

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 II

André Boraine and Jani van Wyk***

Abstract

Part I of the article dealt with the regulatory and supervisory frameworks for consumer-credit information in South Africa and Namibia. The principles developed by the World Bank were canvassed as a point of departure for evaluation of the chosen jurisdictions. In Part II, the substantive frameworks in South Africa and Namibia are investigated and the development in the two systems compared in order to learn from each other. The themes discussed are: registration or licensing of credit bureaus, the notion of consumer-credit information, obligations imposed on credit bureaus in respect of data quality and consumer rights. We also refer to some themes dealt with by the World Bank, but not in detail by the drafters of the South African and Namibian frameworks. We conclude with observations and recommendations pertaining to the article as a whole and present South Africa and Namibia as in-house examples of credit bureau regulatory drafting in these two select African jurisdictions, against the backdrop of the World Bank's principles. As such it may serve as case studies for other African countries.

INTRODUCTORY REMARKS

South Africa

Credit Bureau Registration

The South African National Credit Act 34 of 2005 (NCA) does not define a credit bureau in substantive terms in the definitions section but the concept is phrased in an all-encompassing manner, which results in an entity being categorised as a credit bureau where it meets the statutory (behavioural)

* BJur LLB (Pret) LLM (Wits) LLD (Pret). Dean, Faculty of Law, University of Pretoria.

** LLB LLM (Pret), doctoral candidate under the auspices of the ABSA Chair in Banking Law in Africa, Department of Mercantile Law, University of Pretoria. Note from authors: Footnotes and references are omitted from quotations unless indicated otherwise.

requisites for mandatory registration.⁴¹⁰ An entity which is a juristic person for purposes of the NCA,⁴¹¹ and which behaves in a manner that is set out in section 43(1) is obliged to request the National Credit Regulator to register it as a credit bureau.⁴¹² There were thirteen registered credit bureaus in South Africa at the time of writing this article.⁴¹³

A credit bureau needs to comply with the provisions of both the National Credit Act and the National Credit Regulations.⁴¹⁴ Although specific values are not explicitly set out in connection with credit bureaus in the Act, section 43(5) allows the Minister of Trade and Industry to exclude economic ventures that are contradictory to the norms of impartiality and autonomy from qualification for registration.

Section 43(1) of the NCA governs the factual settings in which a person is required to apply for registration as a credit bureau. The determining factors are those exercised as enterprise activities geared towards obtaining documented information, or analysing requests for credit extension or contracts for this purpose, or in relation to past behaviour in respect of honouring financial obligations or matters relating to consumer-credit information.⁴¹⁵ Collecting and managing credit information on customers and other individuals and disseminating its own reports based on the information collected are further activities determining the need for mandatory registration.⁴¹⁶ These specifications pertain to existing and potential consumers.⁴¹⁷ The elements of section 43 were specifically formulated not to attract the duty to register where the entity under consideration does not receive compensation for the function it fulfils or if it transpires that the entity is a credit provider or an employee of a credit provider.⁴¹⁸ Reports of court orders or *ratio decidendi* of judgements or similar information that are publicly available are also exempted from the scope of section 43.⁴¹⁹

Section 46(1) of the NCA provides that only a juristic person may conduct the business of a credit bureau as it specifically prohibits a natural person from registering as such and thus practising as a credit bureau. In

⁴¹⁰ Section 1 of the NCA: “‘credit bureau’ means a person required to apply for registration as such in terms of section 43(1).”

⁴¹¹ Section 46(1) prohibits a natural person from registration as a credit bureau. There are also instances where the natural persons that have core functions within the entity can impact the viability of the entity for registration or continued registration—see s 47 of the NCA.

⁴¹² Sections 43(1) and 45(1) of the NCA.

⁴¹³ See the NCR’s website <http://www.ncr.org.za/register_of_registrants/registered_cb1.php> accessed 21 February 2017.

⁴¹⁴ See *National Credit Regulator v Southern African Fraud Prevention Services* [2016] ZANCT 32 (29 July 2016) (NCT/23181/2015/140(1) NCA) (hereinafter ‘*NCR v SAFPS*’).

⁴¹⁵ Section 43(1) of the NCA.

⁴¹⁶ *ibid.*

⁴¹⁷ *ibid.*

⁴¹⁸ *ibid.*

⁴¹⁹ *ibid.*

this regard, it is important to note that the NCA has a specific definition of a juristic person. In terms of section 1, a juristic person includes a partnership, incorporated or unincorporated entity,⁴²⁰ or a trust with three or more trustees where the trustees are natural persons or where the trustee is a juristic person.⁴²¹ As such, it is plausible that one of the qualifying factors, being the legal persona of a juristic person as recognised by the NCA, remains dependent on natural persons and the partnership is a case in point. A partnership ends when, for example, one of the partners dies or withdraws.⁴²² This would mean that the business form of the credit bureau that is a legal requirement for registration in terms of section 46(1) of the Act ends. Even where the remaining persons decide to continue the business of the bureau, they will have to form another partnership⁴²³- or any other form of a juristic person recognised by the Act. This will be different to the one that was initially registered with the National Credit Regulator (the Regulator).

The statutory standards that a potential registrant has to comply with prior to successful registration affect the quality of the bureau's staff, contractors, internal structures and processes as well as consumer and credit provider interaction.⁴²⁴ The Regulator is precluded from registering an applicant if there is non-compliance with statutory standards.⁴²⁵ A potential registrant must ensure that its workers and service providers have the proper expertise and training.⁴²⁶ The applicant must have an established scheme, or envisaged scheme, to incorporate adequate personnel and budgetary resources as well as operational resources for the implementation of its activities.⁴²⁷ These resources must be of such a nature as to effect its activities efficiently.⁴²⁸ In addition, the prospective bureau must have processes, or planned processes, to ensure proper customer care relations with consumers and credit providers, and these processes must be fair and expeditious.⁴²⁹ Lastly, the applicant must have a South African Revenue Service registration number.⁴³⁰

The NCA prescribes the features that the Regulator has to consider when deciding to register a prospective bureau.⁴³¹ The mandatory application for

⁴²⁰ Section 1 refers to an 'association or other body of persons'.

⁴²¹ See also NCR Form 5 Part 1 no 2 in respect of the 'legal status' of the prospective registrant that has to be indicated when applying for registration as a credit bureau. The form lists a number of forms but also allows for 'other' legal forms.

⁴²² Johan Henning, *Perspectives on the Law of Partnership in South Africa* (Juta 2014) 166.

⁴²³ *ibid.*

⁴²⁴ Section 43(3) of the NCA.

⁴²⁵ *ibid.*

⁴²⁶ Section 43(3)(a) of the NCA.

⁴²⁷ Section 43(3)(b) of the NCA.

⁴²⁸ *ibid.*

⁴²⁹ Section 43(3)(c) of the NCA.

⁴³⁰ Section 43(3)(d) of the NCA.

⁴³¹ Section 43(3) of the NCA.

registration that must be completed and submitted to the Regulator as per regulation 4(1)(a)(iv) is set out in schedule 1 of the Regulations to the Act. The application form, which is in many instances norm-based because the applicant has to indicate whether the required features are ‘sufficient’ or ‘adequate’ to name but a few examples,⁴³² is supplemented with the required documentation listed on the Regulator’s website.⁴³³ These requirements are much broader than the guiding provisions set out in the Act and refer to thirty-four specific documents or categories of information that need to be submitted.

Categorically speaking, the documents are of such a nature to enlighten the Credit Regulator on various features of the prospective registrant. First, the applicant has to submit information about its business form, setup and vested interests in the business.⁴³⁴ Second, the management profile has to be exposed.⁴³⁵ Third, information on the fiscal and auditory schemes of the applicant must be provided.⁴³⁶ Fourth, the human and technical/mechanised resource structures of the applicant must be set out.⁴³⁷ Fifth, the applicant must make certain stipulated policies, processes and strategies available that relate to core aspects of credit bureau obligations when compared to

⁴³² NCR Form 5 Parts 4 and 5.

⁴³³ NCR, <www.ncr.org.za/ncr-departments/registrations-compliance/credit-bureaus/cb-how-do-i-register> accessed 21 February 2017.

⁴³⁴ *ibid*: ‘Brief description of the organization’s business model’; ‘Companies and Intellectual Property Commission (CIPC) registration document or other legal registration document’; ‘Copy of the organization’s share certificate’ and ‘Shareholding information of the organization’.

⁴³⁵ (n 433): ‘Certified copies of ID/Passports of all members/directors or trustees’; a specifically prescribed ‘Resolution ... if applicant is a juristic person’ as per the example provided; ‘Police Clearance Certificate for all the ... members/directors or trustees issued by the South African Police Services (SAPS) or other service providers listed in the annexure attached hereto marked A’; ‘High level Organogram of the Organization, including CEO and the 1st level of senior Management’, ‘Information of the CEO and 1st level of senior Management (i) [n]ame of employee (ii) [p]osition in organization (iii) [q]ualifications (iv) [e]xperience (number of months, years in current role and similar role)’ and a ‘[c]opy of the latest management accounts’. See Investopedia, ‘Managerial Accounting’ (explaining ‘Managerial Accounting’) <<http://www.investopedia.com/terms/m/managerialaccounting.asp>> accessed 26 October 2016.

⁴³⁶ (n 433): ‘Letter from the bank confirming the applicant’s banking details or a copy of a cancelled blank cheque’; ‘Proof of registration with the South African Revenue Services (SARS)’; ‘Copy of the latest external audit management letter (if applicable)’; ‘Copy of the latest internal audit submission to the main audit Committee (if applicable)’ and ‘Copy of the latest audited financial statements’.

⁴³⁷ (n 433): ‘Copy of the training budget’, information about the ‘[k]ey contractors/[o]utsourced service [p]roviders of the organization’; ‘Copy of the service level agreement (SLA) with the key contractors/outsourced service providers’; ‘Copies of the HR policies and procedures; (i) code of conduct and disciplinary code (ii) performance management’ and ‘[a] detail[ed] overview of the IT infrastructure, systems and IT resources’.

sections of the Act.⁴³⁸ Sixth, other substantive records and undertakings are required, which communicate strategies for dealing with enterprise perpetuity and mishaps;⁴³⁹ set out the recorded compliance of the applicant and checks effected on database inaccuracies;⁴⁴⁰ pledge adherence to certain obligations imposed by the Act⁴⁴¹ and provide information on other miscellaneous matters.⁴⁴² These documents have to be submitted together with Form 5, which is the standard ‘application form’ found in Schedule 1 of the Regulations to the NCA, and evidence that the registration fees have been settled.⁴⁴³

In terms of section 160(2)(d) of the NCA, the wilful provision of untrue information to the Regulator constitutes an offence and punitive action in terms of section 161(b) includes a fine and/or imprisonment limited to one year.

Consumer-Credit Information

In the NCA, different terms are used to denote participants in the information industry and the data applicable in this regard.⁴⁴⁴ The concepts of ‘person’, ‘consumer’, ‘consumer credit information’ and ‘confidential information’

⁴³⁸ (n 433): ‘Copy of the procedures that deal with the following: (i) [a]cceptance and filing of consumer credit information; (ii) [a]ccuracy of consumer credit information (iii) [r]etention of consumer credit information (iv) [m]aintenance of consumer credit information (v) [e]xpunge (sic) of records that are not permitted’; ‘Copy of [the] information security policy’; ‘Copy of the policy and procedures for handling questions, concerns and complaints of consumers or credit providers’; ‘Process map indicating the flow of information’; ‘[a]n overview of the company’s strategy and processes around data. Data sources, verification [and] validation processes, processes around loading and storage of data and processes with data suppliers and data sources (relevance to [r]egulation 17, 18, 19, 20 [s]ection 70(2), (3), [s]ection 71 and [s]ection 72 of the National Credit Amendment Act).’

⁴³⁹ (n 433): ‘Business continuity management plan’ and ‘Copy of disaster recovery plan’. See Investopedia, ‘Business Continuity Planning—BCP Definition’ (explaining ‘Business Continuity Planning’) <<http://www.investopedia.com/terms/b/business-continuity-planning.asp?ad=dirN&qo=investopediaSiteSearch&qsrc=0&o=40186>> accessed 26 October 2016.

⁴⁴⁰ (n 433): ‘Copy of any due [d]iligence/[l]imited assurance report by external parties that was issued the past 12 months (if applicable)’ and ‘List of exception reports run on data (e.g. [d]uplicate ID numbers).’

⁴⁴¹ (n 433): The ‘company’s value proposition and benefit to the consumer details of current consumer awareness campaigns and education drives and the target markets and audiences (relevance to [s]ection 13(a) and [s]ection 72(1) of the National Credit Amendment Act)’ and information in respect of the ‘[c]ommitment in respect of credit bureau reporting requirements as stipulated in regulations 70 and 71.’

⁴⁴² (n 433): ‘A detailed overview of the company’s client base’ and ‘Information on current litigation against the organization; (i) [t]ype, number and value of cases.’

⁴⁴³ See (n 433).

⁴⁴⁴ Anneliese Roos, ‘Data Privacy Law’ in Dana van der Merwe and others (eds), *Information and Communications Technology Law* (2 edn, LexisNexis 2016) 429 and 430.

have different meanings although the definitions do not prevent ambiguity in some instances.⁴⁴⁵

Section 70(1) of the NCA defines ‘consumer credit information’ by listing four subsections that set out substantive categories in which past and/or present data may be retained. These are not necessarily directly applicable to creditworthiness and pertain to the profiles of the consumers in respect of credit-related behaviour,⁴⁴⁶ personal finance,⁴⁴⁷ performance development⁴⁴⁸ and the consumer’s personal profile.⁴⁴⁹ This subsection is supplemented by regulation 18(6), which authorises accumulation, retention and distribution of data on debts owed to creditors⁴⁵⁰ or debts obtained from credit providers,⁴⁵¹ fraudulent behaviour related to credit matters⁴⁵² or other information in respect of which the bureau has obtained the permission of the consumer for use in a specific manner.⁴⁵³

Regulation 19 highlights specific information that has to be included where data is reported to a credit bureau, namely, the surname and either the initials or comprehensive first names of the consumer, as well as the identification number or passport number, and date of birth where the former is not available.⁴⁵⁴ If the data is accessible, the home address and telephone number, as well as the work address and particulars thereof should be provided.⁴⁵⁵

In March 2015, eight additional subregulations were added to regulation 19. Categorically speaking, these additional stipulations primarily relate to restrictions placed upon suppliers of data in respect of the nature and contents of the data forwarded to credit bureaus. For example, suppliers, who are the ‘sources of information’ are not allowed to report on prescribed debts in terms of the Prescription Act 68 of 1998.⁴⁵⁶ Information suppliers also have certain procedural obligations. A source may not report on non-payment unless such default has persisted for three or more sequential

⁴⁴⁵ *ibid.* See specifically Roos, *Data Privacy Law* (n 444) 429 (n 504): ‘S 1 defines confidential information as “personal information that belongs to a person and is not generally available or known by others”. It is not clear from this definition whether the person to whom the information “belongs” is also the consumer to whom the personal information relates.’

⁴⁴⁶ Section 70(1)(a).

