

# The Marketing of Consumer and Mortgage Credit as a Responsible Lending Tool: A Comparison of South African, European and Belgian Law: Part 1

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## Abstract

The vulnerability of prospective credit consumers to over-committing their resources and the inherent dangers posed by credit advertising in particular necessitate the proper regulation of credit marketing. It is therefore not unsurprising that responsible marketing forms part of the responsible lending (and borrowing) measures of various jurisdictions – including South Africa and the Member States of the European Union – with the aim of preventing the extension of credit to consumers who cannot afford it. In this article the credit marketing laws that the South African, European (mainly in the Consumer Credit and Mortgage Credit Directives) and Belgian legislators have enacted are considered and compared, with a focus on the information to be included in advertising, prohibited advertising and prohibited marketing techniques. The ultimate aim is to determine whether South African law contains sufficient guarantees to protect consumers with respect to credit marketing and its consequences.

## Keywords

Marketing; consumer credit; compulsory information; prohibited advertising; prohibited marketing techniques; civil remedies; administrative sanctions.

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## 1 Introduction

According to Makin, Mawrey and Walton<sup>1</sup> "[e]xperience has shown that in the field of consumer credit the prospective debtor<sup>2</sup> is peculiarly vulnerable to over-commitment of his resources...". A lack of adequate information enabling the prospective debtor to make an informed choice, to compare different credit forms and to shop around for cheaper credit, reliance on misleading, incorrect or insufficient information affecting the debtor's ability to make informed decisions, and the exerting of pressure on the debtor to utilise credit are mentioned as contributory factors, which should therefore be avoided.<sup>3</sup> In regard to the inherent dangers posed by credit advertising in particular, it has been remarked<sup>4</sup> that "[t]he stringent restrictions on advertising ... were designed to prevent intending borrowers from being gulled into burdensome loan contracts by attractive advertisements offering easy terms".<sup>5</sup> The proper regulation of credit marketing is further necessitated by the extensive use of marketing – often by means of distance communication, such as the internet and e-mail – to advance the sale of consumer and mortgage credit to consumers, linked with the fact that credit marketing creates the risk of seducing consumers that are not creditworthy to apply for (further) credit.<sup>6</sup> Other reasons for the need to regulate credit advertisements are ensuring that the real rate of interest for or the cost of the proposed credit is disclosed, preventing the consumer from forming a false picture in regard to the advertised credit agreement, ensuring that advertisements do not only attract but also inform, and that the bigger picture of the total cost of credit is indicated. It is therefore not unsurprising that responsible lending (and borrowing) measures that afford much-needed consumer protection in the sphere of consumer credit to prevent the extension of credit to consumers who cannot afford it include responsible marketing.<sup>7</sup>

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<sup>1</sup> Makin, Mawrey and Walton "Division I: Commentary" para 28.1.

<sup>2</sup> The terms "debtor" and "consumer" will be used interchangeably in this article.

<sup>3</sup> Makin, Mawrey and Walton "Division I: Commentary" para 28.1. Also see Van Heerden "Regulation of Marketing under the CPA" Marketing–1 and 2.

<sup>4</sup> With reference to repealed UK legislation, the *Moneylenders Act* of 1927.

<sup>5</sup> Crowther *Report* 258.

<sup>6</sup> Also see Van Heerden "Regulation of Marketing under the CPA" Marketing–2, who states as follows: "Given the pivotal role of marketing as the impetus for transactions between consumers and suppliers, regulation of marketing is an essential component of consumer protection."

<sup>7</sup> Van Heerden and Steennot Part 1 2018 *PELJ* 2.

In this article, which consists of two parts, we will focus on the marketing of consumer credit as a responsible lending (and borrowing) tool, with particular focus on the provisions that South African, European and Belgian legislators have enacted to protect the users of credit in this regard. South African law is addressed in Part 1, followed in Part 2 by a discussion of European and Belgian law, a comparative discussion, our evaluation, suggestions and final conclusions. As the information to be included in credit advertising and prohibited advertising and marketing techniques and practices will in particular be addressed, we use the term "marketing" as an overarching term to denote credit advertising, solicitations, sales methods, etc. The ultimate aim of this article is to compare the laws of the jurisdictions mentioned above and to determine whether South African law contains sufficient guarantees in order to protect credit consumers. However, the rules on comparative advertising do not fall within the ambit of this discussion.

## 2 South African law

The preamble to the *National Credit Act* 34 of 2005,<sup>8</sup> the consumer credit enactment effective in South Africa, sets as goals relevant to credit marketing the provision of "improved standards of consumer information", the prohibition of "certain unfair credit and credit-marketing practices" and the regulation of credit information. In terms of section 3 of the Act its purposes are *inter alia* to<sup>9</sup>

promote a fair, transparent,...credit market and industry, and to protect consumers, [*inter alia*] by addressing and correcting imbalances in negotiating power between consumers and credit providers by providing consumers with adequate disclosure of standardised information in order to make informed choices; and providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers... .

In the light of its goals it is therefore not unexpected that the *National Credit Act*, in the words of Campbell<sup>10</sup>, "introduces a new dispensation in credit marketing by prohibiting certain marketing practices, regulating the marketing and sales of credit at home or work, and laying down various requirements for advertising practices". In addition, the content of and format for advertising practices are prescribed in the Regulations made in terms of the Act.<sup>11</sup> However, the measures of two other pieces of legislation must also be considered, namely certain provisions relating to marketing in

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<sup>8</sup> *National Credit Act* 34 of 2005, hereafter the *National Credit Act*, the NCA or the Act.

<sup>9</sup> Section (3)(e)(ii) and (iii) of the Act.

<sup>10</sup> Campbell "Advertising and Marketing Standards" para 7.1.

<sup>11</sup> GN R489 in GG 28864 of 31 May 2006 (the National Credit Regulations). The NCA's provisions are discussed in para 2.3 below.

the *Consumer Protection Act* 68 of 2008<sup>12</sup> (the South African enactment affording general consumer protection) and the provisions in respect of online marketing in the *Electronic Communications and Transactions Act* 25 of 2002.<sup>13</sup> Before discussing the aforesaid measures, attention will be paid to the concepts "advertising" and "consumer", the latter only within the context of the *National Credit Act*.<sup>14</sup>

## 2.1 The concept "advertising"

Although the *National Credit Act* does not define the concept "advertising", "advertisement" is defined in section 1 as—

any written, illustrated, visual or other descriptive material, communication, representation or reference by means of which a person seeks to bring to the attention of all or part of the public the nature, properties, advantages or uses of, conditions on, or prices of –

- (a) goods to be purchased, leased or otherwise acquired;
- (b) any available service; or
- (c) credit to be granted.

