

TRANSUNION ITC (PROPRIETARY) LIMITED



Submission to the Parliamentary Portfolio Committee for Trade and Industry regarding the National Credit Bill

1. EXECUTIVE SUMMARY

TransUnion supports the objectives of the National Credit Bill. The advancement of the social and economic welfare of South Africans and a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry will be beneficial to consumers and commerce.

Measures introduced by the Bill such as the registration of credit bureaux and the imposition of certain norms and standards proposed by the Bill will promote and protect the reputation of the credit bureaux industry.

In these submissions TransUnion has proposed certain amendments to the Bill which it believes may be implemented without compromising the purpose and objectives of the Bill.

1.1 Section 70(6) provides:

"It is an offence for a credit bureau to contravene this section by knowingly or negligently providing a report to any person containing inaccurate information."

1.1.1 It is submitted that criminal sanction is not an appropriate remedy. The imposition of criminal consequences results in a mechanism not only difficult to enforce but with such drastic implications as to create a disproportionately high risk for credit bureaux.

1.1.2 Prosecution and conviction will be time consuming and costly for all concerned. The onus of proof which the State will have to discharge will be proof beyond a reasonable doubt.

1.1.3 The implementation and enforcement of other legislation illustrates that frequently administrative remedies provide more flexibility and better enforcement than reliance on the criminal justice system.

- 1.1.4 TransUnion submits that enforcement should be decriminalised. The administrative enforcement mechanism introduced by the Bill and involving enforcement by the National Consumer Tribunal constitutes an adequate and effective means of enforcing the Bill.
- 1.2 Sections 70(2)(g) and 70(4) provide:
- “70(2) A registered credit bureau must -*
- (g) issue a report to any person who requires it for a prescribed purpose or a purpose contemplated in this Act;*
- “70(4) The Minister may prescribe standards and fees for the filing, retention and reporting of consumer credit information by credit bureaux, in addition to, or in furtherance of, the requirements set out in this section.”*
- 1.2.1 The sections are expressed in very broad terms and could be interpreted as compelling credit bureaux to provide reports to any customer upon demand as well as empowering the Minister to regulate the pricing of reports provided by credit bureaux to its commercial users i.e. credit providers.
- 1.2.2 Credit providers have substantial bargaining power and it is submitted that a competitive market, subject to the prohibition of the abuses of dominance prescribed by the Competition Act, will best determine the fee payable by commercial users of credit bureau services. TransUnion understands that it is Government’s policy to regulate pricing only where there are compelling policy reasons for such intervention.
- 1.2.3 It is submitted that the Bill should be clarified to make it clear that the price of services provided by credit bureaux will be negotiated with their customers. Alternatively it should be made clear that the fees determined by the Minister will be limited to fees relating to the provision of credit information directly to a “consumer” or the filing of consumer credit information provided by a “consumer”.
- 1.3 The Bill does not cater for credit resellers who purchase credit information and reports from credit bureaux and then sell such information to their commercial clients. Provision should be made for the supply of credit information through credit resellers and for the registration and regulation of credit resellers.
- 1.4 Section 68 of the Bill provides for the right to confidential treatment:
- 1.4.1 The section should make it clear that sub-section 68(1) does not preclude a credit bureau from providing consumer credit information for the purposes contemplated by section 70 of the Bill. As thousands of requests for credit are received each day and the Bill requires credit providers to assess the credit applicant’s debt

repayment history such a requirement would hamper and delay the extension of credit to consumers.

Alternatively, if it is the intention of the Bill to include such a requirement, the Bill should ensure that the onus to obtain any such consents rests with those who interact with consumers, that is, with the credit providers.

- 1.4.2 The comments in 1.1 above regarding the inappropriateness of criminal sanction and the benefits of administrative remedies to ensure the efficient enforcement of the Bill are equally applicable to the criminal offence established by section 68(2)(b).
- 1.5 The Bill fails to distinguish between natural persons and corporate entities. While the procedures to protect consumers may be appropriate for individual consumers, the equivalent considerations are not applicable to corporate entities, the credit information of which should be subject to a higher degree of transparency.