⁴⁴⁷ Section 70(1)(b).

⁴⁴⁸ Section 70(1)(c).

⁴⁴⁹ Section 70(1)(d).

⁴⁵⁰ Regulation 18(6)(a).

⁴⁵¹ Regulation 18(6)(c).

⁴⁵² Regulation 18(6)(b).

⁴⁵³ Regulation 18(6)(d).

⁴⁵⁴ Regulation 19(1).

⁴⁵⁵ Regulation 19(2). The subregulation also provides for ‘a statement’ to be provided where the consumer does not work or works for him- or herself.

⁴⁵⁶ Regulation 19(6). See also reg 19(5) *re* debts prescribed in terms of the Prescription Act 68 of 1969.

payment events,⁴⁵⁷ and may not forward certain specified negative information to the bureau unless the consumer has been provided with notice as required by regulation 19(4).⁴⁵⁸ This provision is mandatory and has the important function of informing the consumer of the available negative data, thus enabling him or her to verify the authenticity thereof.⁴⁵⁹ Furthermore, the data may not be provided to the bureau if the default of the consumer is extinguished through payment within the notification period or in cases of opposition by the consumer relating to the validity of the obligations in respect of the alleged debt.⁴⁶⁰ Regulation 19(13) stipulates that data informants, specifically credit providers, must comply with the requirements set out by the National Credit Regulator through conditions of registration or guidelines issued when providing data to credit bureaus.

The regulations to the NCA provide guidance on the length of time in which data may be kept,⁴⁶¹ and mandate that inadmissible information be deleted from a bureau's records in a timely fashion.⁴⁶² Inadmissible information not only pertains to data that has exceeded the retention dates set out in regulation 17, but also as listed in regulation 18(3) such as race, religion or state of health. The provisions of sections 71 and 71A of the NCA may also find application here. Regulations 19(5) and 19(6) prohibit the provision of data that has prescribed in terms of national legislation, specifically noting the Prescription Acts of 1968 and 1998 respectively.

In *National Credit Regulator v National Consumer Tribunal*, the court held that the distribution of data that conforms to the definition of consumer-credit information in section 70 of the NCA, would necessitate compliance with section 43 of the said Act.⁴⁶³ The court found that the information

⁴⁵⁷ Regulation 19(7).

⁴⁵⁸ Regulation 19(8) refers to reg 19(4), which stipulates that the consumer must be given a minimum of twenty business days' notification that an information provider as contemplated in s 70(2) or reg 18(7) will provide negative data to a credit bureau.

⁴⁵⁹ *Nkume v Transunion Credit Bureau (Pty) Ltd and Another* (2866/11) [2013] ZAECMHC 11; 2014 (1) SA 134 (ECM) para 10. Interestingly, the regulations do not prescribe that the provider needs to inform the consumer to which credit bureau the data will be sent and arguably, a consumer who wants to verify that the correct information was provided, may have to request a report from each bureau. S 62(2) provides that the identity of the bureau must be made available where the record obtained from this bureau was the rationale behind the non-granting of credit.

⁴⁶⁰ Regulation 19(9).

⁴⁶¹ Section 70(2)(d) of the NCA read with reg 17. See also '*NCR v SAFPS*' (n 414) paras 25, 29 and 31, where the Tribunal held that, as the respondent was a credit bureau, it had to comply with the NCA and as such could only retain its data as per the regulations notwithstanding that it argued that the data, in this case 'fraud listings' should be dealt with in a different manner.

⁴⁶² Section 70(2)(f) of the NCA.

⁴⁶³ 2011 JDR 1077 (GNP) (hereinafter '*NCR v NCT*') 18. At 19 the court held that '[i]t is the control and regulation of this information that necessitates registration. Such registration envisages the managing of the impact and avoiding indiscriminative disclosure of information concerning persons who seek to apply for credit.'

dealt with by the scrutinised company, Southern African Fraud Prevention Services, was covered by the provisions of section 70(1).⁴⁶⁴ In particular, the use of the information to support the credit extension process induced the court to consider the purpose for which the information was used in order to bring it under the auspices of section 70(1).⁴⁶⁵

The court seemingly focused on the potential of information to be utilised when considering a credit application as opposed to first considering whether the information was indeed consumer-credit information as per the definition in section 70(1).⁴⁶⁶ Arguably, the information is as relevant to a bank considering an applicant for a new bank or savings account as it is for one requesting a personal loan. Thus, it may be argued that the court considers any data used to evaluate a credit-related matter as constituting consumer-credit information, whether it clearly falls into the categories set out in section 70(1) or not. The purpose for which the information is used, as opposed to the information itself, may become a key factor to consider. If this interpretation of the court's approach is followed, retained data could become consumer-credit information as soon as it can add value to a credit application or credit agreement and if the information is obtainable by those

⁴⁶⁴ See eg *NCR v NCT* (n 463) 19–20: 'Part B of the second respondent's code of conduct document, deals with the categories of filings made to the data base, which is generated and kept by the second respondent... Now if all the items listed under category 6 are supplied to the second respondent by members of the second respondent, who are credit providers, this would be engaging in business with credit providers around consumers credit information.'

⁴⁶⁵ *NCR v NCT* (n 463) 17: 'I want to assume insofar as such information of fraud data warnings is provided to members who are by the nature of their business credit providers, "rapid decision making" would then be in respect of credit applications by prospective consumers ... Therefore if such information is received by the second respondent, it must then be seen in the context of the provisions of section 70.'

⁴⁶⁶ Unfortunately, when reading the case of the Tribunal, the High Court seemingly missed a very important aspect to comment on set out in para 24.5 of *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*']: 'It is perhaps good to comment on one part [of] the Code that was raised during the hearing. I understand the papers as saying that the Code requires a member never to refuse an application for credit based on the grounds that there is a report (or a report in a specific category) with Fraud Service. It may only be used as a factor putting the member on its guard about honesty along credit reputation. The member who does refuse a credit application and is asked to state reasons for a refusal must do so and must do so on the grounds of affordability or credit reputation but a data entry with Fraud Service must still never form part of those concepts of "affordability" or "credit reputation" (After all Fraud Service data do not refer to reputation about credit[]).' We submit that the comments of the Tribunal and the court comments on how regulation 18(4)(a) and (b), which determines that consumer-credit information may be used for purposes of evaluating, ascertaining and pre-empting fraud, fits into this particular scenario, would have been of value.

involved in credit extension.⁴⁶⁷ The purpose of the activity is therefore an important aspect to consider as the National Consumer Tribunal attempted to do in the case of *Southern African Fraud Prevention Service Ltd v National Credit Regulator*.⁴⁶⁸ This important consideration was taken into account by the National Consumer Tribunal, but neglected by the High Court.⁴⁶⁹ In light of the court's approach, it would be difficult to view any data used when considering a credit application as anything other than consumer credit information, particularly when considering the wording of regulation 18. Regulation 18(3) seemingly considers all the categories mentioned therein, such as 'race' and 'political affiliation' as potential 'consumer-credit information' but prohibits the retention of such data.

Section 1 of the Protection of Personal Information Act (POPIA) provides a wide definition of private data worthy of protection. The first part of the definition relates to the subject to which the information applies and stipulates that such a person can be a natural or juristic person, currently alive or in existence, and that the specific person must be ascertainable. This person is otherwise defined as the 'data subject' in section 1. The remainder of the definition classifies data content that is considered to be 'personal information'. These include and relate to the human attributes of a person; the person's history, contact details and biometric information; the person's views and preferences (including views of others about the person); written or electronic correspondence from the person intended for specific recipients or further correspondence that can be used to obtain the contents of an initial correspondence; and the person's name in the event where the disclosure of the name would result in the revelation of the person's information.⁴⁷⁰

⁴⁶⁷ See also the comments of Roos, *Data Privacy Law* (n 444) 431: 'When measuring the provisions of the National Credit Act against internationally accepted data privacy principles, it is evident that the Act attempts to address the purpose-limitation principle by limiting the use of confidential information to a purpose permitted or required by the Act or other legislation and by releasing the information only to the consumer, or to a third party with the consent of the consumer, or by reason of a court order or when it is permitted by legislation. The Act does not specifically require that the purpose for which the information is collected be spelled out before collection takes place. However, from the scope of the Act it is apparent that consumer-credit information can only be used for consumer credit purposes.'

⁴⁶⁸ *SAFPS v NCR* (n 466) eg 18.3.1–18.3.4 and 19.1.

⁴⁶⁹ *SAFPS v NCR* (n 466) para 8.7.1: 'It is interested in fraud and it is for the Fraud Prevention Service purposes coincidental if a credit application or a credit agreement is involved. It takes no interest in, and requires and receives no information about financial creditworthiness. It gives no report on financial creditworthiness. It is not interested in any personal information mentioned in s70-1 except for the name and identity number. Name and number are the nature of things necessary to give content to a report. That identifying element is not received relative to worthiness of deferment of payment but relative to honesty. In the case of employees discharged for fraud there is another exception in that it nominally is of the same type as mentioned in s70-1-c but it is again not of the same character.'

⁴⁷⁰ Section 1 (a), (b), (c), (e), (g), (f) and (h) respectively of the POPIA. Note that other information not stipulated by this definition is not excluded from this definition.

The POPIA categorises certain data as ‘special personal information’ and section 26 contains a general proscription on the processing of such data. The exclusive data classes to which this relates are ‘religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information’.⁴⁷¹ However, there are statutory exceptions allowing processing of such information, and these are set out in sections 27 to 33. Special provisions also apply to information pertaining to children.⁴⁷²

Namibia

Credit Bureau Licensing

A credit bureau is defined in regulation 1 of the Namibian Regulations in a manner that is firstly activity based, and secondly requires positive registration.⁴⁷³ Unlike the South African counterpart, which defines a credit bureau as an entity obliged to register and which sets out the features that require licensing, the Namibian regulations show a discrepancy when considering regulations 1 and 3(1). The activities that mandate registration exceed the boundaries of collection and ‘sale’ of data and include the ‘investigation’, ‘compil[ation] and maint[enance]’ of information.⁴⁷⁴ ‘[C]redit performance information’ is defined in regulation 1 as advantageous or disadvantageous data pertaining to the credit past of a natural or juristic entity and an exposé of its obligation-honouring behaviour. Subregulations 3(1)(a)(i), (ii) and (iii) in turn refer to ‘credit applications’, ‘credit agreements’ and ‘payment history or patterns’ respectively. Regulation 3(1) (a) reflects the wording of section 43(1)(a) of the South African NCA to a large extent. However, the NCA refers to ‘consumer credit information’ as opposed to ‘credit performance information’ in subsection (iv) and also specifically requires that the activities of the bureau should be reliant on ‘payment’. Namibian regulation 1 refers to the ‘sale’ of information, which also denotes counter-performance.⁴⁷⁵

An entity that is not yet registered as per the Namibian Regulations does not meet the criteria for classification as a credit bureau in terms of

⁴⁷¹ Section 26(a) of the POPIA.

⁴⁷² Sections 34–35 of the POPIA.

⁴⁷³ Namibian reg 1: ‘[A]n entity specialised in the collection and sale of credit performance information for individuals and businesses and registered as a credit bureau in terms of these regulations.’

⁴⁷⁴ Namibian regs 3(1)(a) and (b).

⁴⁷⁵ See Johan Löt, ‘General Introduction to the Law of Purchase and Sale’ in Chris Nagel and others (eds), *Commercial Law* (5 edn, LexisNexis 2015) 197 in respect of South African requirements for common-law purchase and sale agreements. Namibia and South Africa share a Roman-Dutch heritage—see World Bank, ‘Report on the Observance of Standards and Codes Insolvency and Creditor/Debtor Regimes Namibia Final’ (October 2014) 2 [this Report was publicly discussed with interested parties at a seminar in Windhoek on 13 March 2015] (hereinafter ‘Namibian ROSC’).

regulation 1. This does not mean that the provisions of the Regulations will not apply to an unregistered entity, as it is not (yet) a ‘credit bureau’ for purposes of the Regulations. Regulation 2 specifies that the regulations are consequential to credit bureaus, credit providers, data subjects as well as those involved in the activities included in regulation 3(1). In terms of regulation 3(5), only a close corporation or company may obtain a licence to practise as a credit bureau.⁴⁷⁶ Regulation 3(1), in turn, specifies activities that will oblige an entity to request registration. However, it is cast in wide terms and does not echo regulation 1 in respect of restrictive language, such as ‘specialised’ and ‘credit performance information’. In terms of regulation 3(1)(a), a person is mandated to submit a licence application if that person obtains data or analyses requests for credit extension, credit contracts, behaviour *re* honouring of past obligations or in respect of credit as part of its enterprise activities. The persons involved in collecting or managing the information generated as set out in regulation 3(1)(a) and disseminating documents in respect of data subjects as per these activities of regulation 3(1)(b), are also obliged to apply for a licence.⁴⁷⁷ However, there is no sanction set out in the regulations *per se* in the case of non-compliance with the registration requirement set out in regulation 3.

The application for registration initiates a similar evaluative process in respect of the capabilities and capacities of the prospective registrant as found in the South African NCA.⁴⁷⁸ However, regulation 3 has an additional requirement, namely, the bureau has to have a scheme in place that allows it to obtain and incorporate data from sources and distribute the reworked data to those in need of information.⁴⁷⁹ Additional information may be presented to the Bank of Namibia if determined relevant by the applicant, who applies for a licence, or upon request of the Bank of Namibia.⁴⁸⁰ The documents and information required by the regulations are comprehensive and would arguably instil in the Regulator a holistic understanding of the activities of the credit bureau and the means to effect these activities, and provide it with an opportunity to evaluate the activities and means referred to against the standards set in the regulations.⁴⁸¹ The information that has to

⁴⁷⁶ It is interesting to note that the regulations issued in July 2014 referred to ‘public’ companies but that amendments were effected in October 2014 to remove the word ‘public’ so that the regulation refers to ‘company’ only: See reg 1 of GG (Republic of Namibia) 5518 (31 Jul 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 Oct 2014) GN 177 [hereinafter ‘Namibian regulations’]. If one considers the Namibian ROSC (n 475) report, the reason becomes clear—the existing entities effecting the business of credit bureaus were private companies—see 39. Thus, if the regulations had not been amended, the legal form of these bureaus would have prevented them from registering.

⁴⁷⁷ Namibian regs 3(1)(b) and 3(1)(c).

⁴⁷⁸ Namibian reg 3(3).

⁴⁷⁹ Namibian reg 3(3)(c).

⁴⁸⁰ Namibian reg 4(2).

