

COMMENTS ON THE CONSUMER CREDIT BILL

16 November 2023

This document was prepared by several experts in Law (including International Trade Law), Economics, Business Management, Corporate Governance, Risk Management, Financial Management, Public Governance and Futures Studies.

This document was funded by voluntary contributions from members and supporters of EPRA.

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EXECUTIVE SUMMARY

The proposed Consumer Credit Bill in Namibia presents a robust framework for safeguarding consumer rights and regulating credit practices. Key provisions focus on confidentiality, responsible lending, empowering consumers to challenge adverse reports, and declaring unlawful credit agreements that breach prescribed norms. Prohibiting excessive charges, the bill ensures fair pricing and transparent cost structures for credit transactions.

Addressing interest rates, the legislation sets limits and allows for variation only under specified conditions. A crucial aspect is the protection afforded to consumers in microlending transactions, allowing a cooling-off period and enabling termination within five business days.

Emphasizing the right of consumers to rescind credit agreements, the bill outlines specific procedures for collections, repayments, and debt enforcement. It requires credit providers to follow due processes before commencing legal proceedings.

The legislation broadly establishes a balanced approach to dispute settlement, directing certain issues to court and others to Consumer Credit Regulators. The enforcement mechanism includes on-site inspections, offering a proactive means of ensuring compliance.

Despite the withdrawal of the Financial Services Adjudicator Bill, the Consumer Credit Bill addresses the need for independent adjudication and highlights the importance of subsequent regulations and standards. Concerns are expressed about the workload of regulatory bodies and the potential lack of independence in dispute resolution. The right of Credit Consumer Regulators to impose huge administrative penalties, and enforce same as civil judgements without due process, is a concern, and likely unconstitutional.

In conclusion, the Consumer Credit Bill sets a comprehensive foundation for responsible credit practices, protecting consumers and promoting fair and transparent dealings in the Namibian credit landscape but there are some areas of concern that can be improved upon as set out in this report.

1. Introduction

A modern economy cannot exist without growth, and growth cannot happen without credit. It is therefore no exaggeration to say that consumer credit is the backbone of economic growth. In recent years, there has been significant movement towards consolidating Namibia's patchwork of consumer credit laws and regulations. A new draft Consumer Protection Bill ("CCB") has now been circulated for public comment. The CCB aims to:

"consolidate, harmonise and reform the laws regulating the provision of credit and credit agreements; to establish the Consumer Credit Regulators; to provide for the regulation of credit providers, credit bureaus and debt collectors; to provide for the regulation of credit agreements in terms of which movable and immovable goods are purchased on credit, services are rendered on credit and the borrowing of money; to provide for the limitation and disclosure of interest, costs, fees and other charges levied in respect of the provision of credit; to provide for improved standards of consumer protection; to promote responsible lending and borrowing practices and market conduct; to repeal the Usury Act, 1968, the Credit Agreements Act, 1980, and the Microlending Act, 2018; and to provide for related incidental matters".

There is no doubt that Namibia's current consumer credit regulatory framework is outdated and needs reform. The whole ecosystem around consumer credit is a dynamic environment. It is rapidly evolving and will continue to do so. Digitalization brings new opportunities (and risks). There is a global trend towards "responsible lending", and South Africa comprehensively overhauled its consumer credit regulations 23 years ago with the adoption of the National Credit Act 35 of 2005 (which became law in 2007). Namibia is therefore behind the curve when it comes to an overhaul of its consumer credit laws. This is about to change.

In Namibia, high levels of household debt and low levels of financial literacy continue to co-exist in an uneasy alliance. The Bank of Namibia ("BON") released its latest Financial Stability Report in April 2023. The BON report finds Namibia's financial system to be generally sound and resilient. However, consumer debt remains relatively high and a concern. The ratio of household debt to disposable income was 77.9 percent in 2022. An excessive increase in household debt (especially non-mortgage-backed debt) usually suggests that consumers are under financial

strain. Any significant external or internal shock (there is no shortage of geopolitical tensions) can easily tip us over the edge and lead to financial contraction, especially in an inflationary environment with high interest rates and suboptimal pro-growth economic policies. All of this suggests that the introduction of consolidated consumer credit legislation in Namibia is both timely and necessary.

Whilst there is broad agreement that consumer credit needs at least some form of regulation, the trick, as always, is to balance competing interests. Too much regulation stifles financial innovation. It also acts as a brake on economic activity because the cost of providing credit to consumers rises (which makes it unaffordable for those who need it most, as the pool of available capital shrinks). Too little regulation means predatory lending practices might take hold (with devastating consequences for consumers, especially those with low financial literacy). It is therefore critically important that the CCB strikes the right balance between (i) encouraging responsible lending practices, (ii) promoting sustainable credit growth and (iii) protecting vulnerable consumers.

2. Methodology

The purpose of this paper is to provide concrete, practical, and constructive comments on the CCB. It is not intended as an exhaustive treatise on consumer credit laws. Apart from the risk of boring the reader to death, it serves no useful purpose to pontificate on all the finer (often very technical) aspects of consumer credit legislation. A more sensible approach is to focus on the big picture (the regulatory and policy environment), global best practices, and the most important provisions of the CCB.

For an excellent paper on Namibia's need to embrace responsible lending practices, consumer credit historical background, and comparative analysis of relevant consumer credit laws see the 2017 paper submitted by Ndatega Asheela in fulfillment of her LLD degree at the University of Pretoria's faculty of law.¹ Her research topic was "*Towards responsible lending in Namibian consumer credit law: a comparative investigation*". Her research informed parts of our report hereunder, with credit to her excellent research.

¹ Available at <https://repository.up.ac.za/handle/2263/65659>

For ease of convenience, we have divided our report into four parts:

In Part 1 we will broadly describe what is considered best practice when it comes to consumer credit laws. Part 2 briefly examines Namibia's current consumer credit regulatory environment (pre-CCB). Part 3 involves desktop research to benchmark the more important elements of EU and South African consumer credit regulations. We will conclude in Part 4 by analyzing and commenting on the most important provisions of the CCB and suggesting improvements, where necessary.

In this report, we often provide examples from personal experience. When referring to "we", we refer to the writer(s) of this report, and not to EPRA itself.

PART ONE

3. WHAT IS CONSIDERED "BEST PRACTICE" IN CONSUMER CREDIT LAWS?

The lubricant of any financial system is its credit market. For the average consumer "credit" typically means access to borrowed funds involving house mortgages, credit card facilities, lay-by purchases, other hire purchase agreements, car loans, overdrafts, and microlending (including so-called "payday loans"). Most consumers are unlikely to read large technical documents or laws numbering hundreds of pages. They are however very interested in the bottom line, namely:

- (i) Do I qualify for a loan?;
- (ii) How much money can I borrow?;
- (iii) What will be the total cost of my loan (i.e. are there any hidden fees, balloon payments, or other escalation costs)?;
- (iv) When do I have to repay my loan? and
- (v) What happens if my financial circumstances change and/or I am unable to repay?

Credit providers, on the other hand, are mainly concerned with the regulatory environment (more red tape generally means more compliance which means more costs) and the borrower's

ability to repay (sometimes, sadly, even more so than the borrowers themselves). They would typically want some type of collateral or security to mitigate against the risk of borrower default. This is not always possible (especially for microloans) and reflects in typically higher interest rates (to cover the increased risk of non-payment).

It is therefore important that both consumers and credit providers know what they are getting themselves into, and that the relevant laws and regulations are transparent, fair, and easy to understand (especially for those with low financial literacy).

Different experts have different opinions on the optimum regulatory balance for consumer credit (ranging from no regulation to communist-style central planning, to socialist overregulation, to everything in between). At a minimum, consumer credit laws and regulations should contain the following key elements (courtesy of Chat GPT):

Disclosure and Transparency: Lenders must provide clear and comprehensive information about the terms and conditions of the credit, including interest rates, fees, and repayment schedules.

Mandatory disclosure requirements: To ensure that consumers are aware of the true cost of credit and can make informed decisions.

Fair Lending: Laws should prohibit discrimination in lending based on factors such as race, color, religion, national origin, sex, marital status, age, and more.

No discrimination: Lenders should use underwriting criteria that are fair and not discriminatory.