2. INTRODUCTION

- 2.1 With a heritage that stretches back over a century, TransUnion is Southern Africa's most experienced and leading provider of data based business intelligence. TransUnion develops and manages complex, multiple databases of relevant and current information on both consumers and businesses. In the process, TransUnion manages more data than any company in the risk information industry. Through the gathering and intelligent analysis of data from its databases and the harnessing of the latest technology, TransUnion develops risk management tools, services and solutions that allow its clients to make objective and effective business decisions that minimise their risk.
- 2.2 TransUnion is actively involved in consumer education helping consumers to understand the importance of managing their own credit profiles. We work closely with NGOs, private organisations and various consumer organizations in this respect. Ongoing communication and education is also ensured through train the trainer programmes, radio and television discussions, workshops, newspaper articles and dissemination of educational information. Our commitment to South Africa is also demonstrated through additional activities, such as support for specific charities, sponsored education for our employees and their children, programmes to support growth and development of employees, SMME seminars and training, graduate recruitment and in-house training, and focussed BEE activities.
- 2.3 TransUnion welcomes and supports the Bill's goal of transforming the credit industry and in so doing empowering the people of South Africa by making credit facilities available to the broader South African community. TransUnion is conscious of the role which credit bureaux play in the development of a healthy credit market and therefore understands the

important role which the credit reporting industry has to play in achieving the Bill's objectives.

- 2.4 While TransUnion endorses the objectives of the Bill and recognises the need for transformation of the South African credit industry, including the need to regulate credit bureaux, TransUnion believes that certain provisions of the Bill create unintended consequences which have the effect of undermining the effectiveness of credit bureaux and therefore ultimately the Bill's objectives.
- 2.5 TransUnion is committed to engaging constructively with the Government in order to address these issues and has in the spirit of this commitment chosen to bring these issues to the attention of Parliament by way of these submissions.

3. SUBMISSIONS IN DETAIL

3.1 SECTION 70(6)

Section 70(6) of the Bill provides:

"It is an offence for a credit bureau to contravene ... section [70] by knowingly or negligently providing a report to any person containing inaccurate information"

When read with section 161, it is apparent that section 70(6) imposes extensive criminal liability upon credit bureaux for the reporting of inaccurate information.

The sub-section could result in the commission of an offence by a credit bureau even where, for example, a company has well established procedures to ensure accurate reporting but an employee fails to follow the correct procedures prescribed by the company.

TransUnion recognises the need for accuracy in its reporting and supports the Bill's intended goal of achieving the best possible standards of accuracy in the reporting of consumer credit information.

It is TransUnion's submission however that the value of consumer credit information lies not only in its accuracy but also in its completeness. The imposition of extensive criminal liability for inaccurate reporting is likely to force credit bureaux to impose such stringent constraints upon the accuracy of information that the completeness of such information, and ultimately its usefulness to credit providers, will be adversely affected.

It will limit the credit information available to the market, make credit providers more cautious and in turn hinder the granting of credit to credit worthy borrowers. The Bill could address the concerns of credit bureaux while promoting accurate reporting by decriminalising the enforcement of section 70 and conferring the responsibility for enforcement of the section solely upon the National Consumer Tribunal. This option would prevent the South African criminal justice system from being unnecessarily burdened by

the prosecution of offences under the Bill and would result in the creation of a more practical enforcement mechanism.

3.2 **SECTION 70(2)(G) AND SECTION 70(4)**

Section 70(4) provides:

“The Minister may prescribe ... fees for the filing, retention and reporting of consumer credit information by credit bureaux ...”

In terms of section 70(2)(g) credit bureaux *“must ... issue a report to any person who requires it for a prescribed purpose or a purpose contemplated in [the] Act”*.

It appears to TransUnion that these sections were introduced to protect the rights of ordinary consumers in relation to the filing and access of information. Section 70(2)(g) seems to have been introduced to ensure that consumers receive free annual reports as required by the Act. Section 70(4) appears designed to prevent the charging of excessive fees to consumers as a means of depriving them of their rights. TransUnion has no objection to these goals and indeed supports them.

The sections are however drafted in such broad terms that they may be interpreted so as to compel credit bureaux to provide credit reports to any customer upon demand as well as to confer upon the Minister the right to regulate the pricing of credit reports provided by credit bureaux to their commercial users i.e. credit providers.