Although at first glance it appears unclear whether the definition of "advertisement" provides for audio and audio-visual advertisements, this seems to be the case, as reference is made to "visual or other descriptive material, communication, representation...". This argument is supported by the reference to "television" and "audio" advertisements in regulation 22(2) and (3) respectively.<sup>15</sup>

The CPA defines "advertisement" in even broader terms than the *National Credit Act*. In terms of section 1, "advertisement" means—

any direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to-

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<sup>12</sup> *Consumer Protection Act* 68 of 2008, hereafter the *Consumer Protection Act* or the CPA, discussed in para 2.4 below. The marketing provisions in legislation relating to financial services and products, such as the *Financial Sector Regulation Act* 9 of 2017 and the *Financial Advisory and Intermediary Services Act* 37 of 2002, will not be discussed in this article. It should also be noted that, in contradistinction to the European law, there is no separate legal framework for unfair commercial practices in terms of South African law.

<sup>13</sup> The *Electronic Communications and Transactions Act* 25 of 2002, hereafter the *Electronic Communications and Transactions Act* or the ECT Act, discussed in para 2.5 below.

<sup>14</sup> However, see para 2.5 below for the meaning of "consumer" for the purposes of the ECT Act.

<sup>15</sup> See para 2.3.1 below.

- (a) bring to the attention of all or part of the public-
  - (i) the existence or identity of a supplier; or
  - (ii) the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which any goods or services are available for supply;
- (b) promote the supply of any goods or services; or
- (c) promote any cause.<sup>16</sup>

## 2.2 The concept "consumer"

Section 1 of the *National Credit Act*<sup>17</sup> defines "consumer" with reference to the type of credit agreement involved, for instance "as the party to whom credit is granted under a credit facility". Therefore the meaning of "consumer" for the purposes of the *National Credit Act* has to be determined in relation to the Act's field of application. In the latter respect it will suffice to say that, except for the few transactions specifically excluded from its ambit, the Act applies to all credit agreements<sup>18</sup> whether small or large and irrespective of their form, the type of movable goods (or services) or the amount of money involved.<sup>19</sup> It is important to note that the *National Credit Act*, including its marketing provisions, applies to mortgage agreements<sup>20</sup> as well. The South African law consequently makes no distinction between mortgage and regular (consumer) credit or credit agreements. It must also be observed that the *National Credit Act* does not follow a purpose-of-credit approach and therefore applies to credit contracts irrespective of whether

<sup>16</sup> In terms of s 1 of the Act the word "promote" *inter alia* means to "advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration".

<sup>17</sup> Also see Van Heerden and Steennot Part 1 2018 *PELJ* para 2.2.

<sup>18</sup> This is true as a result of the catch-all provision in s 8(4)(f), which brings all credit agreements (that for whatever reason cannot be classified under a particular name) in terms of which payment of an amount owed by one person to another is deferred and a fee, charge or interest is payable to the credit provider in respect of the agreement or the deferred amount under the ambit of the NCA.

<sup>19</sup> As long as it has been concluded at arm's length and in SA or has an effect in SA. For a discussion of the field of application of the *National Credit Act*, see: Van Zyl "Scope of Application of the National Credit Act" ch 4; Otto "Types of Credit Agreement" ch 8; Kelly-Louw *Consumer Credit Regulation* 27ff; and Otto and Otto *National Credit Act Explained* ch 3.

<sup>20</sup> Defined in s 1 of the Act as "a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property". "Mortgage" in turn means "a mortgage bond registered by the registrar of deeds over immovable property that serves as continuing covering security for a mortgage agreement". The *National Credit Act* also applies to immovable property transactions where the payment of the purchase price is deferred and interest, fees or charges are payable to the credit provider (eg, the seller of the property). See the definition of "[a]ny other agreement" in s 8(4)(f) of the Act.

the credit is granted for private or business purposes.<sup>21</sup> The same holds for credit agreements concluded by the small group of "juristic person" consumers falling under the ambit of the Act.<sup>22</sup> However, it is important to note that due to the limited application of the Act in respect of such juristic persons, the provisions in the Act dealing with credit marketing practices do not apply to them.<sup>23</sup>

### **2.3 The National Credit Act**

Chapter 4 of the *National Credit Act* concerns "Consumer credit policy" and Part C thereof "Credit marketing practices". In what follows, the provisions of the NCA are discussed in accordance with the sequence that will be used in regard to the European and Belgian law<sup>24</sup> and therefore not necessarily in numerical order.

#### *2.3.1 Information to be included in advertising*

Section 76 of the Act concerns advertising practices and has to be read with regulations 21 and 22 of the National Credit Regulations.<sup>25</sup> When reading section 76, the definition of "advertisement"<sup>26</sup> in terms of the Act has to be kept in mind.

Section 76 applies to the provider of credit that is being advertised, or the seller of any goods or services being advertised for purchase on credit.<sup>27</sup>

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<sup>21</sup> However, the Act is not applicable to credit agreements in terms of which instalments are payable over a period of time without the consumer having to pay any extra cost. See the definitions of the different credit agreements subject to the Act in s 8(3) and 8(4) read with s 1. The only exceptions are mortgage agreements and secured loans (defined in s 1) and credit guarantees (defined in s 8(5)), in respect of which no interest, fees or charges are required to be payable.

<sup>22</sup> The concept "juristic person" is defined in s 1 and includes partnerships, associations of persons, corporate or unincorporated, and trusts having three or more individual trustees or a juristic person as a trustee. The *National Credit Act* applies only to juristic persons as consumers having an asset value or annual turnover of less than R1 million if the juristic person concludes a small or intermediate credit agreement (as defined in s 9(2) and 9(3) read with the Determination of Threshold Regulations (GN 713 in GG 28893 of 1 June 2006)). For further detail, see Van Zyl "Scope of Application of the National Credit Act" paras 4.3(a) and (b); Otto "Types of Credit Agreement" para 8.7.

<sup>23</sup> See s 6 of the Act.

<sup>24</sup> In Part 2 paras 1 and 2.

<sup>25</sup> See below.

<sup>26</sup> See para 2.1 above.

<sup>27</sup> Section 76(2) of the Act. S 76 does not apply to an advertisement that does not make reference to a specific credit product or provider, and of which the dominant purpose is to promote responsible credit practices or the use of credit generally: s 76(1)(a). S 76(1)(b) also excludes advertisements that generally promote a specific credit provider, brand or type of credit agreement without making specific reference to product price, cost or the availability of credit. Advertisements by the seller of goods or services, or on the premises of such a person, are likewise excluded if that notice

Advertisements of the availability of credit, or of goods or services to be purchased on credit, must comply with section 76.<sup>28</sup> They must also contain the statements required by regulation.<sup>29</sup> Section 76(5) renders it compulsory for a credit provider to state or set out the interest rate and other credit costs in the prescribed manner and form<sup>30</sup> in an advertisement concerning the granting of credit.

Part C of Chapter 3 of the National Credit Regulations regulates credit marketing practices, in conjunction with section 76. More particularly, regulations 21 and 22 respectively concern the required content of and format for advertising practices.