Interest Rate Caps: Many jurisdictions have laws that cap the maximum interest rates that lenders can charge, especially in the case of high-cost, short-term loans.

Debt Collection Practices: Laws should regulate the conduct of debt collectors, preventing harassment, false statements, and other abusive practices.

Easy to Understand: There should be clear rules on the collection process, including disclosure of rights and responsibilities, which can help protect consumers.

Responsible Lending: Lenders should assess a borrower's ability to repay a loan, ensuring that credit is extended to individuals who can reasonably be expected to meet their obligations.

Sensible Limits: There should be limits on rollovers or renewals of certain high-cost loans that can prevent borrowers from getting trapped in debt cycles.

Consumer Education: Promote financial literacy and consumer education programs to empower individuals to make informed financial decisions and avoid predatory lending.

Credit Reporting: Ensure that credit reporting agencies and lenders accurately report and maintain credit information and provide consumers with access to their credit reports.

Regulation and Oversight: Effective enforcement mechanisms and regulatory bodies are essential for ensuring compliance with consumer credit laws.

No unlawful practices: Regular audits and supervision of lenders can help identify and prevent unlawful practices.

Dispute Resolution: Establish processes for resolving disputes between consumers and lenders, such as through mediation or the courts.

Consumer Rights: Laws should clearly define the rights and protections available to consumers in credit transactions. These rights may include the right to cancel a loan within a certain period, the right to receive loan documents, and protection against unfair terms.

There is no universal agreement on what constitutes “best practice” when it comes to consumer credit laws. However, there is broad agreement that healthy financial markets, responsible lending practices, transparent loan and repayment provisions, clear laws, adequate

enforcement provisions, and consumer financial literacy go hand in hand to ensure a healthy and sustainable consumer credit environment.

PART TWO

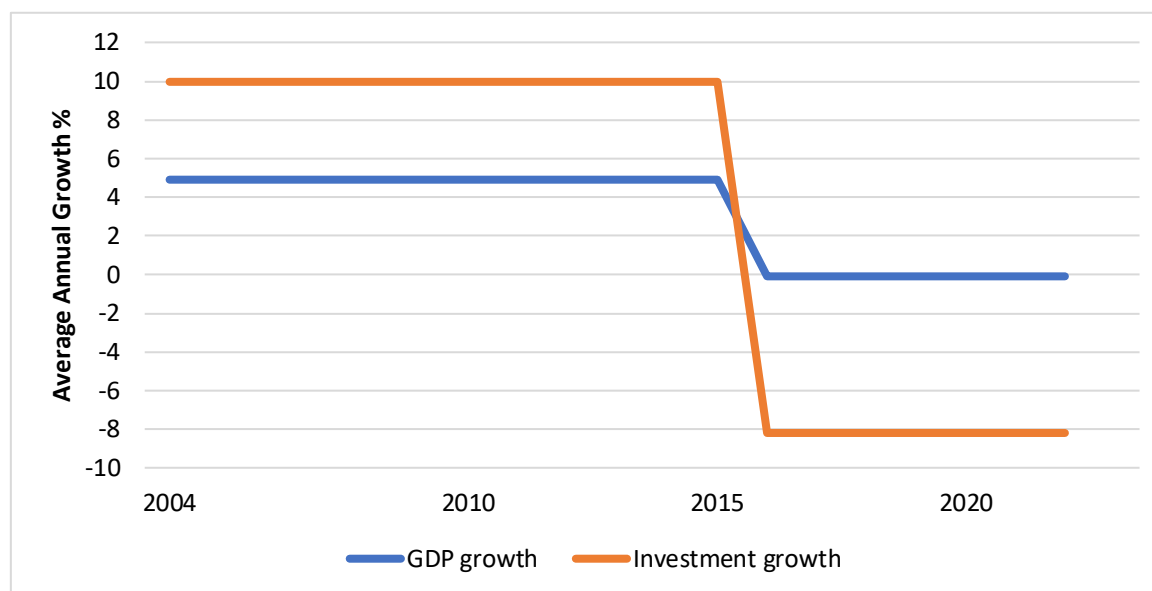
4. NAMIBIA'S CURRENT CONSUMER CREDIT ENVIRONMENT

The Executive Board of the International Monetary Fund (“IMF”) concluded its Article IV consultation with Namibia in December 2022. The IMF report projects that domestic credit to the private sector is expected to stay subdued well into 2027 (Page 3, IMF Country Report No. 22/364). It also highlights that “higher-than-anticipated fuel and food prices, a global economic slowdown, weaker export commodity prices, and further tightening in global financial conditions could exacerbate inflation, worsen imbalances, and undermine” Namibia’s post-Covid recovery process. The Russian invasion of Ukraine last year and the recent escalation of hostilities between Israel and Hamas in the Gaza strip (with the very real possibility of further regional or global escalation) illustrate just how quickly seemingly “far-away” regional geopolitical actions can have local consequences. As a small regional economy, Namibia is particularly vulnerable to global economic shocks.

The IMF, quite correctly, places great emphasis on sustainable and inclusive private sector-led growth in Namibia. This, of course, assumes a policy environment that is conducive to private sector-led growth. Sadly, Namibia has too many sub-optimal policies when it comes to promoting the private sector. Recent examples of flawed bills and directives that hamper economic growth include the National Equitable Economic Empowerment Bill (NEEEB) which has been in the works since 2016, the Investment Promotion Act (2016), the Investment Promotion and Facilitation Bill (2021), new regulations in 2022 to the Affirmative Action Act and Employment Services Act, and more. The graph below shows just how materially economic and investment growth declined by comparing the annual averages for the period 2004 to 2015 to the period 2016 to 2022. The picture would look far worse if the extraordinarily high diamond production in 2022 would be excluded.²

² GDP growth in 2022 was 7.2%, but if mining is excluded the economic growth would be just over 2%.

Average annual GDP growth and average annual investment growth for two periods: 2004 to 2015 and 2016 to 2022



Graph created by Rainer Ritter. Source – Namibia Statistics Agency

Any comments on the CCB should be seen against the backdrop that Namibia needs a conducive (i.e. pro-growth, business-friendly) policy environment for the private sector to be the engine of growth. Simply put, without a healthy private sector there can be no meaningful or sustainable economic growth. Unfortunately, apart from the sub-optimal bills and laws stated above (which hamper private sector growth), there are plenty of examples where government also actively crowds out private sector across industries, by employing taxes and levies paid by private sector, to set up and expand government owned entities which compete with private sector. We have reported on the inevitable, undesirable results of this flawed ideology in several other reports, which can be found at <https://www.epra.cc/downloads/>

Namibia’s current consumer credit framework still relies heavily on the Usury Act 73 of 1968, the Credit Agreements Act 75 of 1980, and the Microlending Act 7 of 2018. The proposed CCB will do away with these laws and consolidate Namibia’s consumer credit market under one (main) legislative umbrella. We will therefore spend no further time analyzing the “old” laws and rather focus on the proposed “new” law. Before we do so, however, it is useful to look at what other jurisdictions have done in terms of consumer credit laws and regulations, notably the European Union and South Africa.

PART THREE

5. BENCHMARKING CONSUMER CREDIT LAWS

5.1. The European Union

The European Union (“EU”) consists of 27 member states (covering a population of approximately 450 million). It is not too hard to imagine that harmonizing any laws across the EU is no small feat. Consumer credit laws are certainly no exception. Arguably the single most significant regulation that deals with consumer credit in the EU is Directive 2008/48/EC (“the Directive”).

5.1.1 What are the objectives of the Directive?

The Directive addresses consumer credit agreements and is designed to harmonize the legal framework for consumer credit across EU member states. The primary purpose of this directive is to enhance consumer protection in the area of consumer credit and to create a common set of rules and standards for such credit agreements throughout the EU. Key objectives include:

Consumer Protection: The directive aims to ensure that consumers have access to clear and transparent information about credit agreements. This information includes the total cost of credit, interest rates, and other relevant terms and conditions.

Responsible Lending: It encourages responsible lending practices by requiring creditors to assess the creditworthiness of consumers before granting credit. This helps prevent over-indebtedness and protects consumers from borrowing beyond their means.

Standardization: By setting common rules for consumer credit agreements, the directive promotes consistency and fairness across the EU. This makes it easier for consumers to compare credit offers from different lenders.

