National Credit Act, no 34 of 2005 – *Submission: National Credit Act Amendment Bill*

MicroFinance South Africa

2 December 2013

The recognised Voice of Reputable Microfinanciers in South Africa'

Tel: +27 12 346 1081
Fax: +27 12 346 1082
Email: ops@mfsa.net
Website: www.mfsa.net

1. Executive Summary

The National Credit Act proposed changes and related processes cannot be seen in isolation. This includes but is not limited to:

- The Code of Conduct;
- Emolument Attachment Orders;
- Credit Life;
- Rates and Fee's;
- Affordability Assessment Guidelines;
- Credit Information Amnesty.

All of these proposed changes and amendments have a direct influence on the credit environment and consumers as a whole. Meaningful and transparent consultation with the credit industry is of utmost importance when these amendments are considered. The Sector aspires for the credit environment to work more efficient for all involved ranging from the small MFSA Credit Providers to Retailers, Vehicle Financiers, Banks, Debt Counsellors and Consumers.

A well-managed credit market ensures and stimulates economic growth and prosperity. Paramount to this process is choice from the perspective of consumers. Undue legislation and compliance pressures, negatively impact on the viability of the businesses of especially smaller Credit Providers, effectively stimulating the underground and rogue market. In this market, consumers do not enjoy any protection and are exposed to totally uncontained cost structures. Ironically these consumers are removed from the formal credit market and will find it difficult to obtain credit from credible and registered institutions.

The requirements of investors in relation to expected returns are high. Investors will be more willing to increase their stake in the Sector, should the market be allowed to work more freely with clear guidelines and predictable behaviour emanating from the oversight agencies. The investor's, in a high risk and unstable credit environment, expectations of return are high because of the high risk environment of the South African Credit Market. The high risk South African Credit Market may create the following:

- Higher expected return on investment;
- Decrease in investment opportunities.

The high returns on investment puts pressure on the consumer and will consequently force consumers into the informal underground market. There is a direct correlation between the South African Credit Landscape, investors and the impact it has on the consumers. If the South African Credit Landscape becomes more stable it will increase investment in South Africa, with a lower risk and not as much pressure on the consumers, thus ensuring that economic growth is stimulated because consumers enjoy access to a well-structured and managed credit market.

It is expected that the proposed changes is based on a requirement to have consumers better protected. This document sets out a brief summary of the noticeable points as contained in the National Credit Amendment Bill 2013 gazetted in October 2013 which seeks to amend the National Credit Act. In this document MFSA will elaborate on certain amendments that will have an influence on the Microfinance Industry.

2. High Level overview of National Credit Act Amendment Bill from a MFSA perspective.

Subject	Amendment	Comments / References
National Credit Regulator	**Amendment of Section 17**	Unclear unfair advantage/playing field not level – **6.1.2**
	Amendment of Section 25	Unclear terms and responsibilities – **6.1.3**
	Amendment of Section 140	Agree – **6.1.4**
Registration and Cancellation process and criteria	**Amendment of Section 45**	Unclear Terminology of registration – **6.2.1**
	Amendment of Section 49	Unclear review and propose new conditions of registration – **6.2.2**
	Amendment of Section 51	Agree – **6.2.3**
	Amendment of Section 58A	Agree – **6.2.4**
Industry Code of Conduct and Affordability	**Amendment of Section 48**	Unclear: confusing and clarity is required – **6.3.3**
	Amendment of Section 82	Unclear: Industry Code & Affordability – **6.3.4**
Reckless Credit	**Amendment of Section 83A**	Unclear: Expertise of tribunal – **6.4.1**
	Amendment of Section 136	Agree but with amendments – **6.4.2**
Consumer Credit Information	**Insertion of Section 71A**	Not in agreement to Credit Information Amnesty – **6.5.1**
	Amendment of Section 73	Not in agreement to Credit Information Amnesty – **6.5.2**
Payment distribution Agents	**Insertion of section 44a**	Not in agreement: National Payment Systems domain – **6.6.1**
Alternative Dispute Resolution Agents	**Amendment of Section 134**	Unclear: Powers of ADR – **6.7.1**
	Insertion of Section 134A &134B	Unclear: Powers of NCR – **6.7.2**
Credit Industry Agents	**Amendment of Section 163**	Agree – **6.8.1**
Debt Review/Counselling	**Amendment of Section 71**	Unclear: Term *financial stability* – **6.9.1**
	Amendment of Section 86	Unclear – **6.9.2**
Debt enforcement	**Amendment of Section 129**	Unclear process – **6.10.1**
Consumers	**Amendment of Section 46**	Agree – **6.11.1**
Documentation	**Amendment of Section 89**	Unclear: *just and equitable order* by court; unlawful credit agreement – **6.12.1**
	Amendment of Section 91	Unclear: unlawful credit agreement – **6.12.2**

3. Introduction: MicroFinance South Africa

MicroFinance South Africa (MFSA) is a representative body of registered microfinance credit providers operating within the ambit of the National Credit Act (NCA) in South Africa. MFSA is the 'Recognised Voice of Reputable Microfinanciers in South Africa'.

Our Vision is to ensure a sustainable Microfinance Industry.

We are committed to promoting the interests of all members and their clients through:

- Advocacy
- Member Interaction
- Development

The MFSA values are:

- Professionalism
- Client Care
- Ethical Conduct

MFSA represents more than 1700 Microfinance credit provider offices, providing short term and unsecured credit, registered with the National Credit Regulator (NCR) and make up the majority of significant service providers in the sector. Our membership base ranges from small one office businesses to larger credit providers with more than 160 outlets.

4. Market Dynamics at the bottom of the Pyramid

The members of MFSA serve consumers who traditionally are not able to obtain services from 'high street' institutions. The fact that MFSA members over decades have been able to remain the service provider of choice to this unique consumer grouping, speaks for itself from a consumer service and value proposition perspective. As consumers vote with their feet, clients who take up credit from MFSA members have continued to support the credit providers due to the unique relationships that they have established over years. Most often these credit providers were prepared to take the first risk by offering them credit while the formal financial sector was not prepared to take that risk. In some cases MFSA members are the only remaining service provider in many of the rural areas while more formal providers have withdrawn from the region due to a lack of economy of scale and high costs associated with the business models.

The non-bank Microfinance Industry is a major employment generator and offers opportunities to around 10 000 individuals, many of which are in the deeper rural areas where unemployment is rife. Our members serve consumers who find it hard to gain access to high street credit, for reasons of credit profile and often geography. In contrast the banking industry that specifically provides long term loans has been shedding jobs over the past five years reducing the number of employment opportunities. This trend would seem to continue for the foreseeable future.

Given the constituency of MFSA and our historical involvement in the sector, our response to your request is limited and focussed around our membership base and their specific market. MFSA wishes to place on record that although many of our members are relatively small, all credit in South Africa should be provided in line with the NCA. MFSA specifically subscribes to and supports initiatives which open opportunities and choice to all consumers.