If an advertisement refers only to the fact that credit is available and does not refer to the costs, interest rate or monthly instalment, it is not required to make any further disclosures regarding the cost of the credit, the interest rate or the monthly repayment.<sup>31</sup> Should an advertisement disclose only the interest rate or the maximum and minimum rates, where a range is applicable, and no reference is made to the other costs of credit, no further information has to be disclosed. However, it has to be indicated that an initiation fee and service fee will be charged, if applicable.<sup>32</sup>

In terms of regulation 21(3), where an advertisement<sup>33</sup> discloses a monthly instalment or any other cost of credit, the following must also be disclosed: the instalment amount; the number of instalments; the total amount of all instalments, including interest, fees and compulsory insurance; the interest rate; and the residual or final amount payable (if any).<sup>34</sup>

The above information must also be included in an advertisement for specific goods to be purchased on credit, services to be rendered on credit

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or advertisement merely indicates that the person is prepared to accept payment through a credit facility in respect of which another person is the credit provider: s 76(1)(c). The notice or advertisement indicates, eg, that credit cards are accepted to effect payment.

<sup>28</sup> Section 76(4)(a) of the Act.

<sup>29</sup> Section 76(4)(b) of the Act. At present no such statements have been prescribed by regulation.

<sup>30</sup> See below.

<sup>31</sup> Regulation 21(1) of the National Credit Regulations.

<sup>32</sup> Regulation 21(2) of the National Credit Regulations. The "initiation fee" is the fee in respect of the initiation costs of a credit agreement and the "service fee" is a fee that may be charged periodically by a credit provider in connection with the routine administration costs of maintaining a credit agreement. See s 1 of the Act.

<sup>33</sup> Other than an advertisement referred to in reg 21(2) of the National Credit Regulations above.

<sup>34</sup> In other words, the amount of a balloon payment, payable at the end of the agreement, if applicable.

or a specific amount of credit obtainable, if reference is made to repayment amounts or the cost of credit.<sup>35</sup>

In terms of regulation 21(7), if a qualitative statement<sup>36</sup> such as "cheap credit", "affordable credit" or "low-cost credit" is made in respect of the cost of credit, the regulation 21(2) or (3) information, above, must be disclosed on the cost of credit. Whether sub-regulation (2) or sub-regulation (3) information must be disclosed depends of course on the content of the advertisement or solicitation<sup>37</sup> containing the qualitative statement or statements.<sup>38</sup>

Section 77, entitled "Required marketing information", concerns solicitations, and provides that any solicitation by or on behalf of a credit provider with the aim of inducing a person to apply for or obtain credit must include a statement with the prescribed information for the particular type of solicitation.<sup>39</sup>

The required format for advertising practices<sup>40</sup> ensures that important information regarding the cost of credit is not obscured in advertisements, *inter alia* by the use of small print. Regulation 22(1), for instance, determines that the information required to be disclosed in terms of regulation 21(2) and (3)<sup>41</sup> must not be of a smaller font size than the average font size used in the advertisement, and that such information should be displayed together. Television and audio advertisements have to provide equal prominence to all the information that has to be disclosed in terms of regulation 21(2) and (3),<sup>42</sup> equivalent to the prominence given to all other elements of such an advertisement.<sup>43</sup>

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<sup>35</sup> Regulation 21(5) of the National Credit Regulations.

<sup>36</sup> Or wording that has substantially the same meaning.

<sup>37</sup> Although reg. 21(7) of the National Credit Regulations does not stipulate whether it applies to advertisements or solicitations or both, the said sub-reg. probably applies to advertisements and solicitations. The reason is that the regulation preceding reg. 21(7), reg. 21(6), applies to advertisements and direct solicitations, while the subsequent regulation to reg. 21(7), reg. 21(8), applies to direct solicitations. The word "solicitation" is not defined in the Act. "Solicit" means "to ask sb eagerly or firmly for sth; to try to obtain sth": Hornby *Oxford Advanced Learner's Dictionary* 1130.

<sup>38</sup> Also see Campbell "Advertising and Marketing Standards" para 7.5.

<sup>39</sup> At present no such statements have been prescribed by regulation.

<sup>40</sup> Regulation 22 of the National Credit Regulations. See Campbell "Advertising and Marketing Standards" para 7.6 for full detail.

<sup>41</sup> Discussed above.

<sup>42</sup> Discussed above. In the case of a television advertisement, the disclosure of the reg. 21(2) and (3) information may be a combination of visual and audio disclosure: reg. 22(2) of the National Credit Regulations.

<sup>43</sup> Regulation 22(2) and (3) respectively of the National Credit Regulations.



### 2.3.2 *Prohibited advertising*

As stated above,<sup>44</sup> section 76 applies to advertisements of the availability of credit or of goods or services to be purchased on credit. However, section 76(3) prohibits such advertisements by a person who is required to be registered as a credit provider, but who is not so registered.<sup>45</sup> In addition, such advertisements must not advertise a form of credit that is unlawful; be misleading, fraudulent or deceptive; or contain any statement prohibited by regulation.<sup>46</sup> In this respect regulation 21(6) is of importance. This regulation prohibits the following statements or phrases, or wording that has substantially the same meaning, from forming part of any advertisement or direct solicitation for credit: "no credit checks required"; "blacklisted consumers welcome"; or "free credit".<sup>47</sup>

Regulation 21(8) provides that a direct solicitation may not contain the expressions "loan guaranteed", "pre-approved" or similar statements. The only exception is "when the credit granted is not subject to any credit assessment after acceptance by the consumer".<sup>48</sup>

### 2.3.3 *Prohibited marketing techniques*

The objective of section 75 of the Act is to afford protection to a person with regard to the marketing and sales of credit at the person's private dwelling<sup>49</sup> or place of work. Section 75(1) contains a general prohibition against the harassment of a person by a credit provider in an attempt to persuade that person to apply for credit or to enter into a credit agreement or a related transaction.<sup>50</sup> Although not specified in terms of section 75(1), it is submitted that this prohibition is aimed at the harassment of persons at work or at

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<sup>44</sup> See 2.3.1.

<sup>45</sup> See s 40 of the Act; Van Zyl "Registration and the Consequences of Non-registration" para 5.2.2; Van Heerden and Renke 2014 *THRHR* 614 and Van Heerden and Renke 2015 *THRHR* 80 for the registration of credit providers.

<sup>46</sup> Section 76(4)(c)(i)-(iii) of the Act respectively.

<sup>47</sup> Regulation 21(6)(a)-(c) of the National Credit Regulations respectively.

<sup>48</sup> Campbell "Advertising and Marketing Standards" para 7.5 first mentions the example of a juristic person consumer who falls outside the scope of application of the Act and is, therefore, not subject to a compulsory credit assessment in terms of s 81 of the Act. Secondly, Campbell also mentions the case of a juristic person consumer falling under the Act, but which is exempted from the s 81 credit assessment by virtue of s 78(1).

