

**TOWARDS RESPONSIBLE LENDING IN NAMIBIAN
CONSUMER CREDIT LAW: A COMPARATIVE
INVESTIGATION**

By

NDATEGA VICTORIA ASHEELA

submitted in accordance with the requirements for the degree

DOCTOR LEGUM

in the

**FACULTY OF LAW
UNIVERSITY OF PRETORIA**

**SUPERVISOR: PROF DR S RENKE
CO-SUPERVISOR: PROF DR M ROESTOFF**

NOVEMBER 2017

ACKNOWLEDGEMENTS

I gratefully acknowledge the following people for their assistance and support in the process of writing this thesis. Genuine appreciation goes to my supervisors, Professor Stéfan Renke and Professor Melanie Roestoff, for their unwavering support and guidance in all the stages of producing this work. They have believed in me from day one and have made the road very comfortable for me, both academically and on a personal level. Be blessed more abundantly.

I am very grateful to Ms. Nicola Howell of the Queensland University of Technology, Professor Gail Pearson of the University of Sydney and Professor Jeannie Paterson of the University of Melbourne Law School for their assistance in retrieving research material in Australia and for their willingness to share with me their work in the field. I am indebted to Ms. Howell for agreeing to read through my draft Australian chapter and for offering many useful suggestions.

I gratefully acknowledge the University of Pretoria for granting me a bursary to pursue this degree. I am also thankful to my employer, the University of Namibia, for granting me a year of staff development leave to complete this degree.

I am grateful to Dr Kenneth Ferdie Mundia, my former lecturer and colleague, for his continuous support. Thank you for encouraging me to embark on this important project. I truly hope it makes you proud. My siblings, Petrina, Josef, Timothy, Nancy, Jakulandje and Asheela, I am eternally grateful to you for the love and support. Special thanks for the friendship I have always found in Paul Nambahu, Emily, Lindelwa, Lineekela, Taimi, Nelly, Ezze and Shipanga. Your prayers and availability to attend to my concerns means everything. Daddy Penda Shapopi, I appreciate you. My son, Boas Ethan Nambahu, thank you baby for making this road easier by being such a strong and independent boy. Above all, I give all the glory and honour to the loving God. Your grace is sufficient for me.

I dedicate this work to my parents, Mr. Andreas Asheela and Mrs. Lea Jakula Asheela, for their gift of a wonderful home and for their investment in our education.

SUMMARY

The regulation of consumer credit in Namibia mainly is provided for by the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. These legislative enactments originated in South Africa and were applied in South West Africa during the period of South Africa's mandate over what is now the Republic of Namibia. Despite the fact that these enactments are over 35 years old, they are substantially unchanged. In response to an awareness of the threat of consumer over-indebtedness and other events such as financial crises, the purpose in this thesis is to undertake a situational analysis of the debt prevention measures as provided for by the Namibian legislative framework and the extent of protection these measures afford consumers in terms of irresponsible credit and over-indebtedness.

A broad survey of the policies aimed at promoting responsible lending benchmarks the Namibian consumer credit regulatory framework against the leading international best principles which have been developed in response to global economic challenges. The Namibia Financial Institutions Supervisory Authority in the 2014 Microlending Bill proposes to introduce responsible lending practices in the form of a compulsory pre-agreement assessment of the prospective consumer before providing them with credit. In a comparative investigation, the creditworthiness assessment and related measures central to the responsible lending regimes in South Africa and Australia are considered. Measuring the Namibian consumer credit regulatory framework against these recent developments, it is submitted that the current debt prevention measures are inadequate in protecting consumers from irresponsible credit lending and the risk of consumer over-indebtedness.

This thesis supplies reasons for the need in Namibia to update the regulatory structure of the credit industry in order to protect consumers. As a contribution to the promotion of a culture of responsible lending in the Namibian consumer credit market, the thesis proposes the introduction of responsible lending measures in Namibia's consumer credit legislative framework.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION	1
1.1 Background	1
1.2 Thesis Statement	3
1.3 Thesis Statement Defined	3
1.4 Research Objectives	4
1.5 Research Methodology	6
1.6 Delineations and Study Limitations	8
1.7 Organisation of Chapters	9
1.8 Terminology and Reference Methods	10
CHAPTER 2: RESPONSIBLE LENDING POLICY	11
2.1 Introduction	11
2.2 Theoretical Perspectives Underlying Responsible Lending Policy	13
2.3 Criticisms of Responsible Lending Policy	17
2.3.1 General.....	17
2.3.2 Responsible Lending is Paternalistic.....	17
2.3.3 Financial Responsibility Shifts to the Credit Provider	19
2.3.4 Responsible Lending Leads to Restrictive Lending Practices	19
2.3.5 Over-reliance on Credit Bureaus for Creditworthiness Assessments	21
2.3.6 Responsible Lending Conflicts with Standardised Models of Credit Scoring	22
2.4 International Efforts to Promote Responsible Lending	23
2.4.1 General.....	23
2.4.2 The Group of Twenty.....	23

2.4.3	The Organisation for Economic Co-operation and Development	25
2.4.4	The World Bank.....	26
2.5	Wilson’s Criteria for an Effective Responsible Lending Regime	29
2.6	Responsible Lending Policies in Particular Credit Markets	31
2.6.1	General.....	31
2.6.2	The United States of America.....	31
2.6.3	The European Union	38
2.6.3.1	The Directive 2008/48/EC	44
2.6.3.2	The Directive 2014/17/EU	46
2.6.4	South Africa.....	49
2.6.5	Australia	52
2.7	Conclusion.....	59
 CHAPTER 3: CONSUMER CREDIT REGULATION IN NAMIBIA.....		70
3.1	Introduction	70
3.2	An Overview of the Namibian Financial System.....	72
3.2.1	General.....	72
3.2.2	The Consumer Credit Market	73
3.3	The Namibian Consumer Credit Legislative Framework	79
3.3.1	General.....	79
3.3.2	The Usury Act.....	80
3.3.2.1	General.....	80
3.3.2.2	The Scope of Application.....	81
3.3.2.3	Debt Prevention Measures in terms of the Usury Act	84
3.3.2.3.1	<i>Finance Charges on the Principal Debt</i>	<i>85</i>
3.3.2.3.2	<i>The Prescribed Interest Rate Ceilings</i>	<i>89</i>
3.3.2.4	An Evaluation of the Usury Act.....	91
3.3.2.4.1	<i>Scope of Application</i>	<i>91</i>
3.3.2.4.2	<i>Debt Prevention Measures</i>	<i>92</i>
3.3.3	The Credit Agreements Act	92

3.3.3.1 General.....	92
3.3.3.2 The Scope of Application.....	93
3.3.3.3 Debt Prevention Measures in terms of the Credit Agreements Act	95
3.3.3.3.1 <i>The Maximum Repayment Period</i>	97
3.3.3.3.2 <i>The Minimum Deposit</i>	97
3.3.3.4 An Evaluation of the Credit Agreements Act	98
3.3.3.4.1 <i>Scope of Application</i>	98
3.3.3.4.2 <i>Debt Prevention Measures</i>	99
3.3.4 The Sale of Land Act.....	101
3.3.4.1 General.....	101
3.3.4.2 Scope of Application.....	101
3.3.4.3 Debt Prevention Measures in terms of the Sale of Land Act	102
3.3.4.4 An Evaluation of the Sale of Land Act	104
3.3.4.4.1 <i>Scope of Application</i>	104
3.3.4.4.2 <i>Debt Prevention Measures</i>	104
3.3.5 An Evaluation of the Namibian Consumer Credit Legislative Framework in light of Leading International Best Principles	105
3.4 Non-Binding Standards: The Banking Code.....	108
3.5 Current Proposals for Legal Reforms in Namibia	110
3.5.1 General.....	110
3.5.2 The Microlending Bill	112
3.6 Conclusion.....	115

CHAPTER 4: THE SOUTH AFRICAN RESPONSIBLE LENDING

REGIME	126
4.1 Introduction	126
4.2 The NCA: Scope of Application	127
4.2.1 General.....	127
4.2.2 Credit Agreements	128
4.2.3 Classification of Credit Agreements	133
4.2.4 Credit Agreements Specifically or Indirectly Excluded	134

4.3	Regulatory Bodies in terms of the NCA	138
4.4	The Responsible Lending Provisions in terms of the NCA	138
4.4.1	General.....	138
4.4.2	Application of Part D of Chapter 4	139
4.4.3	Consumer Over-indebtedness in terms of the NCA	141
4.4.4	The Prevention of Reckless Credit in terms of the NCA.....	144
4.4.4.1	General.....	144
4.4.4.2	The Credit Provider's Pre-Agreement Assessment Obligation	145
4.4.4.2.1	<i>The Consumer's General Understanding of the Credit</i>	<i>145</i>
4.4.4.2.2	<i>The Affordability Assessment</i>	<i>146</i>
4.4.4.3	The Consumer's Information Duty	147
4.4.4.4	The Pre-Agreement Assessment Procedure	150
4.4.4.5	Regulation 23A.....	155
4.4.4.5.1	<i>General.....</i>	<i>155</i>
4.4.4.5.2	<i>The Assessment Procedure as Prescribed by Regulation 23A... ..</i>	<i>156</i>
4.4.4.6	The Courts' Interpretation of the Pre-Agreement Assessment Provisions.....	160
4.4.4.6.1	<i>General.....</i>	<i>160</i>
4.4.4.6.2	<i>ABSA Bank Ltd v Kganakga</i>	<i>161</i>
4.4.4.6.3	<i>ABSA Bank Ltd v De Beer and Others.....</i>	<i>163</i>
4.4.4.7	The Instances of Reckless Credit Lending	165
4.4.4.8	The Powers of the Courts or the Tribunal with Regard to Reckless Credit.....	168
4.4.4.9	A Practical Consideration of the Section 83 Orders	171
4.4.4.9.1	<i>General.....</i>	<i>171</i>
4.4.4.9.2	<i>The Court Order Setting Aside the Consumer's Rights and Obligations.....</i>	<i>172</i>
4.4.4.9.3	<i>The Order Suspending the Force and Effect of the Reckless Credit Agreement.....</i>	<i>176</i>
4.4.4.10	Other Sanctions for Reckless Credit Lending.....	181
4.4.5	The Credit Provider's Duty to Provide Pre-Contractual Information	181
4.4.5.1	General.....	181
4.4.5.2	The Pre-Agreement Statements and Quotations.....	182

4.5 Conclusion.....	184
----------------------------	------------

CHAPTER 5: THE AUSTRALIAN RESPONSIBLE LENDING

REGIME.....	192
5.1 Introduction	192
5.2 The NCCPA: Scope of Application	193
5.2.1 General.....	193
5.2.2 Credit Agreements Specifically Excluded.....	195
5.2.3 Licensing Requirements.....	199
5.2.4 The Classification of Credit Licensees	200
5.2.5 The Consumer Credit Regulator.....	201
5.3 The Responsible Lending Provisions in terms of the NCCPA	202
5.3.1 General.....	202
5.3.2 The Credit Licensee’s Pre-Agreement Assessment Obligations	203
5.3.2.1 General.....	203
5.3.2.2 The Credit Assistance Licensee’s Pre-Agreement Assessment Obligations	203
5.3.2.3 The Credit Provider’s Pre-Agreement Assessment Obligations	206
5.3.2.4 Pre-Agreement Assessment Obligations Relating to Consumer Leases.....	209
5.3.2.5 The Consumer’s Information Duty.....	210
5.3.3 A Practical Consideration of the Suitability Requirements.....	211
5.3.3.1 General.....	211
5.3.3.2 The Expression “It Is Likely”	212
5.3.3.3 The Concept of Substantial Hardship.....	213
5.3.3.4 ASIC’s Guidance in Conducting the Required Assessments.....	214
5.3.3.4.1 <i>General</i>	214
5.3.3.4.2 <i>Reasonable Inquiries about the Consumer’s Requirements and Objectives</i>	215
5.3.3.4.3 <i>Reasonable Enquiries about the Consumer’s Financial Situation</i>	218
5.3.3.4.4 <i>Verification of Information Provided by the Consumer</i>	219

5.3.3.4.5	<i>Assessing the Consumer’s Ability to Meet the Financial Obligations of a Credit Contract</i>	220
5.3.3.4.6	<i>Providing a Written Assessment to the Consumer</i>	221
5.3.3.5	Guidance from Case Law	222
5.3.3.5.1	<i>General</i>	222
5.3.3.5.2	<i>ASIC v The Cash Store</i>	222
5.3.3.5.3	<i>Make It Mine Finance Pty Ltd</i>	226
5.3.4	The Credit Licensee’s Duty to Provide Pre-Agreement Information	227
5.3.4.1	<i>General</i>	227
5.3.4.2	Division 2 of Part 3-2 of the NCCPA.....	228
5.3.4.3	Division 1 of Part 2 of the NCC.....	229
5.3.4.4	The Duty to Provide Pre-Agreement Information Relating to Consumer Leases	232
5.3.4.4.1	<i>General</i>	232
5.3.4.4.2	<i>The Credit Assistance Provider’s Duty to Provide Pre-Agreement Information</i>	232
5.3.4.4.3	<i>The Credit Provider’s Duty to Provide Pre-Agreement Information</i>	233
5.3.4.5	Non-Compliance with the Duty to Provide Pre-Agreement Information.....	234
5.3.5	Additional Responsible Lending Obligations In Respect of Particular Types of Credit Agreements.....	234
5.3.5.1	<i>General</i>	234
5.3.5.2	Standard Home Loans.....	236
5.3.5.2.1	<i>General</i>	236
5.3.5.2.2	<i>The Duty to Provide Pre-Agreement Information</i>	236
5.3.5.3	Credit Card Contracts.....	237
5.3.5.3.1	<i>General</i>	237
5.3.5.3.2	<i>The Duty to Provide Pre-Agreement Information</i>	238
5.3.5.3.3	<i>The Exposure Draft Bill</i>	239
5.3.5.4	Small Amount Credit Contracts	241
5.3.5.4.1	<i>General</i>	241
5.3.5.4.2	<i>The Additional Pre-Agreement Assessment Duty</i>	242

5.3.5.5 Reverse Mortgages	245
5.3.5.5.1 <i>General</i>	245
5.3.5.5.2 <i>The Duty to Provide Pre-Agreement Information</i>	246
5.3.6 Non-Compliance with the Responsible Lending Obligations	248
5.3.6.1 General.....	248
5.3.6.2 The Powers of the Courts.....	248
5.3.6.2.1 <i>General</i>	248
5.3.6.2.2 <i>The Civil Financial Penalties</i>	250
5.3.6.2.3 <i>The Injunctions</i>	252
5.3.6.2.4 <i>Compensatory Orders</i>	253
5.3.6.2.5 <i>Other Compensatory Orders</i>	253
5.3.6.2.6 <i>Criminal Sanctions</i>	256
5.4 Conclusion.....	256
CHAPTER 6: CONCLUSION AND RECOMMENDATIONS.....	264
6.1 Introduction	264
6.2 General Conclusions	268
6.2.1 Leading International Best Principles in Responsible Lending	268
6.2.2 Namibian Consumer Credit Legislation	269
6.2.2.1 Scope of Application.....	269
6.2.2.2 The Debt Prevention Measures under Namibian Consumer Credit Legislation	271
6.3 Recommendations for Legal Reform.....	286
6.4 Concluding Remarks	290
BIBLIOGRAPHY	291

CHAPTER 1

INTRODUCTION

1.1 Background

Namibia has recorded a progressive increase in consumer credit over the years, as is reflected by the profile of active credit consumers and the value of credit extended to consumers.¹ The increase in consumer credit has been largely attributed to the growing rise in bank credit extended to consumers,² as well as to the rapidly-growing micro-lending industry which provides credit services to low and no income consumers.³ Consequently, the Bank of Namibia on numerous occasions has expressed concern over the continued growth in consumer credit, remarking that a large portion of the credit extended to consumers tends to be unproductive and increases the debt burden and servicing costs of consumers.⁴

Noting that a direct consequence of the increase in the availability of consumer credit is the rise in the number of over-indebted consumers,⁵ there is a question as to whether or not the increase in the indebtedness of Namibian consumers warrants monitoring the parameters of credit granting for the protection of consumers. The encouragement of financial inclusion and the availability of credit play a significant role in stimulating consumption and in fostering growth in capitalist societies⁶ by providing options for the realisation of economic plans, but the negative effects of irresponsible credit granting and consumer over-indebtedness cannot be underestimated.⁷ These negative effects include slowing down economic growth and development by limiting future access to credit, social stratification and worsening opportunities for the consumers who cannot afford to repay the credit provided.⁸ Irresponsible credit granting by credit providers and the financial imprudence of

¹ Banking and Statistics Analysis Document (2013) 1.

² BoN *Financial Stability Report* (Mar 2014) 1.

³ NAMFISA *Annual Report* (2014) 86.

⁴ BoN *Financial Stability Report* (Mar 2014) 4.

⁵ BoN *Financial Stability Report* (Mar 2014) 4.

⁶ Adler (1999) *Osgoode Hall LJ* 420.

⁷ Paper by the World Bank *Responsible Lending* (2013) 3. This paper was prepared as a background document for the World Bank Group's Global Financial Development Report on Financial Inclusion (2014) and it provides an overview of key regulatory actions a government may implement to support responsible lending.

⁸ Paper by the World Bank *Responsible Lending* (2013) 8.

consumers associated with an inadequate understanding of the real cost of repaying a loan are cited as the main causes of consumer over-indebtedness.⁹

In the context of the prevention of consumer over-indebtedness, responsible lending practices by credit providers play a crucial role in preventing consumers from over-indebtedness.¹⁰ Responsible lending involves an effort to prevent irresponsible credit granting and includes any attempt to ensure that credit providers, in the pre-agreement stage of credit extension, assess the creditworthiness of the consumers and the affordability of the credit applied for.¹¹ Two things are paramount in a definition of responsible lending, namely creditworthiness and affordability. Creditworthiness has been defined as the propensity of the consumer to repay the credit applied for, whereas affordability implies the consumer's ability to repay or to undertake a specific credit commitment in a sustainable manner without the consumer incurring financial difficulties and/or experiencing adverse consequences.¹² Affordability is assessed on the basis of current income, estimated current consumption as well as existing debts as stated in a credit report.¹³ In the context of responsible lending it appears that creditworthiness assessments inevitably include affordability assessments. As Goode aptly puts it "the concept of responsible lending was meant to protect the consumer from over-indebtedness, and the creditworthiness assessment was meant to be the tool to detect that danger".¹⁴

Developments connected to responsible lending are said to be influenced by the notion that the solution to the problem of over-indebtedness is to be found not only in debt relief measures but also in its prevention through the reform of consumer

⁹ Paper by the World Bank *Responsible Lending* (2013) 5. See also Van Heerden and Renke (2015) *IIR* 67.

¹⁰ Van Heerden and Renke (2015) *IIR* 68.

¹¹ Consumers International Report (2013) 8. Consumers International is an international consumer group that serves as a forum to bring together the interests of consumers in developing countries with those of developed nations. This report was produced in Nov 2013 and it presents a picture of responsible lending practices and policies around the world from the consumer's perspective, drawing on the experience and knowledge of Consumers International's member organisations. See also the Paper by the World Bank *Responsible Lending* (2013) 8, Steennot and Van Heerden (2017a) *PER/PELJ* 1 and para 2.1 below for a detailed discussion of the concept responsible lending.

¹² Bijak, Thomas and Mues (2014) *JCR* 2. See also Van Heerden and Beyers (2016) *JIBLR* 446-447.

¹³ Van Heerden and Beyers (2016) *JIBLR* 446.

¹⁴ Goode Commentary (1977) para 126.43. See also Steennot and Van Heerden (2017a) *PER/PELJ* 1 and Wilson in Wilson *ed* (2013) 109.

protection legislation.¹⁵ In light of this there is a view that the solution to overspending and the over-indebtedness of consumers is to be found *inter alia* in the idea that prevention is better than cure.¹⁶ Considering that one of the objectives of consumer credit legislation includes protecting consumers from becoming over-indebted and that the protection of consumers is best achieved through the regulation of the credit industry,¹⁷ the overall objective in this thesis is to undertake a situational analysis of the primary debt prevention measures¹⁸ as provided by the Namibian consumer credit legislative framework as regards the extent of the protection these measures afford credit consumers.

1.2 Thesis Statement

The broad problem statement of this thesis is critically to examine the adequacy of the primary debt prevention measures under the Namibian consumer credit legislation, more particularly, the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968, in protecting consumers from irresponsible credit granting and over-indebtedness and, accordingly, to make proposals for legal reforms appropriate in the present and future economic and social contexts of Namibia.

1.3 Thesis Statement Defined

Renke proposes a classification of debt prevention measures into primary and secondary measures in respect of consumer credit legislation.¹⁹ This classification is adopted in this thesis. Primary debt prevention measures denote measures

- (a) enacted with an explicit aim to prevent reckless credit granting and over-indebtedness, including for instance an assessment of the consumer's creditworthiness;
- (b) restricting the total of the consumer's eventual debt burden, for instance interest rate caps or any other measures limiting the cost of credit; and
- (c) protecting the consumer in respect of the accumulation of debt after the particular credit agreement has been entered into.²⁰

¹⁵ Roestoff and Renke (2003) *Obiter* 26 and Stoop (2009) *SA Merc LJ* 372.

¹⁶ See the INSOL Report (2001) 29. See also the Crowther Report (1971) 377, Roestoff and Renke (2003) *Obiter* 4-7 and Renke LLD Thesis (2012) 6.

¹⁷ See Stoop (2009) *SA Merc LJ* 366.

¹⁸ See para 1.3 below for the definition of the primary debt prevention measures which is adopted in this study.

¹⁹ Renke LLD Thesis (2012).

²⁰ Renke LLD Thesis (2012) 13.

Secondary debt prevention measures, on the other hand, entail all the other measures which may have the effect of reducing consumer over-indebtedness by influencing the general attitude of consumers to spending and incurring debt, for example, disclosure to consumers of the full cost of credit.²¹

Attaching his classification of the debt prevention measures to the concept of responsible lending, Renke submits that all debt prevention measures, whether primary or secondary, promote responsible lending and therefore can be described as responsible lending in the broad sense.²² However, he accords the concept “responsible lending in the narrow sense” to the primary debt prevention measures enacted with the explicit aim of preventing reckless credit granting and over-indebtedness.²³ In this thesis reference to the concept of responsible lending implies Renke’s description of responsible lending in the narrow sense.²⁴ This is the description that was adopted in discussing the assessment of the consumer’s creditworthiness and all other matters related to it, including the credit provider’s duty to provide pre-contractual information and advice to the consumer. To this end the focal area of this thesis is on the pre-agreement creditworthiness assessment by credit providers and related matters.

1.4 Research Objectives

In an attempt to define and restrict the scope of this thesis, the research objectives are formulated with reference to the above thesis statement as follows:

- (a) To explore the development of consumer credit policies, from truth-in-lending to responsible lending responses, and to formulate leading international best principles in devising a modern and effective responsible lending regime for Namibia.

- (b) To undertake a situational analysis of the regulatory context of consumer credit in Namibia. This is done with an overall objective of determining whether or not

²¹ Renke LLD Thesis (2012) 14.

²² Renke LLD Thesis (2012) 15.

²³ Renke LLD Thesis (2012) 15.

²⁴ See Renke LLD Thesis (2012) 15.

the current primary debt prevention measures provided for by the Namibian consumer credit framework are adequate in protecting consumers from irresponsible lending and consumer over-indebtedness. In order to align the Namibian consumer credit legislative framework with leading international best principles, the Namibian regulatory framework was assessed with the aim of determining how it compares to the leading international best principles. Proposals underway for law reform in Namibia in the form of the 2014 Microlending Bill are considered in order to investigate how the need to introduce a responsible lending regime for Namibia is dealt with. Based on the outcome of the assessment of the measures contained therein against the leading international best principles, submissions are made on the ways in which the Namibian consumer credit regulatory framework may be improved so as to afford consumers protection from irresponsible credit granting and over-indebtedness.

- (c) In seeking to prevent over-indebtedness and in developing effective responsible lending measures, it is clear that Namibia does not have to re-invent the wheel but may roll it further by ensuring the optimum protection for consumers. As Kelbrick aptly puts it with reference to South Africa, “it is always useful to review developments in the same field elsewhere, as the same problems require solution in different jurisdictions, and lessons learnt the hard way in other countries can be implemented here”.²⁵ In light of this remark, attempts to promote a culture of responsible lending in Namibia could be benchmarked against international best practices by investigating the responsible lending provisions in the consumer credit legislation of South Africa and Australia.²⁶ To form a clear picture of the applicability of these provisions and the protections accordingly afforded, the scope of application of the different consumer credit enactments in Namibia, South Africa and Australia will be briefly considered.

²⁵ Kelbrick (2003) *CILSA* 160.

²⁶ The choice of these jurisdictions for comparative study purposes is briefly motivated in para 1.5 below.

- (d) Finally, moving beyond the assessment of the current debt prevention measures and drawing upon the leading international best principles and the lessons to be derived from the comparative investigation, recommendations are made which can be used for future development of the law in Namibia by addressing the weaknesses in current consumer credit policies and by developing a consumer credit regulatory framework which is appropriate for the economic and social contexts of Namibia.

1.5 Research Methodology

The research method adopted in this study to gather the necessary data consisted of a literature review and an analysis of relevant legislation and court decisions which relate to the objectives of this study. A theoretical approach that helps provide a normative framework and a detailed exposition of the existing law as interpreted by the courts is adopted. This study provides a narrative background of the credit law framework in Namibia in relation to the evident explosive growth in consumer over-indebtedness.

To provide a reasonable basis on which to build policy recommendations for the future development of the Namibian consumer credit law framework and to align the Namibian position with international best practices, the current and emerging regulatory practices aimed at promoting responsible lending policy are discussed with the aim of determining current trends and guidelines in responsible lending policy. This approach is informed by an understanding that in order to have an informed debate about the effects of policy measures on responsible lending, it is crucial to have knowledge of the concrete issues, problems and tentative solutions which have been tested in other countries, especially those that were affected by the global financial crisis.

The comparative research method which is employed is believed to provide much broader solutions than a study devoted to the law of a single nation.²⁷ The purpose of the comparative survey is not to give a detailed discussion of the consumer credit

²⁷ Zweigert and Kötz (1998) 15. See also Anderson (2004) *Osgoode Hall LJ* 674 who expressed an idea that “by looking abroad, borrowing, and adapting, a country may create a legal fabric that is unique and more diverse than if left to its own provincial tendencies”.

laws of the countries chosen but merely to reflect on their lending regimes and the philosophy behind them which aims to ensure effective protection of consumers from irresponsible lending. In this thesis a comparative investigation of the South African and Australian responsible lending regimes was undertaken in order to offer a reflection on the measures in these countries to deal with irresponsible lending and the consumer over-indebtedness phenomena. The reasons for engaging in the comparative investigation are as follows:

- (a) To serve as an underlying theoretical base for the study indicating the direction that Namibia should follow in devising its responsible lending regime.
- (b) To use their regimes as model types of law in making proposals for the development of the Namibian responsible lending regime and to serve as a comparative standard in investigating the deficiencies in their responsible lending regime so that Namibia learns from their mistakes.²⁸

To illustrate the different influences that operate at different stages in the legal, political and social evolution, the choice of comparative regimes was across developing and developed countries' legal systems. However the baseline of similarity which is common in the compared legal systems relates to the experience of the over-indebtedness of consumers. The justification for the choice of selected countries follows.

South Africa is an obvious choice of comparison, not only because Namibia and South Africa are neighbouring countries as well as developing member states of the Southern African Development Community, indicating a level of integration on similar economic and social structures, but also because of the legal history that Namibia shares with South Africa. When South Africa was granted the mandate over Namibia²⁹ by the League of Nations, it also assumed legislative powers over Namibia.³⁰ To date, Namibian consumer credit legislation is largely similar to the historic South African credit legislation. The two countries also share hybrid legal

²⁸ See para 1.3 above.

²⁹ Formerly known as the South West Africa territory.

³⁰ Amoo (2008) 39.

systems with both common law and civil law roots.³¹ The comparative survey would be incomplete if it did not reflect on the progressive development of South Africa's responsible lending measures. It is hoped that Namibia can learn from the South African experience in reforming its consumer credit policy and laws to protect credit consumers from irresponsible lending.

The regulation of consumer credit has undergone substantial reform worldwide,³² but the Australian responsible lending regime was selected for comparative focus. Australia, Namibia and South Africa share a common heritage with regard to British influence.³³ It will become evident that the South African and Australian responsible lending regimes are fairly recent. Australia underwent the review of its consumer credit policy in 2008 *inter alia* to address the fact that the preceding legislation, the Uniform Consumer Credit Code, did not have a specific requirement to assess the consumer's ability to repay the credit before providing the consumer with credit.³⁴ In 2009 Australia passed the National Consumer Credit Protection Act 134 of 2009 (Cth). This Act has been in operation since 1 July 2010 and as seen below³⁵ its responsible lending provisions are a key change it introduced to the Australian consumer credit regime. A critical analysis of these provisions is carried out with the aim of determining whether or not there are any beneficial lessons which may improve the Namibian consumer credit regulatory framework.

1.6 Delineations and Study Limitations

This study is limited in focus to consumer debt and/or consumer credit arising from credit agreements in terms of which the consumer is a natural person. The prevention of irresponsible credit lending which contributes to the problem of over-indebtedness and the protection of consumers from such credit form part of this study. Notwithstanding the fact that this study adopts Renke's categorisation of debt prevention measures in terms of consumer credit legislation into primary and

³¹ Kim (2010) *S Cal L Rev* 705.

³² See in general, Duggan (2010) *UTLJ* 678-699, Duhi (2009) *Bus Law* 677-689 and McBride (2003) 4.

³³ Anderson (2008) *PER/PELJ* 1.

³⁴ See para 3.16 of the National Consumer Credit Protection Act Explanatory Memorandum, hereinafter the "NCCPA Explanatory Memorandum". See also Productivity Commission (2008).

³⁵ See para 2.6.5 and ch 5 below.

secondary debt prevention measures,³⁶ the focus of this study is restricted to primary debt prevention measures, enacted with the explicit aim of preventing reckless credit granting and over-indebtedness. Other primary and secondary debt prevention measures therefore are outside the scope of this study.

The concept of over-indebtedness and the measures aimed at the alleviation of over-indebtedness and/or debt already incurred, though relevant to the subject, are excluded from the scope of this study. The study also does not seek to suggest that the consumer credit frameworks of the countries used in the comparative investigation have achieved perfection. The purpose of the comparative research has been alluded to above.³⁷

1.7 Organisation of Chapters

To achieve the research objectives of this thesis, the chapters are organised as follows:

- (a) Chapter 1 provides an introduction to the study.
- (b) Chapter 2 is titled “Responsible Lending Policy”. In this chapter, I focus on the current and emerging regulatory practices intended to promote responsible lending. I begin with a focus on the worldwide policy information as reflected in recent developments with a view to helping address the regulatory deficiencies in Namibian consumer credit law. The aim in this chapter therefore is to draw lessons from the worldwide policy framework and to formulate leading principles in devising an effective and efficient responsible lending regime.
- (c) Chapter 3 is titled “Consumer Credit Regulation in Namibia” in which I provide an overview of the Namibian consumer credit regulatory framework. The question I address in this chapter is whether the current debt prevention measures in Namibia’s consumer credit laws are adequate to protect credit consumers from irresponsible lending and to prevent consumer over-

³⁶ See Renke LLD Thesis (2012) 13. See also para 1.3 above.

³⁷ Para 1.5.

indebtedness. This is addressed by assessing the Namibian consumer credit regulation framework against recent developments and the leading best international principles formulated in chapter 2.

- (d) The titles of Chapter 4 and Chapter 5 are “The South African Responsible Lending Regime” and “The Australian Responsible Lending Regime” respectively. In these chapters I perform a comparative investigation of the responsible lending regimes in South Africa and Australia as provided for by the National Credit Act 34 of 2005 and the National Consumer Credit Protection Act (Cth) 34 of 2009. In these chapters I critically analyse the strengths and weaknesses of both regimes and highlight the lessons which may be useful to Namibian practice.
- (e) In Chapter 6 I provide the conclusions of the study and make recommendations for law reform in Namibia drawing on leading best international principles and the lessons from the comparative investigation.

1.8 Terminology and Reference Methods

- (a) In this thesis the concepts “credit agreement” and “credit contract” are used interchangeably. The same holds for the concepts “consumer”, “debtor”, “credit consumer” and “credit receiver” as well as the concepts “credit provider”, “creditor” and “credit grantor”.
- (b) An abbreviated “mode of citation” is used to refer to particular sources in the footnotes. The full titles of the sources referred to in the footnotes of this study are provided in the bibliography with the abbreviated mode of citation. However, legislation and court decisions are referred to in full.
- (c) For the sake of convenience the masculine grammatical forms are used throughout the thesis to refer to a natural person.
- (d) The law as stated in this thesis reflects the position as on 31 September 2017.

CHAPTER 2

RESPONSIBLE LENDING POLICY

2.1 Introduction

The concept “responsible lending” generally is used to denote the existence of regulatory measures enacted with the aim of preventing irresponsible credit lending and consumer over-indebtedness by ensuring that the affordability and/or the suitability of credit is assessed in the pre-agreement stage of credit granting.¹ The general scope of responsible lending differs from jurisdiction to jurisdiction, but goes beyond measures aimed at promoting “truth-in-lending” such as a disclosure requirement of the full cost of credit, instead it takes a greater role in assessing the affordability of credit goods and services to consumers.² In the United Kingdom, for example, responsible lending is defined as “[t]he lender’s care and responsibility in providing the credit, including reasonable steps to ensure a consumer’s credit worthiness and ability to meet the full terms of the agreement at the time it was concluded”.³ The concept also has been defined as

a label to describe a range of techniques from product design through to sales and marketing practices and account management that lenders employ to ensure credit is used appropriately and carefully. In effect, it is the extent to which lenders promote ‘responsible borrowing’.⁴

The former definition of responsible lending emphasises that which is pivotal to the concept of responsibility and is incumbent on the credit provider, which requires that the credit provider exercise a certain degree of accountability before providing a consumer with credit.⁵ The latter definition is broader in its terms than the former, it indicates that responsible lending is but a policy term used to “paint with a broad brush the desired goal that the regulator seeks to achieve”.⁶ The policy of responsible lending is aimed at

¹ Consumers International Report (2013) 8. See also the paper by the World Bank *Responsible Lending* (2013) 8.

² Mak (2015) *J Consum Policy* 417. See also Nield in Devenney and Kenny eds (2012) 178.

³ DTI *Consumer Credit White Paper* (2003) 57.

⁴ Select Committee on EU Meeting (2005) para 15.

⁵ See, e.g. Cowton (2002) *Bus Ethics Eur Rev* 397.

⁶ Mak (2015) *J Consum Policy* 413.

ensuring responsible behaviour of participants in the financial market – including both lenders and borrowers – particularly focused on preventing over-indebtedness of borrowers, which is given shape through various regulatory mechanisms and which may also be pursued through other legal means, such as remedies in private law, or non-legal means such as education.⁷

In this chapter I provide an overview of current and emerging global regulatory measures intended to promote a responsible lending policy. Worldwide policy information is discussed with the aim of determining current trends and guidelines for devising a responsible lending regime. As part of the conclusions to this chapter, international leading best principles are formulated based on the current trends and guidelines discussed. These international leading principles are used as the benchmark upon which proposals for legal reforms to the Namibian consumer credit regulatory framework are based. The main aim is to solicit ideas on how best to protect Namibian credit consumers from irresponsible lending practices by using the lessons drawn from international best practices to make proposals for a regulatory framework that is suited to the socio-economic transformation of the condition of the Namibian people.

In order to achieve the abovementioned aims in this chapter, in paragraph 2.2 I provide the theoretical perspectives which underlie responsible lending policy, with a view to reflect on both market imperatives and democratic demands. In paragraph 2.3 I consider the criticisms levelled against the concept of ‘responsible lending’, followed by a discussion of the influence of international organisations in the development of responsible lending policy in paragraph 2.4. I discuss Wilson’s criteria of an effective responsible lending regime in paragraph 2.5, it is followed by a discussion of responsible lending policies in selected credit markets with the aim of determining the current trends and guidelines in responsible lending policy in paragraph 2.6. Based on the outcome of the preceding discussions, I conclude the chapter with a formulation of the leading international best principles to inform an efficient and effective responsible lending regime in paragraph 2.7.

⁷ Mak (2015) *J Consum Policy* 413.

2.2 Theoretical Perspectives Underlying Responsible Lending Policy

Consumer credit has been accurately described as “the lubricant of economic life”⁸ as it performs an important role in the economy. As a result of the liberalisation of financial markets and the deregulation of credit markets in the 1980s the use of consumer credit to pay for services has increased,⁹ which has resulted in consumer credit policy being tailored to ensure affordable access to credit in order to enable the full participation of consumers in contemporary society.¹⁰ However, as consumers commit future income to present consumption needs it is inevitable that some consumers commit too many of their resources resulting in over-indebtedness.¹¹

Traditionally, the concept of “consumer sovereignty”¹² was the central goal of consumer credit policy.¹³ In this model of regulation there was less concern on the part of regulators as to the manner in which consumers exercised their sovereignty in the credit markets.¹⁴ The Crowther Report¹⁵ captures the traditional model well in the following terms:

The first principle of social policy should be to treat the users of consumer credit as adults who are fully capable of managing their own financial affairs and not to restrict their freedom of access to it in order to protect the relatively small minority who get into difficulties.¹⁶

Fama also presents the hypothesis that a market in which prices fully reflect available information is efficient.¹⁷ Reading this hypothesis with rational choice theory, which assumes that human beings are “rational maximisers of preference

⁸ COM(2002) 443 final. See also Ramsay (2012) *EuCML* 26.

⁹ Address by Ramsay *Austl Credit* (2004) 1-2. See also DTI *Policy Framework* (2004) 4.

¹⁰ See Ramsay (2006) *Syd LR* 29. See also the Address by Ramsay *Austl Credit* (2004) 1-2.

¹¹ The Crowther Report (1971) 118. See also Renke LLD Thesis (2012) 3.

¹² Consumer sovereignty denotes consumers as “sovereign” beings who are responsible for deciding the products to be produced and the price at which those products are to be offered in the market at the same time consistently making rational choices that improve consumer welfare and overall wealth – see Cvjetanovic (2014) *Seven Pillars Institute* 68.

¹³ Ramsay (2006) *Syd LR* 13.

¹⁴ Ramsay (2006) *Syd LR* 13.

¹⁵ The Crowther Report (1971) was produced by the Crowther Committee which was established in 1965 and chaired by Lord Geoffrey Crowther to consider the status a quo of the United Kingdom’s consumer credit law. The report discussed the economic, social and legal aspects of consumer credit and made a recommendation for the reform of consumer credit laws in the United Kingdom.

¹⁶ Crowther Report (1971) 153. See also Fairweather in Devenney and Kenny eds (2012) 86.

¹⁷ Fama (1970) *J Finance* 383.

satisfaction”,¹⁸ the conclusion that follows is that if credit consumers are provided with accurate information about the credit goods and services offered by the credit provider, then they are able to exercise their competitive choices effectively.¹⁹ In fact, a view has been expressed that if consumers are given the information needed to make rational choices, then “we can sit back and let the free market do its magic”.²⁰ This view relies on an expectation that consumers are in a position to protect themselves and they make appropriate choices in the market place.²¹

Based on the assumption that rational informed consumers cannot borrow beyond their means and that credit providers cannot provide credit products or services if they have doubts about repayment,²² theoretically the burden was on credit consumers to determine the type of credit they needed and to decide responsibly regarding whether or not they should enter into credit agreements, by taking into account their personal circumstances and needs.²³ Information economics, which emerged later, identified imperfect consumer information as a fundamental rationale for consumer regulation.²⁴ This development recognised that consumers rarely possess the perfect information on “price, quality and terms to make efficient choices in the market”.²⁵

In this regard disclosure regulation developed as a “relatively ‘pro market’ regulatory response to consumer credit policy because it facilitates the consumer’s making of

¹⁸ Posner (1997) *Stan L Rev* 1553. The rational choice theory is advocated in the neo-classical model of regulation which assumes that an unregulated perfectly competitive market will achieve an efficient allocation of resources and that market failure is the central rationale for state regulation – see also Ramsay (2007) 55, 61.

¹⁹ Posner (1997) *Stan L Rev* 1551. Posner broadly explains that humans exercise their rational choice by comparing alternative means known to them in terms of cost, comfort and other dimensions of utility and disutility, and then choose from this array the means with the greatest margin of benefit over cost.

²⁰ Prigden (2012) *Loyola Cons L Rev* 615.

²¹ Prigden (2012) *Loyola Cons L Rev* 615.

²² FinCoNet Report (2014) 16. This report was produced by the International Financial Consumer Protection Organisation, abbreviated FinCoNet, to help jurisdictions share information about current developments and to enable them to review the adequacy of their responsible lending arrangements. FinCoNet is an international organisation of supervisory authorities tasked with the responsibility for financial consumer protection. Established in 2013 and with a primary focus on retail banking and consumer credit issues, FinCoNet is aimed at strengthening consumer confidence while reducing systemic risks by promoting sound market conduct and strong consumer protection through efficient and effective financial market conduct supervision.

²³ FinCoNet Report (2014) 15.

²⁴ Ramsay (2007) 64.

²⁵ Ramsay (2007) 65.

an informed choice”.²⁶ On this assumption measures, such as truth in lending and controls on providing misleading information to the consumers, became evident in most consumer credit policies.²⁷ However, making a responsible credit decision has proven to be a complex process for both parties.²⁸ On the one hand consumers do not always make rational decisions about borrowing regardless of the information provided to them.²⁹ This failure could be because their choice and bargaining power are limited due to socio-economic factors, an impaired credit history or to personal circumstances.³⁰ On the other hand, compensation for loan volumes for credit intermediaries as well as penalty fees for late repayments may provide an incentive for both credit providers and their intermediaries to conclude credit agreements without considering the ability of their prospective consumers to repay the credit.³¹

Behavioural economics eventually provided insights into consumer decisions that tend to negate the above assumptions by arguing that consumers are not rational maximisers of their resources and may well make wrong borrowing decisions even if they are provided with adequate information.³² A term first coined in neo-liberal models of regulation,³³ the literature on behavioural economics led to a new development in consumer credit policy that perceives credit as a product potentially dangerous to consumers.³⁴ Basing its formulations on social psychology, behavioural economics disputes the efficiency of rational choice theories as far as consumers are concerned on account of three aspects which affect consumer choices, namely

²⁶ Cartwright (2004) 62.

²⁷ See, e.g. Ramsay (2007) 64.

²⁸ See Ramsay (2007) 71-84 for a summary of studies on behavioural economics and consumer credit policy.

²⁹ Thaler (1980) *J Econ & Org* 39. See also Ramsay (2012) *EuCML* 27, who opines that consumers may choose short-term benefits and ignore the long-term effects of such choices by underestimating credit risks and being too confident “in their ability to stay out” of financial trouble.

³⁰ FinCoNet Report (2014) 17.

³¹ Europe Economics *Credit Intermediaries Report* (2009) iii-iv. See also Ferretti in Ferretti *ed* (2016) 14 and Consumers International Report (2013) 4, for a discussion of a range of “harmful “practices across a number of jurisdictions that may contribute to irresponsible lending and consumer over-indebtedness.

³² Ferretti in Ferretti *ed* (2016) 14. See also Ramsay in Howells, Janssen, Schulze *eds* (2005) 53 and Sustain (2006) *U Chi L Rev* 249-270.

³³ Neo-liberal models of regulation assume that competition in credit markets is systematically skewed to taking advantage of the behavioural biases of consumers. It is the opposite of the neo-classical models of regulation which assume the virtues of competition and disclosure in credit markets – see Ramsay (2012) *EuCML* 28. See also Bar-Gill (2008) *Minn L Rev* 761 and Bar-Gill and Warren (2008) *U Pa L Rev* 1.

³⁴ See Ramsay (2012) *EuCML* 28, who refers to Warren (2007) *J Democr* 8.

unbounded rationality, unbounded willpower and unbounded self-interest.³⁵ These aspects rely on individuals having limited information-processing capabilities and, because they “often lack clear, stable or well ordered preferences: choices are influenced by context for example by default rules, and framing”.³⁶

The concept of a consumer who is fully “rational, fully informed and able to choose which is in his best interest, free of cognitive and other limitations, is replaced by a consumer, who is far more than expected irrational, impulsive and [led] by subjective-opinions, gossips or fears”.³⁷ It is assumed that most unfavourable contracts are as a result of irrational, impulsive and financially illiterate consumers.³⁸ Given that unbounded rationality of the prospective consumer frequently impairs the consumers’ welfare due to wrong borrowing choices,³⁹ in order to best protect consumers against their own biases and from those who exploit those biases, a need for a social model of regulation to protect consumers has been identified.⁴⁰

This identification has resulted in the social consumer credit models being defined to include terms controls, such as interest rate ceilings, capping of default rates and lender liability for irresponsible lending.⁴¹ It is submitted that the responsible lending policy developed as a response to concerns about over-indebtedness and forms an essential component in the social model of regulation.⁴² This regulatory approach is justified as preserving the consumer’s future autonomy⁴³ by tasking those providing credit with the responsibility of ensuring that they provide it only to consumers who have the ability to repay and understand the ramifications of taking up such

³⁵ Ramsay (2007) 72. See also the Address by Ramsay *Austl Credit* (2004) 8, where he explains that “the concept of bounded willpower recognises that individuals may have time inconsistent preferences and illustrates the tension between the ‘impulsive self’ and the ‘planner self’”.

³⁶ Sunstein and Thaler (2003) *U Chi L Rev* 1159. See also the Address by Ramsay *Austl Credit* (2004) 7. In the same light, Durkin and Elliehausen in Durkin and Staten *eds* (2002) 128 assert that “there can be little doubt, however, that understanding credit disclosures is daunting for most recipients and beyond the capabilities of some to absorb the information”.

³⁷ Atamer in Grundmann and Atamer *eds* (2011) 184.

³⁸ Atamer in Grundmann and Atamer *eds* (2011) 184.

³⁹ Atamer in Grundmann and Atamer *eds* (2011) 185.

⁴⁰ Address by Ramsay *Austl Credit* (2004) 4.

⁴¹ Reifner, Kiesilainen, Huls and Springeneer *Study of Consumer Over-indebtedness in EU Member States* (2003) 222. See also the Address by Ramsay *Austl Credit* (2004) 3.

⁴² See Ramsay in Howells, Janssen, Schulze *eds* (2005) 57 and Wilson in Wilson *ed* (2013) 121.

⁴³ Address by Ramsay *Austl Credit* (2004) 11. See also Atamer in Grundmann and Atamer *eds* (2011) 185-186.

commitments. Consequently, three grounds are prominently cited in justifying the need for a responsible lending policy, namely: ⁴⁴

- (a) to promote economic efficiency by addressing information asymmetry between credit providers and consumers,
- (b) to protect consumers by overcoming power imbalances between credit providers and consumers that result in abusive or predatory practices and
- (c) to promote financial stability by lessening systemic risk in the credit market.

2.3 Criticisms of Responsible Lending Policy

2.3.1 General

The primary goal of a responsible lending policy is to prevent irresponsible lending and, as a consequence, to shield consumers from consumer over-indebtedness and other economic consequences, such as financial crises.⁴⁵ As previously noted,⁴⁶ policies, laws and regulations aimed at the promotion of responsible lending in credit markets require the assessment of the consumer's creditworthiness to prevent irresponsible lending and consumer over-indebtedness. However, there are some criticisms levelled against the notion of responsible lending. These criticisms are now discussed.

2.3.2 Responsible Lending is Paternalistic

The idea of responsible lending has been criticised for representing a fundamental shift to paternalism⁴⁷ and as a misunderstanding of the dynamics of consumerism.⁴⁸ Critics charge that responsible lending provisions place a limit on consumers' liberty by severely restricting consumers' freedom of choice to only those credit products

⁴⁴ FinCoNet Report (2014) 15.

⁴⁵ Wilson in Wilson *ed* (2013) 126. See also Consumers International Report (2013) 8 and para 2.1 above.

⁴⁶ See para 2.1 above.

⁴⁷ Paternalism is defined as a policy or practice of governing people by restricting the freedom and responsibilities of such people who are otherwise subordinate to or otherwise dependent on those in authority for their supposed best interest. A paternalistic approach therefore limits a consumer's liberty by encouraging or coercing a consumer into a choice that promotes a benefit or prevents harm – Tokeley in Frankel *ed* (2011) 270.

⁴⁸ Ferretti (2013) *Suffolk U L Rev* 815.

deemed appropriate for them by the credit provider.⁴⁹ It is further argued that responsible lending policy interferes with the principles of freedom of contract and the sanctity of contract by influencing the type of contract that can be entered into by the parties as well as by imposing obligations on credit providers beyond those in the contract.⁵⁰ Therefore it is submitted that responsible lending policy seems to embrace the assumption that most consumers are not capable of making best decisions regarding the taking up of credit and that credit providers, despite the conflict of interest, are better suited to make such decisions.⁵¹

As a response to this criticism, it is submitted that responsible lending policy developed from the lessons of behavioural economics that the efficiency of the rational choice theories in terms of consumer choices is limited.⁵² Further, as a response to a type of market failure, commonly referred to as information asymmetry where credit providers have better information than the consumers, regulatory intervention is necessary to promote economic efficiency.⁵³ The global financial crisis demonstrated that the regulation of credit markets is necessary because the “normative power of contractual consent is significantly and systematically weakened”.⁵⁴

The argument that responsible lending is paternalistic therefore is simplistic and ignores the various factors which render consumers susceptible to making choices which decrease their welfare. In addition, there is also a view that “paternalistic regulation is legitimate if it creates larger benefits for those who make errors while inflicting little or no harm on those who are fully rational”.⁵⁵ In this view consumers who act irrationally and take out credit that they cannot afford will not be allowed to take out such credit and there is little or no harm done to rational consumers.

⁴⁹ Meade LLB Dissertation (2012) 4.

⁵⁰ Tokeley in Frankel *ed* (2011) 280.

⁵¹ Ferretti (2013) *Suffolk U L Rev* 815.

⁵² Atamer in Grundmann and Atamer *eds* (2011) 183.

⁵³ FinCoNet Report (2014) 16.

⁵⁴ Atamer in Grundmann and Atamer *eds* (2011) 185.

⁵⁵ Camerer, Issacharoff, Loewenstein, O'Donoghue and Rabin (2002) *U Pa L Rev* 1211.

2.3.3 Financial Responsibility Shifts to the Credit Provider

Responsible lending policies are also criticised on grounds that they imply that the consumer's responsibility to decide their own financial capability moves to the credit provider because the credit providers ultimately are left to make unilateral decisions on whether or not to grant credit.⁵⁶ It is submitted that this argument ignores the fact that consumer credit regulation is influenced by "value judgment regarding the debt culture" of that particular society.⁵⁷ For instance, it cannot be ignored that responsible lending as a form of social regulation developed as a result of the credit market's failure to protect consumers from excessive debt burdens, their own folly in entering into unfavourable credit contracts and the *mala fide* credit providers and credit intermediaries who exploit consumers' biases.⁵⁸

It is an accepted practice that the creditworthiness assessments underlying the responsible lending obligations are a cost effective tool in preventing consumer over-indebtedness as the credit providers develop long-standing expertise in screening and monitoring, thus eliminating some of the cognitive biases of consumers when it comes to their borrowing decisions.⁵⁹ The ultimate goal of the creditworthiness assessment is not to abandon the decision of the credit consumer on whether or not to enter into a particular credit agreement with the credit provider, but to ensure that the credit provider checks and verifies that the credit consumer's financial situation is such that he will be able to pay back the proposed credit.⁶⁰

2.3.4 Responsible Lending Leads to Restrictive Lending Practices

It has been noted that there may be a concern on the part of credit providers that providing credit to low income consumers is irresponsible and that those consumers are a risk and are likely to default on their loans.⁶¹ This concern is attributed to the use of inflexible credit assessment models which exclude most low income consumers from being eligible for credit.⁶² Therefore it is argued that it is the

⁵⁶ Ferretti (2013) *Suffolk U L Rev* 815.

⁵⁷ Atamer in Grundmann and Atamer eds (2011) 185.

⁵⁸ See para 2.2 above.

⁵⁹ Domurath in Micklitz and Domurath eds (2015) 162.

⁶⁰ Paper by the World Bank *Responsible Lending* (2013) 34.

⁶¹ Wilson in Kelly-Louw, Nehf, Rott eds (2008) 98-99.

⁶² Wilson in Wilson ed (2013) 127.

reluctance and/or the failure of mainstream credit providers to lend to low income consumers that aggravate the situation of financial exclusion and over-indebtedness as these consumers then resort to high cost credit in the fringe market.⁶³

To address this concern a responsible lending regulatory approach with a “more tailored and flexible credit assessment model” rather than the standard credit assessment models used by financial institutions automatically to exclude low income consumers from credit eligibility is suggested.⁶⁴ The appropriate model ensures that an individual consumer’s ability to repay is assessed on a case by case basis and without reference to an arbitrary formula.⁶⁵ This model demonstrates that obtaining credit is not only about money but also is about the consumer’s right to dignity and financial inclusion.⁶⁶

In expressing concern about the contribution of responsible lending to financial exclusion, Ramsay poses the following:⁶⁷

How effective is a responsible lending principle likely to be if the primary cause of over-indebtedness is a change of the debtor’s circumstance after obtaining the loan? Will it lead to lenders being able to justify excluding consumers from obtaining access to credit?

The obvious answer to the first question is that responsible lending is not effective if the cause of over-indebtedness arises after the change of circumstances in the consumer’s financial situation. Clearly, it is because *ex ante* responsible lending practices are preventive in nature and are not intended to address causes of over-indebtedness that emerge after credit has been extended to the consumer, unless indicators of the ensuing over-indebtedness are present at the time of concluding the credit agreement. In instances where over-indebtedness arises as a result of *ex post* causes, it is submitted that at this point debt relief measures would kick in to deal with the consequent over-indebtedness and to provide consumers with another chance to be productive both for themselves and society.

⁶³ Wilson in Kelly-Louw, Nehf, Rott *eds* (2008) 92.

⁶⁴ Wilson in Malbon and Nottage *eds* (2013) 306.

⁶⁵ Wilson in Malbon and Nottage *eds* (2013) 307.

⁶⁶ Wilson in Malbon and Nottage *eds* (2013) 307.

⁶⁷ Ramsay (2007) 554-555.

To address the second question, the idea of responsible lending is to promote responsible lending without discouraging the use of consumer credit. Credit providers, at a minimum, are required to deny credit only to credit consumers whose assessment outcome indicates that the consumer will not be able to repay the proposed credit and not on any other ground. To ensure that consumers are not in a position where they are foreclosed from accessing credit because of the negative outcome of the credit assessment, it is possible for credit consumers to lodge a complaint against the credit provider if they are aggrieved by the outcome of the credit assessment.⁶⁸

2.3.5 Over-reliance on Credit Bureaus for Creditworthiness Assessments

The heavy reliance on credit bureaus as a means to overcome the information asymmetry for purposes of conducting creditworthiness assessments has also been questioned.⁶⁹ It is asserted that the use of credit bureaus alone does not ensure responsible lending practices or lending only to consumers who are capable of repaying the debt⁷⁰ because the lending process is subjective. It is also contended that there is evidence to suggest that credit providers do not always use their knowledge in order to discourage irresponsible borrowing.⁷¹ Further, even though the standardisation of lending practices might help to make clearer the information provided, the provision of more or better information does not eliminate the danger of the misuse of information.⁷²

It is submitted that the use of a credit bureau is critical to the effectiveness of any responsible lending regime because credit providers must rely on accurate and reliable information in carrying out the required assessments and in verifying the information provided by consumers. The role of credit bureaus in the reduction of over-indebtedness therefore should not be undermined as they help credit providers to screen *ex ante* loan applications which reduces adverse selection and detects overcommitted consumers.⁷³ However, credit providers are not restricted to the

⁶⁸ See, e.g. Van Heerden and Renke (2015) *IIR* 91 with reference to South Africa.

⁶⁹ Ferretti (2013) *Suffolk U L Rev* 823.

⁷⁰ Ferretti (2013) *Suffolk U L Rev* 823.

⁷¹ Domurath in Micklitz and Domurath eds (2015) 162.

⁷² Domurath in Micklitz and Domurath eds (2015) 162.

⁷³ Domurath in Micklitz and Domurath eds (2015) 162.

exclusive use of the information kept on the credit bureaus' databases. As will be seen later,⁷⁴ most jurisdictions expect credit providers to make reasonable inquiries and verify credit information provided by consumers.

Evidence suggests that credit providers do not always use their knowledge to discourage irresponsible lending, and it is not unusual that for every law which imposes an obligation there is a party that will contravene it. In this regard it is affirmed that a responsible lending regime will be effective only if it contains sanctions to deter contraventions by credit providers, which requires a resourced regulatory agency charged with the enforcement of responsible lending provisions and imposing penalties for non-compliance.⁷⁵

2.3.6 Responsible Lending Conflicts with Standardised Models of Credit Scoring

Some scholars postulate that responsible lending envisages an individualised lending process which does not involve generalisations or categorisation of consumers, in which case meeting with the consumer is usually necessary.⁷⁶ Whereas credit scoring permits credit providers to make credit available to consumers without meeting the consumer but merely by performing the required credit scores.⁷⁷ This implies that responsible lending is an inconvenience for credit providers who have no incentive to practice it. However, it must be noted that credit scoring focuses only on the creditworthiness of consumers, whereas for a decision to meet responsible lending standards both the consumer's creditworthiness and the affordability of the credit should be assessed.⁷⁸

In consideration of the benefits derived from responsible lending, it is submitted that the difference between responsible lending models and traditional credit scoring does not imply a material conflict and credit providers can be trained to structure their lending policies accordingly. Affordability assessments can be conducted at the

⁷⁴ Para 2.6.

⁷⁵ Wilson in Wilson *ed* (2013) 128.

⁷⁶ Ferretti (2013) *Suffolk U L Rev* 823 and Ramsay in Howells, Janssen, Schulze *eds* (2005) 59.

⁷⁷ Ramsay in Howells, Janssen, Schulze *eds* (2005) 59.

⁷⁸ See para 1.1 above.

same time as creditworthiness assessments having regard to the consumer's income, expenses and existing debts as reflected in the consumer's credit history.⁷⁹

2.4 International Efforts to Promote Responsible Lending

2.4.1 General

The focus by international bodies on promoting a responsible lending policy is fairly new as most display a regard to consumer credit only after the 2008 global financial crisis.⁸⁰ In general, internationally recognised standards on responsible lending are yet to be developed, considering that a wide range of regulatory approaches have been used by individual countries, which range from information disclosure and expecting consumers to make rational decisions to placing the burden on credit providers to lend responsibly.⁸¹ However, a number of international bodies have developed work aimed at promoting a responsible lending policy. A discussion of the relevant activities of the international bodies follows.

2.4.2 The Group of Twenty

The Group of Twenty⁸² adopted the Principles for Innovative Financial Inclusion in 2010.⁸³ These principles underpin the necessity for an inclusive approach to the protection of consumers in financial markets and later were endorsed in October 2011 by the G20 Finance Ministers and Central Bank Governors.⁸⁴ As part of this endorsement process the G20 set out a comprehensive framework on the ways in which financial consumer protection may be regulated in a document titled "G20 High-level Principles on Financial Consumer Protection".⁸⁵ These high-level principles address the necessity for a set of recognised market conduct guidelines

⁷⁹ Bijak, Thomas and Mues (2014) *JCR* 1. See also para 1.1 above.

⁸⁰ FinCoNet Report (2014) 14. See also Micklitz and Durovic (2017) ch 1 for a comprehensive discussion of the role of international and regional subjects in the process of defining and drafting consumer law and policy.

⁸¹ Paper by the World Bank *Responsible Lending* (2013) 13.

⁸² Hereinafter "G20". The G20 is an international forum for the governments and central bank governors from 20 major economies, namely Argentina, Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, South Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom and the United States of America. It was founded in 1999 with the aim of studying, reviewing and promoting the high-level discussion of policy issues pertaining to the promotion of international financial stability – see Nelson CRS Report (2013) 1.

⁸³ See G20 Innovative Financial Inclusion Principles Report (May 2010).

⁸⁴ FinCoNet Report (2014) 20. See also Micklitz and Durovic (2017) 1.

⁸⁵ FinCoNet Report (2014) 21.

against which existing policies, legislative frameworks, regulatory frameworks and other institutional arrangements can be measured and assessed.⁸⁶ Among other requirements, the high-level principles call for a legal recognition of financial consumer protection and responsible business conduct.⁸⁷

The G20 high-level principles on financial consumer protection at a minimum require financial services providers and their intermediaries to work in the best interests of their consumers and be responsible for upholding financial consumer protection as an objective.⁸⁸ Financial services providers are also required to assess their consumers' financial capacity, situation and needs, based on information primarily provided by consumers, before agreeing to provide them with a product, service or advice.⁸⁹ Further, they are also required to ensure that the financial products and services offered to consumers should meet the particular needs of every individual consumer.⁹⁰

Sufficient information must be provided to the consumers to place them in a position where they are able to choose the most suitable and affordable product or service.⁹¹ To assist consumers in making appropriate decisions on their financial needs and essentially to curb consumer over-indebtedness, credit providers should also properly assess the consumer's creditworthiness when offering new credit or extending credit that significantly increases the debt amount assumed by the consumer.⁹² This requirement is said to have triggered a wave of new regulations on responsible lending around the world as it serves a double function: preventing consumer over-indebtedness and promoting a sound financial system.⁹³

⁸⁶ World Bank Good Practices (2012) 2.

⁸⁷ FinCoNet Report (2014) 21.

⁸⁸ G20 *High level principles* (2011) principle 6.

⁸⁹ G20 *High level principles* (2011) principle 6.

⁹⁰ G20 *High level principles* (2011) principle 6.

⁹¹ G20 *High level principles* (2011) principle 6.

⁹² G20 *High level principles* (2011) principle 6.

⁹³ Micklitz and Domurath (2015) 19. See also Wilson in Wilson *ed* (2013) 111.

2.4.3 The Organisation for Economic Co-operation and Development

In September 2013 the Organisation for Economic Co-operation and Development⁹⁴ released an updated report aimed at supporting the implementation of the G20 high-level principles on financial consumer protection.⁹⁵ This report contains recommendations on how effectively to deal with the G20 high-level principles on financial consumer protection relating to the responsible business conduct of financial services providers and their intermediaries.⁹⁶

The report emphasises that the objective of the G20 in the high-level principles is to ensure that financial services providers and their intermediaries work in the best interests of the consumers and that they should be responsible for upholding financial consumer protection.⁹⁷ These goals can best be achieved by *inter alia* providing adequate and objective information and advice to the consumer and, where appropriate, “assessing the needs, financial situation, attitude to risk and interests of different types of consumers at the beginning of any dealing with the consumer, before the consumer is offered a financial product or service”.⁹⁸ Specifically on the aspect of consumer credit, the report asserts that the criteria on responsible lending play an important role in the protection of consumers from debt repayment problems and other ensuing issues because the criteria assist credit providers in avoiding irresponsible credit lending by considering the terms and purpose of the proposed credit agreement, the consumer’s financial situation and other relevant circumstances.⁹⁹

⁹⁴ Hereinafter the “OECD”. The OECD is an international organisation which was established in 1961 and currently consists of 29 Member States. The OECD serves the main purpose of contributing to the economic and social well-being of all people around the world. It achieves this function through the development of a diverse set of policies and has developed influential guidelines for consumer protection and competition policy – see, e.g. the OECD *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders* (2013), OECD *Report on Competition Law and Institutions* (2004) and OECD *Workshop on Consumer Dispute Resolution and Redress in the Marketplace* (2005).

⁹⁵ G20/OECD *Task Force on Financial Consumer Protection Report* (2013).

⁹⁶ G20/OECD *Task Force on Financial Consumer Protection Report* (2013) 12-17. See also FinCoNet Report (2014) 21.

⁹⁷ G20/OECD *Task Force on Financial Consumer Protection Report* (2013) 12.

⁹⁸ G20/OECD *Task Force on Financial Consumer Protection Report* (2013) 12.

⁹⁹ G20/OECD *Task Force on Financial Consumer Protection Report* (2013) 14.

2.4.4 The World Bank

The World Bank¹⁰⁰ started a global programme on Consumer Protection and Financial Literacy in 2010,¹⁰¹ which had the aim of improving consumer protection in financial services worldwide. In 2012, the World Bank published Good Practices for Consumer Protection based on a number of country-level reviews of consumer protection and financial literacy.¹⁰² These practices represent the most frequent approaches to improving the conduct of financial institutions when dealing with consumers.¹⁰³ Primarily, they are aimed at being used as a “diagnostic tool” and thus to assist policy-makers in answering the question: “How does the country’s legal and regulatory framework for financial consumer protection compare to international practice?”¹⁰⁴

The World Bank’s consideration of responsible lending policies is contained under Part XXIV, titled “Disclosure and Sales Practices”. It is indicated here that when a credit provider recommends a product or service it offers to a consumer the credit provider should ensure that such a product or service meets the needs of the consumer.¹⁰⁵ The consumer should also be provided with sufficient information on the product or service offered to enable him to choose the “most suitable and affordable product or service”.¹⁰⁶ Further, if the credit provider presents the consumer with a new offer on a particular credit product or service that is likely significantly to increase the amount of debt assumed by the consumer, the consumer’s creditworthiness should also be assessed.¹⁰⁷

As mentioned earlier,¹⁰⁸ in October 2013 the World Bank prepared a paper titled “Responsible Lending: An Overview of Regulatory Tools” as a background document

¹⁰⁰ The World Bank was established at the end of the World War II to support the reconstruction and development of numerous countries which had been affected by the war. Its function has evolved to “poverty reduction through inclusive and sustainable globalisation”. The World Bank also is responsible for the development of consumer protection in the area of financial services – see Micklitz and Durovic (2017) 8-9.

¹⁰¹ Micklitz and Durovic (2017) 9.

¹⁰² World Bank *Good Practices* (2012) 2.

¹⁰³ World Bank *Good Practices* (2012) 2.

¹⁰⁴ World Bank *Good Practices* (2012) 2.

¹⁰⁵ World Bank *Good Practices* (2012) 58.

¹⁰⁶ World Bank *Good Practices* (2012) 58.

¹⁰⁷ World Bank *Good Practices* (2012) 58.

¹⁰⁸ See para 1.1 above.

for the World Bank Group's Global Financial Development 2014 Report on Financial Inclusion. This paper provides an overview of key regulatory actions that a government may implement to support responsible lending.¹⁰⁹ Therein, the World Bank directs that in the assessment of the consumer's creditworthiness and the suitability of the credit product to the consumer the assessment should consider the following four aspects:¹¹⁰

- (a) The consumer's whole financial portfolio in order to determine how the proposed credit may interact with the consumer's financial stability and long-term goals.
- (b) The consumer's best interest.
- (c) The consumer's understanding of the credit product or service on offer.
- (d) The consumer's long-term affordability.

The World Bank also cautions that because in some countries non-bank credit and micro-finance institutions are not required to ask consumers about other outstanding debts or such debts are not required to be registered in the credit-reporting system the result often is consumers becoming over-indebted as they rely on one loan to pay-off another.¹¹¹ Therefore it recommends that a policy focused on access to consumer credit should ensure that credit is offered and is used responsibly.¹¹² It further emphasises the need for policymakers to strive for a balance in four distinct financial sector policy objectives or what is known as "the I-SIP network", namely:¹¹³

- (a) financial inclusion, by ensuring that consumer credit is widely accessible;

¹⁰⁹ Paper by the World Bank *Responsible Lending* (2013) 1. See also para 1.1 above.

¹¹⁰ Paper by the World Bank *Responsible Lending* (2013) 42.

¹¹¹ World Bank Good Practices (2012) 59.

¹¹² Paper by the World Bank *Responsible Lending* (2013) 8.

¹¹³ Paper by the World Bank *Responsible Lending* (2013) 8-9. See also FinCoNet Report (2014) 15.

- (b) stability of the financial sector, where credit is offered to consumers on a sustainable basis and under well-performing risk policies;
- (c) integrity of the credit market, by ensuring that consumer credit is provided by properly licensed and supervised institutions; and
- (d) consumer protection, by ensuring that consumers are offered adequate information, are well-equipped to use the information provided to make informed decisions and that the consumers are protected from unfair and aggressive business practices when choosing consumer credit.

In devising a responsible lending regime, the World Bank provides guidance that an effective responsible lending regulatory system must be aimed at achieving consumer protection.¹¹⁴ To achieve this goal the World Bank suggests five key consumer protection areas that must be covered for the regime to be effective, namely the institutional arrangements, disclosure, business practices, consumer redress and financial capability.¹¹⁵ It asserts that the key to a truly successful responsible lending regime is the ability on the part of the regulatory body to monitor and enforce the rules,¹¹⁶ hence the need for proper institutional arrangements. It cautions that regulatory arbitrage may arise, which makes responsible lending rules harder to implement if there is no regulator tasked with the responsibility of consumer credit regulation.¹¹⁷

Regarding the disclosure component, it emphasises that responsible credit disclosure should be understandable, complete and comparable to allow prospective credit consumers to compare available offers.¹¹⁸ As regards business practices it is essential that the regulatory approach *inter alia* provides guidance on the lending process, which should be structured in a way that discourages extending credit to individuals who are likely to go into arrears.¹¹⁹

¹¹⁴ Paper by the World Bank *Responsible Lending* (2013) 13.

¹¹⁵ Paper by the World Bank *Responsible Lending* (2013) 13.

¹¹⁶ Paper by the World Bank *Responsible Lending* (2013) 15.

¹¹⁷ Paper by the World Bank *Responsible Lending* (2013) 14.

¹¹⁸ Paper by the World Bank *Responsible Lending* (2013) 14.

¹¹⁹ Paper by the World Bank *Responsible Lending* (2013) 14.

In order to provide for consumer redress, it is submitted that the regulatory approach should allow for an “effective redress mechanism not only to address individual complaints but also to allow the regulator to identify emerging consumer issues” in the credit market.¹²⁰ The final aspect, financial capability, has the implication of empowering consumers to understand that in the area of consumer credit, wrong choices may have significant long-term negative effects on the consumer.¹²¹

2.5 Wilson’s Criteria for an Effective Responsible Lending Regime

In addition to the work developed by international bodies aimed at promoting a responsible lending policy discussed above,¹²² several authors have also published materials that may be useful in the development of policy.¹²³ Specific reference is made to Wilson’s idea of an effective responsible lending regime, a contribution which relates to the issue in this thesis.¹²⁴ Wilson in her book titled “International Responses to Issues of Credit and Over-Indebtedness in the Wake of Crisis (Markets and the Law)” considers the responsible lending regulatory regimes enacted in Australia, South Africa, the United States and Europe and argues that they have been developed in a neo-liberal context which has had an influence on their reactive nature.¹²⁵ She argues that ideally a responsible lending regime should show evidence of a proactive rather than a reactive regulatory approach and, further, should meet the following criteria:¹²⁶

- (a) A focus on responsible lending rather than responsible borrowing.
- (b) A focus on consumer credit in general, not limited to residential mortgage loans.

¹²⁰ Paper by the World Bank *Responsible Lending* (2013) 14.

¹²¹ Paper by the World Bank *Responsible Lending* (2013) 15.

¹²² See para 2.4 above.

¹²³ See e.g. Nield (2010) *Legal Studies*, Atamer in Grundmann and Atamer *eds* (2011), Nield in Devenney and Kenny *eds* (2012), Renke LLD Thesis (2012), Van Heerden and Renke (2015) *IIR*, Mak (2015) *J Consum Policy*, Steennot and Van Heerden (2017a) *PER/PELJ* and Steennot and Van Heerden (2017b) *PER/PELJ*.

¹²⁴ Wilson in Wilson *ed* (2013).

¹²⁵ See Wilson in Wilson *ed* (2013) 109. See also para 2.2 above.

¹²⁶ Wilson in Wilson *ed* (2013) 128.

- (c) An encouragement of flexible, individualised credit assessment practices or at least not an encouragement of rigid and inflexible credit assessment practices.
- (d) The existence of a regulatory agency charged with enforcement, adequately resourced to properly monitor and enforce compliance with market conduct regulation, including responsible lending obligations.

These criteria are based on the contention that “the goal of any responsible lending regime should be first and foremost to protect consumers from the harms of irresponsible lending”.¹²⁷ With regard to the first criterion, it is suggested that the focus of a responsible lending regime should be on responsible lending in order to avoid over-indebtedness as opposed to being on responsible borrowing.¹²⁸ This focus shows an awareness of the structural causes of over-indebtedness where consumers lack choice and end up entering into harmful credit agreements.¹²⁹ The second criterion suggests that focusing only on one type of credit which has caused the most recent harm is short-sighted and reactive rather than proactive.¹³⁰

The third criterion promotes the rejection of rigid standardised credit assessment models and replaces them with flexible, individualised credit assessment models. The fourth criterion recommends that the regulatory agency be vested with powers to pursue legal action against credit providers who have contravened their responsible lending obligations.¹³¹ It is affirmed that the fourth criterion is crucial for the effectiveness of the responsible lending regime because poor consumers, who in most cases are the recipients of irresponsible credit, are not likely to be in a position to pursue litigation and may not even be aware of their rights or that there is a solution to their financial situation.¹³²

¹²⁷ Wilson in Wilson *ed* (2013) 126.

¹²⁸ Wilson in Wilson *ed* (2013) 128.

¹²⁹ Wilson in Wilson *ed* (2013) 126.

¹³⁰ Wilson in Wilson *ed* (2013) 129.

¹³¹ Wilson in Wilson *ed* (2013) 129.

¹³² Wilson in Wilson *ed* (2013) 129. See also in this regard, Genn (1999) 101.

2.6 Responsible Lending Policies in Particular Credit Markets

2.6.1 General

As mentioned earlier,¹³³ several jurisdictions have reviewed their consumer credit policies by introducing elements of responsible lending. The focus here is on the responsible lending policies introduced in the United States of America, the European Union, Australia and South Africa. First, the issues in the credit markets that the regulators sought to address when introducing responsible measures are discussed, followed by an analysis of whether or not the responsible lending standards adequately respond to the threats they were meant to address.

2.6.2 The United States of America

An undisputed contributor to the 2007-2008 financial crisis is the subprime lending market in the United States.¹³⁴ Subprime lending refers to the extension of credit to consumers who have a weakened ability to repay and, in a strict sense, do not qualify for the normal rates and credit terms because their income or assets are too low or because of poor credit histories.¹³⁵ Prior to the advent of subprime lending in the United States' mortgage markets, most of these individuals, regardless of their credit record, could not afford down payments and monthly instalments even on relatively small homes.¹³⁶ This is because for many years, state consumer laws protected consumers against deceptive and unfair terms in the mortgage market.¹³⁷

To help individuals attain home ownership in the 1990s the United States' Congress passed laws that "pre-empted" many state consumer laws that were designed to protect consumers against unfair lending practices.¹³⁸ The new laws encouraged mortgage lending on a subprime basis. Credit rating agencies also pressured states to weaken consumer laws in order to increase efficiencies in the securities

¹³³ Para 2.3.

¹³⁴ Financial Crisis Inquiry Report (2011) 402. See also Gorman (2014) *U.C. Davis Law Rev* 1887 and Sovern (2010) *Ohio St LJ* 761. Sovern argues that one of the causes of the financial crisis was the failure of the Truth in Lending Act of 1968 to ensure that subprime consumers better understood their loan terms. He submitted that policy makers should make rules that will ensure that consumers understand their payment obligations well enough to allow them to decline entering into unwise credit agreements.

¹³⁵ Gorman (2014) *U.C. Davis Law Rev* 1890-1891 and Nehf (2011) *SSRN* essay 1.

¹³⁶ Nehf (2011) *SSRN* essay 2.

¹³⁷ Nehf (2011) *SSRN* essay 5.

¹³⁸ Nehf (2011) *SSRN* essay 5. See also Engel and McCoy *Banking and Financial Services Policy Report* (2012) 25.

markets.¹³⁹ These developments resulted in the flourishing of the mortgage broker industry along with small businesses offering to find creative and affordable mortgages for people at low cost.¹⁴⁰

Since credit providers and their brokers had no incentive to ensure that mortgages suited the consumers' needs or that they could repay the loans, the subprime lending industry became characterised by high application fees, mandatory credit insurance, low or no down payment, little or no verification of the borrower's income or ability to pay, interest only loans or adjustable rate mortgages¹⁴¹ which kept payments affordable for the first few months.¹⁴² These factors increased the demand for houses and consumers bid up prices on houses, subsequently inflating their value.¹⁴³ As housing prices increased, new products were created and new subprime mortgages were approved on terms that many consumers could not afford for long.¹⁴⁴ Due to the unaffordability of the adjusted temporary rates on adjustable rate mortgages and the collapse of house prices, the credit crisis occurred as millions of consumers defaulted on their mortgages, resulting in the loss of their homes to foreclosure, in the credit providers suffering losses and banks, which had bundled the loans as securities and sold them as derivatives, were left holding investments with little market value.¹⁴⁵

To address the loopholes in State and Federal consumer protection laws that mortgage brokers had taken advantage of in issuing mortgages on terms that were likely to fail, Congress passed the Dodd-Frank Act in 2010.¹⁴⁶ Dodd-Frank attempts to protect consumers from dangerous levels of consumer debt by tightening lending standards and increasing the transparency in the mortgage market by requiring

¹³⁹ Nehf (2011) *SSRN essay 5*.

¹⁴⁰ Nehf (2011) *SSRN essay 2*.

¹⁴¹ Commonly referred to as ARMs. ARMs are loans which carry an initial low interest rate and, consequently, the monthly payment, but later are switched to an adjustable rate – Sovern (2010) *Ohio St LJ 765*.

¹⁴² Nehf (2011) *SSRN essay 1-2*.

¹⁴³ Nehf (2011) *SSRN essay 2*. See also Sovern (2010) *Ohio St LJ 766*.

¹⁴⁴ Nehf (2011) *SSRN essay 2*.

¹⁴⁵ Financial Crisis Inquiry report (2011) xvii-xxv and Gorman (2014) *U.C. Davis Law Rev 1890*.

¹⁴⁶ Hereinafter "Dodd-Frank". Dodd-Frank was signed into law on 21 July 2010. For a detailed discussion of the history of residential mortgage regulation, see Pottow (2011) *Berkeley Bus LJ 175* and Hirsch (2008) *N.C. Banking Inst 21*.

mortgage originators to retain some risk of default.¹⁴⁷ It also transferred the responsibility for consumer financial protection from Federal banking regulators to a newly-created independent body, the Consumer Financial Protection Bureau.¹⁴⁸ The Bureau is tasked with responsibility for

implementing and enforcing federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent and competitive.¹⁴⁹

Dodd-Frank does not focus on general consumer credit: its Title XIV is entitled “Mortgage Reform and Anti-Predatory Lending Act”. The primary focus is on mortgage credit, and Dodd-Frank is the first piece of consumer credit legislation in the United States which introduced a duty to assess a consumer’s ability to repay a mortgage loan.¹⁵⁰ Subtitle B of Title XIV sets out minimum standards for residential mortgage loans. Relevantly, it is provided that

[i]n accordance with regulations prescribed by the Board, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.¹⁵¹

In terms of Dodd-Frank, the credit provider must determine the consumer’s ability to repay the loan *inter alia* by considering the consumer’s credit history, current income, expected income, current obligations and residual income after paying mortgage-related and non-mortgage related obligations, employment status and financial sources other than the consumer’s equity in the dwelling.¹⁵² Any payments for a second mortgage or any other subordinate loans should be included in the calculations.¹⁵³ The credit provider’s determination should use a payment schedule that fully amortises the loan over the full loan term.¹⁵⁴

¹⁴⁷ Gorman (2014) *U.C. Davis Law Rev* 1890. See also Skeel (2010) *Faculty Scholarship Paper* 329.

