RESPONSE TO PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY ON DEBT RELIEF BILL

1. The Portfolio Committee on Trade and Industry (PC) invited the Department to engage on the following issues relating to debt relief:

1.1 Application process for requesting debt relief, in particular the adjudication process;

1.2 The application of the *in duplum* rule;

1.3 Any other concerns pertinent to the draft framework Bill.

2. Application process for requesting debt relief, in particular the adjudication process

2.1 Clause 10 of the National Credit Amendment Bill (Bill) seeks to introduce a new section 88A – 88D in Part E in Chapter 4 of the National Credit Act, 2005 (Act No. 34 of 2005)(the NCA), to address debt relief, whilst section 88E deals with debt relief measures by the Minister.

2.2 Section 88A

2.2.1 Section 88A gives definitions of some expressions.

2.2.2 It further provides that a consumer under a credit agreement may apply to the National Credit Regulator (NCR) in the prescribed manner and form to grant the consumer once-off debt relief, if that consumer is indigent (as defined) or heading a child headed household (as defined), has at a certain date a total unsecured debt of a certain amount and the credit agreements that make up the debt are small or intermediate agreements or developmental agreements.

2.2.3 The circumstances under which an application for debt relief may not be made or may be made are set out.

2.2.4 Section 86 of the NCA provides for applications for debt review to a debt counsellor. Regulation 24 to the NCA prescribes the procedure and information required for such an application. Extensive information regarding personal details, income, expenses and all debts of the consumer is required.

2.2.5 Section 88A(4) provides that the application for debt relief must be supported by proof of income and expenses, information confirming the total amount due in terms of credit agreements, the particular credit agreements, credit insurance agreements, agreements relating to the restructuring of debt, the reasons for seeking a debt relief order and other information to be described. It might be prudent to prescribe the same things provided for in regulation 24 for an application for debt relief.

2.2.6 It is also suggested that consideration be given to a definition of a once-off debt relief to ensure legal certainty.

2.3 Section 88B

2.3.1 Section 88B provides for the evaluation of the application for debt relief by the NCR. A consumer applying for debt relief and a credit provider affected thereby must comply with reasonable requests by the NCR to facilitate the evaluation and must participate in good faith in the application.

2.3.2 A credit provider affected by the application may submit an affidavit to the NCR stating facts which may disqualify the consumer for debt relief or affect the order made by the Tribunal in respect of the application for debt relief.

2.3.3 The NCR—

(a) must make a decision whether the consumer qualify or not for debt relief;

(b) may refer the consumer to a debt counsellor for debt review or assistance with debt re-arrangement;

(c) may make a recommendation to the Tribunal for appropriate declarations on reckless lending, unlawful credit agreements, agreements resulting from prohibited behaviour or resulting from dereliction of required conduct;

(d) must make a recommendation to the Tribunal if the consumer qualifies for a once-off debt relief.

2.3.4 When considering these amendments, it is necessary to consider implementation challenges that may arise both out of members of the public accessing the relief and the capacity of the NCR and the Tribunal to deal with all the applications for a once-off debt relief.

2.4 Section 88C

2.4.1 Section 88C provides that a single member of the Tribunal may consider an application for debt relief.

2.4.1 The orders the Tribunal may make, in addition to its other powers in terms of the NCA include—

(a) reject the application;

(b) request the NCR to refer the consumer to a debt counsellor for debt review or debt re-arrangement;

(c) declare a credit agreement reckless or void for being unlawful;

(d) specific performance for restructuring of the debt;

(e) an once-off debt relief order;

(f) a combination of the above.

2.4.2 An order for once-off debt relief may be—

(a) a determination of the maximum interest, fees or other charges for a certain period or a maximum monthly instalment;

(b) a suspension of one or more of the credit agreements for a certain period;

(c) a declaration of the debt as extinguished under certain circumstances; and

(d) setting certain conditions;

(e) a combination of the above.