<sup>49</sup> "Private dwelling" means "any part of a formal or informal structure that is occupied as a residence, or any part of a structure or outdoor living area that is accessory to, and used principally for the purposes of, a residence": s 1 of the Act.

<sup>50</sup> "Related transaction" is not defined in the Act. It is submitted that a credit insurance contract, eg, will constitute a related transaction.

home, as the remainder of section 75 pertains to marketing and sales of credit at home or at work.<sup>51</sup>

Section 75(2),<sup>52</sup> on the one hand, concerns the marketing and sales of credit at home and provides that a credit provider must not enter into a credit agreement at a private dwelling unless one of the following circumstances prevails: the credit agreement was entered into during a visit that was pre-arranged by the consumer for that purpose;<sup>53</sup> a credit provider visited the private dwelling for the purpose of offering goods or services for sale and incidentally offered to provide or arrange credit to finance the purchase of those goods or services;<sup>54</sup> or the credit agreement is of a prescribed category that is permitted to be entered into during a visit to a private dwelling.<sup>55</sup>

Section 75(3), on the other hand, aims to regulate the marketing and sales of credit at the workplace. The *National Credit Act* prohibits a credit provider from visiting a person's place of employment for the purpose of inducing the person to apply for or to obtain credit. Entering into a credit agreement with a person at such a place is also prohibited.<sup>56</sup> However, the aforementioned prohibitions do not apply where the credit provider enters into a credit agreement with the employer.<sup>57</sup> The same holds true where the visit to the person's place of employment results from a formal arrangement between the credit provider, on the one hand, and the employer and any representative trade union or employee, on the other.<sup>58</sup> A visit to a person's

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<sup>51</sup> Also see Campbell "Advertising and Marketing Standards" para 7.3, who states that "[f]or the purposes of regulating credit sales at a person's private dwelling or place of employment, the Act specifically provides that credit providers must not harass a person ...".

<sup>52</sup> Section 75(2) does not apply in respect of developmental credit agreements: s 75(5). The "developmental credit agreement" is defined in s 1 of the Act as an agreement that satisfies the criteria in s 10. Educational loans and agreements for the building or expansion of low income housing constitute examples of developmental credit agreements.

<sup>53</sup> Section 75(2)(a) of the Act.

<sup>54</sup> Section 75(2)(b) of the Act.

<sup>55</sup> Section 75(2)(c) of the Act. At present no such credit agreements have been prescribed by regulation.

<sup>56</sup> Section 75(3) of the Act.

<sup>57</sup> Section 75(3)(a) of the Act.

<sup>58</sup> Section 75(3)(b)(i) of the Act. In terms of s 75(4), no fee, commission, payment, consideration or other monetary benefit may be received in exchange for the making of such an arrangement, or as a consequence of a credit agreement entered into during or as a result of such an arrangement. This prohibition clearly has as its aim to discourage employers or representative trade unions from arranging visits by credit providers to the workplace for their own financial benefit and/or to avoid kickbacks.

place of employment is also allowed if it results from a non-prompted invitation by the person being visited.<sup>59</sup>

Section 75(2) and (3) above is clearly aimed at giving effect to government's intention to prevent coercive sales techniques, to curb door-to-door sales and to prohibit the "unsolicited solicitation and harassment of consumers by commission-driven agents".<sup>60</sup> It is therefore understandable that a visit to a person's private dwelling or workplace for the purposes for instance of entering into a credit agreement is allowed if the initiative for the visit emanates from that person, or from his employer in co-operation with his representative trade union. However, we submit that making allowance for a credit provider to visit a private dwelling to offer goods or services for sale, and then to incidentally offer to provide or arrange credit to finance the purchase, is open to misuse by credit providers.<sup>61</sup>

Section 74 of the *National Credit Act* introduced the concepts "negative option marketing" and "opting out" into South African consumer credit legislation. Three forms of negative option marketing are distinguished, and the legislature also sets out the consequences of each. Negative option marketing, which is now a prohibited marketing practice, was used by credit providers to extend credit to consumers who had never even requested or applied for such credit.<sup>62</sup> The prohibition on negative option marketing does not apply where in terms of the credit agreement the consumer is a juristic person.<sup>63</sup>

First, a credit provider is prohibited from marketing or advertising credit by making an offer to enter into a credit agreement or by inducing a person to enter into a credit agreement on the basis that the agreement will automatically come into existence unless the consumer declines the offer.<sup>64</sup> The *ratio* behind the prohibition of this form of negative option marketing is self-explanatory. The onus is placed on the consumer to act<sup>65</sup> in order to avoid the contract from coming into being. A contract will not ensue according to the general common law principles of the law of contract should the offeree merely ignore an offer.<sup>66</sup> An agreement purportedly entered into

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<sup>59</sup> Section 75(3)(b)(ii) of the Act. The protection afforded in terms of ss 75(2) to (4) above does not apply in respect of developmental credit agreements, as discussed above.

<sup>60</sup> See DTI *Consumer Credit Law Reform* 30.

<sup>61</sup> Also see Stoop 2009 *SA Merc LJ* 378 fn 122.

<sup>62</sup> Campbell "Advertising and Marketing Standards" para 7.2.

<sup>63</sup> Section 6(a) of the Act. See para 2.2 above for the definition of "juristic person".

<sup>64</sup> Section 74(1) of the Act.

<sup>65</sup> For instance, writing a letter to the person making the offer to decline the offer.

<sup>66</sup> In other words, does not expressly turn down the offer: Otto and Otto *National Credit Act Explained* 67.

as a result of this form of negative option marketing is unlawful and void to the extent provided for in section 89.<sup>67</sup>

Section 74(2) of the Act, for the same reasons as those mentioned above, provides that a credit provider must not make an offer to increase the credit limit under a credit facility<sup>68</sup> or induce a person to accept such an increase on the basis that the limit will be increased automatically unless the consumer declines the offer.<sup>69</sup> This prohibition on negative option marketing is subject to the provisions of section 119(4),<sup>70</sup> providing for the unilateral increase of a credit limit under a credit facility.<sup>71</sup> It is submitted that, if a credit provider should for instance make an offer to a person as contemplated in section 74(2) above, the credit provider will also contravene the provisions of section 119. Apart from unilateral increases, the only other way in which the credit provider may take the initiative to increase the credit limit under a credit facility is to make a written proposal to the consumer to that effect. However, in such a case the consumer's written consent is required for the increase to occur.<sup>72</sup> A provision of a credit agreement purportedly entered into as a result of an offer or proposal contemplated in section 74(2) is unlawful and void as from the date that the provision purported to take effect.<sup>73</sup>

The Act also compels credit providers, when entering into a credit agreement, to present to the consumer a statement with prescribed options. The consumer must then be afforded the opportunity to select any of the options,<sup>74</sup> which are to decline the option of pre-approved annual credit limit increases in the event of a credit facility, as provided for by section 119(4);<sup>75</sup> or to be excluded from any telemarketing campaigns conducted on behalf of the credit provider, marketing or customer list that may be sold or

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<sup>67</sup> Section 74(4) of the Act.

