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ATTENTION: THE HONOURABLE MEMBERS
PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

Our Ref: KB11/068

Your Ref: The NCA

ATTENTION: Mr A Hermans
Email: ahermans@parliament.gov.za

4 February 2014

Dear Madam / Sirs

RE: NATIONAL CREDIT AMENDMENT BILL
B 47 - 2013

1. We refer to the above matter and the written submissions presented to the portfolio committee on 29 November 2013 as well as the oral submissions and slide presentation made on 29 January 2014 in relation to the proposed amendments to the National Credit Act 34 of 2005 ("the **NCA**") by our client the Debt Counselling Industry ("**theDCI**") and Ms Deborah Anne Solomon a registered debt counsellor.

2. We confirm having been requested by the chairperson to provide further written submissions on the following aspects:

   2.1. Consolidation loans;

   2.2. Payment distribution agencies / Switches;

   2.3. The roll of courts;

   2.4. Section 86 (10) of the **NCA**;

   2.5. Section 129 letters in terms of the **NCA** & *in duplum* interest;

2.6. Reasons for faith having been lost in the debt review process;

2.7. Credit bureaus and the information retained by them;

2.8. Guidelines relating to codes of conduct – Credit providers (CP's) and Debt Counsellors (DC's);

2.9. Guidelines relating to a resolution code of conduct;

2.10. Affordability assessments;

2.11. Propensity for criminal offences;

2.12. Credit life charges and interest; and

2.13. Conflicting information - particularly in relation to credit providers participating there in.

3. Consolidation Loans

3.1. Consolidation agreements are dealt within in Section 88 (1) of the **NCA** and reads as follows:

*(1) A consumer who has filed an application in terms of section 86(1), or who has alleged in court that the consumer is over-indebted, must not incur any further charges under a credit facility or enter into any further credit agreement, **other** than a **consolidation agreement**, with any credit provider until one of the following events has occurred:*

(a) The debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;
(b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application; or
(c) a court having made an order or the consumer and credit providers having made an agreement re-arranging the consumer's obligations, all the consumer's obligations under the credit agreements as re-arranged are fulfilled, unless

*the consumer fulfilled the obligations by way of a **consolidation agreement**.*

(2) *If a consumer fulfils obligations by way of a **consolidation agreement** as contemplated in subsection 1 (c), or this subsection, the effect of subsection (1) continues until the consumer fulfils all the obligations under the consolidation agreement, unless the consumer again fulfilled the obligations by way of a consolidation agreement.*

(3) *Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-*

(a) the consumer is in default under the credit agreement; and
(b) one of the following has occurred:

(i) An event contemplated in subsection (1) (a) through (c); or

(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

*(4) If a credit provider enters into a credit agreement, other than a **consolidation agreement** contemplated in this section, with a consumer who has applied for a debt re-arrangement and that re-arrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit, whether or not the circumstances set out in section 80 apply.*

(5) If a consumer applies for or enters into a credit agreement contrary to this section, the provisions of this Part will never apply to that agreement.

3.2. Consolidation loans can fall into two categories:

3.2.1. Loans provided to consumers as consolidation loans prior to an application for debt review, which consumers are usually in financial distress; and

3.2.2. Loans provided to consumers who have applied for debt review in terms of consolidation agreements, which consumers are over-indebted.

3.3. In both categories, it is imperative that:

3.3.1. No funds (in any manner whatsoever) over and above the amount required to settle all the consumer's debts are advanced to the consumer as consumers may be enticed by the prospect of receiving additional funds.

3.3.2. The funds must always only be paid directly to the consumer's debtors ensuring agreed settlement figures and receipt of paid up letters so as to avoid consumers from utilising the funds for other purposes and thereafter being in a situation where the original debts remain with the additional debt of the consolidated loan.

3.3.3. The loans should be registered as consolidation loans with credit bureaus so as to ensure that no further loans of any type are taken as consumers could continue to take consolidation loans to pay off the previous consolidation loan and end up in the situation of "rolling" funds.

3.3.4. The provisions of Section 88 (1) and 88 (4) should be applicable to afford protection to consumers in both situations.

3.3.5. It is respectfully submitted that there is a contradiction in the **NCA** in as far as Seciton 88 (5) is concerned as an agreement entered into contrary to the provisions of Section 88 (ie. An agreement other than a consolidation loan) will not have Part D of the **NCA** (relating to over indebtedness and reckless credit) apply to that agreement. A consumer would have to enter into a credit agreement with a credit provider and consequently if the provisions of Part D do not apply then neither will the

protection afforded by Section 88 (4). It is submitted that this anomaly should be corrected when the amendments to the **NCA** are made.

3.4. Consolidation loans should be exactly that. The consolidation of a consumer's debts into one loan without additional loans of a personal nature being made to the consumer until such time as the consolidation loan has been paid off. Without this protection, consumers are in a position where they might very well consolidate their debt, but incur further debt, which will only cause further financial distress.

A Case Study is attached hereto marked **Case Study 1** providing an example of one consumer's problems with consolidation loans.