2.4.3 Section 142 of the NCA provides for hearings before the Tribunal. In general, hearings must be conducted in public, in an inquisitorial manner, as expeditiously as possible, as informally as possible and in accordance with the principles of natural justice. In certain circumstances may members of the public be excluded. A single member of the Tribunal, sitting alone, may hear certain applications and other matters assigned to him or her by the Chairperson of the Tribunal.

2.4.4 The Tribunal consists of a Chairperson and not less than 10 other women or men appointed by the President, on a full or part-time basis. In terms of section 27 of the NCA the Tribunal or a member of the Tribunal acting alone in accordance with this Act or the Consumer Protection Act, 2008, may—

(a) adjudicate in relation to any—

(i) application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application; or

(ii) allegations of prohibited conduct by determining whether prohibited conduct has occurred and, if so, by imposing a remedy provided for in this Act;

(b) grant an order for costs in terms of section 147; and

(c) exercise any other power conferred on it by law.

2.4.5 It appears from the provisions of clause 16 of the Bill, which seeks to amend section 142 of the NCA that a single member of the Tribunal may consider an application for debt relief on the documents included in the referral from the NCR only, without further evidence being led. It therefore seems as if the presence of the consumer and credit providers may not be required and the question arises if the credit provider will have knowledge of the referral to the Tribunal and if further affidavits may be filed. The Bill does not seem to provide that the credit providers be informed as to when the application will be heard.

2.5 Section 88D

2.5.1 Section 88D deals with the effect of a once-off debt relief and requires the consumer to inform the NCR of any changes in his or her financial circumstances. The NCR must evaluate the change and if it affects the once-off debt relief, refer the matter to the Tribunal.

2.5.2 The Tribunal may rescind or revise an order for once-off debt relief if information shows that the consumer was dishonest in his or her application or if the consumer fails to comply with the conditions of the order.

2.6 Section 88E provides among others that the Minister (member of the Cabinet responsible for consumer credit matters), may prescribe forms, time periods, information required and procedures in accordance with section 171 of the NCA to ensure a once-off debt relief measure is administered smoothly. A debt relief measure prescribed by the Minister must, among others, alleviate household debt, benefit indigent persons and child headed households and address economic circumstances.

3. The application of the "*in duplum*" rule

The following is a summary of paragraph 103 in *LexisNexis Law of South Africa Volume 8 - Third Edition*:

3.1 The common law *in duplum* rule restricts the interest recoverable in terms of a loan or credit agreement where a debtor is in default. Interest stops running when unpaid or arrear interest equals the outstanding capital amount.

3.2 The *in duplum* rule is founded on public policy, its objective being to protect the debtor who is in financial difficulty and who is unable to service his or her debts from an ever-increasing accumulation of interest. It can be said that the rule aims to provide a form of relief to a consumer, rather than to prevent a consumer from becoming over-indebted in the first place. However, it provides only interim relief. When the debtor starts making payments again and the interest element of the amount owed is decreased, the interest starts running again. The rule only temporarily prevents the interest from running and does not set a maximum amount of interest that may be charged.

3.3 The common law *in duplum* rule is also not limited to interest on money-lending transactions but applies to all types of contract in terms of which a capital sum is due and on which amount a specific rate of interest is due.

3.4 Before the NCA came into operation, consumers in credit agreements could only rely on the common law *in duplum* rule to protect them from exploitation.

Since 1 June 2007, consumers in credit agreements which fall within the ambit of the NCA can rely on the protection of the statutory *in duplum* rule as set out in section 103(5) of the NCA.

3.5 Section 103(5) of the NCA provides as follows:

"(5) Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)*(b)* to *(g)* that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.".

3.6 Section 101 of the NCA provides for the cost of credit. Subsection (1) provides that a credit agreement must not require payment by the consumer of any money or other consideration, except the principal debt (section 101(1)*(a)*), an initiation fee (section 101(1)*(b)*), a service fee (section 101(1)*(c)*), interest (section 101(1)*(d)*), cost of credit insurance (section 101(1)*(e)*), default administration charges (section 101(1)*(f)*) and collection costs (section 101(1)*(g)*).

