

Submission by the National Credit Regulator (“NCR”) and Department of Trade and Industry (“dti”) on the Proposed Credit Information Amnesty.

Disclaimer

While it was not possible to consult extensively in person with key stakeholders, such as credit providers and credit bureaux, reference has been made to a range of recent studies and further consultation with stakeholders and other policy makers in related industries is envisaged.

Prepared by: Stephen Logan, Confidential Information Systems (Pty) Ltd, a division of Logan Attorneys, 13 Chaucer Avenue, Senderwood, Johannesburg, Registration Number 2010/020681/07, Director: S Logan, Tel 011 453-0922, Fax 086 686-9134

1 INTRODUCTION

- 1.1 Many South Africans are either highly indebted or credit impaired or both. This is surprising given the stringent provisions of the National Credit Act (Act 34 of 2005) (“NCA”) which require that affordability testing be done and which censure reckless lending. Despite these consumer protection provisions, nearly half of all credit active consumers are credit impaired and most personal finance indices and living standards reflect that South Africans’ personal finances are unhealthy.
- 1.2 Some of the aims of the NCA, as set out in section 3¹, have not been realised and additional measures to achieve the purposes of the NCA are called for.
- 1.3 It is therefore appropriate for the National Credit Regulator and Government to attempt to address the underlying problems which have given rise to this situation and seek to find long term solutions which will restore South Africans to credit health and financial wellness.
- 1.4 This submission seeks principally to explore the merits and challenges of a proposed credit information amnesty and to make recommendations in this regard. This submission also seeks to build a framework for discussion as to what can and should be done to enhance access to credit in a responsible manner.

¹ See extract from NCA attached

- 1.5 Many consumers are not able to access credit despite their having overcome financial hardship and they should not be prevented from accessing credit which, when properly managed, is a valuable tool in building wealth.
- 1.6 There is therefore a clear need to weigh up the dangers of promoting reckless credit with the advantage of enhancing access to credit.
- 1.7 It is submitted that, it is appropriate to recognise that credit has been both consumed and advanced recklessly, whether intentionally or otherwise, contrary to the intent of the NCA and to the detriment of hundreds of thousands, if not millions, of consumers.
- 1.8 For a myriad of reasons, nearly half of all consumers of credit have chosen to take on credit that they cannot afford and have defaulted on payment. Likewise, had some credit providers exercised greater caution, it is likely that there would be less non-payment and the massive levels of credit impairment would have been substantially lower.
- 1.9 It is also clear that the global financial crisis and the consequent recession and slow subsequent economic recovery in South Africa has played a significant role in the non-payment of credit obligations and the rapid growth in credit impairment.
- 1.10 Significantly, despite the fact that nearly half of all credit active South Africans are credit impaired, there has been massive growth in unsecured lending.

2 RATIONALE FOR THE PROPOSED AMNESTY

2.1 To achieve the goals of the NCA by correcting the limited effect of the first credit information amnesty carried out in terms of the regulations issued in Government Gazette 28864, Vol 491 on 31 May 2006 (the “first amnesty”).²

2.1.1 The first amnesty affected the credit records of approximately 8 million consumers³ but was calculated to only result in an average of 3.2% more credit applications being accepted.

2.1.2 Given that half of all credit applications are declined, it is believed that the proposed credit amnesty would need to be significantly more extensive in scope than the first amnesty if it is to result in substantially more credit applications being accepted.

2.1.3 It is submitted that the proposed amnesty is required to redress the failure of the first amnesty to adequately benefit credit impaired consumers, as intended by section 3 of the NCA.

2.2 To provide renewed opportunity through the removal of barriers to finance to those adversely affected by the global economic recession during the period 1 January 2006 to 31 December 2011⁴ (the “Period”).

² *Results of the Experian-Scorex study into the impact of the proposed credit information amnesty* (the “Experian-Scorex Study”) found that, on average, only 3.2% more credit applications were accepted as a result of the first amnesty. The Experian-Scorex Study is annexed to this submission as Annexure 1; see also TransUnion Newsletter dated June 2007 which states under the heading “Amnesty”: “We are confident that minimal impact will be felt by Credit Providers, however this may differ slightly depending on different customer profiles.”

³ Experian-Scorex Study

2.2.1 The South African economy was greatly impacted by the global financial crisis. The recession had a significant negative impact on the South African economy and millions of consumers were adversely affected.