4. Payment Distribution Agencies (PDA's) / Switches

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 four **PDA's** which were initially approved by the **NCR** were done so in a situation where there was no proper investigation into an alternative. To the best of our client's knowledge, the **PDA's** stemmed from firms which previously managed payments in terms of administration orders. There also appears to be some relationship between the credit providers and certain **PDA's** which our client believes should never be the case. African Bank was until recently a registered **PDA**, but has subsequently withdrawn as one.

4.3. Despite complaints having been lodged with the **NCR** regarding **PDA's**, debt counsellors are obliged in terms of their registration to utilise **PDA**'s by the **NCR**. This situation causes debt counsellor's (whom have a fiduciary duty to

consumers) to be placed in a situation where their fiduciary duty is likely to be breached and consumers are placed at risk of losing the protection afforded by the **NCA**.

4.4. Our client furthermore submits that in the face of the existing legislation relating to payment distribution regulatiions, dealt with more fully hereinunder, that the current directives from the **NCR** are in breach of the provisions of such legislation and would continue to be breached in the event of the **NCR** simply registering and regulating the existing **PDA's** without taking into account the prevailing legislation.

The current PDA's

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

4.5.1. The system of making and monitoring of payments is insufficient - our client is aware of at least one **PDA** that utilises a manual data capturing and payment system, which obviously allows for human error.

4.5.2. The volume of transactions and complexity of the redistribution schedules are often underestimated and cause processing and reporting difficulties which affect all of the interested parties.

4.5.3. 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 or been distributed incorrectly.

4.5.4. The credit provider, as it is not being paid either proceeds to:

4.5.4.1. Query the non-payment with the debt counsellor;

4.5.4.2. Terminate the credit agreement from the debt restructuring process and proceed with enforcement procedures;

4.5.4.3. Consider the consumer to have breached the terms of a court order and proceed with enforcement procedures.

4.5.5. Debt counsellors in all the possible cases above would have to raise queries with the consumer and the **PDA's**. Where consumer's have provided proof of payment to the **PDA's** the **PDA's** have to show payment to the credit providers and because of the inefficiency often cannot provide proof of the payments or provide proof evidencing incorrect payments.

See Case Study 2 – **PDA's**, which is one example many similar situations.

4.5.6. Consumers are then prejudiced by having to defend legal actions instituted by credit providers.

4.5.7. The effect of this causes confidence in the debt restructuring process to be eroded. In particular, the failure of the **NCR** to properly deal with complaints aggravates the situation. The courts have already determined that consumers who pay to **PDA's** cannot be in default.

(See Case Study 3 – NCR Complaints)

The Challenges

4.6. A payment distribution system is required to ensure accurate payments and compliance with the re-distribution proposals and/or redistribution orders, which system is:

4.6.1. cheaper,

4.6.2. accountable and transparent,

4.6.3. regulated, and

4.6.4. effective.

The Solution – already exists

4.7. Numerous alternative payment distribution companies (which we shall refer hereto as "**Switches**" are already in existence which:

4.7.1. Are properly accredited and subject to the provisions of the National Payment System Act, No 78 of 1998 ("the **NPSA**"),

4.7.2. Are regulated by the South African Reserve Bank Act,

4.7.3. Have highly automated systems for making payments, and

4.7.4. Provide a cheaper and more accurate service,

Advantages

4.8. The following advantages are evident:

4.8.1. The **Switches** have been in existence for a substantial period of time and have a proven track record,

4.8.2. It would provide a cheaper service to the consumer and allow for quicker repayment of debts and rehabilitation. The reduced charges 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.

4.8.3. The cost savings have been gained from the automation of the payment systems and the fact the **Switches** have fine-tuned these systems, under the watchful eye of the South African Reserve Bank for at least the past ten (10) years.

4.8.4. Our client submits that the employment of **Switches** to perform this important function in the debt review process will prevent the possibility of “growing pains” should individuals and new companies have to implement untried systems and the risks associated therewith.

4.8.5. The **Switches** are accredited by the South African Reserve Bank and have to comply with the strict requirements of the **NPSA**, which includes being audited annually, record keeping and transparency.

4.8.6. There would be no additional costs to the **NCR** in respect of the regulation of the function of the **Switches**.

The Proposed amendment

4.9. Our client believes that it is not advisable to have natural persons or other juristic persons registered as a **PDA**, but rather to have the **Switches** registered in these capacities upon successful application to the **NCR**.

Other considerations

4.10. Our client furthermore submits that the **NCR** is under an obligation as envisaged in the proposed amendment to Section 17 of the **NCA** to enter into an agreement with the Reserve Bank who in terms of Section 10(1)(c) of the South African Reserve Bank Act, 1989 is required to perform such functions, implement such rules and procedures and, in general, take such steps as may be necessary to establish, conduct, monitor, regulate and supervise payment, clearing or settlement systems. This is exactly what **PDA's** are meant to do.

4.11. It is our client's submissions that the **PDA's** would fall within the ambit of the National Payment System Act, No 78 of 1998 (the "**NPSA**") and would be subject to the regulatory authority, registration requirements, pricing structures etc which the South African Reserve Bank monitors and enforces. The failure to comply with the **NPSA** and forcing debt counsellors to utilise **PDA's** in these circumstances is in our client's opinion unlawful.

4.12. Existing **PDA's** can apply to be registered as payment systems (**Switches)** in terms of the **NPSA** if they choose to do so and will then be properly regulated

and upon compliance can become registered with the **NCR**. This will allow the current **PDA's** to continue the functions which they are currently performing, only better.

