

# THE NATIONAL CREDIT ACT

## LEARNER GUIDE

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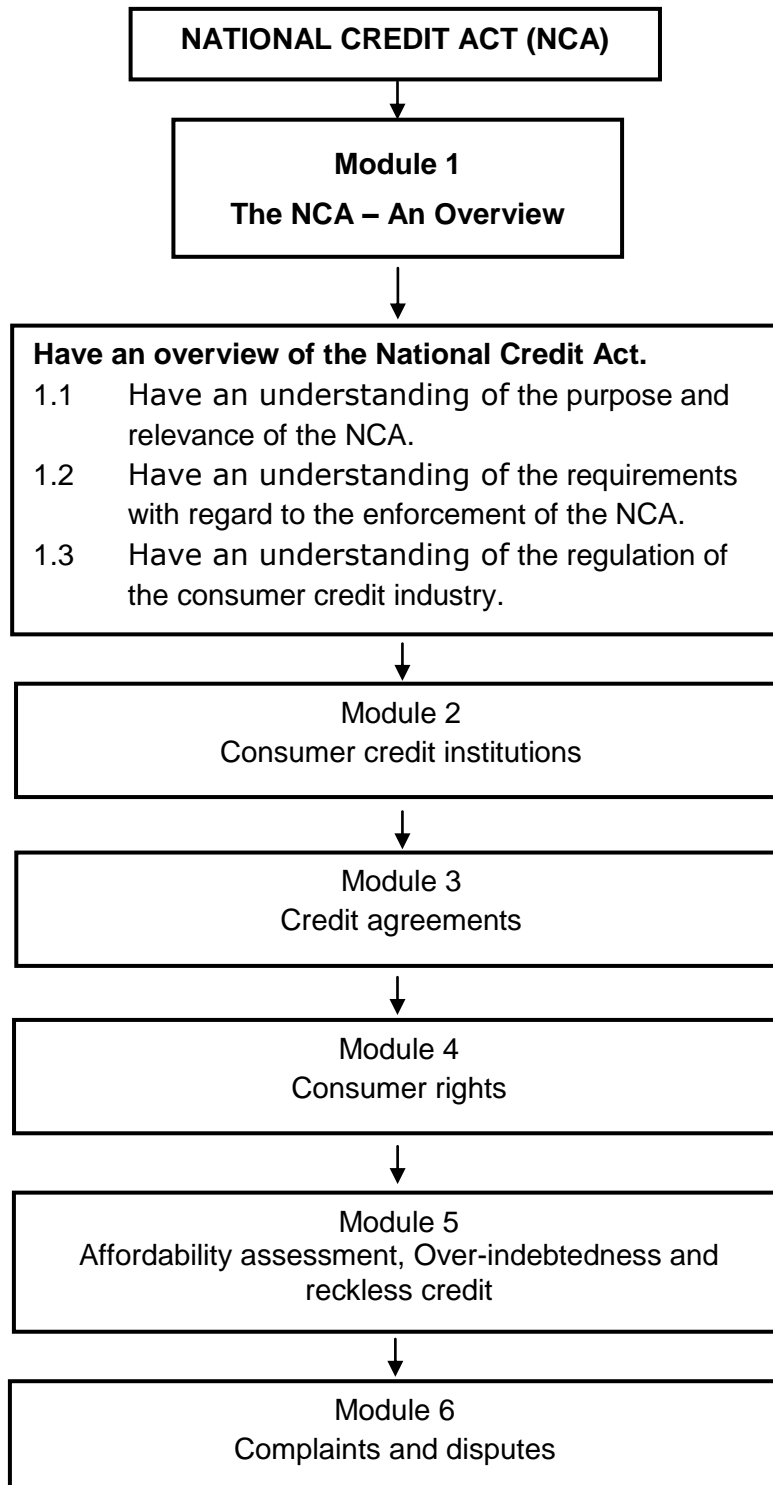
**MODULE 1**

**AN OVERVIEW OF THE ACT**

**At the end of this module you will be able to:**

- 1.1 Have an understanding of the purpose and relevance of the National Credit Act (NCA)
- 1.2 Have an understanding of the requirements with regard to the enforcement of the NCA
- 1.3 Have an understanding of the regulation of the consumer credit industry

**Learning Map**



## 1.1 PURPOSE AND RELEVANCE OF THE ACT

### 1.1.1 Objectives and purpose of the NCA

#### Introduction

The NCA replaced the Usury and Credit Agreement Acts as well as related subordinate legislation that allow micro lending.

The aim is to introduce a single, functional system of regulation that will apply to all credit activities, thereby ensuring that all credit providers and credit consumers are treated equally.

Broadly, the Act aims to reduce reckless credit behaviour – both by credit providers and consumers – and the level of over-indebtedness in South Africa.

Before we continue with this module, let us first look at the definition of a **consumer as a natural person**, as well as a **consumer as a juristic person** as we refer to these two entities throughout the learning material.

#### ***A consumer as a natural person is:***

- a person to whom goods or services are sold under a discount transaction or instalment agreement or by means of incidental credit.
- a person to whom money is paid or credit is granted in a pawn transaction.
- the party who receives the credit under a credit facility and who is the mortgagor under a mortgage agreement.
- the borrower under a secured loan.
- the lessee under a lease.
- the guarantor under a credit guarantee.
- the party to whom or at whose direction money is advanced or credit is granted under any other credit agreement – example unsecured loan.

#### **A consumer as a juristic person**

**A juristic person** includes a partnership, association (e.g. church or sports club), or other body of persons, corporate or unincorporated (e.g. company), or a trust where there are three or more individual trustees or the trustee is itself a juristic person. However, stokvels are not included in the definition.

Despite this definition within the NCA, there are further threshold limitations on the applicability of the Act to juristic consumers.

Stokvels, Sole Proprietors and Trusts where there are two or less trustees for the purposes of the NCA are classified as natural persons (consumers). This is contrary to the Common Law principle.

#### **Reasons for the NCA**

Most South Africans (up to 67%) relied on money-lenders for credit and they were not adequately protected by legislation. **Money-lenders gave loans at ridiculously high interest rates to low-income earners who mostly used these loans for personal purposes, mainly to supplement low wages.** This situation led to the inability to repay loans that provided for basic household needs and led to more borrowing, creating a downward spiral from which the borrowers were unable to escape.

Low-income earners struggled to access credit, and should they get it, they paid very high interest rates because their risk factor was higher. The Usury Act also allowed money-lenders to charge higher interest rates. This was in contrast with middle to high income earners who were charged more reasonable rates of interest and were able to access credit more easily.

#### **The NCA and International Law**

It is important to understand that our legislation and especially market conduct legislation must be aligned with international legislation, because we participate in commerce beyond our borders.

Consumer credit legislation has been and / or is currently being introduced in other countries around the world.

## Objectives of the NCA

The objectives of the Act and thus, the ultimate benefit for all consumers are that:

- The NCA will **create a framework where competition and transparency will be promoted** because all credit transactions will be treated the same within the identified market sectors.
- **All consumers will have equal (credit related) rights and these rights will be protected.** The NCA introduces measures to manage over-indebtedness of consumers and avoid reckless lending practices.
- **A regulatory framework is established** to regulate credit bureaux, credit providers and debt counsellors. The complaints mechanisms are formalised and regulated **to ensure maximum protection and compensation for consumers.**

## Purpose of the NCA

It is important that the purpose of the NCA is understood. The most noteworthy anticipated achievements of the NCA are:

- Improved accessibility of the credit market to previously disadvantaged consumers.
- Enhanced consumer rights and education.
- Regulation of credit.
- Consistent treatment of all consumers and credit providers.
- Responsible borrowing and elimination of reckless lending.
- Readdressing the balance of power between consumer and credit providers.

### 1.1.2 Requirements with regard to agents and employees of credit providers

#### Description of an agent

Most credit providers have a variety of people in different capacities working for them. These categories include employees, agents or other people who do work for the credit provider, but who are not necessarily classified as an employee or an agent. Let us look at a definition of an agent.

**An agent** is a person authorised to act for and under the direction of another person when dealing with third parties. The person who appoints an agent is called the principal. An agent can enter into binding agreements on the principal's behalf and may even create liability for the principal if the agent causes harm while carrying out his / her duties.

#### Training of agents / employees and Register

The NCA specifies that credit providers must train their agents or employees with regard to matters to which the NCA applies. This does not necessarily mean that all staff must receive in-depth training – it merely means that those staff or agents who deal with matters provided for in the NCA must be trained on those specific matters<sup>1</sup>.

The credit provider must also maintain a register of all agents.

#### Requirements for agents

If a credit provider uses agents for solicitation, offering, completion or conclusion of credit agreements, the<sup>2</sup>:

- agent must show the prescribed identification card, provided by the credit provider, to anyone with whom he / she interacts.
- credit provider must maintain a register of all agents.

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<sup>1</sup> S163 of the NCA

<sup>2</sup> S163 of the NCA

### Requirements for non-employees / agents

If a person is not an agent or employee of a credit provider and he / she solicits, offers, completes or concludes a credit agreement for and on behalf of a credit provider or consumer:

- he / she must be identified by name and identity number in the credit agreement.
- he / she must disclose to the consumer any commission or fee which will be paid if the agreement is concluded.
- the fee or commission charged to the consumer must not exceed the prescribed amount and may be paid only if the agreement is concluded.

### 1.1.3 Relevance of the NCA

#### Agreements covered by the NCA

The NCA applies to every credit agreement between parties dealing '**at arm's length**' and made within or having an effect within the Republic of South Africa. Arm's length transactions are agreements in which the parties are **independent of each other** and necessarily strive to obtain the utmost possible **advantage** (i.e. profit) out of the transaction.

For example, agreements NOT at arm's length includes loans between family members

Credit providers deal with various types of 'at arm's length' credit arrangements and agreements, for example:

- Personal loans
- Credit card facilities
- Hire purchase agreements
- Revolving credit
- Mortgage loans, etc.

Legislation cannot always be 'product' specific and therefore some of the typical types of agreements (as listed above) will not be found in the Act.

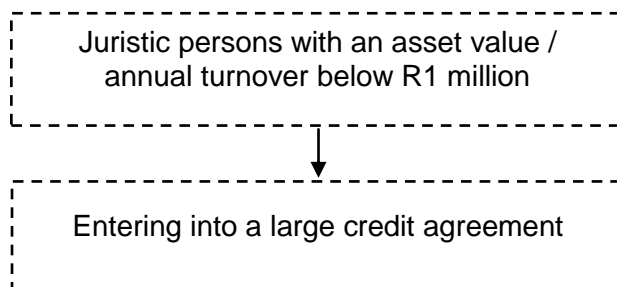
#### Agreements excluded from the NCA

The following credit agreements are also specifically excluded from the application of the NCA.

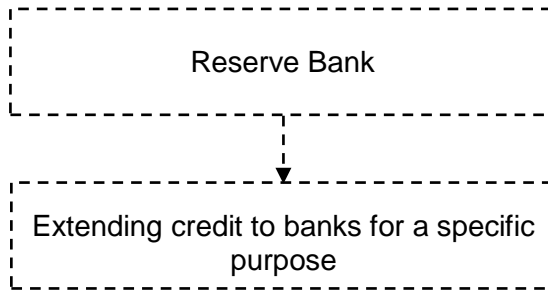
##### 1. Where the consumer is:

- **the State or an organ of the State, or**
- **a juristic person or related juristic persons** (e.g. two close corporations with the same sole member) entering into a credit agreement with –
  - an asset value or annual turnover, or
  - a combined asset value or combined annual turnover (i.e. the total asset value or annual turnover of both close corporations)of R1 million or more at the time of the agreement.

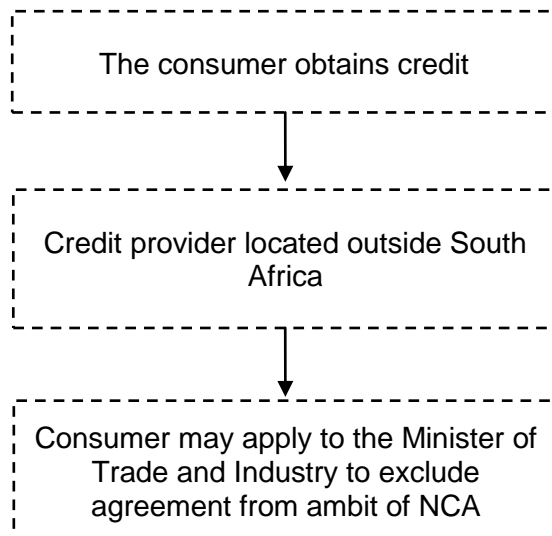
##### 2. Where it is a large credit agreement and the consumer is a juristic person with an asset value or annual turnover below R1 million.



3. **Where the Reserve Bank provides the credit.** The Reserve Bank often extends credit to banks for a specific purpose and when it does, it will be excluded from the Act.



4. **Where the credit provider is outside South Africa and the consumer applied for exemption to the Minister of Trade and Industry.** The applicant may request the Minister of Trade and Industry to exclude such an agreement from the ambit of the NCA in a format as prescribed by the Regulations.



#### 1.1.4 Limited relevance of the NCA

##### Incidental credit agreements

The NCA has a limited relevance with regard to incidental credit agreements. An incidental credit agreement comes into existence where an account is tendered for goods and services that have been / are to be provided and:

- a fee, charge or interest becomes payable when payment of the account is not made within the determined period; or
- two prices were quoted – the lower price to be paid if the account is settled before the determined period and the higher price to be paid if the account is not settled in time.

##### Example:

If a consumer goes to the Doctor and pays immediately or within 30 days, no interest is charged. However, if he / she only pay after 30 days, interest will accrue to the outstanding amount. This is called an incidental credit agreement.

Incidental credit agreements also refer to continuous services, for example when a consumer defaults on payment of lights and water.

Not all the provisions of the NCA will apply to incidental credit agreements – only those specified in the NCA.

##### Juristic persons

The NCA also has limited application with regard to juristic persons, i.e. a company. Certain sections of the NCA do not apply to consumers who are juristic persons.

## 1.2 ENFORCEMENT OF THE NCA

The NCA will be enforced by specific role players who have been given the power to perform acts in terms of the NCA, namely the **National Credit Regulator (NCR)** and the **National Consumer Tribunal (Tribunal)**.