¹⁴⁸ See Title X of Dodd-Frank.

¹⁴⁹ Dodd-Frank s 1021.

¹⁵⁰ See also Pottow (2011) *Berkeley Bus LJ* 176.

¹⁵¹ Dodd-Frank s 1411(1).

¹⁵² Dodd-Frank s 1411(3) read with s 1411(2). See also Wilson in Wilson *ed* (2013) 116.

¹⁵³ See Dodd-Frank s 1411(2).

¹⁵⁴ Dodd-Frank s 1411(3).

Dodd-Frank further provides guidance to credit providers when verifying the consumer's income or assets in determining the consumer's ability to repay. It is indicated that the credit provider may have regard to the consumer's expected income or assets, tax returns, payroll receipts, financial institutions' records and other third party documents that may provide evidence of the consumer's income or assets.¹⁵⁵ The requirement for the determination to be based on verified and documented information implies an end to low document and no document mortgage loans in the United States, which have been a prominent feature of subprime mortgage lending.¹⁵⁶

In a bid to shield legitimate credit providers making non-abusive loans from the burden of ensuring the borrower's ability to repay, Dodd-Frank provides a rebuttable presumption that consumers have an ability to pay their "qualified mortgages".¹⁵⁷ Therefore a credit provider can rely on this presumption provided that the loan offered to the consumer is free of characteristics of the subprime loans that led to the global financial crisis.¹⁵⁸ A mortgage loan is considered a "qualified mortgage" and a credit provider is presumed to have complied with Dodd-Frank's responsible lending obligations if the following criteria are met:¹⁵⁹

- (a) The regular periodic payments for the mortgage loan should not result in an increase of the principal balance¹⁶⁰ or allow the consumer to defer payments.
- (b) The terms of the mortgage loan should not result in a balloon payment.¹⁶¹
- (c) The income and financial resources relied upon in qualifying the consumer are verified and documented.

¹⁵⁵ Dodd-Frank s 1411(4).

¹⁵⁶ Wilson in Wilson *ed* (2013) 116. See also the discussion of Dodd-Frank's elimination of deceptive loans with ballooning payments by Singer, Best and Simon (2010) *J Consum & Com L* 6-9, Pottow (2011) *Berkeley Bus LJ* 176 and Engel and McCoy (2011) 229.

¹⁵⁷ Dodd-Frank s 1412. Qualified mortgages are mortgage loans which are perceived to have less risky features as defined by statute and regulations and therefore are entitled to certain legal benefits so as to encourage credit providers to make safer, more sustainable loans.

¹⁵⁸ Singer, Best and Simon (2010) *J Consum & Com L* 7.

¹⁵⁹ Dodd-Frank s 1412(2)(A)(i)-(ix).

¹⁶⁰ Or what is referred to as "negative amortisation" in Dodd-Frank.

¹⁶¹ A balloon payment is defined as a "scheduled payment that is more than twice as large as the average of earlier scheduled payments" – Dodd-Frank s 1412(2)(A)(ii).

- (d) The underwriting process for affordability must be reliable.¹⁶²
- (e) There was compliance with the Consumer Financial Protection Bureau regulations with respect to debt-to-income ratios or other indicators of the consumer's ability to repay.
- (f) The total points and fees do not exceed three percent of the loan's principal amount.

Dodd-Frank also requires the Consumer Financial Protection Bureau to promulgate regulations prohibiting the "steering" of a consumer to a mortgage loan that the consumer lacks the reasonable ability to repay or which has predatory characteristics such as equity stripping, excessive fees or abusive terms.¹⁶³ It further requires regulations prohibiting credit providers from directing a consumer from a residential mortgage loan for which the consumer is qualified and that is a qualified mortgage to a residential mortgage loan that is not a qualified mortgage.¹⁶⁴

Dodd-Frank authorises the Consumer Financial Protection Bureau to administer, implement and enforce the provisions of Federal consumer financial law.¹⁶⁵ For violations of the responsible lending obligations, the Consumer Financial Protection Bureau may pursue civil actions to impose a civil penalty or to seek an appropriate remedy, including an injunction, rescission or reformation of credit contracts, refund of the consumer's moneys, restitution, compensation for unjust enrichment, payment of damages, limits on the credit provider's activities and civil money penalties.¹⁶⁶ Without regard to any statute of limitations, a consumer is also entitled to defend mortgage foreclosure proceedings on the grounds of non-compliance with the responsible lending requirements.¹⁶⁷ As such, the qualified mortgage presumption

¹⁶² For fixed rate loans, underwriting must be based on a fully amortised payment schedule including taxes and insurance, whereas for an adjustable rate loans' underwriting must be based on the maximum rate permitted in the first five years and a fully amortised payment schedule including taxes and insurance – Dodd-Frank s 1412(2)(A)(iv)-(v).

¹⁶³ Dodd-Frank s 1403(3)(A)(i)-(ii).

¹⁶⁴ Dodd-Frank s 1403(B).

¹⁶⁵ Dodd-Frank s 1022(a).

¹⁶⁶ Dodd-Frank s 1054(a).

¹⁶⁷ Dodd-Frank s 1413(1). See also Wilson in Wilson *ed* (2013) 117.

creates a safe haven situation for the credit provider concerning the provisions which relate to foreclosure.¹⁶⁸

There is an acknowledgement that subprime lending contributed to the financial crisis in that the underlying causes were that credit providers provided loans that consumers could not afford to repay and, secondly, that most consumers did not understand or appreciate the credit terms.¹⁶⁹ It is not disputed that a check on whether a consumer can repay a loan is the consumer himself.¹⁷⁰ However, if a consumer does not understand his payment obligations or underestimates them, that check disappears.¹⁷¹ To ensure that consumers are provided with adequate information to assist them in the decision-making of taking up a loan, section 1419 of Dodd-Frank requires credit providers to disclose the following information to the prospective residential mortgage loan consumer:

- (a) The aggregate amount of settlement charges for all settlement services provided in connection with the loan.¹⁷²
- (b) The amount of charges that are included in the loan and the amount of such charges the borrower must pay at closing.¹⁷³
- (c) The approximate amount of the wholesale rate of funds in connection with the loan.¹⁷⁴
- (d) The aggregate amount of other fees or required payments in connection with the loan.¹⁷⁵

¹⁶⁸ Dodd-Frank s 1412(2) read with s 1413(1).

¹⁶⁹ Sovern (2010) *Ohio St LJ* 761.

¹⁷⁰ Sovern (2010) *Ohio St LJ* 764.

¹⁷¹ Sovern (2010) *Ohio St LJ* 764.

¹⁷² Dodd-Frank s 1419(17).

¹⁷³ Dodd-Frank s 1419(17).

¹⁷⁴ Dodd-Frank s 1419(17).

¹⁷⁵ Dodd-Frank s 1419(17).

- (e) Fees paid to any person who assisted with the loan other than the credit originator and the amount of such fees paid directly by the consumer and any additional amount received by the originator from the creditor.¹⁷⁶
- (f) The total amount of interest that the consumer will pay over the life of the loan as a percentage of the principal of the loan.¹⁷⁷ Such amount shall be computed assuming that the consumer makes each monthly payment on time and in full, without any over-payments.¹⁷⁸

However, Dodd-Frank fails to provide an indication as to whether this duty of disclosure includes the duty to ensure that the consumer actually understands all the obligations flowing from the credit agreement. Although it empowers the Consumer Financial Protection Bureau to prescribe rules on disclosure aimed at ensuring that consumers understand the costs, benefits and risks associated with financial products and services,¹⁷⁹ it goes only as far as directing that if a model form is used at a minimum it should succinctly explain the information that must be communicated to the consumer,¹⁸⁰ without elaborating on whether or not the credit provider is expected to ensure that the consumer does in fact understand the credit terms before providing credit.

Dodd-Frank has been criticised also for its focus purely on mortgage credit and not on consumer credit in general. These critics describe its responsible lending measures as reactive rather than proactive as they respond only to a specific market failure.¹⁸¹ Therefore it leaves a segment of the consumer population of credit products other than mortgages exposed and unprotected against the threat of irresponsible credit.

¹⁷⁶ Dodd-Frank s 1419(18).

¹⁷⁷ Dodd-Frank s 1419(19).

¹⁷⁸ Dodd-Frank s 1419(19).

¹⁷⁹ Dodd-Frank s 1032(a).

¹⁸⁰ Dodd-Frank s 1032(b)(2).

¹⁸¹ Wilson in Wilson *ed* (2013) 129. See also Engel and McCoy (2011) 17.

2.6.3 The European Union

The development of consumer law in the European Union is based mostly on directives which have sought to harmonise aspects of national consumer laws throughout the European Community.¹⁸² Directive 87/102/EEC was the first venture of the European Community in the regulation of consumer credit.¹⁸³ It was aimed at the creation of an efficient and competitive single consumer credit market throughout the European Union in which consumers are adequately protected.¹⁸⁴ It sought to achieve this protection by harmonising the national laws of member states, albeit minimally, in the field of consumer credit in order to promote competition and improve consumers' access to credit.¹⁸⁵

This Directive was central to the policy of information disclosure as it required that the consumer be provided with adequate information as to the conditions and cost of credit and on his obligations.¹⁸⁶ It further required all credit agreements to be in writing and that the consumer is provided with a copy of the written agreement at the time the credit agreement is concluded.¹⁸⁷ It was also a requirement that the credit agreement should indicate a statement of the annual percentage rate of charge and all other "essential terms of the contract".¹⁸⁸

Directive 87/102/EEC follows the approach of improving transparency in the pre-contractual phase combined with the "cooling-off period" prescription in the post-contractual phase as means of achieving consumer protection.¹⁸⁹ However it was later realised that these approaches did not directly address the content of the bargain between credit providers and credit consumers,¹⁹⁰ because the efficiency of these approaches depended on the ability of the consumer to process the

¹⁸² Paper by Kekez *EU Consumer Law* (2016) 207.

¹⁸³ Weatherill (2005) 86.

¹⁸⁴ Preamble Directive 87/102/EEC. See also Ferretti (2013) *Suffolk U L Rev* 802.

¹⁸⁵ See Directive 87/102/EEC art 15. The concept of "minimum harmonisation" means that member states are required to transpose into their national legislations the protection which is offered by the Directive, at the same time they are entitled also to maintain and introduce additional protection to consumers – see Steennot (2011) *FLI WP 2011-06* 1. See also Steennot and Van Heerden (2017b) *PER/PELJ* 27.

¹⁸⁶ Directive 87/102/EEC art 3.

¹⁸⁷ Directive 87/102/EEC art 4(1).

¹⁸⁸ Directive 87/102/EEC art 4(3). See also Weatherill (2005) 84.

¹⁸⁹ Weatherill (2005) 84.

¹⁹⁰ Weatherill (2005) 84.

information provided and to act rationally in response to it. But consumer behaviour has shown that for various reasons consumers do not always act rationally in relation to information provided.¹⁹¹

In 1995 the European Commission published a report on the operation of Directive 87/102/EEC.¹⁹² Although this report asserted that “a consumer who is aware of prices can spur the market to more efficient operation”, it conceded that the problem of over-indebtedness required action at Community level.¹⁹³ In its 1997 communication on financial services the European Commission noted that measures in the financial services sector were inadequate to meet consumers’ needs and failed to meet the demands of the changing market structure.¹⁹⁴ The European Commission proposed a review of Directive 87/102/EEC and the launch of pilot projects on tackling consumer over-indebtedness as from 1998.¹⁹⁵ A final report on the statistical study of consumer over-indebtedness in the European Union was published in October 2001.¹⁹⁶

In November 2001 the European Commission adopted a Resolution on consumer credit and indebtedness which called for an exchange of information on best practices in addressing the problem of over-indebtedness.¹⁹⁷ This process resulted in the European Commission’s 2002 draft Directive,¹⁹⁸ which aimed at “improving the quality of loans and lessening the risk of consumers falling victim to disproportionate commitments that they are unable to meet”.¹⁹⁹ This draft Directive sought to prevent consumer over-indebtedness by requiring member states to establish a central database in which late payments were to be recorded, debtors were to furnish security and credit providers were required generally to exercise caution in providing consumers with credit.²⁰⁰ This proposal was based on an idea which suggests the

¹⁹¹ Weatherill (2005) 85. See also para 2.2 above.

¹⁹² COM(95) 117 final.

¹⁹³ COM(95)117 final 11. See also Weatherill (2005) 91.

¹⁹⁴ COM(97) 309 final 6-8.

¹⁹⁵ COM(97) 309 final.

¹⁹⁶ See Betti, Dourmashkin, Rossi, Verma and Yin *Study of Indebtedness: Statistical Aspects Report* (2001). See also Weatherill (2005) 91.

¹⁹⁷ Goode Commentary (1977) para 126.40.

¹⁹⁸ COM(2002) 443.

¹⁹⁹ See Atamer in Grundmann and Atamer eds (2011) 191-192.

²⁰⁰ COM(2002) 443 15. See also Weatherill (2005) 91.

establishment of a legal principle requiring responsible lending which involves checking the database before credit is provided to the consumer.²⁰¹ This was the first time the concept “responsible lending” was mentioned in any European Commission Directive, indicating that it is a fairly recent policy in the European Union.²⁰² The explanatory memorandum of the 2002 draft Directive made it clear that the consequence of extending irresponsible credit is the imposition of civil and trade sanctions.²⁰³ It directed that sanctions must be effective, proportionate and deterring, for example, a creditor losing his claim for interest and charges.²⁰⁴

In a 2004 draft Directive the principle of responsible lending was specifically outlined,²⁰⁵ by which credit providers were required to assess the creditworthiness of prospective credit consumers on the basis of information they provided and, where appropriate, after consulting the relevant database.²⁰⁶ This document was shortly replaced in October 2005.²⁰⁷ Notably, the requirement to assess the consumer’s creditworthiness on the basis of information disclosed by the consumer and, where possible, consultation of databases was retained.²⁰⁸ The duty to provide pre-contractual information was modified to include the duty to advice, however emphasising that the consumer is always responsible for his final decision to conclude a credit agreement.²⁰⁹ In this light the credit provider not merely should fulfil the pre-contractual information requirements but should provide additional explanations in order to enable the consumer to take a well-informed decision having assessed the rewards and drawbacks of the loan.²¹⁰

Since Directive 87/102/EEC failed to achieve a responsible single credit market partly due to the minimum harmonisation principle, the European Commission’s and

²⁰¹ Weatherill (2005) 91.

²⁰² See also Renke LLD Thesis (2012) 14.

²⁰³ Atamer in Grundmann and Atamer *eds* (2011) 192.

²⁰⁴ 2002 Draft Directive art 31. See also Atamer in Grundmann and Atamer *eds* (2011) 192.

²⁰⁵ See COM(2004) 747.

²⁰⁶ COM(2004) 747. See also Weatherill (2005) 91.

²⁰⁷ COM(2005) 483 final.

²⁰⁸ COM(2005) 483 final *Explanatory Memorandum* para 5.4.

²⁰⁹ COM(2005) 483 final *Explanatory Memorandum* para 5.4.

²¹⁰ COM(2005) 483 final *Explanatory Memorandum* para 5.4.

the European Parliament's efforts resulted in the adoption of Directive 2008/48/EC²¹¹ to facilitate harmonised consumer protection laws and to promote well-functioning markets in the European Union.²¹² The Directive 2008/48/EC had to be transposed into the national laws of member states before 11 June 2010.²¹³ This Directive was the first parliamentary effort to fully harmonise²¹⁴ laws among member states who follow the principle of minimum harmonisation provided for under the preceding Directive, 87/102/EEC.²¹⁵ It was also the first to introduce the principle of responsible lending at European Union community level as it imposes obligations on credit providers to provide standardised information and disclosures on a loan to consumers at advertisement and at the pre-contractual and contractual stage and to assess the creditworthiness of consumers.²¹⁶

One objective in introducing the principle of responsible lending at Community level was to ensure responsible and reliable markets and to restore consumers' confidence in credit markets where credit products are affordable and appropriate to the needs of consumers.²¹⁷ The white paper on the integration of European Union mortgage credit markets also stressed the importance of good information, high quality advice to consumers and responsible lending and borrowing in ensuring that consumers choose the best product for their needs.²¹⁸

²¹¹ According to its art 2(2)-(5), this Directive does not apply to credit agreements secured by either a mortgage or another comparable security, interest-free credit or credit repaid within three months, hiring agreements, certain leasing contracts, credit agreements arising from a settlement agreement reached in court or before another statutory body and credit agreements where the total amount of credit is less than €200 or more than €75 000 and to overdrafts. See also Steennot and Van Heerden (2017b) *PER/PELJ* 28.

²¹² Directive 2008/48/EC recital 7. See also Vandone (2009) 100.

²¹³ Directive 2008/48/EC art 27(1).

²¹⁴ "Maximum harmonisation" means that the Directive determines the maximum level of protection offered to consumers and therefore member states are required to transpose the Directive's determined protection into their national legislation but without an entitlement to introduce additional protection measures – see Steennot (2011) *FLI WP 2011-06 2*.

²¹⁵ Renke LLD Thesis (2012) 25. See also Steennot and Van Heerden (2017b) *PER/PELJ* 27 and Vandone (2009) 100.

²¹⁶ See in general Ferretti (2013) *Suffolk U L Rev* 791 and Goode Commentary (1977) para 126.25.

²¹⁷ COM(2009) 114 final. In this communication, the European Commission stressed the importance for member states to adopt measures to prevent consumer over-indebtedness and to maintain access to financial services. See also Ferretti in Ferretti *ed* (2016) 12.

²¹⁸ COM(2007) 807 final.

After the global financial crisis, which raised issues regarding the protection of consumers and the effectiveness of regulation in financial markets,²¹⁹ the European Union put in place a European Economic Recovery Plan to deal with the crisis and prepare for the economic recovery.²²⁰ The European Commission asserted that a stable financial sector is a prerequisite to building a sustainable recovery.²²¹ It also emphasised the importance of responsible lending and borrowing in the delivery of responsible and reliable credit markets.²²²

The European Commission subsequently held a public consultation on responsible lending and borrowing in the European Union because consumers were being granted credit that was unsuitable for them or their needs.²²³ The purpose was to develop an appropriate framework in which credit providers and their intermediaries act in “a fair, honest and professional manner, before, during and after the lending transaction”.²²⁴ The consultation covered various business practices in the context of credit transactions, such as the provision of pre-contractual information, the assessment of consumers’ creditworthiness and the suitability of credit products.²²⁵

The consultation document asserted that the provision of clear information is an essential element in responsible lending and borrowing.²²⁶ The concept of “responsible lending” was defined to mean credit products appropriate to consumers’ needs and tailored to their ability to repay, whereas responsible borrowing implied that prior to obtaining credit consumers should provide relevant, complete and accurate information as to their financial situation and should make informed and sustainable borrowing decisions.²²⁷

²¹⁹ Ferretti (2013) *Suffolk U L Rev* 791 791.

²²⁰ See COM(2009) 114 final.

²²¹ COM(2009) 114 final 3.

²²² COM(2009) 114 final 7.

²²³ EC Consultation (2009) 6.

²²⁴ EC Consultation (2009) 6.

²²⁵ EC Consultation (2009) 3.

²²⁶ EC Consultation (2009) 3.

²²⁷ EC Consultation (2009) 3.

On 31 March 2011 the European Commission adopted a proposal for a Directive on credit agreements relating to residential property.²²⁸ The proposal was designed against the background of the financial crisis and as part of an effort to create an internal market for mortgage credit.²²⁹ As a result Directive 2014/17/EU entered into force on 20 March 2014²³⁰ and aimed to develop a transparent, efficient and competitive internal market while promoting sustainable lending and borrowing.²³¹ It focuses on boosting consumer confidence and tackling lending practices that lead to the development of property bubbles and an increase in consumer over-indebtedness, defaults and repossession cases across Europe.²³² The Directive 2014/17/EU seeks to ensure that consumers are offered affordable credit and thereby to reduce the need for recourse to the foreclosure of properties.²³³ To achieve this objective the Directive 2014/17/EU introduces an obligation to assess the consumer's creditworthiness before granting mortgage credit.²³⁴

In a recent publication, Domurath²³⁵ maps the framework of responsible lending and responsible borrowing by analysing the extent to which these concepts have been conceptualised in the European Union legal order. She asserts that responsible lending in the European Union is understood as the responsibility of the credit provider to

seek for and provide accurate, transparent, intelligible and comparable information and advice the borrower, while responsible borrowing concerns the responsibility of the borrower to make informed decisions and provide all necessary information within his ambit.²³⁶

Essentially, she equates responsible lending with information disclosure and creditworthiness assessment whereas responsible borrowing is equated with the consumer's responsibility and ability to provide information to the credit provider and

²²⁸ See COM(2011)142 final.

²²⁹ COM(2011)142 final 2.

²³⁰ EU member states were expected to implement Directive 2014/17/EU into national law within 2 years i.e., by Mar 2016.

²³¹ Directive 2014/17/EU recital 6.

²³² Directive 2014/17/EU recital 3.

²³³ See in general Ferretti (2013) *Suffolk U L Rev* 791.

²³⁴ Directive 2014/17/EU, recital 22 read with art 18(1). See also Steennot and Van Heerden (2017b) *PER/PELJ* 28.

²³⁵ Domurath in Micklitz and Domurath eds (2015).

²³⁶ Domurath in Micklitz and Domurath eds (2015) 160.

to understand all necessary information provided to him by the credit provider.²³⁷ In the same vein Vandone opines that responsible lending includes providing an unsuccessful credit applicant with the reasons as to why the credit application has been unsuccessful, so as to enable the applicant to better understand his financial situation.²³⁸ A discussion of the relevant provisions in both Directives follows.

2.6.3.1 The Directive 2008/48/EC

Directive 2008/48/EC imposes two primary responsible lending obligations on credit providers, namely:

- (a) the obligation to ensure that consumers receive complete and relevant information before the conclusion of the contract²³⁹ and
- (b) the obligation to assess the creditworthiness of consumers before providing them with credit.²⁴⁰

The first obligation serves the purpose of enabling the consumer to compare different credit offers more easily before committing to a credit agreement. A credit provider therefore is required to provide pre-contractual information on standardised sheets²⁴¹ in good time before the consumer is bound by any credit agreement or offer.²⁴² This requirement is to enable the consumer to compare different offers in order to make an informed decision as to whether or not to conclude a credit agreement.²⁴³ A credit provider and/or his intermediary are further required to provide adequate explanations to the consumer at pre-contractual stage about the characteristics of the proposed credit agreement and its inherent potential risks.²⁴⁴

²³⁷ Domurath in Micklitz and Domurath eds (2015) 163. This responsibility implies that the financial education of consumers is a necessity for the consumer to make an informed choice when choosing credit.

²³⁸ Vandone (2009) 112.

²³⁹ See Directive 2008/48/EC recital 24. See also arts 4 and 19 for the provisions concerning the completeness of the information that is to be provided to the consumer at different stages of the contractual process.

²⁴⁰ Directive 2008/48/EC art 8(1). See also Steennot and Van Heerden (2017b) *PER/PELJ* 31.

²⁴¹ The Standard European Consumer Credit Information Sheet and the European Standardised Information Sheet, found in Annex II to the Directive.

²⁴² Directive 2008/48/EC art 5. See also Vandone (2009) 104-105.

²⁴³ Vandone (2009) 105.

²⁴⁴ Directive 2008/48/EC art 5(6).

The consumer ultimately carries the responsibility of deciding whether or not to conclude the credit agreement based on the information provided to him.²⁴⁵ Vandone is of the view that any additional information the credit provider wishes to provide to the consumer should be given in a separate document, which should then be attached to the Standard European Consumer Credit Information Sheet.²⁴⁶

With regard to the second obligation, it is accepted that the aim of the creditworthiness assessment is to save consumers from the danger of over-indebtedness and insolvency and, more precisely, to protect the consumer from the irresponsible granting of credit that is beyond their financial capacity.²⁴⁷ In conducting the mandatory creditworthiness assessment, the credit provider is required to base such an assessment on the information provided by the consumer and, if necessary, by consulting specific databases.²⁴⁸ It is in this regard that information and education are said to play a major role in promoting responsible lending practices as an objective of the 2008/48/EC Directive, by making careful assessments by credit providers possible and by ensuring that consumers understand warnings about the risks attached to default and over-indebtedness.²⁴⁹

The 2008/48/EC Directive, however, does not express the precise criteria or method of that assessment and leaves it to member states to provide further instructions and guidelines to credit providers.²⁵⁰ In this regard it is accepted that the regulatory institutions may issue guidelines on the ways in which assessments should be conducted.²⁵¹ In general terms the guidelines may indicate that when verifying the consumer's prospects of meeting his obligations under the credit agreement, the credit provider

should make reasonable inquiries and take reasonable steps to verify the consumer's underlying income capacity, the consumer's income history and any variability over

²⁴⁵ See Renke LLD Thesis (2012) 44, who makes reference to Van der Herten in Cattaruzza *et al* (2009) 293.

²⁴⁶ Vandone (2009) 105.

²⁴⁷ This principle was affirmed by the European Court of Justice in the case of *LCL Le Crédit Lyonnais SA v Fesih Kalhan* Case C – 565/12 (27 Mar 2014) para 42 and 43.

²⁴⁸ Directive 2008/48/EC art 8(1). See also Vandone (2009) 112.

²⁴⁹ Vandone (2009) 112.

²⁵⁰ Directive 2008/48/EC recital 26. See also Steennot and Van Heerden (2017b) *PER/PELJ* 31-32.

²⁵¹ Paper by the World Bank *Responsible Lending* (2013) 42.

time. In the case of consumers that are self-employed or have seasonal or other irregular income, the creditor should make reasonable inquiries and take reasonable steps to verify information that is related to the consumer's ability to meet his/her obligations under the credit agreement, including profit capacity and third party verification documenting such income.²⁵²

Directive 2008/48/EC also does not contain an obligation to refuse the granting of credit in the case of a negative outcome of the assessment, leaving it to the credit provider to exercise discretion.²⁵³ It further lacks provisions prescribing specific sanctions that have to be applied by member states in the event of a breach of duties relating to responsible lending.²⁵⁴ Notwithstanding the above, the Directive provides direction to member states that they should implement penalties that are effective, proportionate and dissuasive.²⁵⁵

The 2008/48/EC Directive's creditworthiness assessments appear to be focused only on affordability rules, as the Directive does not require credit providers to assess the suitability of the loan for the credit consumer's needs. Therefore it fully maintains the burden of deciding whether or not the loan is suitable with the credit consumer by requiring that the credit consumer should be provided with adequate explanation that enables him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation.²⁵⁶

2.6.3.2 The Directive 2014/17/EU

Directive 2014/17/EU contains provisions equivalent to the 2008/48/EC Directive on the provision of pre-contractual information and the creditworthiness assessments. Specifically, credit providers and/or their intermediaries are required to provide consumers with "personalised information needed to compare the credit available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement". It must be in good time before the consumer is bound by any offer after the consumer has provided information on his needs and financial

²⁵² European Banking Authority Report (2015) 10.

²⁵³ Domurath in Micklitz and Domurath eds (2015) 163. See also Steennot and Van Heerden (2017b) *PER/PELJ* 32.

²⁵⁴ Steennot and Van Heerden (2017b) *PER/PELJ* 37.

²⁵⁵ Directive 2008/48/EC art 23.

²⁵⁶ Directive 2008/48/EC art 5(6).

situation.²⁵⁷ The information must be provided on the Standard European Consumer Credit Information Sheet and the European Standardised Information Sheet found in Annexure II of the Directive.²⁵⁸ Adequate explanation must also be given to the consumer about the inherent characteristics and risks of the proposed credit.²⁵⁹ However, there is no explicit obligation on the credit provider to provide advice to the consumer as regards the suitability of the proposed credit.²⁶⁰

Apart from the provisions dealing with the provision of pre-contractual information to credit consumers,²⁶¹ Directive 2014/17/EU's provisions aim at minimum harmonisation.²⁶² Member states therefore can adopt more stringent measures in their national laws to better protect consumers.²⁶³ As far as the creditworthiness assessments are concerned, this Directive prescribes a strict creditworthiness assessment and verification of the credit consumer's ability and propensity to repay the credit before a credit agreement is concluded.²⁶⁴ This assessment should consider the consumer's regular expenditure, debts and other financial commitments, as well as income, savings and assets.²⁶⁵ The Directive asserts that although the value of the secured property is important in the assessment of the amount that may be granted to the consumer the main focus should be on the ability of the consumer to repay.²⁶⁶

Directive 2014/17/EU contains an explicit prohibition on credit providers from extending credit to the consumer if the outcome of the credit assessment indicates that the consumer is not likely to meet the obligations arising from that credit

²⁵⁷ Directive 2014/17/EU art 14(1)(a)-(b). See also Steennot and Van Heerden (2017b) *PER/PELJ* 34.

²⁵⁸ Directive 2014/17/EU art 14(2). See also Steennot and Van Heerden (2017b) *PER/PELJ* 34.

²⁵⁹ Directive 2008/48/EC art 5(6). See also Steennot and Van Heerden (2017b) *PER/PELJ* 35.

²⁶⁰ Steennot and Van Heerden (2017b) *PER/PELJ* 36.

²⁶¹ Directive 2014/17/EU recital 7.

²⁶² Directive 2014/17/EU art 2(1). See also Steennot and Van Heerden (2017b) *PER/PELJ* 28.

²⁶³ See Steennot (2011) *FLI WP 2011-06* 1. See also Steennot and Van Heerden (2017b) *PER/PELJ* 28.

²⁶⁴ Directive 2014/17/EU recital 55.

²⁶⁵ Directive 2014/17/EU recital 55.

²⁶⁶ Directive 2014/17/EU recital 55 read with art 18(3). Based on this, it is now claimed that the goal of responsible lending comprises the financial stability of the consumer as the creditworthiness assessment not only aims at minimising the risk for the credit provider but also at protecting the consumer from the loss of the property acquired with the credit. See in this regard, Domurath in Micklitz and Domurath eds (2015) 162.

agreement.²⁶⁷ However, it lacks a provision on the legal consequences of the credit provider's failure to deny credit in the case of a negative outcome of the creditworthiness assessment.²⁶⁸

In summary, the concept of "responsible lending" in the European Union appears to be strongly linked to the provision of information to the consumer and the understanding of such information by the consumer.²⁶⁹ As a result the consumer is the primary decision-maker in whether or not he should enter into a credit agreement and remains responsible for his own financial well-being.²⁷⁰ This outcome is because the provisions in the two Directives lean more in the direction of addressing information asymmetries by seeking to redress a balance between the credit provider and the consumer's responsibilities as opposed to a specific general aim of preventing consumer over-indebtedness.²⁷¹

In order to develop the European Union's policy on responsible lending, Domurath proposes a broader conceptualisation of the concepts "responsible lending" and "responsible borrowing" so as to address more causes of over-indebtedness.²⁷² This would mean extending their scope of coverage rather than limiting it to non-rational consumption choices and the inability of consumers to understand financial information as being the main causes of over-indebtedness.²⁷³ She recommends that this goal can be achieved by strengthening the existing framework for the provision and verification of information with sanctions and product regulation. For example, by imposing liability at a European Union level on credit providers for irresponsible lending that infringes the provisions in the Directive rather than leaving to member states the decision to pass their own laws in relation to appropriate penalties and sanctions.²⁷⁴ Credit product regulation would also put into focus the

²⁶⁷ Directive 2014/17/EU art 5(a).

²⁶⁸ Domurath in Micklitz and Domurath eds (2015) 163. See also Steennot and Van Heerden (2017b) *PER/PELJ* 37.

²⁶⁹ See Domurath in Micklitz and Domurath eds (2015) 171.

²⁷⁰ Domurath in Micklitz and Domurath eds (2015) 171.

²⁷¹ Domurath in Micklitz and Domurath eds (2015) 171.

²⁷² Domurath in Micklitz and Domurath eds (2015) 165.

²⁷³ Domurath in Micklitz and Domurath eds (2015) 164.

²⁷⁴ Domurath in Micklitz and Domurath eds (2015) 166.

quality of the credit products offered and allow for review of safety and demand the modification of risky products before placing them on the market.²⁷⁵

2.6.4 South Africa

According to Kelly-Louw,²⁷⁶ the South African financial sector is characterised by a formal financial system which is made up of banks and other financial institutions and an informal financial system which comprises micro lenders, loan sharks such as the *mashonisas*,²⁷⁷ pawnbrokers and stokvels.²⁷⁸ Historically, the formal financial system mainly catered for the credit needs of high to middle income consumers, whereas the informal financial system catered to low-income consumers, the majority of whom were black and historically disadvantaged.²⁷⁹ The credit dispensation was characterised by the over-supply of credit to high and middle income consumers who were deemed creditworthy, whereas the majority of the population had no access to formal provision of credit.²⁸⁰

After 1994 most historically disadvantaged consumers gained access to credit, *albeit* in the informal financial sector where credit was expensive and legal regulation non-existent.²⁸¹ Prior to 2007 consumer credit in South Africa was mainly regulated by the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980.²⁸² These statutes applied to only a small number of credit agreements,²⁸³ and did not impose

²⁷⁵ Domurath in Micklitz and Domurath eds (2015) 167.

²⁷⁶ Kelly-Louw in Niemi, Ramsay, Whitford eds (2009) 177-178.

²⁷⁷ The word "*mashonisa*" is South African vernacular for "sinking", and is used to describe township micro lenders whose lending practices sink consumers into a debt trap so deep that it is hard to fully recover, mainly because of their high interest rates and debt collection procedures – James (2014) *Curr Anthropol* S20.

²⁷⁸ A stokvel refers to a formal or informal voluntary rotating financial scheme with entertainment, social or economic functions, consisting of two or more persons, which relies on self-imposed regulation to protect the interests of its members where a continuous pool of capital is established by raising funds by means of subscriptions from the members, and provides for members to share in profits from the scheme and may provide credit to or on behalf of members – NCA s 1. See also ch 4 below.

²⁷⁹ Kelly-Louw in Niemi, Ramsay, Whitford eds (2009) 177.

²⁸⁰ See Renke LLD Thesis (2012) 407.

²⁸¹ Kelly-Louw in Niemi, Ramsay, Whitford eds (2009) 178.

²⁸² See Otto and Otto (2012) para 2.2.

²⁸³ The Credit Agreements Act 75 of 1980 did not apply to credit agreements in terms of which the cash price exceeded R500000 and the Usury Act 73 of 1968 did not apply to credit agreements in terms of which the principal debt exceeded R500000. See also Otto and Otto (2012) para 3.

an obligation on credit providers to assess consumers' ability to repay the credit before providing them with credit.²⁸⁴

The increased access to credit went hand in hand with aspirational borrowing, leading to reckless lending and over-indebtedness on the part of many consumers.²⁸⁵ This outcome provoked a realisation that the consumer credit market was dysfunctional because of outdated legislation, ineffective consumer protection, excessive soliciting and harassment of consumers being offered credit by various credit providers, the reckless behaviour of credit providers when granting credit and a total disregard of consumers' ability to repay leading to high levels of indebtedness.²⁸⁶ Measures that were in place to prevent over-indebtedness and debt relief measures were not sufficient to assist already over-indebted consumers in dealing with their debt.²⁸⁷ Therefore legislative reform was necessary.

In 2001 the Department of Trade and Industry²⁸⁸ undertook a review of South African credit legislation and investigated problems that were experienced in the credit market. In March 2002 a Technical Committee was set up to undertake the review of consumer credit policy and legislation.²⁸⁹ The Committee had to make proposals for a new regulatory framework for consumer credit. It supervised all the research that was undertaken, as well as expert opinion that was consulted, and drew on reports, such as the 1992 South African Law Commission review of the Usury Act and related matters and the 2002 Credit law review which reported on market research.²⁹⁰

The Committee provided a report in which various credit market weaknesses were identified.²⁹¹ It indicated *inter alia* that there was excessive predatory behaviour in the consumer credit market which led to high levels of debt among certain

²⁸⁴ Van Heerden in Scholtz *ed* (2008) para 11.1.

²⁸⁵ Kelly-Louw in Niemi, Ramsay, Whitford *eds* (2009) 178.

²⁸⁶ Kelly-Louw in Niemi, Ramsay, Whitford *eds* (2009) 179.

²⁸⁷ Kelly-Louw in Niemi, Ramsay, Whitford *eds* (2009) 179.

²⁸⁸ Hereinafter the "DTI".

²⁸⁹ Kelly-Louw in Niemi, Ramsay, Whitford *eds* (2009) 179.

²⁹⁰ Policy Framework (2004) 8. See also Renke LLD Thesis (2012) 404.

²⁹¹ Summary of Findings *Credit Law Review* (Aug 2003).

consumers and unmanageable risk to all credit providers.²⁹² Also, there were inadequate rules on the disclosure of the cost of credit which resulted in the regular inflation of costs above the disclosed interest rate by the inclusion of a variety of fees and charges which undermined the ability of consumers to make an informed choice.²⁹³

The Technical Committee developed an initial policy proposal containing recommendations regarding new legislation and changes to the previous regulatory framework,²⁹⁴ which the DTI developed into a policy framework for consumer credit.²⁹⁵ The policy framework aimed to provide guidance on the regulation of the consumer credit market, and was influenced by consumer protection standards, regulatory approaches and credit law reform in other countries.²⁹⁶ It sought to provide direction in the introduction of a new consumer credit enactment and the establishment of a modern regulatory framework.²⁹⁷

The policy document stated that the credit legislation that was in place did not offer effective protection against over-indebtedness.²⁹⁸ It ascribed over-indebtedness to reckless lending and borrowing and it further stated that reckless credit extension will be curbed by introducing a general requirement that all credit providers should undertake affordability assessment prior to approving credit.²⁹⁹ The monitoring of and ensuring compliance with these measures by means of the imposition of strict penalties for non-compliance was set as a goal,³⁰⁰ and the improvement and integration of the credit information infrastructure as well as an establishment of a National Credit Register were proposed as measures aimed at facilitating such affordability assessments.³⁰¹

²⁹² Summary of Findings *Credit Law Review* (Aug 2003).

²⁹³ Summary of Findings *Credit Law Review* (Aug 2003). See also Kelly-Louw in Niemi, Ramsay, Whitford eds (2009) 180.

²⁹⁴ Summary of Findings *Credit Law Review* (Oct 2003).

²⁹⁵ Policy Framework (2004).

²⁹⁶ Policy Framework (2004) 38-39.

²⁹⁷ Policy Framework (2004) 39.

²⁹⁸ Policy Framework (2004) 30.

²⁹⁹ Policy Framework (2004) 31.

³⁰⁰ Policy Framework (2004) 31.

³⁰¹ Policy Framework (2004) 31.

To provide for the effective protection of consumers and access to redress, it was proposed that a National Credit Regulator and the National Consumer Tribunal be established to ensure compliance by credit providers by enforcing the proposed new credit legislation.³⁰² It was also proposed the National Credit Regulator monitor levels of indebtedness in South Africa on a frequent basis,³⁰³ which would further enable government to institute additional debt prevention measures if necessary.³⁰⁴ This policy framework eventually resulted in the promulgation of the NCA and its regulations which aim to address the problem of reckless credit granting by setting out new parameters for the granting of credit in South Africa with the main objective of preventing over-indebtedness.³⁰⁵

The NCA specifically prohibits credit providers from entering into reckless credit agreements with prospective consumers.³⁰⁶ To avoid entering into reckless credit agreements with consumers the credit provider is required to take reasonable steps to assess the prospective consumer's general understanding and appreciation of the risks and costs of the proposed credit, the rights and obligations of a consumer under a credit agreement, the consumer's credit history and the existing financial means, prospects and obligations of the consumer.³⁰⁷ There is a reciprocal duty on the part of the consumer to fully and truthfully answer any request for information made by the credit provider as part of the assessment required by the NCA to prevent reckless credit from being extended.³⁰⁸ A detailed discussion of the responsible lending regime in South Africa is covered in the comparative survey below.³⁰⁹

2.6.5 Australia

In terms of the Australian Commonwealth's constitution of 1900 the power to enact consumer protection legislation was divided between the Commonwealth and state

³⁰² Policy Framework (2004) 34-35.

³⁰³ Policy Framework (2004) 32.

³⁰⁴ Policy Framework (2004) 32.

³⁰⁵ Renke, Roestoff and Haupt (2007) *Obiter* 229.

³⁰⁶ S 81(3).

³⁰⁷ S 81(2).

³⁰⁸ S 81(1).

³⁰⁹ Ch 4 of this thesis.

and territory parliaments.³¹⁰ Until recently, consumer credit legislation and consumer protection were the primary responsibility of individual states and territories³¹¹ as the Federal parliament had passed no legislation regulating consumer credit. Before 1996 the states and territories regulated consumer credit in their respective jurisdictions independently of each other through the “Office of Trading”.³¹²

On 30 July 1993 the states and territories of Australia signed the Australian Uniform Credit Law Agreement with the object of creating a uniform or template legislation.³¹³ As a result the Uniform Consumer Credit Code³¹⁴ was enacted into commonwealth law on 1 November 1996 in a Schedule to the Consumer Credit (Queensland) Act 1994 (Qld).³¹⁵ Its object was to achieve uniformity throughout Australia through a template legislation arrangement in which each jurisdiction enacted a law by means of which they adopted the text of the UCCC as the law of that specific state or territory.³¹⁶

After 1996 the UCCC was adopted by each state and territory and applied throughout Australia with some modifications in the case of Western Australia and Tasmania.³¹⁷ The UCCC applied to natural persons who are seeking credit “wholly or predominantly for personal, domestic or household purposes”.³¹⁸ Therefore it became the main regulatory instrument for the protection of credit consumers in Australia, though the responsibility for regulating the conditions under which consumer credit is granted was retained by the state and territory governments.³¹⁹

³¹⁰ See s 51 of the Constitution. See also Harland (1979) *Rabel Journal* 633 and Nottage (2009) *QUTLJJ* 114. It is worth noting that Australia has six states, namely New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and two territories, the Australian Capital Territory and the Northern Territory of Australia.

³¹¹ Harland (1979) *Rabel Journal* 632. See also in general, Taperell, Vermeesch, Harland (1974) chs 3-8.

³¹² Niven and Gough (2004) *Consumer Credit Legal Service* 3.

³¹³ Freilich and Webb (2010) *Bus L Today* 2.

³¹⁴ Hereinafter the “UCCC”.

³¹⁵ Freilich and Webb (2010) *Bus L Today* 2.

³¹⁶ Tuffin (2009) *QUTLJJ* 289.

³¹⁷ Tuffin (2009) *QUTLJJ* 289.

³¹⁸ UCCC s 6(1).

³¹⁹ Harland (1979) *Rabel Journal* 631 632.

The UCCC protected credit consumers in relation to consumer credit transactions by means of disclosure regulation.³²⁰ It prescribed disclosure requirements aimed at informing consumers about the terms of a credit contract prior to the conclusion of the credit contract.³²¹ The information to be disclosed related to the amount of credit to be provided, details of the annual interest charge and of any other fee or charge payable.³²² The key principle reinforced in the UCCC was “truth in lending” that was based on the United States’ Truth in Lending Act, 1968.³²³ In particular section 14 of the UCCC required a pre-contractual statement to be provided to the prospective credit consumer before a credit contract was entered into.

The credit contract itself was required to set out prescribed information such as the total cost of credit, annual percentage rates of interest and how they were to be calculated, as well as details of security and insurance if any were taken.³²⁴ The pre-contractual statement had to be presented in a financial-table format, containing detailed information about the proposed credit agreement.³²⁵ A breach of these disclosure requirements set out in the UCCC could result in a maximum penalty of AUS\$500 000.³²⁶ This penalty demonstrates the centrality that was given to disclosure as a regulatory tool by the drafters of the UCCC.

However the UCCC did not adequately prevent levels of debts from rising. Available data indicates that the use of credit in Australia has been on an increase since the 1980s.³²⁷ The use of consumer credit has been both beneficial and manageable for most consumers in Australia, but it has detrimental consequences for some consumers.³²⁸ In 2006-2007 consumers in Australia borrowed over AUS\$200 billion.³²⁹ In 2008 the total amount of debt owed by consumers stood at AUS\$1.1 trillion, indicating a six-fold rise from AUS\$190 billion in 1990.³³⁰ The credit card

³²⁰ Wilson, Howell and Sheehan (2009) *J Consum Policy* 117.

³²¹ Productivity Commission (2008) 446.

³²² Productivity Commission (2008) 446.

³²³ Wilson, Howell and Sheehan (2009) *J Consum Policy* 119.

³²⁴ UCCC s 14 and 15.

³²⁵ UCCC s 15(A-O).

³²⁶ See UCCC s 105.

³²⁷ Productivity Commission (2008) 444.

³²⁸ Productivity Commission (2008) 443.

³²⁹ Productivity Commission (2008) 444.

³³⁰ Ramsay and Sim (2010) *Fed L Rev* 311.

industry also has expanded with a notable increase of 437% in credit limits and 501% in outstanding balances between 1997 and 2009.³³¹ These increased debt levels partly are attributed to the early 1970s financial market deregulation,³³² as well as to the global financial crisis of 2007-2008.³³³ Rates of personal insolvencies among Australians reportedly were on the increase and in 2008 alone a record number of 32 865 personal insolvencies were experienced.³³⁴

Affirming that insolvency is “one of the costs stemming from the extension of credit, and [...] a by-product of extensive borrowing”,³³⁵ these statistics indicate that credit consumers in Australia were experiencing financial distress. Poor lending practices have been cited as the chief contributory factor to consumers experiencing financial difficulty,³³⁶ and raised the question as to whether it might be necessary to reform the credit regulation and consumer borrowing laws.³³⁷

The major policy document on consumer credit in Australia is the report of the Productivity Commission in 2008.³³⁸ This report is the product of the Productivity Commission which had been tasked by the Australian government to undertake an enquiry into Australia’s consumer policy framework and to make recommendations on ways to improve it in order to assist and empower consumers.³³⁹

³³¹ Ramsay and Sim (2010) *Fed L Rev* 311.

³³² Productivity Commission (2008) 444. Before financial deregulation began, financial controls were exercised in Australia to control (1) interest rates that banks charged on deposits; (2) credit products offered by banks and (3) the specific industries prescribed in legislation as qualifying for loans. Over time, these controls became ineffective as new, unregulated intermediaries sprung up in the market to provide credit, with wide interest rates. As a result, many creditworthy prospective consumers could not access credit. The deregulation reforms aimed *inter alia* to allocate credit to areas that were considered priority, such as housing and farming. The deregulation increased competition in the financial market and it became more responsive to the financial needs of the economy. For key aspects on Australia’s financial deregulation, see Battellino (Jul 2007) 1-5, Battellino and McMillan *RBA Research Discussion Paper No 8904* (1989).

³³³ Farrar (2010) *Austl J Corp L* 227.

³³⁴ Ramsay and Sim (2010) *Fed L Rev* 284.

³³⁵ Ramsay and Sim (2010) *Fed L Rev* 310. See also Moss and Johnson (1999) *Am Bankr LJ* 349-350.

³³⁶ Productivity Commission (2008) 443.

³³⁷ Productivity Commission (2008) 443.

³³⁸ The Productivity Commission is an independent body established in terms of the Productivity Commission Act of 1998 and serves as the Australian government’s principal review and advisory body on microeconomic policy and regulation aspects, among others.

³³⁹ Productivity Commission (2008) 9.

In the report the Productivity Commission indicated that credit regulation was deficient in several aspects. Firstly, the UCCC had not produced uniformity in the regulation of consumer credit throughout the Australian Commonwealth because its states and territories could enact legislation complementary to the UCCC.³⁴⁰ This possibility created problems by creating a gap in the coverage of regulatory laws and variation across jurisdictions.³⁴¹ Secondly, problem areas had sprung up which related to the increased use of credit as a result of extending credit to consumers who had little prospect of paying off a loan and resulting in high levels of over-indebtedness.³⁴² This was the consequence of the UCCC not having a specific requirement on the part of credit providers to assess a borrower's ability to repay before granting them credit services, especially in instances where intermediaries were involved in the granting of credit.³⁴³

Consumers were exposed to irresponsible lending practices and the responsibility for poor lending decisions could be avoided by credit providers by hiding behind the actions of brokers.³⁴⁴ Brokers are treated in law as agents of credit providers and thus would not be held responsible for their conduct.³⁴⁵ Further, the range of credit products and services kept expanding rapidly in the market with new and modified products being offered by credit providers.³⁴⁶ These market developments were not covered by consumer credit laws, rendering consumer credit regulation deficient in those respects and hampering consumer protection.³⁴⁷

The only notable measure under the UCCC that related to the assessment of the suitability of the credit contract, hence protecting consumers from over-indebtedness, was the unjust contract rule.³⁴⁸ This rule provided a credit consumer with an opportunity to request a court to re-open a transaction that gave rise to a

³⁴⁰ Shay (1968) *Law & Contemp Probs* 752.

³⁴¹ Productivity Commission (2008).

³⁴² Productivity Commission (2008) 456. See also the NCCPA Explanatory Memorandum paras 82-83 and Tuffin (2009) *QUTLJJ* 281.

³⁴³ Productivity Commission (2008) 456.

³⁴⁴ See, e.g., Cox *Legal Information Access Center* (2010) 2.

³⁴⁵ Tuffin (2009) *QUTLJJ* 287. See also *Custom Credit Corporation Ltd v Lynch* [1993] 2 VR 469, *Esanda Finance Corp Ltd v Spence Financial Group (Pty) Ltd* [2006] WASC 177 and *Perpetual Trustees Victoria Ltd v Ford* (2008) 70 NSWLR 611.

³⁴⁶ Productivity Commission (2008) 448.

³⁴⁷ Productivity Commission (2008) 448.

³⁴⁸ UCCC s 70.

credit contract, mortgage or guarantee that was “unjust”. A credit agreement was considered to be “unjust” if *inter alia* it was unconscionable, harsh or oppressive.³⁴⁹

In deciding whether or not to re-open a transaction, the court was expected to have regard to the public interest and the factors listed in section 70(2) of the UCCC. Included in its decision was an inquiry as to whether or not at the time of concluding or changing the terms of a credit contract, consumer credit lease, mortgage or guarantee, the credit provider knew or could have ascertained by reasonable inquiry of the debtor at the time that the debtor could not repay in accordance with the terms of the contract without undue hardship.³⁵⁰

Some authors are of the view that section 70 essentially required the credit provider to assess the capacity of the credit consumer to repay before granting credit.³⁵¹ However, it appears the legislature did not intend to impose that obligation on credit providers but rather only intended the UCCC to deal with credit providers who consciously provided credit without making proper inquiries into the consumer’s ability to pay as opposed to those who made a conscious decision based on the best information available.³⁵² It meant that in instances where the consumer made a choice to assume the risk of non-payment, the court would not re-open the transaction because it would not be deemed “unjust”.³⁵³

To protect consumers from some of the debt-related problems indicated above, the Productivity Commission recommended that the regulation of consumer credit should provide national, consistent protection to credit consumers and those seeking advice on consumer credit.³⁵⁴ On 26 March and 3 July 2008 the Council of Australian Governments³⁵⁵ entered into agreements to transfer the responsibility for the

³⁴⁹ UCCC s 70(7).

³⁵⁰ UCCC s 70(2)(1).

³⁵¹ See, e.g., Tuffin (2009) *QUTLJJ* 289 and Wilson, Howell and Sheehan (2009) *J Consum Policy* 117.

³⁵² See the Legislative Assembly Queensland Parliamentary Debates 8832 (4 Aug 1994) initiated by Burns, the then Deputy Premier Minister for Emergency Services and Minister for Rural Communities and Consumer Affairs. See also Tuffin (2009) *QUTLJJ* 289-290.

³⁵³ Tuffin (2009) *QUTLJJ* 290.

³⁵⁴ Productivity Commission (2008) 443.

³⁵⁵ Hereafter CoAG.

regulation of consumer credit and a related cluster of additional financial services to the Commonwealth through the introduction of responsible lending principles.³⁵⁶

They also agreed to a two-phase implementation plan. The first phase of the implementation plan intended to focus entirely on the introduction of credit regulation to the Commonwealth through responsible lending provisions, whereas phase two made provision for instances where additional reform was needed to address specific issues relating to consumer credit.³⁵⁷ As part of the first phase the National Consumer Credit Protection Bill³⁵⁸ was introduced into Parliament on 25 June 2009.³⁵⁹ Phase two of the plan resulted in the Consumer Credit Legislation Amendment (Enhancement) Bill 2012, which proposed *inter alia* to replace interest rate caps and introduce national price regulation for consumer credit.³⁶⁰

Another product of the CoAG's efforts is the intergovernmental agreement on Australian consumer law which was concluded on 2 October 2008 with regard to a new national consumer policy framework to enhance consumer protection and encourage the development of a seamless national economy.³⁶¹ In terms of this agreement the legislative elements of national consumer policy will be implemented by way of an Australian consumer law to be enacted by the Commonwealth and will be applied through state and territory legislation.³⁶²

To give effect to the 2008 CoAG agreements and as a response to the market failures associated with irresponsible lending the Commonwealth government initiated a movement to develop consumer credit laws to promote responsible lending. In 2009 the National Consumer Credit Protection Act³⁶³ was passed into

³⁵⁶ CoAG *Intergovernmental Agreement for the Australian Consumer Law* (2009). This agreement was a result of the recommendation by the Productivity Commission (2008) 107.

³⁵⁷ CoAG *Intergovernmental Agreement for the Australian Consumer Law* (2009). See also Productivity Commission (2008) 107.

³⁵⁸ Hereinafter the "NCCP Bill".

³⁵⁹ Tuffin (2009) *QUTLJJ* 300.

³⁶⁰ Ali, McRae and Ramsay (2013) *Mon LR* 412.

³⁶¹ CoAG *Intergovernmental Agreement for the Australian Consumer Law* (2009) recital A.

³⁶² CoAG *Intergovernmental Agreement for the Australian Consumer Law* (2009) recital F read with Cl 3.

³⁶³ No 134 of 2009 (Cth), hereinafter the "NCCPA". The NCCPA became operational since 1 July 2010. See also para 5.1 below.

law. The first schedule to the NCCPA contains the National Credit Code,³⁶⁴ which replaced the UCCC although it largely replicates its content.³⁶⁵

The NCCPA has embraced the understanding that a failure to assess the capacity of a consumer to repay within the credit terms can contribute to financial distress and aggravate problems of over-indebtedness.³⁶⁶ Chapter 3 introduces the principle of responsible lending in the Australian credit market based on two key aspects: assessing the appropriateness of the proposed credit to the prospective consumer's needs and the consumer's ability to service and repay the credit.³⁶⁷ The main objective is to prevent irresponsible lending and to provide redress for consumers who fall prey to such lending.³⁶⁸

The responsible lending obligations provided for in the NCCPA are imposed on credit providers and they relate to the process of seeking to enter into a credit contract or to increase the principal loan amount in a credit contract.³⁶⁹ This requirement mainly is to ensure that only suitable credit contracts are extended to creditworthy consumers who are able to perform with ease as per the terms of the proposed credit contract.³⁷⁰ In the assessment of the creditworthiness of the prospective consumer it is essential that credit providers provide consumers with adequate pre-agreement information relating to the terms of the credit product.³⁷¹ A detailed discussion of the responsible lending regime in Australia is covered in the comparative investigation below.³⁷²

2.7 Conclusion

It was stated above³⁷³ that the use of credit in Namibia is on the increase and the rapidly-growing micro-lending industry in Namibia poses a threat to many low-income consumers who do not qualify for credit from formal financial institutions. If

³⁶⁴ Hereinafter the "NCC".

³⁶⁵ See para 5.1 below.

³⁶⁶ Pearson and Batten (2010) 9. See also para 5.1 below.

³⁶⁷ Tuffin (2009) *QUTLJJ* 282.

³⁶⁸ Tuffin (2009) *QUTLJJ* 282.

³⁶⁹ Cvjetanovic (2014) *ALSA Acad J* 145.

³⁷⁰ NCCPA s 111. See also Cvjetanovic (2014) *ALSA Acad J* 145.

³⁷¹ Cvjetanovic (2014) *ALSA Acad J* 145.

³⁷² See ch 5 of this thesis.

³⁷³ Para 1.1.

the threat of over-indebtedness is taken into account, the continued growth in consumer credit calls for a more concerted effort to promote the culture of responsible lending in the Namibian credit market. In this chapter a survey of the philosophies and worldwide emerging trends on responsible lending policy was undertaken. In order to grasp the necessary understanding of the market imperatives and regulatory aspects the theoretical perspectives on responsible lending have been considered.³⁷⁴

In summary, consumer credit regulatory policy has evolved on from a traditional model of regulation based on consumer sovereignty motivation in which credit consumers are treated as adults who are fully capable of managing their own financial affairs and therefore it was not perceived to be necessary to restrict their freedom in order to protect the few who encountered difficulties.³⁷⁵ This model relies on the rational choice theory which assumes that human beings are rational decision makers and therefore if credit consumers are provided with accurate information about the credit goods and services offered by credit providers, then they are able to exercise their competitive choices effectively.³⁷⁶

Information economics later emerged that emphasised the necessity of disclosure regulation to arm consumers with the tools they need to make competitive choices. Behavioural economics demonstrated that consumers do not always make rational decisions about borrowing regardless of the information provided them,³⁷⁷ which facilitated a move to a new development in consumer credit policy that perceives credit as a potentially dangerous product for consumers.³⁷⁸ To protect consumers from harm, social consumer credit models were reformed to include terms controls, such as interest rate ceilings, capping of default rates and prohibitions on irresponsible lending.³⁷⁹ It is submitted that responsible lending policy involves all regulatory measures tasking credit providers with the responsibility to ensure that

³⁷⁴ Para 2.2.

³⁷⁵ Para 2.2.

³⁷⁶ See para 2.2.

³⁷⁷ Para 2.2.

³⁷⁸ Para 2.2.

³⁷⁹ See para 2.2.

they provide credit only to consumers who are able to repay it and who understand the ramifications of making such commitments.

Following on the discussion of the theoretical perspectives underlying responsible lending policy, the criticisms levelled against responsible lending were considered,³⁸⁰ in order to determine whether the primary goals of responsible lending policy and the methods of implementing it are warranted. This consideration was followed by a discussion of the activities of international organisations in promoting responsible lending policy.³⁸¹ Notable in this respect are the G20 high-level principles on financial consumer protection,³⁸² the OECD recommendations report on how effectively to deal with the G20 high-level principles on consumer protection³⁸³ and the World Bank's paper on good practices for consumer protection.³⁸⁴ As it reflects international practice, the World Bank paper on responsible lending may be used as a benchmark to determine the appropriate approach for the improvement of consumer credit policy.³⁸⁵

After a discussion of the contributions by international bodies to responsible lending policy, a discussion of the responsible lending policies in the United States, the European Union, South Africa and Australia was presented.³⁸⁶ The aim, first, was to understand the credit issues that the regulators were seeking to address by introducing responsible lending measures and, second, to extract current trends and guidelines in devising a modern responsible lending regime. A common feature in the justifications for the introduction of responsible lending measures is an understanding, as a result of the experience of the global financial crisis, that there exists a link between irresponsible lending practices and financial instability and that responsible lending is an essential component of a stable financial system.³⁸⁷

³⁸⁰ Para 2.3.

³⁸¹ Para 2.4.

³⁸² Para 2.4.2.

³⁸³ Para 2.4.3.

³⁸⁴ Para 2.4.4.

³⁸⁵ See para 2.4.4.

³⁸⁶ Para 2.5.

³⁸⁷ See para 2.5. See also *FinCoNet Report* (2014) 8.

The expansion of credit markets and the liberalisation of access to credit have resulted in a dramatic increase in consumer over-indebtedness.³⁸⁸ It is stated above that the global financial crisis raised several issues regarding the scope and effectiveness of regulation of financial markets for the protection of consumers.³⁸⁹ As discussed above³⁹⁰ a number of jurisdictions have reviewed their consumer credit regulation policies by endorsing responsible lending to protect consumers through adopting a range of regulatory tools that specifically have an influence in the determination of the consumer's eligibility to enter into a credit contract and the process of decision-making by both parties to the credit agreement.³⁹¹ These reform projects have resulted in several reports and recommendations which provide the leading principles that should be considered in devising a modern and effective responsible lending regime.

The leading international best principles underlying the emerging trends and guidelines on responsible lending formulated from the preceding discussions of this chapter are:

Principle 1: Consumer Protection

A leading consideration that should feature in every responsible lending regime rests upon the idea that the responsible lending rules should be aimed at achieving consumer protection in the credit market.³⁹² Consumers ought to be protected against irresponsible lending practices and the threat of over-indebtedness.³⁹³ In terms of this principle it is accepted that consumer protection in the credit market is achieved if credit providers are responsible for upholding it *inter alia* by conducting assessments of consumer's financial capabilities prior to providing credit.³⁹⁴

³⁸⁸ Ferretti in Ferretti *ed* (2016) 2.

³⁸⁹ Para 2.6.1. See also Ferretti in Ferretti *ed* (2016) 1-2 and Ramsay (2012) *EuCML* 30.

³⁹⁰ Para 2.6.

³⁹¹ FinCoNet Report (2014) 19.

³⁹² See para 2.4 for a discussion of the G20 *High-level principles* (2011), G20/OECD *Taskforce on Financial Consumer Protection Report* (2013), World Bank *Good Practices* (2012) and the paper by the World Bank *Responsible Lending* (2013) and their contributions to the emerging trends in responsible lending policy.

³⁹³ See para 2.4.2 for the G20 principles for innovative financial inclusion and the G20 high-level principles on financial consumer protection both of which underscore the protection of consumers from irresponsible business conduct by all kinds of all financial providers.

³⁹⁴ See, e.g., the G20 high-level principles on financial consumer protection – para 2.4.2. See also the OECD recommendations on implementing the G20 high level principles – para 2.4.3.

It is good practice to set criteria on responsible lending rules in order to achieve the effective protection of consumers against repayment hardship and the ensuing over-indebtedness.³⁹⁵ This practice implies determining the exact responsibility that the credit provider should meet in the interest of protecting consumers against over-indebtedness, for instance, the World Bank's good practices dictate that before an offer of credit is made to the prospective consumer the credit provider should ensure that the proposed credit is in line with the consumer's needs and that the prospective consumer's creditworthiness should be assessed.³⁹⁶ It is asserted that policy considerations aimed at making credit available to consumers, at the same time, should ensure that credit is to be offered and used responsibly.³⁹⁷

Principle 2: The Obligation to Conduct Pre-Agreement Assessments

Linked to Principle 1 identified above is the principle that consumer credit legislation should impose an obligation on the part of the credit provider to conduct pre-agreement assessments of the prospective consumer aimed at determining whether or not the latter will be able to repay the credit for which the consumer applied.³⁹⁸ In general terms, responsible lending practices mandate an assessment of two aspects, namely creditworthiness and affordability.³⁹⁹

In principle, responsible lending practices are not limited to the pre-agreement assessments but also include a strong intervention with regard to the conclusion of

³⁹⁵ See the OECD recommendations on implementing the G20 high level principles – para 2.4.3.

³⁹⁶ World Bank *Good Practices* (2012) – para 2.4.4.

³⁹⁷ World Bank *Good Practices* (2012) – para 2.4.4. See the World Bank's consumer protection areas which should be present in every responsible lending regime to achieve effective consumer protection – para 2.4.4 above and Wilson's idea of a proactive responsible lending regime aimed at protecting consumers from irresponsible lending – para 2.5. See also the policy considerations preceding the passing of Dodd-Frank which tightened lending standards in the United States' mortgage market by introducing the duty to conduct affordability assessments on mortgage loan consumers – para 2.6.2, the development of the European Union Directives aimed at tackling the problems of consumer over-indebtedness to protect consumers from becoming victims of "disproportionate commitments that they are unable to meet" – para 2.6.3, the policy considerations underlying the promulgation of the South African NCA and the Australian NCCPA, where in both situations the credit legislation in place was said not to provide effective protection of consumers from over-indebtedness and the end result were proposals that irresponsible lending practices would be curbed by the introduction of pre-agreement assessments in consumer credit legislation to protect consumers – paras 2.6.4 and 2.6.5 respectively.

³⁹⁸ Ferretti and Livada in Ferretti *ed* (2016) 5.

³⁹⁹ See para 1.1.

the credit agreement which is focused on the responsible credit provider.⁴⁰⁰ This focus entails that after the requisite assessments have been conducted the credit provider should still decide whether or not to grant credit based on the outcome of the assessments. This approach presupposes that a credit consumer is vulnerable and in need of increased protection.⁴⁰¹

Since the exact scope of the pre-agreement assessments differs from jurisdiction to jurisdiction, the procedure for conducting the assessments also varies from regime to regime as adopted by a specific jurisdiction.⁴⁰² The United States' Dodd-Frank, for instance, requires "a reasonable and good faith determination" of whether or not "the consumer has a reasonable ability to repay the loan".⁴⁰³ This determination must be based on verified and documented information and must take into account the proposed terms of the credit agreement, the consumer's current income, a consumer's expected income or assets, the consumer's current obligations, employment status and the consumer's credit history.⁴⁰⁴

The European Union in the 2008/48/EC Directive mandates credit providers to conduct creditworthiness assessments of prospective consumers before providing the latter with credit by relying on information provided by the consumer and by consulting specific databases.⁴⁰⁵ However this Directive does not provide any precise criteria for the prescribed assessments.⁴⁰⁶ In the 2014/17/EU Directive credit providers are further required to conduct pre-agreement assessments and verifications of the consumers' ability and propensity to repay the credit based on the consumers' income, savings or assets, the consumers' regular expenses as well as the consumers' debt and other commitments.⁴⁰⁷ This Directive also proscribes the

⁴⁰⁰ Ferretti and Livada in Ferretti *ed* (2016) 6.

⁴⁰¹ Ferretti and Livada in Ferretti *ed* (2016) 6 and Porras and Van Boom in Devenney and Kenny *eds* (2012) 21-55.

⁴⁰² See, e.g., the discussion of the responsible lending policies in para 2.6.

⁴⁰³ See the discussion of responsible policy in the United States – para 2.6.2.

⁴⁰⁴ See para 2.6.2.

⁴⁰⁵ See Directive 2008/48/EC art 8(1) – para 2.6.3.1.

⁴⁰⁶ See the discussion of responsible policy in the European Union – para 2.6.3.

⁴⁰⁷ See Directive 2014/17/EU recital 55 – para 2.6.3.2.

extension of credit to a consumer whose pre-agreement assessment outcome indicates that the consumer is unable to repay the credit.⁴⁰⁸

The South African NCA requires an assessment of the consumer's ability to repay the proposed credit and the assessment of the consumer's general understanding and appreciation of the risks and costs of the proposed credit and the consumer's rights and obligations under a proposed credit agreement. These factors are to be assessed with reference to the consumer's existing means, prospects and obligations and with regard to the consumer's credit history.⁴⁰⁹ Lastly, Australia's NCCPA at a minimum requires an assessment of the consumer's capacity to repay the credit and the suitability of the proposed credit to the prospective consumer's needs.⁴¹⁰ However the NCCPA does not contain a stipulation on the kind of information on which the required assessments should be based.⁴¹¹

Noting that the pre-agreement assessments methodology differs from regime to regime, it appears that the assessment of the consumer's ability to repay before a credit agreement is concluded should be based on a credible, standard methodology, such as loan-to-value or debt-to-income, and includes considering the consumer's income and expenses by assessing existing credit commitments and leaving sufficient flexibility to deal with unexpected cost.⁴¹²

It should be affirmed that these assessments, however, should not be too restrictive and should make it possible even for low income consumers to fully repay their loans.⁴¹³ This goal can be achieved through appropriate, individual and flexible credit assessment processes and structured repayments and credit terms which are affordable, therefore ensuring that consumers can repay the loan without suffering

⁴⁰⁸ Para 2.6.3.2.

⁴⁰⁹ NCA s 81 – para 2.6.4.

⁴¹⁰ See NCCPA s 128 – para 2.6.5.

⁴¹¹ See para 2.6.5.

⁴¹² Consumers International Report (2013) 8.

⁴¹³ Wilson in Wilson *ed* (2013) 131 – para 2.5.

substantial hardship.⁴¹⁴ There is a general view that consumers are more greatly protected and made more responsible by such a regime.⁴¹⁵

Historically, responsible lending obligations focussed only on prudentially regulated financial institutions such as banks.⁴¹⁶ However recent developments indicate that to ensure optimum protection for consumers by preventing regulatory arbitrage the responsible lending obligations are best imposed on all credit providers and credit intermediaries who provide consumer credit products and services.⁴¹⁷ This development supports the idea that there is a need appropriately to complement progress toward widespread financial inclusion with balances that ensure a responsible provision of financial services and products.⁴¹⁸ Limiting pre-agreement assessments to one industry of the credit market, for instance a focus on mortgage credit only as currently is the case in the United States, therefore is not desirable or encouraged.⁴¹⁹

Principle 3: The Obligation to Provide Pre-Agreement Information

To facilitate proper decision-making the third principle formulated relates to the obligation imposed on credit providers to provide consumers with the relevant information necessary to help the consumer make an informed choice. The World Bank affirms that the protection of consumers against irresponsible credit is best achieved by ensuring that credit providers provide adequate pre-agreement information and by equipping the consumer with the ability to use the information provided.⁴²⁰ A responsible lending regime should oblige credit providers to provide information that is clear, sufficient, reliable, comparable and timely to enable the consumer to compare different products and make an informed decision.⁴²¹

⁴¹⁴ Wilson in Wilson *ed* (2013) 129 – para 2.5.

⁴¹⁵ Wilson in Wilson *ed* (2013) 129 – para 2.5. See also Van Heerden and Renke (2015) *IIR* 67.

⁴¹⁶ FinCoNet *Report* (2014) 9.

⁴¹⁷ FinCoNet *Report* (2014) 9. See also Wilson in Wilson *ed* (2013) 129 – para 2.5.

⁴¹⁸ FinCoNet *Report* (2014) 8.

⁴¹⁹ See Wilson in Wilson *ed* (2013) 129 – para 2.5.

⁴²⁰ See World Bank *Good Practices* (2012) – para 2.4.4.

⁴²¹ Consumers International *Report* (2013) 10. See also Directive 2008/48/EC recital 24 – para 2.6.3.1.

Credit providers may use standardised key information documents with comparable information on interest rates, such as monthly and annualised percentage rates, to ensure that consumers understand the credit costs and the risks attached to over-indebtedness should they take up more credit than they can afford to repay.⁴²² To ensure that the consumers receive complete and relevant information that enables consumers to shop around and compare offers, the European Union's Directives, for instance, impose an obligation on credit providers to provide standardised pre-agreement information to the consumers before concluding a credit agreement.⁴²³ There is no uniform practice on whether or not the duty to disclose pre-agreement information entails a duty to explain the information provided, but it is good practice for credit providers to provide adequate explanations to consumers.⁴²⁴ They should be given examples to demonstrate how charges and interest rates vary over the duration of the contract.⁴²⁵

Overall, the pre-agreement information that should be disclosed to consumers includes information relating to the terms of the proposed credit and the total cost of credit.⁴²⁶ The United States' Dodd-Frank requires disclosure of all fees and charges levied in connection with the provision of the mortgage loan, including charges for the settlement of the credit, commissions to be paid to the credit provider's agents and the total amount of interest payable over the life of a loan.⁴²⁷

Principle 4: Effective Credit Regulator to Enforce Responsible Lending Obligations

It is noted that the key to a successful responsible lending regime is the existence of a regulatory body tasked with the responsibility of monitoring and enforcing the rules.⁴²⁸ This principle is informed by an understanding that regulatory arbitrage may

⁴²² Consumers International Report (2013) 11.

⁴²³ See Directive 2008/48/EC recital 24 and Directive 2014/17/EU art 14 – paras 2.6.3.1 and 2.6.3.2.

⁴²⁴ See Directive 2008/48/EC art 5(6) which requires credit providers to explain the terms of the proposed credit and the risks associated with it – para 2.6.3.1.

⁴²⁵ Consumers International Report (2013) 11.

⁴²⁶ See, e.g., para 2.6.5 with regard to Australia.

⁴²⁷ See Dodd-Frank s 1419 – para 2.6.2.

⁴²⁸ See the Paper by the World Bank *Responsible Lending* (2013) 15 and Wilson in Wilson *ed* (2013) 128 – paras 2.4.4 and 2.5. See also the World Bank's guidelines for an effective responsible lending regime which includes the need for proper institutional arrangements to implement responsible lending rules – para 2.4.4.

arise which makes responsible lending rules harder to implement if no regulator is tasked with the responsibility of consumer credit regulation.⁴²⁹ It is common practice that credit providers are required to be licensed to ease the regulatory process,⁴³⁰ and to make it easier to hold credit providers accountable to their statutory obligations, including conducting the required pre-agreement assessments.⁴³¹

Principle 5: Effective Penalties for Non-Compliance with Responsible Lending Obligations

A proactive and effective responsible lending regime should prescribe sanctions which are effective in deterring credit providers from contravening their responsible lending obligations.⁴³² The credit regulators should be empowered to pursue actions intended to impose prescribed penalties or other appropriate remedies for the benefit of the consumer as a result of the credit provider's failure to comply with their responsible lending obligations.⁴³³ Consumers may also be entitled to defend proceedings based on a credit agreement on grounds of non-compliance with responsible lending obligations.⁴³⁴

Overall, the leading international best principles which should be considered in devising a modern and effective responsible lending regime can be summarised as follows:

- (a) Consumer credit policy should be aimed at achieving consumer protection.
- (b) There should be a rule that imposes an obligation on credit providers to assess the creditworthiness of the prospective consumer.

⁴²⁹ Paper by the World Bank *Responsible Lending* (2013) 14 – para 2.4.4.

⁴³⁰ As will be seen in chs 4 and 5 below.

⁴³¹ See in general Consumers International Report (2013) 8.

⁴³² See, e.g., the World Bank's guidelines on having a regulatory approach with effective redress mechanisms – para 2.4.4.

⁴³³ See, e.g., the powers of the United States' Consumer Financial Protection Bureau established in terms of Dodd-Frank – para 2.6.2. See also the guidance provided by the European Union's Directive 2008/48/EC in art 5(6) for member states to pass penalties which are "effective, appropriate and dissuasive" – para 2.6.3.

⁴³⁴ See the discussion of the remedies provided under the United States' responsible lending regime – para 2.6.2.

- (c) Consumers must be provided with sufficient, reliable, comparable and timely pre-agreement information.
- (d) Credit providers must be regulated by an effective regulator.
- (e) The responsible lending regime should prescribe sanctions for non-compliance with the responsible lending obligations.

These principles are considered in the following chapters in which I argue that they are pivotal for the development of Namibia's new consumer credit regulatory framework.

CHAPTER 3

CONSUMER CREDIT REGULATION IN NAMIBIA

3.1 Introduction

The Namibian economy has recorded a satisfactory and sustained growth since 1990 after Namibia gained political independence from South Africa,¹ However the economy is estimated to have slowed in 2016.² In 2004, Namibia adopted Vision 2030, a document that spells out the country's developmental programmes and its strategies to achieve national objectives.³ The primary objective of Vision 2030 is to improve the quality of life of the Namibian people and raise it to levels found in the developed world.⁴ Vision 2030 *inter alia* sets out various financial sector objectives with a view to achieving a more efficient, competitive and resilient financial system that is vital to secure the prospects of sustainable economic growth and development.⁵ In order to realise the financial objectives spelt out in Vision 2030, the Ministry of Finance launched the Namibian financial sector strategy in 2011 as a guide to the development of the Namibian financial sector and the achievement of the financial-sector objectives as set out in the various National Development Plans as well as Vision 2030.⁶

The Namibian Financial Sector Strategy emphasises the importance of an effectively functioning financial system to the country's general economic growth.⁷ However, it noted that although the financial system is sound and well-functioning there are a number of structural weaknesses that must be addressed for the financial sector to contribute meaningfully to the overall performance of the national economy.⁸ The weaknesses identified *inter alia* include inadequate and less effective regulation of

¹ BoN *Economic Outlook Update* (Feb 2017) 2. See also IMF *Namibia Article IV Consultation* (2016) 4 and IMF *Namibia: Selected Issues* (2015) 2.

² BoN *Monetary Policy Statement* (Feb 2017) 2.

³ *Vision 2030 Policy Framework* (2004).

⁴ *Vision 2030 Policy Framework* (2004) 9. See also the Preamble to the Namibian Constitution which reflects the aspirations of the Namibian people.

⁵ *Vision 2030 Policy Framework* (2004) 41.

⁶ See the Namibian Financial Sector Strategy Document (2011) 5. See also Brouwers, Chongo, Millinga and Fraser *Microfinance Regulatory and Policy Assessment Report* (2014) 37.

⁷ Namibian Financial Sector Strategy Document (2011) 5.

⁸ Namibian Financial Sector Strategy Document (2011) 5.

the financial sector, limited access to financial services, low financial literacy and a lack of consumer protection.⁹ The Namibian Financial Sector Strategy seeks to obviate the identified weaknesses and ensure a dynamic, effective, competitive and resilient financial system with best practices that will fully contribute to sustained economic growth and the achievement of the socio-economic objectives of poverty reduction and wealth creation.¹⁰ To ensure a solution that offers consumer protection the Namibian Financial Sector Strategy promises that

[m]arket conduct principles and oversight will be developed and benchmarked to international best practices to ensure consumer protection ... This is necessitated by the inherent information imbalance between financial service providers and consumers. Once in place, they will not only preserve confidence in the financial system but also encourage responsible dealings on the side of financial service providers. Consumers on the other hand are expected to play their part by making use of available information to choose wisely. Such market conduct codes and standards shall therefore aim to ensure transparency (such that customers know what they are getting into), fair treatment of customers and effective recourse for customer complaints.¹¹

However, since the launch of the Namibian Financial Sector Strategy, not much has been done in the area of consumer credit to address the weaknesses relating to the regulation of the credit market. A review of Namibia's consumer credit regulatory framework therefore is necessary in order to examine the existing responsible lending measures in Namibia against the international best principles in protecting consumers from irresponsible credit provision and consumer over-indebtedness. This review is the main aim of this chapter.

In the light of the above, I provide an overview of the Namibian financial system and, in particular, a review of the Namibian mainstream credit and micro-lending industry in paragraph 3.2. Paragraph 3.3 I consider the consumer credit legislative framework and the responsible lending measures it encompasses. This consideration is followed by an evaluation of the Namibian consumer credit regulatory framework in light of the leading international best principles which were formulated in chapter 2. Paragraph 3.4 I consider the non-binding standards encompassed in the Banking

⁹ Namibian Financial Sector Strategy Document (2011) 5.

¹⁰ Namibian Financial Sector Strategy Document (2011) 5.

¹¹ Namibian Financial Sector Strategy Document (2011) 27.

Code. Thereafter, I consider the current proposals for legal reforms in Namibia in paragraph 3.5 and I conclude the chapter in paragraph 3.6.

