

Insights into aspects of the National Credit Act

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1 Thresholds

Small, intermediate and large agreements

The Minister of Trade and Industry published thresholds as required in the National Credit Act to determine that

- A credit agreement is a small agreement if it is—
 - a pawn transaction;
 - a credit facility, if the credit limit under that facility falls at or below R15 000; or
 - any other credit transaction (except a mortgage agreement) or a credit guarantee, and the principal debt under that transaction or guarantee falls at or below R15 000.
- A credit agreement is an intermediate agreement if it is—
 - a credit facility, if the credit limit under that facility falls above R15 000; or
 - any credit transaction (except a pawn transaction or a mortgage agreement), or a credit guarantee, and the principal debt under that transaction or guarantee falls between R15 000 and R250 000.
- A credit agreement is 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 R250 000.

The categorisation of credit agreements as small, intermediate or large agreements has very little impact on the implementation of the Act. For the most part, this categorisation is used when determining the manner and form of a pre-agreement disclosure statement, quotation, and the statement of account. Different formats are required for small, intermediate or large agreements.

Application of the Act

The Act applies to credit granted to consumers who are juristic persons (such as companies), but only if their annual turnover falls below a certain threshold (ie small businesses). The Minister of Trade and Industry set this threshold at R1 000 000. The implication of this is that the Act does not apply to credit agreements in terms of which the consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds R1 000 000. The Act thus does not apply to those agreements where the consumer is a large business. Even though the credit provider is required to register as a credit provider in terms of the Act, the provisions of the Act will not apply to that particular agreement.

Also, if a small business enters into a large agreement, the Act does not apply: the Act does not apply to a large agreement (at or over R250 000), in terms of which the consumer is a juristic person whose asset value or annual turnover is below R1 000 000. This case is slightly different to the case above. Here the consumer is a small business, but it enters into a large agreement – in this case the provisions of the Act do not apply.

Please note that these provisions only have a bearing on the 'size' of the consumer, and does not apply to the 'size' of the credit provider. The Act will apply to ALL credit providers, irrespective of their size. Businesses should ensure that they train their staff on the application of the Act, and also ensure that they flag those instances where the Act will/will not apply.

The Act will apply to ALL credit providers – whether they are required to register or not. Thus, if a credit provider has less than 100 agreements on their books, or the total outstanding debt is less than R500 000, the credit provider will not be required to register as a credit provider with the

National Credit Regulator – but the Act will nevertheless apply to all agreements entered into by the credit provider.

2 Pre-scoring

Pre-scoring and pre-approval of consumers

The issue of pre-scoring is not uncomplicated and without contention. Pre-scoring occurs when credit providers do a credit check (look at a consumer's credit record), and on the basis thereof determine whether or not they would like to extend credit to the consumer. Pre-scoring is usually followed by an invitation to a consumer to apply for credit. Pre-approval is where credit providers *approve* consumers for credit on the basis of their credit records (no additional affordability assessment is done).

The National Credit Act determines that consumer credit information may be used for purposes permitted or required by the Act. Pre-scoring does not appear to be prohibited by the Act, and it can be argued that pre-scoring falls within the ambit or purpose of the Act. Thus, it is conceivable that credit providers may pre-score and/or pre-approve consumers without a consumer's consent. For example, a clothing retailer may inform a consumer that, on the basis of pre-scoring, he may qualify for a credit facility with a credit limit of R10 000. The consumer is then invited to apply for the credit, during which process a full affordability assessment will be done. Credit may/may not be extended, based on the outcome of the affordability assessment.

However, the consumer's consent is required when a credit provider wants to set a credit limit for the supply of goods (e.g. fertiliser to a farmer), services (e.g. cell phone account) or utility (e.g. electricity and water). A consumer's consent is not required when a credit provider sets the credit limit on a credit facility (e.g. credit card or store card).

3 Quotations

Quotations for small, intermediate and large agreements

A credit provider cannot enter into a credit agreement unless he has given the consumer a quotation in the prescribed form (See Form 20 for small agreements, and Form 20.1 for intermediate and large agreements in the Regulations published in terms of the National Credit Act).

