

Credit bureaus in South Africa and Namibia: a comparative analysis of the regulatory frameworks evaluated against the World Bank’s principles for credit reporting—Part I

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Abstract

Over the years, the South African and Namibian systems have faced challenges relating to credit-information dissemination and, in view of the importance of credit information and credit-information arrangements, it is necessary to consider, evaluate, and compare the jurisdiction-specific measures in order to address identified challenges. We analyse and compare the current frameworks of the two jurisdictions in order to highlight differences. We discuss the World Bank reports on ‘the Observance of Standards and Codes’ for South Africa and Namibia and the ‘General Principles for Credit Reporting’ as general, principled frameworks for the regulation of consumer-information. This is followed by a comparison of the South African and Namibian structures as frameworks with specific structural and substantive features. The discussions focus on the South African National Credit Act 34 of 2005, the South African Protection of Personal Information Act 4 of 2013 and the Namibian Credit Bureau Regulations of 2014. Our aim is to investigate the improvements effected by the systems, the reasons behind these adaptations and, ultimately, the lessons that can be learnt from each jurisdiction.

INTRODUCTION

Orientation

The systematic collection and dissemination of information on a consumer’s credit affairs are usually undertaken by entities created for this

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specific purpose, namely credit bureaus.¹ Credit bureaus serve as the link between the consumer with unique personal-credit information indicators and the credit provider with credit to be extended based on personal-credit information indicating a creditworthy consumer.² Consumer-credit information has an established function to fulfil in meeting the needs and improving the efficiency of a contemporary credit market.³ Proper collection and dissemination of consumer-credit information have proved beneficial to credit markets for a variety of reasons,⁴ ranging from informed customer selection by credit providers and appropriate assessment of customers' credit-receiving capacities,⁵ to encouraging prudent credit

¹ *Southern African Fraud Prevention Service Ltd v National Credit Regulator* [2010] ZANCT 28 (19 February 2010) (NCT 168/2009/54(1) (T)) (hereinafter '*SAFPS v NCR*') para 10.1; Ingrid Goodspeed, 'The Credit Market' in Karin van Wyk, Ziets Botha and Ingrid Goodspeed (eds), *Understanding South African Financial Markets* (4 edn Van Schaik Publishers 2012) 499; South African Law Reform Commission, 'Privacy and Data Protection Report' (Project 124, 2009) <http://salawreform.justice.gov.za/reports/r_prj124_privacy%20and%20data%20protection2009.pdf> accessed 9 July 2017 at 378 (hereinafter '*SALRC*'); New Era, 'Credit Bureaus Now to be Regulated by Bank of Namibia' (29 August 2014) <<https://www.newera.com.na/2014/08/29/credit-bureaus-now-to-be-regulated-by-bank-of-namibia/>> accessed 14 February 2017 Federico Ferretti, 'The Legal Framework of Consumer Credit Bureaus and Credit Scoring in the European Union: Pitfalls and Challenges—Overindebtedness, Responsible Lending, Market Integration, and Fundamental Rights' (2013) 46 *Suffolk University LR* 791 at 798–802.

² *SAFPS v NCR* (n 1) para 10.1; Goodspeed (n 1) 499; *SALRC* (n 1) 378–379; World Bank, 'General Principles for Credit Reporting' (September 2011) <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Credit_Reporting_text.pdf> accessed 9 July 2017 (hereinafter '*World Bank*') at 7–8.

³ *World Bank* (n 2) 1, 7 and 23; *SALRC* (n 1) 379; 'Credit Bureaus'.

⁴ *World Bank* (n 2) 1, 7–8 and 23; *World Bank*, 'Report on the Observance of Standards and Codes Insolvency and Creditor Rights South Africa' (June 2012) [this Report was publicly discussed with interested parties at a seminar in Pretoria on 12 July 2013] (hereinafter '*South African ROSC*') 42; Department of Trade and Industry (DTI), 'Credit Law Review: Summary of Findings of the Technical Committee' (August 2003) <www.ncr.org.za/documents/pages/researchreports/aug13/Summary%20of%20Findings.pdf> accessed 9 July 2017 at 11. From a business point of view, it is also prudent to account for the value of the information itself for the credit bureau as it is 'an asset' and 'loss or damage to this asset results (often directly) in loss of profits'—see Elizabeth de Stadler and Paul Esselaar, *A Guide to the Protection of Personal Information Act* (Juta 2015) 2.

⁵ *World Bank* (n 2) 1 and 7–8; *South African ROSC* (n 4) 42–43; Ruth Goodwin-Groen with input from Michelle Kelly-Louw, 'The NCA and its Regulations in the Context of Access to Finance in South Africa' (November 2006) <www.finmark.org.za/wp-content/uploads/2016/01/Rep_NCA_AccessToFinance_2006.pdf> accessed 9 July 2017 at 14 and 31; *DTI* (n 4) 4; *SALRC* (n 1) 379 and 381.

extension⁶ and safeguarding consumers' financial resources by curtailing over-indebtedness.⁷ It is, therefore, in the interest of both consumers and the nation-state to devote resources to constructing and maintaining competent consumer-credit regulation schemes.⁸

Over the years, the South African and Namibian systems have faced challenges relating to credit-information dissemination and, given the importance of credit information and credit-information arrangements, it is necessary to consider, evaluate, and compare the jurisdiction-specific measures implemented, or sought to be implemented, to address identified challenges.⁹ In this article, we analyse and compare the current legal frameworks of the two jurisdictions in order to highlight differences between the systems. Research into developments in these two jurisdictions remains interesting as they were largely similar until Namibia achieved independence in 1990.¹⁰ Subsequent changes may, consequently, be important from a legal development point of view.

In light of the World Bank's analyses of these two jurisdictions, we consider the respective World Bank reports on 'the Observance of Standards

⁶ See World Bank (n 2) 7–8; SALRC (n 1) 379. See reg 23A of the Regulations made in terms of the South African National Credit Act 2005 published in (GG) 28864 (31 May 2006) GNR 489 as amended and as specifically amended by (GG) 38557 (13 March 2015) RG 10382 vol 597 R202 National Credit Act 34/2005: National Credit Regulations including Affordability Assessment Regulations titled 'Criteria to Conduct Affordability Assessment', specifically reg 23A(12)(b): 'When conducting the affordability assessment, the credit provider must 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.' See Daniel Klein and Jason Richner, 'In Defense of the Credit Bureau' (1992–1993) 12 *Cato Journal* 393 at 395: 'It is crucial to realize that consumers can get credit precisely because credit granters can identify which consumers are likely to pay their bills. Without credit bureaus, businesses would have a tough time accumulating the payment histories of individual consumers and would not give credit, except in special circumstances. Punishing a consumer who defaults would be an expensive and time consuming process. Historically, when credit reporting is absent, so is consumer credit.' See also Ferretti (n 1) 792.

⁷ DTI (n 4) 23 and 26; SALRC (n 1) 379. See World Bank (n 2) 7 in respect of debtor financial over-extension.

⁸ World Bank (n 2) 1; World Bank, 'Report on the Observance of Standards and Codes Insolvency and Creditor/Debtor Regimes Namibia Final' (October 2014) [this Report was publicly discussed with interested parties at a seminar in Windhoek on 13 March 2015] (hereinafter 'Namibian ROSC') 7 and 39; South African ROSC (n 4) 14 and 42.

⁹ See 'Credit Bureaus', 'Credit Bureaus in South Africa' and 'Credit Bureaus in Namibia'.

¹⁰ André Boraine, 'Some Notable Divergences in the Development of South African and Namibian Insolvency Law' (2010) 31 *Obiter* 414 at 414. See also Namibian ROSC (n 8) 18–24 for a brief history and exposé of the legal and economic framework in Namibia.

and Codes' (ROSCs) and its 'General Principles for Credit Reporting'.¹¹ We first discuss the World Bank's framework set out in the ROSCs and its credit¹² reporting principles as a general principled framework for consumer information regulation. We then compare the South African and Namibian structures as frameworks with specific structural and substantive features. Our aim is to investigate the improvements effected by the systems, the reasons behind these adaptations, and, ultimately, the lessons to be learnt from each jurisdiction. We aim to make recommendations for the improvement of consumer-credit information frameworks based on the outcomes of the research. The outcomes and recommendations can be beneficial for the jurisdictions under consideration and for other African jurisdictions experiencing similar conditions, which would benefit from comparative research into comparable challenges and which correlates the need for reform.

Credit Bureaus

The Significance of Credit Bureaus

A workable strategy for data exchange within the financial domain, and specifically between consumer and credit provider, is essential in an advanced credit market.¹³ A successful market that shows sustainable advancement and economic progress usually has an effective method of assessing threats and benefits arising from economic ventures, and is able to handle and assign these risks accordingly.¹⁴ 'Financial infrastructure'—

¹¹ As our research was prompted by the ROSC reports, we mainly focus on the principles drafted by the World Bank; additional references to other jurisdictions or best practices are merely ancillary. See eg SALRC (n 1) 388–390 (specifically with reference to credit reporting); Adrian Naudé and Sylvia Papadopoulos, 'Data Protection in South Africa: The Protection of Personal Information Act 4 of 2013 in Light of Recent International Developments (2)' (2016) 79 THRHR 211 for a discussion on other international best practice documents and foreign-jurisdiction determinants in the context of data protection (this part of their discussion is not specifically focused on credit bureaus—see (n 83) for part 1 and the references therein to the National Credit Act 34 of 2005 (hereinafter 'NCA')).

¹² We did not refer to other African countries, but 'The Credit Information Sharing Project Close Out Report' funded by the FinMark Trust and GIZ (November 2015) <http://www.finmark.org.za/wpcontent/uploads/2016/01/Rep_CreditInformationSharing_closeout_2015.pdf> accessed 14 February 2017 can be reviewed for a brief overview of the needs and some suggestions for improving data dissemination in the SADC countries.

¹³ World Bank (n 2) v. See also SALRC (n 1) 379; Namibian ROSC (n 8) at 39 and South African ROSC (n 4) 42.

¹⁴ World Bank (n 2) 1, 7–8.

of which ‘credit reporting’ is a component—occupies a fundamental place within the market domain.¹⁵

The World Bank report stresses the important role of credit-information institutions in the credit market.¹⁶ Data systems address the core challenge of deficient knowledge-equilibria between stakeholders in a creditor-debtor relationship.¹⁷ This discrepancy influences the quality of the consumer who qualifies for credit extension and the terms on which credit is extended.¹⁸ Knowledge inequalities curtail the accuracy of debtor evaluation by the creditor, as the latter is not privy to the same information in respect of the debtor’s affairs.¹⁹ Poorly informed choices may have adverse effects on credit providers and consumers alike, due to incorrect risk allocation and either under- or overpricing of credit.²⁰ Therefore, proficiency in availing credit information benefits the debtor in the form of increased accessibility to and reduced costs of credit.²¹

Ineffective systems can result in credit being extended to flawed debtors seeking it, as optimal applicants, unwilling to incur costs based on the risk allocated to them, do not accept the credit offered.²² Debtors may be able to over-extend themselves, while cautious credit providers may be wary to extend the true affordable amount to the debtor.²³ Another example is the “moral hazard” problem’, which arises where credit is extended to debtors who will default on the agreement.²⁴ Interestingly, proper credit records may have a beneficial psychological impact on debtors in so far

¹⁵ *ibid* 1: ‘Well functioning financial markets contribute to sustainable growth and economic development, because they typically provide an efficient mechanism for evaluating risk and return to investment, and then managing and allocating risk. Financial infrastructure (FI) is a core part of all financial systems. The quality of financial infrastructure determines the efficiency of intermediation, the ability of lenders to evaluate risk and of consumers to obtain credit, insurance and other financial products at competitive terms. Credit reporting is a vital part of a country’s financial infrastructure and is an activity of public interest.’

¹⁶ World Bank (n 2) 1, 10–12 and 23. See also Iain Ramsay, *Consumer Law and Policy Text and Materials on Regulating Consumer Markets* (3 edn Hart Publishing 2012) 420–424 for a discussion of the role and value of credit bureaus.

¹⁷ World Bank (n 2) 1, 7 and 23.

¹⁸ *ibid*.

¹⁹ *ibid* 7.

²⁰ *ibid* 7 and 23.

²¹ *ibid* 1.

²² *ibid* 7.

²³ *ibid*.

²⁴ *ibid*. See also Michelle Kelly-Louw, ‘The 2014 Credit-Information Amnesty Regulations: What do they Really Entail?’ (2015) 48 *De Jure* 92 at 92–93.

as they are amenable to constructive adjustment of their behaviour.²⁵ Favourable credit records, with concomitant advantageous credit-extension terms, can encourage a debtor not to default on his or her agreements.²⁶ A functional information scheme is important for frameworks that support consumer protection.²⁷ Apart from privacy considerations,²⁸ consumer-credit information relates to consumer creditworthiness, which is arguably a protected interest.²⁹ Improper data retention results in the rejection of applications for credit or increased repayment charges.³⁰

Functioning structures are not only beneficial *vis-à-vis* the ultimate contractual outcome, but also offer an economic advantage by reducing the resources expended by credit providers during the evaluation process, particularly in respect of costs and time.³¹

Ferretti reviews the benefits of credit bureaus,³² but is wary of the adverse challenges generated by credit bureaus and reliance on these entities.³³ He notes that credit data is valuable and plays a role in addressing the state

²⁵ World Bank (n 2) at 8. See also Klein and Richner (n 6) at 395: 'When credit reporting is in place, consumers have an extra incentive to pay their bills. They are eager to keep their credit report clean, for otherwise they may lose the benefits of credit. Beside creditors, apartment managers and prospective employers sometimes consult credit records. By enhancing accountability, credit bureaus help turn consumers into responsible individuals.' The aforementioned authors view '[t]he Credit Bureau as a Mechanism of Social Control' at 396 et seq and argue at 396–397 that bureaus are structured 'gossip' schemes which create consumer repute.

²⁶ World Bank (n 2) 8. See contra Ramsay (n 15) 422: 'A negative reporting system may be predicted to produce greater incentives to repay than a system that includes positive information. In the latter system a borrower who knows that a financial institution will also release positive information may have a higher incentive to default since she knows that one default may be discounted by lenders who have access to other positive information on the credit file.'

²⁷ World Bank (n 2) 23. See also Namibian ROSC (n 8) 13.

²⁸ Johann Neethling, 'Die Kredietburowese en Databeskerming' (1980) 43 THRHR 141 at 145; David McQuoid-Mason, 'Consumer Protection and the Right to Privacy' (1982) 15 CILSA 135 at 137–140. See also Ferretti (n 1) 809–812 in respect of privacy and data protection. It is beyond the scope of this article to discuss the manifestations of privacy in the context of credit bureau-related data.

²⁹ McQuoid-Mason (n 27) 137; Johann Neethling, 'Persoonlike Immaterieelgoedereregte: 'n Nuwe Kategorie Subjektiewe Regte?' (1987) 50 THRHR 316; Johann Neethling, 'Die Reg op die Verdienvermoë en die Reg op die Korrekte Inligting as Selfstandige Subjektiewe Regte' (1990) 53 THRHR 101; Johann Neethling, 'Blacklisting of a Debtor as a Credit Risk—Infringement of a Debtor's Rights to Creditworthiness and Earning Capacity as Personal Immaterial Property Rights' (2006) 18 SA Merc LJ 376. For a basic discussion of the manner in which credit providers use consumer-credit information in South Africa, see Kelly-Louw (n 24) 93. See also *Zokufa v Compuscan (Credit Bureau)* [2010] ZAECMHC 19; 2011 (1) SA 272 (ECM) para 82 in respect of a consumer's 'right to protect her financial credibility against false or incorrect credit reports.'

³⁰ World Bank (n 2) 2.

³¹ *ibid* 8; Goodspeed (n 1) 499. See also Ramsay (n 16) 420 regarding the cost benefits brought about by credit scoring.

³² See the literature review by Ferretti (n 1) 794–798.

³³ *ibid* 815 et seq.

of unequal awareness of a consumer's position when applying for credit.³⁴ The impact of a bureau on consumers and consumer behaviour is also not disregarded.³⁵ There are numerous benefits for a credit provider's business arising from the services of bureaus, including cost benefits and entrepreneurial supremacy.³⁶ However, he questions the soundness of the bureau as a protocol for the prevention of financial over-extension by consumers and the effect that credit bureaus can have on consumer-credit markets.³⁷ He approaches this question through two cardinal statements: that the financial crisis of 2008 was not pre-empted, despite the presence of bureaus, and specifically not in jurisdictions with 'sophisticated' credit bureaus; and that 'credit bureaus were used to foster and encourage the segmentation of credit markets.'³⁸ According to Ferretti, the 'prime' and 'subprime' arenas were the products of credit bureaus.³⁹ He further argues that increased reliance⁴⁰ on credit bureaus for purposes of evaluating whether a consumer is suited to receive credit, is not the desired course of action where reliance is placed on the information held and the services rendered by bureaus without accommodating other factors that have a real impact on a consumer's financial position.⁴¹ Examples include considerations, such as 'poor market conditions in the economy as well as life-changing events such as divorce, loss of employment, illness [and] death of a family member.'⁴² He is critical of the supplementary services (and their implications for consumers) rendered by credit bureaus to clients, although he does recognise

³⁴ *ibid* 794.

