Enforcement of consumer credit legislation — antipodean experiences

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Abstract

One of the areas in South African consumer credit legislation that requires most attention is that of enforcement of controls imposed on creditors, as existing legislation is often ineffectual due to inadequate enforcement provisions. I focus on two other jurisdictions in this article. The New Zealand consumer credit legislation, dating from the early eighties, has been comprehensively reviewed recently and a draft bill was introduced late in 2002, while Australian consumer credit legislation, which comprised a number of different federal Acts, was streamlined into a Uniform Consumer Credit Code in 1996. The three aspects of legislation in these jurisdictions that I discuss are the concept of an enforcement agency to ensure compliance with legislation, the concept of sanctions other than the traditional criminal penalties and negative licensing.

South Africa has two pieces of legislation that govern consumer credit contracts, the Usury Act and the Credit Agreements Act. They contain contradictory provisions and are both outdated. The Exemption Notice of 1999, drafted in terms of the Usury Act to deal with loans of less than R10 000 is more modern in concept but of limited effect.

It is generally accepted that South Africa needs to review its consumer credit legislation, both to deal with new methods and forms of granting credit, and to remove the contradictions arising from two separate pieces of legislation. One of the areas that requires most attention is that of enforcement of controls imposed on creditors, as existing legislation is often ineffectual due

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1Act 75 of 1980.

2NJ Grove & JM Otto Basic principles of consumer credit law (2ed 2002) 5.

3The South African Law Commission The Usury Act and related matters (Working Paper 46) already considered updating and consolidating consumer credit legislation in 1991; however a report was never compiled and the project is no longer on their programme.

4GN 713 in GG 20145 of 1 June 1999 (hereafter Exemption Notice).

5See schedule 1.2(a) of the Exemption Notice.
to inadequate enforcement provisions. It is always useful to review developments in the same field elsewhere, as the same problems require solution in different jurisdictions, and lessons learnt the hard way in other countries can be implemented here.

I focus on two other jurisdictions in this article. The New Zealand consumer credit legislation, dating from the early eighties, has been comprehensively reviewed recently and a draft bill was introduced late in 2002. Australian consumer credit legislation, which comprised a number of different federal Acts, was streamlined into a Uniform Consumer Credit Code, and a post-implementation review undertaken in 1999. Because their debates are so recent, and also because both countries have analysed some of the flaws in each other's legislation, their views are of interest when considering changes to the South African position.

The three aspects of legislation in these jurisdictions that deserve attention, for purposes of this article, are the concept of an enforcement agency to ensure compliance with legislation, the concept of sanctions other than the traditional criminal penalties and negative licensing. Before these concepts can be discussed, it is necessary to define the term 'enforcement' and to determine the issues that require enforcement.

**What is enforcement?**

The term 'enforcement' in consumer credit legislation can have two meanings. The first is that of proceedings by creditors against debtors to compel them to comply with their contractual obligations. The traditional enforcement agency for this type of enforcement is the civil courts, with financial limits determining the level of court that should be approached by a creditor who seeks to enforce the terms of a contract. Consumer credit legislation does not generally govern this form of proceedings, and it is based on general contractual principles.

The second meaning of the term enforcement, and as used in the context of this article, relates to the methods of ensuring compliance by creditors with credit legislation. In any consumer credit contract, the parties are usually in

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6Linda Ensor 'Draft law on lending operations is expected to lead to intense debate' *Business Day* 18 February 2003 at 2.

7The different codes and statutes all have different terms describing the receiver of credit and the grantor of credit — for convenience I will refer uniformly to 'creditor' and 'debtor' even though these terms might not in all instances be the most appropriate description.

8Credit Contracts Act 1981.


10Consumer Credit Bill of 2002.

11Uniform Consumer Credit Code 1996 (hereafter Australian UCCC).


13See s 15 of the Small Claims Courts Act 1984; s 29(1)(e),(g) of the Magistrates' Courts Act 1944.
an unequal bargaining position, as the debtor is anxious to obtain credit. In addition, the debtor is frequently less financially and legally astute than the creditor and so the creditor is often able to abuse his stronger position. For this reason, no consumer credit legislation can be effective without strong and easily utilised enforcement provisions, coupled with substantial sanctions for non-compliance with these provisions.

