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Date: 21 December 2012
Attention: The Secretary of Parliament
c/o: mcoetzee@parliament.gov.za

Dear Sir

**RE: CREDIT BUREAU ASSOCIATION COMMENTS ON THE DRAFT NATIONAL CREDIT ACT AMENDMENT BILL,
PUBLISHED IN THE GOVERNMENT GAZETTE NO. 35876 OF 16 NOVEMBER 2012 (NOTICE 941 OF 2012)**

We thank you for the invitation and opportunity to provide comments on the proposed amendments to the National Credit Act ("NCA").

Our comments to the proposed amendments are as follows:

1. Ad paragraph 1 – Amendment to the Definition of 'consumer' in Section 1

While we understand the rationale behind the amendment to address some of the unintended consequences of the original drafting of the NCA, we do have a couple of concerns with this proposed amendment:

- a. The proposed amendment effectively means that there are four requirements that need to be met before a consumer qualifies as a consumer for the purposes of the NCA. In other words, in order to qualify as a consumer under the NCA: (i) the NCA must apply to the credit agreement in question, **and**:
- (ii) a person must acquire money, goods or services for his/her/its intended consumption; **and**
 - (iii) in a transaction other than a business-to-business transaction; **and**
 - (iv) must be one of the parties listed in (a)-(h) of the rest of the definition of 'consumer'.

- b. Failing the inclusion of a definition of a 'business-to-business transaction', this amendment will exclude any true credit agreements in which the borrower and lender are both 'businesses', which could have the effect of excluding the majority of all juristic persons whose credit agreements are currently governed by the NCA. This is because all four criteria are required to be met to qualify as a consumer, and where it is likely that the third criteria is not met simply because the borrower is a business and is borrowing money, or receiving goods or services from, another business.
- c. We are also not sure how the proposed amendment is to be reconciled with part (g) of the definition of 'consumer' – where a guarantor never acquires the money, goods or services for his/her/its own consumption. Given that the definition of a 'credit guarantee' in section 8(5) of the NCA specifically contemplates a guarantee provided by one party in respect of the obligations of 'another consumer', is it then the intention for the proposed amendment to completely remove credit guarantees from the ambit of the NCA?
- d. Using the example of a guarantor (mentioned above), it is possible that an irreconcilable circular effect may also, in some circumstances, have been created by this amendment, in that:
- Section 4(1) states that '*... this Act applies to every credit agreement [as defined in section 8] between parties [the term consumer is not used] dealing at arm's length*' and thereafter goes on to list exceptions, such as certain juristic persons, etc.;
 - The definition of 'consumer' then goes on to supposedly further limit the instances '*... in respect of a credit agreement to which this Act applies,*' by including the additional requirements relating to 'intended consumption' and 'business-to-business'.

It is possible, such as in the case of a guarantor, for a person to fall outside of the definition of consumer (based on either the 'intended consumption' or 'business-to-business' wording), and yet the credit agreement is governed by the Act in terms of section 4 (where s8(5) does not refer to the consumer at all). Therefore, even if the guarantor is not a consumer, is the credit guarantee still subject to and governed by the NCA? It is unclear which provision takes preference.

- e. The wording that appears at the end of paragraph 1(a) of the Amendment Bill appearing in the notice (i.e. the words '*agreement, but does not include a default administration charge; co-operative principles*') seems to have been included incorrectly and should be removed.

- f. Credit bureaus are generally not involved with the transaction in which credit is extended and, as such, does not interact directly with consumers or businesses. This makes it very difficult for a credit bureau to ascertain the annual turnover or asset value of a business and to categorise the entity accordingly. This position will only be further exacerbated by the addition of a new type of 'contract category' underlying the 'business categorisation', and will certainly only be possible if the NCA were also to include obligations on all credit providers to submit all business information to the credit bureaus, together with the asset value and annual turnover numbers, as well as the applicability or non-applicability of the NCA to each contract entered into with that business.

- g. Additionally, this amended definition of consumer will mean that businesses will frequently have some contracts governed by the NCA and others not governed by the NCA, while the privacy provisions, consent requirements, retention periods, etc. under the NCA do not recognise and cater for this. Credit information is currently identified by and housed under the relevant individual or business, so that a holistic view of that individual or business can be obtained. The proposed amendment would significantly alter this, and this credit information would now need to be identified by type of contract (for businesses and certain individuals). This would in turn require substantial investment to the current IT infrastructure, which would be cost prohibitive to the credit bureaus (for potentially very little perceived benefit).

- h. Perhaps consideration should be given to whether the benefits of such an amendment outweigh the substantial cost that will be incurred by the credit industry as a whole and, if so, whether these benefits could not be achieved in some other way, such as the exclusion of juristic persons completely from the ambit of the NCA, or the exclusion of incidental credit agreements from the ambit of the NCA. The potential effect of either of these amendments would of course still need to be considered by all industry participants, although we would be very happy to share with you our recent comments submitted to the NCR in support of the removal of juristic persons from the ambit of the NCA.

By way of example however, the exclusion of juristic persons from the ambit of the Act would no doubt simplify things, but it is notable that such exclusion would also *not* be to the detriment of juristic persons. Motivation for the exclusion of juristic persons would lie in the fact that the interests of juristic persons would be comprehensively covered by the new legislation to be enacted, namely the Protection of Personal Information Bill ("PoPI"). PoPI includes provisions relating to the protection of information and other significant interests of juristic persons which are more pressing in nature than those offered to juristic persons by being included in the ambit of the NCA specifically. In

addition to this, juristic persons constitute such a small portion of total consumers reported on (in terms of both the quarterly synoptic and annual reports) under the NCA, that an exclusion of the numbers relating to juristic persons from these reports would be insignificant, as these numbers currently have little or no value or benefit to juristic persons.

2. Ad Paragraph 2 – Amendment to Section 86 to Include Suspension of Interest Accrual on Debts

The only comment relating to this proposed amendment is that it should be clarified, much along the lines of the similar provision in s84(2) of the NCA, that the suspended interest is also not recoverable after the period of suspension.

We trust that our inputs will be received as constructive and in the spirit in which they are submitted. As an industry we welcome any debate or discussion around our comments, and are appreciative of the opportunity to make submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lisa Maino', with a large, sweeping initial stroke.

Lisa Maino

Legal Consultant to the CBA

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