⁴⁸¹ See Namibian regs 3 and 4.

be forwarded to the Bank of Namibia for consideration for a licence include proof of the founding documents of the juristic person and proof of the viability of the prospective registrant in respect of its economic, business, operational and logistical profile.⁴⁸² The Regulator is provided with copies of the documents effecting the establishment, nature and purpose of the business.⁴⁸³ The prospective registrant is obliged to undertake an assessment of its viability in respect of the envisaged enterprise activities, the work scheme, and the management and oversight measures of the applicant.⁴⁸⁴ The analysis forwarded to the Regulator must include an industry evaluation, the composition of ownership, the supervisory and control scheme, the enterprise and ongoing enterprise plans as well as the handbooks that set out the functions for determining the veracity of data held and the currency thereof.⁴⁸⁵

The applicant further has to provide details in respect of its internal oversight and enabling mechanisms, including software necessary for proper functioning, the nature and identifying features of the products and services rendered to clients, documented processes and the envisaged safeguards to protect against maladministration and unacceptable use of the data.⁴⁸⁶ A breakdown of the activities must be provided, specifically of the programmes and schemes used by the bureau, the structuring and strategies for information accumulation and distribution, and the manner in which a specific person or enterprise would be linked with the relevant data in such a way that the use of the bureau's collection of information is facilitated.⁴⁸⁷ The Bank is further informed about the facilities of the prospective registrant, the adequacy thereof for consumer assistance and the safeguards to be employed.⁴⁸⁸ Some of these requirements set out in regulation 4(2) underscore the duties of the bureau in terms of part 4 of the Regulations.⁴⁸⁹ The strategy for calculating the remuneration payable for use of the system, an example of how the data will be presented to customers and a working concept of the completed 'product' that illustrates the primary characteristics and activities of the scheme also form part of the application documents.⁴⁹⁰ The application fee, as determined by an

⁴⁸² Namibian reg 4(2)(a) and (b).

⁴⁸³ Namibian reg 4(2)(a).

⁴⁸⁴ Namibian reg 4(2)(b): '... a feasibility study by the applicant, showing the nature of the planned business, organisational structure, internal control system and monitoring procedures of the company.' For an explanation of 'Feasibility Study', see Investopedia, 'Feasibility Study Definition' <<http://www.investopedia.com/terms/f/feasibility-study.asp?ad=dirN&qo=investopediaSiteSearch&qsrc=0&o=40186>> accessed 26 October 2016.

⁴⁸⁵ Namibian reg 4(2)(b).

⁴⁸⁶ Namibian reg 4(2)(c).

⁴⁸⁷ Namibian reg 4(2)(d).

⁴⁸⁸ Namibian reg 4(2)(e).

⁴⁸⁹ See eg Namibian reg 21 titled 'Data Management and Quality Control'.

⁴⁹⁰ Namibian regs 4(2)(f)–(h).

annexure to the regulations, is also included in the application and is due whether the application is successful or not.⁴⁹¹

The regulations authorise the Bank to interact with the prospective registrant if the Regulator is not satisfied with the application information provided and requires the provision of more data or a presentation to the Bank.⁴⁹² The Bank may incorporate conditions as part of the issued licence if deemed necessary and may expand, amend or redraft these conditions as it deems fit.⁴⁹³

Adherence to the licensing specifications determined for registration by the regulations obligate the Bank of Namibia to provide the licence.⁴⁹⁴ Thus, the Bank is responsible to determine whether the prospective credit bureau meets the requisite standards in various categories, such as expertise,⁴⁹⁵ efficacy,⁴⁹⁶ adequacy,⁴⁹⁷ fairness and attentiveness of processes.⁴⁹⁸ The effect of regulation 5(1) is that once the Bank has concluded that the requirement of the regulations have been met, it has no discretion to refuse licensing. If there is scope for refusal, the unsuccessful applicant must be provided with the motivating factors underlying the decision and may approach the Minister to challenge the decision.⁴⁹⁹

Annexure 1 to the Namibian Regulations is the pro forma application form that must be forwarded to the regulator supported by the information determined by the regulations.⁵⁰⁰ The form largely echoes its South African counterpart, with the necessary differentiation as per the specific provisions of the Namibian Regulations. In order to retain the format of this article, we deal with these additions in the comparative section below.⁵⁰¹

The regulations require that a statement be provided to the Bank of Namibia in terms of which the Chief Executive Officer undertakes under oath that the bureau will conduct itself in accordance with the regulatory prescriptions and ‘not disclose to any person any information obtained pursuant to the applicant’s obligations under [the] Regulations except as provided [therein]’.⁵⁰²

⁴⁹¹ Namibian reg 4(2)(i).

⁴⁹² Namibian reg 5(2).

⁴⁹³ Namibian reg 5(6).

⁴⁹⁴ Namibian reg 5(1).

⁴⁹⁵ Namibian reg 3(3)(a).

⁴⁹⁶ Namibian reg 3(3)(b). See also Namibian reg 3(3)(d).

⁴⁹⁷ Namibian reg 3(3)(c).

⁴⁹⁸ Namibian reg 3(3)(d).

⁴⁹⁹ Namibian regs 6 and 7.

⁵⁰⁰ See Namibian reg 4. See ‘The Significance of Credit Bureaus’ (n 44) in Part I (2017) L 3 CILSA.

⁵⁰¹ See ‘Introductory Remarks: Comparison and Evaluation’.

⁵⁰² Namibian annex 2 para 4.

Consumer-Credit Information

The definitions in the Namibian regulations show discrepancies in the terminology used and the inconsistencies could be intentional, denoting different meanings, or accidental. It is not always clear which is the case. For example, the drafters use the term ‘credit performance information’ in some instances and ‘credit information’ or ‘information’ in others.⁵⁰³

‘Credit performance information’ is defined in regulation 1 as ‘any favourable or unfavourable information bearing on a credit history and payment profile of a person’. Firstly, reference is made to the specific nature of the information, namely, ‘favourable’ or ‘unfavourable’.⁵⁰⁴ Information is sometimes defined *vis-à-vis* the adversity thereof for the person to whom the information relates and this necessitates consideration of the definitions of ‘favourable credit performance information’ and ‘unfavourable credit performance information’ found in regulation 1. The former excludes the latter and relates to every form of credit extension by a credit provider to a data subject⁵⁰⁵ as well as proper compliance with the terms of the loan agreement in respect of re-payment.⁵⁰⁶ The latter term is defined as negative data pertaining to a data subject and although examples are given, the list is not exhaustive.⁵⁰⁷ Examples include ‘refer to drawer cheques’, ‘closing of bank accounts other than for administrative reasons’, ‘being involved in proven cases of fraud, corruption, theft or forgery’, untrue disclosures during applications for credit extension, business failure and closure, non-compliance with contractual obligations and untimely payments in so far as credit is concerned.⁵⁰⁸ Secondly, the information relates specifically and exclusively to financial pasts and obligation-honouring records.⁵⁰⁹

The wording of the above definition regarding the use of the term ‘person’ as opposed to ‘data subject’ defined elsewhere, may suggest that there is not necessarily a relation between the person whose credit information is categorised as ‘credit performance information’ and a ‘data subject’ whose information is eligible for transaction as regulated by the Namibian regulations.⁵¹⁰ A ‘data subject’ is defined in regulation 1 as ‘an individual or a business entity whose information can be shared in terms of these regulations’. This is an interesting discrepancy as it could suggest that ‘credit performance information’ can relate to a person whose information

⁵⁰³ See also the different meanings attributed to the terminology in the NCA—Roos, *Data Privacy Law* (n 444) 429–430.

⁵⁰⁴ Namibian reg 1.

⁵⁰⁵ This is the definition of ‘credit facility’ in Namibian reg 1.

⁵⁰⁶ Namibian reg 1.

⁵⁰⁷ *ibid.*

⁵⁰⁸ *ibid.*

⁵⁰⁹ *ibid.*

⁵¹⁰ *ibid.*

will not be subject to the regulations.⁵¹¹ The term ‘credit history’ is defined in a manner that clearly links the data with the data subject through corresponding terminology, stipulating in regulation 1 that “‘credit history’ means all credit information about a data subject which is recorded or retained in a form determined by the Bank by a credit bureau and includes both favourable and unfavourable information’. ‘Payment profile’ is not defined.

The information eligible for dissemination is set out in regulation 16. The overall identifying term is that of ‘credit performance information’ and the recorded format in which the information is related to the requesting party may contain financial data, such as details on the monetary aspects of credit extended⁵¹² as well as the means to ascertain who the data subject is.⁵¹³ The credit profile of the subject⁵¹⁴ and payment safeguards established or offered to secure payment of the amount extended in respect of the credit agreements that constitute the profile of the data subject may be included in the subject’s record.⁵¹⁵ Regulation 16(1)(e) authorises reports of recurring behaviour relating to contractually compliant payment or contractual breach through non-payment as well as data in respect of the non-clearance of cheques, reorganisation of debt, and internal and legal enforcement actions implemented by the credit grantor or debt collector. A credit bureau is not allowed to retain or disseminate the data listed in regulation 17. Thus, recording or reporting on ‘race, colour, ethnic origin, sex, religion or social or economic status’ is unlawful.⁵¹⁶

Regulation 20(4)(a) allows a credit bureau to obtain information, over and above credit performance information as per the regulations, concerning the ‘status’ and credit history in respect of unfulfilled responsibilities and payments in relation to a credit agreement or products, services or utilities extended to the consumer. Information may also be accumulated in so far as it pertains to repayments where the debt had been ceded or sold to another.⁵¹⁷ Data that does not assist in credit extension considerations may also be retained, but only with the consent of the consumer.⁵¹⁸

⁵¹¹ See the comments of Roos, *Data Privacy Law* (n 444) 429 (n 504) in respect of a similar ambiguity in the NCA.

⁵¹² Namibian reg 16(1)(a), eg ‘number and amount of credit facility’, ‘repayment period’, ‘interest rate’, etc.

⁵¹³ Namibian reg 16(1)(b).

⁵¹⁴ Namibian reg 16(1)(c) refers to the ‘credit history’ of the person but it includes both credit extended and credit yet to be extended and overlaps with reg 16(1)(a) to some extent.

⁵¹⁵ Namibian reg 16(1)(d).

⁵¹⁶ Namibian reg 17.

⁵¹⁷ Namibian reg 20(4)(b).

⁵¹⁸ Namibian reg 20(4)(c).

Comparison and Evaluation

In contrast with the South African position, the Namibian regulations define a credit bureau in general terms guided by the business of a bureau and not just the requirement of registration.⁵¹⁹ Whilst both regimes prohibit natural persons from registering as credit bureaus, the definition in the NCA in respect of juristic persons extends the potential business forms well beyond the limitations of close corporations and companies.⁵²⁰ The Namibian regulations only allow companies and close corporations incorporated under the relevant laws of Namibia to register as such.⁵²¹ The simplified approach to qualifying business entities under the Namibian regime *vis-à-vis* the South African extended approach avoids the problematic scenario where a business form's existence is dependent on the natural persons involved, as discussed earlier on by using the example of a partner who passes away or withdraws from the partnership and the subsequent dissolution of the partnership.⁵²²

The other problem of the South African regime is brought about by the sanctions imposed by the POPIA, specifically the criminal sanctions.⁵²³ The POPIA does not define a juristic person whilst the NCA does.⁵²⁴ For example, for purposes of the POPIA, a partnership is not incorporated under a statute-specific definition of a juristic person, whereas for purposes of the NCA, it is.⁵²⁵ The question in this regard is how a criminal sanction will be effected against a bureau that is registered and authorised in terms of different laws and recognised differently in respect of its nature by these laws.⁵²⁶

The Namibian regulations set out strict requirements for a prospective licensee by ensuring that the Regulator is informed of the workings of the applicant through the compulsory provision of data pertaining to viability,

⁵¹⁹ Namibian reg 1; s 1 of the NCA.

⁵²⁰ Namibian reg 3(5); ss 1 and 46(1) of the NCA. See 'South Africa: Credit Bureau Registration'.

⁵²¹ Namibian reg 3(5).

⁵²² See 'South Africa: Credit Bureau Registration'.

⁵²³ See 'Supervisory Frameworks: South Africa' and 'Supervisory Frameworks: Comparison and Evaluation' in Part I (2017) L 3 CILSA.

⁵²⁴ See 'South Africa: Credit Bureau Registration'.

⁵²⁵ *ibid.* See Jannie Otto and Birgit Prozesky-Kuschke, 'Contractual Capacity' in Chris Nagel and others (eds), *Commercial Law* (5 edn, LexisNexis 2015) 90.

⁵²⁶ In respect of the Information Regulator, see Elizabeth de Stadler and Paul Esselaar, *A Guide to the Protection of Personal Information Act* (Juta 2015) 89: 'If the offence has been committed by the responsible person and the responsible person is a company, the Information Regulator would be wise to levy the administrative fine rather than bring a criminal charge, because the administrative fine is likely to be larger than the fine levied by the courts. However, the responsible party can also work the system by demanding to be tried in court (in terms of section 109(4), which is likely to result in a lesser criminal sanction (rather than the administrative fine). Of course this only applies to juristic persons. Where natural people are accused of committing an offence, they run the risk of going to prison and getting a criminal record, making an administrative fine a far more attractive option for them.'

management, structure, internal schemes and processes, to name but a few.⁵²⁷ The regulations further specifically require clarification on the following: the economic viability of the entity through a prerequisite ‘feasibility study’,⁵²⁸ the texts that set out the provision of data to a requesting customer and the products and services that will be made available to credit extenders who are the recipients of consumer information.⁵²⁹ In South Africa, additional documents are also required such as detailed information on management personnel and shareholding,⁵³⁰ however, a draft version of the document to be provided to a requesting consumer, does not have to be submitted together with the licensing application. We recommend that the Namibian requirement be incorporated into the South African regime. As consumer awareness is one of the core features of the NCA and supported by the World Bank,⁵³¹ such a stipulation can ensure that the document meets the requirements of sections 64 and 72.

The requirements for registration differ on a substantial level as well and reflect the levels of development of the respective jurisdictions. A ‘feasibility study’ as found in the Namibian sector is not required in South Africa.⁵³² We submit that a feasibility study for applicants should be considered as the documents required by the South African authority lean towards established entities—for example, entities that have existing clientele,⁵³³ a financial history,⁵³⁴ a proven management track record,⁵³⁵ proven compliance and existing risk-managing features.⁵³⁶

On the Namibian side, we would recommend that the detailed information found in the South African regime in respect of finances, management and risk-control be echoed.⁵³⁷ In addition, provision should be made for an annual compliance report in a similar format as that provided for in section 56(2) of the NCA.

It is recommended that the Legislature should consider the Namibian approach to credit bureau adequacy and competency assessment for registration purposes. This will provide more certainty about registration requirements and avoid necessary requests for information to be disputed as being potential *ultra vires* requests. However, we submit that section

⁵²⁷ See ‘Namibia: Credit Bureau Licensing’.

⁵²⁸ Namibian reg 4(2)(b).

⁵²⁹ *ibid*; Namibian regs 1, 4(2)(c)(ii) and 4(2)(g).

⁵³⁰ See ‘South Africa: Credit Bureau Registration’.

⁵³¹ See ‘The World Bank’ and ‘Legal Frameworks: South Africa’ in Part I (2017) L 3 CILSA and ‘South Africa: Consumer Credit Information’ and ‘Consumers: South Africa’ in this Part.

⁵³² See ‘South Africa: Credit Bureau Registration’.

⁵³³ See (n 442) ‘South Africa: Credit Bureau Registration’.

⁵³⁴ See (n 436) ‘South Africa: Credit Bureau Registration’.

⁵³⁵ See (n 435) ‘South Africa: Credit Bureau Registration’.