### 1.2.1 Types of offences

#### Introduction

The NCA identifies five offences with regard to the enforcement of the NCA, namely:

- i. Breach of confidentiality.*
- ii. Hindering of the administration of the Act.*
- iii. Failure to attend a hearing when summoned.*
- iv. Failure to answer fully and truthfully under affirmation.*
- v. Offences relating to the failure to comply with an order from the NCR and Tribunal.*

### 1.2.2 Penalties imposed in terms of the NCA

The NCA imposes certain penalties on **any person convicted** of an offence.

The Tribunal imposes penalties with regard to the abovementioned offences. The contravention of or failure to comply with an order from the Tribunal may warrant a fine or a maximum 10 year prison sentence, or both.

Any person convicted of any other offence, may warrant a fine, or a maximum prison sentence of 12 months, or both.

## 1.3 REGULATION OF THE CONSUMER CREDIT INDUSTRY

### 1.3.1 Registration of credit providers

#### Introduction

The NCA requires credit providers that fall within the registration criteria, to register. A credit provider might want to register nationally, because it operates throughout the whole country, or only provincially, because it only operates in one province (once provincial regulators have been established).

#### Registration criteria

A person needs to register as a credit provider if the total number of credit agreements (excluding incidental credit agreements) on the books is 100 or more,

**OR**

If the total principal debt of all the outstanding credit agreements (excluding incidental credit agreements) is **R 500 000** or more.

The above applies if the credit provider acts alone or with an associated person\*. If the associated person also provides credit in its own name (alone or with someone else), with 100 or more agreements or with a principal debt of R 500 000, he / she must register as a credit provider.

**\*The following are regarded as 'associated persons' where the credit provider is:**

#### a. natural person:

1. Spouse
2. Business partner

#### b. juristic person:

- a. any person that directly or indirectly has a controlling interest in the credit provider, or is directly or indirectly controlled by the credit provider
- b. any person that has a direct or indirect controlling interest in, or is directly or indirectly controlled by, a person contemplated in (a) above; or
- c. any credit provider that is a joint venture partner of a person described in a or b above.



### 1.3.2 Registration of credit bureaux

The NCR registers and regulates credit bureaux. As with credit providers, a credit bureau must also adhere to certain registration criteria. A person can only operate as a credit bureau, if registered. A natural person cannot register as a credit bureau.

### 1.3.3 Registration of debt counsellors

As with credit bureaux, debt counsellors are also registered and regulated by the NCR.

#### Description of debt counsellors

**A debt counsellor** is a person who assists consumers, when they become over indebted or when they fear that they might be over indebted, in rescheduling their debt.

#### Example:

If a consumer has four retail accounts and the repayments are very high and will put him / her in a position where he / she may no longer be able to afford them, a debt counsellor's assistance can be requested.

#### Debt counsellors' function

Debt counsellors' function is to intervene, when requested and when applicable, in consumers' over indebtedness or where a consumer fears that he / she might be over indebted / living beyond his / her means. The NCR, Tribunal or a court can refer matters of over indebtedness to a debt counsellor. Alternatively, consumers can approach a debt counsellor on their own initiative.

### 1.3.4 Registration of Payment Distribution Agents

Payment Distribution Agents (PDAs) distribute payments to credit providers on behalf of consumers who are under debt review. These payments may be as a result of debt rearrangements, court orders, Tribunal orders or other agreements.

The NCR registers and authorises PDAs. Payment Distribution Agents must meet certain requirements in order to be registered by the NCR.

These requirements include the following:

- education: appropriate qualifications and a compulsory training programme;
- experience: the agency must have an executive director who is responsible for the day to day operations with five years' experience in collecting, distributing payments, accounting or financial services;
- competency: sufficient human, financial and operational resources, put in place adequate resources, systems and procedures, comply with the Broad-based Black Economic Empowerment Act, 2003 (Act 53 of 2003) as amended;
- honesty and integrity and
- other requirements such as investment capital to establish the agency.

Some of the functions of Payment Distribution Agents include the following:

- implement, maintain and utilise an electronic payment distribution system to facilitate payments
- send consumers monthly statements
- deposit collected monies into a designated trust account
- distribute monies within five days of receipt

### 1.3.5 Standard conditions for registration

#### Standard conditions

Standard conditions of every registration include:

- that the NCR (or any person authorised by the NCR) is allowed to enter any premises where the registered activities are being conducted, during normal business hours, to conduct reasonable inquiries to ascertain compliance and to 'enter and search' premises.
- that the registrant must comply with the Act, the Financial Intelligence Centre Act (FICA), other applicable legislation and all the applicable provincial legislation where he / she operates from.



### **Display of certificate**

Each registrant must display the certificate in any premises from which it operates from, e.g. at all the branches of the credit provider, as well as show its registered status / registration number on all credit agreements and communications.

### **Validity of registration**

Registration is valid from the date of issue (provided the renewal fees are paid) until deregistration or cancellation.

## **1.3.6 Compliance notices to registered and non-registered persons**

### **Issue of compliance notice**

The NCR may issue a compliance notice to a person or association of persons if it reasonably believes that there is:

- Non-compliance / inconsistency with the Act.
- Non-compliance with a condition of registration.

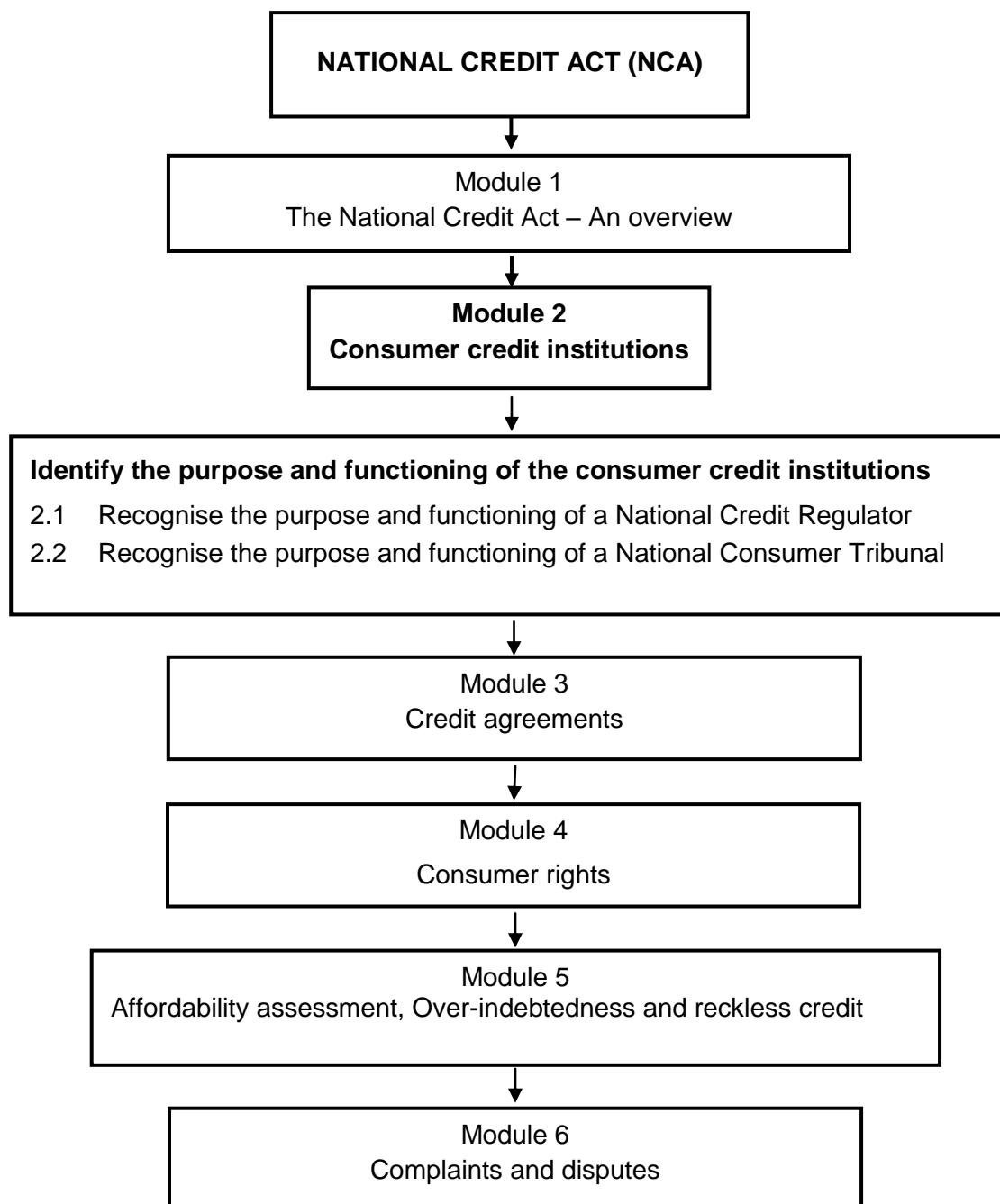
## **1.3.7 Cancellation of registration**

The Tribunal, on request by the National Credit Regulator may cancel a registration if the registrant contravenes the NCA, fails to meet commitments or due to non-compliance with a condition of registration. A registrant may also, by submitting a written notice to the NCR, voluntarily cancel its registration.

If a credit provider's registration is cancelled, its obligations will continue beyond cancellation or the suspension date of the registration. The consumer will not be affected by the cancellation or suspension if a credit agreement was in effect at the time of the event. Neither the credit provider, nor the consumer will be able to use the cancellation of a credit provider's registration to escape their responsibilities with regard to an existing credit agreement.

<b>MODULE 2</b>	
<b>CONSUMER CREDIT INSTITUTIONS</b>	
<b>At the end of this module you will be able to:</b>	
2.1	Recognise the purpose and functioning of the National Credit Regulator
2.2	Recognise the purpose and functioning of the National Consumer Tribunal

### Learning Map



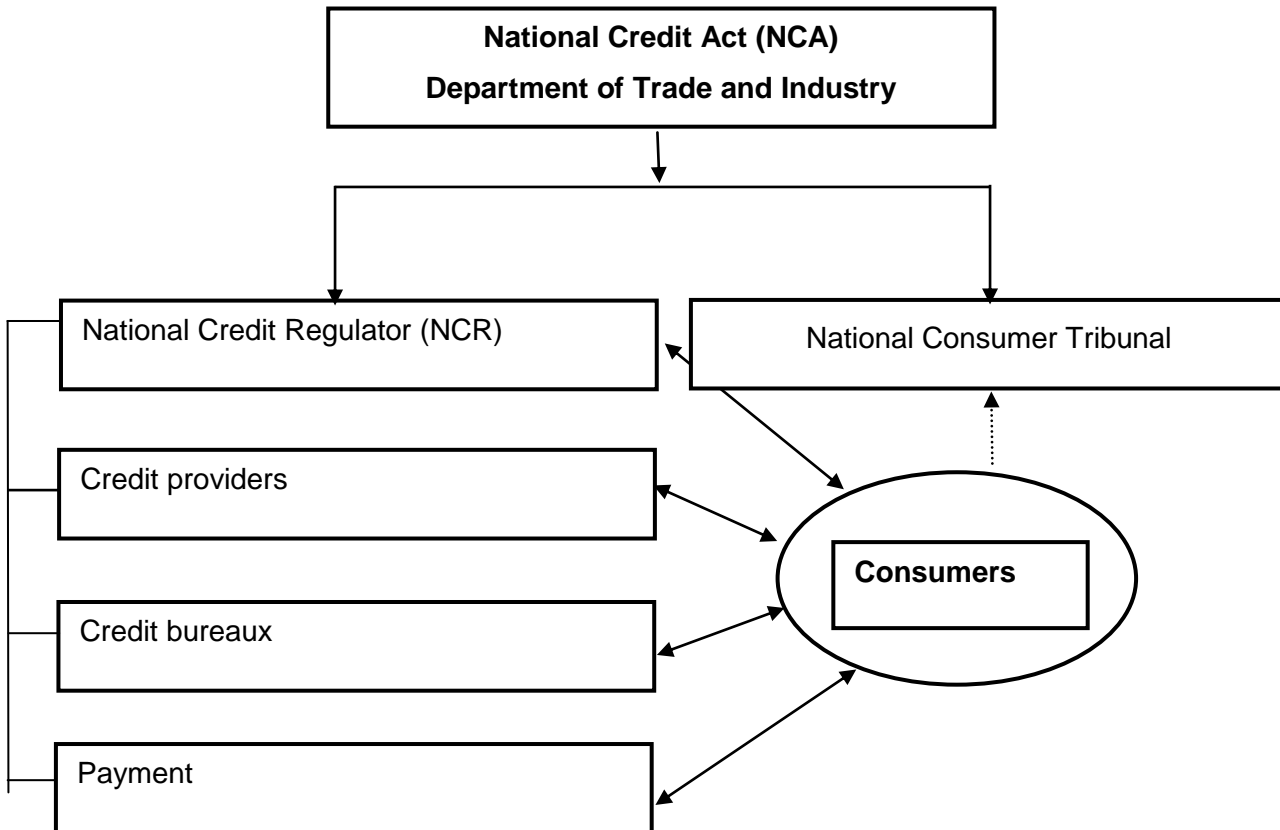
## 2.1 PURPOSE AND FUNCTIONING OF THE NATIONAL CREDIT REGULATOR

### Overview

The purpose of this module is to introduce you to the **two** consumer credit institutions established by the NCA, namely:

- The **National Credit Regulator (NCR)**
- The **National Consumer Tribunal (Tribunal)**

The diagram below illustrates the different role players in the NCA.



### 2.1.1 Establishment of the NCR

The NCR is established to effectively administrate and enforce the NCA throughout the Republic. It is an independent body subject to the Constitution and the Law.

The NCR must be transparent and impartial in its enforcement of the NCA.