2.2.2 During the Period, many businesses were forced to close or retrench staff and many South Africans found themselves unemployed or without the income to properly service their financial commitments. The global recession was outside the control of consumers and it is within the prerogative of Government to come to the financial aid of those citizens who were adversely impacted by the global financial crisis through the proposed amnesty.⁵

2.3 To assist credit impaired consumers to both access credit and pay less for it.

2.3.1 There is a proven correlation between the degree to which consumers' credit records are impaired and the likely cost of the credit they are granted. It is common cause that the greater the degree of impairment the greater the cost of credit is likely to be. Likewise it is accepted that historical credit information, stored by credit bureaux, is the most significant variable used in assessing the risk of default and the consequent pricing of credit.

⁴ <http://www.southafrica.info/news/business/33972.htm> and http://en.wikipedia.org/wiki/2008%E2%80%932012_global_recession

⁵ While it was initially believed that South Africa had been largely shielded from the adverse effects of the large scale credit default, it is now clear that too much reliance was had on the NCA to shield consumers. The subsequent down-turn in the South African economy resulted in growing impairment in credit collections and a significant growth in the impairment of consumer credit records throughout the Period.

- 2.3.2 The exact correlation between the level of impairment and the risk of default is less certain. Clearly there is a high correlation in many cases and a poor correlation in others.
- 2.3.3 While it is likely that historical payment default/s will have a high correlation with an ongoing propensity to default on payment, the economic and personal circumstances prevailing at the time of default are not taken into consideration when determining the risk of default.
- 2.3.4 The risk of default is therefore premised largely on the prior payment history irrespective of broader macro-economic or even personal micro-economic circumstances. Factors such as retrenchment, divorce, sickness, declining commission based income, unplanned expenses such as a new child or declining GDP and other macro-economic variables, such as the global economic recession, are simply not part of credit score cards and such personal and macro-economic information is neither collected nor weighted in credit assessments.
- 2.3.5 This failure to take into effect personal and macro-economic factors when granting or declining credit application provides a rationale for the proposed amnesty as a means to redress imbalances, correct distortions and redress inequality resultant from imperfect information⁶.

⁶ http://en.wikipedia.org/wiki/Perfect_information

2.4 To assist those consumers who are unable to obtain employment due to the impairment of their credit records.

2.4.1 There is a direct relationship between employment prospects and credit impairment. Although the NCA makes specific provision⁷ that prospective employees' credit records not be taken into consideration unless the prospective job applicant is seeking a position of financial trust there is ample evidence that credit checks are done on a routine basis for many positions which would ordinarily not be seen as high risk.

2.4.2 It is therefore likely that the proposed amnesty would benefit many credit impaired job applicants to find employment.

2.5 To reduce over pricing

2.5.1 The cost of credit remains extremely high for the poorest consumers, with the marginal interest rate charged on unsecured loans standing at 31%⁸ after the recent reduction in the Reserve Bank Repurchase Rate ("REPO Rate") to 5%. Aside from the even more expensive short term loans, which bear a maximum rate of 60% per year, these unsecured loans, which have grown significantly in amount and number advanced⁹, dominate lending in the lowest income brackets. Moreover the initiation fees charged and the

⁷ Section 70(2)(g) read with Regulation 18(4)(c)

⁸ 17% of all credit granted in the first quarter of 2012 was to consumers earning less than R5,500.

⁹ Consumer Credit Market Report | First Quarter | March 2012 - Table 1.5: Credit granted – credit type percentage of unsecured lending increased from 13.47% to 20.85%

Unsecured credit 16,694,204 18,954,134 21,213,694 26,451,931 21,949,604 23.10% -17.02% 31.48%

frequent addition of expensive credit life insurance makes most of these loans extremely expensive.

2.5.2 In practice it appears that many credit providers choose to charge the majority of loan applicants close to the maximum rate allowed irrespective of the level of impairment of the consumer's credit profile. The NCR research states that:

"A significant amount of unsecured personal loans are written at the margin, i.e. at or close to the interest rate cap.."¹⁰

2.5.3 In summary, the proposed amnesty would likely reduce over pricing provided credit risk and pricing were properly assessed on an individual and/or relative basis using consumers' credit information.

2.6 To reduce costs associated with the rescission of judgments

2.6.1 Given that most unpaid debts will prescribe if legal action is not taken¹¹ credit providers will usually seek judgment where the amount owed is seen to justify the cost of legal action in order to protect their right to repayment. This should continue to result in judgments being taken on an ongoing basis.

2.6.2 Following payment of the related accounts, judgments are frequently rescinded at a cost of between R1,000 and R10,000 incl VAT depending on

¹⁰ Unsecured Personal Loans Study, page 14

¹¹ In terms of the Prescription Act (Act 68 of 1969)

factors such as the level of difficulty in obtaining the judgment creditor's consent, the ease of location of the court file and whether the court is a high court (where it is more difficult to have a judgment rescinded due to different legal provisions).

