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ATTENTION: THE HONOURABLE MR R DAVIIES
DEPARTMENT OF TRADE AND INDUSTRY **Our Ref: KB11/068**

ATTENTION: K MOKABA **Your Ref: The NCA**
Email: nca@thedti.gov.za

11 July 2013

Dear Sirs

RE: DRAFT NATIONAL CREDIT ACT POLICY REVIEW FRAMEWORK
GENERAL NOTICE 559 OF 2013

We refer to the above matter and advise that we act on behalf of the Debt Counselling Industry CC t/a t**heDCI**, which provides a platform for debt counsellors and consumers to discuss the debt review process, concerns and experiences regarding debt issues via an online forum. Over eight hundred debt counsellors are members on the portal and the portal has a consumer database of over 450 000.

The sole member of **theDCI**, Ms D Solomon is a debt counsellor (NCRDC 689) herself and is aware of the challenges faced by debt counsellors. We also represent Ms Solomon in her capacity as a debt counsellor.

Our clients have requested us to draft this submission on the proposed Draft National Credit Act Policy Review Framework having regard to General Notice 559 of 2013 and our client's experiences and interaction with other debt counsellors and consumers.

1. **ADDRESSING INEFFECTIVE AND INEFFICIENT LEGISLATION**

1.1. Our clients believe that the following aspects would need to be dealt with by the amendment of the National Credit Act 34 of 2005 (the **NCA**), alternatively the promulgation of regulations:

1.1.1. The definition of the following words:

1.1.1.1. "mortgage" to correctly reflect the common law position;

1.1.1.2. "alternative dispute resolution agents" to make provision for this group of persons in a more accurate manner. There are two suggestions here:

1.1.1.2.1. The term is removed completely from the legislation and the anticipated functions of an ADR be incorporated into the functions of a debt counsellor. This will allow for regulatory supervision of the process by the National Credit Regulator (the **NCR**), achieve the intention of the **NCA** and prevent any uncertainty or competing interests; alternatively

1.1.1.2.2. The term is re-defined in order to ensure that the persons referred to therein are required to be registered (with certain criteria which we propose would be similar to those imposed on debt counsellors), the NCR has regulatory powers in

respect of those persons, the fees in respect of those persons be determined and published.

1.1.1.3. "interest" to make provision for the proper definition of fixed, variable interest and maximum allowable interest rate in each scenario. It is submitted that the current formula linked to the South African Reserve Bank Repo Rate is not ideal and that in order to provide the commercial certainty required that the calculation of the various interest rates rather be fixed at a reasonable maximum and thereafter each credit provider can determine (based on the individual consumers assessment) its own interest rate.

- This will allow for certainty in the minds of the consumers and competitiveness from credit providers.

- The applicability of the statutory *in duplum* rule - Section 103 (5) be clarified to ensure that the uncertainty is clarified.

- See the proposal below in paragraph 1.1.4 regarding the calculation of the default amount.

- It will also provide the certainty in relation the repayment plan and the amount that would be applicable and the parties could easily ascertain if the consumer would qualify for debt relief in terms of the provisions of the agreed codes.

1.1.1.4. “suretyship” to incorporate and include in such definition the fact that such a document is a credit agreement (whether under a credit gurantee) or otherwise in order to afford the protection of the **NCA** to persons signing suretyships and allow for more accurate reporting regarding the credit industry.

1.1.1.5. “developmental credit” to properly provide for the cope and limit in order to prevent abuse of the terminology in as far as it relates to agreements which are couched in those terms and allows “developmental” credit providers to escape the obligations and duties placed on credit providers generally. Proper regulatory oversight is required to ensure that this type of credit is provided in a responsible and streamlined manner in order to ensure that such credit obtains the intended objective.