<sup>68</sup> "Credit facilities" are defined in s 8(3) of the Act and entail an undertaking to supply goods or services or to pay an amount or amounts to a consumer on a revolving credit basis. Examples are store- and credit card transactions.

<sup>69</sup> Section 74(2) of the Act.

<sup>70</sup> Section 74(2) of the Act.

<sup>71</sup> Section 74(2) of the Act. S 119(4) provides that a credit provider may unilaterally increase the credit limit under a credit facility if the consumer in writing has specifically requested the option of having the credit limit automatically increased from time to time.

<sup>72</sup> Section 119(1)(b)(ii) of the Act. The third form of negative option marketing provided for in terms of s 74(3) is not relevant to the purposes of this article.

<sup>73</sup> Section 74(5) read with s 90(3) of the Act. In such a case the court must (a) sever the unlawful provision from the credit agreement; (b) alter it to the extent required to render it lawful (if it is reasonable to do so in the context of the agreement as a whole); or (c) declare the entire agreement unlawful (as from the date the agreement, or amended agreement, took effect) and void (in terms of s 89(5)).

<sup>74</sup> Section 74(6) of the Act.

<sup>75</sup> Section 74(6)(a) of the Act. S 119(4) is mentioned above.

distributed by the credit provider or from any mass distribution of electronic mails or short message service<sup>76</sup> messages.<sup>77</sup>

When a consumer declines an option or chooses to be excluded from an option, he "opts out" of the option, hence the term "opting out". Credit providers must keep a register of all the options selected by their different customers<sup>78</sup> and must not act in a manner contrary to an option selected by a consumer in terms of section 74(6).<sup>79</sup> The opting out requirements, like negative option marketing, are not applicable to juristic person consumers.<sup>80</sup>

## 2.4 The Consumer Protection Act

The field of application of the CPA can be summarised as follows:<sup>81</sup>

In essence, the Consumer Protection Act applies to every *transaction* occurring within South Africa for the *supply of goods or services* or the *promotion* of goods or services and the goods or services themselves, unless the transaction has been exempted from the application of the Act.<sup>82</sup>

One of the exemptions is that the CPA does not apply to any transaction that constitutes a credit agreement under the *National Credit Act*. However, it is applicable to the goods or services that are the subject of the credit agreement<sup>83</sup> and consequently the CPA's marketing provisions in respect of such goods or services could be relevant for the purposes of this article, provided of course that they are sold or rendered on a credit basis.<sup>84</sup> Where there are two agreements, the one relating to the credit or financing aspect of the sales transaction, for instance, and the other to the goods that are sold, the NCA will apply to the finance agreement and the CPA will apply to the goods (or services, if applicable).<sup>85</sup> The situation is therefore that both

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<sup>76</sup> Sms: s 1 of the Act.

<sup>77</sup> Section 74(6)(b)(i)-(iii) of the Act.

<sup>78</sup> Section 74(7)(a) of the Act read with reg. 58 of the National Credit Regulations and Form 36.

<sup>79</sup> Section 74(7)(b) of the Act.

<sup>80</sup> Section 6(a) of the Act.

<sup>81</sup> For a complete discussion of the CPA's field of application, see De Stadler "Purpose, Policy and Application of Act" 5-1ff.

<sup>82</sup> See Kelly-Louw *Consumer Credit Regulation* 552. See s 1 of the CPA for the definitions of "transaction", "supply", "goods" and "services". S 1 also provides a definition of "supplier" and "promote": see for the latter para 2.1 above. "Transaction" refers to a transaction in the "ordinary course of business". See s 5(1) for the CPA's field of application.

<sup>83</sup> Section 5(2)(d) of the CPA.

<sup>84</sup> See Kelly-Louw *Consumer Credit Regulation* 557, 560; Melville and Palmer 2010 *SA Merc LJ* 276; Stoop 2014 *THRHR* 136.

<sup>85</sup> Kelly-Louw *Consumer Credit Regulation* 557; Melville and Palmer 2010 *SA Merc LJ* 274; Stoop 2014 *THRHR* 136.

the NCA and the CPA apply to the marketing of consumer credit.<sup>86</sup> Section 2 of the CPA concerns the interpretation of the Act and section 2(8) and (9) provides the rules concerning conflicting legislation. In terms of section 2(9), which is important for our purposes, where there is an inconsistency between any CPA provision and the provisions of any other Act, such as the NCA, the provisions of both Acts must apply concurrently, to the extent that this is possible.<sup>87</sup> However, if it is not possible, the provision that extends the greater protection to a consumer prevails over the alternative provision.<sup>88</sup> The same rules hold in respect to the application of the marketing provisions in the CPA and the NCA.<sup>89</sup> However, Melville and Palmer are of the opinion that section 2(9) is of little help in deciding whether or not the CPA's provisions on promotion apply to NCA transactions, "because the former are complementary to the latter and not inconsistent with them".<sup>90</sup> In what follows, the CPA's (credit) marketing provisions that are not excluded as a result of the section 5(2)(d) exemption will be addressed briefly.<sup>91</sup>

Sections 11 and 12 of the CPA concern the consumer's right to privacy, one of nine fundamental consumer rights recognised in the CPA.<sup>92</sup> Section 11 affords the right to a consumer to restrict unwanted direct marketing, the latter concept meaning

to approach a person, either in person or by mail or electronic communication,<sup>93</sup> for the direct or indirect purpose of-

- (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
- (b) ...

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<sup>86</sup> See Kelly-Louw *Consumer Credit Regulation* 557, who also points to the practical problems in this respect. According to the authors one such problem is that certain provisions of the CPA do not pertain to goods or services, but to matters such as promotion and marketing.

<sup>87</sup> Section 2(9)(a) of the CPA.

<sup>88</sup> Section 2(9)(b) of the CPA.

<sup>89</sup> See Kelly-Louw *Consumer Credit Regulation* 559.

<sup>90</sup> Melville and Palmer 2010 *SA Merc LJ* 276.

<sup>91</sup> For an overview of the CPA's marketing provisions, see Van Heerden "Regulation of Marketing under the CPA" *Marketing*–1ff.

<sup>92</sup> See in general Van Zyl and De Stadler "Fundamental Consumer Rights Part B" 11-5ff; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 320ff.

<sup>93</sup> "Electronic communication" means any communication by means of electronic transmission. The latter includes communication by telephone, fax, sms, wireless computer access, email or any similar technology or device: s 1 of the CPA.

