



The National Credit
Amendment Act:
What's in store for
lenders and
borrowers?

Michael Shackleton



**WHAT DOES IT MEAN FOR LENDERS AND
BORROWERS?**

13 AIMS OF THE ACT AS SET OUT BY MINISTER OF TRADE AND INDUSTRY, ROB DAVIES:



- ONE: TO IMPROVE THE EFFECTIVENESS OF DEBT COUNSELLING AND DEBT REVIEW
- TWO: TO ISSUE AFFORDABILITY ASSESSMENT REGULATIONS
- THREE: TO IMPROVE THE STANDARDS OF SERVICE AND PROCEDURES FOR DEBT COUNSELLORS

- FOUR: TO REGISTER ALTERNATIVE DISPUTE RESOLUTION AGENTS
- FIVE: TO REGULATE PAYMENT DISTRIBUTION AGENCIES
- SIX: TO ENHANCE THE POWERS OF THE NATIONAL CREDIT TRIBUNAL

- SEVEN: TO PROVIDE FOR THE AUTOMATIC REMOVAL OF ADVERSE CONSUMER CREDIT INFORMATION
- EIGHT: TO IMPROVE COOPERATION AMONG REGULATORS
- NINE: TO REVIEW THE COST OF CREDIT

- TEN: TO DEAL WITH PREDATORY AND DECEPTIVE ADVERTISING OF CREDIT TO CONSUMERS
- ELEVEN: TO DEAL WITH ILLEGAL CREDIT PROVIDERS
- TWELVE: TO PROHIBIT THE SELLING AND COLLECTION OF PRESCRIBED OR EXTINGUISHED DEBT

- THIRTEEN: TO REVISE THE GOVERNING STRUCTURE OF THE NCR

IMPROVING THE EFFECTIVENESS OF DEBT COUNSELLING AND DEBT REVIEW:

- The Act provides that a consumer may apply to a debt counsellor at any time for a clearance certificate relating to the debt review. For the clearance certificate to be issued, there are precarious conditions that need to be satisfied, such as settling all arrears in the original short term and mortgage/long term agreements. This is an insurmountable task on the part of the consumer in that a consumer may be in a position to pay up all arrears and short term debt, but a long term debt such as a mortgage will take longer to settle. This means consumers cannot be rehabilitated earlier as they would still be paying the mortgage for another 15 to 20 years. The effect of this is that a consumer is not allowed to access any further credit as they are still under debt review. The NCAB seeks to alleviate this situation by allowing a consumer to be issued with a clearance certificate if the consumer has paid up all other debt and the only outstanding debt being serviced by a consumer is a mortgage agreement, provided that there are no arrears on the mortgage agreement as rearranged during the debt review.**

Section 86(10)(b) is NEW: “No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.”

Section 86(11): No longer limited to Magistrates’ Court. “If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the [Magistrate’s Court] court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.”

- INTENDED TO STREAMLINE THE PROCESS

129(4): Now, a CREDIT PROVIDER (used to read consumer) may not re-instate or revive a credit agreement after –

- **(a) the sale of any property pursuant to –**
- **(i) an attachment order; or**
- **(ii) surrender of property in terms of section 127;**
- **(b) the execution of any other court order enforcing that agreement; or**
- **(c) the termination thereof in accordance with section 123.**

Section 134. Disputes following an allegation of a reckless credit agreement may now be referred to alternative dispute resolution.

ADVANTAGES AND DISADVANTAGES

POTENTIALLY ADVANTAGEOUS:

IMPROVED COOPERATION AMONG REGULATORS:

The NCAB is amending section 17(4) to enhance cooperation between the NCR, the Financial Services Board and the Registrar of Banks. This extends only to the NCR notifying the other regulators of any investigations or action against the regulated entities. However, it does not mean that NCR or any regulator will need permission or concurrence of another in order to take action against a bank, or any credit provider for that matter. This amendment will also help achieve coordinated enforcement action to deal decisively with reckless practices within the industry.