5. MFSA Strategic Position

We wish to place on record our support for a well regulated and functioning credit market, but need to ensure that the numerous interventions are strategically integrated as to not stimulate the birth of a plethora of unintended consequences. This will in turn lead to a further round of ad hoc interventions possibly fuelling a spiral of negative interactions.

The MFSA membership, since their inception, has been operating under uncertainty as the legislation that governed our sector was based on an exemption to the Usury Act. This made it extremely difficult for our members to plan far ahead. With the introduction of the NCA it created some level of certainty and the ability to plan for the future. The current extent of amendments and changes creates immense uncertainty and leaves MFSA members with the inability to plan for the future.

6. Summary of Findings

6.1. National Credit Regulator

The role of the NCR as oversight body with regards to market conduct rather than a body of policy formation needs to be confirmed and entrenched. The platforms and processes that are being used to consult and engage with the Sector have in the perception of MFSA stagnated and require an open discussion as to confirm jurisdiction, sustainability and stakeholder trust.

Microfinanciers have over an extended period made it their business to 'clean up' their act and work with the State, the Government, Regulators and formal institutions. Unfortunately one still finds consumers who support underground operators and do not report illegal businesses or practices. The perception exist that registered Microfinanciers are 'sitting ducks' when enforcement is done. In order to grow and develop consumer protection Microfinanciers require unconditional support from Regulators when insisting that malpractice need to be eradicated in all instances, including these in the underground market and unfortunately in some 'high street' institutions.

With current economic conditions, the majority of South Africans who live at the bottom of the pyramid requires that due care is taken when considering intervention and improvement of the South African Credit landscape. This will require extensive engagement amongst all stakeholders and agreement on new rules of engagement. Self-regulation is preferred but meaningless without formal sanctioning, as opportunistic behaviour can take advantage of vulnerable and naive consumers.

Smaller and registered non-bank Credit Providers are experiencing selective enforcement and this need to be corrected. Prohibited behaviour must be detected and acted upon in an appropriate manner. Ongoing investigations have to take place in the Credit environment focusing on all NCR registered Credit Providers and a special effort needs to be made with regards to non-registered Credit Providers and rogue operators.

MFSA is of the opinion that all Credit Providers irrespective of their annual disbursements or number of contracts must be registered with the NCR. This will contribute to consumers becoming more aware of the difference between registered and underground and rogue operators.

6.1.1. Twin Peaks Model

From a MFSA perspective, over and above the fact that sound academic international best practice and free market principles need to be applied, the following in our humble view needs to be factored into the already complex equation.

The separation of Prudential and Market conduct matters do make sense. This can however not be taken to an absolute level, given the fact that the South African dilemma of two economies within one country distorts the natural and comfortable link between good policy and strategy if the micro elements of a generally large lower market is ignored. Despite good policy and legislation, market conduct can undo all the good intentions, unfortunately only to be noticed once the horse has bolted. In practice the Public Relations machinery can deceive the public, politicians and regulators. Consumer choice and protection are two sides of the same coin; complex bureaucracies tend to discriminated against vulnerable consumers and smaller business. All Credit Providers, regardless of size and affiliation, needs to be subjected to an accountable single authority. Credit specifically and more so consumer credit is competitive, risky and therefor attracts businesses that are set-up accordingly.

MFSA is of the opinion that the banking fraternity is currently finding themselves in a position which gives them a distinct and unfair advantage, especially when dealing with lower and some middle market consumers. The growth in unsecured lending and certain ATM loans, have unnecessarily set-off alarm bells. Should the Department of Trade and Industry, National Treasury and the National Credit Regulator been better harmonized and capacitated a pro-active and comprehensive engagement process would have benefitted all stakeholders and specifically consumers at the lower end of the market.

6.1.2. Amendment of Section 17

Section 17 regulates the relationship between the NCR and other relevant regulatory authorities The amendments seek to make the following mandatory for the NCR, in that the NCR "*must*" (as opposed to "*may*" in the current version of the NCA):

- liaise with other regulatory authorities on matters of common interest;
- enter into valid agreements with regulatory authorities in respect of the exercise of jurisdiction over consumer credit matters within the relevant industry or sector and to ensure the consistent application of the NCA;
- participate in the proceedings of any regulatory authority; and

- advise or receive advice from any regulatory authority.

The amendment further creates a new responsibility for the NCR by requiring it to notify the Registrar of Banks of an intention to investigate a bank as defined in the Banks Act. In addition the amendment makes it mandatory for regulatory authorities (which exercise jurisdiction over consumer credit matters in a particular industry or sector) to enter into a valid "agreement" with the NCR (as opposed to previously having the power to "negotiate" such agreements).

The insertion of the obligation to notify the Registrar of Banks is interesting in that it is clear that the Registrar will now have some involvement in any investigation of Banks by the NCR and thus providing the banks with an unfair advantage because they are being exempted from certain rules and regulations the MFSA members have to comply with.

Further the creation of a mandatory obligation of other regulatory authorities to enter into valid agreements with the NCR in respect of the above does not appear to provide for circumstances where there is a failure to enter into the agreement. For example, what are the circumstances where the terms of that agreement cannot be agreed to by the parties. In addition it is not clear what the agreements are supposed to govern now that the obligation to enter into them is mandatory.

6.1.3. Amendment of Section 25

Section 25 provides for the appointment of inspectors and investigators by the Chief Executive Officer ("CEO") of the NCR. The Amendment Bill amends this section by entitling the CEO, as well as any official duly authorised by the CEO to appoint inspectors or investigators. The October version of the Amendment Bill makes reference to an official "*duly authorised by*" the CEO.

The term "*official*" is not defined in the NCA and thus it is not clear whether there are any specific requirements, competencies and qualifications in respect of the person to whom this authority may be delegated to or how such authority is to be delegated. The types of responsibilities that can be delegated are also not set out. This may have the effect of diluting the responsibility and accountability of the CEO.

6.1.4. Amendment to Section 140

Section 140 sets out provisions regulating the outcome of complaints to the NCR. In particular, Section 140(1) sets out the steps that the NCR may take following an investigation into a complaint.

The insertion of the proposed amendment has the effect that it does not limit the NCR to taking only the listed actions in Section 141 (although it may be argued that the NCR was not limited to only these actions as this section states "*the National Credit Regulator may*" and thus it does not appear that these provisions were peremptory). While the insertion widens the scope of the NCR's powers, it does not create unfettered powers and authorities as it limits the NCR to take enforcement action as provided for in the NCA. It is crucial that the NCR focus on their specific area of jurisdiction and those measurements are in place to prevent 'jurisdiction creep'.

6.2. Registration and Cancellation process and criteria

6.2.1. Amendment of Section 45

Section 45 of the NCA regulates the registration of credit providers, credit bureaux and debt counsellors. Currently, the obligation on the NCR to register an applicant if that applicant complies with and meets the criteria in terms of the Act, is peremptory and the NCR has no discretion in this regard, (i.e. the NCR "*must*" register the entity if it meets the relevant requirements).