³⁵ *ibid*.

³⁶ Ferretti (n 1) 795: '[C]redit-reporting systems are instrumental tools in expanding the breadth and depth of financial markets and in strengthening the financial system. They reduce transaction costs, loan-processing costs, and the time required to process applications. Credit-reporting systems improve lenders' client-portfolio quality by monitoring it and identifying potential problems. They also provide cost-efficient, standardized, and objective criteria for credit analysis; facilitate distant transactions (including e-finance or Internet transactions); provide opportunities for new financial products to reach consumers; and enable lenders to serve consumers who would be underserved or ignored otherwise. All of these aspects, in turn, result in the development and sale of new products as well as tailored pricing, targeting, and marketing that ultimately contribute to the lenders' profitability.'

³⁷ *ibid* 795–796. See also Ramsay (n 16) 422.

³⁸ *ibid* 796.

³⁹ *ibid*. Ferretti further notes at 796: 'Those borrowers who were at a disadvantage in the subprime market were offered more costly loans that were more burdensome related to the risk-taking of lenders (rather than the alternative, where those at a disadvantage would pay less in order to meet their payment obligations).' See also Ferretti (n 1) 799–800 in the context of 'private credit bureaus' in the European Union.

⁴⁰ *ibid* 816. He argues that market players should bear concern for consumer over-extension, but that 'other more important issues' should enjoy preferential attention prior to enhancing the utilisation of data-dissemination mechanisms.

⁴¹ *ibid* 815–816. Ferretti (n 1) further refers to a very interesting research outcome at 816, when he reports that the escalation of consumer commitments is a result of more competition amongst financial providers, as well as facilitated credit extension to consumers.

⁴² *ibid* 816.

their value for the customer-lender.⁴³ These services include ‘credit-scoring services’, which are methods used to categorise consumers based on certain limiting or identifying factors specially accommodated through statistical techniques designed for this purpose.⁴⁴

The implications of including credit bureau-related activities in credit extension are also noteworthy for consumers when it comes to over-extension and sensible credit provision. First, the requirements for the prevention of unmanageable credit extension and mature credit provision may conflict; while secondly, there are repercussions for exposed consumers and the provision of other financial products.⁴⁵

As regards ‘discrimination’, Ferretti—specifically referencing the applicable Directives of the European Union—warns of a form of differentiation that is not easily controlled by statutory intervention.⁴⁶ He refers to this as ‘concealed forms of discrimination’ and characterises it as a creation of credit-profiling programmes (‘credit scoring’) through the use of less contentious information.⁴⁷ A consumer would be hard-pressed to show the causal nexus between the adverse outcome, the information and the methods used to rework the information.⁴⁸

⁴³ *ibid* 799–800 and 822–823. See also the comments of Ramsay (n 16) 422–423.

⁴⁴ Ferretti (n 1) 797 and 799–800. At 797 he states: ‘In technical terms, credit-scoring models are mathematical algorithms or statistical programs that determine the probable debt repayments by consumers, assigning a score to an individual based on information processed from a number of data sources and categorizing credit applicants according to risk classes. They involve data-mining techniques that include statistics, artificial intelligence, machine learning, and other fields aimed at getting knowledge from large databases.’ In a South African context, see SALRC (n 1) 379. See also Kelly-Louw (n 24) 106 in respect of ‘score bands’ in South Africa, where the author notes that determination of these risk indicators differs from bureau to bureau as the manner in which these bands are calculated varies from entity to entity. She further states at 106 that ‘a credit bureau does not decide whether any credit should be granted, it generally just indicates what the possible risk factor for default by a consumer is, and such determination is not an exact science.’ According to reg 18(4)(j), the aim of developing such a score scheme to obtain credit records from a bureau is a lawful reason, as authorised by the regulations. In contrast to the South African position, in Namibia a ‘credit score’ is defined in reg 1 of GG 5518 (31 July 2014) GN 102 Credit Bureau Regulations: Bank of Namibia Act, 1997 (the Notice itself is dated 11 July 2014) as amended in GG 5579 (1 October 2014) GN 177 (hereinafter ‘Namibian Regulations’) as ‘a numerical expression *determined by the Bank in consultation with credit bureaus and credit providers* based on a credit history and payment profile of a data subject that is used to determine creditworthiness of a data subject.’ [Emphasis added].

⁴⁵ Ferretti (n 1) 823.

⁴⁶ *ibid* 814.

⁴⁷ *ibid*.

⁴⁸ *ibid*.

Different Bureaus

On a macro-level, the availability of information also advances the regulation of supervisory and financial stability.⁴⁹ The World Bank's report on standards of information narration deals with a wider understanding of data institutions and not only with credit bureaus.⁵⁰ A distinction is drawn between 'credit bureaus' and 'credit registries'.⁵¹ Credit bureaus accumulate data from and disseminate it to multiple participants involved in the information-exchange scheme.⁵² The relevant industry is usually the consumer-credit and small-enterprises sphere, which deals with large numbers of lesser-value capital amounts.⁵³ As such, credit bureaus evolved to serve various needs, ranging from rendering some steps in the application evaluation process cost effective,⁵⁴ to offering mechanisms to assist with the actual evaluation.⁵⁵ The core business of these entities is structured around the provision of so-called quality information in order to assist with debtor assessment.⁵⁶

Credit registries are designed as a mechanism to assist the regulatory regime with oversight of the financial sector, in particular industry patterns or the health of financial institutions.⁵⁷ The information, therefore, is limited to those organisations or markets in which the oversight regime has an interest and the data is presented in a relevant manner—that is to say, 'consolidated or aggregated'.⁵⁸ The operation of the registry is often the responsibility of the oversight body itself.⁵⁹ The outcomes of credit bureaus' and credit registries' activities may overlap, as the information held by credit bureaus may assist with oversight functions concerning broader

⁴⁹ World Bank (n 2) 1 and 8.

⁵⁰ *ibid* eg 10–12.

⁵¹ *ibid* 10–12.

⁵² *ibid* 11.

⁵³ *ibid*.

⁵⁴ *ibid* 8 and 11.

⁵⁵ *ibid* 11: 'Credit bureaus generally target retail credit and small business lending markets, where average loan volumes are small and mass screening techniques using statistical analyses enable the processing of a large number of standard loan applications cost-effectively. Indeed, data collected from various data providers is used to develop specialized products and services such as credit reports, credit scores and portfolio monitoring applications, which enable better informed and quicker credit granting decisions, enhanced credit portfolio monitoring and improved overall credit risk management. These products and services are typically offered for a fee.'

⁵⁶ *ibid* 10. This first overall category of entities described by the World Bank is based on the envisaged outcomes of these entities (credit bureaus resort hereunder). The World Bank, however, warns that a 'private/public' distinction is incorrect as 'private credit bureau' may assist with 'public functions'—see 10–11.

⁵⁷ *ibid* 11–12. See 10–12 for the second overall category based on envisaged outcomes of entities (credit registries resort hereunder).

⁵⁸ *ibid* 12.

⁵⁹ *ibid*.

financial-sector management,⁶⁰ whilst credit registries can also play a role in increasing the quality of available information.⁶¹

Ferretti draws a similar distinction based on policy considerations⁶² and refers to the respective entities as ‘private’ and ‘public’.⁶³ However, he is adamant that the performance by the two types of entity cannot be fully interchangeable.⁶⁴

In light of the acknowledged impact of credit bureaus on consumers and countries,⁶⁵ we now turn to a comparison of the South African and Namibian credit-reporting systems. We aim to establish what these two jurisdictions can learn from each other in preference to acting in isolation to reform their credit bureau arenas.⁶⁶ The South African system has reformed the credit-bureau framework as part of an holistic revision of the consumer-credit sector and erstwhile laws.⁶⁷ Namibia, on the other hand, has introduced focused credit-bureau regulation independent of broader consumer-credit reform action affecting the earlier versions of South African legislation that currently still apply in Namibia.⁶⁸

⁶⁰ See the Credit Bureau Monitor issued by the National Credit Regulator on a quarterly basis and where the information is sourced from the licensed South Africa bureaus—see eg NCR, ‘Credit Bureau Monitor Fourth Quarter’ (December 2016) 1 <www.ncr.org.za/documents/CBM/CBM%20December%202016.pdf> accessed 9 July 2017. The bureaus retained 24.31 million ‘credit-active’ consumers’ reports and information pertaining to 82.42 million accounts. It dealt with 446.44 million queries about reports according to this Monitor—see NCR (n 60) 1. See also the DTI, Draft National Credit Act Policy Review Framework 2013, Invitation for the Public to Comment on the Draft National Credit Act Policy Review Framework (2013) in GG (Republic of South Africa) 36504 (29 May 2013) vol 575 GN 559 para 1.8.1.

⁶¹ World Bank (n 2) 10.

⁶² In general, the examples of policy considerations presented by Ferretti (n 1) 793 (in the context of the European Union) are ‘the stability of the member states’ financial systems; the fight against consumer overindebtedness; and risk-management in the interest of the profitability of the retail-credit industry.’ See his notes at 793 on ‘public and private credit bureaus’ within the European Union and their specific purposes. See also (n 57) and (n 58).

⁶³ Ferretti (n 1) 793 and 798–802.

⁶⁴ *ibid* 801.

⁶⁵ See also DTI, ‘Making Credit Markets Work a Policy Framework for Consumer Credit’ (2004) <www.ncr.org.za/documents/pages/research-reports/nov10/Credit%20Law%20Review.pdf> accessed 9 July 2017 in para 3.13, noting that the information exchange brought about by bureaus ought to limit ‘the scope for discrimination in decisions about credit. Credible credit bureau information could also provide a basis for statistical analysis to detect potential racial bias in client selection by any particular credit provider. Credit bureaus could thus play a very important role in supporting more efficient financial markets, and more equitable credit allocation.’

⁶⁶ We refer to the reformative action on various occasions, but see *inter alia* Legal Frameworks’.

⁶⁷ DTI (n 64) paras 2.10 and 3.12–3.15.

⁶⁸ See *inter alia* ‘Legal Frameworks: South Africa’ and ‘Legal Frameworks: Namibia’ See (n 102) for reference to Namibian bills.

INTRODUCTION AND REGULATORY FRAMEWORKS

South Africa and Namibia

Credit Bureaus in South Africa

The South African consumer-information market displays problematic features when it comes to consumer-credit information dissemination.⁶⁹ The system was described as undependable, inaccurate and unregulated, and was found wanting with regard to consumer participation.⁷⁰ There were notable concerns about the contents of the data⁷¹ and shortcomings as regards the scheme's comprehensiveness, accuracy, consistency, accessibility and reliability.⁷² This position contrasts sharply with some of the principled foundations of an acceptable consumer-credit information framework, which are comprehensiveness, accuracy, truthfulness and consistency.⁷³

These shortcomings undermined the abilities of role-players and stakeholders in some discernible areas.⁷⁴ The first was the ability to address problems arising from the inability of consumers to challenge inaccuracies in the data.⁷⁵ The second was the ability to use the data in a way that would promote acceptable standards of consumer evaluation for credit-granting purposes, including assessing the suitability of a consumer as a customer for purposes of calculating the expenditure on credit in accordance with the level of risk posed by the consumer.⁷⁶ The third was highlighted during the policy-drafting stage and referred to a need to provide proper credit information to the credit provider, as this data has an effect on the promotion of consumer well-being through prudent financial-capacity appraisals aimed at avoiding over-extension of the consumer's income

⁶⁹ DTI (n 4) 7, 9, 11, 13 and 20; Michelle Kelly-Louw with contributions by Philip Stoop, *Consumer Credit Regulation in South Africa* (Juta 2012) 14.

⁷⁰ *ibid*; Michelle Kelly-Louw, 'The Prevention and Alleviation of Consumer Over-indebtedness' (2008) 20 SA Merc LJ 200 at 204 [hereinafter Kelly-Louw (2008)]; Michelle Kelly-Louw, 'Consumer Credit' in Willem Joubert, John Faris and Ashleka Kanjan (eds), *Law of South Africa*, vol 8 (3 edn LexisNexis December 2014) [Last updated: reflects the law as at 31 August 2014] (hereinafter Kelly-Louw *LAWSA*) para 78; SALRC (n 1) 391.

⁷¹ DTI (n 4) 20; Kelly-Louw (2008) (n 70) 204; Goodwin-Groen (n 4) 14 and 54; SALRC (n 1) 391.

⁷² DTI (n 4) 20; Kelly-Louw (2008) (n 70) 204; Kelly-Louw (n 69) 14; Kelly-Louw (n 24) 96–97; Goodwin-Groen (n 4) 54; SALRC (n 1) 391.

⁷³ World Bank (n 2) 3 and 23–38. See also South African ROSC (n 4) 42 and Namibian ROSC (n 8) 39, emulating World Bank Principle B1.

⁷⁴ For purposes of general shortcomings, some sources cross-referenced one another and for these purposes the following sources were important: DTI (n 65); DTI (n 4); Goodwin-Groen (n 4); Kelly-Louw (n 69); Kelly-Louw (2008) (n 70); SALRC (n 1).

⁷⁵ Kelly-Louw (n 69) 14; Kelly-Louw (2008) (n 70) 204; Kelly-Louw (n 24) 97.

⁷⁶ DTI (n 4) 4 and 7; Goodwin-Groen (n 4) 14.

vis-à-vis credit-related debt repayments.⁷⁷ Inadequate data was one of the reasons why credit providers contracted with sub-standard clientele, failed to deal adequately with credit hazards and had to manage increased non-performing accounts.⁷⁸ This state of affairs eventually led to an escalation in credit charges.⁷⁹ The exchange of credit information was further described as ‘fragmented’.⁸⁰

Consumer-credit information⁸¹ has been a central feature in the development of the South African legal and economic credit spheres.⁸² The flaws identified in the South African credit system preceded and informed the policy decisions and, ultimately, the remedial content of the National Credit Act (NCA).⁸³ Information regulation has been significantly modified over the past twenty years, from the enactment of the Constitution of the Republic of South Africa, 1996, to the extensive revision in 2006 through the

⁷⁷ DTI (n 64) paras 6.8–6.9.2. See the discussion by Kelly-Louw (2008) (n 70) 221 in the context of the role of credit information in the reckless credit arena of the NCA. See also South African ROSC (n 4) at 44 and DTI, ‘Memorandum on the National Credit Bill’ (2005) para 2.6. See DTI (n 4) 23 and 26 in respect of international standards and the requirements that a statutory framework for consumer credit should comply with regarding credit-bureau regulation; and Ferretti (n 1) 823 where he discusses the role of credit bureaus and information in the context of responsible lending to consumers. See also South African ROSC (n 4) 44.

⁷⁸ The authors reference the ‘credit market weaknesses identified by the 2004 committee’ and notes that ‘[w]eak and incomplete credit bureau information results in bad client selection, ineffectual credit risk management and high bad debts, hugely increasing the cost of credit’—see Goodwin-Groen (n 4) 14. See also DTI (n 4) 7; Kelly-Louw (2008) (n 70) 206.

⁷⁹ Goodwin-Groen (n 4) 14. See also DTI (n 4) 7 and 20. Some sources indicate that the challenges had effected ensuing problems, see Goodwin-Groen (n 4) 14 and 54; Kelly-Louw (2008) (n 69) 206.

⁸⁰ DTI (n 4) 20: ‘Credit risk information: Current credit information exchange is fragmented and incomplete. Credit bureaus exclude information on substantial and important parts of the consumer credit market, while the information on the bureaux is frequently inaccurate. This undermines the credit provider’s ability to identify non-creditworthy consumers; leads to high levels of bad debt and thus to increased cost of credit across the board.’

⁸¹ ‘Consumer credit information’ is the term found in the NCA and ‘credit information’ in the World Bank ROSCs—we shall use the same terminology in our discussion.

⁸² Kelly-Louw (n 69) 6 and 16–17; DTI (n 65) paras 1.3–1.6, 1.11 and 3.12–3.15.

