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GENERAL NOTICES

NOTICE 1249 OF 2003

DEPARTMENT OF TRADE AND INDUSTRY CONSUMER AFFAIRS (UNFAIR BUSINESS PRACTICES) ACT, 1988

I, Alexander Erwin, Minister of Trade and Industry, do hereby, in terms of section 10(3) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No. 71 of 1988), publish the report of the Consumer Affairs Committee on the result of an investigation made by the Committee pursuant to General Notice 949 of 2001 as published in Government Gazette No. 22298 dated 18 May 2001, as set out in the Schedule.

A ERWIN
MINISTER OF TRADE AND INDUSTRY

SCHEDULE

CONSUMER AFFAIRS COMMITTEE

**REPORT IN TERMS OF SECTION 10(1) OF THE CONSUMER AFFAIRS
(UNFAIR BUSINESS PRACTICES) ACT, 1988,
(ACT NO 71 OF 1988)**

REPORT NO 97

An investigation in terms of section 8(1)(b) of the Consumer Affairs (Unfair Business Practices) Act, 1988 into the role of the Credit Bureau Association with reference to its ability to enforce its existing code and credit bureaus and their compliance with the code.

1. Introduction

A number of specific abbreviations, acronyms and words are used to a greater or lesser extent in this report. These are:

Act	Consumer Affairs (Unfair Business Practices) Act, 71 of 1988
BPC	Business Practices Committee, the predecessor of the Committee
BPC Act	Harmful Business Practices Act, 71 of 1988
CBA	Credit Bureau Association (voluntary association not for gain)
CCA	Consumer Credit Association, which has as its members the majority of large retailers
Committee	Consumer Affairs Committee, established in terms of section 2 of the Act.
Creditor	business or bank who granted credit to a debtor
Debtor	person (consumer) who received credit from a business or bank
Exp	Experian Bureau (Pty) Ltd, a major credit bureau
FTA	Furniture Traders' Association which represents 163 members with 3 177 outlets countrywide
Goods	includes services unless indicated otherwise
ITC	Information Trust Corporation (Pty) Ltd, a major credit bureau
Minister	Minister of Trade and Industry

2. Credit, the principal classes, its function and credit granting

Credit ⁽¹⁾ is a term used to denote transactions involving the transfer of money or other property on promise of repayment, usually at a fixed future date or dates. The transferor thereby becomes a creditor, and the transferee, a debtor. "Credit" and "debt" are therefore simply terms describing the same operation viewed from opposite standpoints.

2.1 The principal classes of credit

The principal **classes of credit** are as follows:

- commercial credit, which merchants extend to one another to finance the production and distribution of goods;
- investment credit, used by business firms to finance the acquisition of plant and equipment and represented by corporate bonds, long-term notes, and other proofs of indebtedness;

¹Parts of this section is based on "Credit", Microsoft® Encarta® Encyclopedia 2001. © 1993-2000 Microsoft Corporation.

- bank credit, consisting of the deposits, loans, and discounts of depository institutions;
- public or government credit, represented by the bond issues of national, state, and municipal governments;
- international credit, which is extended to particular governments by other governments, by the nationals of foreign countries, or by international banking institutions, such as the International Bank for Reconstruction and Development (World Bank);
- mortgage credit, when a loan is secured by property and
- consumer or personal credit, which comprises advances made by credit grantors, such as retailers and banks, to individuals to enable them to meet expenses or to purchase, on a deferred-payment basis, goods or services for personal consumption, water and electricity, medical fees, school fees.

In this report, the term "credit" is used with the reference to consumer or personal credit and mortgage credit.

2.2 The function of credit

The principal **function of credit** is to transfer goods and services from those who own them to those who wish to use them. The transfer is conditional until the goods and services have been fully paid and is made for a price, known as interest, which varies with the risk involved and also with the demand for, and supply of, credit.

Credit transactions have become indispensable to the economic development of the modern world⁽²⁾. Many, if not most, South African consumers do not have the cash available to use and enjoy the benefits of goods such as homes, motor vehicles, clothing, furniture, professional and other services. If they wish to acquire these goods, they are totally dependent upon suppliers of goods and services who are willing to sell on credit. Today the use of credit facilities to obtain goods and services has increased to a point where most consumer spending, excluding food, is on credit. For example, it is estimated that the total debt of South African consumers in respect of clothing other retailers and furniture as at 30 June 2001 is R31 700 000 000⁽³⁾. The CCA and the FTA also estimate that ± 80 per cent of furniture sales in South Africa are on credit and in the case of clothing and other retailers, the percentage is as high as ± 65 per cent.

The Council of Banks furnished the Committee with the following figures which applied

²Ibid.

³Estimate of the CCA and FTA. R16 700 000 000 is owed in respect of furniture and the remaining R15 000 000 000 is in respect of clothing and other retailers.

as on 30 June 2001:

- (a) Total advances to the domestic private sector was R539.1 billion.
- (b) Credit card book outstanding was R12.5 billion and most of this was probably incurred by individuals.
- (c) Total overdrafts and loans was R214.7 billion, but unfortunately the breakdown between individuals and businesses is not known.
- (d) Instalment sales to individuals was R32.5 billion, and this figure includes non-incorporated agriculture.
- (e) Leases to individuals amounted to R9.1 billion, and this figure includes non-incorporated agriculture.
- (f) Total credit extension by banks to households was R280 billion.
- (g) Total mortgage loan book was R231.4 billion of which the Banking Council estimates 70 per cent to 75 per cent probably relates to private dwellings and flats.

From this information it would appear that without access to credit, the standard of living of millions of South Africans would suffer significantly. This is confirmed by the figures quoted above.

2.3 Credit granting

It is in the public interest to promote a well-structured system whereby credit can be granted. The main objective of the suppliers of goods is to sell their merchandise in order to make profits. To simplify matters, and ignoring factors such as gross margins, overheads, competition, stock turnover rates, the cost of capital and liquidity, one can, as a general rule, say that higher sales usually lead to higher profits. **The suppliers of goods** are therefore not adverse to selling their merchandise, even on credit. They are in the business of selling goods and services and earn their profits by buying and selling.