### 2.1.2 Functions of the NCR

The NCR has specific functions, namely:

- Development of an accessible credit market
- Registration function
- Enforcement function
- Research and public information function

## 2.2 PURPOSE AND FUNCTIONING OF THE NATIONAL CONSUMER TRIBUNAL

### 2.2.1 Establishment of a Tribunal

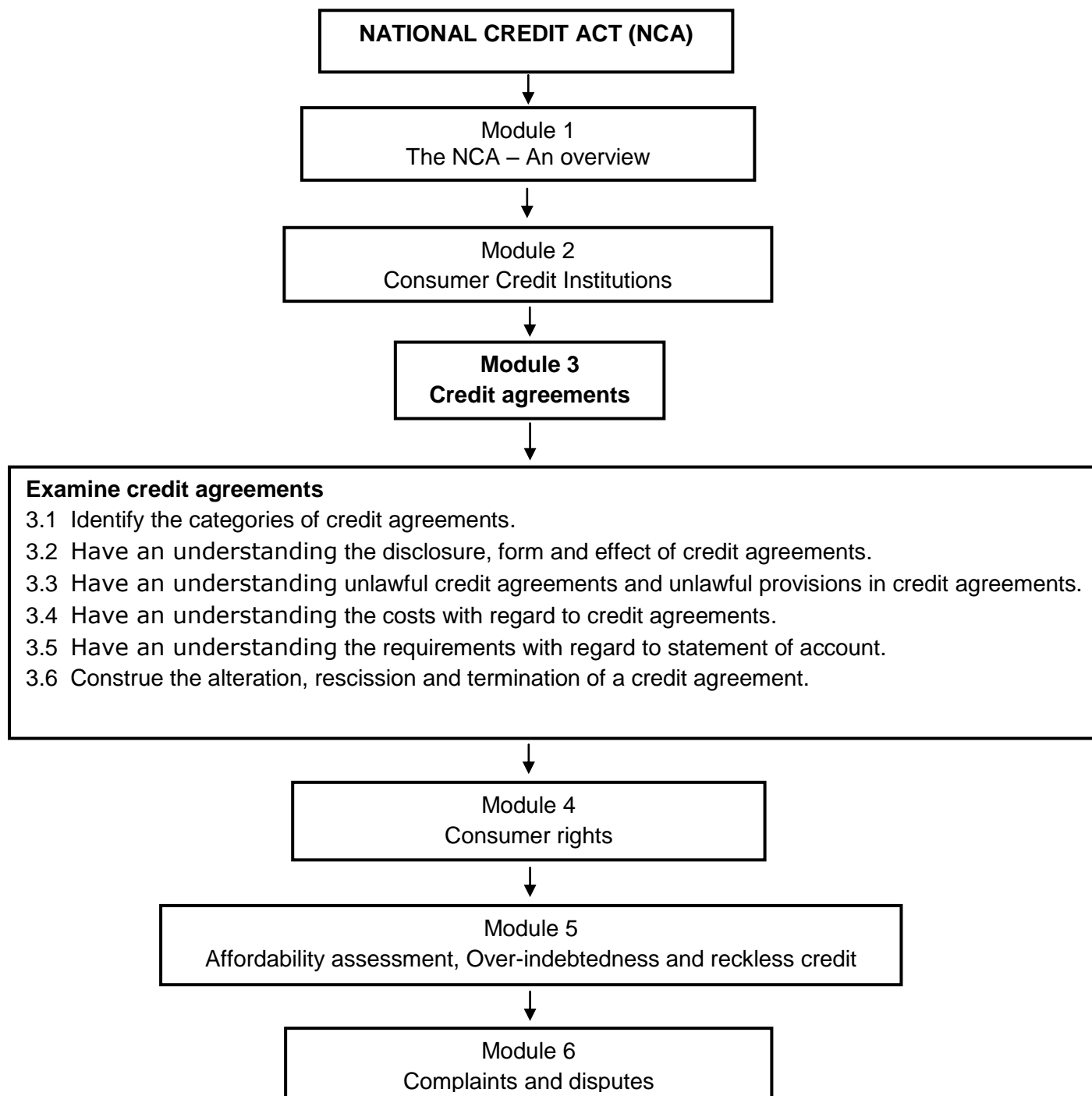
The Tribunal is established to adjudicate issues and to do what is required of it in terms of the NCA. The Tribunal has jurisdiction throughout South Africa.

As with the NCR, the Tribunal has certain functions assigned to it by the NCA, including the following:

- The de-registration of a financial institution as a credit provider, but only if the NCR received such a request from, or with the consent of, the Regulator of the financial institution and applied to the Tribunal for cancellation of the registration.
- Matters referred to it by the NCR, e.g. for an order to deliver or review a statement of account.

<b>MODULE 3</b>	
<b>CREDIT AGREEMENTS</b>	
<b>At the end of this module you will be able to:</b>	
3.1	Identify the categories of credit agreements
3.2	Have an understanding of the disclosure, form and effect of credit agreements
3.3	Have an understanding of unlawful credit agreements and unlawful provisions in credit agreements
3.4	Have an understanding of the costs with regard to credit agreements
3.5	Have an understanding of the requirements with regard to statement of account
3.6	Have an understanding of the alteration, rescission and termination of a credit agreement

### Learning Map



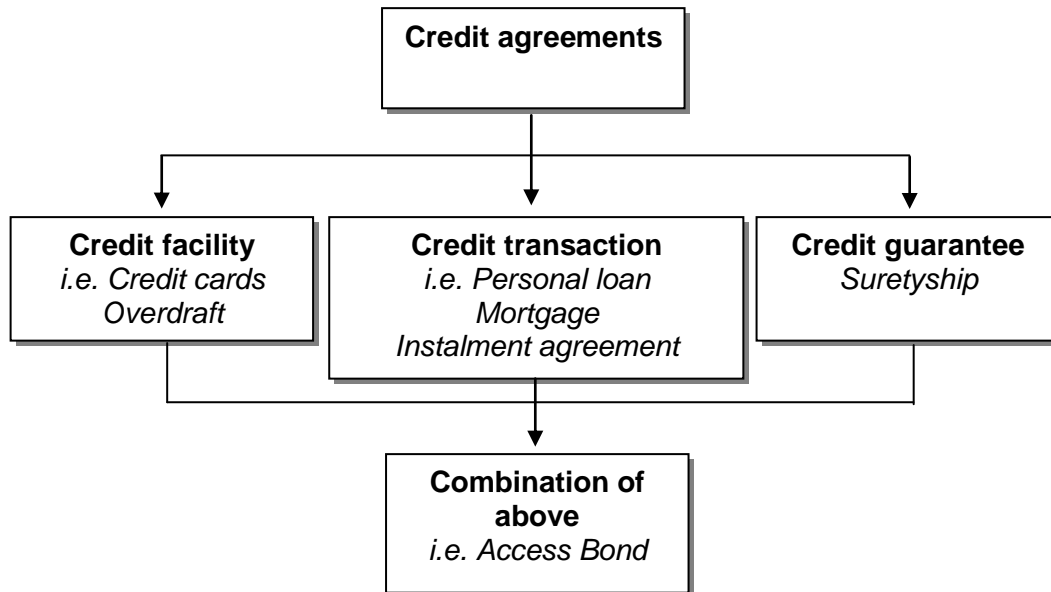
### 3.1 CATEGORIES OF CREDIT AGREEMENTS

#### 3.1.1 A credit agreement

**Description of a credit agreement** The NCA classifies an agreement **as a credit agreement** if it is a:

- credit facility; or
- credit transaction; or
- credit guarantee; or
- any combination of the above.

The diagram below provides an overview and some examples of what the NCA defines as a credit agreement.



**A credit guarantee relates to the credit facility or credit transaction in respect of which it was granted.**

#### **When is an agreement not a credit agreement?**

The NCA specifies that an agreement **is not a credit agreement** if it is:

- an insurance policy or consists of credit extended by an insurer for payment of premiums.
- a lease of immovable property e.g. renting a house.
- a transaction within a stokvel.

#### **Types of credit agreements**

The NCA allows for the following categories of credit agreements:

- A credit facility.
- A credit transaction.
- A credit guarantee.
- A combination of the above.

#### **The NCA describes a credit facility as follows:**

- A credit provider undertakes to supply goods or services, or pay amount/s as and when and to whom, as determined by the consumer from time to time.
- The consumer pays the amount back as agreed, for example a credit card, or he / she is billed periodically for the services or part of the amount.
- Interest, charges or fees are payable by the consumer.

Examples of a credit facility include an overdraft on a cheque account and the facilities provided on a credit card.

**A credit transaction includes the following:**

- a pawn transaction,
- a discount transaction,
- an incidental credit agreement (If a consumer goes to the Doctor and pays immediately or within 30 days, no interest is charged. However, if he /she only pays after 30 days, interest will accrue to the outstanding amount. This is called an incidental credit agreement),
- a secured loan,
- an instalment agreement,
- a mortgage agreement,
- a lease of moveable property; or
- another agreement which is not a credit facility or credit guarantee, i.e. when an amount is owed by one person to another and payment thereof is deferred and a charge, fee or interest is payable to the credit provider in respect of the amount, for e.g. an unsecured loan.

**A credit guarantee is where one person undertakes to pay what another person owes in terms of a credit facility or credit transaction.**

An example of a credit guarantee is a suretyship. For example, where a parent signs surety for a student loan for his / her child's studies.

**3.1.2 Categories of credit agreements**

The NCA introduced new categorisation of the aforementioned agreements by using monetary values to distinguish between small, intermediate and large credit agreements.

An agreement is classified into a specific category based on the monetary value of the agreement. This monetary value is referred to as the threshold of the category. This means that minimum and maximum amounts will apply to the different categories.

A credit facility will have a specific credit limit threshold and a credit transaction will have a specific principal debt threshold limit.

**Developmental credit agreements**

Any type of credit agreement can also be classified as a developmental credit agreement, provided it meets certain criteria, e.g. a credit provider must be registered to provide developmental credit.

**Public interest credit agreements**

In addition to developmental credit agreements, a credit agreement could also be declared a public interest credit agreement by the Minister of Trade and Industry through regulations or a declaration in the Government Gazette. This will relate to credit agreements:

- entered into in specified circumstances or for specific purposes, or
- for a specific period; or
- until the declaration or regulation is cancelled.

As its name indicates, the purpose of a public interest agreement is to make credit available in:

- parts of the country in circumstances of national disaster; or similar emergent (developing and growing) areas.

**1. Small credit agreements** Small credit agreements include the following types:

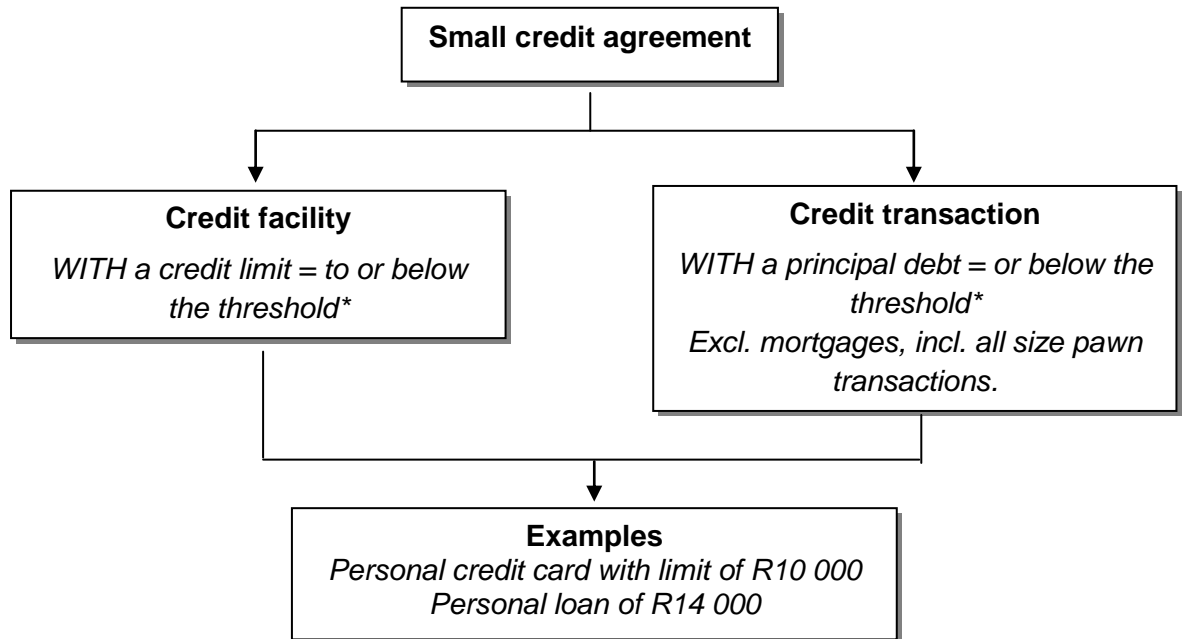
- Credit facilities
- Credit transactions (excluding mortgages)

**All pawn transactions, regardless of the size, are classified as small agreements.**

**A small credit agreement is a credit agreement where the credit limit or principal debt is equal to or below the lower threshold.**

**\*The threshold for small credit agreements is R15 000.**

The graphic below illustrates a small credit agreement.



**2. Intermediate credit agreements** Intermediate credit agreements include the following types:

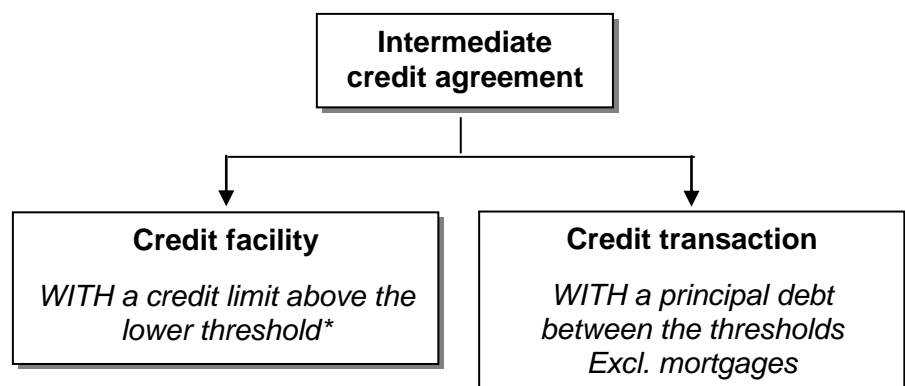
- Credit facilities
- Credit transactions (excluding mortgages, pawn transactions and credit guarantees)

**An intermediate credit agreement is a credit agreement where the:**

- **credit limit of a credit facility is above the lower threshold.**
- **principal debt of a credit transaction is between the thresholds.**

**\*The lower threshold limit is R15 000.  
The higher threshold limit is R250 000.**

The graphic below illustrates an intermediate credit agreement.