Right of Withdrawal: The directive provides consumers with the right to withdraw from a credit agreement within a specified period without incurring any penalties.

Early Repayment: It establishes rules on early repayment, ensuring that consumers can repay their credit agreements early, if they wish, and that any associated costs are reasonable and transparent.

Advertising and Marketing: The directive includes provisions regarding advertising and marketing of credit agreements, with the aim of preventing misleading or aggressive advertising practices.

Consumer Information: Creditors are required to provide consumers with standardized pre-contractual information that makes it easier for consumers to understand the terms and conditions of the credit agreement.

Right to a Cooling-Off Period: It gives consumers a cooling-off period during which they can reconsider and cancel the credit agreement without incurring costs.

Overall, the Directive seeks to strike a balance between ensuring that consumers have access to credit while protecting them from unfair lending practices and promoting transparency in the consumer credit market within the European Union. The Directive is part of the broader efforts to create a single market for financial services within the EU and enhance consumer rights in financial transactions.

In November 2020, the European Commission presented its report (the “Report”) on the implementation of the Directive. The Report makes it quite clear that it does not seek to “encourage consumers to take more credit, but rather to provide them with all necessary information to reflect and compare offers before taking a credit and to give them rights in case they change their mind.”³ We set out below some of the key observations contained in the Report:

³ The Directive and the Report are respectively available for download at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008L0048-20190726> and <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0963>

5.1.2 What consumer credit transactions are covered by the Directive?

It is important to note that the Directive does not cover all consumer credit transactions. It applies to consumer credit between EUR 200 and EUR 75 000, such as loans granted for personal consumption, overdrafts and credit cards, as well as unsecured loans above EUR 75 000 the purpose of which is the renovation of a residential immovable property. The Directive does not apply to certain specific types of consumer credit (e.g. certain interest-free credits, certain leasing agreements).

5.1.3 How have EU Member States reacted to the Directive?

As expected, the Directive triggered substantial reforms in the consumer credit environment in most Member States. Member States had to either develop and set up an entirely new legal framework applicable to the credit market or amend their existing legislation. In general, the Directive succeeded in establishing harmonized provisions because national laws in Member States cannot substantially diverge from what is set out in the Directive (with some discretionary flexibility).

5.1.4 Has the Directive been a success?

The results are mixed but broadly positive. There has generally been a high level of consumer protection and increased harmonization of the relevant consumer credit provisions across the EU. Notably, the provisions related to the rights of withdrawal (consumers can unilaterally cancel a credit agreement within 14 calendar days without giving any reasons), early repayment, and the regulation of the Annual Percentage Rate of Charge (the total cost of the credit to the consumer expressed as an annual percentage of the total amount of credit) have been particularly effective. Standardized information forms have also proven beneficial because they keep consumers informed and avoid (or limit) information clutter and blind spots.

More work however needs to be done in terms of creditworthiness assessments and credit databases. There has also been a cost implication because implementing the Directive generally requires more monitoring, compliance, and enforcement efforts. The consensus however is that

these costs are justified because the benefit (of implementing the Directive) to consumers outweighs the costs to public authorities (in any event shouldered by the taxpayers) and credit providers. There is also a feeling that more work needs to be done to align the Directive with mortgage credit directives and the EU's General Data Protection Regulation.

5.1.5 What emerging trends can affect the Directive?

The Report flags new emerging consumer habits and emerging market developments triggered by digitalization as areas that require increased monitoring (and possibly adapting some of the provisions contained in the Directive). There is no doubt that consumer habits are changing because of increased digitalization. The trend points to more digitalization in the future, not less. There is ongoing debate on whether the current definition of "creditor" (meaning a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession) is sufficient.

New emerging products are short-term high-cost credit, revolving credit, and peer-to-peer lending. The Report states that "some of these new products currently do not fall within the scope of the Directive. At the same time, some of them pose particular risks for consumers as charges related to them may be either very high from the outset or increase rapidly over time, thus bearing the risk of sending the consumer into a spiral of debt."

Consumer consumption habits are also changing. There is a greater emphasis on the "smoother and faster process of obtaining the credit rather than the location or identity of the creditor". All of this shows that consumer credit laws need to continuously evolve to keep pace with new developments.

5.1.6 Pre-contractual information

The Directive requires credit providers, prior to entering into a credit agreement, with "the information needed to compare different offers and take an informed decision whether to conclude a credit agreement. Such information is provided by means of the Standard European

Consumer Credit Information form which includes key details such as type of credit, Annual Percentage Rate of Charge, number and frequency of payments, and total amount owed”.

The Report finds that “stakeholders acknowledge that the Standard European Consumer Credit Information form has had a positive impact on consumer protection by providing them with information in an easily understandable and well-structured format” and that “compliance among credit providers with the provision on pre-contractual information is generally high”. Having said that, there is some concern that the Standard European Consumer Credit Information form works better on paper formats than with electronic devices. This will need to be remedied.

5.1.7 Conclusion on the EU

The broad consensus is that the Directive succeeded in its twin aims of (i) enhancing consumer protection and (ii) harmonizes the EU consumer credit market. It is not perfect though, and more work needs to be done to tighten some of its definitions, expand the scope of the Directive (to include zero-interest loans, payday loans, leasing agreements that do not impose an obligation to purchase, or agreements with pawnshops) and possibly the thresholds, and generally to keep up with emerging trends. There is also some fragmentation across the EU in respect of creditworthiness assessment and credit databases.

Article 8 (1) of the Directive states that

“Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement”.

Different Member States have implemented further provisions on the creditworthiness assessment and access to databases. Some have imposed stricter obligations (beyond a solvency check) and require consumer credit providers to ask for specific documents from consumers.

There is therefore some fragmentation in terms of how credit databases are to be accessed and this has a negative effect on cross-border transactions. Overall, the impact of the Directive has been largely positive, and Namibia can take some valuable lessons from its implementation. We will address these below.

Turning closer to home, we will examine the impact of South Africa's National Credit Act and see whether it holds any lessons for Namibia.

5.2. South Africa

The National Credit Act 34 of 2005 ("NCA") came into force in South Africa in 2007. The NCA also established the National Credit Regulator ("NCR") which regulates the South African consumer credit market. Credit providers must register with the NCR.

5.2.1 Scope of the NCA

The NCA has very broad application and generally applies to everyone in the provision of consumer credit supply chains who deals at arm's length (excluding certain entities such as the SA Reserve Bank, juristic persons with income above a certain threshold, organs of state and, subject to waivers, credit providers located outside South Africa).

Generally, banks, retailers, micro-lenders, credit bureaus, debt counselors and businesses or individuals who provide credit are all regulated under the NCA (with few exceptions). Commercial property lending by banks is generally not covered under the NCA in circumstances where the borrower is a juristic person whose asset value or annual turnover at the time of the agreement equals or exceeds ZAR 1,000,000 (meaning most mortgage agreements are generally excluded). The position is different if the borrower is a natural person. The NCA also does not apply where there is no arms-length transaction (for example where a husband lends money to

his wife). Agreements where company directors lend money to their company are also not covered.

The NCA guarantees and protects certain consumer rights, including the right to apply for credit (which does not mean a credit provider is obliged to provide credit), not to be discriminated against, have information in an understandable language, be given written reasons (and documents, if applicable) for any credit being declined, and confidentiality.

The NCA also provides that certain rights cannot be waived. For example, it is not possible to insert clauses into a credit agreement that mislead the consumer, or that provide that a consumer waives his right to have his debt restructured. Similarly, a consumer cannot contractually agree that he/she is deemed to have received goods before it has actually been received. The credit provider is also not entitled to keep a consumer's bank cards, pin numbers, or identity documents in his possession. Any unilateral changes made by a credit provider to a credit agreement will also have no effect (unless the consumer agrees in writing to the changes).

5.2.2 Combatting Reckless and Predatory lending

One of the main aims of the NCA was to curtail the practice of “reckless” and “predatory” lending. Reckless lending goes further than irresponsible lending. It can probably be equated to reckless disregard for serious harm under English Common Law⁴. Schmulow, et al further argue that, even though predatory lending is more difficult to define, it goes beyond robust marketing practices. Section 80 of the NCA deals with “reckless credit”. It obliges a credit provider to undertake reasonable steps to conduct certain pre-agreement assessments.