In summary, the quotation should contain the following information:

Credit advanced / value of goods or services provided on credit	R
Instalment, including interest, fees & credit life insurance, excluding optional insurance	R
Deposit, deducted from credit advance	R
Number of instalments
Instalments payable - <i>specify: monthly / weekly / other</i>
Total all instalments, including interest, fees & credit life insurance, excluding optional insurance	R
Initiation fee, which will be added to the credit advanced:	R
Annual Interest Rate%
Monthly service fee, included in instalment	R.....
Credit life insurance, included in instalment	R.....

A quotation must be valid for five days after the date on which the quotation is presented. It should be noted that this quotation refers to the **cost of credit**, and not the actual good or service for which credit is sought. If a consumer wants to buy a motor vehicle on credit, the credit provider has to present the consumer with a quotation. This quotation refers only to the cost of credit (interest

rate, initiation fee and monthly service fee), and does not apply to the actual motor vehicle. Thus, the credit provider (or dealership, retailer etc.), as the case may be) need not keep the particular item such as the motor vehicle, for a period of 5 days.

However, if credit is extended for the purchase of an item, with limited availability, the credit provider may state that the quotation provided is subject to the continued availability of the item during the 5 day period.

A quotation delivered to a consumer may be in a paper form, or in a printable electronic form.

4 Advertising practices

Content of advertisement

The National Credit Act requires certain types of information to be included in any advertisement where credit is being advertised, or any goods or services are being advertised for purchase on credit. In the main, the advertisement should not be misleading, and should disclose all costs involved.

If an advertisement makes reference to a monthly instalment, repayment amount, or any other cost of credit, the advertisement must also disclose the following:

- instalment amount;
- number of instalments;
- total amount of all instalments, including interest, fees and compulsory insurance;
- interest rate percentage; and
- residual or final amount payable (if any).

Thus, where an advertisement states that certain goods may be purchased on credit at a monthly instalment of R100, the advertisement should also say how many instalments, interest rate applicable, give an indication of the fees that would be charged, etc.

If an advertisement refers only to the *availability of credit*, and no reference is made to costs, interest rates or monthly instalments, no further disclosure of cost of credit, interest rate percentage or monthly repayment is required. This would apply, for instance, where an invitation to put to consumers to purchase a particular item, and the advertisement states that consumers may apply for credit or that credit is available.

Where phrases such as “cheap credit”, “affordable credit”, or “low cost credit”, or any wording that has substantially the same meaning are used, specific information related to the following should be provided

- instalment amount;
- number of instalments;
- total amount of all instalments, including interest, fees and compulsory insurance;
- interest rate percentage; and
- residual or final amount payable (if any).

The provisions of the Act related to over-indebtedness and reckless credit requires that consumers should not be misled into taking up credit that they cannot afford. Phrases such as “low cost credit” might be construed as misleading, and therefore the Act requires credit providers to explain such phrases by providing complete information as to the true cost of credit.

The provisions in the Act on interest determine that there may not be a varying interest rate during the life of a credit agreement, except if the variation is linked to an acceptable reference rate (such as the prime lending rate). The implication of this is that credit providers will no longer be able to advertise products as “first six months free” or “0% interest for first year”, etc.

When expressions such as “loan guaranteed”, “pre-approved” or similar statements are used in a direct solicitation, no credit assessment or check after the consumer accepted the offer would

potentially be required. These types of phrases should not be used to mislead consumer into believing that they are eligible for credit without a credit check, when the credit provider plans to do a further assessment once a consumer has accepted the offer.

None of the following statements or phrases, or any wording that has substantially the same meaning, may form part of any advertisement or direct solicitation for credit - "no credit checks required", "blacklisted consumers welcome" or "free credit".

If an advertisement discloses only the interest percentage (or the maximum and minimum rates where a range is applicable) and no reference is made to other costs of credit, no further information needs to be disclosed. However, the advertisement must indicate that an initiation fee and service fee will be charged (if applicable).

Required format for advertisements

Where required information needs to be disclosed (see above), such as

- instalment amount;
- number of instalments;
- total amount of all instalments, including interest, fees and compulsory insurance;
- interest rate percentage; and
- residual or final amount payable (if any) ...