Section 45(3) is substituted to state that where an application complies with the provisions of the NCA, and the applicant meets the criteria for registration the NCR must register the applicant, unless the NCR (after subjecting the application to a "*probity test*" or any other "*prescribed test*" or "*upon investigations*") is of the view that there are other compelling grounds that disqualify the applicant and which renders such an applicant to not be a fit and proper person to be registered in terms of the NCA.

In this regard although the NCR's obligation to register applicants, once the applicant has met the relevant criteria, is still mandatory, it is subject to a test or investigations as to whether there are compelling grounds that disqualify the applicant (to the extent that there are such grounds, the NCR is not obliged to register that applicant). This creates discretion in favour of the NCR in respect of the registration process. This provision creates uncertainty with no explanation as to what would be considered to be "*probity test*", "*prescribed test*" as well as what the "*compelling grounds*" would be that would disqualify the applicant. This may give the NCR an unfettered discretion in granting these applications based on criteria that are not governed by the NCA or its regulations.

6.2.2. Amendment of Section 49

Section 49 deals with the variation of conditions of registration and provides the NCR with the power and authority to review and propose new conditions of registration based on certain criteria (i.e.

upon request by the registrant, after a period of five years since the conditions of registration were last reviewed or varied, if the registrant contravened the NCA, if the registrant did not satisfy any conditions of registration, if the registrant has not met its commitments or undertakings made in connection with its registration, or if the registrant has breached any approved code of conduct applicable and cannot provide adequate reasons for doing so).

The October version of the Amendment Bill proposes to provide the NCR with an additional power in that it may review and propose new conditions of registration "*if the NCR, on compelling grounds, deems it necessary for the attainment of the purposes of this Act and efficient enforcement of its functions*". The effect of this proposed amendment is that the NCR will have subjective wider powers and authority to review and propose new conditions of registration. In addition this may lead to uncertainty in strategies of those credit provider's whose conditions of registration are not constant for the 5 year period.

The October version of the Amendment Bill appears to seek to limit these wider powers by stating that they may only be exercised in "*compelling circumstances*". However, what could be considered to be such a compelling circumstance is unclear.

6.2.3. Amendment of Section 51

Section 51 deals with the application, registration and renewal of fees and states that the Minister may prescribe application fees and registration fees. The October Amendment Bill provides the Minister with an additional power to prescribe a penalty fee for late renewal of registration by registrants, which will be imposed by the NCR on any registrant that fails to renew its registration within the specified time period. The formula by which the above is determined needs to be transparent and realistic, relative to the size and scope of both small and corporate business.

6.2.4. Insertion of Section 58A

Section 58 sets out requirements for the voluntary cancellation of registration by registrants. The Amendment Bill in its October version seeks to impose additional requirements in that:

- a debt counsellor who voluntarily requests that his or her registration be cancelled must:
    - submit the prescribed notice [no notice has yet been prescribed] and an affidavit to the NCR setting out its intention, the reasons for cancellation and the date on which the cancellation will be effected;

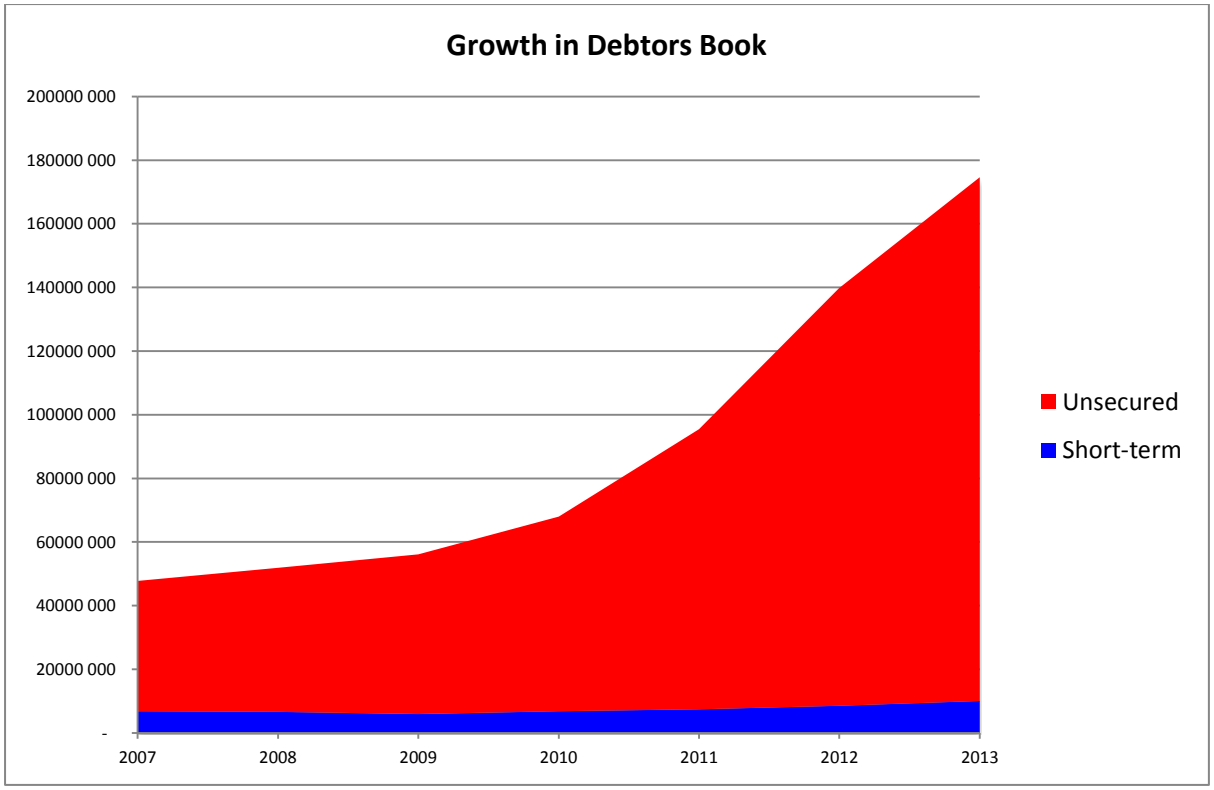
- attach proof that all the effected consumers, credit providers and credit bureaux have been notified of the intended cancellation;
- attach the registration certificate issued to the debt counsellor; and
- submit an affidavit to the NCR advising that the consumers referred to above have been transferred to another registered debt counsellor (it is not clear whether this must take place in a separate affidavit);

- the debt counsellor whose registration has been cancelled in accordance with this section must in the prescribed manner and form, notify all consumers, credit bureaux and credit providers in writing of the deregistration;
- a credit provider who voluntary requests the cancellation of his or her registration must submit a cancellation notice to the NCR accompanied by the registration certificate and an affidavit from the accounting officer, auditor or authority of the credit provider confirming that the registered activities have ceased.
- MFSA agrees with this position.

6.3. Industry Code of Conduct and Affordability Assessment Standards

An affordability assessment is a pre-condition in the mass-market to ensure quality credit decisions are taken. Given the fact that consumers have different profiles and personal circumstances, prescriptive approaches will not ensure proper consumer protection and will merely become a 'tick box' exercise. Affordability assessments have to be reviewed on an on-going basis in order to ensure compliance and prevent reckless lending.

