula, has stated that the role of the Board of the NCR is to provide oversight and guidance to the NCR and to advise the Minister of Trade and Industry in respect of all matters regarding its performance: see *NCR Annual Report* op cit note 3 at 3. The NCR's structure is similar to that of a company with a board of directors, hence the appropriate terms 'board' and 'CEO'. The composition appears to be logically hierarchical, with a concentrated decision-making body, the Board. As opposed to reporting to its share holders, the Board must report to the Minister. Given that a nucleus – the Board – must report to the Minister, one hopes that it will also consequently bare the brunt of accountability. One (all too often) finds with government institutions that it is a shifting of decision-making responsibility that deters both progress with and the finalisation of projects.

<sup>20</sup> Section 19(5).

<sup>21</sup> CEO Davel stated in the *NCR Annual Report* op cit note 3 at 11 that the vision of the NCR included the responsibility to promote and support the development of a fair, transparent, competitive, sustainable and accessible credit market. It has to monitor the availability of credit, pricing and market conditions, trends in access to credit and indebtedness, market conduct and competition. Furthermore the CEO highlighted the monitoring of consumer indebtedness as a 'particularly important aspect of the NCR's mandate'.

<sup>22</sup> 'The provisions dealing with the establishment and powers of the National Credit regulator and the National Consumer Tribunal, registration of role players, alternative dispute resolution, powers and jurisdiction of courts and other formal and administrative matters represent in the order of 40% of the National Credit Act's printed text': Otto op cit note 2 at 3.

<sup>23</sup> Section 13(a).

<sup>24</sup> See <http://www.ncr.org.za/> (last visited on 15 Nov 2007).

<sup>25</sup> Section 13(b). In terms of s 1 read with s 10, a 'developmental credit agreement' is a credit agreement where, at the time it is entered into, the credit provider holds a supplementary registration certificate and the credit agreement is between a credit co-operative as credit provider and a member of that credit co-operative as consumer – profit must not be the dominant purpose for entering into the agreement and the principal debt does not exceed the prescribed amount; or where the credit agreement is for an educational loan, or where it is for any other purposes, prescribed by the Minister, which are designed to promote the socio-economic development and welfare of persons.

participation by historically disadvantaged persons; access to consumer credit by small businesses and historically disadvantaged persons, low-income persons, and remote, isolated or low density communities; levels of consumer indebtedness and the incidence and social effects of over-indebtedness.<sup>26</sup> The NCR is also responsible for conducting research and proposing policies to the Minister regarding matters which affect the consumer credit industry, including but not limited to proposals for legislative, regulatory or policy initiatives that would improve access to credit for historically disadvantaged persons, low-income persons, and remote, isolated or low density communities.<sup>27</sup>

The NCR is further tasked with the enforcement of the Act. It must promote the informal resolution of disputes arising between consumers and providers or credit bureaux, without intervening or adjudicating such disputes.<sup>28</sup> The NCR must also receive, investigate and evaluate complaints with regards to alleged contraventions of the Act; monitor the market and industry to ensure that prohibited conduct is prosecuted, and that national and provincial registrants comply with the Act; issue and enforce compliance notices; refer concerns regarding market share, anti-competitive behaviour or conduct which may be prohibited by the Competition Act, 89 of 1998, to the Competition Commission; and refer relevant matters to the National Consumer Tribunal.<sup>29</sup>

Section 16 of the National Credit Act places the burden on the NCR to increase the knowledge of the nature and dynamics of the credit market and industry and further to promote public awareness of consumer credit matters through, amongst others means, implementing education and information measures. The NCR must provide guidance to the role players in the credit market and industry by issuing explanatory notices outlining its procedures or by providing opinions on its interpretation of the Act. Such interpretative opinions are non-binding. In this regard the NCR may apply to a court for a declaratory order on the interpretation or application of the various provisions in the Act.<sup>30</sup> It must also monitor socio-economic patterns of the credit market. This it may achieve by conducting periodic audits on credit providers to establish, amongst others, demographic patterns of the credit market and to detect patterns of possible discriminatory practices. The NCR must also research patterns, causes and consequences of over-indebtedness. It is tasked

---

<sup>26</sup> Section 13(c).

<sup>27</sup> Section 13(d).

<sup>28</sup> See <http://www.ncr.org.za/> (last visited on 15 Nov 2007). It appears that the Legislature envisioned that the NCR should facilitate a conciliation process in the event of a dispute.

<sup>29</sup> This is a national body having jurisdiction throughout South Africa that has been established by the Act (s 26) and that must adjudicate matters in accordance with the Act or other legislation, including, allegations of prohibited conduct (see ss 26 and 27).