Traditionally, the criminal courts have been tasked with ensuring creditor compliance with credit legislation. But prosecutions in terms of credit legislation can be complicated, and, particularly in South Africa, there are other more urgent breaches of criminal law that require the attention of the courts.

**What issues require enforcement**

There is general consensus that the most essential requirement of any consumer credit agreement is adequate and comprehensible disclosure of the contract terms. Certain standard and minimum information is required in consumer credit legislation everywhere. This information usually includes the amount of credit, duration of the agreement, annual percentage rate, interest charges, default charges, and amounts paid as fees and charges. The reason for this is that adequate disclosure before concluding a contract allows a consumer to make an informed comparison. A failure to provide sufficient information removes this choice from consumers and makes them vulnerable to unscrupulous creditors. Although South African legislation contains disclosure requirements, these are frequently ignored. Another important area that requires control is credit advertising. Advertisements often target less educated consumers and contain deliberate misrepresentations or inducements to enter into agreements. Solicitations to enter into a credit agreement are also used by unscrupulous creditors and, although provisions in the Credit Agreements Act prohibit certain of these methods, these are often flouted. The Usury Act contains no similar provisions. Abusive collection methods also require sanctions. Finally, financial misinformation and post-contract disclosures are frequent trouble spots for debtors, who cannot find out how much they owe or have paid, or who are given incorrect information.

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14 Section 17 of the Usury Act 1968, s 23 of the Credit Agreements Act 1980.
15 D McQuoid-Mason (ed) Consumer law in South Africa (1997) 133; NZCCLR part 1 at 13; NCP Review at 47.
16 See, for example, ss 2 & 3 of the Usury Act 1968, s 4 of the Credit Agreements Act 1980 and Rule 2 of the Rules of the Exemption Notice 1999.
17 Section 3(c) of the Credit Agreements Act 1980 allows the Minister of Trade and Industry to prescribe the manner in which goods or services are advertised, but no Notice prescribing advertising standards has been published. The SA Law Commission The Usury Act and related matters (Working Paper 46) 1991 suggests at 253 that all credit advertisements be regulated.
18 Sections 7 and 13.
19 Rule 5 of the Exemption Notice prohibits certain creditor collection methods, but other than that, the Debt Collectors Act 114 of 1998 and the code of conduct published in terms of s 14 of the Act (GN R663 in GG 24867 of 16 May 2003) only control persons who collect debts owed to another, not to creditors themselves.
on the status of their debts. Without adequate sanctions, there is no incentive for creditors to assist debtors in this regard. 20

Enforcement agencies
As said above, the traditional enforcement agency for most legislation, including that dealing with consumer credit, has been the relevant Justice Department, which instigates prosecutions in the criminal courts. More recent developments show a trend towards enforcement by, or with the assistance of, a separate government or outside agency.

The current position in South Africa is that both the Credit Agreements Act 21 and the Usury Act 22 provide only criminal sanctions for non-compliance with legislation. These sanctions must be enforced by the prosecuting authorities in the Department of Justice. The only other entity tasked with enforcement of certain consumer credit legislation is the Micro Finance Regulatory Council. This institution consists of representatives from government, industry and consumer groups and is authorised by the Minister of Trade and Industry to ‘require adherence to and monitor and ensure compliance by lenders’ 23 with the Exemption Notice, which applies to loans of less than R10 000. The MFRC rules to ensure compliance include requirements on registration, disclosure, confidentiality, collection methods and reckless lending. 24 Creditors who do not comply with any of the rules, whether contained in the Notice or published by the MFRC, are prosecuted by the MFRC and sentenced by a disciplinary committee appointed by it. 25 Penalties include a fine not exceeding R25 000 per charge (payable to the MFRC), suspension or withdrawal of registration as lender, and an instruction to reimburse microdebtors who have been overcharged. 26

The New Zealand Credit Contracts Act of 1981 remains valid, but a comprehensive review led to the drafting of new legislation that will be introduced in the near future. The current Act contains limited criminal penalties for breaches of certain credit advertising restrictions. 27 The Consumer Credit Law Review found that these provisions are seldom enforced as no specialist agency exists to institute criminal prosecutions. 28 Other than the limited