Our observation and evaluation of the NCR statistics indicate that the overindebtedness problem was introduced by the high growth in unsecured credit. When considering the level of short term credit provision from 2007 to 2013, there is hardly any growth in this sector. The majority of MFSA members provide short term credit. It is therefore our view that short term credit has not aggravated the level of overindebtedness.



NCR Statistics 2007 – 2013

The current mind-set where overindebtedness is linked to smaller credit providers who mainly play in the short term market is simply not accurate and as such the approach to dealing with overindebtedness need to be addressed at a macro and micro level. A significant portion of smaller micro-lenders puts in a special effort to do detailed affordability to ensure effective collection. Overindebtedness is symptomatic of a much deeper combination of problems reaching well beyond the realm of affordability calculations. There is an above inflation growth in living expenses while the growth in income was below inflation. MFSA members work with their own capital therefore responsible conduct makes business sense.

6.3.1. Credit starvation and discrimination

MFSA members predominantly provide short term credit products to consumers (loans smaller than R8000 repaid over a period of up to 6 months). It is commonly known that the short term loans are viewed as the 'overdraft facility' of lower income consumers. These clients do not own homes and do not have bonds, because they simply do not qualify for such luxuries. They make use of public transport or walk / hike to their destinations and do not drive a vehicle which is financed by a high street bank. Their savings happen either through a 'stokvel' or basic insurance products, if it happens at all.

MFSA members are predominantly credit providers to the lower income market. If conditions within the lower income market are unfavourable, then Banks and Retailers can shift their focus on other products - non-credit- and/or other markets, out of the lower income market. MFSA members would however have to move out of the market and it would probably be impossible to re-enter the market, leaving the lower income market with almost no access or limited choice to credit. Differently put, banks and retailers can move out of the lower end market through mere board decisions while MFSA members need to consider business closure to be able to do this. MFSA members thus play a vital role in access to credit because of their products, outreach and consistent participation since their inception in this market. Consumers borrow money in order to handle the challenges which life throws at them, illness, death, floods, and unexpected crises thus the need for access to credit through such an 'overdraft' facility. Any dispensation which simply looks at monthly affordability, regardless of the eventual charges that will make it impossible for the consumer to take up any further credit, is questionable.

Credit starvation and discrimination will only feed the informal/underground market, as in our experience, a consumer who has been turned down from formal credit has not rid him/herself of the financial problem they are trying to solve. When they get home, the problem still exists and therefore the high need to access credit albeit in the informal market. If a client does not qualify for a loan under the new affordability guidelines this will have the following impact:

- An increase in informal/ underground credit, very often illegal and unlegislated:

  'There appears to be a high awareness and usage levels of 'Skoppers/ mashonisas/ laqhashe/loans sharks' across all areas, irrespective of gender, income level and area of location. The perceptions of the underground operators are that they are always there for those in desperate need – accessible due to minimal documentation, but they are ruthless to defaulters. Although 'mashonisas' are not completely trusted, they have established very strong relationships with their clients. Clients tend to rely on 'mashonisas' to access credit for emergencies.

  MFSA sponsored Synovate/African Response Research June 2011 – August 2011.

- A decrease of formal access to credit which is not in line with the purpose National Credit Act;

There is blatant discrimination taking place against lower income consumers by denying them access to formal credit, assuming that lower income consumers do not qualify for formal credit and are reckless in their spending behaviour, therefor discriminating against consumers on subjective terms. The social and political wisdom of such a policy needs to be considered. Realistic affordability

guidelines are thus required for the different form of Credit Providers, a 'one size fits all' approach cannot be followed in this regard.

A technical subcommittee for the Affordability Assessment Guidelines has been established. At the time of writing the committee has not commenced its work despite a due date for completion of work of 8 December 2013.

6.3.2. General comments on the Code of Conduct to Combat Overindebtedness.

MFSA is of the opinion that the proposed code will not achieve the outcomes for the following reasons:

- The Code deals with issue which are currently debated in the public domain and deals with a number of topics, but lacks to affectively assist in combating overindebtedness. The document does not allow for sufficient distinction between the reality of consumers who have simply lived beyond their means and those who are in reality poor and who have to daily face the shocks of live.
- The reference to "Unsecured Term Credit" speaks to the heart of the current debates around unsecured credit. In short the much debated growth and associated actions ignores the fact that short term credit has not grown in real terms and as such the strategy to combat overindebtedness need to centre on product design, market conduct and in particular to ensure relevant, responsible products are supplied. MFSA is on record to say that the short term product is the 'Overdraft' of the Low income consumer and as a fraternity we have provided this service to consumers for almost two decades.
- The Code of Conduct needs to deal with **principles** to combat overindebtedness;
- **Simplicity** is the key, down to a level where the credit consultant can explain the intent and obligations to a consumer applying for a short term loan;
- The Code of Conduct and the style there- off need to be in line with the above and highly readable for the lower level consumer and should form part and parcel of the **consumer education** process;
- The implications of the Code of Conduct should simplify credit to lower income consumers and not further complicate it as the current state is;
- Reporting on compliance, acceptance and impact of the code should be done annually and should include consumer views, perceptions, knowledge and understanding;
- The Code of Conduct needs to develop a life and personality of its own, whilst the detailed matters addressed in the current version need to be dealt with, using the Code of Conduct

as a yard stick. **A specific custodian of the Code of Conduct who practically brings and holds it together will add great value, especially during the early phases**. The hard ethical questions need to be asked, privately and publically as part and parcel of the strategy to combat overindebtedness.

6.3.3. Amendment to Section 48

Section 48(1) of the NCA sets out provisions for conditions of registration for credit providers. As it currently stands Section 48(1)(b) states that the National Credit Regulator must consider an application of a registrant relating to "*the commitments, if any, made by the applicant or any associated person in connection with combating over-indebtedness, including whether the applicant or any associated person has subscribed to any relevant industry code of conduct approved by a regulator or regulatory authority*".

In respect of the October version, the NCR would be able to consider an application for registration as a credit provider in light of compliance with a "*prescribed code of conduct*" or a "*guideline including but not limited to an affordability assessment guideline*" prescribed by the Minister after consultation with the NCR. In this regard it removes the reference to a "*relevant industry code of conduct*", and specifically refers to a prescribed code of conduct. The reference to a prescribed code of conduct and guideline must be considered in the context of the recent activities in the credit industry.

Presently affordability assessment guidelines, which are promulgated under section 81 of the NCA are not binding on credit providers. This provision has not been amended in the October version of the Amendment Bill, and thus the amendments to the NCA may lead to a complicated circumstance whereby the affordability assessment guidelines are not binding on credit providers, but in terms of section 48 it appears that the NCR may refuse to register a credit provider if that credit provider does not comply with those non-binding affordability assessment guidelines. This is confusing and will introduce further uncertainty and risk to the market.