<sup>30</sup> The fact that the NCR may approach a court of its own accord is encouraging from a consumer and industry perspective. It may be hoped that the NCR will not hesitate to do so on a regular basis as any interpretative light so shed on the Act should be welcomed, if only because it will reduce the need for consumers to have to do so at their own cost.

with monitoring trends in the market with regards credit insurance,<sup>31</sup> and patterns and costs of alternative dispute-resolution agents.<sup>32</sup>

If on reasonable grounds it believes that a person or association has failed to comply with a provision of the Act, or is engaging in activity in a manner which is inconsistent with the Act, the NCR may issue a compliance notice in the prescribed form.<sup>33</sup> Such a notice may also be issued to a registrant which the NCR detects has failed to comply with a condition of registration.<sup>34</sup> Should a person fail to comply with a compliance notice, the NCR may refer the matter to the National Prosecuting Authority if the failure amounts to an offence in terms of the Act; alternatively, non-compliance may be referred to the National Consumer Tribunal for an appropriate order.<sup>35</sup>

#### 4 Registration Division of the National Credit Regulator<sup>36</sup>

The NCR has set up a Registration Division, which will be responsible for the registration of credit providers, credit bureaux,<sup>37</sup> and debt counsellors.<sup>38</sup> The NCR must maintain a register of all the registered role players.<sup>39</sup> Credit providers, credit bureaux and debt counsellors may not conduct their respective businesses without registering with the NCR.<sup>40</sup> It must also monitor compliance with the conditions laid down by the Act<sup>41</sup> as well as attend to queries related to the registration process.<sup>42</sup>

Interestingly enough, the NCR does not have the power to withdraw or de-register any body or person registered with it. Registrations may only be cancelled by the National Consumer Tribunal, normally upon request by the NCR, and only after the latter has conducted an investigation into alleged unlawful or prohibited conduct and brought a request for cancellation to the Tribunal.<sup>43</sup> The NCR may request that the Tribunal<sup>44</sup> cancel the registration of

<sup>31</sup> In this regard, the NCR may in terms of s 16(2)(a) require insurers to provide, amongst other matters, periodic synoptic reports of aggregate information relating to credit insurance policies issued by it, with the proviso that such reports may not identify particular consumers.

<sup>32</sup> Section 16(1).

<sup>33</sup> Section 55(1)(a).

<sup>34</sup> Section 55(1)(b).

<sup>35</sup> Section 55(6).

<sup>36</sup> The sections of the Act dealing with the registration of credit providers, credit bureaux and debt counsellors became effective on 1 Jun 2006: see the *NCR Annual Report* op cit note 3 at 15.

<sup>37</sup> A credit provider or a credit bureau must register within 40 business days of the commencement of the Act, being 1 Jun 2006. In the first year after that date, once a provider or bureau has submitted an application to register with the NCR, it was automatically considered as registered until a decision was taken by the NCR on the application: see <http://www.ncr.org.za/Registration.html#when> (last consulted on 15 Nov 2007).

<sup>38</sup> Debt counsellors should have registered by 1 Jun 2007: see <http://www.ncr.org.za/Registration.html#when> (last visited on 15 Nov 2007).

<sup>39</sup> Section 14(c) and 53.

<sup>40</sup> Sections 40(3), 43(2) and 44(2). In terms of s 51, an application fee is payable, as well as initial registration fees (upon registration) and annual renewal registration fees.

<sup>41</sup> The Registration requirements, criteria and procedures are contained in ss 39-53 (ch 3 ('Consumer Credit Industry Regulation'), part A ('Registration Requirements, Criteria and Procedures') of the Act.

<sup>42</sup> See <http://www.ncr.org.za/Registration.html#when> (last visited on 15 Nov 2007).

<sup>43</sup> The body or person (credit provider, credit bureau or debt counsellor) will have the opportunity to defend itself against a request for deregistration: see *NCR Annual Report* op cit note 3 at 16. However, a

a registrant if it repeatedly fails to comply with any of the conditions of its registration, is in contravention of the Act, or fails to meet any of its black economic empowerment commitments in respect of combatting over indebtedness.<sup>45</sup>

#### 4.1 The Registration of Credit Providers<sup>46</sup>

A person must apply to be registered as a credit provider<sup>47</sup> if that person alone or in conjunction with any associated person is the provider of credit for not less than 100 credit agreements,<sup>48</sup> other than incidental credit agreements.<sup>49</sup> A credit provider must also register if the total principal debt owed to such provider under all outstanding credit agreements exceeds R500 000.<sup>50</sup>

---

registered body may voluntarily cancel its registration by submitting a prescribed form (Form 10) to the NCR: see reg 9 in GN 489 in GG 28864 of 31 May 2006.

<sup>44</sup> Chapter 2, part B of the Act establishes a National Consumer Tribunal which functions in a similar manner as a court and has country-wide jurisdiction. See also MW Jones & HC Schoeman *An Introduction to South African Banking and Credit Law* (2006) at 156.

<sup>45</sup> See <http://www.ncr.org.za/Registration.html#when> (last visited on 15 Nov 2007)

<sup>46</sup> See s 40.