Print

... the information must be of no smaller font size than the *average font size* used in the advertisement, and must be displayed together. This generally means that the information pertaining to the cost of credit should not be tucked away in small print at the bottom of an advertisement. Credit providers will no longer be able to use phrases such as 'terms and conditions apply'. Also, the font size should be such that it is no less prominent than the main message of the advertisement. Depending on the content of the advertisement, this might mean that less product related information can be provided, in order to allow sufficient space for the cost related information.

Television

... the disclosure may be a combination of visual and audio disclosure provided that *equal prominence* is given to all the information required, equivalent to the prominence given to all other elements of the advertisement. Thus, if a voice-over is used to deliver the main product related message, the required credit cost information may be in visual form, but should not be any less prominent. Likewise, where part of the message is presented in visual form and part in audio form, the same can apply to the credit related information. Presenting information in a quick and rushed manner at the end of an advertisement will not meet the requirements of the Act.

Audio

... audio advertisements must provide prominence to all the information *equivalent* to the prominence given to all other elements of the advertisement. The same rules will apply to audio advertisements.

These provisions might have cost implications for advertisers, as existing advertisements will have to be amended or replaced to meet the requirements of the Act. Also, advertisers might require more space or airtime to deliver the main product related message and give equal prominence to the required credit information.

5 Marketing practices

Negative option marketing

The National Credit Act outlaws negative option marketing. Negative option marketing occurs where a credit provider makes an offer to the consumer, on the basis that the offer is accepted unless the consumer declines the offer. Example: A bank sends a consumer a credit card with a credit limit of R10 000. Unless the consumer returns the card, he or she will be held liable for the related costs (initiation fee and monthly service fee).

The prohibition against negative option marketing relates to 3 instances

- Where a credit provider makes an offer to *enter into a credit agreement*, on the basis that the agreement will automatically come into existence unless the consumer declines the offer.
- Where a credit provider makes an offer to *increase the credit limit under a credit facility* (credit card or store card), or induces a person to accept such an increase, on the basis that the limit will automatically be increased unless the consumer declines the offer – this would apply for example where a consumer has a store card at a clothing retailer, and the credit provider wants to increase the credit limit on that store card.
- Where a credit provider makes a proposal to *alter or amend a credit agreement*, on the basis that the alteration or amendment will automatically take effect unless the consumer rejects the proposal. This would be applicable, for example, where a credit provider informs the consumer of an increase in the monthly service fee or the interest rate, and accepts that if the consumer does not respond, the amendment will be effective.

An *agreement* entered into as a result of negative option marketing is void and unenforceable. This means that the credit provider has no legal basis to enforce any provision of the agreement – it is as if the agreement was never entered into in the first place. Similarly, a *provision* of a credit agreement entered into as a result of negative option marketing, is an unlawful provision and void. This means that that particular provision does not form part of the agreement. When interpreting the agreement the court may disregard the provision and interpret the agreement without the unlawful provision or alter the provision to make it lawful.

Marketing options and register

When a credit provider and a consumer enter into a credit agreement, the credit provider must present the consumer with the following options and afford the consumer an opportunity to select any of those options:

- The consumer may choose to be excluded from any—
 1. telemarketing campaign that may be conducted by or on behalf of the credit provider;
 2. marketing or customer list that may be sold or distributed by the credit provider; or
 3. any mass distribution of email or sms messages.
- The consumer may also decline the option of pre-approved annual credit limit increases as provided for in the Act (Section 119 determines that a credit provider may implement an automatic annual increase in a credit facility limit (limit on a credit card or store card). The consumer may choose not to be subject to such an annual increase).

Credit providers will have to amend their agreements to provide for these marketing options. They should also implement a system to ensure that the choices are recorded and that effect is given to it.

A credit provider must maintain a register of all options selected by consumers (in written or electronic format) and must not act in a manner contrary to an option selected by a consumer. The records contained in the register must be maintained until the consumer closes the account.

Door to door selling of credit

Door to door selling of credit is prohibited by the Act. A credit provider may not, generally, enter into a credit agreement at a private dwelling or at a consumer's workplace, unless he or she was invited by the consumer. Other instances where credit agreements may be entered into at the workplace include where an employer invited a credit provider to the workplace, or where an agreement with an appropriate trade union was made.

The Act includes a five business day cooling off period in relation to all credit agreements that are entered into away from the business premises of the credit provider. In other words, the consumer is entitled to terminate the credit agreement within 5 business days after signature, if the agreement was concluded off site.