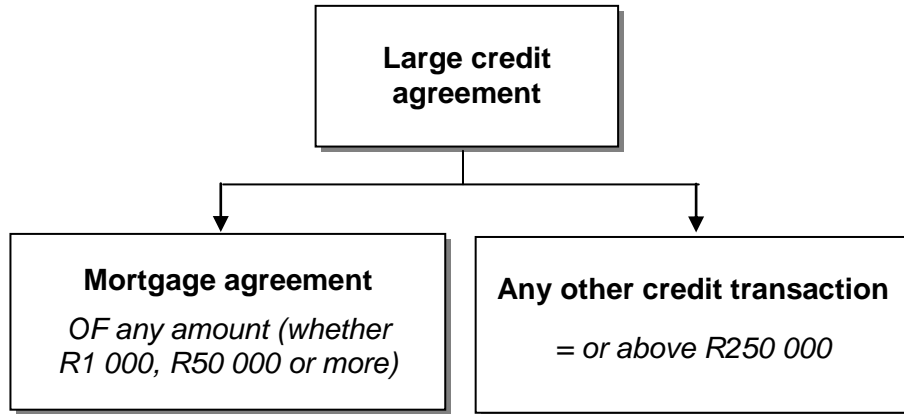
**3. Large credit agreements** Large credit agreements include the following types:

- Any mortgage agreements
- Any other credit transaction (= or above R250 000), except a pawn transaction or credit guarantee.

**Mortgages are only classified as large credit agreements. Whereas credit facility can never be a large agreement.**



The graphic below illustrates a large credit agreement.



**A large credit agreement is:**

- a mortgage agreement\* of any amount.
- any other credit transaction with a principal debt of R250 000 or more (= or above R250 000).

**The higher threshold is R250 000.**

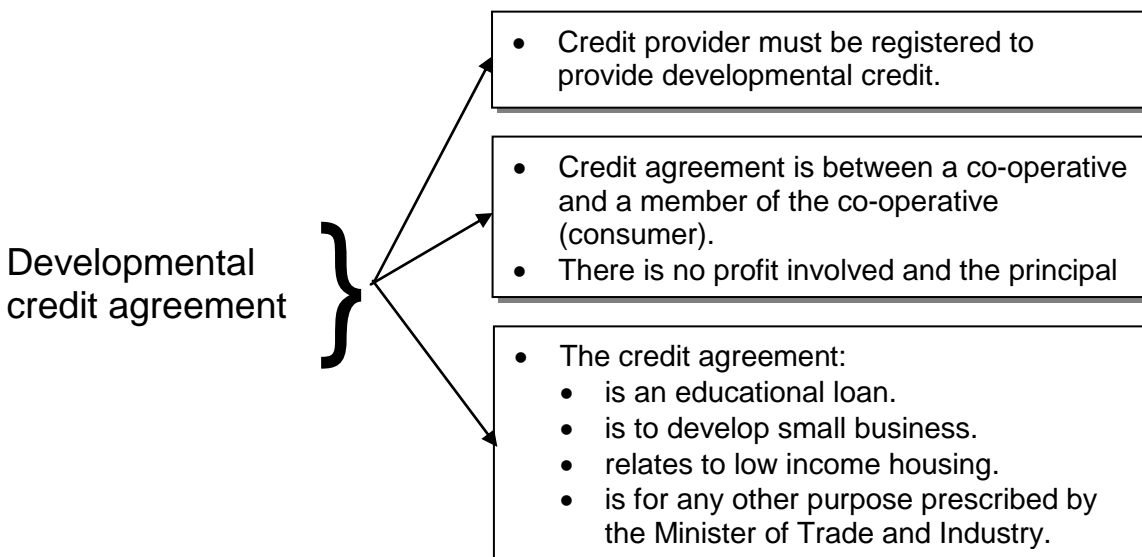
- **A mortgage agreement** means a credit agreement that is secured by a pledge of immovable property. For e.g. an overdraft secured by a bond is a mortgage agreement.

#### Developmental credit agreements

Some credit agreements can also be classified as a developmental credit agreement, provided it meets the criteria as stipulated below.

#### Developmental credit agreement criteria

**A credit agreement is classified as a development credit agreement if any of the criteria below are met.**



#### Example:

A rural community obtains funds to build a school.

If any of the requirements above are met, this may be classified as a developmental credit agreement and the conditions of the NCA applicable to developmental credit will apply.

## 3.2 DISCLOSURE, FORM AND EFFECT OF CREDIT AGREEMENTS

### 3.2.1 Pre-agreement disclosure requirements for credit agreements

A consumer must receive a pre-agreement statement and quotation before he / she enters into a small credit agreement. All consumers that enter into an intermediate or large credit agreement must also receive a pre-agreement statement and quotation. The pre-agreement statement and quotation for **small credit agreements** must be in a prescribed format.

The pre-agreement statement for intermediate and large credit agreements may look like the proposed agreement or be in a different format, but must include all the **required information** of a credit agreement.

The quotation for intermediate and large agreements is prescribed in the Regulations.

Credit providers must ensure that the following is disclosed in the pre-agreement and quotation:

- the credit cost multiple<sup>3</sup> and total cost of credit;
- the credit cost multiple disclosures for credit facilities must be based on one year of full utilisation up to the credit limit proposed;
- the attention of the prospective consumer is drawn to the credit cost multiple and that the cost of credit as disclosed, is understood by the prospective consumer;
- a total cost of credit which includes but not limited to, the following items:-
  - (a) the principal debt;
  - (b) interest;
  - (c) initiation fee, if any;
  - (d) service fee aggregated to the life of a loan; and
  - (e) credit insurance aggregated to the life of a loan.

The purpose of the credit cost multiple is to show how many times one pays for the capital amount borrowed.

For example:

The total cost of credit is R5 000 and the original capital amount is R3 800.

To determine the total cost of credit: R5 000 divided by R3 800 which gives you 1.31.

The customer pays 1.31 times for the original capital amount.

### 3.2.2 Content of intermediate and large credit agreements

Intermediate and large credit agreements must contain information on:

- agreement details (type of agreement, credit provider's name, contact details and registration number)
- cost of credit.
- repayment of agreement.
- statements of account.
- collateral / mortgage.
- default by the consumer.
- 'information sharing practices'.
- the consumer's rights.
- the NCR / Tribunal.

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<sup>3</sup> The credit cost multiple is the total cost of credit divided by the principal debt, expressed as a decimal number.

### 3.2.3 Purpose of a quotation

The purpose of a quotation is to provide the consumer the opportunity to consider the cost of the credit and then to decide whether he / she wants to enter into the agreement and if he / she can afford the credit. The quotation is valid and binding for 5 business days from the date of the quotation, except:

- where the goods to be financed are in limited supply or unavailable and the credit provider states that the quotation is valid subject to the availability thereof.
- if the credit provider thinks that the credit agreement will result in granting reckless credit.
- when the interest rate exceeds the prescribed rate (the highest rate that the debt can incur).
- when the interest rate provided in the quote is based on the credit provider's prevailing interest rate and this rate has changed, the interest on the quote may be changed accordingly. This is only applicable for intermediate and large agreements.

Note, that the consumer may accept the quotation and enter into the agreement immediately.

### 3.2.4 Developmental and other credit agreements

The Minister of Trade and Industry may prescribe specific forms to be used for developmental and other credit agreements.

Quotations and pre-agreement documents must be given to the consumer in paper form, or may be sent by fax or e-mail, provided the consumer can print the documents.

### 3.2.4 Requirements for intermediate and large credit agreements

The following requirements are prescribed for all categories of intermediate and/or large agreements:

- The credit agreement may be set out in one or more documents. If set out in more than one document, the document signed by the consumer must include a reference clearly identifying each of the other documents.
- The lettering must be legible and clear enough to ensure that it remains legible and clear if photocopied or faxed.
- If the quotation does not form part of the pre-agreement, the information that is required to be disclosed in the quotation must be disclosed in the credit agreement on the 1<sup>st</sup> page in a bordered text box titled 'Quotation'.

**Once the consumer accepts the quotation issued by the credit provider, they may enter into a credit agreement. The credit provider must supply the consumer with a free copy of the agreement in paper form (or in electronic format, provided the consumer can print the agreement).**

### 3.2.5 Obligations of parties to a credit agreement

#### Changes, deferrals and waivers

A change to an existing credit agreement, which may result in a

- waiver,
- deferral, or
- change in the amount,

may not be regarded as a new credit agreement, as long as the changes were made in accordance with the NCA.

#### Example:

The limit on a consumer's credit card is increased.

The credit provider does not have to draw up a new agreement or have the consumer complete a new application. Nor will a quotation and pre-agreement statement have to be provided.

### 3.3 UNLAWFUL CREDIT AGREEMENTS AND UNLAWFUL PROVISIONS IN CREDIT AGREEMENTS

#### 3.3.1 Unlawful credit agreements

##### Description of an unlawful credit agreement

Before we discuss unlawful credit agreements and unlawful provisions in credit agreements, let us first look at the meaning of the word 'unlawful'.

Unlawful is any action that is against the law or does not comply with the law.

##### If a credit agreement is unlawful, it cannot be enforced.

This means that a credit provider cannot rely on any legal means to get the consumer to fulfil his / her obligations under an agreement.

##### Example:

When a person applies for a credit card with a false identity document, the contract would not be unlawful in terms of this Act because the credit provider was misled. The court can be requested to cancel the contract.

However, if the credit provider knew that the person was not old enough to open a credit account, but allowed it without consent of a guardian, the agreement would be unlawful.

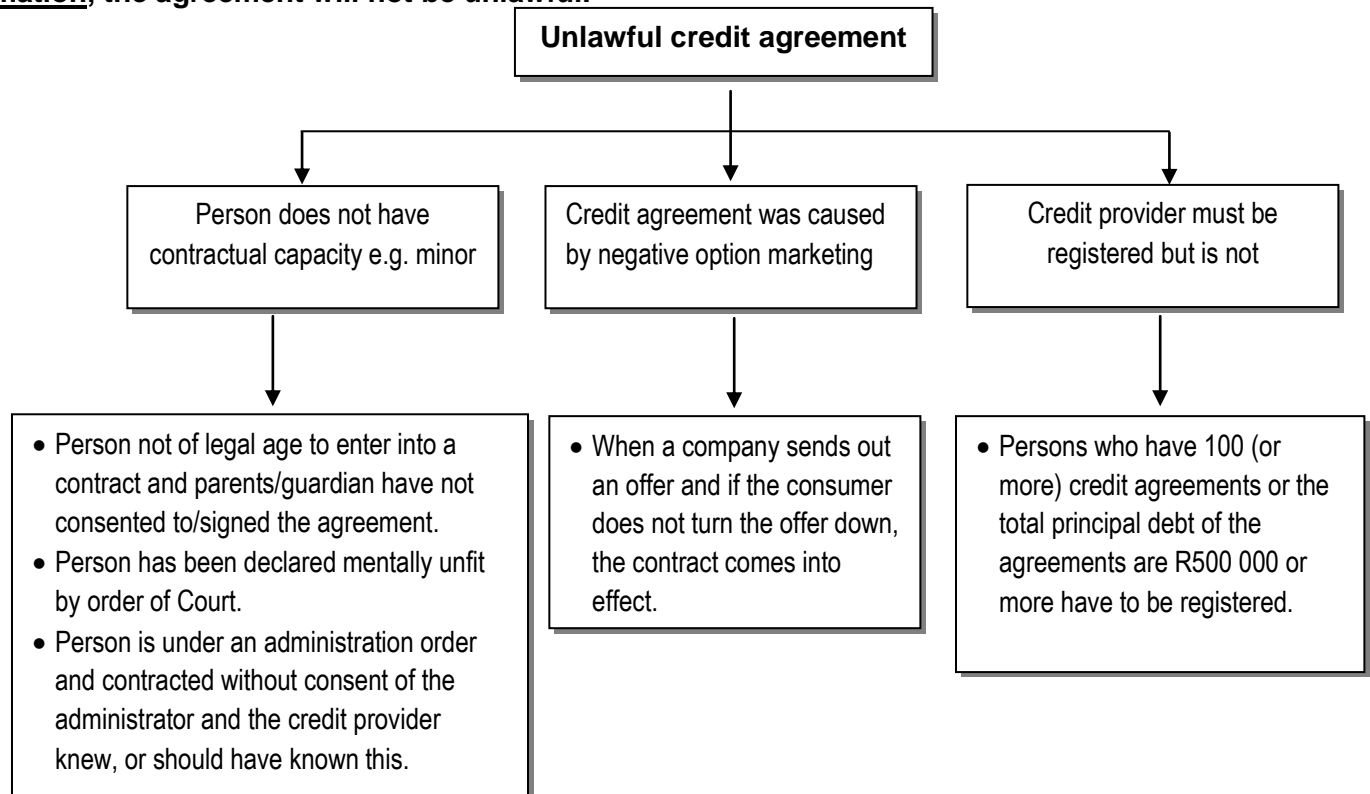
The effect of an agreement that is unlawful is that the agreement must be declared void by the court. The court must then order that all the money paid into the account be returned, together with the interest at the rate that has been charged, either to the consumer or the State (should the court find that the consumer would be unjustifiably enriched).

The credit provider will forfeit its right to recover any moneys in terms of the agreement.

##### Unlawful credit agreement

As discussed, unlawful, means **something that is against the law or does not comply with the law**. If a credit agreement is unlawful, it cannot be enforced. The diagram below illustrates when a credit agreement is unlawful.

**Remember, if a person sets out to defraud a credit provider intentionally by giving wrong information, the agreement will not be unlawful.**



### **Implications of unlawful agreements**

An unlawful credit agreement has negative implications – especially for the credit provider. A court must order that the agreement be cancelled (as if it never existed). The credit provider must return any money paid by the consumer, with interest.

If the court finds that the consumer would profit unfairly, it would order that the assets under the agreement be forfeited to the State instead of the consumer.

#### **Example:**

If a minor bought a Ferrari without the consent of his / her guardian, it is an unlawful agreement. The vehicle may go to the State and the credit provider suffers the loss.