6.3.4. Amendment of Section 82

Section 82 deals with assessment mechanisms and procedures and provides the NCR with the right to pre-approve evaluated mechanisms, models and procedures to be used in affordability assessments in respect of proposed developmental credit agreements as well as publish guidelines in respect of affordability assessments applicable to other credit agreements.

The amendments to section 82 provide that is now the Minister in consultation with the NCR who has this power, and further extends the power to provide for the publishing of guidelines proposing evaluated mechanisms, models and procedures in respect of affordability assessments and "*any other guidelines related thereto*".

The October Amendment Bill does not amend section 82(2)(3) which states that the guidelines published by the NCR in accordance with the above is not binding on a credit provider. This creates uncertainty in respect of the binding nature of the guidelines which are published by the NCR in consultation with the Minister in terms of the Amendment Bill.

The above provision must be considered in the context of the Affordability assessment guidelines which have been made available to industry participants for commentary, and which intend on imposing various obligations in respect of affordability assessments of credit providers. The need to create certainty and clarity needs to be reiterated, failure to do so will lead to formal credit starvation and the stimulation of the underground market.

6.4. Reckless Credit

MSFA supports a well regulated and functioning credit market, but need to ensure that the numerous interventions are strategically integrated as to not stimulate the birth of unintended consequences. This will in turn lead to a further round of ad hoc interventions possibly fuelling a spiral of negative interactions.

6.4.1. Amendment of Section 83A

Currently Section 83 of the NCA provides that a court, in any court proceedings in which a credit agreement is being considered, may declare a credit agreement to be reckless.

The October version of the Amendment Bill confers upon the Tribunal the right to declare credit agreements to be reckless. In this regard the Tribunal is provided with all the powers that a court may have in declaring a credit agreement reckless. As such, the expertise and experience of those sitting on the Tribunal becomes important. Due to the technical nature of credit and the legal consequences for both the Regulator and Credit Providers the benchmark needs to be set rather higher than lower. Legal qualifications and practical experience needs to be balanced with matters of consumer protection.

'The judiciary must not take on the coloration of whatever may be popular at the moment. We are guardian of rights, and we have to tell people things they often do not like to hear.'

Rose Bird

Rose Elizabeth Bird served for 10 years as the 25th Chief Justice of California. She was the first female Justice, and first female Chief Justice, on that court. - http://en.wikipedia.org/wiki/Rose_Bird

6.4.2. Amendment of Section 136

Currently section 136 deals with the initiating of complaints to the NCR and states that a person may submit a complaint concerning an alleged contravention of the NCA to the NCR. In this regard section 136 is amended to state that any person may submit, in addition to a contravention of the NCA, a complaint concerning an allegation of reckless credit agreement to the NCR.

Current practices at the NCR is that Credit Providers who wish to report unregistered lenders or illegal practices are not being heard and the NCR in practice requires consumers to lay complaints. In practice consumers do not complain about illegal and reckless lenders as they perceive them as their last resort to credit. This needs to be investigated and dealt with accordingly, in order to facilitate access to formal credit.

6.5. Consumer credit information

Accuracy of credit information plays a significant role. The current approach with regards to Consumer Credit Information does not support the very noble aim of combatting overindebtedness. Accurate credit information, particularly on lower income consumers, was one of the drivers in creating access to credit. The removal of credit information will result in lower income consumers having limited access to credit and at a premium.

Complete data forms an integral part of a Credit Providers assessment before granting credit to consumers. Credit reporting tools are essential to a well-functioning credit market. Responsible access to credit is dependent on the sound risk and affordability assessment tools and ultimately benefits responsible borrowers and lenders.

An informed credit decision improves risk management and reduces default rates and this simultaneously leads to accurate pricing and curbing overindebtedness. The implementation of removal of Consumer Credit Information as proposed will create predicaments with regards to affordability assessments done by Credit Providers. Credit Providers will have less access to accurate data creating even more risk in the Credit environment. Credit Providers will no longer have the capability to differentiate between a high-quality borrower and a low-quality borrower. Each

consumer will be perceived and managed as a high risk borrower, indicating that access to credit will become more expensive and in some cases impossible. This will then create an irregular form of credit granting, due to the lack of data and discrimination against the lower income consumer. Consumers who have served their accounts well and diligently will lose the benefit and advantage which they have earned. Consumers who, on the other hand, have mismanaged their accounts will see no reason for improving their financial behaviour and may very well expect further amnesty in the nearby future.

The impact of removal of Consumer Credit Information will have on MFSA members are of vital importance when the decision is considered. The majority of MFSA borrowers are lower income consumers. Bad debt will increase and this can then lead to Sector failure. Consumers with the lack of access to credit will then exit the formal credit environment and move into the illegal credit environment. This will increase the number of illegal Operators because they can now provide the Consumers with credit. The illegal Operators will create even more risk for the consumer and the consumer will have to deal with the burden of exorbitant interest rates.

The granting of the removal of Consumer Credit Information has a direct influence on the Credit Environment as a whole. Data is a significant element in granting credit in a responsible manner. Any form of meddling with data can have dire implications on all involved in the credit environment and can increase the indebtedness of consumers.

The removal of the Consumer Credit Information will be counterproductive relative to the purpose of the National Credit Act and will have consequences which will negatively impact on the social and economic welfare of South Africans. Effective and sustainable credit will not be accessible to consumer and this may lead to an unproductive and in-efficient Sector.

The South African consumer will then be exposed to the following:

- Limited choice;
- Stimulation of the underground market;
- No consumer protection;
- Consumer embarrassment and desperation;
- Lack of reach by regulators;
- Blatant discrimination against responsible borrowers and lenders.

MFSA wishes to register that the matter of the removal of Consumer Credit Information has not received the required consideration. MFSA is concerned that the very consumers who are intended to benefit will in fact be jeopardised.

The process with regards to Credit Information Amnesty created an expectation from many consumers to walk away from their debt only to as soon as possible take up credit again hoping that they will not be required to meet their legal obligations. Incorrect expectations will eventually not be met and will certainly have political consequences. Additional information and research will be shared with the Portfolio Committee focusing on independent high level research that has been done.

6.5.1. Insertion of Section 71A

The Amendment Bill inserts a new section dealing with the automatic removal of consumer credit information as follows:

- where an obligation under a credit agreement had been previously submitted to credit bureaux (as an adverse classification of consumer behaviour, an adverse classification of enforcement action or as a payment profile of the consumer), the credit provider is required to notify credit bureaux within seven days after settlement by the consumer of the obligations under that credit agreement;
- credit bureaux are required to remove the adverse information within seven days of receipt of the notice from the credit provider;
- where a credit provider has failed to submit such a notice to credit bureaux, the consumer is entitled to lay a complaint with the National Credit Regulator (NCR).

This provides for a legislative on going removal of adverse consumer credit information.

Further, the October Amendment Bill seeks to insert definitions of the following:

- "*adverse classifications of consumer behaviour*" as subjective classifications of consumer behaviour which include classifications such as "*delinquent, default, slow paying, absconded or not contactable*"; and
- "*adverse classifications of enforcement*" as classifications related to enforcement action taken by the credit provider, including classifications such as "*handed over for collection or recovery, legal action or right off*".