TransUnion believes that most commercial users are commercially and legally sophisticated and therefore not in need of the same legislative protection as consumers. The pricing of products to commercial users is unlikely to have any impact upon ordinary members of the public.

The imposition of pricing constraints insofar as they relate to the commercial users of credit information will stifle competition and innovation in the industry. Therefore it is proposed that the section should be redrafted to ensure that the control of fees properly addresses the objectives of section 70(2)(g) without inadvertently limiting the right of credit bureaux to negotiate with its commercial customers.

3.3 **REGULATION OF CREDIT RESELLERS**

It has become established practice in the South African credit reporting industry for credit bureaux to distribute credit information through the medium of credit resellers. Credit resellers purchase reports and credit information from credit bureaux and then sell such reports to their clients in the same form as initially supplied by the credit bureau. The resellers act as a conduit for the supply of credit information to credit providers. In essence credit resellers distribute credit information products manufactured or compiled by credit bureaux.

Credit resellers fulfil an integral and indeed important function in the South African credit reporting industry, by:

- making consumer credit information more conveniently accessible to credit providers;
- reducing the cost of providing consumer credit information to small and medium business enterprises;
- allowing credit information to be dispersed as widely as possible;

thereby making credit information more widely accessible and creating greater opportunity for the granting of credit to credit worthy borrowers by a wider range of credit providers.

The Bill defines a credit bureau as “a person required to apply for registration as such in terms of section 43(1)”. Section 43 in turn requires the registration of:

“A person [who] ... engages for payment, other than as a credit provider or an employee of a credit provider, in the business of:

(a) receiving reports of, or investigating:

(i) credit applications;

(ii) credit agreements;

(iii) payment history or patterns; or

(iv) personal financial information,

relating to consumers or prospective consumers, other than reports of court orders or reasons for judgement or similar information that is in the public domain;

(b) compiling and maintaining data from reports contemplated in subparagraph (i); and

(c) issuing reports concerning consumers or other natural persons based on information or data referred to in this paragraph”

Given the function which credit resellers fulfil in the credit reporting industry, credit resellers do not play any role in the accumulation and processing of consumer information for the purpose of issuing reports or issue reports of their own accord. Credit resellers therefore cannot be said to be credit bureaux for the purposes of the Bill.

Apart from not being covered by the definition of a credit bureau, resellers are not provided for by the Bill. Their business is however impacted upon materially by the provisions of section 68 which provide that:

“Any person who, in terms of this Act, receives, compiles, retains or reports any confidential information pertaining to a consumer or prospective consumer must protect the confidentiality of that information, and in particular, must ... use that information only for a purpose permitted or required in terms of this Act, other national legislation, or applicable provincial legislation;”

Section 1 defines “confidential information” as “*personal information that belongs to a person and is not generally available to or known by others*”. This broad definition naturally includes information of the nature supplied by credit bureaux to credit resellers.

The supply of confidential information by a credit bureau to a reseller and the onward supply of that information by the reseller are not at present contemplated by the Bill. Neither purpose can therefore be said to constitute a “purpose permitted or required in terms of the Act”.

Section 68 therefore has the effect that credit bureaux cannot supply consumer credit information to credit resellers and credit resellers in turn are unable to supply such information to their clients.

3.4 CONFIDENTIAL INFORMATION

3.4.1 It is not clear whether the disclosure or release of consumer credit information by a credit bureau as contemplated by section 70 is a report or release of information as contemplated by section 68(1)(b)(i) and as such is subject to the requirement that the provision of the information be directed by the instructions of consumer or an order of a court. It is important that this should be clarified.

3.4.2 It is submitted that it would not be appropriate to include a requirement of this nature as such a requirement would hamper and delay the provision of credit and increase costs in this regard. However, should it be considered that such a requirement is appropriate then it is submitted that the Bill will best achieve this end by imposing any obligation to consent on the credit provider as the consumer interface is with credit providers who are accordingly best placed to obtain instructions regarding the release of confidential information.