### **3.3.2 Unlawful provisions in credit agreements**

An agreement could contain unlawful provisions, but the agreement could still be lawful and enforceable. Only a court can declare a provision unlawful or amend it. The court will separate the unlawful provision from the agreement and must then decide whether amending it will still make it reasonable within the context of the rest of the agreement. The court can also declare the whole agreement unlawful from the date of inception of the agreement.

#### **Example:**

Any provision that takes away a 'consumer's rights in terms of this Act'. Such as a provision saying that the consumer will not be able to question and challenge any information placed on a credit bureau by the credit provider.

### **Supplementary requirements and documents of credit agreements**

The NCA also includes prohibitions for credit providers when entering into supplementary agreements or requests, which contain provisions which would be unlawful if they were to be found in the main credit agreement.

The credit provider must not:

- ask a consumer directly, or
- indirectly (e.g. in a roundabout way or through another person) to enter into an additional agreement, or
- persuade the consumer

to enter into an additional agreement that would be unlawful if it were included in the (original) credit agreement.

#### **Example:**

The main credit agreement is lawful, but the credit provider has told the consumer that in order to have the facility made available, he / she must sign another document which gives the credit provider the right to enter the consumer's home at any time to repossess furniture / appliances if he / she default on the payments.

### **Consumer identification documentation**

A consumer may not be asked to provide his / her:

- identity document,
- bank card, or
- similar document

to the credit provider, except for use of identification purposes or to make a copy thereof.

### **3.4 COSTS WITH REGARD TO CREDIT AGREEMENTS**

#### **3.4.1 Cost with regard to credit agreements**

The NCA and the Regulations regulate charges, fees, credit cost and interest rates.

The cost with regard to credit agreements includes the following:

- Prohibited fees or charges
- Fees or charges that may be included in the principal debt
- Fees and charges that make up the cost of credit
- Credit insurance / assurance
- Costs involved with the settlement of a credit agreement
- Interest rates on the different categories of credit agreements as well as the calculation thereof
- Maximum rates of interest

**A credit provider may not charge more for goods or services because it is on credit, than what the cost would have been if it was a cash transaction.**

#### **3.4.2 Prohibited fees or charges**

A credit provider may not demand any fees or charges that are not allowed, nor may higher fees or charges be asked. This includes any fee, charge, commission, expense or other amount which is paid over to another person (3<sup>rd</sup> party), except if it is allowed or provided for as discussed below.

#### **3.4.3 Fees or charges that may be included in the principal debt**

For some credit agreements, fees and charges may be included in the principal debt and may be paid off over the term of the agreement.

However, this may only be done for:

- an instalment agreement, for e.g. with a consumer's purchase of a car.
- a mortgage agreement.
- a secured loan, for e.g. when a consumer pledges something for security for a loan, for e.g. shares.
- a lease, for e.g. when a consumer leases a photocopier.

**Fees and charges may be added to the principal debt with regard to specific types of loans, but only as far as it is applicable to the goods or services being financed.**

The fees and charges that may be included in the principal debt include:

- an initiation fee – if the consumer has declined the option to pay this fee separately.
- the cost of an extended warranty, i.e. a mechanical and electrical breakdown warranty for a vehicle.
- delivery, installation and initial fuelling charges.
- connection fees, levies or charges.
- taxes, licence / registration fees, i.e. for a new vehicle bought on a credit agreement.
- premiums for credit insurance.

**Remember, none of the above fees may be charged unless the consumer has appointed the credit provider as the agent for providing the services and goods. The credit provider may not force the consumer to appoint him / her as such.**

#### **Example:**

If a consumer chooses his / her own delivery service to deliver the goods, or he / she has chosen his / her own insurance broker, the credit provider cannot charge fees or charges for these amounts.

If a bank has a motor insurance scheme of its own, the bank may offer it to the consumer. However, the bank may not appoint itself as a broker for the policy unless the consumer agrees to this. The consumer may obtain his / her own insurance or appoint his / her own broker.

The amounts required for the above fees and charges may not be more than:

- the actual amount that the credit provider is going to pay after discount or any deduction, or
- a fair market value for the service if the credit provider is carrying out the service itself.

If the credit provider does charge a fee for a service, and the actual fee charged when the service is rendered, is **less** than the amount charged on the agreement, the difference must be refunded to the consumer, or credited to the agreement.

### 3.4.4 Changes to fees and charges

A credit provider **must not unilaterally** (on its own) increase:

- service fees or method of calculating the service fees, or
- a fixed interest rate.

A credit provider **may unilaterally** increase the following charges by giving **5 business days** written notice to a consumer, explaining the changes:


- rate of interest,
- amount of a credit fee or charge, or
- frequency or time for payment of credit fee or charge.

A credit provider must give **written** notice to a consumer no later than **30 business days** after the effective date of a change in the variable interest rate.

### 3.4.5 Fees and charges that make up the cost of credit

The fees and charges that make up the cost of credit consist of the following:

- Principal debt
- Insurance premium
- Initiation fee, to process an approved application
- Service fee, annually or monthly, for e.g. credit cards attract an annual fee
- Interest at the prescribed rate
- Default administration charges
- Collection costs



*These fees and charges are prescribed in the Regulations.*

#### Principal debt

This is the total amount deferred and any fees or charges that may be included in respect of instalment / mortgage agreements, secured loans or leases of moveable property.

#### Initiation fee

An initiation fee is payable when a credit agreement is established.

The following are provisions with regard to initiation fees:

- The fee may not exceed the prescribed amount which relates to the principal debt and may never be more than what is prescribed.
- The credit provider may not charge a fee for doing all the work upfront unless the application is successful.
- If a consumer and a credit provider enter into a new agreement which replaces an existing agreement, an initiation fee may be charged as prescribed. Currently no fee may be charged in terms of the regulations.

#### Service fee

Service fees on credit agreements may be charged monthly, annually, per transaction or on a combination basis.

Service fees must not be more than the prescribed amount relative to the principal debt.

If a credit facility is attached to a financial services account\*, the service charges of the credit facility part of the account, may not exceed the maximum amount.



## Interest

The interest rate must be shown in percentage (%) terms as an annual rate which has to be calculated in the prescribed manner and must not exceed the maximum prescribed amount.

This is how the interest rate and credit cost must be quoted on small credit agreements:

### Explanation:

A credit provider must enter into a small credit agreement **at or below the interest rate and credit costs quoted**, subject to the provision on reckless lending and the interest rate being within the prescribed parameters if the consumer requests it.

In effect, if the credit provider offers the consumer credit in the form of a quotation and if the consumer accepts the offer, the credit provider must enter into the agreement as quoted.

### Example:

The credit provider gives the consumer a quote with an interest rate of 10%.

If the interest rate changes to 11% within the 5 business days in which the quote is valid and the consumer accepts the quote before the 5 days have passed, the credit provider must enter into the agreement at 10% interest.

If the interest rate is decreased to 9%, the agreement may be issued at either 10% or 9%.

However, if the maximum interest rate allowed for a small agreement is 11% and the quote is given at 11%, and during the 5 days in which the quote is valid, the maximum rate is decreased to 9%, the agreement may not be entered into for more than 9%.

This is how the interest rate and credit cost must be quoted on intermediate and large credit agreements:

### Explanation:

If the consumer accepts the offer on an **intermediate or large credit agreement**, the credit provider must enter into the agreement **at an interest rate or credit cost at or below those quoted**. If the rate or costs are now higher than quoted, the new rate can be equal to, but not higher than the difference between the bank rates on the quotation date and the agreement date.

**Credit cost** is the price that the consumer will pay for having the credit facility and is not necessarily linked to the interest rate.

### Example:

The quotation for a large credit agreement, dated 10 January stated an interest rate of 12%. The consumer had a maximum of 5 days to consider it. However, between 10 and 15 January, the bank rate rose with 2% to 14%. If the consumer wants to accept the quotation, the credit provider will be entitled to charge a rate of up to 14%, thereby adding 2%, which is not higher than the difference between 12% and 14%.

The requirements for quotations and pre-agreement disclosures do not apply to any offer, proposal or pre-approval statement that is given to a consumer simply to give them an idea of the type of credit that the credit provider would be willing to consider granting to the consumer.

**The prime rate is the starting rate (a reference rate) when lending to consumers. Rates charges may be below or above prime rate, depending on the risk profile of the consumer.**

<b>Insurance</b>	Only appropriate insurance premiums may be added and the consumer must be advised of the charges up front.
<b>Default administration charges</b>	These charges will be raised if the agreement is in default. Default administration charges may not be more than the prescribed maximum for the category of agreement. It may only be charged if a consumer missed a payment.
<b>Collection costs</b>	A credit provider may charge a consumer collection costs, if such costs are incurred in collecting the debt. These costs must not be more than the prescribed maximum for the category of agreement and may only be charged as permitted by the NCA.

### 3.4.6 Credit insurance / assurance

#### **Assurance / life cover on credit agreements**

The credit provider may require a consumer to maintain life cover for the duration of the period of the agreement.

**However, the cover required by the credit provider may not exceed the total amount outstanding in terms of the agreement at any time.** The consumer is free to insure for a higher amount.

#### **Insurance cover on immovable property**

Insurance cover in respect of immovable property (e.g. a house) subject to a mortgage agreement may not exceed the full asset value of the property. If the outstanding obligation is more than the actual value of the property, the credit provider may only require insurance cover in respect of the property **equal to the actual market value of the property**.

#### **Insurance cover on moveable property**

The credit provider can require the consumer to take cover for loss or damage to the goods, but only up to the value of the outstanding obligations. This will take care of the outstanding balance, but will not restore the consumer's loss or damage in respect of the goods. The consumer may take additional insurance for this purpose which will cover his / her loss / damage.

#### **Consumer's own insurance policy**

If a credit provider offers a particular insurance policy to the consumer, the consumer must be advised that he / she may provide a policy of his / her own. However, the credit provider is entitled to require the following in writing from the consumer:

- A directive from the consumer to the credit provider to pay the premiums in a prescribed manner and form, to the insurer and to recover these amounts from the consumer either **monthly (for small and intermediate agreements) or annually (large agreements – the premiums must be paid within the applicable year)**.
- A directive to the insurer, naming the credit provider as the receiver of the settlement amount of the credit agreement, in the event of a claim and ensuring that the credit provider is the first to receive any proceeds from the policy for the duration of the agreement.

#### **Credit provider's insurance policy**

If the consumer takes a policy offered by the credit provider, the credit provider must:

- not add any additional charges, fees or premiums above the actual cost of the insurance.
- disclose the cost of the insurance to the consumer in the prescribed format as well as any benefit, commission remuneration or fee which the credit provider might receive from the insurance company.
- explain the terms and conditions to the consumer and give the consumer a copy of the policy (this places the onus on the credit provider to ensure that the consumer understands the policy conditions).
- only be entitled to receive payment from the insurer, in the event of a claim, to the value of the settlement amount under the agreement and must pay the balance to the consumer.

#### **Refund**

Where the premiums are paid annually and there is a claim resulting in the credit agreement being settled, the consumer is entitled to receive a refund of the unused part of the final year's premium.

### 3.4.7 Interest rates

#### **Accumulation of interest**

The NCA prescribes that the interest that accumulates in the event of a default or an overdue payment may not exceed the highest rate applicable to any part of the credit agreement.

The fees listed under 'cost of credit' that accumulate while a consumer is in default, may not, when added together, exceed the unpaid balance of the principal debt at the time that the defaults occurs. This concept is similar to what was known as the 'in duplum' rule.

The NCA codifies the 'in duplum' rule as follows:

"Despite any provision of the common law or a credit agreement to the contrary, the amounts with regard to the cost of credit that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate (cumulative), exceed the unpaid balance of the principal debt under that agreement as at the time that the default occurs".

**Example:**

The unpaid balance of the principal debt at the time of default is R2 000. The following charges are added:

Unpaid charges:	R500
Interest:	R300
Collection costs:	R1 500
Total:	R2 300

The credit provider will have to reduce the total charges of R2 300 to R2 000 because R2 300 is more than the balance of the principal debt at the time of default.

The interest rate applicable to an amount in default or an overdue payment under a credit agreement may not exceed the **highest interest rate applicable** to any part of the principal debt under that agreement.

**Interest payable or debited to an account**

A credit agreement may provide for an interest charge to become payable or to be debited at any time after the day on which it applies. Interest may not be charged to an account before the end of the day on which it becomes due.

**Example:**

If interest is debited on the morning of the day it becomes due and the consumer pays a large additional payment on that day, the interest that was charged would be incorrect if it was calculated on the balance at the beginning of the day. The credit provider would have to reverse the interest charged, recalculate it and then re-debit it to the credit agreement account.

**Variable interest rates**

When an interest rate is variable, it must have a fixed relationship to a reference, such as a prime rate or fringe benefit tax rate. This reference link must be the same for all similar types of agreements. This does not apply to developmental credit agreements unless otherwise declared by the NCR.

**Example:**

Vehicle finance credit agreements with variable interest rates that are issued to retail banking consumers may be linked to the prime rate. The credit provider may not issue only one credit agreement in that group of consumers to the jibar rate (the rate at which banks buy and sell short-term money).

However there might be a group of private banking consumers whose credit agreements are all linked to the **jibar rate\***, in which case there could not be discrimination by charging only one consumer in that group a rate linked to the jibar rate.

**\* The three-month Johannesburg interbank agreed rate. The average rate at which banks buy and sell three-month money.**

**Changes in variable interest rates**

Changes in variable interest rates are allowed in accordance with the provisions of the credit agreement. If the change is due to a change in the reference rate (rate to which the interest rate is linked), the credit provider must advise the consumer within 30 days after the effective date of the change to the interest rate.

The notice to the consumer with regard to a change in the variable rates must include:

- the new rate.
- the new reference rate (if linked to the reference rate).

A provision that the 'interest rate will be variable' must state what the reference rate or maximum rate is from which the prevailing rate may vary.

The whole idea of variable interest rates is that the prevailing rate may vary from month to month, as opposed to a fixed interest rate which pegs the rate for the duration of the agreement. An allowable provision for variable interest rate would state that the (prevailing) interest rate will be 1% above prime. This means that, if the SA Reserve Bank changes the interest rate up or down, the interest charged on the agreement would change accordingly, but would always remain at 1% above prime.

### **3.4.8 Maximum rates**

#### **Introduction**

We have discussed the charges, credit cost and interest rates that are regulated by the NCA and the Regulations.