⁵³⁶ See *eg* (n 438–441) ‘South Africa: Credit Bureau Registration’.

⁵³⁷ See ‘South Africa: Credit Bureau Registration’ (specifically n 435, 436, 439 and 440).

45(2) is at present a good safeguard to allow for ‘relevant’ information to be requested by the National Credit Regulator over and above that required by legislation. A version of Namibian Regulation 3(3)(c) should be incorporated into section 43(3) and an adapted version of regulation 4(2) should be incorporated into section 43 as an additional subsection.

The norms set out in section 43(3), such as ‘appropriate’ and ‘sufficient’,⁵³⁸ go some distance towards linking the requirements to the needs of the entity or market but it is difficult to see how the Regulator is able to assess same comprehensively at the licensing stage given the information provided as per the statutory requirements.⁵³⁹ The information on the NCR website is therefore of the utmost importance. It is not clear why the provision of information to this extent is statutorily regulated in so far as the information should be included in the annual compliance report of the bureau, but not statutorily listed when an application for registration is brought.⁵⁴⁰

CONDUCT

Introduction

Information quality is the basic building block of an effective credit reporting environment. Accuracy of data implies that such data is free of error, truthful, complete and up to date ... Quality also means that data is sufficient and adequate, implying that i) relevant detailed information is captured, including negative as well as positive data; ii) information from as many relevant sources is gathered, within the limits established by law;

⁵³⁸ Section 43(3)(a) of the NCA provides that the personnel and service providers need to be suitably qualified, trained and practised and s 43(3)(b) provides that the monetary, functional and human means need to be adequate. The forms to be completed by the applicant and, if successful, the registrant, must contain information pertaining to employees and/or activities (such as call centre personnel, call received, reports issued)—see Form 5.

⁵³⁹ Eg in some areas the information to be provided is helpful—such as the financial statements or call centre activities together with the employees—see Form 5. However, see the comments in NCR, ‘Annual Report 2010-11’ 4 <<http://www.ncr.org.za/documents/pages/Financial%20Statement/2011%2012%20Annual%20Report%20Final.pdf>> accessed 9 July 2017, in respect of the ‘pre-registration audit’ in order ‘to determine whether the applicant has appropriate technical capacity, procedures and expertise to operate a credit bureau and the capability [sic] to meet the requirements of the Act.’ See also the criticism by 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 ULRev* 791 at 814, who refers to the doubt caused by the use of the undefined concepts of ‘*satisfied* and *legitimate interests*’ [original emphasis] in the context of a specific provision of Directive 95/46 in respect of computer-generated choices that affect consumers. In this regard, De Stadler and Esselaar (n 526) 35 (in the context of safeguarding data) notes that ‘[w]hat is reasonable’ is dependent on the settings of individual cases and a variety of factors play a role in determining whether there was compliance with a requirement.

⁵⁴⁰ See s 52(6), reg 70 and 71.

iii) information is sufficient in terms of the period over which observations are available.⁵⁴¹

Information also needs to be protected against various threats, which include misappropriation, wrongful tampering and accidental changes to or unintentional eradication of data.⁵⁴² Information that ultimately proves to be incorrect can, *inter alia*, be the result of an individual's mistake.⁵⁴³ The World Bank lists possible reasons, such as mistaken data supplied by the consumer or credit provider or errors during data capturing or when reworking the information into the form submitted to receivers of credit reports,⁵⁴⁴ however, Klein and Richner note that credit bureaus often bear the criticism for errors that were not of their making.⁵⁴⁵ The authors highlight that information provided to the bureau, together with the inaccuracies, will be assimilated into the database.⁵⁴⁶ Consumer-credit information generation occurs where the credit providers and credit receivers are transacting and the bureau only receives the information as it is forwarded to it.⁵⁴⁷

South Africa

In terms of section 69(2) of the NCA, a credit provider must forward certain information to 'a credit bureau'. The Act compels the credit bureau to receive data from credit providers as long as the latter compensate the bureau by way of a 'filing fee', if applicable.⁵⁴⁸ However, the bureau may not refuse or demand payment for reception of information from the consumer where the data is obtained in order to approve or dispute the existing data

⁵⁴¹ World Bank, 'General Principles for Credit Reporting' (September 2011) 2 and 4 <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Credit_Reporting_text.pdf> accessed 9 July 2017 (hereinafter 'World Bank').

⁵⁴² Id at 4.

⁵⁴³ Id at 14.

⁵⁴⁴ *ibid.* Reported data of an undesirable quality can be due to the standard of new data uploaded by the bureau and consequently incorporated in the reporting done by the bureau and which can be as a result of misinformation sourced from consumers ('data subjects'), mistakes by creditors or because the providers of data do not supply the necessary information (eg as reserving valuable information can be a chosen stratagem)—see World Bank (n 541) 14.

⁵⁴⁵ Daniel Klein and Jason Richner, 'In Defense of the Credit Bureau' (1992–1993) 12 *Cato Journal* 393 at 400–401. See also South African Law Reform Commission, 'Privacy and Data Protection Report' (Project 124, 2009) 382 <http://salawreform.justice.gov.za/reports/r_prj124privacy%20and%20data%20protection2009.pdf> accessed 9 July 2017 (hereinafter 'SALRC').

⁵⁴⁶ Klein and Richner (n 545) 400–401.

⁵⁴⁷ *ibid.* See also Klein and Richner (n 545) 400: 'The credit bureaus are held solely responsible for errors, but it is imperative to realize that many forces are involved in the credit reporting process ... Credit granters are a bigger part of the credit reporting process. Credit granters turn their information over to the credit bureaus. Any errors in the information sent unavoidably becomes part of the credit bureau. The source of credit transactions begins with the consumer and the credit granter. The credit bureau merely records the information as it is received.'

⁵⁴⁸ Section 70(2)(a) of the NCA.

at the bureau relating to that consumer.⁵⁴⁹ The bureau is statutorily obliged to set in motion ‘reasonable’ procedures in order to authenticate any data obtained.⁵⁵⁰ The data may be accumulated from the sources set out in section 70(2), namely, credit providers and, if applicable, consumers.⁵⁵¹ Regulation 18(7) authorises a credit bureau to obtain data from other persons, subject to the caveat that the generation of the data can be traced back to an organ of state or the judiciary, an insurer, supplier, service or utility provider, fraud investigator, edification agency, debt collector, the cessionary or buyer of the book debt or other licensed credit bureaus.

The NCA provides that a registered credit bureau has to ensure that the data in its system is retained in accordance with stipulated benchmarks.⁵⁵² These benchmarks are set out in regulation 18 to the Act and require the bureau to employ certain standards in respect of accuracy, safety and safekeeping of data. The legislative guidance is norm-based in so far as the responsible entity has to ‘ensure’ the ‘confidential[ity] and secur[ity]’ of data as well as ‘protection’ against various unwanted actions.⁵⁵³ The stipulations in respect of the duties of the credit bureau pertain to the accumulation and dissemination of data and the protective measures needed to ensure unsanctioned observance, modification, interaction and distribution.⁵⁵⁴ Specific information that allows for the correct liaison between consumer and data needs to be reflected by the system, including, but not limited to, identifying numbers, whether by way of identity number or passport number.⁵⁵⁵

Sections 70(2) and 71 note the obligations of credit bureaus in respect of credit information and of data cleansing. Further data verification requirements are provided for *inter alia* in sections 72 and 73.⁵⁵⁶

⁵⁴⁹ Section 70(2)(b) of the NCA.

⁵⁵⁰ Section 70(2)(c) of the NCA.

⁵⁵¹ Regulation 18(7).

⁵⁵² Section 70(2)(e) of the NCA.

⁵⁵³ Regulations 18(1) and (2). As far as the NCA is concerned, Roos, *Data Privacy Law* (n 444) 431 states: ‘The Act purports to deal with the security and confidentiality principle by instructing persons who receive, compile, retain or report confidential information to protect the confidentiality of that information. At this stage, however, the technical and organisational security measures that a credit bureau has to follow are not spelled out in the Act and it would seem the Act does not comply sufficiently with the security principle.’ Roos, *Data Privacy Law* (n 444) refers at 431 to ‘internationally accepted data privacy principles’.

⁵⁵⁴ Regulation 18(1)(b)–(e).

⁵⁵⁵ Regulation 18(1)(a).

⁵⁵⁶ Section 72 deals with the process to be followed where a consumer queries data about him- or herself whilst s 73 of the NCA mandates the Minister of Trade and Industry to issue binding guidance as to *inter alia* the handling of data, namely, ‘the nature of, time-frame, form and manner in which consumer credit information held by credit bureaux must be reviewed, verified, corrected or removed.’ However, the regulations proposed by the Minister must be provided to the appropriate Parliamentary Committee for discussion—see s 73(3) of the NCA.

Accuracy standards also apply to data providers.⁵⁵⁷ Regulations 19(10) and 19(11) deal with the duty of information providers to ensure that data is extended to credit bureaus in such a manner that the consumer's profile reflects accurate information, specifically where negative data is reflected. In terms of regulation 19(10), a provider of information must inform the credit bureau when a consumer rectifies the reason for the negative listing through meeting its obligations. The bureau is then afforded seven days to reflect same on the consumer's profile.⁵⁵⁸ Similar considerations apply in respect of judgment debts and administration orders.⁵⁵⁹ The exercise goes beyond a mere correction in order to reflect the current financial position of the consumer when section 71A is considered.⁵⁶⁰ This section was introduced into the NCA through the amendments effected in March 2015.⁵⁶¹ Section 71A aims to effect the timely amendment of a consumer's credit report in order to reflect the outcomes of the steps taken by the consumer to ameliorate his or her negative standing with the credit provider due to non-payment of a debt.⁵⁶² The section creates an obligation for credit providers to inform credit bureaus of developments that positively affect a consumer's financial profile at a credit bureau.⁵⁶³ It also creates an obligation for credit bureaus to dispose of the negative profile reflection detailed in subsection 1.⁵⁶⁴ Section 71A further creates a ground for the consumer to refer the matter to the National Credit Regulator based on a credit provider's non-compliance with the provisions of this section.⁵⁶⁵

⁵⁵⁷ Regulation 19(3).

⁵⁵⁸ Regulation 19(10).

⁵⁵⁹ Regulation 19(11). See also Michelle Kelly-Louw, 'The 2014 Credit-Information Amnesty Regulations: What do they Really Entail?' (2015) 48 De Jure 92 at 111.

⁵⁶⁰ This section is headed 'Automatic Removal of Adverse Consumer Credit Information'.

⁵⁶¹ See also Kelly-Louw (n 559) 110–111 for a discussion in this regard. The author criticises the wording of the section in so far as she submits that the terminology used is vague and ambiguous [see (n 559) 110]. She specifically refers to the use of the phrase 'after settlement by a consumer of any obligation under any credit agreement' and the term 'settlement' (see 110). The ambiguity, according to her, is found in the various interpretations of the phrase and term that can be contemplated: 'For instance, do these words refer to a consumer having to pay only the outstanding "capital amount" in terms of the amount in arrears, which form the subject-matter of the adverse information, or do they also refer to him paying all his arrears plus the relevant interest (including *mora* interest)? Or, do they simply refer to a consumer paying, for example, the missed instalments (and the interest included therein) in terms of an instalment agreement?' [see (n 559) 110]. Although we shall not be repeating her analysis, her comments are also very relevant for the discussion of the retention periods set out in reg 17 where reference to s 71A is made in some instances. See also the discussion in Michelle Kelly-Louw, 'Consumer Credit' in Willem Joubert and others (eds), *Law of South Africa* vol 8 (3 edn, LexisNexis December 2014) para 76(b) [Last updated: Reflects the law as at 31 August 2014] (hereinafter Kelly-Louw *LAWSA*).

⁵⁶² See Kelly-Louw (n 559) 110–111.

⁵⁶³ Section 71A(1) of the NCA.

⁵⁶⁴ Section 71A(2) of the NCA.

⁵⁶⁵ Section 71A(3) of the NCA.

Where a report is requested for a legitimate purpose, the credit bureau may not refuse to issue same but is entitled to levy payment against provision of the report unless there is a legislative prohibition on reciprocity.⁵⁶⁶ Legitimate purposes include certain commercial criminal investigations by the South African Police Service or authorised government body, determination and prohibition of fraudulent behaviour, recruitment-related enquiries including suitability referencing, financial status of debtors, insurance-related enquiries, locating consumers and designing credit-scoring models.⁵⁶⁷ In some instances, the consumer has to give his or her permission for another to obtain a credit report.⁵⁶⁸ In other instances, the data requester has to verify that the application for information is for a legitimate reason.⁵⁶⁹

The POPIA sets out clear norms to which data management must conform.⁵⁷⁰ This Act is intended to advance the safeguarding and standardisation of measures dealing with the aforementioned data.⁵⁷¹ Part A of Chapter 3 sets out the basic norms when dealing with personal information. The norms are set out as ‘conditions’ that are a pre-requisite for the ‘lawful processing’ of data to which the Act relates.⁵⁷² The conditions are ‘accountability’, ‘processing limitation’ and ‘further processing limitation’, ‘purpose specification’, ‘information quality’, ‘openness’, ‘security safeguards’ and ‘data subject participation’.⁵⁷³ These norms are detailed and for the sake of brevity, only the crux of each condition will be dealt with.⁵⁷⁴

Under the first theme of ‘accountability’, section 8 provides that these norms should be adhered to at the time when the reason for the use of the data and the manner in which it will be dealt with are decided as well as when the actual handling of the data occurs. The second condition deals with the standards relevant when information is handled, or ‘processed’ as defined in section 1.⁵⁷⁵ Compliance requires that data may only be dealt with in a manner that is legal, rational in ensuring the privacy of the person

⁵⁶⁶ Section 70(2)(g) of the NCA.

⁵⁶⁷ Regulation 18(4)(a)–(j)—reg 18(4)(c) was amended by GG (Republic of South Africa) 38557 (13 March 2015) RG 10382 GN R 202.

⁵⁶⁸ Regulation 18(5)—these instances are those set out in regs 18(4)(c), 18(4)(e), 18(4)(g) and 18(4)(f).

⁵⁶⁹ Specifically reg 19(12).

⁵⁷⁰ Sections 8–25 of the POPIA.

⁵⁷¹ Section 2 of the POPIA.

⁵⁷² Sections 8–25 of the POPIA.

⁵⁷³ *ibid.*

⁵⁷⁴ See also Roos, *Data Privacy Law* (n 444) 442–454; Daleen Millard, ‘Hello, POPI? On Cold Calling, Financial Intermediaries and Advisors and the Protection of Personal Information Bill’ (2013) 76 THRHR 615–617; 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 61–64 for a brief discussion of these norms.

⁵⁷⁵ Sections 9–12 of the POPIA.

whose information is transacted; and sufficient, suitable and proportionate in view of the reason for dealing with the data.⁵⁷⁶ Specific prohibitions on dealing with data can be inferred from the provisions of sections 11 and 12 as these sections determine when data processing is allowed. Section 11 is concerned with lawful rationale, such as fulfilment of legal, contractual or, where a public entity is concerned, public duties; and acquired acquiescence or the safeguarding of lawful interests of the data subject or, where relevant, that of another entity. Sections 11(1)(c) and (d) are of particular relevance to credit bureaus as they determine that data may be processed to meet a statutory mandate of the responsible party or if the processing is required in the process of reaching ‘the legitimate interests of the responsible party or of a third party to whom the information is supplied’. Section 12 is concerned with the obligation to accumulate individual data straight from the person whom the data concerns and sets out the exceptions to this general rule.