3.7 The statutory *in duplum* rule does not protect juristic persons but effectively protects natural persons, stokvels and trusts where there are one or two individual trustees that concluded credit agreements governed by the NCA. The statutory rule also does not apply to credit agreements already in existence when section 103(5) came into operation and accordingly the common law *in duplum* rule applies to those credit agreements.

3.8 The statutory *in duplum* rule (in section 103(5) of the NCA), provides in essence that when a consumer of credit is in default, all the combined amounts set out in section 101(1)*(b)* to *(g)* of the NCA, cease to run when they reach the outstanding balance of the consumer's principal debt at the time of the default. In *National Credit Regulator v Nedbank Ltd 2009 4 All SA 505 (GNP),* the court

held that these costs of credit, including interest, may not exceed in aggregate the unpaid balance of the principal debt during the time that the consumer is in default, and once those charges and interest equal the principal debt, no further charges and interest may accrue for as long as the consumer is in default. Interest or other costs of credit may only start accruing again once the consumer is no longer in any default. The operation of the statutory rule is not suspended by a summons and operates as long as the consumer is in default. This interpretation was also confirmed by the Supreme Court of Appeal in *Nedbank Ltd v National Credit Regulator 2011 4 All SA 131 (SCA)*.

3.9 When a consumer makes payments on the arrears, section 126(3) of the NCA provides the manner in which the payments should be appropriated: first to due or unpaid interest charges, then to due or unpaid fess or charges and lastly to the principal debt.

3.10. Constitutional Court judgment dealing with the *in duplum* rule

The following is an extract from *De Rebus August 2015*:

"In the case of *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) in 2006 a certain company, Winskor, received a loan in the amount of R 12 million from the respondent, Slip Knot Investments. As trustees of a trust, which held shares in Winskor the appellants, Mr and Mrs Paulsen (the Paulsens), stood surety for the loan whose terms were that interest would run at the rate of 3% per month, which translated into 43% per annum. A year later the company defaulted on repayments. When legal proceedings were instituted against the appellant in 2010 the total amount sought was R 72 million, being the capital amount of R 12 million and R 60 million in interest. The WCC granted judgment against the appellants. An appeal to the full Bench achieved limited success in that interest was limited to R 12 million in terms of the *in duplum* rule. A further appeal to the SCA was dismissed with costs. The majority of the court held per Wallis JA that whereas the *in duplum* rule limited accumulation of interest to the extent of the capital

amount, the R 12 million in the instant case, on the authority of *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA); [1998] 1 All SA 413 (SCA) (the *Oneanate* case) once legal proceedings were instituted to recover a debt the *in duplum* rule was suspended with the result that interest started accumulating without limit. For that reason the SCA upheld the respondent's cross appeal, granting judgment in its favour in the amount of R 72 million, just as the High Court did. As a result the appellants applied for leave to appeal to the CC against the decision of the SCA.

The main judgment was read by Madlanga J (Jafta and Nkabinde JJ concurring) while the majority judgment, which was the concurring judgment, was read by Moseneke DCJ while Cameron J delivered a dissenting judgment. Madlanga J granted leave to appeal and ordered the appellants to pay the respondent –

- the capital amount of R 12 million;
- interest on the capital amount at the rate of 3% per month, up to a maximum of R 12 million (the *in duplum* rule); and
- interest on the judgment debt (consisting on R 12 million capital amount and R 12 million maximum accumulated interest) limited to a maximum on R 24 million.

The court held that the *in duplum* rule was a long-standing and well-established part of South African law, which provided that interest ceased to accrue once the total of unpaid interest equaled the amount of the outstanding capital. The overarching purpose of the rule was to protect debtors from being crushed by the never ending accumulation of interest on the outstanding debt. By suspending the application of the *in duplum* rule *pendente lite* the *Oneanate* case indiscriminately targeted all debtors regardless of whether they were defending the claim in good faith or not. To hit all debtors in that manner would definitely have an undesirable chilling effect. Some debtors, despite a genuinely held belief that they had a valid defence, could sooner opt to settle a claim than face the potentially financially ruinous interest that would again commence to pile up once a court process was served. Therefore, the *Oneanate* case principle inhibited rather than promoted the right of access to courts as provided

for in s 34 of the Constitution. To many consumers astronomical interest would mean the difference between economic survival and complete financial ruin. To allow for uncapped, and possibly exorbitant, interest to run *pendente lite* granted a powerful tool to creditors to bully and possibly annihilate debtors using the litigation process to their best advantage. Allowing uncapped interest to run as a result of a debtor exercising her right of access to courts by suspending the *in duplum* rule *pendente lite*, created a risk of rendering the debtor's right of access to courts tenuous, if not illusory.".