A person's right to privacy includes the right to refuse to accept direct marketing.<sup>94</sup> It further includes the right to require another person to discontinue with direct marketing or to pre-emptively block direct marketing.<sup>95</sup> In order to enable consumers to efficiently protect themselves against the aforementioned activities, a person who has been approached for the purpose of direct marketing may demand within a reasonable time after that communication that the person initiating the communication desists from initiating any further communication.<sup>96</sup> It is submitted that the CPA's direct marketing provisions and the NCA's opting out provisions<sup>97</sup> have a similar goal, are not inconsistent with each other, and consequently have to be read together.<sup>98</sup>

Section 12 regulates the time for contacting consumers for direct marketing purposes. If a consumer has not expressly or implicitly requested or agreed otherwise, suppliers may not engage in direct marketing directed at a consumer at the latter's home for promotional purposes during times prescribed by the Minister in the regulations to the CPA. Such prescribed times may involve specific days, dates, public holidays or times of day.<sup>99</sup> The NCA does not contain measures similar to section 12. The inconsistency provisions in section 2 of the CPA consequently do not apply and section 12, which does not relate to credit agreements *per se*, should therefore be applicable to credit marketing.<sup>100</sup>

The right to fair and responsible marketing is another fundamental consumer right in the CPA.<sup>101</sup> Although this right, which has a wide ambit,<sup>102</sup>

<sup>94</sup> Section 11(1)(a) of the CPA.

<sup>95</sup> Sections 11(1)(b) and (c) of the CPA respectively. The National Consumer Commission, established in terms of s 85 of the CPA is responsible for a registry where consumers may register pre-emptive blocks, generally or for a specific purpose: s 11(3). The registry has not been established yet: Van Zyl and De Stadler "Fundamental Consumer Rights Part B" 11-18.

<sup>96</sup> Section 11(2) of the Act. In terms of s 11(5) no person may charge a consumer a fee for making a demand in terms of s 11(2) or registering a pre-emptive block in terms of s 11(3).

<sup>97</sup> In terms of s 74(6) of the NCA, discussed in para 2.3.3 above.

<sup>98</sup> Also see Melville and Palmer 2010 *SA Merc LJ 277*, who confirm the application of s 11 of the CPA to credit agreements.

<sup>99</sup> Sections 12(1) and (2) of the CPA. For more detail see Van Zyl and De Stadler "Fundamental Consumer Rights Part B" 12-3ff.

<sup>100</sup> Melville and Palmer 2010 *SA Merc LJ 277* confirm that s 12 of the CPA applies to credit agreements. Also see Kelly-Louw *Consumer Credit Regulation* 561, who is of the opinion that s 12 "offers better protection to consumers regarding direct marketing than the National Credit Act."

<sup>101</sup> See in general Jacobs, Stoop and Van Niekerk 2010 *PELJ* 334ff.

<sup>102</sup> In Part E of ch 2, ss 29-39 of the CPA, provision is made for the general standards for the marketing of goods or services, bait marketing, negative option marketing, direct marketing to consumers, catalogue marketing, trade coupons and similar promotions, customer loyalty programmes, promotional competitions, alternative work schemes, referral selling and agreements with persons lacking legal capacity.

may apply to the marketing of credit products or to the goods or services that form the subject of a credit agreement,<sup>103</sup> only those measures which are in accordance with or an elaboration of the marketing provisions that have already been discussed in this article will be addressed.

The essence of section 29<sup>104</sup> is to prohibit producers, importers, distributors, retailers and service providers from marketing any goods or services in a misleading, fraudulent or deceptive manner.<sup>105</sup> The latter includes the manner in or conditions on which those goods or services may be supplied and the price at which the goods may be supplied. It also includes the existence of or relationship of the price to any previous price for comparable or similar goods or services.<sup>106</sup> Also, the participants in the supply chain mentioned above must also refrain from marketing any goods or services in a manner having a reasonable likelihood of implying a false or misleading representation – as contemplated in section 41 – concerning those goods or services.<sup>107</sup> Section 41, in turn, dealing with "[f]alse, misleading or deceptive representations" in relation to the marketing of any goods or services, prohibits a direct, indirect, express or implied false, misleading or deceptive representation concerning a material fact to a consumer,<sup>108</sup> the use of an exaggeration, innuendo or ambiguity as to a material fact, or the failure to disclose a material fact if that failure amounts to a deception,<sup>109</sup> or a failure to correct an apparent misapprehension on the part of the consumer, amounting to a false, misleading or deceptive representation.<sup>110</sup> Although exaggerations in marketing or advertisements *per se* are not restricted or prohibited, an exaggeration as to a material fact, for instance "Lowest interest rate in the world", is prohibited.<sup>111</sup> A person acting on behalf of the supplier or other person or institution in the supply chain must not engage in any conduct that the former is prohibited from engaging in under section 41(1).<sup>112</sup>

Due to the fact that the NCA provides for so-called "negative option marketing",<sup>113</sup> it is submitted that the negative option marketing provisions in section 31 of the CPA do not apply to credit marketing. Section 32

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<sup>103</sup> Kelly-Louw *Consumer Credit Regulation* 563; Melville and Palmer 2010 *SA Merc LJ* 277.

<sup>104</sup> See in general Van Zyl "Fundamental Consumer Rights Part E" 29-1ff.

<sup>105</sup> Section 29(b) of the CPA.

<sup>106</sup> Sections 29(b)(ii) and (iii) of the CPA respectively.

<sup>107</sup> Section 29(a) of the CPA.

<sup>108</sup> Section 41(1)(a) of the CPA.

<sup>109</sup> Section 41(1)(b) of the CPA.

<sup>110</sup> Section 41(1)(c) of the CPA. It is further prohibited to permit or require any other person to do the same on behalf of the supplier, etc.

<sup>111</sup> Kelly-Louw *Consumer Credit Regulation* 564.

<sup>112</sup> Section 41(2)(b) of the CPA.

<sup>113</sup> See 2.3.3 above.



concerns direct marketing to consumers. Section 32(1), aiming to ensure that the consumer is made aware of his/her right to rescind the transaction or agreement entered into as a result of the direct marketing, is not relevant to this article. The same holds for section 32(2), which provides that if a person who has directly marketed any goods to a consumer has left any goods with the consumer without requiring or arranging payment for them, those goods are unsolicited goods, to which section 21 applies. Section 32(2) is clearly not relevant in the case of goods bought in terms of a credit agreement.

For completeness sake it must be mentioned that the CPA, under the fundamental consumer right of equality in the consumer market, affords focussed protection to consumers in respect of discriminatory marketing.<sup>114</sup> This is in contrast to the NCA which, although it contains anti-discrimination measures,<sup>115</sup> does not afford protection in respect of discriminatory marketing in particular.