6 Reckless credit

What is reckless credit?

The National Credit Act aims to increase access to credit to as many consumers as possible, while simultaneously preventing over-indebtedness. One of the mechanisms introduced by the Act to counter over-indebtedness, is the concept of reckless credit. The Act obliges the credit provider to conduct a proper assessment of each consumer's ability to meet their obligations, taking reasonable steps to investigate and evaluate the consumer's:

- understanding and appreciation of the obligations of the proposed agreement, and
- their ability to meet those obligations in a timely manner.

Failure to conduct such an assessment might lead to a setting aside of the consumers obligations or a suspension of the credit agreement. However, if the court is satisfied that the consumer failed to fully and truthfully answer any question for information, the court will not declare credit to be reckless.

In order to meet the requirements of the Act, and to avoid entering into a reckless credit agreement, the credit provider has to ensure that the consumer understands and appreciates the risks, costs and obligations under the agreement, and needs to conduct an affordability assessment to ensure that the consumer will be in a position to meet their obligations under the proposed agreement.

Understanding the terms of the agreement

The content of the Pre-Agreement Statement (required in terms of section 92 of the Act) should provide the consumer with sufficient information to ensure the he or she understands and appreciates the obligations under the agreement. In summary, the Pre-Agreement Statement should contain, for example, at least the following information:

- Credit advanced or the value of goods or services provided on credit;
- Instalment, including interest, fees and credit life insurance, excluding optional insurance;
- Deposit, deducted from credit advanced;
- Number of instalments;
- Instalments payable - *specify: monthly / weekly / other*
- Total of all instalments, including interest, fees & credit life insurance, excluding optional insurance;
- Initiation fee, which will be added to the credit advanced;
- Annual Interest Rate;
- Monthly service fee, included in instalment;
- Credit life insurance, included in instalment.

In those instances where there are special or unusual risks or obligations (for example, where a loan is secured by a pension fund), special care should be taken to ensure that the consumer understands these risks. In these instances it is proposed that the credit provider explains the special risks to the consumer.

Affordability assessment

An affordability assessment should be done to ensure that the credit provider is satisfied that the consumer has the ability to meet his obligations in a timely manner. The National Credit Regulator has indicated that credit providers may use the content of Form 16 of the Regulations made in terms of the National Credit Act, as published in the Government Gazette No 28864, as a basis for such an assessment. In brief, the content of Form 16 relates to the following:

- Personal details, including:
 - name, initials and surname;
 - identity number, if the consumer does not have an identity number, the passport number and date of birth;
 - postal and physical address;
 - contact details.
- All income, inclusive of employment income and other sources of income.
- Monthly expenses, for example:
 - taxes
 - unemployment insurance fund
 - pension
 - medical Aid
 - insurance
 - court orders
 - other (specify)
- List of all debts, disclosing monthly commitment, total balance outstanding, original amount and amount in arrears (if applicable), for example:
 - home loans
 - furniture retail
 - clothing retail
 - personal loans
 - credit card
 - overdraft
 - educational loans
 - business loans
 - car finances and leases
 - sureties signed
 - other (specify)
- Living expenses, for example:
 - groceries
 - utility and continuous service
 - school fees
 - transport costs
 - other (specify)

In order to verify some of the information provided by the consumer, the credit provider may conduct a credit check with a registered credit bureau, and may also consult the National Credit Register, once the Register is established.

Consequences

The court may declare an agreement to be reckless in any of 3 instances:

1. Where the credit provider *failed to conduct an assessment* as required by the Act, irrespective of what the outcome of such an assessment might have concluded at the time;
2. Where the credit provider, having conducted an assessment, entered into the credit agreement with the consumer despite the fact that the information available to the credit provider indicated that the *consumer did not generally understand or appreciate* the consumer's risks, costs or obligations under the proposed credit agreement;
3. Where the credit provider, having conducted an assessment, entered into the credit agreement with the consumer despite the fact that the information available to the credit provider indicated that entering into that credit agreement would *make the consumer over-indebted*.

If a court declares that a credit agreement is reckless in terms of 1 or 2 above, the court may either

- set aside all or part of the consumer's rights and obligations under that agreement, or
- suspend the force and effect of that credit agreement.