⁸³ See Goodwin-Groen (n 4) 14–15; Kelly-Louw (n 69) 1–6, 16 and 17; Kelly-Louw (n 24) 96; DTI (n 77) para 1. See DTI (n 60) para 2.3.4.1.1 in respect of the 2013 policy review of the NCA: ‘The NCA introduced, for the first time, registration of credit bureaux and regulations regarding the removal of negative listings, cleaning of records and access to personal credit records. In each case, these regulations have done much to ensure more equitable and fair access to credit and ensure greater responsibility by credit providers when updating consumer credit information.’

measures incorporated in the NCA.⁸⁴ The Constitution introduced general rights to privacy⁸⁵ and access to information,⁸⁶ while the NCA specifically targeted the credit-information domain—notably through the embodiment of specific consumer rights and remedies suited to the consumer-credit information arena.⁸⁷ Apart from incentives to realign the credit industry with best practices,⁸⁸ certain country-specific considerations also drove this reformation in the focus on the regulation of credit bureaus in South

⁸⁴ Kelly-Louw (n 69) 6 and ch 6; Anneliese Roos, 'Data Protection: Explaining the International Backdrop and Evaluating the Current South African Position' 2007 SALJ 400 at 421–433; Adrian Naudé and Sylvia Papadopoulos, 'Data Protection in South Africa: The Protection of Personal Information Act 4 of 2013 in Light of Recent International Developments (Part 1)' (2016) 79 THRHR 51 at 52–59; Jannie Otto, 'Rights and Duties of Parties' in Chris Nagel et al (eds), *Commercial Law* (5 edn LexisNexis 2015) 318–319. See Naudé and Papadopoulos (n 83) 52–59 for a discussion of some applicable laws. However, these authors state at 51–52: 'It took South Africa forty years since the first enactment of national data privacy legislation to enact its own data privacy legislation in the form of the Protection of Personal Information Act (PPI), despite the fact that the South African Law Reform Commission (SALRC) took the first steps towards enacting data privacy legislation in South Africa fifteen years ago.' Some of the authors mentioned in this footnote, namely, Roos at 433; Naudé and Papadopoulos at 59 and SALRC (n 1) 395 find the NCA wanting in respect of data protection. See also Anneliese Roos, 'Data Privacy Law' in Dana van der Merwe et al (eds), *Information and Communications Technology Law* (2 edn LexisNexis 2016) 429 and 431–432, specifically stating at 432 that the NCA's lack of privacy safeguards can be remedied by referring to the Protection of Personal Information Act 4 of 2013 (hereinafter 'the POPIA') as the latter will supersede stipulations that do not conform to the aims or content of the POPIA.

⁸⁵ S 14. See Lee Swales, 'Protection of Personal Information: South Africa's Answer to the Global Phenomenon in the Context of Unsolicited Electronic Messages (Spam)' (2016) 28 SA Merc LJ 49 at 49–51 in respect of the constitutional concept of 'privacy' and its relation to personal data in South Africa. See also Naudé and Papadopoulos (n 834) 55–56. Further, see Ferretti (n 1) 809–811, where the author differentiates between 'privacy' and 'data protection' when he states at 809: 'As recent scholarship persuasively shows, data protection cannot be reduced to a "late privacy spin-off" that echoes a privacy right with regard to personal data, but formulates the conditions under which information processing is legitimate. While privacy laws derive their normative force from the need to protect the legitimate opacity of the individual through prohibitive measures, data protection forces personal-data-processing transparency while enabling data subjects to take full control where the processing is not authorized by the law.'

⁸⁶ S 32. See s 2 of the 1996 Constitution, which establishes it as the uppermost South African law and nullifies behaviour or legislative rules that contradict its provisions. See also Naudé and Papadopoulos (n 84) 57 for a short discussion of the Promotion of Access to Information Act 2 of 2000, which is the statutory enablement of s 32 of the 1996 Constitution. We do not discuss the latter Act in this article.

⁸⁷ Long title of the NCA; Otto (n 84) 318–319; Roos, 'Data Protection' (n 84) 429–433; Naudé and Papadopoulos (n 84) 58–59. In general, see also Johann Scholtz, 'The Implementation, Objects and Interpretation of the National Credit Act' in Johann Scholtz et al (eds), *Guide to the National Credit Act* (LexisNexis Service Issue 8 May 2016) 2-1.

⁸⁸ DTI (n 65) paras 8.4 and 8.6 at 39.

Africa. Most notable here was the prohibition of racial discrimination in credit allocation.⁸⁹

In addition to the statutory regulation of credit bureaus, referencing the information held by these entities also became obligatory when a consumer was considered for credit extension—sections 80 and 81 of the NCA require that the credit provider conduct an assessment of the consumer's financial position in order to establish whether the loan applied for would result in the consumer becoming over-indebted. As such, the importance of credit bureaus in South Africa cannot be understated, as the information services they render directly affect both credit providers and consumers through the statutory obligations imposed by the NCA—regulation 23A(12)(b) to the NCA compels the credit provider to consider the information on a consumer held by a credit bureau.⁹⁰ The mandatory calculation of the consumer's 'discretionary income' depends on the information on file with credit bureaus.⁹¹ However, Van Heerden and Renke point out that the data on file with bureaus are not always comprehensive, as credit providers do not consistently adhere to section 69 and provide information to credit bureaus.⁹²

The 'impending' Protection of Personal Information Act (POPIA) will further regulate the management of individual consumer data.⁹³ We deem it prudent to clarify that a comparison between and an evaluation of the provisions of the NCA and the POPIA are not primary outcomes of this article. Such an in-depth evaluation and comparison should most likely form the topic for separate research, as some of the sources we briefly

⁸⁹ *ibid* paras 3.12–3.13. See also Scholtz (n 87) 2–1 (n 7) in respect of socio-economic re-equalisation and the case law referred to there.

⁹⁰ See (n 6). See also Kelly-Louw (n 24) 93–94; Corlia van Heerden and Stéfan Renke, 'Perspectives on the South African Responsible Lending Regime and the Duty to Conduct Pre-agreement Assessment as a Responsible Lending Practice' (2015) 24 *International Insolvency Review* 67 at 84–85.

⁹¹ Regs 1 and 23A(3). See also Van Heerden and Renke (n 90) 84.

⁹² Van Heerden and Renke (n 90) 87. However, see also the provisions of item 3 in sch 3 'Transitional provisions' in respect of ss 69(2), (3), (4) and (5) of the NCA.

⁹³ At time of writing, the Act had been approved, but the date on which it will become fully operational had yet to be announced—see <<https://upezproxy.up.ac.za:2581/Index.aspx>> accessed 21 February 2017. Some sections and parts are already operational—ss 1, 39–54, 112 and 113 (as from 11 April 2014)—see the South African GG 37544 (11 April 2014) Vol 586 RG 10173 Proc no 25, 2014. See also Kelly-Louw *LAWSA* (n 70) para 76(c); Nicky Campbell, 'Credit Bureaus' in Scholtz et al (eds), (n 86) 15–11–15–12; and Roos, 'Data Privacy Law' (n 84) 429. See Devnomics Developmentnomics (Pty) Ltd, 'Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Market' (Final Report June 2012) <www.ncr.org.za/documents/pages/research-reports/jun13/NCR_NCA%20IMPACT%20LITERATURE%20REVIEW_FINAL%20REPORT_260612.pdf> accessed 9 July 2017 at 15 and 36. Devnomics notes at 15 that the 'data privacy' laws could modify consumer assent procedures and make it more burdensome; they query the outcome of this for consumers as refusal to assent to perusal of a credit record may cause refusal of the credit application. See also Neethling, 'Blacklisting of a Debtor' (n 29) 381–382.

considered, touched on this matter. This indicates that a detailed study could be valuable.⁹⁴

Credit Bureaus in Namibia

According to the World Bank analysis of the Namibian regime, consumer-data structures in Namibia followed the South African format but functioned without legislative intervention.⁹⁵ There were no formal consumer-protection standards;⁹⁶ in addition problems with safeguarding the rights of debtors had been raised.⁹⁷ Other reported complaints include the accuracy and comprehensiveness of data⁹⁸ and the nature of information retained and disseminated.⁹⁹ A formalised system was contemplated while the World Bank was in the process of analysing the Namibian debtor and creditor regime,¹⁰⁰ and the regulatory regime was introduced in 2014. Namibia does not have a statute specifically governing credit bureaus, but this is now effected through regulations to the Bank of Namibia Act 15 of 1997 published by the Minister of Finance.¹⁰¹ In further contrast to the South African position, no statutory reliance on credit-bureau data is forced upon credit providers when deciding on credit extension to an applicant consumer.¹⁰²

⁹⁴ See (n 84).

⁹⁵ Namibian ROSC (n 8) 2 and 39.

⁹⁶ *ibid* 2.

⁹⁷ *ibid* 2 and 40.

⁹⁸ *ibid* 40–41.

⁹⁹ *ibid* 40.

¹⁰⁰ *ibid* 40–41.

¹⁰¹ Namibian Regulations (n 44).

¹⁰² In Namibia, the Credit Agreements Act 75 of 1980 (see Boraine (n 10) 423 for a discussion) and the Usury Act 73 of 1968 (see Namibian ROSC (n 8) 21 for a discussion) still apply. These Acts do not make reference to a pre-provide assessment of an applicant for credit-granting purposes. Namibia also does not have a statute in the comprehensive style of the South African NCA, but it has drafted bills that echo some of the provisions of the NCA. One of the versions of the Financial Institutions and Markets Bill (one of the drafts has an added chapter 14, which version was provided to the authors by Ms Ndatega Asheela from the University of Namibia and held on file with authors) provides for ‘Credit Institutions’ in ch 14 and deals with aspects, such as registration of credit bureaus in cl 402, consumer rights in respect of information in part 5, and over-indebtedness and reckless credit in cls 426 and 427. The Minister in terms of the aforementioned Markets Bill is also the Minister of Finance, which is the same Minister responsible for the credit-bureau regulations currently in effect—see (n 43) and cl 1 of the Markets Bill. The Microlending Bill (provided to the authors by Ms Asheela and held on file with authors) provides that a microlender will have to review a prospective consumer’s profile at a credit bureau prior to extending credit to that person and must ‘carry out an affordability assessment’—see cl 24(4)(a). However, whilst at present there is no legislative obligation on Namibian counterparts, the World Bank team reported that credit providers (specific reference was made to banks) do consult credit-bureau data when processing requests for credit extension—see Namibian ROSC (n 8) 19 and 40.

Comparing Credit Bureaus in South Africa and Namibia

The World Bank assessed the credit-information systems in South Africa and Namibia as part of its compilation of the ROSC reports for the two countries.¹⁰³ This was done in 2012 and 2014 respectively. At the time of reporting on the South African regime, the National Credit Act and its provisions regulating consumer-credit information had been fully effective for five years and had been in operation for a number of years at the assessment stage of the ROSC study.¹⁰⁴ However, at the time of reporting on the Namibian regime, the Namibian authorities had developed regulations in respect of consumer information and these were considered by the World Bank team during the assessment stage of their Namibian study.¹⁰⁵ The regulations, published in July 2014, preceded the report by four months.¹⁰⁶ The adaptations in the Namibian scheme were not as legislatively informed as its South African counterpart,¹⁰⁷ yet the respective reforms to the South African and Namibian data systems for consumer credit were effected in response to a similar need for consumer protection and the prevention and eradication of undesirable practices and ineffective schemes.¹⁰⁸

This interplay of circumstances presents an optimal opportunity for comparative research. Both countries' regimes were subjected to World Bank analysis and were, therefore, evaluated against similar criteria.¹⁰⁹ On the one hand, South Africa had an established legal framework that had been operational for some time;¹¹⁰ on the other hand, the Namibian system consisted of draft regulations that had been assessed in form by the team

¹⁰³ South African ROSC (n 4); Namibian ROSC (n 8).

¹⁰⁴ The whole NCA was operational by 1 June 2007 and the South African ROSC was dated June 2012. The researchers visited South Africa in March and April 2011 as per the South African ROSC (n 4) 4.

¹⁰⁵ The researchers visited Namibia in July 2013 as per the Namibian ROSC (n 8) 3.

¹⁰⁶ See (n 44).

¹⁰⁷ See 'Comparing Credit Bureaus in South Africa and Namibia' and 'Legal Frameworks: Comparison and Evaluation'.

¹⁰⁸ Namibian ROSC (n 8) 2, 40 and 41; Long title and s 3 of the NCA. See also 'Credit Bureaus in Namibia'.

¹⁰⁹ See the introductory parts to both ROSCs that refer to the evaluation criteria—South African ROSC (n 4) 3–4 and Namibian ROSC (n 8) 3, which are 'the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems'. The comprehensive framework was approved by the Board of the Bank in 2001 and amended in 2005, at which stage there were thirty-three principles—see South African ROSC (n 4) 3 as this was the criteria against which the South African regime was assessed. However, another amendment occurred in 2011, after which there were, thirty-five principles—see Namibian ROSC (n 8) 3, as this was the criteria against which the Namibian regime was assessed.

¹¹⁰ South African ROSC (n 4) 44: 'South Africa provides a sound framework for the dissemination of credit information on borrowers. The work of the main credit bureaus evidences considerable regulation and professionalism and lenders are able to confidently rely on their services. The implementation of the 2005 Act has also focused on the importance of vetted and high quality financial information as a basis for responsible lending.'

from the World Bank, but had not yet been implemented in practice.¹¹¹ Comparable evaluations therefore took place in respect of a regime with an extant legislative scheme,¹¹² as well as a regime with only a prospective, but recommended, legislative scheme.¹¹³

The credit-bureau landscapes are also, to some extent, similar in that the Namibian ROSC indicated that its entities' 'holding companies' are based in South Africa.¹¹⁴ Changes effected to these companies, in response to legislative intervention by the South African authorities, have influenced Namibian companies, despite no similar statutory reform in Namibia at that time.¹¹⁵ The World Bank's stance on the similarities in the level of development in both South Africa and Namibia justifies a comparison of the two systems.¹¹⁶

Over and above the existence of credit-information flows in both countries and the similarities in the reported defects in the systems that prompted reform,¹¹⁷ South Africa and Namibia share a peculiar history, as South Africa administered Namibia until that country's independence in 1990.¹¹⁸ The Namibian regime preserved much of the legislative foundation that preceded its autonomy and shared many commonalities with the South African regime.¹¹⁹ Namibia inherited many South African legacies.¹²⁰ It also inherited deep societal and financial disparities,¹²¹ and certain of the issues presented by its legal framework pertaining to creditor and debtor rights echo those experienced by South Africa—in particular because of legislation preserved from the South African reign.¹²² The nature of

¹¹¹ Namibian ROSC (n 8) 2 and 13: 'Credit information systems in Namibia follow the South African model and their coverage of the Namibian population is good, but the industry is unregulated and there are no rules providing for consumer protection. ... Credit information systems should be adequately regulated. There is a need for credit information systems operating under clear regulations and full respect of consumer protection rules. The draft regulations prepared by the bank of Namibia address the issues and should be adopted.'

¹¹² South African ROSC (n 4) 43–44.

¹¹³ Namibian ROSC (n 8) 13.

¹¹⁴ *ibid* 40. It is to be noted that the Namibian ROSC is dated October 2014. We have not inquired whether this position still relates to all or only some of the credit bureaus found in Namibia, as the position may have changed since 2014.

¹¹⁵ *ibid* 2 and 40.

¹¹⁶ The World Bank described South Africa as being 'home to a developed credit market and a sophisticated legal system'—see South African ROSC (n 4) 1. Namibia was described as having 'achieved political and economic stability and a moderate rate of economic growth.... The legal system of Namibia is based on the Roman-Dutch law inherited from South Africa. There have been important changes to the legal system since independence, but these changes have been marginal in the area of insolvency and creditor/debtor regimes'—see Namibian ROSC (n 8) 2.

¹¹⁷ See 'Credit Bureaus in South Africa' and 'Credit Bureaus in Namibia'.

¹¹⁸ Namibian ROSC (n 8) 18.

¹¹⁹ *ibid* 18 and 19–20; Boraine (n 10) 414.

¹²⁰ Namibian ROSC (n 8) 18.

¹²¹ *ibid*.