5. The Roll of the Courts

5.1. Due to the fact that there have been numerous challenges to the interpretation of the various sections of the **NCA**, the magistrates courts dealing with debt review applications have historically been in a situation where the outcome of these challenges to higher courts were awaited prior to dealing with debt review applications. This obviously caused a delay in the finalisation of the debt review applications. This is unfortunately an unintended consequence of new legislation.

5.2. The current situation that our client and other debt counsellors have experienced is that there is no uniformity in the dealing with debt review applications in the various magistrates' courts. Certain magistrates require additional information to be provided or to be contained in the debt review applications, whereas others do not. This causes ambiguity in the minds of debt counsellors as what information they need to obtain and the possibility for additional costs to be incurred so as to allow for these additional requirements.

5.3. The magistrates courts unfortunately furthermore do not possess the necessary capacity to ensure that an application for debt review would be completed within the sixty (60) day time limit imposed by Section 86 (10) of the existing **NCA**.

6. Section 86 (10) of the National Credit Act

6.1. The existing section 86(10) reads as follows:

If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-

(a) the consumer;
(b) the debt counsellor; and
(c) the National Credit Regulator,

at any time at least 60 business days after the date on which the consumer applied for the debt review.

6.2. The existing section has been the source of various legal challenges with conflicting decisions in various divisions of the High Courts. Ultimately the Supreme Court of Appeal determined the following in **Collett v Firstrand Bank Ltd [2011] 4 All SA 508 (SCA)**:

6.2.1. A credit provider may indeed terminate the debt review after 60 days have lapsed since the application for debt review, provided that the consumer was in default **and** that the credit provider participated in good faith.

6.2.2. Should a credit provider terminate the debt review after 60 days, a magistrate's court, or a *high court* dealing with the enforcement proceedings may in terms of section 86(11) order that the debt review resume**.** See paragraph 17 of the judgment.

6.2.3. If a consumer who is *not* in default yet, but is experiencing financial problems, applies for debt review, the credit provider may not make use

of section 86(10) to terminate the debt review. See paragraph 12 of the judgment**.**

6.3. It is respectfully submitted that on a proper interpretation of the Section (read with the Collett judgment) that where a consumer is not in default of the credit agreement at the time of entering the debt review, the credit provider cannot terminate the agreement from debt review in terms of Section 86(10).

6.4. Notwithstanding the aforegoing, the debate is still raging as to whether or not if the consumer goes into default in respect of the original credit agreement during the course of the debt review proceedings, the credit provider can terminate the credit agreement from the debt review proceedings.

6.5. It is our client's submission that the proposed amendment - by the insertion of Section (86)10(b) will clarify the situation and provide protection to the consumer and should be encouraged. It will limit the scope of litigation which can arise regarding termination of credit agreements from debt review proceedings and provide certainty to all stakeholders.

6.6. Our client would, however, submit that the proposed time period of 60 days should be amended to 90 days. It has often been the experience of our client that debt review applications, particularly where there is opposition, are not finalised within the period provided and that it would make sense to allow an additional period to take into account the practicalities and the capacity of the courts to hear the matters.

6.7. In our client’s experience matters are often postponed by the credit providers in order to file opposing papers and this causes a delay in the finalisation of the proceedings.

6.8. Our client would therefore submit that in order to afford proper protection an additional subsection in the proposed amendment to Section 86(10) should be inserted to allow the time limit before a credit provider can terminate to be extended by the Magistrates dealing with the matter Court (in a situation where the delay is caused by unforeseen circumstances) so as to ensure that the lack of capacity and the practicalities do not ultimately result in terminations.

Concerns regarding misuse of the debt review proceedings by consumers

6.9. Credit providers have raised objections to the amendment on the basis of the possibility that consumers may utilise the debt review proceedings to delay enforcement of the credit agreement by simply lodging an application for debt review but not proceeding with it. The credit providers argue that the proposed amendment would prejudice them in terminating a credit agreement and proceeding with the enforcement thereof.

6.10. It is respectfully submitted that this contention has no merit. The Magistrates Court Rules make provision for the manner in which applications are to be dealt with and it would always be open to the credit providers to take such steps as provided for in terms of the rules to ensure that the debt review application be set down for hearing and/or make application for the dismissal of the application in situations where the application is simply being delayed.

6.11. It is also to be remembered that a consumer's application for debt review has serious implications for the consumer himself regarding his creditworthiness and ability to conclude future contracts.

6.12. The inability to terminate is also limited to the situation where the consumer is not in default of the original credit agreement at the time of entering debt review. It is

submitted that the SCA correctly interpreted the provisions of Section 86 (10) in Collett to allow the consumer redress under the **NCA**.

6.13. It is submitted that accordingly, the proposed amendment (as amplified by the submissions above) should be effected as the potential prejudice to the consumers (having a credit agreement relating to their primary residence and/or mode of transport) terminated from debt review proceedings greatly outweighs the alleged prejudice which the credit providers will suffer.

7. Section 129 letters in terms of the National Credit Act & *in duplum* interest

7.1. Section 129 sets out the requirements to be followed by a credit provider prior to enforcement if a consumer is in default of a credit agreement and provides:

129 (1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and ....