<sup>47</sup> In terms of s 1 of the Act, a 'credit provider', in respect of a credit agreement to which the Act applies, means the party who supplies goods or services under a discount transaction, incidental credit agreement or installment agreement; the party who advances money or credit under a pawn transaction; the party who extends credit under a credit facility; the mortgagee under a mortgage agreement; the lender under a secured loan; the lessor under a lease; the party to whom an assurance or promise is made under a credit guarantee or the party who advances money or credit to another under any other credit agreement.

<sup>48</sup> In terms of s 1 of the Act, a 'credit agreement' refers to an agreement which meets all the criteria in s 8, which in turn makes an agreement a credit agreement if it is a credit facility; a credit transaction; a credit guarantee or any combination of these. A policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy insurance, a lease of immovable property, and a transaction between a stokvel and a member of that stokvel are in terms of s 8(2) of the Act not credit agreements.

<sup>49</sup> In terms of s 1 of the Act, an 'incidental credit agreement' means 'an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or good or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply: (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period; or (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date'. See further Otto op cit note 2 at 4 where he states that '[t]here are definitions and phrases [in the National Credit Act] which could have been worded more elegantly or accurately, while certain terminology is not only new but also rather meaningless in the South African context'. The example he provides of this is the definition of an incidental credit agreement. An example of what may amount to an incidental credit agreement in terms of the Act would be an attorney's statement of account, which, if not paid on or before the 30-day period, would incur an additional fee of Rx, or even a doctor's account which would incur interest at a rate of x% per annum pro rata. The NCR's own interpretation is that a person need not register if he, she or it 'provides incidental credit as a result of outstanding transactions': see <http://www.ncr.org.za/Registration.html#when> (last visited on 15 Nov 2007).

<sup>50</sup> In terms of s 42(1), the Minister must at intervals of not more than five years, by notice in the *Government Gazette*, determine a threshold of not less than R500 000 to determine whether or not a credit provider has to be registered. It is interesting to observe that the NCR adds the additional requirement that credit providers must register if 'they have a commitment to combating over-indebtedness': see <http://www.ncr.org.za/Registration.html#when> (last visited on 15 Nov 2007). This commitment to combating over indebtedness appears to be further encouraged by s 40(5) which provides for the voluntary registration of any person who is not required to register in terms of the Act, or a person to whom s 40 does not apply. When a determination must be made as to whether or not a provider must register in terms of s 40(1), for purposes of a credit facility, the value of such credit

Section 40(2)(1) of the Act requires each associated person, who is a credit provider in its own name, to apply for registration in that name. The section itself provides a definition of an ‘associated person’: the spouse or business partner of a credit provider, if such is a natural person, or if the credit provider is a juristic person, any person who directly or indirectly has a controlling interest in the credit provider or is directly or indirectly controlled by that credit provider, as well as any person that is a joint venture partner of such a juristic person.<sup>51</sup>

Between 1 June 2006 and 31 March 2007, the NCR had registered a total of more than 396 819 574 credit providers, in the following categories:<sup>52</sup>

<i>Entity</i>	<i>Number</i>
Banks	243 835
Clothing retailers	83 778
Food retailers	2 183
Furniture stores	272 600
Co operatives	7 238
Housing lenders	448
Life insurers	12 233
Motor-vehicle financiers	6 740

facility is the credit limit under that credit facility and excludes any credit guarantee to which the provider is a party. This is in terms of s 40(6) of the Act. If one looks at the definition section, a ‘credit facility’ falls under the term ‘credit agreement’, but bears its own specific definition (see s 8(3)); likewise the term ‘credit guarantee’ (see s 8(5)). One has to wonder why these two have been singled out when a ‘credit transaction’ also falls under the umbrella term ‘credit agreement’. To compound the problem, in terms of s 8(6), a credit agreement may be constituted by [both] a credit facility and a credit transaction. Why has the Legislature not provided a mechanism for the determination of the value of a credit transaction? The answer could perhaps be that upon closer inspection of the definition of a credit transaction provided by s 8(4), the Legislature assumed that these amounts, values or credits would have been settled and fixed at the time of the conclusion of the agreement. This assumption, it is submitted, is not entirely satisfactory. Taking the pawn transaction, which also falls under the term ‘credit transaction’, as an example, the problem arises when the goods handed over as security exceed the value of the credit granted. In this case, which value should the credit grantor look to: the actual credit extended, or the value of the goods in its possession as security? Further considerations of interest and charges complicate the issue of the determination of value for purposes of registration.