5.2.3 Combatting Negative Marketing

The NCA prohibits certain negative marketing practices. The aim is to prevent consumers (especially those with low financial literacy) from being “trapped” by unfair or predatory marketing practices. Examples of prohibited behavior includes providing credit the consumer

⁴ Schmulow, Andrew and Woker, Tanya Ann and van Heerden, Corlia, South Africa's National Credit Act: Successes (and Failures) in Preventing Reckless and Predatory Lending (January 23, 2018).

did not apply for (so called negative option marketing), marketing products at a consumer's home or place of work (with certain exceptions, for example where the consumer invited the credit provider to his home).

5.2.4 Credit Bureau Information

As stated above, the NCA also regulates credit bureaus (who retain relevant information related to a consumer's credit worthiness). The NCA makes it easier for consumers to challenge the information retained by a credit bureau. In the past, it was exceedingly difficult for aggrieved consumers to change invalid information retained by a credit bureau (so called "blacklisting"). An aggrieved consumer can now write to a credit bureau to challenge any information he/she feels is "wrong". The credit bureau then must "hide" that information from public view and is given 20 days to obtain proof that the information is correct and valid. The onus is on the credit bureau to prove that the information is correct. If it cannot do so within 20 days of having been notified that information is wrong, then it must remove the information. Any dispute can be referred to the NCR.

There is also an obligation on anyone who provides information to a credit bureau to ensure the information is correct. Credit providers must generally notify consumers of they send adverse information (for example a record of payment default) to a credit bureau. The consumer then has an opportunity to challenge the accuracy of the information. The idea is that a consumer should not be "blackmailed" or "ambushed" by incorrect information provided to a credit bureau of which he/she is unaware.

5.2.5 Costs

The NCA aims to provide consumers with a transparent overview of the cost of entering into a credit agreement. For example, the interest rate must be reflected at the time of entering into a credit agreement. There are also limits on so called "initiation fees" (a fee charged by the credit provider to the customer for entering into a credit agreement). The initiation fee cannot exceed 15% of the loan amount. Also, the customer should have the option of paying the initiation fee

upfront (without it becoming part of the loan and attracting interest). Interest rates on the loan are also capped.

Certain other “hidden” costs are also prohibited under the NCA. For example, a credit provider cannot charge a collection cost which is more than the court tariff allows. The “*in duplum* rule” also applies, which means that interest in arrears cannot exceed the outstanding capital balance once a consumer is in default.

5.2.6 Credit Insurance

The NCA also regulates credit insurance. Credit insurance is generally required by the credit provider to cover default by the borrower (and paid for by the borrower). There are many examples of unsuspecting consumers being surprised by the amount of credit insurance costs which can exceed the loan amount. The credit insurance may generally not exceed the consumer’s outstanding obligation. The NCA also prohibits a credit provider from “forcing” a customer to take up its chosen credit insurance. The consumer should have the option of choosing its own insurance.

5.2.7 National Consumer Tribunal

Apart from the National Credit Regulator (“NCR”), the NCA also established a National Consumer Tribunal (“NCT”) to adjudicate disputes arising under the Act.

5.2.8 Affordability Assessment

Credit providers are required to do an affordability assessment before entering into a credit agreement. The aim is to place an obligation on the credit provider to make sure that the borrower can afford to take up the loan (and, crucially, has the ability to repay) before it is offered. Credit Bureaus need to retain certain information such as the consumer’s credit history, repayment history, income (past and present), assets and liabilities, information related to credit fraud, and other relevant data to ensure that the borrower is eligible to enter into a consumer credit agreement.

5.2.9 Debt Counseling

The NCA makes provision for debt counseling to assist consumers who are over-indebted. Debt counselors must be registered with the National Credit Regulator. Enforcement proceedings to recover outstanding debt generally only commence after debt counseling fails. A dispute about a debt counseling proposal can be adjudicated by a magistrate's court (which can extend the terms of the agreement or otherwise make decisions to restructure the debt).

5.2.10 Early Termination

The NCA provides that a consumer can terminate a credit agreement early. Generally, no early termination penalty may be charged by the credit provider for credit agreements under ZAR 250,000. For larger amounts, an early termination fee may be charged (but it should not exceed 3 months of interest).

5.2.11 Default

The NCA sets out what happens after a consumer defaults. Prior to the NCA, some unsavory credit providers (especially micro-lenders) employed a variety of tactics to collect debt. This included keeping customers' bank cards (and pin numbers) to withdraw funds in the event of a default. The NCA makes it clear that a credit provider cannot keep a customer's bank card or pin number or identity documents to "force" payment. Generally, the procedure after default (normally once the customer is 20 days in arrears) is to notify the consumer of the default and to propose debt restructuring (typically with the help of a debt counselor). A credit provider cannot generally approach the court before the debt default procedures set out in the NCA have been exhausted. Debt counselors may become involved if the consumer voluntarily approaches them, or if the credit provider triggers the referral to a debt counselor, or if a court orders it.

5.2.12 Complaints

Any dispute related to a credit agreement covered by the NCA should be referred to the National Credit Regulator (“NCR”). Depending on the nature of the dispute, the NCR can also refer disputes to other relevant entities, notably the NCT, the Ombudsman, or an alternative dispute resolution agent.

5.2.13 Recent Court Developments

A recent judgment by the Supreme Court of Appeal may have a profound impact on debtors and is worth highlighting. Prior to this judgment, the general view amongst collection attorneys in South Africa was that section 103(5) of the NCA effectively meant that credit providers couldn’t recover more than double the amount they loaned at the time of the debtor’s default.

The judgment in *Bayport Securitisation Ltd v University of Stellenbosch Law Clinic* (507/2020) [2021] ZASCA 156 (4 November 2021) means that this is no longer the case. The question before the Court was essentially whether collection costs include all legal costs incurred in enforcing credit agreements. The Court held that collection costs, as defined and referred to in section 101(1)(g) of the NCA, “should be given its common law meaning by drawing a distinction between the collection fees charged by an attorney prior to litigation and the costs awarded in an action to recover the debt – legal costs commence with a summons and do not as a general rule allow for pre-litigation costs to be recovered from the losing litigant – the judgment entered is for the capital sum fixed at a particular date together with interest – thus section 103(5) does not apply post-judgment”.

The net effect is that a defaulting debtor could potentially face costs far exceeding the capital amount outstanding at the time of default.

PART FOUR

6. COMMENTARY ON NAMIBIA'S PROPOSED CCB

Legislative limitations exist on the regulatory and supervisory framework governing agreements on consumer credit, and current legislation lacks robust provisions for the protection of consumers against unfair market practices.

The CCB is a collaborative exercise between various stakeholders, notably NAMFISA, the Ministry of Finance and Public Enterprises, the Bank of Namibia, the Ministry of Industrialisation, Trade and SME Development, the Financial Literacy Initiative and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ).

The CCB aims to promote fair, transparent and responsible market conduct in the consumer credit market where consumers of credit are protected. It aims to consolidate, harmonise and reform the laws regulating the provision of credit and credit agreements by –

- establishing the Consumer Credit Regulators;
- providing for the regulation of credit providers, credit bureaus and debt collectors;
- providing for the regulation of credit agreements in terms of which movable and immovable goods are purchased on credit, services are rendered on credit and the borrowing of money;
- providing for the limitation and disclosure of interest, costs, fees and other charges levied in respect of the provision of credit;
- providing for improved standards of consumer protection;
- promoting responsible lending and borrowing practices and market conduct;
- repealing outdated legislation such as the Usury Act, 1968, the Credit Agreements Act, 1980, and the Microlending Act, 2018; and
- providing for related incidental matters.

The CCB also aims to protect consumers of credit by ensuring that there is –

- no arbitrage in the regulation and supervision of different types of consumer credit and associated intermediary services;
- responsible borrowing and lending that prohibits credit granting by credit providers without conducting affordability assessments;
- fair treatment of consumers, balancing the respective rights and obligations of credit providers and consumers;
- transparency and full disclosure of information for consumers to make informed choices, and to prevent deceptive, unfair or fraudulent conduct;
- improved reporting of consumer credit information;
- a system of resolution of disputes arising from credit agreements;
- a consistent and harmonised system of debt collection and enforcement of obligations under credit agreements;
- regulation and supervision of services provided by credit providers, credit bureaus and debt collectors promoting the highest standards of conduct of business; and
- reduction and deterrence of financial crimes.