The third condition concerns the consumer’s knowledge of the reason for data accumulation, the time limits imposed on data storage and the incidences where the ability to handle the data is diminished or prohibited.⁵⁷⁷ The fourth condition, ‘further processing limitation’, expands on the requirement of a rational connection between the reason for the accumulation of the data and the additional handling of the data, by determining the features that must be taken into account and the instances where dealing with the data would be considered amenable to the reasons for the accumulation of the data.⁵⁷⁸ The next two norms relate to the merits and transparency of personal information.⁵⁷⁹ Section 16 requires that measures be implemented to ensure that data is current, comprehensive and clear and that these measures be determined in contemplation of the reason for the accumulation or additional processing thereof. Thus, the data needs to be of qualitative value.⁵⁸⁰ Sections 17 and 18 set out the requirements for the recording of actions pertaining to the handling of data and the actions that need to be taken in respect of informing the data subject of the accumulation of data. These sections encourage transparency in so far as data ‘processing operations’ are recorded and that the person to whom the

⁵⁷⁶ Sections 9 and 10 of the POPIA.

⁵⁷⁷ Sections 13–14 of the POPIA.

⁵⁷⁸ Section 15 of the POPIA. ‘Processing’ is extensively defined in s 1 but the term ‘further processing’ is not defined. See Johann Neethling, ‘Features of the Protection of Personal Information Bill, 2009 and the Law of Delict’ (2012) 75 THRHR 241 at 251.

⁵⁷⁹ Sections 16 and 17 of the POPIA. In many instances, the obligation to adhere to the norms is on the ‘responsible party’ who is defined in s 1 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.’

⁵⁸⁰ Section 16 of the POPIA. See Nicky Campbell, ‘Credit Bureaus’ in Johann Scholtz and others (eds), *Guide to the National Credit Act* (LexisNexis Service Issue 8 May 2016) 15–12 for a reference to s 16 (1) in the context of credit bureaus. Roos, *Data Privacy Law* (n 444) notes at 449 that ‘information can be factually accurate but still be misleading’.

data pertains is aware of *inter alia* the accumulation, accumulator, rationale for accumulation, the receivers of the accumulated data and the relevant rights of the data subject.⁵⁸¹

The seventh norm pertains to the safeguarding of the veracity and privacy of data and the protective ‘technical’ and ‘organisational’ features to facilitate same.⁵⁸² The applicable sections set out mandatory measures to be implemented in respect of pre-emption of harmful acts, risk management,⁵⁸³ adherence to best practice guidelines,⁵⁸⁴ the manner of handling and authorisation of data handlers,⁵⁸⁵ including the establishment of contractual conduct standards, and measures to be taken where data has been wrongly viewed or obtained.⁵⁸⁶

The eighth norm is dealt with in sections 23 to 25 and facilitates a data subject’s access to the information that concerns him or her. In terms of section 23(1)(a), there are no costs involved where a person enquires whether information is held by a responsible party but there is no similar statutory restriction in section 23(1)(b) on charging a person for releasing the information to him or her upon demand. In fact, section 23(3) provides that a quotation must be provided to the data subject prior to ‘providing the services’. In terms of section 23(2), the data subject has to be informed of his or her right to demand rectification of data as stipulated in section 24, being data that does not comply with the substantive norms set out in section 24(1). The process for rectification and the options available to the parties are set out in section 24.

Namibia

In terms of regulation 22(1), a provider of consumer data must forward the information ‘to all credit bureaus that meet the requirements set out in these regulations.’ Regulation 14(1) of the Namibian Regulations provides that a credit bureau ‘may’ accumulate, obtain, match and distribute data from the entities stipulated in the third annex to the Regulations. Regulation 14(2) provides that it is mandatory for the entities set out in Annexure 3 to contribute data to every registered credit bureau. The annex identifies these

⁵⁸¹ Sections 17 and 18 of the POPIA.

⁵⁸² Section 19(1) of the POPIA.

⁵⁸³ The POPIA makes four steps legally obligatory—identification [s 19(2)(a)], pre-empting risks through protective mechanisms [s 19(2)(b)], reviewing the operation and adequacy of the pre-emptive mechanisms [s 19(2)(c) and (d)] and adjusting the mechanisms accordingly [s 19(2)(d)]. See Jackie Young, *Operational Risk Management—The Practical Application of a Qualitative Approach* (Van Schaik 2006) for an explanation of the process of risk management and different forms of risk that a business may face. See also De Stadler and Esselaar (n 526) 35 *et seq* for a discussion of data safety in this context *vis-à-vis* the POPIA and Neethling (n 577) 253 (n 104).

⁵⁸⁴ Section 19(3) of the POPIA.

⁵⁸⁵ Section 20 of the POPIA.

⁵⁸⁶ Sections 21 and 22 of the POPIA.

entities as the ‘primary sources of credit performance information’, being credit extenders,⁵⁸⁷ certain providers of services and goods,⁵⁸⁸ government organisations⁵⁸⁹ and the judiciary.⁵⁹⁰ However, regulation 18(1) provides that credit bureaus are not allowed to refuse data from an entity that qualifies as a foundational data provider in terms of annexure 3.⁵⁹¹

The standards set by the Regulations pertain to the accumulation of data,⁵⁹² the process of generating and disseminating credit reports⁵⁹³ or data relating to credit performance,⁵⁹⁴ the quality of information and the means of dealing with data.⁵⁹⁵ The regulations are detailed and the point of departure is that the bureau has to ‘take all reasonable precautions’ to make sure that the data obtained is sufficiently and correctly dealt with and protected.⁵⁹⁶ The bureau is obliged to take the steps prescribed in regulation 19(1) in respect of credit reports. This includes compliance with a variety of measures,⁵⁹⁷ such as countermeasures and processes used where a credit report is demanded,⁵⁹⁸ adherence to a required ‘automated’ scheme established to identify relevant data within the database, reporting on same, and keeping records of insertions of data on the data subject profile and data so requested.⁵⁹⁹ The regulations also require that systems be maintained to determine actual or assumed transgressions of safety measures and to stipulate the compromised information, descriptions of the transgression and post-analytic steps implemented.⁶⁰⁰ The bureau is obliged to reconsider the management of staff and information accessing users’ passwords and to establish sufficient safeguards in order to limit the potential for unlawful acquisition of information held by the bureau.⁶⁰¹

⁵⁸⁷ Specifically ‘Banking institutions’, ‘Micro lenders’, ‘Microfinance banking institution’ and ‘Retailers providing credit’.

⁵⁸⁸ Specifically, ‘Utilities’ being ‘Regional Electricity Distributors’, ‘Bulk water suppliers’, ‘Telecommunication companies’ and those persons whose ‘provi[sion] of service[s] and goods ... give rise to a credit agreement.’

⁵⁸⁹ Specifically, ‘State agenc[ies]’ being ‘an Office, Ministry, or an Agency or a board, commission, company, corporation, fund or other entity established by an Act of Parliament and that by nature of their activities may lead to debts by individuals and businesses accruing to such institutions’ and ‘Local Authorities’ being ‘Municipalities’, ‘Town Councils’ and ‘Village Councils’.

⁵⁹⁰ Specifically courts and judicial officers.

⁵⁹¹ Annexure 3 identifies these entities as ‘primary sources of credit performance information’.

⁵⁹² Namibian reg 18(2).

⁵⁹³ Namibian reg 19.

⁵⁹⁴ Namibian reg 20(2).

⁵⁹⁵ Namibian reg 21.

⁵⁹⁶ Namibian reg 18(2).

⁵⁹⁷ Namibian reg 19(1)(a)–(e).

⁵⁹⁸ Namibian reg 19(1)(a).

⁵⁹⁹ Namibian reg 19(1)(b).

⁶⁰⁰ Namibian reg 19(1)(c).

⁶⁰¹ Namibian reg 19(1)(d) and (e).

In respect of dissemination and the manner in which the credit bureau is to deal with data, the regulations determine that the privacy of data obtained has to be safeguarded and that it may only be disseminated to entities where clearly mandated in writing to do so or if the person or entity is listed or inferred in regulation 20(2).⁶⁰² In fact, a credit bureau is obliged to provide information to a person or entity listed in the aforementioned regulation, whether explicitly listed in subregulation (a), having warranted that the data will only be utilised for the reasons set out in the regulations and that it will discard the data in a manner that will ensure that it is incomprehensible or unattainable.⁶⁰³

The qualitative value of the information is promoted through the provisions of regulation 21. The credit bureau is obliged to apply stringent quality-control measures in order to effect the highest level of data veracity and the resilient sequential offering of its facilities.⁶⁰⁴ Apart from reiterating that data may only be utilised as determined by the regulations,⁶⁰⁵ seven norms are set out to which the data must conform, namely, 'current', 'authentic', 'legitimate', 'reliable', 'accurate', 'truthful' and 'it reflects the credit history of the data subject' and the realisation thereof is the responsibility of the bureau.⁶⁰⁶ Thus, the bureau has to implement mechanisms to rectify deficient data,⁶⁰⁷ set arduous safety and dependability rules⁶⁰⁸ and safeguard information from 'loss', 'corruption', 'destruction', 'misuse', 'undue access' and 'disclosure'.⁶⁰⁹

The entities that forward data or from whom data is accumulated also have statutory commitments in respect of the bureaus to which information is provided as well as the standard of data given.⁶¹⁰ First, data suppliers are obliged to furnish information to every credit bureau and second, the bureau and supplier have to agree contractually on the terms of their interaction in so far as data conferment and utilisation are concerned.⁶¹¹ The assigned data has to be correct, comprehensive and up-to-date so as to truthfully set out the consumer conduct of the data subject.⁶¹² The duty is on the information provider, as opposed to the credit bureau, to undertake and conclude enquiries within twenty working days of initiation of same, where it is found that the data is incorrect or a consumer opposes the correctness of

⁶⁰² Namibian reg 20(1)(a) and (3).

⁶⁰³ Namibian reg 20(2)(b) and (c).

⁶⁰⁴ Namibian reg 21(1)(a).

⁶⁰⁵ Namibian reg 21(1)(b).

⁶⁰⁶ Namibian reg 21(1)(c).

⁶⁰⁷ Namibian reg 21(1)(d).

⁶⁰⁸ Namibian reg 21(1)(e).

⁶⁰⁹ Namibian reg 21(1)(f).

⁶¹⁰ Namibian reg part 5. See reg 1 regarding 'credit performance information provider'.

⁶¹¹ Namibian reg 22(1)(a) and (b).

⁶¹² Namibian reg 22(1)(c).

the information.⁶¹³ Regulation 33(2) requires a supplier of data to protect a credit bureau through indemnification against remedial action resulting from incorrect data furnished to it. This regulation applies under circumstances where the credit bureau acted reasonably in ascertaining whether the data is indeed true when it integrated the information.⁶¹⁴

Regulation 20(5) provides that the recipient of credit bureau information is only mandated to apply the data in respect of decisions effected in the course of enterprise activities. Regulation 20(6) stipulates that the information may not be forwarded to a person, other than the agent of the recipient, in order to obtain outstanding payments from the consumer.

Comparison and Evaluation

Firstly, the NCA does not require submission of information to all registered credit bureaus in all instances whilst the Namibian regulations do require same.⁶¹⁵ Secondly, under the South African regime, the duty to inspect allegations pertaining to the correctness of data is allocated to the credit bureau which must collect the necessary proof of the exactness of the data.⁶¹⁶ Under the Namibian regime, that duty is on the credit information provider.⁶¹⁷

The standards set by the POPIA in South Africa, are framed in the style of eight conditions applicable to various data handlers.⁶¹⁸ In respect of standards for credit bureau behaviour and data management, the Namibian regulations are codified, concise and detailed. The NCA reverts to the authority of the Minister to prescribe the standards that need to be complied with.⁶¹⁹ However, it is recommended that these standards should be

⁶¹³ Namibian reg 22(2) and (3).

⁶¹⁴ Namibian reg 33(2): 'A credit performance information provider must indemnify a credit bureau for any type of action or damage awards that may result from inaccurate credit performance information reported to it, if the credit bureau takes all reasonable measures to ensure the information is correct when processed by the bureau.'

⁶¹⁵ See 'Conduct: South Africa' and 'Conduct: Comparison and Evaluation'. S 71A(1) of the NCA requires that information be sent to 'all registered credit bureaux'. See also DTI, Draft National Credit Act Policy Review Framework 2013, Invitation for the public to comment on the draft South African National Credit Act Policy Review Framework, 2013 in GG 36504 Vol 575 (29 May 2013) GN 559 paras 2.3.4.1.2–2.3.4.2.1 in respect of the importance of bringing credit bureaus up to date, especially via information provided by credit grantors and in the context of affordability assessments.

⁶¹⁶ See 'Conduct: South Africa'. See Campbell (n 580) 15–11 and Kelly-Louw *LAWSA* (n 561) para 76(c).

⁶¹⁷ See 'Conduct: Namibia'.

⁶¹⁸ Sections 8–25 of the POPIA. The SALRC (n 545) 395 stated: 'The NCA and Regulations do not, for instance, deal effectively, or in some instances, at all, with the collection limitation principle (Principle 2), purpose specification (Principle 3), further processing (Principle 4), openness (Principle 5) and accountability of responsible parties (Principle 1) principles. Neither trans-border transfer of information (section 69 of POPIA) nor automated decision making (section 68 of POPIA) has been addressed.'

⁶¹⁹ Section 70(4)(a) of the NCA.

developed in consultation with the National Credit Regulator.⁶²⁰ Under the Namibian regulatory regime, the Minister of Finance ‘in consultation with the Bank of Namibia’ sets the regulatory framework for credit bureaux.⁶²¹

The formulation of the standards in normative terms results in difficult implementation or self-evaluation by the bureau. This is over and above the ‘generic’ nature of the Information Act, setting out specific standards and norms for protection of personal information in general.⁶²² In South Africa, the information must be ‘protected’⁶²³ or the credit bureau has to ‘ensure’ the privacy and safety of information in its database.⁶²⁴ On a basic reading of the regulations, any breach in security would mean that there was non-compliance with the requirement of regulation 18, notwithstanding that the bureau implemented high levels of security measures.⁶²⁵ On the other hand, a bureau that has not yet suffered a breach may be relying on substandard protection measures but, as no breach had occurred, there is no ground for the Regulator to demand higher security levels as long as some form of protective mechanism is present. In this regard, we recommend that the legislation and regulations be amended to reflect the wording of the Namibian regulations to either denote a high standard such as ‘strict’ or ‘rigorous’⁶²⁶ or minimum standard of competency such as ‘measures necessary’.⁶²⁷

We submit that it will become increasingly important to consider the features of consumer-credit information within the context of the POPIA *vis-à-vis* consumer credit reporting and that there may be unintended consequences from the disharmonised features of the regulatory regime.⁶²⁸ Regulation 18(3) to the NCA proscribes the retention of certain information by a credit bureau, such as race and religion, whilst the POPIA allows the retention of this information under certain circumstances.⁶²⁹ An important

⁶²⁰ This will not be an unknown concept—see the advisory function of the NCR in ss 13(c), 13(d) and 18 of the NCA as well as its commendation function in s 82(2), as amended.