## **2.5 The Electronic Communications and Transactions Act**

When dealing with online consumer transactions, the provisions of the ECT Act, in particular Chapter VII, which provides "a measure of protection to online consumers", must be considered.<sup>116</sup> But first the ECT Act<sup>117</sup> defines a consumer as "any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier".<sup>118</sup> The term "consumer" in terms of the ECT Act accordingly has a restricted meaning and includes natural persons acting as end-users of the goods or services only.<sup>119</sup> Section 42(1) restricts the application of Chapter VII only to electronic transactions, which concept is not defined in the Act.

Section 43 of the ECT Act applies to a supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction and requires certain information to be placed on a web-trader's website where

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<sup>114</sup> Section 8 of the CPA.

<sup>115</sup> See ss 61 and 66 of the NCA.

<sup>116</sup> See Van der Merwe *et al Information and Communications Technology Law* 196-197.

<sup>117</sup> Section 1 of the ECT Act.

<sup>118</sup> The ECT Act does not define "electronic transaction" but "'transaction' means a transaction of either a commercial or non-commercial nature, and includes the provision of information...". See s 1.

<sup>119</sup> A transaction between a web-trader and a natural person in terms of which the latter procures the goods or services for on-selling purposes does not enjoy the Ch. VII protection. However, where the goods or services are procured to be used in the individual's business, he or she is regarded as an end-user: Van der Merwe *et al Information and Communications Technology Law* 199.

such goods or services are offered with the aim *inter alia* of informing the consumer about the nature of the goods or services and the agreement. Such information must *inter alia* include the fact that the web-trader is a member of or subscribes to a "self-regulatory, accreditation or professional body";<sup>120</sup> any code of conduct to which that supplier subscribes<sup>121</sup> and how that code of conduct may be accessed electronically by the consumer; an adequate description of the main characteristics of the goods or services;<sup>122</sup> the full price of the goods or services and any other costs; and the manner of payment.<sup>123</sup> The consumer has the right in terms of section 43(3) of the ECT Act to cancel the agreement within 14 days in the case of the web-trader's failure to supply the section 43 information.<sup>124</sup> Where a person sends unsolicited commercial communications to consumers, that person must provide the consumer with the option to cancel his/her subscription to

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<sup>120</sup> Such as the Advertising Regulatory Board (the ARB) and the Direct Marketing Association. The contact details of the body must also be provided. More detail on the ARB is provided in the next footnote. The Direct Marketing Association of South Africa is a section 21 company and self-regulatory organisation empowered by law to ensure that direct marketers adhere to a strict code of practice, and to protect the rights of consumers when buying from direct marketing organisations.

<sup>121</sup> Such as the Code of Advertising Practice (the Code), which in turn is based on the International Code of Advertising Practice. The ARB administers the Code, which is supplemented by individual codes determined by the various member organisations of the ARB or negotiated with governmental institutions. The Code is divided into different sections. Section I tells how the Code is interpreted, II contains the basic rules for advertising, III contains rules that are specific to particular situations and IV deals with editorial-style print advertisements. The primary object of the Code is the regulation of commercial advertising: Section I para 2.1. The "General principles" in Section II provide for aspects such as "[o]ffensive advertising", "[h]onesty" and "[t]ruthful presentation". Section III para 11.1, dealing with "Financial advertising", determines that such advertisements should "take special care to ensure that the public are fully aware of the nature of the commitment into which they may enter as a result of responding to the advertisement". Advertisers also bear "a particular responsibility to ensure that advertisements in no sense take advantage... of the lack of experience or knowledge or the credulity of those to whose attention it is likely to come". Appendix C to the Code, pertaining to direct marketing advertising in particular serves as an example of an individual code that supplements the Code. The direct marketing code *inter alia* compels advertisers to provide different opt-out opportunities (for instance from e-mail marketing) to consumers and addresses sales promotion by means of field marketing. The latter is the face-to-face promotion or sale of products or services to consumers. The information provided directly to consumers by field personnel must not be misleading and the latter must not employ unreasonably aggressive sales techniques. Protection is also afforded to consumers in respect of telephone or fax, cell phone text, SMS, MMS, internet and e-mail marketing. See ARB 2019 <http://arb.org.za/index.html>; ARB 2019 <http://arb.org.za/codes.html>; ARB 2019 <http://arb.org.za/assets/section-i.pdf>; ARB 2019 <http://arb.org.za/assets/section-ii.pdf>; ARB 2019 <http://arb.org.za/assets/section-iii.pdf>; ARB 2019 <http://arb.org.za/assets/appendix-c.pdf>.

<sup>122</sup> The consumer must be enabled to make an informed decision concerning the proposed electronic transaction. See Van der Merwe *et al Information and Communications Technology Law* 201 for detail.

<sup>123</sup> Sections 43(1)(d), (e), (h), (i) and (j) of the ECT Act respectively.

<sup>124</sup> Van der Merwe *et al Information and Communications Technology Law* 200.

the mailing list of that person.<sup>125</sup> The consumer must also on his/her request be provided with the identifying particulars of the source from which that person obtained the consumer's personal information.<sup>126</sup> Non-compliance with the provisions of section 45(1) constitutes an offence.<sup>127</sup> It is also an offence to send unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome.<sup>128</sup> Where a consumer has failed to respond to an unsolicited communication no agreement is concluded.<sup>129</sup>

## **2.6 The sanctions for non-compliance with the marketing provisions**

The sanctions for non-compliance with the marketing provisions in terms of the *National Credit Act* and the *Consumer Protection Act* discussed above will be briefly considered. The effectiveness of the marketing provisions in these enactments, as is the case with any other legislative provisions, depends on their effective enforcement. The latter, in turn, naturally depends on the prescribed sanctions for non-compliance, among other things.

It was seen above<sup>130</sup> that particular sanctions have been provided in respect to the negative option marketing provisions in the NCA. However, except for those, the NCA provides no sanctions for contravening any of its other marketing provisions.<sup>131</sup> The same holds for a contravention of the prescripts in the National Credit Regulations.

Should the credit provider, therefore, contravene the marketing provisions of the Act or the National Credit Regulations, only one or two options are available to the aggrieved consumer. First, the consumer may attempt to resolve a dispute with the credit provider via a process of alternative dispute resolution.<sup>132</sup> If the attempt to resolve the dispute with the credit provider is

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<sup>125</sup> Section 45(1)(a) of the ECT Act.

<sup>126</sup> Section 45(1)(b) of the ECT Act.

<sup>127</sup> Section 45(3). The ECT Act does not contain a general penalty clause.

<sup>128</sup> Section 45(4) of the ECT Act.

<sup>129</sup> Section 45(2) of the ECT Act.

<sup>130</sup> See 2.3.3.

<sup>131</sup> For instance, for a contravention of ss 76(4)(b) and (c) of the NCA, which *inter alia* provides that an advertisement of the availability of credit, or of goods or services to be purchased on credit, must contain a statement prescribed by regulation, or must not advertise a form of credit that is unlawful.