The Usury Act, 1968, the Credit Agreements Act, 1980, and the Microlending Act, 2018, will be repealed. Amendments to other legislation will be required, such as the Electronic Transactions Act, 2019, the NAMFISA Act, 2021, and the Bank of Namibia Act, 2020.

The CCB consists of nine chapters as follows:

Chapter One:	Interpretation, Purpose, Scope and Application of Act
Chapter Two:	Consumer Credit Regulators
Chapter Three:	Consumer Credit Industry Regulation
Chapter Four:	Consumer Credit Policy
Chapter Five:	Consumer Credit Agreements
Chapter Six:	Collection, Repayment, Surrender and Debt Enforcement
Chapter Seven:	Dispute Settlement Other Than Debt Enforcement
Chapter Eight:	Enforcement Of Act
Chapter Nine:	General Provisions

We have reviewed the CCB (a substantial piece of legislation running up to 162 pages) and will highlight and comment only on the most relevant sections below. All references to sections refer to the latest CCB (4th draft, dated 23 January 2023) circulated for comments. Where we recommend amendments to the CCB we underline such parts of our assessment hereunder.

6.1. Chapter One: Interpretation, Purpose, Scope and Application of CCB

6.1.1 Definitions

“Appeal board” refers to either the appeal board established by section 39 of the NAMFISA Act or the appeal board established by section 73B of the Banking Institutions Act as is relevant in the circumstances. The NAMFISA appeal board is administered by the Ministry of Finance and Public Enterprises. This is undesirable. The administration of an appeal board is crucial to its efficiency. From our experience the administration of the NAMFISA appeal board is suboptimal, and a major obstacle to finalization of cases brought to that appeal board. As an example, the disciplinary cases against lawyers, dealt with by the Statutory Disciplinary Committee (DC), is administered by the Ministry of Justice. A recent survey amongst lawyers shows major dissatisfaction with the efficiency of the DC. The core problem is the administration of the DC, by a “secretary” appointed amongst ministerial staff. The person so appointed has a massive workload within the DC (not always appreciated by the appointing authority), which he/she must perform outside of his/her normal ministerial duties. As a result, the DC has been close to dysfunction since its inception in 1995. A proposed overhaul of the Legal Practitioners Act will hopefully change the current arrangement, to bring the administration of the DC back to the statutory regulator, the Law Society.

The NAMFISA appeal board also consists of members serving part-time. We envisage that, given the volume of credit transactions entered in Namibia, the workload of an appeal board dealing with the matters in the CCB will require dedicated administrative staff, preferably permanently employed by a Consumer Credit Regulator. Alternatively, the laws governing the NAMFISA appeal board must be amended to place the administration of the NAMFISA appeal board under NAMFISA.

“Payment instrument” has the meaning ascribed to it in terms of the Payment System Management Act, 2003 (Act No. 18 of 2003). The Payment System Management Act of 2003 has been repealed and replaced by the Payment System Management Act 14 of 2023 (GN 251/2023 (GG 8171)). It came into force on 8 August 2023. This definition should be amended accordingly.

6.1.2 Scope of the CCB

The protection afforded by the CCB will extend to all natural persons who are consumers, as well as consumers who are micro, small and medium juristic persons. Consumers who are large juristic persons or public bodies (the Government and statutory bodies performing regulatory functions or functions for the benefit of the public) will not fall within the scope of the CCB.

The CCB will apply to all types of credit providers (exclusive of the Bank of Namibia), and it will apply to all credit agreements between parties dealing at arm’s length and made, or having an effect, within Namibia (with some exceptions).

In terms of section 4(1)(c) the CCB will not be applicable to a credit agreement where the principal office of the credit provider is located outside Namibia. On the face of it, this means that many consumers of credit in Namibia may find themselves without the protection this law intends to provide.

One such instance will be online credit providers, i.e. a company from South Africa providing credit via a digital platform. This will become more prevalent in the future as the number of digital banks are increasing. It is however understandable that such providers are excluded, for two reasons: (a) It is difficult (if not impossible) to have jurisdiction over foreign entities, and thus hold them accountable to Namibian laws, and (b) the consumer willingly contracts with a foreign entity, and thus willing assumes the risk of not being protected by Namibian law.

A second example is where a credit provider’s principal office is not in Namibia, but it provides credit through a branch in Namibia (and whether this is factually the case or not can become the subject of a very technical legal debate). In this example the consumer will probably unknowingly obtain credit with the transaction not being protected by the CCB. We believe this

should not be allowed. It is noted that all credit providers must register with the respective regulators, and that, for registration, the provider must have a principal office in Namibia. However, a provider who does not comply with this commits a criminal offense (only) and the consumer still does not receive the further protection provided under the CCB, as the CCB otherwise does not apply to the unregistered, foreign provider.

We commend the drafters for including incidental credit agreements in the CCB, as this was an area of uncertainty, and a source of great frustration in our law before. It is especially encouraging that the CCB now specifically clarifies that a credit provider to an incidental credit agreement may only charge fees and interest which were specifically disclosed and also accepted by the consumer before the goods or services were supplied.

6.1.3 Threshold determination and other limitations

It is understandable that the Minister should be compelled to determine thresholds no later than every five years. In our experience, however, this may not always happen, as the bureaucratic system often leads to decisions, and subsequent regulations by Ministers being made very late. We propose that a safeguard be included in the event that the Minister fails to set a new threshold by the stated deadline, either by the “old” threshold remaining in place until a new threshold is set, or the “old” threshold increasing by a specific percentage (every five years) until the Minister sets a new threshold.

6.2. Chapter Two: Consumer Credit Regulators

The two consumer credit regulators (CCRs) will be (a) NAMFISA for the non-banking credit providers, credit bureaus and debt collectors, and (b) the Bank of Namibia (BoN) for banking credit providers.

The CCRs are responsible for regulating the conduct of the consumer credit market and enforcing the CCB by, amongst other –

- registering credit providers, credit bureaus and debt collectors;

- receiving and resolving complaints concerning alleged contraventions; and
- monitoring the consumer credit market to ensure that prohibited conduct is identified, assessed, and prevented.

6.2.1 Supervisory powers of CCRs

The CCRs may, in terms of their supervisory powers, amongst other

- restrict the activities of unregistered persons;
- remove key responsible persons who are not in compliance with the CCB or no longer fit and proper;
- declare practices as irregular or undesirable and issue directives;
- issue administrative sanctions and cancel registrations;
- receive specified complaints from consumers and investigate such complaints; and
- do inspections and conduct searches.

Registrants may appeal against administrative or enforcement decisions of the CCRs, and such appeals must be directed to either the NAMFISA or BoN appeal boards, depending on the laws by which the registrant is registered, i.e. complaints on banks are heard by the BoN appeal board and complaints against non-banking financial services providers such as microlenders, are brought to the NAMFISA appeal board.

6.3. Chapter Three: Consumer Credit Industry Regulation

This chapter deals with credit providers, credit bureaus and debt collectors.

All persons who conduct business in respect of credit agreements to which the CCB applies, must apply to be registered with one of the CCRs as credit providers. All credit bureaus and debt collectors must also apply for registration as such. Legal practitioners do not have to register and they may hold themselves out as “debt collector”. The registration requirements are quite onerous, but this is probably justified given the purpose of protecting consumers. A natural

person may not register as debt collector or credit bureau, but may register as credit provider, if compliant with certain conditions.

All registrants must, in terms of administrative compliance with the CCB, amongst other:

- have a principal office in Namibia and appoint a principal officer;
- submit returns;
- not amalgamate, transfer its business or open additional branched without prior approval;
- comply with codes of conduct; and
- ensure that their managers, employees or agents are trained.

Credit bureaus must ensure data management and quality control and keep a register of credit agreements. Debt collectors must keep trust accounts. The CCRs may deregister a registrant. Every registrant must have a principal officer who will be responsible for compliance with the CCB. All registrants must provide such information as required by the applicable “standards” (to be gazetted in regulations from time to time). Registrants may only open additional branches with approval of the CCRs. Registrants are subject to stringent data management regulations, which, again, is justified given the nature of the public protection required.