2.6.3 In general, most consumers battle to afford the legal fees required to have a judgment rescinded and it is usually only those consumers who have recovered their financial means who can afford to both settle the judgment debt and apply for the judgment to be cancelled.

2.6.4 The proposed amnesty would make it far less costly and time consuming to have a judgment removed from a consumer's credit record.

2.7 To stimulate economic growth

2.7.1 It is widely reported that the Reserve Bank has reduced South Africa's growth forecasts. The current World Bank forecast is for growth to slow in 2012 to 2.5%¹², while other economists believe that it may slow even further, with the outlook for 2013 being only slightly better.¹³

2.7.2 In this context of significantly lower growth, it appears at face value that the proposed amnesty may well act as a stimulus measure and arguably benefit the economy as a whole.

2.8 To broaden access to credit providers

¹² <http://www.businessday.co.za/Articles/Content.aspx?id=176940>

¹³ <http://www.businessday.co.za/articles/Content.aspx?id=177185>

2.8.1 It may be argued that when consumers are credit impaired they are likely to find it significantly more difficult to move from their existing credit provider to another credit provider or take up different credit offerings simply because their credit record is impaired. The proposed credit amnesty may “level the playing field” and make it possible for consumers to “start over” and choose the most advantageous credit offerings. Again, this would be in line with the stated purpose of the NCA set out in section 3.

3 SCOPE OF THE PROPOSED AMNESTY

- 3.1 It is widely accepted that consumers who have impaired credit records are generally declined credit. For this reason it would be appropriate in any credit information amnesty to remove those types of credit information that would most negatively impact consumers’ credit scores, while also attempting to retain key credit information in order to allow credit providers to distinguish between consumers and price for risk on a relative basis. For this reason, it is essential that the proposed amnesty not over-reach and rather opt for a more cautious approach in the removal of credit information.
- 3.2 Just how wide the scope of the proposed amnesty should be is difficult to determine without empirical analysis and further consultation. It may be argued that the scope of the first amnesty was relatively wide in that over eight million consumers’ credit records were impacted. However, the effect on broadening access to credit and on “levelling the playing field” was relatively poor, despite the seemingly wide scope of the first amnesty, in that only 3.2% more applications for credit were accepted.
- 3.3 Given the relative ineffectiveness of the first amnesty it is submitted that the proposed amnesty should seek to address credit impairment which ought to have been remedied by the first amnesty.

3.4 Despite the poor result of the first amnesty, we may use it as a guide to determine the scope of the proposed amnesty. In summary, the first credit information amnesty requirements included:

3.4.1 Removal of all dormant accounts older than 24 months i.e. accounts where there had been no payment and no default in 24 months.

3.4.2 Removal of all default accounts, listed prior to 1 September 2006 less than or equal to R500.

3.4.3 Removal of all judgments, listed prior to 1 September 2006 less than or equal to R500, unless the consumer had more than 2 judgments.

3.4.4 Removal of all judgments, listed prior to 1 September 2006 less than or equal to R5000 and older than 18 months, unless the consumer had more than 2 judgments.

3.4.5 Removal of all paid up judgments, listed prior to 1 September 2006 less than or equal to R50 000.

3.4.6 In addition, consumers had until 1 September 2007 to apply for the removal of judgments that had been paid in full, listed prior to 1 September 2006, that are less than or equal to R50 000, on presentation of the proof of payment.

3.5 The first amnesty had four core components:

3.5.1 the automated removal of dormant Payment Profile or Adverse Information;

3.5.2 the automated removal of Adverse Information and Judgment information of less than or equal to R500 (subject to conditions);

- 3.5.3 the automated removal of Judgments less than or equal to R5,000 (subject to conditions); and
- 3.5.4 the removal of all Judgments less than or equal to R50,000 on confirmation of payment and within a specified time frame.
- 3.5.5 As may be seen from the comments of the Credit Ombud below, the monetary limits of the first amnesty together with the other conditions were largely responsible for many listings not qualifying for removal.
- 3.5.6 In summary, while many consumers benefitted from the first amnesty, they did not benefit to a significant extent due to the conditions attached. These consumers' credit records, whilst improved, remained somewhat impaired despite the removal of some credit information. It was the failure to ensure that more credit information qualified to be removed that is the likely cause of the small increase in the level of credit acceptances, despite the seemingly wide scope of the first amnesty.
- 3.6 It is necessary to consider what types of credit information should form the basis of the proposed amnesty.
- 3.6.1 The following three types of credit information can most easily be removed through automated rules alone: Payment Profile; Adverse Information and Judgments. Notices, including Sequestration, Debt Counselling and Administration, are less easily removed in that they often relate to several creditors and in the case of Sequestration and Administration affect the status of the person's legal estate. Moreover, including Administration Orders in the proposed amnesty would be problematic as it would entail the credit bureaux having to draw the court file and check whether the various creditors protected by the order had been paid. The three types of credit information to which the proposed amnesty relates are briefly

outlined below and a description of the intended affect on each type of credit information is outlined:

3.6.1.1 Payment Profile Information

3.6.1.1.1 The Payment Profile information shows how every account is paid on a month to month basis. The credit bureaux reflect between 24 and 36 months of payment profile information per account. At the end of each month the oldest month's payment data is deleted and the latest month's payment data is added. Where a payment is missed, this is recorded and repeated failure to pay any account is likely to result in a new credit application being declined or in far higher rates of interest being charged.

3.6.1.1.2 In the first amnesty dormant account information was removed. These dormant accounts were likely to be either Payment Profile information or Adverse Information (see below). In the first amnesty the removal of dormant accounts affected some 8,218,085 consumers.¹⁴ It is proposed to remove dormant information, as defined by the first amnesty, in the proposed amnesty but to otherwise leave Payment Profile information as is.

3.6.1.2 Adverse Information Listings

3.6.1.2.1 Credit providers and other service providers (such as telecoms companies, municipalities and gyms) are able to notify the credit bureaux of a default in payment and classify the defaulter as absconded, a slow payer (subjective) or where the credit provider has taken steps to collect the debt by e.g. handing the account over or writing the account off from an accounting perspective (enforcement action). The entity does not need to prove the

¹⁴ Experian-Scorex Study

debt and may simply list the fact of default on the basis of having notified the consumer.

3.6.1.2.2 The existence of one or more Adverse Information listings is either a significant hurdle in obtaining credit or a major cause in having to pay significantly more for the credit granted.

3.6.1.2.3 Given that Adverse Information is only listed for up to two years from the date of the event, as defined in section 17(1) of the regulations made in terms of the NCA as published in Government Gazette 28864, Vol 491 on 31 May 2006 (the "Data Retention Regulations"), it is submitted that there is no point in seeking to remove the Adverse Information listings added during the Period as they should have already been removed by operation of the NCA.

3.6.1.2.4 Unlike the first amnesty, it is proposed to allow consumers the opportunity to remove any Adverse Information listings where the related account was settled. This is a significant extension both in scope and likely impact to the first amnesty and will likely affect many more consumers than the 1,765,821¹⁵ consumers who benefitted from the first amnesty by the removal of Adverse Information having a value of less than R500.

3.6.1.3 Civil Judgments

3.6.1.3.1 A civil judgment is granted either by default (when the defendant fails to defend him/herself) or following the outcome of a hearing. Judgments reflect the decision of a court that a debt is due and payable and assists the judgment creditor to compel payment through a garnishee or other attachment order. Given the fact that a court has made a determination, judgments are regarded as extremely negative. Consumers who have one

¹⁵ Experian-Scorex Study

or more civil judgments are extremely unlikely to be granted credit and in those rare cases where they are granted credit, they pay significantly more for it.

3.6.1.3.2 It is possible to have a judgment removed from the credit record by having it cancelled by the court that granted it. This process is known as applying for the judgment to be rescinded. Alternatively, in the Magistrates' Court, it is possible for the credit provider to abandon the judgment and this can likewise be used to have the judgment removed from the credit record. Most credit providers refuse to abandon judgments as it appears they often wish the judgment debtor to have to go to the expense and difficulty of having the judgment rescinded and wish to avoid any related costs.

3.6.1.3.3 It is appropriate to note that the removal of judgment information from consumers' credit records does not have the effect of "writing off" the judgment debt. All judgments are capable of being collected for up to thirty years in terms of the Prescription Act (Act 68 of 1969). The removal of judgments from credit records does not impact on the legal rights of judgment creditors to collect the judgment debt.

3.6.1.4 Increase of monetary limits

3.6.1.4.1 The Recommended Proposal seeks to remove all judgments having a value equal or less than R10,000, even if the judgment has not been settled, provided the judgment was granted during the Period. Moreover the Recommended Proposal seeks to remove all judgments above R10,000 granted during the Period provided there is *prima facie* proof that the judgment debt has been settled. Both of these remedies will greatly reduce the level of credit impairment and likely benefit far more than the 93,799¹⁶

¹⁶ Experian-Scorex Study

consumers who benefitted from the removal of judgments following the first amnesty.