If a court declares that a credit agreement is reckless in terms of 3 above, the court may

- suspend the force and effect of that credit agreement until a date determined by the Court, and
- restructure the consumer's obligations under any other credit agreements – such a restructuring might entail the lengthening of the term of the agreement and a reduction in the monthly payment by the consumer.

The consequences for a credit provider, should a credit agreement be declared reckless in terms of the Act, are severe. If an agreement is *set aside*, the credit provider will have no legal right to claim either payment for any outstanding amount, or the return of goods purchased on credit in terms of the agreement. If the agreement is suspended, for the duration of the suspension, the

- the consumer is not required to make any payment required under the agreement;
- no interest, fee or other charge under the agreement may be charged to the consumer, and
- the credit provider's rights under the agreement are unenforceable.

After a suspension of the force and effect of a credit agreement ends all the respective rights and obligations of the credit provider and the consumer under that agreement are revived, and are fully enforceable, and 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.

Thus, credit providers have to ensure that they do not enter into and agreements with consumers that might be classified as reckless credit. It is proposed that credit providers

- keep a record (even if it is in electronic form) of the affordability assessment and the pre-agreement disclosure statement; and
- consider including a declaration/statement in the affordability assessment, to be signed by the consumer, where the consumer declares that he
 - understands the costs, risks and obligations contained in the agreement, and
 - that he fully and truthfully answered all requests for information.

7 Insurance

Principles underlying provisions pertaining to insurance

The provisions of the National Credit Act pertaining to insurance were necessitated by some of the current practices employed by certain credit providers and insurers: Especially low income

consumers are sometimes forced to take insurance from a predetermined insurer (consumers are given no choice as to whom the insurer should be) for the full value of the items purchased on credit (in some instances for more than the full value). In addition, all insurance premiums are capitalised upfront. This means that if insurance is taken for 2 years, all 24 monthly insurance premiums are added to the principal debt. Consumers are then expected to pay interest on the full principal debt.

The overriding principle contained in the Act is that a credit provider must not offer or demand that the consumer buy or maintain insurance that is *unreasonable*, or at an *unreasonable cost* to the consumer.

There are 3 main points to consider when applying the National Credit Act from an insurance perspective:

- The credit provider may only require insurance up to the value of the consumer's outstanding obligations (if the consumer bought a car for R80 000 and still owes R10 000, the consumer only needs insurance for R10 000).
- The consumer has the right to substitute the proposed insurance policy of the credit provider with a policy of their own choice. The credit provider cannot force the consumer to buy a specific insurance policy.
- Insurance premiums may not be capitalised upfront, but should be charged monthly or annually (i.e. no single premium capitalisation would be permissible). This means that if insurance premiums are payable on a monthly basis, it should be charged on a monthly basis. The consumer must then pay the entire premium in the applicable month. The same would apply to annual premiums (for some intermediate or large agreements).

An important principle with reference to insurance in the National Credit Act is that a credit provider may only require a consumer to have insurance up to the value of their outstanding obligations at any time during the life of the credit agreement. However, should the consumer choose to insure the full value of goods or take insurance for more than the value of outstanding obligations, he is free to do so.

Types of insurance

A credit provider may require a consumer to maintain *credit life insurance* (up to the value of the consumer's outstanding obligations). In addition, the credit provider may require either—

- in the case of a mortgage agreement, *insurance cover in respect of the immovable property* that is subject to the mortgage (this may, however, not exceed the full asset value of that property); or
- in any other case, *insurance cover against damage or loss* of any property, (also, not exceeding, at any time during the life of the credit agreement, the total of the consumer's outstanding obligations to the credit provider in terms of their agreement).

Choice

The National Credit Act provides consumers with the right to choose their own insurer. When the credit provider proposes to the consumer the purchase of a particular policy of credit insurance, the consumer must be given, and be informed of, the right to waive that proposed policy and substitute a policy of the consumer's own choice. Should the consumer exercise the right to select an insurance policy of the consumer's own choice, there is very little intervention by the Act – the Act does not interfere in the way in which the insurance policy is set out of the level of insurance the consumer buys. In essence, the credit provider may require the consumer to provide the credit provider with the following written instructions —

- requiring and permitting the credit provider to pay any premiums due under that policy during the term of the credit agreement on behalf of the consumer as they fall due, and to bill the consumer for the amount of such premiums;
 - on a monthly basis for small and intermediate agreements; and
 - on a monthly or annual basis for large agreements.