3.2 An Overview of the Namibian Financial System

3.2.1 General

Namibia is classified by the International Monetary Fund among those African countries that have a sophisticated and highly-developed financial system.¹² Its financial system consists of financial markets, banking and non-banking financial institutions.¹³ The banking sector in Namibia comprises eleven banking institutions, which can be categorised as follows: five commercial banks,¹⁴ a small and medium enterprise bank (in liquidation), two micro-finance banking institutions,¹⁵ a branch of Banco Atlantico¹⁶ and the ABSA Representative Office.¹⁷ These banking institutions are the main source in Namibia of financing for mortgage loans, vehicle financing, personal loans, overdrafts and credit card facilities.¹⁸ The non-banking financial sector comprises insurance companies, pension funds, a stock exchange, asset management and unit trust management companies, several specialised lending institutions, hire purchase outlets and micro-finance institutions.¹⁹

The financial system in Namibia is regulated by the Bank of Namibia and the Namibia Financial Institutions Supervisory Authority.²⁰ The Bank of Namibia is the

¹² IMF *Namibia: Selected Issues* (2015) 2. See also IMF *Namibia Financial System Stability Assessment* (2007) 13.

¹³ BoN *Financial Stability Report* (May 2016) v. The Bank of Namibia issues Financial Stability Reports annually covering events of the preceding year, to inform members of the public of the soundness of the financial system, the risks and vulnerabilities it may be facing and what the regulators are doing to mitigate the identified risks.

¹⁴ The commercial banks are: First National Bank Namibia Ltd, Bank Windhoek Ltd, Standard Bank Namibia Ltd, Nedbank Namibia Ltd, E-Bank Limited and Bank BIC Namibia Limited.

¹⁵ Namely, Trustco Bank Namibia Ltd and Letshego Bank Namibia Ltd.

¹⁶ Banco Atlantico is a foreign banking institution authorised to conduct banking business under the laws of Portugal and Angola.

¹⁷ See BoN *Banking System in Namibia* (Mar 2017).

¹⁸ See BoN *Banking System in Namibia* (Mar 2017).

¹⁹ IMF *Namibia Financial System Stability Assessment* (2007) 13. See also LRDC *Consumer Protection Discussion Document* (2014) 61.

²⁰ Hereinafter "NAMFISA". Although these regulatory bodies are responsible for the regulation of different financial institutions, to facilitate a consolidated supervision of the financial sector, the Bank of Namibia and NAMFISA make use of the United States' initiated Consolidated Supervision Framework for Large Financial Institutions and have also signed a Memorandum of Understanding to permit the exchange of supervisory information between them. – NAMFISA *Annual Report* (2016) 82. See also BoN *Financial Stability Report* (May 2016) v.

central bank established in terms of section 2 of the Bank of Namibia Act 8 of 1990.²¹ It is tasked with the responsibility *inter alia* of promoting and maintaining a sound monetary, credit and financial system in Namibia and of sustaining the liquidity, solvency and functioning of that system.²² The Bank of Namibia exercises prudential supervision over commercial banks.²³ NAMFISA, on the other hand, is a supervisory body established in terms of section 2 of the Namibia Financial Institutions Supervisory Authority Act 3 of 2001.²⁴ It has the mandate to supervise the business of non-banking financial institutions and to provide advice on related matters to the Minister of Finance.²⁵ NAMFISA is funded by the levies, registration and penalty fees charged to the financial institutions under its purview.²⁶

3.2.2 The Consumer Credit Market

At the core of any financial system there are credit products. The Namibian consumer credit market features credit products such as mortgage loans, car finance, instalment sales, leasing agreements, credit cards, overdrafts, other loans and advances, as well as microloans.²⁷ There is no measure of consumer debt in Namibia currently available, in that the Bank of Namibia uses a measure derived from the total credit provided by formal financial institutions as a proxy for debt.²⁸ Based on this measure, mortgage loans are said to be the main lending instrument of banking institutions in Namibia,²⁹ with residential mortgages dominating commercial mortgages as they account for over 52.6 percent of the total loans and advances of banking institutions.³⁰ Several reports also indicate that mortgage loans

²¹ This Act has been amended by the Bank of Namibia Act 15 of 1997. The Bank of Namibia Act 15 of 1997 s 2(1) provides for the continuation of the Bank of Namibia as the central bank notwithstanding the repeal of the establishing Act.

²² Bank of Namibia Act 15 of 1997 s 3(a). S 3 of this Act provides for the objects of the Bank and the relevant provision states that the Bank has the responsibility to foster monetary, credit and financial conditions conducive to the orderly, balanced and sustained economic development of Namibia.

²³ See the Banking Institutions Act 2 of 1998 s 3(1) read with s 27(1).

²⁴ Hereinafter "NAMFISA Act".

²⁵ NAMFISA Act s 3(a)-(b).

²⁶ NAMFISA *Annual Report* (2016) 167.

²⁷ See BoN *Financial Stability Report* (Apr 2017) 17. See also para 3.2.1 above.

²⁸ BoN *Financial Stability Report* (Mar 2014) 40.

²⁹ BoN *Annual Report* (2013) 26.

³⁰ BoN *Annual Report* (2013) 26. See also IMF *Namibia Article IV Consultation Report* (2016) 14 and in general, IMF *Namibia Selected Issues* (2015).

are the leading cause of credit growth in Namibia and the consequent elevation in consumer indebtedness.³¹

Concerns in relation to the continuously high exposure of consumers to mortgage lending led to the passing of regulations on 26 September 2016 in the form of loan-to-value ratios for non-primary residential properties.³² It is expected that the loan-to-value ratios will “promote responsible borrowing while giving preferential access to housing for first-time buyers in Namibia”.³³ The regulation does not require any upfront deposit by the buyer for the purchase of his or her first residential property, whereas for a second residential property the loan-to-value ratio is set at 80 percent of the purchase price or market value of the property, whichever is lower.³⁴ For instance, if the value of the second property to be acquired by the consumer through mortgage financing is N\$1 000 000.00, the bank may provide a loan of up to N\$800 000.00 and the consumer will be required to pay at least 20 percent of the purchase price upfront, that is, N\$200 000.00.³⁵ The minimum deposit becomes 30 percent on a third house, 40 percent on a fourth house and 50 percent on a fifth and subsequent houses acquired.³⁶

Notably, another main contributor to high levels of consumer debt is the micro-lending industry.³⁷ Although there are no available statistics on the number of over-indebted consumers, it has been reported that consumer indebtedness reached about 90 percent of disposable income in 2015, higher than in South Africa and close to the level of advanced economies.³⁸ The micro-lending industry provides credit mostly to low-income consumers for consumption and not for business

³¹ See, e.g. IMF *Namibia Article IV Consultation Report* (2016) 4.

³² Reg 2(1) in GN 229 in GG 6130 (20 Sep 2016). These regulations came into effect in Mar 2017.

³³ BoN *Financial Stability Report* (Apr 2017) 3.

³⁴ See the annexure to GN 229 in GG 6130 (20 Sep 2016). See also the BoN *Financial Stability Report* (Apr 2017) 36.

³⁵ See the BoN *Financial Stability Report* (Apr 2017) 36.

³⁶ See the BoN *Financial Stability Report* (Apr 2017) 36.

³⁷ See in general, the NAMFISA *Annual Report* (2010) and the LRDC *Consumer Protection Discussion Document* (2014).

³⁸ This figure stood at 81 percent in 2013 – see in this regard, IMF *Namibia Article IV Consultation Report* (2016) 5. Although currently there is no available information on individual consumers' income sources and indebtedness, this report indicates that stress-tests on estimated households' balance sheets suggest that middle and upper-middle income consumers are particularly vulnerable to both income and interest rate shocks.

purposes.³⁹ This industry is regulated by NAMFISA, a responsibility it carries out in terms of the Inspection of Financial Institutions Act 38 of 1984,⁴⁰ the Usury Act 73 of 1968 and its Exemption Notices.⁴¹

Any person wishing to conduct a business which includes the provision of microloans may register with NAMFISA as a micro-lender before commencing to operate the business.⁴² A micro-lender is defined as any person who grants a loan to a consumer in terms of a money lending transaction.⁴³ It appears that the registration with NAMFISA is optional as there is no obligation to register if the provider of microloans wishes to comply with the usury limits imposed by the Usury Act.⁴⁴ Therefore it follows that there are members of the micro-lending sector who are not regulated. In the event that they charge rates over the usury limits, their consumers are left with no avenue to complain because NAMFISA has no authority over them.⁴⁵

There are two standard microcredit products offered in the micro-lending industry, namely payday loans where the repayment period ranges from one to three months and term loans where the repayment period is longer than three months.⁴⁶ A typical size of a microloan from a term lender amounts to N\$15 766 whereas that taken from a payday lender averages N\$1 130 per loan.⁴⁷ Payday lenders expect their consumers to make repayments in cash, whereas term lenders usually deduct the payment in instalments from their consumers' salaries or bank accounts.⁴⁸

³⁹ LRDC *Consumer Protection Discussion Document* (2014) 71.

⁴⁰ This Act basically empowers the Registrar NAMFISA or his instructed inspectors to inspect the affairs of financial institutions.

⁴¹ GN 189 and 196 in GG 3266 (25 Aug 2004). The Exemption Notices allow micro-lenders registered with NAMFISA to charge interest rates and fees over the prescribed usury limit – Brouwers, Chongo, Millinga and Fraser *Microfinance Regulatory and Policy Assessment Report* (2014) 38. See in this regard para 3.3.2.2 below.

⁴² CI 3(1) GN 189 in GG 3266 (25 Aug 2004). See also para 3.3.2.2 below.

⁴³ CI 1 GN 189 in GG 3266 (25 Aug 2004).

⁴⁴ Brouwers, Chongo, Millinga and Fraser *Microfinance Regulatory and Policy Assessment Report* (2014) 39.

⁴⁵ Brouwers, Chongo, Millinga and Fraser *Microfinance Regulatory and Policy Assessment Report* (2014) 39.

⁴⁶ Brouwers, Chongo, Millinga and Fraser *Microfinance Regulatory and Policy Assessment Report* (2014) 36. See also *Feasibility Concise Report on Fees and Charges* (2010) 8.

⁴⁷ NAMFISA *Annual Report* (2016) 105. See also LRDC *Consumer Protection Discussion Document* (2014) 71.

⁴⁸ *Feasibility Concise Report on Fees and Charges* (2010) 8.

In the past some payday lenders retained consumers' bank cards and personal identification numbers so that they can withdraw the money every month directly from the consumer's account as a way of securing the repayment of the loan.⁴⁹ However, NAMFISA issued regulations in 2004 that prohibit the keeping of bank cards and personal identification numbers by micro-lenders.⁵⁰ Despite the regulations, evidence indicates that micro-lenders continue to engage in this conduct and no enforcement action has been taken by NAMFISA.⁵¹ Instead, in 2011 NAMFISA merely issued a circular calling upon the micro-lenders to abide by the regulations and notified the micro-lenders that it would ensure strict compliance with the provisions of the law.⁵²

There is no longer a need for the micro-lenders to persist in the practice of retaining a consumer's bank cards as they can subscribe to service providers such as RealPay and PayMed. RealPay and PayMed are payment solutions in terms of which micro-lenders can debit the consumer's banking account.⁵³ Nonetheless, there still are micro-lending outfits that retain consumers' bank cards to collect repayment.⁵⁴ One suspects that the reasons for this continued practice is because of the involved subscription fees payable to the service providers for the use of the aforementioned payment solutions.

The micro-lending industry is reported to be growing at an average rate of about 25% annually.⁵⁵ In 2012, credit extension by micro-lenders rose by 6.9 percent to N\$1.586 billion.⁵⁶ In 2013, a supply of close to N\$2.262 billion was noted,

⁴⁹ LRDC *Consumer Protection Discussion Document* (2014) 71.

⁵⁰ CI 11(a) GN 189 in GG 3266 (25 Aug 2004). See also para 3.3.3 below.

⁵¹ LRDC *Consumer Protection Discussion Document* (2014) 71. NAMFISA not taking action can be attributed to the lack of technical enforcement powers on the part of NAMFISA, and it must be granted such powers by the Ministry of Finance – LRDC *Consumer Protection Discussion Document* (2014) 71.

⁵² NAMFISA *Compliance Circular* (22 Dec 2011). See also the LRDC *Consumer Protection Discussion Document* (2014) 71.

⁵³ The RealPay payment system initially worked only with First National Bank clients, but recently has been rolled out to retrieve payments from other banking institutions' accounts as well.

⁵⁴ Brouwers, Chongo, Millinga and Fraser *Microfinance Regulatory and Policy Assessment Report* (2014) 36.

⁵⁵ NAMFISA *Annual Report* (2014) 86 and LRDC *Consumer Protection Discussion Document* (2014) 71.

⁵⁶ NAMFISA *Annual Report* (2016) 104.

representing a growth of 37.5 percent on 2012.⁵⁷ This figure increased to N\$2.259 billion in 2014.⁵⁸ As at 31 December 2015 there were 280 registered micro-lenders.⁵⁹ The value of loans disbursed in 2015 in comparison to 2014 increased and stood at N\$2.621 billion.⁶⁰ This increase is attributed to the large amount of credit extended by term lenders, whose total value of loans disbursed in 2015 amounted to N\$1.9 billion, accounting for 72.2% of the total value of loans disbursed.⁶¹ Payday loans constituted the remaining 27.8%, and amounted to N\$0.721 billion.⁶² Statistics for the outstanding loans stood at N\$4.3 billion as at 31 December 2015,⁶³ indicating that there is a wide gap between the value of loans disbursed and the outstanding loan values.

Apart from the growth in microloans, the micro-lending industry has also been the cause of many concerns in the consumer credit market.⁶⁴ It is noted that consumers who make use of microloans often fall victim to exorbitant interest rates charged by unscrupulous micro-lenders above the prescribed rates in the Usury Act.⁶⁵ As a result, micro-lending creates a perpetual debt trap in which consumers continue to go back to the micro-lenders to borrow more, often just to pay interest without substantial payment of the principal debt amount.⁶⁶ In 2010, for example, NAMFISA reported that inspections of the micro-lending institutions showed a significant amount of “reckless lending”, where

⁵⁷ NAMFISA *Annual Report* (2014) 86. See also the NAMFISA *Annual Report* (2016) 104.

⁵⁸ NAMFISA *Annual Report* (2016) 104.

⁵⁹ NAMFISA *Annual Report* (2016) 16. According to the NAMFISA 2nd *Quarterly Report* (2016), there were about 301 registered micro-lenders in 2016. However, at the end of Dec 2016 18 micro-lenders had been deregistered, reducing the number to 283.

⁶⁰ NAMFISA *Annual Report* (2016) 103.

⁶¹ NAMFISA *Annual Report* (2016) 103.

⁶² NAMFISA *Annual Report* (2016) 103.

⁶³ NAMFISA *Annual Report* (2016) 105.

⁶⁴ See, e.g. the NAMFISA *Annual Report* (2010) and the LRDC *Consumer Protection Discussion Document* (2014) 71.

⁶⁵ LRDC *Consumer Protection Discussion Document* (2014) 71. See also para 3.3.2.4. For payday loans, where the repayment period ranges from one to three months, there is an accepted standard that micro-lenders may charge between 25% and 30% interest on these loans – Brouwers, Chongo, Millinga and Fraser *Microfinance Regulatory and Policy Assessment in SADC* (2014) 46. This means that if the repayment period of the loan is three months, then that loan is not supposed to attract a monthly interest of 30%, but only a once-off rate of 30% over the loan period. However, some micro-lenders charge more than the stipulated maximum 30% interest, for example by charging 45% interest on the loan amount, justifying the figure as a breakdown of 15% interest per month, thus disguising their conduct to fall within the prescribed rate.

⁶⁶ LRDC *Consumer Protection Discussion Document* (2014) 72.

- (a) consumers were allowed to borrow more than half their take-home salary in payday loans;
- (b) consumers could qualify for subsequent loans without having paid off a previous loan; and
- (c) there was a continued practice of rolling over loans which allows the consumer the option to renew a loan on the date when it is due without actually paying the loan.⁶⁷

It is worth mentioning at this point that most micro-lenders do not conduct creditworthiness assessments before granting loans to consumers.⁶⁸ However, there are computerised loan administration systems, such as Proloan and Delfin,⁶⁹ which micro-lenders may rely on to perform a credit score prior to granting a loan. At registration NAMFISA also requires that all micro-lenders are registered users of CompuScan.⁷⁰ Notwithstanding the outcome of the credit scores obtained after using the abovementioned systems, the micro-lender has the prerogative to decide on whether or not to provide the consumer with the microloan after considering the risk of non-repayment.

⁶⁷ NAMFISA *Annual Report* (2010) 54. See also Microcapital Brief *Microfinance Institutions in Namibia* (Dec 2010).

⁶⁸ LRDC *Consumer Protection Discussion Document* (2014) 71.

⁶⁹ These are loan management systems used to automate, manage and simplify the loan management process.

⁷⁰ CompuScan is a credit bureau registered in terms of the Credit Bureau Regulations of 2014, whose operations include the sharing of credit information of consumers amongst the credit providers, which includes microloan information, previous enquiries, identification information, judgment information and administration orders. The subscription to the CompuScan database comes with the following products: Proloan – which is a loan management system to automate, manage and simplify the loan management process; Xcelerator – which is an automated application processing system; CompuWatch – which provides credit check subscribers with a tool to monitor consumers' movements in the credit industry and the Marshal Score which provides a scorecard for the microfinance sector. The Marshal Score categorises consumers either as high risk or low risk consumers – See CompuScan *Operational Countries* (2013).

3.3 The Namibian Consumer Credit Legislative Framework

3.3.1 General

Consumer credit in Namibia mainly is regulated by the Usury Act 73 of 1968,⁷¹ the Credit Agreements Act 75 of 1980⁷² and the Sale of Land on Instalments Act 72 of 1971.⁷³ These three statutes are originally South African law which were made applicable to South West Africa.⁷⁴ South West Africa was the name for Namibia when it was a German colony from 1884 and later a South African mandated territory.⁷⁵ After 1920 South West Africa was declared a League of Nations Class C Mandate territory⁷⁶ under the Peace Treaty of Versailles,⁷⁷ and the Union of South Africa responsible for the administration of South West Africa.⁷⁸

The Union of South Africa endorsed its administration legally over South West Africa territory by passing the Treaty of Peace and South West Africa Mandate Act 49 of 1919.⁷⁹ This Act granted the Governor-General of South Africa both legislative and executive powers,⁸⁰ at the same time the Administration of Justice Proclamation 21 of 1919 introduced Roman-Dutch law into South West Africa.⁸¹ The Governor-General subsequently delegated administrative powers over the territory to the Administrator-General of South West Africa in terms of section 2(c) of the Treaty of Peace and South West Africa Mandate Act 49 of 1919.⁸² During the years 1977 to

⁷¹ Hereinafter the "Usury Act".

⁷² Hereinafter the "Credit Agreements Act".

⁷³ Hereinafter the "Sale of Land Act".

⁷⁴ See paras 3.3.2.1, 3.3.3.1 and 3.3.4.1 below.

⁷⁵ Germany had had a difficult time administering its colony with many uprisings among the local population, in 1915 at the beginning of the First World War, South Africa acting on behalf of the British Imperial Government captured the German colony – Amoo and Skeffers in Horn and Bösl *eds* (2009) 17. See also Legal Assistance Centre (2010) 1-2.

⁷⁶ A Class C Mandate is a territory which was considered to be "best administered under the laws of the Mandatory as integral portions of its territory" – art 22 of the Covenant of the League of Nations. See also the preamble to the Treaty of Peace and South West Africa Mandate Act 49 of 1919.

⁷⁷ Signed on 28 June 1919.

⁷⁸ Amoo and Skeffers in Horn and Bösl *eds* (2009) 17. See also Legal Assistance Centre (2010) 1 and the Treaty of Peace and South West Africa Mandate Act 49 of 1919 read with GN 72 (6 Jun 1921).

⁷⁹ Mapaure, Ndeunyema, Masake, Weyulu and Shaparara (2014) 3.

⁸⁰ See s 1 read with s 2(a)-(b) of the Treaty of Peace and South West Africa Mandate Act 49 of 1919. See also Mapaure, Ndeunyema, Masake, Weyulu and Shaparara (2014) 3 and Legal Assistance Centre (2010) 2.

⁸¹ This Proclamation provides that Roman-Dutch law as applied in the Cape of Good Hope as at 1 Jan 1920 is also applicable in South West Africa – Mapaure, Ndeunyema, Masake, Weyulu and Shaparara (2014) 3. See also Legal Assistance Centre (2010) 1.

⁸² See SA Proclamation 1 (Union Gazette Extraordinary) (2 Jan 1921).

1980 the administration of some South African statutes was transferred from the South African government departments to the Administrator-General of South West Africa, by way of “Transfer Proclamations” promulgated by the Administrator-General.⁸³

South West Africa became known as Namibia when the United Nations’ General Assembly changed its name in 1968.⁸⁴ However it was not until 21 March 1990 that the South West Africa territory became the independent Republic of Namibia. With the advent of the Namibian Constitution in 1990, which is the supreme law of the land,⁸⁵ all laws in force immediately prior to independence were retained to prevent the creation of a legal vacuum.⁸⁶ Accordingly, by virtue of Article 140 of the Constitution all consumer credit legislation that applied to the then South West Africa remained unchanged. This situation raises a question as to whether pre-independence laws adequately address the challenges consumers face today.

3.3.2 The Usury Act

3.3.2.1 General

The Usury Act came into operation in South Africa on 1 April 1969.⁸⁷ Its application was extended with effect from 23 October 1974 to South West Africa by the Usury Amendment Act 62 of 1974 through the insertion of the following two definitions: “Republic” includes the territory and “territory” which means the territory of South West Africa.⁸⁸ The administration of the Usury Act was not transferred to the Administrator-General of South West Africa. This means that the South African

⁸³ Legal Assistance Centre (2010) 5.

⁸⁴ See the UN Resolution 2372 (XXII) (12 Jun 1968).

⁸⁵ Art 1(6) of the Namibian Constitution.

⁸⁶ Art 140(1) of the Namibian Constitution provides that “[s]ubject to the provisions of this Constitution, all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court”. See also Amoo and Skeffers in Horn and Bösl *eds* (2009) 18.

⁸⁷ For an overview on the historical development of consumer credit regulation in South Africa, see Renke LLD Thesis (2012) ch 6.

⁸⁸ S 1. S 19(1) also provides that “[t]he provisions of this Act and any amendment thereof shall apply also in the territory of South West Africa, including the area known as the Eastern Caprivi Zipfel and referred to in section 3(3) of the South West Africa Affairs Amendment Act 55 of 1951, and also in relation to all persons in that portion of the territory known as the ‘Rehoboth Gebiet’ and defined in the First Schedule to Proclamation No. 28 of 1923, of the Administration of the said territory”. See also Legal Assistance Centre (2010) 182.

amendments to the Usury Act up to the Usury Amendment Act 91 of 1989 apply in Namibia and all South African Notices and Regulations promulgated under the Act, which applied to Namibia on 21 March 1990, the date of independence, apply in Namibia subject to Namibian amendments to the Act thereafter.

3.3.2.2 The Scope of Application

The Usury Act provides for the limitation and disclosure of finance charges levied on loan and credit transactions.⁸⁹ It applies to credit transactions, leasing transactions and money lending transactions, unless exempted from the application of the Act.⁹⁰ In terms of the Usury Act a credit transaction refers to a transaction by which:

- (a) movable property is sold or supplied or services are sold or supplied on credit against payment of a sum of money; or
- (b) the use and enjoyment of movable property or services are transferred or granted on credit against payment of a sum of money.⁹¹

The Usury Act further defines a leasing transaction as a transaction by which a lessor leases movable property to a lessee and the amount which is owing or will be owed in connection with the transaction is payable or will be payable after the date of the conclusion of the transaction.⁹² A money lending transaction, on the other hand, is defined as a transaction which is substantially one of money lending and includes:⁹³

⁸⁹ The Usury Act's long title. Regulations on the maximum annual finance charge rates are announced in government notices from time to time. See, e.g. GN 97 in GG 455 (15 Aug 1992), GN 39 in GG 617 (1 Apr 1993), GN 27 in GG 807 (2 Mar 1994), GN 47 in GG 1037 (1 Mar 1995), GN 97 in GG 1090 (1 Jun 1997), GN 154 in GG 1151 (15 Sep 1995), GN 126 in GG 1590 (1 Jul 1997), GN 6 in GG 2259 (15 Jan 2000), GN 136 in GG 2782 (6 Aug 2002) and GN 196 in GG 3266 (25 Aug 2004). Certain exemptions relating to microloan transactions are also set forth in the government notice and published in the GG. See in this regard GN 34 in GG 2267 (2 Feb 2000), which is replaced by GN 136 in GG 2782 (6 Aug 2002), replaced in turn by GN 189 in GG 3266 (25 Aug 2004).

⁹⁰ S 2(1). See also Otto Commentary (1991) para 10.

⁹¹ S 1.

⁹² S 1.

⁹³ S 1.

- (a) an agreement in terms of which goods are sold under a condition of repurchase at a higher price, in which case the lower price is deemed the sum of money lent;
- (b) an agreement in terms of which goods are purchased, services are rendered or cash is obtained by a credit card, in which case the price of the goods or such services or the cash obtained is deemed the sum of money lent;
- (c) an agreement in terms of which immovable property is sold against payment of a sum of money in future, in which case such sum, excluding finance charges, is deemed the sum of money lent;
- (d) any transaction in terms of which a sum of money owing for alterations or improvements to immovable property is to be paid by the credit consumer in future, in which case such sum of money is deemed the sum of money lent.

The Usury Act does not apply to:

- (a) a money lending transaction, credit transaction or leasing transaction in terms of which the principal debt on the date of the transaction exceeds N\$500 000;⁹⁴
- (b) a sum of money deposited with a bank or building society;⁹⁵
- (c) a leasing transaction expiring within three months, which is not renewed on expiry and in respect of which the principal debt and finance charges are payable before or on the date of expiry of the lease;⁹⁶
- (d) debentures quoted on a stock exchange in Namibia;⁹⁷

⁹⁴ S 15(g) read with reg 5 of R943 (5 May 1988).

⁹⁵ S 15(f).

⁹⁶ S 15(h).

⁹⁷ S 15(i).

- (e) leasing transactions in terms of which the cash price or market value of the goods, less any deposit and less the present value of the book value⁹⁸ of the goods, exceeds N\$100 000 and the lessee waives the protection of the Usury Act;⁹⁹
- (f) leasing transactions according to which the lessee is entitled to terminate the lease by giving written notice of 90 days or less, without being held responsible for the payment of any increased or additional lease payments of any amount as compensation resulting from such termination;
- (g) credit and leasing transactions in terms of which movable property representing assets of a business is sold or leased with all the assets of the business as a going concern;
- (h) leasing transactions in terms of which:
 - (i) the lease payments are wholly or partially deductible from the income of the lessee for income tax purposes;
 - (ii) the ownership of the leased goods shall not pass to the lessee at any time during or after the expiry of the lease period or after termination of the transaction; and
 - (iii) the lessee is not liable for or guarantees any amount in respect of the value of the leased goods at any time during or after the expiry of the lease period or after termination of the transaction; and
- (i) money lending transactions that qualify as microloan transactions.

⁹⁸ S 1 defines the “present value of the book value” as the amount that has to be invested on the date of commencement of a leasing transaction for the duration of the transaction at the annual finance charge rate stipulated in the contract to equal the book value of the leased property on the date of expiry of the transaction. The “book value” of movable property leased in terms of a leasing transaction means the money value thereof at expiry of the lease, as determined by the lessor at the conclusion of the contract.

⁹⁹ This transaction and those below form part of the Ministerial exemptions granted in terms of s 15A.

Microloan transactions are exempted from the general application of the Usury Act,¹⁰⁰ save for sections 2, 13, 14 and 17 thereof, on condition that:

- (a) the credit provider is registered as a microlender with the Registrar; and
- (b) the credit provider complies at all times with the Exemption Notice.¹⁰¹

In the event of non-compliance with the determined conditions, a microloan transaction will be subject to the Usury Act.¹⁰² A microloan transaction is defined as a money lending transaction in respect of which the loan amount:¹⁰³

- (a) does not exceed N\$50 000;
- (b) together with the finance charges¹⁰⁴ which is owing must be paid within a period of 60 months from the date on which it was advanced to the consumer; and
- (c) is not paid in terms of a credit card scheme or withdrawn from a cheque account with a bank so as to leave that cheque account with a debit balance.

3.3.2.3 Debt Prevention Measures in terms of the Usury Act

The Usury Act does not impose any obligation on credit providers to conduct creditworthiness assessments of consumers before extending credit to them.¹⁰⁵ However, it contains provisions that can be described as primary debt prevention measures by restricting the total cost of credit to consumers.¹⁰⁶ These provisions provide for a limitation on and disclosure of finance charges.¹⁰⁷ To realise this

¹⁰⁰ CI 2 GN 189 in GG 3266 (25 Aug 2004).

¹⁰¹ CI 2(a)-(b) GN 189 in GG 3266 (25 Aug 2004).

¹⁰² CI 6(2) GN 189 in GG 3266 (25 Aug 2004).

¹⁰³ CI 1 GN 189 in GG 3266 (25 Aug 2004).

¹⁰⁴ See para 3 3 2 3 below for the definition of finance charges.

¹⁰⁵ See also Renke LLD Thesis (2012) 345.

¹⁰⁶ See para 1.3 above.

¹⁰⁷ See the Usury Act long title. "Finance charge" as a concept denotes interest although it encompasses more than interest. In theory, it includes all charges that a credit provider makes when a loan is extended or credit granted, such as administrative fees and charges to obtain a credit report – Grové and Otto (2002) 66.

objective, the Usury Act contains measures placing a ceiling on the finance charges that a credit provider can levy on the principal debt in respect of a specific credit agreement and imposing financial charges control.¹⁰⁸ A discussion of these measures follows.

3.3.2.3.1 Finance Charges on the Principal Debt

As mentioned above,¹⁰⁹ the Usury Act limits the finance charges that a credit provider can levy on the principal debt in respect of a specific credit agreement. The concept “principal debt” with regard to the transactions to which the Usury Act applies is defined extensively in the Act. The principal debt of a money lending transaction comprises the cash amount in money that is actually received by or on behalf of the consumer in terms of the transaction plus certain other claims authorised by the Usury Act.¹¹⁰ In respect of credit transactions the principal debt is the selling price of movable goods or services or the amount charged by the creditor for the use or enjoyment of movable property or services which could also constitute a credit transaction, plus certain statutory authorised claims in terms of the Usury Act, less the deposit paid or payable.¹¹¹

For leasing transactions the principal debt consists of the cash price at which the movable property leased is normally sold by the lessor on the date on which the transaction was entered into or, if the lessor was not a trader normally selling any such movable property, the market value of such property, minus the deposit and the present value of the book value,¹¹² plus certain statutory authorised claims in terms of the Usury Act.¹¹³

The statutory authorised claims referred to above automatically form part of the principal debt of the specific money-lending and credit or leasing transaction if the consumer authorises the expenditure in writing in terms of the credit agreement

¹⁰⁸ See s 2(1).

¹⁰⁹ Para 3.3.2.3.

¹¹⁰ S 1.

¹¹¹ S 1. The statutory authorised claims are discussed below.

¹¹² See para 3.3.2.2 above for the definition of the present value of the book value and the book value of movable property.

¹¹³ S 1. The statutory authorised claims are discussed below.

between himself and the credit provider and if the credit provider indeed incurs the specific expenditure.¹¹⁴ Stamp duties however are exempt as no written authority is necessary.¹¹⁵ In summary, the expenditures forming part of the principal debt of each transaction comprise:¹¹⁶

- (a) costs of the preparation, execution and registration of a bond as security for the transaction;
- (b) taxes, other fiscal charges and licence fees payable in connection with the transaction;
- (c) insurance premiums payable to an insurer in respect of an insurance policy to insure the goods against various risks;
- (d) premiums in respect of a life policy which is ceded to the credit provider by the credit consumer as security;
- (e) stamp and transfer duties; and
- (f) attorney's costs for preparation of the documentation.

In essence, the definition of principal debt in the Usury Act implies any credit granted or amount received by the credit consumer plus every amount incurred by the credit provider as a result of entering into that specific agreement.¹¹⁷ The amounts forming part of the principal debt are fixed and the finance charges are calculated on the fixed amount of the principal debt.¹¹⁸

The Usury Act defines "finance charges" as the total of any valuable consideration which a credit consumer has given or is owing to a credit provider in terms of a credit

¹¹⁴ Renke LLD Thesis (2012) 348.

¹¹⁵ Renke LLD Thesis (2012) 348.

¹¹⁶ S 1. See also Renke LLD Thesis (2012) 348.

¹¹⁷ Renke LLD Thesis (2012) 349.

¹¹⁸ Renke LLD Thesis (2012) 349.

agreement.¹¹⁹ Where goods are sold under a condition of repurchase of such goods at a higher price, the difference between the higher price at which the goods are repurchased and the lower price at which the goods are sold constitutes the finance charges.¹²⁰ Finance charges therefore comprise any compensation or benefit received by the credit provider as a counter-performance for the granting of credit.¹²¹ The following costs or amounts do not qualify as finance charges:¹²²

- (a) a ledger fee;
- (b) any amount referred to in section 5(1)(b);¹²³
- (c) the costs referred to in section 5(1)(e) or (f);¹²⁴
- (d) the costs of repair and maintenance of the movable property leased in terms of a leasing transaction;
- (e) any valuable consideration specifically included in the principal debt by this Act;
- (f) any underwriting fee; and
- (g) any amount or costs referred to in section 5A(1)(a) or (c).¹²⁵

In addition to the principal debt and finance charges, the Usury Act authorises the recovery of certain amounts from the consumer as described in section 5(1) and 5A(1). Renke describes these amounts as the “maximum amount recoverable” from a consumer¹²⁶ because of the stipulation in section 5(2). Section 5(2) stipulates that no credit provider in any court proceedings shall obtain judgment against a consumer in respect of any loss, damage or expense alleged to have been incurred

¹¹⁹ S 1.

¹²⁰ S 1.

¹²¹ Grové and Otto (2002) 66. See also Renke LLD Thesis (2012) 350.

¹²² S 1.

¹²³ See the discussion of these amounts below.

¹²⁴ See the discussion of these amounts below.

¹²⁵ See the discussion of these amounts below.

¹²⁶ Renke LLD Thesis (2012) 346.

in connection with a transaction, for any sum not included in the amount recoverable in respect of that transaction under section 5(1). It must be affirmed that the purpose of section 5 is to limit the amount which is payable by the debtor by prescribing the maximum amount that a credit provider may recover from a consumer.¹²⁷ The amounts recoverable in terms of section 5(1) and 5A(1) are:

- (a) in the case of a money lending transaction where a bond is registered over immovable property, certain defined expenses authorised by the consumer which the moneylender incurred after the conclusion of the agreement in respect of the maintenance and repair of and renewal premiums on a fire insurance policy over the said immovable property;¹²⁸
- (b) additional finance charges on the principal debt calculated in the manner prescribed by section 4 of the Usury Act,¹²⁹ and if applicable, in terms of section 2A(1)(a) and on the amount referred to in paragraph (a) at an annual finance charge rate.¹³⁰
- (c) legal costs awarded in terms of a judgment obtained for the payment of the principal debt or finance charges owing thereon by the credit consumer.¹³¹
- (d) legal costs actually incurred by the credit provider after instituting legal proceedings for the payment of the principal debt or of finance charges owing thereon, where payment of such principal debt or finance charges is made by the credit consumer without judgment being obtained by virtue of such proceedings;¹³²
- (e) reasonable ledger fees;¹³³

¹²⁷ Grové and Otto (2002) 81.

¹²⁸ S 5(1)(b).

¹²⁹ S 5(1)(d).

¹³⁰ S 5(1)(c).

¹³¹ S 5(1)(e).

¹³² S 5(1)(f).

¹³³ S 5(1)(g). Grové and Otto (2002) 82 define ledger fees as “transaction fees”.

- (f) reasonable underwriting fees;¹³⁴
- (g) the cost of repair and maintenance of movable property leased in terms of a leasing transaction;¹³⁵
- (h) raising fees where the credit consumer is contractually obliged to pay the credit broker for his services;¹³⁶
- (i) certain administration fees recoverable in terms of a housing loan;¹³⁷ and
- (j) certain disbursements by mortgagees under a mortgage on immovable property.¹³⁸

At this point it must be mentioned that the amounts that form part of the principal debt are fixed and the finance charges are calculated on the amount of the principal debt.¹³⁹ This measure which limits the amounts that can be claimed as part of the principal debt and prescribes what constitutes finance charges prevents credit providers from increasing the cost of credit by loading the principal debt with various fees, and, consequently, protects consumers.

3.3.2.3.2 The Prescribed Interest Rate Ceilings

In order to restrict the total cost of credit the Usury Act also provides for interest rate ceilings to be imposed under the Act. A credit provider is prohibited, in connection with any money lending transaction, credit transaction and/or leasing transaction, to make stipulation for, demand or receive finance charges at an annual finance charge rate greater than the percentage stipulated in the Government Gazette in respect of such transaction.¹⁴⁰ The schedule to the Government Notice 196 of 2004 provides that the annual finance charge rate may not be greater than 1.6 times the average

¹³⁴ S 5(1)(h).

¹³⁵ S 5(1)(i)

¹³⁶ S 5(1)(j).

¹³⁷ S 5(1)(k).

¹³⁸ S 5A(1).

¹³⁹ Renke LLD Thesis (2012) 349.

¹⁴⁰ See ss 2(1)(a), 2(2)(a) and 2(3)(a). See also GN 196 in GG 3266 (25 Aug 2004).

prime rate in respect of a money lending transaction (other than a microloan transaction), any credit transaction and any leasing transaction.¹⁴¹ For a microloan transaction, the annual finance charge rate may not be greater than twice the average prime rate.¹⁴² This stipulation means that finance charges are restricted to a percentage of the principal debt per year and therefore are calculated on the principal debt.

The Usury Act further provides for the compulsory disclosure of finance charges prior to the conclusion of any money lending, credit or leasing transaction in every instrument of debt¹⁴³ executed in terms of that transaction.¹⁴⁴ The disclosure requirements should be construed as prohibiting any credit provider from charging a finance charge at a rate higher than the annual finance charge rate disclosed in the instrument of debt.¹⁴⁵ In respect of any money lending transaction, for example, the following amounts should be disclosed:¹⁴⁶

- (a) the cash amount in money actually received by or on behalf of the consumer or which will be received by or on behalf of the consumer or prospective consumer;
- (b) all other charges, shown separately, forming part or which will form part of the principal debt;
- (c) the principal debt, that is, the sum of the amounts referred to in paragraphs (a) and (b) above;

¹⁴¹ See cl 1 of the sch to GN 196 in GG 3266 (25 Aug 2004).

¹⁴² The prime rate presently is 10.5 percent, therefore the maximum interest a micro-lender is allowed to charge for any term loan is 21 percent per annum or 1.75 percent per month. However, for the payday loans, NAMFISA has set a requirement that micro-lenders may not charge over 30% of interest on the loan amount – see Brouwers, Chongo, Millinga and Fraser *Microfinance Regulatory and Policy Assessment in SADC* (2014) 46.

¹⁴³ An “instrument of debt” is defined to include “a negotiable instrument, bond, written contract or agreement or other document containing the terms and conditions of any contract or agreement in connection with a money lending transaction or a credit transaction or a leasing transaction, but does not include any covering bond in so far as it purports to convey security for future advances” – s 1.

¹⁴⁴ S 3(1).

¹⁴⁵ S 2(9).

¹⁴⁶ S 3(1)(a)(f). See also s 3(2) and s 3(2A) for the amounts that must be disclosed in respect of credit and leasing transactions.

- (d) the amount in Namibian dollars and cents of the finance charges calculated at the annual finance charge rate;
- (e) the annual finance charge rate; and
- (f) as the case may be, the date upon which or the number of instalments in which the principal debt together with the finance charges must be paid, the amount of each instalment and the date upon which each instalment must be paid or the manner in which that date is determined.

3.3.2.4 An Evaluation of the Usury Act

3.3.2.4.1 Scope of Application

As discussed above¹⁴⁷ the Usury Act applies to credit transactions and leasing transactions of movable goods, the rendering of services on credit as well as money lending transactions provided that the principal debt¹⁴⁸ does not exceed N\$500 000. Also, it should be noted that the Usury Act *inter alia* applies only to leasing transaction whose payment terms exceed three months and where the lessee is not entitled to terminate the lease by giving written notice of 90 days or less.¹⁴⁹ The money lending transactions qualifying as microloan transactions are exempted from the provisions of the Usury Act and therefore are regulated in terms of the Exemption Notice provided that the credit provider is registered as a micro lender.¹⁵⁰ The monetary cap on the amounts of credit agreements regulated and the exclusion of some types of credit agreements from its scope of application indicate that the Usury Act has a limited scope of application and not enough consumers enjoy its protection, for instance, a consumer under a mortgage credit agreement. However the Usury Act is commendable on account that it contains no limitation to the purpose of the credit and therefore applies to all credit agreements as provided in the Usury Act regardless of whether or not the credit was acquired for the sole purpose of business activities such as a resale or a subsequent rental at a profit.¹⁵¹

¹⁴⁷ Para 3.3.2.2.

¹⁴⁸ "Principal debt" is defined in s 1. See also para 3.3.2.3.1 above.

¹⁴⁹ See para 3.3.2.2 above.

¹⁵⁰ See para 3.3.2.2 above.

¹⁵¹ Compared to the Credit Agreements Act – see the discussion in para 3.3.3.2 below.

3.3.2.4.2 Debt Prevention Measures

The Usury Act provides for the limitation and disclosure of finance charges by placing a ceiling on the finance charges that a credit provider can levy on the principal debt in respect of a specific credit agreement and imposing financial charges control.¹⁵² The provision for the compulsory disclosure of finance charges prior to the conclusion of any credit agreement is aimed at ensuring that the credit provider does not charge a higher rate of finance charge than the disclosed rate.¹⁵³ Considering the question whether or not these measures should be retained in the Namibian consumer credit legislative framework, it appears that the prescribed interest rate ceilings are difficult to enforce effectively in practice. Notwithstanding the existence of these measures, the Usury Act fails to adequately protect consumers because some credit providers still do not comply with these measures by charging rates higher than the determined usury ceiling without any enforcement action from the regulatory bodies.¹⁵⁴ However, it must be emphasised that these measures protect consumers from incurring too much debt and therefore are worth retaining in the consumer credit regulatory framework.¹⁵⁵

3.3.3 The Credit Agreements Act

3.3.3.1 General

The Credit Agreements Act was a South African enactment which came into operation on 2 March 1981 and replaced the Hire-Purchase Act 36 of 1942.¹⁵⁶ The Credit Agreements Act was made applicable to the South West Africa territory as from 27 May 1981 by virtue of the Credit Agreements Proclamation AG 17 of 1981.¹⁵⁷ The Credit Agreements Proclamation AG 17 of 1981 transferred the administration of the Credit Agreements Act to the Administrator-General of the South West Africa territory.¹⁵⁸ This means that subsequent amendments to the Credit Agreements Act that were made in South Africa after the passing of Proclamation AG 17 of 1981 and prior to South West Africa's independence had to be made specifically applicable to South West Africa. However, until 1990 when

¹⁵² See paras 3.3.2.3.1 and 3.3.2.3.2 above.

¹⁵³ See para 3.3.2.3.2 above.

¹⁵⁴ See para 3.2.2 above.

¹⁵⁵ See also Renke (2011) *THRHR* 220.

¹⁵⁶ Legal Assistance Centre (2010) 415. See also Renke LLD Thesis (2012) 325.

¹⁵⁷ See the Credit Agreements Proclamation AG 17/1981 s 1.

¹⁵⁸ Credit Agreements Proclamation AG 17/1981 s 4.

Namibia attained independence, no amendment to the Credit Agreements Act contained an express provision making it applicable to South West Africa.¹⁵⁹ The Credit Agreements Act therefore applied in Namibia in its form as at 27 May 1981.

3.3.3.2 The Scope of Application

The Credit Agreements Act *inter alia* provides for the regulation of certain transactions in terms of which movable goods are purchased or leased on credit and where certain services are rendered on credit.¹⁶⁰ It explicitly provides that it applies to credit transactions and leasing transactions irrespective of whether any such transaction or transactions are subject to a resolutive or suspensive condition.¹⁶¹ A credit transaction implies a contract of purchase and sale of movable goods or the rendering of services against payment of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future.¹⁶²

The Credit Agreements Act has reference to an “instalment sale transaction”, which is a specie of the credit transaction but has an attached condition that the purchaser does not become the owner of those goods merely by virtue of the delivery to or the use, possession or enjoyment by him thereof and/or the seller is entitled to the return of those goods if the purchaser fails to comply with any term of that transaction.¹⁶³

A leasing transaction to which the Credit Agreements Act applies implies a transaction in terms of which a lessor leases goods to a lessee against payment by the lessee to the lessor of a stated or determinable sum of money at a stated or determinable future date in whole or in part in instalments over a period in the future.¹⁶⁴ Prior to the amendment of the Credit Agreements Act by the Credit Agreements Amendment Act 3 of 2016,¹⁶⁵ if parties at the conclusion of the contract agreed that the lessee would become the owner or retain possession, use or

¹⁵⁹ Legal Assistance Centre (2010) 415.

¹⁶⁰ See the Credit Agreements Act long title.

¹⁶¹ S 1. See also Renke LLD Thesis (2012) 368.

¹⁶² S 1. See also Renke LLD Thesis (2012) 368.

¹⁶³ S 1. See also Grové and Otto (2002) 14 and Renke LLD Thesis (2012) 368.

¹⁶⁴ S 1. See also Renke LLD Thesis (2012) 369.

¹⁶⁵ Hereinafter the “Credit Agreements Amendment Act”.

enjoyment of the leased goods on the expiry or the termination of the lease, the Credit Agreements Act would not have applied to such a transaction.¹⁶⁶ The definition of a leasing transaction now includes a transaction by which it is agreed at the time of its conclusion that the consumer at any stage during or after the expiry of the lease or after the termination of the transaction will become the owner of those goods or retain the possession or use or enjoyment of those goods.¹⁶⁷

The scope of application of the Credit Agreements Act is limited. Section 2(1) provides that the Credit Agreements Act applies only to such credit agreements or categories of credit agreements as determined by the relevant minister from time to time by way of notice in the Government Gazette.¹⁶⁸ By virtue of Notice AG 67 of 1981 the Administrator-General determined the Credit Agreements Act in South West Africa to be applicable to the following credit agreements:¹⁶⁹

- (a) where certain movable goods¹⁷⁰ listed in the schedule thereto were sold or leased in terms of credit transactions, including instalment sale transactions or leasing transactions;
- (b) the duration of which exceeds three months from the date of the conclusion of the agreement; and
- (c) where the cash price¹⁷¹ is N\$100 000 or less.

¹⁶⁶ S 1. See also Grové and Otto (2002) 15.

¹⁶⁷ Credit Agreements Amendment Act s 1(b)(i)-(ii).

¹⁶⁸ On account of the fact that South West Africa was a South African territory, the administration of the Credit Agreements Act rested with the then Administrator-General of South West Africa. After independence, the responsible person is the Minister of Trade and Industry.

¹⁶⁹ Notice AG 67/1981 (27 May 1981).

¹⁷⁰ The movable goods which form the subject matter of the credit agreements regulated by the Credit Agreements Act are contained in the schedule to the Notice AG 67/1981 (27 May 1981) and include 20 items in three broad categories, namely: machines and equipment (items 1-6), durable household goods (items 7-18) and motor vehicles (items 19-20). This Regulation (Notice AG 67/1981) has never been amended.

¹⁷¹ "Cash price" is defined in s 1 in relation to a credit agreement which is a credit transaction in terms of which a service is rendered to mean "the cash price at which the credit receiver may obtain that service from the credit grantor" and in relation to a leasing transaction to imply "the cash price at which the goods leased in terms of that leasing transaction are normally sold by the credit grantor on the date on which that leasing transaction is entered into or, if the credit grantor is not a trader normally selling any such goods, the reasonable money value of those goods as agreed upon between the credit grantor and the credit receiver". In terms of an instalment sale transaction, the

Footnote continues on next page

The Credit Agreements Act was not made specifically applicable to the rendering of services on credit, although the definition of a “credit transaction” includes the rendering of services.¹⁷² The Credit Agreements Act also provides that the Minister of Trade and Industry is not empowered to make the provisions of the Credit Agreements Act applicable to credit agreements in terms of which a person purchases or leases goods for the sole purpose of business activities¹⁷³ or in terms of which the state is the credit provider.¹⁷⁴

3.3.3.3 Debt Prevention Measures in terms of the Credit Agreements Act

The only primary debt prevention measure extant in the Credit Agreements Act is in the form of terms control,¹⁷⁵ in that the Credit Agreements Act authorises the Minister of Trade and Industry by regulation in the Government Gazette to prescribe the maximum periods of repayment of the full price in terms of the credit agreements and to prescribe the minimum portion or percentage of the cash price payable as a deposit with regard to credit agreements.¹⁷⁶ The concept of a deposit carries the same meaning as “initial payment” or “initial rental” in terms of the Credit Agreements Act.¹⁷⁷ These measures can be categorised as primary debt prevention measures because of their cumulative effect on restricting the consumer’s total eventual debt burden.¹⁷⁸ Relevantly, Grové and Otto affirm that

by these measures the legislature can help to prevent a credit receiver from overextending his creditworthiness. If a prospective credit receiver is unable to pay the minimum prescribed deposit, there is a material risk that he will also be unable to pay the instalments. By prescribing a maximum period within which payment must take place, the consumer is prevented from binding himself for a period that exceeds the economic life of the thing that has been bought or leased.¹⁷⁹

cash price means the price at which goods are normally sold by the credit grantor on immediate payment of the full purchase price and includes a selling price referred to in the Usury Act – s 1. See also Grové and Otto (2002) 16, Renke LLD Thesis (2012) 368 and para 3.3.3.4.1 below.

¹⁷² See Notice AG 67/1981 (27 May 1981).

¹⁷³ S 2(1)(a) as amended by the Credit Agreements Amendment Act.

¹⁷⁴ S 2(1)(b).

¹⁷⁵ See Renke LLD Thesis (2012) 357. See also the Crowther Report (1971) 346.

¹⁷⁶ See s 3(1)(a) and 3(1)(b).

¹⁷⁷ See s 6(5), discussed in para 3.3.3.3.2 below.

¹⁷⁸ See para 1.3 above. See also Renke LLD Thesis (2012) 7, where it is stated that measures preventing the accumulation of debt after the credit agreement has been entered into, for instance, the prevention of a situation where the consumer is bound to a credit agreement for an indefinite period of time, encourage responsible lending.

¹⁷⁹ Grové and Otto (2002) 32-33.

In the same vein Renke submits that prescribing the minimum deposits payable *inter alia* serves to reduce the consumer's principal debt amount in terms of the credit agreement and indicates that the consumer has the ability to perform as per the terms of the agreement,¹⁸⁰ whereas the prescribed maximum periods of payment ensure that the consumer settles his contractual debt within a reasonable time, consequently preventing the payment of unnecessary or very high interest.¹⁸¹ The aim of the prescribed maximum periods of payment therefore is to help prevent consumers from committing themselves to credit agreements for extended periods, while the deposit requirement is aimed at preventing overspending and the over-indebtedness of consumers by ensuring that only consumers who are able to pay the prescribed deposit are allowed to buy or lease goods on credit.¹⁸²

The Administrator-General in terms of section 3 of the Credit Agreements Act published Regulation AG 68 of 1981 prescribing the maximum payment period and minimum deposits payable in respect of credit and leasing transactions to which the Credit Agreements Act was made applicable by Notice AG 67 of 1981. The schedule to Regulation AG 68 of 1981 largely corresponded with the schedule attached to Notice AG 67 of 1987, as they both made reference to the same listed 20-item goods.¹⁸³ In 1992 the Minister of Trade and Industry passed regulations in terms of section 3 of the Credit Agreements Act.¹⁸⁴ In replacing Regulation AG 68 of 1981, these regulations prescribe the maximum period in which the credit is to be repaid and the minimum deposit that should be paid by the consumer before credit is provided.¹⁸⁵ For example, in respect of the sale or lease of household furniture at a cash price of N\$100 000 or less, the maximum payment period is 54 months and a minimum initial payment at 10 percent of the cash price must be paid. A discussion of these measures as reflected in the 1992 regulations and the relevant provisions of the Credit Agreements Act follows.

¹⁸⁰ Renke LLD Thesis (2012) 526. See also Renke (2011) *THRHR* 227.

¹⁸¹ Renke LLD Thesis (2012) 526-527.

¹⁸² See Renke, Roestoff and Haupt (2007) *Obiter* 246 and Renke (2011) *THRHR* 227. See also para 3.3.3.4.2 below.

¹⁸³ These are: machines and equipment (items 1-6), durable household goods (items 7-18) and motor vehicles (items 19-20).

¹⁸⁴ GN 177 in GG 536 (1 Dec 1992).

¹⁸⁵ See GN 177 in GG 536 (1 Dec 1992).

3.3.3.3.1 *The Maximum Repayment Period*

As mentioned above,¹⁸⁶ the Credit Agreements Act restricts the period within which the full price must be paid. The parties to a credit agreement are not allowed to agree to leave the duration of the credit agreement undetermined.¹⁸⁷ The Credit Agreements Act also prohibits a person from being a party to a credit agreement in terms of which the period within which the full price is payable exceeds the prescribed period.¹⁸⁸ This implies that once the maximum period within which the full price must be paid is prescribed the parties are prohibited from unlawfully extending it. However non-compliance with this provision does not automatically render the credit agreement invalid, but the parties to such a credit agreement commit a statutory offence.¹⁸⁹

3.3.3.3.2 *The Minimum Deposit*

Another measure in the Credit Agreements Act that may protect consumers from irresponsible credit is the requirement for the consumer to pay the deposit.¹⁹⁰ Section 6(5) of the Credit Agreements Act provides that no credit agreement shall be binding until the credit consumer has paid the deposit as prescribed by regulation. This means that the credit consumer must first render partial performance in terms of the contract by paying the deposit in order for the credit agreement to be valid. If the deposit is not paid, goods are delivered to the consumer and the latter continues to pay instalments despite the fact that the contract is not binding, it is accepted that the moment the total amount paid in instalments reaches the deposit amount the contract becomes binding on the parties to the agreement.¹⁹¹

The deposit may be paid in cash or wholly or partly in goods.¹⁹² It is required that the value placed on the goods must not exceed their market value unreasonably.¹⁹³ Where the value attached to a good exceeds the market value of the good it is

¹⁸⁶ Para 3.3.3.3.

¹⁸⁷ S 6(1)(i). See also Renke LLD Thesis (2012) 372.

¹⁸⁸ S 6(6)(a). See also Renke LLD Thesis (2012) 372.

¹⁸⁹ S 23. See in this regard Renke LLD Thesis (2012) 372 and Otto Commentary (1991) para 25.

¹⁹⁰ S 6(5). See also Renke LLD Thesis (2012) 374.

¹⁹¹ Grové and Otto (2002) 36.

¹⁹² S 6(7)(a). See also Renke LLD Thesis (2012) 372.

¹⁹³ S 6(7)(b). See also Renke LLD Thesis (2012) 372 and Grové and Otto (2002) 33.

deemed as though no deposit is paid.¹⁹⁴ The goods used to pay the deposit must be accurately defined to be easily identifiable.¹⁹⁵ The Credit Agreements Act proscribes the use of another scheme to assist purchasers to obtain goods without paying the required deposit.¹⁹⁶ For example, by means of the cancellation of an existing credit agreement and consolidating it with a new credit agreement so that the deposit paid in the first credit agreement serves as the deposit in the new agreement is prohibited.¹⁹⁷ The consumer may also not borrow money from the credit provider for the purpose of paying the deposit.¹⁹⁸

3.3.3.4 An Evaluation of the Credit Agreements Act

3.3.3.4.1 Scope of Application

If the scope of application of the Credit Agreements Act is compared to the scope of application of the Usury Act, it appears that these two enactments treat credit agreements differently.¹⁹⁹ The definitions of credit transactions and leasing transactions in these statutes do not correspond.²⁰⁰ Even though both statutes place a monetary ceiling on the credit agreements to which they apply, these, too, differ.²⁰¹ Persons exempted in terms of the two statutes also differ.²⁰²

The Credit Agreements Act has a much narrower scope of application in that it applies only to movable goods which the Minister of Trade and Industry has determined to be applicable to it, and, to date, the Credit Agreements Act has not been made applicable to the rendering of services on credit.²⁰³ Also, the Credit Agreements Act does not apply to money lending transactions, lump-sum payments and credit agreements in terms of which goods are acquired for the sole purpose of business activities, to which the Usury Act does apply.²⁰⁴ Whereas the Usury Act

¹⁹⁴ See Renke LLD Thesis (2012) 372-373.

¹⁹⁵ S 5(1)(d).

¹⁹⁶ S 6(4).

¹⁹⁷ See Renke LLD Thesis (2012) 373 and Grové and Otto (2002) 34.

¹⁹⁸ S 6(7)(c). See also Grové and Otto (2002) 34.

¹⁹⁹ See paras 3.3.2.1 and 3.3.3.1 above. See also Renke, Roestoff and Haupt (2007) *Obiter* 230.

²⁰⁰ See also Grové and Otto (2002) 17.

²⁰¹ The Usury Act applies where the principal debt amount does not exceed N\$500 000, whereas the Credit Agreements Act applies where the cash price does not exceed N\$100 000 – see paras 3.3.2.1 and 3.3.3.1 above. See also Grové and Otto (2002) 22.

²⁰² See paras 3.3.2.1 and 3.3.3.1 above.

²⁰³ See paras 3.3.2.1 and 3.3.3.1 above. See also Grové and Otto (2002) 15-16.

²⁰⁴ See paras 3.3.2.1 and 3.3.3.1 above. See also Grové and Otto (2002) 22.

applies only to leasing transactions whose repayment terms exceed three months, the Credit Agreements Act applies to credit agreements whose repayment terms exceed six months.²⁰⁵ Its scope of application is also limited by the types of movable goods involved in the credit agreement, a limitation which is not provided for under the Usury Act.²⁰⁶

The general effect of the narrower scope of application of the Credit Agreements Act is that the benefit derived by the consumers from its debt prevention measures is enjoyed by a small segment of the consumer population, leaving many others exposed to the risks of irresponsible lending and consumer over-indebtedness.

3.3.3.4.2 Debt Prevention Measures

The Credit Agreements Act authorises the Minister to prescribe the maximum periods of repayment of the full price in terms of the credit agreement and to prescribe a minimum deposit payable by the consumer with regard to credit agreements.²⁰⁷ Regarding the prescribed repayment period, the Credit Agreements Act prohibits a person from being a party to a credit agreement in terms of which the period within which the full price is payable exceeds the prescribed period.²⁰⁸ While these measures may prevent the incurring of irresponsible and unaffordable debts and may assist to protect consumers from becoming over-indebted, non-compliance with these provisions does not automatically render the credit agreement invalid. The main weakness is therefore the reliance on the individual consumer to bring an action to court seeking relief through rendering the credit agreement invalid. This reliance places another burden on consumers who cannot afford credit and still may lack the means to take their credit provider to court.

Further, regarding the prescribed minimum deposit, the Credit Agreements Act provides that no credit agreement shall be binding until the credit consumer has paid the prescribed deposit.²⁰⁹ However, even if no deposit is paid, it is in principle accepted that if the consumer pays instalments, the moment the total amount paid in

²⁰⁵ See paras 3.3.2.1 and 3.3.3.1 above. See also Grové and Otto (2002) 22-23.

²⁰⁶ See paras 3.3.2.1 and 3.3.3.1 above. See also Grové and Otto (2002) 22-23.

²⁰⁷ See para 3.3.3.3 above.

²⁰⁸ See para 3.3.3.3.1 above.

²⁰⁹ Para 3.3.3.3.2.

instalments reaches the deposit amount the contract becomes binding on the parties.²¹⁰ It is submitted that this position, to a certain extent, could encourage credit providers to contravene the provisions of the Credit Agreements Act and the regulations prescribing the payment of deposits.

Considering that the aim of the deposit requirement is to prevent overspending and the over-indebtedness of consumers by ensuring that only consumers who are able to pay the prescribed deposit should be allowed to buy or lease goods on credit and that the prescribed maximum periods of payment also help prevent consumers from committing themselves to credit agreements for an extended period,²¹¹ the effectiveness of these measures has been weakened because credit providers have adopted more relaxed and accommodative credit terms. For instance, where the regulations prescribe a deposit of ten percent for motor vehicle financing and that the loan must be repaid within 54 months from the date of delivery of the motor vehicle, credit is provided without requiring a deposit and the repayment period extended to 60 months.²¹² For the reasons alluded to above, these practices which sidestep important debt prevention measures in the Credit Agreements Act can lead to irresponsible lending and exacerbate the problem of over-indebtedness on the part of consumers.

It appears that the deposit requirement is difficult to enforce, especially because the Credit Agreements Act does not prescribe the methods of payment of the deposit.²¹³ However, in light of the benefits that a consumer derives from the terms control as far as the consumer's total debt burden is concerned, it is submitted that these are good consumer protection measures which Namibia should retain to prevent the consumers from overburdening themselves with debt.²¹⁴

²¹⁰ See para 3.3.3.3.2 above.

²¹¹ See para 3.3.3.3 above. See also Renke (2011) *THRHR* 227

²¹² See the Namibian Sun Newspaper (17 Jun 2013).

²¹³ See para 3.3.3.3.2 above. See also Renke LLD Thesis (2012) 122.

²¹⁴ See Renke (2011) *THRHR* 228.

3.3.4 The Sale of Land Act

3.3.4.1 General

The Sale of Land Act is yet another South African enactment that was made applicable to South West Africa by virtue of section 19. This section provides that “[t]his Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel”. The administration of the Sale of Land Act was transferred to South West Africa by the Executive Powers (Commerce) Transfer Proclamation,²¹⁵ which meant that subsequent amendments to the Sale of Land Act made in South Africa after the passing of this Transfer Proclamation and prior to South West Africa’s independence had to be made specifically applicable to South West Africa.²¹⁶ There was one amendment to this Act in South Africa²¹⁷ however there was no explicit provision that would make it applicable to South West Africa. The Sale of Land Act therefore applies in Namibia as amended in South Africa until April 1978, the date of the Transfer Proclamation. The Sale of Land Act was replaced in South Africa by the Alienation of Land Act 68 of 1981, which was not made applicable to South West Africa.²¹⁸

3.3.4.2 Scope of Application

The Sale of Land Act regulates the purchase and sale of residential land in terms of which payments are to be made in more than two instalments over a period of one year or longer.²¹⁹ It applies to any written contract of purchase and sale of land,²²⁰ under which the purchaser is a natural person and which relates to land situated in the municipal area and forming part of any other area subdivided into erven or plots, with or without public open spaces and in streets bounded by such erven, plots or

²¹⁵ AG 28/1978 (28 Apr 1978). See also Legal Assistance Centre (2010) 414.

²¹⁶ Legal Assistance Centre (2010) 414.

²¹⁷ The Sale of Land on Instalment Amendment Act 74 of 1978.

²¹⁸ Legal Assistance Centre (2010) 414. For the sake of completeness, attention should also be drawn to the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969, a South African legislative enactment that was also made applicable to the territory of South West Africa by virtue of its s 3. This Act forms part of the Namibian consumer credit framework as it sets forth the necessary formalities in contracts for the sale of land or certain interests in land, by prescribing that a contract of sale of land or any interest in land shall be of no force or effect if it is not reduced to writing and signed by the parties thereto or by their agents acting on their written authority – s 1. However, this Act does not contain any debt prevention measure.

²¹⁹ See the Sale of Land Act long title.

²²⁰ “Land” is defined to mean any land used or intended to be used mainly for residential purposes, including any undivided share in such land and any land not exceeding 23 hectare in extent and forming part of such land, unless the contrary is proven – s 1.

spaces.²²¹ However it does not apply to contracts relating to land where the State or local authority is the seller or where land is held in trust by the State for any person.²²²

3.3.4.3 Debt Prevention Measures in terms of the Sale of Land Act

The Sale of Land Act provides for statutory disclosure requirements. This Act requires that every written contract of sale and purchase of land *inter alia* should disclose the amount of the purchase price,²²³ the annual rate of interest to be paid by the purchaser if any,²²⁴ the date before which or the period within which payment of the purchase price with interest and all other charges shall be effected in full²²⁵ and the amount payable by the purchaser, if any, before he may take possession or occupation of the land.²²⁶

The Sale of Land Act also requires the seller to provide the purchaser with a copy of the contract within one month after the conclusion of the contract at no charge to the purchaser.²²⁷ Similarly, the seller is required to furnish the purchaser with an annual statement of account at no charge, within one month after the conclusion of the contract, reflecting the purchase price, outstanding balance, interest and all other charges or costs incurred in terms of the contract.²²⁸ In the event that the seller is in default of providing any of these documents, the purchaser must request the documents from the seller and if he continues to be in default for 14 days from the date of the request, then the purchaser will not be liable for the payment of interest under the contract from the date on which the said one month expires to the date of the receipt by the purchaser of the relevant document.²²⁹

²²¹ S 2(a)(i)-(ii).

²²² S 2(b)(i)-(iv).

²²³ S 4(1)(e).

²²⁴ S 4(1)(f).

²²⁵ S 4(1)(g)

²²⁶ S 4(1)(h).

²²⁷ S 5(1).

²²⁸ S 9(1).

²²⁹ S 5(2) read with s 9(2).

The Sale of Land Act further prescribes the frequency of calculating interest and limits the sum that the seller can recover from the purchaser.²³⁰ It specifically provides that interest on the outstanding amount shall be calculated not more than monthly and not less than quarterly.²³¹ Sellers are also prohibited from charging interest at a rate which is higher than the prescribed rate.²³² Although the Sale of Land Act does not prescribe maximum rates of interest, for purposes of this prohibition it empowers the Minister of Finance to prescribe by regulation from time to time the applicable interest rate.²³³ In the event that the purchaser has paid in full the purchase price with interest and all other charges payable in terms of the contract, the Sale of Land Act provides that no interest shall be payable in terms of the contract in respect of any period after the date of such payment.²³⁴

As a measure of preventing the seller from increasing the cost of land bought on instalments, the Sale of Land Act restricts the amounts that can be claimed by the seller in connection with the sale of a piece of land.²³⁵ In particular, it provides that no seller shall be able to recover from the purchaser an amount exceeding the sum of:

- (a) the purchase price and interest owing to him by the purchaser in terms of the contract,²³⁶
- (b) the costs for the payment of which the purchaser is liable in terms of an express provision in the contract and which have actually been incurred by the seller,
 - (i) in connection with the drafting of the contract;²³⁷
 - (ii) in connection with the transfer of the land to the purchaser, including stamp duty, provided that such transfer has already taken place or is

²³⁰ S 6.

²³¹ S 6(1).

²³² S 6(2).

²³³ S 6(2). No regulations in terms of this section have been passed yet.

²³⁴ S 6(4).

²³⁵ S 6(3).

²³⁶ S 6(3)(a).

²³⁷ S 6(3)(b)(i).

- tendered against payment by the purchaser of the amount due,²³⁸ and
- (iii) after the date on which the risk, profit and loss of the land had passed to the purchaser, in respect of maintenance and repair of improvements on the land, rates and taxes in respect of the land, and premiums on an insurance policy relating to the subject matter of the contract;²³⁹ and
- (c) all costs which are actually incurred by him in connection with the recovery of the amount referred to in this subsection and are recoverable in terms of any provision of law from the purchaser.²⁴⁰

3.3.4.4 An Evaluation of the Sale of Land Act

3.3.4.4.1 Scope of Application

The Sale of Land Act applies to credit contracts in terms of which land is sold against payment by the purchaser of the purchase price in more than two instalments over a period exceeding one year.²⁴¹ For the Sale of Land Act to apply, the land bought must be used or intended to be used mainly for residential purposes.²⁴² This means that credit contracts with two or less instalments and sales of land not used for residential purposes, for instance the sale of agricultural land, are excluded from the protections provided by the Sale of Land Act.

3.3.4.4.2 Debt Prevention Measures

As does the Usury Act, the Sale of Land Act provides for the statutory disclosure of the principal debt amount, annual rate of interest and all other charges in the contract of sale.²⁴³ However, it does not oblige credit providers to disclose this information to the consumer before they are bound by the contract of sale. It is submitted this loophole defeats the necessity of the consumer being aware of the costs of credit, which results in an underestimation of the consumer's financial obligations in terms of the contract and the consumer's total debt burden.

²³⁸ S 6(3)(b)(iA).

²³⁹ S 6(3)(b)(ii).

²⁴⁰ S 6(3)(c).

²⁴¹ See para 3.3.4.1 above.

²⁴² See para 3.3.4.1 above.

²⁴³ See para 3.3.4.3 above.

The Sale of Land Act further prohibits the seller from charging interest at a rate which is higher than the prescribed rate and restricts the amounts that can be claimed by the seller in connection with the sale of a piece of land.²⁴⁴ However, for purposes of this prohibition, the Minister of Finance is yet to prescribe the applicable interest rates for the sales of land on instalments.²⁴⁵ This means that the parties to the contract of sale are at liberty to agree upon any rate of interest. Further, while the provisions in the Sale of Land Act aimed at limiting recoverable costs are commendable because of the protection they afford consumers against credit providers, it is not clear whether or not in practice these measures always provide the protection intended. It is possible for credit providers to get around these provisions by displacing the costs of credit, by these means the recoverable costs are inflated resulting in unaffordable credit for consumers.

3.3.5 An Evaluation of the Namibian Consumer Credit Legislative Framework in light of Leading International Best Principles

The Namibian consumer credit legislative framework, if considered as a whole reveals that there is no consumer credit legislation in Namibia that provides for the pre-agreement assessment of consumers.²⁴⁶ This is because neither the Usury Act or the Credit Agreements Act or the Sale of Land Act imposes an obligation on credit providers to conduct an assessment of the consumer's financial position and ability to repay the credit before extending credit to the consumer. This constitutes a "failure to provide effective protection against consumer over-indebtedness and to address irresponsible lending practices".²⁴⁷

For example, a recent Supreme Court decision in *Mukapuli and Another v Swabou Investments (Pty) Ltd*²⁴⁸ illustrates the inadequacy of Namibian consumer credit legislation to protect consumers from irresponsible credit and the threat of consumer over-indebtedness. The Supreme Court pronounced itself on this case after the appellants, husband and wife, noted an appeal against the High Court judgment

²⁴⁴ See para 3.3.4.3 above.

²⁴⁵ See para 3.3.4.3 above.

²⁴⁶ See the evaluations of the current debt prevention measures in paras 3.3.2.4.2, 3.3.3.4.2 and 3.3.4.4.2 above.

²⁴⁷ See Steennot and Van Heerden (2017a) *PER/PELJ* 8.

²⁴⁸ SA 49/2011 2017 NASC (23 Jun 2017). Hereinafter "*Mukapuli*".

which declared them indebted to the respondent in an amount of N\$177 743.46 plus interest at the rate of 13,75 per cent per year.²⁴⁹ The indebtedness arose as a result of a loan of N\$151 950 advanced to the appellants to extend their principal home in terms of a written agreement between the parties.

As security, a mortgage bond was registered over the appellants' home and the repayment of the loan was spread over a period of 30 years at an interest rate of 21,25 per cent.²⁵⁰ At the time the bond was registered the husband was 52 years old and had eight years to go before retirement, the wife was 50 years old.²⁵¹ After August 2005 the appellants defaulted on their monthly instalments and the respondent issued a combined summons in which it claimed payment of the amount of N\$131 707.36, interest on that amount at the rate of 13.75 percent per year, calculated daily and compounded monthly, legal costs and that the property subject to the mortgage bond be declared executable.²⁵² The proceedings were successful in favour of the respondents and it is that order which formed the subject of the appeal.

In adducing evidence to the court, the second appellant stated that, in her view, the debt had been fully paid because the amount paid back in terms of the agreement amounted to N\$249 882.07 whereas the loan amount was only N\$151 950.²⁵³ To support this argument, she referred to instalment agreements when furniture is bought on hire purchase, highlighting the fact that the purchase price of the furniture plus interest are calculated and the total amount, being the purchase price and the interest payable combined, is then reflected in the hire-purchase contract for it to be clear to the consumer that that was the amount to be repaid.²⁵⁴ Further, she stated that the respondent never told them that so much of the amount paid would go towards the payment of interest, and that had they been informed of this fact they would not have taken up the loan.²⁵⁵

²⁴⁹ *Mukapuli* paras 3 and 6.

²⁵⁰ *Mukapuli* para 6.

²⁵¹ *Mukapuli* para 5.

²⁵² *Mukapuli* para 8.

²⁵³ *Mukapuli* para 37.

²⁵⁴ *Mukapuli* para 37.

²⁵⁵ *Mukapuli* para 37.

During cross-examination she admitted that it was their (appellants) signatures on the application form for the loan.²⁵⁶ To the fact that the form indicated that the loan had to be paid back over a period of 360 months, she answered that she and the first appellant signed the document without knowing what they were signing and only later became aware that the loan had to be repaid over 30 years because “she had not read the document and was only told to sign it”.²⁵⁷ She also could not remember whether the application form had been completed at the time of signing.²⁵⁸ Regarding other documents shown to her, she maintained that nothing had been explained to her²⁵⁹ and that she saw the various bank statements only in 2007.²⁶⁰ The Supreme Court accepted the findings of the court *a quo* regarding the credit agreement as pleaded by the respondent,²⁶¹ and stated that the appellants “signing of documents, or acceptance thereof, without reading or understanding them, had been of their own choice”.²⁶²

The *Mukapuli* case proves that predatory lending in the form of asset-based lending is taking form in Namibia.²⁶³ It is common cause that where a credit provider does not have regard to “the appropriateness of the credit terms” to the consumer or the consumer’s ability to service the loan, then such lending is not only predatory but also irresponsible.²⁶⁴ The facts in the *Mukapuli* case suggest that the credit provider relied on the value of the consumer’s principal home rather than their income in granting a loan. The consumers were “not so young any more” with poor education and a low income, indicating that they were disadvantaged and vulnerable.

²⁵⁶ *Mukapuli* para 38.

²⁵⁷ *Mukapuli* para 38.

²⁵⁸ *Mukapuli* para 39.

²⁵⁹ *Mukapuli* para 38.

²⁶⁰ *Mukapuli* para 40.

²⁶¹ See *Mukapuli* paras 41 and 43.

²⁶² *Mukapuli* para 69.

²⁶³ Asset-based lending has been defined in the Australian case of *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41 128 as “to lend money without regard to the ability of the borrower to repay by instalments under the contract, in the knowledge that adequate security is available in the event of default”. See also Rajapakse (2014) *CCLJ* 151-152 and para 5.3.3.3 below.

²⁶⁴ See in this regard, Tuffin (2009) *QUTLJJ* 285.

In summary, if regard is to be had to the leading international best principles formulated in chapter 2 above,²⁶⁵ this case indicates that the lack of the obligation on the part of credit providers to conduct a pre-agreement assessment of the consumer's financial position implies that the consumer bears the utmost responsibility in determining whether or not the credit is responsible and affordable for him.²⁶⁶ The third principle identified in this thesis pertains to the provision of pre-contractual information to the consumer. Although there are compulsory disclosure requirements in Namibia's consumer credit legislations,²⁶⁷ the credit provider is not required to explain to the consumer the specific features, risks and costs of the credit and to ensure that the consumer understands the information provided before entering into a credit agreement with such a consumer.

3.4 Non-Binding Standards: The Banking Code

In addition to the legislative framework, there are non-binding standards which are observed by the banking institutions. These standards are provided for in the Code of Banking Practice in Namibia,²⁶⁸ which sets voluntary standards of good banking practice for banking financial institutions to follow when dealing with consumers. In relation to the provision of credit the Banking Code provides that

[w]e will extend credit to you responsibly (based on the information you supply to us), to match your borrowing requirements and capabilities and supply you with suitable products, in an attempt to ensure that you are not extended beyond your financial means. You are also responsible for ensuring that you do not extend yourself beyond your financial means. Our ability to do so is heavily dependent on your co-operation and the full disclosure of your financial obligations. You must provide complete and accurate information to your bank as part of the credit application process. All lending will be subject to an assessment of your ability to afford and willingness to repay, general desirability and any other conditions set by your bank.²⁶⁹

It further provides that before credit is extended to a consumer an assessment will be conducted which may include taking into account the following factors.²⁷⁰

²⁶⁵ Specifically, Principles 1 and 2, which relate to the protection of consumers in credit markets from irresponsible lending by imposing an obligation on credit providers to conduct pre-agreement assessments of consumers prior to credit extension – see para 2.7.

²⁶⁶ See in this regard Steennot and Van Heerden (2017a) *PER/PELJ* 9.

²⁶⁷ See paras 3.3.2.4.2 and 3.3.4.4.2 above.

²⁶⁸ Hereinafter the “Banking Code (Jan 2013)”.

²⁶⁹ Banking Code (Jan 2013) cl 11.1. As will be seen below, these assessment criteria is similar to the criteria adopted in the Australian responsible lending regime – see ch 5 below.

²⁷⁰ Banking Code (Jan 2013) cl 11.1.

- (a) the consumer's income and expenses, including the dependability of such income;
- (b) the consumer's past financial history;
- (c) information obtained from credit risk management services and related services, and other appropriate parties, for example, employers, other credit providers and landlords;
- (d) the consumer's conduct relating to previous and existing accounts with the bank;
- (e) information supplied by the consumer, including identity verification and the purpose of the borrowing;
- (f) credit assessment techniques, for example, credit scoring;
- (g) the consumer's age in relation to the loan facility required;
- (h) any security or collateral provided; and
- (i) the consumer's statement of assets and liabilities.

Consumers will be provided with the costs and "terms and conditions" of the credit applied for prior to the conclusion of the credit agreement.²⁷¹ In the event that the consumer's application is not approved, the consumer will be provided with reasons for non-approval.²⁷² Non-approval may be on account of the consumer's overall credit score, information obtained from credit risk management services, the consumer's over-indebtedness or due to a specific policy of the bank.²⁷³

²⁷¹ Banking Code (Jan 2013) cl 11.1.

²⁷² Banking Code (Jan 2013) cl 11.1.

²⁷³ Banking Code (Jan 2013) cl 11.1.

Although the Banking Code is merely a guideline in that it is not binding on the banking institutions as they are not compelled to abide by the aforementioned provisions when providing credit to consumers, the measures contained therein are a step in the right direction in preventing irresponsible lending and consumer over-indebtedness. However, in the absence of Namibian consumer credit legislation that provides for the pre-agreement assessment of consumers before providing them with credit it remains doubtful whether the spirit of the Banking Code will yield any benefit to the consumers. For example, in the *Mukapuli* case,²⁷⁴ the Namibian courts failed to acknowledge that the provisions of the Banking Code could have guided the credit provider in deciding whether or not to provide the consumers with the credit applied for.