⁶²¹ Section 59(1) of the BNA; (n 44) and ‘Supervisory Frameworks: Namibia’ in Part I (2017) L 3 CILSA.

⁶²² SALRC (n 545) 392 and 396.

⁶²³ See eg reg 18(1)(c)–(e) of the NCA.

⁶²⁴ Regulation 18(1)(b) of the NCA.

⁶²⁵ See also the comments of De Stadler and Esselaar (n 526) 35.

⁶²⁶ Namibian reg 21(1)(a) and (e): ‘A credit bureau must implement strict quality control procedures to ensure the maximum accuracy of its database and the continuity of its services’ and ‘A credit bureau must maintain rigorous standards of security and reliability.’

⁶²⁷ Namibian reg 21(1)(d): ‘A credit bureau must take measures necessary to correct credit performance information in its database that is contrary to provisions of these regulations or are inaccurate or no longer valid.’

⁶²⁸ An example would be where the credit bureau is registered with the National Credit Regulator after successful application and paid the non-refundable application fee (see n 433—the fee is currently set at R550) and perhaps the registration fee as prescribed by the National Credit Act, but it cannot obtain the necessary authorisation from the Information Regulator—see ‘Supervisory Frameworks: Comparison and Evaluation’.

⁶²⁹ See part B of ch 3.

effect of the provisions of the POPIA on credit bureaus will probably be seen in the manner in which the information that is no longer authorised for retention is dealt with.⁶³⁰

CONSUMERS

Introduction

Consumer rights within the credit reporting scheme are important.⁶³¹ It encompasses honouring the privacy⁶³² of the consumer in so far as the gathering and dispersing of data are concerned,⁶³³ informing the consumer of information accumulation and dissemination, and extending participatory faculties to the consumer to review and contradict the truthfulness of the information held by others.⁶³⁴ Ultimately, upholding the rights of the consumer must be evaluated against the requirement to create an efficacious data structure and privacy considerations, thus consumer rights and a sound information narration scheme must be assessed in a ‘balanced’ manner.⁶³⁵ Klein and Richner emphasise that consumer engagement and the welfare of the system are not opposing features.⁶³⁶

⁶³⁰ In this regard, the comments of De Stadler and Esselaar in respect of POPIA is of value: ‘The secure destruction of PI is almost as important as keeping it secure.’ See De Stadler and Esselaar (n 526) 41 (see also the comments on 42). See also ‘Miscellaneous Matters’ below.

⁶³¹ World Bank (n 541) 19–21. See also World Bank (n 541) 53: ‘Consumer protection in the context of credit reporting can be summarized as the right of any data subject to be aware that his/her information is being collected, shared or consulted (information notice/access), to challenge data (petition to correct or delete information), and claim compensation for damages suffered as a result of the misuse of personal data held on them in a credit reporting system.’

⁶³² See ‘Introduction: Credit Bureaus’ in Part I (2017) L 3 CILSA and see Klein and Richner (n 545) 398: ‘Viewed against the performance of other mechanisms of social control, one finds that the credit bureau is remarkably respectful of privacy. Compared to the sensational tactics of the press, the entrapment and wiretapping practiced by police, the taintedness of gossip, and ... the disclosure of public testimony, credit reporting must be deemed a precise and unobtrusive means of social control. It deals with standardized, automated information, and utilizes only the most relevant information and transmits it to only the most relevant parties. Credit bureaus are discreet and impersonal when gathering and storing information precisely because it is in their best interest to act this way. They serve an important social purpose and clearly are less intrusive than other social control mechanisms that we accept without a moment’s thought.’

⁶³³ World Bank (n 541) 19–20, meaning that the collector is bound to accumulate and disseminate the information only within the limits allowed by the law, whether limiting the reasons for collection or the rationales for dissemination to third parties.

⁶³⁴ World Bank (n 541) 19–20.

⁶³⁵ *Id* at 20–21.

⁶³⁶ Klein and Richner (n 545) 399: ‘It is crucial to realise that answering consumer complaints is an inherent part of the credit reporting industry. There are standardized practices the industry follows based on both legal necessity and sound management. It is in the best interests of the industry to maintain accurate records and be responsive to consumer complaints. Input from consumers is precisely the way that credit bureaus check the reliability of their procedures and improve the quality of their product.’

South Africa

The two credit bureau-specific policy objectives that underlie the NCA are data quality assurance and consumer empowerment.⁶³⁷ The latter specifically refers to means that enable credit customers to challenge the truthfulness and retention of erroneous information.⁶³⁸ The problems with the South African system referred to earlier were therefore addressed in principle at this preliminary stage through these policy outcomes.⁶³⁹

Consumers are entitled to obtain the information held on them by credit bureaux *ex gratia* once every year; or by virtue of an order of court or of the National Consumer Tribunal; or on a single occasion in order to authenticate that incorrect data had been removed where it was correctly disputed.⁶⁴⁰ In other instances, a charge may be levied to provide the information but the charge may not exceed a prescribed amount contemplated in Schedule 2.⁶⁴¹ The consumer may also invoke the assistance of the credit bureau or the National Credit Regulator in exploring whether the disputed data is correct.⁶⁴² The assistance has to be rendered free of charge.⁶⁴³

Another valuable provision is the compensation determination reflected in section 72(1)(d), which provides the consumer with the right to remuneration for pecuniary expenses incurred in challenging and changing records in instances where false data was provided to the bureau in respect of that consumer. This right lies against the source or informant of the inaccurate data.⁶⁴⁴ However, the whole of section 72(1) will be subject to the processes of Chapters 10 and 11 of the POPIA in future.⁶⁴⁵

A credit provider who is a source of data for a bureau has to inform the consumer twenty days in advance of the intention to submit information about the consumer, whereafter the consumer may obtain information about the data and dispute same.⁶⁴⁶ The consumer may also dispute information on record at a credit bureau.⁶⁴⁷ The credit grantor or the bureau is thereafter

⁶³⁷ DTI, 'Making Credit Markets Work A Policy Framework for Consumer Credit' (2004) para 3.14 <www.ncr.org.za/documents/pages/research-reports/nov10/Credit%20Law%20Review.pdf> accessed 9 July 2017.

⁶³⁸ *ibid.* See *Zokufa v Compuscan (Credit Bureau)* [2010] ZAECMHC 19; 2011 (1) SA 272 (ECM) para 98: 'Whatever nomenclature is used in the different sections of the Act and the regulations to submit documents to a consumer, they have one common denominator: they protect consumers by regulating and improving standards of consumer credit information and reporting, and to this end they regulate the issue of reports to consumers by credit bureaux and promote a fair and transparent credit industry.' See also *Nkume v Transunion Credit Bureau* (n 459) para 10.

⁶³⁹ See 'Introduction: Credit Bureaus' in Part I (2017) L 3 CILSA.

⁶⁴⁰ Section 72(1)(b)(i) of the NCA.

⁶⁴¹ Section 72(1)(b)(ii) read with reg 18(8).

⁶⁴² Section 72(1)(c)(iii) of the NCA.

⁶⁴³ *ibid.*

⁶⁴⁴ Section 72(1)(d) of the NCA.

⁶⁴⁵ See 'Legal Frameworks: South Africa' in Part I (2017) L 3 CILSA.

⁶⁴⁶ Sections 72(1)(a), 72(1)(b) and 72(1)(c) of the NCA read with reg 19(4).

⁶⁴⁷ Section 72(2)(c)(ii) of the NCA.

compelled to obtain verification of the disputed data in the form of ‘credit evidence’ through ‘reasonable’ measures.⁶⁴⁸ The verification information has to be forwarded to the disputing consumer or the data has to be deleted in the absence of such verification.⁶⁴⁹ Disregard for these entitlements of the consumer set out in section 72 is a ground for the composition of a section 55 compliance notice by the Regulator, non-compliance with which is an offence as per section 72(7).⁶⁵⁰ Nonetheless, the inclusion of consumer rights in respect of credit information has not precluded incidences of non-compliance, as can be seen from disputes that have reached resolution forums.⁶⁵¹

Provision is made that information pertaining to inquiries about a consumer’s credit report, such as challenges initiated by the consumer with regards to the information held by the credit bureau, as well as other queries about a person’s report, must be retained by the bureau for a statutorily determined period.⁶⁵² These occurrences must be noted in respect of the quantity and type of challenges or, in respect of queries, the names and contact details of the natural or juristic persons who initiated the queries.⁶⁵³ However, in so far as challenges are concerned, only unsuccessful challenges by a consumer in respect of the contents of his or her credit record may be disclosed and no details of successful challenges may be shown.⁶⁵⁴ The period is calculated from the initiation of the challenge and the information

⁶⁴⁸ Section 72(3) of the NCA.

⁶⁴⁹ *ibid.* S 72, specifically s 72(3), is subject to s 72(6), which provides the credit provider, credit bureau or NCR with *locus standi* to approach the NCT for an order to reduce the duties of these parties towards a consumer under certain circumstances.

⁶⁵⁰ There are also specific times for adjudicating matters set out in reg 20. Reg 20(1) provides that the contents of a credit report furnished to a consumer has to echo the information provided to other report receivers and where a consumer disputes the truthfulness of the information, the person to whom the consumer complains has to deal with the matter within twenty business days by taking the steps contemplated in s 72(3)—see reg 20(2). Where data is discarded, the consumer has to be notified of same together with those persons who had received credit reports reflecting this information over the past twenty business days and ‘all other registered credit bureaux’—see reg 20(3).

⁶⁵¹ See *Zokufa v Compuscan* (n 638) and *Nkume v TransUnion Credit Bureau* (n 459). See also Campbell (n 580) 15–9 (n 61): ‘In *Nkume v TransUnion Credit Bureau (Pty) Ltd and Another* 2014 (1) SA 134 (EHC) it was pointed out that the credit provider’s obligation to notify the consumer of its intention to submit adverse information concerning the consumer to a credit bureau was peremptory in respect of the credit provider and that a failure to do so on the part of the credit provider deprives the consumer of the opportunity to challenge the credit information.’ See also *Nkume v Transunion Credit Bureau* (n 459) para 10. Interestingly, the regulations do not prescribe that the provider needs to inform the consumer to which credit bureau the data will be sent and, arguably, a consumer who wants to verify that the correct information was provided, may have to advise the credit provider that he, she or it wishes to exercise the right set out in the second part of s 72(1)(a), being the right to obtain a copy of the data reported to the bureau when entreated to do so.

⁶⁵² Regulation 17(1) of the NCA.

⁶⁵³ *ibid.*

⁶⁵⁴ *ibid.*

may not be retained for longer than six months in the case of challenges and twelve months in the case of queries.⁶⁵⁵ A credit bureau is prohibited from reporting information that is subject to dispute.⁶⁵⁶

In terms of the POPIA, the person whose personal information is transacted is entitled to view and dispute data held by a responsible party and to demand that inaccuracies be corrected.⁶⁵⁷ This is the last condition set out in the Act in respect of the norms that guide data management, titled ‘Data subject participation’.⁶⁵⁸

Section 5 sets out the rights of persons to whom information relates and the data subject is primarily entitled to have his or her information dealt with in accordance with the norms set out in Chapter three of the Act.⁶⁵⁹ The section stipulates that the person has to be informed that his or her data is accumulated or that the data has been wrongfully viewed or obtained.⁶⁶⁰ The person is entitled to know who retains information about him or her and what information is held, to challenge another from dealing with the data and demand that information that relates to him or her be eradicated, removed or rectified.⁶⁶¹ De Stadler and Esselaar also note that

⁶⁵⁵ Regulation 17(1) of the NCA.

⁶⁵⁶ Section 72(5) of the NCA.

⁶⁵⁷ Sections 23 and 24 of the POPIA. Interestingly, s 24(2) envisages some form of midway where there is dissatisfaction on the side of the data subject—the information must either be changed [s 24(2)(a)], removed [s 24(2)(b)], proven in a manner that mollifies the data subject [s 24(2)(c)] or in the case where the data subject and responsible party remains in dispute, the data subject may demand that the disputed information be viewed in such a manner that it shows that the accuracy of the particular data has been disputed but that the demands have not been met (‘an indication that a correction of the information has been requested but has not been made’) [s 24(2)(d)].

⁶⁵⁸ Sections 23 and 24 of the POPIA.

⁶⁵⁹ Section 5 of the POPIA.

⁶⁶⁰ Section 5(a) of the POPIA. S 5(a)(i) provides for the right to be informed about data accumulating in line with the provisions of s 18. S 18 deals with the information that has to be provided to the data subject in order to create awareness of the aspects set out in the subsections and to provide guidance as to the circumstances where compliance is necessary and non-compliance with this section is allowed. S 5(a)(i) sets out the right to know about ‘unauthorised’ interference with the subject’s data as dealt with in s 22. S 22 is concerned with informing the data subject of ‘security compromises’ and stipulates when and how the subject must be informed.

⁶⁶¹ Sections 5(b)–(f) of the POPIA. S 5(b) refers to the right of the data subject to find out who has information pertaining to that person and view the data as determined by s 23. S 23 sets out that to which the data subject is entitled including a reference to the right to demand rectification of the information in accordance with s 24. S 24 is also referred to in s 5(c) which sets out the rights and responsibilities in respect of data rectification or eradication in more detail. S 5(e)–(f) stipulate when the data subject may refuse the processing of information (see s 11(3)(a) which refers to ‘reasonable grounds’) including in respect of direct marketing [see s 11(3)(b)], unrequested electronic interaction [see s 69(1)] and as provided for in s 69(3)(c) which also deals with direct marketing and unsolicited electronic communication and sets out the manner in which the data subject must be provided with ‘a reasonable opportunity to object’.

the duty to notify recipients of data that was subsequently amended, may be burdensome to bureaus.⁶⁶²

Subsections 5(h) and (i) afford recourse to the data subject by determining that the Information Regulator and judiciary may be approached where the rights of the subject have been affected.⁶⁶³ Section 99 deals with the relief that can be afforded to a data subject, which includes damages, aggravated damages, interest and costs.

Namibia

The first right set out in part 6 of the Namibian regulations relates to the 'right to information and data'.⁶⁶⁴ A credit grantor has to notify a successful credit receiver of the data that is furnished to credit bureaus.⁶⁶⁵ The data subject is entitled to view the information that is held by a credit bureau on him, her or it and to receive a copy of the report *ex gratia* on a yearly basis.⁶⁶⁶ Juristic enterprises may only obtain a credit report relevant to the business against payment of a fee.⁶⁶⁷ Part 6 sets out the rights of data subjects and other safety measures.