These definitions seem to be those exact definitions that are contained in Regulation 17(3) and (4) to the NCA, in respect of retention periods for credit bureau information. MFSA in principle opposes any form of removal of Consumer Credit Information.

6.5.2. Amendment of Section 73

The Amendment Bill provides the Minister with the power to prescribe the verification, review, correction or removal of consumer credit information at any time. Currently, the Minister was only entitled to do so within a period of six months following the effective date of the NCA, which was 1 June 2006.

In addition the amendment provides the Minister with the power to prescribe the manner in which a registered auditor may confirm that the consumer credit information has been reviewed, verified, corrected or removed. This provision is highly relevant to the current industry concerns regarding the proposed "*credit amnesty*". In this regard, the Minister is not currently empowered to affect the credit amnesty notwithstanding public statement and notice to this effect. The Minister is a creature of statute and cannot act in excess of that power, thus the amendment in this regard to the NCA. (As an aside, the powers of the Minister, as well as the NCR are important in the context of the various documents that have been made public in the credit industry, for example the Affordability assessment guidelines, and code of conduct, which code of conduct seeks to regulate premiums on credit insurance, as well as reports that the NCR and Minister wish to regulate certain aspects of emolument attachment orders. These issues would fall under the scope of the Financial Services Board and Minister of Justice respectively and do not appear to fall within the scope of the authority and powers of the Minister and NCR).

If the Amendment Bill is passed in its present form, the Minister will be empowered to proceed with drafting regulations regarding the removal of adverse credit. With public hearings taking place at the end of January 2014, the proposed credit amnesty could not be duly implemented as anticipated during 2013.

If the proposed credit amnesty regulations are "*passed*" before Amendment Bill in effect, the regulation would be ultra vires (outside of the power of the Minister) and may be declared invalid under section 172(1)(a) of the Constitution and may be reviewed and set aside under section 6(2)(a)(i) of the Promotion of Administrative Justice Act. (Courts have held that the making of regulations generally constitute administrative action - *Minister of Health and Another NO vs New Clicks South Africa (Pty) Limited and City of Tswana Metropolitan Municipality vs Cable City*).

Once again the process followed created massive uncertainty and reflects negatively on stakeholders to create a stable and well-functioning modern credit dispensation.

6.6. Payment Distribution Agents

MFSA is of the opinion that the PDA's has to be governed by a formal structure/body due to their main function of offering a choice of different collection methods in order to distribute money from the Debt Counsellor to the Credit Providers. MFSA is of the opinion that PDA's should function under the auspices of the National Payment Systems Act who intern may delegates such powers to an enforcement agency of their choice. Proper enforcement of unregistered Payment Distribution Agents should take place on an ongoing basis to ensure that misconduct does not take place. The integrity of bodies handling money's from distressed consumers' needs to be totally above any form of suspicion and therefor the payments needs to be overseen at the same standard as all other payments which is a NPS department domain.

6.6.1. Insertion of Section 44A

The NCA as it stands only formally regulates Credit Providers, Credit Bureaux and Debt Counsellors. Payment Distribution Agencies are thus not formally regulated by a body or institution; they just have to comply with a Code of Conduct. Compliance with a Code of Conduct has a number of weaknesses and the PDA's are not governed by a formal structure or body.

The October version of the Amendment Bill inserts a section 44(A) with the heading "Registration of Payment Distribution Agents", which makes provision for a natural or juristic person to apply to the NCR to be registered as a Payment Distribution Agent. The term "Payment Distribution Agent" is not defined in the Amendment Bill, and so it is unclear at what point such entities would be required to be registered.

The Amendment Bill provides that a person may not offer to or engage in the services of a Payment Distribution Agent unless that person is so registered, and any applicant for registration must satisfy any prescribed education, experience or competency requirements. Such requirements have not been prescribed as yet and will need to be scrutinised. Further the type of "services" that a Payment Distribution Agent would undertake have not been defined.

Practically the NCR has for some time been accrediting entities referred to as "Payment Distribution Agents" and have required as a condition of registration of debt counsellors that they only make use

of registered Payment Distribution Agents as part of the debt review process. The legislative provision for the registration of such entities is not stated to be retrospective, thus this status of entities "registered" without authority may be problematic.

6.7. Alternative Dispute Resolution Agents

6.7.1. Amendment of Section 134

Section 134 deals with alternative dispute resolution, and currently provides that as an alternative to filing a complaint with the NCR in terms of section 136 a person may refer a matter that could be the subject of that complaint to a number of alternative dispute resolution entities. The amendment now provides that an alternative dispute resolution option also applies to a dispute following an allegation of a reckless credit agreement. The powers of the ADR's needs to be established to ensure that consumers do not make use of continuous forum shopping – finding a dispensation that suits the consumer or credit provider. Alternative Dispute Resolution requires good insight and fair judgement in order to be impartial and even handed.

6.7.2. Insertion of Section 134A and 134B

Section 134A provides that a NCR must register an accredited dispute resolution agent ("ADR Agent"). Currently the NCR does not have any rights or obligation to register these agents.
Section 134B then sets out the process that must be followed in respect of the deregistration of ADR Agents.

Firstly the issue is that the amendments to the NCA do not appear to set out the specific requirements in respect of registration of ADR Agents. In terms of section 134B, the registration and accreditation of an ADR Agent may be cancelled by the Tribunal on application by the NCR, if that agent fails to comply with any condition of registration and accreditation or contravenes the NCA (this is consistent with the current provisions of the NCA which deal with deregistration of other registrants).
In the event that such contravention or failure to comply occurs and the ADR Agent is also licenced by another regulatory authority then the NCR may:

- impose conditions on the registration of the ADR Agent consistent with its licence;
- refer the matter to the regulatory authority that licenced the ADR Agent with a request to review the licence; or
- at a the request or with the consent of the regulatory authority apply to the Tribunal for cancellation of the registration and accreditation of the ADR Agent .

Section 134B then goes to place obligations on the other regulatory authority to conduct a formal review of the ADR Agent, suspend the licence or request/consent to the NCR lodging an application with the Tribunal as set out above.

The issue that arises here is that the NCR seeks to place obligations on a separate regulatory authority in that "*must conduct a formal review of the… agent's licence*". In this regard it is questionable whether the NCA and the NCR have the power to impose those obligations on an independent regulatory authority.

Further, the NCR must attempt to reach agreement with the regulatory authority that issued any licence to an ADR Agent in order to coordinate procedures to be followed in respect of the above.
Where the registration of an ADR Agent is cancelled, it is effective as at the date on which the Tribunal issues an order to this effect or where the deregistration is voluntary, the date specified by the Alternative Dispute Resolution Agent in the notice of voluntary cancellation. An Alternative Dispute Resolution Agent whose registration has been cancelled is not entitled to engage in any type of registered activities after the cancellation date.

6.8. Credit Industry Agents

A clear distinction needs to be made with regards to the different agents in the Sector:

- Debt Counsellors;
- Alternative Dispute Resolution Agents;
- Credit Providers.