3.6.1.4.2 An Alternative Proposal seeks to only remove judgments less than or equal to R5,000 granted during the Period, irrespective of non-payment. Likewise, the Alternative Proposal seeks to only remove those paid up judgments between R5,000 and R50,000. Although far reaching, the Alternative Proposal would have less impact.

3.7 It is submitted that the scope of the proposed amnesty, in terms of the suggested increase in monetary limits as well as in the removal of conditions, will need to be greater than that of the first amnesty if the desired outcomes, as set out in this submission and section 3 of the NCA, are to be achieved.

3.8 RECOMMENDED PROPOSAL - PROPOSAL 1 (being most extensive in potential scope and impact)

3.8.1 It is proposed that:

3.8.1.1 any dormant account information be removed, on substantially the same basis as that set out in the first amnesty;

3.8.1.2 any Adverse Information listing be removed on *prima facie* evidence of the related account having been settled, again on substantially the same basis as that set out in the first amnesty;

3.8.1.3 that any judgment listing less than or equal to R10,000 be removed, irrespective of non-payment, provided such judgment was granted during the Period;

3.8.1.4 that all judgments granted during the Period greater than R10,000 be removed from any and all credit records, irrespective of the value of the

judgment, on submission to a credit bureau of *prima facie* evidence of settlement of the judgment debt.

3.9 ALTERNATIVE PROPOSAL – PROPOSAL 2 (being less extensive in potential scope and impact)

3.9.1 It is proposed that:

3.9.2 any dormant account information be removed, on the same basis as that set out in the first amnesty;

3.9.3 any Adverse Information listing be removed on *prima facie* evidence of the related account having been settled, again on substantially the same basis as that set out in the first amnesty;

3.9.4 that any judgment listing less than or equal to R5,000 be removed, irrespective of non-payment, provided such judgment was granted during the Period;

3.9.5 that all judgments granted during the Period having a value between R5,000 and R50,000¹⁷ inclusive be removed from any and all credit records, irrespective of the value of the judgment, on submission to a credit bureau of *prima facie* evidence of settlement of the judgment debt.

3.10 To summarise, it is recommended that the proposed amnesty only remove:

3.10.1 Dormant Payment Profile information;

3.10.2 Adverse Information following payment; and

¹⁷ The amount of R50,000 was chosen as it is less than half the monetary jurisdiction of Magistrates' Courts. The average value of judgments in Magistrates' Courts during 2011 was approximately R10,000 (see Table 3 and Table 4 of the Statistics for civil cases for debt issued by Statistics South Africa during May 2012).

3.10.3 Judgments granted during the Period (less than a set value);

3.10.4 Judgments granted during the Period following payment (either with no cap in value or only those judgments less than or equal to R50,000).

4 ASSESSMENT OF IMPACT OF THE PROPOSED AMNESTY

4.1 The Credit Information Ombud explained at the time of the first amnesty that:

“We engaged in an advertising campaign in August which resulted in the credit bureaux receiving up to 12,000 telephone calls per day and the majority of callers did not qualify for the amnesty.”¹⁸

4.2 As has been confirmed by the Credit Ombud, many consumers did not benefit from the provisions of the first amnesty. In many instances, the first amnesty failed to benefit consumers because they failed to meet the limiting conditions¹⁹. While it is submitted that both the Recommended and Alternative Proposal will likely impact far more consumers, there has been no quantitative research to justify this conclusion.

4.3 It is recommended that Government first assess the impact of the Recommended and Alternative Proposals outlined above through commissioning a study using predictive scoring methodologies, such as those use in the Experian-Scorex Study, in conjunction with registered credit bureaux, and the credit industry before proceeding further with the proposed amnesty (“Predictive Study”).

¹⁸ <http://www.experian.co.za/Credinews/200711/November%20Credinews%202007.htm#industry1>

¹⁹ As above

- 4.4 Likewise, although it will likely be difficult to assess the impact of affordability and credit life guidelines, as suggested elsewhere in this submission, it would be appropriate to consider the effect of such countervailing measures on the supply of credit and weigh up whether the dampening of supply could offset, at least to some degree, the likely increase in credit acceptances as a result of the proposed amnesty.
- 4.5 Consideration should also be given to the possible effect of the proposed amnesty on the pricing of credit to ensure that the proposed amnesty is not allowed to become an excuse to increase the cost of credit across the board.