3.5 Current Proposals for Legal Reforms in Namibia

3.5.1 General

It is trite that NAMFISA exercises supervision over non-banking financial institutions.²⁷⁵ In discharging this regulatory function NAMFISA relies on 15 pieces of legislation.²⁷⁶ It is submitted that these statutes are fragmented and outdated. It is for this reason that NAMFISA is proposing legal reforms to cater for a modernised and flexible regulatory framework.²⁷⁷ To this end four Bills are proposed, namely the NAMFISA Bill of 2012, the Financial Services Adjudicator Bill of 2012,²⁷⁸ the Financial Institutions and Markets Bill of 2012²⁷⁹ and the Microlending Bill of 2014.²⁸⁰ All these Bills are yet to be tabled in Parliament.²⁸¹

²⁷⁴ See para 3.3.5 above.

²⁷⁵ See para 3.2.1 above.

²⁷⁶ These are the Credit Agreements Act, the Financial Institutions (Investments of Funds) Act 39 of 1984, the Financial Intelligence Act 13 of 2012, the Friendly Societies Act 25 of 1956, the Inspection of Financial Institutions Act 38 of 1984, the Long-Term Insurance Act 5 of 1998, the Medical Aid Funds Act 23 of 1995, the Namibia Financial Institutions Supervisory Authority Act 3 of 2001, the Pension Funds Act 24 of 1956, the Public Accountants' and Auditors' Act 51 of 1951, the Short-Term Insurance Act 4 of 1998, the State-Owned Enterprises Governance Act 2 of 2006, the Stock Exchanges Control Act 1 of 1985, the Unit Trusts Control Act 54 of 1981 and the Usury Act.

²⁷⁷ LRDC *Consumer Protection Discussion Document* (2014) 74. See also in general NAMFISA's Regulatory Development Report in NAMFISA *Annual Report* (2016) 78-79.

²⁷⁸ Hereinafter the "FSA Bill".

²⁷⁹ Hereinafter the "FIM Bill".

²⁸⁰ Hereinafter the "Microlending Bill".

²⁸¹ Regarding their progress, NAMFISA has indicated in its recent Annual Report that the FIM Bill and the Microlending Bill have been resubmitted to the legislative drafters of the Ministry of Justice for further consideration - NAMFISA *Annual Report* (2016) 79.

Briefly, the NAMFISA Bill is intended to replace the current NAMFISA Act and increase the regulatory powers of NAMFISA by creating a governance structure that will address deficiencies identified in its current regulatory compliance framework.²⁸²

The FSA Bill, on the other hand, is intended to create a legal and institutional framework for the Office of the Financial Services Adjudicator for the entire financial sector in Namibia to enquire into, investigate, consider and determine complaints against financial services providers in a just, procedurally fair, economical and expeditious manner.²⁸³ The purpose is to provide a solution to the current situation where aggrieved consumers have to seek redress through the normal judicial process, which can be time-consuming and expensive.²⁸⁴ The FSA Bill was motivated by the recognition that the regulatory bodies, namely NAMFISA and the Bank of Namibia, are not empowered to deal effectively with complaints against the regulated institutions.²⁸⁵ The need for a type of Ombudsman was identified to adjudicate complaints with minimum legal formalities, at no cost to complainants and with the determination of the Adjudicator to carry the same weight as that of a civil judgment of a competent court.²⁸⁶

The FIM Bill is intended to consolidate and harmonise the several outdated laws that currently regulate the non-banking financial industry.²⁸⁷ The original version of the FIM Bill did not contain aspects pertaining to consumer credit.²⁸⁸ A revised version was later passed in 2012 with an added chapter 14 providing for “Credit Institutions”. Chapter 14 has since been deleted from the latest version of the FIM Bill because NAMFISA does not have oversight over the majority of credit providers they intended to regulate.²⁸⁹ It must be mentioned that chapter 14 borrowed largely from the South

²⁸² NAMFISA *TOR Bills Implementation Project* (2015) 3.

²⁸³ NAMFISA *TOR Bills Implementation Project* (2015) 4.

²⁸⁴ NAMFISA *TOR Bills Implementation Project* (2015) 4.

²⁸⁵ NAMFISA *TOR Bills Implementation Project* (2015) 4.

²⁸⁶ NAMFISA *TOR Bills Implementation Project* (2015) 4.

²⁸⁷ LRDC *Consumer Protection Discussion Document* (2014) 74.

²⁸⁸ Probably because there were plans of passing an independent Consumer Credit Bill to cover all aspects of consumer credit including micro-lending. See in this regard, LRDC *Consumer Protection Discussion Document* (2014) 74.

²⁸⁹ This state of affairs was confirmed in a face-to-face interview with the Chief Legislative Drafter Mr Gabriel Nepaya and the Deputy Chief Legislative Drafter Dr Free Zenda on 29 Mar 2017.

African National Credit Act 34 of 2005,²⁹⁰ concerning the issues addressed in this thesis.²⁹¹ Had this Bill been passed with the deleted chapter 14, it would have addressed most of the concerns raised in this thesis. What follows is a discussion of the Microlending Bill.

3.5.2 The Microlending Bill

The Microlending Bill is intended to establish a sound regulatory and supervisory framework in order effectively to regulate and supervise the micro-lending industry in Namibia.²⁹² This Bill is a response to the current regulatory framework, the Exemption Notice,²⁹³ which is said not to be sound and effective. Once enacted the Act will regulate and supervise micro-lenders and ensure that they comply with the relevant provisions of the Usury Act.²⁹⁴ The Microlending Bill seeks to provide a custom-built, new, dynamic enforcement framework to regulate the conducting of the micro-lending business in Namibia.²⁹⁵ One objective of the Bill is to improve consumer protection and to promote responsible borrowing and lending.²⁹⁶ In support of this objective a micro-lender, prior to the conclusion of a micro-lending transaction, is required to

perform a credit check through a registered credit bureau on a loan applicant and must carry out an affordability assessment to satisfy him or herself that the loan applicant is or will be able to satisfy in a timely manner all the obligations under the loan agreement to which that loan applicant is a party, having regard to the –
(i) financial means, prospects and obligations; and

²⁹⁰ Hereinafter the “NCA”. See ch 4 below.

²⁹¹ Compared to the NCA, ch 14 of the FIM Bill was also aimed at protecting consumers *inter alia* by (1) promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers and discouraging reckless credit granting by credit providers – Cl 389(1)(c); (2) addressing and correcting imbalances in negotiating power between consumers and credit providers by providing consumers with adequate disclosure of standardised information in order to make informed choices – cl 389(1)(e); and (3) addressing and preventing over-indebtedness of consumers, providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations – cl 389(1)(g). Ch 14 also dealt with over-indebtedness and reckless credit in cls 426, 427 and 428.

²⁹² NAMFISA *TOR Bills Implementation Project* (2015) 3.

²⁹³ See para 3.3.2.2 above.

²⁹⁴ NAMFISA *TOR Bills Implementation Project* (2015) 4.

²⁹⁵ NAMFISA *TOR Bills Implementation Project* (2015) 3-4.

²⁹⁶ Cl 2(1)(a)(iii).

- (ii) probable propensity to satisfy in a timely manner all the obligations under all loan or credit agreements to which the loan applicant is a party, as indicated by the loan applicant's history of debt repayments.²⁹⁷

Equally, the prospective microloan consumer has an obligation to fully and truthfully answer any questions posed by the micro-lender and to fully supply accurate information to the micro-lender as part of the application for a loan or the affordability assessment.²⁹⁸ However there is no provision in the Bill which provides guidance on the effect of the consumer's failure to comply with this obligation.

There is an explicit prohibition placed on the micro-lender not to provide a loan to the consumer if the outcome of the affordability assessment of the loan application indicates that the consumer will not be able to service the loan, having regard to all his or her existing obligations.²⁹⁹ Further, a micro-lender is prohibited from providing a loan to a consumer who already has an existing loan, unless the affordability assessment of the loan application indicates that the consumer will be able to service the additional loan having regard to all his or her existing obligations.³⁰⁰ However, it does not provide for sanctions or any indication as to what may be done in the event that a microloan transaction is concluded without the micro-lender performing credit checks to determine whether or not the consumer has the capacity to repay the loan applied for.

Although the Bill does not outline the procedure for conducting the affordability assessments, nonetheless it empowers NAMFISA to issue standards by way of notice in the Government Gazette *inter alia* relating to the form and content of the affordability assessment to be performed by micro-lenders in respect of each micro-lending transaction.³⁰¹

²⁹⁷ Cl 24(4)(a). As will be seen in ch 4 below, this proposed law is largely based on the pre-agreement assessment provisions of the South African NCA.

²⁹⁸ Microlending Bill cl 30(1).

²⁹⁹ Microlending Bill cl 23(1)(b).

³⁰⁰ Microlending Bill cl 23(1)(c).

³⁰¹ Microlending Bill cl 35(1)(g).

In relation to the provision of pre-agreement information a micro-lender is required to provide the consumer, before the conclusion of the micro-lending transaction, with a statement setting out the following information relating to the microloan:³⁰²

- (a) the principal debt amount;
- (b) the financial charges and the elements comprising the finance charges and any other costs and expenses;
- (c) the total debt amount repayable, including interest;
- (d) the details about any insurance taken;
- (e) the penalty interest and any additional costs payable in the event of default and how that would be calculated;
- (f) the instalment amount and the number of instalments; and
- (g) the duration of the microloan.

As will be seen below,³⁰³ the Microlending Bill borrows greatly from the South African NCA. Its proposed features aimed at introducing responsible lending in the Namibian micro-lending industry therefore are a step in the right direction and thus commendable. However when these proposed reforms are assessed against leading international best principles formulated in chapter 2, it appears that they are not fully in tandem with international principles, especially the last three principles. Firstly, the Microlending Bill does not oblige credit providers to explain the pre-contractual information provided to consumers. Secondly, it is silent on the current regulatory challenges experienced by NAMFISA as a result of the Exemption Notice and its registration requirements.³⁰⁴ Thirdly, its coming into operation will introduce responsible lending practices only to the micro-lending industry and therefore the

³⁰² Microlending Bill cl 24(4)(b)(i)-(ix).

³⁰³ See ch 4 below.

³⁰⁴ Para 3.2.2.

consumers of other credit products and services will remain unprotected from the threat of irresponsible credit lending and consumer over-indebtedness.

3.6 Conclusion

The main aim in this chapter was to conduct a review of Namibia's consumer credit regulatory framework with a view to evaluating the existing responsible lending measures in Namibia against leading international best principles in protecting consumers from irresponsible credit and consumer over-indebtedness. A consideration of the Namibian financial system and the consumer credit industry in particular reveals that credit products such as mortgage loans, car finance, instalment sales, leasing agreements, credit cards, overdrafts, other personal loans and advances, as well as microloans are offered in the Namibian credit market.³⁰⁵ Of all these, mortgage loans and microloans are said to be the leading cause of credit growth in Namibia and the consequent elevation in consumer indebtedness.³⁰⁶

In order to have oversight over market conduct, the Bank of Namibia exercises regulatory control over the banking institutions which are responsible for mainstream credit, whereas NAMFISA regulates the non-banking financial institutions, including micro-lenders.³⁰⁷ Consumer credit in Namibia is regulated by the Usury Act, the Credit Agreements Act and the Sale of Land Act.³⁰⁸ These statutes were originally South African and were made applicable to South West Africa as a South African mandated territory, and were retained after independence.³⁰⁹

As indicated above,³¹⁰ the Usury Act applies to credit transactions and leasing transactions of movable goods, the rendering of services on credit as well as money lending transactions, provided that the principal debt does not exceed N\$500 000. However, there are exceptions.³¹¹ For instance, it should be noted that the Usury Act *inter alia* applies only to leasing transaction whose payment terms exceed three

³⁰⁵ Para 3.2.2.

³⁰⁶ Para 3.2.2.

³⁰⁷ Para 3.2.1.

³⁰⁸ Para 3.3.1.

³⁰⁹ Paras 3.3.1, 3.3.2.1, 3.3.3.1 and 3.3.4.1.

³¹⁰ Para 3.3.2.2.

³¹¹ Para 3.3.2.2.

months and where the lessee is not entitled to terminate the lease by giving written notice of 90 days or less.³¹²

The money lending transactions qualifying as microloan transactions also are exempted from the general application of the Usury Act and thus are regulated in terms of the Exemption Notice.³¹³ This exemption applies only if the credit provider in respect of such a transaction is registered as a micro-lender with NAMFISA, and if the credit provider at all times complies with the Exemption Notice.³¹⁴ Any person wishing to operate a business as a micro-lender therefore may register with NAMFISA as a micro-lender before commencing operations to enable NAMFISA to assume its supervisory powers over the business.³¹⁵ However, if that person chooses not to register, he would be bound by the provisions of the Usury Act but without a regulatory body to monitor the conduct of the business and its compliance with the applicable laws.³¹⁶ It follows therefore that there are members of the micro-lending sector who are not regulated.³¹⁷

The monetary cap of N\$500 000 on the amount of the credit agreements regulated by the Usury Act and the exclusion of some credit agreements from the Usury Act's scope of application on the basis of the nature of the credit product indicates that the Usury Act has a limited scope of application and not enough consumers enjoy its protection, for instance, a consumer under a mortgage credit agreement.³¹⁸ However, the Usury Act is commendable on account that it contains no limitation as to the purpose of the credit and therefore applies to all credit agreements as provided in the Usury Act regardless of whether or not the credit was acquired for the sole purpose of business activities, such as a resale or a subsequent rental at a profit.³¹⁹

³¹² Para 3.3.2.2.

³¹³ Para 3.3.2.2.

³¹⁴ Para 3.3.2.2.

³¹⁵ Paras 3.2.2 and 3.3.2.2.

³¹⁶ Para 3.2.2.

³¹⁷ Para 3.2.2.

³¹⁸ Para 3.3.2.4.2.

³¹⁹ Compared to the Credit Agreements Act – see para 3.3.3.2.

As regards debt prevention measures the Usury Act establishes the limitation and disclosure of finance charges, by placing a ceiling on the finance charges that a credit provider can levy on the principal debt in respect of a specific credit agreement and imposing financial charges control.³²⁰ However it appears that in practice the prescribed interest rate ceilings are difficult to enforce effectively. Notwithstanding the existence of these measures, the Usury Act fails adequately to protect consumers because some credit providers still do not comply with these measures by charging rates higher than the determined usury ceiling without any enforcement action from the regulatory bodies.³²¹ It is submitted that considering the protection these measures afford consumers from incurring too much debt, they are worth retaining in the consumer credit regulatory framework.³²²

Another legislative enactment applicable to the regulation of consumer credit in Namibia is the Credit Agreements Act. As indicated above,³²³ the Credit Agreements Act applies only to credit and leasing transactions. When the scope of application of the Credit Agreements Act is compared to that of the Usury Act, it appears that these two enactments treat credit agreements differently because their definitions of credit transactions and leasing transactions do not correspond, and neither does the monetary ceiling on the amounts of credit agreements that apply to the enactments.³²⁴

The Credit Agreements Act has a much narrower scope of application in that it does not apply to money lending transactions, lump-sum payments and credit agreements in terms of which goods are acquired for the sole purpose of business activities. It applies only to movable goods which the Minister of Trade and Industry determines to be applicable, and to date the Credit Agreements Act has not been made applicable to the rendering of services on credit.³²⁵ Further, it applies only to credit agreements whose repayment terms exceed six months.³²⁶ The narrow scope of

³²⁰ Paras 3.3.2.3.1, 3.3.2.3.2 and 3.3.2.4.2.

³²¹ Paras 3.2.2 and 3.3.2.4.2.

³²² Para 3.3.2.4.2.

³²³ Para 3.3.3.2.

³²⁴ Para 3.3.3.4.1.

³²⁵ Paras 3.3.2.1, 3.3.3.1 and 3.3.3.4.1.

³²⁶ Paras 3.3.2.1, 3.3.3.1 and 3.3.3.4.1.

application of the Credit Agreements Act implies that most consumers are not accorded the protection from irresponsible credit lending by its debt prevention measures, and hence are left exposed to the risk of consumer over-indebtedness.

The debt prevention measures in terms of the Credit Agreements Act were discussed and indicated that the Act authorises the Minister of Trade and Industry to prescribe the maximum periods of repayment of the full price in terms of the credit agreement and to prescribe a minimum deposit payable by the consumer with regard to credit agreements.³²⁷ The parties to a credit agreement are not allowed to agree to leave the duration of the credit agreement undetermined, neither are they allowed to agree to longer periods of repayment than the prescribed period.³²⁸

Regarding the minimum deposit, the Credit Agreements Act provides that no credit agreement shall be binding until the credit consumer has paid the deposit as prescribed by regulation.³²⁹ The use of schemes to assist consumers to obtain goods without paying the required deposit is prohibited.³³⁰ Consumers are also prohibited from borrowing money from the credit provider for the purpose of paying the deposit.³³¹ However, even if no deposit is paid, it is in principle accepted that if the consumer pays the instalments, the moment the total amount paid reaches the deposit amount, the contract becomes binding on the parties.³³² This practice may encourage credit providers to contravene the provisions of the Credit Agreements Act and the regulations prescribing the payment of deposits and therefore expose consumers to the threat of over-indebtedness.³³³

It was demonstrated that the aim of the deposit requirement is to prevent overspending and the over-indebtedness of consumers by ensuring that only consumers who are able to pay the prescribed deposit should be allowed to buy or lease goods on credit and that the prescribed maximum periods of payment also

³²⁷ Paras 3.3.3.3 and 3.3.3.4.2.

³²⁸ Para 3.3.3.3.1.

³²⁹ Para 3.3.3.3.2.

³³⁰ Para 3.3.3.3.2.

³³¹ Para 3.3.3.3.2.

³³² See paras 3.3.3.3.2 and 3.3.3.4.2.

³³³ Para 3.3.3.3.2 and 3.3.3.4.2.

help prevent consumers from committing themselves to credit agreements for an extended period.³³⁴ However, the effectiveness of these measures is weakened because credit providers adopt their own more relaxed and accommodative credit terms.³³⁵ These practices sidestep important debt prevention measures in the Credit Agreements Act and could lead to irresponsible lending thus exacerbating the problem of over-indebtedness among consumers.

Further, non-compliance with these provisions does not automatically render the credit agreement invalid. The main weakness of these measure lies in the burden which is placed on the individual consumer to bring an action to court in seeking relief by rendering the credit agreement invalid on the ground of non-compliance with the above provisions.³³⁶ This requirement may hinder the enforceability of the provisions of the Credit Agreements Act because of the possibility that a consumer who cannot afford credit may be lacking the necessary means to take the credit provider to court.³³⁷

To sum up, it appears that the deposit requirement is difficult to enforce in practice because the Credit Agreements Act does not prescribe the methods of payment of the deposit.³³⁸ However, in light of the benefits that a consumer derives from the terms control as far as the consumer's total debt burden is concerned, it is submitted that these are good consumer protection measures which Namibia should retain to prevent consumers from overburdening themselves with debt.³³⁹

The terms of the Sale of Land Act which applies to credit contracts for the sale of land against payment in more than two instalments over a period exceeding one year are briefly remarked upon.³⁴⁰ This Act determines that the land bought must be used or intended to be used mainly for residential purposes for it to apply.³⁴¹ Credit sales of land not used for residential purposes, for instance the sale of agricultural

³³⁴ Para 3.3.3.4.2.

³³⁵ Para 3.3.3.4.2.

³³⁶ Para 3.3.3.4.2.

³³⁷ Para 3.3.3.4.2.

³³⁸ Paras 3.3.3.3.2 and 3.3.3.4.2.

³³⁹ Para 3.3.3.4.2.

³⁴⁰ Paras 3.3.4.1 and 3.3.4.4.1.

³⁴¹ Paras 3.3.4.1 and 3.3.4.4.1.

land, are excluded from the protections provided by the Sale of Land Act, so are credit contracts making provision for two or less instalments and in less than one year.

The Sale of Land Act provides for the statutory disclosure of the principal debt amount, annual rate of interest and all other charges in the contract of sale.³⁴² However its failure to oblige credit providers to disclose pre-contractual information defeats the purpose of ensuring that the consumer understands the costs of credit so as to prevent an underestimation of the total debt burden. The Sale of Land Act also prohibits the seller from charging interest at a rate which is higher than the prescribed rate and restricts the amounts that can be claimed by the seller in connection with the sale of a piece of land,³⁴³ however no interest rates have been prescribed for the sales of land on instalments, which gives credit providers room to charge exorbitant rates.³⁴⁴ Further, on the limitation of recoverable costs, it is not clear whether or not in practice these measures always provide the protection intended because it is possible for credit providers to get around these provisions by displacing the costs of credit which results in inflated “recoverable costs”.

When the Namibian consumer credit legislative framework is considered as a whole, it is noteworthy that there is no consumer credit legislation in Namibia which seeks to protect consumers from irresponsible credit lending by imposing an obligation on credit providers to conduct an assessment of the consumer’s financial position and ability to repay the credit before extending credit to the consumer.³⁴⁵ This deficiency constitutes a lack of effective protection of consumers from irresponsible lending practices and a failure to address consumer over-indebtedness.³⁴⁶ It was noted that predatory lending in the form of asset-based lending is taking shape in Namibia, because of the lack of responsible lending practices.³⁴⁷

³⁴² Para 3.3.4.3.

³⁴³ Para 3.3.4.3.

³⁴⁴ Para 3.3.4.3.

³⁴⁵ See paras 3.3.2.4.2, 3.3.3.4.2, 3.3.4.4.2 and 3.3.5.

³⁴⁶ Para 3.3.5.

³⁴⁷ Para 3.3.5.

Other measures provided for in the Banking Code which is observed by the banking institutions were also considered.³⁴⁸ It was indicated that the measures are a step in the right direction of protecting consumers from irresponsible lending and consumer over-indebtedness. The Banking Code promises that credit providers will provide consumers with credit responsibly by meeting the consumer's borrowing requirements and capabilities based on the information provided by the consumer, and by supplying suitable credit products to ensure that consumers are not extended beyond their means.³⁴⁹ However in the absence of Namibian consumer credit legislation that provides for the pre-agreement assessment of consumers before providing them with credit, it is doubtful whether the spirit of the Banking Code will yield any benefit to consumers.³⁵⁰

The current proposals for legal reforms in Namibia to cater for a modernised and flexible regulatory framework were also discussed.³⁵¹ The 2012 FIM Bill and the 2014 Microlending Bill deserve a special mention. The FIM Bill is aimed at consolidating and harmonising the several outdated laws that currently regulate the non-banking financial industry.³⁵² Its original version did not contain aspects pertaining to consumer credit, however it was later revised with an added chapter 14 entitled "Credit Institutions".³⁵³ Chapter 14, which borrowed greatly from the South African NCA, would have provided Namibia with a regulatory framework aimed at protecting consumers across the board from reckless credit granting and consumer over-indebtedness and therefore would have addressed the main concerns of this thesis.³⁵⁴ However this chapter has since been deleted from the latest version of the FIM Bill because NAMFISA does not have oversight over the majority of credit providers they intended to regulate.³⁵⁵

In the Microlending Bill, NAMFISA is proposing a custom-built and dynamic enforcement framework to regulate the conducting of micro-lending business in

³⁴⁸ Para 3.4.

³⁴⁹ Para 3.4.

³⁵⁰ Para 3.4.

³⁵¹ Para 3.5.1.

³⁵² Para 3.5.1.

³⁵³ Para 3.5.1.

³⁵⁴ Para 3.5.1.

³⁵⁵ Para 3.5.1.

Namibia which will operate together with the provisions of the Usury Act.³⁵⁶ This Bill aims *inter alia* to improve consumer protection and promote responsible borrowing and lending.³⁵⁷ This is now the only existing Bill that proposes credit providers conduct pre-agreement assessments of the prospective consumer.³⁵⁸ The proposals in the Microlending Bill aimed at introducing responsible lending in the Namibian micro-lending industry therefore are a step in the right direction and are commendable.

To summarise, an evaluation of current Namibian consumer credit laws and proposed laws against the leading international best principles in chapter 2 indicates that there is a need for Namibia to update its regulatory framework in order to protect consumers from irresponsible credit and over-indebtedness. The first Principle identified in this thesis determines that the protection of consumers should be the basis of any consumer credit policy. This determination indicates that consumer protection should be a leading consideration in the formulation of responsible lending rules.³⁵⁹ However, considering the current consumer credit laws in Namibia, the existing debt prevention measures do not afford Namibian consumers adequate protection against irresponsible credit and consumer over-indebtedness. It is against this background that Namibia needs a policy on consumer credit which is aimed at achieving consumer protection in the credit market.

The second Principle identified in this thesis indicates a general requirement for credit providers to conduct creditworthiness assessments of the prospective consumer before providing the latter with credit.³⁶⁰ As noted in the discussion above, save for the non-binding standards in the form of the Banking Code and the proposed Microlending Bill of 2014,³⁶¹ in Namibia there is no consumer credit legislation that imposes an obligation on credit providers to conduct pre-agreement assessments of consumers. It is submitted that any attempt to introduce responsible lending policy will have to consider the measures contained in these two enactments

³⁵⁶ Para 3.5.2.

³⁵⁷ Para 3.5.2.

³⁵⁸ Para 3.5.2.

³⁵⁹ Para 2.7.

³⁶⁰ See para 2.7 for a detailed exposition of this principle.

³⁶¹ Para 3.5.2.

although the exact criteria of the assessments appear to be different. For instance, the Banking Code makes reference to providing suitable credit by meeting the needs of the particular consumer based on the information provided by the consumer,³⁶² whereas the Microlending Bill focuses more on affordability assessments by performing credit checks through registered credit bureaus having regard to the consumer's financial means, prospects and obligations as well as the probable propensity of the consumer to repay the credit on time.³⁶³

The third Principle identified in this thesis requires that responsible lending should be dependent not only on the responsible credit provider but also on the consumer, who makes responsible financial decisions. It posits that consumer protection will be achieved in the credit market if credit providers supply consumers with adequate pre-agreement information and equip the consumers to use the information provided to enable them make an informed decision.³⁶⁴ Currently, there is a form of disclosure regulation underlying the Namibian consumer credit legislative framework.³⁶⁵ The Microlending Bill lacks an obligation on credit providers to explain the pre-contractual information provided to consumers. This failure indicates that disclosure measures in Namibia are largely based on the image of a reasonably circumspect consumer who is empowered and can exercise his choices rationally.³⁶⁶ It must be affirmed that detailed disclosure requirements will not achieve much in practice if the consumer does not understand the information provided so as to be able to apply it.³⁶⁷ It is submitted that the duty of the credit provider to supply adequate pre-contractual information to the consumer must include a duty to explain the information provided to the consumer.³⁶⁸

The fourth Principle identified in this thesis relates to the existence of an effective credit regulatory body tasked with the responsibility of monitoring and enforcing the

³⁶² Para 3.4.

³⁶³ Para 3.5.2.

³⁶⁴ Para 2.7.

³⁶⁵ Paras 3.3.2.2 and 3.3.4.2.

³⁶⁶ See, e.g., the *Mukapuli* case – para 3.3.5.

³⁶⁷ Para 2.7.

³⁶⁸ Para 2.7.

responsible lending obligations.³⁶⁹ Normally, this goal is achieved by requiring credit providers to be licensed.³⁷⁰ It was noted above that the regulation of credit providers in Namibia is divided between the Bank of Namibia and NAMFISA. However not all credit providers are subject to regulation because only banking institutions and micro-lenders who wish to be regulated by the Exemption Notice are required to obtain a licence before operating.³⁷¹ It is also doubtful whether NAMFISA is adequately resourced to monitor the compliance of micro-lenders through the relevant laws in addition to the regulation of other financial institutions.³⁷² The Microlending Bill is silent on the regulatory challenges currently experienced by NAMFISA as a result of the Exemption Notice and its registration requirements.³⁷³

The last Principle identified in this thesis states that a proactive and effective responsible lending regime should prescribe sanctions which are effective in deterring credit providers from contravening their responsible lending obligations.³⁷⁴ Unfortunately, the current consumer credit laws do not contain any sanctions in the event of non-compliance.³⁷⁵ The same lack holds for the proposed 2014 Microlending Bill.³⁷⁶

Under the guidance of the leading international best principles, it is submitted that in order to prevent irresponsible lending and consumer over-indebtedness there is a need for a legislative framework which compels the implementation of responsible lending practices, such as the compulsory pre-agreement assessment of the consumer's ability to service the credit applied for, in respect of all credit products in Namibia. Further, in order to develop a responsible credit market responsible lending practices should be encouraged with reference to all consumer credit products and services, as opposed to the current proposals for legal reforms which restrict such

³⁶⁹ Para 2.7.

³⁷⁰ See in general, para 2.7.

³⁷¹ Para 2.7.

³⁷² Para 2.7.

³⁷³ Paras 3.2.2 and 3.5.2.

³⁷⁴ Para 2.7.

³⁷⁵ See paras 3.3.2.4.2, 3.3.3.4.2 and 3.3.4.4.2 for the evaluations of the existing responsible lending measures.

³⁷⁶ Para 3.5.2.

measures to the micro-lending industry.³⁷⁷ The exact criteria to be adopted in this responsible lending regime will be decided on after a comparative investigation is carried out in the chapters that follow. The situation in South Africa and Australia has been selected for this comparative analysis.³⁷⁸ The outcome of this investigation will be used to determine how best Namibia devises its responsible lending regime.

³⁷⁷ Para 3.5.2.

³⁷⁸ See para 1.5 for the justification of the countries chosen for the comparative investigation.

CHAPTER 4

THE SOUTH AFRICAN RESPONSIBLE LENDING REGIME

4.1 Introduction

As mentioned the ineffectiveness of the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980 in dealing with the demands of the consumer credit market led to the promulgation of the National Credit Act 34 of 2005,¹ which regulates the South African consumer credit industry.² The NCA replaced the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980 and became fully operative on 1 June 2007.³ In order to prevent consumer over-indebtedness the NCA sets out the parameters for granting credit and introduces responsible lending practices into South African consumer credit law.⁴

The NCA *inter alia* aims “to provide for the general regulation of consumer credit [...], to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting”.⁵ Its objectives are 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 *inter alia* by promoting responsibility in the credit market through encouraging responsible borrowing, preventing consumer over-indebtedness and discouraging reckless credit granting by credit providers and contractual default by consumers.⁶

In this chapter I reflect on the South African responsible lending regime as provided for by the NCA. The focus of the chapter is limited to the provisions in the NCA that apply to proposed and existing credit agreements to the extent that these are concerned with irresponsible or reckless credit. The provisions dealing with debt

¹ Hereinafter the “NCA”.

² See para 2.6.4, in which the consumer credit policy developments leading to the promulgation of the NCA in South Africa were discussed. See also Kelly-Louw (2012) 20, Renke in Nagel *ed* (2015) 173, Renke, Roestoff and Haupt (2007) *Obiter* 230.

³ S 172(4) which became effective on 1 Jun 2006. See also NCA sch 3, Kelly-Louw (2012) 3-4 and Otto and Otto (2012) 8.

⁴ Renke, Roestoff and Haupt (2007) *Obiter* 229.

⁵ Preamble to the NCA.

⁶ S 3(c)(i)-(ii). See also Otto and Otto (2012) 7.

relief for consumer over-indebtedness therefore are not addressed. In undertaking this comparative investigation, I begin by briefly discussing the scope of application of the NCA to determine the extent of protection accorded to South African credit consumers in paragraph 4.2. Paragraph 4.3, I discuss the regulatory bodies established in terms of the NCA.

Paragraph 4.4, I consider the responsible lending obligations imposed by the NCA and related matters such as the obligation on credit providers to provide pre-contractual information to consumers. In this paragraph those provisions which have as their primary objective the prevention of reckless credit granting and consumer over-indebtedness are discussed first. This is followed by a discussion of the credit provider's obligation to conduct a pre-agreement assessment and the consumer's obligation to provide information for the pre-agreement assessment. Thereafter, I discuss the powers of the courts in respect of reckless credit, as well as the credit provider's duty to provide pre-contractual information to the consumer. Paragraph 4.5, concludes the chapter.

4.2 The NCA: Scope of Application

4.2.1 General

In general terms, section 4(1) of the NCA provides that the NCA applies to every consumer credit agreement concluded⁷ between the parties, the consumer⁷ and the credit provider⁸ who deal at arm's length,⁹ and which is made within the Republic of

⁷ The NCA in s 1 defines a consumer, in respect of a credit agreement, as the party to whom goods or services are sold, to whom money is paid or advanced or credit granted under any credit agreement.

⁸ A credit provider is defined as the party *inter alia* who supplies goods or services or advances money or credit to another under any credit agreement – s 1. S 40 of the NCA as amended by s 10 of the National Credit Amendment Act 19 of 2014 (hereinafter the "NCAA") requires the registration of credit providers with the National Credit Regulator (see para 4.3 below). A person must apply to be registered as a credit provider if the total principal debt owed to that person under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold determined by the Minister of Trade and Industry – see s 40(1)(a) read with s 42(1). The threshold for the credit providers' registration is set at R0 – cl 2 of GN 513 in GG 39981 (11 May 2016). This means that all credit providers in South Africa regardless of the number of credit agreements and credit amount should register with the National Credit Regulator as credit providers. Failure to register as a credit provider renders the credit agreement entered into by that person unlawful and void in terms of s 89 – see s 40(4).

⁹ The discussion of "dealing at arm's length" is provided in para 4.2.4 below.

South Africa or has an effect within the Republic of South Africa.¹⁰ The application of the NCA extends to all credit agreements or proposed credit agreements irrespective of whether or not the credit provider resides or has its principal office in or outside South Africa, is an organ of the state or is an entity controlled by the state or created in terms of any public regulation, or is the Land and Agricultural Development Bank.¹¹ However, in terms of section 4(1)(c) the NCA does not apply if the credit provider is the Reserve Bank of South Africa.

4.2.2 Credit Agreements

In terms of the NCA an agreement constitutes a credit agreement to which the NCA applies if it qualifies as a credit facility, credit transaction, credit guarantee or any combination of these.¹² In terms of section 8(3) an agreement constitutes a credit facility if a credit provider undertakes to supply goods or services or to pay an amount or amounts to a consumer and to either defer the consumer's obligation to pay the cost or part thereof or to defer repayment of such amount or if he undertakes to periodically bill the consumer for any part of such costs or amount, and any charge, fee or interest is payable to the credit provider in respect of such undertaking and not paid within the time provided in the agreement.¹³ Section 8(4) of the NCA defines a credit transaction to include:

(a) Pawn transactions

A pawn transaction refers to an agreement, in terms of which a party advances money or grants credit to another and takes possession of goods as security for the money advanced or credit granted, and either the estimated resale value of the goods exceeds the value of the money provided or the credit granted or a charge, fee or interest is imposed in respect of the agreement, or of the loaned amount or the credit granted. On expiry of the defined period the party that advanced the money or

¹⁰ S 4(1). See also Renke in Nagel *ed* (2015) 173.

¹¹ S 4(3)(a)-(b). See also Kelly-Louw (2012) 31.

¹² See s 4(1) read with s 8(1) and s 8(3)-(5). See also Renke in Nagel *ed* (2015) 174-176, Kelly-Louw (2012) 52-78, Otto and Otto (2012) 20-30, Van Heerden and Boraine (2011) *De Jure* 392, Stoop and Kelly-Louw (2011) *PER/PELJ* 66 and Renke LLD Thesis (2012) 382-391 for a detailed exposition of these credit agreements.

¹³ E.g., buying goods on credit by means of an in-store card and the rendering of services on revolving credit. Borrowing money by means of a credit card serves as another example – Renke in Nagel *ed* (2015) 174. See also Kelly-Louw (2012) 52-57 and Tennant (2011) *SA Merc LJ* 126.

granted the credit is entitled to sell the goods and retain all the proceeds of the sale in settlement of the consumer's obligations under the agreement.¹⁴ The NCA therefore applies to pawn transactions.

(b) Discount transactions

These are agreements in terms of which goods or services are to be provided to a consumer over a period of time and where a lower and higher price is quoted for the goods or service. The lower price becomes applicable if the account is paid on or before a determined date and the higher price becomes applicable if the price is paid after that date.¹⁵

(c) Incidental credit agreements

These imply agreements in terms of which an account was tendered for goods or services that have been provided or goods or services to be provided to the consumer over a period of time and either or both of the following conditions apply:

- (i) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or
- (ii) a lower and higher price was 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.¹⁶

¹⁴ S 1. See also Renke in Nagel *ed* (2015) 174-175 and Kelly-Louw (2012) 58.

¹⁵ S 1. E.g., where a consumer buys goods from a shop at a price of R3 000, provided that the price of the goods is paid within three months from the date of the agreement. However, if the consumer does not pay within the three months, the price of the goods becomes R4 500 – see Renke in Nagel *ed* (2015) 175 and Kelly-Louw (2012) 59.

¹⁶ S 1. See also Renke in Nagel *ed* (2015) 175 and Kelly-Louw (2012) 63-64. The NCA has limited application to incidental credit agreements – see s 5. In terms of s 5(2), an incidental credit agreement comes into existence 20 business days after the date upon which interest is levied by the credit provider for the first time or the date upon which the higher price become payable. For a detailed discussion of incidental credit agreements, see Otto (2010) *THRHR* 464, Renke (2011) *THRHR* 464 and Tennant (2011) *SA Merc LJ* 126.

(d) Instalment agreements

Instalment agreements entail the sale of movable property in terms of which payment of the purchase price or part thereof is deferred and is to be paid by periodic payments at the same time transferring the possession and use of the property to the consumer. However, ownership of the property either passes to the consumer only when the agreement is fully complied with or passes to the consumer immediately subject to a right of the credit provider to repossess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement, and interest, fees or other charges are payable to the credit provider in respect of the agreement or the amount that has been deferred.¹⁷

(e) Mortgage agreement or secured loans

A mortgage agreement is a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property, whereas a secured loan means an agreement, excluding an instalment agreement, in terms of which a person advances money or grants credit to another and retains or receives a pledge on any movable property or other thing of value as security for all amounts due under that agreement.¹⁸

(f) Leases

A lease entails an agreement in terms of which temporary possession of any movable property is delivered to the consumer, or the right to use any such property is granted to the consumer and payment for the possession or use of that property is made on an agreed or determined periodic basis during the term of the agreement or is deferred in whole or in part for any period during its existence. Interest, fees or other charges are payable to the credit provider in respect of the agreement or on the amount that has been deferred and at the end of the term of the agreement ownership of that property either passes to the consumer absolutely or passes to the consumer upon satisfaction of specific conditions set out in the agreement.¹⁹

¹⁷ S 1. See also Renke in Nagel *ed* (2015) 175 and Kelly-Louw (2012) 61.

¹⁸ S 1. See also Renke in Nagel *ed* (2015) 176 and Kelly-Louw (2012) 72-73.

¹⁹ S 1. See also Renke in Nagel *ed* (2015) 176 and Kelly-Louw (2012) 75.

(g) Other Credit Agreements

A credit transaction also includes any other agreement, other than a credit facility or credit guarantee,²⁰ in terms of which payment of an amount owed by the consumer to the credit provider is deferred and any charge, fee or interest is payable to the credit provider in respect of the agreement or the amount that has been deferred.²¹ This is described as a catch-all provision and includes other agreements, such as the sale of land, where payment of the price is deferred and interest is payable,²² as well as fixed-sum money-lending transactions whereby one person lends a sum of money to another person who undertakes to repay an equivalent sum, for instance, a personal loan with a banking institution.²³

A credit guarantee to which the NCA applies is defined as an agreement in terms of which a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the NCA applies.²⁴ This means that the NCA applies only to a credit guarantee to the extent that it applies to the concerned credit facility or credit transaction in respect of which credit is granted.²⁵ For this reason the NCA will not apply, for instance, to a credit guarantee concluded with regard to a lease agreement of immovable property.²⁶ The NCA also applies to what it terms developmental credit agreements²⁷ and public

²⁰ The definition of a credit guarantee is provided below.

²¹ S 8(4)(f).

²² Otto and Otto (2010) 24. See also Kelly-Louw (2012) 79.

²³ Renke in Nagel *ed* (2015) 176. See also Renke LLD Thesis (2012) 390.

²⁴ S 8(5).

²⁵ S 4(2)(c).

²⁶ Renke in Nagel *ed* (2015) 176. See also Kelly-Louw (2012) 82 and Stoop and Kelly-Louw (2011) *PER/PELJ* 67. As seen in para 4.2.3 below the NCA does not apply to lease agreements of immovable property.

²⁷ A credit agreement qualifies as a developmental credit agreement if, at the time the agreement was entered into, (1) the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in s 41; (2) the credit agreement is between a credit co-operative as credit provider; (3) profit is not the dominant purpose for entering into the agreement; and (4) the principal debt amount under that agreement does not exceed the prescribed maximum amount – s 10. This may include an educational loan, any credit agreement entered into for purposes of developing a small business, the acquisition, rehabilitation, building or expansion of low income housing or any other purpose prescribed in terms of s 10(2)(a). “Educational loan” is defined in s 1 to include a student loan, a school loan and any other credit agreement entered into by the consumer for purposes related to the consumer’s adult education, training or skill’s development.

interest credit agreements.²⁸ The NCA also applies to what it terms developmental credit agreements²⁹ and public interest credit agreements.³⁰

In contrast to the Namibian consumer credit legislative framework, the NCA has a very wide field of application, especially when the section 8(4)(f) catch-all provision is considered. The NCA applies to a wide range of credit agreements concluded between consumers and credit providers no matter their financial position,³¹ provided that the terms of the credit agreement are arranged in a way that either payment is deferred and a fee, interest or charge is payable by the consumer or provision is made for prepayment against a discount.³² This means that the NCA is not applicable to credit agreements in terms of which payments or repayments are done over a period of time without the consumer having to pay an extra cost.³³

It is noted that the NCA does not follow a “purpose of the credit” approach and therefore applies to credit agreements regardless of whether the credit is granted for personal or commercial purposes.³⁴ This provision makes the NCA substantially different from its predecessors, the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980, which Namibia currently retains.³⁵ In light of the consumer protection principle³⁶ the wide field of application of the NCA is a positive development because most consumers in South Africa now are afforded protection in terms of the NCA.³⁷

²⁸ These are agreements which have been declared as such by the Minister of Trade and Industry in terms of s 11(1) for purposes of promoting the availability of credit in the Republic of South Africa, in circumstances which the minister considers to be in the public interest.

²⁹ A credit agreement qualifies as a developmental credit agreement if, at the time the agreement was entered into, (1) the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in s 41; (2) the credit agreement is between a credit co-operative as credit provider; (3) profit is not the dominant purpose for entering into the agreement; and (4) the principal debt amount under that agreement does not exceed the prescribed maximum amount – s 10. This may include an educational loan, any credit agreement entered into for purposes of developing a small business, the acquisition, rehabilitation, building or expansion of low income housing or any other purpose prescribed in terms of s 10(2)(a). “Educational loan” is defined in s 1 to include a student loan, a school loan and any other credit agreement entered into by the consumer for purposes related to the consumer’s adult education, training or skill’s development.

³⁰ These are agreements which have been declared as such by the Minister of Trade and Industry in terms of s 11(1) for purposes of promoting the availability of credit in the Republic of South Africa, in circumstances which the minister considers to be in the public interest.

³¹ Otto and Otto (2012) 4.

³² See Renke in Nagel *ed* (2015) 177. See also Kelly-Louw (2012) 48.

³³ See Renke LLD Thesis (2012) 399. The exceptions are mortgage agreements and secured loans.

³⁴ See Renke LLD Thesis (2012) 399.

³⁵ See paras 3.3.2.4.4.1, 3.3.3.4.1 and 3.3.4.4.1 above.

³⁶ See para 2.7 above.

³⁷ See the policy considerations underlying the NCA in para 2.6.4 above.

Another positive feature of the NCA that differentiates it from the Namibian consumer credit legislative framework is the fact that the NCA is a piece of consolidated legislation.³⁸ Unlike the circumstances in which the Usury Act 73 of 1980 regulated the usurious aspects of the credit agreements, the Credit Agreements Act 75 of 1980 dealt with the terms and formalities of the credit agreements and the Sale of Land Act 72 of 1971 with the credit agreements for the sale of land on instalments,³⁹ the NCA makes provision for all aspects relating to credit agreements. This change is especially useful in the implementation of the legislative provisions because regulators have only one piece of legislation with which to work.

4.2.3 Classification of Credit Agreements

Every credit agreement is further classified as either a small, intermediate or large credit agreement.⁴⁰ The main purpose of this classification is to facilitate the effective regulation of the credit industry by the NCA as some provisions that need to be observed by credit providers do not necessarily apply to all classes of credit agreements.⁴¹ In terms of section 9(2) a credit agreement is a small agreement if it is a pawn transaction, a credit facility or any credit transaction, except a mortgage agreement or a credit guarantee, provided that the credit limit under that facility or the principal debt under that transaction or guarantee falls at or below the lower of the thresholds established in terms of section 7(1)(b).⁴²

A credit agreement is categorised as an intermediate agreement if it is a credit facility or a credit transaction, except a pawn transaction, a mortgage agreement or a credit guarantee, if the credit limit under that facility or the principal debt under that transaction or guarantee falls between the thresholds established in terms of section 7(1)(b).⁴³

³⁸ See Steennot and Van Heerden (2017a) *PER/PELJ* 2.

³⁹ See paras 3.3.2 and 3.3.3 above.

⁴⁰ S 9(1). See also Kelly-Louw (2012) 92 and Otto and Otto (2012) 35.

⁴¹ See e.g., the differential pre-agreement disclosure obligations provided for in s 92. See also Kelly-Louw (2012) 93.

⁴² See also Kelly-Louw (2012) 94.

⁴³ S 9(3). See also Kelly-Louw (2012) 94.

A credit agreement is categorised as a large agreement if it is a mortgage agreement or any other credit transaction, except a pawn transaction or a credit guarantee, and the principal debt under that transaction or guarantee falls at or above the higher of the thresholds established in terms of section 7(1)(b).⁴⁴ It follows that credit guarantees are not classified as small, intermediate or large agreements.⁴⁵ However, Renke holds a different opinion based on the argument that in section 9(1)-(4) the NCA refers to the principal debt of a guarantee as well.⁴⁶

The lower threshold determined in terms of section 7(1)(b) is R15 000, while the higher threshold determined in terms of the same section is R250 000.⁴⁷ This means that all pawn transactions and all credit facilities and credit transactions, except a mortgage agreement, are small credit agreements if the credit value falls at or below R15 000. All credit facilities whose credit value exceed R15 000 are intermediate credit agreements as well as all the other credit transactions whose credit values range between R15 000 and R250 000, except a pawn transaction or a mortgage agreement. All mortgage agreements, regardless of the credit value, are categorised as large credit agreements. Credit transactions, except pawn transactions, in which credit values fall at or more than R250 000 are also large credit agreements.

4.2.4 Credit Agreements Specifically or Indirectly Excluded

The following credit agreements are specifically excluded from the scope of application of the NCA:⁴⁸

- (a) Credit agreements in terms of which the consumer is the state.⁴⁹
- (b) Credit agreements in terms of which the consumer is an organ of state.⁵⁰

⁴⁴ S 9(4). See also Kelly-Louw (2012) 94.

⁴⁵ S 9(2)-(4). See also Otto in Scholtz *ed* (2008) para 8.7.

⁴⁶ See Renke LLD Thesis (2012) 394.

⁴⁷ GN 713 in GG 28893 (1 Jun 2006), hereinafter "Threshold Regulations, 2006".

⁴⁸ See also Kelly-Louw (2012) 32-33.

⁴⁹ S 4(1)(a)(ii).

⁵⁰ S 4(1)(a)(iii).

- (c) Credit agreements in terms of which the credit provider is the Reserve Bank of South Africa.⁵¹
- (d) Credit agreements in terms of which the credit provider is located outside the Republic.⁵²
- (e) Credit agreements where the consumer is a juristic person⁵³ whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons,⁵⁴ at the time the agreement is made, equals or exceeds R1 million.⁵⁵
- (f) Large credit agreements⁵⁶ in terms of which the consumer is a juristic person whose asset value or annual turnover is below R1 million at the time the agreement is made.⁵⁷

Where a credit agreement is concluded in terms of which the consumer is a juristic person, the NCA is applicable if that juristic person has an asset value or annual turnover of less than R1 million and it concludes a small or an intermediate agreement.⁵⁸ However the NCA has only limited application.⁵⁹ Further, in respect of credit agreements where the consumer is a juristic person, the provisions of the NCA dealing with credit marketing practices, over-indebtedness and reckless lending and

⁵¹ S 4(1)(c).

⁵² S 4(1)(d) read with reg 2 of GN R489 in GG 28864 (31 May 2006) – hereinafter “the National Credit Regulations, 2006” provide that such a credit agreement will be excluded from the application of the NCA only if the consumer has applied for the exemption in the prescribed manner and form and if it was approved by the minister. Where no application has been made or where it was made but not approved by the minister, the NCA would otherwise be applicable in terms of s 4(3)(a).

⁵³ The concept “juristic person” in terms of s 1 of the NCA has an extended meaning and includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or where the trustee itself is a juristic person, but does not include a stokvel. See the definition of a stokvel below. See also para 2.6.4 above.

⁵⁴ S 4(2)(d) provides that a juristic person is related to another juristic person if one of them has direct or indirect control over the whole or part of the business of the other or if a person has direct or indirect control over both of them.

⁵⁵ S 4(1)(a)(i) read with the Threshold Regulations, 2006.

⁵⁶ See para 4.2.3 above.

⁵⁷ S 4(1)(b) read with the Threshold Regulations, 2006.

⁵⁸ See Van Zyl in Scholtz *ed* (2008) para 4.3. See also para 4.2.3 for the discussion of the classification of credit agreements into small, intermediate and large credit agreements.

⁵⁹ S 6.

the measures protecting the consumer against the financial implications of credit agreements do not apply.⁶⁰

The NCA also does not apply to debt flowing from the following set of circumstances:⁶¹

- (a) Where a person sells goods or services and accepts a cheque or a similar instrument as full payment for those goods or services and payment is subsequently refused, the resulting debt owed to the seller by the issuer of the cheque does not constitute a credit agreement and therefore the NCA does not apply.⁶²
- (b) Where the seller accepts as full payment for the goods or services a charge by or on behalf of the buyer against a credit facility, such as a credit card facility, in terms of which a third person is the credit provider and that credit provider subsequently refuses the charge for any reason. The resulting debt owed to the seller by the issuer of that charge does not constitute a credit agreement.⁶³
- (c) Where the consumer pays fully or partially for goods or services through a charge against a credit facility that is provided by a third party, the person who sells the goods or services must not be regarded as having entered into a credit agreement with the consumer merely by virtue of that payment.⁶⁴

The following agreements do not constitute credit agreements and therefore the NCA also does not apply to them:⁶⁵

- (a) A policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on an insurance policy.⁶⁶

⁶⁰ S 6(a) and (d). See also para 4.4.2 below.

⁶¹ See also Kelly-Louw (2012) 34-35.

⁶² See s 4(5)(a) for an example.

⁶³ See s 4(5)(b) for an example.

⁶⁴ S 4(6)(a), e.g., a credit card facility.

⁶⁵ See Kelly-Louw (2012) 33-34.

⁶⁶ S 8(2)(a).

- (b) A lease of immovable property.⁶⁷
- (c) A transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel.⁶⁸

It was mentioned above that the NCA applies to almost every consumer credit agreement provided that the parties are dealing at arm's length.⁶⁹ Although the NCA does not define the concept "dealing at arm's length",⁷⁰ it specifically excludes from its application credit agreements which have been concluded in any of the following instances because the parties are deemed not to be dealing at arm's length:

- (a) A shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider.⁷¹
- (b) A loan to a shareholder or other credit agreement between a juristic person, as credit provider, and a person who has a controlling interest in that juristic person, as consumer.⁷²
- (c) A credit agreement between natural persons who are in a familial relationship and are co-dependent on each other or one is dependent upon the other.⁷³
- (d) Any other arrangement in which each party is not independent of the other and

⁶⁷ S 8(2)(b).

⁶⁸ S 8(2)(c). "Stokvel" is defined in s 1 as "a formal or informal rotating financial scheme with entertainment, social or economic functions, which –

- (a) consists of two or more persons in a voluntary association, each of whom has pledged mutual support to the others towards the attainment of specific objectives;
- (b) establishes a continuous pool of capital by raising funds by means of subscriptions of the members;
- (c) grants credit to or on behalf of members;
- (d) provides for members to share in profits from, and to nominate management, of the scheme; and
- (e) relies on self-imposed regulation to protect the interest of its members". See also para 2.6.4 above.

⁶⁹ Para 4.2.1 above. See also Kelly-Louw (2012) 29-30 and Renke LLD Thesis (2012) 396-397.

⁷⁰ See Kelly-Louw (2012) 29.

⁷¹ S 4(2)(b)(i).

⁷² S 4(2)(b)(ii).

⁷³ S 4(2)(b)(iii).

consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction.⁷⁴

- (e) Arrangements that are of a type that has been held in law to be between parties who are not dealing at arm's length.⁷⁵

4.3 Regulatory Bodies in terms of the NCA

To facilitate the effective regulation of the consumer credit industry in South Africa there is a regulatory body, the National Credit Regulator,⁷⁶ established in terms of section 12 of the NCA. The NCR is required to promote the development of an accessible credit market, monitor market conduct and propose policies relating to any matter affecting the credit market, manage the registration of industry participants such as credit providers, credit bureaux and debt counsellors, investigate complaints, conduct educational research and ensure compliance with the NCA.⁷⁷

There is also a National Consumer Tribunal,⁷⁸ established on 1 September 2006,⁷⁹ to adjudicate over applications made to it and to determine allegations of prohibited conduct in terms of the NCA.⁸⁰ It operates independently of the NCR and *inter alia* is responsible for hearing cases against credit providers that have contravened the NCA.⁸¹

4.4 The Responsible Lending Provisions in terms of the NCA

4.4.1 General

As indicated above, the NCA is the first piece of consumer credit legislation to introduce responsible lending provisions in South African consumer credit law.⁸² Pivotal to these responsible lending provisions are the concepts "reckless lending"

⁷⁴ S 4(2)(b)(iv)(aa).

⁷⁵ S 4(2)(b)(iv)(bb).

⁷⁶ Hereinafter the "NCR".

⁷⁷ See ss 14-16. See also Otto and Otto (2012) 37-38 and Kelly-Louw (2012) 126.

⁷⁸ See ss 26-34. Hereinafter the "Tribunal".

⁷⁹ Kelly-Louw (2012) 101.

⁸⁰ S 27(a).

⁸¹ Kelly-Louw (2012) 101. See also Otto and Otto (2012) 39.

⁸² Para 4.1. See also ss 78-88.

and “over-indebtedness”.⁸³ Before the promulgation of the NCA the concepts “reckless lending” and “over-indebtedness” were uncommon in South African legal discourse.⁸⁴ It has been said that consumer over-indebtedness *inter alia* is caused by reckless lending and borrowing which result in the consumer’s inability to service all his debts.⁸⁵ This claim acknowledges that a consumer may become over-indebted after a credit agreement has been entered into, but not as a result of reckless credit granting, for instance, where the consumer is retrenched from employment and can no longer afford to repay the credit he could have afforded while still employed.⁸⁶

In light of the above, a discussion of “over-indebtedness” in this chapter is limited to situations where the consumer becomes over-indebted as a result of reckless credit granting.⁸⁷ In the South African context, “responsible lending” in the narrow sense entails primary debt prevention measures which as their primary objective have the prevention of reckless credit granting and consumer over-indebtedness.⁸⁸ These measures are provided for in Part D of Chapter 4 of the NCA, which is entitled “Consumer credit policy”.⁸⁹

4.4.2 Application of Part D of Chapter 4

Part D of Chapter 4 has a limited scope of application. First, it applies only to a credit agreement or proposed credit agreement in terms of which the consumer is a natural person.⁹⁰ This proviso means that the responsible lending provisions in the NCA do not apply to credit agreements in terms of which the consumer is a juristic person. As indicated earlier,⁹¹ the concept “juristic person” in terms of the NCA has an extended meaning and includes a partnership, association or other body of persons, corporate or unincorporated, or a trust if there are three or more individual trustees or where the trustee itself is a juristic person, but does not include a *stokvel*.⁹² It follows,

⁸³ These concepts are discussed in paras 4.4.3 and 4.4.4 below.

⁸⁴ See Van Heerden in Scholtz *ed* (2008) para 11.1. See also Vessio (2009) *TSAR* 274.

⁸⁵ Kelly-Louw (2012) 290.

⁸⁶ See Van Heerden in Scholtz *ed* (2008) para 11.1 and Van Heerden and Boraine (2011) *De Jure* 394.

⁸⁷ See para 1.6 for the delineations of this thesis.

⁸⁸ Renke LLD Thesis (2012) 15. See also para 1.3 above.

⁸⁹ See ss 78-88. See also Coetzee LLD Thesis (2015) 271.

⁹⁰ S 78(1).

⁹¹ See para 4.2.4.

⁹² S 1.

therefore, that only natural person consumers are protected from reckless credit and over-indebtedness by the NCA.

Secondly, the provisions dealing with reckless credit in Part D of Chapter 4,⁹³ do not apply to the following credit agreements:⁹⁴

- (a) a school loan or student loan;⁹⁵
- (b) an emergency loan;⁹⁶
- (c) a public interest credit agreement;⁹⁷
- (d) a pawn transaction;⁹⁸
- (e) an incidental credit agreement;⁹⁹ and
- (f) a temporary increase in the credit limit under a credit facility.¹⁰⁰

It is required that for the school loan, student loan, emergency loan and a public interest credit agreement to be exempt from the application of the reckless credit provisions, credit extension in respect of these credit agreements must be reported

⁹³ Ss 81-84.

⁹⁴ S 78(2)(a)-(f). See also Kelly-Louw (2012) 294-295 and Otto and Otto (2012) 87.

⁹⁵ A school loan is defined as a credit agreement in terms of which money is paid by the credit provider to a school on account of school fees or related costs for the benefit of the consumer's child or other dependant or where the school defers payment of the school fees or related costs for the consumer's child or other dependant – s 1. A student loan on the other hand is defined as a credit agreement in terms of which money is paid by the credit provider to a tertiary institution on account of education fees or related costs for the benefit of the consumer or a dependant of the consumer or where the institution defers payment of the consumer's education fees or related costs – s 1.

⁹⁶ An emergency loan includes every credit agreement entered into by a consumer to cover costs associated with death, illness or medical condition, any unexpected loss or interruption of income or for the catastrophic loss of or damage to home or property due to fire, theft or natural disaster, affecting the consumer or his dependant – s 1.

⁹⁷ See para 4.2.2 for the definition of a public interest credit agreement.

⁹⁸ See para 4.2.2 for the definition of a pawn transaction.

⁹⁹ See para 4.2.2 for the definition of an incidental credit agreement.

¹⁰⁰ See para 4.2.2 for the definition of a credit facility. See also ss 80(1) and 119(4) and para 4.4.4.7 below where the provisions of these sections are discussed.

by the credit provider to the National Credit Register¹⁰¹ once the agreement is established and operational in the prescribed manner and form.¹⁰² Further, in respect of any credit extended in terms of an emergency loan, reasonable proof of the existence of the emergency as defined in section 1, such as a death certificate or medical records reflecting the consumer's illness or medical condition, must be obtained and retained by the credit provider.¹⁰³

Lastly, it should be noted that the provisions of Part D of Chapter 4 do not apply to a consumer who applies for or enters into a credit agreement contrary to the provisions of section 88.¹⁰⁴

4.4.3 Consumer Over-indebtedness in terms of the NCA

For purposes of the NCA a consumer is over-indebted if the particular consumer is unable or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party.¹⁰⁵ The determination whether a consumer is over-indebted is made by applying the determining criteria as they exist at the time the determination is made,¹⁰⁶ by having regard to the consumer's

- (a) financial means, prospects and obligations; and
- (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.¹⁰⁷

The concept "financial means, prospects and obligations" has an extended meaning in terms of the NCA, as it is defined to include

- (a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective

¹⁰¹ See the discussion of the National Credit Register at para 4.4.3 below.

¹⁰² See s 69 read with item 3 of sch 3 to the NCA and reg 23 of the National Credit Regulations, 2006. See also Kelly-Louw (2012) 294.

¹⁰³ Kelly-Louw (2014) *SA Merc LJ* 27 and Kelly-Louw (2012) 294-295.

¹⁰⁴ S 88(5). S 88 provides for the effect of debt review or a re-arrangement order or agreement. For a discussion of the effects of this exclusion, see Vessio (2009) *TSAR* 288 and Van Heerden and Borraine (2009) *PER/PELJ* 35/161.

¹⁰⁵ S 79(1).

¹⁰⁶ S 79(2).

¹⁰⁷ S 79(1)(a)-(b).

- consumer receives or has a right to receive, or holds in trust for another person;¹⁰⁸
- (b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily –
 - (i) share their respective financial means; and
 - (ii) mutually bear their respective financial obligations;¹⁰⁹ and
 - (c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose.¹¹⁰

In the case of *Standard Bank of South Africa Ltd v Panayiotts*,¹¹¹ the court stated that “financial means” includes not only income and expenses but also assets and liabilities, whereas “prospects” could include “prospects of improving the consumer’s financial position, such as increases, and even, liquidating assets”. In respect of credit agreements where goods constitute the subject matter of the agreement, for example instalment agreements, secured loans, leases and mortgages, the prospect of selling the goods to reduce the consumer’s debt must be included under financial means and prospects.¹¹²

With regard to the second criterion in section 79(1)(b), the NCA does not prescribe or define what constitutes the consumer’s “probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer’s history of debt repayment”. For Vessio, this criterion requires determining the likelihood of the consumer to meet his obligations under the credit agreements by looking at his repayment history and habits of paying his debts.¹¹³

The consumer’s probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as suggested by the consumer’s debt repayment history, requires the credit provider to assess the likelihood of the consumer meeting his obligations under the proposed credit agreement by considering his repayment history. This exercise is retrospective in

¹⁰⁸ S 78(3)(a).

¹⁰⁹ S 78(3)(b).

¹¹⁰ S 78(3)(c). See also Vessio (2009) TSAR 278.

¹¹¹ 2009 3 SA 363 (W) 366. Hereinafter “*Panayiotts*”.

¹¹² *Panayiotts* 366.

¹¹³ Vessio (2009) TSAR 276.

nature as it requires the consideration of past events to determine the habitual patterns of the potential consumer in discharging his credit obligations.¹¹⁴ In the determination of the consumer's credit repayment history, reliance may be had on the credit information kept by the credit bureaux.¹¹⁵

It must be mentioned that it is critical for the NCR, the credit industry regulator, to ensure that the credit information retained by the credit bureaux is accurate, relevant and up-to date. For this purpose the NCA contains provisions aimed at improving and integrating the credit information infrastructure. It is compulsory for all credit bureaux to be registered with the NCR.¹¹⁶ The consumer credit information that may be kept by a credit bureau includes the following:¹¹⁷

- (a) A person's credit history and related matters.
- (b) A person's financial history, including the person's past and current income, assets and debts and related matters.
- (c) A person's education, employment, career, professional or business history and related matters.
- (d) A person's identity and related matters.

In terms of section 69(1) of the NCA the minister may require the NCR to establish and maintain in the prescribed manner and form, a single national register of all existing credit agreements.¹¹⁸ The register established in terms of this section will contain information on all outstanding credit agreements,¹¹⁹ including the parties'

¹¹⁴ Vessio (2009) *TSAR* 276.

¹¹⁵ See s 70(1) read with s 70(2)(g). See also the assessment procedure as prescribed in terms of Reg 23A in para 4.4.4.5.2 below.

¹¹⁶ S 43 provides that a person must apply to be registered as a credit bureau if that person engages for payment in the business of receiving reports or investigating credit applications, credit agreements, payment history or patterns or consumer credit information, relating to consumers or prospective consumers; compiling and maintaining data from those reports and disseminating these reports.

¹¹⁷ S 70(1).

¹¹⁸ See also Kelly-Louw (2012) 299.

¹¹⁹ Pawn transactions and incidental credit agreement are explicitly excluded – s 69(2).

particulars, the principal debt amount under the existing credit agreement, the instalments and schedules of every instalment payment as well as the date on which the consumer's obligations will be fully satisfied if the agreement is fully complied with.¹²⁰ It is submitted that once this register is operational, it may be useful in the prevention of reckless credit granting as it will enable credit providers to obtain the necessary credit information regarding consumers before concluding a credit agreement with them. These circumstances lessen the risk of the credit provider providing credit to an already over-indebted consumer or to those that might become over-indebted if further credit is granted.¹²¹

Furthermore, the NCA provides guidance for the values to be used in the determinations concerning credit facilities and credit guarantees.¹²² The value of any credit facility is the settlement value at the time of the determination.¹²³ The value of a credit guarantee depends on whether the guarantor has been called upon to honour that guarantee or not. If the guarantor has been called upon to honour the guarantee, the value of the credit guarantee is the settlement value of the credit agreement that it guarantees.¹²⁴ Where the guarantor has not been called to honour the guarantee, the value is the settlement value of the credit agreement it guarantees, discounted by a prescribed factor.¹²⁵

4.4.4 The Prevention of Reckless Credit in terms of the NCA

4.4.4.1 General

The NCA introduces measures that credit providers must comply with to prevent consumers from being irresponsibly provided with credit and thereby prevent consumer over-indebtedness. In particular, credit providers are prohibited from entering into reckless credit agreements with prospective consumers.¹²⁶ Before a credit agreement is entered into the credit provider is required to conduct a

¹²⁰ S 69(2)(a)-(c).

¹²¹ Kelly-Louw (2012) 299. See also Kelly-Louw (2014) *SA Merc LJ* 38-39.

¹²² S 79(3). See also Kelly-Louw (2012) 298.

¹²³ S 79(3)(a).

¹²⁴ S 79(3)(b)(i).

¹²⁵ S 79(3)(b)(ii).

¹²⁶ S 81(3).

compulsory pre-agreement assessment.¹²⁷ In this part of the chapter I discuss the credit provider's obligation to conduct a pre-agreement assessment and the consumer's obligation to provide information for the pre-agreement assessment. Finally, I discuss the powers of the courts in respect of reckless credit.

4.4.4.2 The Credit Provider's Pre-Agreement Assessment Obligation

Section 81(2) of the NCA provides that

- a credit provider must not enter into a credit agreement without first taking reasonable steps to assess –
- (a) the proposed consumer's –
 - (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
 - (ii) debt re-payment history as a consumer under credit agreements;
 - (iii) existing financial means, prospects and obligations; and
 - (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement.

The assessment obligation imposed in this provision is comprehensive and may be categorised as having two aspects, which I discuss below, namely:

- (a) the consumer's general understanding of the credit and what it entails and
- (b) the affordability assessment.

4.4.4.2.1 The Consumer's General Understanding of the Credit

The first aspect a credit provider is required to assess is the consumer's general understanding and appreciation of the risks, costs, rights and obligations in connection with the proposed credit agreement.¹²⁸ Kelly-Louw maintains that this requirement is coupled to the duty of the credit provider to inform and/or explain to the consumer of the proposed credit agreement the risks, costs and obligations.¹²⁹ If a credit provider fails to comply with this assessment duty and still concludes a credit

¹²⁷ S 81(2). See also Kelly-Louw (2012) 293.

¹²⁸ S 81(2)(a)(ii).

¹²⁹ Kelly-Louw (2014) *SA Merc LJ* 31.

agreement the terms of which the consumer does not understand or appreciate its risks, costs and obligations, then the credit agreement may be declared reckless.¹³⁰

Notably, section 81 of the NCA is worded broadly in that it does not require that the consumer should “specifically” not have understood the risks, costs and obligations under the agreement but merely requires a “general” lack of understanding.¹³¹ What qualifies as a general lack of understanding, however is not clear.

4.4.4.2.2 The Affordability Assessment

The credit provider wishing to conclude a credit agreement with a prospective consumer must also assess whether the consumer can “afford” the credit. This requirement involves taking reasonable steps in assessing whether the consumer will be able to satisfy in a timely manner all his obligations under all his credit agreements, including the proposed credit agreement. The determination is done taking into account the following factors:

- (a) All the existing or future financial means of the consumer and other members contributing to his household and all the existing or future expenses paid by the consumer and by other members contributing to his household and all relevant assets and liabilities.¹³²
- (b) The consumer’s debt repayment history before the credit provider can validly conclude the credit agreement with the consumer.¹³³
- (c) Where the consumer applies for credit for a commercial purpose, for example to start a business, the credit provider must analyse the business risk involved in order to assess whether providing the consumer with the credit will entail reckless credit.¹³⁴

¹³⁰ See s 80(1)(b)(i).

¹³¹ Van Heerden and Boraine (2011) *De Jure* 394.

¹³² S 78(3). See also Kelly-Louw (2014) *SA Merc LJ* 30.

¹³³ S 81(2)(a)(i). See also Coetzee LLD Thesis (2015) 272.

¹³⁴ Vessio (2009) *TSAR* 276.

When the provisions of the proposed Microlending Bill in Namibia are compared to those in the NCA it becomes clear that the proposed requirement for micro-lenders to conduct a pre-agreement assessment borrows greatly from the requirement that is imposed through the NCA on South African credit providers.¹³⁵ As is the case with the NCA, the proposed Microlending Bill determines that credit providers conduct affordability assessments of the consumer's ability to satisfy in a timely manner all the obligations under the proposed credit agreement by having regard to the consumer's financial means, prospects and obligations and probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party as indicated by the consumer's history of debt repayments.¹³⁶

4.4.4.3 The Consumer's Information Duty

It has been mentioned that the credit provider is required to conduct a pre-agreement assessment in terms of section 81(2) of the NCA.¹³⁷ Reciprocal is the duty on the prospective consumer to prevent reckless credit from being extended to him.¹³⁸ When a consumer applies for credit and while that application is being considered by the credit provider, the prospective consumer is required to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by the NCA.¹³⁹ In the view of Coetzee the aim of this requirement in the NCA is to enable the credit provider to conduct a proper affordability assessment.¹⁴⁰

Section 81(4) provides that it is a complete defence for the credit provider in relation to an allegation that a credit agreement is reckless, if the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the required assessment, and if a court or the

¹³⁵ See para 3.5.2 above.

¹³⁶ See para 3.5.2 above.

¹³⁷ See para 4.4.4.2 above. See also Coetzee LLD Thesis (2015) 272.

¹³⁸ Kelly-Louw (2012) 300 and Van Heerden and Boraine (2011) *De Jure* 397.

¹³⁹ S 81(1).

¹⁴⁰ Coetzee LLD Thesis (2015) 271.

Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.¹⁴¹

This defence provided for in section 81(4) of the NCA was considered in the case of *ABSA Bank Ltd v COE Family Trust and Others*.¹⁴² In this case the plaintiff applied for summary judgment against the defendants for the payment of money lent in advance and for an order declaring certain immovable property executable in terms of the mortgage bond. The defendants opposed the application on the grounds that the provision of credit by the plaintiff constituted reckless credit because the required assessment in terms of section 81(2) of the NCA was not carried out.

Counsel for the plaintiff relied on clause 11 of the mortgage loan agreement which stated that the consumer "fully and truthfully answered all and any requests for information made of him by or on behalf of the bank leading up to the conclusion of this agreement".¹⁴³ He submitted that the agreement covered all requirements for a prescribed assessment and that the defendants could not raise a defence of reckless credit because in terms of section 81(1) of the NCA, if it is established that the consumer failed to fully and truthfully answer requests for information made by the credit provider, this was a complete defence to the defendant's averments.¹⁴⁴

It was held that section 81(4) of the NCA, which gives the credit provider a defence where the consumer fails to fully and truthfully answer any request for information made by the credit provider as part of its assessments, must be read together with section 81(2). It then follows that if no assessment was conducted by the credit provider as required by section 81(2), the section 81(4) defence falls away.¹⁴⁵ The creditor's reliance on a contractual term and seeking to apply the doctrine of *pacta sunt servanda* was not allowed because many people conclude contracts without any bargaining power and without understanding to what they are agreeing.¹⁴⁶ In this regard the court affirmed that the pre-agreement assessments provided for in section

¹⁴¹ S 81(4). See also Kelly-Louw (2012) 300 and Van Heerden and Boraine (2011) *De Jure* 400.

¹⁴² 2012 3 SA 184 (WCC). Hereinafter "*COE Family Trust*".

¹⁴³ *COE Family Trust* 187.

¹⁴⁴ *COE Family Trust* 187.

¹⁴⁵ *COE Family Trust* 189.

¹⁴⁶ *COE Family Trust* 189.

81(2) of the NCA are compulsory and therefore it is not sufficient for the credit provider to rely on a contractual clause containing the consumer's declaration to the effect that the consumer understood for what she was contracting, unless such a clause was properly brought to the consumer's attention and the consumer acknowledged having understood it.¹⁴⁷

In the case of *Horwood v FirstRand Bank Ltd*,¹⁴⁸ the consumer applied to have five credit agreements declared reckless and for an order setting aside part of her rights and obligations under them. The credit agreements related to two personal loans, two credit card loans and a mortgage loan secured by two mortgage bonds. The mortgage loan had been concluded in 2005 and in 2007 the loan agreement was increased. The applicant contended that the reckless credit provisions of the NCA applied to her "entire indebtedness ... under consideration since the greatest majority of withdrawals" was from August 2007 which is after the commencement of the provisions of the Act on 1 June 2007.¹⁴⁹ The court held that there was no merit in this contention because in terms of section 80 of the NCA, the relevant time for determining whether an agreement is reckless is when the agreement is concluded or when the amount approved in terms of it is increased. The time of the withdrawal of amounts is irrelevant.¹⁵⁰

Further, the applicant argued that the mortgage agreement was reckless because the respondent did not conduct a proper assessment as required by section 81(2), specifically that the respondent did not take reasonable steps to assess her debt repayment history and her financial means, prospects and obligations.¹⁵¹ Facts provided by the respondent proved that the respondent conducted a proper assessment and raised a complete defence that the consumer furnished incorrect information to the credit provider during the assessment.¹⁵²

¹⁴⁷ *COE Family Trust* 190.

¹⁴⁸ *Horwood v FirstRand Bank Ltd* [2011] ZAGPJHC 121 (21 Sept 2011). Hereinafter "*Horwood*".

¹⁴⁹ *Horwood* para 10.

¹⁵⁰ *Horwood* para 10.

¹⁵¹ *Horwood* para 11.

¹⁵² *Horwood* para 12.

The applicant denied the correctness of the information relating to her income and expenses upon which the creditor relied to approve the credit, denied that she provided incorrect information to the respondent, but failed to adduce the relevant primary facts or evidence to refute the credit provider's allegations.¹⁵³ On the facts and in the circumstances, the court held that the respondent acted reasonably in accepting the correctness of the information furnished to it on behalf of the applicant and found the respondent to have met the prescribed assessment obligations at the time the loan amount was increased, making the section 81(4) defence unnecessary.¹⁵⁴ This ruling indicates that a credit provider is entitled to accept the accuracy of the information provided by the consumer where there is no indication that would reasonably alert it to the contrary.¹⁵⁵ As will be seen below, the result of an amendment to the NCA is that credit providers in conducting the required assessments are now required to validate some information provided by the consumers.¹⁵⁶

Vessio is of the view that the consumer's duty to fully and truthfully answer questions posed by the credit provider during the consideration of the credit application places the positive responsibility on the credit provider to ask the relevant information-gathering questions and ensure that the credit risk is sufficiently analysed during the determination period.¹⁵⁷ She recommends that credit providers obtain the necessary legal advice to ensure that their credit assessment forms are comprehensive enough to enable them to obtain sufficient information.¹⁵⁸

4.4.4.4 The Pre-Agreement Assessment Procedure

As outlined earlier¹⁵⁹ the NCA prescribes the aspects which the credit provider must assess in relation to the consumer. The NCA further requires that credit providers must take reasonable steps in conducting the required assessments.¹⁶⁰ However, it does not prescribe the way in which such assessments must be conducted. Section

¹⁵³ *Horwood* para 13.

¹⁵⁴ *Horwood* para 14-15.

¹⁵⁵ See *Horwood* para 14. See also Coetzee LLD Thesis (2015) 271.

¹⁵⁶ Coetzee LLD Thesis (2015) 271. See also para 4.4.4.5.2 below.

¹⁵⁷ Vessio (2009) TSAR 279.

¹⁵⁸ Vessio (2009) TSAR 279.

¹⁵⁹ See para 4.4.4.2 above.

¹⁶⁰ S 81(2). See also para 4.4.4.2 above.

82 empowers credit providers to determine their own evaluative mechanisms or models and procedures to be used in meeting their assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment and must not be inconsistent with the affordability assessment regulations laid down by the minister.¹⁶¹

Section 61(5) of the NCA provides that a credit provider may determine for itself any scoring or other evaluative mechanism or model to be used in managing, underwriting and pricing credit risk, provided that any such mechanism or model is not founded or structured upon a statistical or other analysis in which the basis of risk categorisation, differentiation or assessment is a ground of unfair discrimination prohibited in section 9(3) of the South African Constitution.

Van Heerden and Boraine's interpretation of the relevant sections of the NCA suggests that for purposes of comprehensive compulsory assessments, the evaluative measures adopted by the credit provider must be cast in plain language, in an official language that the consumer reads and understands,¹⁶² and *inter alia* should address the following aspects:¹⁶³

- (a) The consumer's understanding and appreciation of the risks and costs of the credit and of his rights and obligations as a consumer under the credit agreement. After the assessment, the credit provider may insert a clause into the credit agreement indicating that the risks and costs of credit and the consumer's rights and obligations as a consumer under a credit agreement were explained to him by the credit provider and that the consumer expressly acknowledged that he understood and appreciated these provisions.¹⁶⁴
- (b) The consumer's debt repayment history as a consumer under credit agreements. In this regard the credit provider should check with a credit bureau

¹⁶¹ S 81(1) as amended by s 24(a) of the NCAA. S 82(2) provides that the minister must lay down affordability assessment regulations on recommendation of the NCR. See also Van Heerden and Beyers (2016) *JIBLR* 449, Van Heerden and Renke (2015) *IIR* 83 and Coetzee LLD Thesis (2015) 274.

¹⁶² As required by s 64.

¹⁶³ Van Heerden and Boraine (2011) *De Jure* 398-399.

¹⁶⁴ Van Heerden in Scholtz *ed* (2008) para 11.6 and Vessio (2009) *TSAR* 280.

to determine whether the consumer has a good or bad debt repayment history. A bad repayment history, for example judgments due to non-payment of debt, serves to expose the consumer as a possible “reckless borrower” risk, which may result in consumer over-indebtedness if a credit agreement is concluded. It is submitted that the assessment should contain an assertion indicating that the credit provider had due regard to the consumer’s debt repayment history as required by section 81(2)(a)(ii).

- (c) The consumer’s existing financial means, prospects and obligations.¹⁶⁵
- (d) Where the consumer has a commercial purpose in applying for credit, the credit provider for the purposes of assessing the consumer’s financial means, prospects and obligations also may have regard to the reasonably estimated future revenue flow from that business purpose.¹⁶⁶
- (e) Assessments should be done not only of the means, prospects and obligations of a consumer under a credit facility or a credit transaction to which the NCA applies, but also of the surety in respect of such credit facility or credit transaction.

Prior to the amendment of the NCA by the NCAA, the right of credit providers to determine their own evaluative mechanisms or models was subject to the right of the NCR to:

- (a) pre-approve the evaluative mechanisms, models and procedures to be used for assessment purposes in respect of developmental credit agreements; and
- (b) publish guidelines proposing evaluative mechanisms, models and procedures to be used in respect of other credit agreements.¹⁶⁷

¹⁶⁵ S 78(3). See para 4.4.3 above.

¹⁶⁶ S 78(3)(c).