Banks are deposit-taking intermediaries between *inter alia* consumers with surplus funds and other consumers requiring credit. As such, banks have a fiduciary relationship towards their depositors to ensure that the funds of their depositors are protected. This means that depositors must receive their capital and interest when due. **Banks do not lend out their own money. Every cent that is lent out by banks is raised from depositors.** Consequently, banks are under duty to "lend wisely", to ensure that borrowers are able and willing to repay their loans and interest when due.

The extension of credit by banks and suppliers of goods, without being able to judge the ability of prospective customers to meet their commitments, could lead to bad debt losses⁽⁴⁾. This in turn leads to higher prices as these losses are unavoidably built into

⁴From figures furnished by the Council of Banks, it appears that there is a major credit risk in the banking sector, and that some R5 billion to R7 billion per annum is written off as bad debts, despite the conservative approach to credit by the sector.

the costing structure and thus the selling price. **Consumers who meet their obligations are disadvantaged** by both **poor credit granting standards** and **the defaults of those who**, for whatever reason, **do not meet their obligations**.

In ordinary retail the retailers do not know the purchasers and therefore need a system of referral. Most retailers (suppliers or credit grantors) apply "scoring" systems when considering a new prospective client's application for credit. Many of the larger businesses have sophisticated credit scoring systems to determine the degree of risk. Prospective clients are usually required to complete application forms⁽⁵⁾ in which they are required to answer a number of personal questions. The answers to these questions will assist the supplier to "... calculate a score" and decide whether credit should be granted to the buyer, and if so, how much and on what terms. A prospective client is usually requested to disclose her/his marital status, postal address and residential address, how long the prospective client has lived at the address given, occupation, income, type of employment, banking details and credit references. Answers to these questions could indicate to the supplier the applicant's **ability to pay**. The supplier, however, has no record of the prospective client's credit history and **willingness to pay**.

Creditors sometimes require no other assurance of repayment than the debtor's credit standing - that is, the debtor's record of honesty in fulfilling financial obligations and the debtor's current ability to fulfil similar obligations. The ability to pay does not necessarily imply that clients will honour their commitments. Credit bureaus are businesses which specialize in selling information relating to consumers' credit records or their **willingness to pay** or payment diligence. Suppliers may utilise the services of credit bureaus to obtain information regarding the credit record of consumers.

3. Credit bureaus

Credit bureaus are private businesses which acquire, record, maintain and make available to contracted subscribers information concerning the manner in which consumers conduct their credit and business dealings. The contracted subscribers are businesses, or any other body or individual, which extends credit facilities to, or have other business dealings with consumers involving the taking of a business risk in such dealings. The information acquired is recorded electronically on computers.

3.1 Credit bureaus in South Africa⁽⁶⁾

The forerunner of the modern credit bureaus in South Africa was RG Dunn & Co Inc, an American company, which commenced business in South Africa in 1901. During

⁵In most of these application forms, customers are requested to authorise the retailers (credit grantors) to disclose and transmit any information regarding the customers' accounts, including their credit worthiness and details how the accounts are conducted in meeting payment obligations to one or more credit bureaus.

⁶See also section 3.3.1: The origin of the existing retention periods

1932 RG Dunn became Dunn and Bradstreet. The major credit bureaus in South Africa and their shareholders at present are, in alphabetical order:

- Commercial Information Agency. The acronym for this entity is CIA. The Commercial Information Agency is a full subsidiary of Transunion, an American company.
- Compuscan. Standard Merchant Bank holds 25 per cent and the directors the remaining 75 per cent.
- Exp. Experian International of the United Kingdom holds 61 per cent of the shares, Scorex of Monaco holds another 33 per cent and an individual holds the remaining 6 per cent of the shares.
- ITC. Transunion of the USA holds 80 per cent of the shares and Dunn and Bradstreet of the United Kingdom holds the remaining 20 per cent.
- Kredit Inform. The directors hold 60 per cent and the remaining 40 per cent is held by Gensec.
- Medical Creditwatch. A Gordon and SE Ehrlich each have an equal shareholding of 50 per cent.
- Medinform. Medinform is a full subsidiary of Debtpack Holdings (Pty) Ltd. Debtpack is owned by AP Maas Trust and Price Waterhouse Coopers, each hold 50 per cent of the entity.
- Microlenders Credit Bureau. Thuthukani Integrated Credit Services (Pty) Ltd holds 51 per cent, KH Human 19 per cent, FJC Steffers 13.07 per cent, CW Human 4.03 per cent, LM Brits 4.5 per cent, Louhen Financial Services (Pty) Ltd 3.6 per cent, DNJ Finance CC 1.2 per cent, and Mastermind Alliance CC 1.2 per cent. The remaining 2.4 per cent of the shares have not been issued.
- Snyman and Vennote Credit Profile Bureau. This is a full subsidiary of Thuthukani Integrated Credit Services (Pty) Ltd. Thuthukani Integrated Credit Services (Pty) Ltd is part of the Tutukani Group Ltd which is listed on the Johannesburg Stock Exchange. Saambou Ltd holds 90 per cent of the Tutukani Group Ltd.
- Vericred. A Olivier holds 95 per cent of the shares and R Olivier the remaining 5 per cent.

The Credit Bureau Association (CBA) was established during 1986. The founding members were ITC, Eastvaal Credit Bureau, Greylings Credit Control and Campbells Consumer Enquiries. The founding members no longer exist as separate entities. The present members of the CBA (June 2001) are the major credit bureaus listed above.

3.2 The information sources of credit bureaus

The information on the records of credit bureaus are obtained from public and private sources.

Public sources of information are, for example, judgements of courts of law. Credit bureaus will record judgements where a credit or financial matter is in evidence. Other public sources of information are the Registrar of Companies and Close Corporations, the various Deeds Offices for title deeds and the Department of Home Affairs (for the validation of identity numbers).

Private sources of information are **consumers** and the **credit grantors**. Consumers do not directly supply information to the credit bureaus, but their information reaches the credit bureaus via credit grantors (subscribers) such as retailers, banks or other providers of goods. The subscribers transmit the information to credit bureaus by magnetic tape on a monthly basis or on-line through direct terminal links or by hard copy.