**CLEARLY, THE BAN ON COLLECTING AND SELLING
PRESCRIBED DEBT WILL RESULT IN ANY COMPANY
THAT HAS ACCOUNTS HAVING TO CLOSE MANY OF
THEM: BANKS, RETAIL COMPANIES, ETC.**

**THE ASSOCIATION OF DEBT RECOVERY AGENTS HAS
A MEMBER WHO CLOSED 80% OF HIS ACCOUNTS
DUE TO THE BAN THAT WILL COME INTO BEING
REGARDING THE PRESCRIPTION OF DEBT.**

- **126B. (1)(a) No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished under the Prescription Act, 1969.**
- **(b) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies –**
 - **(i) which debt has been extinguished by prescription under the Prescription Act, 1969; and**
 - **(ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.”**



IMPACTS ON RECKLESS LENDING



The National Consumer Tribunal will now be able to declare a credit agreement reckless as well as confirming arrangements between consumers and credit providers where no disputes exist. These matters currently take time awaiting the normal courts, and the NCAB empowers the NCT to speedily provide redress to consumers.

CREDIT AMNESTY

- **IT IS IMPORTANT TO COMMENT ON THE DTI'S PROPOSED CREDIT INFORMATION AMNESTY, WHICH WILL HAVE A NEGATIVE EFFECT ON POOR SOUTH AFRICANS, AND WILL HAVE THE UNINTENDED CONSEQUENCE OF LIMITING ACCESS TO CREDIT, NOT EXTENDING IT.**
- **THE AMNESTY WILL REMOVE LENDERS' ABILITY TO MAKE INFORMED DECISIONS ABOUT WHETHER TO LEND MONEY TO A CUSTOMER OR NOT, BECAUSE MUCH OF THE CUSTOMERS NEGATIVE CREDIT HISTORY WILL HAVE BEEN EXPUNGED. THIS MEANS THE RISK PROFILE OF CUSTOMERS WILL DETERIORATE, AND THE RISK IS THAT LENDERS WILL SIMPLY LIMIT ACCESS TO CREDIT OR INCREASE THE PRICE OF CREDIT.**

- Paul Esselaar (Attorney) remarked that: “

“Credit bureaux must be most excited about legislation that will force credit providers to buy more of their credit reports. It’s time to buy shares in Trans Union.”

- **The NCA requires that credit providers must perform a full credit assessment before entering into a credit agreement with the customer. Such an assessment includes taking reasonable steps to ensure that the customer understands the rights, obligations, risks and costs associated with the credit agreement; and it must assess the consumer's financial position.**

TAKING THE PREVIOUS SLIDE INTO ACCOUNT, IT APPEARS THAT THE ACT WILL ULTIMATELY RESULT IN RECKLESS CREDIT LENDING TAKING PLACE.

71A: NEW SECTION: “Automatic removal of adverse consumer credit information”

- (1) The credit provider must submit to all registered credit bureaus within seven days after settlement by a consumer of any obligation under any credit agreement, information regarding such settlement where an obligation under such credit agreement was the subject of –
 - (a) an adverse classification of consumer behaviour;
 - (b) an adverse classification of enforcement action against a consumer;
 - (c) an adverse listing recorded in the payment profile of the consumer; or
 - (d) a judgment debt.
- (2) The credit bureau must remove any adverse listing contemplated in subsection (1) within seven days after receipt of such information from the credit provider.
- (3) If the credit provider fails to submit information regarding a settlement as contemplated in subsection (1), a consumer may lodge a complaint against such credit provider with the National Credit Regulator.
- (4) For the purposes of this section –
 - (a) ‘adverse classification of consumer behaviour’ means classification relating to consumer behaviour and includes a classification such as “delinquent”, “default”, “slow paying”, “absconded”, or “not contactable”; and
 - (b) ‘adverse classification of enforcement action’ means classification relating to enforcement action taken by the credit provider, including a classification such as “handed over for collection or recovery”, “legal action”, or “write-off”.
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BUT....