5 CONCERNS ABOUT THE PROPOSED AMNESTY

- 5.1 Given the high levels of household indebtedness it is fair to question whether a credit information amnesty would be in the best interests of consumers. Clearly, it cannot be appropriate to assist consumers to go deeper into debt or allow credit providers to ignore past non-payment when assessing consumers' likely propensity to repay. As has been stated in a similar context:

"There is a need to broaden the access, but also one needs to limit the growth of further defaulting levels."²⁰

- 5.2 Moreover, the credit industry has a legitimate interest in ensuring that the scope and impact of the proposed amnesty is not detrimental to the industry itself or to consumers of credit.

²⁰ Literature review on the impact the National Credit Act has had on South Africa's credit market, Devnomics Research & Surveys (June 2012) (the "Impact Study") page 108

5.3 Following the proposed Predictive Study it may be appropriate to change the scope of the proposed amnesty to safeguard the legitimate interests of the credit industry and the consumers it seeks to serve.

5.4 Specific concerns are likely to include:

5.4.1 The timing of the proposed amnesty

5.4.1.1 Consumers are vulnerable and lack credit health.²¹ There is significant evidence that many consumers are financially distressed²² and would borrow simply to meet basic consumption needs. Such unhealthy credit consumption could possibly be fuelled by the proposed amnesty. Some argue that it would be better to wait until economic growth is more entrenched and the levels of household financial vulnerability have declined.

5.4.1.2 Furthermore, it may be argued that the proposed amnesty may have negative consequences, especially if it is implemented during a period in which many consumers are in financial distress. It is therefore important to consider the timing of the proposed amnesty and to determine whether the proposed amnesty should possibly be delayed until the financial wellness of consumers is determined to be “Drifting Well” rather than where, at present, it is calculated to be “Drifting Unwell”.²³

5.4.2 The risk of stimulating unhealthy credit consumption

²¹ Unsecured Personal Loans Study, pages 38-39

²² Impact Study, page 19

²³ Unsecured Personal Loans Study, pages 38-39

5.4.2.1 South African households are already severely indebted.

“From an economic point of view, the level of household debt as a percentage of disposable income stands at an average of 75%, a ratio that has to come down. It is currently anticipated that the consumer will only be sufficiently deleveraged and be able to begin borrowing at normalised levels in 2014.”²⁴

5.4.2.2 It may be argued that the proposed amnesty would, absent any significant change in consumer behaviour, result in South Africans becoming increasingly indebted. Caution has been voiced over the further stimulating the credit market:

“Given the highly stressed consumer debt levels, stimulating the credit market into more high risk lending categories may not be advisable at this point.”²⁵

5.4.3 Credit providers need more credit information not less

5.4.3.1 Credit providers will not be able to identify and price for risk as well as they could have had there been more credit information available.

5.4.4 Consumers with unimpaired credit records will pay more for credit

5.4.4.1 By removing dormant, adverse and judgment information, credit providers may be less able to differentiate between consumer and those consumers with unimpaired credit records may be prejudiced or otherwise end up paying more for credit.

5.5 The above arguments may be countered, at least to some extent, as follows:

²⁴ Impact Study, page 62

²⁵ Impact Study, page 21

5.5.1 It is true that household debt levels are reasonably high. However the proposed affordability guidelines will likely reduce the supply of credit and largely offset the ability of over-indebted consumers to borrow more.

5.5.2 Likewise, while it may be better to wait until consumers are theoretically more able to cope with taking on more debt, this is ultimately a question of affordability. Provided affordability assessments are effective and reduce reckless credit demand this concern should be adequately resolved.

5.5.3 While it may always be argued that credit providers should have more credit information, the payment profile information, which is barely impacted by the proposed amnesty, is extensive. Credit providers should be able to make greater use of this payment profile data to adequately predict and differentiate risk and price effectively.

5.6 In summary, each of the above arguments against the proposed amnesty is valid when assessed in isolation or without consideration of the countervailing measures that could be taken to counter their negative impact. It is submitted that there are nevertheless sufficient grounds to proceed with the proposed amnesty on the basis set out in this submission.

6 COUNTERVAILING MEASURES²⁶

6.1.1 Between June 2007 and March 2012 impaired credit records percentage rose from 36.4% to 46.4% (an increase of approximately 17%)²⁷.

²⁶ Steps taken to negate the effect of an action, in this case the proposed amnesty.

²⁷ Table 1: Credit Bureau Monitor data issued by the NCR

6.1.2 As at March 2012, the percentage of credit applications rejected had increased by approximately 7% year-on-year and now stands at approximately 50.93%.²⁸

6.1.3 The fact that nearly half of all credit active consumers are credit impaired and that approximately half of all credit applications are rejected is likely to be strongly related.