- **Consumers** who apply for credit initiate the collection of information. Such consumers are invariably required to complete credit application forms from which data is captured. The credit application forms contain several questions which the applicant must answer, for example, marital status, postal address and residential address, how long the prospective client has lived at the address given, occupation, income, type of employment, banking details and credit references. The questions asked relate to the risk assessment of granting credit. Questions about a person's religious beliefs, sexual preference and political affiliation have no relation to risk assessment. At the time of completing the application form, the consumer is informed that the information supplied will be shared with all credit bureaus.
- **Subscribers** or the credit grantors who extended the credit, monitor the payment behaviour of the debtors on a regular basis. The information supplied by the credit grantors to credit bureaus relate to **defaults** and **payment profiles**.
 - Should consumers default on their agreements with their creditors, the credit grantors will report these defaults to a credit bureau or credit bureaus. The following are general reasons why credit grantors will inform credit bureaus that consumers have defaulted. Consumers could default when:
 - they abscond, that is, disappear and cannot be traced by the credit grantor;
 - their accounts are closed by the credit grantors due to misconduct;
 - their debts have been written off;

- they are classified as "bad payers" by the credit grantors;
 - a final notice to settle their debt has been issued to consumers;
 - the credit grantors handed the matter over for legal action;
 - letters of demand were issued to the debtors;
 - cheques have been referred to the drawers;
 - goods have been repossessed; and / or
 - they are classified as "slow payers" by the credit grantors.
- **Payment profile** is the payment performance data of debtors supplied to the credit bureaus by subscribers. This information is based on the terms of the contract and the payment frequency as evidenced by receipts. If a subscriber is not a member of the CCA, it cannot access a consumer's payment profile.

In addition to the name, address, occupation, and identity number of the consumer, as a permanent record, credit bureaus will also note judgements and defaults as well as the names of all credit grantors who enquired about the consumer during the past two years. Where available, information relating to the accounts conducted by the consumer, ongoing balances, the instalments payable and the state of the account is kept on an ongoing basis.

Judgements, defaults and unacceptable (to the credit grantor) payment profiles are **adverse notations**. Most consumers refer to *any* adverse notation as **black listing**. A black-list could be a "... list of persons who are considered dangerous or who are to be punished"⁽⁷⁾ or "... an official or private list of fraudulent or insolvent people; a list of convicted, suspected or discredited persons"⁽⁸⁾ or "... a list of individuals or firms who shall not be supplied or dealt with by members of a trade association in order to enforce prices or other conditions of trading. Black lists were used to enforce resale price maintenance before the 1956 Restrictive Trade Practices Act"⁽⁹⁾. It appears from these quotes that there were indeed "lists" of various sorts and it is probably that the names on these "lists" were written in black ink.

The familiar use of the term "black-listing" to indicate that a credit bureau has adverse information about a consumer is misunderstood. No credit bureau in South Africa has a separate "blacklist" of consumers. ***It is important to note that every person who has ever applied for credit is listed with the credit bureaus. They either have a positive listing or a negative listing depending on their payment profiles.***

It is also important to understand that the subscribers (credit grantors) of credit bureaus grant or refuse credit to consumers. ***The bureaus*** supply information to their

⁷The Oxford Advanced Learners Dictionary of Current English (AS Hornby) Oxford University Press, Eleventh Impression, 1983,

⁸Odhams Dictionary of the English Language, Odhams Books Ltd, London

⁹The New World Encyclopedia, New International Publications (Pty) Ltd, Johannesburg. Fourth Edition, 1995.

subscribers, at the request of these subscribers, but they ***do not decide whether a subscriber, which could be a retailer, should grant credit to a potential buyer.***

3.3 The periods for which information must be retained

At present, credit bureaus are through their Code of Conduct committed to retain credit information for the following periods:

- Insolvencies and rehabilitations for a minimum of 10 years.
- Rehabilitation orders, whether they are granted by applications to court or automatically after the statutory period, remain on the file for five years from the date of rehabilitation.
- Judgements for debt for a maximum of five years.
- Default information supplied by subscribers for a maximum of three years or until a three year period has elapsed during which no further references to any defaults have been added to the record.
- Payment profiles are maintained on an ongoing basis and the payments for the past 24 months are recorded.

3.3.1 The origin of the existing retention periods⁽¹⁰⁾

Approximately 26 separate entities operated as "credit bureaus" in South Africa during the early 1970's and there was no consistency in the data retention periods. Some of these entities were East Rand Credit Bureau (Pty) Ltd in Springs, Eastvaal Credit Bureau (Pty) Ltd which operated in Witbank, Ermelo and Nelspruit, and Newcastle Trade Protection Bureau (Pty) Ltd which did business in Newcastle. Across the country many major towns and cities had their own credit bureaus. Some of these services were provided by the local Chambers of Commerce, for example in Durban, East London and Kroonstad.

During the mid 1970's Dunn & Bradstreet, the largest supplier of commercial credit information ⁽¹¹⁾, acquired all but three of the credit bureaus and created a national electronic database. Until this national file was created, the commercial banks in South Africa did not generally use credit bureau records in the assessment of consumer credit risk. With the creation of the national file however, the banks started to use credit bureau information and discussions took place to reach agreement on the period of data retention. The retailers and banks wanted a five year retention period for judgements and three years for enquiries. In 1981 the Dunn and Bradstreet national file was fully supported by the retail and banking communities who established user groups which, amongst other things, were asked to provide the bureaus with market needs and recommendations and changes which also covered the area of data retention periods.

¹⁰This section is based on information supplied by the CBA.

¹¹Business to business.

In the mid 1980's Dunn & Bradstreet¹²⁾ acquired a one-third equity interest in the remaining three independent bureaus and converted their files from manual to the national computer file. Again the retention periods for the data at each of these were at a variance not only to the national file standard, but also to each other. Once again enquiries were undertaken to establish the retention periods by canvassing the users or credit grantors, of the information. At the same time the CCA's consumer payment profile was being created by the major retailers and the CCA determined the data retention rules by the end of the 1980's.

The Committee was informed by the CBA that only negative information was captured by the credit bureaus in South Africa up to mid 1980's. However, today credit bureaus record all information both positive and negative. A major credit bureau has 26 million names of consumers who are verified by identity numbers on their records and the bureau estimates that about **15 million consumers** on its database **are credit active**.