¹²² *ibid* 2, 22–24.

the countries' legal systems are categorised as hybrid on the basis of the foundational Roman-Dutch common law and the impact of the English law on the schemes.¹²³

After initial convergence of legislation and the common law, Namibia and South Africa appear, more recently, to be diverging.¹²⁴ In some domains—such as insolvency, credit and labour law—the developments in Namibia have digressed from those observed in South Africa.¹²⁵ In anticipation of deepening divergence, concerns have been raised that the unfiltered cross-jurisdictional application of judgments may become increasingly unreliable.¹²⁶ In addition, these two jurisdictions present a relevant and logical application of the World Bank's fifth principle: cross-border information extension.¹²⁷

THE WORLD BANK

The World Bank's General Principles of Credit Reporting

The general principles designed by the World Bank are based on public-policy considerations.¹²⁸ The policy focuses on the proficiency of the structure, which is held as the point of departure to effect advanced credit industries through appropriate credit provision.¹²⁹ The ideal scheme is sensitised to certain values, including the honouring of rights.¹³⁰ Five principles broadly related to the nature of the information, the behaviour of credit-information institutions and the regulatory framework have been developed.¹³¹ These principles, and further guidance on the behaviour of participants as recommended by the World Bank, aim to found structures that are healthy and useful.¹³²

The first principle concerns the contents of the data held by a bureau.¹³³ Data that serves to inform stakeholders in the credit industry has to be of a certain standard.¹³⁴ It has to be correct, comprehensive, appropriate and current.¹³⁵ Appropriately related and proper information entails that the necessary so-called positive and negative information is captured and

¹²³ *ibid* 22.

¹²⁴ Boraine (n 10) 414 et seq (in particular 427).

¹²⁵ *ibid* 426–427.

¹²⁶ *ibid* 427.

¹²⁷ See World Bank (n 2) 3.

¹²⁸ *ibid* 2, 3 and 23.

¹²⁹ *ibid* 3.

¹³⁰ *ibid*: 'Credit reporting systems should effectively support the sound and fair extension of credit in an economy as the foundation for robust and competitive credit markets. To this end, credit reporting systems should be safe and efficient, and fully supportive of data subject and consumer rights.'

¹³¹ World Bank (n 2) 3.

¹³² *ibid* 2 and 3.

¹³³ *ibid* 3.

¹³⁴ *ibid* 2 and 3.

¹³⁵ *ibid*.

reflected, that the data is obtained from multiple sources and that the information is applicable to the time when the enquiry is made.¹³⁶

The second and third principles are concerned with the behaviour of the bureau.¹³⁷ These principles relate to the demands placed on responsible entities due to the nature of the information held and include the facilities used to retain the information.¹³⁸ Data is prone to abuse and can be damaged, wrongfully manipulated, or obtained by non-authorised persons.¹³⁹ As such, protective measures are warranted in order to avoid unwanted events and to mediate risks.¹⁴⁰ The management scheme of the bureau should also implement practices that enhance answerability and clarity of action, and should properly address the challenges of the business.¹⁴¹

The fourth principle deals with legislative structure.¹⁴² This structure is a primary factor that influences the success of credit-reporting systems.¹⁴³ It plays an important role in mediating the conflicting objectives of access to information and personal privacy.¹⁴⁴ The structure supplements party agreements in respect of consumer protection through the development of recourse methods where inaccurate data is reflected on the system.¹⁴⁵ Interestingly, the World Bank report states: 'There is no clear consensus on what constitutes an optimal legal and regulatory framework for credit reporting.'¹⁴⁶

The fifth principle addresses information dissemination across jurisdictional boundaries.¹⁴⁷ Neither creditors, nor debtors are limited by national boundaries.¹⁴⁸ This allows credit providers to extend credit to debtors who are either not domiciled or resident in the lender's jurisdiction, or who have financial interests and obligations in jurisdictions other than that of the lender.¹⁴⁹ The rationale for consumer-credit information remains the same, regardless of whether one or more jurisdiction is involved, as do the standards and challenges.¹⁵⁰ On the one hand, multi-national reporting structures may be a resourceful option for small industries, but, on the

¹³⁶ *ibid* 2, 4, 15 and 24.

¹³⁷ *ibid* 3.

¹³⁸ *ibid*.

¹³⁹ *ibid* 4 and 27.

¹⁴⁰ *ibid*.

¹⁴¹ *ibid* 4 and 29.

¹⁴² *ibid* 3.

¹⁴³ *ibid* 4.

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid*.

¹⁴⁶ *ibid*.

¹⁴⁷ *ibid* 3.

¹⁴⁸ *ibid* 4 and 21–22.

¹⁴⁹ *ibid*.

¹⁵⁰ *ibid*. See also 2 and 3 for a discussion of the rationale.

otherhand, additional considerations, such as variations in legal structures and industry procedures, become important issues.¹⁵¹

The World Bank report sets out universal principles and formulates outcomes and mechanisms to realise them.¹⁵² These may be used for national reviews and were intended to form the basis of certain evaluations undertaken by international bodies, including the World Bank itself.¹⁵³ We discuss the ROSC analyses below, which contextually reflect some of the principles as assessed by the World Bank for the jurisdictions of South Africa and Namibia.

The World Bank's ROSC Framework

The World Bank uses a principled framework to evaluate credit-information systems.¹⁵⁴ The relevant standard against which the data arrangements of a particular jurisdiction are analysed for purposes of the ROSC analysis, is Principle B1, which forms part of the broader analytical scheme of a country's 'risk management and corporate workout'.¹⁵⁵ The foundational notions are that contemporary markets need data about debtors' behaviour in honouring their financial obligations when credit is granted¹⁵⁶ and that this data has to be comprehensive, correct and dependable.¹⁵⁷ According to the Bank, an appropriate system has five identifiable features, which the Bank frames as suggestions.¹⁵⁸ It is therefore logical that a system that meets these standards, will reflect adherence to the Bank's principled suggestions and we have framed the recommendations in these terms.

First, the system has an enabling regulatory structure, which balances the need for correct and truthful data with that of adequate unrestricted opportunities for the development and functioning of proper credit systems.¹⁵⁹ Information systems can benefit from measures that shield entities in order to promote their endeavours, whilst promoting adherence to the norms of correctness and truthfulness.¹⁶⁰

Second, the activities of the credit-information systems are regulated with certain outcomes in mind.¹⁶¹ Databases are expanded to reflect varied information on a significant number of consumers.¹⁶² Controls are applied when the information sourced from credit-information databases is available

¹⁵¹ *ibid* 4.

¹⁵² *ibid* 4–5.

¹⁵³ *ibid* 5.

¹⁵⁴ Namibian ROSC (n 8) 39; South African ROSC (n 4) 42.

¹⁵⁵ *ibid*.

¹⁵⁶ *ibid*.

¹⁵⁷ *ibid*.

¹⁵⁸ Namibian ROSC (n 8) 39 and 41; South African ROSC (n 4) 42.

¹⁵⁹ Namibian ROSC (n 8) 39 and 41; South African ROSC (n 4) 42.

¹⁶⁰ *ibid*.

¹⁶¹ *ibid*.

¹⁶² *ibid*.

for use, particularly where the information relates to natural persons.¹⁶³ In addition, measures are taken to protect the data and the veracity of the database.¹⁶⁴

Third, the manipulation of categories of data that may legally be accumulated and reported on, is an important tool to endorse and advance principles and strategies—for example, disallowing unfair differentiation or limiting information-retention periods for unfavourable consumer data.¹⁶⁵ In this way, the content of the data held by credit bureaus can be correlated with community interests or government strategy.¹⁶⁶

Privacy is the fourth feature and refers to informed consumers.¹⁶⁷ The consumer, as the ‘subject of information’, knows when data relevant to him or her is transacted throughout the process.¹⁶⁸ This ranges from knowing about data systems and their functions, to actual awareness of the content of the data and the corresponding capacity to challenge, review and rectify incorrect data.¹⁶⁹

The fifth feature is concerned with principles for authorities responsible for the overall scheme of credit information.¹⁷⁰ There is a delicate balance between freedom to develop and improve a system, and adherence to policies regarding responsible data accumulation and reflection.¹⁷¹ A proper system has a variety of mechanisms to achieve compliance with the necessary rules and standards.¹⁷² The manner in which aversion to non-compliance is endorsed, is sensitive to this balance between liberty to progress and compliance with certain norms.¹⁷³ Regulatory oversight within the context of data schemes also involves bodies that evaluate the hazards posed to organisations and enable and motivate them to measure these challenges themselves.¹⁷⁴ The development of optimal conflict-resolution processes that are efficacious, open, economical and ‘predictable’ is encouraged.¹⁷⁵

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ In this specific context of ‘public policy’, it refers to ‘societal discrimination, such as discrimination based on race, gender, national origin, marital status, political affiliation, or union membership’—see Namibian ROSC (n 8) 39; South African ROSC (n 4) 42.

¹⁶⁶ Namibian ROSC (n 8) 39; South African ROSC (n 4) 42.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

LEGAL FRAMEWORKS

Introduction

One of the recommendations by the World Bank for the optimal functioning of consumer-information structures, is the establishment of a regulatory framework.¹⁷⁶ This framework should be characterised by elements of clarity, predictability and suitability, while enhancing equality and promoting consumer rights.¹⁷⁷ There should be functional court-based or out-of-court options available to settle conflicts between role-players.¹⁷⁸ Furthermore, the laws should be unambiguous in prescribing acceptable behaviour and those affected by the prescriptions should be able to determine exactly what is expected of them and what the consequences of non-performance are.¹⁷⁹ As such, the evaluative standards should be well-defined, known and reliable.¹⁸⁰

South Africa

The regulation of credit bureaus in South Africa is, in the main, effected through legislation in the form of the credit-centred NCA, its regulations, and the statutorily established National Credit Regulator.¹⁸¹ The NCA is currently the authoritative consumer-credit legislation in South Africa.¹⁸² This Act aims to facilitate not only a dynamic, mature and resilient market, but also a regime devoted to consumer protection.¹⁸³ The regulation of

¹⁷⁶ See 'The World Bank'

¹⁷⁷ World Bank (n 2) 30.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid* 30–31.

¹⁸⁰ *ibid.*

¹⁸¹ Credit bureaus are already subjected to multiple statutes regulating various business aspects. First the Companies Act 71 of 2008 regulates company behaviour and business-incorporation requirements in general; secondly, the NCA and its regulations specifically regulate credit-bureau behaviour, consumer data and registration requirements; and thirdly, the Consumer Protection Act 68 of 2008 may also be applicable to regulate consumer-protection mechanisms in general and in those instances where all the requirements for the application of the Act have been met (see s 1 of this Act regarding the definition of a 'service', which includes 'the provision of any ... information'). POPIA will regulate data collection and assimilation in general. See also Kelly-Louw *LAWSA* (n 70) para 76(c).

¹⁸² See Kelly-Louw (n 69) 6, 20, 110, 113 and 169–170.

¹⁸³ S 3 of the NCA. See also Nicky Campbell, 'The Consumer's Rights and Credit Provider's Obligations' in Johann Scholtz, et al (eds) n (87) 6-1.

credit bureaus is set as one of the means of meeting the objectives outlined in section 3 of the Act.¹⁸⁴

At the policy-formulation stage, state regulation of privacy was considered and the initial strategy was that privacy legislation would deal more comprehensive with the regulation of credit bureaus, than with credit legislation.¹⁸⁵ In 2009, the South African Law Reform Commission viewed the NCA as a narrow supervisory regime for credit bureaus.¹⁸⁶ As such, a part of the debate revolved around the protective regime that should apply in respect of credit bureaus and the approach was ‘that protection of the information should be ensured throughout the credit reporting cycle, not only while the information is being processed by the credit bureau.’¹⁸⁷ Reference was made to an ‘interim’ understanding between the Department of Trade and Industry and the Department of Justice to include partial data-protection measures applicable to consumer-credit reporting in the NCA.¹⁸⁸ While the principal aim of the Act was viewed as consumer protection, the subsequent ancillary aim was personal data-dissemination protection during credit-reporting activities.¹⁸⁹ Consequently, a decision needed to be taken in respect of future data protection in an arena where two legislative instruments were available.¹⁹⁰ The point of departure was then that the Information Act would be the overarching law and that subject-specific statutes would function concurrently, subject to its provisions and international standards for the safeguarding of information.¹⁹¹ The options were basically exclusionary or inclusionary, meaning that either the NCA or the Protection Act should regulate data protection for bureaus under the auspices of either consumer credit or information regulation, depending on the statute, or that the statutes should apply concurrently insofar as general principles applied, but subject to ‘specific sectoral legislation’.¹⁹²

¹⁸⁴ See s 3 in general and subs (f) in particular. The regulation of credit-bureau behaviour is also set as an objective in s 3(e), regarding ‘unfair or fraudulent conduct by credit providers and credit bureaux.’ See also Kelly-Louw (n 69) 19–21. For a general explanation and discussion of the provisions of the NCA pertaining to credit bureaus, see Campbell (n 93). Campbell argues at 15-1 that ‘[o]ne of the main aims of the National Credit Act is to improve standards of consumer information’ and that the registration of these entities is a means of achieving the desired level of enhanced norms. In respect of some of the applicable rights of the consumer in this context, see Campbell (n 183) 6-11–6-14; in respect of the objectives of the Act and the means to achieve same, see Scholtz (n 87) 2–7.

¹⁸⁵ DTI (n 65) 4 para 3.14.

¹⁸⁶ SALRC (n 1) 10.

¹⁸⁷ *ibid* 382.

¹⁸⁸ *ibid* 386 and 391–392.

¹⁸⁹ *ibid* 384 and 388.

¹⁹⁰ *ibid* 391 and 396.

¹⁹¹ *ibid* 392 and 396.

¹⁹² *ibid* 393.

The Commission preferred the latter option¹⁹³ and noted its implications,¹⁹⁴ some of which were realised, as we discuss below. Therefore, and although not referring directly to credit bureaus by name, the POPIA will have implications for credit bureaus in the context of information management.¹⁹⁵ This link between privacy legislation and credit-information entities was foreshadowed in the first policy document on consumer credit, which preceded the NCA.¹⁹⁶ The intended outcome stated in this document was that consumer-credit laws would ultimately relinquish credit-bureau regulation to privacy legislation.¹⁹⁷ The implementation of the POPIA will amend the NCA by, *inter alia*, subjecting some of the provisions of the NCA to those of the Protection Act, as explained below.

¹⁹³ *ibid* 396–398.

¹⁹⁴ *ibid* 396–397: ‘However, aspects of such a dual protection system that should be considered are the following: a) First, there may be overlapping rules where a responsible party subject to the NCA also falls within the ambit of POPIA. When using information contained in a credit report, a bank, finance company or other credit provider must comply with both NCA and POPIA. Banks, finance companies and other credit providers would have to deal with two statutory privacy regimes—that is, specific rules in relation to credit reporting and the generic rules set out in POPIA in relation to other aspects of handling personal information. b) On the other hand, the handling of other personal information relevant to credit worthiness by a credit provider, such as that obtained solely from the credit provider’s own records, may be covered only by POPIA. c) Difficulties in regulating credit reporting as an industry matter rather than regulating the handling of personal information used in credit reporting may include inconsistency and fragmentation, increasing the complexity of privacy regulation, varying levels of privacy protection and regulatory gaps. d) POPIA is, furthermore, much more comprehensive than the NCA. POPIA makes extensive provision for education of responsible parties (credit providers and bureaux) and data subjects (consumers), mediation and conciliation of disputes between opposing parties (credit providers, bureaux and consumers), prior assessments (of credit bureaux before they are allowed to start operations, especially where they do not subscribe to a code of conduct), disclosures (where security has been breached—this has been found to be more effective than criminal sanction), enforcement notices, etc.’

¹⁹⁵ See Part II in (2017) L 3 CILSA; DTI (n 65) para 3.14; and Campbell (n 93) 15-11–15-12. Campbell (n 93) 15-11–15-12 states: ‘Credit bureau information shall be deemed to be “personal information” in terms of the Protection of Personal Information Act, that is, information relating to the financial history of the consumer. Such information shall have to be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject.’ See also Kelly-Louw *LAWSA* (n 70) para 76(c). See Part II (2017) L 3 CILSA ‘Consumer Credit Information’.

¹⁹⁶ DTI (n 65) para 3.14: ‘The envisaged consumer credit legislation will provide for the regulation of credit information, but primarily with a view to ensuring the integrity and accuracy of information held by credit bureaux and to giving consumers rights to have incorrect information rectified or removed. It is recognized that there is a need for the much more extensive regulation of credit bureaux. However, the Department of Justice, through the Law Commission, has initiated a process to draft new privacy legislation, which will also capture the regulation of credit bureaux and credit information. In order to minimise potential duplication and regulatory conflict, the more extensive regulation of these institutions will be left to privacy regulation. It is further envisaged that provisions concerning credit bureaux in new credit legislation will eventually be taken over in new privacy law.’

¹⁹⁷ *ibid*.