The regulations also prescribe the form and time for data dissemination as regulation 19(2) provides that the report has to be paper-based or a non-modifiable electronic version. Regulation 19(3) determines that the information has to be issued within five working days after the data subject has demanded same. The form and mechanism of delivery has to be decided between the parties.⁶⁶⁸ Data may be disputed by the data subject⁶⁶⁹ and the credit bureau has an obligation to apprise the data subject of the right to do so upon demand of a credit report.⁶⁷⁰ The process for disputing information is as follows: incorrect or obsolete data is brought to the attention of the credit

⁶⁶² De Stadler and Esselaar (n 526) 49: 'When a request to correct, reduce or delete the PI is received, the responsible party must respond as soon as "reasonably practicable" and provide the data subject with credible evidence that the request was complied with. Sometimes the change will affect decisions which will be or have been made about the data subject (many decisions are based on a person's financial history for instance). When this is the case, the responsible party must, where reasonably practicable, inform all persons or bodies to whom the PI was disclosed of the change to the PI. This requirement may turn out to be a particularly onerous one for credit bureaux.'

⁶⁶³ Section 5(h) of the POPIA concerns the ability of the data subject to issue a 'complaint' in respect of 'the alleged interference with the protection of the personal information' or 'a determination of an adjudicator as provided for in terms of section 74' whilst s 5(g) entitles the data subject to approach a court as per s 99.

⁶⁶⁴ Namibian reg 23.

⁶⁶⁵ Namibian reg 23(1)(a).

⁶⁶⁶ Namibian reg 23(1)(b) and (c).

⁶⁶⁷ Namibian reg 23(2). See also reg 27 which allows the bureau to provide services against payment as determined by a fee structure that has been forwarded to the Bank in the bureau's 'periodic returns'.

⁶⁶⁸ Namibian reg 23(1)(c) and (2).

⁶⁶⁹ Namibian regs 23(1)(d) and 24.

⁶⁷⁰ Namibian reg 24(1).

bureau, the bureau notes the details of the dispute against the credit report, the credit bureau demands that the supplier of that information furnish it with reliable proof of the disputed data that it provided and the proof is either forwarded to the disputing person or the disputed information is erased from the database where no proof is forthcoming.⁶⁷¹ The credit bureau is prohibited from disclosing disputed data until the matter is determined⁶⁷² and the regulations set out specific timeframes within which proof must be obtained and the data subject informed or the data eradicated.⁶⁷³ In the case where a data provider does not adhere to the demands of the credit bureau within the time limitation specified in the regulations, the bureau is obliged to bar the provider from accessing credit performance information until it is compliant and the Bank has to be informed of the event of non-compliance.⁶⁷⁴ Finally, the data subject is furnished with the rectified report at no cost.⁶⁷⁵

In the event that the information provider is able to issue confirmation of the challenged data, the data subject has a right of recourse to the Bank of Namibia, which has to query the matter and communicate the outcome of the query to the three parties involved.⁶⁷⁶ The credit bureau is entitled to disclose the information on credit reports where the Bank's conclusion is that the dispute by the data subject is unfounded.⁶⁷⁷ Regulation 24(7) provides that information subject to debate must be reflected as such 'in all credit reports' until conclusion of the Bank's query. The credit bureau must retain information on disputed data and the 'status' thereof, note how the dispute was settled, and forward this information to the Bank of Namibia on a monthly basis in the form requested by Bank.⁶⁷⁸

Comparison and Evaluation

Both the South African and Namibian regimes provide for consumer rights as well as mechanisms to enforce these rights.⁶⁷⁹ In both countries, there was an observed need for and response to this need in respect of consumer protection⁶⁸⁰ but in South Africa a broad consumer protection regime has evolved since Namibia became independent⁶⁸¹ whereas the Namibian regime

⁶⁷¹ Namibian reg 24(2) and (3).

⁶⁷² Namibian reg 24(3)(d).

⁶⁷³ Namibian reg 23(3)(b) and (c).

⁶⁷⁴ Namibian reg 26.

⁶⁷⁵ Namibian reg 24(4).

⁶⁷⁶ Namibian reg 24(5) and (6).

⁶⁷⁷ Namibian reg 24(8).

⁶⁷⁸ Namibian reg 25(1).

⁶⁷⁹ See 'Consumers: South Africa' and 'Consumers: Namibia'.

⁶⁸⁰ See 'Credit Bureaus in South Africa' and 'Credit Bureaus in Namibia' in Part I (2017) L 3 CILSA.

⁶⁸¹ See Johann Scholtz, 'The Implementation, Objects and Interpretation of the National Credit Act' in Johann Scholtz and others (eds), *Guide to the National Credit Act* (LexisNexis Service Issue 8 May 2016) 2-1-2-2.

has not shown similar evolution. By pointing this out, it is not suggested that Namibia should adopt the South African regime but we do note that the developments and challenges experienced by this jurisdiction can be of immense value to inform any future reforms in Namibia.⁶⁸²

In respect of consumer rights in the context of credit bureau regulation, a number of discrepancies between the systems require further analysis. One of the aspects stressed by the World Bank is the enlightenment of the consumer in respect of the use of information on that consumer.⁶⁸³ In terms of Namibian regulation 23(1), the consumer has a right and the credit grantor a corresponding obligation to enlighten the consumer in respect of the data that can be disseminated in respect of that consumer. This right to be informed lies against the credit grantor as soon as the application for credit extension has been successful.⁶⁸⁴ Under the South African consumer credit regime, the consumer is only entitled to be informed of the dissemination of data on him or her by the grantor where the information is of a negative nature.⁶⁸⁵ Therefore, the consumer has no general right to be informed of the distribution of information, especially not where the data is of a neutral or positive nature. Under the Namibian regime, the instruction affects any distribution of data about the consumer whilst the South African regime under the National Credit Act only sanctions same where information is distributed to a credit bureau.⁶⁸⁶

Neither of the regimes provides the consumer with an open right to be informed of his or her right to challenge the correctness of the information held by a credit bureau. Namibian regulation 24(1) provides that the consumer is only informed of this right when the consumer asks for its record from the bureau.

In terms of the POPIA's condition 6, which relates to 'openness', the consumer must be informed by the responsible party of information accumulation.⁶⁸⁷ This notification must also set out the right of the consumer to view and correct the data,⁶⁸⁸ and must be done either 'before the information is collected or as soon as reasonably practicable after it has been collected'.⁶⁸⁹ Section 18(3) provides that 'a responsible party that

⁶⁸² We have not dealt with each challenge identified in the South African system. See eg Roos, *Data Privacy Law* (n 444) 432 who notes that the NCA 'gives persons a right of access to their information and a right to request rectification of incorrect information. However, it does not give them the right to object to certain processing operations, nor does it impose restrictions on the onward transfer of confidential or consumer credit information to countries without adequate data privacy.'

⁶⁸³ See 'Consumers: Introduction'.

⁶⁸⁴ Namibian reg 23(1).

⁶⁸⁵ Section 72(1)(a) of the NCA.

⁶⁸⁶ See Namibian reg 23(1) and s 72(1)(a) of the NCA.

⁶⁸⁷ Section 18 of the POPIA.

⁶⁸⁸ Section 18(h)(iii) of the POPIA.

⁶⁸⁹ Section 18(2)(b) of the POPIA, s 18(2)(a) deals with data obtained 'directly from the data subject'.

has previously taken the steps referred to in subsection (1) complies with subsection (1) in relation to the subsequent collection from the data subject of the same information or information of the same kind if the purpose for the collection of the information remains the same.’ The Act does not specify any differentiation in the application of subsection 3 if similar information is obtained from different sources.

We recommend that the Namibian position be applied in South Africa, namely, that the consumer ‘be informed by a credit provider upon approval of [a] credit application regarding the type of information shared or to be shared on the [consumer].’⁶⁹⁰ This does not mean that the application of section 72(2) informing the consumer of the reporting of negative information becomes obsolete. An amendment as suggested would only serve to ensure that the consumer is informed in a holistic manner at a specified time⁶⁹¹ where the consumer is involved in fundamental negotiations pertaining to the obligation that would ultimately become the rationale for reporting to the credit bureau. A credit bureau does not accumulate only negative information, but also positive⁶⁹² and neutral information⁶⁹³ and thus, the consumer must also be informed that his neutral information will be submitted to the credit bureau as prescribed by legislation.⁶⁹⁴ Should this recommendation be followed, we submit that the requirement set out in the POPIA that the credit bureau should inform the consumer of the accumulation of information will be superfluous as the credit provider would inform the consumer of the information to be submitted to the bureau. However, one benefit that arises from the POPIA is that the consumer would be informed about which bureau holds information on him or her unless the credit provider has a preferred bureau and can inform the consumer of same. Neither the NCA nor the Regulations to the Act include a provision similar to the Namibian Regulation 22(1)(a): ‘A credit performance information provider must provide credit performance information to all credit bureaus that meet the requirements as set out in these regulations.’

In contrast to the Namibian regulations, the South African regime is restricted in respect of the obligation, enticement or sanctioning of an information provider for information that was wrongly reported. Part 5 of the Namibian regulations legislates the duties of an information provider and places the obligation to confirm or motivate submitted but contested

⁶⁹⁰ Namibian reg 23(1).

⁶⁹¹ See s 69(2) of the NCA, which specifies that the credit provider must submit certain information to the credit bureau when a contract is concluded or modified. See also regs 19(1) and (2) in respect of data that must accompany information reported to a bureau.

⁶⁹² See ‘Consumers: South Africa’.

⁶⁹³ See s 69(2) of the NCA *re* information that must be provided to the credit bureau by a credit provider, which includes the name, address, identity number, etc of the consumer.

⁶⁹⁴ See eg s 69(2) of the NCA.

information on the provider.⁶⁹⁵ Over and above the stipulation of regulation 22(1)(b), which implores a contractual business relationship between the information provider and credit bureau, regulation 33(2) safeguards a credit bureau where it had adhered to the standard of conduct expected and incorrect information was recorded. We submit that a similar provision in the South African regime, would encourage accurate reporting by information providers and lessen the burden on credit bureaus to substantiate information where the correctness thereof is within the personal knowledge of another entity. Placing more responsibility on the information provider, underscored by litigious sanctions, may contribute to an increase in the provision of accurate data. However, the Namibian regulations do not prescribe a specific sanction—apart from regulation 26(1) referred to above in cases where the provider does not effect the necessary evaluations as per regulation 24(3)(c). Under the NCA, non-compliance with its provisions justifies recourse to the National Credit Regulator and subsequently to the National Consumer Tribunal.⁶⁹⁶ In light of the definition of ‘prohibited conduct’ in section 1, non-compliance with the stipulations pertaining to credit bureau data enables the National Consumer Tribunal to exercise jurisdiction and impose administrative fines in terms of sections 150 and 151.

Information providers play an indispensable role in the domain of consumer-credit information. As such, we recommend that these providers be tasked with greater responsibilities for proper data reporting, including the obligation to investigate challenges in respect of data submitted by the provider over and above providing the information to the credit bureau substantiating the data so provided.⁶⁹⁷ Provisions similar to those contained in the Namibian regulations pertaining to the contractual regulation of interactions between bureaus and providers and indemnification provisions can be incorporated in the South African regime.⁶⁹⁸ We are of the opinion that the provisions of section 72(1)(d) that entitle the consumer to recover the expenditure of correcting information from the provider who wrongly reported data are not adequate to safeguard the credit bureau against other

⁶⁹⁵ In terms of Namibian reg 22(2), the information provider has to commence enquiries where the data that it submitted was incorrect or the data subject complains about the correctness of the information.

⁶⁹⁶ Sections 136, 140(1)(b), 141 of the NCA. See ‘Consumers: Namibia’ for the Namibian position under regs 24 and 26.

⁶⁹⁷ See also the recommendations of the World Bank (n 541) 36: ‘Data providers should report accurate, timely and sufficient data to credit reporting service providers, on an equitable basis.’ It is also important that consumers provide correct information—see World Bank (n 541) 37: ‘Data subjects should provide truthful and accurate information to data providers and other data sources.’ See also ‘Modification of the Legislative Framework’ for some indication of the impact of the POPIA on credit providers, although this was not the aim of our discussion.

⁶⁹⁸ See ‘Consumers: Namibia’.

remedial actions for reporting incorrect information obtained from a provider, notwithstanding that it had been verified.

MISCELLANEOUS MATTERS

Earlier we referred to the interactive nature of the South African and Namibian credit bureaus.⁶⁹⁹ The World Bank specifically notes the importance of proper schemes to regulate cross-border information exchange.⁷⁰⁰ At present, neither the South African consumer credit legislation nor the Namibian system has any specific provisions relating to cross-border passage of data. The only restrictions are the domestic provisions and standards of the respective regulatory frameworks.⁷⁰¹

The World Bank considers cross-border information exchange as part of its development of credit reporting principles.⁷⁰² This was motivated by the internationalisation of monetary entities and their customers.⁷⁰³ Financial consumers are subject to obligations in foreign jurisdictions that contribute to the consumer's expenditure and affects the consumer's credit history.⁷⁰⁴ Traversing domestic boundaries necessitate that enterprises and people are either able to interact with institutions in the new jurisdiction or remain reliant on those institutions established in the old jurisdiction.⁷⁰⁵ Interactive credit data systems enhance access to more information and, subsequently, credit.⁷⁰⁶

However, some of the hazards posed by these schemes include concerns about the safety and confidentiality of information that is accessible by foreign institutions.⁷⁰⁷ Disharmonised legislative obligations can be obstructive and complaints by consumers difficult to resolve due to uncertainties about the origin of the data or the relevant regime or resolution processes.⁷⁰⁸ Unaligned information disclosure purging times, periods to check relevancy and timeliness of data, substantive reporting categories

⁶⁹⁹ See 'South Africa and Namibia' in Part I (2017) L 3 CILSA. See also 'The Credit Information Sharing Project Close Out Report' funded by the FinMark Trust and GIZ (November 2015) <http://www.finmark.org.za/wp-content/uploads/2016/01/Rep_CreditInformationSharing_closeout_2015.pdf> accessed 14 February 2017 for research and recommendations regarding harmonising credit reporting in the SADC region.

⁷⁰⁰ World Bank (n 541) 21–22. See specifically World Bank (n 541) 22: 'In principle cross-border data flows raise concerns similar to those raised by purely domestic information sharing and credit reporting activities. However, cross-border activities are associated with a more complex environment due to multiplicity of applicable laws, consumer protection frameworks, credit cultures, market practices, and institutional structures, among others.'

⁷⁰¹ See 'Introductory Remarks', 'Conduct' and 'Consumers'.

⁷⁰² World Bank (n 541) 21–22 and 34–35.

⁷⁰³ *Id* at 21.

⁷⁰⁴ *ibid*.

⁷⁰⁵ *Id* at 21 and 34.

⁷⁰⁶ *ibid*.

⁷⁰⁷ *Id* at 22.