6.1.4 The significant growth in the level of impairment of consumer credit records despite the reckless lending and other consumer protection provisions of the NCA should be regarded as alarming.²⁹

6.1.5 The Unsecured Personal Loans Study commissioned by the NCR states that:

*"The relatively high level of consumers with impaired accounts with credit bureaus is a concern. The level of consumers with impaired credit records requires consideration."*³⁰

6.2 Therefore, in order for the proposed amnesty to achieve the key goals, action must be taken to improve several market regulation issues as well as to redress ongoing shortcomings in the credit information economy.

²⁸ Consumer Credit Market Report | First Quarter | March 2012

Table 1.4: Number of applications received and rejected - % of applications rejected increased as follows: 1Q2011:43.25%; 2Q2011:43.76%; 3Q2011:44.61%; 4Q2011:45.74%; 1Q2012: 50.93%

²⁹ During the same period credit active consumers rose from 16.78 million to 19.49 million (an increase of 16%). It would have been reasonable to expect the rise in credit active consumers to bear closer correlation to the approximately 51% of consumers who were not credit impaired, i.e. to rise by approximately half i.e. 8-9% rather than 17%.

³⁰ Unsecured Personal Loans Study, page 91.

- 6.3 It is proposed that guidelines be issued by the NCR setting out what affordability testing³¹ should include. Such guidelines could, for example, make it mandatory to consider the debt instalment information reflected in consumers' credit records; and require evidence of expenses to be justified through consumers' bank and account statements.
- 6.4 It is proposed that guidelines be issued by the NCR relating to the pricing of credit life insurance. Such guidelines could assist to reduce the pricing of credit where risk is meaningfully offset through insurance. It is submitted that credit life insurance premiums should reduce in proportion to the declining balance owed. It may be possible to provide credit providers with statistical measures or other information to assist them in this regard.
- 6.5 It is proposed that guidelines be issued by the NCR relating to the process of listing Adverse Information stating when it is permissible to list the non-payment of accounts in this manner to promote consistency and avoid manipulation of such listings through changes in the type. It may be appropriate to require that some enforcement type action be evidenced before the listing is added to the consumer's credit record.
- 6.6 To this end, it may be necessary to amend section 82 of the NCA to ensure that any guidelines by the NCR, as outlined above, are binding.

7 POSSIBLE LEGAL CHALLENGES TO THE PROPOSED AMNESTY

- 7.1 The following guiding principles should be followed:

³¹ Impact Study, page 17

- 7.1.1 Proper and detailed consideration must be given to Government's objectives and the means chosen to give effect to such objectives must not be disproportionate to the goals.
 - 7.1.2 Consultation with all affected stakeholders must be properly undertaken and all objections and comments, whether positive or negative, properly evaluated.
 - 7.1.3 It is essential that the mechanism used to give effect to the proposed amnesty be substantially justified, procedurally correct and constitutionally supportable.
- 7.2 Provided the above principles are followed, it is submitted that legal challenges will be unlikely or of limited impact.

8 LEGAL CONSIDERATIONS REGARDING THE PROPOSED AMNESTY

- 8.1 The first amnesty was given effect through regulations promulgated by the then Honourable Minister of Trade and Industry in terms of section 73 read with section 171 of the NCA.
- 8.2 It is unlikely that the Honourable Minister presently has the requisite authority to promulgate further regulations in terms of sections 73 and 171 of the NCA. It is likely that the state law advisors will recommend that express authority be given for the Honourable Minister to issue further regulations in terms of sections 73 and 171 by means of an amendment to the NCA.
- 8.3 Alternatively, it may be possible to provide the NCR with the necessary authority, via an amendment to the NCA, to issue appropriate notices to effect the proposed amnesty, or such similar amnesty, after due consultation with the Minister.

9 PRACTICAL MEANS OF EFFECTING THE PROPOSED AMNESTY

- 9.1 It is proposed that, if possible, the same regulatory framework and mechanism be used to effect the proposed amnesty. The reason for this recommendation is that the first amnesty was not subject to any significant legal challenge and it is likely that there would be few challenges to the Minister's delegated authority to repeat an exercise that has already taken place before.
- 9.2 It is recommended that the credit bureaux be consulted as to a time frame in which to give effect to those aspects of the proposed amnesty that may be automated, and further consultation with credit bureaux take place as to how to lodge *prima facie* evidence of payment in regards the removal of Adverse Information and qualifying Judgments. It is submitted that it is likely that credit bureaux would wish to make use of their existing dispute resolution process to give effect to these aspects of the proposed amnesty.
- 9.3 It is suggested that the credit bureaux be required to conduct an audit on the same basis as was required with the first amnesty to ensure compliance with the proposed amnesty; however, following consultation, it may be possible to rather accept a certificate from each registered credit bureau stating that the provisions of the proposed amnesty have been effected.