20Section 10 of the Usury Act contains provisions on post-contract disclosure.
21Section 23 provides that any person who contravenes or fails to comply with any provision of the Act is guilty of an offence and liable on conviction to a fine not exceeding R5 000 or to imprisonment for a period not exceeding two years or to both.
22Section 17 contains a general penal provision similar to that quoted above, but with a maximum of R10 000 fine or three years imprisonment.
23Section 1.6.(d) Exemption Notice.
24The most recent of these rules appear in MFRC circular 0011/03/2002 (hereafter MFRC rules).
25See MFRC rule 3.15-3.17.
26MFRC rule 9.
27Section 38 Credit Contracts Act 1981.
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criminal provisions, the Act focusses on a system of self-enforcement, that is
direct action by a debtor against a creditor. At first glance, these provisions
appear of great value to debtors. They are expected to take action themselves
to enforce their rights by approaching the creditor directly, or by instituting
action in a dispute tribunal (the equivalent of our small claims courts) or a
court. 29 No government department or agency is appointed to oversee
enforcement of these provisions of the Act as the threat of individual action
by debtors was viewed as adequate to ensure creditor compliance. 30
Experience of the Act proved this assumption unfounded. 31 The imbalance
of power and knowledge between debtors and creditors, consumers' ignorance of their rights, and the mere effort of instituting some form of action
made the self-enforcement objective of the Act 'fundamentally unrealistic'. 32

The Review proposed a solution based on the creation of an enforcement
agency, emphasising the effectiveness of an agency as opposed to individual
consumer actions. 33 An agency can develop specialist expertise in the legal
complexities of the relevant legislation, it has the power and resources to
investigate and assess breaches of legislation, it can act on behalf of a number
of debtors, where individual action would be inappropriate, 34 and it redresses the power imbalance between debtors and creditors. 35 The Bill has
included this proposal and appoints the existing Commerce Commission as the
agency to promote compliance with the new legislation. Its functions include
the monitoring of trade practices and the institution of prosecutions and civil
proceedings in relation to breaches of the Bill. 36 It has the right to appear and be heard, to lead evidence and to cross-examine witnesses, in any
proceedings in terms of the Bill. 37

In Australia, the different states all agreed to a uniform Consumer Credit Code
in 1996. This code refers to a Government Consumer Agency, which exists in
each state to represent the public interest and the interests of debtors. 38
Either of the parties to a contract or this agency may institute any court
application for Part 6 orders for civil penalties for defaults by creditors. 39
Should the agency approach the court and a civil penalty be awarded, this
penalty must be paid into a special public interest fund created by law or, if

30 NZCCLR part 5 at 10.
31 NZCCLR part 5 at 19–21.
32 NZCCLR part 5 at 20.
33 NZCCLR part 5 at 39–45.
34 K Tokeley Consumer law in New Zealand (2000) at 382–387, states that class
actions, although permitted by rule 78 of the High Court Rules, are not generally
used in consumer credit litigation.
35 NZCCLR part 5 at 40.
36 Clause 85 Consumer Credit Bill 2002.
37 Clause 86.
38 Section 111 Australian UCCC.
39 The code is silent on the persons who may institute criminal proceedings and so
presumably the responsibility for this lies with the Attorney-General.
no such fund exists in that state, to the agency itself. The Australian post-implementation review did not deal with the role or function of the agency, and so it is assumed that it functions efficiently.

In both jurisdictions surveyed above, a government or other regulatory body acts together with, or instead of, the Justice Department. Its functions can include the instigation of prosecutions, the protection of the public interest, and the enforcement of non-criminal sanctions to benefit the affected consumers or the general public. In South Africa, the MFRC serves this function within the limited scope of the Exemption Notice. The rules it has promulgated are closer to international thought on credit regulation than any existing South African legislation. Its relationship with the Department of Trade and Industry and the extent of its powers and functions are already defined. So if a regulatory body were to be created by new legislation, it would seem more feasible to extend the function of the MFRC to cover all consumer credit legislation, than to create a further body to deal with instances in excess of the financial limit imposed by the exemption notice.