¹⁶⁷ S 82(2)(a)-(b) in its original form. See also Van Heerden and Renke (2015) *IIR* 77.

The guidelines published by the NCR were not intended to be binding on a credit provider, except with regard to developmental credit or if so ordered by the Tribunal.¹⁶⁸ This requirement was informed by the fact that after the pre-approval of such evaluative mechanisms, models and procedures by the NCR, they became binding on the credit provider and had to be used consistently in the credit assessment of consumers.¹⁶⁹ In instances where the credit provider continuously failed to meet its assessment mechanisms or where it used evaluative mechanisms, models or procedures that did not result in a fair and objective assessment, the Tribunal was empowered on application of the NCR to require that the credit provider applies any of the assessment guidelines published by the NCR or any other alternative guidelines as determined by the Tribunal.¹⁷⁰

With the exception of the draft affordability assessment guidelines issued in May and September 2013 by the NCR,¹⁷¹ until the NCA was amended, no final guidelines were published by the NCR to guide credit providers in the affordability assessments.¹⁷² The NCR, however, had indicated that credit providers could use the contents of Form 16¹⁷³ as a basis in conducting such assessments. Form 16 relates to the following information about the consumer: personal details; income, both employment and other sources of income; monthly expenses; liabilities and living expenses.

It is apparent that the lack of assessment guidelines caused inconsistencies in the way credit providers conducted the required assessments because it was not clear what was considered a reasonable assessment.¹⁷⁴ It is possible that some consumers were denied credit they qualified for by credit providers who cautiously tried to comply with the pre-agreement assessment obligations. On the other hand, consumers also may have become victims of reckless lending at the hands of credit

¹⁶⁸ S 82(3). See also Van Heerden and Renke (2015) *IIR* 78.

¹⁶⁹ S 82(2) read with s 82(1) and 82(3).

¹⁷⁰ S 82(4). See also Van Heerden and Renke (2015) *IIR* 77.

¹⁷¹ See Van Heerden and Renke (2015) *IIR* 80-83. See also para 4.4.4.5.2 below.

¹⁷² See Kelly-Louw (2015) *De Jure* 95 and Van Heerden and Renke (2015) *IIR* 78. See also Kelly-Louw (2014) *SA Merc LJ* 25 for a commentary on the draft guidelines public notice issued by the NCR during May 2013.

¹⁷³ Form 16 of reg 23 of the National Credit Regulations, 2006.

¹⁷⁴ See Van Heerden and Renke (2015) *IIR* 77 and Van Heerden and Beyers (2016) *JIBLR* 449-450.

providers who either did not know what reasonably was expected of them or simply did not care to verify the information obtained in the assessment, as long as they could prove that an assessment of some sort was conducted.

In *Standard Bank of South Africa Ltd v Kelly and Another*,¹⁷⁵ the court acknowledged that there was no applicable binding format for the required pre-agreement assessment.¹⁷⁶ In this case, the defendants (consumers) to a summary judgment application raised a defence that no pre-agreement assessment took place because they were provided only with “very limited financial information”.¹⁷⁷ Further, they were not made aware of the risks and costs of the proposed credit or the rights and obligations of a consumer under a credit agreement, nor were their existing financial means, prospects and obligations fully examined before the granting of the loans.¹⁷⁸

The court held that because the consumers had signed a standard credit agreement confirming that the risks and costs of the loan had been fully explained to them and did not adduce evidence to the court as to why that confirmation should not be accepted at face value the court disregarded their defence.¹⁷⁹ The court’s approach in this regard is justified because the defendants’ defence indicated that they were uncertain as to whether or not an adequate assessment was conducted by the credit provider and it seemed as if the consumers had a statutorily prescribed form of assessment in mind.¹⁸⁰ Even when they indicated that the credit provider had provided them with limited financial information, they failed to give an indication of the exact detail of that information.

The matter referred by the NCR to the Tribunal in 2013 concerning the African Bank Investments Ltd¹⁸¹ issue also confirms the difficulty experienced as a result of the lack of guidelines in the pre-agreement assessments. The African Bank was found in contravention of the NCA for entering recklessly into over 700 credit agreements with

¹⁷⁵ [2011] ZAWCHC 1 (25 Jan 2011). Hereinafter “*Kelly*”.

¹⁷⁶ *Kelly* para 12.

¹⁷⁷ *Kelly* para 11.

¹⁷⁸ *Kelly* para 11.

¹⁷⁹ *Kelly* para 13.

¹⁸⁰ See *Kelly* para 12.

¹⁸¹ Hereinafter the “African Bank”.

consumers.¹⁸² The African Bank failed to conduct the required assessments and had a policy that requested consumers to sign a standard document that set out the risks, costs and obligations of the credit to be provided.¹⁸³ Although the African Bank's lending policy reviewed the consumer's payslip and requested the consumer to sign an expense declaration,¹⁸⁴ in assessing the consumer's existing financial means, prospects and obligations, it appears this assessment policy was not complied with at all material times. The situation changed when regulation 23A, discussed next, was enacted.

4.4.4.5 Regulation 23A

4.4.4.5.1 General

The NCA was amended as a result of the NCAA which came into effect on 13 March 2015.¹⁸⁵ This amendment to the NCA was the product of the Department of Trade and Industry's assessment of the effectiveness of the NCA in its original form in achieving its core purposes, in particular those relating to the protection of consumers by encouraging responsible borrowing, the prevention of consumer over-indebtedness and the fulfilment of financial obligations by consumers.¹⁸⁶ The procedures in conducting affordability assessments of consumers were reviewed and it was agreed that a standard affordability assessment model be used by all credit providers.¹⁸⁷ The relevant changes introduced by the NCAA include powers vested in the Minister of Trade and Industry to issue affordability assessment regulations upon recommendation of the NCR.¹⁸⁸

In May 2015, affordability assessment regulations were passed by the Minister of Trade and Industry.¹⁸⁹ The regulations introduced new criteria in conducting affordability assessments and effectively amended chapter 3 of the National Credit

¹⁸² Fin24 *African Bank Fined R20m for Reckless Lending* (Oct 2013). See also Coetzee LLD Thesis (2015) 2.

¹⁸³ See the African Bank Lending Policy (2013).

¹⁸⁴ See the African Bank Lending Policy (2013).

¹⁸⁵ See GN 389 in GG 37665 (19 May 2014).

¹⁸⁶ See the Draft NCA Policy Review Framework (2013).

¹⁸⁷ Van Heerden and Renke (2015) *IIR* 79. See also Van Heerden and Beyers (2016) *JIBLR* 450.

¹⁸⁸ S 82 as amended by the NCAA. See also Van Heerden and Renke (2015) *IIR* 83 and Van Heerden and Beyers (2016) *JIBLR* 450.

¹⁸⁹ See GN R.202 in GG 38557 (13 Mar 2015). See also Van Heerden and Renke (2015) *IIR* 80 and Coetzee LLD Thesis (2015) 275.

Regulations, 2006 by the insertion of regulation 23A.¹⁹⁰ Regulation 23A became effective on 13 September 2015.¹⁹¹ Regulation 23A applies to all consumers, credit providers and all credit agreements to which the NCA applies,¹⁹² with a similar exclusion of credit agreements that are exempted from the reckless credit provisions.¹⁹³ In addition to this exclusion, regulation 23A also does not apply to any change to a credit agreement and/or any deferral or waiver of an amount under an existing credit agreement in accordance with section 95 of the NCA¹⁹⁴ or to Mortgage Agreements that qualify for the Finance Linked Subsidy Programs developed by the Department of Human Settlements and credit advanced for housing that falls within the threshold set from time to time.¹⁹⁵ A discussion of the assessment procedure as prescribed by regulation 23A follows.

4.4.4.5.2 The Assessment Procedure as Prescribed by Regulation 23A

Regulation 23A imposes a duty on the credit provider to take the “necessary practicable” steps to assess the consumer’s discretionary income in order to determine whether or not a consumer has the financial means and prospects to pay the proposed credit instalments.¹⁹⁶ The “discretionary income” of the consumer is made up of the consumer’s

[g]ross income less statutory deductions, less necessary expenses, less all other committed payment obligations as disclosed by the consumer, including obligations disclosed by the consumer’s credit record as held by credit bureaux and which income is available to fund the proposed credit instalment.¹⁹⁷

¹⁹⁰ Van Heerden and Renke (2015) *IIR* 85.

¹⁹¹ Regulation 23A was supposed to become effective on 13 Mar 2015 when the NCA was put into operation – see GN R.202 in GG 38557 (13 Mar 2015). However, its operation was postponed for a further six months to 13 Sept 2015 to afford credit providers an opportunity to align their assessment models with Reg 23A – see GN 756 in GG 39127 (21 Aug 2015). See also Steennot and Van Heerden (2017a) *PER/PELJ* 16 and Van Heerden and Renke (2015) *IIR* 80.

¹⁹² Reg 23A(1).

¹⁹³ See reg 23A(2) read with s 78(2). See also Van Heerden and Beyers (2016) *JIBLR* 451 and para 4.4.2 above.

¹⁹⁴ Reg 23A(2)(j).

¹⁹⁵ Reg 23A(2)(k).

¹⁹⁶ Reg 23A(3). It should be noted that reg 23A refers to “practicable” steps instead of “reasonable” steps as required by s 81, creating a discrepancy in the terminology. However, it is not clear whether or not this discrepancy establishes a varying degree in the steps to be taken by the credit provider in order to meet the assessment requirements in the NCA and reg 23A. See also Van Heerden and Beyers (2016) *JIBLR* 451 and Van Heerden and Steennot (2017a) *PER/PELJ* 16.

¹⁹⁷ “Gross income” of the consumer is the total income earned by the consumer from whatever source before any deduction – reg 1.

A credit provider further is obliged to take practicable steps to validate the gross income of a consumer in the various circumstances under which such gross income is earned by the consumer.¹⁹⁸ In relation to consumers that receive a salary from an employer, the credit provider must validate such gross income by means of the latest three payslips or latest bank statement showing the latest three salary deposits.¹⁹⁹ In relation to consumers that do not receive a salary, the credit provider must validate such gross income by means of the latest three written proof of income or latest three months bank statements.²⁰⁰ For consumers that are self-employed, informally employed or employed in a way that they do not receive a payslip or proof of income, the credit provider must validate such gross income by means of the latest three months bank statements or latest financial statements.²⁰¹

After ascertaining the gross income of the consumer, the credit provider is required to consider the consumer's expenses by applying the minimum expense norms table found in the regulations.²⁰² The minimum expense norms table basically indicates the individual consumer's necessary expenses that a credit provider must accept a consumer has and therefore must be kept free from use as a loan repayment. In exceptional circumstances and where justified, the credit provider may accept the consumer's declared minimum expenses which are lower than those set out in the minimum expense norms table, provided the questionnaire set out in the schedule is completed by the consumer.²⁰³

Determining the consumer's minimum expenses may prove to be challenging for credit providers because the minimum expense norms table does not provide guidance on how to apply the income bands which are based on monthly income to calculate the minimum monthly expenses of the consumer.²⁰⁴ The draft September

¹⁹⁸ Reg 23A(4).

¹⁹⁹ Reg 23A(4)(a).

²⁰⁰ Reg 23A(4)(b).

²⁰¹ Reg 23A(4)(c).

²⁰² See Reg 23A(11). See also Van Heerden and Renke (2015) *IIR* 87.

²⁰³ Reg 23A(11). See also Van Heerden and Renke (2015) *IIR* 92 and Van Heerden and Beyers (2016) *JIBLR* 452. The consumer is required to complete this questionnaire when he discloses living expenses that are lower than the capped thresholds provided in Table 1.

²⁰⁴ See the Minimum Expense Norms Table. See also Van Heerden and Beyers (2016) *JIBLR* 449 and Steennot and Van Heerden (2017a) *PER/PELJ* 20.

2013 guidelines²⁰⁵ in which the consumer's annual income was used as a basis for determining the income bands contained an example of how the minimum expense norms table was to be applied by indicating that if the consumer's annual gross income is R240 000, then according to the structure of the minimum expense norms table the credit provider may not accept annual necessary expenses of less than R14 400. This is the amount indicated as annual minimum living expenses plus R648 or 6.75% of R9 600, which is the amount above the band minimum.²⁰⁶ However, it is not clear if the credit provider is expected to apply the same formula in conducting the required assessments.²⁰⁷

If a consumer has existing debt obligations, the credit provider is required to calculate the consumer's discretionary income to enable the consumer to satisfy the repayment of any new debt.²⁰⁸ This calculation should take into account all the monthly debt repayment obligations of the consumer in terms of credit agreements as reflected on the consumer's credit profile held by a registered credit bureau and maintenance obligations and any other necessary expenses.²⁰⁹

The consumer's debt repayment history as envisaged in section 81(2)(a) of the NCA must also be taken into account by the credit provider during the creditworthiness assessment.²¹⁰ This obligation must be performed within seven business days immediately prior to the initial approval of the credit or the increasing of an existing credit limit,²¹¹ and within 14 business days with regards to mortgages.²¹² In instances where the credit agreement is entered into on a substitutionary basis in order to set off one or more existing credit agreements, the credit provider must record that the

²⁰⁵ See para 4.4.4.4 above.

²⁰⁶ Van Heerden and Beyers (2016) *JIBLR* 449. See also Steennot and Van Heerden (2017a) *PER/PELJ* 20.

²⁰⁷ See Steennot and Van Heerden (2017a) *PER/PELJ* 20.

²⁰⁸ Reg 23A(10)(a)-(c).

²⁰⁹ Reg 23A(12). "Necessary expenses" are defined in reg 1 as the consumer's minimum living expenses including maintenance payments but excluding monthly debt repayment obligations in terms of credit agreements.

²¹⁰ Van Heerden and Renke (2015) *IIR* 87.

²¹¹ Reg 23A(13)(a).

²¹² Reg 23A(13)(b).

credit being applied for is to replace other existing credit agreements and take practicable steps to ensure that such credit is properly used for such purposes.²¹³

The consumer is required accurately to disclose to the credit provider all financial obligations and must provide authentic documentation to the credit provider to enable the credit provider to conduct the affordability assessment.²¹⁴ When the necessary documentation is provided to the credit provider by the consumer, the credit provider is required to assess the consumer's existing financial obligations. This entails a calculation of the consumers existing financial means, prospects and obligations as envisaged in sections 78(3) and 81(2)(a)(iii) of the NCA.²¹⁵

In addition to the duty of the credit provider to conduct affordability assessments of the prospective credit consumer, a credit provider is also required to disclose to the consumer the "credit cost multiple" and "total cost of credit" in the pre-contractual statement and quotation as based on one year of full utilisation up to the credit limit proposed.²¹⁶ The "credit cost multiple" is defined as "the ratio of the total cost of credit to the advanced principal debt, that is, the total cost of credit divided by the advanced principal debt expressed as a number to two decimal places".²¹⁷ The "total cost of credit" includes but is not limited to the principal debt amount, interest charged on the principal debt amount, the initiation fee, a service fee aggregate to the life of a loan, the cost of any credit insurance aggregate to the life of a loan, administration charges and collection costs.²¹⁸ The credit provider must also ensure that the information disclosed is understood by the prospective consumer.²¹⁹

Regulation 23A empowers a consumer who is aggrieved by any outcome of the affordability assessment to lodge a complaint or to initiate a complaint with the NCR for dispute resolution.²²⁰ The credit provider is obliged to attempt to resolve the complaint within 14 business days of being notified of the complaint by the credit

²¹³ Reg 23A(14)(a)-(b).

²¹⁴ Reg 23A(6)-(7). See also Van Heerden and Renke (2015) *II*R 86.

²¹⁵ See reg 23A(8) and Van Heerden and Renke (2015) *II*R 86.

²¹⁶ Reg 23A(15)(a)-(b). See also Van Heerden and Renke (2015) *II*R 87.

²¹⁷ Reg 23A(1).

²¹⁸ See s 101(1).

²¹⁹ Reg 23A(15)(c).

²²⁰ Reg 23A(16) read with ss 134 and 136.

ombudsperson.²²¹ Where a credit provider fails to address the complaint within the specified timeframe, the consumer can approach the NCR and the NCR must resolve the complaint within seven business days.²²² If the NCR issues a notice of non-referral to the Tribunal in response to a complaint, the consumer may refer the matter directly to the Tribunal.²²³

While the NCAA and regulation 23A do not take away the right of a credit provider to determine for itself any scoring model or evaluative mechanism to be used in the creditworthiness assessment of the consumer, all credit providers now have to ensure that any such model or mechanism or model complies with the provisions of regulation 23A.²²⁴ Regulation 23A therefore provides a uniform framework that must be followed by credit providers in conducting the required affordability assessments before entering into a proposed credit agreement. However, Regulation 23A appears cumbersome and may prove difficult to comply with, not only because it lacks clarity on the formula to be used in working out the amounts in minimum expense norms table but also because it is too prescriptive and therefore may bring about unintended consequences, such as reducing the access of consumers to credit.

4.4.4.6 The Courts' Interpretation of the Pre-Agreement Assessment Provisions

4.4.4.6.1 General

After the affordability assessment regulations came into force in September 2015,²²⁵ it is common cause that credit providers now have a guideline as to how the pre-agreement assessments required by the NCA in terms of section 81(2) should be conducted. It was held in *Horwood* that whether or not a credit provider has taken the required reasonable steps to meet its assessment obligations, in the light of the wording of sections 81(2) and 82(1), is to be determined objectively on the facts and circumstances of any given case.²²⁶ In this paragraph I highlight the main considerations the courts recently have had regard to in their interpretations of the

²²¹ Reg 23A(16) read with s 134.

²²² Reg 23A(17)-(19).

²²³ Reg 23A(20).

²²⁴ Kelly-Louw (2015) *De Jure* 95 and Van Heerden and Renke (2015) *IIJ* 84.

²²⁵ See para 4.4.4.5.1 above.

²²⁶ *Horwood* para 5. See also para 4.4.4.3 above.

provisions relating to the pre-agreement assessment in section 81(2). These cases indicate that notwithstanding the guidelines provided by regulation 23A there still are some aspects of the assessment which require specific guidelines.

4.4.4.6.2 *ABSA Bank Ltd v Kganakga*

In *ABSA Bank Ltd v Kganakga*,²²⁷ the defendant purchased a property for R900 000 and applied for a loan to be secured by a mortgage bond in favour of the credit provider ABSA Bank, the plaintiff in this case. A loan in the amount of R720 000 was approved and granted to the defendant. The defendant defaulted on her loan repayments and the plaintiff instituted an action for payment of the outstanding amount, interest, costs of suit and for an order declaring the immovable property executable.²²⁸

The defendant pleaded that in terms of section 81(2)(a), the plaintiff was obliged to take reasonable steps to ensure that she had a general understanding of the risk in the credit transaction, but had failed to ensure that she understood the risk of the substantial difference between the value of the property, which was averred to be not more than R425 000, and the loan amount of R720 000.²²⁹ The defendant further pleaded that the plaintiff ought to have known that she was purchasing the property purely for a commercial purpose but failed to enquire, in terms of section 81(2)(b), if she understood the risk in the credit transaction and to advise her whether or not it would achieve any successful purpose.²³⁰

To ascertain whether the credit provider complied with section 81(2)(a), the court developed a three-fold test. The first aspect of the test related to the consumer's state of mind as it relates to the consumer's understanding and appreciation of the risks and costs of the proposed credit and her rights and obligations under a credit agreement.²³¹ It was stated that the required consumer's understanding pertains only

²²⁷ [2016] ZAGPJHC 59 (18 Mar 2016). Hereinafter "*Kganakga*".

²²⁸ *Kganakga* para 5.

²²⁹ *Kganakga* para 6.

²³⁰ *Kganakga* para 6.

²³¹ *Kganakga* para 25.

to the risks and costs of the credit sought and not to the risks of the things to be acquired with the credit or for which the credit will be utilised.²³²

Essentially, reasonable steps must be taken to assess that the proposed consumer understands and appreciates what is meant by credit, by a loan, to pay in instalments, what the penalties are for failure to make payment of an instalment, the concept of interest, how it is calculated and at what rate.²³³ Where the loan is secured by security, the credit provider must ensure that the prospective consumer understands what is meant by security, its purpose, how such security is used in relation to credit and that the immovable property may be at risk if the instalments are not paid.²³⁴

The second aspect related to the consumer's previous experience and behaviour as a consumer under credit agreements.²³⁵ The credit provider should ask the consumer to disclose her own history insofar as she has previously utilised credit and the manner in which that was handled. The credit provider may also request the consumer to disclose any civil judgments obtained against the consumer.²³⁶

The third aspect required that the finances of the proposed consumer at the time of the application should be disclosed to ensure that the consumer can afford to pay the instalments in terms of the credit agreement. Future prospects should also be taken into account as well as other expenses and obligations of the consumer which must be met before any credit instalments can be repaid.²³⁷

The court took into account the fact that the defendant is a highly educated woman with a PhD and who has previously satisfactorily entered into similar credit agreements.²³⁸ The defendant also did not produce evidence to the court that she did not understand the concepts of the mortgage bond, capital, interest, and

²³² *Kganakga* para 25.

²³³ *Kganakga* para 25.

²³⁴ *Kganakga* para 25.

²³⁵ *Kganakga* para 26.

²³⁶ *Kganakga* para 26.

²³⁷ *Kganakga* para 27.

²³⁸ *Kganakga* para 73.

instalments or that failure to pay instalments could place the security at risk of attachment and sale in execution.²³⁹

In interpreting the provisions of section 81(2)(b) which deals with the possible success or otherwise of “any commercial purpose”, if that is the purpose in applying for credit, the court in the *Kganakga* case affirmed that the commercial purpose does not pertain to any other or underlying agreement with other persons, but only to the purpose of applying for the credit.²⁴⁰ This includes instances where the credit itself is to be used for running a business, paying off debtors of a business, leasing business premises, acquiring equipment used in the running of a business, buying a share in a business or funding a business through an overdraft facility.²⁴¹ However, the mere acquisition of immovable property is not a “commercial purpose”.²⁴²

The court found that there was no commercial purpose in applying for the credit because the defendant’s purpose was to obtain funds to purchase an immovable property.²⁴³ What she intended to do with the property should not be a concern of a credit provider. It was held that the credit agreement entered into between the plaintiff and defendant did not constitute reckless credit.²⁴⁴

4.4.4.6.3 *ABSA Bank Ltd v De Beer and Others*

In *ABSA Bank Ltd v De Beer and Others*,²⁴⁵ the credit provider and plaintiff sought a claim for payment of the amount of R1 740 737 plus interest at the rate of 8.65% per annum against the defendants.²⁴⁶ The claim against the first and second defendants, De Beer and his wife who were married in community of property, was based on a total of four credit agreements the plaintiff has entered into with them. The third defendant is the couple’s daughter who stood surety to her parents’ indebtedness to the plaintiff.²⁴⁷

²³⁹ *Kganakga* para 73.

²⁴⁰ *Kganakga* para 31.

²⁴¹ *Kganakga* para 32.

²⁴² *Kganakga* para 36.

²⁴³ *Kganakga* para 75.

²⁴⁴ *Kganakga* para 78.

²⁴⁵ 2016 3 SA 432 (GP). Hereinafter “*De Beer*”.

²⁴⁶ *De Beer* para 1.

²⁴⁷ *De Beer* para 2.

The first defendant is a pensioner who used his pension to buy an undeveloped smallholding to build a residential unit and start farming.²⁴⁸ As the money was not sufficient for that purpose his wife, the second defendant, retired from her employment and collected pension benefits.²⁴⁹ Her pension was used to complete the house, buy the necessary machinery for farming and for living costs.²⁵⁰ Even with her pension benefits, the money was not sufficient for farming operations. The two started borrowing from the plaintiff, using the smallholding, which was their primary and only residence, as security.²⁵¹

The defendants raised a defence that the credit was granted recklessly and in a counterclaim asked that the credit agreements be set aside or suspended in terms of the NCA. This defence was based on the submission that apart from the first defendant's annuity of R647 per month the couple did not have any other source of income.²⁵² However, an employee of the plaintiff indicated that the first two defendants had a monthly income of some R27 000.²⁵³ That assertion was found to be misleading as their only income was the monthly annuity of R647 and the rest of the money belonged to the surety. The financial position of all three had not been verified by the bank and no financial statements were requested, especially in the case of the third defendant who was self-employed.²⁵⁴

It was held that for a credit provider to take "reasonable steps" to assess the proposed consumer's existing means, prospects and obligations meant that the assessment had to be done reasonably and not irrationally, because only a reasonable assessment would comply with the preamble to the NCA which exists to promote responsible credit granting and use.²⁵⁵ It was found to be clearly irrational for a credit provider to have taken the surety's income into account in coming to the conclusion that the consumers had the financial means to pay the instalments because a surety did not fall within the definition of a consumer in terms of section 1

²⁴⁸ *De Beer* para 7-9.

²⁴⁹ *De Beer* para 10.

²⁵⁰ *De Beer* para 11.

²⁵¹ *De Beer* para 13.

²⁵² *De Beer* paras 8 and 12.

²⁵³ *De Beer* para 53.

²⁵⁴ *De Beer* para 31.

²⁵⁵ *De Beer* para 60.

of the NCA.²⁵⁶ Furthermore, the surety had not been an issue until the principal debtors had failed to comply with their obligations.²⁵⁷

For purposes of section 81(2)(b), the court made reference to the amounts invested in the farming operations to determine whether or not the commercial purpose of the loans would be successful.²⁵⁸ The court found that based on the figures presented there could be no reasonable expectation that the farming operations would be successful.²⁵⁹ The court held that the plaintiff's claim against all the defendants amounted to a reckless credit agreement and set aside the rights and obligations of the first and second defendants arising from the credit agreements.²⁶⁰ Accordingly, the plaintiff's claim was dismissed with costs.

4.4.4.7 The Instances of Reckless Credit Lending

The NCA prohibits reckless credit lending.²⁶¹ The legislature also attempts to prevent reckless credit lending by requiring pre-agreement assessments by credit providers.²⁶² Specifically, section 80(1) provides that

[a] credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)^[263] –

- (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
- (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that –
 - (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or
 - (ii) entering into that credit agreement would make the consumer over-indebted.

²⁵⁶ *De Beer* para 61.

²⁵⁷ *De Beer* para 61

²⁵⁸ *De Beer* para 62.

²⁵⁹ *De Beer* para 64.

²⁶⁰ *De Beer* para 64.

²⁶¹ S 81(3).

²⁶² S 81(2). See also para 4.4.4.2 above.

²⁶³ S 119(4) provides that if a consumer, at the time of applying for the credit facility or at any later time, in writing has specifically requested the option of having the credit limit automatically increased from time to time the credit provider unilaterally may increase the credit limit once a year and by an amount as indicated in the subsection. Thus, in such an instance a pre-agreement assessment as prescribed by s 81 is not required.

From the wording of section 80(1) it appears that the NCA provides for three instances of reckless credit. The first instance of reckless credit lending occurs in the event that the credit provider failed to conduct the required section 81 pre-agreement assessment.²⁶⁴ The mere failure to conduct the assessment renders the credit agreement under consideration *per se* reckless and the supposed outcome of the pre-agreement assessment is irrelevant.²⁶⁵

The second instance of reckless credit lending occurs where the credit provider has conducted the required section 81 pre-agreement assessment, but nonetheless entered into a credit agreement with the consumer despite a negative assessment outcome indicating that the consumer did not generally understand or appreciate his risks, costs or obligations under the proposed credit agreement.²⁶⁶ It is accepted that where the credit provider has conducted the required assessment but failed to advise the consumer with regard to the financial implications of the credit agreement, the concluded credit agreement is reckless due to the credit provider's disregard of the consumer's ignorance.²⁶⁷

The third instance of reckless credit lending occurs where the credit provider has conducted the required section 81 pre-agreement assessment and entered into a credit agreement with the consumer despite the fact that the information available indicated that entering into that credit agreement would make the consumer over-indebted.²⁶⁸ The concluded credit agreement is reckless because of the effect it has on the consumer who is not over-indebted but becomes over-indebted as a result of entering into that credit agreement.²⁶⁹

The NCA also provides for another instance of reckless credit granting that does not fall under section 80(1), which occurs when the credit provider enters into a credit

²⁶⁴ S 80(1)(a). See also Steennot and Van Heerden (2017a) *PER/PELJ* 8.

²⁶⁵ Van Heerden in Scholtz *ed* (2008) para 11.4.3.

²⁶⁶ S 80(1)(b)(i). See also Steennot and Van Heerden (2017a) *PER/PELJ* 8.

²⁶⁷ Van Heerden in Scholtz *ed* (2008) para 11.4.3. See also Renke LLD Thesis (2012) 433, who is of the view that this instance of reckless credit lending is related to the credit provider's duty not only to provide information to the consumer, but also to explain the information provided to ensure the general understanding and appreciation thereof.

²⁶⁸ S 80(1)(b)(ii). See also Steennot and Van Heerden (2017a) *PER/PELJ* 8.

²⁶⁹ Van Heerden in Scholtz *ed* (2008) para 11.4.3 and Renke LLD Thesis (2012) 434.

agreement with a credit consumer who is subject to a debt re-arrangement and that debt re-arrangement still subsists.²⁷⁰ This credit agreement is reckless because the credit consumer is under debt relief and it will be irresponsible to further burden the consumer with debt. A consolidation agreement, however, is exempt from this prohibition.²⁷¹ Although the NCA does not define a consolidation agreement, it is accepted that a consolidation agreement implies an agreement in terms of which the consumer's existing debt is consolidated under one credit agreement.²⁷²

The determination whether or not a credit agreement is reckless is made by applying the determining criteria as they exist at the time the credit agreement was made and without regard to the ability of the consumer to meet the obligations under that credit agreement or to understand or appreciate the risks, costs and obligations under the proposed credit agreement at the time the determination is being made.²⁷³ The reckless behaviour as prohibited by the NCA therefore must be present at the moment the credit agreement is being concluded.

As is the case with the over-indebtedness provisions,²⁷⁴ the NCA provides guidance as to the values of credit facilities and credit guarantees to be used in the reckless credit lending determinations.²⁷⁵ The value of any credit facility is the credit limit under the credit facility at the time of entering into the agreement.²⁷⁶ The value of a credit guarantee depends on whether it is a pre-existing credit guarantee or a new guarantee. The value for the pre-existing credit guarantee is the settlement value of the credit agreement it guarantees, if the guarantor has been called upon to honour that guarantee.²⁷⁷ If the guarantor has not been called to honour the guarantee, the value is the settlement value of the credit agreement it guarantees, discounted by a

²⁷⁰ S 88(4).

²⁷¹ S 88(1).

²⁷² See Renke LLD Thesis (2012) 459.

²⁷³ S 80(2). See also Kelly-Louw (2012) 298.

²⁷⁴ See para 4.3.3 above.

²⁷⁵ S 80(3). See also Kelly-Louw (2012) 298.

²⁷⁶ S 80(3)(a).

²⁷⁷ S 80(3)(b)(i).

prescribed factor.²⁷⁸ The value for a new guarantee is the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor.²⁷⁹

It is clear that non-compliance with the reckless lending provisions is not tested when the parties enter into a credit agreement but only after the fact, for instance, when the credit agreement is being enforced in court and the consumer raises a defence of being over-indebted or that the particular credit agreement is reckless.²⁸⁰ However Stoop suggests that the NCR should “conduct a credit audit to spot-check credit providers’ compliance with the provisions on reckless credit and over-indebtedness”, emphasising that it will be beneficial if greater focus is on the indirect measures for preventing over-indebtedness such as consumer education.²⁸¹ Further, he suggests that credit providers should be required quarterly to submit responsible lending compliance reports with all supporting evidence to the NCR to create a robust detection of non-compliance cases.²⁸² Stoop therefore advocates a more pro-active approach in respect of the prevention of reckless lending.

4.4.4.8 The Powers of the Courts or the Tribunal with Regard to Reckless Credit

As indicated above,²⁸³ section 80(1) provides for three instances of reckless credit lending which are linked to the section 81 pre-agreement assessment. The NCA by virtue of section 83(1) empowers any court or the Tribunal in which a credit agreement is being considered to declare that a particular credit agreement is reckless in accordance with the provisions of Part D of Chapter 4.²⁸⁴

Section 83(1) does not require an allegation of reckless credit before a court or the Tribunal can exercise its powers with regard to reckless credit.²⁸⁵ A court or the Tribunal therefore on its own accord can determine the issue of reckless credit

²⁷⁸ S 80(3)(b)(ii).

²⁷⁹ S 80(3)(c).

²⁸⁰ See Stoop (2009) *SA Merc LJ* 371. See para 4.4.4.8 below.

²⁸¹ Stoop (2009) *SA Merc LJ* 371-372.

²⁸² Stoop (2009) *SA Merc LJ* 371-372.

²⁸³ See para 4.4.4.7 above.

²⁸⁴ See Van Heerden and Boraine (2011) *De Jure* 400-4001. See also Coetzee LLD Thesis (2015) 276.

²⁸⁵ Van Heerden in Scholtz *ed* (2008) para 11.4.5.

during court proceedings in which a credit agreement is being considered.²⁸⁶ Given that the wording of section 83(1) refers to “court proceedings”, it appears that a court can make use of these powers in both action and application court proceedings.²⁸⁷

Section 83(2) provides that if a court or the Tribunal declares a credit agreement reckless in the first two instances, that is, where the credit provider has failed to conduct the required section 81 assessment²⁸⁸ or because he entered into a credit agreement with a consumer who did not generally understand or appreciate his risks, costs or obligations under the credit agreement,²⁸⁹ the court or the Tribunal may make an order –

- (a) setting aside all or part of the consumer’s rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or
- (b) suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i).²⁹⁰

This section further declares that only a single order may be granted by the court or the Tribunal in terms of section 83, but not both.²⁹¹ It follows, therefore, that where the court or the Tribunal declare a credit agreement reckless in the first two instances of reckless credit it has the discretion to decide whether wholly or partly to set aside the consumer’s rights and obligations under the reckless credit agreement or to suspend the force and effect of that credit agreement.²⁹²

If a court or the Tribunal declares that a credit agreement is reckless in terms of the third instance of reckless credit lending where the credit provider entered into a credit agreement that renders the consumer over-indebted,²⁹³ the court or the Tribunal is further required to consider whether the consumer is over-indebted at the time of those proceedings.²⁹⁴ In terms of this consideration and for the purposes of

²⁸⁶ Van Heerden in Scholtz *ed* (2008) para 11.4.5. See also Van Heerden and Boraïne (2011) *De Jure* 400 and Kelly-Louw (2012) 305.

²⁸⁷ Van Heerden in Scholtz *ed* (2008) para 11.4.5.

²⁸⁸ S 80(1)(a).

²⁸⁹ S 80(1)(b)(i).

²⁹⁰ This order is discussed below.

²⁹¹ Renke (2011) *THRHR* 224.

²⁹² Van Heerden and Boraïne (2011) *De Jure* 402.

²⁹³ S 80(1)(b)(ii).

²⁹⁴ S 83(3). See also Kelly-Louw (2012) 307.

making its order, the court or the Tribunal is expected to consider the consumer's current means and ability to pay the current financial obligations that exist at the time the agreement was made²⁹⁵ and the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order.²⁹⁶ If the court or the Tribunal concludes that the consumer is over-indebted, section 83(3)(b) provides that the court or the Tribunal may make an order –

- (i) suspending the force and effect of that credit agreement until a date determined by the court when making the order of suspension; and
- (ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

From the wording of section 83(3)(b), it is clear that the court or the Tribunal is empowered to issue both orders provided by this section. This means that the particular reckless agreement may be suspended and other credit agreements restructured. However, to ensure that the consumer will meet all his repayments in accordance with the order,²⁹⁷ the court or the Tribunal must consider the expected date when any such suspended or restructured obligation under the credit agreement will be satisfied.²⁹⁸ The section also requires the restructuring of the consumer's obligations to be made in accordance with section 87. Section 87(1)(b)(ii) empowers the court or the Tribunal making an order contemplated in section 83(3) to re-arrange or restructure the consumer's obligations in any manner contemplated in section 86(7)(c)(ii).²⁹⁹ Accordingly, a court or the Tribunal may, therefore,

- (a) extend the period of the agreement and accordingly reduce the amount of each payment due;³⁰⁰

²⁹⁵ S 83(4)(a).

²⁹⁶ S 83(4)(b). See also Kelly-Louw (2012) 307.

²⁹⁷ S 83(4)(b).

²⁹⁸ Renke LLD Thesis (2012) 455.

²⁹⁹ S 87(1)(b)(ii).

³⁰⁰ S 86(7)(c)(ii)(aa).

- (b) postpone during a specified period the dates on which payments are due under the agreement;³⁰¹
- (c) extend the period of the agreement and at the same time postpone during a specified period the dates on which payments are due under the agreement;³⁰²
or
- (d) recalculate the consumer's obligations under the agreement, where Part A or Part B of Chapter 5 or Part A of Chapter 6 of the NCA have been contravened.³⁰³

4.4.4.9 A Practical Consideration of the Section 83 Orders

4.4.4.9.1 General

As mentioned above,³⁰⁴ the NCA penalises the credit provider's disregard of the section 81(2) pre-agreement assessment duty with the declaration by a court or the Tribunal of the particular credit agreement as reckless.³⁰⁵ The effect of this declaration in the first two instances of reckless credit lending is that the rights and obligations of the consumer under the credit agreement or part thereof may be set aside or the force and effect of the credit agreement be suspended.³⁰⁶ Regarding the third instance of reckless credit lending, the court or the Tribunal may grant an order suspending the force and effect of the credit agreement and restructuring the consumer's obligations under other credit agreements.³⁰⁷

Where a credit agreement is declared reckless, the NCA prescribes the orders a court may make in terms of section 83. This means that the court has discretion in deciding whether a credit agreement is reckless, but it does not have discretion to make an order other than the ones prescribed in section 83.³⁰⁸ However, the NCA is

³⁰¹ S 86(7)(c)(ii)(bb).

³⁰² S 86(7)(c)(ii)(cc).

³⁰³ S 86(7)(c)(ii)(dd). Ch 5 of the NCA deals with consumer credit agreements. Part A is entitled "Unlawful Agreements and Provisions", and Part B is entitled "Disclosure, Form and Effect of Credit Agreements". Ch 6 is entitled "Collection, Repayment, Surrender and Debt Enforcement" and its Part A is entitled "Collection and Repayment Practices".

³⁰⁴ See para 4.4.4.7 above.

³⁰⁵ See also Van Heerden and Borraine (2011) *De Jure* 393.

³⁰⁶ S 83(2). See also Vessio (2009) *TSAR* 281.

³⁰⁷ S 83(3).

³⁰⁸ See s 130(4)(a). See also Van Heerden and Borraine (2011) *De Jure* 401.

silent on how the court or the Tribunal should exercise this discretion on the order it should make considering the types of reckless credit agreements. Also it does not specify how the court or the Tribunal should exercise its discretion in determining whether the rights and obligations of the consumer under the credit agreement should be set aside or the force of the credit agreement be suspended.³⁰⁹ I discuss section 83(2) orders below.

4.4.4.9.2 The Court Order Setting Aside the Consumer's Rights and Obligations

With regard to the setting aside of all or part of the consumer's rights and obligations under the credit agreement, the only guidance that the NCA provides is that it should be "as the court determines just and reasonable in the circumstances".³¹⁰ In *De Beer*,³¹¹ a consolidated credit agreement valued at over R1.7 million was declared reckless. In exercising the discretion in terms of section 83(2) to either set aside the agreement or to suspend the force and effect of the agreement, the court affirmed that the section requires the remedy to be "just and reasonable".³¹² In choosing to set aside the reckless credit agreement, the court asserted that the credit provider's practice of taking into account the surety's income in determining whether the prospective consumer qualified for credit proved the extent of recklessness.³¹³ Further, the consumers were an elderly couple and the property which the plaintiff sought to be declared executable was their only and primary home.³¹⁴

Van Heerden and Boraine have criticised section 83(2)(a) which provides for the setting aside of the consumer's rights and obligations under the credit agreement with reference to the following aspects:³¹⁵

³⁰⁹ Van Heerden and Boraine (2011) *De Jure* 402.

³¹⁰ S 83(2)(a).

³¹¹ See para 4.4.4.6.3 above for the summary of facts.

³¹² *De Beer* para 64.

³¹³ *De Beer* para 65.

³¹⁴ *De Beer* para 65.

³¹⁵ Van Heerden and Boraine (2011) *De Jure* 402-403.

- (a) What will be deemed “just and reasonable” to set aside all of the consumer’s rights and obligations and what will be “just and reasonable” to set aside only part of the consumer’s rights and obligations is not clear.
- (b) There is no differentiation between situations where performance in terms of the contract has been rendered and in situations where no performance has been rendered.
- (c) The NCA does not provide for the remedies of the credit provider in the case where he has performed in terms of the credit agreement and the obligations of the consumer are set aside, raising questions as to whether restitution of performance ought to take place.
- (d) Section 83(2)(a) does not deal with the rights and obligations of the credit provider as it refers only to the setting aside of the consumer’s rights and obligations.

With regard to the first aspect of what is deemed “just and reasonable”, the court has developed a test that where a consumer has a legitimate complaint that “but for the recklessness of the credit provider, the consumer would never have become involved in the credit transaction, it might be ‘just and reasonable’ to ‘set aside’ the agreement”.³¹⁶ Whereas Van Heerden and Borraine submit that it appears to be just and reasonable to completely set aside the consumer’s rights and obligations where no performance has yet been rendered. .³¹⁷

As mentioned the NCA provides only for the setting aside of the consumer’s rights and obligations under the credit agreement and is silent on the rights and obligations of the credit provider. Borraine and Van Heerden³¹⁸ submit that because a credit agreement is a reciprocal contract for every right there is a counterpart. It follows therefore that if the rights and obligations of the consumer are set aside then

³¹⁶ *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) 319. Hereinafter “*Mbatha*”. See also Renke LLD Thesis (2012) 441 and Coetzee LLD Thesis (2015) 280.

³¹⁷ Van Heerden and Borraine (2011) *De Jure* 403.

³¹⁸ Borraine and Van Heerden (2010) *THRHR* 653.

automatically by implication the rights and obligations of the credit provider are also set aside.³¹⁹ If this view is correct, then it answers the question raised pertaining to the third aspect, which is that restitution of performance ought to take place in light of the absence of a prohibition in the NCA preventing a credit provider from claiming money or goods delivered to the consumer.³²⁰

In terms of the NCA if a credit agreement is unlawful, a court order must declare it as void and unenforceable from the date it was entered into.³²¹ However, the NCA does not provide that the credit agreement giving rise to reckless credit is unlawful so as to invoke the above consequence.³²² Therefore it is accepted that the credit provider will be able to claim restitution of any performance because the NCA does not categorise reckless credit agreements as unlawful credit agreements.³²³

The prospects for such a claim succeeding however are questionable. It is submitted that if a credit agreement is wholly or partly set aside by the court, the credit provider's claim for restitution is not likely to succeed for the following reasons. First, because the court will be inclined to give effect to the purposes of the NCA as set out in section 3.³²⁴ The NCA is *inter alia* aimed to promote responsible credit lending by discouraging reckless credit granting by credit providers.³²⁵ If the credit provider, for example, disregarded his obligation in terms of the NCA and entered into a credit agreement with the consumer without conducting the required section 81 assessment, that particular credit provider cannot successfully claim restitution of performance because that will defeat the object of the Act. To deter credit providers from reckless credit lending there should be sanctions for non-compliance with the

³¹⁹ *Mbatha* 319. See also Boraine and Van Heerden (2010) *THRHR* 653 and Coetzee LLD Thesis (2015) 280.

³²⁰ Boraine and Van Heerden (2010) *THRHR* 653 and Renke (2011) *THRHR* 227. See also Coetzee LLD Thesis (2015) 280.

³²¹ S 89(5)(a).

³²² See NCA s 89, which renders certain credit agreements unlawful.

³²³ See in this regard s 89 before its amendment, in particular s 89(5)(c) which prevented a credit provider from claiming restitution. See also Van Heerden and Boraine (2011) *De Jure* 403, Boraine and Van Heerden (2010) *THRHR* 650 and Vessio (2009) *TSAR* 274. See also the discussion of this section below.

³²⁴ See s 2(1). See also *Nedbank Ltd and Others v The National Credit Regulator and Another* 2011 3 SA 581 (SCA) para 2.

³²⁵ S 3(c)(ii).

provisions prohibiting reckless lending and the section 83(2)(a) order is meant to be that tool.

Second, notwithstanding the fact that the NCA does not recognise a reckless credit agreement as unlawful,³²⁶ it is submitted that the setting aside of a reckless credit agreement naturally should attract the consequences of an unlawful credit agreement as provided for in section 89(5). Section 89(5) provides that

[i]f a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that —

(a) the credit agreement is void as from the date the agreement was entered into.

From the wording of section 83(2)(a), it appears logical that if a reckless credit agreement or part of it is set aside by the court in terms of section 83, then *ab initio* it will be null and void.³²⁷ Where the parties have performed in terms of the credit agreement that is set aside, the credit provider should forfeit his rights and obligations under the credit agreement due to his reckless disregard of his responsible lending obligations. However it is submitted that setting aside a reckless credit agreement should not be interpreted to result in unjustified enrichment because of the lack of intention on the part of the consumer to act dishonourably.

To support this submission, guidance is sought from the general principles of the law of contract. The point of departure should be the doctrine of *pacta sunt servanda* which presupposes that obligations flowing from a contract ought to be honoured. However, where a contract is unlawful or *contra bonos mores* or contrary to the social and economic interests it is not enforceable.³²⁸ A party wishing to claim the restitution of performance in pursuance of an unlawful agreement cannot do so under the agreement but through an action based on the unjustified enrichment of the receiver.³²⁹ In order for the action to be successful ordinarily the party who claims on the basis of unjust enrichment must be free of turpitude and show that he or she

³²⁶ See s 89(2) for a list of unlawful credit agreements.

³²⁷ See *Mbatha* 319. See also Coetzee LLD Thesis (2015) 280.

³²⁸ Christie (2006) 392.

³²⁹ Visser (2008) 442.

has not acted dishonourably.³³⁰ This demand is informed by the *par delictum* doctrine that dictates that neither party to an unlawful contract is entitled to restitution of performance, if both acted improperly.³³¹

If a reckless credit agreement is to be treated as unlawful, the consequences, first, are that the parties are barred from claiming specific performance from each other.³³² Second, where a party has performed in terms of the reckless credit agreement, in this case the credit provider, the *par delictum* rule prevents the said party from claiming the return of performance based on unjustified enrichment because that party has not complied with its responsible lending obligations and thus is blameworthy.

Notwithstanding this position, the South African Constitutional Court has held that the *par delictum* rule no longer is an absolute bar to a claim for restitution in South Africa as it has been relaxed so as to prevent injustice by taking fairness into account.³³³ Courts therefore have the discretion to grant or reject a claim for restitution based on the facts before it.

4.4.4.9.3 The Order Suspending the Force and Effect of the Reckless Credit Agreement

The order suspending the force and effect of the reckless credit agreement is prescribed as a possibility in all three instances of reckless lending.³³⁴ The NCA deals with the effect of the suspension on the credit agreement. In particular, section 84 provides that during the period that the force and effect of a credit agreement is suspended,³³⁵

- (a) the consumer is not required to make any payment required under the agreement;
- (b) no interest, fee or other charge under the agreement may be charged to the consumer; and

³³⁰ Visser (2008) 442.

³³¹ The underlying principle is that the law should discourage and deter illegality and should not render assistance to those who defy it. See in this regard, *Afrisure CC and Another v Watson NO and Another* 2009 2 SA 127 (SCA) para 39.

³³² Christie (2006) 392.

³³³ *National Credit Regulator v Opperman and Others* 2013 2 SA 1 (CC) para 17.

³³⁴ See para 4.4.4.8 above. See also Van Heerden and Borraine (2011) *De Jure* 403-404.

³³⁵ S 84(1). See also Coetzee LLD Thesis (2015) 277.

- (c) the credit provider's rights under the agreement, or under any law in respect of that agreement, are unenforceable, despite any law to the contrary.

After the suspension of the force and effect of a credit agreement ends,³³⁶

- (a) all the respective rights and obligations of the credit provider and the consumer under that agreement –
 - (i) are revived; and
 - (ii) are fully enforceable except to the extent that a court may order otherwise; and
- (b) for greater certainty, no amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that were unable to be charged during the suspension in terms of subsection (1)(b).

From the wording of section 84 it appears that the effect of the suspension of a reckless credit agreement is that the duration of the credit agreement is extended by the suspension period, thus affording the consumer more time to fulfil his obligations under the agreement.³³⁷ After the end of the suspension period the parties' rights and obligations in terms of the agreement remain the same and the consumer is liable to pay back the principal debt amount plus interest, fees and other charges as provided for by the credit agreement. However, the credit provider will not be able to recover any interest, fee or charge that he would have charged during the period of suspension.³³⁸

The suspension order in the above circumstances, in the event that the consumer became over-indebted as a result of the credit agreement, will provide the consumer with a "debt-breather" to alleviate over-indebtedness and recover financially.³³⁹ Van Heerden and Boraine submit that if a suspension order does not assist the consumer to recover financially then it is an exercise in futility.³⁴⁰ This view indicates that the suspension order is not aimed at merely punishing the credit provider for extending credit recklessly, but at providing the consumer with temporary relief from over-indebtedness.³⁴¹

³³⁶ S 84(2). See also Coetzee LLD Thesis (2015) 277.

³³⁷ See also Renke LLD Thesis (2012) 453.

³³⁸ S 84(2)(b).

³³⁹ Van Heerden and Boraine (2011) *De Jure* 404.

³⁴⁰ Van Heerden and Boraine (2011) *De Jure* 404.

³⁴¹ See Coetzee LLD Thesis (2015) 278.

However, section 84 fails to provide guidance on two aspects. First, it does not prescribe a time limit for the suspension of the force and effect of the reckless credit agreement. A reckless credit agreement therefore may be suspended for a considerable time.³⁴² Second, it does not stipulate what happens to the subject matter of the credit agreement or the credit provider's asset which serves as security for the repayment of the debt during the period of the suspension. For example, it is not clear whether the consumer keeps the credit provided or goods provided under the credit agreement for the duration of the suspension.

For Renke this issue is relevant because of the possibility that an agreement may not be revived at the end of the suspension period due to the consumer's inability to continue with the payments under the agreement.³⁴³ In light of the fact that the NCA does not restrict the period of suspension and that further suspensions of the agreement are not ruled out,³⁴⁴ Renke argues that "the credit provider's asset, which serves as his security ... should therefore be protected against loss, damages or depreciation in value".³⁴⁵ He supports this argument by affirming the need to strike a balance between the rights and interests of credit providers and consumers.³⁴⁶

This issue has been considered by the court in the *Mbatha* case³⁴⁷ where the court held that the consumer should not be allowed to retain possession of the vehicle during the period of the suspension of the force and effect of the agreement.³⁴⁸ Specifically, the court stated that

[t]here is no basis for reading into the language of the NCA a provision that, when suspension is appropriate, the Court also has the power to permit the consumer to utilise the security in a manner which will permit it to deteriorate during the period of suspension.³⁴⁹

The court indicated that "it seems unlikely that the legislature ever intended that the

³⁴² Van Heerden and Boraine (2011) *De Jure* 405.

³⁴³ Renke LLD Thesis (2012) 447.

³⁴⁴ See Renke LLD Thesis (2012) 447, where reference is made to the views of Boraine and Van Heerden (2010) *THRHR* 654 with regard to s 84(2)(a)(i)-(ii).

³⁴⁵ Renke LLD Thesis (2012) 447.

³⁴⁶ Renke LLD Thesis (2012) 447.

³⁴⁷ 2011 1 SA 310 (GSJ).

³⁴⁸ *Mbatha* 319. See also Coetzee LLD Thesis (2015) 278.

³⁴⁹ *Mbatha* 317.

consumer could keep the ‘money and the box’”,³⁵⁰ further pronouncing that if the consumer obtained possession and use of the goods in instances where no credit should have been extended to the consumer in the first place, it would be “fundamentally unfair and counterproductive” for the consumer to be allowed to continue using the goods whilst not making any payments in terms of the credit agreement.³⁵¹ The facts in this case, briefly, were that the plaintiff financed the acquisition of taxis and entered into lease agreements pursuant to which the plaintiff leased the taxis to the defendants.³⁵² In terms of the lease agreements, each defendant was required to pay a rental, which included capital plus finance charges. The defendants defaulted on their obligation to pay the rentals. The plaintiff cancelled the lease agreements and applied for summary judgment in order to repossess the leased vehicles.³⁵³ The defendants raised various defences under the NCA.³⁵⁴

In considering these defences the court expressed a concern that since the enactment of the NCA there has been a tendency for consumers to make bald allegations that they were “over-indebted” or that they were extended “reckless credit”.³⁵⁵ In this regard the court considered the policy objectives behind the NCA and emphasised that the purpose of the NCA is to balance the rights of credit providers and consumers and not to “shift the balance of power so much that all power in the credit relationship would amass into the hands of the consumer”.³⁵⁶

The court further affirmed that the NCA is aimed at preventing over-indebtedness and at providing for the more efficient discharge of consumer debts.³⁵⁷ It cautioned that if credit providers are not able to recover their deteriorating security promptly, the consequences would be economically catastrophic for asset-based lenders, especially those lending to the less affluent, consequently reducing available credit and pushing up the cost of credit for those consumers who are performing their

³⁵⁰ *Mbatha* 319.

³⁵¹ *Mbatha* 319. See also Coetzee LLD Thesis (2015) 278-279.

³⁵² *Mbatha* 311.

³⁵³ *Mbatha* 311.

³⁵⁴ *Mbatha* 311.

³⁵⁵ *Mbatha* 315.

³⁵⁶ *Mbatha* 316.

³⁵⁷ *Mbatha* 317.

obligations.³⁵⁸ The following remarks summarise the court's position:

[i]f, as the [d]efendants maintain, the purpose of the Act was to enable an over-indebted consumer to retain a lender's depreciating security while at the same time not making debt payments, the NCA would make it significantly more unlikely that over-indebted consumers would ever discharge their indebtednesses. The restoration of a lender's security to the lender while it still has value facilitates the efficient reduction and discharge of indebtedness. The retention of deteriorating security has the opposite effect.³⁵⁹

Also, it was stated that

[w]hile one purpose of the NCA is to discourage reckless credit, the Act is also designed to facilitate access to credit by borrowers who were previously denied such access. An over-critical armchair approach by the courts towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit, would significantly chill the availability of credit, especially to the less affluent members of our society.

Van Heerden and Boraine, by way of contrast, are of the view that it can be argued that the legislature intended for the consumer to retain possession of the credit provider's asset in terms of the agreement due to the absence of an express provision in the NCA to the effect that possession should be returned to the credit provider.³⁶⁰ Inferring from the fact that the NCA bars the credit provider from enforcing his rights in terms of the agreement during the period of the suspension,³⁶¹ they submit that the credit agreement should not be treated as cancelled and therefore the consumer can retain possession.³⁶² On the other hand, they point to the revival of the parties' rights and obligations after the suspension has ended and submit that consequently it seems as if the consumer is not entitled to possess and use the security during the suspension period.³⁶³

With regard to the submission that the consumer is not entitled to keep possession and use the security during the suspension period, Van Heerden and Boraine consider the practical implications in instances where the financed property is an immovable property.³⁶⁴ They affirm that requiring the consumer to vacate the

³⁵⁸ *Mbatha* 317.

³⁵⁹ *Mbatha* 317.

³⁶⁰ Van Heerden and Boraine (2011) *De Jure* 405.

³⁶¹ S 84(1)(c).

³⁶² Van Heerden and Boraine (2011) *De Jure* 405.

³⁶³ Van Heerden and Boraine (2011) *De Jure* 406.

³⁶⁴ Van Heerden and Boraine (2011) *De Jure* 407.

immovable property due to the suspension of the credit agreement may be expensive and inconvenient, but “equality” may be an issue if suspension of the credit agreements’ provisions is restricted to movable property with the effect that the movable property consumer alone forfeits possession and use of the security.³⁶⁵

4.4.4.10 Other Sanctions for Reckless Credit Lending

In addition to having a credit agreement set aside or suspended in terms of section 83, the Tribunal is empowered to impose an administrative fine in respect of prohibited behaviour or failure to perform the required conduct.³⁶⁶ Because reckless credit lending constitutes prohibited conduct in terms of the NCA, an administrative fine may be imposed upon a credit provider who has granted credit recklessly. The NCA prescribes that the fine imposed may not exceed the greater of 10 percent of the credit provider’s annual turnover during the preceding financial year or R1 000 000.³⁶⁷ The reputational and financial risk associated with an administrative fine is considered a deterrent to credit providers from recklessly extending credit.³⁶⁸

4.4.5 The Credit Provider’s Duty to Provide Pre-Contractual Information

4.4.5.1 General

In an effort to address the consumer’s unequal bargaining position and to protect consumers from credit providers’ malpractices, consumer credit legislation requires the supply of specified information to help consumers make informed choices and to shop among different credit providers.³⁶⁹ Pre-contractual disclosure relates to the stage of seeking business in the form of credit advertising and issuing credit quotations.³⁷⁰ This disclosure primarily is aimed at promoting competition amongst credit providers by ensuring that consumers can compare the cost of different credit products offered by different credit providers and thus make an informed choice.³⁷¹

³⁶⁵ Van Heerden and Boraine (2011) *De Jure* 407.

³⁶⁶ S 151(1).

³⁶⁷ S 151(2)(a)-(b).

³⁶⁸ Van Heerden and Renke (2015) *IIR* 94.

³⁶⁹ Stoop (2009) *SA Merc LJ* 377. See also Policy Framework (2004) 26-27.

³⁷⁰ Stoop (2009) *SA Merc LJ* 378. See also Grové and Otto (2002) 84-89.

³⁷¹ Stoop (2009) *SA Merc LJ* 380.

The NCA makes provision for compulsory pre-contractual disclosure measures by credit providers by prescribing pre-agreement documentation that must be provided to the consumer prior to the conclusion of any credit agreement. The required documentation relates to pre-agreement statements and credit quotations disclosing prescribed financial information and which remain binding on a credit provider for a specified period. The credit provider's pre-agreement duty of disclosure as provided for in section 92 of the NCA is discussed below.

4.4.5.2 The Pre-Agreement Statements and Quotations

Section 92 provides that a credit provider shall not enter into a small, intermediate or large credit agreement unless that credit provider has given the consumer a pre-agreement statement and a quotation as prescribed.³⁷² A pre-agreement statement and quotation for a proposed small credit agreement should be in the prescribed format as outlined in Form 20,³⁷³ and must disclose the principal debt amount, the deposit to be paid, instalments including interest and other fees and charges, the number of instalments and the interest rate.³⁷⁴

Section 92 requires the pre-agreement statement for an intermediate or large credit agreement to be in the form of the proposed agreement³⁷⁵ or in another form but all matters required in terms of section 93 must be addressed.³⁷⁶ The quotation for a proposed intermediate or large agreement must be in the prescribed form³⁷⁷ and must disclose the principal debt amount, the deposit to be paid, the proposed distribution of the principal debt amount, the interest rate and additional charges, instalments, the total cost of the proposed credit and the basis of any costs that may be charged if the consumer rescinds the credit agreement.³⁷⁸

³⁷² S 92(1)-(2) read with regs 28-29.

³⁷³ S 92(1) read with reg 28(1)(b).

³⁷⁴ S 92(2)(b) and Form 20.

³⁷⁵ S 92(2)(a)(i).

³⁷⁶ S 92(2)(a)(ii). S 93 deals with the different forms of credit agreements. In summary, it requires the credit provider to provide a copy of the credit agreement in the prescribed form or, if there is no prescribed form, in the form that is determined by the credit provider and which complies with every prescribed requirement for that particular category of credit agreement – s 93(1)-(3) read with regs 30-31.

³⁷⁷ S 92(2)(b).

³⁷⁸ S 92(2)(b) and Form 20.

The pre-agreement statement and quotation for both credit agreements may be contained in one document or in two separate documents.³⁷⁹ Where the two are contained in a single document, the quotation must be on the first page of the document³⁸⁰ in a bordered text box titled “Quotation”.³⁸¹ The pre-agreement statements and quotations may be transmitted to the consumer in a paper form or printable electronic form.³⁸² These documents remain binding upon the credit provider for a period of five business days³⁸³ from the date it was presented to the consumer and subject to certain conditions.³⁸⁴

In essence, the quotation provides the prospective consumer with a statutory option³⁸⁵ during the five business-day period to request the credit provider to enter into a proposed small credit agreement at a cost or interest rate below the quoted credit cost or interest rate.³⁸⁶ For a proposed intermediate or large credit agreement the consumer has an option to enter into the contemplated credit agreement at a credit cost or interest rate below the quoted cost or rate³⁸⁷ or at a credit cost or interest rate higher than that which is quoted by a margin not greater than the difference between prevailing bank rates on the date of the quotation and the date on which the agreement is made.³⁸⁸ However, it must be noted that the credit provider is entitled to provide the consumer with the credit quotation and eventually enter into the contemplated credit agreement only after conducting the required pre-agreement assessment under section 81.³⁸⁹

It must be affirmed that the NCA places no express obligation on the credit provider to explain the features of the proposed credit or to advise the consumer on the

³⁷⁹ Reg 28(1)(a) and reg 29(1)(b).

³⁸⁰ Reg 29(1)(b).

³⁸¹ Reg 29(1)(c).

³⁸² S 92(6).

³⁸³ See s 2(5) for the definition of “business days”.

³⁸⁴ S 92(3)(a)-(b). The pre-agreement disclosure requirements in s 92 do not apply to “any offer, proposal, pre-approval statement or similar arrangement in terms of which a credit provider merely indicates to a prospective consumer a willingness to consider an application to enter into a hypothetical future credit agreement generally or up to a specified maximum value” – see s 92(7).

³⁸⁵ See Stoop (2009) *SA Merc LJ* 380. See also Otto and Otto (2010) 44.

³⁸⁶ S 92(3)(a).

³⁸⁷ S 92(3)(b)(i).

³⁸⁸ S 92(3)(b)(ii).

³⁸⁹ S 92(3). See also Renke LLD Thesis (2012) 425.

appropriateness of the proposed credit to the consumer's specific needs.³⁹⁰ This implies that the consumer is largely responsible for the decision on whether or not to enter into a particular credit agreement, provided that the outcome of the prescribed pre-agreement assessment is positive.³⁹¹

To remedy instances of non-compliance with the pre-agreement disclosure requirements, the NCR in the past has sent instructive letters to the credit providers who were not using the prescribed pre-agreement statements and quotation forms and asked them to implement corrective action.³⁹² Also, the NCR is empowered by the NCA to issue compliance notices to the credit providers who do not meet their pre-agreement disclosure obligations so that they can remedy the non-compliance.³⁹³ A compliance notice *inter alia* must prescribe the specific steps that must be taken to remedy non-compliance, the period within which the steps must be taken and the penalty that may be imposed in terms of the NCA if those steps are not taken.³⁹⁴ If the credit provider fails to comply with the compliance notice, the NCR must refer the matter to the Tribunal for an appropriate order.³⁹⁵

4.5 Conclusion

The aim in this chapter has been to reflect on the South African responsible lending regime as provided for by the NCA. The NCA is a fairly new piece of legislation that was promulgated *inter alia* to promote the principle of responsible lending in the South African credit market.³⁹⁶ The study of the South African responsible lending regime aimed at achieving two objectives: first, to determine the extent of protection accorded to South African credit consumers and, second, to identify processes, practices and experiences related to its responsible lending regime which may be usable in improving the Namibian consumer credit regulatory framework.

³⁹⁰ Steennot and Van Heerden (2017a) *PER/PELJ* 8.

³⁹¹ Steennot and Van Heerden (2017a) *PER/PELJ* 8. See also para 4.4.4.2 above.

³⁹² Stoop (2009) *SA Merc LJ* 380.

³⁹³ S 55.

³⁹⁴ See s 55(3)(d)-(e).

³⁹⁵ S 55(6)(b).

³⁹⁶ Para 4.2.

As regards the first objective, the scope of application of the NCA indicates that the extent of protection accorded the South African credit consumers is greater compared to what is afforded by the Namibian consumer credit legislative framework.³⁹⁷ The NCA has a wide field of application as it applies to almost every credit agreement where the parties are dealing at arm's length,³⁹⁸ regardless of the credit amounts or type of goods involved and without reference to the purpose of the credit.³⁹⁹ Where exceptions apply, they relate to policy issues as decided by the South African government. For example, the NCA only is applicable to credit agreements where the consumer is a juristic person if that juristic person has an asset value or annual turnover of less than R1 million and only if the juristic person concludes small or intermediate credit agreements.⁴⁰⁰ Even though the NCA applies in the above instance, it has limited application only.⁴⁰¹ For instance the provisions of the NCA dealing with reckless lending and over-indebtedness, among others, do not apply where the consumer is a juristic person.⁴⁰²

It is worth noting that the NCA is a comprehensive piece of legislation with a wide and consolidated field of application that addresses most aspects relating to consumer credit.⁴⁰³ This approach eases the regulatory process and it is an aspect which the Namibian lawmakers could take into consideration to improve consumer protection.⁴⁰⁴ The regulation of the consumer credit industry is entrusted to the NCR. This regulatory body *inter alia* manages the registration of credit providers, investigates complaints and ensures compliance with the provisions of the NCA.⁴⁰⁵ The NCR may refer complaints to the Tribunal for adjudication of credit providers that allegedly have contravened the obligations in terms of the NCA.⁴⁰⁶ It is submitted that having one credit regulator and an independent Tribunal responsible for adjudication meets the leading international best principles standard, as opposed

³⁹⁷ Paras 3.6 and 4.2.2.

³⁹⁸ Para 4.2.4.

³⁹⁹ Para 4.2.2.

⁴⁰⁰ Para 4.2.4.

⁴⁰¹ Para 4.2.4.

⁴⁰² Paras 4.2.4 and 4.4.2.

⁴⁰³ Para 4.2.2.

⁴⁰⁴ See discussion of the first principle which recommends that consumer credit policy should be aimed at the protection of consumers in para 2.7.

⁴⁰⁵ Para 4.3.

⁴⁰⁶ Para 4.3.

to the Namibian position where the regulation of consumer credit is divided between NAMFISA and the central bank.⁴⁰⁷

When the provisions aimed at preventing reckless credit are assessed against the leading international best principles formulated in chapter 2,⁴⁰⁸ it appears that the South African responsible lending regime is in line with the identified principles. The behavioural norm at the heart of responsible lending in South Africa relates to the prevention of reckless credit granting and consumer over-indebtedness.⁴⁰⁹ It is seen that the NCA attempts to prevent reckless lending and consumer over-indebtedness by prohibiting credit providers from entering into credit agreements with prospective consumers, without first taking reasonable steps to assess the proposed consumer's general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement, the debt re-payment history as a consumer under credit agreements and the consumer's existing financial means, prospects and obligations.⁴¹⁰ The required pre-agreement assessment is based on the consumer's financial information as provided by the consumer himself, for example, the existing or future financial means of the consumer and other members contributing to his household and all the existing or future expenses paid by the consumer and by other members contributing to his household and all relevant assets and liabilities, as well as on the credit information reports held by credit bureaux.⁴¹¹

A consumer has a duty to assist in the pre-agreement assessment by fully and truthfully answering all requests for information made by the credit provider as part of the assessment. If it is established that the consumer failed to fully and truthfully answer requests for information made by the credit provider, and the consumer's failure to do so materially affects the ability of the credit provider to make a proper assessment, a credit provider has a complete defence to an allegation that reckless credit was granted.⁴¹²

⁴⁰⁷ See the discussion of the fourth principle in para 2.7. See also para 3.2.

⁴⁰⁸ Para 2.7.

⁴⁰⁹ Para 4.4.1.

⁴¹⁰ Paras 4.4.4.1 and 4.4.4.2.

⁴¹¹ Paras 4.4.4.1 and 4.4.4.2.

⁴¹² Para 4.4.4.3.

The South African responsible lending system is commended for passing Regulation 23A, which provides guidelines to credit providers on the way the pre-agreement assessments should be conducted. All credit providers now have to ensure that their evaluative or assessment model or mechanism complies with the provisions of regulation 23A.⁴¹³ At a minimum, regulation 23A requires the credit provider to take the “necessary practicable” steps to assess the consumer’s discretionary income in order to determine whether a consumer has the financial means and prospects to pay the proposed credit instalments and to verify the gross income of a consumer.⁴¹⁴ Regulation 23A provides additional protection for the consumer by requiring the credit provider to validate the financial information relating to the consumer’s financial situation and therefore ensuring that the consumer will be provided only with the credit he can afford.⁴¹⁵ Nonetheless, it remains to be seen whether or not regulation 23A will be successful in practice in nudging credit providers into responsible lending habits. It is submitted that its lack of clarity on the formula for determining the amounts in the minimum expense norms table will be a challenge for credit providers. Also, it is feared that regulation 23A may bring about unintended consequences, such as foreclosure of credit to consumers because the regulation is too restrictive.⁴¹⁶

It is seen that the NCA by virtue of section 83(1) empowers any court or Tribunal in which a credit agreement is being considered to declare that a particular credit agreement is reckless.⁴¹⁷ It should be noted that reckless credit may constitute both a cause of action where the consumer takes the initiative to have the agreement declared reckless as well as a defence in legal proceedings instituted by the credit provider to enforce the concerned credit agreement.⁴¹⁸ A court on its own accord as well can determine the issue of reckless credit during court proceedings in which a credit agreement is being considered.⁴¹⁹ This is a good feature for a responsible lending system not only because it ensures that the responsible lending rules are

⁴¹³ Para 4.4.4.5.2.

⁴¹⁴ Para 4.4.4.5.2.

⁴¹⁵ Para 4.4.4.5.2.

⁴¹⁶ Para 4.4.4.5.2.

⁴¹⁷ Para 4.4.4.8.

⁴¹⁸ Para 4.4.4.8.

⁴¹⁹ Para 4.4.4.8.

enforced as the credit provider's chances of receiving payment on a credit agreement will depend on whether or not the required assessments were done, but also because it is not dependent on each individual consumer to take the credit provider to court for having contravened its responsible lending obligations.⁴²⁰

Where a credit agreement is declared reckless by the court or Tribunal, the NCA in section 83 prescribes the orders that the court or Tribunal may make in the case of the three instances of reckless credit.⁴²¹ For the first and second instances of reckless lending the court or the Tribunal may set aside all or part of the consumer's rights and obligations under that credit agreement or suspend the force and effect of the credit agreement.⁴²² For the third instance of reckless lending the court or the Tribunal may suspend the force and effect of the credit agreement and restructure the consumer's obligations under any other credit agreement.⁴²³

While these orders may deter credit providers from contravening the provisions of the NCA, interpretational issues arise because the wording of section 83 is cast in discretionary terms and the NCA is silent on how the court or Tribunal should exercise its discretion on the order it should make regarding the different instances of reckless credit.⁴²⁴ Also, the NCA does not specify how the court or Tribunal should exercise its discretion in determining whether or not the rights and obligations of the consumer under the credit agreement should be set aside or the force and effect of the credit agreement suspended.⁴²⁵

Regarding the setting aside of all or part of the consumer's rights and obligations under the credit agreement, the NCA requires only the order be "just and reasonable in the circumstances".⁴²⁶ However, what is deemed just and reasonable to set aside all of the consumer's rights and obligations and what is just and reasonable to set

⁴²⁰ See e.g., the current situation in Namibia where the onus is on the consumer to seek the intervention of the courts to enforce compliance with the debt prevention measures, such as the minimum deposit and maximum repayment term – para 3.3.3.4.2.

⁴²¹ Para 4.4.4.8.

⁴²² Para 4.4.4.8.

⁴²³ Para 4.4.4.8.

⁴²⁴ Para 4.4.4.9.2.

⁴²⁵ Para 4.4.4.9.1.

⁴²⁶ Para 4.4.4.9.2.

aside only part of the consumer's rights and obligations is not clear. The courts have formulated a "but for test", that if the consumer would not have entered into a credit agreement but for the credit provider's recklessness, then it will be just and reasonable to set aside that credit agreement.⁴²⁷ This test implies an interpretation that where the parties have not performed the setting aside results in the credit agreement being null and void. On the other hand, where the parties have performed, restitution of the parties might be possible.⁴²⁸

Further, regarding the order suspending the force and effect of the reckless credit agreement, the NCA does not prescribe a time limit for the suspension of the force and effect of the reckless credit agreement. A reckless credit agreement therefore may be suspended for a considerable time.⁴²⁹ Also, it is not clear whether or not more than one suspension may occur.⁴³⁰ The NCA also does not stipulate what happens to the subject matter of the credit agreement or the credit provider's asset which serves as security for the repayment of the debt during the period of the suspension.⁴³¹ It is submitted that the issue of court orders as regards reckless credit may require further investigation because of the dissenting views that have been expressed in their regard.⁴³²

Another weakness in the South African responsible lending regime is that non-compliance with the reckless lending provisions is not tested when the parties enter into a credit agreement but only when the credit agreement is enforced in court.⁴³³ Although the NCA provides that the determining criteria of whether a credit agreement is reckless should be applied as they existed at the time the credit agreement was concluded,⁴³⁴ in addition to the fact that courts or the Tribunal *mero motu* can take cognisance of reckless credit, credit agreements are considered in court only when, for instance, the consumer applies for debt relief or when the credit provider is seeking an order to enforce a credit agreement and the consumer raises

⁴²⁷ Para 4.4.4.9.2.

⁴²⁸ Para 4.4.4.9.2.

⁴²⁹ Para 4.4.4.9.3.

⁴³⁰ Para 4.4.4.9.3.

⁴³¹ Para 4 4 4 9 3.

⁴³² See in general paras 4.4.4.9.2 and 4.4.4.9.3.

⁴³³ Para 4.4.4.7.

⁴³⁴ Para 4.4.4.7.

a defence of being over-indebted or that the particular credit agreement is reckless.⁴³⁵ Therefore there is a possibility that some credit providers do not comply with the reckless lending provisions and get away with their behaviour because the consumers under those credit agreements struggle to repay without raising the over-indebtedness defence. It is submitted that this situation calls for a more proactive approach to responsible lending rather than the current reactive approach.⁴³⁶

Nevertheless, when the South African responsible lending regime is assessed against the fifth leading international best principle identified in chapter 2 of this thesis, which dictates that there must be prescribed sanctions for the credit provider's non-compliance with the responsible lending obligations,⁴³⁷ it appears that the regime is compliant with this standard. South Africa therefore is a step ahead if compared to the Namibian dispensation with regard to consumer credit, which at present does not impose pre-agreement assessment obligations and consequently there are no sanctions.⁴³⁸

With regard to the third leading international best principle identified in chapter 2 above which relates to the obligation of the credit providers to provide consumers with sufficient, reliable, comparable and timely pre-agreement information, the NCA prescribes that a pre-agreement statement and a credit quotation disclosing prescribed financial information should be provided to the prospective consumer before entering into a credit agreement.⁴³⁹ To address issues of non-compliance, the NCR is empowered to issue compliance notices to credit providers who do not meet their pre-agreement disclosure obligations in order to afford them an opportunity to rectify their non-compliance.⁴⁴⁰ However, the fact that the NCA places no specific obligation on the credit provider to explain the features of the proposed credit or to advise the consumer on the appropriateness of the proposed credit for the

⁴³⁵ Para 4.4.4.7.

⁴³⁶ Para 4.4.4.7.

⁴³⁷ Para 2.7.

⁴³⁸ See in general para 3.6.

⁴³⁹ Para 4.4.5.2.

⁴⁴⁰ Para 4.4.5.2.

consumer's specific needs implies that the consumer largely is responsible for the decision as to whether or not to enter into a particular credit agreement.⁴⁴¹

Nevertheless, it is submitted that the South African responsible lending regime provided for by the NCA demonstrates a good framework to protect consumers from over-indebtedness. When credit providers uphold their responsible lending obligations, issues of irresponsible lending practices will effectively be prevented resulting in a fair outcome for consumers since the NCA seeks to ensure that only credit that is affordable and for which a consumer has an understanding of all the risks, costs and obligations will be provided.

⁴⁴¹ Para 4.4.5.2.

CHAPTER 5

THE AUSTRALIAN RESPONSIBLE LENDING REGIME

5.1 Introduction

The National Consumer Credit Protection Act 134 of 2009 (Cth)¹ regulates consumer credit in Australia. The first schedule to the NCCPA delineates the National Credit Code² that largely replicates its predecessor the Uniform Consumer Credit Code.³ It is mentioned above that the NCCPA is the first piece of consumer credit legislation that introduces the concept of “responsible lending” in Australia.⁴ The main purpose in introducing responsible lending obligations in Australia is to protect consumers by ensuring that they are not provided with credit products or services that are unaffordable and unsuitable.⁵ In this chapter I investigate the responsible lending provisions as provided for in the NCCPA, focusing primarily on the obligations of the credit provider to conduct pre-agreement assessments and related matters, such as the provision of pre-agreement information and the explanation of these matters to be offered the consumer.

In undertaking a comparative investigation, I explore how Australia has approached the concept of “responsible lending” in the effort to curb consumer over-indebtedness. In order to achieve this objective, firstly, I discuss in paragraph 5.2 the scope of application of the NCCPA to determine the extent of protection accorded to Australian credit consumers. Secondly, in paragraph 5.3 I investigate aspects central to the duty of responsible lending, namely the credit licensee’s obligation to conduct pre-agreement assessments and the related duty to provide pre-contractual information. This investigation explores the provisions of the NCCPA in order to consider its interpretation of the responsible lending obligations. This examination is followed by a discussion of the powers of the courts in instances of non-compliance

¹ Hereinafter the “NCCPA”. See para 2.6.5 above.

² Hereinafter the “NCC”.

³ Hereinafter the “UCCC”. The UCCC regulated consumer credit in Australia from 1996 until July 2010 when the NCCPA and its schedules passed into law. See ASIC *Financial System Inquiry* (Apr 2014) para 831. See also para 2.6.5 above as regards the discussion of the policy developments leading to the promulgation of the NCCPA.

⁴ See para 2.6.5 above.

⁵ Pearson and Batten (2010) 9.

with the responsible lending obligations. Finally, in paragraph 5.4 I conclude the chapter.

5.2 The NCCPA: Scope of Application

5.2.1 General

The NCCPA works to the benefit of a consumer by regulating aspects relating to credit⁶ and those who engage in credit activities.⁷ A consumer is defined in the NCCPA to include a natural person or a strata corporation.⁸ Credit activities in terms of the NCCPA include the provision of credit,⁹ credit services,¹⁰ consumer leases,¹¹ mortgages¹² and credit guarantees.¹³ A person is said to engage in a credit activity, if that person:¹⁴

⁶ See the NCCPA preamble.

⁷ NCCPA s 6 provides a table setting out various meanings of the concept “credit activity” in terms of the Act.

⁸ NCC s 5(1)(a). In terms of the NCCPA s 5(1), a strata corporation is accorded the same meaning as in s 204 of the NCC. This section provides that a strata corporation means “(a) a body corporate incorporated in relation to land subdivided wholly or mainly for residential purposes under a law of the Commonwealth, a State or a Territory providing for strata, cluster, precinct or other subdivision of land; or (b) a body corporate whose issued shares confer a right to occupy land for residential purposes”.

⁹ See the NCC s 4, where a credit contract is defined as “a contract under which credit is or may be provided”, being the provision of credit to which the NCC applies. See also Malbon in Malbon and Nottage *eds* (2013) 244.