3.3.2 Retention periods in other countries

The following retention periods are applicable in Australia, Netherlands, Italy, United Kingdom and the United States of America:

Australia

Data held	Period of retention
Bureau enquiries	5 years
Overdue payments	5 years
Dishonoured cheques	5 years
Court judgements	5 years
Bankruptcy records	7 years
Serious credit infringement (fraud or clear out)	7 years

All other personal data must be relevant to the purpose of collection. There is no maximum time frame for holding the data but an organisation should take steps to de-identify or delete any data no longer relevant to its activities

Netherlands

The legal data retention period is a maximum 8 years for all data. The retention period with regard to bankruptcies, is as long as the courts determine to retain the data, i.e. 20 years.

Italy

All data is held for 5 years.

United Kingdom

Data held	Period of retention
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¹²Now ITC.

Insolvencies	6 years from date of bankruptcy
Judgements	6 years from date of judgement
Defaults	6 years from default date
Payment profile	Rolling 3 year payment profile held indefinitely whilst account active then for 6 years after settlement

United States of America

The general retention period is approximately 6 years and 9 months. Data may only be retained for as long as it is needed for the purpose for which it has been collected. This usually means that data may be kept for as long as there is a contractual relationship between the client and the owner of the data (or at least a client-merchant relationship plus 6 months after that relationship has ended). There are some trade laws which demand storage of business data. These periods are well defined and range from 5 - 10 years. Until recently 6 years was the average retention period, now its 10 years for most contracts, correspondence etc (including electronically stored data).

4. The Business Practices Committee

The BPC was established in 1988 in terms of section 2 of the BPC Act. The purpose of the BPC Act was to provide for the prohibition or control of harmful business practices and for matters connected therewith. The Chairperson of the BPC reported to the Minister.

A "harmful business practice" was defined as any business practice which, directly or indirectly, had or was likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer or deceiving any consumer.

The BPC could conduct two types of formal investigations. *Firstly*, in terms of section 8 of the Act, the BPC could on its own initiative, and had to on the directions of the Minister, make such investigation as it may consider necessary into any harmful business practice **of a particular entity** which the BPC had reason to believe existed or may come into existence. *Secondly*, the BPC could make such investigation into any business practice **in general** which was commonly applied by entities for the purposes of creating or maintaining a harmful business practice. The first type of investigation was known as a section 8(1)(a) investigation in terms of the Act and the second was called a section 8(1)(b) investigation.

The BPC reported to the Minister on the result of any investigation made by it in terms of section 8. If the BPC, after an investigation, was of the opinion that a harmful business practice existed, or may come into existence and was not satisfied that the harmful business practice was justified in the public interest, the BPC in its report recommended to the Minister the action that should be taken to ensure the discontinuance of the harmful business practice. The orders of the Minister were published in the Government Gazette.

Soon after the establishment of the BPC, a former Minister of Trade and Industry and Tourism, Mr D De V Graaf, instructed the BPC to undertake an investigation in terms of section 8(1)(b) of the BPC Act into "... the advertising of goods and services, the provision, marketing and sale of furniture, and the provision, marketing, sale, lease and repair of motor cars". The BPC, however, resolved to recommend to the Minister "... that consumer codes be adopted for advertising, for motor cars and furniture, and on deceptive or unfair business practices in general"⁽¹³⁾. The BPC Report 15: "Consumer Codes" was published on 18 May 1992⁽¹⁴⁾. Two annexures to the report were "Guidelines on Unfair or Deceptive Acts or Practices" and "Guidelines on Consumer Codes".

Thereafter the BPC embarked on a self-regulation campaign and 15 consumer codes were developed and accepted between 1993 and 1995. No codes have been developed since then. It is important to note that even if these codes had not been developed, the functions of the BPC would not have been curtailed. The codes have neither a legal standing nor the force of law and investigations could have been undertaken even without reference to a particular code. What constituted a harmful business practice in industry "Abc" was not dependent on what was stated in the Consumer Code for "Abc".

The existing codes were adopted for the various industries by the BPC. All the codes supported by the former BPC, served as guidelines only for the relevant industries. All the codes state that the BPC "... will consider the provisions of the Code in assessing whether conduct complained of constitutes a harmful business practice...". The codes merely served as guidelines for the particular industries on how the participants in the industries should conduct their businesses.

4.1 The BPC Consumer Code for Credit Bureaus

The CBA approached the BPC with a view to formalising a code of conduct applicable to all credit bureaus in South Africa. The eventual code was based on the then existing CBA's Code of Practice. The CBA undertook to ensure that its members complied with the provisions of this Code. Consumers who were dissatisfied with the treatment they received from a member of the CBA were urged to submit their grievances to the CBA. Should a consumer be dissatisfied with the CBA's handling of the complaint, the matter could be referred to the BPC. Where there were complaints against credit bureaus who were not members of CBA, consumers could directly contact consumer bodies such as the former South African National Co-ordinating Consumer Council or the BPC.

When complaints were received, the BPC had to consider the provisions of the code in assessing whether the conduct complained of constituted a harmful business practice, irrespective of whether such a credit bureau was a member of the CBA. In

¹³BPC, Report for the period 1 July 1988 to 31 December 1991, p.9.

¹⁴See Notice 444 in Government Gazette 323 of 18 May 1992.

this respect the code was more than a voluntary code of conduct.

In the development of the various codes, the starting point was the existing code that applied in a particular industry. The relevant code was then edited to make it more consumer friendly. This involved protracted negotiations between officials of the BPC and the relevant association. Once the code was acceptable to the BPC and the association, the draft was published in the Government Gazette for comment. Depending on the comments which were received, the draft was amended and thereafter the final code was published. The draft Consumer Code on Credit Bureaus was published under Notice 287 in Government Gazette No 15604 on 8 April 1994 and the final code was released during February 1995.

5. The Consumer Affairs Committee

The BPC administered the BPC Act. During May 1999 several amendments were made to the BPC Act and from 14 May 1999 the amended act, called the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, has been administered by the Consumer Affairs Committee. The purpose of the Act continues to be to provide for the prohibition or control of unfair business practices.

The definition of an unfair business practice is extremely wide. It is any business practice, which, directly or indirectly, has or is likely to have the effect of harming the relations between businesses and consumers, unreasonably prejudicing any consumer, deceiving any consumer or unfairly affecting any consumer. The words "... or unfairly affecting any consumer" is an addition to the former definition of a harmful business practice, now called an unfair business practice.

The Committee is empowered to undertake the same type of investigations⁽¹⁵⁾ as those undertaken by the BPC. The Committee has wide investigative powers in terms of the Act, but the powers to issue orders are, in terms of section 12 of the Act, vested with the Minister.

