

**COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)
ON THE DRAFT NATIONAL CREDIT ACT AMENDMENT BILL, 2013
AS REFLECTED IN GOVERNMENT GAZETTE NO. 36505 OF 29 MAY 2013**

GOVERNMENT GAZETTE NO 35876 of 16 NOVEMBER 2012

1. It is not clear what happened to the suggestions made by Dr Ambrosini pertaining to Section 86 as well as the definition of the word "consumer" reflected in his suggestions contained in Government Gazette no. 35876 of 16 November 2012.

SECTION 1: DEFINITIONS

1. "Secured loan": The deletion of the words "the title to" seems to remove the major concerns with regard to this definition.
2. "Mortgage agreement": We suggest that reference to "secured by a pledge of immovable property" be changed to "secured by the registration of a bond over immovable property".
3. The proposed definition of "lease" is supported.

SECTION 25: APPOINTMENT OF INSPECTORS AND INVESTIGATORS

The proposed amendment is supported.

SECTION 45: APPLICATION OF REGISTRATION

The proposed amendment is not supported in its current form, as we believe this creates too wide a discretion for the National Credit Regulator. The grounds that render an applicant not to be a fit and proper person to be a debt counsellor should be listed.

SECTION 46: DISQUALIFICATION OF NATURAL PERSONS

We agree that a person may not be registered as a debt counsellor if he/she is an unrehabilitated insolvent. However, it is not clear why an unrehabilitated insolvent may not be registered as a credit provider and this should be reconsidered.

SECTION 48: CONDITIONS OF REGISTRATION

The proposed amendment is supported.

SECTION 49: VARIATION OF CONDITIONS OF REGISTRATION

The proposed insertion of subsection (e) is not supported. The discretion created for the National Credit Regulator is unreasonable, vague and confusing.

SECTION 57: CANCELLATION OF REGISTRATION

In terms of Section 40(4) a credit agreement concluded by an unregistered credit provider is void and receives the same far-reaching treatment as that meted out to other unlawful agreements provided for in Section 89 of the Act. Therefore, this decision cannot be taken one sided and a registrant must have the right to be heard before such a decision is taken. We do not support the amendment.

SECTION 58A: VOLUNTARY CANCELLATION OF REGISTRATION

It is suggested that Section 58 should rather be amended to include a second and third sub-paragraph and not to create an addition to the section. It is noted that the proposed Section 58A (1)(a)(i) makes provision for “*all credit providers*”. It should be clarified that the letter advising of his or her deregistration should be submitted to all credit providers *of the consumer he or she was counselling*.

SECTION 83A: RECKLESS CREDIT AGREEMENT

1. In terms of the current Section 83 it is not clear on whom the onus of proof of reckless lending rests. It is suggested that Section 83 be amended to provide for this.
2. In terms of the proposed Section 83A, a consumer would be able to approach the Tribunal with an application. However, it is not indicated what the procedure and administrative processes of such an application should be and this should be clarified.
3. We are concerned that the Tribunal would not be as accessible to a consumer as a court. Magistrates' Courts are easily accessible throughout the country. Furthermore, we are of the view that the proposed addition of Section 83A would create uncertainty as regards the appropriate forum. The consumer will for instance be entitled to approach the Tribunal while the matter is already in court. The possibility of “forum shopping” is also not excluded.

4. We regard the proposed addition of Section 83A as unnecessary and believe that there are currently sufficient provisions and processes for consumers to approach the courts for relief.

SECTION 86: APPLICATION FOR DEBT REVIEW

The proposed amendment is supported. However, it is noted that the word “Magistrate’s” appears in Sections 86(8)(b), 86(9) and 87. It is uncertain as to why a deletion of the word is proposed in respect of Section 86(11).

SECTION 89: UNLAWFUL CREDIT AGREEMENTS

In the matter of *National Credit Regulator v Opperman and Others, 2013 (2) SA 1 (CC)* the entire Section 89 (5) (c) was declared unconstitutional and invalid. It is suggested that consideration should be given to appropriate penalties in respect of unlawful credit agreements.

SECTION 92A: PRE-AGREEMENT DISCLOSURE

We submit that it should be sufficient for a spouse to co-sign documents.

SECTION 129: PROCEDURES BEFORE DEBT ENFORCEMENT

1. There should be personal delivery of Section 129 notices.
2. We are of the view that Section 129(3) should not be deleted, as it contains a form of protection to the consumer. The deletion of the subsection will be to the detriment of the consumer.

SECTION 130: DEBT PROCEDURES IN A COURT

The proposed amendments are supported.

SECTION 134: ALTERNATIVE DISPUTE RESOLUTION

It is noted that in the proposed Section 124A the word “may” is used and it is suggested that it rather be “shall”. Furthermore, the alternative dispute resolution practises and structures had never been defined in the Act and are also not regulated. It is suggested that, instead of inserting a new Section 134A, Section 134 be amended by adding the following subsection (6): “Any person referred to in Section 134(1)(b)(ii) shall register as such an agent on conditions imposed by the National Credit Regulator.”

SECTION 140: OUTCOME OF COMPLAINT

The proposed amendment is supported.

SECTION 163: AGENTS

1. The proposed amendment to Section 163(1) is supported.
2. The proposed subsection (1A) is not supported. It is of concern that, should debt counsellors only be entitled to make use of agents for administrative tasks, a position might arise where debt counsellors and credit providers would not be allowed to make use of the services of attorneys to represent them in a Court of law. This would be unacceptable.
3. The proposed amendment to Section 163(3) (b) is supported.

SCHEDULE: 8A

The proposed Section 8A, reading "A debtor who has applied for a debt review must not be regarded as having committed an act of insolvency" is of concern. The phrase is too widely drafted. Surely it is only the application for debt review which should not be used as establishing an act of insolvency on the part of the debtor. If there are other facts which establish an act of insolvency, they can be used. The case law is clear that an application for an order of debt rearrangement under the NCA does not bar an application for sequestration. The phrase should therefore read: "An application for debt review or order granted in terms thereof shall not be regarded as an act of insolvency."