The CCRs may set code of conduct by way of “standards”. Standards are issued by the CCRs and do not form part of the regulations issued by the Minister in a government gazette. Any person who operates as credit provider, debt collector or credit bureau (or any agent of such persons) who is not registered commits an offence and is liable to pay a fine not exceeding N\$5 million or imprisonment for 10 years, or both.

Certain practices by registrants can from time to time be declared “irregular” or “undesirable” and must thereafter cease, failing which the CCRs may impose administrative penalties. The CCRs have access to the premises of all registrants during normal business hours due to consent provided in the registration process.

The CCRs may issue “directives” limited to certain circumstances. The directives may include the removal of a “key responsible person”. Non-compliance may result in an administrative penalty. Generally, the CCRs may impose administrative sanctions up to a maximum amount of N\$10 million.

Such sanctions relate to non-compliance with the CCB (and all directives, regulations and codes of conduct made in terms of it), but also when, in the sole discretion of the CCRs a registrant “is undertaking, or has undertaken, an act or cause of action that may prejudice consumers or prospective consumers”. The latter instance is undesirable, as such wide, arbitrary powers, are open for abuse. A registrant can be punished for an act which is not even mentioned in the CCB, regulations, codes of conduct, or directives. This is a form of regulating outside of the statutory regulatory process and should be removed from the CCB. The risk is amplified because penalties are payable to the CCRs, and thus the CCRs have a direct financial incentive to raise administrative penalties.

It is arguably a perverse incentive which is, unfortunately, already the system in place with several other regulators such as NAMFISA and the NaCC. To appeal these penalties is an extremely time-consuming and costly exercise, both at the appeal stage, and then again often in court, where, if a review process is not the only remedy, the whole appeal process starts afresh. This in itself creates fertile grounds for abuse of public power by the CCRs. They know what an appellant will have to go through. They know the legal costs for the applicant will probably run into many millions. They know the applicant cannot obtain a cost order at the appeal board level. We state this not out of speculation, but out of experience with NAMFISA and its appeal board process.

To add insult to injury, a penalty imposed by the CCRs is given the status of “civil judgment” (section 43(3) of the CCB) without any court proceedings (and the right to a fair trial) having preceded this “judgment”. The registrant can make representations to the CCB within 30 days after having received notice that this “judgment” will be filed, but as stated, the CCB acts in its own cause, and is not an independent judicial platform. This cannot qualify as a “fair trial before an independent court or tribunal”. As the penalty is already imposed, without a fair hearing before and independent judicial platform, the only remedies available to the registrant is to

overturn the already decided upon “verdict of guilty”, before the appeal board, and if necessary, before a court. This is neither fair nor reasonable, nor does the process of finding the registrant guilty without a hearing comply with the constitutional right to a fair hearing.

To sum up the above undesirable provisions: If the CCBs are of the opinion, in their sole discretion, that a registrant acted to the “prejudice of a consumer” (without such action ever being expressly prohibited in any way before), they effectively already have a civil judgment of up to N\$10 million in their favour, which they can immediately execute, unless the registrant has very, very deep pockets to fight the decision, first through the appeal boards (which cost money to approach to begin with, with no possibility of a cost order to recover costs), and then through the High Court (the latter not being possible before the appeal board process is finalised).

This process is likely to be unconstitutional (offensive of the right to a fair trial and the right to fair and reasonable administrative action) and should be removed from the CCB. It should be replaced with a system whereby the registrant raises a defence before an independent judicial platform to assess guilt or innocence, and before a penalty is imposed.

6.4. Chapter Four: Consumer Credit Policy

6.4.1 Consumer rights and obligations of credit providers

It is commendable that the CCB introduces several transparency requirements to be complied with by credit providers, aimed at protecting the consumer. These include reasons to be provided to the consumer when credit is denied, information on adverse credit information received from a credit bureau, and the right of the consumer to receive copies of certain documents.

All consumers must be treated equally, and any form of discrimination is prohibited. A credit provider is prohibited from punishing a consumer who exercises his/her rights provided for in the CCB.

Consumers have the following rights, amongst other –

- the right to be provided with reasons for credit being refused;
- the right to information in plain language, and confidential treatment;
- the right to access and challenge credit records and information held by credit bureaus;
- the right to receive pre-agreement disclosure and the right to receive statements of account;
- a cooling-off period (in respect of some credit transactions);
- the right to rescind the credit agreement;
- the right to settle the credit agreement at any time, with, or without, notice, and the right to make early payments;
- the right to receive notice before a credit provider institutes legal action; and
- the right to complain, either to the CCRs or the court.

Credit providers must comply with the provisions of the CCB detailing prohibited conduct and other obligations. Affordability assessments are prescribed.

Credit providers may not:

- require a consumer or prospective consumer to sign any blank or incomplete documents, inclusive of an acknowledgment of debt or a consent to judgment or any document in terms of which the consumer or prospective consumer waives any legal rights during the application process or at the time of entering into the credit agreement;
- solicit or accept deposits from the public in contravention of the Banking Institutions Act;
- retain or keep in his, her or its possession, or request or demand to retain or keep in his, her or its possession, the consumer or prospective consumer's identity document, credit or debit card, bank account or automatic teller machine access card, or any similar identifying document or device;
- require disclosure by the consumer of his, her or its personal identification code or number to be used to access any credit or debit card, bank account or automatic teller machine access card or any similar device; or

- use a consumer’s personal identification code or number to access any credit or debit card, bank account or automatic teller machine access card or any similar device.

No person shall be a party to a credit agreement or any other agreement or document in terms of which or which has the effect that—

- an earlier credit agreement is cancelled and substituted by a later credit agreement and the goods or service, or any part thereof, to which that earlier agreement relates; or
- any money or other consideration paid or delivered in terms of that earlier credit agreement, serves as an initial payment in respect of the goods or service to which that later credit agreement relates.

A credit provider must, before entering into a credit agreement with a consumer or prospective consumer—

- obtain a credit report regarding that consumer or prospective consumer from a registered credit bureau;
- conduct an affordability assessment as required by section 67(2);
- allow the consumer or prospective consumer an opportunity to read the proposed credit agreement or have it read to the prospective consumer if he or she is illiterate; and
- explain to the consumer or prospective consumer the terms and conditions of a credit agreement in a language which the consumer or prospective consumer understands, if necessary with the assistance of an interpreter provided by the consumer or prospective consumer, so as to ensure that the meaning and consequences of the credit agreement are understood.

6.4.2 Confidentiality

Consumer information may only be used for the purposes allowed by the CCB. Some information may be provided to “subscribers” (clients) of credit bureaus, for specific purposes, including investigating alleged crimes, by prospective employers, and for purposes of tracing credit consumers. Subscribers must keep confidential all information received from a credit bureau

and may only use the information for purposes of decision making in the subscribers' ordinary course of business.

Credit providers have a duty to clear with a credit bureau all previous adverse reports where a consumer settled his/her debt in respect of which the reports were made. In the event of a credit provider failing to do so within 7 days, the only remedy available to the consumer, unfortunately, is a complaint to the CCRs. This process can take several months, even years, to finalise.⁵

6.4.3 Right to challenge adverse reports

Every consumer must be informed by the credit provider before an adverse report is filed with a credit bureau. Every consumer also has the right to inspect all reports at the credit bureau on him/her, and to dispute the accuracy of thereof, also to request the credit bureau to investigate the accuracy.

Furthermore, a credit bureau may not disclose adverse information which have been challenged, while such process is ongoing. This is commended, as credit providers and credit bureaus sometimes abused the secretive system that were applicable in the past, with the only remedy available to the injured consumer being an expensive application to the High Court.

6.4.4 Negative option marketing and opting out

A credit agreement cannot come into existence by mere inaction of a consumer – “if you don't opt out, an agreement is automatically concluded”. A credit provider cannot increase a credit limit unilaterally, simply because the consumer did not specifically object to the increase. This is especially prevalent in the retail credit environment and is a major driver of overindebted retail credit consumers in Namibia. The description of and prohibition against reckless credit is commended. Although the credit provider can escape liability by relying on an untruthful

⁵ We state this from personal experience, with past complaints to NAMFISA taking around 18 months to finalise. Some have never been finalised and probably do not receive any further attention from NAMFISA. It appears that when NAMFISA deals with a fairly technical matter which involves some legal / regulatory uncertainty, it tends to ignore the matter and do not take steps to bring it to finality. This leaves consumers frustrated, and also unable to approach a court because the consumer must first exhaust all internal remedies.

consumer, the credit provider still has a duty to “take reasonable steps” to assess the consumer’s financial position. If the credit provider did not take such reasonable steps, the fact that the consumer was untruthful will not be a valid excuse.