- **81(2)(4):** (4) For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if: (a) 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 assessment required by this section; and
- (b) a court or the Tribunal determines that the consumer's failure to do so materially affected the ability of the credit provider to make a proper assessment.

- **Research and investigations by the NCR have revealed a serious gap in how affordability assessments are conducted. Credit providers are allowed in terms of this Act to develop their own affordability assessment models but research revealed serious discrepancies in how the credit providers do this, and in most cases it appears that such assessments are not done at all. This means a lot of credit is extended recklessly, again going against the spirit and objectives of the Act. The recent investigation by the NCR in Marikana found that 100% of the lenders looked at did not adhere to the Act, thus leading to reckless credit. The NCAB therefore empowers the Minister to prescribe affordability assessment regulations to achieve uniformity and consistency in this area. It is important to also point out that consumers must be honest in providing information for the purposes of affordability assessments. If a consumer provides wrong information, the affordability assessment will give incorrect results, and reckless credit may be extended. Clearly such a dishonest consumer will battle to repay and will find it difficult to get protection under this Act.**

Ultimately, whether intentionally or not, the Bill is designed in such a way so that people who cannot pay off their debts can access credit.

PERSONAL VIEW:

**IT SHOULD BE AN OFFENCE FOR CONSUMERS
TO WITHHOLD INFORMATION PERTAINING TO
AN AFFORDABILITY ASSESSMENT.**



IMPACTS ON CREDIT AND LENDING ADVERTISING

PREDATORY AND DECEPTIVE ADVERTISING OF CREDIT TO CONSUMERS:

Complaints were raised about consumers being enticed and tempted to take credit, especially short term credit with high interest rates. These adverts come through emails, SMS, etc, and include offers of pre-approved loans and credit cards, which prey on vulnerable consumers. The Act already empowers the NCR to deal with these practices, and government has impressed on them to closely monitor and take action against these unscrupulous companies. Naming and shaming of these entities will be explored. This means more financial resources will be needed for the NCR and NCT to fulfil their mandate effectively.



BENEFITS AND SETBACKS IN FUTURE

REVIEWING THE COST OF CREDIT

- We don't know yet what the consequences will be

The Minister will within six months of the passing of the NCAB revise the caps to control the cost of credit. The NCAB introduces the capping of credit insurance. Also, costs associated with administration and collection of debt will be reviewed in consultation with the Minister of Justice and Constitutional Development. This means all persons charging fees from collection of debt arising from a credit agreement, or incidental credit must fall within the regulations and that their fees should be capped as well. The NCAB also makes it an offence for credit providers to charge above capped amounts.

WIDE RANGE OF COURT DECISIONS POSSIBLE

- We don't know yet what the consequences will be

Section 89. Sets out types of orders a court can make if a credit agreement is found to be unlawful, such as refund by credit provider, declaring the agreement as void, cancelling credit providers' rights. Before, the Act only mentioned those types of orders. Now, there's wider scope: says that "court must make a just and equitable order including but not limited to" those orders. So, orders could be more lenient or much more harsh. Wider discretion of Court to decide.

ALL CREDIT PROVIDERS MUST REGISTER

- Could be administratively onerous AND WILL HIT SMALL PROVIDERS FINANCIALLY

Allegedly and according to the Minister, the threshold of 100 credit agreements for registration as a credit provider in the Act has allowed for a loophole in that “unregistered and unscrupulous credit providers play in this space.” The NCAB requires that all credit providers must be registered, irrespective of the threshold or number of credit agreements. However, it is proposed that the requirements for registration and fees payable should be less for smaller lenders in recognition of their size. If registered, it will be easier to identify unlawful ones, shut them down and prosecute the owners.

OF CONCERN:



There is nothing in the underlined portion of the previous slide mentioned in the Act. So, the requirements and fees payable for smaller credit providers will NOT be less.

We know that small business is essential to growing employment and boosting job creation. Enough said.