<sup>51</sup> It is difficult to comprehend why the Legislature considered this provision necessary. It appears, if not somewhat redundant, then at least overly cautious. If A and B are married and A is a credit provider whose loans are above the value of R500 000 or is the credit provider in terms of at least 100 credit agreements, then he must register in terms of s 40(1) of the Act. If B, his wife, is a credit provider whose loans are above the value of R500 000 or is the credit provider in terms of at least 100 credit agreements, then she must register in terms of s 40(1). Their association (marriage, whether in or out of community property) appears to have little to do with whether or not they must register as credit providers. Likewise with a juristic person, it is submitted that one would look to the wording of s 40(2)(b) which provides that if that associated person ‘*is a credit provider in its own name*’, it must register. So XX (Pty) Ltd and YY (Pty) Ltd are joint venture partners (no definition of joint venture partner is provided in the Act, and one should probably assume that a common-law joint venture was intended) and XX company is, inter alia, a credit provider whose loans are above the value of R500 000 or is the credit provider in terms of at least 100 credit agreements, then XX must register in terms of the Act. If company YY is *not* lending or its loans are, in value, less than R500 000 and it is providing credit in terms of less than 100 credit agreements, then it is not required to register, even though its joint venture partner is. It is evident that the Legislature was seeking to avoid a situation where an associated person would use its association to avoid registration, but it is submitted that the wording of s 40(2)(b) could have eliminated any doubt as to who should register in terms of the Act.

<sup>52</sup> See *NCR Annual Report* op cit note 3 at 19.



Municipalities	811
Pension funds	2 020
Private colleges	4 124
Provident funds	1 313
Short-term insurers	612
State enterprises	572
Universities	824
Other short- and long-term financiers	38 147 643

A person who should be registered in terms of the Act but is not, is prohibited from making an offer to enter into, from making available or from entering into a credit agreement, or from agreeing to any of the above.<sup>53</sup> A credit agreement, entered into by person who is not registered but is required to be registered in terms of the Act, is unlawful and void.<sup>54</sup> That will not be the case if at the time that the credit agreement is concluded or within 30 days after it has been entered into, the credit provider had applied<sup>55</sup> or applies for registration, or if at the time of the credit agreement the provider held a valid clearance certificate issued by the NCR.<sup>56</sup>

If a credit agreement is found to be unlawful, a court must order such agreement to be void as from the date it was entered into, and must order the provider to refund to the consumer any money paid by the latter in terms of that agreement together with interest calculated at the rate set out in the agreement and for the period from the date on which the consumer paid the money to the provider until the date upon which the money is refunded. The court must also order that all the rights conferred on the provider in terms of the agreement, such as the right to recover money paid or goods delivered, must be cancelled, unless it finds that such cancellation would unjustly enrich the consumer, in which event it may even order that such goods be forfeited to the State.<sup>57</sup>

The NCR appears to have some authority with regards the imposition of various criteria for purposes of registering. Should the applicant not comply, the NCR may refuse it registration. The following statement from the NCR appears relevant:<sup>58</sup>

<sup>53</sup> Section 40(3).

<sup>54</sup> Section 40(4). The effect of this section is that a debtor will be able to use s 40(4) as complete defense for a claim by the non registered credit provider.

<sup>55</sup> And was waiting for the determination of the application.

<sup>56</sup> Section 89(4).

<sup>57</sup> Section 89(5).

<sup>58</sup> See <http://www.ncr.org.za/Registration.html#when> (last visited on 15 Nov 2007).

'Although basic registration of credit providers is under this Act, the Regulator may impose conditions to address matters relating to the purpose of the Act generally and the Regulator will further consider the application relating to BEE and over-indebtedness concerns specifically.'

#### 4.1.1 Supplementary Registration as Credit Providers of Developmental Credit<sup>59</sup>

Once a credit provider is registered or has applied to be registered as such, it may apply for supplementary registration as a credit provider for developmental credit agreements. A developmental credit agreement must, in terms of s 1, satisfy the criteria set out in s 10 of the Act. A credit agreement is also a developmental credit agreement if it is an educational loan or if it is entered into for the development of a small business, or for the acquisition, rehabilitation, building or expansion of low-income housing. Furthermore, the Minister may prescribe<sup>60</sup> additional purposes designed to promote the socio-economic development and welfare of historically disadvantaged persons or low-income persons or remote, isolated or low-density populations and communities.<sup>61</sup>

In order to register as a developmental credit provider, a provider must be a close corporation, company, credit co-operative, trust, statutory entity, mutual bank or bank, must further be registered with the South African Revenue Service, and must not employ any person in a controlling or managerial capacity who would be disqualified from individual registration in terms of s 46(3).<sup>62</sup>

#### 4.2 The Registration of Credit Bureaux<sup>63</sup>

The National Credit Act requires registration of all credit bureaux. A credit bureau is an entity<sup>64</sup> that is in the business of receiving reports of, or investigating, credit applications, credit agreements, payment history or

<sup>59</sup> Section 41. For a definition of a developmental credit agreement, see n 25 above. The Minister may prescribe criteria and standards to be applied by the NCR in considering whether a credit provider's dominant purpose for making an agreement was profit or a purpose other than profit: see s 10(2)(c). The maximum amount has been prescribed by the Minister in GN 713 in GG 28893 of 1 Jun 2006.