Modification of the Legislative Framework

Section 110 of the Protection Act, which was not yet in operation at the time of writing, will impact on the scope of the NCA.¹⁹⁸ This section deals with the amendments made to other statutes. Section 55(2) of the NCA will be modified by an insertion of a subsection (*b*) and the renumbering of the existing provision as subsection (*a*). The new subsection (*b*) will provide that Chapters 10 and 11 of the POPIA apply to sections 68, 70(1), 70(2)(b)–(g) and (i), 70(3), 70(4), 72(1), 72(3) and 72(5) of the NCA. ‘[P]rohibited conduct’ as per the NCA will refer to actions or non-actions that conflict with the NCA, but will exclude behaviour inconsistent with section 55(2)(b) or conduct that incurs criminal penalties if the behaviour is performed by non-licensed persons conducting licensed actions, whilst under the duty to be licensed, or by a credit provider, credit bureau, or debt counsellor.¹⁹⁹

In terms of the amendments effected by section 110, non-compliance with a notice given to a non-conformant in terms of section 55 (a ‘compliance notice’) will no longer be an offence in terms of the NCA where the notice is given in respect of non-compliance with section 69.²⁰⁰ The effect of this is that non-compliance with section 69 as per the provisions of the NCA will be dealt with in terms of the enforcement and punitive measures set out in the POPIA. In substantive terms, this means that Chapter 10, titled ‘Enforcement’, and Chapter 11, titled ‘Offences, Penalties and Administrative Fines’, will apply where a credit bureau: infringes on the consumer’s right to confidentiality by utilising the data for impermissible objectives or distributes the information in contravention of the stipulations of section 69(1)(b);²⁰¹ refuses consumer-credit information from a consumer to rectify or dispute the data on file with the bureau; charges the consumer for receipt of the information;²⁰² fails to take reasonable action to check the accuracy of reported data;²⁰³ fails to preserve data as per the pre-determined time frames²⁰⁴ or preserves disallowed data;²⁰⁵ does not maintain its database in line with pre-determined norms;²⁰⁶ fails to provide a record to a person entitled to receive it;²⁰⁷ and intentionally or negligently issues a report containing incorrect data.²⁰⁸ The same position will apply where the bureau retains data not authorised by law or obtains such data from

¹⁹⁸ See Kelly-Louw *LAWSA* (n 70) para 76(c). See also (n 94).

¹⁹⁹ S 110 of the POPIA, referring to the schedule to the Act and amending s 1 of the NCA.

²⁰⁰ The amendment by the POPIA retracts s 69(2), leaving only the substantive stipulation regarding the right to confidential treatment.

²⁰¹ S 68 of the NCA.

²⁰² S 70(2)(b) of the NCA.

²⁰³ S 70(2)(c) of the NCA.

²⁰⁴ S 70(2)(d) of the NCA.

²⁰⁵ S 70(2)(f) of the NCA.

²⁰⁶ S 70(2)(e) of the NCA.

²⁰⁷ S 70(2)(g) of the NCA.

²⁰⁸ S 70(2)(i) of the NCA.

non-prescribed persons.²⁰⁹ Section 70(4), which authorises the Minister to set out the criteria governing the receipt, storage and dissemination of consumer-credit information—as well as the charges to which a consumer wishing to view data held by a bureau, may lawfully be subjected—is also subject to the provisions of Chapters 10 and 11 of the Information Act. We therefore deduce that non-compliance with any stipulations by the Minister under subsection 70(4) will be dealt with in terms of the Information Act.

Section 110 will further amend section 136 of the National Credit Act by subjecting the complaints that may be referred to the National Credit Regulator to the provisions of section 55(2)(b), which brings certain sections within the ambit of Chapters 10 and 11 of the POPIA. The National Credit Regulator will no longer be mandated by section 137(1)(a) to refer a matter regarding the resolution of a disagreement over data in a credit bureau's database to the Tribunal for an order, as this subsection is also removed by the provisions of section 110 of the Information Act. The provisions of the Protection Act will also apply when the provisions of section 72(1), (3) and (5) are contravened. These latter provisions set out the right of the consumer to be informed, to be given the opportunity to evaluate data and to dispute information held by a credit bureau, as well as the processes to be followed when such a claim is made.

A further consideration is the application of the POPIA to areas where there is dual regulation without specific reference to either Act. Section 3(2) of the Protection Act establishes the overriding nature of the statute in respect of personal information and opposing provisions that are 'materially inconsistent' with the aims or provisions of the Protection Act. The statutory provision that extends the greatest level of protection when compared to the provisions of Chapter 3 of the Protection Act—that is the 'conditions' applicable to the handling of personal information—will be the governing provision.²¹⁰ The provisions of the NCA are less competitive, as section 2(7) stipulates that the statute does not intend to restrict, change, or discard the provisions of other statutes, or detract from a person's statutory responsibilities, whether in respect of obligations or duties, to comply with specific laws.²¹¹ In light of the respective provisions of the Act just mentioned, the provisions of the Protection Act would prevail, unless it can be shown that the NCA's provisions can effect a higher level of consumer protection when data is processed by credit bureaus.

²⁰⁹ S 70(3) of the NCA.

²¹⁰ S 3(2)(b) of the POPIA.

²¹¹ See also Scholtz (n 87) 2-14. Also, s 2(9) of the Consumer Protection Act, if applicable, requires that the disharmony between statutes be resolved by adhering to both provisions where it is possible to observe one provision without infringing the other. Where this is not feasible, the provision that provides the most protection to the consumer has to be complied with.

This position differs, at face value, from the initial comments of the South African Law Reform Commission in 2009. First, the Commission endorsed the universal nature of the Information Act's provisions that also apply to credit-information dissemination.²¹² However, it stated specifically that 'these requirements should be able to be *displaced* by more specific legislation that deals with the particular aspect of privacy protection found in credit reporting. This would allow for the prescripts in POPIA to operate alongside the more specific provisions of the NCA and its Regulations'.²¹³ Secondly, it recommended that credit bureaus should resort under the authority of the Information Act, but that the NCA be amended to align it with the Information Act through specification and harmonisation of the relevant norms.²¹⁴ Thirdly, the position in respect of non-compliance and the interaction between the enforcement duties of the Credit and Information Regulators become clearer upon consideration of the following recommendation:

It is therefore proposed that the UK example be followed and that section 55 of the NCA be amended to distinguish between compliance notices issued, on the one hand, for failure to implement privacy protection provisions and, on the other, for non-compliance of the other provisions of the Act. The Information Protection Regulator to be given the authority to issue notices in terms of section 55 where the protection of privacy is at stake.²¹⁵

Finally, it should again be noted that the main aim of this article is not to evaluate the provisions of the NCA against data-protection principles or to argue whether or not the NCA complies with accepted norms and standards. Our aim is to discuss the current positions in South Africa and Namibia and to point out some challenges that were uncovered during the course of the comparative study.²¹⁶

Namibia

Namibia does not have primary legislation aimed at regulating consumer-credit information and credit bureaus. The Minister of Finance issued comprehensive credit-bureau regulations under the authority of section 59

²¹² SALRC (n 1) 397.

²¹³ *ibid* [emphasis added].

²¹⁴ *ibid* 397. It was further noted that '[a]n initial evaluation of the sections in the NCA seems to suggest that it is not so much any discrepancies that may result in problems, but rather the fact that the NCA does not deal comprehensively enough with the privacy provisions. ... *Note should be taken that the NCA should only particularise and complement the privacy principles*' [emphasis added].

²¹⁵ *ibid* 398. See 'Supervisory Frameworks: South Africa'.

²¹⁶ Some authors have already embarked on subject-field comparisons from the perspective of the POPIA and data-protection principles, as opposed to a credit-centred evaluation—see (n 85).

of the Bank of Namibia Act.²¹⁷ Section 59(1) authorises the Minister to develop regulations for the dual purposes of supporting the Bank of Namibia in the efficacious attainment of its intended outcomes and in meeting the objectives of the enabling statute. However, the Minister is not limited in respect of the subject matter of the regulations, but may only issue same ‘in consultation with the Bank’.²¹⁸ In terms of the Bank of Namibia Act, the aims of the Bank shall, inter alia, be to effect healthy pecuniary and economic schemes, including circumstances that support progress in a systematic, equitable and consistent manner.²¹⁹ Consumer protection is not an express objective of the Bank of Namibia.

The Minister may also, by virtue of section 36(2), and without subordination to other legal provisions, endow the Bank with ‘any power, function or duty conferred upon or assigned to any other person or authority by a law’, provided that the subject matter falls within the jurisdiction of the Finance ministry.

Comparison and Evaluation

Regulation of credit bureaus is a requirement for operational information schemes.²²⁰ The World Bank does not specify the manner in which state intervention is to be effected, but incorporates guidance in respect of legal, supervisory and regulatory features.²²¹ In the context of its discussion of consumer rights and reporting systems, the World Bank notes that jurisdictions have varying schemes in place to deal with consumers whose information is available for use within the credit framework.²²² On the one hand, consumers are protected by regulations that focus on information in- and outside of the credit sphere, while, on the other hand, some nations’ schemes involve data within credit information systems *per se*.²²³ It is interesting to note that the South African regime has elements of both, that is, wide personal information-protection legislation, as well as consumer-credit information-specific laws.²²⁴ Namibia only has credit bureau related provisions that pertain to consumers.²²⁵

The aims of the South African statutes differ in respect of information. The POPIA purports to safeguard personal information and to set standards

²¹⁷ See ‘Comparing Credit Bureaus in South Africa and Namibia’.

²¹⁸ S 59(1) of the Bank of Namibia Act (hereinafter the ‘BNA’).

²¹⁹ S 3(a) and 3(c) of the BNA.

²²⁰ World Bank (n 2) 3 and 4.

²²¹ *ibid*.

²²² *ibid* 19.

²²³ *ibid*.

²²⁴ See ‘Legal Frameworks: Namibia’. Compare World Bank (n 2) 19. We do not consider whether there are common-law protective measures, such as the *actio iniuriarum*, available—see McQuoid-Mason (n 28)135 et seq.

²²⁵ See ‘Legal Frameworks: Comparison and Evaluation’.

for the handling of the specified data.²²⁶ The NCA, however, aims to control credit-related data and the behaviour of credit bureaus.²²⁷ Both statutes make provision for separate regulators to manage the respective domains.²²⁸

The South African legal framework includes both statutory and regulation-based provisions for the regulation of credit bureaus; while in Namibia, only designed regulations govern this domain.²²⁹ The South African regime has consumer protection and market sustainability at its core, whilst the enabling Namibian statute does not specifically reflect this and is mainly aimed at ensuring market welfare.²³⁰ This does not mean that the Namibian framework for bureau regulation does not have elements that clearly codify and protect what is considered to be consumer rights.²³¹ As such, the main aims of the enabling statutes of these two jurisdictions reflect two rationales for well-functioning information structures.²³²

The South African legislative landscape is complex and may become more so with the full implementation of the POPIA. Apart from the multiplicity of governing statutes, the NCA is the responsibility of the Department of Trade and Industry, whilst the POPIA is the domain of the Department of Justice. Some aspects of the credit bureau statutory regulation will be undertaken in terms of the NCA²³³ and other related aspects in terms of the POPIA.²³⁴ In some instances, non-compliance with the provisions of the NCA is sanctioned under the POPIA.²³⁵ The division between the jurisdiction of the NCA and that of the POPIA is, in some instances, limited only in respect of subsections.²³⁶ A consumer with a complaint that a credit bureau has retained information that should have been expunged, has to approach the authorities under the provisions of the POPIA, as section 70(2)(f) is to be dealt with in terms of the processes set out in Chapters 10 and 11 of that Act. A consumer who complains that a credit bureau has made an adverse assessment based on lack of information on that consumer as per section 70(2)(h), has to take the steps available to him or her in terms of the NCA, as this subsection is not set out in the amended version of section 55(2)(b).

In contrast, the substantive Namibian provisions pertaining to credit-bureau regulation, apart from structural provisions regulating ordinary

²²⁶ Long title and s 2 of the POPIA.

²²⁷ Long title, s 3(e)(iii) and 3(f) of the NCA.

²²⁸ S 12 of the NCA; s 39 of the POPIA.

²²⁹ See 'Comparing Credit Bureaus in South Africa and Namibia' 'Legal Frameworks: Namibia' and 'Legal Frameworks: Comparison and Evaluation'.

²³⁰ *ibid.*

²³¹ See Part II (2017) L 3 CILSA 'Conduct: Namibia' and 'Consumers: Namibia'.

²³² See 'Credit Bureaus' and 'The World Bank's General Principles of Credit Reporting'.

²³³ See eg the NCA's non-discrimination (s 61(2)) and plain language provisions (s 64).

²³⁴ See 'Supervisory Frameworks: Namibia' and Part II (2017) L 3 CILSA.

²³⁵ See 'Legal Frameworks: Namibia'.

²³⁶ See 'Modification of the Legislative Framework'.

business schemes, are set out in one concise legislative document and supervised by a single regulator under the auspices of the Finance ministry.²³⁷

It is doubtful whether the envisaged regime established in South Africa by the NCA and the POPIA will be uncomplicated and encourage effortless compliance. In contrast with the World Bank principles, and whilst there may be clarity about a specific provision, ambiguity in respect of the application and harmonisation of the provision within the broader statutory scheme is likely. For example, if the occasion arises where the NCA and the POPIA arguably regulate the same matter, over and above those specific sections that have been removed from the dispute-resolution processes of the NCA and placed under the POPIA,²³⁸ it is unclear which remedial path a prejudiced consumer should follow²³⁹ and what the consequences would be were the consumer to select the less favourable option.²⁴⁰ It is also clear that credit bureaus need to comply fully with all statutory provisions (including supervisory provisions, as will be shown below), however burdensome, if they are to avoid sanctions.²⁴¹ This is in stark contrast to a regime that is ‘clear, predictable, non-discriminatory, proportionate and supportive of data subject/consumer rights’ and incorporates ‘effective judicial or extrajudicial dispute resolution mechanisms’.²⁴²

²³⁷ See ‘Legal Frameworks: Comparison and Evaluation’.

²³⁸ See ‘Legal Frameworks: Namibia’.

²³⁹ Consider eg the following scenario: In terms of s 110 of the POPIA, s 72(1) and (3) *re* data disputes between consumers and credit bureaus will be subject to the provisions of chs 10 and 11 of the POPIA. These chapters include the steps available to the Information Regulator. Therefore, where a consumer wants to dispute the truthfulness of data as authorised by s 72(1)(c) and the bureau refuses, or where a consumer objects to the data and the credit bureau does not verify the information, does not provide the obtained proof of the verified truthfulness or does not discard data that has been shown to be incorrect (s 72(3)), the consumer may complain to the Information Regulator in terms of s 74 (which forms part of ch 10 of the POPIA). However, s 72(4) of the NCA has not been repealed or subjected in terms of s 110. This section gives the consumer the right to approach the NCR ‘to investigate the disputed information as a complaint under section 136’, where the consumer has been presented with proof supporting the disputed data as per subs 72(3). The amendment to s 136 of the NCA only refers to s 55(2)(b) and does not otherwise limit the authority of the NCR to investigate matters in terms of s 139 but the amendments to s 137 limit the NCR’s ability to apply to the Tribunal in respect of data disputes, which can then be problematic.

²⁴⁰ See SALRC (n 1) 397–398 (where the SALRC gave its recommendations): ‘The Commission acknowledges that the creation of a multiplicity of processes and regulators for the protection of personal information will not be cost-effective and will create uncertainty for consumers (data subjects) to know where their remedies lie. A situation where one set of circumstances gives rise to various remedies in terms of different pieces of legislation and where the consumer has to approach more than one regulator in order to address each aspect of his or her problem, has to be avoided.’

²⁴¹ There is some alignment between the statutes—see Campbell (n 92) 15–11–15–12, where the author refers to correlating provisions and argues that there is ‘harmony’ between the provisions of the NCA or POPIA. See also Kelly-Louw *LAWSA* (n 69) para 76(c).

²⁴² World Bank (n 2) 30.

We have already noted that the South African policy drafters acknowledged that frameworks for information regulation would play a cardinal role in the credit-bureau and credit-data domains.²⁴³ In its assessment of the Namibian scheme, the researchers of the World Bank commented that the scheme to be developed ‘should also be anchored on broader data protection legislation’.²⁴⁴ In light of the broadly-styled understandings of consumer-credit information and personal information and limited, if any, incidences where data would not qualify as either credit or personal information, the combined impact of the dual regulatory frameworks of the NCA and the POPIA on data domain should not be underestimated.²⁴⁵ There is no clear and explicit alignment of the NCA and the POPIA,²⁴⁶ and it is submitted that general statutory guidelines—such as eminence in the case of conflicting stipulations and efforts at coordination by the respective regulators—will become extremely important. The legislation is clear in some regards involving the expected behaviour of data handlers, but the comparison of statutory norms, especially where these norms are to be evaluated by different parties,²⁴⁷ such as the different regulators, and discrepancies in this regard can be dangerously confusing for credit bureaus.