The chairperson of the Committee has, in terms of section 3A of the Act, the power to appoint liaison committees, which shall advise the committee on such matters as the chairperson may determine and refer to a liaison committee for advice. A liaison committee shall consist of the number of members determined by the chairperson and the chairperson and vice-chairperson of a liaison committee shall be designated by the chairperson.

6. The meeting of the Committee on 9 May 2001

Representatives of the CBA addressed the meeting of the Committee during the morning of 9 May 2001. The CBA explained the functions of credit bureaus and its role

¹⁵See section 4.

in a modern economy. During the afternoon of 9 May 2001 senior executives of the National African Federated Chambers of Commerce and Industry addressed the Committee about the CBA and credit bureaus. The representatives of the National African Federated Chambers of Commerce and Industry were sceptical about the business practices of both the CBA and credit bureaus. They referred to various cases where it is believed that the CBA and credit bureaus operated unfairly.

The Committee resolved to undertake a section 8(1)(b) investigation into the role of the CBA with reference to its ability to enforce its existing code and credit bureaus and their compliance with the code. The Committee also resolved that the investigation should also consider whether the existing code should be amended and/or whether regulations should be formulated to regulate the industry¹⁶.

7. Notice of the investigation

The following notice of the general investigation was published under Notice 949 in Government Gazette 22298 of 18 May 2001:

"In terms of the provisions of section 8(4) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act No 71 of 1988), notice is hereby given that the Consumer Affairs Committee intends undertaking an investigation in terms of section 8(1)(b) of the said Act into the role of the Credit Bureau Association with reference to its ability to enforce its existing code and credit bureaus and their compliance with the code. The investigation will also consider whether the existing code should be amended and/or whether regulations should be formulated to regulate the industry.

Any person may within a period of thirty (30) days from the date of this notice make written representations regarding the above-mentioned investigation to: The Secretary, Consumer Affairs Committee...."

8. The response of consumers after notice of the section 8(1)(b) investigation

The notice of the investigation was published in the Government Gazette of 18 May 2001 and the vice-chairperson of the Committee issued a press statement about the impending investigation. Articles about the investigation were published in a number of newspapers and the notice of the investigation was also covered by television and national and regional radio stations.

By 25 June 2001 the Committee received more than 300 letters from consumers in response to the newspaper articles and the interviews over radio and television. The letters from these consumers were sorted alphabetically and the essence of the

¹⁶At its meeting held on 13 and 14 June 2001, the Committee resolved that it accepts as policy that it will neither develop any new consumer codes for various industries nor will it update any of the existing consumer codes

contents of the first 300 letters was categorised.

The result of this categorisation is summarised in the table hereunder. Some consumers raised more than one issue in their letters and the total number of aspects mentioned is therefore 404, an average of 1.34 per consumer. A consumer could, for example, have stated that she was retrenched but that she informed the store or bank but was nevertheless listed. Other consumers gave no detail whatsoever and merely stated, for example, "... please remove my name from the list".

Table - Aspects mentioned in complaints

Aspect mentioned	Number	% of 300
Not informed about listing	97	32.3
Paid account/goods repossessed	71	24
Retrenched/lost job/accident/illness	43	14.3
Informed the store/bank about financial problems	28	9.3
No detail - requested that name be "removed" only	27	9
Dispute about goods/services/contract cancelled	23	7.7
Unaware of reason why listed	20	6.7
Wrongfully listed	16	5.3
Denied employment	13	4.3
Black people targeted/apartheid structure	12	4
Problems around identity number	8	2.7
Admitted to being a slow payer but want name cleared	6	2
Admitted arrears, Skipped one or two payments only	6	2
Long ago: 1981, 1982 and 1991, rent boycott	4	1.3
General statements	4	1.3
Listed for a small amount R6, R8, R27.01 and R30	4	1.3
Will pay if name is cleared	4	1.3
Still obtain credit from the store that listed me	4	1.3
Comment only	3	1
Judgement long time ago/Judgment rescinded	2	0.7
Other	9	3

The last row in the table shows the aspects which were each mentioned once only. These were:

- the saleslady "forced" the consumer to buy,
- consumer sequestered but long since rehabilitated,
- lost a tender because of being blacklisted,

- threatened that name will be listed,
- will pay the outstanding amount but not all at once,
- never had account with store,
- the matter was referred to banking adjudicator,
- the person listed consumer was a minor and
- although the adverse information was cleared, the stigma of being listed remained.

It is important to note that the first four aspects named in the table, namely:

- not informed about the listing,
- paid account/repossessed,
- retrenched/lost job/accident/illness/financial problems and
- informed the store/bank about financial problems

were mentioned 239 times. This represents 79.7 per cent of the 300 consumers and 59.4 per cent of the 404 aspects mentioned.

It is possible that a structured questionnaire might have revealed other percentages. It is, for example, possible that a higher percentage of consumers informed their credit providers about their misfortunes regarding retrenchments and their illnesses. It is, however, also possible that the 14.3 per cent of consumers who experienced financial problems, could have been more or less the same if a structured questionnaire was drawn up.

The complaints received were a direct result of the coverage the notice of the investigation received in the press and electronic media. The complaints received are therefore probably not representative of the demographics of the South African population. The Committee is, however, of the opinion that the types of complaints received from consumers are representative of the complaints usually levelled at credit bureaus.

Following the publication of the Committee's intended investigation, a number of suggestions and proposals were received from interested parties. These suggestions and proposals as well as information available in the Department of Trade and Industry and the manner in which data is protected internationally have been taken into account by the Committee in its consideration of whether the existing code should be amended and/or whether regulations should be formulated to regulate the industry.

9. Regulations or a new code of conduct

The Committee accepted it as policy that it will be supportive of attempts by industry bodies to develop and police their own codes. In circumstances where there is a functioning code in a particular industry, the Committee will refer to that code and to the relevant industry body when dealing with complaints. However, the Committee has resolved that it will neither develop any new consumer codes for various industries nor will it update any of the existing consumer codes released by the BPC. The

Committee, in line with its policy regarding consumer codes, therefore does not intend to recommend to the Minister that the existing BPC Consumer Code for Credit Bureaus should be updated.