7.2. The existing section has been authoritatively interpreted by the courts to mean that if the credit provider has already proceeded with enforcement of the agreement because of the consumer's default, the consumer may not apply for a debt review in respect of that agreement, and his application for a debt review

does not apply to that particular agreement. See ***Nedbank Ltd v National Credit Regulator*** **and others 2011 (3) SA 581 (SCA).**

7.3. This means that a consumer who receives a notice in terms of Section 129(1)(a) is barred from applying for debt review in connection with that particular credit agreement. The consumer may, however, still apply for debt review regarding his other credit agreements. Moreover, a court still has the power to refer the matter relating to that particular credit agreement to a debt counsellor (in terms of Section 85 of the **NCA**) once the agreement concerned is considered by the court or to declare the credit agreement reckless.

The proposed amendment provides for the amendment of the existing section 129 (1) as follows:

129 (1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to—

(i) a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; or

(ii) in the event of any other dispute relating to the terms of the credit agreement, refer such credit agreement to the National Credit Regulator or court with the intent that the parties resolve any such dispute;"

7.4. Our client submits that it is necessary to amend the Section to expand on what information needs to be contained in the notice contemplated in Section 129(1)(c) of the **NCA** as follows:

7.4.1. Provision should be made for the inclusion in the letter of the following information:

7.4.1.1. The original date of the credit agreement and the capital amount and interest applicable thereto,

7.4.1.2. The current capital amount and the current interest rate,

7.4.1.3. The details of the consumer court, ombud and national credit regulator,

7.4.1.4. The amount of the current arrears, and

7.4.1.5. The portion of the outstanding amount that relates to the capital, the interest and the other finance and additional charges.

7.4.2. Where the credit agreement relates to a mortgaged property, the consumer's attention should furthermore be drawn to the fact that should action be instituted and judgment obtained against him, execution against his residence will ordinarily follow and usually lead to his eviction therefrom.

7.5. The information relating to the capital amount, arrears and interest proposed by our client will assist the consumer and any individual assisting the consumer in determining the maximum amount which the consumer would be liable for and thereby ensure that proper negotiations can be entered into.

7.6. It is particularly important that the interest rate and finance charges are disclosed in the letter so that any person assisting the consumer would be able to ascertain whether or not the statutory *in duplum* principle set out in Section 103 (5) has application to the credit agreement.

7.7. The provision of the contact details of the relevant bodies to whom the consumer can turn to for assistance would also empower consumers to make the necessary enquiries in order to deal with the notice more effectively. Consumers can then be referred to debt counsellors registered with the **NCR** in their area. An open and transparent system of referral by **NCR** and credit providers is essential to ensure that there is no conflict of interest, there is certainty and that consumers are provided with the necessary assistance which they require.

7.8. Our client furthermore submits that the amendment to the section should allow for a consumer who is in default of the original agreement to bring the arrear payments up to date or enter into a suitable arrangement with the credit provider to do so (within the 20 day period) and then still be able to refer the credit agreement for debt review.

7.9. Our client submits that in most circumstances, the default triggers the outstanding of the entire capital amount (such as in the case of a mortgage bond), which no consumer will be able to settle in a situation where the consumer is already in financial distress.

7.10. It is furthermore submitted that without the provision of the aforesaid in the section that credit providers may start enforcement proceedings immediately once a consumer is in default in order to prevent his applying for debt review.

7.11. Without the ability of the consumer to pay up the arrears (or come to such an arrangement with the credit provider) and still refer the matter to debt review the bargaining position of the credit provider shall be much stronger than the consumer's. The credit provider can insist on re-payment terms which are impossible for the consumer to meet with the full knowledge that it can proceed with legal action.

7.12. It is submitted that without the amendment proposed that the contemplated resolution or re-arrangement of the debt and the intended “safety net” to be provided in the proposed amended subsection 129 (3) of the **NCA** will have no effect.

8. Reasons for faith having been lost in the debt review process

8.1. Our client submits that credit provider’s, consumers and debt counsellors have lost faith in the debt review process for, *inter alia*, the following reasons:

8.1.1. Uncertainty relating to the changing environment, terminations and conflicting information.

8.1.1.1. the process when matters are referred to courts – different courts have different requirements and some even fail to hear opposed matters which cause a delay in finalisation of the applications for debt review within the anticipated time period putting the consumer at risk of termination and frustrating the credit provider,

8.1.1.2. the conflicting information received:

8.1.1.2.1. from credit providers as to what remedies are available to consumers and suggestions and inferences that certain debt counsellor and/or organisations can offer them relief,

8.1.1.2.2. by consumers regarding the effectiveness of debt review,

8.1.1.2.3. from the **NCR** regarding the **PDA's** and the roll of mediation associations, and

8.1.1.2.4. from the **PDA**'s relating to payments

all result in uncertainty, frustration and terminations,

8.1.1.3. the termination of credit agreements from debt review proceedings in situations where the credit provider has consented to the restructuring, but the legal department of the credit provider is unaware thereof,

8.1.1.4. the possibility of terminations occurring where there is a debt review application pending and the consumer is making payments in respect of the proposals but the credit providers are not acting in good faith in the negotiations,