Millard discusses some aspects of the then POPI Bill in comparative terms, using the Financial Advisory and Intermediary Services Act and the Consumer Protection Act.²⁴⁸ One of her final recommendations is that the Services and Protection Acts should be modified in order to point the reader to the provisions of the POPI Bill, as it was then known.²⁴⁹ We understand her desire to ensure that the greatest level of protection becomes the norm,²⁵⁰ unlimited by the governing statute, but after the ease of reviewing the Namibian framework, where all relevant substantive regulatory matters relating to credit bureaus are set out in a single document, it is difficult to support her recommendation, relevant as it is for our discussion. At present, credit bureaus are subject to the NCA and various regulations and are guided by decisions of the National Consumer Tribunal and the ordinary

²⁴³ See ‘Credit Bureaus in Namibia’; DTI (n 65) para 3.14.

²⁴⁴ Namibian ROSC (n 8) 41.

²⁴⁵ See also the concerns and uncertainty raised by Devnomics (n 93) 15, 36 and 38.

²⁴⁶ See also (n 85) and (n 86) and the comments of the authors referred to.

²⁴⁷ De Stadler and Esselaar (n 4) 1 state that: ‘POPI is an example of principles-based legislation—ie legislation that is designed to be applied intelligently to many unique situations, rather than to provide a fixed set of rules that must be applied universally. Consequently, very little is completely prohibited by POPI. Instead an evaluation of the application of all of the rights and duties in each case is required. This explains why the word “reasonable” appears so often.’

²⁴⁸ Daleen Millard, ‘Hello, POPI? On Cold Calling, Financial Intermediaries and Advisors and the Protection of Personal Information Bill’ (2013) 76 THRHR 604 et seq.

²⁴⁹ *ibid* 621.

²⁵⁰ *ibid* 621–622.

civil courts, in addition to the provisions of the POPIA once the latter has been fully implemented.²⁵¹

In light of the importance of credit bureaus,²⁵² the limited number of bureaus in South Africa, and the magnitude of their activities,²⁵³ we should rather recommend the practicality of unifying regulatory aspects as a single document or as a specialised part of a single selected statute, even though the research shows that this approach is not necessarily recommended for other jurisdictions or supported by the initial approach of the South African government.²⁵⁴ As such, we prefer the direction in which the South African Law Reform Commission aimed insofar as the NCA would play a specialised role in data protection in the credit-reporting arena, as opposed to those set out by the Department of Trade and Industry in the consumer-credit policy document.²⁵⁵ However, in light of the outcomes of this particular comparative study, we support a regime in which the NCA is amended to provide exclusively for credit bureaus, but in line with the standards set by the POPIA.²⁵⁶ It is important to recognise credit-bureau regulation within the broader data-regulation framework, as it is underscored by special considerations of financial welfare that is, consumer-credit affordability, and optimal consumer-credit extension by credit providers.²⁵⁷ The regulatory responsibility would then fall to the National Credit Regulator, which is already mandated to deal with credit bureaus. A provision, similar to clause 85 of the Financial Sector Regulation Bill, can be incorporated, whether for the benefit of the responsible members of cabinet or the regulators themselves.²⁵⁸

²⁵¹ See ‘Credit Bureaus in South Africa’ and ‘Legal Frameworks: South Africa’.

²⁵² See ‘The Significance of Credit Bureaus’.

²⁵³ See ‘Different Bureaus’ (n 60) and Part II (2017) L 3 CILSA ‘Credit Bureau Registration’.

²⁵⁴ See the Namibian ROSC (n 8) 41; DTI (n 65) para 3.14. See principle 1 of the ‘Principles for Credit Reporting in within SADC’ set out in FinMark Trust and GIZ (n 12) 9, particularly the suggestions that ‘[r]isks must be managed between data privacy legislation (potentially too restrictive) and credit bureau legislation’ and that the ‘[c]redit bureau regulator always [be] the “lead regulator”’.

²⁵⁵ SALRC (n 1) 397; DTI (n 64) para 3.14.

²⁵⁶ This, however, was not exactly what the SALRC (n 1) recommended (the Commission envisaged a more complementary system—see ‘Modification of the Legislative Framework’). An exclusive regime was excluded—see SALRC (n 1) 393 and 395–396.

²⁵⁷ See the considerations set out in World Bank (n 2) 1, 7 and 23 and DTI (n 65) at paras 3.12–3.15. See also eg (n 6), (n 78) and (n 84).

²⁵⁸ Financial Sector Regulation Bill passed by the National Assembly on 22 June 2017 [B-34D-2015] <<http://www.treasury.gov.za/twinpeaks/FSRB%20D%20Bill%20as%20passed%20by%20Parliament.pdf>> accessed 6 July 2017.

SUPERVISORY FRAMEWORKS

Introduction

The World Bank sets out specific recommendations for supervisory frameworks²⁵⁹ and further provides that supervisory functions should be undertaken by a designated and empowered authoritative entity.²⁶⁰

First, the Bank suggests, with reference to the regulatory network, that one or more regulatory bodies be tasked with the core responsibility of credit-data supervision.²⁶¹ *Lacunae* should then ideally be addressed through collaborative efforts.²⁶²

Secondly with reference to the empowerment of regulators, the resource allocation and the statutory abilities of regulators to effect transformation, where needed, should be addressed.²⁶³ It is particularly important to consider the ability of the regulator to be informed of various matters that affect credit bureaus, including matters such as the risks to which the regulated entities are exposed to or that they themselves pose; legal compliance; and the endeavours and financial welfare of information institutions, including their effect on the financial welfare of and scheme in the country.²⁶⁴

Thirdly, the World Bank notes that regulatory agencies should be open and interactive by divulging their aims, functions, policies and rules.²⁶⁵ The benefits of such an approach are the ability to appraise its regulatory endeavours, transparency, uniformity and compliance with stated rules.²⁶⁶ This would mainly entail the protection and enhanced efficacy of the regulated systems, publication of the lowest acceptable behavioural norms, as well as interaction with role-players.²⁶⁷ However, it is important to note that the obligations remain with the regulated entities.²⁶⁸

The fourth and fifth recommendations relate, respectively, to the unification of norms though the adoption of the Bank's stated principles and the collaboration between regulatory agencies.²⁶⁹ We find the recommendation of unification of particular interest, especially in light of the jurisdictions discussed here and the cross-border implications dealt with in greater detail below. The use of best-practice guidelines and liaison between regulators are valuable aspects to consider for South Africa, especially as the World Bank highlights the associated benefits, such as a

²⁵⁹ World Bank (n 2) 39–42.

²⁶⁰ *ibid* 39–40.

²⁶¹ *ibid* 39.

²⁶² *ibid*.

²⁶³ *ibid* 40. See also 19 at paras 80 and 81 in respect of the ability of regulators to compel compliance with rules.

²⁶⁴ *ibid*.

²⁶⁵ *ibid* 40 and 41.

²⁶⁶ *ibid* 41.

²⁶⁷ *ibid*.

²⁶⁸ *ibid*.

²⁶⁹ *ibid* 41 and 42.

reduction in repetitive actions and lower incidences of contradictions and *lacunae*.²⁷⁰

South Africa

The National Credit Regulator is responsible for the regulation of the consumer-credit market in South Africa.²⁷¹ Its duties include registering those that are obliged by the NCA to do so as well as monitoring compliance with the Act.²⁷² In this jurisdiction, a credit bureau must be registered as such in order to conduct the business of a bureau lawfully.²⁷³ The Regulator has to assess prospective bureaus for licensing purposes against the standards set out by the NCA for these registrants.²⁷⁴ It may evaluate the bureau based on a competency analysis or other prerequisite assessment methods.²⁷⁵ The Regulator is compelled to register a prospective bureau where there is compliance with the requirements of the NCA; the tests applied have been satisfied; and there are no additional unavoidable reasons for non-registration.²⁷⁶

Some conditions are attached to every registration as a matter of law.²⁷⁷ The registrant has to comply with the provisions of the NCA and the Financial Intelligence Centre Act 38 of 2001 and has to acknowledge the authority of the National Credit Regulator to carry out on-site supervisory visits.²⁷⁸ The Regulator may impose additional conditions for registration on

²⁷⁰ *ibid* 42.

²⁷¹ See ss 12–16 of the NCA.

²⁷² Ss 14 and 15 of the NCA.

²⁷³ S 54(2) of the NCA.

²⁷⁴ Ss 14(a) and 43(3) of the NCA—the specific term used is ‘registration’.

²⁷⁵ In ss 43(3) and 45(3) of the NCA—referred to as a ‘fit and proper test or any other prescribed test’. See Corlia van Heerden and Stéfan Renke, ‘Perspectives on Selected Aspects of the Registration of Credit Providers in Terms of the National Credit Act 34 of 2005 (1)’ (2014) 77 THRHR 614; Corlia van Heerden and Stéfan Renke, ‘Perspectives on Selected Aspects of the Registration of Credit Providers in Terms of the National Credit Act 34 of 2005 (2)’ (2015) 78 THRHR 80 in relation to licensing requirements and a discussion of the ‘fit and proper test’ pertaining to credit providers. They also discuss the requirements and compliance (and resultant enforcement of non-compliance) with the registration determinations applicable to credit providers. See Van Heerden and Renke, ‘Perspectives on Registration (1)’ 626–631 and Van Heerden and Renke, ‘Perspectives on Registration (2)’ 96–98 these also apply to a similar extent to credit providers—see ‘Supervisory Frameworks: South Africa’ in Part I and ‘Credit Bureau Registration’ in Part II (2017) L 3 CILSA.

²⁷⁶ S 45(3) of the NCA.

²⁷⁷ S 50(2) of the NCA.

²⁷⁸ S 50(2)(a) and (b) of the NCA

a prospective registrant²⁷⁹ and these may only be reconsidered, put forward for renewal, or changed under the circumstances contemplated in the Act.²⁸⁰ The 2015 amendments incorporated an additional ground, namely ‘if the National Credit Regulator, on compelling grounds, deems it necessary for the attainment of the purposes of this Act and efficient enforcement of its functions’.²⁸¹

The Regulator enforces compliance with the provisions of the Act, subject to the amendments to be effected by section 110 of the POPIA.²⁸² It is not entitled to cancel the registration of a credit bureau, which can only be done after the Regulator has referred the matter to the National Consumer Tribunal and the latter has issued an order for the cancellation of the registration.²⁸³ The Tribunal may make different orders, ranging from a pronouncement of prohibited conduct to an administrative penalty.²⁸⁴ A credit bureau that has been negatively affected by a decision of the National Credit Regulator, may approach the Tribunal to review the decision.²⁸⁵

The National Credit Regulator is mandated to inform persons or registrants, acting contrary to the provisions of the NCA, by way of notices in terms of sections 54 or 55. It may provide a non-compliant entity with a notice detailing unlicensed conduct where the person is involved in acts requiring registration.²⁸⁶ It is a criminal offence to disregard a notice relating to ‘[r]estricted activities by unregistered persons’.²⁸⁷ It may also issue ‘compliance notices’ in terms of section 55 for undesirable behaviour, such as disregarding or contravening the NCA or conditions of registration.²⁸⁸ Both sections have detailed instructions as to the content of the respective notices, including the measures that need to be implemented to rectify the

²⁷⁹ S 48(3) of the NCA. In effect, this subsection authorises the NCR to take various aspects into account when contemplating conditions of registration, such as the objectives of the Act, the application itself and the aspects that the Regulator has to consider by virtue of s 48(1) and (2). These two subsections relate specifically to considerations where the application is made by a prospective credit provider or debt counsellor. Apart from these considerations, s 48(3) empowers the Regulator to impose ‘any conditions’. However, provision is made for the procedure by which the conditions may be challenged—see, *inter alia*, s 48(5)–(7).

²⁸⁰ S 49 of the NCA.

²⁸¹ S 49(1)(e) of the NCA. See also Van Heerden and Renke ‘Perspectives on Registration (1)’ (n 274) at 98–99.

²⁸² S 15 of the NCA. See para 4.2.1.

²⁸³ S 57(1) of the NCA; Monica Vessio, ‘What Does the National Credit Regulator Regulate?’ (2008) 20 SA Merc LJ 227 at 232–233. See also s 57(7) of the NCA.

²⁸⁴ S 150 of the NCA.

²⁸⁵ S 59(1) of the NCA.

²⁸⁶ S 54(1) of the NCA.

²⁸⁷ S 54(5) of the NCA.

²⁸⁸ S 55(1)(a) and (b) of the NCA.

recipient's actions, and sanctions applicable in case of non-compliance with the stipulations of the notice.²⁸⁹

The affected party may contest a notification by the Regulator through recourse to the National Consumer Tribunal.²⁹⁰ Adverse decisions may relate to registrations and supervisory actions—such as notices to cease allegedly unlawful conduct due to non-registration or compliance notices in respect of non-compliance with legislative or other binding provisions.²⁹¹ Decisions by the Tribunal may, in turn, be taken on appeal or review to the high court.²⁹² However, in light of the proposed amendments to the NCA by the POPIA, section 137(1)(a) of the NCA is repealed.²⁹³ This removes the authority of the National Credit Regulator to approach the National Consumer Tribunal to determine disputes in respect of credit bureau data.²⁹⁴

The NCA reverts to the authority of the minister to determine the 'standards for the filing, retention and reporting of consumer credit information by credit bureaux, in addition to, or in furtherance of the requirements set out in this section; and ... maximum fees that may be charged to a consumer for accessing consumer credit information concerning that person'.²⁹⁵ This section will, curiously, be subject to the provisions of Chapters 10 and 11 of the POPIA. The Regulator must also advise the minister on consumer credit matters.²⁹⁶

Under the regime introduced by the POPIA, the Information Regulator is established by virtue of section 40. Apart from its informative duties—

²⁸⁹ Ss 54 (3) and 55(3) of the NCA. Interestingly, the NCR does not have unrestricted authority to recall a s 55 compliance notice, as the NCA only makes provision for two instances that end the validity and applicability of a compliance notice—compliance with the rectifying measures set out in the notice, which precedes the release of a 'compliance certificate' or revocation by the NCT or a court of law—see s 55(4).

²⁹⁰ S 56 of the NCA. See also s 59 of the NCA.

²⁹¹ S 59(1) of the NCA.

²⁹² S 148(2) of the NCA. The time expended on obtaining clarity on matters via the route of the Tribunal can be considerable and the controversy surrounding the duty to apply for registration in *SAFPS v NCR* (n 1) is a case in point. The Regulator issued the compliance notice on 15 July 2009, the Tribunal handed down its decision on 19 February 2010 and the matter was then taken on review to the North Gauteng High Court, which handed down its decision on 26 May 2011—see *National Credit Regulator v National Consumer Tribunal* 2011 JDR 1077 (GNP) (hereinafter '*NCR v NCT*') at 1 and 2. In 2016, the parties were before the Tribunal again, this time in respect of a contravention of the NCA by the SA Fraud Prevention Services—see *National Credit Regulator v Southern African Fraud Prevention Services* [2016] ZANCT 32 (29 July 2016) (hereinafter '*NCR v SAFPS*') paras 2 and 48.

²⁹³ S 110 of the POPIA.

²⁹⁴ In particular, this section determined that the NCR could obtain 'an order resolving a dispute over information held by a credit bureau, in terms of Part B of Chapter 4'. Part B, titled 'Confidentiality, Personal Information and Consumer Credit Records' of Chapter 4, titled 'Consumer Credit Policy' specifically deals with the type of data that is deemed consumer-credit information, including the manner in which a credit bureau is supposed to deal with the information.

²⁹⁵ S 70(4)(a) of the NCA.

²⁹⁶ S 13(c) and (d) of the NCA.

such as citizen education and interacting with stakeholders in the personal information domain—and supervisory and compliance-inducing duties, the Regulator plays a role in the development of policy and legislative frameworks for information regulation.²⁹⁷ We submit that the Information Regulator’s regulatory reach will affect credit bureaus to the extent that the POPIA, and the amendments effected to the NCA, apply to the activities and/or conduct of credit bureaus, to name but a few instances.²⁹⁸ The legislation deals with individuals and entities involved in ‘processing’ ‘personal information’ and both terms are comprehensively defined in section 1.²⁹⁹ A credit bureau will have to resort under the definition of a ‘responsible party’ for many of the provisions of the Act to apply to it.³⁰⁰ A ‘responsible party’ is defined as ‘a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.’³⁰¹ Although the business of the bureau, being ‘credit reporting’ is not defined in the POPIA, ‘processing’ is defined in section 1.³⁰²

The Information Regulator is empowered to release a credit bureau from the duty to comply with certain provisions of the POPIA.³⁰³ This is one of the general powers given to the Regulator and does not flow from the provisions of section 110 of the POPIA. It can do so notwithstanding the impact on, or infringement of, a person’s constitutional right to privacy, should it consider the public interest or the interests of the data subject or another person to be better served through the release from obligations.³⁰⁴ However, the favourable effects on the public interest, data subject, or

²⁹⁷ S 40 of the POPIA.