All of the agents within the Sector need to be accredited and receive mandatory training on an ongoing basis to ensure that they remain updated with regards to legislative changes.
With regards to Debt Counsellors and ADR's it is unclear where the line will be drawn between actual debt counselling functions and alternative dispute resolution functions. There needs to be a form of prescription for the agents to ensure they act in accordance with their mandate.

Credit Providers should accept responsibility and accountability for their agents. These agents should act responsible with regards to their conduct because this can create repercussions for the credit providers involved. The involvement of Agents in the Industry remains crucial because this can be seen as part of a career pathing strategy within each industry. The Accreditation of Agents is also of

utmost importance to ensure that they conduct their business responsible and according to the National Credit Act.

6.8.1. Amendment to Section 163

Section 163 makes provisions for the functioning of agents who act on behalf of credit providers and/or consumers. The Amendment Bill provides that a credit provider, debt counsellor or payment distribution agent (now inserting a reference to the use of agents by debt counsellors or ADR's) must ensure that its employees or agents attend prescribed training in respect of the matters to which the NCA applies. Previously credit providers were simply required to ensure that such agents were trained. The amendment appears to imply that the NCR will prescribe training for these agents which will now be mandatory.

The section 1A limits the use of agents by debt counsellors in that a debt counsellor may only make use of agents for administrative tasks relating to debt review. This would then preclude the debt counsellor from making use of agents on its behalf to perform actual debt counselling functions.
The amendment to subsection 163(b) requires that where a person (who is not an employee or agent of a credit provider) solicits, completes or concludes a credit agreement for or on behalf of a credit provider or a consumer that person is required to disclose to the consumer the amount of any fee or commission that will be paid if the agreement is concluded in writing. This will then prevent any such disclosure taking place on a verbal or oral basis.

6.9. Debt Review/Counselling

The impact of the Statutory Debt Counselling process and the effectiveness thereof needs to be reviewed. Costing and fee structures need to be taken into consideration when this process is being reviewed. The process should focus on Credit Providers, Consumers and Debt Counsellors and whether there was a significant change in consumer debt since the inception thereof. An alternative mechanism has to be created for the consumer where the consumer and credit provider can come to an alternative agreement. This needs to be investigated focusing on dispute resolution in a more cost effective manner. The needs of the consumer especially from the lower end of the market need to enjoy priority above the commercial needs of Debt Counsellors. The success of Debt Counselling is subject to practical implementation processes which will require all Credit Providers, Debt Counsellors, Payment Distribution Agents, Credit Bureau's and Courts of law to co-ordinate at a much improved level.

Access to debt counselling by lower end consumers is limited because of the commercialisation of the discipline. Debt Counsellors are at the focus point where a consumer needs to take important and far reaching decisions and actions, the qualification of such individuals need to be set on par with the demands taking into consideration qualifications, experience and ethics.

6.9.1. Amendment of Section 71

Section 71 deals with the removal of record of debt adjustment (i.e. debt re-arrangement) or judgments, and currently provides that consumers whose debts have been rearranged may apply to debt counsellor at any time for clearance certificate relating to that debt rearrangement.

The proposed amendments in the October version of the Amendment Bill provide for an automatic obligation on debt counsellors to issue consumers whose debts have been rearranged with a clearance certificate within seven days after the consumer has:

- satisfied all obligations under every credit agreement that was subject to the debt rearrangement order, in accordance with that order; or
- demonstrated financial ability to satisfy every current obligation under every credit agreement.

In this regard this provision not only creates an automatic obligation for the debt counsellor, but provides for wider circumstances where a clearance certificate may be issued, as previously under the current NCA it was only required to be issued where the consumer has satisfied all obligations under every credit agreement that was subject to the debt rearrangement. There are no suggested parameters or guidelines to identify what is meant by the demonstration of "*financial stability*". This makes a decision in this regard dependent upon the discretion of a debt counsellor, creating less certainty in the market place about who can factually pay their debts.

In addition the debt counsellor is now required to file a certified copy of the clearance certificate with the National Register established in terms of section 69 or any credit bureau (i.e. the National Register of Credit Agreements). Previously a consumer was able to file a copy. Should the debt counsellor fail to file a certified copy, the consumer may do so and lodge a complaint against the debt counsellor with the NCR.

6.9.2. Amendment of Section 86

Section 86 deals with the application for debt review by a consumer and currently it states that an application in terms of Section 86 may not be made in respect of a credit agreement if at the time of the application the credit provider under that credit agreement has proceeded to take the steps

contemplated in terms of Section 129 to enforce that agreement. The proposed amendment seeks to replace the reference to Section 129 with the reference to Section 130.

The leading case on the interpretation of Section 86 read with Section 129 is *Nedbank Limited & Others vs National Credit Regulator & Another* 2011 4 All SA 131 SCA ("Nedbank vs NCR"). In this regard, the NCR sought a declaratory order to the effect that the reference in Section 86(2) to the taking of a step in terms of Section 129 to enforce a credit agreement is a reference to the commencement of legal proceedings in terms of Section129(1)(b), and does not include those steps taken under Section 129(1)(a) [that is where Section 129(1)(a) refers to the delivery of what is commonly referred to as "*Section 129*" notice informing the consumer of his or her rights].
The Supreme Court of Appeal held that once a credit provider has taken these steps in terms of Section 129(1)(a) [i.e. the sending of the Section 129 notice], the credit provider has proceeded to take steps to enforce that agreement and a debt review relating to that specific agreement is thereafter excluded.

In these circumstances it then appears that the proposed amendment will have the effect of moving away from the SCA decision, in that an application for debt review may not be made if at the time of the application the credit provider under that credit agreement has proceeded to take the steps in Section 130 (i.e. has made an actual application to the court). This would mean that to the extent that the credit provider has commenced the required procedures before debt enforcement (i.e. the sending of the Section 129 notice) an application for debt review may still be made in terms of that credit agreement until such time as the steps contemplated in Section 130 have been taken. This amendment will supercede the finding in Nedbank vs NCR.

In addition, the amendment specifically states that a credit provider may terminate the debt review process at any time at least 60 days after the date on which the consumer applied for the debt review, provided that an application for debt review has not been lodged in court in terms of Section 87 (i.e. where a consumer has made application to the Magistrates Court for debt review following a rejection of the debt review application by the debt counsellor or when the consumer is not over-indebted but is experiencing difficulty in satisfying his/her obligations and the debt counsellor's recommendation is rejected by the credit providers and the debt counsellor makes an application to the Magistrates Court). To the extent that such application has been lodged in court the credit provider may not terminate the debt review in terms of Section 86.

Further, the credit provider is now obliged to give notice to terminate the review to the NCR (in addition to the consumer and debt counsellor as currently provided for).

6.10. Debt Enforcement

6.10.1. Amendment of Section 129

Section 129 sets out the required procedures to take place prior to debt enforcement. Section 129(1) currently requires that where a consumer is in default under a credit agreement, the credit provider must draw the default to the notice of the consumer and inform the consumer of various rights in respect of resolving the issue.