Sanctions for non-compliance
The second aspect of both Australian and New Zealand consumer credit legislation that is novel to South Africa, is the concept of civil penalties. The traditional sanction for non-compliance with legislation has always been a criminal prosecution with imprisonment or a fine as punishment. Recent developments elsewhere, including the United States and Britain, show a trend when punishing non-compliance with consumer legislation, towards compensation of the debtor, rather than a fine accruing to the state.

In South Africa, criminal sanctions are the only penalty that may be imposed in terms of both the Credit Agreements Act and the Usury Act. The Credit Agreements Act provides for a fine of R5 000 and/or a two year period of imprisonment for breach of disclosure provisions and for inclusion of other invalid provisions in a contract. The Usury Act provides for a fine of R10 000 and/or three years imprisonment for breach of the disclosure provisions, incorrect methods of calculation, and false statements. In South Africa, too, calls have been made for the availability of adequate civil remedies for breaches of credit legislation, so that the debtor has some financial incentive to enforce his rights, rather than penal provisions that amount to an 'undesirable and sweeping criminalisation of the private law'.

By contrast, the MFRC rules provide that one of the penalties that may be imposed on a creditor is an order to reimburse a debtor who has been overcharged.

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40 Section 106 Australian UCCC.
42 Grove & Otto n 2 above at 56.
43 MFRC rule 9.5.4.5.
As said earlier, the existing New Zealand Credit Contracts Act provides for a system of self-enforcement. The Act provides for very limited criminal sanctions but then makes it possible for direct action by debtors, who may themselves enforce their rights against creditors by approaching the creditor directly or instituting action in an appropriate forum. Debtors have not made use of these provisions for a number of reasons.\(^{44}\) First, a debtor must determine whether the disclosure requirements have been met, a task even the legal profession can find difficult.\(^ {45}\) He must then inform the creditor of this breach, work out the amount of credit the creditor forfeits and adjust the outstanding amount owed — all of these calculations requiring some expertise. Second, it is not straightforward for debtors to enforce their rights at a dispute tribunal or a court for a number of reasons. The court process is inaccessible — time, cost and ignorance all play a part, and in addition the penalty provisions are complex and difficult for debtors to enforce. While dispute tribunals are more accessible, the fact that referees are not required to have legal training has led to inconsistent and inaccurate decisions.\(^ {46}\) The Review considered all these issues and concluded that, because the self-enforcement provisions are not used, creditors do not have sufficient incentive to comply with the Act and debtors are not compensated for the non-compliance of creditors.\(^ {47}\)

The new draft Consumer Credit Bill is intended to offer a solution to these problems by providing various types of enforcement sanction. The traditional method of a criminal sanction for the commission of an offence, has been extended. Any breach of the provisions of the Bill is an offence which the district court may punish with a fine not exceeding NZ$30 000 which accrues to the state.\(^ {48}\) But the Bill creates other, possibly more effective, sanctions in addition to the traditional fine which benefits the state but not the affected debtor.

The first of these is statutory damages. A debtor may recover statutory damages from a creditor if the creditor has breached some of the provisions of the Bill (mostly those concerned with disclosure).\(^ {49}\) The statutory damages are usually an amount of $3 000 or 5 per cent of the relevant contract amount, but may be decreased in the court’s discretion.\(^ {50}\) Individual debtors and the Commission may apply for such damages, the Commission both on behalf of a class of persons and on behalf of individual debtors.\(^ {51}\)

In addition to statutory damages, a court may also order a refund or credit of a payment, actual damages suffered by a party to a contract, and exemplary

\(^ {44}\)NZCCR part 5 at 19-21.  
\(^ {45}\)\textit{Consumer credit and hire purchase} Butterworths Laws of New Zealand par 60-150, as quoted in NZCCR part 5 at 19.  
\(^ {46}\)NZCCR part 5 at 20.  
\(^ {47}\)NZCCR part 5 at 3.  
\(^ {48}\)Clause 77 Consumer Credit Bill 2002.  
\(^ {49}\)Clause 63.  
\(^ {50}\)Clause 64, 66 & 67.  
\(^ {51}\)Clause 65(1), (4).
damages. Such orders are granted for any breach of the provisions of the Bill and may be requested by the Commission or any party to the relevant contract.

The High Court may also grant injunctions (interdicts) restraining persons from breaching the provisions of the Bill. The Bill also pertinently provides that a contract may not be enforced if the key disclosure requirements have not been met.