8.1.1.5. proposals and approaches for consolidation agreements to consumer's which are not properly managed and controlled and which cause more hardship to the consumer,

8.1.1.6. no support from the **NCR** to consumers or debt counsellors,

8.1.1.7. the undermining of debt counsellors by the **NCR** in failing to deal with complaints lodged with the **NCR** speedily, thoroughly and in terms of the provisions of the **NCA**,

8.1.1.8. no enforcement by the **NCR** and/or lack of proper enforcement, despite provision being made in the **NCA** for the manner in which complaints should be dealt with,

8.1.1.9. the fact that despite evidence exists and information is provided to the credit providers which shows that the consumer has been paying, that the credit agreements are still terminated,

8.1.1.10. the non – adherence of credit providers to court orders in particular the ceasing of charges, debit orders etc on accounts and other charges which are added to the consumer's account (or cost the consumer additional fees in respect of reversed debit order instructions) all add to the amount outstanding and ultimately cause the debt never to be paid.

See Case Study 4: Refusal to abide by a Court Order

8.1.2. **Delays caused by:**

8.1.2.1. **Lack of information and co-operation from credit providers** – such as certificates of balances, credit agreement documents, details of the arrears and interest rates. Our client submits that should credit providers be forthcoming and set out concessions and time periods upon which they will provide information and the terms on which they would be willing to renegotiate a debt, then it will provide certainty to all parties,

See Case Study 5: No Certificates of Balances

8.1.2.2. **Adversarial nature of litigation** – facts need to be substantiated and result in additional information and affidavits having to be filed, which causes postponements,

8.1.2.3. **Court process** – as indicated above, the capacity of the lower courts to deal with and resolve the debt review applications is limited and one is often faced with a situation where the matter is opposed that the opposed matter can only be heard more than 60 days after the initial date for the application. This means that a consumer who was in default of the credit agreement, but did not receive a Section 129 letter will have the agreement terminated without having an opportunity to have the court consider the matter,

8.1.2.4. **No resolution process** – it is submitted that in the absence of a speedy and effective resolution process for disputes between stakeholders that the finalisation of disputes relating to the debt review proceedings are delayed. An example often encountered by our client is the that a credit provider terminates an agreement from debt review after the 60 days have passed and alleges that the consumer was in default at the time of applying for debt review. The credit provider institutes action to enforce the agreement, usually in the High Court. The consumer would have to defend the action and bring an application in terms of Section 86(11) on the basis that:

8.1.2.4.1. The consumer was not in default of the credit agreement at the time of entering debt review, and/or

8.1.2.4.2. The credit provider did not participate in the debt review proceedings in good faith, and

8.1.2.4.3. Show that it would be just and equitable to refer the credit agreement back to the debt review proceedings i.e. that there is a prospect of a successful re-arrangement being ordered in the debt review proceedings.

The problem with this is that it delays the finalisation of the debt review application, particularly in the case where the credit agreement being excluded is a mortgage bond. The debt review application cannot be finalised (even though there might be full agreement from all the other credit providers) as the primary residence of the consumer has been excluded from the debt review re-arrangement. Should a restructuring arrangement be made an order of court in the debt review application without the inclusion of the mortgage bond, the mortgage bond cannot be referred back to the debt review process (an order is in place) and the proposals made in terms of the debt restructuring and the calculations in respect thereof would be substantially altered.

It is submitted that if there was a proper resolution process, which could halt proceedings and suspend further steps that

the key issues to be determined for a valid termination (default and good faith) can be resolved without the consumer and the credit provider having to incur the additional costs and add to the case load of both the Magistrates and High courts.

8.1.2.5. **PDA's –** proper and effective payment systems would prevent disputes relating to payments and it is submitted by our client it would also prevent credit providers from terminating agreements from debt review proceedings. It is submitted that a credit provider who is getting regular payment (even if in terms of a proposal) is more likely to negotiate in good faith than one who is not getting regular payments.

8.1.2.6. **Codes and Enforcement –** it is respectfully submitted that without proper codes of conduct for credit providers and debt counsellors which are enforced by the **NCR** that the uncertainty as to the obligations, rights and duties of parties will continue to delay the speedy resolution of debt review applications. Effective codes shall provide the guidelines for what is expected from each party which can then be applied in the resolution process described above. The implementation of sanctions would ensure that subscribers to the codes would not repeat mistakes. It would also limit the necessity for courts to intervene in disputes.

8.1.2.7. **Legal Process –** the legal process is not the preferable method of resolution. It is time consuming and costly for all. Although the legal process obviously has a place in the **NCA**, it is our client's submission that with proper codes of conduct

for stakeholders and a proper resolution process in place that a substantial amount of the delays and costs occasioned by the legal process can be avoided.

8.1.2.8. **Termination Costs –** the potential costs resulting from terminations has been discussed above.

8.1.2.9. **Rehabilitation –** the longer it takes to obtain a restructuring order, the longer it will take for a consumer to embark on the road to recovery. Additional costs incurred to the consumer due to terminations, legal battles, delays etc all result in the rehabilitation of the consumer taking longer. Our client has had many consumers who have successfully been rehabilitated through the debt review process and now have the opportunity to rebuild their financial future.