However, the Minister of Trade and Industry will apply certain principles when considering the maximum interest rate and the charges as discussed for the various sub-sectors of the consumer credit market. These sectors include the differentiation which the NCA makes in terms of small, intermediate and large credit agreements.

#### **Considering maximum rates**

The Minister of Trade and Industry must take the following into account when considering the maximum amounts:

- The need to make credit available to historically disadvantaged persons, low income persons and communities, as well as remote, isolated or low density populations and communities.
- Conditions of the credit market at the time, the cost of credit and the manner in which the credit market is functioning.
- The social impact on low income consumers (how it will affect them if credit becomes more or less accessible by a change in the interest rates).

When new regulations are made, the Minister of Trade and Industry must take the following into account:

- The provision of different maximums to the various sectors of the credit market.
- The total amount of fees that may be charged by credit providers offering credit agreements and other financial products which may be combined.

This means that other types of fees may be applicable in terms of other legislation, for example the Short and Long Term Insurance Acts.

### **3.5 STATEMENT OF ACCOUNT**

The NCA requires that a credit provider must offer to deliver a statement of account to a consumer.

Statements provide a record of activities on an account and it gives the consumer the opportunity to verify the credit provider's version of the statement of the account.

There is no need to issue a statement in respect of a credit facility if there were no debits and credits on the account between statements.

#### **3.5.1 Form and content of statement of account**

All small credit agreements have a prescribed format with regard to statements (as prescribed in the Forms by the Regulations). It must include the information on the details of the, credit provider, consumer, settlement, loan, transaction.

Intermediate and large credit agreements may have prescribed formats or the format may be determined by the credit provider, if it complies with all prescribed requirements and the NCR may publish guidelines to assess whether a statement satisfies these requirements.

#### **3.5.2 Effective date of a debit**

A debit to a consumer's account is effective on the date that he / she incurred the debt.

#### **Example:**

If a consumer buys groceries using his / her debit card on the afternoon of 10 April, then the consumer's account will be debited as of 10 April

### 3.5.3 Effective date of a credit

As with a debit, a credit is effective on the date that the consumer makes the payment, or earns the right to have the account credited.

If the consumer pays the account on the afternoon of 20 April, then the credit must be passed to the account as of 20 April.

If there was a problem with the system, and the instruction (for 20 April) was not processed through no fault of the consumer, the account must be credited as of 20 April, regardless of the actual date of processing.

### 3.5.4 Adjustment of charges / interest

All charges and interest must be adjusted when an error is being corrected. The adjustments must be made from the date that the error occurred, up to the date the error was corrected.

If an error that was made on the 1<sup>st</sup> of the month is only corrected on the 15<sup>th</sup> of the month, the interest and charges for that account must be corrected so that they are charged only on the correct balance of the account from the 1<sup>st</sup> of that month.

### 3.5.5 Settlement statement

A consumer or guarantor may request a credit provider to deliver (without charge), a statement showing the settlement amount of the credit agreement as at the date of the request.

### 3.5.6 Alteration of original or amended credit agreements

Any change to a credit agreement which was made after the agreement (or an amended agreement) that was signed by or delivered to the consumer is void, unless:

- the change reduces the consumer's liability under the agreement.
- the consumer signed or initialled next to the change, except in the case of automatic credit limit increases.
- the change is in writing and is signed by both the consumer and credit provider.
- any verbal change (for e.g. changes made electronically) is recorded electromagnetically and put in writing afterwards.

### 3.5.7 Rescission of credit agreements ("cooling-off")

The consumer has a right to rescind a credit agreement, if it is a **lease or instalment agreement** that was entered into any place other than the credit provider's registered business premises.

The consumer may rescind an agreement within **5 business days** after the date on which the agreement was signed, by:

- delivering a notice in writing to the credit provider either by hand, fax, e-mail or registered mail.
- returning any money or goods received.
- paying in full for any services received from the credit provider.

### 3.5.8 Termination of credit agreements

A consumer can terminate a credit agreement at any time by:

- paying the settlement amount.
- surrendering the goods (this only applies to the termination of instalment agreements, secured loans or leases of moveable property) and paying the amount demanded.

A credit provider may only terminate an agreement, before the end of its term if the consumer defaults on the credit agreement. If the consumer defaults, the credit provider may proceed with the collection, repayment, surrender and debt enforcement procedures.

**Remember, even if a facility is closed or suspended, rendering the consumer unable to use it, the agreement still remains effective until all outstanding amounts have been paid.**

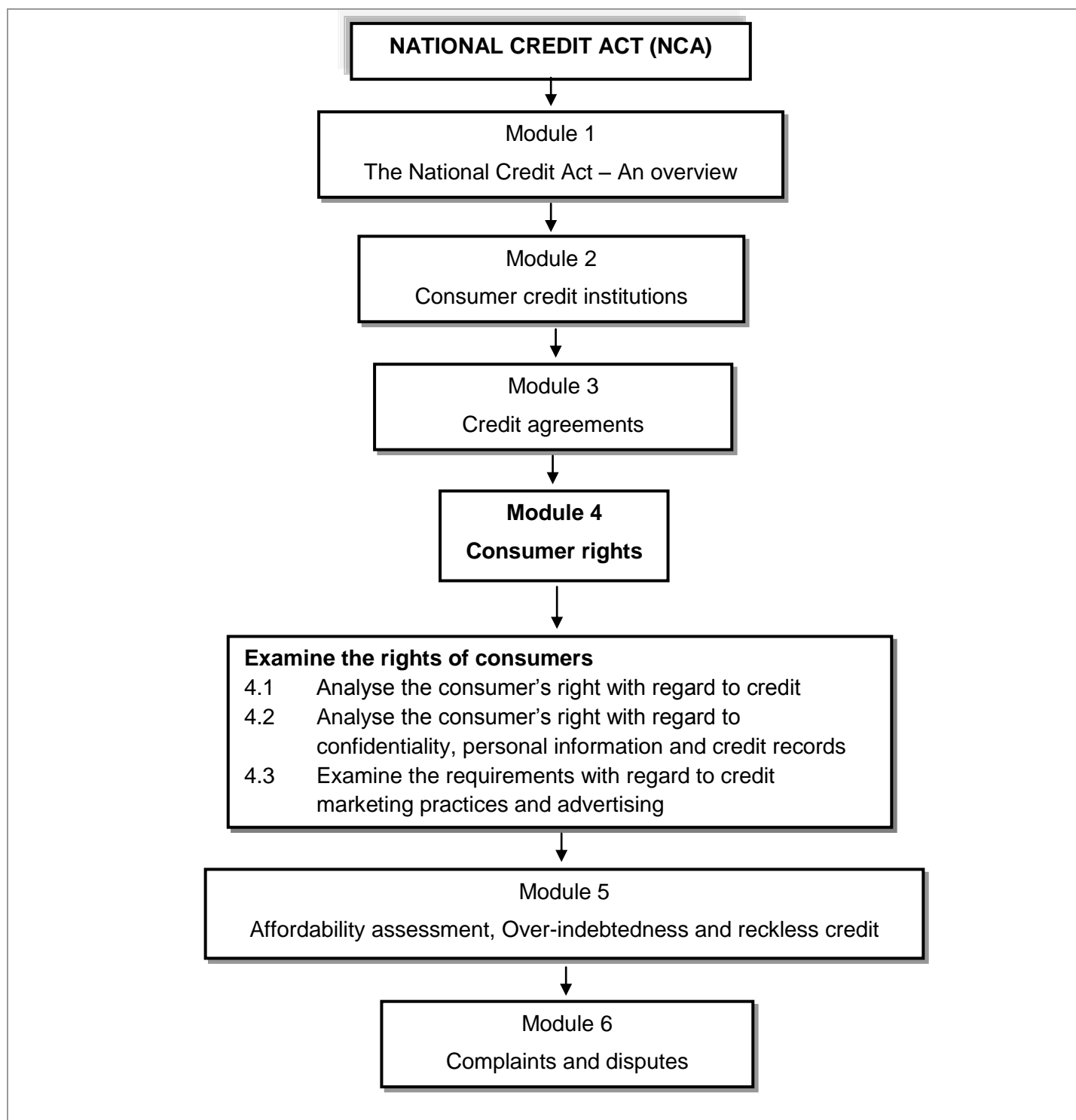
### 3.5.9 Closing of facility

If a credit provider closes a facility due to a lawful decision, the consumer still has the obligation to repay the outstanding balance, fees and charges that are due in terms of the agreement.

The credit provider's obligations towards the consumer also remain effective, until fulfilled.

MODULE 4	
CONSUMER RIGHTS	
<b>At the end of this module you will be able to:</b>	
4.1	Have an understanding the consumer's right with regard to credit.
4.2	Have an understanding the consumer's right with regard to confidentiality, personal information and credit records.
4.3	Examine the requirements with regard to credit marketing practices and advertising.

## Learning Map





## **4.1 THE CONSUMER'S RIGHT WITH REGARD TO CREDIT**

### **Overview of consumer's rights**

The NCA prescribe the following consumer rights, namely the right to:

1. Apply for credit.
2. Protection against discrimination in respect of credit.
3. Reasons for credit being refused.
4. Information in an official language.
5. Information in plain and understandable language.
6. Receive documents.
7. Protection of consumer credit rights
8. Confidential treatment.
9. Access and challenge credit records and information.

### **The right to apply for credit**

The NCA prescribes that every natural or juristic person (or association of persons, for example a burial society), has a right to apply for credit. A credit grantor can refuse to provide credit to a consumer, provided the reasons for refusal are based on reasonable commercial grounds and the credit provider does not discriminate against the consumer.

### **Protection against discrimination in respect of credit**

The NCA outlaws unfair discrimination against a consumer or prospective consumer by:

- credit providers
- credit bureaux
- debt counsellors
- ombudsman
- employers
- trade unions

There are two pieces of legislation that prohibit the State or a person to unfairly discriminate against any other person, namely:

1. The Constitution
2. The Promotion of Equality and Prevention of Unfair Discrimination Act

### **The right to reasons for credit being refused**

Where requested, a consumer must be given in writing, the main reason for:

- refusing to enter into a credit agreement.
- offering a lower credit limit than applied for, or lowering the limit of an existing facility.
- refusing a request to increase an existing credit limit.
- refusing to renew an expiring credit card or similar credit facility (for example an overdraft).

### **The right to information in an official language**

Every consumer has a right to receive documentation from the credit provider in an official language of the consumer's choice. However, it should be reasonable (practical) for the credit provider to provide the documentation in the requested language, taking into account:

- the language of the people in the area or region.
- how practical and cost effective it will be.
- the use of the documentation.

The credit provider, credit bureau or debt counsellor must submit a proposal to the NCR to make the relevant documentation available in at least two official languages. The consumer must be given the opportunity to choose a language from these two languages which were approved by the NCR.



### **The right to information in plain and understandable language**

The consumer has the right to be provided with information in plain and understandable language.

The documents must be written / compiled in such a way that the ordinary consumer, with little experience in credit matters and average literacy skills, could be expected to understand the content, significance and importance of the document.

### **The right to receive documents**

The credit provider, credit bureau or debt counsellor should ensure that all the required documentation is delivered to the consumer. The manner in which the documents should be delivered to the consumer may be prescribed by the Act or the consumer may choose a preferred method.

The credit provider may not charge any fees for the original copy of any document required to be delivered. A consumer may request the credit provider in writing for one replacement copy of a document (free of charge, provided the request is within one year after the delivery of the original documents). The credit provider may charge a fee for any other replacement copy.

### **Protection of consumer credit rights**

When a consumer wants to exercise any of his / her rights as set out in the Act, the credit provider may not discriminate against the consumer for that reason. The credit provider must treat the consumer in the same way he / she will treat any other consumer and should not penalise him / her for exercising his / her rights.

### **The right to confidential treatment**

A consumer submits personal information when applying for credit or when opening an account at a bank, a retailer or a service provider. This information includes the consumer's age, marital status, address, income and employment details.

A number of entities may have access to a consumer's, or prospective consumer's, confidential information. They include:

- Credit providers
- Debt counsellors
- Credit bureaux
- The Tribunal
- The NCR

When any of the above entities receive, compile, retain or report on a consumer's confidential information, they must protect the confidentiality of the information. They may only use or report on a consumer's confidential information if:

- the NCA or other legislation allows or requires it.
- the consumer / prospective consumer consents to it.
- a court order requires it.

A consumer's credit information includes:

- Credit history
- Financial history
- Employment history
- Personal information (identity, etc.)

A credit bureau may only receive, compile and report any information on a consumer, as prescribed in the Act.

The Regulations prescribe additional standards for filing, retention and reporting of a consumer's credit information.

### **National register of credit agreements**

In order to address the problem of over-indebtedness and reckless credit the NCR should establish and maintain a National Credit Register (when established) of all credit agreements, except:

- pawn transactions; and
- incidental credit agreements.

All credit providers are required to submit information to the National Credit Register (when established) or a credit bureau when:

- a new credit agreement is entered into.
- an existing agreement is amended.

Once an agreement is reported, the credit provider must also report the termination or fulfilment of all the obligations in terms of the agreement.

### **The right to access and challenge credit records and information**

Every person has a right to be advised, within 20 business days, by the credit provider before the credit provider reports adverse information about the person to a credit bureau. The person may also receive a copy of that information on request.

Every person has a right to inspect any credit bureau, National Credit Register (when established), file or information regarding him / herself without charge:

- once within every 12 month period.
- if the Tribunal or a court ordered it.
- once within a reasonable time after he / she successfully challenged the information, to see if the information has been corrected.

This inspection may also be done at any other time upon payment of a prescribed fee of the credit bureau or National Credit Register (when established).

Every person has a right to challenge the accuracy of his / her information that:

- a credit provider wants to submit to a credit bureau.
- is held by a credit bureau or National Credit Register (when established).

### **Verification, review and removal of consumer credit information**

It will be unwise to allow the removal of credit records without considering the effect it may have on the credit industry and consumers. It is also true that some consumer credit information records should not be on the bureau database (prior to the NCA), for whatever reason.

Consumers, whose debt has been re-arranged by a debt counsellor in terms of the NCA, now have the opportunity to remove information pertaining to his / her debt, from the bureaux records by applying to a debt counsellor (at any time) for a clearance certificate regarding debt re-arrangement.