¹⁰ Credit services are defined as providing credit assistance to a consumer or acting as an intermediary in the provision of such a service – see the NCCPA ss 8 and 9. The provisions of s 8 of the NCCPA are discussed below.

¹¹ The NCCPA regulates only consumer leases in terms of which (1) the consumer has no right or obligation to purchase the leased goods at the end of the agreement, (2) the agreement is for a fixed period of more than four months, and (3) the total amount payable by the consumer exceeds the cash price of the goods – see NCC ss 5(1)(c), 9(1), 9(3), and 170(1)(b). This means that where the consumer has a right or obligation to purchase the leased goods, the contract is regulated as a normal credit contract. It also means that the NCCPA does not apply to consumer leases, where the lease is for an indefinite period, and where the initial term of the lease is for a fixed period of less than four months, regardless of whether or not the parties had agreed that the contract would be rolled out on a regular basis – Commonwealth Treasury *RIS* (Jun 2011) 28-29. See also para 5.3.2.4 below for the discussion of specific responsible lending obligations relating to consumer leases.

¹² See paras 5.3.5.2 and 5.3.5.5 below for a discussion of additional responsible lending obligations relating to standard home mortgages and reverse mortgages.

¹³ NCCPA ss 5, 6 and 8. For purposes of this chapter, except for consumer leases and where additional obligations are imposed by the NCCPA for particular types of credit activities, credit contracts, credit services, mortgages and credit guarantees will be generally referred to as credit contracts. A discussion of the general responsible lending obligations relating thereto are discussed in para 5.3 below.

¹⁴ NCCPA s 6(1)-(2).

- (a) Is a credit provider under a credit contract or carries on a business of providing credit and/or performs the obligations or exercises the rights of a credit provider in relation to a credit contract or proposed credit contract either as the credit provider or on behalf of the credit provider.
- (b) Provides a credit service.
- (c) Is a lessor under a consumer lease or carries on a business of providing consumer leases or performs the obligations or exercises the rights of a lessor in relation to a consumer lease or proposed consumer lease.
- (d) Is a mortgagee under a mortgage or performs or exercises the obligations and rights of a mortgagee in relation to a mortgage or proposed mortgage.
- (e) Is a beneficiary of a credit guarantee or performs the obligations or exercises the rights of another person who is a beneficiary of a credit guarantee or proposed credit guarantee, in relation to the credit guarantee or proposed credit guarantee.
- (f) Engages in an activity which is prescribed by the regulations and which relates to credit which the NCC applies to or would apply to if the credit were provided.

The NCC provides that it applies in relation to an existing or proposed credit contract,¹⁵ where credit is provided or is intended to be provided to a consumer, wholly or predominantly for:¹⁶

- (a) personal, domestic or household purposes;
 - (b) to purchase, renovate or improve residential property for investment purposes;
- or

¹⁵ "Credit contract" is defined in ss 5 and 6 of the NCC.

¹⁶ NCC s 5(1)(b)-(c). This means that the NCCPA also applies to similar credit contracts – see in this regard, Malbon in Malbon and Nottage *eds* (2013) 244 and Wilson in Wilson *ed* (2013) 113.

- (c) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes.

However, both the NCCPA and the NCC do not apply to consumers borrowing to invest in financial products or non-residential property.¹⁷ In determining whether or not credit is provided or is intended to be provided wholly or predominantly for personal, domestic or household purposes or to renovate residential property or to refinance credit that has been used for such purposes, the NCC provides for a rebuttable presumption that the credit is not provided or intended to be provided wholly or predominantly for such purposes, if the consumer declares, before entering into the contract, that the credit is to be applied wholly or predominantly for a different purpose.¹⁸ Notwithstanding this presumption, the consumer's declaration referred to above is ineffective if at the time the declaration was made, the credit provider knew or had reason to believe or ought to have known or ought to have had reason to believe that the credit was in fact to be applied wholly or predominantly for the purpose purported in the NCC, had he made reasonable inquiries about the purpose for which the credit was provided or was intended to be provided under the contract.¹⁹

5.2.2 Credit Agreements Specifically Excluded

In terms of section 6 of the NCC the following credit contracts are excluded from the scope of application of the NCCPA:

- (a) Short term credit.²⁰ The exemption of short term credit might suggest that short term credit, for example payday loans are exempt from the scope of application of the NCCPA.²¹ However, these types of credit contracts are usually included because the exemption applies only if the costs of the loan are below certain limits and these limits are well below the kind of fees that are charged for

¹⁷ See also ASIC *Financial System Inquiry* (Apr 2014) para 834.

¹⁸ NCC s 13(2).

¹⁹ NCC s 13(3).

²⁰ NCC s 6(1).

²¹ See the discussion of these types of credit contracts in para 5.3.5.4.1 below.

payday loans. In particular, section 6(1) of the NCC provides that the NCCPA will not apply to short term credit if

- (i) the provision of credit is limited to a total period that does not exceed 62 days;
 - (ii) the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit; and
 - (iii) the maximum amount of interest charges that may be imposed or provided for does not exceed an amount (calculated as if the NCC applied to the contract) equal to the amount payable if the annual percentage rate were 24% per annum.²²
- (b) Credit provided without an express prior agreement between the credit provider and the consumer for the provision of credit.²³ For example, when the consumer's cheque account with the credit provider becomes overdrawn but there is no expressly agreed overdraft facility between the parties or when the consumer's savings account with the credit provider falls into debit.²⁴
- (c) Credit provided under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided.²⁵
- (d) A credit contract under which both credit and debit facilities are available to the extent that the contract or any amount payable or other matter arising out of it relates only to the debit facility.²⁶
- (e) Credit provided out of a bill facility²⁷ if the credit provider is an authorised deposit-taking institution,²⁸ or if the regulations are passed which specifically

²² NCC s 6(1).

²³ NCC s 6(4).

²⁴ NCC s 6(4).

²⁵ NCC s 6(5).

²⁶ NCC s 6(6).

²⁷ A "bill facility" is defined as a facility in terms of which the credit provider provides credit to the consumer by accepting, drawing, discounting or endorsing a bill of exchange or promissory note – NCC s 6(7).

²⁸ Within the meaning of s 5(1) of the Banking Act 1959.

exclude the applicability of the NCCPA to the provision of credit arising out of such facilities from any credit provider.²⁹

- (f) Credit provided by the insurer to the insured as a consumer for the payment of an insurance premium by instalments, even though the instalments exceed the total of the premium that would be payable if the premium were paid in a lump sum, if on cancellation the insured would have no liability to make further payments under the contract.³⁰
- (g) Credit provided on the security of pawned or pledged goods by a pawnbroker in the ordinary course of a pawnbroker's business on the undertaking that if the consumer is in default, the pawnbroker's only recourse is against the goods provided as security for the provision of the credit.³¹
- (h) Credit provided by the trustee of a deceased person's estate by way of an advance to a beneficiary or prospective beneficiary of the estate.³²
- (i) Credit provided by an employer to an employee or former employee.³³
- (j) Credit provided in terms of a margin loan.³⁴ However, it should be noted that although margin loans are not covered by the NCCPA, they are subject to

²⁹ NCC s 6(7).

³⁰ NCC s 6(8).

³¹ NCC s 6(9).

³² NCC s 6(10).

³³ NCC s 6(11).

³⁴ NCC s 6(12). A "margin loan" is not defined in the NCC. However, the NCC adopts the meaning of a margin loan in s 761EA(1) of the Corporations Act 2001 (Cth), where it is defined as: (a) a standard margin lending facility; or (b) a non-standard margin lending facility; or (c) a facility of a kind that has been declared by the Australian Securities and Investments Commission (see para 5.2.5 below) to be a margin lending facility under subsection (8); unless the facility is of a kind that has been declared by ASIC not to be a margin lending facility under subsection (9). Essentially, a standard margin lending facility is a facility under the terms of which credit is or to be provided to a consumer, to acquire a financial product or a benefit therefrom or to repay credit which was acquired for such a purpose and the credit provided is secured by property consisting of marketable securities – s 761EA(2) of the Corporations Act 2001 (Cth), whereas a non-standard margin lending facility is a facility in terms of which a consumer transfers one or more marketable security or securities or a benefit in marketable securities to a credit provider, who in return transfers property to the consumer as consideration or security for the transferred securities, provided that the transferred property is to be applied wholly or partly to acquire one or more financial product or a benefit therein – see s 761EA(5) of the Corporations Act 2001 (Cth).

responsible lending obligations as well as disclosure obligations in the Corporations Act 2001 (Cth).³⁵

- (k) The provision of credit which falls into the category of credit agreements which are specifically excluded in the regulations.³⁶

In summary, when the scope of application of the NCCPA is compared to Namibian legislative enactments it is apparent that it has a broad scope of application because it applies to almost every credit contract without reference to the credit amount involved or the nature of the credit product or service involved.³⁷ However, when the NCCPA is compared to South Africa's National Credit Act 34 of 2005,³⁸ it is clear that the latter has a broader scope of application because it does not follow the "purpose of credit" approach.³⁹ The purpose of credit is important in Australia because the NCCPA will apply to a credit contract only if the credit is provided mainly for personal, domestic or household purposes, to purchase, renovate or improve residential property for investment purposes or to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes.⁴⁰

Further, when the credit agreements specifically excluded from the scope of application of the NCA are compared to those specifically excluded in terms of the NCCPA again it is evident the South African scope of application is broader. With the exception of similarities, such as that both enactments do not apply to credit provided by the insurer to the insured for the payment of insurance premiums and employer-employee loans,⁴¹ a further difference is that the NCA applies to small amount loan transactions and pawn transactions.⁴² It excludes from its scope of application only credit agreements in terms of which the consumer is the state⁴³ or a

³⁵ See Pt 7.8, Division 4A, Subdivision A of the Corporations Act 2001 (Cth).

³⁶ NCC s 6(13).

³⁷ See para 5.2.1 above.

³⁸ Hereinafter the "NCA".

³⁹ See para 4.2.3 above.

⁴⁰ See para 5.2.1 above.

⁴¹ See also para 4.2.4 above.

⁴² See para 4.2.2 above.

⁴³ Or an organ of state – para 4.2.4 above.

juristic person with an annual turnover or assets over R1 million or large credit agreements in terms of which the consumer is a juristic person and credit agreements in terms of which the credit provider is the Reserve Bank of South Africa.⁴⁴

5.2.3 Licensing Requirements

It is important to note that a person cannot engage in a credit activity without holding an Australian credit license that authorises the licensee to engage in the particular credit activities it specifies.⁴⁵ Specifically, section 29(1) imposes a compulsory licensing regime by providing that “a person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity”. Taking the broad definition of credit activity in the NCCPA into account,⁴⁶ the prohibition on engaging in a credit activity without a licence precludes persons engaging in credit activities on behalf of their principal licensees, unless engaging in the credit activity is within the explicitly written authority of the principal licensee to engage in the relevant activity.⁴⁷ Part 2-2 of Chapter 2 of the NCCPA deals with the procedure of applying for the credit license. It also sets out the conditions that may be imposed on the credit licensee and prescribes the manner in which a credit license may be suspended, cancelled or its conditions varied.⁴⁸

Although the licensing of credit providers falls outside the scope of this thesis, it is significant that the NCCPA requires the licensing of persons prior to engaging in credit activities with consumers. This proactive measure provides regulatory control over the credit market and contributes to the effective protection of consumers from possible abuses by credit providers who may take advantage of the regulation vacuum if they are not registered with the credit regulator. Similarly, South Africa requires the registration of persons as credit providers if the total principal debt owed to that person under all outstanding credit agreements other than incidental credit

⁴⁴ See para 4.2.4 above.

⁴⁵ NCCPA s 27 read with s 35(1)-(2). See also North (2015) *Fed L Rev* 375 and Malbon in Malbon and Nottage eds (2013) 244-245.

⁴⁶ See NCCPA ss 5, 6 and 8.

⁴⁷ NCCPA s 29(3)-(4).

⁴⁸ NCCPA s 34.

agreements exceeds R0.00.⁴⁹ Failure to register as a credit provider renders the credit agreement entered into by that person unlawful and void.⁵⁰ It is submitted that the compulsory requirement for all credit providers to register with the credit regulator is a positive aspect of consumer credit legislation, specifically in comparison with the situation in Namibia where some credit providers are able to operate for life unregulated because they are not required to register with the regulatory authorities.⁵¹

5.2.4 The Classification of Credit Licensees

The NCCPA distinguishes between two types of credit licensees:

- (a) a credit licensee who provides credit assistance to the consumer;⁵² and
- (b) a credit licensee who provides credit to the consumer and enters into a credit contract with a consumer as a credit provider in terms of that credit contract.⁵³

Section 8 of the NCCPA states that a person provides credit assistance to a consumer if, by dealing directly with the consumer in the course of business carried on by the person or another person, the person does any of the following:⁵⁴

- (a) Suggests that the consumer apply for a particular credit contract or for an increase to the credit limit of a particular credit contract with a particular credit provider.
- (b) Suggests that the consumer remain in a particular credit contract with a particular credit provider.

⁴⁹ See para 4.2.1 above.

⁵⁰ See para 4.2.1 above.

⁵¹ See para 3.2.2 above.

⁵² See NCCPA s 8.

⁵³ A credit provider is defined as a person who engages in any credit activity as defined in the NCCPA s 6(1)-(2).

⁵⁴ NCCPA s 8(a)-(h). The NCCPA makes it clear that it does not matter whether the person engages in the above mentioned conduct on his own behalf or on behalf of another person – NCCPA s 8.

- (c) Assists the consumer to apply for a particular credit contract or for an increase to the credit limit of a particular credit contract with a particular credit provider.
- (d) Suggests that the consumer apply for a particular consumer lease or that the consumer remain in a particular consumer lease with a particular lessor.
- (e) Assists the consumer to apply for a particular consumer lease with a particular lessor.

5.2.5 The Consumer Credit Regulator

Reference should be made to the Australian Securities and Investments Commission,⁵⁵ Australia's integrated corporate, markets, financial services and consumer credit regulator.⁵⁶ ASIC is provided for in terms of the Australian Securities and Investments Commission Act 2001 (Cth),⁵⁷ and it is tasked *inter alia* with the responsibility for

- (a) maintaining, facilitating and improving the performance of the financial system and entities within it in order to develop the economy;⁵⁸
- (b) effectively administering the law that confers functions and powers on it and with a minimum of procedural requirements;⁵⁹ and
- (c) taking whatever necessary action to enforce and give effect to the laws of the Commonwealth.⁶⁰

ASIC took over regulation of consumer credit on 1 July 2010 under the NCCPA from the previous regimen of separate regulation by the individual states and territories.⁶¹ As the consumer credit regulator, ASIC is responsible for the licensing and

⁵⁵ Hereinafter "ASIC".

⁵⁶ ASIC *Annual Report 2015-2016* (2016) 12.

⁵⁷ S 1(a). Hereinafter the "ASIC Act".

⁵⁸ ASIC Act s 2(a). See also ASIC *Annual Report 2015-2016* (2016) 12.

⁵⁹ ASIC Act s 2(d). See also ASIC *Annual Report 2015-2016* (2016) 12.

⁶⁰ ASIC Act s 2(f). See also ASIC *Annual Report 2015-2016* (2016) 12.

⁶¹ ASIC *Financial System Inquiry* (Apr 2014) para 816. See also ASIC *Annual Report 2015-2016* (2016) 12 and North (2015) *Fed L Rev* 376.

regulating of persons and businesses engaging in consumer credit activities, including banks, credit unions, finance companies and mortgage and finance brokers, by ensuring that credit licensees meet the standards and their responsibilities to consumers that are set out in the NCCPA.⁶²

5.3 The Responsible Lending Provisions in terms of the NCCPA

5.3.1 General

Chapter 3 of the NCCPA is aimed at preventing irresponsible lending and at providing redress for consumers who fall victim to such lending practices.⁶³ The responsible lending obligations provided for in Chapter 3 of the NCCPA are imposed on all credit licensees and they relate to the process of seeking to enter into a credit contract or to increase the credit limit amount in an existing credit contract.⁶⁴ The primary standard of responsible lending as enshrined in the NCCPA is to ensure that credit licensees do not suggest, assist with or provide unsuitable and unaffordable credit to consumers.⁶⁵ In essence, these responsible lending obligations in the NCCPA are based on two key aspects, namely

- (a) assessing the consumer's ability to service and repay the loan; and
- (b) assessing the suitability of the proposed credit to the prospective consumer.⁶⁶

At this point and as seen below,⁶⁷ it should be noted the aspects required to be assessed by Australian credit licensees in terms of the NCCPA differ from the South African pre-agreement assessment obligations imposed by the NCA, in that the credit provider in South Africa is required to assess only the consumer's general understanding and appreciation of the risks and costs of the proposed credit and of the rights and obligations of a consumer under a credit agreement, the debt repayment history as a consumer under credit agreements and the consumer's

⁶² ASIC *Financial System Inquiry* (Apr 2014) para 12.

⁶³ See NCCPA Pt 3. See also Pearson and Batten (2010) 9 and Tuffin (2009) *QUTLJJ* 282.

⁶⁴ Cvjetanovic (2014) *Seven Pillars Institute* 145. See also Malbon in Malbon and Nottage eds (2013) 244.

⁶⁵ NCCPA s 111. See also Cvjetanovic (2014) *Seven Pillars Institute* 145 and Malbon in Malbon and Nottage eds (2013) 244-245.

⁶⁶ See paras 5.3.2.2 and 5.3.2.3 below.

⁶⁷ Paras 5.3.2.2 and 5.3.2.3 below.

existing financial means, prospects and obligations, without reference to the suitability of the proposed credit to the prospective consumer.⁶⁸ A discussion of the credit licensee's duty to conduct pre-agreement assessments in terms of the NCCPA follows.

5.3.2 The Credit Licensee's Pre-Agreement Assessment Obligations

5.3.2.1 General

Division 4 of Part 3-1 and Division 3 of Part 3-2 of Chapter 3 of the NCCPA set out expected responsible lending standards of conduct for credit licensees. These Divisions impose the key obligations on all credit licensees to ensure that the credit licensees do not suggest, assist or provide a consumer with credit that is unsuitable. Credit licensees therefore are required to observe the responsible lending obligation in the following three instances:

- (a) where they assist a consumer to apply for a credit contract;
- (b) where they suggest a credit contract to a consumer; and
- (c) where they enter into a consumer credit contract with a consumer.

5.3.2.2 The Credit Assistance Licensee's Pre-Agreement Assessment Obligations

Division 4 of Part 3-1 of the NCCPA imposes an obligation on a credit assistance licensee to conduct a preliminary assessment of the consumer.⁶⁹ Specifically, section 115(1) provides that

[a] licensee must not provide credit assistance to a consumer on a day (the assistance day) by:

- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or
- (b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular credit contract with a particular credit provider;

unless the licensee has, within 90 days (or other period prescribed by the regulations) before the assistance day:

- (c) made a preliminary assessment that:
 - (i) is in accordance with subsection 116(1); and

⁶⁸ See paras 4.4.4.1 and 4.4.4.2 above.

⁶⁹ See NCCPA ss 115-120.

- (ii) covers the period proposed for the entering of the contract or the increase of the credit limit; and
- (d) made the inquiries and verification in accordance with section 117.⁷⁰

For purposes of the preliminary assessment required in section 115(1), section 116(1) provides that

[f]or the purposes of paragraph 115(1)(c), the licensee must make a preliminary assessment that:

- (a) specifies the period the assessment covers; and
- (b) assesses whether the credit contract will be unsuitable for the consumer if the contract is entered or the credit limit is increased in that period.

From the wording of this section it appears that the preliminary assessment contemplated in section 115 must cover the whole proposed duration of the credit contract or increase of the credit limit.⁷¹ It is also required that the preliminary assessment should specify the period covered by the assessment,⁷² and further assess whether or not the credit contract will be unsuitable for the consumer if the contract is entered into or the credit limit is increased in that period.⁷³ In the event that the consumer is an existing consumer, the preliminary assessment should assess whether or not the credit contract will be unsuitable if the consumer is to remain in the contract in that period.⁷⁴

Relevant inquiries and verification as prescribed by section 117 should also be made.⁷⁵ Section 117(1) requires the credit assistance provider, before making the required preliminary assessment in terms of section 115, to⁷⁶

- (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract; and

⁷⁰ NCCPA s 115 (2) has a corresponding provision relative to credit licensees providing credit assistance to a consumer by suggesting that the consumer remains in a particular credit contract with a particular credit provider. These credit licensees are required to have

- “(a) made a preliminary assessment that:
 - (i) is in accordance with subsection 116(2); and
 - (ii) covers a period in which the assistance day occurs; and
- (b) made the inquiries and verification in accordance with section 117”.

⁷¹ NCCPA s 115(1)(c).

⁷² NCCPA s 116(1).

⁷³ NCCPA s 118(1).

⁷⁴ NCCPA s 118(2).

⁷⁵ NCCPA s 115(1)(d).

⁷⁶ NCCPA s 117(1)(a)-(e). See also North (2015) *Fed L Rev* 377.

- (b) make reasonable inquiries about the consumer's financial situation; and
- (c) take reasonable steps to verify the consumer's financial situation; and
- (d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and
- (e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

The NCCPA provides that credit assistance must be assessed as unsuitable for the consumer if at the time of the preliminary assessment it is likely that:⁷⁷

- (a) the consumer will be unable to comply with the consumer's financial obligations under the contract; or
- (b) the consumer will only comply with substantial hardship; and
- (c) the contract will not meet the consumer's requirements or objectives.

Unless the contrary is established, there is a statutory presumption that the consumer can meet the contractual obligations only with substantial hardship if the consumer can meet the contractual terms in a credit contract only by disposing of his "principal place of residence", making the proposed credit contract unsuitable.⁷⁸ The assessment required in terms of section 115 of the NCCPA is conducted by considering only the information about the consumer's financial situation that the credit assistance provider had reason to believe is true or had reason to believe was true if the credit assistance provider had made the inquiries and verifications required under section 117.⁷⁹

In the event that the outcome of the preliminary assessment determines that the credit assistance will be unsuitable for the consumer, the NCCPA in terms of section 123 prohibits a credit assistance provider from providing credit assistance to the consumer.⁸⁰ A credit assistance provider is also prohibited from suggesting that a consumer remain in unsuitable credit contracts.⁸¹ From the provisions of section

⁷⁷ NCCPA s 118(2). See also North (2015) *Fed L Rev* 377.

⁷⁸ NCCPA s 124(3). See also para 5.3.3.3 below.

⁷⁹ NCCPA s 118(4).

⁸⁰ NCCPA s 123(2)(a)-(b).

⁸¹ NCCPA s 124(1).

120,⁸² it is implied that the preliminary assessment must be recorded in writing because this section grants a consumer who has been provided with credit assistance the right to obtain a written copy of the preliminary assessment from the credit licensee who provided credit assistance.

5.3.2.3 The Credit Provider's Pre-Agreement Assessment Obligations

As stated above,⁸³ responsible lending provisions in respect of credit providers are provided for in Division 3 of Part 3-2 of Chapter 3 of the NCCPA.⁸⁴ Section 128 of the NCCPA requires that

[a] licensee must not:

- (a) enter a credit contract with a consumer who will be the debtor under the contract; or
 - (aa) make an unconditional representation to a consumer that the licensee considers that the consumer is eligible to enter a credit contract with the licensee; or
- (b) increase the credit limit of a credit contract with a consumer who is the debtor under the contract; or
 - (ba) make an unconditional representation to a consumer that the licensee considers that the credit limit of a credit contract between the consumer and the licensee will be able to be increased; on a day (the credit day) unless the licensee has, within 90 days (or other period prescribed by the regulations) before the credit day:
- (c) made an assessment that:
 - (i) is in accordance with section 129; and
 - (ii) covers the period in which the credit day occurs; and
- (d) made the inquiries and verification in accordance with section 130.

For purposes of conducting the required assessment in terms of section 128, section 129 provides that

[f]or the purposes of paragraph 128(c), the licensee must make an assessment that:

- (a) specifies the period the assessment covers; and
- (b) assesses whether the credit contract will be unsuitable for the consumer if the contract is entered or the credit limit is increased in that period.

On the other hand, section 130(1) provides that

... the licensee must, before making the assessment:

- (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract; and

⁸² NCCPA s 120(1) provides that "[i]f the consumer requests the licensee for a copy of the preliminary assessment ... the licensee must give the consumer a written copy of the assessment".

⁸³ Para 5.3.2.1.

⁸⁴ See NCCPA ss 128-132.

- (b) make reasonable inquiries about the consumer's financial situation; and
- (c) take reasonable steps to verify the consumer's financial situation; and
- (d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and
- (e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

From the wording of these provisions it is clear if the credit provider is to meet these responsible lending obligations the credit provider must undergo a three-stage process.⁸⁵

- (a) First, make reasonable enquires about the consumer's requirements, objectives and financial situation.
- (b) Second, take reasonable steps to verify the consumer's financial situation, with a particular focus on the ability of the consumer to meet his obligations under the proposed credit contract.
- (c) Third, make a final assessment about whether or not the proposed credit contract is not unsuitable for the consumer.

In terms of section 131 of the NCCPA a proposed credit contract or a proposed increase in the credit limit of an existing credit contract must be assessed as unsuitable for the consumer if, at the time of the assessment, it is likely that

- (a) the consumer will be unable to comply with the consumer's financial obligations under the contract or the consumer could comply only with substantial hardship;⁸⁶
- (b) the proposed credit contract will not meet the consumer's requirements or objectives;⁸⁷ or

⁸⁵ NCCPA s 130(1). See also North (2015) *Fed L Rev* 377-378.

⁸⁶ NCCPA s 131(2)(a).

⁸⁷ NCCPA s 131(2)(b).

- (c) the prescribed circumstances in the regulations in terms of which a credit contract should be assessed as unsuitable will arise.⁸⁸

In aid of determining the suitability of a credit contract by a credit provider, section 129 states that the licensee must make an assessment that specifies the period covered by that “specific assessment” and further assess whether or not the credit contract will be unsuitable for the consumer if the contract is entered into or the credit limit is increased in that period. For the credit licensee to meet this obligation, it is accepted that the consumer’s ability to meet all of the repayments, fees, charges and transaction costs of complying with the proposed credit contract must be assessed.⁸⁹

If a proposed credit contract or an increase in the credit limit is unsuitable for the consumer, the licensee is prohibited from entering into that contract or from increasing the credit limit under it.⁹⁰ Credit licensees are also required to keep a record, in writing, of all material information forming the basis of the “unsuitability” of the credit contract applied for by the potential credit consumer.⁹¹ Should the credit consumer request a copy, it must be provided to him.⁹²

Further, for purposes of determining whether a contract will be unsuitable, only information that is about the consumer’s financial situation, requirements or objectives should be taken into account.⁹³ This information should be of such a nature that at the time the assessment was made the licensee had reason to believe or would have had a reason to believe that the information was true if the licensee had made the required inquiries or verification required under section 130.⁹⁴ The onus therefore is on the credit provider to ask the consumer about his financial situation and to engage in an effort to verify the information obtained from the consumer as any normal prudent and reasonable credit provider would have

⁸⁸ NCCPA s 131(2)(c).

⁸⁹ See also ASIC RG 209 (Nov 2014) 15-16.

⁹⁰ NCCPA s 133.

⁹¹ NCCPA s 132(1).

⁹² See ASIC Report 264 (Nov 2011) 4.

⁹³ NCCPA s 131(4).

⁹⁴ NCCPA s 131(4).

undertaken in those circumstances.⁹⁵ This test is objective and credit licensees are not expected to go beyond prudent business practice in verifying the information they receive.⁹⁶ A credit reference check is deemed reasonable.⁹⁷ However, a credit reference check might not be necessary for a credit assistance provider as opposed to a credit provider.⁹⁸

5.3.2.4 Pre-Agreement Assessment Obligations Relating to Consumer Leases

The NCC defines consumer leases which are regulated by the NCCPA as contracts for goods which are hired wholly or predominantly for personal, domestic or household purposes for longer than four months, and in terms of which agreement the consumer does not have a right or obligation to purchase the goods and the total amount payable exceeds the cash price.⁹⁹ Ali *et al* define a “consumer lease” as a “bailment-for-reward or lease of goods for consumer purposes” because it allows the consumer to take immediate possession of goods without having to pay the full purchase price upfront.¹⁰⁰

It has been mentioned above that where the credit contract confers the right or an obligation to purchase the leased goods, such an agreement is regulated as any other credit contract and not as a consumer lease.¹⁰¹ This means that although the NCCPA applies to both agreements, consumer leases are regulated differently from other credit contracts.¹⁰² The specific responsible lending obligations relating to consumer leases are provided for in Parts 3-3 and 3-4 of Chapter 3 of the NCCPA.

⁹⁵ Tuffin (2009) *QUTLJJ* 301.

⁹⁶ NCCPA s 130(1)(c).

⁹⁷ Tuffin (2009) *QUTLJJ* 301.

⁹⁸ See ASIC RG 209 (Nov 2014) 15.

⁹⁹ See NCC ss 169 and 170. The “cash price” is defined as being the lowest price that the lessee might reasonably expect to be able to pay for the goods from a supplier of goods or, if the goods are not available for cash or are only available for cash at the same or similar price to which they would be provided on credit, the market value of the goods – NCC s 204(1). See also Ali, McRae, Ramsay and Saw (2013) *ABLR* 242.

¹⁰⁰ Ali, McRae, Ramsay and Saw (2013) *ABLR* 240.

¹⁰¹ See para 5.2.1 above.

¹⁰² See para 5.2.1 above for the description of consumer leases as credit activities and how they are regulated in terms of the NCCPA. See also Ali, McRae, Ramsay and Saw (2013) *ABLR* 250-252 who argue that the different regulatory treatment of consumer leases due to the classification of credit contracts or consumer leases according to whether or not the lease agreement contains a right or obligation to purchase, has created opportunities for regulation arbitrage, for instance, where a lease that is designed to provide the lessee with the opportunity to own the leased goods is disguised as a consumer lease or where a lease is structured as neither a credit contract nor a consumer lease to avoid regulatory requirements.

However, a close investigation of the pre-agreement assessment obligations relating to consumer leases reveals that the relevant provisions mirror the general provisions applicable to credit contracts,¹⁰³ and a discussion dedicated to these provisions therefore amounts to duplication. Nonetheless, the expectations placed on credit licensees are highlighted below.

Part 3-3 of Chapter 3 of the NCCPA requires a licensee, before providing credit assistance to a consumer in relation to a consumer lease, to make a preliminary assessment as to whether the lease will be unsuitable for the consumer if the consumer lease is entered into in that period.¹⁰⁴ In the event that the consumer requests the credit licensee for a copy of the preliminary assessment, the credit licensee is obliged to give the consumer a written copy of the assessment in the manner prescribed by the regulations and at no cost.¹⁰⁵

Similarly, Part 3-4 of Chapter 3 of the NCCPA requires a credit licensee who will be the lessor under the proposed consumer lease to make an assessment as to whether or not the consumer lease will be unsuitable for the consumer, by making reasonable enquiries and verification about the consumer's requirements, objectives and financial situation and making the copy of the assessment available to the consumer on request.¹⁰⁶

5.3.2.5 The Consumer's Information Duty

The NCCPA does not specifically impose any duty of disclosure on the prospective credit consumer. However, considering the fact that the NCCPA requires credit licensees to assess the consumer's requirements, objectives and financial situation to determine the possible unsuitability of the credit contract, it becomes clear that the consumer is required to provide the credit licensee with information that will form the basis of the assessment. It appears that during the assessment and verification processes, the credit provider may take into account only information which he has

¹⁰³ See paras 5.3.2.2 and 5.3.2.3 above. See also Ali, McRae, Ramsay and Saw (2013) *ABLR* 251.

¹⁰⁴ NCCPA s 134. See also NCCPA ss 138, 139, 140 and 141 and Ali, McRae, Ramsay and Saw (2013) *ABLR* 252.

¹⁰⁵ NCCPA s 143(1)-(3).

¹⁰⁶ NCCPA s 151(a)-(d). See also ss 148, 152, 153, 154, 155, 156 and Ali, McRae, Ramsay and Saw (2013) *ABLR* 252.

reason to believe is true.¹⁰⁷ Acknowledging that the effectiveness of the responsible lending obligations depends on credit providers having reliable information about prospective consumers' other credit commitments,¹⁰⁸ a credit provider can be relieved of liability for non-compliance with responsible lending obligations if he has acted honestly having regard to all the circumstances.¹⁰⁹

In South Africa there is no such explicit onus on credit provider to take into account only information he believes to be true. Rather, a duty is placed on the consumer to assist in the pre-agreement assessment by fully and truthfully answering all requests for information made by the credit provider as part of the assessment.¹¹⁰ If it is established that the consumer failed to fully and truthfully answer requests for information made by the credit provider for purposes of the assessment and the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment, a credit provider has a complete defence to an allegation that reckless credit was granted.¹¹¹

5.3.3 A Practical Consideration of the Suitability Requirements

5.3.3.1 General

As shown above,¹¹² the NCCPA's responsible lending regime is based on suitability requirements. A credit assistance provider must make a preliminary assessment and a credit provider must make a final assessment as to whether or not the proposed credit contract or increase in the credit limit will be unsuitable for the consumer.¹¹³ Credit licensees are prohibited from entering into an unsuitable credit contract or increasing the credit limit under an unsuitable credit contract,¹¹⁴ or suggesting that a consumer remains in an unsuitable credit contract.¹¹⁵ Notable from the suitability requirements outlined above is the fact that in addition to ensuring that the credit consumer has the ability to repay the loan, the credit licensee bears the primary

¹⁰⁷ NCCPA s 131(4).

¹⁰⁸ Howell in Malbon and Nottage *eds* (2013) 323.

¹⁰⁹ NCCPA s 138.

¹¹⁰ See para 4.4.4.3 above.

¹¹¹ See para 4.4.4.3 above.

¹¹² Paras 5.3.2.2 and 5.3.2.3.

¹¹³ NCCPA s 128 read with s 129. See also paras 5.3.2.2 and 5.3.2.3 above.

¹¹⁴ NCCPA s 123 read with s 133.

¹¹⁵ NCCPA s 124. See also para 5.3.2.2 above.

responsibility not to suggest, assist with or provide credit that does not meet the consumer's requirements or objectives.

The NCCPA provides four circumstances under which credit will be deemed unsuitable for the consumer, if at the time of the assessment it is likely that:¹¹⁶

- (a) The consumer will be unable to comply with his or her financial obligations under the proposed credit contract.
- (b) The consumer could comply with the financial obligations under the proposed credit contract only with substantial hardship.
- (c) The proposed credit contract will not meet the consumer's requirements or objectives.
- (d) The circumstances provided for in the regulations will arise that will render the credit unsuitable.¹¹⁷

However, the NCCPA lacks the necessary guidance required in practice to analyse these responsible lending provisions so as to ensure optimal compliance by credit licensees. In this part of the chapter, I, first, provide an interpretation of the key concepts forming the suitability requirements. Secondly, I reflect on ASIC's guidance on meeting the suitability requirements imposed on credit licensees. Finally, I consider some of the courts' interpretations of the required pre-agreement assessments as applied to real life cases.

5.3.3.2 The Expression "It Is Likely"

As stated above, the NCCPA provides that credit will be unsuitable for the consumer if at the time of the assessment "it is likely" that any four of the listed circumstances will arise.¹¹⁸ However, the NCCPA fails to define the expression "it is likely" and does not offer any guidance. Nonetheless, case law has provided some direction in that

¹¹⁶ See paras 5.3.2.2 and 5.3.2.3 above.

¹¹⁷ NCCPA ss 118, 119 and 131.

¹¹⁸ See para 5.3.3.1 above.

the expression “it is likely” has been accorded its ordinary meaning, which is “a real chance or possibility”.¹¹⁹

5.3.3.3 The Concept of Substantial Hardship

The NCCPA also fails to define the concept “substantial hardship”. However, it provides a presumption which may offer guidance in the determination of the meaning of this concept.¹²⁰ Section 131(3) of the NCCPA provides that if the consumer could comply with the financial obligations under the credit contract only by selling the consumer’s principal place of residence, substantial hardship will be presumed, making the credit contract unsuitable.¹²¹

In context, substantial hardship is defined according to the consumer’s individual circumstances and is accorded its ordinary meaning.¹²² It therefore refers to a situation where the consumer experiences “painful difficulty, severe suffering or privation”, causing “severe toil, trial, oppression or need”.¹²³ As will be seen below,¹²⁴ it appears that assessing whether a consumer will be able to comply with the terms and obligations of the proposed credit contract without substantial hardship is an objective exercise, which is conducted by considering a number of factors depending on the circumstances of each case.

This requirement that the consumer should be able to meet the credit terms and obligations without substantial hardship goes against the practice of asset-based lending,¹²⁵ where credit providers made no effort to enquire about the consumer’s

¹¹⁹ *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 505. See also *Global Sportsman (Pty) Ltd v Mirror Newspapers (Pty) Ltd* (1984) 2 FCR 87.

¹²⁰ See NCCPA s 131(3).

¹²¹ See also NCC s 76(2)(l).

¹²² Malbon in Malbon and Nottage eds (2013) 247.

¹²³ See Malbon in Malbon and Nottage eds (2013) 247, who refers to the case of *Silberman v Citigroup Pty Ltd* [2011] VSC 514 para 11. See also Cvjetanovic (2014) *ALSA Acad. J* 145.

¹²⁴ Para 5.3.3.4.5.

¹²⁵ “Asset-based lending” is defined to encompass a variety of credit products that include “subprime” or “non-conforming” loans, that are made available to consumers who cannot obtain loans from traditional lenders, and includes “low-documentation” or “no-documentation” loans that do not require as rigorous a proof of creditworthiness, because they arise in circumstances where a credit provider provides a loan on the basis of security over an asset, rather than relying on the borrower’s capacity to repay the loan from their income – Rajapakse (2014) *CCLJ* 151-152. See also *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41 128 and para 3.3.5 above.

ability to service a loan and based their decisions to lend purely on the availability of the equity in an asset and in the fact that there is security available should there be a default by the consumer.¹²⁶ This requirement is a commendable element in the Australian responsible lending regime which protects consumers from both predatory and irresponsible lending practices, in comparison with the position in Namibia where currently asset-based lending is practiced due to the lack of compulsory pre-agreement assessments.¹²⁷ This situation means that the provision of credit to the consumer is possible without the credit provider having regard to the consumer's ability to meet the credit terms merely because the credit provider relies on the security furnished as the basis for granting a loan, which usually turns out to be the consumer's principal residence.

5.3.3.4 ASIC's Guidance in Conducting the Required Assessments

5.3.3.4.1 General

In November 2014 ASIC published its Regulatory Guide 209 to "responsible lending" behaviour. This guide acknowledges that a credit licensee is at liberty to determine how it will meet the responsible lending obligations.¹²⁸ However, it sets out regulatory expectations with respect to compliance with the responsible lending obligations in chapter 3 of the NCCPA.¹²⁹ It indicates that the primary obligation is for the credit licensee to conduct an assessment that the credit contract is not unsuitable for the consumer.¹³⁰ This assessment is referred to as a preliminary assessment for the credit licensee providing credit assistance or a final assessment for the credit licensee providing the credit.¹³¹ In undertaking the assessment, the credit licensee is required to make reasonable enquiries about both the consumer's requirements and objectives and his financial situation and take reasonable steps to verify the consumer's financial situation.¹³² Here I provide a summary of what ASIC expects the credit licensees to do at a minimum, in meeting their responsible lending obligations.

¹²⁶ Rajapakse (2014) *CCLJ* 158.

¹²⁷ See the discussion of this aspect in the Namibian context, in particular the *Mukapuli* case at para 3.5.5 above.

¹²⁸ ASIC RG 209 (Nov 2014) 4.

¹²⁹ ASIC RG 209 (Nov 2014) 1.

¹³⁰ ASIC RG 209 (Nov 2014) 5.

¹³¹ ASIC RG 209 (Nov 2014) 5. See also paras 5.3.2.2 and 5.3.2.3 above.

¹³² ASIC RG 209 (Nov 2014) 5. See also paras 5.3.2.2 and 5.3.2.3 above.

5.3.3.4.2 Reasonable Inquiries about the Consumer's Requirements and Objectives

As regards the reasonable enquiries about a consumer's requirements and objectives, the ASIC guide indicates that what is required is that the credit licensee ascertains sufficient details about why the particular consumer requires the credit and understands whether or not the credit contract offered will meet that purpose.¹³³ Depending on the circumstances, reasonable enquiries about a consumer's requirements and objectives therefore may include enquiries about:¹³⁴

- (a) The amount of credit sought.
- (b) The credit timeframe for which the credit is required.
- (c) The purpose of the credit.
- (d) The product features or flexibility sought by the consumer.
- (e) Whether or not the consumer is prepared to accept any additional costs or risks associated with the product features.
- (f) The consumer's awareness and intentions regarding additional expenses, such as insurance related to the credit.

In order to assess whether or not a credit contract will meet the consumer's requirements and objectives, ASIC provides guidance that this stage involves matching the consumer's stated requirements and objectives with a credit contract that is not unsuitable.¹³⁵ While the assessment depends on the circumstances of each case, it is indicated that the following factors may be taken into account:¹³⁶

¹³³ ASIC RG 209 (Nov 2014) 17-18.

¹³⁴ ASIC RG 209 (Nov 2014) 18.

¹³⁵ ASIC RG 209 (Nov 2014) 43.

¹³⁶ ASIC RG 209 (Nov 2014) 44.

- (a) The nature of the credit requested by the consumer and the consumer's stated objectives in obtaining the credit.
- (b) The relative importance of the consumer's requirements and objective.
- (c) The term of the credit relative to the likely useful life of the asset, if the credit is to be used to purchase a specific item.
- (d) The interest rate, fees and charges applying to the credit contract.
- (e) The consumer's comprehension of the proposed contract.
- (f) The complexity of the credit contract and whether or not a more basic product could meet the consumer's needs.
- (g) Whether or not the consumer will need to finance a large final payment under the contract.
- (h) Where the consumer is involved in switching to a new credit contract or refinancing activities, the extent to which switching or refinancing will benefit the consumer.

The ASIC guide indicates that the obligation to make reasonable enquiries is scalable and the steps involved vary depending on the circumstances.¹³⁷ Nonetheless, the following factors are deemed relevant to the scalability of the reasonable enquiries and verification obligations of the credit licensees:¹³⁸

- (a) The potential impact on a consumer of entering into an unsuitable credit contract.
- (b) The complexity of the credit contract.

¹³⁷ ASIC RG 209 (Nov 2014) 11.

¹³⁸ ASIC RG 209 (Nov 2014) 13.

(c) The capacity of the consumer to understand the credit contract.

(d) Whether or not the consumer is an existing or new consumer.

In instances where negative circumstances are present, for example, if the size of a loan is large relative to the consumer's capacity to repay the loan, then the credit licensee is expected to conduct more extensive enquiries.¹³⁹ More enquiries about the consumer's requirements and objectives are also necessary when it is evident to the credit licensee that:¹⁴⁰

(a) The consumer has limited capacity to understand the credit contract and his repayment obligations under that contract, for example, where the consumer has limited English-speaking skills.

(b) The consumer has conflicting objectives or is confused about his objectives or has difficulty articulating them.

(c) There is an apparent mismatch between the consumer's objectives and the credit product being considered by the consumer.

Whereas this guidance may be interpreted to mean that the credit licensee is expected to assess the consumer's understanding of the credit contract and the ensuing obligation, it should be noted that the guide cautions that ASIC does not expect credit licensees to "routinely evaluate the capacity of consumers to understand the credit product", but only to take this factor into account if it is clearly an issue.¹⁴¹

In instances where the credit contract has relatively simple terms that most consumers can easily understand, it is indicated that less extensive enquiries are likely to be necessary as opposed to if the credit contract has complex terms.¹⁴² The

¹³⁹ ASIC RG 209 (Nov 2014) 13. See also North (2015) *Fed L Rev* 380.

¹⁴⁰ ASIC RG 209 (Nov 2014) 13.

¹⁴¹ ASIC RG 209 (Nov 2014) 13.

¹⁴² ASIC RG 209 (Nov 2014) 13.

situation is similar in instances where the consumer is an existing consumer because the credit licensee already holds information about the consumer.¹⁴³

5.3.3.4.3 Reasonable Enquiries about the Consumer's Financial Situation

The NCCPA does not outline the specific details to be considered by the credit licensee in conducting enquiries about the consumer's financial situation. In this regard, the ASIC guide provides that reasonable enquiries about a consumer's financial situation will generally include¹⁴⁴

- (a) the consumer's current amount and source of income or benefits (this would include the nature and length of their employment – for example, full-time, part-time, casual or self-employed – and whether all or part of the consumer's income is sourced from payments under the Social Security Act 1991);
- (b) the extent of the consumer's fixed expenses (such as rent, repayment of existing debts, child support and recurring expenses such as insurance); and
- (c) the consumer's variable living expenses (such as food and utilities) and drivers of variable expenses, such as dependants and any particular or unusual circumstances.

Depending on the circumstances of the particular consumer and the kind of credit contract they may acquire, reasonable enquiries could also include¹⁴⁵

- (a) the consumer's other expenditure that may be discretionary (such as entertainment, take-away food, alcohol, tobacco and gambling);
- (b) the extent to which any existing debts are to be repaid from the credit advanced;
- (c) the consumer's credit history (including the number of small amount credit contracts the consumer has been a debtor under within the previous 90-day period, and whether the consumer has defaulted on payments under those contracts);
- (d) the consumer's circumstances, including their age (particularly where they may be a minor) and the number of dependants;
- (e) the consumer's assets, including their nature (such as whether they produce income) and value [...];
- (f) any significant changes to the consumer's financial circumstances that are reasonably foreseeable (such as a change in repayments for an existing home loan due to the ending of a 'honeymoon' interest rate period or other foreseeable interest rate changes, or changes to the consumer's employment arrangements such as seasonal employment or impending retirement and plans to fund retirement – for example, from superannuation or income-producing assets);

¹⁴³ ASIC RG 209 (Nov 2014) 13.

¹⁴⁴ ASIC RG 209 (Nov 2014) 16. This explanation of the concept "reasonable inquiries" is commendable because although the South African NCA also requires the credit provider to conduct reasonable inquiries, it fails to provide guideline on what is deemed "reasonable" – see para 4.4.4.1 above.

¹⁴⁵ ASIC RG 209 (Nov 2014) 16-17.

- (g) geographical factors, such as remoteness, which may require consideration of specific issues (such as potentially higher living costs compared to urban areas); and
- (h) indirect income sources (such as income from a spouse) where that income is reasonably available to the consumer, taking into account the history of the relationship and the expressed willingness of the earning person to meet repayment obligations.

The aspects enumerated above explain the concept “reasonable enquiries” about the consumer’s financial situation in the context of the NCCPA. Whereas in South Africa the NCA requires credit providers to take “reasonable steps” and its regulation 23A requires credit providers to take “practicable steps” to assess the consumer’s general understanding of the credit and the consumer’s affordability of the proposed credit, it is not clear what this standard entails in the South African context.¹⁴⁶ Noting that the NCA empowers credit providers to determine their own evaluative procedures, models and mechanisms for the pre-agreement assessment, it is submitted that any assessment procedure, model and mechanism which is in conformity with regulation 23A and results in an objective assessment will be deemed to constitute a “reasonable step” in meeting the pre-agreement assessment obligations.¹⁴⁷

5.3.3.4.4 Verification of Information Provided by the Consumer

Credit licensees are expected to take reasonable steps to verify a consumer’s financial situation and this obligation requires the verification of the information provided by the consumer.¹⁴⁸ The required degree of reasonableness in verifying the information provided is also scalable because it is dependent on the information to which the credit licensee is privy.¹⁴⁹ After making enquiries and gathering the information about the consumer’s financial situation, it is directed that the credit licensee may rely on the following to verify the reliability of the information obtained.¹⁵⁰

- (a) Recent payslips and income tax returns.

¹⁴⁶ See paras 4.4.4.2, 4.4.4.4 and 4.4.4.5.2 above.

¹⁴⁷ See para 4.4.4.4 above.

¹⁴⁸ ASIC RG 209 (Nov 2014) 20.

¹⁴⁹ ASIC RG 209 (Nov 2014) 20.

¹⁵⁰ See ASIC RG 209 (Nov 2014) 21.

- (b) Confirmation of employment with the employer.
- (c) Credit reports.
- (d) Information or reports from other credit providers.
- (e) Bank account or credit card records held by credit providers.

When the credit licensees' obligation to take reasonable steps to verify a consumer's financial situation is compared to the South African position, it becomes apparent that it was not until the passing of regulation 23A that credit providers in South Africa were required to verify the consumer's financial position. Credit providers were entitled to accept at face value the accuracy of the information provided by the consumer.¹⁵¹ After regulation 23A became operative credit providers in South Africa now are required to verify the information about the consumer's financial situation by considering the latest three payslips or three months' bank statements or financial statements.¹⁵² However, it appears that the requirement to validate financial information in South Africa is too restrictive as credit providers are expected to undertake stringent steps to verify the consumer's financial situation compared to the "scalable" verification requirements in Australia's NCCPA.¹⁵³

5.3.3.4.5 Assessing the Consumer's Ability to Meet the Financial Obligations of a Credit Contract

ASIC affirms that a responsible lending system that only measures the credit risk of the consumer without assessing the consumer's capacity to meet their repayment obligations will not meet the responsible lending requirements.¹⁵⁴ A credit licensee therefore is expected to assess whether or not the consumer will be able to meet his financial obligations under the contract without substantial hardship based on the

¹⁵¹ See para 4.4.4.3 above.

¹⁵² See para 4.4.4.5.2 above.

¹⁵³ See para 4.4.4.5.2 above.

¹⁵⁴ ASIC RG 209 (Nov 2014) 19.

obtained and verified information after having made reasonable enquiries about the consumer's financial situation.¹⁵⁵

In determining whether or not the consumer will be able to meet his repayment obligations under the credit contract without substantial hardship, the ASIC regulatory guide directs credit licensees to take the following factors into account:¹⁵⁶

- (a) The surplus likely to remain after disbursing of expenses from the net income of the consumer and the proposed additional repayments.
- (b) The source of the consumer's income.
- (c) The frequency and reliability of the consumer's income.
- (d) The size of the payment obligations relative to consumer's income.
- (e) Whether or not the consumer's expenses are likely to be significantly higher than that of an average consumer.
- (f) The consumer's other debt repayment obligations and similar commitments.
- (g) Whether or not the consumer is likely to have to sell their assets to meet their repayment obligations.

5.3.3.4.6 Providing a Written Assessment to the Consumer

The NCCPA requires a credit licensee conducting the required assessment to keep a record of all material that forms the basis of an assessment of whether or not a credit contract will not be unsuitable for the consumer, in a form that will enable him to provide the consumer with a written copy of the assessment when requested to do so.¹⁵⁷ It is indicated that credit licensees should ensure that the written assessment provided to consumers will assist the consumers in understanding that the credit

¹⁵⁵ See ASIC RG 209 (Nov 2014) 35.

¹⁵⁶ ASIC RG 209 (Nov 2014) 36.

¹⁵⁷ NCCPA s 132(1). See also ASIC RG 209 (Nov 2014) 49.

contract has been assessed as not unsuitable for them and at the same time demonstrating compliance with the responsible lending obligations on the part of the credit licensee.¹⁵⁸ The consumer should also be afforded an opportunity to check the factual basis on which the assessment has been made.¹⁵⁹ The assessment therefore should reflect a record of the financial information obtained and the requirements and objectives as communicated by the consumer.¹⁶⁰

5.3.3.5 Guidance from Case Law

5.3.3.5.1 General

As stated above,¹⁶¹ the NCCPA does not provide guidance to credit licensees in meeting their suitability requirements. In this paragraph, I consider the interpretation of the provisions relating to the required assessments and prescribed unsuitability circumstances by the Federal Court of Australia.¹⁶²

5.3.3.5.2 ASIC v The Cash Store

In *ASIC v The Cash Store Pty Ltd (in liquidation)*,¹⁶³ the respondents, the Cash Store and its loan funder, Assistive Finance Australia, were found guilty by the Federal court *inter alia* of engaging in irresponsible lending, for

- (a) not properly assessing whether a particular credit contract was unsuitable for a consumer;
- (b) not making reasonable inquiries about a borrower's requirements, objectives and financial situation nor verifying the information; and

¹⁵⁸ See ASIC RG 209 (Nov 2014) 50.

¹⁵⁹ ASIC RG 209 (Nov 2014) 50.

¹⁶⁰ ASIC RG 209 (Nov 2014) 50.

¹⁶¹ Para 5.3.3.1.

¹⁶² The Federal Court of Australia was established in terms of s 5(1) of the Federal Court of Australia Act 1976. It is the superior court of record and is a court of law and equity – s 5(2) of the Federal Court of Australia Act 1976. It has broad jurisdiction and enjoys both original jurisdiction vested in it by laws made by the Federal Parliament and appellate jurisdiction by hearing appeals from its own decisions of single judges and those from the Federal Circuit Court in non-family law matters – see ss 19(1)-(2) and s 33ZC of the Federal Court of Australia Act 1976. See also s 39B of the Judiciary Act 1903. All appeals from this court go to the High Court – see s 33 Federal Court of Australia Act 1976.

¹⁶³ [2014] FCA 926. Hereinafter “Cash Store”.

- (c) not providing a credit guide¹⁶⁴ to the consumer before the consumer made a decision whether or not to enter into a credit contract.

The respondents had a business arrangement in terms of which the second respondent outsourced to the first respondent the full servicing of short term, low value loans, commonly known as “payday loans”, which it funded.¹⁶⁵ By virtue of that arrangement 325756 individual short term credit contracts to 52000 consumers were provided for amounts up to \$2200 with terms of one to 36 days.¹⁶⁶ Some consumers had multiple or overlapping loans over the same period.¹⁶⁷ It was discovered that the loan applications used during the period in question did not require any information about the consumer’s expenses to be furnished on the application form.¹⁶⁸ It also appeared that the loan officers rarely made enquiries about expenses and rarely carried out preliminary assessments.¹⁶⁹

As regards the requirement to make reasonable enquiries about the consumer’s requirements and objectives, the court affirmed that ASIC considers a credit licensee to have made reasonable enquiries about the consumer’s requirements and objectives if the file indicates the purpose for which the loan was sought and if the consumer’s stated purpose was specific enough to enable the credit provider to ascertain for what the loan is needed.¹⁷⁰ Broad descriptions such as “living expenses”, “to pay bill & live til payday”, “shortfall”, “cash shortage”, and “personal” or “personal needs” were viewed as being insufficient to enable the credit licensee to understand the purpose of the loan, and hence represent a failure to make reasonable enquiry about the credit consumer’s requirements and objectives.¹⁷¹

¹⁶⁴ See para 5.3.4.2 below for the discussion of the requirement to provide a credit guide.

¹⁶⁵ *Cash Store* para 5.

¹⁶⁶ It must be noted that for the purpose of the case only a representative sample of contracts was examined by the court. The total number of contracts issued in the relevant period was considered in assessing the appropriate penalty to be imposed – See *Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liquidation) (No 2)* [2015] FCA 93.

¹⁶⁷ *Cash Store* para 6.

¹⁶⁸ *Cash Store* para 31.

¹⁶⁹ *Cash Store* para 31.

¹⁷⁰ *Cash Store* para 34.

¹⁷¹ *Cash Store* para 34.

Out of the 227 reviewed contracts the court was satisfied with only four contracts where the credit licensee did not fail to make reasonable enquiries about the consumer's requirements and objectives, because the purpose of the credit contract was found to be reasonably specific and the amount of credit provided to the consumer was found to be consistent with the said purpose.¹⁷² The specified purposes were:¹⁷³

- (a) "food" for a credit amount of \$214.95;
- (b) "work shoes" for a credit amount of \$257;
- (c) "bills" for a credit amount of \$277; and
- (d) "doctor, insulin" for a credit amount of \$164.95.

Regarding the reasonable assessment of the consumer's financial situation, the court held that in about 268 of the sample credit contracts there was a failure to undertake reasonable enquiries about the consumer's financial situation for the following reasons:

- (a) In 26 contracts, the first respondent failed to determine the extent of the consumer's fixed and variable expenses and other debts because there was no evidence on file to indicate that any information was provided, or that any enquiry was made, about the consumer's expenses.¹⁷⁴
- (b) For the remaining 242 contracts, where some information about the consumer's expenses was available, it was insufficient to enable a conclusion to be reached that reasonable enquiries were made about the customer's expenses.¹⁷⁵

¹⁷² *Cash Store* paras 37-40.

¹⁷³ *Cash Store* paras 37-38.

¹⁷⁴ *Cash Store* para 41 read with para 43.

¹⁷⁵ *Cash Store* para 44.

In this regard, the court stated that¹⁷⁶

[a]ssessing whether there is a real chance of a person being able to comply with his or her financial obligations under the contract requires, at the very least, a sufficient understanding of the person's income and expenditure. It is axiomatic that "reasonable inquiries" about a customer's financial situation must include inquiries about the customer's current income and living expenses. The extent to which further information and additional inquiries may be needed in order to assess the consumer's financial capacity to service and repay the proposed loan and determine loan suitability will be a matter of degree in each particular case.

As regards the finding with reference to the failure to verify the customer's financial situation, the court reasoned that there was "either nothing on the file to indicate that any steps were taken to seek verification of the customer's income and/or expenses, or the [...] documentation on the file about the customer's financial position was patently inadequate as verification".¹⁷⁷ It was also held that there was a failure to make an adequate preliminary assessment as required in terms of section 116 of the NCCPA based on the following reasons:¹⁷⁸

- (a) In respect of 227 credit contracts, the first respondent failed to make reasonable enquiries about the consumer's requirements and objectives.
- (b) In respect of 268 credit contracts, the first respondent failed to make reasonable enquiries about the consumer's financial situation.
- (c) In respect of 197 contracts, there was no preliminary assessment conducted.
- (d) In respect of all the credit contracts, the first respondent failed to make a preliminary assessment that the contract will be unsuitable for the consumer if, at the time of the preliminary assessment, the consumer will be unable to comply with the consumer's financial obligations under the contract, or could comply only with substantial hardship, or the contract will not meet the consumer's requirements or objectives.

¹⁷⁶ *Cash Store* paras 42 and 46.

¹⁷⁷ *Cash Store* para 47.

¹⁷⁸ See *Cash Store* paras 49-57.

Considering the second respondent's contraventions of Part 3-2 of the NCCPA as the credit provider, the court asserted that the fact that it outsourced all its functions to the first respondent did not exonerate it from liability for non-compliance with the NCCPA.¹⁷⁹ For the same reasons as the first respondent, the second respondent was found in contravention of the NCCPA for entering into credit contracts with consumers without making an assessment in accordance with section 128, for failing to make reasonable enquiries about the consumer's requirements and objectives and the consumer's financial situation and further, for failing to undertake reasonable verification.¹⁸⁰

5.3.3.5.3 Make It Mine Finance Pty Ltd

In the case of *Make It Mine Finance Pty Ltd, in the matter of Make It Mine Finance Pty Ltd*,¹⁸¹ ASIC intervened in the credit provider's¹⁸² application to the Federal Court,¹⁸³ seeking declaratory orders that MIM had contravened its responsible lending obligations under the NCCPA,¹⁸⁴ in relation to 20 763 credit contracts which were concluded between 2011 and 2013.¹⁸⁵ MIM provided computers, computer equipment and household goods exclusively to low income consumers whose main source of income was Centrelink benefits, for instance a parenting payment, family tax benefit, disability support pension, aged pension or carer's allowance.¹⁸⁶ After receiving an online or telephonic application from the consumer, MIM only required the consumer to confirm that he was in ongoing receipt of Centrelink payments and agreed to make payments by a deduction through Centrepay. The consumer was then approved to receive the product and provided with an agreement to sign before a product was sent to the consumer.¹⁸⁷

The court declared that MIM failed to make reasonable enquiries and to verify each consumer's financial situation and did not undertake any assessment as to whether

¹⁷⁹ *Cash Store* para 68.

¹⁸⁰ *Cash Store* para 69.

¹⁸¹ [2015] FCA 393. Hereinafter "*MIM No 1*".

¹⁸² *Make it Mine Finance Pty Ltd*, hereinafter "MIM".

¹⁸³ See para 5.3.4.3 below for the discussion of the contents of that application.

¹⁸⁴ In particular, ss 128(c), 128(d), 130(1)(b) and 130(1)(c).

¹⁸⁵ *MIM No 1* paras 3 and 4.

¹⁸⁶ *MIM No 1* para 9.

¹⁸⁷ *MIM No 1* para 23.

or not the contract would be unsuitable for the consumer¹⁸⁸ because there were no questions about expenses or other aspects of the consumer's financial situation and no steps were taken to verify any financial information. However, without elaborating on the exact expectation upon credit licensees as regards responsible lending, the court made some observations about the responsible lending obligations, namely that¹⁸⁹

[i]t must be said that the relevant statutory provisions are shrouded in conceptual imprecision. First, one would have thought that, in sequence, ss 128(c) and (d) and their counterparts in ss 129 and 130 respectively should have been reversed. Second, the concept of unsuitability in s 129 is not defined. Its ambit is unclear. True it is that s 131 stipulates sufficient conditions (rather than necessary conditions) under which it is mandated that there must be an assessment of unsuitability. But that still leaves unsuitability under s 129 conceptually unbounded. Section 131 is not expressed in the language of "if and only if".

The court's observations in this regard accurately describe the responsible lending regime in Australia because the NCCPA provisions are couched in unclear terms, making it difficult to apply them without having to refer to other commentaries such as the ASIC regulatory guide.¹⁹⁰

5.3.4 The Credit Licensee's Duty to Provide Pre-Agreement Information

5.3.4.1 General

A preliminary duty ancillary to the pre-agreement assessment of the consumer is the duty of the credit provider to provide a prospective consumer with adequate pre-contractual information relating to the terms of the proposed credit activity. The justification for the pre-agreement disclosure requirement is informed by the assumption that once a consumer is provided with information on the credit contract, they will act rationally and exercise their bargaining power to their advantage, for example by shopping around and make appropriate choices, and at the same time "enabling responsible lending practices among credit providers".¹⁹¹ Aspects relating to the provision of pre-contractual information as provided for in Division 2 of Part 3-2 of the NCCPA and Division 1 of Part 2 of the NCC are discussed below.

¹⁸⁸ *MIM No 1* para 24 read with para 72.

¹⁸⁹ *MIM No 1* para 65.

¹⁹⁰ See para 5.3.3.4.1 above.

¹⁹¹ Cvjetanovic (2014) *Seven Pillars Institute* 126. See also Ramsay (2009) *Syd LR* 13.

5.3.4.2 Division 2 of Part 3-2 of the NCCPA

Division 2 of Part 3-2 to the NCCPA imposes disclosure requirements on credit providers. A credit licensee is required to provide a consumer with a credit guide as soon as practicable after it becomes apparent to the licensee that it is likely to enter into a credit contract with a consumer who will be the debtor under the contract.¹⁹² The credit guide must be in writing and should contain information about the credit licensee's obligations under the NCCPA, for instance the obligations to give the consumer a copy of the assessment, to not conclude a credit contract that is unsuitable for the consumer and to disclose internal and external dispute resolution mechanisms that the debtor can access as well as any other requirements prescribed in the regulations.¹⁹³

Credit licensees are further required to disclose key details about themselves that will assist the consumer to understand who they are dealing with, the dispute resolution services available to the consumer, an indication of any costs the consumer may incur, and other matters.¹⁹⁴ There are also documentary obligations relating to the provision of credit guides, quotes and a copy of the suitability assessment. The rules primarily apply to credit assistance providers, credit providers and lessors, credit representatives and debt collectors.¹⁹⁵

Credit assistance providers are further required to comply with the obligations under section 113 of the NCCPA.¹⁹⁶ This section requires the provision of a credit guide "as soon as practicable" after it becomes apparent to the licensee that it is likely to provide credit assistance to the consumer in relation to a credit contract.¹⁹⁷ The credit guide must be in writing and *inter alia* should provide information relating to all fees payable by a credit consumer for the credit assistance, the method for determining or working out the amount of the fees and charges, the names of credit providers the licensee conducts business with when providing credit assistance, if six or fewer, and if they are more than six, the licensee should provide the names of six

¹⁹² NCCPA s 126(1).

¹⁹³ NCCPA s 126(2).

¹⁹⁴ NCCPA s 126(2).

¹⁹⁵ See, e.g. para 5.3.4.4 below for the discussion of the pre-contractual documents to be provided by credit licensees relating to consumer leases.

¹⁹⁶ See NCCPA reg 28N(5).

¹⁹⁷ NCCPA s 113(1).

credit providers with whom he reasonably believes he conducts the most business, and any commissions or amounts that the credit licensee is likely to receive in relation to credit contracts.¹⁹⁸

5.3.4.3 Division 1 of Part 2 of the NCC

The NCC provides for pre-contractual disclosure obligations for credit contracts, mortgages and credit guarantees. Division 1 of Part 2 of the NCC contains provisions relating to the negotiating and making of credit contracts. Specifically, section 16 makes provision for pre-contractual disclosure. A credit provider is required to provide a pre-contractual statement and an information statement of the consumers' statutory rights and statutory obligations¹⁹⁹ before the contract is entered into or before the consumer makes an offer to enter into a credit contract, whichever occurs first.²⁰⁰

The pre-contractual statement to be provided to the consumer must contain all the relevant financial information relating to the proposed credit contract and any other information prescribed by regulation.²⁰¹ In particular, the following particulars should be provided to the consumer:²⁰²

- (a) The name of the credit provider.
- (b) The amount of credit.
- (c) The annual percentage rate or rates applicable to the credit contract.
- (d) The method of calculation of the interest payable under the proposed contract.
- (e) The frequency with which interest charges are to be debited under the contract.

¹⁹⁸ NCCPA s 113(2).

¹⁹⁹ NCC s 16(1).

²⁰⁰ NCC s 16(2).

²⁰¹ NCC s 16(4).

²⁰² NCC s 17(1)-(16).

- (f) The total amount of interest charges payable under the contract, if ascertainable.
- (g) The repayment terms.
- (h) Credit fees and charges that are payable under the contract.
- (i) Changes in the contract affecting interest and credit fees and charges.
- (j) The frequency with which statements of account are to be provided to the debtor.
- (k) The rate of interest which may be charged for payments in default and the margins, if any, above or below the reference rate to be applied to determine the annual percentage rate.
- (l) The statement that enforcement expenses may become payable in the event of a breach.
- (m) In instances where a credit contract is relating to a mortgage or credit guarantee, a statement to that effect and the description of the property subject to the mortgage.
- (n) Commissions to be paid to the credit provider, if applicable.
- (o) Insurance financed by the credit contract.
- (p) Any other information or warning required by the regulations.

It must be mentioned here that the obligations on credit providers to provide the consumers with pre-agreement information as imposed by the NCC are largely similar to the obligations on credit providers in South Africa as contained in the NCA. The NCA also prescribes that a pre-agreement statement and a credit quotation

disclosing prescribed financial information should be provided to the prospective consumer before entering into a credit agreement.²⁰³

In the case of *MIM No 1*,²⁰⁴ the credit provider applied for a declaration that it has contravened various key requirements under the NCC and an order seeking the fixing of an appropriate pecuniary penalty in relation to such conduct.²⁰⁵ This application related to about 24 377 credit contracts entered into between 2010 and 2013, and that in terms of section 17(3)-(6) of the NCC, MIM was obliged to disclose certain information to consumers.²⁰⁶

The agreements between the parties were structured as a “lease” of goods and the consumer paid a “hire fee” over a 12 month period, at the end of which period ownership of the goods would pass to the consumer, upon all payments being made.²⁰⁷ Even though the cost of the “rental” was advertised to consumers, MIM failed to disclose the true cost of the goods, the proportion of the amount paid that represented interest and the total cost of the goods over the course of the 12 months.²⁰⁸ The court declared that MIM was in contravention of its disclosure obligations in this regard.²⁰⁹ This declaration confirms the object of disclosure requirements in consumer credit legislation which is to ensure that consumers are provided with useful information to enable them to make informed and responsible decisions and the failure to provide information relating to the cost of the goods and charges of the credit may have the effect of the consumer undermining the proposed credit commitments.²¹⁰

²⁰³ See para 4.4.5.2 above.

²⁰⁴ See also para 5.3.3.5.3 where this case is also discussed regarding responsible lending obligations.

²⁰⁵ *MIM No 1* para 1. This application was based on the provisions of the NCC which entitle credit providers to apply for declaratory orders for the contravention of the provisions of the NCC in instances where credit providers foresee possible prosecution for contravention of their responsible lending obligations, these provisions make it possible for the credit provider to apply to court for a declaratory order in exchange for reduced penalties – see ss 112 and 116.

²⁰⁶ *MIM No 1* para 2.

²⁰⁷ *MIM No 1* para 11.

²⁰⁸ *MIM No 1* para 16.

²⁰⁹ *MIM No 1* para 69.

²¹⁰ See the discussion of principle 3 in para 2.7 above.

5.3.4.4 The Duty to Provide Pre-Agreement Information Relating to Consumer Leases

5.3.4.4.1 General

Reference is made to paragraph 5.3.2.4 above, where it was stated that there are specific responsible lending obligations contained in Parts 3-3 and 3-4, as regards consumer leases. Part 3-3 contains responsible lending rules that apply to credit assistance providers in relation to consumer leases,²¹¹ whereas Part 3-4 contains responsible lending rules that apply to credit providers in relation to consumer leases with the aim of better informing consumers and preventing them from engaging in unsuitable consumer leases.²¹² I discuss the obligations central to the credit licensee's duty to provide pre-contractual information below.

5.3.4.4.2 The Credit Assistance Provider's Duty to Provide Pre-Agreement Information

The credit licensee providing credit assistance is required to give the consumer a credit guide and a credit quote before providing credit assistance or credit to the consumer. The credit guide should be in writing and in a form as prescribed by the regulations.²¹³ It should also disclose some information about the credit licensee and some of the credit licensee's obligations under the NCCPA,²¹⁴ the credit licensee's fee for providing the credit assistance and other services, charges that will be incurred by the licensee for matters associated with providing the credit assistance and other services and the method for working out the amount of the fees and charges.²¹⁵ Information about credit licensees who provide credit as lessors with whom the credit licensee providing credit assistance deals and a reasonable estimate of any commissions that the credit licensee is likely to receive from the lessor in relation to the consumer leases for which the licensee provides credit assistance should also be provided in the credit guide.²¹⁶

²¹¹ See NCCPA s 134.

²¹² See NCCPA s 148.

²¹³ NCCPA s 136(2)(a)-(b).

²¹⁴ NCCPA s 136(3)(c)-(d).

²¹⁵ NCCPA s 136(3)(e).

²¹⁶ NCCPA s 136(3)(f).

Furthermore, the credit quote is required to be in writing and should provide information about the credit assistance and other services that the quote covers.²¹⁷ It should also outline specific details about the following:²¹⁸

- (a) The maximum amount that will be payable by the consumer to the licensee in relation to the licensee's credit assistance and other services.
- (b) A breakdown of the total amount payable by the consumer, including the licensee's fee for providing the credit assistance and other services, charges that will be incurred by the licensee for matters associated with providing the credit assistance and other services and any other fees or charges that will be payable by the licensee to another person on behalf of the consumer.

The quote also must state whether or not any amount will be payable by the consumer to the licensee if a consumer lease is not entered into, and if so, specify the maximum amount payable.²¹⁹ The licensee is prohibited from charging more than the quoted amount.²²⁰

5.3.4.4.3 The Credit Provider's Duty to Provide Pre-Agreement Information

A credit licensee who will be the lessor under the consumer lease is required to provide the consumer with a credit guide only as soon as practicable after it becomes apparent to the licensee that it is likely to enter a consumer lease with a consumer, who will be the lessee under the lease.²²¹ This credit guide also should be in writing and must be in the form prescribed by the regulations.²²² It must also contain information relating to the credit licensee, such as information about the licensee's pre-agreement assessment obligations under sections 155 and 156.²²³

²¹⁷ NCCPA s 137(2)(a)-(b).

²¹⁸ NCCPA s 137(2)(c)-(d).

²¹⁹ NCCPA s 137(2)(e).

²²⁰ NCCPA s 137(4).

²²¹ NCCPA s 149(1).

²²² NCCPA s 149(2)(a)-(b).

²²³ See, e.g. NCCPA s 149(2)(f). S 155 entails the obligation of the credit licensee at the request of the consumer to provide the consumer with a written copy of the assessment, before entering the lease, whereas s 156 entails the obligation of the credit licensee to not enter into an unsuitable consumer lease with a consumer – see also para 5.3.2.4 above.

5.3.4.5 Non-Compliance with the Duty to Provide Pre-Agreement Information

If the disclosure requirements of the NCC have not been met, Part 6 of the NCC holds credit providers liable to make payment of a civil penalty to the consumer or to a government fund in respect of a failure to disclose key requirements.²²⁴ The NCC grants legal standing to a party to a credit contract, ASIC and a guarantor to apply to court for an order under Part 6 of the NCC.²²⁵ Seeking an order under Part 6 is a two-stage enquiry in which the court is required to determine whether or not a contravention of a key requirement has been established²²⁶ and whether or not the contravention ought to give rise to a penalty.²²⁷ The amount of a penalty payable to a consumer or credit guarantor is limited to the total amount of interest charges payable under the credit contract.²²⁸ However, if the consumer has suffered a loss, the court may impose a greater penalty that shall be not less than the amount of the loss.²²⁹

5.3.5 Additional Responsible Lending Obligations In Respect of Particular Types of Credit Agreements

5.3.5.1 General

The responsible lending obligations introduced by the NCCPA apply to all the credit licensees who engage in credit activities that are regulated in terms of the NCCPA, with the aim of ensuring that credit licensees do not suggest, assist with or provide credit that is unsuitable for consumers.²³⁰ In 2011 the Australian Commonwealth government conducted a review of how the phase one implementation of the NCCPA reforms influenced the credit market.²³¹ The regulation impact statement indicated that the NCCPA reforms which required all credit licensees to comply with responsible lending obligations had a marginal effect as they did not adequately address all the financial risks faced by consumers, especially those on a low income,

²²⁴ See NCC s 111.

²²⁵ See NCC s 112.

²²⁶ NCC s 113(1).

²²⁷ NCC s 113(2).

²²⁸ NCC s 114(1).

²²⁹ See NCC s 114(2).

²³⁰ See paras 5.3.2.2 and 5.3.2.3 above.

²³¹ See the Commonwealth Treasury *RIS* (Jun 2011). The RIS is a regulation impact statement issued by the Treasury Department in which the outcome of the review was documented.

in respect of particular types of credit agreements such as small amount credit contracts and consumer leases.²³²

A consideration of the responsible lending obligations in respect of small amount credit contracts indicated that because the responsible lending obligations require each proposed credit contract to be considered in isolation it was not possible to consider the cumulative effect of a series of contracts with the same credit provider in the case of repeat borrowings.²³³ Regarding consumer leases, the regulation impact statement indicated that phase one implementation of the NCCPA had a marginal effect also on consumer leases because the responsible lending obligations did not directly impact on the cost of credit, therefore lessors could not set the repayments at a level that the consumer could afford to pay.²³⁴

The marginal effect of the NCCPA on the particular types of credit agreements invoked the phase two implementation plan,²³⁵ which made provision for instances where additional reforms to the NCCPA may be needed to address specific issues relating to consumer credit. As a result the Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011 (Cth)²³⁶ was introduced to amend the NCCPA. The objective of the amendments *inter alia* was to extend the applicability of the NCCPA to the regulation of small amount, high interest and short term loans.²³⁷ Also, there was an idea to complement legislative reforms with additional strategies which would reduce consumer reliance on payday loans, such as increasing the availability of affordable microfinance and low-to-no interest community loan schemes, as well as promoting the availability of financial counselling services.²³⁸

²³² Commonwealth Treasury *RIS* (Jun 2011) 38.

²³³ Commonwealth Treasury *RIS* (Jun 2011) 39.

²³⁴ Commonwealth Treasury *RIS* (Jun 2011) 38.

²³⁵ See para 5.2.1 above.

²³⁶ Hereinafter the "Enhancements Bill". This Bill was introduced to the Commonwealth parliament on 21 Sept. 2011 by the then Assistant Treasurer and Minister for Financial Services and Superannuation.

²³⁷ Ali, McRae and Ramsay (2013) *Mon LR* 411.

²³⁸ Commonwealth Treasury *Discussion Paper* (Apr 2012) 7-15. This Discussion Paper covered a wide range of possible measures aimed at reducing the dependency of consumers on small amount loans. See also Ali, McRae and Ramsay (2013) *Mon LR* 411.

The final version of the Enhancements Bill was promulgated into law in August 2012 as the Consumer Credit Legislation Amendment (Enhancements) Act 130 of 2012 (Cth).²³⁹ This Act introduced amendments to the NCCPA by adding special rules for credit, which apply in addition to the general rules applying to all credit providers in Part 3-2 of the NCCPA.²⁴⁰ The additional responsible lending rules in respect of particular types of credit are discussed below.

5.3.5.2 Standard Home Loans

5.3.5.2.1 General

Amendments introduced by the Enhancements Act also affect responsible lending provisions relating to credit arrangements for home loans. Consequently, Part 3-2A of the NCCPA makes provision for additional rules relating to credit licensees that are credit providers under standard home loans, which apply in addition to the general rules applying to all credit providers in Part 3-2 of the NCCPA.²⁴¹ A standard home loan is defined as a “standard form of credit contract under which the licensee provides credit: (a) to purchase residential property; or (b) to refinance credit that has been provided wholly or predominantly to purchase residential property”.²⁴²

5.3.5.2.2 The Duty to Provide Pre-Agreement Information

To promote responsible lending conduct in the home loan industry, more specifically as a result of the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 84 of 2011 (Cth), the NCCPA now further requires credit providers to produce a standardised pre-contractual disclosure document known as the “Key Factsheet”²⁴³ with respect to standard home loans.²⁴⁴ This additional requirement is aimed at making it easier and cheaper for consumers to identify the best market available in home loans and to switch to the more competitive standard home loans as they become available.²⁴⁵

²³⁹ Hereinafter the “Enhancements Act”.

²⁴⁰ NCCPA s 133C. See also para 5.3.2.3 above for the discussion of the general responsible lending obligations for credit licensees providing credit.

²⁴¹ See para 5.3.2.3 above.

²⁴² NCCPA s 133AA (1).

²⁴³ A “key factsheet” is defined as a document that contains the information relating to the standard home loan that is required by the regulations and complies with any other requirements prescribed by the regulations – NCCPA s 133AB(1).

²⁴⁴ NCCPA Pt 3-2A-3-2B.

²⁴⁵ NCCPA s 133AA(1).

The key factsheet is required to be in a tabular, concise and portable form to enable consumers to compare alternative products.²⁴⁶ In general, the information contained in the key factsheet may relate to a specific individual consumer and to the cost or implications of the loan for the consumer.²⁴⁷ However, when the consumer requests the key factsheet, the credit provider is obliged to provide specified variables such as the relevant interest rate, fees, and total estimated amount repayable in a standardised format.²⁴⁸ The regulations further require that the key factsheet should be generated in a single-page document setting out loan costs in a transparent and readable way to maximise the consumer's comprehension of the disclosed credit costs.²⁴⁹

If a credit provider has a website which can be used by a consumer to apply for, or make an enquiry about the standard home loans of that credit provider, then that website should meet the requirements specified in the NCCPA.²⁵⁰ First, the website should inform the consumer that the website may be used to generate a key factsheet for the standard home loan.²⁵¹ Second, the website should indicate the information that must be entered to generate the key factsheet and, third, provide instructions on how to generate the key factsheet.²⁵²

5.3.5.3 Credit Card Contracts

5.3.5.3.1 General

Australian credit card debt is the second largest type of household credit product offered by Australian banks after household mortgages.²⁵³ In addition to the general responsible lending obligations provided for in Part 3-2, Part 3-2B of the NCCPA which was incorporated through the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 84 of 2011 (Cth), makes provision for additional disclosure obligations relating to credit card contracts. A credit card includes a card issued to a consumer for use in obtaining goods or services on credit

²⁴⁶ NCCPA s 133A.