9. Credit bureaus and the information retained by them

9.1. It is our client's submission that the information kept by credit bureaus are important and should be retained so as to:

9.1.1. place credit providers in a position of determining whether or not the granting of credit is suitable – credit providers will be better able to determine affordability assessments and better manage their risk,

9.1.2. allow debt counsellors to determine whether or not there was reckless credit – clearly if a consumer has judgments against his name and/or is recorded on the credit bureaus as a bad payer, the granting of credit would be reckless,

9.1.3. prevent consumers from providing untruthful information and thereby negate the protective measures of the **NCA** in as far as it relates to the granting of reckless credit, and

9.1.4. prevent a situation where the emphasis is on credit provision and economic stimulation while ignoring the protection of the consumer and the proper and responsible development of the credit industry as a whole. It is our client's submission that failing to take these steps would simply cause a repeat of the financial collapse experienced in the recent recession.

9.2. As previously indicated, the retention of the information particularly that of consolidated loans which our client submits should be kept as part of the credit history of consumers is paramount in preventing the further granting of reckless credit.

10. Guidelines relating to codes of conduct – CP's and DC's

10.1. It is our client's submission that it is necessary for the relevant industry players to subscribe to codes of conduct.

10.2. Such a step coupled with proper enforcement thereof will ensure that industry players are aware of the boundaries and rules applicable to them and will assist in limiting the scope for disputes. Our client does not support the idea of self regulation and believes that the enforcement of the proposed codes is the most important function of the **NCR**.

10.3. Our client submits that the proposed amendments to the **NCA** should provide for the Minister of Trade and Industry to have the powers to draft such codes and to make such codes a part of the regulations to the **NCA**.

10.4. Our client believes that it is advisable to link compliance with the codes to the registration of industry players. As previously submitted the implementation of a fine or a penalty coupled with regular reporting on decisions and transparency (from the **NCR**) would ensure adherence to the code and provide the certainty which the industry desperately requires.

10.5. The Minister may then in the exercise of the powers granted to him in terms of the amendment set up a legitimate and transparent task teams or enquiries (with the opportunity for the relevant stakeholders and the public to submit comments and participate in the process) in order to establish a proper code of conduct for each of the industry players. The Minister should, however, retain the power to introduce the codes as he determines, after consultation.

10.6. Our client believes that the codes of conduct for industry players should be put into place which provides for the fair and reasonable consideration and negotiations of debt restructuring agreements. In this regard the concessions which credit providers are prepared to give for each type of credit agreement should be set out in the codes. It would also be advisable to set out the requirements for information which is to be provided by debt counsellors and consumers so that proper negotiations and restructuring agreements can be entered into.

10.7. Our client believes that the establishment of proper codes of conduct (to which all parties within the process have to subscribe) could lead to an effective and harmonised solution to the current crisis, the prevailing uncertainty in the process and limit the number of matters referred to the courts.

10.8. It is furthermore submitted that proper codes can provide for a mediation process which our client submits is best performed by debt counsellors and will ensure that such a mediation process is subject to such codes and limit the charges to consumers. Our client submits that this would be particularly useful in the context of the Section 129 letters and in circumstances where debt review is not applicable or desirable. Consumers would be afforded an opportunity to discuss the matter with a debt counsellor who could mediate with the credit providers to try and resolve the issue. This would allow an opportunity to resolve the process amicably before resorting to the legal process.

10.9. Our client is aware of numerous companies that offer mediation services without regulation by the **NCR**. This often results:

10.9.1. in high charges not only initially for the application for mediation but also for legal costs (attorneys negotiate on behalf of consumers) and a percentage of the negotiated repayment having to be paid to these companies,

10.9.2. consumers waiving rights;

10.9.3. concessions being granted to these “preferred” mediators by credit providers which are not granted to other mediators or debt counsellors and/or

10.9.4. having to as part of the “mediation process” consent to judgments if there is a default on the repayments for the total capital amount, consent to a change in jurisdiction and an emoluments/garnishee order being granted against them.

10.10. Our client submits that without proper regulation that consumers can be placed in a worse financial position than before and at greater risk of losing the protection afforded by the **NCA**. Our client furthermore submits that a conflict of interest exists in mediation companies receiving concessions while also imposing the conditions set out in 10.9.4 on consumers.

10.11. Our client and other debt counsellors have as part and parcel of their functions as debt counsellors assisted numerous clients with mediating the repayment of their debts and have found that in most situations credit providers are prepared and willing to assist consumers:

10.11.1. provided that some payment arrangement is in place or an agreement is reached to suspend payments to assist consumers,

10.11.2. they are advised of the difficulties being faced by consumers such as financial emergencies, cash short flows, loss of income etc.

10.11.3. the mediation is for a short term not usually more than 6 months, and

10.11.4. they are kept advised of changes in the consumer’s personal and financial circumstances.

10.12. Our client submits that it would be ideal and beneficial to consumers for debt counsellors to perform these mediation functions due to their knowledge and expertise in the industry. The guidelines for mediation can form a part of the codes of conduct.

10.13. Debt counsellors would also be able to assist consumers after the 6 month period should the consumer's situation have gotten worse and the mediated solution is no longer available to consumers.

10.14. Our client submits that mediation is not ideal for any lengthy period of time as consumers could be enticed to obtain further credit during the "grace period" if the consumer's financial situations do not improve.