3.5 CORPORATE ENTITIES UNDER THE BILL

3.5.1 Although the Bill in certain respects draws a distinction between natural persons and corporate entities, the Bill fails to make any such distinction when dealing with credit bureaux. The effect of this is that all the rights and obligations of natural persons and credit bureaux *vis-à-vis* each other are applicable to corporate entities as well.

3.5.2 Although TransUnion accepts that many of the rights and obligations created by the Bill in relation to credit bureaux are

appropriate for the purpose of safeguarding consumer rights, corporate entities are not in need of the same protections conferred upon individual consumers. The position of an individual conducting their personal affairs in the market cannot be equated with that of a corporate entity conducting its day to day commercial activities. Corporate entities do not have the same vulnerabilities as natural persons and therefore do not require the same protections as natural persons.

- 3.5.3 The confidentiality of small and medium businesses will generally be protected in the same manner as the confidential information of individuals because credit providers will generally insist that individual members, shareholders and directors provide surety for the debts of a small or medium business. As such the extension of credit to small and medium enterprises will generally require that the consent of the members, shareholders or directors be given. To the extent that there remains concern that small and medium businesses require protection equivalent to that afforded to individuals it is submitted that this could be specifically dealt with by regulation.

4. AMENDMENTS PROPOSED

On the basis of the submissions set out above, TransUnion proposes that the following amendments to the Bill:

4.1 SECTION 70(6)

The following paragraph should replace section 70 (6):

“Any person may apply in the prescribed manner and form to the National Credit Regulator to investigate any contravention of this section by a credit bureau.”

Alternatively TransUnion submits that the above end would also be achieved by deleting Section 70 (6) in its entirety.

4.2 SECTION 70(2)(G) and 70(4)

Section 70(4)

“The Minister may prescribe fees for services rendered by credit bureaux to a consumer and standards for the filing, retention and reporting of consumer credit information by credit bureaux, in addition to, or in furtherance of, the requirements set out in this section.”

and 70(2)(g)

- (g) issue a report to any person who requires it for a prescribed purpose or a purpose contemplated in this Act provided that a credit bureau need only provide a report to a credit provider or other commercial

user on terms and conditions agreed with that credit provider or commercial user,

4.3 REGULATION OF CREDIT RESELLERS

In order to cater for credit resellers TransUnion suggests that the Bill be amended by:

4.3.1 the introduction of a definition of a credit reseller as follows:

“credit reseller means a person engaging for payment, other than as a credit provider, in the business of:

(a) purchasing reports of:

(I) credit applications;

(II) credit agreements;

(III) payment history or patterns; or

(IV) personal financial information

relating to consumers or prospective consumers, other than reports of court orders or reasons of judgement or similar information that is in the public domain from credit bureaux; and

(b) reselling reports contemplated in sub-paragraph (a) to its clients.”

4.3.2 the incorporation of a section dealing with credit resellers as follows:

“Section 72A – Credit Resellers

(1) Credit bureaux may sell to credit resellers who may purchase reports of:

(a) credit applications;

(b) credit agreements;

(c) payment history or patterns; or

(d) personal financial information

relating to consumers or prospective consumers and such credit resellers may resell such reports to any person to whom a registered credit bureau is authorized to supply consumer credit information.”

4.4 REGULATION OF CONFIDENTIALITY

4.4.1 A new section 68(3) should be added which should provide:

“(3) Nothing in this section prohibits a credit bureau from providing consumer credit information contemplated by section 70(1) where the person to whom the information is given warrants that the report or release is authorised by the consumer or prospective consumer concerned.”

4.4.2 Section 68 (2) (b) should be deleted and the following new subsection 68(4) inserted:

“(4) Where a person discloses confidential information in contravention of subsection (1), or fails to disclose confidential information in contravention of paragraph 2(a), any aggrieved person may apply in the prescribed manner and form to the National Credit Regulator to investigate a contravention of this section.”

4.5 REGULATION OF CORPORATE ENTITIES

4.5.1 In order to ensure that corporate entities are, for the purposes of credit bureaux not dealt with on the same basis as natural persons, TransUnion suggests the incorporation of the following section 67A.

“All rights which in terms of this Part are conferred upon persons as consumers and all obligations which are imposed in terms of this part upon credit bureaux in relation to persons as consumers shall, apply solely to natural persons.”