²⁴⁷ NCCPA s 133AB(2)(a).

²⁴⁸ NCCPA s 133AD. See also Beatty and Smith (2014) 784-785.

²⁴⁹ NCCP reg 28LB.

²⁵⁰ NCCPA s 133AC(2).

²⁵¹ NCCPA s 133AC(2)(a).

²⁵² NCCPA s 133AC(2)(b)(i)-(ii).

²⁵³ Ali, McRae and Ramsay (2012) *ABLR* 126.

from the person issuing the card,²⁵⁴ and a credit card contract refers to a continuing credit contract under which credit is ordinarily obtained only by the use of a credit card.²⁵⁵

5.3.5.3.2 The Duty to Provide Pre-Agreement Information

It is a requirement that if the credit licensee provides a consumer with an application form for a credit card, he must ensure that the application form includes a key factsheet for the contract that contains up-to-date information.²⁵⁶ Therefore a credit provider may not enter into a credit card contract unless a key factsheet has been provided.²⁵⁷ Once a credit card contract is concluded, the credit licensee may not offer a credit limit increase invitation in relation to the contract²⁵⁸ unless he has obtained the express informed consent from the consumer who is the debtor under that credit card contract and the consent has not been withdrawn.²⁵⁹

A credit provider is also tasked with the responsibility of notifying a consumer of the use of the credit card in excess of the credit limit.²⁶⁰ Regulations may prescribe how and when the credit licensee must notify the consumer as well as other aspects which must be included in the notification.²⁶¹ Extra fees or charges may not be imposed on a consumer merely because the credit limit was exceeded without prior consent obtained from the consumer.²⁶² In instances where prior consent was obtained, this consent must not have been withdrawn by the consumer.²⁶³ The NCCPA also requires a credit licensee to keep a record of all the consents obtained from the consumer under a credit card contract and the withdrawals of such consents.²⁶⁴

²⁵⁴ NCCPA s 133BA(2).

²⁵⁵ NCCPA s 133BA(1).

²⁵⁶ NCCPA s 133BC(1).

²⁵⁷ NCCPA s 133BD(1).

²⁵⁸ NCCPA s 133BE(1).

²⁵⁹ NCCPA s 133BF(1)(a)-(b).

²⁶⁰ NCCPA s 133BH(1).

²⁶¹ NCCPA s 133BH(2).

²⁶² NCCPA s 133BI(1).

²⁶³ NCCPA s 133BI(1).

²⁶⁴ See NCCPA s 133BJ(1).

5.3.5.3.3 *The Exposure Draft Bill*

Notwithstanding the current responsible lending obligations relating to credit cards as discussed above, an assessment of the credit card industry indicated that there are several problems, such as consumers in unsuitable credit card contracts and the over-borrowing and under-repayment on credit cards by consumers which in turn contribute to financial distress.²⁶⁵ To address these problems, the Australian government passed a consultation paper *inter alia* seeking stakeholder feedback on its proposed actions in relation to the identified problems in the credit card market with a view to developing and releasing associated exposure draft legislation.²⁶⁶ This draft legislation would tighten the responsible lending obligations for credit card contracts *inter alia* by prescribing that a credit limit on a credit card should be assessed to be unsuitable for the consumer if the consumer will not be able to repay the credit limit within a reasonable period.²⁶⁷ On 14 August 2017 the exposure draft legislation was passed as the Treasury Laws Amendment (2017 Measures No. 8) Bill 2017: Credit Card Reforms.²⁶⁸

The purpose of the proposed amendments to the NCCPA as contained in the Exposure Draft Bill is *inter alia* to reduce the likelihood of consumers being granted excessive credit limits by tightening the responsible lending obligations.²⁶⁹ This comes after a realisation that in the current dispensation an assessment as to whether or not a credit card is suitable for a consumer is typically assessed on the basis of whether the consumer can afford to pay the minimum monthly repayment on the proposed credit limit amount, with the result that some consumers incur credit

²⁶⁵ Commonwealth Treasury *Consultation Paper* (May 2016) 13-14. See also the Senate Economics References Committee Report (Dec 2015), which formed the basis of this Consultation Paper. The Senate Report examined the level of credit card interest rates and the competitive dynamics of the credit card market, as well as the impact of responsible lending obligations on credit card debt and made recommendations relating to improving disclosure on the costs of credit cards, improving cancellation and switching options and tightening responsible lending obligations. As a response to this Report, the Commonwealth Treasury *Consultation Paper* (May 2016) was released. This Paper identified that there is a small subset of consumers that persistently incur very high credit card interest charges due to the inappropriate selection and provision of credit cards as well as certain patterns of credit card use – See the Treasury Laws Amendment (2017 Measures No. 8) Bill 2017: Credit Cards and the National Consumer Credit Protection Amendment (Credit Cards) Regulations 2017 *Exposure Draft Explanatory Materials* para 1.5-1.7. Hereinafter the “Exposure Draft Explanatory Materials”.

²⁶⁶ See the Commonwealth Treasury *Consultation Paper* (May 2016) 2.

²⁶⁷ Commonwealth Treasury *Consultation Paper* (May 2016) 16.

²⁶⁸ Hereafter the Exposure Draft Bill. Consultations on the Exposure Draft Bill ended on 23 Aug 2017.

²⁶⁹ Exposure Draft Explanatory Materials paras 1.2-1.3.

card debt that cannot be paid down in a timely manner and which is associated with large cumulative interest charges.²⁷⁰ Therefore it is hoped that the introduction of this new requirement that a consumer's suitability for a credit card contract or credit limit increase be assessed according to the consumer's ability to pay the credit limit over a certain period addresses this problem.²⁷¹

In particular, the Exposure Draft Bill introduces a new requirement that a consumer's unsuitability for a credit card contract or a credit limit increase be assessed on the basis of whether or not the consumer could repay an amount equivalent to the credit limit of the contract within a period determined by ASIC.²⁷² The Exposure Draft Bill empowers ASIC to determine, by legislative instrument, the period within which a consumer must be assessed as being able to repay an amount equivalent to the credit limit of the credit card contract, the period which may be for a fixed period or a range of time.²⁷³ Also, ASIC may determine different periods in relation to different classes of credit card contracts, different credit limits and different rates of interest.²⁷⁴

This additional requirement will apply to both credit assistance providers and credit providers, in relation to existing and proposed credit card contracts with effect from 1 January 2019.²⁷⁵ It is also provided that the existing civil and criminal penalties for breaches of the responsible lending obligations²⁷⁶ will apply to breaches of the new requirement.²⁷⁷ However, it is submitted if these measures are passed, they may amount to an over-regulation of the credit industry.

²⁷⁰ Exposure Draft Explanatory Materials para 1.23.

²⁷¹ See the Exposure Draft Explanatory Materials para 1.24.

²⁷² See the Exposure Draft Bill pt 1 of sch 1, ss **118(3AA), 119(3A), 123(3AA), 124(3A), 131(3AA) and 133(3AA)**. See also the Exposure Draft Explanatory Materials para 1.13.

²⁷³ See the Exposure Draft Bill pt 1 of sch 1, s **160A and 160F(1)**. See also the Exposure Draft Explanatory Materials paras 1.35-1.36.

²⁷⁴ Exposure Draft Bill pt 1 of sch 1, s **160F(2)**.

²⁷⁵ See the Exposure Draft Bill pt 1 of sch 1 – commencement information. See also the Exposure Draft Explanatory Materials para 1.14.

²⁷⁶ Discussed in para 5.3.6.2 below.

²⁷⁷ See the Exposure Draft Explanatory Materials para 1.14.

5.3.5.4 Small Amount Credit Contracts

5.3.5.4.1 General

Small amount credit contracts are classified under fringe credit as they fall within the category of non-mainstream credit products.²⁷⁸ Small amount loans in Australia colloquially are known as “payday loans”.²⁷⁹ This credit product is mostly relied on by consumers with adverse credit histories or those that are unemployed, hence ineligible for mainstream bank loans or credit cards.²⁸⁰ Even if payday loans mostly are used by low income, financially disadvantaged borrowers,²⁸¹ they also can be accessed by a small fraction of informed consumers who are not financially excluded from mainstream credit products but cannot conveniently access them.²⁸² Payday lending has been pronounced as a fast-growing phenomenon in Australia.²⁸³

In 2011 the Commonwealth government identified payday loans as a credit product that carries a high risk of being of financial detriment to vulnerable consumers.²⁸⁴ This assessment was based on the high cost of payday loans which accounts for the risk of default on the part of consumers compared to mainstream credit rates.²⁸⁵ Ali *et al* submit that the high cost of payday loans is linked to the low creditworthiness of most payday consumers.²⁸⁶ Also, the cost is increased in some circumstances by the purchase of “consumer credit insurance” where the payday lender prompts the consumer to purchase the loan by financing the payment of premiums, thus increasing the principal amount lent to the consumer and, consequently, increasing fees or the interest chargeable for advancing that amount.²⁸⁷

²⁷⁸ Ali, McRae and Ramsay (2013) *Mon LR* 416.

²⁷⁹ Ali, McRae and Ramsay (2013) *Mon LR* 419.

²⁸⁰ Ali, McRae and Ramsay (2013) *Mon LR* 419. See also Andersen (2011) *ABLR* 10-11.

²⁸¹ See also Ali, McRae and Ramsay (2013) *Mon LR* 417.

²⁸² Commonwealth Treasury *RIS* (Jun 2011) 16. Duggan (2010) *UTLJ* 692.

²⁸³ Cvjetanovic (2014) *ALSA Acad. J* 127. See also National Financial Services Federation *Submission to Financial Services and Credit Reform* Green paper (2008) 3. The payday lending market in Australia is relatively large, although it is difficult to determine the size of the industry. In 2013 its market value has been estimated to be above AU\$800 million and over a billion dollars annually. See in this regard ASIC *Report 426* (Mar 2015) 7. The market is characterised by large and small national chains, dual pawn-broking and small loan businesses as well as stand-alone lenders.

²⁸⁴ ASIC *Report 426* (Mar 2015) 4. See also the Commonwealth Treasury *RIS* (Jun 2011) 32.

²⁸⁵ ASIC *Report 426* (Mar 2015) 4. See also Ali, McRae and Ramsay (2013) *Mon LR* 422.

²⁸⁶ Ali, McRae and Ramsay (2013) *Mon LR* 422.

²⁸⁷ Ali, McRae and Ramsay (2013) *Mon LR* 422.

The repayment mechanisms adopted with regard to payday loans by payday lenders include automated direct debits from the consumer's bank account.²⁸⁸ The repayments are timed to coincide with the day on which a consumer's wages or welfare benefits are paid into the consumer's account.²⁸⁹ The loans generally are payable within two weeks to one month.²⁹⁰ This means that when the consumer's salary or welfare benefit is exhausted, it is highly likely that the consumer will need to take out another loan either to cover monthly expenses or to refinance "the balance of a partially paid-out loan to start a new loan".²⁹¹

5.3.5.4.2 The Additional Pre-Agreement Assessment Duty

The Enhancements Act introduced additional provisions for small amount loans. The credit licensee who is or is to be a credit provider under small amount credit contracts, when assessing the consumer's creditworthiness, is required to obtain and consider any account statements for the period of 90 days immediately preceding the date of assessment.²⁹² Relative to assessing the consumer's creditworthiness, two presumptions of unsuitability are in place:²⁹³

- (a) The default presumption.

- (b) The multiple loan presumption.

The former presumption proposes that a small amount credit contract will be unsuitable for the consumer if at the time of assessment the consumer is in default under another small amount credit contract.²⁹⁴ The latter presumes that a small amount credit contract will also be unsuitable for the consumer if in the last preceding 90 days the consumer has had two or more other small amount loans.²⁹⁵ Therefore it is required of the credit provider to make reasonable enquiries into whether the consumer, at the time of assessment, is or was a credit consumer within

²⁸⁸ Ali, McRae and Ramsay (2013) *Mon LR* 422.

²⁸⁹ Ali, McRae and Ramsay (2013) *Mon LR* 422.

²⁹⁰ Ali, McRae and Ramsay (2013) *Mon LR* 424.

²⁹¹ Ali, McRae and Ramsay (2013) *Mon LR* 425.

²⁹² NCCPA s 130 (1A).

²⁹³ NCCPA s 131 (3A).

²⁹⁴ NCCPA s 131 (3A).

²⁹⁵ NCCPA s 131 (3A).

the 90 days preceding the assessment under any other small amount loans and whether or not the credit consumer is in default in payment of an amount under those loans.²⁹⁶ Even though credit may still be provided to a consumer who triggers either of the presumptions the credit provider has to rebut the presumption, and failure will mean the small amount loan is unsuitable for the consumer.

Howell submits that the multiple loan presumption does not prevent a consumer from being continuously indebted under one or two small amount loans.²⁹⁷ Further, the presumption does not apply if the consumer has only one small amount loan, but has other heavy credit commitments as well.²⁹⁸ She maintains that the remedy introduced by this presumption largely is dependent on each individual consumer having the resources to challenge the credit provider's actions. Since most consumers using this credit product are on a low income, the presumption does not achieve much in practice.²⁹⁹

Small amount credit contracts for AU\$2000 or less that have a repayment term of up to 15 days, also referred to as "short-term loans", are prohibited.³⁰⁰ The reason for banning this form of "very short term credit" is the risk that arises from having to repay within a very short period and does not rely greatly on the capacity to repay.³⁰¹ In instances where a consumer has an existing small amount credit contract, concluding a short-term credit contract that increases the credit limit of an existing small loan credit contract and/or providing credit assistance in relation to short-term credit contracts is prohibited.³⁰²

Small amount lending and credit assistance in relation to small amount credit contracts remain permissible, there is a qualification to that validation, namely that a small amount credit provider should display information at their business premises

²⁹⁶ See ASIC RG 209 (Nov 2014) 25.

²⁹⁷ Howell in Malbon and Nottage *eds* (2013) 324.

²⁹⁸ Howell in Malbon and Nottage *eds* (2013) 324.

²⁹⁹ Howell in Malbon and Nottage *eds* (2013) 324.

³⁰⁰ NCCPA s 133CA.

³⁰¹ Pearson in Fairweather, O'shea, Grantham *eds* (2017) 49.

³⁰² NCCPA s 124A(1) read with s 133CA(1)(a)-(b).

and website as prescribed by the regulations in place.³⁰³ A licensee also is not allowed to conclude or offer to conclude a small amount credit contract with a consumer if the consumer is included in a class of consumers prescribed by the regulations,³⁰⁴ and if the repayments required under the credit contract will not meet the requirements prescribed by the regulations.³⁰⁵ Regulations in place require small amount credit providers to display warnings at their premises prominently on the front door, such as “Do you really need a loan today?”³⁰⁶ If the credit provider offers on-line applications for finance, there must be a pop-up warning on the website.³⁰⁷ If a consumer applies for credit over the phone, the credit licensee must read the warning to the consumer before providing credit or credit assistance.³⁰⁸

The regulations further prohibit a credit provider from concluding a small amount credit contract with a consumer who receives more than 50 percent of his income under the Social Security Act, 1991, or social security benefits where that credit contract will amount to more than 20 percent of the benefit amount.³⁰⁹ Refinancing an existing short-term small amount loan also requires compliance with the same responsible lending obligations. Specifically, both the legislature and regulator, ASIC, caution that³¹⁰

where a consumer is refinancing, particularly where they are having difficulties meeting the repayments, or are even in arrears, on their existing credit contract ... it will be possible to determine that the consumer cannot meet the repayments of the

³⁰³ NCCPA s 124B(1)(a)-(b).

³⁰⁴ NCCPA s 133CC(1)(a).

³⁰⁵ NCCPA s 133CC(1)(b).

³⁰⁶ NCCPA reg 28XXA(1)(vi). See also NCCPA s 133CB.

³⁰⁷ NCCPA reg 28XXB(a) and (iv).

³⁰⁸ NCCPA reg 28XXC read with reg 28XXD.

³⁰⁹ NCCPA s 133CC read with reg 28S. See also the Commonwealth Treasury *SACC Final Report* (Mar 2016) 1. This report is the product of the review which was ordered by the Australian Government on 7 August 2015, *inter alia* to examine and report on the effectiveness of the laws relating to small amount credit contracts. This report was made available to the public on 19 Apr 2016 and as regards responsible lending it recommended that the protected earnings amount regulation should be extended to cover small amount credit contracts provided to all consumers, and that the cap on the total amount of all small amount credit contracts repayments (including under the proposed credit contract) should be reduced from 20 percent of the consumer's gross income to 10 percent of the consumer's net income to promote financial inclusion. It went on to recommend that, in the event this recommendation is endorsed, it will not be necessary to retain the rebuttable presumption that a loan is presumed to be unsuitable if either the consumer is in default under another small amount credit contract or in the 90-day period before the assessment the consumer has had two or more other small amount credit loans – Commonwealth Treasury *SACC Final Report* (Mar 2016) 11-12.

³¹⁰ ASIC RG 209 (Mar 2011) para 82. See also the NCCPA Explanatory Memorandum para 3.148.

amount being charged under that contract, and a contract will prima facie be unsuitable where the repayments are at the same or a similar level.

ASIC explains that the obligation to verify the consumer's financial position is scalable and thus varies from circumstance to circumstance.³¹¹ However, ASIC indicates that if a consumer is on a low income, even a small amount loan can cause financial difficulties.³¹² Credit providers therefore are expected to make further enquiries in order to meet the responsible lending obligations in these instances.³¹³

5.3.5.5 Reverse Mortgages

5.3.5.5.1 General

Burns defines a "reverse mortgage" in relation to the "standard 'forward' mortgage" where the consumer obtains a loan to acquire a property and eventually will attain 100 percent equity in that property with the loan repayments.³¹⁴ However, under a reverse mortgage the consumer, who normally is retired and already owns a property, releases equity in the property in a form of a secured loan against such a property as cash, and uses it for a wide variety of purposes.³¹⁵ The loan does not have to be repaid immediately, instead, the principal amount borrowed, interest and fees charged are repaid when the consumer dies or vacates the property.³¹⁶

An investigation into these types of credit contracts revealed some major pre-contractual issues relating to features of reverse mortgages that most consumers who were using them did not understand, such as how they actually worked and how the release of equity could have an adverse effect on the consumer in the future.³¹⁷ It was also found that the reverse mortgages were not always suitable for the specific needs of the consumer.³¹⁸ Relevantly, prior to the adoption of the NCCPA ASIC had recommended that the structure and operation of reverse mortgages be tailored to the needs of consumers and that extra, clearer and relevant information

³¹¹ ASIC RG 209 (Mar 2011) table 3.

³¹² ASIC RG 209 (Nov 2014) 24.

³¹³ ASIC RG 209 (Mar 2011) table 3.

³¹⁴ Burns (2013) *Mon LR* 613.

³¹⁵ Burns (2013) *Mon LR* 613-614.

³¹⁶ Burns (2013) *Mon LR* 613-614.

³¹⁷ See Burns (2013) *Mon LR* 623-631 and ASIC *Media Release 06-093* (Mar 2006) for a detailed discussion of the challenges faced by consumers in the Australian reverse mortgage market.

³¹⁸ Burns (2013) *Mon LR* 623.

be disclosed to consumers.³¹⁹ However, after phase one implementation of the NCCPA reforms it was realised that the NCCPA did not deal with all the concerns peculiar to reverse mortgages.³²⁰

To address the issues associated with reverse mortgages the Commonwealth parliament as a result of the Enhancements Act passed additional responsible lending obligations relating to the duty of disclosure which are now contained in Part 3-2D of the NCCPA. These obligations apply to credit licensees that are credit assistance providers and to credit providers.³²¹ A discussion of the additional obligations follows.

5.3.5.5.2 The Duty to Provide Pre-Agreement Information

To preclude misrepresentation by the credit licensee and/or any misunderstanding on the part of the consumer,³²² credit licensees bear further obligations before providing credit assistance or entering into a credit contract for a reverse mortgage, to inform the consumer about the depletion of the consumer's equity in the property that may be covered by the reverse mortgage and the nature and effect of reverse mortgages generally.³²³ Specifically, section 133DB(1) provides that

[b]efore a licensee makes a preliminary assessment for the purposes of paragraph 115(1)(c) or (2)(a), or an assessment for the purposes of paragraph 128(c), in connection with a credit contract with a consumer for a reverse mortgage, the licensee must:

- (a) show the consumer in person, or give the consumer in a way prescribed by the regulations, projections that:
 - (i) relate to the value of the dwelling or land that may become reverse mortgaged property, and the consumer's indebtedness, over time if the consumer were to enter into a contract for a reverse mortgage; and
 - (ii) are made in accordance with the regulations by using a website approved by ASIC; and
- (b) give the consumer a printed copy of the projections; and
- (c) tell the consumer in person the things (if any) that relate to reverse mortgages and are prescribed by the regulations; and
- (d) give the consumer a reverse mortgage information statement.

³¹⁹ ASIC Report 109 (Nov 2007) 31-34. See also Burns (2013) *Mon LR* 632.

³²⁰ Burns (2013) *Mon LR* 637.

³²¹ See the NCCCPA s 133DA.

³²² Burns (2013) *Mon LR* 643-644.

³²³ NCCPA s 133DB. See also Burns (2013) *Mon LR* 644.

Failure to comply with the provisions of this section constitutes an offence attracting a criminal penalty.³²⁴ However, the NCCPA provides the credit licensee with a defence in the case of non-compliance with this obligation if the credit licensee reasonably believes that another person has shown the consumer in person the projections required in this section and the consumer was provided with a printed copy of the projections, and the projections either are the same or substantially the same as those required to be shown to the consumer.³²⁵

Considering the obligation to provide the consumer with an information statement, the NCCPA mandates that if a credit licensee has a website that provides information about reverse mortgages, then the credit licensee should also make reverse mortgage information statements available to the consumer on the website.³²⁶ In the event that the consumer seeks assistance with or applies for a reverse mortgage with the credit licensee by other means than using the website of the licensee for a reverse mortgage information statement or where the regulations require a consumer to be given a reverse mortgage information statement, then the credit licensee must provide the consumer with a reverse mortgage information statement in accordance with any requirements prescribed by the regulations.³²⁷ However, it is a defence to an allegation of non-compliance with this requirement if in the following circumstances:³²⁸

- (a) The credit licensee has given the consumer or reasonably believes that someone else has given the consumer a reverse mortgage information statement.
- (b) The credit licensee reasonably believes that the consumer would not be eligible to enter into a credit contract with the credit licensee for a reverse mortgage.

³²⁴ Burns (2013) *Mon LR* 644.

³²⁵ NCCPA s 133DB(3).

³²⁶ NCCPA s 133DC(1)(b) read with s 133DC(2).

³²⁷ NCCPA s 133DD(1)-(2).

³²⁸ NCCPA s 133DD(4)(a)-(c).

- (c) The regulations prescribe circumstances in which the licensee is not required to give the consumer a reverse mortgage information statement, and such circumstances exist.

Credit licensees are further prohibited from inaccurately using the term “reverse mortgage” in making representations about credit contracts and mortgages,³²⁹ unless the representation truly relates to a credit contract for a reverse mortgage.³³⁰ The inclusion of this obligation was a response to instances where consumers were lulled by credit licensees into a false sense of security that they were entering a reverse mortgage under so-called asset-based loans or low document loans.³³¹

5.3.6 Non-Compliance with the Responsible Lending Obligations

5.3.6.1 General

The responsible lending obligations are aimed at effectively prohibiting lending where there is no reasonable capacity to repay and where the credit contract will be unsuitable for the consumer.³³² It has been hoped that compliance with and the enforcement of the responsible lending obligations can prevent the problem of consumer over-indebtedness.³³³ To ensure compliance and to deal with cases of non-compliance, chapter 4 of the NCCPA empowers the courts to grant a range of remedies against credit licensees who engage in conduct that contravenes the provisions of the Act, including the responsible lending obligations. A discussion of the powers of the courts regarding unsuitable and unaffordable credit contracts follows.

5.3.6.2 The Powers of the Courts

5.3.6.2.1 General

The NCCPA does not provide for sanctions unique to the contravention of the responsible lending provisions. In general, it provides for civil financial penalties that

³²⁹ See the NCCPA s 133DE(1)-(2).

³³⁰ NCCPA s 133DE(3).

³³¹ Burns (2013) *Mon LR* 645. See para 5.3.3.3 above for the definition of asset-based loans and low document loans.

³³² Pearson (2010) *Syd L Rev* 275.

³³³ Tuffin (2009) *QUTLJJ* 285.

may be sought in relation to the contravention of the civil penalty provisions.³³⁴ Criminal sanctions in the form of financial penalties or prison terms may also be imposed on credit licensees.³³⁵ Other civil remedies that may be granted by the courts include injunctions,³³⁶ compensation orders³³⁷ and other orders to compensate for loss or damage.³³⁸

As is the case with other provisions in the NCCPA, every provision imposing a responsible lending obligation on credit providers and other credit licensees is accompanied by a civil penalty. These provisions collectively are known as civil penalty provisions.³³⁹ A civil penalty of 2000 penalty units is provided against the credit provider's contravention of the prohibition on entering into unsuitable contracts with a consumer.³⁴⁰ The same civil penalty units are imposed for the failure of the credit licensee to make reasonable enquiries about the consumer's requirements and objectives in relation to the credit contract and the consumer's financial situation and to take reasonable steps to verify the consumer's financial situation.³⁴¹ The civil penalty provisions thus feature in most of the remedies that may be granted against credit licensees as will be seen below.³⁴²

The NCCPA grants a wide discretion to the court to consider the appropriate remedy for the credit consumer. The court therefore is tasked with the responsibility of determining the appropriate remedy to address the harm caused by the credit provider's contravention of the civil penalty provision or commission of an offence under any provision. It must be affirmed that the NCCPA makes provision for multiple remedies to be granted in addition to one or more orders under the provisions of the NCCPA or another Act.³⁴³ However, in circumstances in which multiple orders are granted against the credit licensee in relation to a contravention of a civil penalty provision or the commission of an offence, and the credit provider

³³⁴ NCCPA s 165.

³³⁵ See eg NCCPA s 133(6).

³³⁶ NCCPA s 177. See para 5.3.6.2.3 below.

³³⁷ NCCPA s 178. See para 5.3.6.2.4 below.

³³⁸ NCCPA s 179. See para 5.3.6.2.5 below.

³³⁹ NCCPA s 165.

³⁴⁰ NCCPA s 133(1).

³⁴¹ NCCPA s 130(1).

³⁴² Para 5.3.6.2.2.

³⁴³ NCCPA s 184.

does not have sufficient financial resources to pay both the financial penalty or fine and compensation, the NCCPA provides direction that the court must give preference to making the order for compensation.³⁴⁴ A discussion of various court orders follows.

5.3.6.2.2 The Civil Financial Penalties

Part 4-1 of the NCCPA provides for the civil penalties that may be sought in relation to the contravention of the penalty provisions. The court is authorised to make a declaration that a person has contravened a civil penalty provision,³⁴⁵ and order the person to pay a financial or pecuniary penalty to the Commonwealth that the court considers appropriate.³⁴⁶ From the wording of the relevant provisions,³⁴⁷ it appears that only ASIC may apply to the court for the declaration or order within six years of the contravention.

In *Make It Mine Finance Pty Ltd, in the matter of Make It Mine Finance Pty Ltd (No 2)*,³⁴⁸ the court addressed the question of a pecuniary penalty in relation to the declarations made in the *MIM No 1* case,³⁴⁹ where the credit provider was found in contravention *inter alia* of its responsible lending obligations and disclosure requirements. In assessing the penalty payable, the court stated that penalties in general should be assigned by reference to the categories of contraventions that have been identified.³⁵⁰ It was noted that for the disclosure requirements, the maximum penalty that can be imposed where an application is made by either ASIC or the credit provider should not exceed AU\$500 000.³⁵¹ In respect of the 24,377 credit contracts, there were four classes of breaches, hence the maximum penalty is

³⁴⁴ NCCPA s 181(a)-(c).

³⁴⁵ NCCPA s 166(1).

³⁴⁶ NCCPA s 166(2) read with s 167(1). The determination of the appropriate penalty is subject to the provisions of s 167(3), which provides that the pecuniary penalty in respect of natural persons must not be more than the maximum number of penalty units referred to in the civil penalty provision, whereas in respect of partnerships and legal persons, it must be five times the maximum number of penalty units referred to in the civil penalty provision.

³⁴⁷ See NCCPA s 166(1) and s 167(1).

³⁴⁸ [2015] FCA 1255. Hereinafter "*MIM No 2*".

³⁴⁹ See *MIM No 2* para 14. See also the discussion of the *MIM No 1* case at paras 5.3.3.5.3 and 5.3.4.3 above.

³⁵⁰ *MIM No 2* para 26. See also *ASIC v The Cash Store No 2* [2015] FCA 93 paras 24 and 25.

³⁵¹ *MIM No 2* para 40. See also NCC s 166.

AU\$2 000000 for the disclosure breaches.³⁵² Noting that there were three contraventions of the responsible lending provisions in respect of each of 20,763 credit contracts³⁵³ and that the maximum penalty where the breach has been committed by a body corporate is 10 000 penalty units, the total penalty would have been AU\$1 100 000 for each contravention.³⁵⁴

The court set out the following guiding principles that apply to all classes of contraventions in determining the appropriate pecuniary penalty. These are:

- (a) Deterrence – penalties imposed should be of a sufficient quantum and proportionate to deter commercial operators from merely weighing up and then accepting the risk of a penalty being ordered as a strategic business cost.³⁵⁵
- (b) The methodology – the assessment of the appropriate penalty is a discretionary judgment based on all relevant factors.³⁵⁶
- (c) Course of conduct – the particular course of conduct involved should be considered and the penalty fixed should be appropriate to that course of conduct.³⁵⁷
- (d) The parity principle – the penalty imposed should not leave an inequality that would suggest that the contravention meted out has not been even-handed.³⁵⁸

³⁵² *MIM No 2* para 41.

³⁵³ The court affirmed that in the context of s 128(c) there is one category of breach, namely the failure to comply with s 129 which requires the assessment for unsuitability of each credit contract, having regard to the period the assessment covered and the potential for any increase of the credit limit over the period of each credit contract. For s 128(d), there have been the following two contraventions, namely a failure to make reasonable inquiries about the consumer's financial situation as required by s 130(1)(b) and a failure to take reasonable steps to verify the consumer's financial situation as required by s 130(1)(c) – see *MIM No 2* paras 32-33.

³⁵⁴ *MIM No 2* para 29.

³⁵⁵ *MIM No 2* para 45.

³⁵⁶ *MIM No 2* para 46.

³⁵⁷ *MIM No 2* para 47.

³⁵⁸ *MIM No 2* para 49.

- (e) The size of the contravener and its financial position – the penalty imposed must be substantial enough so that the party realises the seriousness of its conduct not to repeat it.³⁵⁹
- (f) The totality principle – in determining the appropriate penalty, the totality principle involves a final overall consideration of the sum of the penalties determined and it provides that the total penalty for the offences ought not to exceed what is just and appropriate for the entire contravening conduct.³⁶⁰

After a consideration of the above principles and other factors such as the credit provider's co-operation with ASIC, the fact that it instituted one of the proceedings, the fact that it has made substantial changes to its systems designed to ensure that similar contraventions do not occur and its level of contrition,³⁶¹ pecuniary penalties for both the responsible lending and disclosure breaches were set at AU\$500 000.³⁶²

5.3.6.2.3 The Injunctions

Apart from the civil penalties, ASIC or any other person may lodge an application to court for an injunction order in terms of section 177. If the court is satisfied that the credit licensee has engaged or is intending to engage in conduct that constitutes or would constitute a contravention of its responsible lending obligations as imposed by the NCCPA, the court may grant an injunction on such terms as the court considers appropriate.³⁶³ The injunction order may have the effect of restraining a credit licensee from engaging in the prohibited conduct,³⁶⁴ or of requiring a credit licensee to do a certain act or thing.³⁶⁵ In addition to the injunction order or in substitution of the injunction order, the court is empowered to order the credit licensee to pay damages to the credit consumer.³⁶⁶

³⁵⁹ *MIM No 2* para 51.

³⁶⁰ *MIM No 2* para 52.

³⁶¹ *MIM No 2* para 125.

³⁶² *MIM No 2* para 92. In total, MIM had to pay a penalty of \$1.25 million, including the AU\$ 250,000 for the licensing breaches – see paras 119 and 120.

³⁶³ NCCPA s 177(1).

³⁶⁴ NCCPA s 177(5).

³⁶⁵ NCCPA s 177(6).

³⁶⁶ NCCPA s 177(8).

5.3.6.2.4 Compensatory Orders

In terms of section 178(1), the court may order the credit licensee to compensate the credit consumer for loss or damage suffered by the credit consumer as a result of the credit licensee's contravention of the civil penalty provision or the credit licensee's committing an offence in terms of the NCCPA.³⁶⁷ For the order to be granted, the credit consumer or ASIC on behalf³⁶⁸ of the credit consumer must apply to court within six years from the day the cause of action that relates to the contravention or commission of the offence arose.³⁶⁹

5.3.6.2.5 Other Compensatory Orders

Where the credit licensee has contravened a civil penalty or has committed an offence in terms of the NCCPA, and the credit consumer has suffered or is likely to suffer loss or damage as a result of the contravention or commission of the offence, the court is empowered to grant such order it considers appropriate against the credit licensee to

- (a) compensate the credit consumer, in whole or in part, for the loss or damage;³⁷⁰
or
- (b) prevent or reduce the actual or potential loss or damage.³⁷¹

Without limiting the powers of the court to grant orders it considers appropriate to achieve the aforementioned objectives, the following orders serve as examples of compensatory orders that a court may make:³⁷²

- (a) An order declaring the whole or any part of a contract or arrangement between the parties to be void and, if the court considers it appropriate, to have been

³⁶⁷ This order may be granted regardless of whether or not the declaration of the contravention has been made under NCCPA s 166.

³⁶⁸ NCCPA s 178(3) requires that the plaintiff must have given his consent in writing to ASIC before the application is made to the court.

³⁶⁹ NCCPA s 178(2)(a)-(b).

³⁷⁰ NCCPA s 179(1)(c).

³⁷¹ NCCPA s 179(1)(d).

³⁷² NCCPA s 179(2)(a)-(f).

void from the time it was entered into or at all times on and after a specified day before the order is made.

- (b) An order varying such a contract or arrangement in such a manner as is specified in the order and, if the court considers it appropriate, declaring the contract or arrangement to have had effect as so varied on and after a specified day before the order is made.
- (c) An order refusing to enforce any or all of the terms of such a contract or arrangement.
- (d) An order directing the defendant to refund money or return property to the plaintiff.
- (e) An order directing the defendant to pay to the plaintiff the amount of loss or damage the plaintiff suffered.
- (f) An order directing the defendant, at the defendant's own expense, to supply specified services demanded by the plaintiff.

Compensatory orders are also granted on application by the credit consumer or by ASIC on behalf³⁷³ of the credit consumer to court within six years from the day the cause of action that relates to the contravention or commission of the offence arose.³⁷⁴

Section 179 dealing with compensatory orders, as aforementioned, does not provide guidance on what happens to the rights and obligations of the parties arising from credit contracts which should have been assessed as unsuitable. This lack is probably because the section is intended to be of general application to all civil penalty provisions in the NCCPA and not to deal with unsuitable contracts *per se*. Therefore it is not explicitly clear as to what will happen to the rights of the credit

³⁷³ NCCPA s 179(4) requires that the plaintiff must have given his consent in writing to ASIC before the application is made to the court.

³⁷⁴ NCCPA s 179(3)(a)-(b).

provider if the order granted in terms of section 179(1) has any of the following effects:

- (a) declaring the whole or any part of a contract or arrangement between the parties to be void; or
- (b) refusing to enforce any or all of the terms of such a contract or arrangement.

However, it is my submission that guidance should be implied from the provisions of subsection 179(6). This subsection provides that

... if:

- (a) the defendant is a credit provider who has contravened section 133 by entering into, or increasing the credit limit of, a credit contract (the illegal contract) that is not a credit contract for a reverse mortgage; and
- (b) the debtor's obligations under the illegal contract are secured by a mortgage over the debtor's principal place of residence; and
- (c) the court is satisfied that, at any time in the period in which an assessment needed to be made to comply with section 128 in relation to the illegal contract:
 - (i) there was a credit provider (whether the defendant or not) offering credit through a reverse mortgage (whether or not the credit provider actually made such an offer to the debtor); and
 - (ii) the debtor would have been eligible to enter into a credit contract for the reverse mortgage; and
 - (iii) the credit contract for the reverse mortgage would not have been unsuitable for the debtor under section 133; and
- (d) the plaintiff, or ASIC on behalf of the plaintiff, applies for an order under this section to let the plaintiff reside in the place to prevent or reduce loss or damage suffered or likely to be suffered by the plaintiff vacating the place.

This subsection implies that where the credit provider enters into an unsuitable contract in contravention of section 133, the concerned contract is illegal and therefore a nullity in law. However, where the parties have performed in terms of the illegal contract, restitution ought to take place to prevent unjustified enrichment. This means that the credit provider must refund all the moneys paid by the credit consumer in terms of the unlawful credit contract. Reciprocally, the credit consumer has to return to the credit provider the financed property or money lent to him under the credit contract.

Where the consumer's obligations under the illegal contract were secured by a mortgage over the consumer's principal place of residence, the consumer would be

placed in a position of detriment by losing his principal place of residence due to the credit provider's disregard of his responsible lending obligations. To prevent loss or damage suffered or likely to be suffered by the consumer by vacating the place, the consumer has to apply to court to be allowed to continue to reside on the premises.³⁷⁵ Therefore it is not automatic that the credit consumer gets to keep the financed property.

5.3.6.2.6 Criminal Sanctions

Non-compliance with some provisions of the NCCPA may give rise to both civil and criminal penalties, for example, the provision that prohibits a credit provider from requesting or demanding payment from the consumer for providing him with a copy of the assessment.³⁷⁶ A credit provider who contravenes this provision may attract a civil penalty of 2000 penalty units, and also commits a strict liability offence which attracts the criminal penalty of 50 penalty units.³⁷⁷ In the same light, a credit provider who enters into an unsuitable credit agreement also commits an offence, which attracts a criminal penalty of 100 penalty units or two years imprisonment or both.³⁷⁸

5.4 Conclusion

The aim in this chapter is to carry out a comparative investigation of the Australian responsible lending regime as provided by the NCCPA and its NCC in order to elicit ideas on how best Namibia can devise its responsible lending regime. First, the scope of application of the NCCPA was discussed to determine the extent of protection that it provides to Australian credit consumers. From that discussion it is seen that Australia's enactments have a wide scope of application and cover most types of credit contracts without reference to the credit amount involved or to the nature of the credit product or service involved. These contracts range from small amount loans, credit card contracts, home loans, consumer leases and reverse mortgages.³⁷⁹

³⁷⁵ NCCPA s 179(7), provides that where the elements outlined in s 179(6) are met, the court must consider the order appropriate to prevent or reduce the loss or damage and grant the order unless the court is satisfied that the order would adversely affect a person other than the debtor and the defendant.

³⁷⁶ NCCPA s 132(3).

³⁷⁷ NCCPA s 132(4)-(5) and s 120(4)-(5). See also NCCPA s 133(6).

³⁷⁸ NCCPA s 133(6).

³⁷⁹ Para 5.2.1.

This range indicates that the NCCPA is a comprehensive piece of legislation with a consolidated field of application that addresses most aspects relating to consumer credit.³⁸⁰ ASIC, the regulatory body inter alia entrusted with the regulation of consumer credit in Australia, assists in the enforcement of the provisions of the NCCPA.³⁸¹ It is affirmed that having one piece of comprehensive consumer credit legislation and one credit regulator is a good approach in consumer credit regulation to improve the regulatory process and overall consumer protection. Namibia will do well to learn from such initiatives.

Nonetheless, it was noted that the “purpose of credit” is relevant in Australia because the NCCPA applies only to credit contracts in terms of which credit is provided mainly for personal, domestic or household purposes, to purchase, renovate or improve residential property for investment purposes or to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes.³⁸² This stipulation limits the extent of protection accorded to Australian consumers because credit not used or not intended to be used mainly for personal, domestic or household purposes or the renovation of residential property for investment purposes are excluded from the field of application of the NCCPA.³⁸³ Further, the NCCPA excludes from its field of application some categories of credit contracts, for instance short term small amount loans and pawn transactions among others.³⁸⁴ This renders the scope of application of the South African NCA broader than the NCCPA.³⁸⁵ Nonetheless, the NCCPA’s field of application remains broader compared to Namibian legislative enactments and therefore Namibia can learn from the NCCPA in this regard.

Although the licensing of credit providers falls outside the scope of this thesis, it was mentioned that the licensing of persons engaging in credit activities in terms of the NCCPA was considered for purposes of differentiating between credit licensees,

³⁸⁰ Para 5.2.1.

³⁸¹ Para 5.2.5.

³⁸² Para 5.2.1.

³⁸³ Para 5.2.1.

³⁸⁴ Para 5.2.1.

³⁸⁵ Paras 5.2.1 and 5.2.2.

who, consequently, are burdened with different responsible lending obligations.³⁸⁶ It was seen, as is case in South Africa,³⁸⁷ that the NCCPA requires the licensing of persons prior to their engaging in credit activities with consumers in contrast to the Namibian position where some credit providers are able to operate unregulated for life because they are not required to register with the regulatory authorities.³⁸⁸ It is submitted that the compulsory requirement for all credit providers to register with the credit regulator is a good proactive measure to have in consumer credit legislation because it contributes to the effective protection of consumers by ensuring that all credit providers are subject to regulatory control.³⁸⁹

When the provisions aimed at protecting consumers from irresponsible lending and consumer over-indebtedness are assessed against the leading international best principles formulated in chapter 2,³⁹⁰ it appears that the Australian responsible lending regime complies with the identified principles. With regard to the second leading international best principle which dictates the presence of rules that impose an obligation on credit providers to assess the creditworthiness of the prospective consumer, it was noted that the Australian responsible lending regime contains measures not only aimed at ensuring that credit providers assess the consumer's affordability by conducting reasonable inquiries about the consumer's financial situation but also at meeting "suitability" requirements.³⁹¹ A credit licensee is required to make an assessment as to whether or not the proposed credit contract will be unsuitable.³⁹² This assessment is made after the credit licensee has made reasonable enquiries about the consumer's requirements and objectives in relation to the proposed credit contract and the consumer's financial situation and taken reasonable steps to verify the consumer's financial situation.³⁹³

It is interesting to note that the NCCPA does not place any obligation on the consumer to provide any information that may be necessary to facilitate the required

³⁸⁶ Paras 5.2.3 and 5.2.4.

³⁸⁷ Para 5.2.3.

³⁸⁸ See para 3.2.2.

³⁸⁹ Para 5.2.3.

³⁹⁰ See para 2.7.

³⁹¹ Para 5.3.1.

³⁹² Paras 5.3.2.2 and 5.3.2.3.

³⁹³ Paras 5.3.2.2 and 5.3.2.3.

assessment.³⁹⁴ However, considering the fact that the NCCPA requires credit licensees to assess the consumer's requirements, objectives and financial situation, it is clear that the consumer is required to provide the credit licensee with information that will form the basis of the assessment.³⁹⁵ Since the credit licensee is required to consider only information which he had reason to believe is true in conducting the assessment, he may be relieved of liability for non-compliance with responsible lending obligations if, having regard to all the circumstances, he acted honestly.³⁹⁶

This position differs from that in South Africa where a credit provider is not required to take into account only information he believes to be true.³⁹⁷ The consumer has a positive duty to prevent reckless credit from being extended to him by fully and truthfully answering all requests for information made by the credit provider as part of the assessment.³⁹⁸ It is a defence for the credit provider to an allegation of reckless lending if it is established that the consumer's failure to fully and truthfully answer requests for information by the credit provider materially affected the ability of the credit provider to make a proper assessment.³⁹⁹

The NCCPA prescribes the circumstances under which credit should be assessed as unsuitable and further allows for regulations to be passed prescribing circumstances in which a proposed credit contract will be said to be unsuitable for the consumer.⁴⁰⁰ Essentially, the NCCPA provides that a proposed credit contract should be assessed as unsuitable for the consumer if the consumer will be unable to comply with his obligations under the contract or if he could comply only with substantial hardship, or if the contract will not meet the consumer's requirements and objectives.⁴⁰¹ This provision indicates that the Australian responsible lending regime is motivated by the wish to protect consumers as the central tenet of its consumer credit policy, which is the first leading international best principle formulated in chapter 2,⁴⁰² This purpose

³⁹⁴ Para 5.3.2.5.

³⁹⁵ Para 5.3.2.5.

³⁹⁶ Para 5.3.2.5.

³⁹⁷ Para 5.3.2.5.

³⁹⁸ Para 5.3.2.5.

³⁹⁹ Para 5.3.2.5.

⁴⁰⁰ Paras 5.3.2.2 and 5.3.2.3.

⁴⁰¹ Paras 5.3.2.2 and 5.3.2.3.

⁴⁰² Para 2.7.

is in contrast to the current position in Namibia where consumers have to deal with irresponsible lending practices such as asset-based lending due to the lack of measures aimed at protecting consumers from such practices.⁴⁰³

To ensure optimum compliance with the responsible lending obligations, it is generally required that the pre-agreement assessments of consumers should be based on a credible and standard methodology and wherever possible the responsible lending provisions *inter alia* should provide guidance to the lending process.⁴⁰⁴ The NCCPA demonstrates this requirement well in that it explicitly prohibits the provision of credit where the contract has been assessed as unsuitable for the consumer.⁴⁰⁵ ASIC's regulatory guide also provides that whereas the obligations to make reasonable enquiries and verification are scalable depending on the circumstances of each case, in order to assess whether or not a credit contract will meet the consumer's requirements and objectives the credit licensee should match the consumer's stated requirements and objectives with a credit contract that is not unsuitable.⁴⁰⁶ This guide, which credit licensees may use in meeting the responsible lending obligations, creates a form of uniformity by ensuring that the standard applied in conducting the pre-agreement assessments is not left entirely to the credit licensees, as was the case in South Africa prior to regulation 23A.⁴⁰⁷

The Australian responsible lending regime is commended for underscoring the relevance of an individual assessment and enquiry,⁴⁰⁸ in that the NCCPA requires the credit licensee to conduct an individual enquiry and verification, at least insofar as the individual consumer's particular requirements or objectives and financial situation are concerned. A credit licensee will be able to meet his responsible lending obligations in terms of the NCCPA only by conducting individual assessments because the suitability requirements demand a consideration of a range of factors which may render a particular credit contract unsuitable, for example a failure to meet the requirements and/or objectives of a particular consumer, which can be

⁴⁰³ Para 5.3.3.3.

⁴⁰⁴ See the discussion of principle 2 in para 2.7.

⁴⁰⁵ Paras 5.3.2.2 and 5.3.2.3.

⁴⁰⁶ Para 5.3.3.2.4.

⁴⁰⁷ Para 5.3.3.4.3.

⁴⁰⁸ For a discussion of the relevance of individual credit assessments, see para 2.5.

ascertained only if the credit licensee engages with the individual consumer's credit application.⁴⁰⁹

Regarding the third international leading principle which presupposes that consumers must be provided with sufficient, reliable, comparable and timely pre-agreement information, the Australian enactments impose two separate obligations: one relates to the provision of credit guides, credit quotes and a copy of the suitability assessment as required by the NCCPA,⁴¹⁰ and the other is imposed by the NCC which relates to the provision of the pre-contractual statement and an information statement of the consumer's statutory rights and statutory obligations, before the contract is entered into or before the consumer makes an offer to enter into a credit contract.⁴¹¹ Both obligations serve the main purpose of ensuring that the consumer is well-informed of the total true cost of the credit so as not to underestimate the credit commitment to be undertaken.

The latter duty imposed on the credit licensee who is a credit provider is similar to the South African position.⁴¹² Under both dispensations credit providers are required to provide the consumers with pre-contractual statements. However, neither of them demands a specific obligation requiring credit providers to explain the features of the proposed credit.⁴¹³ The NCCPA goes further by requiring an assessment of the suitability of the proposed credit to the consumer's specific needs and therefore protects consumers from credit which is not appropriate to the consumer's needs and financial situation.

The NCCPA has provision for additional responsible lending obligations for particular types of credit contracts, for instance standard home loans, credit card contracts, small amount credit contracts and reverse mortgages.⁴¹⁴ The additional obligations are designed to deal with the specific risks associated with those credit contracts. These obligations are a good feature to have in a responsible lending regime

⁴⁰⁹ Paras 5.3.2.3, 5.3.3.3.4 and 5.3.3.5.2.

⁴¹⁰ Para 5.3.4.2.

⁴¹¹ Para 5.3.4.3.

⁴¹² Para 5.3.4.3.

⁴¹³ Paras 4.4.5.2 and 5.3.4.3.

⁴¹⁴ Para 5.3.5.

because they provide targeted solutions to specific market challenges. However, the application of the additional rules and the remedies available should be streamlined to fit in with the general responsible lending provisions in order to enable the credit licensee to access information about the consumer as regards other credit products.⁴¹⁵ Nonetheless, it is my submission that if the proposed Exposure Draft Bill in respect of credit card contracts is passed in the current format, it will amount to an over-regulation of the credit industry and bring about the unintended consequence of foreclosing many consumers from this type of credit.⁴¹⁶

When the Australian responsible lending regime is assessed against the fifth leading international best principle identified in chapter 2 of this thesis which dictates that there must be prescribed sanctions for the credit provider's non-compliance with the responsible lending obligations,⁴¹⁷ it is apparent that there is compliance with this standard. The NCCPA empowers the court *inter alia* to grant civil financial penalties in relation to the credit licensee's contravention of the civil penalty provisions in the NCCPA.⁴¹⁸ However, before granting the civil financial penalty sought the court must first make a declaration that the credit licensee has contravened a civil penalty provision, only then can it order the credit licensee to pay the Commonwealth the financial penalty that the court considers appropriate.⁴¹⁹ Further, since only ASIC has legal standing to apply to court for this remedy,⁴²⁰ it is doubtful whether all consumers falling victim to unsuitable credit derive a personal benefit from these provisions, and in comparison with the South African responsible lending regime, for instance, where consumers may raise irresponsible credit as a defence to the enforcement of the particular credit agreement that was concluded in circumstances in which the responsible lending obligations were not complied with. Nonetheless, it is submitted that ASIC's reliance on these provisions as way of enforcing responsible lending may serve as a deterrent action against credit licensees.

⁴¹⁵ See, e.g. para 5.3.5.4.2.

⁴¹⁶ Para 5.3.5.3.3.

⁴¹⁷ Para 2.7.

⁴¹⁸ Para 5.3.6.2.

⁴¹⁹ Para 5.3.6.2.2.

⁴²⁰ Para 5.3.6.2.2.

In addition to the civil financial penalty, ASIC or any other person may have recourse to other civil remedies by lodging an application to court for an injunction order in terms of section 177 to restrain a credit licensee from engaging in irresponsible lending or to compel the credit licensee to comply with the NCCPA.⁴²¹ Also, an application may be made to court for any compensatory order in terms of section 178 or section 179, for loss or damage suffered by the consumer as a result of the credit licensee's contravention of their responsible lending obligations in terms of the NCCPA.⁴²²

The NCCPA empowers ASIC, which has more resources compared to an individual consumer, to initiate proceedings for all the remedies provided for in terms of the NCCPA, which increases the chances of the responsible lending obligations being enforced when a credit licensee is in breach.⁴²³ This is a good aspect to have in any responsible lending regime and is also likely to be effective because its enforcement tool does not depend on the individual consumer to initiate the court proceedings. This position also fully complies with the fourth leading international best principle identified in this thesis, which requires credit providers to be regulated by an effective regulator.⁴²⁴

⁴²¹ Para 5.3.6.2.3.

⁴²² Paras 5.3.6.2.4 and 5.3.6.2.5.

⁴²³ Paras 5.3.6.2.1 and 5.3.6.2.2.

⁴²⁴ Para 2.7.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The overall aim in this thesis has been the undertaking of a situational analysis of the debt prevention measures in Namibian consumer credit enactments, namely the Usury Act 73 of 1968,¹ the Credit Agreements Act 75 of 1980² and the Sale of Land on Instalments Act 72 of 1971.³ The purpose of the analysis was to assess their adequacy in protecting Namibian consumers from irresponsible lending and over-indebtedness with a view to offering proposals for the legal reform of Namibian consumer credit laws.⁴

For reasons of continuity the study adopted Renke's classification of debt prevention measures in respect of consumer credit legislation into primary and secondary measures.⁵ In discussing primary debt prevention measures enacted with the primary aim of preventing reckless credit granting and over-indebtedness, such as the assessment of the consumer's creditworthiness and all other matters related to it including the credit provider's duty to provide pre-contractual information and advice to the consumer, within the concept of "responsible lending" in the thesis implies Renke's description of "responsible lending in the narrow sense".⁶ Finally, it is reiterated that the prevention of irresponsible credit lending which contributes to the problem of over-indebtedness and the protection of consumers who are natural persons from such credit form part of this study.⁷ Other primary and secondary debt prevention measures although related to debt prevention are outside the scope of this study, and so are measures aimed at the alleviation of over-indebtedness and/or debt already incurred.⁸

¹ Hereinafter the "Usury Act".

² Hereinafter the "Credit Agreements Act".

³ Hereinafter the "Sale of Land Act".

⁴ Para 1.2.

⁵ Para 1.3.

⁶ Para 1.3.

⁷ Para 1.6.

⁸ Para 1.6.

To fulfil the aims of the study stated above it was necessary to explore the development of consumer credit policies, from truth-in-lending to responsible lending responses, and to formulate leading international best principles in a modern and effective responsible lending regime.⁹ In light of the above a survey of the philosophies and worldwide emerging trends in respect of responsible lending policy has been undertaken in chapter 2 of this thesis. In order to gain the necessary understanding the market imperatives governing regulatory aspects as well as the theoretical perspectives on responsible lending have been considered.¹⁰

Without a doubt responsible lending is a leading issue in the regulation of credit markets. Viewed as an effective solution to irresponsible lending and consumer over-indebtedness, responsible lending rules have evolved to establish a balance between consumers' and credit providers' interests by ensuring participants in the credit market display responsible behaviour.¹¹ In a consideration of the theoretical perspectives underlying responsible lending policy, it becomes clear that consumer credit policy has developed in contemporary society to enable the full participation of consumers.¹² Policy objectives of responsible lending practices in particular credit markets, namely the United States, the European Union, South Africa and Australia's consumer credit markets were taken into account in order to provide an overview of recent policy considerations in responsible lending and to identify leading international best principles against which to benchmark the reform of Namibia's consumer credit laws.¹³

It is trite that after attaining independence the Namibian economy has recorded a satisfactory and sustained growth since 1990 and the government has adopted national policies to conform to the modern global economy.¹⁴ As the economy has grown and various financial sector objectives are achieved more credit has been extended to consumers. Although no measure of consumer over-indebtedness is currently available in Namibia, data which is derived from the total credit provided to

⁹ Para 1.4.

¹⁰ Para 2.2.

¹¹ Para 2 1.

¹² Para 2.2.

¹³ See ch 2.

¹⁴ See para 3.1.

consumers indicates that the level of indebtedness of Namibian consumers is high compared to regional and international counterparts.¹⁵ This higher level warrants a more coordinated effort in monitoring the parameters of credit granting in Namibia.¹⁶

Having regard to the concerns, *inter alia* levelled by the Namibian Financial Sector Strategy Document in respect of the Namibian financial system, raised the question whether or not the structural weakness it identifies, for instance the inadequate and less effective regulation of the financial sector and the lack of consumer protection, extends to the consumer credit market as well.¹⁷ Namibian consumers have been promised a solution will be found which offers consumer protection through the development of “market conduct principles and oversight” and benchmarking to international best practices.¹⁸ In chapter 3 of this thesis I provide a review of the Namibian consumer credit regulatory framework with the main focus on debt prevention measures.

An assessment of the Namibian consumer credit legislative framework against the leading international best principles formulated in chapter 2 of this thesis had the objective of determining whether or not there is a need to introduce a responsible lending regime for Namibia and finally in this chapter to suggest the ways in which it may be structured so as to afford credit consumers protection from irresponsible lending and over-indebtedness.¹⁹

In terms of promoting a culture of responsible lending in Namibia it was noted that this could be undertaken by benchmarking against international best practices through an investigation of the responsible lending regimes of other countries. The responsible lending provisions in the consumer credit legislation of South Africa and Australia were considered in chapters 4 and 5 to provide a theoretical base in devising a responsible lending regime and to elicit ideas which would assist in making proposals for an improved Namibian responsible lending regime.²⁰ The

¹⁵ Paras 3.1 and 3.2.2.

¹⁶ Para 1.1.

¹⁷ See para 3.1.

¹⁸ Para 3.1.

¹⁹ Para 1.4.

²⁰ Paras 1.5, 2.6.4 and 2.6.5. See also chs 4 and 5.

choice of the countries for the above-mentioned comparative investigation has been explained.²¹ For example, South Africa and Namibia share the same historic consumer credit legislation as a result of the League of Nations' mandate that South Africa had over Namibia.²² It was noted that South Africa since 2007 has repealed its old consumer credit legislation and promulgated the National Credit Act 34 of 2005,²³ which *inter alia* is aimed at promoting responsibility in the credit market through encouraging responsible borrowing, preventing consumer over-indebtedness and discouraging reckless credit granting by credit providers.²⁴ A consideration of the new parameters for credit granting in the sense of responsible lending practices in South African consumer credit law was significant in determining practices which may be usable in improving the Namibian consumer credit regulatory framework.

The choice of Australia in the comparative investigation primarily was influenced by the country's new consumer credit dispensation introduced by the National Consumer Credit Protection Act 134 of 2009 (Cth).²⁵ The policy reasons facilitating this change were relevant to determining whether there are lessons to be learned which may benefit and improve the Namibian consumer credit regulatory framework because amongst others Australia's preceding legislation, the Uniform Consumer Credit Code 2006, also did not have a specific requirement to assess the consumer's ability to repay before providing the consumer with more credit.²⁶

Finally, the study concludes with an assessment of the current debt prevention measures provided for by the Namibian consumer credit legislative framework.²⁷ Drawing lessons from the leading international best principles formulated in chapter 2 and the lessons from the comparative investigation of the South African and Australian responsible lending regimes, I offer recommendations which can be used for future development in addressing the weaknesses in the current consumer credit

²¹ Para 1.5.

²² Para 1.5.

²³ Hereinafter the "NCA".

²⁴ Paras 2.6.4 and 4.1.

²⁵ Para 1.5. Hereinafter the "NCCPA".

²⁶ Paras 1.5 and 2.6.5.

²⁷ Para 6.2.

policies and which can develop a consumer credit regulatory framework which is appropriate for the economic and social contexts in Namibia.²⁸

6.2 General Conclusions

6.2.1 Leading International Best Principles in Responsible Lending

A discussion of the worldwide policy framework aimed at promoting responsible lending policy as reflected in recent developments was presented in chapter 2, and included an examination of activities aimed at promoting a responsible lending policy by international bodies, namely the Group of Twenty, the Organisation for Economic Co-operation and Development and the World Bank.²⁹ Wilson is a resource in exploring the development of responsible lending policy,³⁰ and specific responsible lending policies as introduced in the United States of America, the European Union, Australia and South Africa,³¹ with a view to formulating leading international best principles for a modern and effective responsible lending regime.³² The several reports and recommendations initiated by the reform projects reflected above have led to the formulation of a list of leading international best principles which underlie the emerging trends and guidelines on responsible lending, namely that:³³

- (a) Consumer credit policy should be aimed at achieving consumer protection.
- (b) There should be a rule that imposes an obligation on credit providers to assess the creditworthiness of the prospective consumer.
- (c) Consumers must be provided with sufficient, reliable, comparable and timely pre-agreement information.
- (d) Credit providers must be regulated by an effective regulator.

²⁸ Para 6.3.

²⁹ Para 2.4.

³⁰ Para 2.5.

³¹ Paras 2.6.2, 2.6.3, 2.6.4 and 2.6.5.

³² Para 1.4.

³³ Para 2.7. These principles are addressed in greater detail below – para 6.2.2.2.

- (e) The responsible lending regime should prescribe sanctions for non-compliance with the responsible lending obligations.

6.2.2 Namibian Consumer Credit Legislation

6.2.2.1 Scope of Application

A complete study of the scope of application of various consumer credit enactments although addressed in the thesis fall outside the scope of the study.³⁴ Further, it was not the aim of the thesis to make extensive proposals in connection with the reform of the field of application of Namibian credit law.³⁵ However, the field of application of this type of legislation is important in that it has a direct correlation to the consumers' enjoyment of protection.³⁶ This holds as well for the law amendments I am going to propose for Namibia.³⁷

As is seen in chapter 3 of this thesis, all Namibian credit law enactments have a limited scope of application and therefore not enough consumers enjoy their protection. The Usury Act, which applies to credit transactions and leasing transactions of movable goods, the rendering of services on credit as well as to money lending transactions, does not apply if the principal debt exceeds N\$500 000.³⁸ Also, it does not apply to leasing transaction whose payment terms are less than three months and where the lessee is entitled in terms of the credit agreement to terminate the lease of movable of goods by giving written notice of 90 days or less.³⁹ Further, it exempts money lending transactions qualifying as microloan transactions from its general application.⁴⁰

Similarly, the Credit Agreements Act has a narrow scope of application as *inter alia* it applies only to credit and leasing transactions.⁴¹ Money lending transactions, lump-sum payments and credit agreements in terms of which goods are acquired for the

³⁴ Paras 1.4 and 1.6.

³⁵ Paras 1.4 and para 1.6.

³⁶ Para 1.4.

³⁷ Para 6.3.

³⁸ Para 3.3.2.2.

³⁹ Para 3.3.2.2.

⁴⁰ Para 3.3.2.2.

⁴¹ Para 3.3.3.2.

sole purpose of business activities therefore are excluded from its purview.⁴² Also, it applies only to movable goods which the Minister of Trade and Industry determines to be applicable, and the Credit Agreements Act for instance has not been made applicable to the rendering of services on credit.⁴³ Further, it applies only to credit agreements whose repayment terms exceed six months.⁴⁴

The Sale of Land Act applies only to credit contracts in term of which the land acquired or financed is used or is intended mainly for residential purposes.⁴⁵ Therefore it excludes credit sales of land used not for residential purposes, for instance the sale of agricultural land, and for credit contracts making provision for two or less instalments and in less than one year.

As indicated above,⁴⁶ in order to optimise the protection for Namibian consumers from consumer over-indebtedness, the wide fields of application of the South African and Australian consumer credit law regimes are welcomed.⁴⁷ Accordingly, it is proposed that the Namibian legislature moves away from the restricted fields of application of the Usury Act, Credit Agreements Act and the Sale of Land Act, which are outdated and have been repealed in South Africa,⁴⁸ and instead considers a broad, consolidated approach as demonstrated by the fields of application of the NCA and the NCCPA. The finer detail, for instance whether Namibian juristic persons should enjoy similar protection to natural consumers, is for the Namibian government to decide having regard to statistics and the need for these entities to be protected.

With regard to a consolidated credit enactment for Namibia, it is proposed that Namibia moves in the direction of having a single and comprehensive consumer credit legislation with a broad field of application that addresses most aspects relating to consumer credit in order to improve consumer protection.⁴⁹ The question whether or not Namibia should replace the outdated consumer credit enactments

⁴² Para 3.3.3.2.

⁴³ Paras 3.3.2.1, 3.3.3.1 and 3.3.3.4.1.

⁴⁴ Paras 3.3.2.1, 3.3.3.1 and 3.3.3.4.1.

⁴⁵ Paras 3.3.4.1 and 3.3.4.4.1.

⁴⁶ Paras 4.5 and 5.4.

⁴⁷ Paras 4.2.2 and 5.2.1.

⁴⁸ Para 4.1.

⁴⁹ Para 2.7.

with a single consolidated piece of legislation is beyond the scope of this thesis.⁵⁰ However, an approach that mimics the consolidated and comprehensive credit enactments in South Africa and Australia appears to ease the regulatory process and improve overall consumer protection. The same is true for the need for having a single regulatory body entrusted with the regulation of the consumer credit industry.⁵¹ Namibia therefore would do well to learn from such approaches.⁵²

6.2.2.2 The Debt Prevention Measures under Namibian Consumer Credit Legislation

As part of the review of the Namibian consumer credit regulatory framework the debt prevention measures in terms of Namibian consumer credit legislation were considered, and raised the question whether these measures should be retained for the protection of consumers.⁵³ It was seen that the Usury Act establishes the limitation and disclosure of finance charges, by placing a ceiling on the finance charges that a credit provider can levy on the principal debt in respect of a specific credit agreement and imposing financial charges control.⁵⁴ However it appears that in practice the prescribed interest rate ceilings are difficult to enforce effectively because, notwithstanding the existence of these measures, the Usury Act fails to offer consumers adequate protection.⁵⁵ Some credit providers do not comply with these measures by charging rates higher than the determined usury ceiling without any enforcement action by the regulatory bodies.⁵⁶ Nevertheless, considering the protection these measures afford consumers from incurring too much debt, it is submitted that they are worth retaining in the consumer credit regulatory framework.⁵⁷

The debt prevention measures in terms of the Credit Agreements Act relate to the prescribed maximum periods of repayment of the full price in terms of the credit agreement and the minimum deposit payable by the consumer with regard to credit

⁵⁰ Paras 1.4 and para 1.6.

⁵¹ Paras 4.2.2, 4.3, 5.2.1 and 5.2.5. This conclusion is addressed in detail below – para 6.2.2.2.

⁵² Para 5.4.

⁵³ Paras 3.3.2.4.2, 3.3.3.4.2 and 3.3.4.4.2.

⁵⁴ Paras 3.3.2.3.1, 3.3.2.3.2 and 3.3.2.4.2.

⁵⁵ Para 3.6.

⁵⁶ Paras 3.2.2 and 3.3.2.4.2.

⁵⁷ Para 3.3.2.4.2.

agreements.⁵⁸ Regarding the minimum deposit, the Credit Agreements Act provides that no credit agreement shall be binding until the consumer has paid the prescribed deposit.⁵⁹ However, even if no deposit is paid, in principle it is accepted that if the consumer pays the instalments, the moment the total amount paid reaches the deposit amount, the contract becomes binding on the parties.⁶⁰ It is submitted that this practice encourages credit providers to contravene the provisions of the Credit Agreements Act and the regulations prescribing the payment of deposits and therefore exposes consumers to the threat of over-indebtedness.⁶¹

It was demonstrated that the aim of the deposit requirement is to prevent overspending and the over-indebtedness of consumers by ensuring that only consumers who are able to pay the prescribed deposit should be allowed to buy or lease goods on credit and that the prescribed maximum periods of payment also help prevent consumers from committing themselves to credit agreements for an extended period.⁶² However, the effectiveness of these measures is weakened because credit providers adopt their own more relaxed and accommodative credit terms.⁶³ These practices sidestep important debt prevention measures in the Credit Agreements Act and can lead to irresponsible lending thus exacerbating the problem of over-indebtedness among consumers.

Further, non-compliance with these provisions does not automatically render the credit agreement invalid. The main weakness of these measure lies in the burden which is placed on the individual consumer to bring an action to court in seeking relief by rendering the credit agreement invalid on the ground of non-compliance with the above provisions.⁶⁴ This requirement hinders the enforceability of the provisions of the Credit Agreements Act because of the possibility that a consumer who cannot afford credit may lack the necessary means to take the credit provider to court.⁶⁵

⁵⁸ Paras 3.3.3.3 and 3.3.3.4.2.

⁵⁹ Para 3.3.3.2.

⁶⁰ Paras 3.3.3.3.2 and 3.3.3.4.2.

⁶¹ Para 3.3.3.3.2 and 3.3.3.4.2.

⁶² Para 3.3.3.4.2.

⁶³ See 3.3.3.4.2.

⁶⁴ Paras 3.3.3.4.2 and 3.6.

⁶⁵ Paras 3.3.3.4.2 and 3.6.

It was seen that the deposit requirement is difficult to enforce in practice because the Credit Agreements Act does not prescribe the methods of payment of the deposit.⁶⁶ However, in light of the benefits that a consumer derives from the terms control as far as the consumer's total debt burden is concerned, it is submitted that these are good consumer protection measures which Namibia should retain to prevent consumers from overburdening themselves with debt.⁶⁷

The Sale of Land Act does not oblige credit providers to disclose pre-contractual information to consumers before a credit agreement is concluded.⁶⁸ It is submitted that this failure defeats the purpose of ensuring that the consumer understands the costs of credit so as to prevent an underestimation of the total debt burden. Although the Act prohibits the seller from charging interest at a rate which is higher than the prescribed rate and restricts the amounts that can be claimed by the seller in connection with the sale of a piece of land,⁶⁹ the failure of the minister to pass regulations prescribing interest rates for the sale of land on instalments gives leeway for credit providers to charge in terms of exorbitant rates.⁷⁰

What this study shows is that currently no consumer credit legislation in Namibia has a debt prevention measure which is explicitly aimed at preventing irresponsible lending and consumer over-indebtedness by, for example, making provision for the pre-agreement assessment of consumers before providing them with credit. It is submitted that the Namibian legislature retain the existing debt prevention measures as summarised above in a consolidated consumer credit enactment in addition to the proposed new measures.⁷¹ However, if retained, the measures should be re-enacted in a single piece of legislation to ensure their effective enforcement.

A review of the Namibian consumer credit regulatory framework also had regard to the non-binding standards contained in the Banking Code which are observed by

⁶⁶ Paras 3.3.3.3.2, 3.3.3.4.2 and 3.6.

⁶⁷ Para 3.3.3.4.2 and 3.6.

⁶⁸ Para 3.6.

⁶⁹ Paras 3.3.4.3 and 3.6.

⁷⁰ Para 3.3.4.3 and 3.6.

⁷¹ Paras 3 3 2 4 2 and 3 3 3 4 2.

banking institutions.⁷² It was indicated that the measures contained therein are a step in the right direction in protecting consumers from irresponsible lending and consumer over-indebtedness.⁷³ The Banking Code promises that credit providers will provide consumers with credit responsibly by meeting the consumer's borrowing requirements and capabilities based on the information provided by the consumer, and by supplying suitable credit products to ensure that consumers are not extended beyond their means.⁷⁴ However in the absence of Namibian consumer credit legislation that provides for the pre-agreement assessment of consumers before providing them with credit, it is doubtful whether the spirit of the Banking Code will yield any benefit to consumers.⁷⁵

A proposed Financial Institutions Markets Bill of 2012⁷⁶ which aims to consolidate and harmonise the several outdated laws that currently regulate the non-banking financial industry was discussed.⁷⁷ Although this Bill was revised with an added a chapter 14 featuring a framework aimed at protecting consumers across the board from reckless credit granting and consumer over-indebtedness, this chapter has been deleted and the latest version no longer contains provisions relating to credit agreements.⁷⁸ This means that Namibia is back at square one without a comprehensive consumer credit legislation which requires pre-agreement assessments.⁷⁹

The Microlending Bill of 2014⁸⁰ which proposes a custom-built and dynamic enforcement framework to regulate the conducting of the micro-lending business in Namibia and which will operate together with the provisions of the Usury Act was also discussed.⁸¹ This Bill *inter alia* aims to improve consumer protection and promote responsible borrowing and lending and now is the only Bill which proposes that credit providers should conduct pre-agreement assessments of the prospective

⁷² Para 3.4.

⁷³ Para 3.4 and 3.6.

⁷⁴ Para 3.4 and 3.6.

⁷⁵ Para 3.4.

⁷⁶ Hereinafter the "FIM Bill".

⁷⁷ Para 3.5.1.

⁷⁸ Para 3.5.1.

⁷⁹ Para 3.5.1.

⁸⁰ Hereinafter the "Microlending Bill".

⁸¹ Para 3.5.2.

consumer before granting credit extension.⁸² The proposals in the Microlending Bill which are aimed at introducing responsible lending in the Namibian micro-lending industry therefore are a step in the right direction and are to be commended.

An evaluation of the current Namibian consumer credit laws and the proposed Microlending Bill against the leading international best principles in chapter 2 indicates that there is a need for Namibia to update its regulatory framework in order to protect consumers from irresponsible credit and over-indebtedness. The first principle determines that the protection of consumers should be the basis of any consumer credit policy.⁸³ This determination indicates that consumer protection should be a leading consideration in the formulation of responsible lending rules.⁸⁴ However, considering the current consumer credit laws in Namibia, the existing debt prevention measures do not afford Namibian consumers with adequate protection against irresponsible credit and consumer over-indebtedness. It is submitted that Namibia needs a policy on consumer credit which is aimed at achieving consumer protection in the credit market.

The second principle indicates a general requirement for credit providers to conduct creditworthiness assessments of the prospective consumer before providing the latter with credit.⁸⁵ As seen above, save for the non-binding standards in the form of the Banking Code and the Microlending Bill,⁸⁶ there is no consumer credit legislation in Namibia that imposes an obligation on credit providers to conduct pre-agreement assessments of consumers. It is submitted that any attempt to introduce responsible lending policy will have to consider the measures contained in these two enactments although the exact criteria of the assessments appear to be different. For instance, the Banking Code refers to providing suitable credit by meeting the needs of the particular consumer based on the information provided by the consumer,⁸⁷ whereas the Microlending Bill focuses on affordability assessments by performing credit checks through registered credit bureaus having regard to the consumer's financial

⁸² Para 3.5.2.

⁸³ Para 2.7.

⁸⁴ Para 2.7.

⁸⁵ Para 2.7.

⁸⁶ Paras 3.4 and 3.5.2.

⁸⁷ Para 3.4.

means, prospects and obligations as well as the probable propensity of the consumer to repay the credit on time.⁸⁸

Although the Microlending Bill contains an explicit prohibition on the part of the micro-lender to provide a loan to the consumer if the outcome of the affordability assessment of the loan application indicates that the consumer will not be able to service the loan and when the consumer already has an existing loan unless the affordability assessment indicates that the consumer will be able to service the additional loan, it fails to provide guidance on the assessment procedure and on the effect of the consumer's failure to fully and truthfully answer the credit provider's request for information.⁸⁹ Further, when passed into practice, it will apply only to micro loan transactions.⁹⁰

Both South Africa and Australia follow a prescriptive approach to the pre-agreement assessment of consumers.⁹¹ South Africa's NCA prohibits credit providers from entering into credit agreements with prospective consumers, without first taking reasonable steps to assess the proposed consumer's general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement, the debt re-payment history as a consumer under credit agreements and the consumer's existing financial means, prospects and obligations.⁹² A consumer also has the duty to assist in the pre-agreement assessment by fully and truthfully answering all requests for information made by the credit provider as part of the assessment.⁹³ If it is established that the consumer failed to fully and truthfully answer requests for information made by the credit provider and the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment, a credit provider has a complete defence to an allegation that reckless credit was granted.⁹⁴

⁸⁸ Para 3.5.2.

⁸⁹ Para 3.5.2.

⁹⁰ Para 3.5.2.

⁹¹ Chs 4 and 5.

⁹² Paras 4.4.4.1 and 4.4.4.2.

⁹³ Para 4.4.4.3.

⁹⁴ Para 4.4.4.3.

Clearly, the proposed Namibian Microlending Bill is based on the South African regime although it differs from it in that it does not accord the credit provider with a complete defence to an allegation of irresponsible credit lending in the event of the consumer not fully and truthfully answering the credit provider's requests for information.⁹⁵ Further, it is not clear as to why the responsible lending obligations should be restricted to the micro-lending industry only and leave out a large segment of the consumer population exposed to irresponsible lending practices. This matter is raised in light of the fact that the proposed FIM Bill chapter which contained provisions dealing with consumer credit has been deleted.⁹⁶

The South African responsible lending system by way of regulation 23A provides guidelines to credit providers on the procedure for conducting the required pre-agreement assessments. Regulation 23A requires the credit provider to take "necessary practicable" steps to assess the consumer's discretionary income and to verify the gross income of a consumer in order to determine whether a consumer has the financial means or prospects to pay the proposed credit instalments.⁹⁷ While regulation 23A may provide additional protection to the consumer by ensuring that the consumer will be provided only with credit he can afford through the validation of financial information relating to the consumer's financial situation, a restrictive application thereof may limit consumer's access to credit.⁹⁸

Australia's NCCPA contains measures aimed not only at ensuring that credit providers assess the consumer's affordability by conducting reasonable inquiries about the consumer's financial situation but also at meeting "suitability" requirements.⁹⁹ A credit licensee is required to make an assessment as to whether or not the proposed credit contract will be unsuitable.¹⁰⁰ This assessment is made after the credit licensee has made reasonable enquiries about the consumer's requirements and objectives in relation to the proposed credit contract and the consumer's financial situation and taken reasonable steps to verify the consumer's

⁹⁵ Para 4.4.4.3.

⁹⁶ Para 3.5.1.

⁹⁷ Para 4.4.4.5.2.

⁹⁸ Para 4.4.4.5.2.

⁹⁹ Para 5.3.1.

¹⁰⁰ Paras 5.3.2.2 and 5.3.2.3.

financial situation.¹⁰¹ It is submitted that the Australian system is an improvement on the South African regime because of the explicit requirement on credit licensees to assess the suitability of the proposed credit.

It is seen that the NCCPA does not place an obligation on the consumer to provide any information to the credit provider that may be necessary to facilitate the required assessment.¹⁰² However, considering the fact that the NCCPA requires credit licensees to assess the consumer's requirements, objectives and financial situation, it is clear that the consumer will have to provide the credit licensee with information that will form the basis of the assessment.¹⁰³ Since the credit licensee is required to consider only information which he has reason to believe is true in conducting the assessment, he may be relieved from liability for non-compliance with responsible lending obligations if he acted honestly with regard to all the circumstances.¹⁰⁴

This position differs from that in South Africa in that a credit provider is not required to take into account only information he believes to be true in conducting the assessment.¹⁰⁵ The consumer in South Africa has a positive duty to prevent reckless credit from being extended to him by fully and truthfully answering all requests for information made by the credit provider as part of the assessment.¹⁰⁶ It is a defence for the credit provider to an allegation of reckless lending if it is established that the consumer failed fully and truthfully to answer requests for information by the credit provider which materially affected the ability of the credit provider to make a proper assessment.¹⁰⁷ This is a good aspect to have in any responsible lending regime as it encourages consumers to be truthful and therefore prevents irresponsible credit from being extended to them.

In relation to the pre-agreement procedure, the NCCPA prescribes the circumstances under which credit should be assessed as unsuitable and further

¹⁰¹ Paras 5.3.2.2 and 5.3.2.3.

¹⁰² Para 5.3.2.5.

¹⁰³ Para 5.3.2.5.

¹⁰⁴ Para 5.3.2.5.

¹⁰⁵ Para 5.3.2.5.