- to the insurer, naming the credit provider as a loss payee under the policy up to the settlement value at the happening of an insured contingency, and requiring the insurer, if an insured event occurs, to settle the consumer's obligation under the credit agreement as a first charge against the proceeds of that policy at any time during the term of the credit agreement. Example: A consumer buys a lounge suite on credit for R5000. He still owes R3000. The consumer has insurance against damage or loss in the amount of R4000 (remember, the consumer is only obliged to insure the outstanding amount, but may choose to insure for more). If the lounge suite is stolen, the insurer has to first pay the credit provider whatever amount was still outstanding in terms of the credit agreement (R3000), and then pay the remainder to the consumer (R1000).

When the consumer chooses to purchase a particular policy as proposed by the credit provider, such policy must provide for payment of premiums by the consumer—

- on a monthly basis in the case of small and intermediate agreements; or
- on a monthly or annual basis in the case of large agreements (in the case of an annual premium the premium must be recovered from the consumer within the applicable year).

The credit provider must further —

- disclose to the consumer the cost of the insurance, and the amount of any fee, commission, remuneration or benefit received by the credit provider – the credit provider must set out the cost of insurance, indicating the premium, the service fee (if applicable), the commission of the insurer (if applicable), any commission paid to the credit provider by the insurer (if applicable), etc.;
- explain the terms and conditions of the insurance policy to the consumer and provide the consumer with a copy of that policy – this should be done prior the consumer signing the insurance agreement;
- not add any surcharge, fee or additional premium above the actual cost of insurance arranged by that credit provider, and
- be a loss payee under the policy up to the settlement value at the occurrence of an insured contingency only and any remaining proceeds of the policy must be paid to the consumer.

8 Varying interest rate

Condition for variable interest rate

The National Credit Act determines that a credit agreement may provide for the interest rate to vary during the term of the agreement, but only if the variation is by fixed relationship to a reference rate stipulated in the agreement. This may for instance be the case where a credit provider determines that the interest rate applicable to the credit agreement will be 'prime lending rate minus 2%'.

In terms of this provision of the Act, credit providers will not be allowed to market, or enter into credit agreements which state, for instance:

- '0% interest for first 6 months'
- 'Low interest for 1st year'
- 'Start paying in 6 months'

It should be noted that the reference rate used to determine the varying interest rate must be the same as that used by that credit provider for any similar credit agreements currently issued by it.

9 *In duplum* rule

Common law *in duplum* rule

The common law *in duplum* rule determines that *interest* that accrues during the time that a consumer is in default under a credit agreement may not exceed the unpaid balance of the principal debt at the time that the default occurs. In practice this means that if a consumer

borrowed R5 000 and defaulted when he still owed R4 000, the credit provider may continue to charge interest on the outstanding amount, but only until the accumulated interest reaches R4 000. However, although the accumulated interest will never exceed R4 000, the credit provider is not prohibited from charging costs and fees until the consumer has paid off the entire debt.

New in duplum rule

The National Credit Act amended and codified the *in duplum* rule in section 103(5). The rule was extended to also apply to costs and fees, in addition to interest. Thus, the 'new' *in duplum* rule determines that, despite any provision of the common law or a credit agreement to the contrary, the *amounts* that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs. This means that if a consumer borrowed R12 000 and defaulted when he still owed R10 000, the credit provider may continue to charge interest and fees, but only until the accumulated interest and fees reach R10 000. The consumer will thus never be liable for more than R20 000 (R10 000 outstanding principle debt plus R10 000 accumulated interest and fees).

The amounts which may accrue during the time that the consumer is in default are:

- an initiation fee;
- a service fee;
- interest;
- cost of any credit insurance;
- default administration charges; and
- collection costs.