In Australia, prior to the adoption of the Uniform Credit Code, the Credit Acts of the different states all provided that a creditor who was in breach automatically lost the right to charge interest. He could apply to court for reinstatement of the lost interest if he wished to argue the matter. It was generally felt that these provisions were too harsh, given that they applied to any breach of legislation irrespective of whether it disadvantaged debtors or not.

The Uniform Consumer Code introduced a new concept, that of 'civil penalties'. This type of penalty can only be imposed for a breach of one of a number of 'key requirements', which relate to disclosure, credit charges, excessive interest rates and statements of account. Both the debtor and the creditor, as well as the Government Consumer Agency, can approach the court when a key requirement has been breached. As will appear, the creditor is encouraged to apply to correct any breach he has committed by the fact that his liability will be limited, if he, rather than the debtor, has instigated the action.

If the debtor applies for an order, the maximum penalty is all the interest that would have been payable from date of conclusion of the contract, or from the date of contravention. This amount may be set off against any amount that is or becomes due to the creditor in terms of the credit contract. The amount may be increased if the debtor has suffered an actual loss. The debtor may also approach the court for compensation for loss arising from the breach of a key requirement, either instead of seeking civil penalties or if the court has already been approached for the same reason by the creditor or Government Consumer Agency.

If one of the latter approaches the court because a key requirement has been

51Clause 69.
52Clause 70(1).
53Clause 71.
54Clause 74.
55See generally Australian MCC final report at 86.
56Part 6 Australian UCCC.
57Section 100 Australian UCCC.
58Sections 103, 105.
59Section 103(1).
60Section 104(1).
61Section 107.
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contravened, the maximum penalty that may be imposed is $500,000. Although this amount seems enormous, it relates to all contraventions of that requirement, as disclosed by the creditor, throughout Australia. The court is also expected to divide the amount awarded as penalty between the various states, depending on the number of contracts affected in each jurisdiction. Amounts awarded as penalty in such instances are not given to the affected debtors, but to a fund established in each jurisdiction for that purpose, or to the Government Consumer Agency.

Before the court imposes any civil penalty, it must consider the conduct of the parties, whether the contravention was deliberate, procedures created by the creditor to prevent or identify contraventions, actual detriment to the debtor and any attempts by the creditor to remedy the contravention or compensate the debtor.

The Government Consumer Agency, or anyone affected by a contravention of any requirement not listed as a key requirement, may also approach the court for an order that the creditor make restitution or pay compensation.

The Code also provides for criminal offences. A maximum penalty is listed at the end of various sections of the Code, expressed in penalty units. Each unit is the equivalent of $100. This is the traditional criminal sanction expressed as a fine which accrues to the state.

The Uniform Consumer Credit Code was introduced in the various states in 1996. At the end of the decade, a two-stage post-implementation review was conducted, first by the Ministerial Council on Consumer Affairs and then in terms of the National Competition Policy. The report by the Council on Consumer Affairs dealt in some detail with the civil penalty provisions. One of the key issues was whether this regime encouraged a compliance culture. Both consumer groups and legal groups were generally of the opinion that the previous Credit Acts, with automatic forfeiture provisions, were more effective in ensuring compliance than the civil penalty provisions. But some industry groups felt that compliance with the new Code was ensured by encouraging a strictly legalistic interpretation of the Code and that debtors were given too much unnecessary information to avoid the possibility of a contravention. In particular, the general consensus was that consumers were swamped with too much information at too early a stage of the contract negotiations. This

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63Section 105(1).
64Section 106.
65Section 102(4).
66Section 114.
67Section 179.
68Australian MCC Final Report 1999, which reviewed the Code from a consumer perspective.
69Australian NCP Final Report 2001, which reviewed the Code from a competition perspective.
70At 87.
71At 87–88.
was counterproductive, as consumers were then not able to shop around for the best deal, one of the main objectives of the Code.\textsuperscript{72}

Neither of the South African Acts contains any form of civil penalty. The MFRC rules are more progressive, with compensation available to debtors for actual losses they have suffered.\textsuperscript{73} It is suggested that this be extended to cover all consumer credit legislation, and that the New Zealand form of statutory damages appears the easiest to implement effectively. If a regulatory body is created to protect consumer interests, with the power to request such damages, it would be of enormous benefit to consumers, who are unable to approach the civil courts as individuals because of the cost involved.