²⁹⁸ See, for example, the comments by Campbell (n 93) 15-11–15-12. See also ‘Modification of the Legislative Framework’ and Part II (2017) L 3 CILSA. The provisions of s 6 of the POPIA, which deal with those activities and persons to whom the Act does not apply, do not refer to the activities of credit bureaus or a similar notion.

²⁹⁹ S 3(1) of the POPIA.

³⁰⁰ See SALRC (n 1) 379, where it was stated that ‘credit providers and credit bureaux’ would qualify as such and that these entities would be ‘jointly responsible for the protection of the personal information of data subjects during various stages of the credit reporting cycle.’ Neethling, ‘Blacklisting of a Debtor’ (n 29) 381–382 states that credit bureaus will indeed be ‘so-called responsible parties’, although he still writes from the perspective of and refers to the draft Bill set forth in October 2015 in a discussion paper of the South African Law Reform Commission—see 381. See also De Stadler and Esselaar (n 4) ch 2, ‘Who Does the Protection of Personal Information Act Apply to?’ for a broader discussion of all the elements that play a role in determining the application of the POPIA.

³⁰¹ S 1 of the POPIA.

³⁰² *ibid*: ‘[A]ny operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alternation, consultation or use; (b) dissemination by means of transmission, distribution or making available in any other form; or (c) merging, linking, as well as restriction, degradation, erasure or destruction of information.’

³⁰³ S 37(1) of the POPIA.

³⁰⁴ *ibid*.

another person must be ‘to a substantial degree’ when compared to the effects on the privacy of the data subject.³⁰⁵

Section 57(1)(d) further enables the Regulator to provide a credit bureau with ‘prior authorisation’ to deal with data with a specific outcome in mind, namely ‘credit reporting’. This is an obligatory, pre-emptive process, during which the Regulator must be informed of the proposed conduct by the entity contemplating management of data.³⁰⁶ The Regulator may, on receipt of the notification, initiate an ordinary or ‘more detailed’ evaluation.³⁰⁷ Specific timelines apply within which the Regulator has to make a decision on the legality of the processing; non-communication of a decision allows the credit bureau to presume a favourable outcome, namely that it may proceed to deal with the data.³⁰⁸

Section 59 criminalises behaviour that does not conform to this provision, specifically where the Regulator is not informed of the actions that require permission, or where the processing actions are effected during the period of investigation or before the Regulator’s announcement that no investigation will be held. A credit bureau is prohibited from dealing with the information before obtaining the necessary approval from the Regulator, which is, in effect, an evaluation of the lawfulness of the processing action.³⁰⁹ Notification of non-approval takes the form of ‘an enforcement notice’,³¹⁰ which prohibits the recipient from handling the data.³¹¹

The Regulator is enabled to issue ‘enforcement’-, ‘information’- and ‘infringement’ notices.³¹² To the extent that there is ‘interference’ with a person’s rights as stipulated in section 73, the Information Regulator may, in an ‘enforcement notice’ authorised by section 95, demand that a responsible party cease processing data in accordance with the wishes of the Regulator recorded. In terms of section 58(6), communication of a finding by the Regulator that the management of data contemplated in section 57(1) is unlawful, is also considered ‘an enforcement notice’ as per section 95. Disregarding an enforcement notice or submitting inaccurate information regarding an ‘information notice’ is a criminal act.³¹³ Non-compliance

³⁰⁵ *ibid.*

³⁰⁶ Ss 57(1) and 58(1) of the POPIA. See De Stadler and Esselaar (n 4) 73 for a step-by-step breakdown of what the authorisation process entails and their comments at 74 on scenarios where authorisation-requiring actions are en route, pending the complete implementation of the POPIA.

³⁰⁷ S 58 of the POPIA.

³⁰⁸ S 58(3), (4) and (7) of the POPIA; De Stadler and Esselaar (n 4) 73.

³⁰⁹ Ss 57(1), 58(2) and 58(5) of the POPIA.

³¹⁰ S 58(6) of the POPIA.

³¹¹ De Stadler and Esselaar (n 4) 72.

³¹² Ss 90, 95 and 109 of the POPIA respectively. See Roos, ‘Data Privacy Law’ (n 84) 470–477 for the Information Regulator’s authority to enforce the POPIA and specifically 474 for a brief definition of an information notice and of an enforcement notice.

³¹³ S 103 of the POPIA.

and malpractices are to be dealt with in terms of the procedures of the Protection Act, namely criminal sanctions (a fine and/or imprisonment) or an administrative fine.³¹⁴ The offence and sanctions are communicated to the contravener via an ‘infringement notice’.³¹⁵

In addition, and in accordance with the amendments to be effected by section 110, the Information Regulator may review how data is processed by a responsible party.³¹⁶ The person evaluated is entitled to receive a report setting out the outcome of the review and suggestions by the Regulator.³¹⁷ These suggestions are compulsory recommendations, as the Regulator may request feedback from the responsible party regarding their actions, or intended actions, in adopting the suggestions, or regarding their reasons for not doing so.³¹⁸ Section 90(3) provides that the report is of the same nature as a section 95 enforcement notice. In terms of section 90(2), the Regulator is further entitled to publish certain data about the ‘personal information management practices of a responsible party’ subjected to evaluation, if deemed to be in the public interest.

Some sections in the NCA will fall under the auspices of the POPIA—more specifically Chapters 10 and 11—when section 110 of the latter Act becomes operational.³¹⁹ However, these sections are neither exhaustive, nor exclusively applicable to credit bureaus, and there is no provision that the general application of the Act cannot also render a credit bureau subject to other provisions of the Act.

Chapter 10 sets out various important aspects. First, it establishes non-conformity to the norms for dealing with data as per Chapter 3, or disregard of specific sections or a code of conduct in terms of section 60, as an ‘interference’ with the safeguarding of the personal information of a consumer.³²⁰ Secondly, it provides for referrals to the Information Regulator, based on assertions of interference, including specifications as to the regulatory authority and processes applicable.³²¹ Thirdly, provision is made for the issuing of warrants where there is presumed interference or criminal activity.³²² The Regulator is empowered to evaluate the way in which a person subject to the provisions of the Act handles information³²³ and, thus,

³¹⁴ Chs 10 and 11 of the POPIA.

³¹⁵ S 109(1) and (2) of the POPIA.

³¹⁶ Ss 89–91 of the POPIA.

³¹⁷ S 91(1)(a) of the POPIA.

³¹⁸ S 91(1)(b) of the POPIA.

³¹⁹ See ‘Modification of the Legislative Framework’.

³²⁰ S 73 of the POPIA—the specific sections referred to in s 73(b) are ss 22 (notification of security compromises), 54 (duty of confidentiality), 69 (direct marketing by means of unsolicited electronic communications), 70 (directories), 71 (automated decision-making) and 72 (transfer of personal information outside the Republic).

³²¹ Ss 74–81 of the POPIA.

³²² Ss 82–88 of the POPIA.

³²³ Ss 89–91 of the POPIA.

its authority in respect of the abilities set out in this chapter applies to credit bureaus as detailed above. The involvement of the enforcement committees and the ability of the Regulator to refer matters to this committee, as well as its ability to issue enforcement notices, are provided for in this chapter.³²⁴ It also sets out the redress available to affected persons, namely their *locus standi* to approach the judiciary and the remedial civil actions that the Regulator may take.³²⁵

Chapter 11 sets out conduct that amounts to offences, as well as the sanctions applicable where there has been non-compliance with the Act. Of particular importance are the penalties imposed in terms of section 107 and in respect of offences. A credit bureau that does not comply with an enforcement notice issued by the Information Regulator commits an offence, which attracts a fine and/or imprisonment of up to ten years.³²⁶ A bureau that does not inform the Regulator that it deals with data in respect of which it is required to obtain the necessary prior authorisation as per Chapter 6, commits an offence,³²⁷ which attracts a fine and/or imprisonment of up to one year.³²⁸ The Regulator is further empowered to issue an infringement notice in terms of section 109(1), which informs a responsible party that has committed an offence, of a determined administrative penalty payable. The administrative fine is limited to R10 million³²⁹ and the person has the option of paying the fine, negotiating incremental payments, or opting for the matter to be dealt with in terms of the criminal justice system.³³⁰

Subjecting section 70(4) of the NCA to the provisions of the protection of the POPIA has created another complicated scenario. Section 70(4) sets out the authority of the Minister of Trade and Industry to issue norms and charges in respect of certain credit bureau activities. However, the minister referred to in section 1 of the POPIA as responsible for the Act, is the Minister of Justice.³³¹

Namibia

The Namibian regime regulates bureaus through regulations to the Bank of Namibia Act and the nominated oversight body is the Bank of Namibia, which is also the country's central bank.³³² In terms of regulation 28(1), the Bank has three major functions: registration, regulation and oversight over credit bureaus.³³³ In respect of registration, the Bank is obliged to accept

³²⁴ Ss 92–96 of the POPIA.

³²⁵ Ss 97–99 of the POPIA.

³²⁶ S 107(a) of the POPIA, as this is a contravention of s 103(1).

³²⁷ S 59 of the POPIA.

³²⁸ S 107(b) of the POPIA, as this is a contravention of s 103(b).

³²⁹ S 109(2)(c) of the POPIA.

³³⁰ S 109(1)(d) of the POPIA.

³³¹ Ie 'the Cabinet member responsible for the administration of justice.'

³³² Part 7 of the Namibian regs; s 2 of the BNA.

³³³ Namibian reg 28(1).

the application and to register an applicant who has met the Regulatory requirements.³³⁴ It may also attach conditions to the licence, but only to the extent that ‘the Bank may consider necessary’.³³⁵ These conditions may be changed or amended as the Regulator exercises its discretion.³³⁶ A bureau that has been affected negatively by a decision of the Bank in respect of a licence, may approach the Minister of Finance in terms of regulations 6 and 7. However, the aggrieved party must first take the matter up with the Bank and obtain reasons for non-registration.³³⁷

The authority of the Bank is set out comprehensively in regulation 28. It may undertake on-site supervisory visits in order to monitor adherence to the regulations and may take steps to ensure that there is constant compliance with the provisions of the licence granted.³³⁸ The Bank has the authority to issue ‘directives’, ‘determinations’, ‘guidelines’ and ‘circulars’ in order to inform registrants of how it performs its monitoring and oversight duties.³³⁹ The release of a ‘non-compliance notice’ in terms of regulation 34 reflects the South African position, save that there is no duty to set out the punitive outcomes associated with non-adherence to the notification, and no reference to recourse to a tribunal. A non-compliance notice ceases to have effect only after referral to a court, or after a compliance certificate has been extended.³⁴⁰

The prerogative of the Bank to visit licensed bureaus is subject to the Bank informing the bureau in advance of its intention to make an on-site visit.³⁴¹ A credit bureau is obliged to provide the Bank with information and the documents requested, either in advance or at the time of the visit.³⁴² The visits are remedial in nature, as the Bank is obliged to forward to the licensee a report indicating areas that are in need of improvement.³⁴³ Where action is required, the credit bureau has ten working days to draft a course of remedial action, submit this to the Bank for approval and, if approved, adopt the course within a further ten days.³⁴⁴

Regulation 11(2) empowers the Bank to suspend or retract a licence. Due process has to be followed and the Bank has to inform the affected party of the reasons for removal or suspension of the licence.³⁴⁵ It is a regulatory requirement that the affected party be invited to present arguments against

³³⁴ Namibian reg 5(1). The specific terminology used, is to provide a ‘licence’.

³³⁵ Namibian reg 5(6)(a).

³³⁶ Namibian reg 5(6)(b)—instances that ‘the Bank considers appropriate’.

³³⁷ Namibian reg 6(1).

³³⁸ Namibian regs 28(2)(a), (b) and 29.

³³⁹ Namibian reg 28(2)(c).

³⁴⁰ Namibian reg 34(3) and (4).

³⁴¹ Namibian reg 29(2).

³⁴² Namibian reg 29(3).

³⁴³ Namibian reg 29(4).

³⁴⁴ Namibian reg 29(4) and (5).

³⁴⁵ Namibian reg 10(1).

removal or suspension of the licence.³⁴⁶ The bureau is then afforded an additional opportunity to approach the Bank for a reconsideration of the intention to remove or suspend the licence and to present additional information for consideration by the Bank.³⁴⁷ The Bank must inform the affected party of its decision ‘as soon as possible in writing’.³⁴⁸ An aggrieved party may then approach the minister for reconsideration and the outcome is ‘binding on all parties’.³⁴⁹ The regulations set out clear timelines for decisions, delivery of documents and data, as well as for reaction times.³⁵⁰

The Bank further receives information from the credit bureaus in respect of their activities and may prescribe the form and regularity of the submissions.³⁵¹

Comparison and Evaluation

The National Credit Regulator is the South African regulatory body for the consumer-credit industry and so also for credit bureaus.³⁵² The Information Regulator was established by section 39 of the POPIA, which came into effect on 11 April 2014.³⁵³ Both regulators are specialist regulators, specifically created for the respective purposes of governing the consumer-credit market³⁵⁴ and personal-information oversight.³⁵⁵ The two regulators, regulate the South African credit-data domain over and above regulators such as the Companies and Intellectual Property Commission, which is responsible for business forms such as companies.³⁵⁶ In Namibia, the regulatory and supervisory task fall to the Central Bank.³⁵⁷

The outcomes of the respective interventions differ. The National Credit Regulator has a broad obligation to enhance the consumer-credit market in a manner that increases its equality, efficacy, accessibility, clarity and reliability.³⁵⁸ The establishing legislation has consumer protection as one of its core objectives.³⁵⁹ The information legislation is aimed at protecting the constitutional right to privacy and all that it entails, as well as providing a statutory framework for the management of personal information.³⁶⁰ The

³⁴⁶ Namibian reg 10(2).

³⁴⁷ Namibian reg 11(1).

³⁴⁸ Namibian reg 11(2).

³⁴⁹ Namibian reg 11(3) and (4).

³⁵⁰ Namibian regs 6(2), 11(1), (2) and (3).

³⁵¹ Namibian reg 28(3).

³⁵² Ss 12–15 of the NCA; Vessio (n 282) 230, 232 and 236–238.

³⁵³ See ‘Introduction’.

³⁵⁴ See eg ss 13 and 15 of the NCA.

³⁵⁵ See ch 5, eg ss 39 and 40 of the POPIA.

³⁵⁶ See part A of ch 8 of the Companies Act 71 of 2008 (specifically ss 185 and 186).

³⁵⁷ See part 7 of the Namibian regs.

³⁵⁸ S 13(a) of the NCA.

³⁵⁹ S 3 of the NCA. See also *NCR v NCT* (n 291) 12.

³⁶⁰ S 2 of the POPIA. See also Naudé and Papadopoulos (n 84); Swales (n 85).

Information Regulator is tasked with giving effect to the protection afforded by the Act.³⁶¹ The Namibian framework supports systemic financial and economic welfare, but does not refer explicitly to consumer protection as a regulatory objective.³⁶² This does not mean that protective measures are not present within the scheme or that the objectives pursued do not offer customer safeguarding.³⁶³

However, whilst the Namibian system is straightforward insofar as the substantive provisions regulating credit bureaus are contained in a single set of regulations administered by a single regulator, the South African system has at least two primary core statutes regulated by two regulators and fall under two separate government departments.³⁶⁴ The registration of credit bureaus is effected by the National Credit Regulator as the NCA prohibits any unregistered person from undertaking activities that require registration as a credit bureau.³⁶⁵ However, before actually undertaking the work of a credit bureau insofar as it relates to ‘processing of information for purposes of credit reporting’, and notwithstanding registration by the National Credit Regulator,³⁶⁶ a credit bureau requires the Information Regulator’s permission to operate.³⁶⁷

The Information Regulator is established by the POPIA, which has no direct regulatory function in the welfare of the consumer-credit industry and in the importance of credit bureaus for the industry, and is empowered to evaluate and enforce compliance with certain provisions of the NCA. The National Credit Regulator does the same in terms of the other, unaffected provisions of the NCA.³⁶⁸ The provisions in the NCA are enforced punitively in terms of provisions of the POPIA and not in terms of the provisions of the NCA itself.³⁶⁹

It will be interesting to see whether the National Credit Regulator takes this into account when deciding to grant a licence to a prospective

³⁶¹ Ss 2(d) and 40 of the POPIA.