The CC judgment therefore makes it clear that the common law *in duplum* rule is not suspended when legal proceedings are instituted.

3.11 In an article in the *2011 South African Mercantile Law Journal 352*, Professor Kelly-Louw dealt with the statutory *in duplum* rule as an indirect debt relief mechanism. Much of the contents of the article have been included in paragraph 103 in *LexisNexis Law of South Africa Volume 8 - Third Edition*, referred to above. The article points out that there are three major differences between the common law and the statutory *in duplum* rules:

- First, under the common law rule, it is only the interest that ceases to run if it equals the outstanding capital amount. In terms of the statutory rule, all the amounts (initiation fees, service fees, interest, cost of credit insurance, default administration charges and collection costs) cease to run if they combine to exceed the outstanding capital debt.
- Second, in terms of the common law rule, the interest may start to run again once the consumer makes a payment and the arrear interest is reduced. In terms of the statutory rule, interest and other costs only start to run once the consumer is no longer in any default.
- Third, the common law rule is suspended once the credit provider has issued summons, and interest may then start accruing again, but the statutory rule is not suspended by a summons and operate for as long as the consumer is in default. It must be pointed out, that the CC has made it clear that the common

law rule is not suspended where legal proceedings are instituted, as indicated in paragraph 3.10 above.

The article came to the conclusion that the statutory *in duplum* rule offers much better debt relief for an over-indebted consumer who has insufficient financial resources, is willing to pay the arrears, but who just needs some type of relief or temporary moratorium on the further accumulation of interest and other costs of credit. Although this form of debt relief is not a direct mechanism, like debt counselling or administration orders, it is an indirect mechanism. The statutory rule is a much more workable form of debt relief and provides consumers with a real opportunity to pay off their arrears if credit providers allow them the opportunity to do so. The article also points out that the statutory rule has worsened the position of credit providers, therefore credit providers will have to be much more vigilant of consumers not servicing their debts and take immediate appropriate legal action if they want to avoid a situation where the statutory *in duplum* rule comes into operation.

4. Any other concerns pertinent to the draft framework Bill

4.1 Regarding the second paragraph of the Preamble, it is stated that the "focus [is] on benefit to credit providers". In this regard it must be pointed out that section 3 of the NCA states that the purpose of this Act is to promote and advance the social and economic welfare of South Africans and to protect consumers.

4.2 Is the once-off debt relief in respect of a credit agreement or agreements or does it apply to the person of a consumer? In other words, can a consumer only apply once in respect of a specific agreement for debt relief and later again in further agreements or can a consumer only apply once in his or her lifetime for debt relief, notwithstanding how many credit agreements he or she might have?

4.3 It is not certain why in clause 10, in the definition of a child headed household, reference is made to only the death of a parent or legal guardian. What if the parent or guardian is still alive, but, for example, missing or mentally disabled?

The question also arises as to what the situation is of elderly people, households with women at the head or persons with disabilities. This is in line with section 55A of the Magistrates' Courts Act which considered section 4 of the PIE Act.

"(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is **just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.**

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is **just and equitable** to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the **rights and needs of the elderly, children, disabled persons and households headed by women."**

4.4 The list of assets in the definition in clause 10 which may not be realised, include, necessary tools of trade, necessary household furniture and effects to a maximum of an amount to be determined, a motor vehicle to a certain maximum amount or a fund such as a pension fund or retirement annuity that has a future realization date. The list does not include all the assets provided for in section 67 of the Magistrates' Courts Act, 1944, which lists the property protected from seizure and which may not be attached or sold in execution, namely:

(a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family;

(b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(c) stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(d) the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month;

(e) tools and implements of trade, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his possession as part of his equipment:

Provided that the court shall have a discretion in exceptional circumstances and on such conditions as it may determine to increase the amounts determined by the Minister in respect of paragraphs (b), (c), (e) and (f).