1.1.1.6. “consolidated loans” need to be defined within the **NCA** to ensure that the loans are not utilised by credit providers as a manner to entice consumers out of debt review. Our client has experienced scenarios where consumers (in debt review with orders in place) are approached by credit providers offering consolidation loans in terms of which:

- The credit provider proposes to consolidate all the debt of the consumer into one account,
- The credit provider pays the consumer an amount in terms of the loan in order for the consumer to settle the consumer’s outstanding debt,

- The credit provider charges the consumer a lower interest rate than what the consumer would be paying on the outstanding debts in terms of the debt review order.
- Often the consumer does not pay the outstanding debts with the money loaned and utilises it for other purposes. This is particularly so in light of the fact that the consumers would not have had access to such an amount of money for some time and they often spend the money on unnecessary items and luxuries which they were not able to do before.
- As consequences the consumer loses the protection afforded by debt review.
- The consolidation loans offered need to be monitored and dealt with in a manner to ensure that the consumer's outstanding debts are paid by the credit provider and that the consumer is not in a worse position than while under debt reviewed.

1.1.2. The definitions in the **NCA** often result in a circular, nonsensical and confused reading of the **NCA** which causes uncertainty and interpretational disputes.

1.1.3. Our client fully supports the intended amendments to cure the irregularities and errors which are obvious from the wording of the **NCA**.

1.1.4. Our client would submit that the provisions of Section 129 of the **NCA** be re-drafted to ensure that:

1.1.4.1. There is a prescribed manner for bringing the default to the notice of the consumer – our client proposes it be by registered

mail in accordance with recent court decisions and electronically in terms of the relevant legislation and that same is logged with the **NCR**,

1.1.4.2. The consumer must in the notice:

- be given a reasonable period in which to approach a debt counsellor,
- be referred to the website of the **NCR** which should provide a list of all debt counsellors in practising in the various areas,
- be allowed to include the debt in the debt review proceedings,

1.1.4.3. The credit provider must in the Section 129 letter also stipulate the capital amount outstanding (which is to be used for the purposes of calculating *in duplum*).

1.1.4.4. The letter must be sent by the credit provider within a certain time after the default or if the amount meets a certain threshold. This would ensure that the process for the consumer and the credit provider is certain and allows for the debt review process to commence in a proper and effective manner.

1.1.4.5. This insures that the amount of the debt is fixed, the consumer has an opportunity to resolve the issue, there is no debate regarding the interest amount or total amount outstanding.

1.1.5. Our client would submit that the unintended consequence of Section 86 (10) and Section 86 (11) of the **NCA** could be suitably dealt with by the adoption of the relevant codes. Terminations would be limited. The suspension of proceedings would allow the parties to resolve issues, if any exist, would not result in court action being instituted and consequently equate to a cheaper and streamlined process for both the consumer and the credit provider.

1.1.6. Our client would submit that the unconstitutionality of Section 89(5)(c) of the **NCA** consequence of Section 86 (10) and Section 86 (11) could be suitably dealt

2. **ALTERNATIVE DISPUTE RESOLUTION AGENTS ("the ADR's")**

2.1. Although an attractive thought, **ADR's** would have to (should their continued involvement in the **NCA**) be carefully monitored to ensure that:

2.1.1. The **ADR's** are accountable to the **NCR** in the provision of the services,

2.1.2. The minimum guidelines as to the process and fees should be spelt out in the **NCR**,

2.1.3. There should be a clear separation between **ADR's** and credit providers – no payments, preferences or "punting" of certain **ADR's** over others,

2.1.4. The **ADR's** should act as independent persons appointed in terms of the **NCA** and be obliged to deal with matters within the guidelines and **NCA** provisions of the **NCA**.

THE POSSIBLE SOLUTION

2.2. Our client believes that the need for **ADR's** can be eliminated from the **NCA** completely as it is an unnecessary function which would become obsolete if:

2.2.1. There was a proper codes of conduct for credit providers (which would have to be subscribed to by all credit providers) and in terms of which minimum standards in relation to the debt review process, the terms for restructuring of specific types of debts (mortgages, short/long term, credit cards, unsecured debt), interest rate reductions, consumer assessment standards, relationship and dealings with consumers, debt counsellors and the **NCR** etc).