11. Guidelines relating to a resolution code of conduct

11.1. Our client furthermore believes that it is necessary for the Minister of Trade and Industry to have the power to establish a code for resolving issues, which should at least incorporate the following key aspects:

11.1.1. A time based resolution mechanism – this will ensure that matters are resolved quickly with the least amount of prejudice to credit providers, consumers and debt counsellors,

11.1.2. The suspension of the operation of time limits within the **NCA** while a dispute is being resolved – this will ensure that legal costs are not needlessly incurred,

11.1.3. The suspension of legal action until the dispute is resolved – this will again prevent unnecessary legal costs,

11.1.4. A fine or penalty to be imposed upon offenders of the codes including the possibility of awarding costs to the successful party,

11.1.5. Mediation – can be provided for in the codes. It is our client's submission that with a proper code to resolve issues sensibly and enforcement by the **NCR**, with reporting to the industry stakeholders on decisions would limit the number of disputes and streamline the process for all parties concerned.

11.1.6. An appeal process to the tribunal in order to ensure the right of review and transparency.

12. **Affordability assessments**;

12.1. It is our client's submission that the current regulations and requirements for credit providers in respect of the format, documentation and information which they are to obtain and verify when performing affordability assessments is wholly inadequate to prevent an increase in the granting of reckless credit. This would be particularly affected in a situation where credit providers do not have access to the information that would be removed by the proposed amendment to the information stored by the credit bureaus.

12.2. The affordability assessment information should be prescribed by the Minister and properly enforced by the **NCR**.

12.3. Credit affordability assessments should be more in-depth, in the consumer's choice of home language and verified from third-party sources such as bank accounts, municipal accounts and the personal information of the consumers. Our client would submit that the affordability assessments should require copies of the supporting documentation to be kept by credit providers and provided to debt counsellors should the consumer apply for debt review.

12.4. Our client has come across numerous examples where the consumer information is not verified from third party sources and this opens the door for abuse by both credit providers and consumers.

See Case Study 6 – Reckless Credit

12.5. **The Risks for Consumers and Credit Providers**

12.5.1. Without proper assessments there is increased uncertainty in assessing the risk which has led to credit providers having a substantially larger book debt whereas this could have been avoided if proper procedures were first put in place. It is important to note that the gross book debt of unsecured credit[1] in the 120+ days range has more than double from the 2011 - Q2 figure and that the current has also almost doubled. This means that credit providers in this part of the industry have become more exposed and consequently more consumers have participated in this credit segment.

[1] CCMR Q2-2013 Table 22 at page 29

12.5.2. Without proper and detailed affordability assessments, the consumers are placed in a position to manipulate the truthfulness of their financial means and the credit providers would not be in a position to independently verify information given to them. It is submitted by our client that consumers who find themselves in financially strained circumstances would be likely to manipulate their financial circumstances in order to obtain credit.

See Case Study 1 – Page 12 read with pages 21 & 22.

12.5.3. Creditor providers can provide the credit and thereafter claim that the provisions of reckless credit to not apply as the consumer was not truthful in the provision of information. If the information is properly detailed and verified – there can be no debate.

12.5.4. There is a real concern that the consumer would be in a worse position than before if the affordability assessments are not conducted properly, responsibly and verified by third parties.

12.5.5. The current assessment procedures (which differ from credit provider to credit provider) are simply inadequate and do not fulfil the function which they were meant to serve in terms of the **NCA**.

12.6. **Unethical Credit Providers – possible widening of loopholes**

12.6.1. Certain unethical credit providers could manipulate:

12.6.1.1. the current lacking regulatory framework regarding the affordability assessments,

12.6.1.2. the lack of financial knowledge of consumers,

12.6.1.3. the desperation that consumers would have for additional loans and the belief which the consumers place in the credit providers when the terms of the credit agreement are explained to them, and

12.6.1.4. the current situation of non-enforcement and no deterrent

to grant reckless credit and hinder the effective operation of the **NCA**.

See Case Study 7 – Pressure on consumers to take credit

12.7. **The collection methods**

12.7.1. Debt collectors are collectively one of the cheapest and largest debt collectors for credit providers. This fact is often overlooked by credit providers and our client believes that placing emphasis on this could result in a mutually beneficial relationship for all stakeholders within the industry.

12.7.2. It is submitted that as the book debt of credit providers increase the collection methods employed by credit providers would escalate with

additional costs which would have to be paid by the credit providers and ultimately by the consumers.

12.7.3. Numerous credit providers have large collection call centres which often harass clients with phone calls, sms's and intimidation. These activities add to the uncertainty and desperation felt by consumers which are in financial difficulties and should be properly monitored and enforced by the **NCR**.

See Case Study 8 - Harrassment

12.7.4. Numerous credit providers employ the services of debt collectors and/or sell the value of the credit agreement to a third party who then utilises the services of a debt collector to recover the funds from the consumer.

12.7.5. These debt collectors will not be governed by the provisions of the **NCA** or the proposed industry codes, unless, and our client submits that it is imperative that the credit providers are held responsible for the conduct of the third parties and debt collectors (whether as agents for the credit providers or as cessionaries of the credit agreements).

12.7.6. It is submitted that the provisions of Section 133 of the **NCA** should be amended to cater for the possibilities described above.