³⁶² S 3 of the BNA.

³⁶³ See the rights and remedies afforded to a ‘data subject’ in part 6, which is defined in reg 1 of the Namibian Regulations as the person (natural or juristic) to whom the information/data, as regulated by the Regulations, relates. The person referred to in this regard correlates with the person protected by the credit-bureau regulatory provisions in the NCA—see *NCR v NCT* (n 291) 12. See also Financial Stability Board, ‘Consumer Finance Protection with Particular Focus on Credit’ (26 October 2011) <http://www.fsb.org/wp-content/uploads/r_111026a.pdf> accessed 9 July 2017 at 9: ‘[I]n several jurisdictions, the protection of financial consumers is not an explicit goal; rather, prudential supervisory measures are seen as protecting consumers indirectly and implicitly.’

³⁶⁴ The NCA is the domain of the Department of Trade and Industry, whilst the POPIA is the responsibility of the Department of Justice—see the respective definitions of ‘Minister’ in the NCA and POPIA.

³⁶⁵ Ss 43(2) and 45(1) of the NCA.

³⁶⁶ See s 50(1) of the NCA.

³⁶⁷ Ss 57 and 58 of the POPIA.

³⁶⁸ See ‘Supervisory Frameworks: South Africa’.

³⁶⁹ See ‘Supervisory Frameworks: Namibia’ and ‘Legal Frameworks: Namibia’.

credit bureau, particularly as the Regulator is empowered by section 45(3) of the Act to submit the prospective registrant to ‘any other prescribed test’. (We discuss the requirements published by the Credit Regulator on its website, which are far broader than the guiding provisions set out in the Act, in Part II of this article.) The Information Regulator is tasked to consider specific aspects set out in section 44 of the POPIA. Unfortunately, the specific grounds for assessment of a prospective data processor or its activities requiring pre-authorisation, are not set out in the POPIA and there is therefore currently no ‘prescribed test’. The following uncomfortable position prevails: the entity must be registered with one regulator, but needs the consent of another regulator before commencing its operations. In the absence of proper coordination, it is possible for an entity to be registered, but be unable to perform its activities due to its inability to obtain the required authorisation.

Another challenge arises when considering the authority of the two regulators, namely potential disharmony and/or disproportionate punitive action. The following serves as an example. The National Credit Regulator is empowered to approach the National Consumer Tribunal to deregister a credit bureau where the bureau does not comply with its conditions of registration, with certain commitments or with the Act.³⁷⁰ However, the Regulator will no longer be able to issue a compliance notice giving the registrant the opportunity to rectify the non-compliance before referring the matter to the Tribunal.³⁷¹ We submit that, as subsection (1) is made subject to subsection (2), the amendment of section 55(2) affects only the Regulator’s authority to issue compliance notices where the ground for non-compliance is set out in section 55(1) and is clearly affected by section 55(2).³⁷²

There are two possible interpretations of the interface between these two subsections. First, even if non-compliance with the conditions of registration is not specifically mentioned in section 55(2)(b), every condition of registration is deemed to include a provision that the entity will comply with the Act.³⁷³ Non-compliance with the sections subject to the enforcement processes of the POPIA may, therefore, not form part of the substance of the compliance notice, as this would subject them to the enforcement procedures in the NCA. The Information Regulator will have to issue an enforcement notice if the entity is to be given the opportunity to rectify its non-compliance.³⁷⁴ However, even though some provisions are subject to certain chapters of the POPIA, non-compliance will, objectively

³⁷⁰ See s 57(1) of the NCA.

³⁷¹ S 110 of the POPIA, amending s 55(2) of the NCA.

³⁷² S 55(1) of the NCA is subject to the provisions of s 55(2), which will include those sections brought under the auspices of chs 10 and 11 of the POPIA when s 110 becomes operational.

³⁷³ S 50(2)(b)(i) of the NCA.

³⁷⁴ S 95 of the POPIA.

speaking, still amount to a contravention of the NCA. Alternatively, there is no specific exclusion of the jurisdiction of the National Credit Regulator and the interpretation turns on the wording of the amended subsection. The wording states that the specified sections ‘will be *subject*’ to the POPIA, as opposed to ‘must be’ or ‘are only’. If the Regulator does not have the authority in this regard, this would have the undesirable consequence that an application for deregistration cannot be initiated where the bureau does not comply with these cardinal provisions of the NCA. It must be noted that the Information Regulator does not have the capacity to deregister a credit bureau, although it may require it to cease processing operations in terms of a section 95 enforcement notice. The bureau, being unable to continue its operational mandate lawfully, would have the option of either facing sanctions or deregistering voluntarily.³⁷⁵

Disputes, such as dissatisfaction with an information- or enforcement notice issued by the Information Regulator, have to be dealt with in terms of judicial processes, as there is no equivalent tribunal in terms of this Act.³⁷⁶ The Information Regulator decides on the conduct of the entity and the amount of the administrative fine.³⁷⁷ An entity that has been issued with an infringement notice in terms of section 109, may then choose either to pay the fine or to be held accountable in a criminal court of law.³⁷⁸ The National Consumer Tribunal is also empowered to make other orders, where applicable,³⁷⁹ including an administrative fine that is currently R10 million or 10 per cent of the annual turnover of the entity, whichever is the higher.³⁸⁰ The administrative fine is only applicable in instances of ‘prohibited or required conduct in terms of this Act’ and the definition of ‘prohibited conduct’ will be amended with the implementation of section

³⁷⁵ See ss 58 and 58A of the NCA regarding voluntary termination of registration.

³⁷⁶ S 97 of the POPIA. In this regard, the comments of De Stadler and Esselaar (n 4) 82 (albeit in the context of complaints) are of value: ‘While POPI does provide for a decision of the Information Regulator to be appealed to the High Court, in practical terms a decision to dismiss a complaint by the Information Regulator is likely to be the end of the road for most complaints, as an application to the appropriate High Court is normally too expensive for most complainants. This in turn means that the wide discretion provided to the Information Regulator has the potential to result in an injustice that the complainant simply cannot afford to redress.’ On the other hand, the comments of Van Heerden and Renke (n 90) 94 about the NCT (albeit in the context of consumer remedial action pertaining to reckless credit) is also insightful: ‘It should also be noted that the NCA Amendment Act has now bestowed comprehensive powers relating to declarations of reckless credit on the National Consumer Tribunal with the result that cheap and speedy access to justice is now to the consumer’s avail.’

³⁷⁷ See ss 92 and 109 of the POPIA.

³⁷⁸ See ‘Supervisory Frameworks: South Africa’

³⁷⁹ See s 150 for a list of orders that the NCT can make.

³⁸⁰ S 151(2) of the NCA.

110 of the Protection Act.³⁸¹ In these instances, the Information Regulator will be able to set an administrative penalty capped at R10 million.³⁸²

In Namibia, the authority of the Bank exceeds that of the South African National Credit Regulator and Information Regulator in important areas. First, the Bank is the grantor and restrictor of credit bureau licences, whilst the National Credit Regulator may grant registration, but is unable to deregister a registrant without an order by the National Consumer Tribunal.³⁸³ Likewise, the Information Regulator needs to pre-approve conduct of a bureau, but is not able to retract the registration of the bureau.³⁸⁴ It may cause a cessation of activities.³⁸⁵

Secondly, the Namibian regulations set out clear timelines for granting licences and for resolving disputes around licences,³⁸⁶ whilst these timelines are absent in the South African consumer-credit regime for the Regulator³⁸⁷ (apart from general procedures applicable to National Consumer Tribunal matters),³⁸⁸ although present in the information-regulation regime.³⁸⁹ The National Credit Regulator is not bound to consider an application for registration within a specified time, such as the sixty working-day limitation imposed on the Bank of Namibia in terms of regulation 4(3). An entity that has not been informed of the Information Regulator's approval, may assume, after a set period, that it may conduct its activities.³⁹⁰

Thirdly, licensees enjoy direct access to the Minister in case of disputes, whereas the South African provisions necessitate referral to the National Consumer Tribunal for objections against notices and disputes about decisions of the Regulator.³⁹¹ However, in terms of the NCA, the members of the Tribunal are to 'have suitable qualifications and experience in economics, law, commerce, industry or consumer affairs'.³⁹² The NCA specifically provides for a further right of recourse to the civil courts,³⁹³

³⁸¹ S 151(1) of the NCA. See 'Modification of the Legislative Framework' and 'Supervisory Frameworks: South Africa' regarding the concept of 'prohibited conduct'.

³⁸² S 109(2)(c) of the POPIA.

³⁸³ Namibian regs 5, 6, 9 and 10; ss 14, 45 and 57 of the NCA.

³⁸⁴ See 'Supervisory Frameworks: South Africa'

³⁸⁵ *ibid.*

³⁸⁶ Namibian regs 4(3), 6(2) and 11.

³⁸⁷ See, however, s 56(1) of the NCA, which sets out timelines for referral of a matter to the Tribunal for review of a s 54 or s 55 notice.

³⁸⁸ See Table 2 in the Schedule referred to in the DTI Regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the National Consumer Tribunal, as published in GG 30225 (28 August 2007) GN 789 as amended.

³⁸⁹ See eg s 58(3) of the POPIA, which imposes a four-week limitation on the Regulator to inform an applicant (who applied for authorisation in terms of s 57) of its intention to undertake 'a more detailed investigation'.

³⁹⁰ S 58(3) and (7) of the POPIA.

³⁹¹ Namibian regs 6 and 7; ss 56 and 59 of the NCA.

³⁹² S 28(2)(b) of the NCA.

³⁹³ S 148(2) of the NCA.

which is absent from the Namibian regulations.³⁹⁴ Apart from criminal sanctions that are dealt with by courts,³⁹⁵ the Information Regulator is responsible for determining the lawful nature of the behaviour and punitive action, and any disputes must be resolved by a court of law.³⁹⁶ In some instances, the enforcement committee may assist the Regulator to determine a suitable penalty.³⁹⁷

Fourthly, the Namibian regulations provide that an attempt must be made to resolve the matter *inter partes* before approaching the Minister in circumstances where the Bank resolves to revoke the registration of a credit bureau.³⁹⁸ In South Africa, the Credit Regulator lacks the authority to remove registrations or to cancel compliance notices of its own volition in the absence of compliance with the contents of the compliance notice or an order of the Tribunal.³⁹⁹ Thus, any substantial dispute, such as removal of a registration, or punitive measures, such as compliance notices, will ultimately be dealt with by the National Consumer Tribunal.⁴⁰⁰ However, the punitive measures provided for in the NCA, such as administrative fines imposed by the National Consumer Tribunal,⁴⁰¹ exceed those of the Namibian Regulations and, apart from the extreme measure of deregistration,⁴⁰² no further punitive action may be authorised by the Bank of Namibia.

In South Africa, a credit bureau may be deregistered and attract fines, civil damages and criminal prosecution.⁴⁰³ Therefore, collaborative efforts between the National Credit Regulator and the Information Regulator should

³⁹⁴ Namibian ROSC (n 8) 41.

³⁹⁵ See s 108 of the POPIA.

³⁹⁶ See ch 10 of the POPIA, eg ss 77, 79, 81, 89, 90–91 and 97–99.

³⁹⁷ S 92 of the POPIA.

³⁹⁸ Namibian regs 10 and 11.

³⁹⁹ See ‘Supervisory Frameworks: South Africa’

⁴⁰⁰ *ibid.*

⁴⁰¹ Ss 150–151 of the NCA.

⁴⁰² Namibian regs 9 and 10.

⁴⁰³ Ss 57 and 150 of the NCA; ss 99, 107 and 109 of the POPIA. See also ss 160–162 for some of the offences and criminal penalties in terms of the NCA, apart from those specifically applicable to credit bureaus—see eg ‘Supervisory Frameworks: South Africa’ in this Part and ‘Consumers: South Africa’ in Part II (2017) L 3 CILSA.

be encouraged, although it may be argued that sections 17(4)⁴⁰⁴ and 17(5)⁴⁰⁵ of the Credit Act already oblige these regulators to do so. We recommend further collaboration between the national regulators through a Memorandum of Understanding.⁴⁰⁶ As the credit bureaus in these jurisdictions are related (as discussed above), it is important that the Regulators interact and consult with industry members in order to ensure that their efforts support means that are practical, implementable and inexpensive.⁴⁰⁷ It is therefore our recommendation that the South African and Namibian authorities enter into a Memorandum of Understanding that deal with specific matters relating to cross-border information exchange, such as risk management by regulated entities and harmonisation techniques, taking into account that the authority

⁴⁰⁴ S 17(4) of the NCA already provides for cooperation between regulators and s 17(4)(a)–(c) could be particularly relevant for the relation between the NCR and the Information Regulator. See also Johann Scholtz, ‘Consumer Credit Institutions’ in Johann Scholtz, et al (eds) (n 87) 3–4, who points out that s 17(4) was amended to oblige the NCR to effect the ensuing subsections by modifying the wording to read ‘must’.

⁴⁰⁵ S 17(5)(a) and (b) obliges any ‘regulatory’ agency that has authority over aspects pertaining to consumer credit to contract with the NCR in order to effect collaboration and aligned implementation of NCA norms. It also authorises the other (non-NCR) authority to deal with matters as set out in an understanding with the NCR. Even though we only discuss the relationship between the registrant and the Regulator in this paper, insofar as complaints within the context of the POPIA are concerned, provision is also made for consultation between the Information Regulator and other authorities where jurisdictional boundaries are concerned—see De Stadler and Esselaar (n 4) 82.

⁴⁰⁶ See World Bank (n 2) 35–36. The World Bank at 39 recognises that more than one authoritative establishment can be involved in the consumer-credit information domain, recommending that ‘[o]ne or more authorities should be appointed as primary overseer. Such authority(ies) could coordinate its/their oversight actions with other relevant authorities’ and at 42 recommend that ‘[a]uthorities should cooperate with each other, as appropriate, to support more efficient and effective regulation and oversight or credit reporting systems.’ See also the recommendation by Swales (n 85) 83 (albeit in the context of enforcement): ‘South Africa’s regulator should consider signing cross-border mutual enforcement assistance agreements with jurisdictions with similar data protection legislation. As discussed above, the United Kingdom, Australia and the United States are already party to a Memorandum of Understanding in this regard, and South Africa would be wise to consider doing the same. This type of cross-border assistance will only assist enforcement and compliance and should be treated as an early priority.’

⁴⁰⁷ See ‘Comparing Credit Bureaus in South Africa and Namibia’ See also the concerns noted by the World Bank in respect of unaffordable systems—World Bank (n 2) 22.

of the Regulators may differ, as indicated earlier.⁴⁰⁸ This is in line with the World Bank's recommendations.⁴⁰⁹

In Part II of this article, (2017) L 3 CILSA, we discuss the substantive provisions of credit bureau regulation in the NCA, POPIA and the Namibian Regulations, and evaluate these provisions against the World Bank's principles.

⁴⁰⁸ See 'Supervisory Frameworks: South Africa' See World Bank 42: 'Cooperative regulatory and oversight arrangements for systems that have important cross-border links or serve multiple jurisdictions will need to involve a formal arrangement because of the involvement of non-domestic authorities.' The Bank also sets out guidelines for oversight at 42, such as 'a committee of regulators and overseers' and for choosing the main authority, as 'the primary regulator or overseer is the relevant authority where the credit reporting system is located, as it has the authority to provide effective regulation and oversight and the relevant local market experience.' As the main holding companies for the bureaus in Namibia are South African based (see 'Credit Bureaus in Namibia') either the NCR or Information Regulator would have this responsibility.

⁴⁰⁹ World Bank (n 2) 35–36: 'A framework for cooperation and coordination is therefore a useful tool to ensure a common understanding of the relevant issues and problems, as well as to discuss, propose and eventually develop solutions. An initial framework for cooperation typically consists of periodic (eg annual or semi-annual) meetings between parties. In many cases, the latter evolves into more formal forms of cooperation, like a Memorandum of Understanding (MoU) between two or more parties in order to, for example, secure regular exchanges of information, or joint task forces to address specific issues.' See also 42, where the Bank notes that the interactive measures should still conform to a regulator's legislative capacities and that there should be a chief responsible regulator: 'A credit reporting system that operates across borders and serves more than one jurisdiction should be subject to day-to-day regulation and oversight by an authority that accepts primary responsibility, although it could potentially be supplemented by a committee of regulators and overseers.'