2.2.2. There was a proper code of conduct for debt counsellors (which would have to be subscribed to by all debt counsellors) in terms of which minimum standards in relation to debt review matters shall be set out, the number of consumers which a debt counsellor (with and without court orders) can have is stipulated, the fee structure in relation to additional costs such as dispute referral and mediation.

2.2.3. There was proper code and detailed procedure for the resolution of complaints and disputes relating to debt review matters (bearing in mind the provisions of the anticipated codes) including the following aspects:

- the ability of the consumer to be involved in the resolution and complaints procedure either as complainant against debt counsellor or credit provider.
- Credit providers and debt counsellors agree to be bound by the "complaints/resolution" code.
- That provision be made for, in appropriate circumstances for costs to be paid (as limited by the codes) by the debt counsellor, the credit provider and/or the consumer eg. where there have been actions causing unnecessary costs and the institution of the dispute.
- That provision be made for the implementation of a penalty (such as de-registration) or fines in respect of repeated minor offences.
- That the triggering of a complaint/dispute procedure would pend the *status quo* until the outcome of the complaint with the necessary "freezing" of all time periods and/or obligations in terms of the **NCA**, until the resolution whereafter the necessary time period which was being applied re-commences.
- That a time period be set for the resolution of complaints/disputes so as not to disrupt the process.

Our client believes that should the codes be properly drafted there should be a minimum amount of disputes.

2.2.4. A code be set up for mediation in relation to matters which do not fall within the prescribed / agreed terms contained in the anticipated creditors code.

- This would be applicable for example in a situation where a consumer would not fall into the prescribed / agreed codes, but still wants to go under debt review and there are compelling reasons to allow him to.

- It is suggested that these mediations be conducted by the Tribunal and that the findings get published and become binding on the industry participants, alternatively regularly incorporated in updated codes of conduct.

- This will ensure that debt review applications with similar facts would not need to be referred to the tribunal. Credit providers and debt counsellors agree to be bound by the “mediation” code.

- It will allow for development and flexibility within the credit industry to ensure that changes are accommodated and that disputes can be resolved without resorting to costly litigation.

2.3. Our client believes that it would be advisable to set up a legitimate and transparent task team or enquiry with the opportunity for all the stakeholders (credit providers, debt counsellors, the **NCR**, the competitions board, consumer protection board etc) and the public to submit comments and participate in the establishment of proper codes of conduct which will then have legitimacy within the debt review process and provide the certainty required by the relevant participants. It is further submitted that the Codes be incorporated into the **NCA** or within the regulations.

2.4. In as far as it might be necessary the **NCR** should ensure that the anticipated Codes are in harmony and complement each other, which will further reduce confusion.

3. RECKLESS LENDING – PARTICULARLY IN THE UNSECURED MARKET SEGMENT

3.1. From reports received by our client and its independent investigations it is apparent that:

3.1.1. There are numerous reckless credit lending activities which have historically taken place.

3.1.2. The current *status quo* of dealing with these reckless credit agreements (either through the court system, the credit ombudsman and/or the NCR) is not a viable option in order to:

3.1.2.1. actually ascertain whether or not the credit granted was reckless, and/or

3.1.2.2. have such credit agreements declared as reckless, and/or

3.1.2.3. allow consumers to challenge whether or not reckless credit has been granted as consumers who seek debt relief are not in a position to fund the litigation in order to have a credit agreement declared reckless and most of the times, the information required to show that the credit was reckless is within the knowledge and possession of the credit providers.

THE POSSIBLE SOLUTION

3.2. A proper process for dealing with reckless credit in the credit provider's code of conduct will be able to alleviate these difficulties by making provision for, inter alia,:

3.2.1. A proper and adequate assessment needs to be done of the consumers financial affairs including any garnishee orders, judgments, overdraft facilities, other unsecured loans and relevant proof needs to be provided to the credit provider of all living expenses, income, loans etc,

3.2.2. A proper assessment form (contained in the code) must be completed in respect of each and every credit agreement without exception (unless application is made to the Minister) and the supporting documentation must be kept by the credit provider and a copy thereof must be given to the consumer,

3.2.3. The information must be made available on request to a debt counsellor or the **NCR**,

3.2.4. Allow a perusal and/or cooling off period with reference to an **NCR** educational web page or document explaining the assessment form the duties and obligations of the consumer and the credit provider, possible alternatives and so forth in order to promote the education of the consumers.