<sup>60</sup> In terms of s 10(2).

<sup>61</sup> Section 10 refers to persons contemplated in s 13(a), which have been mentioned in the text.

<sup>62</sup> This section disqualifies natural persons from registration as credit providers if they are under the age of 18; have been registered on the register of excluded persons in terms of a court order under s 14 of the National Gambling Act, 7 of 2004; have been declared to be mentally unfit or disordered, by a competent court; have previously been removed from an office of trust due to misconduct relating to fraud or the misappropriation of money whether in South Africa or elsewhere; have been directors or members of a governing body of an entity at such time when the entity was involuntarily deregistered in terms of public regulation, brought the consumer credit industry into disrepute, acted with disregard for consumer rights; or had during the previous 10 years, whether in South Africa or elsewhere, been convicted of theft, fraud, forgery or uttering a forged document, perjury or an offence under the Prevention of Combating of Corrupt Activities Act, 12 of 2004 or comparable legislation of another jurisdiction, or of a crime involving violence against another natural person or an offence under the Act, a repealed law or comparable legislation.

<sup>63</sup> Section 43. By 31 Mar 2007, eight credit bureaux had been fully registered: see *NCR Annual Report* op cit note 3 at 16.

<sup>64</sup> It should be observed that s 46(1) prevents a natural person from being registered as a credit bureau.

patterns, or consumer credit information relating to consumers or prospective consumers,<sup>65</sup> other than information which is in the public domain.<sup>66</sup> This excludes credit providers or employees of credit providers. Credit bureaux will also be responsible for compiling and maintaining data obtained from credit applications,<sup>67</sup> as well as issuing reports concerning consumers.<sup>68</sup>

The NCR must not register an entity as a credit bureau unless it maintains and imposes qualification, competence, knowledge and experience requirements for its employees or contractors who will have authority to represent it. The NCR must be satisfied that the entity has sufficient human, financial and operational resources to enable it to function efficiently.<sup>69</sup> The NCR must further be satisfied that the entity wishing to register as a bureau must have adopted procedures to ensure that questions, concerns and complaints of consumers and credit providers are treated equitably and consistently, in a timely, efficient and courteous manner.<sup>70</sup> The following from the NCR's *Annual Report* is relevant:<sup>71</sup>

'Prior to the registration of a credit bureau, the NCR is required to consider whether an applicant has appropriate systems, procedures and staff to operate the business of a credit bureau. The NCR therefore performs a pre-registration audit on all applications for registration as a credit bureau.'

<sup>65</sup> Consumer credit information constitutes a person's credit history including application's for credit, credit agreements to which a person is or has been a party, pattern of payment or default, debt re-arrangement in terms of the Act, and incidence of enforcement actions taken in terms of these credit agreements. It involves information with regards a person's financial history, including a person's past and current income, assets and debts and prospects and obligations. Credit information includes other particulars of a person including a person's education, employment, career, professional or business history, as well as the circumstances of termination of any of the above, and also a person's name, date of birth, identity number, marital status and family relationships, past and current addresses and other contact details. This is in terms of s 70(1)(a)-(d), and appears not to be a numerus clauses, as the section refers also to 'other related matters'.

<sup>66</sup> Consumer information is considered to be in the public domain when, inter alia, it consists of court orders or reasons for judgment: see s 43.

<sup>67</sup> When a consumer requests a credit report, the report must disclose identical information to that which will be displayed should such a report be provided to a third party. If the accuracy of the consumer credit information is challenged by a consumer, the latter should contact the credit bureau concerned to raise an objection or lodge a complaint (the NCR website refers consumers to the companies TransUnion or Experian). The bureau then has 30 business days in which to resolve the issue. If the bureau is unable to resolve the issue, the consumer should refer the matter to the Credit Information Ombudsman ('CIO'). Should the CIO be unable to find a resolution, it may in turn request the NCR to intervene. The NCR is restricted from dealing with the matter until such time as the consumer has contacted the credit bureau. See further [http://www.ncr.org.za/Credit\\_records.html](http://www.ncr.org.za/Credit_records.html) (last visited on 15 Nov 2007). The first statistical returns by credit bureaux were received by the NCR on 15 Feb 2007, for the period 1 Oct 2006 to 31 Dec 2006. However, it appears that in order to allow sufficient time to assess the accuracy of the data, and the consistency between the statistics submitted by different bureaux, the NCR decided to delay the publication of the statistics: see the *NCR Annual Report* op cit note 3 at 16.

<sup>68</sup> Section 43(1).

<sup>69</sup> The NCR may also accept a credible plan, presented by the entity wishing to register as a credit bureau, which demonstrates how such entity intends acquiring or developing those resources: see s 43(3)(b).