It is clear that whilst there is a need for credit bureaus there is also a need for clear guidelines for how the information should be dealt with. It is of the utmost importance that clear guidelines be determined to regulate the businesses that have this information as this could have a lasting impact on the larger society. The proposed guidelines as outlined in section 11 (recommendation) of the report, necessitate the need for an association or associations of credit bureaus to deal with and rule on disputes between consumers and bureaus, a role the CBA has been tasked with since the launch of the BPC Consumer Code on Credit Bureaus in 1995.

10. Consideration

The mandate in terms of the Act is embodied in the title of the Act which reads 'to provide for the prohibition or **control of certain business practices ...**'. The powers of the Minister are outlined in section 12 of the Act. In terms of section 12(6)(a) the Minister may, after considering a report by the Committee in relation to an investigation in terms of section 8(1)(b), **if he is of the opinion that it is in the public interest, regulate any business practice or type of business practice which was the subject of the investigation, by prescribing conditions or requirements which must be complied with in respect thereof.** The impact of information held by credit bureaus and the way the CBA is able to enforce compliance with industry standards, are issues that directly affect millions of people in the country and are therefore undisputably a business practice that, in the public interest, needs to be regulated.

Note should be taken of what the Committee's intention was with the investigation as outlined in the Government Gazette (see section 7), i.e. the role of the CBA with reference to its ability to enforce its existing Code and the credit bureaus and their compliance with the Code. The information received after the publication of the notice concentrated primarily on general complaints (see section 8) about processes not followed, dissatisfaction that the information is held at the bureaus without their knowledge and that it is made available and used for purposes other than what it was originally intended for. The comments, information and proposals received made it clear that the concerns outlined by the consumers originate with the credit grantors who forward the information to the bureaus. The conduct of the credit grantors forms an integral part of the chain of events. The credit bureaus cannot exist without their subscribers and cannot distance themselves from any incorrect information on their systems as they have an obligation to see to it that their subscribers comply with acceptable business practices and are therefore responsible for the information they make available to other subscribers and the public.

Credit bureaus are businesses which record the **credit transactions** and payment

history of individuals. Although the existing BPC Code on Credit Bureaus defined subscribers as "businesses, organisations, associations, or any other body or individual, statutory or non-statutory, which extend credit facilities to, or have other business dealings with consumers involving the taking of a business risk in such dealings", it is the Committee's view that subscribers to credit bureaus should be limited to only persons / businesses that grant credit, as the information with the credit bureaus are about credit transactions. The Committee is further of the view that other persons or businesses may still obtain the information they need through making use of the procedures prescribed in the Promotion of Access to Information Act, 2000.

The nature of the information to be stored and recorded must take account of the interests of both consumers and subscribers. All subscribers to credit bureaus should extend credit to consumers fairly and without discriminating amongst consumers on any basis, including no unfair discrimination against consumers or a group or class of consumers on the basis of gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and lack of credit history. Only information relating to the credit and business dealings of consumers may be kept on file. Information of a personal nature may not be recorded, except that which is necessary for evaluation and correlation. Bureaus have a duty to treat subscribers and consumers as fairly and impartially as possible.

Whenever a bureau compiles a record, it must follow reasonable procedures to ensure that it obtains accurate, relevant and unbiased information about the person to whom the record relates. It must maintain a record of all subscribers who receive the information for a minimum period of two years and of the source of each item of information. The Committee is of the opinion that the bureaus must take responsibility for the correctness of information recorded by them and if they are informed that the information is incorrect, it is their responsibility to take steps to rectify the position.

To ensure that credit be granted in a responsible manner and credit grantors be aware of the dangers of unsolicited credit, credit bureaus' systems have to provide information wherein a credit grantor has to record that s/he conducted a credit assessment before granting credit. For this purpose credit grantors should share as much information as possible about the credit behaviour of individuals. A credit grantor should also not grant credit to a consumer if it was responsible for any adverse information recorded against that consumer's name.

The Committee is of the opinion that disclosure is one of the most important elements of credit. In evaluating an application for credit, the ability to pay, the willingness to pay and stability should be determining factors. Reasons for refusing credit are usually over-commitment, an inability to confirm an essential detail, an inadequate risk profile (which may include adverse credit bureau information) and/or the applicant's credit profile does not match the grantor's credit risk. Credit grantors must comply with

acceptable disclosure measures. Acceptable disclosure measures must include giving unsuccessful applicants for credit the factual reason or reasons, why credit has been declined and should refrain from automatically stating that a poor credit bureau record is the reason for refusing credit. The reasons should be recorded and made available to consumers when specifically requested and should be in writing. In those cases where a credit record is the reason for the refusal of debt, the name of the credit bureau must be revealed to the consumer.

To facilitate transparency, subscribers must include in the application form for credit specific and prominent clauses to obtain the customers' permission to access data about them in assessing risk and to share their payment habits with other credit grantors. When there is a *bona fide* dispute, listing should not go ahead and where accounts are in dispute, that information must be noted at bureaus. The Committee is of the opinion that disputed information should be removed within 5 business days from the date it was brought to the attention of the credit bureaus. It is the view of the Committee that the 5 business days will afford the credit bureaus enough time to ascertain the status of the disputed information. Should the subscriber not respond within the 5 business days, the information should be regarded as inaccurate and should be deleted. Where a borrower has fully discharged arrears and resumed payment of full instalments in accordance with the contract, this information should also be made available to bureaus. Whilst privacy of information between a bank and its customers is maintained, negative information regarding the borrower's credit record may be supplied to credit bureaus in the public interest to protect other credit grantors.

The Committee is also very strongly of the view that consumers must be made aware that they are responsible to declare all their debt and repayments to credit grantors. They are expected to make full disclosures of all information which impacts on the ability of the credit grantors to make informed credit decisions and in this regard, subscribers can ask consumers to confirm full disclosure. Credit grantors should inform consumers about what processes are followed when granting or refusing credit. More transparency is imperative, such as that credit grantors utilise information not provided by applicants to evaluate their credit worthiness. Consumers should be able to verify the additional information to ascertain whether it is correct should it have a negative impact on the application. These processes should be a prerequisite for becoming a subscriber to the credit bureaus.

A number of persons questioned the period information is kept on the credit bureaus' records. In section 3 the periods and the origin of the retention periods are discussed. At present credit information is retained for the following periods:

- Insolvencies / sequestration and rehabilitations for a minimum of 10 years.
- Rehabilitation orders, whether they are granted by applications to court

or automatically after the statutory period, remain on the file for 5 years from the date of rehabilitation.