3.2.5. Failure to complete and have the documentation in the approved form must result in the credit agreement declared to be reckless and allow for the consequences provided in the **NCA**.

3.3. Our client verily believes that the aforegoing shall ensure that credit providers meet their obligations in terms of the **NCA** to combat over indebtedness in that it would ensure that credit providers will not grant to consumers:

3.3.1. Unsecured loans and cause or allow unsuitable consumers to enter into these types of agreements in situations where they are desperate and mistakenly believe that the short term unsecured loan will solve their underlying debt problems,

3.3.2. Loans to consumers without properly conducting credit and lending risk assessments, alternatively pressurising consumers into accepting reckless credit,

3.3.3. Unsecured loans in circumstances where the other alternatives are not properly explained to them (such as debt review) and/or assistance from credit providers (something to consider in the potential amended Creditor's Industry Code of Conduct) to prevent the continuing spiral of over indebtedness.

3.4. Our client verily believes that the aforegoing will also cause the credit providers to be more circumspect in granting credit which our client believes will:

3.4.1. Make for a more responsible and sustainable credit industry that can stimulate the economy without causing unnecessary hardships to consumers.

3.4.2. Prevent credit providers from entering into numerous credit agreements with consumers and then selling or ceding their rights in terms thereof to third parties with the idea of being paid the capital outlay ("the loan") and thereafter having these third parties (who would not be regulated by the **NCR**, alternatively not effectively regulated) proceed to recover the amounts outstanding in terms of the agreements from consumers.

3.4.3. Cause the credit providers to approach credit applications from consumers differently.

3.5. It is proposed that the **NCA** would have to be amended to ensure that the unsecured lending industry is more efficiently monitored and regulated with the

necessary powers of oversight and enforcement given to the **NCR**. In order to achieve this it is proposed that:

3.5.1. The sale, cession, securitisation etc of a credit agreement or the rights of the credit provider in terms of the credit agreement must be strictly monitored,

3.5.2. A credit provider must keep a record of the aforegoing (suitable to be identified in a easy and searchable database by agreement and consumer ID) and advise the **NCR** and the consumer if the credit agreement is affected as aforesaid and furthermore inform the **NCR** and the consumer of the identity of the other party to the agreement.

4. THE PAYMENT DISTRIBUTION AGENCIES (PDA's)

4.1. Our client believes that the establishment of the **PDA's** is *ultra-vires* the provisions of the **NCA** and can find no basis for their establishment within the **NCA**.

4.2. Our client believes that the existing four **PDA's** were initially approved by the **NCR** as no alternative was readily available at that stage. To the best of our client's knowledge, the **PDA's** stemmed from firms which previously managed payments in terms of administration orders.

4.3. The current **PDA's** are not, in the view of our client and other debt counsellors properly fulfilling their functions in that:

4.3.1. The system of making and monitoring of payments is not sufficient - our client is aware of at least one **PDA** that utilises a manual data capturing and payment system (which obviously allows for human error),

4.3.2. Our client has personally had and has received numerous reports from other debt counsellors of cases where payments made to the **PDA's** have not been distributed to creditor providers, which obviously opens the door for the creditor providers to cancel the debt restructuring arrangement and causes confidence in the debt restructuring process to be eroded,

4.3.3. Accounts have been opened by **PDA**'s in the name of debt counsellors without their knowledge and without them controlling same, which could result in the Debt Counsellor being liable for any deficiencies, fraud or theft on the account even though they have no control over same.

4.3.4. There is to the best our client's knowledge and belief no oversight and regulation of the **PDA's** or auditing requirements.