<sup>70</sup> Here again, the NCR may accept a credible plan, presented by the entity wishing to register as a credit bureau, which demonstrates how such entity intends acquiring or developing these procedures: see s 43(3)(c).

<sup>71</sup> Op cit note 3 at 15. In order to be registered by the NCR, a credit bureau must furthermore be registered with the South African Revenue Service: see s 43(3)(d).

An entity may not offer or conduct business as a credit bureau, or hold itself out to the public as being authorised to offer any service customarily offered by a credit bureau, unless it is registered with the NCR as required by the Act.<sup>72</sup> The Minister may, by regulation, declare any business activity a disqualified activity if it is inconsistent with the functioning of an independent and objective credit bureau.<sup>73</sup>

All the provisions in the Act relating to credit bureaux and credit information came into effect on the 1 September 2006. The NCR takes a very positive stance with regards their effect on credit bureaux:<sup>74</sup>

'The response to these regulations has been positive and consumers are becoming increasingly aware of their rights in relation to credit information, their right to free reports, and the mechanisms through which to enforce these rights. We hope that these regulations would go a long way to addressing the considerable public concern in this area, and counter the scepticism about the important role that credit bureaux are playing in a modern economy.'

#### 4.3 The Registration of Debt Counsellors<sup>75</sup>

The National Credit Act makes provision for the registration of debt counsellors to assist over-indebted consumers.<sup>76</sup> Registration is not automatic and application must be made to the NCR in the prescribed manner,<sup>77</sup> and will succeed only if all the requisite criteria have been met.<sup>78</sup> A natural person may apply to be registered as a debt counsellor, provided he or she meets the prescribed education, experience or competency requirements laid down by the Act or is in a position to satisfy any additional requirements as may be determined by the NCR.<sup>79</sup> These additional requirements may even be set as a condition for the applicant's registration.<sup>80</sup> Debt counsellors are required to undergo training approved by the NCR. From 1 June 2007, debt counseling

<sup>72</sup> Section 43(2).

<sup>73</sup> Section 43(5) and (24.1) *CLISB [Commercial Law Information Service Bulletin]* 17.

<sup>74</sup> Negative credit information, specifically 'blacklisting', was an important motivating factor in the promulgation of the Act. Section 73 deals specifically with this issue and on 30 Nov 2006 regulations relating to 'data removal' were published as GN 1209 in *GG* 29442). This provides for a once-off removal of specified categories of consumer credit information. It was seen as an opportunity for consumers to 'clean' their credit records, and to remove this from being a barrier to financial access and economic activity: see *NCR Annual Report* op cit note 3 at 9.

<sup>75</sup> Section 44. By 31 Mar 2007, 51 debt counsellors had submitted applications for registration: see the *NCR Annual Report* op cit note 3 at 16.

<sup>76</sup> See further [http://www.ncr.org.za/Debt\\_Counsellor.html](http://www.ncr.org.za/Debt_Counsellor.html) (last visited on 15 Nov 2007).

<sup>77</sup> Section 45(1).

<sup>78</sup> See (24.1) *CLISB* 16.

<sup>79</sup> 'The Act makes provision for the registration of debt counsellors which have complied with all the provisions of the Act and satisfied the training requirements of the NCR. Debt counsellors will conduct independent enquiries into consumers financial circumstances and make recommendations to the courts concerning debt restructuring and suspension of reckless credit agreements': see <http://www.ncr.org.za/Registration.html#when> (last visited on 15 Nov 2007).

<sup>80</sup> Section 44(3). This essentially signifies that the NCR may, at any point, set conditions to different and individual applications. This authority could be viewed as amounting to discrimination. If a requirement is necessary for one applicant, it should be necessary for another candidate, and any discrimination would, accordingly, have to be justified. The NCR must look at laying down policy that is applicable for all applications. However, as the Legislature has left it open to the NCR to set different standards for individual applicants and has not imposed development of a uniform policy for application requirements upon the NCR, it may be in order to accommodate different language groups focused in certain areas. Interestingly enough, s 61 of the Act, in contrast, states that relative to the treatment of any other consumer or prospective consumer, a credit provider must not unfairly discriminate directly or

services have begun to be available to consumers who are unable to honour, in a timely manner, credit agreements to which they are party, as indicated by their history of debt repayment.<sup>81</sup>

A person may not offer or engage in the services of a debt counselor or hold themselves out to the public as being authorised to offer any such service, unless such person is registered with the NCR, as required by the Act.<sup>82</sup>

The Department of Trade and Industry and the Micro Finance Regulatory Council had been involved in what is referred to as a 'pilot debt relief programme' from 2003. The project served as a basis for the implementation of debt counseling and debt review as provided for in the National Credit Act. A procedure manual for debt counseling and training materials has been developed and issued. The NCR has furthermore accredited training service providers, which are responsible for the training of debt counselors.<sup>83</sup>

'Debt counselling' is a new concept introduced by the Act. The Act now enables an over-indebted consumer to apply for debt counselling. The debt counsellor would review the credit agreements which the consumer is committed to and then develop a proposal for debt re-arrangement.<sup>84</sup> This proposal will then be put to the affected credit providers and, if accepted, implemented as a 'consent order', or, if not accepted, referred to the Magistrate's Court for a hearing.<sup>85</sup>

---

indirectly against any person on any of the grounds set out in s 9(3) of the Constitution of 1996, or any of the grounds set out in ch 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

<sup>81</sup> See [http://www.ncr.org.za/Debt\\_Counsellor.html](http://www.ncr.org.za/Debt_Counsellor.html) (last visited on 15 Nov 2007).