6.5. Chapter 5: Consumer Credit Agreements

6.5.1 Unlawful credit agreements

Credit agreements that do not comply with the prescriptions of the CCB can be declared unlawful, in full or part, by a competent court. No party can contract out of the obligations imposed on him/her by the CCB or by common law. Unlawful provisions include, inter alia:

- permission by the consumer to the credit provider to enter a private property to repossess any goods;
- a consent to pre-determined value of costs relating to enforcement of the agreement;
- a consent to the jurisdiction of the High Court, if the matter falls within the jurisdiction of the Magistrate’s Court, or consent to any court outside of the jurisdiction of the consumers residence or place of work, or where the goods are kept;
- undertaking to deposit with the credit provider any ID document or debit, credit, or ATM) card;
- consent to a varying rate, except if the variation is by fixed relationship to a reference rate stipulated in the agreement (i.e. prime lending rate +1%); and
- the consumer acknowledging that he or she or it has inspected any goods to which such credit agreement relates.

The latter is indeed a prevalent clause in retail credit agreements and has caused substantial headache for consumers who later found goods to be defective. This prohibition now allows consumers in such a position to more freely exercise their common law rights.

Any credit provider who makes a consumer sign an agreement that contains an unlawful provision commits an offense. This constitutes very strong protection for the consumer, for the consumer could otherwise only have to rely on the outcome of (costly) civil court proceedings.

Any prospective credit provider or his manager, agent, or employee shall not, as an inducement to enter into any credit agreement, directly or indirectly offer, give or promise any benefit to any prospective consumer unless such benefit, in the ordinary course of events, will constitute a condition of the credit agreement. This prohibits what is commonly known as “perverse incentives” and constitutes a criminal offense. Again, this is commended because perverse incentives are a major contributor to consumers becoming overindebted.

Before entering into a credit agreement a credit provider must provide a quotation setting out—

- the principal debt, and the proposed distribution of the principal debt over the repayment period;
- the interest and the proposed distribution of the interest over the repayment period;
- the amount to be paid as initial payment, if any;
- the fees, charges and costs over the repayment period;
- the total cost of the proposed agreement;
- the instalment amount and the number of instalments over the repayment period; and
- the basis of any costs that may be assessed if the consumer rescinds the contract within the five days allowed to do so.

6.5.2 Disclosure of location of goods purchased on credit

Credit providers also obtain some protection under the CCB. If ownership of goods purchased under a credit agreement have not passed to the consumer, or the credit provider has the right to repossess goods due to the consumer’s breach, then the consumer has a duty to keep the credit provider informed at all times of the location of such goods, the consumer’s residential address, the name and address of any person to whom possession of goods were transferred. A consumer who fails to do so commits an offense.

6.5.3 Prohibited charges

A registrant must not charge an amount to, or impose a monetary liability on, the consumer in respect of-

- a fee or charge prohibited by the CCB;
- a fee or charge exceeding the amount that may be charged consistent with the CCB;
- an interest charge under a credit agreement exceeding the amount that may be charged consistent with the CCB; or
- any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as allowed under section 84 of the CCB. These include:
 - an initiation fee as contemplated in section 83(1)(b), if the consumer has been offered and declined the option of paying that fee separately;
 - the cost of an extended warranty agreement;
 - delivery, installation and initial fuelling charges;
 - connection fees, levies or charges;
 - taxes, licence or registration fees;
 - subject to section 88, the premiums of any credit insurance payable in respect of that credit agreement; or
 - costs of the preparation, execution and registration of a mortgage bond.

A credit provider must not charge a consumer a higher price for any goods or services than the price charged by that credit provider for the same or substantially similar goods or services in the ordinary course of business on the basis of a cash transaction.

6.5.4 Cost of credit

A credit agreement must not require payment by the consumer of any money or other consideration, except-

- the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 84;
- an initiation fee, which—
 - may not exceed the prescribed amount relative to the principal debt; and
 - must not be applied unless the application results in the establishment of a credit agreement with that consumer;
- a service fee, which—
 - in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or
 - in any other case, may be payable monthly or annually; and
 - must not exceed the prescribed amount relative to the principal debt;
- interest, which—
 - must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and
 - must not exceed the applicable maximum prescribed rate determined in terms of section 87;
- cost of any credit insurance provided in accordance with section 88;
- default administration charges, which—
 - may not exceed the prescribed maximum; and
 - may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, and only to the extent permitted by Part C of Chapter 6; and
- collection costs, which may not exceed the prescribed maximum and may be imposed only to the extent permitted by Part C of Chapter 6

6.5.5 Interest rates

1. Subject to (5) and (6) below, the interest rate applicable to an amount in default or an overdue payment under a credit agreement must not exceed the highest interest rate applicable to any part of the principal debt under that agreement.
2. A credit agreement may provide for an interest charge to become payable or be debited at any time after the day to which it applies.

3. A credit provider must not, at any time before the end of a day to which an interest charge applies, require payment of, or debit, the interest charge.
4. A credit agreement may provide for the interest rate to vary during the term of the agreement only if the variation is by fixed relationship to a reference rate stipulated in the agreement, which reference rate must be the same as that used by that credit provider in respect of any similar credit agreements currently being issued by it.
5. Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 83(1)(b) to (g) 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. (The *in duplum* rule as referred to before)
6. In respect of a microlending transaction, the interest rate applicable to an amount in default or an overdue payment may not exceed such interest rate as may be prescribed by the Minister by regulation.

The Minister may prescribe the maximum rates of interest, fees and charges. The Minister may also prescribe the limit in respect of the cost of credit insurance that a credit provider may charge a consumer. This is also commended as exorbitant credit insurance costs offered in especially the retail credit industry (with unscrupulous partners in the short-term insurance industry) is a major concern. We have experience in this with a retailer who was only willing to sell a product on credit (worth N\$3,000 at the time) if the consumer also signs for credit insurance. The credit insurance (and other charges) amounted to over N\$12,000 (while the consumer defaulted for only one month) within the span of about a year. The consumer complained to NAMFISA. After around three years NAMFISA eventually acted, and the consumer received credit on the outstanding amount and ultimately paid around N\$6,000 to be relieved from her obligations towards the credit provider / retailer. The credit agreement itself was horribly abusive, but not as much as the mandatory credit insurance agreement. We must also mention that the retailer was never licensed to sell credit insurance. We never obtained any feedback on this issue from NAMFISA, and we understand the situation prevails. This example highlights the importance of credit consumer protection, which also deals with credit insurance, and also the risk in NAMFISA being the consumer credit regulator.

6.5.6 Cooling off period in micro-lending transactions

A microlender must allow a consumer to terminate the microlending transaction within a period of five business days after the date of the credit agreement, and if the loan amount has been advanced to the consumer, to simultaneously repay the loan amount so advanced to the microlender.

If the consumer terminates the microlending transaction within five business days and simultaneously repays the loan amount to the microlender, the microlender may only stipulate for, demand or receive from the consumer pro rata interest at the rate applicable to that microlending transaction.

6.5.7 Consumer's right to rescind credit agreement

This only applies in respect of an instalment agreement entered into at any location other than the business premises of the credit provider.

A consumer may terminate a credit agreement within five business days after the date of the agreement, by—

- delivering a written notice to the credit provider; and
- tendering the return of any money or goods, or paying in full for any services, received by the consumer in respect of the agreement.

When a credit agreement is terminated in terms of this section, the credit provider —

- must refund any money the consumer has paid under the agreement within seven business days after the delivery of the notice to terminate; and
- may require payment from the consumer for —
 - the reasonable cost of having any goods returned to the credit provider and restored to saleable condition; and
 - a reasonable rent for the use of those goods for the time that the goods were in the consumer's possession, unless those goods are in their original packaging and it is apparent that they have remained unused.