It is also important that any regulatory body be placed in a position to sanction creditors who do not comply with legislation. The South African criminal courts are overburdened and under-skilled in commercial crime prosecution. So it is extremely unlikely that the type of individual small creditor breaches relevant in consumer credit legislation will ever enjoy priority in the scheme of criminal prosecutions.

In the other jurisdictions reviewed above, criminal and/or administrative sanctions co-exist with debtor compensation. It is vitally important to introduce the possibility of recompense in South African consumer credit legislation. Criminal sanctions are insufficient to ensure creditor compliance, as it frequently remains profitable to breach legislation and pay any fine imposed. It is also advisable that, as is the position in New Zealand and America, any compensation be set off against the loan amount, rather than paid out to the debtor, both for economic stability and to ensure that the money is used to reduce the debt.

**Negative licensing**

The New Zealand Credit Contracts Act of 1981 gives the district courts the power to prohibit or restrict persons from acting as creditors, either permanently or for specific periods, if they have been convicted of offences under the Act, have entered into oppressive contracts, or are, in the court's opinion, not fit and proper persons to act as creditors.\textsuperscript{74} Any person can apply for such an order. During the review of this Act, it was stated that section 39 is theoretically useful, as its value lies in the fact that it can allow a free-market credit industry to operate while reserving the right to 'prune off' inappropriate creditors.\textsuperscript{75} But the review then argued that for such orders to be imposed, an enforcement agency was necessary, pointing out that by the year 2000 action had never been taken in terms of this section. The reasons for this were identified as a lack of knowledge and inability of the general consumer to obtain the information necessary to institute such an action.

\textsuperscript{72}At 92.
\textsuperscript{73}MFRC rule 9.5.4.5.
\textsuperscript{74}Section 39 Credit Contracts Act 1981.
\textsuperscript{75}NZCCLR part 5 at 43.
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constraints that would not apply to an enforcement agency.\textsuperscript{76} It was also proposed that only a court, and not the agency itself, should have the power to restrict a creditor by negative licensing.\textsuperscript{77} The reason for this was that this created a confusing overlap of roles for the agency, and also that the gravity of removing someone from a particular trade made it appropriate for only a court to have authority to make such an order.

The New Zealand Consumer Credit Bill retains the negative licensing provisions and allows anyone, including the Commission as enforcement agency, to apply for such an order.\textsuperscript{78} The district court has the power to make such orders, and may restrict or prevent a person from providing credit.\textsuperscript{79}

The Australian Uniform Consumer Credit Code does not make provision for registration of creditors, but the prior legislation that required all states and territories to adopt the Code or alternative consistent legislation,\textsuperscript{80} provides that any of these jurisdictions may establish schemes for the licensing or registration of creditors.\textsuperscript{81} A number of states have enforcement agencies that may enforce a negative licensing scheme, and may themselves debar persons from practice as creditors.\textsuperscript{82}

In South Africa, neither the Usury Act nor the Credit Agreements Act makes provision for registration or deregistration as creditor. Both Acts make provision for officials from the Department of Trade and Industry to inspect the activities of a creditor and to request information from creditors,\textsuperscript{83} but merely provide for financial penalties for non-compliance.\textsuperscript{84}

In contrast, the MFRC rules make provision for positive registration. All microlenders must be registered with the MFRC\textsuperscript{85} and a failure to register means that they cannot charge the higher rates provided for in the Exemption Notice. Also, non-compliance with the Exemption Notice rules or the MFRC rules can allow a disciplinary committee to suspend registration as microlender pending compliance with certain conditions, or even to withdraw registration completely.\textsuperscript{86} While this does not prevent such a creditor from providing credit in the future, it does mean that he then becomes subject to the interest rate limits imposed by the Usury Act, and cannot rely on the