<sup>82</sup> Section 44(2).

<sup>83</sup> The NCR has held various information workshops in order to introduce both the prospective debt counsellors and other stakeholders (including credit providers and credit bureaux) to the concepts related to debt counselling: see the *NCR Annual Report* op cit note 3 at 8. The *Report* provides no more than a glimpse of what the NCR has done in terms of training and preparation of debt counsellors. It provides no statistics and no information as to how many debt counsellors to every consumer there are. The *Report* does estimate that well over 300 000 consumers in South Africa find themselves in an extremely over-indebted position, and that a further million or more of them are potentially 'debt-stressed'. No definition of the latter term is provided. Is the NCR referring to a physiological stress or financial strain? If 'debt-stressed' indicates the latter, when does 'debt-stressed' become 'insolvent'? Furthermore, while the NCR is training debt counsellors, one wonders whether the average consumer aware of his or her local debt counsellor? How does the consumer find these debt counsellors, and what, practically, are the debt counsellors doing or able to do for the consumer? Other than to state that the impact and cost of over indebtedness should not be underestimated, the NCR's *Report* gives no concrete statistical data of the impact or, at the very least, the anticipated impact of debt counsellors or of their functions and duties.

<sup>84</sup> Further clarity is required on what exactly the concept of 'debt-restructuring' entails, on the management of repayments once there has been debt counseling and on how the distribution of payments to credit providers will be managed. The NCR envisages that this function should be performed by a 'Payment Distribution Agent' which should have the required administrative capacity to perform such a function, and who may have to be independent from the debt counsellor. The NCR has proposed that the regulations in GG 28864 of 31 May 2006 should be amended in order to regulate this function, and to provide for increased fees for debt counselors: see the *NCR Annual Report* op cit note 3 at 24.

<sup>85</sup> Should the proposal not be accepted by the credit providers, or even by a single credit provider, who will assist the already 'debt-stressed' consumer in taking the matter to court? What kind of procedure will be followed? Our civil procedure is notoriously drawn out, even at the Magistrates Court level. What will the consumer do in the interim? What will the credit providers do in the interim, now that they are aware that there is a problem with the particular consumer? The practicality of the procedure is not too convincing, given that the consumer is likely to be given false hope, while the credit provider stands to lose his bottom line and the Magistrate is required to decide financial as

The current regulations allow a debt counsellor to recover R50 from a consumer upon acceptance of the latter's application for debt review. This amount is clearly insufficient to cover the cost of debt counselling. As a result, the NCR has encountered a resistance among debt counselors to register. If the debt-counselling fees are not increased, there may be insufficient debt-counselling capacity to cope with the NCR's expected number of applications from over-indebted consumers.<sup>86</sup>

## 5 Complaints

The NCR is responsible for dealing with complaints related to the National Credit Act,<sup>87</sup> the Usury Act, the Usury Act Exemption Notice of 1999, and the Credit Agreements Act. The NCR also acts as a mediator in disputes arising between consumers and credit providers or credit bureaux in terms of these measures.<sup>88</sup>

Once it receives a complaint,<sup>89</sup> the NCR may issue a notice of non-referral to the complainant if it finds the complaint to be frivolous or vexatious or that the complaint does not contain allegations of fact, which if these were found to be true, would not in themselves constitute grounds for remedy under the Act.<sup>90</sup> The NCR may also refer the complaint to a debt counselor if the complaint is related to reckless credit or possible over-indebtedness of the consumer; or it may refer such complaint to an ombud<sup>91</sup> with jurisdiction,<sup>92</sup> a

---

opposed to legal issues. The following from the NCR's *Report* op cit note 3 at 24 is demonstrative of the [essential] impracticality of the system: 'There is also uncertainty regarding the manner in which the Magistrate's Courts will deal with debt counseling cases. These may similarly require clarification through amendments to the regulations or to the Magistrate's Court Act. These concerns had been raised with the respective departments and the proposals for amendments are being considered. However, it must be recognised that the institutional capacity required to meet the expected demand from debt-stressed consumers and the complexity of co-coordinating between the different parties that are affected, creates considerable challenges. The NCR will continue investing time and effort into this area, but the effective implementation of debt counseling depends on the goodwill and co-operation of a number of different stakeholders, including credit providers, credit bureaux and magistrate's courts.'