10 POSSIBLE ADDITIONAL MEASURES

- 10.1 Should the Government wish to reduce credit impairment on a long term basis, without the need for further credit amnesties, it could consider adopting the additional measures set out below:

10.1.1 Requiring that, from a date to be set by the Honourable Minister of Trade and Industry, all judgment creditors be required to abandon judgments in terms of section 86 of the Magistrates' Court Act or Rule 41(2) of the Uniform Rules of Court (as applicable), following settlement of the judgment debt.

10.1.1.1 this measure would have the effect of dramatically reducing the cost of having judgments removed from credit records as consumers would not need to apply to court for the judgment to be rescinded.

10.1.1.2 should Government adopt this measure, it would need to provide that the abandonment of judgments granted in the High Court also fall within the removal requirement of the Data Retention Regulations. The Data Retention Regulations would then need to be amended along the following lines:

"The earlier of 5 years or until the judgment is rescinded by a court or abandoned by a credit provider in terms of section 86 of the Magistrates' Court Act 32 of 1944 or as provided in terms of Rule 41(2) of the Uniform Rules of Court issued in terms of section 43 of the Supreme Court Act 1959" [underlined text to be added].

10.1.2 Requiring that, from a date to be set by the Honourable Minister of Trade and Industry, all subscribers to credit bureaux be required, following settlement of the related account, to instruct the appropriate credit bureau/x to remove the associated Adverse Information listing³²;

³² It is proposed that in future all Adverse Information be removed on settlement of the related account, as is done in other jurisdictions, such as Brazil³². It is acknowledged that Adverse Information has value in determining the price of credit, however the Payment Profile information reflects the length of non-payment of the account and the removal of Adverse Information following payment is fairer to consumers.

10.1.3 Requiring the free provision of standardised financial literacy material, issued by the NCR, in the home language of the consumer, on submission of any application for credit;

10.1.4 Requiring that no person attempt to collect a debt that would, at face value, be deemed to have prescribed in terms of the Prescription Act (Act 69 of 1969) and providing appropriate criminal sanction for such outlawed activity.

10.1.5 Referring credit providers to the Competition Commission where it is believed that there is *prima facie* evidence of collusive price fixing.

11 CONCLUSION

11.1 Given the high demand and relatively easy supply of credit, at least on an unsecured basis, it would be inappropriate to simply implement a second credit information amnesty without redressing underlying systemic problems. This is necessary as should unsecured loans continue to grow quickly, or faster following the proposed amnesty, many South Africans will likely face an uncertain and precarious financial future.³³

11.2 It is recommended that the financial literacy programmes of credit providers be scrutinised to ensure that they adequately address the risk of reckless lending and how credit, when poorly managed, can undermine financial prosperity. In this regard, it is proposed that financial literacy material, issued by the NCR, be provided, on a mandatory basis, by credit providers to every credit applicant.

³³ *Research on the increase of unsecured personal loans in South Africa's credit market, Compliance & Risk Resources (July 2012, (the "Unsecured Personal Loans Study") page 92*

11.3 It is crucial that proper consultation be undertaken with all stakeholders within the credit industry as to the extent, likely impact and timing of the proposed amnesty.

11.4 Provided the proposed amnesty takes adequate measures to offset the risk of reckless lending and over pricing the proposed amnesty would likely have a positive impact on the economy and benefit millions of credit impaired consumers.

REFERENCES:

1. Consumer Credit Market Report | First Quarter | March 2012
2. Credit Bureau Monitor data issued by the NCR
3. Results of the Experian-Scorex study into the impact of the proposed credit information amnesty (2007)
4. Literature review on the impact the National Credit Act has had on South Africa's credit market, Devnomics Research & Surveys (June 2012)
5. Research on the increase of unsecured personal loans in South Africa's credit market, Compliance & Risk Resources (July 2012)
6. Household Wealth Report Q1 2012, Bureau for Market Research
7. Statistics for civil cases for debt, Statistics South Africa (May 2012)
8. National Credit Act (Act 34 of 2005)
9. Data Retention Regulations and First Amnesty Regulations issued in Government Gazette 28864, Vol 491 dated 31 May 2006