6.6. Chapter Six: Collection, Repayment, Surrender and Debt Enforcement

At any time, without notice or penalty, a consumer may prepay any amount owed to a credit provider under a credit agreement. A credit provider must accept any payment under a credit agreement when it is tendered, even if that is before the date on which the payment is due.

A credit provider must credit each payment made under a credit agreement to the consumer as of the date of receipt of the payment, as follows—

- firstly, to satisfy any due or unpaid interest charges;
- secondly, to satisfy any due or unpaid fees or charges; and
- thirdly, to reduce the amount of the principal debt.

No person may continue the collection of, or reactivate a debt under a credit agreement to which this Act applies—

- which debt has been extinguished by prescription under the Prescription Act, 1969 (Act No. 68 of 1969); and
- 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.

If the consumer is in default under a credit agreement, the credit provider—

- must draw the default to the notice of the consumer in writing and propose that the consumer discuss the default with the credit provider, within a period of at least ten business days, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
- subject to section 115(2), may not commence any legal proceedings to enforce the agreement before—
 - first providing notice to the consumer, as contemplated in paragraph (a); and
 - meeting any further requirements set out in section 115. These requirements are:

- if the consumer is in default and has been in default under that credit agreement for at least 20 business days and—
 - at least ten business days have elapsed since the credit provider delivered a notice to the consumer; and
 - the consumer has—
 - not responded to that notice; or
 - responded to the notice by rejecting the credit provider's proposals; and
 - in the case of an instalment agreement or secured loan, the consumer has not surrendered the relevant property to the credit provider.
- In addition to the circumstances above, in the case of an instalment agreement or secured loan, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if—
 - all relevant property has been sold pursuant to—
 - an attachment order; or
 - surrender of property; and
 - the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.

When summons is issued by a credit provider in proceedings in connection with, or arising from, a credit agreement that is an instalment agreement or a secured loan, he, she or it may include in such summons a notice whereby any person is prohibited from using the goods in question or removing them from the place where they are when the summons is served, or allowing them to be used or removed from such place, by any person other than the plaintiff or a deputy sheriff or a messenger of court

6.7. Chapter Seven: Dispute Settlement Other Than Debt Enforcement

Several disputes must be directed directly to court, and several disputes must be directed to the CCRs. This is prescribed in section 122. The CCRs have the powers to investigate complaints under their jurisdiction as per the CCB.

6.8. Chapter Eight: Enforcement of the CCB

The CCRs may, without prior notification to the registrant concerned, authorise an inspector appointed under the CCB to conduct an on-site inspection of the business and affairs of the registrant. A person conducting an on-site inspection may, at any time during business hours enter and search the premises of the registrant.

A person who is authorised to enter and search premises may—

- enter upon or into those premises and require the production of the accounts, accounting and other records, books, documents or other items of the registrant or related to the inspection;
- search those premises for the accounts, accounting and other records, books, documents or other items of the registrant or related to the inspection;
- open, or cause to be opened any strong room, safe or other container in which the inspector suspects the accounts, accounting and other records, books, documents or other items of the registrant or related to the inspection are kept;
- search any person on those premises if there are reasonable grounds to believe that the person has personal possession of an article or document that has a bearing on the investigation;
- examine any accounts, accounting and other records, books, documents or other items on or in those premises that has a bearing on the investigation;
- request information or explanations about any accounts, accounting and other records, books, documents or other items of the registrant or related to the inspection from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;
- take extracts from, or make copies of, any accounts, accounting and other records, books, documents or other items of the registrant or related to the inspection on or in the premises that has a bearing on the investigation;
- use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to—
 - search any data contained in or available to that computer system; and
 - reproduce any record from that data;

- seize any output from that computer for examination and copying;
- attach and, if necessary against issue of a receipt, remove from the premises for examination and safekeeping anything that has a bearing on the investigation; and
- require the registrant to produce, at a specific time and place, the accounts, accounting and other records, books, documents or other items of the registrant or related to the inspection.

If the relevant CCR, after considering the results of an inspection in terms of the CCB, is satisfied that it is reasonable to do so, the expenses incurred by and the remuneration of, an inspector may be recovered from the registrant.

A complaint in terms of the CCB may not be made to the relevant CCR or a court more than three years after—

- the act or omission that is the cause of the complaint; or
- in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

6.9. Chapter Nine: General Provisions

The Consumer Credit Regulators may, by notice in the Gazette, issue such standards that may be considered necessary or advisable for the due carrying out of the provisions of the CCB and to achieve the purpose and intent of the CCB.

Before issuing a standard, the relevant CCR must—

- obtain the approval of its board;
- publish the proposed standard in the Gazette for public comment;
- give the public not less than 30 calendar days after the date of publication of the proposed standard to make representations in writing to the relevant CCR with respect to the proposed standard; and
- take any such representations into account in determining whether to issue the standard as originally published or in a modified form.

7. General

The withdrawal from Parliament of the Financial Services Adjudicator Bill has impacted on the CCB in that no provision could be made for disputes to be adjudicated by an objective tribunal or ombudsman. The CCRs must deal with consumer disputes as far as is provided for in their enabling legislation. We are of the opinion that an independent, dedicated Financial Services Adjudicator would have been a better option for amongst others, the following reasons:

- The legal department of especially NAMFISA is overloaded with work, and any matter that must be dealt with by that department takes ages to reach finality, to great frustration of consumers.⁶
- The financial services regulators are not independent adjudicators if they stand to benefit financially from their own rulings.⁷ The lack of independence is a distinct, and probably untenable disadvantage for all registrants who are parties to complaint proceedings.
- A Financial Services Adjudicator would issue rulings. In South Africa the equivalent of this office has often in the past ruled against the financial services regulator itself. It is unlikely that NAMFISA or BoN will for instance “rule” against themselves. So, they set the law, and also rule on their own law. This is undesirable.

The MFPE is empowered to issue regulations, while the Consumer Credit Regulators are empowered to issue standards on operational matters aiding the implementation of the law. At this stage, none of the subordinate legislation to the Bill has been drafted. The work on subordinate legislation will start at a later stage pending the completion of material drafting work on the CCB itself.

⁶ We state this from personal experience with complaints to NAMFISA.

⁷ To as much as N\$10 million per complaint.

8. Conclusion

In crafting the CCB, Namibia has taken a significant stride toward fostering a credit environment that prioritizes consumer protection and responsible lending practices.

The CCB's emphasis on confidentiality, the right to challenge adverse reports, and the prohibition of unlawful credit agreements underscores a commitment to protecting consumers from potential abuses. By curbing excessive charges and regulating interest rates, the legislation promotes equitable pricing structures and guards against predatory lending practices.

Crucially, the CCB acknowledges the vulnerabilities in microlending transactions, instituting a cooling-off period and empowering consumers with the right to terminate agreements within a specific timeframe. The provisions related to debt enforcement strike a delicate balance, encouraging communication and resolution before resorting to legal action.

The dispute settlement mechanisms, channeling specific issues to CCRs, demonstrate a commitment to providing accessible avenues for conflict resolution. However, there is some concern about the regulatory independence of the CCRs. There may be concerns about potential conflicts of interest when regulators are responsible for both setting the law and ruling on its implementation. The administrative penalties that essentially become civil judgments without due process is draconian, and most likely unconstitutional.

There is also some concern in relation to delays in legal proceedings and dispute resolution processes, especially given the workload of regulatory bodies, which is expected to increase once the CCB is passed. Lengthy resolution times could impact the effectiveness of consumer protection measures.

Looking forward, the successful implementation of this legislation hinges on the subsequent drafting of regulations and standards. It is imperative that these complementary components be developed with precision, addressing operational intricacies to ensure the effective execution of the CCB. This should be paired with increased financial literacy and consumer education. The effectiveness of the CCB will depend significantly on consumers being aware of

their rights and responsibilities. If there are insufficient efforts to educate consumers about the provisions of the CCB, they may not be able to fully exercise their rights or protect themselves from unfair practices. Addressing these concerns through continuous review, stakeholder engagement, and potential amendments to the CCB can help strengthen its effectiveness in safeguarding consumers and promoting responsible credit practices in Namibia.

In conclusion, the CCB is a welcome step towards improving Namibia's consumer credit landscape. It is a comprehensive legislative framework designed to protect consumers and regulate credit practices, but there are certain areas that may raise concerns or warrant careful consideration as discussed in this report.