SECTION 129 NOTICES BY REGISTERED MAIL

- Harsh economic impact to collect debt

•129(5), (6) & 7 ARE NEW: The notice contemplated in subsection (1)(a) must be delivered to the consumer –

•(a) by registered mail; or

•(b) to an adult person at the location designated by the consumer.

•(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

•(7) Proof of delivery contemplated in subsection (5) is satisfied by –

•(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

•(b) the signature or identifying mark of the recipient contemplated in subsection 5(b).

MY VIEW: ALL NEW AGREEMENTS SHOULD INCLUDE THE OPTION.

TO NOTE:

Section 48 (conditions of registration): Inserts further criteria to be considered when approving an application to be a credit provider, namely “affordability assessment regulations”, which the Minister will prescribe.

MORE ADMINISTRATIVE PROCEDURES FOR CREDIT PROVIDERS

- **Section 48A:** There is an intention for the Minister to prescribe a code of conduct, once the NCR has received public comment thereon.
- **Section 49: New insertion:** A penalty for late renewal of registration of registrants *must* be imposed by the NCR on a registrant who fails to pay his or her prescribed registration renewal fees within 30 days from the date on which such fees were payable.
- **Section 52:** Registration will lapse upon the last day upon which the prescribed renewal fee should have been paid in terms of section 51(1)(c).
- **Section 58A: New Section:** Voluntarily cancellation of registration requires submission of affidavits and proof that affected parties have been notified.



CRITICISMS OF THE BILL

IT HAS BEEN ALLEGED THAT EMOLUMENT ATTACHMENT ORDERS ARE EXPLOITATIVE AND HARM CONSUMERS. THIS BILL FAILS TO ADDRESS EAO'S AND SO WE MAY SEE SOME FURTHER AMENDMENTS OR A NEW ACT DOWN THE LINE.

WE MAY SIMPLY SEE SILENCE ON EAO'S. THE AIM OF THIS BILL (ALLEGEDLY) IS TO PROTECT CONSUMERS BUT THE BILL IS SILENT ON THIS ASPECT.

**THE MINISTER HAS DEFENDED THE CREDIT AMNESTY
BY SAYING THAT MANY PEOPLE CAN'T ACCESS
EMPLOYMENT DUE TO IMPAIRED CREDIT RECORDS.**

**WHY DON'T THEY JUST ATTEMPT TO RESOLVE THIS
ISSUE BY MAKING IT ILLEGAL TO USE CREDIT
RECORDS IN HIRING DECISIONS?**

**THAT WOULD ALSO BE PREPOSTEROUS. WHAT IS
NEEDED FOR BUSINESSES TO THRIVE IS AN EMPHASIS
ON THE FREE MARKET AND A REDUCTION IN
GOVERNMENT INTERVENTION.**

IT IS PROPOSED THAT THERE SHOULD BE NO CHARGE FOR REMOVING A DEFAULT JUDGMENT FROM ONE'S CREDIT HISTORY, OR INDEED, THAT THIS SHOULD OCCUR AUTOMATICALLY ONCE THE LOAN IN QUESTION HAS BEEN FULLY REPAYED. – AS OPPOSED TO THE AMNESTY.

THE PROPER RIGOROUS ENFORCEMENT OF THE NATIONAL CREDIT ACT IS STILL THE BEST WAY TO PROTECT CONSUMERS FROM ILLEGAL LENDERS.

THE NCR NEEDS TO SIGNIFICANTLY INCREASE THE NUMBER OF INSPECTORS IT CAN DEPLOY TO AREAS AROUND THE COUNTRY TO ENSURE THAT ALL LICENSED OPERATORS ARE STICKING TO THE LETTER OF THE NCA.

A BALANCE HAS TO BE REACHED WHERE RESPONSIBLE LENDERS ARE PROVIDED THE ENVIRONMENT TO OPERATE CREDIT BUSINESSES AND CONSUMERS PROTECTED AGAINST EXPLOITATION BY ILLEGAL OPERATORS.