<sup>86</sup> *NCR Annual Report* op cit note 3 at 24.

<sup>87</sup> The NCR may also initiate a complaint in its own name: see s 136.

<sup>88</sup> Where informal resolution is not possible, the NCR may issue compliance notices or refer the matter to the National Consumer Tribunal. The enforcement framework in the Act, with the option of referral to the Tribunal, is seen by the NCR as being sufficiently flexible that it will facilitate speedy compliance without necessitating an overly litigious approach which would further add to the burden of the courts: see <http://www.ncr.org.za/Complaints.html> (last visited on 15 Nov 2007).

<sup>89</sup> A consumer may lodge a complaint against a credit provider by submitting a completed prescribed form to the NCR by fax, mail, e-mail or telephone. Complaints lodged by telephone and e-mail may be lodged only by the complainant, and not by someone on behalf of the complainant. If a person completes and submits the prescribed form on behalf of the complainant, the complaint must be accompanied by a written consent signed by the complainant. A written consent provided by the complainant must contain the name of the third party, the name of the credit provider, the date of signing of the agreement to which the complaint relates, and details of the complaint: see [http://www.ncr.org.za/Complaints\\_requirements.html](http://www.ncr.org.za/Complaints_requirements.html) (last visited on 15 Nov 2007).

<sup>90</sup> Section 139(1)(a).

<sup>91</sup> The Act refers to an ombud in terms of the National Services Ombud Schemes Act, 37 of 2004. In terms of this Act, an ombud is a person who is responsible for resolving complaints in terms of a scheme or arrangement established by a financial institution, or a group of financial institutions: see further Otto op cit note 2 at 36.

consumer court, or an alternative dispute-resolution agent for the purposes of assisting the parties in resolving the dispute.<sup>93</sup> The NCR may also direct that an inspector investigate the complaint.<sup>94</sup>

After investigations have been conducted, the NCR may issue a notice of non-referral to the complainant, or may refer the matter to a consumer court, or refer the matter or make application to the Tribunal.<sup>95</sup> If the matter concerns an offence in terms of the Act, the NCR may also refer the matter to the National Prosecuting Authority.<sup>96</sup>

## 6 Conclusion

The NCR appears to be the focal point through which the operation of the Act will be controlled. All those in some way or another involved in the lending and credit regime established by the new dispensation, will in some way come into contact with the NCR, be it for purposes of registration or for lodging a complaint.

As of 31 March 2007, the end of the period that is covered by the NCR's first *Annual Report*, the compliance requirements of the National Credit Act had not yet taken effect. The only sections of the Act that were operational, were those creating the National Credit Regulator and the National Consumer Tribunal, and those governing registration and credit bureaux. It is accordingly difficult at this early stage to assess the impact of the National Credit Act, and more specifically the effectiveness of the NCR in carrying out its extensive responsibilities.

With staff complement of 51 permanent employees and eight contract employees<sup>97</sup> the NCR finds itself with an administrative overload, especially as regards the initial stages of the registration of the providers, bureaux and counselors as well as their training and other incidental matters. However, its *Annual Report* appears positive albeit vague as regards the practicalities of the

---

<sup>92</sup> An 'ombud with jurisdiction' means in terms of the Act a person who has jurisdiction in terms of the National Services Ombud Schemes Act to deal with complaints arising out of a credit agreement in terms of which the credit provider is a 'financial institution' as defined in that Act.

<sup>93</sup> Section 139(1)(b).

<sup>94</sup> Section 139(1)(c). Section 139(2)-(4) deals with the practical aspects of conducting the investigations and the powers vested in the NCR in terms of these investigations, including the summoning persons believed to be able to furnish information on the subject of the investigation, or having control of any book, document or other object, to undergo interrogations by the NCR.

<sup>95</sup> The National Credit Act established the National Consumer Tribunal. This Tribunal is an independent body and its functions are to adjudicate in matters concerning allegations of prohibited conduct against credit providers, debt counsellors and other persons registered with the NCR. It also hears appeals against the decisions of the NCR, and consumer complaints where the complaint had been rejected by the NCR or an alternative dispute agency. The Tribunal has the power to issue fines for non-compliance by persons registered with the NCR and s 150 of the Act provides for a number of different orders which the Tribunal may issue in respect of non-compliance with the Act. The decisions of the Tribunal may be appealed to the High Court. The Chairperson and members of the Tribunal are appointed by the President (the first appointed chairperson of the Tribunal is Diane Terblanche). See further the *NCR Annual Report* op cit note 3 at 11.

<sup>96</sup> Section 140.

<sup>97</sup> As at 31 Mar 2007: see the *NCR Annual Report* op cit note 3 at 29.

initial process of implementation. Its next Report will make for interesting reading, given that, by then, the NCR will have had to deal with more than the simple mechanics of starting up, creating awareness, and educating the relevant role players.

---