The October version of the Amendment Bill, supplements section 129(1) and includes that a credit provide must inform the consumer that it has the right, in the event of any other dispute relating to the terms of the credit agreement, to refer such credit to the NCR or court to resolve the dispute.

In this regard it appears that where the consumer is in default, and the consumer and credit provider are in dispute about the terms of the agreement unrelated to the default, that agreement may be referred to the NCR or applicable court. The effect of this is unclear but it may result in circumstances where a consumer has referred a default to a debt counsellor and then refers a complaint regarding the same agreement to the NCR. This may lead to issues arising from one credit agreement being dealt with in more than one forum at the same time.

6.11. Consumers

6.11.1. Amendment of Section 46

Section 46 of the NCA deals with the disqualification of un-rehabilitated insolvent natural persons for certain functions and will now apply to credit providers and debt counsellors and payment distribution agents in respect of the proposed amendment. This type of amendment is a positive step as persons who are unable to manage their own financial affairs, will be precluded from handling the financial affairs of others as debt counsellors.

6.12. Documentation

MFSA does not support the retention of any form of a temporary or permanent possession of an Instrument referred to in the National Credit Act. The term unlawful agreement needs to be specified and explained in order to gain clarity on what is the real intention of an unlawful credit

agreement. This is due to the many factors involved in the credit value chain and the processing of legal credit transaction.

6.12.1. Amendment of Section 89

Currently, Section 89 regulates unlawful credit agreements and Section 89(5) sets out the consequences of unlawful agreements. In this regard, Section 89(5) states that

"*If a credit agreement is unlawful ….. a court must order that –*

(a) the credit agreement is void as from the date the agreement was entered into;

(b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, with interest calculated interest –

(i) at the rate set out in that agreement; and

(ii) for the period from the date on which the consumer paid the money to the credit provider, until the date the money is refunded to the consumer; and

(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either –

(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or

(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer".

In this regard, the applicable decision is that of the Constitutional Court in the *National Credit Regulator vs Opperman and Others* CCT 34/12 2012 ZACC 29 wherein the Constitutional Court held that the forfeiting of the rights of the credit provider in terms of Section 89(5)(c) results in an arbitrary deprivation of property, as it extinguishes a creditor provider's right to claim restitution based on unjustified enrichment, without leaving any discretion to a court to consider a just and equitable order. As such Section 89(5)(c) was held to be inconsistent with Section 25(1) of the Constitution was declared to be invalid. The proposed amendment in the October version of the Amendment Bill deletes Section 89(5)(b) and 89(5)(c). Although it was only section 89(5)(c) that was declared unconstitutional, the October version of the Amendment Bill seeks to also delete section 89(5)(b) which places an obligation on the credit provider to refund to the consumer any money paid by the consumer under the credit agreement that is declared unlawful.

This must be read with the amendments to section 89(5)(a) which states that a court must make a "*just and equitable order including but not limited to*". The court is now empowered to make an

order that feels is just and equitable, thus giving it wider discretion than the current version of the section 89(5) where the court was mandated to order that the agreement is unlawful, that the credit provider refund to the consumer and that purported rights of the credit provider are cancelled or forfeited to the State. This bears the question of what a "*just and equitable order*" could consist of.

In addition, section 89(5)(a) currently states "*that if a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any other provision of agreement to the contrary* …..". The Amendment Bill removes the reference to "*any provision of common law*". The effect of this amendment is not clear, it may be the intention that the provisions of common law may trump the NCA in these circumstances.

6.12.2. Substitution of Section 91

Section 91 of the NCA deals with supplementary requirements and documents and previously provided that a credit provider could not induce a consumer to enter into a supplementary agreement that contains a provision that would be unlawful if it were included in a credit agreement. This provision has been substituted to now provide that, in addition to the above, a credit provider must not:

"*directly or indirectly, by false pretence or with the intent to defraud, offer, require or induce a consumer to enter into or sign a credit agreement that contains an unlawful provision contemplated in section 90*".

In this regard the amendment specifically incorporates a reference to the provisions of section 90, which sets out provisions which are unlawful in a credit agreement.

The substitution of section 91 further removes the prohibition on a credit provider from requesting or demanding a consumer:

- give the credit provider temporary or permanent possession of the instruments referred to in section 92(l)(i) [i.e. identity documents, credit or debit card, bank account, automatic teller machine access card or similar card or document];
- reveal a personalised identification code or number; or
- direct or knowingly permit any other person to do anything referred to in this section on behalf of or for the benefit of the credit provider.

Rather the new section 91, under the Amendment Bill, specifically states that a credit provider must not require the consumer to enter into a credit agreement that contains an unlawful provision as contemplated in section 90. In this regard, section 90 does make reference to provisions relating to the keeping of identity books, pin numbers or cards etc., and thus the prohibition on this behaviour is still contained in the Amendment Bill.

7. Rates and Fee's

One of the main objectives of the MFSA is to ensure a sustainable Microfinance Industry through research, advocacy and the creation and development of growth opportunities. In this context, the MFSA recognises that in order to maintain a sustainable microfinance industry, to the benefit of consumers and Credit Providers alike, Credit Providers must be able to financially sustain and grow their businesses. In order to do so, rates and fees, as prescribed by the National Credit Act (NCA) must take into consideration and reflect the real costs of credit provision, in order to ensure a competitive, fair and transparent industry.

The MFSA recognises and hereby places on record the need to, as a matter of priority and based on an examination of relevant economic factors in the microfinance market, ensure a determination of rates and fees which is fair, transparent and in line with the requirements of the NCA. The MFSA represents members who are dedicated to providing fair and transparent access to credit to a specific category of South African citizens in an ethical and legally compliant manner. It must be taken into consideration that the business of our members focuses entirely on the unsecured market, thus serving a segment of the financial industry that would not have previously qualified for finance in a manner compliant with the NCA and all regulations.

MFSA has to formally gain clarity on how the rates and fees pertaining to both short term and unsecured credit were set, as well as the costs that these rates and fees are intended to cover. These queries are relevant to ensure a proper understanding of the requirements and obligations of the Credit Provider in terms of the NCA, as well as to ensure compliance by MFSA members.

In this regard, the MFSA is of the view that any intended review process must include an extensive focus on the revision of rates and fees, so as to ensure that they are properly reflective of the real and actual costs of credit provision. Failure to do so has and will continue to fundamentally affect the businesses of microfinance Credit Providers, as well as the efficient and effective running of the credit industry as a whole.

MFSA has approached Regulators with regards to the review process of rates and fees but with minimal success. If the review process has taken place, MFSA requires more information on how these fees were determined. MFSA has substantial submissions and we are more than willing to engage and share the information.

8. Engagement

MFSA has over 17 years proven its willingness to engage with all appropriate Authorities and Regulators. We sincerely appreciate the opportunity to submit our submission and are committed to continue constructive and transparent inputs in the sector.

MFSA wishes to once again reiterate that this document forms the basis of further engagement between the Association and Industry and political stakeholders.

Regards

P H Ferreira
Chief Executive Officer
Mobile: 083 572 1214
Email: ceo@mfsa.net

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