If the debt counsellor refuses to issue a clearance certificate, the consumer may apply to the Tribunal to review the decision.

When a credit bureau receives a copy of a court order cancelling a judgment, it must delete all the information relating to the judgment.

### **Negative option marketing**

The NCA aims to regulate the ways in which credit is marketed in order to provide protection against abusive marketing practices. The NCA also aims to ensure that marketers and advertisers of credit adhere to the same principles.

Therefore the NCA prescribes various requirements with regard to:

- marketing and sales of credit at home or at work.
- advertising practices.

The NCA prohibits negative option marketing.

When a consumer and a credit provider enter into a credit agreement, the credit provider must give the consumer certain options in writing to select from.

### **Credit marketing practices**

Any advertisement of the availability of credit, goods or services to be purchased on credit must:

- comply with the NCA's advertising practices.
- contain any prescribed statements (as per the Regulations).
- not advertise unlawful credit.
- not be misleading, fraudulent or deceptive, or
- not contain a statement which is prohibited by the Regulations.

Advertisements may include a statement of comparative credit costs as permitted by another applicable law or industry code, provided that such a statement of comparative costs:

- show the costs for each alternative which is compared.
- show the interest rates and other costs of credit for each alternative.
- is set out in the prescribed manner and form.
- is accompanied with the prescribed cautions and warnings concerning the use of the comparative statements.

When a credit provider advertises the granting of credit, it must show the interest rate and credit costs as prescribed for the facility or transaction being advertised.

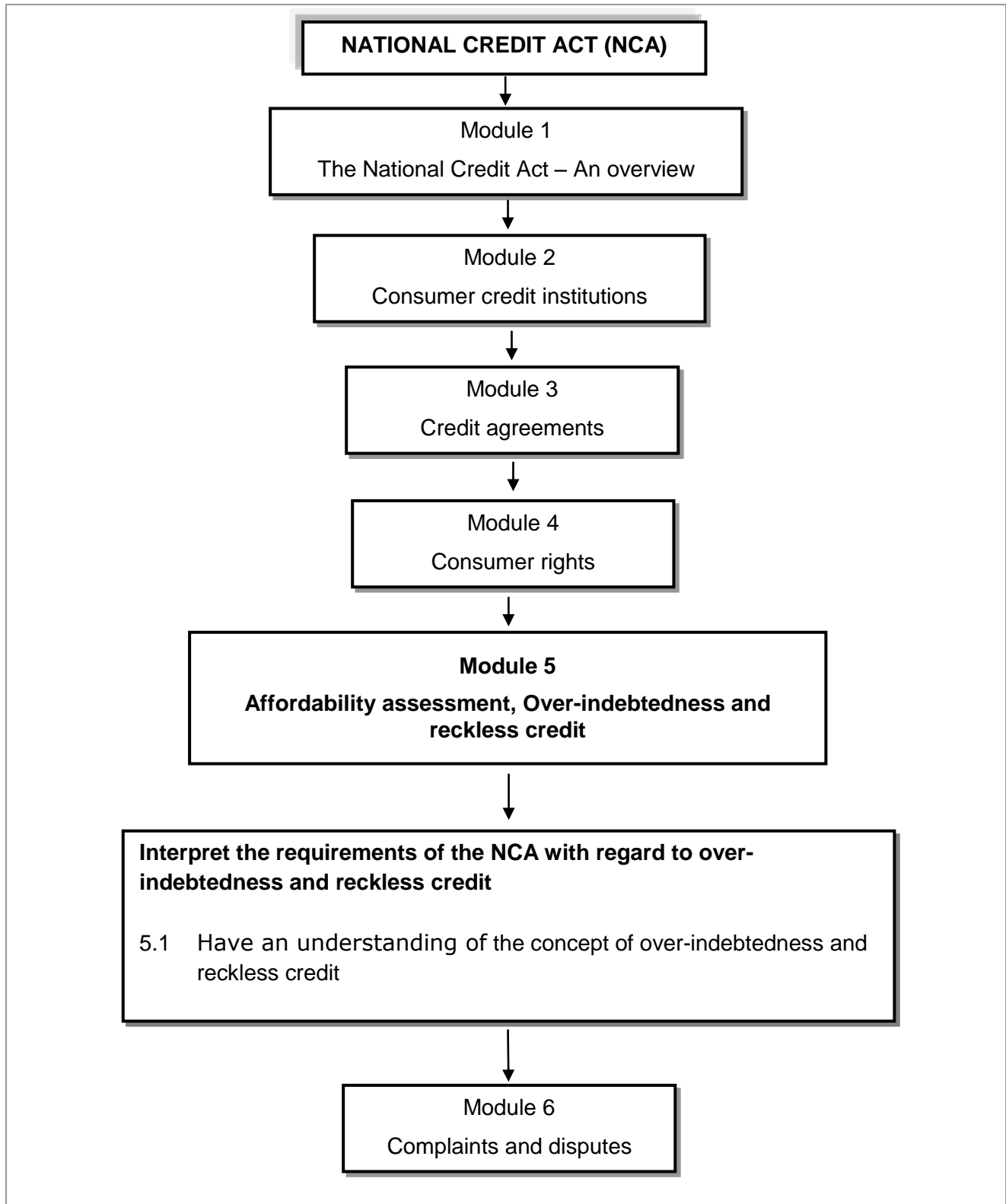
**MODULE 5**

**AFFORDABILITY ASSESSMENT, OVER-INDEBTEDNESS AND RECKLESS CREDIT**

**At the end of this module you will be able to:**

- 5.1 Have an understanding of the concept of affordability assessments.
- 5.2 Have an understanding of the concept of over-indebtedness and reckless credit.

**Learning Map**



## 5.1 Affordability assessment

The NCA requires credit providers to do affordability assessments to establish if consumers can afford credit before issuing credit. There are a few exceptions such as juristic persons and developmental credit agreements.

The 2015 Regulations to the NCA require credit providers to do an affordability assessment which means they must establish the consumer's current financial means and prospects (income) and the existing financial obligations (expenses).

The affordability assessment includes the following that must be done by credit providers:

- Take practicable steps to validate the gross income. This must be done by checking the latest three bank statements showing salary deposits or salary slips or the latest three documented proof of income or the latest financial statements (for self-employed consumers).
- If the monthly income varies in a material way, the average gross income of the last three pay periods just before the credit application must be used.
- The consumer must accurately disclose to the credit provider all financial obligations.
- The consumer must provide authentic documentation to the credit provider to enable the credit provider to conduct the affordability assessment.
- The credit provider must calculate the consumer's discretionary income, take into account all monthly debt repayment obligations in terms of credit agreements as reflected on the consumer's credit profile held by a registered credit bureau and take into account maintenance obligations and other necessary expenses.

A credit provider must make a calculation of the consumer's existing financial means, prospects and obligations by using the minimum expenses table provided in the Regulations.

The Table looks like this:

Minimum	Maximum	Minimum monthly fixed factor	Monthly fixed factor =% of income above band minimum
R0.00	R800.00	R0.00	100%
R800.01	R6 250.00	R800.00	6.75%
R6 250.01	R25 000.00	R1 167.88	9.00%
R25 000.01	R50 000.00	R2 855.38	8.20%
R50 000.01	Unlimited	R4 905.38	6.75%

Let's look at an example of how this will be applied:

Client earns R28 500 (gross) per month.

Minimum living expenses are:

Minimum monthly fixed factor: R2 855.38

PLUS +

Monthly fixed factor (8.20%) of income above Band minimum {R25 000}

8.20% of (R28 500-R25 000) R3 500 = R287

**TOTAL MINIMUM LIVING EXPENSES R3 142.38**

If a consumer's living expenses are lower than the amounts provided for in the formula, a specific form called "Declaration of consumer's necessary expense questionnaire" must be completed.

Credit providers will incorporate this formula in their credit scoring models, so it is not critical that you need to be able to apply it in your dealings with customers. It is important though to note that the NCR introduced a method (the formula discussed above) to assist in the assessment of affordability to enter into credit agreements.

If a consumer is not happy with the outcome of an affordability assessment, he/she may lodge a complaint with the credit provider. Thereafter the complaint may be escalated to the NCR where it must be resolved within seven business days.

## **5.2 THE CONCEPT OF OVER-INDEBTEDNESS AND RECKLESS CREDIT**

### **5.2.1 Over-indebtedness and reckless credit**

In the previous modules we have referred to **over-indebtedness and reckless credit** a number of times. Credit providers have an **obligation** to guard against over-indebtedness of consumers when they apply for credit.

When assessing credit, it is a specific requirement to ascertain the levels of debt of a consumer and to ensure that the credit agreement being applied for will not over extend the consumer.

#### **Over-indebtedness**

A consumer is over-indebted, if most of the available information, at the time when a determination is made by the credit provider, indicates that the consumer is, or will be unable to pay / fulfil his / her obligations under all the credit agreements which he / she has made, taking into account:

- financial means\*.
- his / her prospects and obligations.
- the likelihood that he / she will be able to fulfil the obligations of all the credit agreements given his / her debt repayment history.

#### **\*Financial means include:**

- **Income, or any right to receive income (regardless of the source, frequency or the regularity of that income), other than the normal income the consumer receives, has a right to receive or holds in trust for someone else.**
- **The financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, with whom the consumer shares their respective financial means and pays their mutual debt.**
- **The reasonable estimated revenue flow if the consumer wants to finance a business.**

#### **Financial means also includes the:**

- **right to receive matrimonial maintenance (whether paid or not).**
- **combined income and expenses of consumers in close family or household relationships (not necessarily married).**
- **projected income of a business venture.**

#### **Reckless credit**

Credit providers also have a duty in terms of the NCA to ensure that they do not grant reckless credit.

Firstly, a credit agreement is regarded as reckless, if at the time it was made or at the time of a limit increase, the credit provider **did not do an assessment**, irrespective of what the outcome of the assessment might have been and the court could declare it reckless at any time it is being considered.

Secondly, it will also be reckless if the credit provider **did the assessment and entered into an agreement**, despite the fact that it showed that the consumer **did not really understand the risks, cost or obligations of the agreement**, or despite the fact that the specific agreement will cause the consumer to be **over-indebted**.

#### **Reckless agreement**

To determine whether an agreement is reckless or not, one must look at the **circumstances** at the time the agreement was entered into and not at the time of the determination.

**The reckless credit provisions do not apply to the following agreements:**

- **school loan and student loan,**
- **emergency loan,**
- **public interest credit agreement,**
- **a pawn transaction,**
- **an incidental credit agreement, or**
- **a temporary increase in the credit limit under a credit facility.**

### **5.1.2 Avoidance of reckless credit**

In order to avoid reckless credit, both the consumer and the credit provider have certain responsibilities.

#### **Applying for credit**

When applying for credit and whilst the application is being considered, the consumer must **fully and truthfully answer any request for information** made by the credit provider as part of the assessment.

**It will not be reckless credit if the credit provider establishes that the consumer did not answer fully and truthfully the request for information and if the court / Tribunal finds that this failure of the consumer materially affected the ability of the credit provider to make a proper assessment.**

#### **Credit provider's responsibilities**

When applying for credit and whilst the application is being considered, the prospective consumer must fully and truthfully answer any request for information made by the credit provider as part of the assessment.

The credit provider must assess the prospective consumer's:

- general understanding and appreciation of the risk and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement.
- debt repayment history (as a consumer) under credit agreements.
- existing financial means, prospects and obligations.

The credit provider must take reasonable steps to assess if the reason or business venture which the consumer has in mind by applying for credit, will be successful.

**A credit provider is prohibited from entering into a reckless credit agreement with a prospective consumer.**

### **5.1.3 Application for debt review**

#### **Court's consideration**

When the court considers a credit agreement, and it is suspected that the consumer is over-indebted, the following options exist. The court may:

- refer the matter to a debt counsellor for consideration; or
- declare that the consumer is over-indebted and may make an order to declare the agreement reckless;

**or**

- re-arrange the consumer's obligations.

#### **Duties of debt counsellor**

One of the duties of a debt counsellor is to assist a consumer with regard to debt review. A consumer may apply to a debt counsellor (on a prescribed form) to have him / her declared over-indebted. The debt counsellor may charge the consumer a fee, (which is presently R50.00) before accepting the application. The debt counsellor may not accept or request a fee from a credit provider, in respect of a specific application.

Once the application form is received, the debt counsellor must give the consumer proof of receipt and notify the credit providers listed in the application form and all the registered credit bureaux. Credit providers have 5 days to verify consumer information. The debt counsellor must determine within 30 business days if the consumer appears to be over-indebted. The debt counsellor must determine whether the credit agreement appears to be reckless and propose to the court to be declared as such.

#### **Participation of consumer / credit provider**

The consumer and the listed credit providers must comply with all reasonable requests by the debt counsellor to assist in the evaluation of the consumer's affairs and the prospects for reasonable debt re-arrangement. They must also participate in good faith in the review and any negotiations regarding possible debt re-arrangement.



#### 5.1.4 Effect of debt review or re-arrangement of an agreement

Once a consumer is successful with a debt review or re-arrangement order, certain rules apply whilst these orders are effective.

Both the consumer and the credit provider have certain obligations.

##### Consumer's obligations

A consumer may not incur further charges in a credit facility, or enter into another credit agreement, unless it is a consolidation agreement, until **one** of the following has happened:

- The debt counsellor has rejected the application and the consumer has not applied to the court within 20 business days.
- The court has found the consumer is not over-indebted, rejected the debt counsellor's proposal or the consumer's application.
- The court has made an order, or the consumer and credit provider/s agreed to re-arrange the debt and those obligations have been fulfilled, unless the obligations were captured in a consolidation agreement.

**If a consumer enters into a consolidation agreement, he / she may not perform the actions discussed above, unless the obligations in the consolidation agreement are fulfilled or UNLESS the obligations are fulfilled by a (further) consolidation agreement.**

##### Credit provider's obligations

A credit provider who receives notice of application for debt review or of court proceedings in terms of which a credit agreement is considered to be reckless or it is alleged that the consumer is over-indebted, may not exercise any right or security it has under the agreement through litigation (legal action) or any other legal process **until the consumer is in default and one of the following has happened:**

- The debt counsellor rejected the application and the consumer did not apply to the court within 20 business days.
- The credit provider gave notice to terminate the debt review, 60 business days after the date on which the consumer applied for the debt review.
- The court found the consumer is not over-indebted, the debt counsellor's proposal or the consumer's application, has been rejected.
- The court has made an order or the consumer and credit provider / s agreed to re-arrange the debt and those obligations have been fulfilled, unless the obligations were captured in a consolidation agreement.
- The consumer defaulted on a re-arrangement agreed between him / her and the credit providers or as ordered by a court or the Tribunal.