⁷⁰⁸ *ibid*.

such as monetary limitations and agreement categories can all contribute to constricting the efficacy of cross-border information flows.⁷⁰⁹ Challenges brought about by differentiated features identified in relation to European research include the substance of databases, terms utilised and licensing requirements.⁷¹⁰ In some instances in the past, role-players in the European Union have collaborated through a Memorandum of Understanding to include electronic access across borders.⁷¹¹ The World Bank also warns that the development of such a scheme should only be undertaken if the required resource input justifies the outcomes and had shown the feasibility thereof.⁷¹² In addition, risk identification and management schemes are becoming increasingly important.⁷¹³ Uninterrupted interaction between credit reporters invites similar risks to the traversing scheme which are comparable to those posed to the national entity.⁷¹⁴ Schemes that are not directly interlinked present functional, regulatory and status threats.⁷¹⁵

The World Bank recommends that the evaluation of the positive and negative features of domestic-foreign interrelation should consider the industry milieu, the degree of economic and pecuniary desegregation, legislative and regulatory restrictions and the requirements of those involved.⁷¹⁶ In addition, regional integration resulting in equal treatment independent of actual jurisdiction can be realised where the authoritative entities desire same.⁷¹⁷

In light of the existing intimacy between the South African and Namibian credit information schemes,⁷¹⁸ harmonisation should not be unattainable and is to be encouraged. In fact, in light of the provisions of Chapter 9 of POPIA, it may be argued that correlation is not an option but mandatory.⁷¹⁹ Section 72 deals with data dissemination across jurisdictions and specifically prohibits same in the absence of compliance with the requirements set out in section 72(1). The essence of this subsection is that personal information may only be transmitted beyond national borders if the information receiver is bound by enforceable laws, rules or contracts that echo the norms set out in the POPIA. Specifically, there must be similar characteristics to the eight conditions found in Chapter 3 of the Act and stipulations regarding

⁷⁰⁹ *ibid.*

⁷¹⁰ *Id* at 21.

⁷¹¹ *ibid.*

⁷¹² *Id* at 4, 22 and 34–35—also referring to ‘a cost-benefit analysis’.

⁷¹³ *Id* at 35.

⁷¹⁴ *ibid.*

⁷¹⁵ *ibid.*: ‘The difficulty in identifying, understanding and managing the new risks might even be greater given the inherent complexity in trying to comply with an expanded, or even conflicting, set of laws, regulations and other rules.’

⁷¹⁶ World Bank (n 541) 34.

⁷¹⁷ *ibid.*

⁷¹⁸ See ‘South Africa and Namibia’ in Part I (2017) L 3 CILSA.

⁷¹⁹ See De Stadler and Esselaar (n 526) ch 14 ‘Transferring personal information across borders’.

subsequent transmission of data to other jurisdictions as per Chapter 9 of the Act.⁷²⁰ As such, provisions with relatable principles in both Namibia and South Africa would facilitate compliance with this section. However, the POPIA also provides for personal aspects to be taken into account and authorises transmission across borders *inter alia* where the data subject assents or in cases where the transmission would be beneficial to the data subject and where consent can ‘reasonably practica[lly]’ not be attained and would probably be given if sought.⁷²¹ Some of these latter provisions may very well be applicable to credit bureaus where records are sought by credit providers for purposes of credit extension. It also goes without saying that the interrelatedness of Namibian and South African credit bureau companies necessitates compliance with this section.⁷²²

There are many correlating factors between these two regimes, as indicated in part two of our discussion. However, there are some discrepancies, particularly relating to regulatory means and complexities as well as risk management that may be hazardous. The Bank of Namibia is the sole regulator of credit bureaus in Namibia whilst the South African entities are subjected to two regulators.⁷²³ In respect of risk management, neither the Namibian regulations nor the South African Credit Act require the data handler to engage in risk identification, mediation or monitoring in a similar fashion as the POPIA.⁷²⁴ The Namibian regulations put a scheme in place to deal with data where a credit bureau fails, which the South African NCA does not.⁷²⁵ However, the POPIA has strict determinants in so far as the destruction of data is concerned, which may play a role when

⁷²⁰ Section 72(1)(a)(i) and (ii) of the POPIA.

⁷²¹ Section 72(b) and (e) of the POPIA.

⁷²² See ‘Comparing Credit Bureaus in South Africa and Namibia’ in Part I (2017) L 3 CILSA. In this regard, see the comments of De Stadler and Esselaar (n 526) 60–61 where they discuss the positions of ‘remotely accessing the database within South Africa’ and where ‘the responsible party operates within a multi-national group of companies.’ We did not research the exact position of the credit bureaus in Namibia and South Africa and the ‘holding company’ scenario as noted in ‘Credit Bureaus in Namibia’ in Part I (2017) L 3 CILSA, but there may be scope for further research in this regard.

⁷²³ See ‘Supervisory Frameworks: South Africa’ and ‘Supervisory Frameworks: Namibia’ in Part I (2017) L 3 CILSA.

⁷²⁴ See ‘Conduct: South Africa’ and (n 582).

⁷²⁵ Namibian reg 32: ‘(1) Where a credit bureau terminates business and surrenders its licence due to bankruptcy or liquidation, the data provided to the credit bureau by credit performance information providers and sources stored in the database of the credit bureau is surrendered to the Bank without any compensation. (2) The Bank may make information in the database mentioned in subregulation (1) available to another credit bureau.’

a bureau fails.⁷²⁶ As such, determining if the considerations above can be harmonised with the provisions of Namibian regulation 32, requires further research, particularly in light of De Stadler and Esselaar's views of personal information as 'an asset'.⁷²⁷ The World Bank specifically recommends that 'the potential sources of risks that can arise should be identified and appropriately managed.'⁷²⁸

CONCLUSION AND RECOMMENDATIONS

The two systems were on equal terms until 1990 and diverting legal patterns were observed after Namibia became independent from South Africa.⁷²⁹ However, in the above comparison we observed some converging patterns in relation to credit bureaus due to similar needs and challenges.⁷³⁰ Both jurisdictions have created legal frameworks tailored to the credit bureau sector but the larger frameworks for the interventions differ drastically. On the one hand, the South African regulatory framework is steeped in consumer protection and credit sector development legislation whilst the Namibian regime is linked to the Central Bank and the financial welfare needs of the country.⁷³¹ The NCA is part of a strong, structured consumer-protection regime but the Namibian regulations have shown a different approach to dealing with similar issues.⁷³² The research into these two Southern African countries' regimes has highlighted positive and negative aspects. We have shown some of the perceived successes and failures through the course of this article but we do not suggest a blanket adoption of the successes or preferences of one jurisdiction by the other.

In Namibia, for example, the proposed modification of the consumer protection regime may not be effected in a similar fashion as its South African counterpart and multiple statutes will regulate consumer credit.⁷³³ At present reference to credit bureaus, which are but one niche in a much larger

⁷²⁶ De Stadler and Esselaar (n 526) 6: 'The definition of "private body" quite specifically refers to businesses that are no longer in existence. How would POPI apply to non-existent businesses? Because processing includes the mere possession as well as the destruction of PI, it also governs what happens after a business stops trading. In particular, the security of PI that is no longer being used can be a significant risk. This means that the destruction of PI should be high on a business's or liquidator's agenda when trading stops.'

⁷²⁷ Id at 2.

⁷²⁸ World Bank (n 541) 35.

⁷²⁹ See 'Orientation' and 'Comparing Credit Bureaus in South Africa and Namibia' in Part I (2017) L 3 CILSA.

⁷³⁰ See 'Comparing Credit Bureaus in South Africa and Namibia' Part I (2017) L 3 CILSA and 'Consumers: Comparison and Evaluation' in this Part.

⁷³¹ See 'Credit Bureaus in Namibia', 'Comparing Credit Bureaus in South Africa and Namibia', 'Legal Frameworks: South Africa' and 'Legal Frameworks: Namibia' in Part I (2017) L 3 CILSA.

⁷³² See 'Legal Frameworks: Comparison and Evaluation' and 'Supervisory Frameworks: Comparison and Evaluation' in Part I (2017) L 3 CILSA.

⁷³³ See 'Credit Bureaus in Namibia' (n 102) in Part I (2017) L 3 CILSA.

sector, is made in two draft bills over and above the regulations currently in place.⁷³⁴ We view our contribution as an opportunity to benefit from structures, drafts, successes and mistakes already made. The two regimes are examples of differentiating approaches when considering whether one wants to create a regime under one regulator or specialist regulator or not. In addition, our research can be of value to Namibian authorities to reflect on the existing regime *vis-à-vis* the regime to be effected, which has many of the South African characteristics and may also reflect the South African flaws if implemented as such. We recommend further research in this regard as the focus of our research was not the upcoming Namibian regime, but the existing one and whilst brief reference is made to the draft bills in a footnote,⁷³⁵ we did not consider the contents and implications in depth.

Credit bureaus have an important role to fulfil in the consumer credit market, and in both South Africa and Namibia these institutional infrastructures are a reality.⁷³⁶ The comparative analysis has highlighted some areas where improvement of the South African regime is necessary. In our opinion, these improvements are needed despite progress in the area of data protection and credit bureau regulation. In South Africa, detailed attention to the performances of credit bureaus is of cardinal importance as credit providers are obliged to consider the contents of consumer data records held by these bureaus prior to extending credit.⁷³⁷

The South African regulatory regime is subject to intricacies and multiple layers of regulation that can be confusing, especially as the standards set out in the respective statutes are normative in nature.⁷³⁸ In addition, the governing statutes are not administered by the same government department or the same regulatory authority.⁷³⁹ South Africa has two specialist regulators in the styles of the consumer credit regulator and information regulator.⁷⁴⁰ In Namibia, the Bank of Namibia is the central bank, which has financial sector and monetary policy obligations and is now tasked with credit bureau supervision as well.⁷⁴¹ We recommend that mechanisms be developed to harmonise, align and simplify, where possible, the various applicable statutes and activities of the national authoritative

⁷³⁴ *ibid.*

⁷³⁵ *ibid.*

⁷³⁶ See 'Credit Bureaus' and 'South Africa and Namibia' in Part I (2017) L 3 CILSA.

⁷³⁷ See 'Credit Bureaus in South Africa' in Part I (2017) L 3 CILSA.

⁷³⁸ See eg 'Legal Frameworks: South Africa' in Part I (2017) L 3 CILSA and 'Introductory Remarks: South Africa' in this Part.

⁷³⁹ See 'Supervisory Frameworks: Comparison and Evaluation' in Part I (2017) L 3 CILSA.

⁷⁴⁰ Sections 12–16 of the NCA; ss 39–40 of the POPIA.

⁷⁴¹ Sections 2 and 3 of the BNA; 'Supervisory Frameworks: Namibia' in Part I (2017) L 3 CILSA.

entities in South Africa.⁷⁴² We also recommend that cross-border initiatives be undertaken to promote the interaction between the national authoritative entities of these two closely-related jurisdictions.⁷⁴³

As far as the substantive aspects of credit bureau regulation in South Africa are concerned, we suggest that the simplified approach taken by the Namibian regulations that limit the institutional form of a credit bureau to a company or close corporation be followed.⁷⁴⁴ In addition and as per the Namibian example, when applying for registration, we would suggest that the registration application submitted to the National Credit Regulator be supplemented to include draft prototype versions of the documents statutorily required for distribution to consumers and clients.⁷⁴⁵ A feasibility study, especially in light of the number of existing credit bureaus in South Africa,⁷⁴⁶ would also assist the Regulator to evaluate applicants although care should be taken that this does not become an obstacle for prospective credit bureaus. Some of the normative language used in the National Credit Act pertaining to registration, such as ‘appropriate’ and ‘sufficient’ can also be subjected to criticism, as Ferretti has done in the context of the European Union data protection laws.⁷⁴⁷ Guidance to the industry, under the auspices of the Regulator’s section 16(1)(b) mandate to issue non-binding guidelines as to its procedures or declaratory orders where needed, could be of value in order to meet the criteria of transparent regulatory processes set by the World Bank.⁷⁴⁸

The NCA authorises the Minister of Trade and Industry to prescribe certain standards of conduct and we recommend that the National Credit Regulator be consulted when developing these standards as the Regulator is the enforcer of the Act.⁷⁴⁹ The incorporation of the views of the Information Regulator could also be of value to avoid imposing conflicting or burdensome regulatory demands on the credit bureau industry.⁷⁵⁰

The consumer is only entitled to be informed of data distribution by the credit provider where negative information is shared.⁷⁵¹ We would suggest that this aspect be reconsidered by the legislator, together with a cost-benefit analysis, in light of the World Bank’s preference for a knowledgeable

⁷⁴² See ‘Legal Frameworks: Comparison and Evaluation’ and ‘Supervisory Frameworks: Comparison and Evaluation’ in Part I (2017) L 3 CILSA and ‘Conduct: Comparison and Evaluation’ in this Part.

⁷⁴³ See ‘Supervisory Frameworks: Comparison and Evaluation’ in Part I (2017) L 3 CILSA and ‘Miscellaneous Matters’ in this Part.

⁷⁴⁴ See ‘Introductory Remarks: Comparison and Evaluation’.

⁷⁴⁵ *ibid.*

⁷⁴⁶ See ‘Credit Bureaus in South Africa’ in Part I (2017) L 3 CILSA.

⁷⁴⁷ See (n 539).

⁷⁴⁸ See ‘Supervisory Frameworks: Introduction’ in Part I (2017) L 3 CILSA.

⁷⁴⁹ See ‘Consumers: South Africa’.

⁷⁵⁰ See ‘Supervisory Frameworks: Comparison and Evaluation’ in Part I (2017) L 3 CILSA.

⁷⁵¹ *ibid.*

consumer⁷⁵² and Ferretti's view of the purpose of data protection.⁷⁵³ As to data sharing and distribution in the South African market, the National Credit Act does not require credit providers to submit information to all registered credit bureaus and it may be worthwhile to re-evaluate the *status quo vis-à-vis* the Namibian position.⁷⁵⁴ However, we reserve a final opinion in this regard as we recommend further research and the involvement of market players in such a decision.

This article has only dealt with the jurisdictions of South Africa and Namibia. With reference to Ferretti's research in the European Union,⁷⁵⁵ we support further research incorporating other Southern African countries as the cross-jurisdictional movement of consumers, goods and services is as much a reality for this region of Africa as for the European Union.⁷⁵⁶

The South African and Namibian regimes were both evaluated by the World Bank. These two African jurisdictions thus provide 'in-house' examples of credit bureau regulatory drafting and legislative manifestations of these principles for other African countries. The variations in drafting, whilst incorporating the core issues highlighted by the World Bank, allow for differing stages of development or regulatory structures of a specific jurisdiction. These include the presence or absence of a regulator responsible for or able to take responsibility for credit bureaus and the development or absence of credit and/or information legislation, to name but a few.

⁷⁵² *ibid.*

⁷⁵³ Ferretti (n 539) 812: '[G]ranteeing individuals control over their personal information is a tool to allow them control over the *persona* they project in society free from unreasonable or unjustified associations, manipulations, distortions, misrepresentations, alterations, or constraints on their true identity. Control is also a fundamental value for humans to keep and develop their personalities in a manner that allows them to fully participate in society without having to conform their thoughts, beliefs, behaviors, or preferences to those of the majority.'

⁷⁵⁴ See 'Consumers: Comparison and Evaluation' and eg s 69 of the NCA where reference is only made to 'a credit bureau'.

⁷⁵⁵ Ferretti (n 539) 792–793 and 817 *et seq.*

⁷⁵⁶ See the views and recommendations of FinMark Trust and GIZ (n 699) 3–5 and 10.