10 Surrender of goods

Consumer may surrender goods at any time

The National Credit Act provides for a procedure in terms of which the consumer may, at any time during the life of a credit agreement notify the credit provider that he wishes to terminate the agreement. If the credit agreement is an instalment agreement, a secured loan or a lease (for example where furniture was bought on credit from a furniture store, or a motor vehicle was bought on credit from a motor dealership), the consumer has to surrender to goods to the credit provider for the goods to be sold. This arrangement does not apply to credit facilities, thus, if clothing was bought using a store card, the consumer may not surrender the clothing in terms of this provision.

The goods should be delivered to the credit provider's place of business during normal office hours, or at such time and place as agreed to between the consumer and the credit provider. **Note:** the goods must be returned to the business premises of the *credit provider* – where goods were purchased from a merchant or dealership, and credit was provided by a separate institution, the goods should not be returned to the merchant or dealership, but rather to the credit provider.

Within 10 days of receiving the notice to terminate the agreement or the goods, the credit provider has to inform the consumer, in writing, of the estimated value of the goods. The consumer may, within 10 days after receiving this notice, withdraw his notice to terminate the agreement and resume possession of the goods. However, if the consumer does not respond, the credit provider must proceed to sell the goods as soon as practicable for the best possible price. (It would be good if the credit provider can show that the price obtained was reasonable).

The credit provider is entitled to deduct from the proceeds of the sale any expenses he reasonably incurred in connection with the sale. The credit provider should then write to the consumer, informing him of:

- the settlement value of the agreement immediately before the sale;
- the gross amount realised on the sale;

- the net proceeds of the sale after deducting the credit provider's permitted default charges and reasonable costs allowed; and
- the amount credited or debited to the consumer's account.

11 Enforcement and debt counselling

Impact of debt counselling on enforcement process

When a consumer is in default, the credit provider may draw the default to the notice of the consumer and propose that the consumer refer the credit agreement to:

- a debt counsellor;
- alternative dispute resolution agent;
- consumer court; or
- ombud with jurisdiction;

in an attempt to resolve any dispute under the agreement or to develop and agree on a plan to bring the payments under the agreement up to date.

Although a credit provider is not obliged to send such a letter to the consumer, it should be noted the credit provider may not commence any legal proceedings to enforce the agreement before it has sent this letter. This requirement will not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order. If the consumer does not respond to the letter within 10 business days, or if the consumer rejects the credit provider's proposal, the credit provider may proceed with enforcement.

Where a consumer is in default under an agreement that is being reviewed by a debt counsellor, the credit provider may give notice to terminate the review, at any time, at least 60 days after the consumer applied for the debt review. Once such a notice has been given, the credit provider may resume enforcement procedures. The credit provider should receive notice from the debt counsellor of a consumer's application for debt review within 5 days of the application. It is proposed that credit providers effect a systems change to record this fact and to alert them as soon as the 60 day period expires (in effect, the debt counsellor will have to engage the credit provider during a 30 day period after notice was given to all credit providers of the consumer's application for debt counselling).

It has been suggested that the credit provider informs a consumer of his right to engage the services of a debt counsellor as soon as he defaults – this might lead to an early resolution of potential disputes or a payment plan for the consumer to pay his debt, or might prevent eventual delays in the 'normal' enforcement process, should the credit provider decide to go this route.

The introduction of the debt counselling procedure led to a lengthening of the enforcement process. Credit provider has to ensure that they account for the longer credit enforcement process by amending their risk management policies and procedures accordingly.

Debt counselling process

In simple terms, the process to be followed by a debt counsellor is as follows:

- the consumer applies for debt counselling;
- the debt counsellor has to inform all credit providers and credit bureaux (by fax, registered mail or e-mail) of the application within 5 business days after receiving the application;
- the debt counsellor has to make a determination (of either over-indebtedness and/or reckless credit) within 30 business days after receiving the application;
- the debt counsellor has to inform all credit providers and credit bureaux of the outcome of the assessment within 5 business days of completing the assessment:
 - consumer's application for debt review was rejected, or

- consumer's application for debt review was successful and the debt obligations are in the process of being restructured, or
- consumer's debt obligations have been restructured and a court / Tribunal order has been issued
- All credit bureaus are advised to update the abovementioned consumer's record, within 5 days of receipt of this notice.

The debt counselling process should be concluded within 40 business days. However, if this process is not concluded within 60 business days, the credit provider may give notice to terminate the debt counselling process and proceed to enforce.