4.4. Our client and other debt counsellors have become aware of alternative payment distribution companies and organisations which would result in a dramatic decrease in the administration charges levied by the **PDA's** on consumers making payments in terms of the debt restructuring agreement or order.

4.5. The reduced charges (as much as **R 200.00** per month on average) would mean that there will be more funds available for distribution to creditor providers. This will not only facilitate the debt restructuring negotiations (more will be available for the proposals) but will also ultimately ensure that credit providers are paid sooner and consumers are eligible for rehabilitation much earlier.

4.6. Our client is aware of numerous advances made to the **NCR** by such alternative payment distribution companies, but despite the obvious benefits and the fact that such companies:

4.6.1. have been in existence for a substantial period of time and have a proven track record,

4.6.2. have the necessary software and infrastructure to perform the functions required on an automated system,

4.6.3. are strictly regulated and audited in terms of their regulations,

4.6.4. are accredited by the South African Reserve Bank.

The **NCR** has failed to even consider the use of such alternative payment solution companies.

THE POSSIBLE SOLUTION

4.7. Our client verily believes that the current payment distribution agency and their systems and structures should be investigated and alternative companies who can provide more efficient and cheaper service and who are properly regulated should be accredited by the **NCR**.

4.8. We attach hereto a document produced by one such alternative company which sets out more information on their functioning and the possible framework within which it can operate.

4.9. Our client would suggest that provision be made in the **NCA** for:

4.9.1. a proper definition for third party payment companies to distribute payments on behalf of consumers and in terms of proposals and/or court orders,

4.9.2. that a code be drafted for them,

4.9.3. that they are subject to registration and deregistration and the "mediation and/or dispute resolution code",

4.9.4. guidelines for their fees can also be prescribed.

4.10. It would also be proposed by our client that any interest that accrues on the third party payment company's relevant to debt review matters be paid to the **NCR** for the purposes of meeting the requirements of educating consumers, compliance monitoring, dispute resolution staff and management.

5. THE FUNCTIONING OF THE NCR AND THE BODIES APPOINTED IN TERMS OF THE NCA

5.1. It is no doubt evident from the aforegoing, that the **NCR** has, with respect not been properly fulfilling its duties and obligations in terms of the **NCA**.

5.2. Our client has personally lodged numerous complaints with the **NCR** regarding conduct of certain credit providers regarding the failure to negotiate in good faith, ignoring court orders and various other matters, but there is more often than not no response or action from the **NCR**.

5.3. When there is a response from the **NCR** it is not uniform in nature and therefore causes confusion amongst the players in the debt review process and the credit industry and undermines the realisation of the aims and objectives of the **NCA**.

5.4. Our client has also found that there is a significant backlog in respect of the granting of orders by agreement by the Tribunal, which causes a delay in providing certainty to the parties to the debt restructuring arrangement.

THE POSSIBLE SOLUTION

5.5. Our client believes that the functioning of the Tribunal needs to be streamlined and improved in order to provide credibility to its existence and functioning.

5.6. Our client believes that it is necessary to have an investigation into the functioning of the **NCR** and the other bodies in order to address the problems highlighted above and if necessary to provide training and support structures so as to ensure that the **NCR** and the other bodies play a meaningful and proactive role and ensure that the provisions of the **NCA** are properly implemented.

5.7. Our client submits that with the introduction of proper codes of conduct will ensure that there are more orders taken by agreement (within the Tribunal) and will ensure that debt review relief is granted sooner to the benefit of the consumer and the credit provider without unnecessary legal costs being incurred in relation to applications to court.

5.8. Our client submits that with the framework of a proper code of conduct for each of the participants in the application of the **NCA**, the burden which would be placed on the **NCR** would be dramatically reduced and self regulation and enforcement would be capable and sustainable particularly in a system where there are potential costs implications for the participants.

5.9. Where the parties cannot resolve issues and it cannot easily be solved by the **NCR** dispute process (such as failure to adhere to time lines or clear agreements in terms of the codes) then the matter could be referred to a senior **NCR** employee who can deal with the dispute in a proper and speedy manner.