- Judgements for debt for a maximum of 5 years from the date of judgement.
- Default information supplied by subscribers for a maximum of 3 years or until a three year period has elapsed during which no further references to any defaults have been added to the record.
- Payment profiles are maintained on an ongoing basis and the payments for the past 24 months are recorded.

Although a direct comparison should not be made with the retention periods in other countries, the Committee nevertheless is of the opinion that the retention periods in South Africa compare favourably with those in the countries mentioned in section 3.3.3 and is of the view that the retention periods should for the time being be retained as is. The Committee is also of the opinion that the period for which administration orders should be kept, must be the same as the period for judgements, i.e 5 years after lapsing or rescission thereof and if not lapsed or rescinded, for 10 years.

Credit grantors must follow due process and should inform debtors prior to listing as defaulters in the public domain section by way of a prominent clause on the original application form and by written notice to the last known address, at least 28 days prior to forwarding the information to a credit bureau. One of the problems in South Africa is a lack of capacity to track down and/or notify default debtors. The Committee wishes to stress the fact that consumers have an obligation to notify credit grantors as soon as possible of a change in their addresses.

It is known that many judgements are taken with a minimum of information which could lead to wrong matches by bureaus. The Committee is of the opinion that only judgements wherein the initials and the identity numbers of the persons involved are stated may be recorded by the credit bureaus. The Committee will bring its concern to the attention of the Rules Board for Courts of Law.

The Committee is of the view that credit bureaus and its subscribers must display on their premises the procedures of viewing a record and have a detailed brochure available on how to correct or improve one's credit profile as well as the names, addresses and telephone number of bodies to whom complaints could be directed.

The Promotion of Access to Information Act, 2000 defines a requester and prescribes the procedures to be followed for obtaining information held by private and public bodies. The credit bureaus are not exempted from these requirements and strict

adherence to the legislation is expected. It is also expected that a consumer will be provided with his/her information free of any charge.

The Committee is also of the view that a bureau must upon request disclose to a consumer, who has satisfied the bureau regarding his or her identity through an identification process that should not be too cumbersome or unduly difficult, the nature and substance of all information and the sources of the information in its files on that consumer at the time of the request. A bureau must make the disclosures required during normal business hours and on reasonable notice. The disclosures required must be made to the consumer in person, provided he or she appears in person and furnishes proper identification. Written disclosure in response to a telephonic and/or written request may be made only if the bureau is satisfied that the request is from the consumer concerned.

A bureau must provide trained personnel to explain to a consumer any information furnished and must assist consumers by providing reasonable advice on how to obtain changes to their records where possible.

Bureaus are expected to have fair procedures in place in case a consumer disputes the completeness or accuracy of any item of information contained in his/her file. If after an investigation the information is found to be inaccurate or can no longer be verified, the bureau must delete the information promptly and notify all relevant subscribers accordingly. Should the investigation not resolve the dispute, the consumer may file a brief statement setting out the nature of the dispute. Where the consumer does not dispute the information but does have a reasonable explanation for the occurrence(s), the bureau must place a brief explanation on file provided satisfactory evidence corroborating the explanation is produced and the explanation is not frivolous or irrelevant.

In the event of a dispute between a consumer and a bureau, which is a member of an association of credit bureaus, about the accuracy or relevance of information on file, the bureau must request the association to investigate the matter and give a ruling on it. In the case of a dispute between a consumer and a bureau that is not a member of an association, the Consumer Affairs Committee or any provincial consumer affairs office may be approached.

As mentioned in section 8 of the report, 4,3 per cent of the 300 letters received from consumers in response to the publication of the investigation, mentioned that they were denied employment because of a bad credit record. Information received in this regard indicated that employers do employment application reference checks at credit bureaus for two specific purposes, i.e to verify ID and address details and to determine whether the applicant has a history of poor personal credit management (defaults, judgements and/or insolvency). With regard to banks, it is mentioned that as banks are in a fiduciary relationship with their depositors, the banking system is based largely

on trust and confidence and management has a statutory requirement to be "fit and proper". It was also brought to the Committee's notice that both the Labour Relations Act and the Employment Equity Act establish mechanisms where employment related decisions can be tested against principles of equity, and where the complex balancing of employer rights to know and employee rights to privacy can be balanced. These mechanisms require employers to seek information only for a lawful, specified and justifiable purpose. The same mechanisms are used to balance rights to equality in the workplace with the rights to pursue business efficiency. The Committee accepts that a consumer's credit history is relevant for certain positions in the banking system. The Committee has also taken note of the Promotion of Access to Information Act, 2000, which in effect allows an employer, with the consent of the applicant, to obtain the information from the credit bureaus.

The Committee acknowledges the need for education campaigns for both consumers and credit grantors. Education should be ongoing. Education is the responsibility of the government, private sector and civil society. A forum, representing the above stakeholders, needs to be established to ensure a co-ordinated approach to education.

A specific proposal was made for the appointment of an Industry Consumer Protector to investigate consumer complaints and to award redress measures. The Committee is in favour of the appointment of an Industry Consumer Protector. It is, however, the Committee's view that the decision regarding the structure and the responsibilities of the Industry Consumer Protector should be taken with all relevant stakeholders once they have had the opportunity to evaluate the compliance of the credit bureaus with the guidelines outlined in section 11 (recommendations). To assist in this regard, the Committee favours the appointment of a "Credit Bureau Liaison Committee" as provided for in section 3A of the Act, representative of at least the following institutions / sectors: Consumer Advocacy Group, relevant established forums, Business Chamber, Trade Union, Retail Association, Banking sector, association(s) of credit bureaus, a nominated representative for the credit bureaus which are not members of an association of credit bureaus and government.

11. Recommendation

In view of the above, it is accordingly recommended that the Minister in terms of section 12(6) of the Act regulate the business practices of credit bureaus by prescribing the following conditions and requirements. For the purpose of the conditions and requirements, (i) "contracted subscriber" means a credit grantor accepted by a credit bureau as a subscriber; (ii) "credit bureau" means a business which acquires, records, maintains and makes available to contracted subscribers information concerning the manner in which consumers conduct their credit and business dealings; (iii) "credit grantor" means a business or any other person who extend credit facilities and (iv) "requester" means a person as defined in the Promotion of Access to Information Act, 2000, having access to all the information a contracted

subscriber has access to.