¹⁰⁶ Para 5.3.2.5.

¹⁰⁷ Para 5.3.2.5.

allows for regulations to be passed prescribing circumstances in which a proposed credit contract will be said to be unsuitable for the consumer.¹⁰⁸ A proposed credit contract should be assessed as unsuitable for the consumer if the consumer will be unable to comply with his obligations under the contract or if he could comply only with substantial hardship or if the contract will not meet the consumer's requirements and objectives.¹⁰⁹ This assessment indicates that the Australian responsible lending regime is motivated by protecting consumers, which is the central tenet of a consumer credit policy and is the first leading international best principle formulated in chapter 2.¹¹⁰

To ensure optimum compliance with the responsible lending obligations, it is generally required that the pre-agreement assessments of consumers should be based on a credible and standard methodology and, wherever possible, the responsible lending provisions *inter alia* should provide guidance on the lending process.¹¹¹ The NCCPA demonstrates this requirement well by prohibiting the provision of credit where the contract has been assessed as unsuitable for the consumer.¹¹² ASIC's regulatory guide also provides that although the obligation to make reasonable inquiries and verification is scalable depending on the circumstances of each case, in order to assess whether or not a credit contract will meet the consumer's requirements and objectives the credit licensee should match the consumer's stated requirements and objectives with a credit contract that is not unsuitable.¹¹³ This guide, which credit licensees may use in meeting the responsible lending obligations, creates a form of uniformity by ensuring that the standard applied in conducting the pre-agreement assessments is not left entirely to the credit licensees as was case in South Africa prior to regulation 23A.¹¹⁴

¹⁰⁸ Paras 5.3.2.2 and 5.3.2.3.

¹⁰⁹ Paras 5.3.2.2 and 5.3.2.3.

¹¹⁰ Para 2.7.

¹¹¹ Para 2.7.

¹¹² Paras 5.3.2.2 and 5.3.2.3.

¹¹³ Para 5.3.3.2.4.

¹¹⁴ Para 5.3.3.4.3.

The NCCPA is commended for underscoring the relevance of an individual assessment and enquiry,¹¹⁵ by requiring a credit licensee to conduct individual enquiries and verifications at least insofar as the individual consumer's particular requirements or objectives and financial situation are concerned. A credit licensee will be able to meet his responsible lending obligations in terms of the NCCPA only by conducting individual assessments because the suitability requirement demands a consideration of a range of factors which may render a particular credit contract unsuitable, for example a failure to meet the requirements and/or objectives of a particular consumer, which can be ascertained only if the credit licensee engages with the individual consumer's credit application.¹¹⁶

The NCCPA makes provision for additional responsible lending obligations for particular types of credit contracts, for instance standard home loans, credit card contracts, small amount credit contracts and reverse mortgages.¹¹⁷ The additional obligations are designed to deal with the specific risks associated with those credit contracts. This is a good feature to have in a responsible lending regime because it provides targeted solutions to specific market challenges. Namibia therefore can benefit from the experiences of imposing additional responsible lending obligations to address the specific risks for consumers in those particular credit industries where consumers need additional protection, for instance the micro-lending industry. However, the application of the additional rules and the remedies available should be streamlined to correlate with the general responsible lending provisions in order to enable the credit provider's access to information about the consumer as regards other credit products.¹¹⁸ Nonetheless, it is my submission that if the proposed Australian Exposure Draft Bill in respect of credit card contracts is passed in the current format it amounts to an over-regulation of the credit industry and will have the unintended consequence of foreclosing many consumers from this type of credit.¹¹⁹

¹¹⁵ Para 2.5.

¹¹⁶ Paras 5.3.2.3 and 5.3.3.3.4. See also para 5.3.3.5.2.

¹¹⁷ Para 5.3.5.

¹¹⁸ Para 5.3.5.4.2.

¹¹⁹ Para 5.3.5.3.3.

The third principle requires that responsible lending should be dependent not only on the responsible credit provider but also on the consumer who makes responsible financial decisions. The Microlending Bill lacks an obligation on credit providers to explain the pre-contractual information provided to consumers to enable the consumer to understand what is disclosed and use it effectively in making responsible decisions. On this duty South Africa's NCA prescribes that a pre-agreement statement and a credit quotation disclosing prescribed financial information should be provided to the prospective consumer before entering into a credit agreement with a consumer.¹²⁰ Similarly, Australia's enactments impose two separate obligations on the different credit licensees: one relates to the provision of credit guides, credit quotes and a copy of the suitability assessment as required by the NCCPA¹²¹ and the other, imposed by the NCC, which relates to the provision of the pre-contractual statement and an information statement of the consumers' statutory rights and statutory obligations before the contract is entered into or before an offer to enter into a credit contract is made.¹²²

These obligations serve the main purpose of ensuring that the consumer is well-informed of the total true cost of the credit so as not to underestimate the credit commitment to be undertaken. However, none of the NCA, NCCPA or the NCC contains an express obligation requiring credit providers to explain the features of the proposed credit.¹²³ The NCCPA at least goes further to require an assessment on the suitability of the proposed credit for the consumer's specific needs and therefore protects consumers from credit which is not appropriate to the consumer's needs and financial situation. It is submitted that the duty of the credit provider to supply adequate pre-contractual information to the consumer must include a duty to explain the information provided to the consumer to ensure that the consumer understands the total true cost of the credit so as not to underestimate the credit commitment to be undertaken.¹²⁴

¹²⁰ Para 4.4.5.2.

¹²¹ Para 5.3.4.2.

¹²² Para 5.3.4.3.

¹²³ Paras 4.4.5.2 and 5.3.4.3.

¹²⁴ Para 2.7.

The fourth principle identified in this thesis relates to the existence of an effective credit regulatory body tasked with the responsibility of monitoring and enforcing the responsible lending obligations.¹²⁵ Noting that this goal is achieved by requiring credit providers to be licensed,¹²⁶ it was determined that the regulation of credit providers in Namibia is divided between the Bank of Namibia and NAMFISA. However not all credit providers are subject to regulation.¹²⁷ It is doubtful whether NAMFISA is adequately resourced to monitor the compliance of micro-lenders through the relevant laws in addition to the regulation of other financial institutions.¹²⁸ The Microlending Bill is silent on the regulatory challenges currently experienced in practice as a result of the Exemption Notice and its registration requirements.¹²⁹

The regulation of the South African consumer credit industry is entrusted to the National Credit Regulator.¹³⁰ This regulatory body *inter alia* manages the registration of credit providers, investigates complaints and ensures compliance with the provisions of the NCA.¹³¹ The NCR may refer complaints to the Tribunal for adjudication of credit providers that allegedly have contravened the obligations in terms of the NCA.¹³² It is submitted that having a single credit regulator and an independent Tribunal responsible for adjudication meets the leading international best principles standard, as opposed to the Namibian position where the regulation of consumer credit is divided between NAMFISA and the central bank,¹³³ leaving some credit providers unregulated.

Similarly, the the NCCPA empowers the regulatory body, namely the Australian Securities Investments Commission,¹³⁴ which has greater resources than an individual consumer to initiate proceedings, with all the remedies provided for in terms of the NCCPA, thus increasing the chances of the responsible lending

¹²⁵ Para 2.7.

¹²⁶ Para 2.7.

¹²⁷ Para 2.7.

¹²⁸ Para 2.7.

¹²⁹ Paras 3.2.2, 3.5.2 and 3.6.

¹³⁰ Hereinafter the "NCR".

¹³¹ Para 4.3.

¹³² Para 4.3.

¹³³ Paras 2.7 and 3.2.

¹³⁴ Hereinafter "ASIC".

obligations being enforced when a credit licensee is in breach.¹³⁵ This is a good aspect to have in any responsible lending regime as it is more likely to result in effective compliance with the responsible lending obligations and because its enforcement tool is not dependent on the individual consumer to initiate the court proceedings.¹³⁶

The licensing of credit providers is outside the scope of this thesis. However, in chapter 5 of this thesis this practice was considered with the aim of identifying the different categories of credit licensees in Australia. In light of this it was seen that the NCCPA requires the licensing of persons prior to engaging in credit activities with consumers.¹³⁷ It is submitted that this is a good aspect to have in consumer credit legislation in order to enhance regulatory control over the credit market and to improve consumer protection from unregistered market participants as opposed to the situation alluded to above in Namibia where some credit providers operate for life unregistered.¹³⁸

The fifth and final principle this thesis identifies dictates that a proactive and effective responsible lending regime prescribes sanctions which are effective in deterring credit providers from contravening their responsible lending obligations.¹³⁹ Unfortunately, current consumer credit laws in Namibia do not contain any sanctions in the event of non-compliance.¹⁴⁰ The same lack holds for the proposed Microlending Bill.¹⁴¹ It was seen that the NCA, by virtue of section 83(1), empowers any court or Tribunal in which a credit agreement is being considered to declare that a particular credit agreement is reckless.¹⁴² It is noted that reckless credit may constitute both a cause of action where the consumer takes the initiative to have the agreement declared reckless as well as a defence in legal proceedings instituted by the credit provider to enforce the concerned credit agreement.¹⁴³ A court or Tribunal

¹³⁵ Paras 5.3.6.2.1 and 5.3.6.2.2.

¹³⁶ Para 2.7.

¹³⁷ Para 5.2.3.

¹³⁸ Para 3.2.2.

¹³⁹ Para 2.7.

¹⁴⁰ Paras 3.3.2.4.2, 3.3.3.4.2 and 3.3.4.4.2.

¹⁴¹ Para 3.5.2.

¹⁴² Para 4.4.4.8.

¹⁴³ Para 4.4.4.8.

on its own accord can determine the issue of reckless credit during the proceedings in which a credit agreement is being considered.¹⁴⁴ This is a good feature for a responsible lending system not only because it ensures that the responsible lending rules are enforced as the credit provider's chances of receiving payment on a credit agreement will depend on whether or not the required assessments were done, but also because enforcement of the responsible lending obligations is not dependent on each individual consumer to take the credit provider to court for having contravened its responsible lending obligations.¹⁴⁵

Where a credit agreement is declared reckless by the court or Tribunal, the NCA in section 83 prescribes the orders that the court or Tribunal may make in the case of the three instances of reckless credit.¹⁴⁶ For the first and second instances of reckless lending the court or the Tribunal may set aside all or part of the consumer's rights and obligations under that credit agreement or suspend the force and effect of the credit agreement.¹⁴⁷ For the third instance of reckless lending the court or the Tribunal may suspend the force and effect of the credit agreement and restructure the consumer's obligations under any other credit agreement.¹⁴⁸

Even if these orders deter credit providers from contravening the provisions of the NCA, interpretational issues arise because the wording of section 83 is cast in discretionary terms and the NCA is silent as to how the court or Tribunal should exercise its discretion on the order it should make regarding the different instances of reckless credit.¹⁴⁹ Also, the NCA does not specify how the court or Tribunal should exercise its discretion in determining whether or not the rights and obligations of the consumer under the credit agreement should be set aside or the force and effect of the credit agreement suspended.¹⁵⁰

¹⁴⁴ Para 4.4.4.8.

¹⁴⁵ Paras 4.4.4.8 and 3.3.3.4.2.

¹⁴⁶ Para 4.4.4.8.

¹⁴⁷ Para 4.4.4.8.

¹⁴⁸ Para 4.4.4.8.

¹⁴⁹ Para 4.4.4.9.2.

¹⁵⁰ Para 4.4.4.9.1.

Regarding the setting aside of all or part of the consumer's rights and obligations under the credit agreement, the NCA only requires the order to be "just and reasonable in the circumstances".¹⁵¹ However, what is deemed just and reasonable to set aside all of the consumer's rights and obligations and what is just and reasonable to set aside only part of the consumer's rights and obligations is not clear. The courts have formulated a "but for test", that if the consumer would not have entered into a credit agreement but for the credit provider's recklessness, then it will be just and reasonable to set aside that credit agreement.¹⁵² This test implies an interpretation that where the parties have not performed the setting aside results in the credit agreement being null and void. On the other hand, where the parties have performed, restitution of the parties might be possible.¹⁵³

Further, regarding the order suspending the force and effect of the reckless credit agreement, the NCA does not prescribe a time limit for the suspension of the force and effect of the reckless credit agreement. A reckless credit agreement therefore may be suspended for a considerable time.¹⁵⁴ Also, it is not clear whether or not more than one suspension may occur.¹⁵⁵ The NCA also does not stipulate what happens to the subject matter of the credit agreement or the credit provider's asset which serves as security for the repayment of the debt during the period of the suspension.¹⁵⁶ Namibia should learn from South Africa's experiences in this regard.

The NCCPA on the other hand empowers the court *inter alia* to grant civil financial penalties in relation to the credit licensee's contravention of the civil penalty provisions in the NCCPA.¹⁵⁷ However, before granting the civil financial penalty sought, the court first must make a declaration that the credit licensee has contravened a civil penalty provision, only then can it order the credit licensee to pay the financial penalty to the Commonwealth that the court considers appropriate.¹⁵⁸

¹⁵¹ Para 4.4.4.9.2.

¹⁵² Para 4.4.4.9.2.

¹⁵³ Para 4.4.4.9.2.

¹⁵⁴ Para 4.4.4.9.3.

¹⁵⁵ Para 4.4.4.9.3.

¹⁵⁶ Para 4.4.4.9.3.

¹⁵⁷ Para 5.3.6.2.

¹⁵⁸ Para 5.3.6.2.2.

Because only ASIC has legal standing to apply to court for this remedy,¹⁵⁹ it is doubtful whether all consumers falling victim to unsuitable credit derive a personal benefit from these provisions, as compared to the South African responsible lending regime, for instance, where consumers may raise irresponsible credit as a defence against the enforcement of the particular credit agreement that was concluded in circumstances where the responsible lending obligations were not complied with. Nonetheless, it is submitted that ASIC's reliance on these provisions as a way of enforcing responsible lending may serve as a deterrent action on the part of other credit licensees.

In addition to the civil financial penalty, ASIC or any other person may have recourse to other civil remedies by lodging an application to court for an injunction to restrain a credit licensee from engaging in irresponsible lending or to compel the credit licensee to comply with the NCCPA.¹⁶⁰ An application may also be made to court for compensatory orders for loss or damage suffered by the consumer as a result of the credit licensee's contravention of their responsible lending obligations in terms of the NCCPA.¹⁶¹

The Australian responsible lending regime is likely to be effective because it is not dependent on the individual consumer to initiate the court proceedings but empowers ASIC, which has more resources than an individual consumer, to initiate proceedings on behalf of the consumer for all the remedies in terms of the NCCPA, thus increasing the chances of the responsible lending obligations being enforced when a credit licensee is in breach. It is submitted that the Australian responsible lending regime may be a useful guide to Namibia, especially because of the wide discretionary powers of the courts in granting sanctions, a challenge with which South Africa seems to be struggling.

6.3 Recommendations for Legal Reform

It has been determined that the current consumer credit laws in Namibia and the proposed laws alike are not adequate to protect consumers from irresponsible credit

¹⁵⁹ Para 5.3.6.2.2.

¹⁶⁰ Para 5.3.6.2.3.

¹⁶¹ Paras 5.3.6.2.4 and 5.3.6.2.5.

lending and over-indebtedness.¹⁶² To ensure effective protection of consumers in the credit market, a complete overhaul of the Namibian consumer credit regulatory framework is necessary. Firstly, a consolidated credit enactment for Namibia is proposed with a wide and comprehensive field of application that addresses most aspects relating to consumer credit in order to improve consumer protection.¹⁶³ Other aspects, for instance whether Namibian juristic persons should also be covered by the scope of this proposed enactment, are an issue of policy on which the Namibian government will decide having regard to statistical evidence and the need for these entities to be protected.¹⁶⁴ This consolidated consumer credit legislation should replace the outdated consumer credit enactments and also should establish a regulatory body charged with the supervision and administration of the regulation of the consumer credit industry.¹⁶⁵ Credit providers should be required to register with this credit regulator prior to engaging in the business of providing credit.¹⁶⁶ The regulatory body, for example, should be empowered to institute legal action against credit providers for non-compliance with responsible lending obligations.

Secondly, the Namibian legislature should retain the existing debt prevention measures as provided for in the current consumer credit laws to ensure the optimum protection of consumers.¹⁶⁷ These measures however need be re-enacted in the proposed consolidated piece of legislation to ensure effective enforcement.¹⁶⁸

Thirdly, in relation to the main issue addressed in this thesis, it is submitted that there is a pressing need for the Namibian legislature to introduce an improved responsible lending regime with compulsory pre-agreement assessments of consumers.¹⁶⁹ In light of the above, it is recommended that the pre-agreement assessments be based on a compulsory assessment and verification of the following aspects:

¹⁶² Paras 3.6 and 6.2.2.2.

¹⁶³ Para 6.2.2.1.

¹⁶⁴ Para 6.2.2.1.

¹⁶⁵ Para 6.2.2.1.

¹⁶⁶ Para 6.2.2.2.

¹⁶⁷ Para 6.2.2.1.

¹⁶⁸ Para 6.2.2.2.

¹⁶⁹ Para 6.2.2.2.

- (a) The suitability of the proposed credit contract in terms of the consumer's requirements and objectives in relation to the proposed credit contract.
- (b) The consumer's general understanding and appreciation of the risks and costs of the proposed credit and of the rights and obligations of a consumer under a credit agreement established on an adequate provision and explanation of pre-agreement information to the consumer.
- (c) The consumer's ability to repay the proposed credit by assessing the consumer's financial situation and taking reasonable steps to verify the consumer's financial situation with regard to the consumer's debt re-payment history as a consumer under credit agreements and the consumer's existing financial means, prospects and obligations.

Credit providers should explicitly be prohibited from providing credit to consumers if the outcome of pre-agreement assessment indicates that the consumer will not be able to afford the credit or if the credit will not meet the consumer's needs, requirements and/or objectives.¹⁷⁰ The proposed responsible lending regime should offer guidance on the assessment procedure in the following respects:

- (a) The consumer's duty to assist in the pre-agreement assessment by providing information to the credit provider for purposes of the pre-agreement assessment and the effect of the consumer's failure to dispose of that duty, as is the case in South Africa.¹⁷¹
- (b) The exact standard required of credit providers in order to fully comply with the responsible lending standards. In this regard Australia's credit regulator's guide is of use. For instance, if the consumer is unable to comply with his obligations under the contract or if he can comply only with substantial hardship or if the contract will not meet the consumer's requirements and objectives, the proposed credit contract should be assessed as unsuitable for the consumer

¹⁷⁰ Para 6.2.2.2.

¹⁷¹ Para 6.2.2.2.

and therefore should not be provided to the consumer.¹⁷² Further, although the obligation to make reasonable enquiries and verification in the pre-agreement assessments is scalable depending on the circumstances of each case, the individual consumer's requirements and objectives should be assessed.

- (c) To meet the leading international best principles formulated in chapter 2 of this thesis, the proposed responsible lending regime for Namibia should be made applicable to all kinds of credit products regardless of the nature and/or the purpose of the consumer credit provided.¹⁷³ The regime should also regulate the appropriateness of the pre-contractual information provided and should specifically require credit providers to explain the information provided to the consumer to ensure a proper understanding of the specific characteristics of the credit product or service.¹⁷⁴ Finally, the legislature should impose stiffer sanctions for a breach of responsible lending obligations and the courts should be given wide discretionary powers to determine the appropriate remedies for the victims of irresponsible lending.¹⁷⁵
- (d) As regards the declarations for non-compliance, it is recommended that Namibia follow the NCA position of empowering any court in which a credit agreement is being considered to declare a particular credit agreement reckless if, in the opinion of the court, the responsible lending obligations were not complied with. This position should be followed in instances where the consumer takes the initiative to have the agreement declared reckless, as well as a defence in legal proceedings instituted by the credit provider to enforce the concerned credit agreement.¹⁷⁶ Empowering courts on their own accord to determine the issue of reckless credit during court proceedings in which a credit agreement is being considered works to the advantage of consumers and at the same time ensures that the responsible lending rules are enforced.¹⁷⁷

¹⁷² Para 6.2.2.2.

¹⁷³ Para 6.2.2.2.

¹⁷⁴ Para 6.2.2.2.

¹⁷⁵ Para 6.2.2.2.

¹⁷⁶ Para 6.2.2.2.

¹⁷⁷ Para 6.2.2.2.

(e) The courts should be granted wide discretionary powers as regards the penalties or orders that can be issued against credit providers for a breach of responsible lending obligations. The remedies contained in the NCCPA work best because the courts have powers to grant financial penalties or an injunction to restrain credit providers from engaging in irresponsible lending or to compel the credit licensee to comply with their responsible lending obligations and to issue compensatory orders for loss or damage suffered by the consumer as a result of the contravention of the responsible lending obligation.¹⁷⁸

6.4 Concluding Remarks

The single most important factor that motivated this study is that the regulation of consumer credit in Namibia is provided for by legislative enactments which are more than 35 years old.¹⁷⁹ As well as the legal framework being outdated, the debt prevention measures extant in the current legislative framework do not provide effective protection for consumers against irresponsible credit and over-indebtedness, which calls for an urgent introduction of responsible lending measures. The introduction of responsible lending measures is critical to the improvement of the Namibian consumer credit regulatory framework, with a focus on compulsory creditworthiness assessments, the consumers' responsibilities to prevent irresponsible lending, the disclosure and explanations of pre-contractual information to the consumers, the powers of the credit regulator and the sanctions to be imposed for non-compliance with responsible lending obligations by a credit provider, as this thesis recommends.¹⁸⁰ However, not only should Namibia focus on the reform of the debt prevention measures but it should effect a proper and thorough repeal of current consumer credit laws in line with the recommendations in this thesis.¹⁸¹

¹⁷⁸ Para 6.2.2.3.

¹⁷⁹ Para 3.3.1.

¹⁸⁰ Para 6.3.

¹⁸¹ Para 6.3.

BIBLIOGRAPHY	
1. BOOKS	MODE OF CITATION
Amoo SK <i>An Introduction to Namibian Law: Materials and Cases</i> Macmillan Namibia Windhoek (2008)	Amoo (2008)
Bar-Gill O <i>Seduction by Contract: Law, Economics, and Psychology in Consumer Markets</i> Oxford University Press Oxford (2012)	Bar-Gill (2012)
Beatty A and Smith A <i>LNN: Annotated National Credit Code</i> LexisNexis Butterworths Sydney (2011)	Beatty and Smith (2011)
Beatty A and Smith A <i>Annotated National Credit Code</i> (5 th edition) LexisNexis Butterworths Sydney (2014)	Beatty and Smith (2014)
Burrows AS <i>The Law of Restitution</i> (3 rd edition) Oxford University Press Oxford (2002)	Burrows (2002)
Cartwright P <i>Banks, Consumers and Regulation</i> Hart Publishing Oregon (2004)	Cartwright (2004)
Cavanagh SW and Barnes S <i>Consumer Credit Law in Australia</i> Butterworths Sydney (1988)	Cavanagh and Barnes (1988)
Christie RH <i>The Law of Contract in South Africa</i> (5 th edition) LexisNexis Butterworths Durban (2006)	Christie (2006)
Devenney J and Kenny M (eds) <i>Consumer Credit, Debt and Investment in Europe</i> University Press Cambridge (2012)	Devenney and Kenny eds (2012)

Durkin TA and Staten ME (eds) <i>The Impact of Public Policy on Consumer Credit</i> Kluwer Academic Publishers New York (2002)	Durkin and Staten eds (2002)
Engel KC and McCoy PA <i>The Subprime Virus: Reckless Credit, Regulatory Failure and the Next Steps</i> University Press Oxford (2015)	Engel and McCoy (2015)
Fairweather K, O'Shea P and Ross Grantham (eds) <i>Credit, Consumers and the Law: After the Global Storm</i> Routledge United Kingdom (2017)	Fairweather, O'shea, Grantham eds (2017)
Ferreti F (ed) <i>Comparative Perspectives on Consumer Over-indebtedness – A View from the UK, Germany, Greece and Italy</i> Eleven International Publishing The Hague (2016)	Ferretti ed (2016)
Frankel S (ed) <i>Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand</i> Lexis Nexis, Wellington (2011)	Frankel ed (2011)
Genn H <i>Paths To Justice: What People Do and Think About Going to Law</i> Hart Publishing Oxford (1999)	Genn (1999)
Goode RM <i>Consumer Credit Law in Australia</i> Butterworths London (1989)	Goode (1989)
Goode RM Division I "Commentary" <i>Consumer Credit Law and Practice</i> , with updates (last updates: paras 1-10: August 2010; paras 11-20: September 2009; paras 21-60: April 2011; paras 61-69: March 2009; paras 121-126: April 2011) LexisNexis Butterworths London (1977 <i>et seq</i>)	Goode Commentary (1977)

Grové NJ and Otto JM <i>Basic Principles of Consumer Credit Law</i> (2nd edition) Juta Lansdowne (2002)	Grové and Otto (2002)
Grundmann S and Atamer YM (eds) <i>Financial Services, Financial Crisis and General European Contract Law: Failures And Challenges of Contracting</i> Kluwer Law International The Netherlands (2011)	Grundmann and Atamer eds (2011)
Horn N and Bösl A (eds) <i>Human Rights and the Rule of Law in Namibia</i> (2 nd edition) Macmillan Namibia Windhoek (2009)	Horn and Bösl eds (2009)
Howells G and Weatherill S <i>Consumer Protection Law</i> (2 nd edition) Ashgate Publishing Aldershot (2005)	Howells and Weatherill (2005)
Howells G, Janssen A and Schulze R (eds) <i>Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness (Markets and the Law)</i> Ashgate Publishing Aldershot (2005)	Howells, Janssen, Schulze eds (2005)
Kelly-Louw M <i>Consumer Credit Regulation in South Africa</i> Juta & Co Ltd Cape Town (2012)	Kelly-Louw (2012)
Kelly-Louw M, Nehf JP and Rott P (eds) <i>The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems</i> Ashgate Publishers England (2008)	Kelly-Louw, Nehf, Rott eds (2008)
Lanyon E (ed) <i>Australian Credit at the Crossroads: Looking for Landmarks: Essays in Australian Consumer Affairs – An Occasional Series</i> Federation Press Melbourne (2005)	Lanyon ed (2005)
Legal Assistance Centre <i>Namlex Index to the Laws of Namibia</i> Legal Assistance Centre Windhoek (2010)	Legal Assistance Centre (2010)

Logemann J (ed) <i>The Development of Consumer Credit in Global Perspectives Business, Regulation, and Culture</i> Palgrave Macmillan New York (2012)	Logemann ed (2012)
Malbon J and Nottage L (eds) <i>Consumer Law and Policy in Australia and New Zealand</i> The Federation Press Sydney (2013)	Malbon and Nottage eds (2013)
Mapaure C, Ndeunyema N, Masake P, Weyulu F and Shaparara L <i>The Law of Pre-Trial Criminal Procedure in Namibia</i> University of Namibia Press Windhoek (2014)	Mapaure, Ndeunyema, Masake, Weyulu and Shaparara (2014)
Micklitz HW and Domurath I <i>Consumer Debt and Social Exclusion in Europe (Markets and the Law)</i> Routledge London (2015)	Micklitz and Domurath eds (2015)
Micklitz HW and Durovic M <i>Internationalization of Consumer Law: A Game Changer</i> Springer International Switzerland (2017)	Micklitz and Durovic (2017)
Micklitz HW, Reich N and Rott P (eds) <i>Understanding EU Consumer Law</i> Intersentia Antwerp (2009)	Micklitz, Reich, Rott eds (2009)
Nagel CJ (ed) <i>Business Law</i> (5th edition) LexisNexis Durban (2015)	Nagel ed (2015)
Niemi J, Ramsay I and Whitford WC (eds) <i>Consumer Credit, Debt And Bankruptcy: Comparative And International Perspectives</i> Hart Publishing United Kingdom (2009)	Niemi, Ramsay, Whitford eds (2009)
Otto JM "Commentary" <i>Credit Law Service</i> , with updates (last updated: August 2006) LexisNexis Durban (1991 et seq)	Otto Commentary (1991)
Otto JM and Otto R-L <i>The National Credit Act Explained</i> (2 nd edition) LexisNexis Durban (2010)	Otto and Otto (2010)

Otto JM and Otto R-L <i>The National Credit Act Explained</i> (4 th edition) LexisNexis Durban (2012)	Otto and Otto (2012)
Pearson G <i>Financial Services Law and Compliance in Australia</i> Cambridge University Press Port Melbourne (2009)	Pearson (2009)
Pearson G and Batten R <i>Understanding Australian Consumer Credit Law: A Practical Guide to the National Consumer Credit Reforms</i> CCH Australia Ltd Sydney (2010)	Pearson and Batten (2010)
Ramsay I <i>Consumer Law and Policy: Text And Materials on Regulating Consumer Markets</i> (2 nd edition) Hart Publishing Oxford and Portland (2007)	Ramsay (2007)
Ramsay I <i>Consumer Law and Policy: Text and materials on Regulating Consumer Markets</i> (3 rd edition) Hart Publishing Oxford and Portland (2012)	Ramsay (2012)
Scholtz JW (ed) <i>Guide to the National Credit Act</i> LexisNexis Durban (2008)	Scholtz ed (2008)
Taperell GQ, Vermeesch RB and Harland DJ <i>Trade Practices and Consumer Protection</i> Butterworths Sydney (1974)	Taperell, Vermeesch, Harland (1974)
Vandone D <i>Consumer Credit in Europe – Risks and Opportunities of a Dynamic Industry</i> Springer Verlag Berlin Heidelberg (2009)	Vandone (2009)
Visser D <i>Unjustified Enrichment</i> Juta & Co Cape Town (2008)	Visser (2008)
Weatherill S <i>EU Consumer Law and Policy</i> Edward Elgar Publishing Ltd Oxford (2005)	Weatherill (2005)

Wilson T (ed) <i>International Responses to Issues of Credit and Over-Indebtedness in the Wake of Crisis (Markets and the Law)</i> Ashgate Publishing London (2013)	Wilson <i>ed</i> (2013)
Zweigert K and Kötz K <i>Introduction to Comparative Law</i> (3 rd ed) Clarendon Press Oxford (1998)	Zweigert and Kötz (1998)

2. COMMISSION REPORTS, POLICY FRAMEWORKS AND OTHER POLICY DOCUMENTS	MODE OF CITATION
2.1 AUSTRALIA	
Commonwealth Treasury <i>Credit Cards: Improving Consumer Outcomes and Enhancing Competition Consultation Paper</i> , Parkes (May 2016)	Commonwealth Treasury <i>Consultation Paper</i> (May 2016)
Commonwealth Treasury <i>Strategies for Reducing Reliance on High-Cost, Short-Term, Small Amount Lending: Discussion Paper</i> , Parkes (April 2012)	Commonwealth Treasury <i>Discussion Paper</i> (Apr 2012)
Commonwealth Treasury <i>The Regulation of Short Term, Small Amount Finance: Regulation Impact Statement</i> , Parkes (June 2011)	Commonwealth Treasury <i>RIS</i> (Jun 2011)
Commonwealth Treasury <i>Review of the Small Amount Credit Contract Laws Final Report</i> , Parkes (March 2016)	Commonwealth Treasury <i>SACC Final Report</i> (Mar 2016)
Productivity Commission <i>Review of Australia's Consumer Policy Framework Final Report</i> , Canberra (2008)	Productivity Commission (2008)

2.2 EUROPEAN UNION

<i>Communication of the Commission Report on the Operation of Directive 87/102/EEC for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit, COM (95) 117 final (11 May 1995)</i>	COM(95) 117 final
<i>Communication of the Commission Follow-up to the Green Paper on “Financial Services: Meeting Consumers’ Expectations”, COM (97) 309 final (23 June 1997)</i>	COM(97) 309 final
<i>Communication of the Commission Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Credit for Consumers, COM (2002) 443 (11 September 2002)</i>	COM(2002) 443
<i>Communication of the Commission Amended Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Credit for Consumers Repealing Directive 87/102/EC and Modifying Directive 93/13/EC, COM(2004) 747 (28 October 2004)</i>	COM(2004) 747
<i>Communication of the Commission Modified Proposal for a Directive of the European Parliament and of the Council on Credit Agreements for Consumers Amending Council Directive 93/13/EC, COM(2005) 483 final (07 October 2005)</i>	COM(2005) 483 final

<i>Communication of the Commission White Paper on the Integration of EU Mortgage Credit Markets, COM(2007) 807 final, (18 December 2007)</i>	COM(2007) 807 final
<i>Communication of the Commission Communication for the Spring European Council: Driving European Recovery, COM(2009) 114 final (04 March 2009)</i>	COM(2009) 114 final
<i>Communication of the Commission Proposal for a Directive of the European Parliament and of the Council on Credit Agreements Relating to Residential Property, COM(2011) 142 final (31 March 2011)</i>	COM(2011) 142 final
<i>DTI Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century White Paper (December 2003)</i>	<i>DTI Consumer Credit White Paper (2003)</i>
<i>European Commission Public Consultation on Responsible Lending and Borrowing in the EU, Brussels (15 June 2009)</i>	EC Consultation (2009)
<i>House of Lords Select Committee on European Union Minutes of Evidence (25 May 2005)</i>	Select Committee on EU Meeting (2005)
2.3 NAMIBIA	
<i>Namibia Law Reform and Development Commission: LRDC 29 Consumer Protection Discussion Document Windhoek (July 2014)</i>	<i>LRDC Consumer Protection Discussion Document (2014)</i>
<i>Office of the President Namibia Vision 2030: Policy Framework for Long-Term National Development, Windhoek (2004)</i>	<i>Vision 2030 Policy Framework (2004)</i>

Namibia Financial Sector Strategy 2011-2021: A Sector Development Document Towards Achieving Vision 2030 (2011)	Namibia Financial Sector Strategy Document (2011)
2.4 SOUTH AFRICA	
The Department of Trade and Industry South Africa <i>Credit Law Review</i> Summary of Findings of the Technical Committee (August 2003)	Summary of Findings <i>Credit Law Review</i> (Aug 2003)
The Department of Trade and Industry South Africa <i>Credit Law Review</i> Summary of Findings of the Technical Committee (October 2003)	Summary of Findings <i>Credit Law Review</i> (Oct 2003)
The Department of Trade and Industry South Africa <i>Consumer Credit Law Reform: Policy Framework for Consumer Credit</i> August 2004	Policy Framework (2004)
2.5 UNITED STATES	
The Financial Crisis Inquiry Commission <i>The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States</i> (January 2011)	Financial Crisis Inquiry Report (2011)

3. DIRECTIVES, LEGISLATIVE ACTS, BILLS AND REGULATIONS
3.1 AUSTRALIA
Australian Securities and Investments Commission Act 2001 (Cth)
Banking Act 1959 (Cth)

Corporations Act 2001 (Cth)
Credit Cards and the National Consumer Credit Protection Amendment (Credit Cards) Regulations 2017
Federal Court of Australia Act 1976
Judiciary Act 1903
National Consumer Credit Protection Act 134 of 2009 (Cth)
National Consumer Credit Protection Regulations 2010 (Cth)
Treasury Laws Amendment (2017 Measures No. 8) Bill 2017
Treasury Laws Amendment (2017 Measures No. 8) Bill 2017: Credit Cards and the National Consumer Credit Protection Amendment (Credit Cards) Regulations 2017
3.2 EUROPEAN UNION
Council Directive 87/102/EEC Of 22 December 1986 for the Approximation of the Laws, Regulations and Administration Provisions of the Member States Concerning Consumer Credit
Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC
Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements Relating to Residential Immovable Property and Amending Directives 2008/48/EC and 2013/36/EU And Regulation (EU) No 1093/2010, OJ 2014 L60/34
3.3 NAMIBIA
Administration Proclamation 28 of 1923
Bank of Namibia Act 8 of 1990
Bank of Namibia Act 15 of 1997
Banking Institutions Act 2 of 1998

Code of Banking Practice 2013
Constitution of the Republic of Namibia Act 1 of 1990
Covenant of the League of Nations
Credit Agreements Act 75 of 1980
Credit Agreements Amendment Act 3 of 2016
Credit Agreements Proclamation AG 17 of 1981
Executive Powers (Commerce) Transfer Proclamation AG 28/1978 (28 Apr 1978)
Financial Institutions and Markets Bill of 2012
Financial Institutions (Investments of Funds) Act 39 of 1984
Financial Intelligence Act 13 of 2012
Financial Services Adjudicator Bill of 2012
Formalities in Respect of Contracts of Sale of Land Act 71 of 1969
Friendly Societies Act 25 of 1956
Inspection of Financial Institutions Act 38 of 1984
Long-Term Insurance Act 5 of 1998
Medical Aid Funds Act 23 of 1995
Microlending Bill of 2014
Namibia Financial Institutions Supervisory Authority Act 3 of 2001
Namibia Financial Institutions Supervisory Authority Bill of 2012
Notice in terms of Section 15A of the Usury Act GN 189 in GG 3266 (25 Aug 2004)
Pension Funds Act 24 of 1956
Public Accountants' and Auditors' Act 51 of 1951

Regulations Relating to Restrictions on Loan-To-Value Ratios under the Banking Institutions Act 2 of 1998 GN 229 in GG 6130 (20 Sep 2016)
Regulations under the Credit Agreements Act 75 of 1980 GN 177 in GG 536 (1 Dec 1992)
SA Proclamation 1 (Union Gazette Extraordinary) (2 Jan 1921)
Sale of Land on Instalments Act 72 of 1971
Short-Term Insurance Act 4 of 1998
South West Africa Affairs Amendment Act 55 of 1951
State-Owned Enterprises Governance Act 2 of 2006
Stock Exchanges Control Act 1 of 1985
Treaty of Peace and South West Africa Mandate Act 49 of 1919
UN Resolution 2372 (XXII) (12 Jun 1968)
Unit Trusts Control Act 54 of 1981
Usury Act 73 of 1968
Usury Amendment Act 62 of 1974
3.4 SOUTH AFRICA
Alienation of Land Act 68 of 1981
Credit Agreements Act 75 of 1980
National Credit Act 34 of 2005
National Credit Amendment Act 19 of 2014
National Credit Act Determination of a Threshold for Credit Provider Registration Regulations GN 513 in GG 39981 (11 May 2016)

National Credit Act Determination of Threshold Regulations GN 713 in GG 28893 (1 Jun 2006)
National Credit Regulations GN R489 in GG 28864 (31 May 2006)
National Credit Regulations including Affordability Assessment Regulations GN R.202 in GG 38557 (13 Mar 2015)
Sale of Land on Instalments Act 72 of 1971
Sale of Land on Instalment Amendment Act 74 of 1978

4. JOURNALS	MODE OF CITATION
Adler M “The Overseas Dimension: What can Canada and the United States Learn from the United Kingdom?” (1999) <i>Osgoode Hall Law Journal</i> 415	Adler (1999) <i>Osgoode Hall LJ</i>
Ali P “Banking and Finance: New National Responsible Lending Obligations – Part 1” (2011) <i>Australian Business Law Review</i> 464	Ali (2011) <i>ABLR</i>
Ali P, Anderson ME, McRae CH and Ramsay I “The Financial Literacy of Young Australians: An Empirical Study and Implications for Consumer Protection and ASIC’s National Financial Literacy Strategy” (2014) <i>Company & Securities Law Journal</i> 334	Ali, Anderson, McRae and Ramsay (2014) <i>Co Secur Law J</i>
Ali P, McRae CH and Ramsay I “Consumer Credit Reform and Behavioural Economics: Regulating Australia’s Credit Card Industry” (2012) <i>Australian Business Law Review</i> 126	Ali, McRae and Ramsay (2012) <i>ABLR</i>

Ali P, McRae CH and Ramsay I "The Politics of Payday Lending Regulation in Australia" (2013) <i>Monash University Law Review</i> 412	Ali, McRae and Ramsay (2013) <i>Mon LR</i>
Ali P, McRae CH and Ramsay I and Saw TT "Consumer Leases and Consumer Protection: Regulatory Arbitrage and Consumer Harm" (2013) <i>Australian Business Law Review</i>	Ali, McRae, Ramsay and Saw (2013) <i>ABLR</i>
Anderson C "Viewing the Proposed South African Business Rescue Provisions from an Australian Perspective" (2008) <i>PER/PELJ</i> 1	Anderson (2008) <i>PER/PELJ</i>
Anderson K "The Explosive Global Growth of Personal Insolvency and the Concomitant Birth of the Study of Comparative Consumer Bankruptcy: Consumer Bankruptcy in Global Perspective, by Johanna Niemi-Kiesilainen, Iain Ramsay & William C. Whitford (eds.); Comparative Consumer Insolvency Regimes: A Canadian Perspective, by Jacob S. Ziegel" (2004) <i>Osgoode Hall Law Journal</i> 661	Anderson (2004) <i>Osgoode Hall LJ</i>
Avery RB, Brevoort KP and Canner GB "Credit Scoring and its Effects on the Availability and Affordability of Credit" (2009) <i>The Journal of Consumer Affairs</i> 516	Avery, Brevoort and Canner (2009) <i>The J Consum Aff</i>
Bar-Gill O "Seduction by Plastic" (2003) <i>Northwestern University Law Review</i> 1373	Bar-Gill (2003) <i>Nw U L Rev</i>
Bar-Gill O "The Behavioral Economics of Consumer Contracts" (2008) <i>Minnesota Law Review</i> 749	Bar-Gill (2008) <i>Minnesota L Rev</i>
Bar-Gill O "The Law, Economics and Psychology of Subprime Mortgage Contracts" (2009) <i>Cornell Law Review</i> 1073	Bar-Gill (2009) <i>Cornell L Rev</i>

Bar-Gill O and Warren E “Making Credit Safer” (2008) <i>University of Pennsylvania Law Review</i> 1	Bar-Gill and Warren (2008) <i>U Pa L Rev</i>
Beales H, Craswell R and Salop SC “The Efficient Regulation of Consumer Information” (1981) <i>Journal of Law and Economics</i> 491	Beales, Craswell and Salop (1981) <i>J Law Econ</i>
Bijak K, Mues C, So M and Thomas LC “Credit Card Market Literature Review: Affordability and Repayment” (2015) <i>Southampton Business School</i> 1	Bijak, Mues, So and Thomas (2015) <i>SBS</i>
Bijak K, Thomas LC and Mues C “Dynamic Affordability Assessment: Predicting an Applicant’s Ability to Repay Over the Life of the Loan” (2014) <i>Journal of Credit Risk</i> 1	Bijak, Thomas and Mues (2014) <i>JCR</i>
Blakeney M and Barnes S “Advertising Regulation in Australia: An Evaluation” (1982) <i>The Adelaide Law Review</i> 29	Blakeney and Barnes (1982) <i>Adel L Rev</i>
Boraine A and Renke S “Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 - Part 1” (2007) <i>De Jure</i> 222	Boraine and Renke (2007) <i>De Jure</i>
Boraine A and Renke S “Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005 - Part 2” (2008) <i>De Jure</i> 1	Boraine and Renke (2008) <i>De Jure</i>
Boraine A and Van Heerden C “Some Observations Regarding Reckless Credit in terms of the National Credit Act 34 of 2005” (2010) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 650	Boraine and Van Heerden (2010) <i>THRHR</i>

Boraine A and Van Heerden C "To Sequestrate or Not to Sequestrate in View of the National Credit Act 34 of 2005: a Tale of Two Judgments" (2010) <i>Potchefstroom Electronic Law Journal</i> 84/508	Boraine and Van Heerden (2010) <i>PER/PELJ</i>
Burns F "The Evolving Statutory Regulation of Reverse Mortgages in Australia's 'Risk Society'" (2013) <i>Monash University Law Review</i> 611	Burns (2013) <i>Mon LR</i>
Camerer C, Issacharoff S, Loewenstein G, O'Donoghue T and Rabin M "Regulation for Conservatives: Behavioral Economics and the case for Asymmetric Paternalism" (2002) <i>University of Pennsylvania Law Review</i> 1211	Camerer, Issacharoff, Loewenstein, O'Donoghue and Rabin (2002) <i>U Pa L Rev</i>
Campbell J "The Excessive Cost of Credit on Small Money Loans under the National Credit Act 34 of 2005" (2007) <i>South African Mercantile Law Journal</i> 251	Campbell (2007) <i>SA Merc LJ</i>
Chakravorti S "Theory of Credit Card Networks: A Survey of the Literature" (2003) <i>Review of Network Economics</i> 50	Chakravorti (2003) <i>REN</i>
Cowton CJ "Integrity, Responsibility and Affinity: Three Aspects of Ethics in Banking" (2002) <i>Business Ethics: A European Review</i> 393	Cowton (2002) <i>Bus Ethics Eur Rev</i>
Cvjetanovic M "Consumer Sovereignty: The Australian Experience" (2014) <i>Seven Pillars Institute</i> 67	Cvjetanovic (2014) <i>Seven Pillars Institute</i>
Davis J "Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts" (1977) <i>Virginia Law Review</i> 841	Davis (1977) <i>Va L Rev</i>
Duggan AJ "Consumer Credit Rate Disclosure in the United Kingdom and Australia: A Functional and Comparative Appraisal" (1986) <i>The International and Comparative Law Quarterly</i> 87	Duggan (1986) <i>Int'l & Comp LQ</i>

Duggan AJ "Some Reflections on Consumer Protection and the Law Reform Process" (1991) <i>Monash University Law Review</i> 252	Duggan (1991) <i>Mon LR</i>
Duggan AJ "Consumer Credit Redux" (2010) <i>University of Toronto Law Journal</i> 689	Duggan (2010) <i>UTLJ</i>
Duhl GM "International Developments in Consumer Financial Services Law 2007-2008" (2009) <i>The Business Lawyer</i> 677	Duhl (2009) <i>Bus Law</i>
Engel LC and McCoy PA "Federal Pre-Emption and Consumer Financial Protection: Past and Future" (2012) <i>Banking and Financial Services Policy Report</i> 25	Engel and McCoy (2012) <i>Banking & Fin Services Policy Report</i>
Faber D and Schuijling B "Financial Leasing and its Unification by Unidroit" (2010) <i>Electronic Journal of Comparative Law</i> 1	Faber and Schuijling (2010) <i>EJCL</i>
Fama EF "Efficient Capital markets: A review of Theory and Empirical Work" (1969) <i>The Journal of Finance</i> 383	Fama (1969) <i>J Finance</i>
Farrar JH "The Global Financial Crisis and the Governance of Financial Institutions" (2010) <i>Australian Journal of Corporate Law</i> 227	Farrar (2010) <i>Austl J Corp L</i>
Felsenfeld C, Goldfarb LH, Johnson RW, McManus RP and Prins CA "Consumer Credit Regulation: Illusion or Reality?" (1978) <i>The Business Lawyer</i> 1145	Felsenfeld, Goldfarb, Johnson, McManus and Prins (1978) <i>Bus Law</i>
Feltham JD "Fair Consumer Credit Laws: Report to the Attorney-General for the State of Victoria by a Committee of the Law Council of Australia" (1973) <i>The Modern Law Review</i> 174	Feltham (1973) <i>MLR</i>

Ferretti F “The Legal Framework of Consumer Credit Bureaus and Credit Scoring in the European Union: Pitfalls and Challenges – Overindebtedness, Responsible lending, Market Integration, and Fundamental Rights” (2013) <i>Suffolk University Law Review</i> 791	Ferretti (2013) <i>Suffolk U L Rev</i>
Finlay SM “Predictive Models of Expenditure and Over-Indebtedness for Assessing the Affordability of New Consumer Credit Applications” (2006) <i>The Journal of the Operational Research Society</i> 655	Finlay (2006) <i>J Oper Res Soc</i>
Freilich A and Webb E “Reforms to Australian Consumer and Credit Law” (2010) <i>Business Law Today</i> 1	Freilich and Webb (2010) <i>Bus L Today</i>
Gorman C “Undoing Hardship: Applying the Principles of Dodd-Frank to the Law Student Debt Crisis” (2014) <i>University of California Davis Law Review</i> 1887	Gorman (2014) <i>U C Davis L Rev</i>
Grundmann S and Hofmann C “EC Financial Services and Contract law – Developments 2007-2010” (2010) <i>European Review of Contract Law</i> 467	Grundmann and Hofmann (2010) <i>ERCL</i>
Grven D and Sayegh A “The Evolution of Fiscal Policy in Australia” (2005) <i>Oxford Review of Economic Policy</i> 618	Grven and Sayegh (2005) <i>OREP</i>
Hand DJ and Henley WE “Statistical Classification Methods in Consumer Credit Scoring: A Review” (1997) <i>Journal of the Royal Statistical Society. Series A (Statistics in Society)</i> 523	Hand and Henley (1997) <i>R Stat Soc Ser A Stat Soc</i>
Harland D “Consumer Protection in Australia” (1979) <i>The Rabel Journal of Comparative and International Private Law</i> 631	Harland (1979) <i>Rabel Journal</i>

Hirsch FA "The Evolution of a Suitability Standard in the Mortgage Lending Industry: The Subprime Meltdown Fuels the Fires of Change" (2008) <i>North Carolina Banking Institute</i> 21	Hirsch (2008) <i>N C Banking Inst</i>
Howell NJ "National Consumer Credit Laws, Financial Exclusion And Interest Rate Caps: The Case for Diversity Within a Centralised Framework" (2009) <i>Competition and Consumer Law Journal</i> 212	Howell (2009) <i>CCLJ</i>
Howell NJ "Revisiting the Australian Code of Banking Practice: Is Self-Regulation Still Relevant for Imposing Consumer Protection Standards?" (2015) <i>UNSW Law Journal</i> 544	Howell (2015) <i>UNSW LJ</i>
Howell NJ and Wilson T "Access to Consumer Credit: The Problem of Financial Exclusion in Australia and the Current Regulatory Framework" (2005) <i>Macquarie Law Journal</i> 127	Howell and Wilson (2005) <i>Macquarie LJ</i>
Howells G "The Potential and Limits of Consumer Empowerment by Information" (2005) <i>Journal of Law and Society</i> 349	Howells (2005) <i>J Law & Soc</i>
Howells G "What Type of Future is There for Consumer Law?" (1994) <i>Consumer Law Journal</i> 1	Howells (1994) <i>Consum LJ</i>
Howells G "The Consumer Credit Litigation Explosion" (2010) <i>October Law Quarterly Review</i> 617	Howells (2010) <i>Oct Law Q Rev</i>
Hurwitz I and Luiz J "Urban Working Class Credit Usage and Over-Indebtedness in South Africa" (2007) <i>Journal of Southern African Studies</i> 107	Hurwitz and Luiz (2007) <i>J South Afr Stud</i>
James D "'Deeper Into a Hole?' Borrowing and Lending in South Africa" (2014) <i>Current Anthropology</i> S17	James (2014) <i>Curr Anthropol</i>

Kelbrick R “Enforcement of Consumer Credit Legislation — Antipodean Experiences” (2003) <i>The Comparative and International Law Journal of Southern Africa</i> 159	Kelbrick (2003) <i>CILSA</i>
Kelly-Louw M “The Prevention and Alleviation of Consumer Over-Indebtedness” (2008) <i>South African Mercantile Law Journal</i> 200	Kelly-Louw (2008) <i>SA Merc LJ</i>
Kelly-Louw M “Categorising Credit Agreements, Particularly Credit Guarantees, as Small, Intermediate or Large Agreements Under the National Credit Act 34 of 2005” (2012) <i>South African Mercantile Law Journal</i> 217	Kelly-Louw (2012) <i>SA Merc LJ</i>
Kelly-Louw M “A Credit Provider’s Complete Defence Against a Consumer’s Allegation of Reckless Lending” (2014) <i>South African Mercantile Law Journal</i> 24	Kelly-Louw (2014) <i>SA Merc LJ</i>
Kelly-Louw M “The 2014 Credit-Information Amnesty Regulations: What Do They Really Entail?” (2015) <i>De Jure</i> 92	Kelly-Louw (2015) <i>De Jure</i>
Kim K “Mixed Systems in Legal Origins Analysis” (2010) <i>Southern California Law Review</i> 693	Kim (2010) <i>S Cal L Rev</i>
Lindgren KE “The Consumer Credit Act: Its scope” (1977) <i>The Modern Law Review</i> 159	Lindgren (1977) <i>MLR</i>
Mak V “What is Responsible Lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands” (2015) <i>Journal of Consumer Policy</i> 411	Mak (2015) <i>J Consum Policy</i>
Mann RJ “Contracting for Credit” (2006) <i>Michigan Law Review</i> 899	Mann (2006) <i>Mich L Rev</i>

McGill D, Corones SG and Howell N “Regulating the Cost of Small Loans: Overdue or Overkill?” (2012) <i>Company and Securities Law Journal</i> 149	McGill, Corones and Howell (2012) <i>Co Secur Law J</i>
Melville N and Palmer R “The Applicability of the Consumer Protection Act 2008 to Credit Agreements” (2010) <i>South African Mercantile Law Journal</i> 272	Melville and Palmer (2010) <i>SA Merc LJ</i>
Micklitz HW “The Regulation of Over-Indebtedness of Consumers in Europe” (2012) <i>Journal of Consumer Policy</i> 417	Micklitz (2012) <i>J Consum Policy</i>
Miller FH and Rohner RJ “In Search of a Uniform Policy – State and Federal Sources of Consumer Financial Services Law” (1982) <i>The Business Lawyer</i> 1415	Miller and Rohner (1982) <i>Bus Law</i>
Moss DA and Johnson GA “The Rise of Consumer Bankruptcy: Evolution, Revolution or Both? (1999) <i>American Bankruptcy Law Journal</i> 311	Moss and Johnson (1999) <i>Am Bankr LJ</i>
Muellbauer J “The Assessment: Consumer Expenditure” (1994) <i>Oxford Review of Economic Policy</i> 1	Muellbauer (1994) <i>Oxford Rev. Econ Policy</i>
Myers MG “The Control of Consumer Credit in Australia” (1961) <i>The Journal of Finance</i> 409	Myers (1961) <i>J Finance</i>
Nehf JP “Consumer Credit Regulation and International Financial Markets: Lessons From the Mortgage Meltdown” (2011) in Centro de Estudios de Estado y Sociedad available at http://ssrn.com/abstract=19238837 (accessed 20 Oct 2016)	Nehf (2011) <i>SSRN essay</i>
Nield S “Responsible Lending and Borrowing: Whereto Low-Cost Home Ownership?”(2010) <i>Legal Studies</i> 610	Nield (2010) <i>Legal Studies</i>

Nottage L “Consumer Law Reform in Australia: Contemporary and Comparative Constructive Criticism” (2009) <i>Queensland University of Technology Law and Justice Journal</i> 111	Nottage 2009 <i>QUTLJJ</i>
Otto JM “Oosthuizen v Standard Credit Corporation Ltd 1993 3 SA 891 (A)” (1994) <i>De Jure</i> 184	Otto (1994) <i>De Jure</i>
Otto JM “The Incidental Credit Agreement” (2010) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 637	Otto (2010) <i>THRHR</i>
O’Shea PM “Consumer Credit: Too Much Information?” (2009) <i>Precedent</i> 22	O’Shea (2009) <i>PR</i>
O’Shea PM and Finn C “Consumer Credit Code Disclosure: Does it Work?” (2005) <i>Journal of Banking and Finance Law and Practice</i> 5	O’Shea and Finn (2005) <i>JBFLP</i>
Pagano M and Jappelli T “Information Sharing in Credit Markets” (1993) <i>The Journal of Finance</i> 1693	Pagano and Jappelli (1993) <i>J Finance</i>
Paterson JM “Knowledge and Neglect in Asset Based Lending: When is it Unconscionable or Unjust to Lend to a Borrower Who Cannot Repay?” (2009) <i>Journal of Banking and Finance Law and Practice</i> 18	Paterson (2009) <i>JBFLP</i>
Pearson G “Making prudence: consumer credit and twin peaks, a comparison of Australia and South Africa” (2016) <i>Journal of Banking and Finance Law and Practice</i> 223	Pearson (2016) <i>JBFLP</i>
Pearson G “Reading Suitability Against Fitness for Purpose – The Evolution of a Rule” (2010) <i>Sydney Law Review</i> 275	Pearson (2010) <i>Syd LR</i>

Pearson G “Risk and the Consumer in Australian Financial Services Reform” (2006) <i>Sydney Law Review</i> 99	Pearson (2006) <i>Syd LR</i>
Posner RA “Rational Choice, Behavioral Economics and the Law” (1997) <i>Stanford Law Review</i> 1553	Posner (1997) <i>Stan L Rev</i>
Pottow J “Ability to Pay” (2011) <i>Berkeley Business Law Journal</i> 175	Pottow (2011) <i>Berkeley Bus L J</i>
Prigden D “Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Money Lending Act of 2010” (2012) <i>Loyola Consumer Law Review</i> 615	Prigden (2012) <i>Loy Consumer L Rev</i>
Rajapakse PJ “Unconscionable or Unfair Dealing in Asset-Based Lending in Australia” (2014) <i>Competition and Consumer Law Journal</i> 151	Rajapakse (2014) <i>CCLJ</i>
Ramsay I “Consumer Credit Law, Distributive Justice and the Welfare State” (1995) <i>Oxford Journal of Legal Studies</i> 177	Ramsay (1995) <i>Oxford J Legal Stud</i>
Ramsay I “Consumer Credit Law, Regulatory Capitalism and the ‘New Learning’ in Regulation” (2006) <i>Sydney Law Review</i> 9	Ramsay (2006) <i>Syd LR</i>
Ramsay I “Consumer Credit Regulation After the Fall: International Dimensions” (2012) <i>Journal of European Consumer and Market Law</i> 24	Ramsay (2012) <i>EuCML</i>
Ramsay I “‘To Heap Distress Upon Distress’: Comparative Reflections on Interest Rate Ceilings” (2010) <i>University of Toronto Law Journal</i> 60	Ramsay (2010) <i>UTLJ</i>

Ramsay I and Sim C “Personal Insolvency in Australia: An Increasingly Middle Class Phenomenon” (2010) <i>Federal Law Review</i> 283	Ramsay (2010) <i>Fed L Rev</i>
Reich RB “Toward a New Consumer Protection” (1979) <i>University of Pennsylvania Law Review</i> 1	Reich (1979) <i>U Pa L Rev</i>
Renke S “Aspects of Incidental Credit in terms of the National Credit Act 34 of 2005” (2011) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 464	Renke (2011) <i>THRHR</i>
Renke S “Credit Agreements: Lump Sum Payment or Payments by Way of Instalments in Future Required? – <i>Ukubona 2000 Electrical CC and Abb South Africa (Pty) Ltd v City Power Johannesburg (Pty) Ltd</i> (case no 155/03 (SCA)” (2004) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 710	Renke (2004) <i>THRHR</i>
Renke S “Measures in South African Consumer Credit Legislation Aimed at the Prevention of Reckless Lending and Over-Indebtedness: An Overview Against the Background of Recent Developments in the European Union” (2011) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 208	Renke (2011) <i>THRHR</i>
Renke S and Roestoff M “The Consumer Credit Bill – A Solution to Over-Indebtedness?” (2005) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 115	Renke and Roestoff (2005) <i>THRHR</i>
Renke S, Roestoff M and Bekink B “New Legislative Measures in South Africa Aimed at Combating Over-Indebtedness – Are the New Proposals Sufficient Under the Constitution and Law in General?” (2006) <i>International Insolvency Review</i> 91	Renke <i>et al</i> (2006) <i>IIR</i>

Renke S, Roestoff M and Haupt F “The National Credit Act: New Parameters for the Granting of Credit in South Africa” (2007) <i>Obiter</i> 229	Renke, Roestoff and Haupt (2007) <i>Obiter</i>
Robert J and McEwen SJ “Economic Issues in State Regulation of Consumer Credit” (1967) <i>Boston College Law Review</i> 387	Robert and McEwen (1967) <i>BC L Rev</i>
Roestoff M and Renke S “Debt Relief for Consumers – The Interaction Between Insolvency and Consumer Protection Legislation - Part 1” (2005) <i>Obiter</i> 561	Roestoff and Renke (2005) <i>Obiter</i>
Roestoff M and Renke S “Debt Relief for Consumers – The Interaction Between Insolvency and Consumer Protection Legislation - Part 2” (2006) <i>Obiter</i> 98	Roestoff and Renke (2006) <i>Obiter</i>
Roestoff M and Renke S “Solving the Problem of Overspending by Individuals: International Guidelines” (2003) <i>Obiter</i> 1	Roestoff and Renke (2003) <i>Obiter</i>
Roszbach K “Bank Lending Policy, Credit Scoring and the Survival of Loans” (2013) <i>Sveriges Riksbank Working Paper Series No 154</i> 1	Roszbach (2013) <i>SR Working Paper</i>
Schwartz PM “Where Do We Go From Here: The Battle Against Predatory Subprime Lending” (2008) <i>Brooklyn Journal of Corporate, Financial and Commercial Law</i> 213	Schwartz (2008) <i>Brook J Corp Fin & Com L</i>
Singer L, Best Z and Simon N “Breaking Down Wall St. Financial Reform: A Summary of the Major Consumer Protection Portions of the Dodd Frank Wall Street Reform and Consumer Protection Act” (2010) <i>Journal of Consumer and Commercial Law</i> 2	Singer, Best and Simon (2010) <i>J Consum & Com L</i>

Shay RP “The Impact of the Uniform Consumer Credit Code Upon the Market for Consumer Instalment Credit” (1968) <i>Law and Contemporary Problems</i> 752	Shay (1968) <i>Law & Contemp Probs</i>
Skeel DA “The New Financial Deal: Understanding the Dodd-Frank and its (Unintended) Consequences” (2010) <i>Faculty Scholarship Paper</i> 329 1	Skeel (2010) <i>Faculty Scholarship Paper</i> 329
Sovern J “Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed Subprime Borrowers” (2010) <i>Ohio State Law Journal</i> 761	Sovern (2010) <i>Ohio St LJ</i>
Steennot R “Protecting Borrowers through Information and Advice: The Belgian Consumer Credit Act” (2011) <i>Financial Law Institute Working Paper Series</i> 2011-06 1	Steennot (2011) <i>FLI WP</i> 2011-06
Steennot R and Van Heerden CM “Pre-Agreement Assessment as a Responsible Lending Tool in South Africa, the EU and Belgium – Part 1” (forthcoming 2017) <i>PER/PELJ</i> 1	Steennot and Van Heerden (2017a) <i>PER/PELJ</i>
Steennot R and Van Heerden CM and “Pre-Agreement Assessment as a Responsible Lending Tool in South Africa, the EU and Belgium – Part 2” (forthcoming 2017) <i>PER/PELJ</i> 27	Steennot and Van Heerden (2017b) <i>PER/PELJ</i>
Stoop PN “South African Consumer Credit Policy: Measures Indirectly Aimed at Preventing Consumer Over-Indebtedness” (2009) <i>South African Mercantile Law Journal</i> 365	Stoop (2009) <i>SA Merc LJ</i>
Stoop PN and Kelly-Louw M “The National Credit Act Regarding Suretyships and Reckless Lending” (2011) <i>Potchefstroom Electronic Law Journal</i> 67/226	Stoop and Kelly-Louw (2011) <i>PER/PELJ</i>

Sunstein C “Boundedly Rational Borrowing” (2006) <i>University of Chicago Law Review</i> 249	Sunstein (2006) <i>U Chi L Rev</i>
Sunstein C and Thaler R “Libertarian Paternalism is Not an Oxymoron” (2003) <i>University of Chicago Law Review</i> 1159	Sunstein and Thaler (2003) <i>U Chi L Rev</i>
Taylor B “New National Responsible Lending Obligations: Pt 1” (2011) <i>Australian Business Law Review</i> 464	Taylor (2011) <i>ABLR</i>
Taylor B “New National Responsible Lending Obligations: Pt 2” (2012) <i>Australian Business Law Review</i> 43	Taylor (2012) <i>ABLR</i>
Thaler R “Towards a Positive Theory of Consumer Choice” (1980) <i>Journal of Economic Behaviour and Organization</i> 39	Thaler (1980) <i>J Econ & Org</i>
Tennant S “The Incorrect Understanding of an Incidental Credit Agreement Leads to Undesirable Consequences: <i>JMV Textiles Ltd v De Chalain Spareinvest</i> ” (2011) <i>South African Mercantile Law Journal</i> 123	Tennant (2011) <i>SA Merc LJ</i>
Tsai H, Thomas L and Yeh HC “An Economic Model for Credit Assessment Problems Using Screening Approaches” (2005) <i>The Journal of the Operational Research Society</i> 836	Tsai, Thomas and Yeh (2005) <i>J Oper Res Soc</i>
Trebilcock M “The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords” (1976) <i>University of Toronto Law Journal</i> 359	Trebilcock (1976) <i>UTLJ</i>
Tuffin J “Responsible Lending Law: Essential Development or Overreaction?” 2009 <i>Queensland University of Technology Law and Justice Journal</i> 280	Tuffin (2009) <i>QUTLJJ</i>

Van Heerden CM “The Impact of the National Credit Act 34 of 2005 on Standard Acknowledgements of Debt” (2011) <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> 644	Van Heerden (2011) <i>THRHR</i>
Van Heerden CM and Beyers C “Dynamic Affordability Assessment in the Context of the South African National Credit Act 34 of 2005” (2016) <i>Journal of International Banking Law and Regulation</i> 446	Van Heerden and Beyers (2016) <i>JIBLR</i>
Van Heerden CM and Boraine A “The Money or the Box: Perspective on Reckless Credit in terms of the National Credit Act 34 of 2005” (2011) <i>De Jure</i> 392	Van Heerden and Boraine (2011) <i>De Jure</i>
Van Heerden CM and Renke S “Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-Agreement Assessment as a Responsible Lending Practice” (2015) <i>International Insolvency Review</i> 67	Van Heerden and Renke (2015) <i>IIR</i>
Vessio ML “Beware the Provider of Reckless Credit” (2009) <i>Tydskrif vir Suid-Afrikaanse Reg</i> 274	Vessio (2009) <i>TSAR</i>
Warren E “Unsafe at Any Rate” (2007) <i>Democracy Journal</i> 1	Warren (2007) <i>J Democrat</i>
Wilson T, Howell, N and Sheehan, G “Protecting the Most Vulnerable in Consumer Credit Transactions” (2009) <i>Journal of Consumer Policy</i> 117	Wilson, Howell and Sheehan (2009) <i>J Consum Policy</i>

5. ONLINE SOURCES	MODE OF CITATION
African Bank Investments Ltd <i>Lending Policy</i> available on http://www.africanbank.co.za/about-us/heritage-and-values accessed on 26 January 2017	African Bank Lending Policy (2012)

<p>Battellino R Australia's Experience with Financial Deregulation, Address to the China Governance Program, Melbourne (16 July 2007) available on http://www.rba.gov.au/speeches/2007/sp-dg-160707.html last accessed 15 May 2016</p>	<p>Battellino (Jul 2007)</p>
<p>Bank of Namibia <i>Banking System in Namibia</i> available on https://www.bon.com.na/Bank/Banking-Supervision/The-Banking-Supervision/The-Banking-System-in-Namibia.aspx last accessed 31 March 2017</p>	<p>BoN <i>Banking System in Namibia</i> (Mar 2017)</p>
<p>CompuScan Operational Countries available on https://www.compuscan.co.za/about-us/markets/ last accessed on 20 May 2017</p>	<p>CompuScan <i>Operational Countries</i> (2013)</p>
<p>Fin24 <i>African Bank Fined R20m for Reckless Lending</i> (Oct 2013) available on http://www.fin24.com/Companies/Financial-Services/African-Bank-fined-R20m-for-reckless-lending-20131003 last accessed on 26 January 2017</p>	<p>Fin24 <i>African Bank Fined R20m for Reckless Lending</i> (Oct 2013)</p>
<p>Microcapital Brief Microfinance Institutions (MFIs) in Namibia <i>See 24% Increase in Business in 2009 According to Namibia Financial Institutions Supervisory Authority (NAMFISA), Concerns Persist Regarding Irresponsible Lending</i> (December 2010) available on http://www.microcapital-brief-microfinance-institutions-mfis-in-namibia-see-24-increase-in-business-in-2009-according-to-namibia-financial-institutions-supervisory-authority-namfisa-concerns-persist-regard/ last accessed 24 March 2017</p>	<p>Microcapital Brief <i>Microfinance Institutions in Namibia</i> (Dec 2010)</p>

6. OTHERS	MODE OF CITATION
Namibia Financial Institutions Supervisory Authority Terms of Reference: The Bills Implementation Project (“Bip”) - Namfisa, Financial Institutions and Markets, Financial Services Adjudicator and Micro Lending Bills, Windhoek (28 May 2015)	NAMFISA TOR Bills Implementation Project (2015)

7. PAPERS AND CONFERENCE PAPERS	MODE OF CITATION
Battellino R and McMillan R <i>Changes in the Behaviour of Banks and their Implications for Financial Aggregates</i> , Research Department Reserve Bank of Australia Discussion Paper No 8904 (July 1989)	Battellino and McMillan RBA Research Discussion Paper No 8904 (1989)
Kekez DB <i>EU Consumer Law – The Past and the Future</i> , a paper delivered at the Scientific Cooperations 2 nd International Conference on Social Sciences, Istanbul (2-3 April 2016)	Paper by Kekez <i>EU Consumer Law</i> (2016)
Mushendami P and Kandume K <i>Investigating the Role Securitisation Could Play in Deepening the Financial Sector in Namibia</i> , <i>BoN Occasional Paper</i> (2008)	Mushendami and Kandume <i>BoN Occasional Paper</i> (2008)
Ramsay I <i>Consumer Credit Regulation as ‘The Third Way’?</i> , keynote address delivered at the Australian Credit at the Crossroads Conference, Melbourne (8 November 2004)	Address by Ramsay <i>Austl Credit</i> (2004)
The World Bank <i>Responsible Lending: Overview of Regulatory Tools</i> , Washington DC (October 2013)	Paper by the World Bank <i>Responsible Lending</i> (2013)

8. REPORTS	MODE OF CITATION
Australian Securities and Investments Commission <i>Annual Report 2015-2016</i> (2016)	ASIC <i>Annual Report 2015-2016</i> (2016)
Australian Securities and Investments Commission <i>ASIC Stops Misleading Reverse Mortgage Advertising 06-093</i> (March 2006)	ASIC <i>Media Release 06-093</i> (Mar 2006)
Australian Securities and Investments Commission <i>All We Have is This House: Consumer Experiences with Reverse Mortgages</i> , Report 109 (November 2007)	ASIC Report 109 (Nov 2007)
Australian Securities and Investments Commission <i>Review of Micro Lenders' Responsible Lending Conduct and Disclosure Obligations</i> , Report 264 (November 2011)	ASIC Report 264 (Nov 2011)
Australian Securities and Investments Commission <i>Regulatory Guide 209 Credit Licensing: Responsible Lending Conduct</i> (November 2014)	ASIC RG 209 (Nov 2014)
Bank of Namibia <i>Annual Report</i> (2013)	BoN <i>Annual Report</i> (2013)
Bank of Namibia and NAMFISA <i>Namibia Financial Stability Report</i> (March 2014)	BoN <i>Financial Stability Report</i> (Mar 2014)
Bank of Namibia and NAMFISA <i>Namibia Financial Stability Report</i> (May 2016)	BoN <i>Financial Stability Report</i> (May 2016)
Bank of Namibia and NAMFISA <i>Namibia Financial Stability Report</i> (April 2017)	BoN <i>Financial Stability Report</i> (Apr 2017)
Betti G, Dourmashkin N, Rossi RC, Verma V and Yin Y <i>Study of the Problem of Consumer Indebtedness: Statistical Aspects</i> Final Report prepared for the European Commission Contract no: B5-1000/00/000197 A report for (October 2001)	Betti, Dourmashkin, Rossi, Verma and Yin <i>Study of Indebtedness: Statistical Aspects Report</i> (2001)
Brouwers D, Chongo B, Millinga A and Fraser F <i>Microfinance Regulatory and Policy Assessment in SADC – Case Study of Namibia, Tanzania and Zambia</i> Report prepared for Finmark Trust and GIZ (December 2014)	Brouwers, Chongo, Millinga and Fraser <i>Microfinance Regulatory and Policy Assessment Report</i> (2014)

Consumers International <i>Responsible Lending: An International Landscape</i> , edited by Hubbard-Solli J (November 2013)	Consumers International Report (2013)
Report of the Committee <i>Consumer Credit</i> , chaired by Lord Crowther volumes 1 and 2 Cmnd 4596 Her Majesty's Stationery Office, London (1971)	Crowther Report (1971)
European Banking Authority <i>Guidelines on Creditworthiness Assessment</i> Final Report EBA/GL/2015/11 (19 August 2015)	European Banking Authority Report (2015)
Europe Economics <i>Study on Credit Intermediaries in the Internal Market</i> Final Report, Contract ETD/2007/IM/H3/118 (January 2009)	Europe Economics <i>Credit Intermediaries Report</i> (2009)
Feasibility (Pty) Ltd <i>Fees and Charges for Financial Services in Namibia and their Effect on the Access of the Poor and the MSME to these Services: A Concise Report for the Ministry of Finance, the Bank of Namibia and NAMFISA</i> (June 2010)	Feasibility <i>Concise Report on Fees and Charges</i> (2010)
International Financial Consumer Protection Organisation <i>FinCoNet Report on Responsible Lending: Review of Supervisory Tools for Suitable Consumer Lending Practices</i> (July 2014)	FinCoNet Report (2014)
G20/OECD <i>Task Force on Financial Consumer Protection: Update Report on the Work to Support the Implementation of the G20 Highlevel Principles on Financial Consumer Protection</i> (September 2013)	G20/OECD <i>Task Force on Financial Consumer Protection Report</i> (2013)
International Monetary Fund <i>Article IV Consultation - Press Release, Staff Report and Statement by the Executive Director for Namibia</i> Country Report No. 16/373, Washington D.C. (December 2016)	IMF <i>Namibia Article IV Consultation Report</i> (2016)

International Monetary Fund <i>Namibia Financial System Stability Assessment, Including Report on the Observance of Standards and Codes on Banking Supervision</i> Country Report No. 07/83, Washington D.C. (February 2007)	IMF <i>Namibia Financial System Stability Assessment</i> (2007)
International Monetary Fund <i>Namibia: Selected Issues</i> Country Report No. 15/277, Washington D.C. (October 2015)	IMF <i>Namibia: Selected Issues</i> (2015)
INSOL <i>International Consumer Debt Report: Report of Findings and Recommendations</i> , London (May 2001)	INSOL Report (2011)
Namibia Financial Institutions Supervisory Authority Annual Report (2010)	NAMFISA Annual Report (2010)
Namibia Financial Institutions Supervisory Authority Annual Report (2014)	NAMFISA Annual Report (2014)
Namibia Financial Institutions Supervisory Authority Annual Report (2016)	NAMFISA Annual Report (2016)
Namibia Financial Institutions Supervisory Authority Compliance Circular (22 December 2011)	NAMFISA Compliance Circular (22 Dec 2011)
Namibia Financial Institutions Supervisory Authority Quarterly Report - Second Quarter 2016	NAMFISA 2 nd Quarterly Report (2016)
Nelson RM <i>The G20 and International Economic Cooperation: Background and Implications for Congress</i> Congressional Research Service Report for Congress (October 2013)	Nelson CRS Report (2013)
Reifner U, Kiesilainen J, Huls N and Springeneer H <i>Study of the Legislation Relating to Consumer Over-Indebtedness in all European Union Member States</i> , Contract Reference No B5-1000/02/000353 (September 2003)	Reifner, Kiesilainen, Huls and Springeneer <i>Consumer Over-Indebtedness in EU Member States</i> (2003)

9. TABLE OF CASES

9.1 AUSTRALIA

Australian Securities and Investments Commission v Channic Pty Ltd (No 4) [2016] FCA 1174

Australian Securities and Investments Commission v Channic Pty Ltd (No 5) [2017] FCA 363

Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liquidation) [2014] FCA 926

Australian Securities and Investments Commission v The Cash Store Pty Ltd (in liquidation) (No 2) [2015] FCA 93

Custom Credit Corporation Ltd v Lynch [1993] 2 VR 469

Ennis v Credit Union Australia [2017] FCCA 549

Esanda Finance Corp Ltd v Spence Financial Group (Pty) Ltd [2006] WASC 177

Global Sportsman (Pty) Ltd v Mirror Newspapers (Pty) Ltd (1984) 2 FCR 87

Make It Mine Finance Pty Ltd, in the matter of Make It Mine Finance Pty Ltd [2015] FCA 393

Make It Mine Finance Pty Ltd, in the matter of Make It Mine Finance Pty Ltd (No 2) [2015] FCA 1255

Marks v GIO Australia Holdings Ltd (1998) 196 CLR 505

Perpetual Trustee Company Limited v Khoshaba [2006] NSWCA 41

Perpetual Trustees Victoria Ltd v Ford (2008) 70 NSWLR 611

Silberman v Citigroup Pty Ltd [2011] VSC 514

9.2 EUROPEAN UNION

LCL Le Crédit Lyonnais SA v Fesih Kalhan Case C -565/12 (27 Mar 2014)

9.3 NAMIBIA

Mukapuli and Another v Swabou Investments (Pty) Ltd SA 49/2011 2017 NASC (23 Jun 2017) (Reportable)

9.4 SOUTH AFRICA

ABSA Bank Ltd v COE Family Trust and Others 2012 3 SA 184 (WCC)

ABSA Bank Ltd v De Beer and Others 2016 3 SA 432 (GP)

ABSA Bank Ltd v Kganakga [2016] ZAGPJHC 59 (18 Mar 2016)

Afrisure CC and Another v Watson NO and Another 2009 2 SA 127 (SCA)

Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC 2011 2 SA 266 (SCA)

Horwood v FirstRand Bank Ltd [2011] ZAGPJHC 121 (21 Sept 2011)

National Credit Regulator v Opperman and Others 2013 2 SA 1 (CC)

Nedbank Ltd and Others v The National Credit Regulator and Another 2011 3 SA 581 (SCA)

SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases 2011 1 SA 310 (GSJ)

Standard Bank of South Africa Ltd v Kelly and Another [2011] ZAWCHC 1 (25 Jan 2011)

Standard Bank of South Africa Ltd v Panayiotts 2009 3 SA 363 (W)

10. THESES AND DISSERTATIONS	MODE OF CITATION
Brown SE <i>Consumer Credit And Over-Indebtedness: The Parliamentary Response: Past, Present and Future</i> , Thesis Submitted in Accordance with the Requirements for the Degree Doctor of Philosophy, University of Leeds School of Law (2006)	Brown Ph D Thesis (2006)
Coetzee H <i>A Comparative Reappraisal of Debt Relief Measures for Natural Person Debtors in South Africa</i> , Thesis Submitted in Accordance with the Requirements for Degree Doctor Legum, University of Pretoria (2015)	Coetzee LLD Thesis (2015)
Maghembe NJ <i>A Proposed Discharge Dispensation For Consumer Debtors in Tanzania</i> , Thesis Submitted in Accordance with the Requirements for the Degree Doctor Legum, University of Pretoria (2013)	Maghembe LLD Thesis (2013)
Meade E <i>Responsible lending: Irresponsible regulation of consumer credit in New Zealand?</i> , Dissertation Submitted in Partial Fulfillment of the Degree Bachelor of Laws, University of Otago (2012)	Meade LLB Dissertation (2012)
Renke S <i>An Evaluation of Debt Prevention Measures in terms of the National Credit Act 34 of 2005</i> , Thesis Submitted in Accordance with the Requirements for the Degree Doctor Legum, University of Pretoria (2012)	Renke LLD Thesis (2012)