<sup>132</sup> Section 134 of the Act makes provision for alternative dispute resolution. For a discussion, see Scholtz "Dispute Settlement other than Debt Enforcement" paras 13.2 and 13.3.

unsuccessful, the consumer may file an application to the National Consumer Tribunal,<sup>133</sup> which must then conduct a hearing into the matter.<sup>134</sup>

Secondly, the consumer may also submit a complaint to the National Credit Regulator in terms of section 136, which entitles any person to submit such a complaint concerning an alleged contravention of the Act.<sup>135</sup> The Regulator, after investigating the matter,<sup>136</sup> may make use of section 55 of the Act and issue a compliance notice to the credit provider,<sup>137</sup> *inter alia* setting out the steps that must be taken by the latter.<sup>138</sup> If the credit provider fails to comply with the compliance notice, the Regulator may refer the matter to the Tribunal for an appropriate order.<sup>139</sup> In terms of section 150(a) and (c) respectively, the Tribunal may *inter alia* declare conduct to be prohibited<sup>140</sup> in terms of the Act and impose a stiff administrative fine on the credit provider.<sup>141</sup> The Tribunal may in addition to the specific orders make "any other appropriate order required to give effect to a right, as contemplated in [the] Act" and consequently has "fairly expansive and far-reaching powers".<sup>142</sup> Finally, it should be noted that the *National Credit Act*, in contrast with its predecessors, contains no general penalty clause.

The enforcement provisions in the CPA<sup>143</sup> are more or less similar to those in terms of the *National Credit Act*. In the case of the CPA the National Consumer Commission may issue a compliance notice to a person<sup>144</sup> who the Commission on reasonable grounds believes has engaged in prohibited conduct in terms of the CPA.<sup>145</sup> If such a person then fails to comply with the notice, the Commission may refer the matter to the Tribunal to impose

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<sup>133</sup> Section 137(3) read with s 134(4) of the NCA. The complaint may not be made to the Tribunal more than three years after the act or omission that caused the complaint: s 166(1)(a). The Tribunal was established in terms of s 26 of the NCA.

<sup>134</sup> Section 141(4) of the NCA. The powers of the Tribunal in this regard are discussed below.

<sup>135</sup> For a discussion of this option, see Scholtz "Dispute Settlement other than Debt Enforcement" paras 13.4 to 13.6 and Van Zyl "Effects of Non-compliance" para 17.3.

<sup>136</sup> In terms of s 139 of the Act.

<sup>137</sup> No reference is made to this step in Parts A and B of Ch 7 of the Act, *inter alia* dealing with the initiating of complaints to the Regulator.

<sup>138</sup> See ss 55(1)(a)(i) and (ii) read with s 55(3) of the Act.

<sup>139</sup> Section 55(6)(b) of the Act.

<sup>140</sup> Section 1 defines "prohibited conduct" as an act or omission in contravention of the Act.

<sup>141</sup> In this regard see Kelly-Louw 2008 *SA Merc LJ* 214.

<sup>142</sup> Scholtz "Dispute Settlement other than Debt Enforcement" para 13.6.

<sup>143</sup> See in general Kelly-Louw *Consumer Credit Regulation* 572; Jacobs, Stoop and Van Niekerk 2010 *PELJ* 307ff.

<sup>144</sup> Or association of persons.

<sup>145</sup> Section 100(1) of the CPA.

an administrative fine<sup>146</sup> or to the National Prosecuting Authority for the prosecution of an offence.<sup>147</sup> Finally,

[t]o enforce any right in terms of the Act, or to resolve any dispute with a supplier, a consumer may refer the matter directly to the National Consumer Tribunal if the Act permits it, or refer the matter to the relevant ombud, apply to a court, refer the matter to an alternative dispute resolution agent, file a complaint with the Commission, or approach a court with jurisdiction if all other remedies available in terms of legislation have been exhausted.<sup>148</sup>

## **2.7 Concluding observations in respect of the South African law**

As far as the protection afforded to South African consumers as the users of credit in respect of credit marketing and its inherent dangers are concerned, the provisions of the *National Credit Act*, the *Consumer Protection Act* and the *Electronic Communications and Transactions Act* have to be read and applied together. The latter fact, the wide fields of application of the NCA and the CPA, their broad definitions of the concept "advertisement" and the particular and focussed attention paid to credit marketing in the objectives and provisions of the NCA, the *lex specialis* with respect to credit law in South Africa, are endorsed. More comprehensive protection of more consumers in respect of credit marketing is thus achieved. For similar reasons, the attempts at self-regulation by the advertising industry in South Africa have to be welcomed.

However, as far as the *National Credit Act* is concerned, we submit that the doorstep selling provisions in the *National Credit Act*<sup>149</sup> should receive further attention with regard to three aspects. First, section 75(2) prohibits the entering into of a credit agreement at a private dwelling, unless the credit agreement was *inter alia* entered into during a visit that was pre-arranged by the consumer for that purpose. Section 75(2), in contrast with section 73(3), which prohibits a visit to a person's place of employment for the purpose of inducing the person to apply for or obtain credit, or enter into a credit agreement at such a place, does not provide that the pre-arrangement must not have been prompted by or on behalf of the credit provider. The Act should be rectified in this respect.

Secondly, section 75(2) prohibits only the entering of a credit agreement at a private dwelling, while section 75(3) prohibits a visit to a person's place of employment for the purpose of inducing the person to apply for or obtain credit, or enter into a credit agreement at such a place. The Act should be

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<sup>146</sup> Section 100(6)(a) of the CPA.

<sup>147</sup> Section 100(6)(b) of the CPA.

<sup>148</sup> See Kelly-Louw *Consumer Credit Regulation* 572.

<sup>149</sup> See 2.3.3 above.

amended in order for the section 75(2) prohibition also to include inducements to apply for or obtain credit.

Thirdly, it was pointed out that the section 75(2)(b) exception – in terms of which a credit provider is allowed to enter into a credit agreement at the consumer's private dwelling where the former only incidentally offered to provide or arrange credit – is susceptible to misuse and therefore to criticism. We submit that this sub-section should be deleted from the Act. A credit provider should therefore be entitled to visit a consumer's private residence to market or sell credit only where the visit was pre-arranged by the consumer for that purpose.

Finally, as far as the South African law and in particular the *National Credit Act* is concerned, it should be noted that, with the exception of negative option marketing, no particular sanctions are prescribed for contravening the advertising prescriptions of the NCA and its regulations.

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### List of Abbreviations

ARB	Advertising Regulatory Board
CPA	Consumer Protection Act
DMASA	Direct Marketing Association of South Africa
DTI	Department of Trade and Industry
ECT Act	Electronic Communications and Transactions Act
MMS	Multimedia messaging service
NCA	National Credit Act
PELJ	Potchefstroom Electronic Law Journal
THRHR	Tydskrif vir die Hedendaagse Romeins- Hollandse Reg
SA Merc	LJ South African Mercantile Law Journal
SMS	Short message service