1. A credit bureau may only register credit grantors which extend credit to consumers fairly and without unfair discrimination, as subscribers.
2. A credit bureau may only keep information relevant to the credit and business dealings of consumers on file. Information of a personal nature may not be recorded, except that which is necessary for evaluation and correlation.
3. Whenever a credit bureau compiles a record, it must follow reasonable procedures to ensure that it obtains accurate, relevant and unbiased information about the person to whom the record relates.
4. A credit bureau must maintain a record of all subscribers who receive the information for a minimum period of two years and of the source of each item of information.
5. A credit bureau shall take responsibility for the correctness of information recorded by it and must therefore take reasonable steps to rectify information if incorrect information is brought to its attention.
6. Credit bureaux' systems must provide information wherein a credit grantor has to indicate that s/he conducted a credit assessment before granting credit.
7. A credit bureau must ensure that its name will be revealed to the consumer in the case where the credit record is the reason for the refusal of debt.
8. A credit bureau should not accept information from subscribers unless a customer's permission has been obtained to access data concerning him/her in assessing risk and sharing his/her payment habits with other credit grantors.
9. A credit bureau may not request information regarding the amount of credit applied for by a client.
10. When there is a *bona fide* dispute, a credit bureau shall not go ahead with listing.
11. Where accounts are in dispute, such dispute must be noted and made available to subscribers. A credit bureau must remove the disputed information within 5 business days from the date it was brought to the attention of the credit bureaux if the correctness thereof cannot be verified. In this regard, if the requested information is not received from the subscriber within the 5 business days, the information will be regarded as inaccurate.
12. Where a borrower has fully discharged arrears and resumed payment of full instalments in accordance with the contract, such information shall be made available by the credit bureaux to all subscribers. This information must be provided simultaneously with the credit history of the consumer and credit

bureaus need to ensure that their systems can accommodate this principle.

13. Where the consumer does not dispute the information but does have a reasonable explanation for the occurrence(s), the credit bureau must place a brief explanation on file provided satisfactory evidence corroborating the explanation is produced and the explanation is not frivolous or irrelevant.
14. A credit bureau shall only accept subscribers who inform consumers about the processes followed when granting or refusing credit, such as the utilization of information not provided by applicants to evaluate their credit worthiness and that consumers are given the opportunity to verify the additional information to ascertain whether it is correct, should it have a negative impact on the application.
15. Access to consumers records must be made available by a credit bureau to a requester as defined in the Promotion of Access to Information Act, 2000, when requested in the prescribed form free of any charge.
16. A credit bureau shall only accept subscribers that follow due process before default reporting takes place. In this regard subscribers / credit grantors should inform debtors prior to listing as defaulters in the public domain section by way of a prominent clause on the original application form and by written notice to the last known address, at least 28 days prior to forwarding the information to a credit bureau.
17. Whilst privacy of information between a bank and its customers is maintained, negative information regarding the borrower's credit record may be supplied to a credit bureau in the public interest to protect other credit grantors.
18. A credit bureau must display on their premises the procedures to view a record and have a detailed brochure available on how to correct or improve one's credit profile as well as the names, addresses and telephone number of bodies to whom complaints can be directed. Complaints handling procedures and the manner in which complaints may be lodged must be prominently displayed at the premises of the credit bureaus.
19. Only judgements wherein the initials and the identity numbers of the persons involved are stated may be recorded by the credit bureaus.
20. A credit bureau must ensure that subscribers prominently display at their premises complaints handling procedures and the manner in which and where complaints may be lodged.
21. A credit bureau is not exempted from the requirements of the Promotion of Access to Information Act, 2000 and strict adherence to the legislation is obligatory.
22. A credit bureau must upon request disclose to a consumer, who has satisfied the credit bureau regarding his or her identity, which identification process

should not be unduly cumbersome or difficult, the nature and substance of all information and the sources of the information in its files on that consumer at the time of the request. A credit bureau must make the disclosures required during normal business hours and on reasonable notice. The disclosures required must be made to the consumer in person, provided he or she appears in person and furnishes proper identification. Written disclosure in response to a telephonic and/or written request may be made only if the bureau is satisfied that the request is from the consumer concerned.

23. A credit bureau must provide trained personnel to explain to a consumer any information furnished and must assist consumers by providing reasonable advice on how to obtain changes to their records where possible.
24. In the event of a dispute between a consumer and a credit bureau, which is a member of an association of credit bureaus, about the accuracy or relevance of information on file, the credit bureau must request the association to investigate the matter and give a ruling on it. In the case of a dispute between a consumer and a credit bureau that is not a member of an association, the Consumer Affairs Committee or any provincial consumer affairs office may be approached.
25. Credit information may not be retained for longer than the following periods:
 - Insolvencies / sequestration and rehabilitations for a period of 10 years.
 - Rehabilitation orders, whether they are granted by applications to court or automatically after the statutory period, remain on the file for 5 years from the date of rehabilitation.
 - Judgements for debt for a maximum of 5 years from date of judgement
 - Administration orders for 5 years after lapsing or rescission thereof and if not lapsed or rescinded, for 10 years.
 - Default information supplied by subscribers for a maximum of 3 years or until a three year period has elapsed during which no further references to any defaults have been added to the record.
 - Payment profiles are maintained on an ongoing basis and the payments for the past 24 months are recorded.

It is further recommended that the Minister consent to the appointment of a "Credit Bureau Liaison Committee" as provided for in section 3A of the Act, representative of at least the following institutions / sectors: Consumer Advocacy Group, relevant established forums, Business Chamber, Trade Union, Retail Association, Banking sector, CBA a nominated representative for the credit bureaus which are not members of the CBA and government with the view to assist with the determination of the structure and responsibilities of an Office for an Industry Consumer Protector and to evaluate the compliance of the credit bureaus with the above guidelines.

It is also recommended that education campaigns should be undertaken to educate both consumers and credit grantors. Education should be ongoing. Education is the responsibility of the government, private sector and civil society. A forum, representing the above stakeholders, needs to be established to ensure a co-ordinated approach to education.

Signed by

PROF T A WOKER

VICE - CHAIRPERSON: CONSUMER AFFAIRS COMMITTEE