\textsuperscript{76}Ibid.
\textsuperscript{77}Ibid.
\textsuperscript{78}Clause 82.
\textsuperscript{79}Ibid.
\textsuperscript{80}Australian Uniform Credit Laws Agreement, 1993.
\textsuperscript{81}See also Australian NCP Final Report 2001 at 55.
\textsuperscript{82}See the discussion on these schemes in NZCCLR part 5 at 43.
\textsuperscript{83}Sections 13–14 Usury Act 1968; s 26 Credit Agreements Act 1980.
\textsuperscript{84}Section 17–17A Usury Act 1968; s 23 Credit Agreements Act 1980.
\textsuperscript{85}Section 1.5 Exemption Notice.
\textsuperscript{86}Rule 9.5.4.3–4. See also annexure B 1.8 which provides that an application for registration as lender may be rejected if one of the members of the applicant has previously been de-registered or 'has brought the industry into disrepute or ... has acted with disregard for consumer rights generally'.

Exemption Notice to charge more than these amounts.

As said above, the MFRC rules do not prevent a creditor from working altogether but merely make it possible to deny him the benefits of the Exemption Notice. A regulatory authority cannot be given the power to debar persons completely from acting as creditors, given the provisions of the Bill of Rights protecting the right of citizens 'to choose their trade, occupation or profession freely'. But this section in the Bill of Rights also states that the practice of a trade, occupation or profession may be regulated by law, and it is perfectly feasible to allow a regulatory authority to approach a court to sanction a creditor who does not comply with any new legislation. The Constitutional Court has already held that section 22 and its precursor should not 'be construed as entitling persons to ignore legislation regulating the manner in which particular activities have to be conducted', and numerous examples can be found of professional bodies who request the courts to sanction their members.

The question is then whether a positive or negative registration system is advisable. The MFRC has a positive licensing scheme, where all creditors must be licensed and their licences may be revoked. However, they deal with only a small part of the creditors that offer credit in South Africa. It would be a vast and costly task to register all creditors, and unwise to exclude certain categories of creditor, such as those whose practices are under a certain limit, or who do not extend credit as their primary function, as it is usually not the mainstream creditors or those who make large loans who engage in undesirable practices.

I suggest that any regulatory authority created by new legislation should have the power to impose fines and other limited penalties on creditors who do not comply with legislation, but should not require positive registration by creditors. The regulatory authority should also have the power to refer serious or regular offenders to a High Court for a suspension from practice or a prohibition on practice. This ultimate form of deterrent is necessary as financial penalties are frequently not severe enough to prevent further transgressions.

Conclusion

The United Nations Guidelines for Consumer Protection, adopted by the General Assembly on 16 April 1985, which were drafted 'taking particularly into account the needs of developing countries', include as objectives the need to achieve or maintain adequate protection for consumers; and the need to develop market conditions which provide consumers with greater choice.

88S v Lawrence 1997 4 SA 1176 (CC) par 33–34.
89See for example Law Society of Transvaal v Macbaka 1998 4 SA 413 (T). See also Janse van Rensburg NO v Minister van Handel en Nywerheid 1999 2 BCLR 204 (T) where provisions of the Harmful Business Practices Act 71 of 1988 that ensure consumer protection were challenged as a violation of s 22.
at lower price.\textsuperscript{90} Regrettably, South African consumer credit legislation meets neither these nor any other of the stated objectives. It is outdated, contains conflicting provisions, and has been described as 'the antithesis of what good consumer legislation should in fact be'.\textsuperscript{91}

For more than a decade it has been accepted that South African consumer credit legislation is inadequate. Since then, the consumer profile has changed considerably, with ever-increasing numbers of less sophisticated consumers seeking and being offered different types of credit. The consumer credit market has exploded in the past few years, with even low income groups and unemployed becoming credit-active. Injudicious use of credit can adversely affect a consumer's life for many years, and this risk is aggravated when consumers are not financially literate. In addition, the imbalance of power between creditors and debtors, the cost of litigation, and low levels of consumer education all make the consumer credit market more difficult to navigate than ever before.

I have touched on only one aspect of suggested legislative changes, and there are many others that can be viewed as equally or more pressing. But without strong and effective sanctions to ensure that creditors comply at least with minimum legislative requirements, debtors remain vulnerable to deceptive and fraudulent conduct that can have massive implications for their future financial stability.

\textsuperscript{90}Annexure 1 to Resolution 39/248 of the General Assembly.

\textsuperscript{91}Grove & Otto n 2 above at 3.