12.8. **Reckless Credit**

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

12.9.1. Numerous reckless credit lending activities have historically taken place.

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

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

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

12.9.2.3. 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.

12.10. A proper procedure for doing affordability assessments will be able to alleviate these difficulties as it would ensure that the relevant assessment procedures are standard and that the documentation used to determine credit worthiness and the ability of a consumer to repay credit agreements will be available if reckless credit is alleged.

12.11. It is furthermore submitted by our client that should reckless credit be found after an investigation into a complaint that all the branches of the credit provider should be investigated by the **NCR** to ascertain if there are more instances thereof.

12.12. It is submitted that the regulation of affordability assessments would also prevent the dramatic increase in the number of unsecured loans being offered by credit providers and being taken up by consumers.

12.13. Our client verily believes that the aforegoing shall also ensure that credit providers comply with the obligations placed on them as registered credit providers in terms of the **NCA** to combat over indebtedness. It will also prevent the undesirable effect of consumers:

12.13.1. Taking up these loans and entering 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,

12.13.2. Being afforded loans by the entities without properly conducting credit and lending risk assessments, alternatively pressurising consumers into entering into further credit agreements,

12.13.3. Taking unsecured loans in circumstances where the other alternatives are not properly explained to them such as debt mediation and/or review) to prevent the continuing spiral of over indebtedness.

13. Possibility of criminal offences

13.1. It is our client's submission that without proper regulation, codes of conduct and enforcement that there is a real possibility of criminal offences occurring.

13.2. Consumers could enter into consolidation loans (which contain an element of additional personal loans) where they are prohibited therefrom. Credit providers in these situations would be just as guilty by offering such loans in the first place.

13.3. The current general offence clause is found at Section 157 of the **NCA** and reads as follows:

It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by this Act.

13.4. It therefore means that the failure of providing information to debt counsellors when they are performing their duties in terms of the **NCA**. The most common examples of contraventions are where credit providers do not provide a certificate of balance, do not respond to proposals and fail to engage in good faith in negotiations with debt counsellors. A finger can also be pointed at certain of the existing **PDA's** when they fail to provide proper accounting information.

13.5. Our client would furthermore submit that the granting of personal loans or entering into additional credit agreements with consumers who have applied for or are under debt review, other than a consolidation agreement as defined in terms of the **NCA** is an offence.

See Case Study 7 read with the provisions of Section 88 of the NCA

13.6. Furthermore it is submitted that the provision of conflicting information and harassment of consumers by credit providers hinders the functioning of debt counsellors and would also constitute an offence. Our client has had numerous examples where consumers are advised in these phone calls that their debt review applications are cancelled, that their debt counsellors are incompetent and that the credit provider will proceed with enforcement.

See Case Study 8 - Harrassment

13.7. Our client has previously raised concerns about the involvement of credit providers in the Voluntary Debt Mediation Solution, which was promoted by the National Debt Mediation Association. The solution provided for a mediation system where the consumer had to agree to certain conditions, one of which was that there could not be any allegations of reckless lending. The credit providers would then offer substantial concessions to the consumer. These concessions would not be available to debt counsellors who did not subscribe to a code of conduct which was ultimately imposed by the credit providers via the NDMA. Credit Providers would also refer consumers to the NDMA as a preferred method of obtaining relief.

13.8. It is worth noting that any hindrance into the investigation of complaints by the **NCR** would also be a criminal offence.

13.9. The official response received from the **NCR** when complaints have been lodged in terms of Section 157 by our client is that our client is not entitled to lodge complaints utilising the section and only the **NCR** has that power.

14. Credit life charges and interest

14.1. It has also come to our client's attention that certain credit providers include in their products credit life charges. This is basically a form of insurance taken out in respect of the credit agreements.

14.2. These credit life charges are not properly explained to consumers and interest is added on them and charged to the consumer, which is illegal.

14.3. Consumers are usually in such a desperate situation that they would sign or agree to any terms in order to obtain and secure the next loan.

14.4. In the experience of our client, these credit life charges are substantial and add substantial amounts to the repayment amount which consumers have to make. It is our client's submission that these credit life charges and other charges related to the credit agreement should be deleted on credit agreements when a consumer applies for debt relief, provided that the consumer takes out an alternative life insurance to meet his obligations in terms of the restructured payments. Alternatives are often cheaper and managed in the debt review restructuring process so as to ensure that all credit providers (not only those who have added credit life to their agreements) have a level of security for the repayment of the debt.

See Case Study 1 – page 11 (costs) and pages 17 to 19

15. Conflicting information - particularly in relation to credit providers participating therein

15.1. It is our client's submission that there should be regulation of the information which is provided by credit providers and the contact which they have with consumers.

15.2. The failure to provide and enforce codes of conduct and a proper guideline can result in criminal offences being incurred, confusion in the minds of consumers and ultimately undermine the entire debt review process.

15.3. The **NCR** should be more transparent in its investigations and make reports relating to investigations available to all parties in relation to the matter. Our client is aware of reports being provided by the **NCR** relating to investigations into debt counsellors, but the reports are not readily provided when an investigation is conducted into the affairs of credit providers.

We trust that you find the above in order.

Yours faithfully
K J BREDENKAMP
ATTORNEYS

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