6. THE LEGAL FRAMEWORK OF DEBT REVIEW

6.1. It has come to our client's attention that the various structures within credit providers do not necessarily communicate effectively with one another and with debt counsellors.

6.2. Most large credit providers have established Debt Review departments which deal with debt counsellors. These departments are aware of details of consumers applying for debt review and are responsible for the negotiations which are to take place within the ambit of the **NCA** to allow for a the restructuring of a credit agreement. The current Debt Review departments of the larger credit providers are not properly skilled and staffed in order to deal with the debt review matters as they stand at the moment. Our client believes that the adoption of proper codes will eliminate the uncertainty and confusion being caused by the various court decisions, differing views of participants in the industry and allow for the smooth and effective functioning of the debt review process in a cost saving and mutually beneficial manner.

6.3. Unfortunately, most large credit providers have a separate legal department and it has come to our client's attention that the various structures within credit providers do not necessarily communicate effectively with one another or with debt counsellors.

6.4. The legal departments of credit providers appear to be completely cut off from the debt review department and once the matter has been transferred to the legal department, the debt counsellors are unable to participate in the process anymore and the legal wheels start turning.

6.5. Our client believes that if there was better communication internally between the departments of the credit providers which would allow for a proper assessment of each matter (on its own merits) that unnecessary legal action (at a further cost and burden to the consumer and the debt counsellor) would not be incurred.

6.6. Our client has had numerous matters where the legal departments of credit providers have sent termination letters in terms of Section 86 (10) of the **NCA** and instituted proceedings to enforce credit agreements in circumstances where the debt review department of the same credit provider has:

6.6.1. agreed to a restructuring proposal, and/or

6.6.2. the consumer was not in default at the time of applying for debt review (and the termination is therefore invalid), and/or

6.6.3. failed to revert regarding proposals made by the debt counsellor or engage in the discussions in good faith.

THE POSSIBLE SOLUTION

6.7. Our client proposes that the Code for Credit Providers will resolve these issues.

7. THE END OF DEBT REVIEW

7.1. The possibility exists for consumers to exit debt review in two ways:

7.1.1. by obtaining a clearance certificate,

7.1.2. or voluntarily withdrawing from the debt review prior to the granting of a court,

7.1.3. default of the consumer in terms of a re-arrangement agreement or court order.

7.1.4. if there is a court order to enter into a consolidation loan agreement (the concerns relating thereto have already been raised above).

7.2. Our client submits that should the consumer default in respect of a re-arrangement, that the credit provider must before proceeding to enforce the credit agreement which was re-arranged give notice of its intention to terminate the credit agreement to the consumer, the **NCR** and the debt counsellor citing the reason therefore from the debt review order.

7.3. It is submitted that the notice should allow the debt counsellor and/or consumer an opportunity to clarify the reason for the alleged default and if there was a default an opportunity to rectify same within a reasonable time.

7.4. In our client's experience there are circumstances when the **PDA** payments are not made accurately, the payments to a particular credit provider are stopped in the belief that the terms of the court order in respect of that credit agreement have been fulfilled, that there is confusion from the credit provider regarding the default.

7.5. It is submitted that the aforegoing will allow for the clarification of these issues in a sensible manner without the incurring of unnecessary legal costs and will prevent unnecessary hardship to consumers in circumstances where there has been no intentional default on their part.

7.6. Our client would submit that where the consumer exits the debt review in scenarios 7.1.1 and 7.1.4 that provision should be made in the **NCA** for the debt counsellor to continue with the monitoring of the consumer in order to ensure that:

7.6.1. Consumers keep up payments in terms of the consolidated loan agreements,

7.6.2. Consumers do not simply revert to negative financial practices, such as a spending spree.

7.6.3. Consumers are provided with a support structure to assist them in their new found financial freedom.

We trust that you find the above in order.

Yours faithfully
K J BREDENKAMP
ATTORNEYS