If...	then...
a credit provider enters into a (new) credit agreement (which is not a consolidation agreement) with a consumer who has applied for debt re-arrangement which is still in operation,	all or part of the new agreement may be declared reckless, regardless whether the requirements of the NCA with regard to reckless credit are present or not.
a consumer applies for or enters into a credit agreement contrary to the requirements of the NCA with regard to reckless credit,	the provisions of the NCA will not apply to that agreement.

## 5.2.5 Suspension of reckless credit agreement

### Orders by a court

A credit agreement can be reckless, despite anything agreed on, or any law to the contrary.

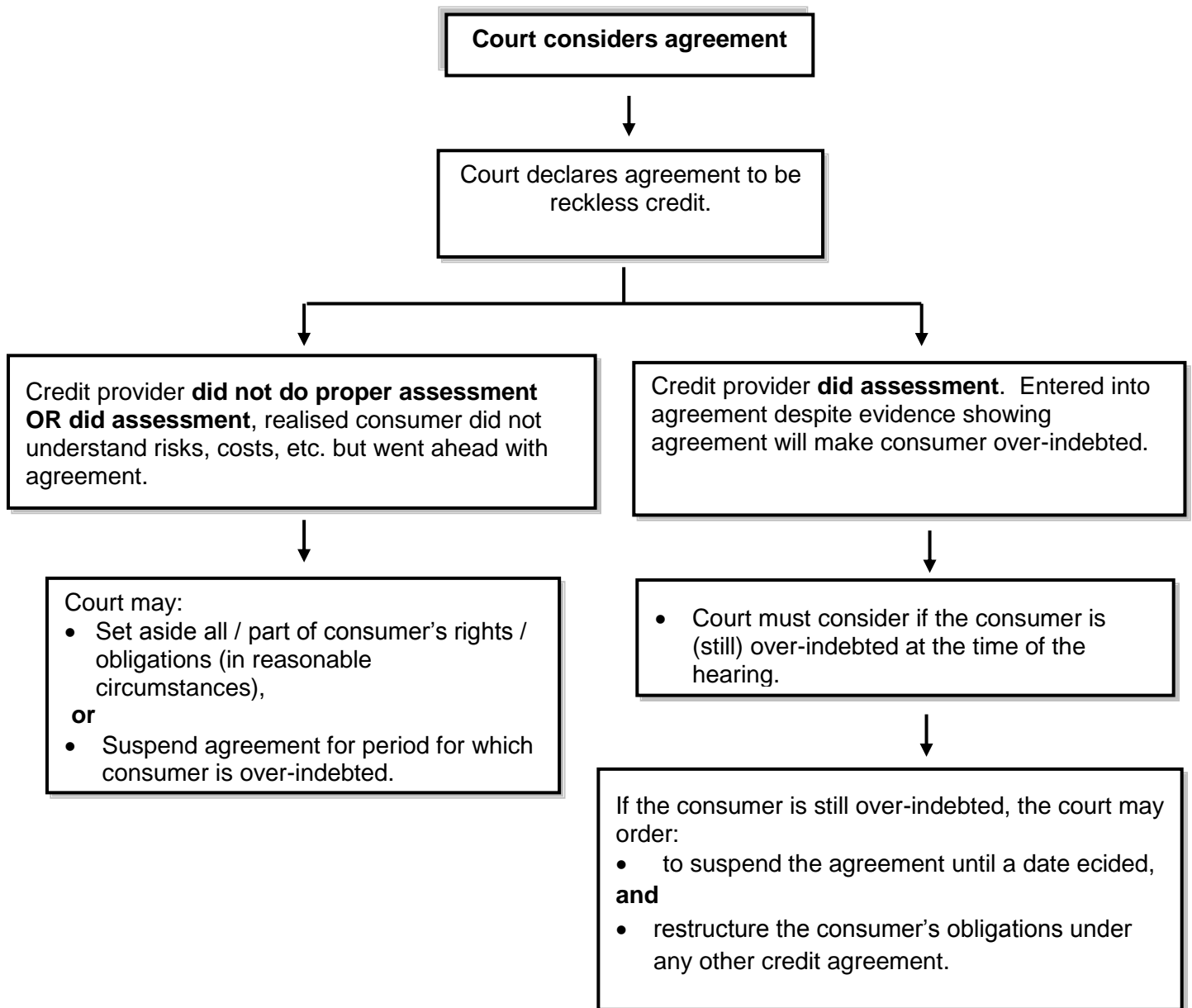
If...	then...
<p>a court has found an agreement to be reckless because the credit provider:</p> <ul style="list-style-type: none"> <li>• did not do a proper assessment,</li> </ul> <p><b>or</b></p> <ul style="list-style-type: none"> <li>• did an assessment and realised the consumer did not understand the risks, costs and obligations of the agreement, but still went ahead with the agreement,</li> </ul>	<p>it may:</p> <ul style="list-style-type: none"> <li>• set aside all the consumer's rights and obligations under the agreement as it finds just and reasonable,</li> </ul> <p><b>or</b></p> <ul style="list-style-type: none"> <li>• suspend the agreement when it finds the consumer is over-indebted until a date as determined by the court.</li> </ul>
<p>the court finds the credit agreement is reckless because the credit provider entered into the agreement despite the fact that there was evidence that entering into the agreement will make the consumer over-indebted,</p>	<p>the court:</p> <ul style="list-style-type: none"> <li>• must consider if the consumer is (still) over-indebted at the time of the court proceedings,</li> </ul> <p><b>and</b></p> <ul style="list-style-type: none"> <li>• may suspend the agreement when it finds that the consumer is over-indebted, until a date determined by the court,</li> </ul> <p><b>and</b></p> <ul style="list-style-type: none"> <li>• may order a restructuring of the consumer's obligations under any other credit agreement.</li> </ul>

When a court considers whether a credit agreement is reckless, it must consider:

- the consumer's current financial situation and his / her ability to pay the financial obligations that existed at the time the agreement was made; and
- the expected date when an agreement will be paid up, assuming the consumer keeps to the repayments as ordered.

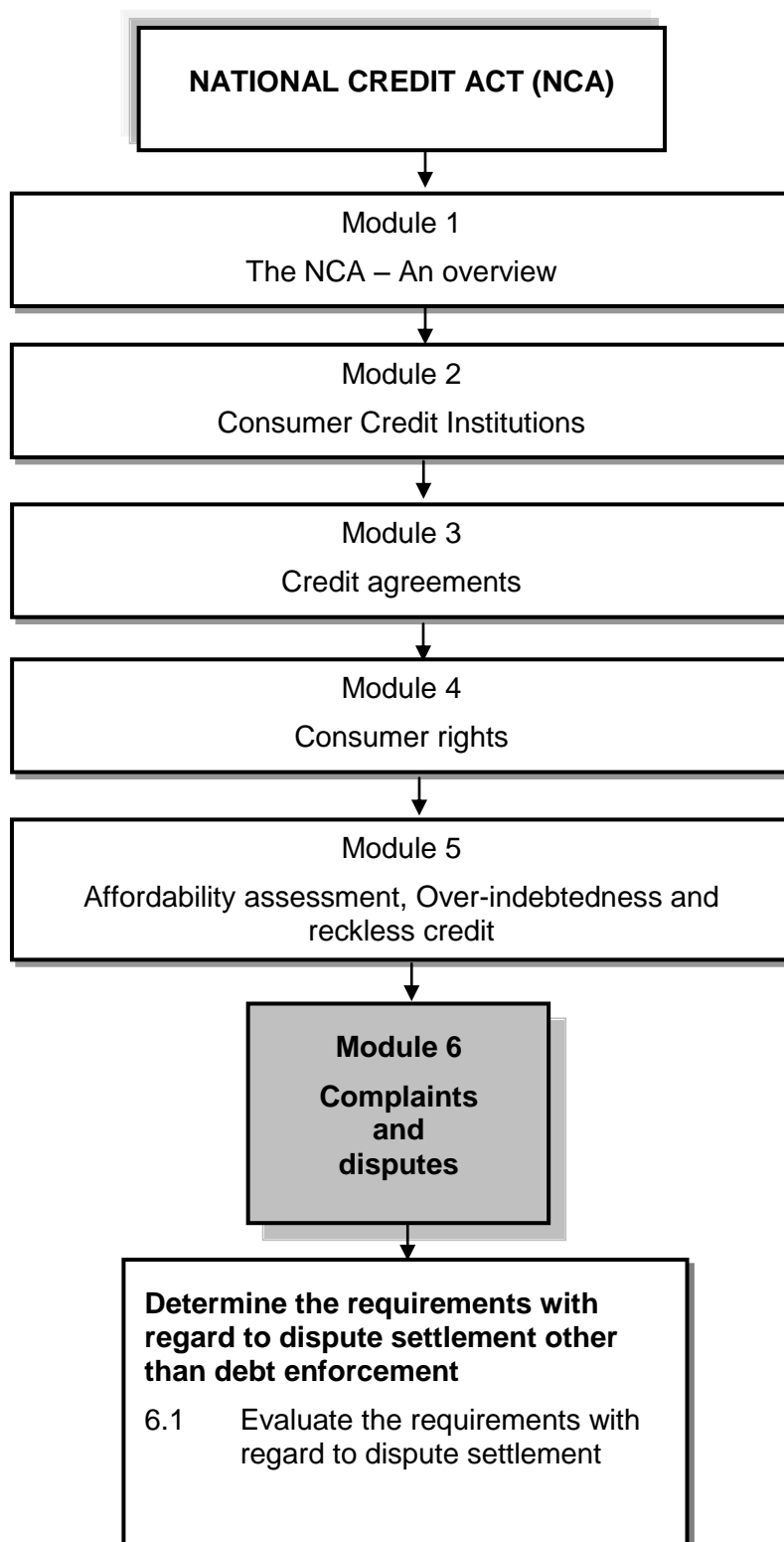
## Suspension of reckless credit agreement

The diagram below illustrates the **suspension of reckless credit by the court** as discussed on the previous page.



MODULE 6	
COMPLAINTS AND DISPUTES	
<b>At the end of this module you will be able to:</b>	
6.1	Evaluate the requirements with regard to dispute settlement.

## Learning Map



## 6.1 ALTERNATIVE DISPUTE RESOLUTION

A problem between a credit provider and a consumer may be resolved without the credit provider using the legal system. The NCA provides for **alternative dispute resolution** mechanisms in order to create various channels which may be used to resolve complaints and disputes.

If a complaint is not resolved satisfactorily, it may become a dispute. The NCA created the NCR and Tribunal which will be instrumental in the resolution of complaints and disputes.

As an alternative of filing a complaint with the NCR, a person may file a complaint with another dispute resolution entity, namely:

- an ombud with jurisdiction (in case of a Financial Institution),
- a Consumer Court, or
- an alternative dispute resolution agent.

### Initiating applications to Tribunal

All role players may also lodge complaints or file applications to the Tribunal. These role players include:

- The NCR
- A registrant (credit provider, credit bureau, debt counsellor)
- Prospective consumer
- Consumer

A credit provider or consumer, who could not resolve a dispute directly or through an alternative dispute resolution agent, Ombud with jurisdiction, Consumer Court or NCR may file an application to the Tribunal.

### Informal resolution or investigation of complaints

Any person may initiate a complaint to the NCR.

The NCR may refer the matter for resolution to:

- a debt counsellor, if the matter involves granting of reckless credit or over-indebtedness of the consumer, or
- the ombud with jurisdiction, a Consumer Court, or alternative dispute resolution agent.

He / she may also get one or more designated persons to assist the inspector, to examine the matter as quickly as possible.

If a complaint is frivolous or vexatious (playful / lacking seriousness), he / she will issue a notice of non-referral.

### Outcome and referral of complaints to NCR

On completion of an investigation, the NCR, must take the appropriate action, namely to:

- issue a notice of non-referral to the complainant.
- refer the matter to a Consumer Court or the Tribunal if he / she believe there was prohibited conduct.
- apply to the Tribunal if it is a matter for the Tribunal.
- refer the matter to the National Prosecuting Authority if the matter constitutes an offence in terms of the NCA.

### Hearings before the Tribunal

The Tribunal may accept applications from any one of the following parties:

- the NCR.
- registrants (credit providers, credit bureaux, debt counsellors).
- prospective registrants.
- consumers.

If the Tribunal conducts a hearing, it must be held in public. The Tribunal members take part in the proceedings by asking questions. Hearings must be held as promptly and informal as possible and in a fair and reasonable manner. At the end of the hearing the Tribunal must make an appropriate order and give written reasons for the decisions.

Participants in the hearings and members of the public must have reasonable access to the record of the hearing, except where its confidentiality must be protected.

A presiding member of the Tribunal at a hearing has similar powers as the NCR when doing an investigation.

The Tribunal may summon people to give evidence and may call witnesses.

### **Tribunal orders**

The Tribunal has the power and may make orders in matters brought before it.

An applicant may seek interim relief while waiting for a matter to be finalised. If he / she thinks that he / she will lose or suffer too much, the Tribunal can be approached to grant some form of relief.

The Tribunal will not grant an interim order lightly – only if there is evidence that the allegations made by the complainant may be true and to prevent irreversible damage to the complainant.

The Tribunal may also grant appropriate orders with regard to prohibited conduct or required conduct in terms of the NCA.

### **Administrative fines**

The Tribunal may impose administrative fines that must be paid to the National Revenue Fund (all the money received from national governing is paid into this fund).

This fine may not be more than the **greater** of 10% of the respondent's annual turnover during the previous financial year or R1 million.

The turnover is calculated as follows:

If the respondent is a credit provider, the annual turnover (at the time of assessment of the fine), is the total income of the credit provider (during the financial year immediately before), of all credit agreements under the NCA, **MINUS** the sum of all repayments of principal debt of the agreements.

If the respondent is another person, i.e. a credit bureau or debt counsellor the amount must be determined as prescribed in the Regulations.