By GN R385 of 1 March 1994 the amounts in paras *(b)*, *(c)*, *(e)* and *(f)* were determined at R2 000,00 each.

Consideration could be given to extend the list in clause 10.

4.5 In clause 10, which seeks to insert a section 88A – 88E in the NCA, in section 88A(2), several dates are indicated as dates on which a total unsecured debt was owed. Some of these dates seem to be retrospective which may be of concern. Retrospective provisions are usually frowned upon as they create rights and responsibilities and care should be taken to avoid unintended consequences in this regard. The question arises as to on what basis were the dates of 8 December 2016 and 7 November 2017 decided on? Are all these

dates included and what are the criteria to decide which date will apply to the specific application? The consumer's financial position could have been different then. Possible consequences for a credit provider could be that if the Tribunal extinguishes a consumer's debts from a date in the past, will the credit provider have to repay any amounts paid to service the particular debt that the consumer has with that credit provider?

4.6 In clause 10, in the insertion of section 88A(4), the information that must support an application for debt relief, is listed. This include, proof of the consumer's income and expenses, information confirming the total amount due in terms of credit agreements, credit agreements that relate to the debt due in terms of the agreements, agreements related to the restructuring of a debt, a statement from the consumer regarding the kind of order sought and the reasons therefor and any other information as may be prescribed. In this regard, the Courts of Law Amendment Act (the Amendment Act), may be mentioned. In the amendments of section 57 and 58 of the Magistrates' Courts Act, by the Amendment Act, provision is made for an affordability test by the court when considering a request for judgment. The written request for judgment must be supported by—

(a) the summons or a copy of the letter of demand;

(b) the defendant's written acknowledgment of liability and offer;

(c) the monthly or weekly income and expenditure, supported where reasonably possible by the most recent proof in the possession of the defendant and other court orders or agreements with creditors for the payment of a debt and costs in instalments.

The written acceptance of the offer and an affidavit or certificate setting out the balance must also be submitted. In addition, the court may request any relevant information for the court to be apprised of the defendant's financial position.

4.7 A new section 55A has been inserted into the Magistrates' Courts Act by the Amendment Act which lists the factors a court must take into consideration

when considering an order which is just and equitable, as per the CC's judgment in the Stellenbosch-case. These factors are—

(a) the size of the debt;

(b) the circumstances in which the debt arose;

(c) the availability of alternatives to recover the debt;

(d) the interests of the plaintiff or judgment creditor;

(e) the rights and needs of the elderly, children, persons with disabilities and households headed by women;

(f) social values and implications;

(g) the amount and nature of the defendant's or judgment debtor's income;

(h) the amounts needed by the defendant or debtor for necessary expenses and those of the persons dependent on him or her and for the making of periodical payments which he or she is obliged to make in terms of an order of court, agreement or otherwise in respect of other commitments; and

(i) whether the order would, in the circumstances be grossly disproportionate.

4.8 The amendment of section 65J of the Magistrates' Courts Act, which deals with emolument attachment orders, also seeks to properly provide for protection mechanisms and judicial oversight. It may be prudent for the drafters of the Debt Relief Bill, to provide for proper mechanisms for affordability and oversight by the NCR or the Tribunal. In a possible appeal or review, these kind of factors might be taken into account.

4.10 In clause 10, in the insertion of section 88B(3), provision is made that a credit provider affected by the application may submit an affidavit stating facts that in the view of that credit provider disqualify the consumer for debt relief or affect the order made by the Tribunal. The question arises if sufficient provision is made for the credit provider to oppose the application. The words "affect the order made by the Tribunal" seem to mean that the order has already been

made. Furthermore, will the Tribunal be able to ask for further information from the credit provider to assist in coming to the most appropriate order?

4.11 In clause 10, in the insertion of section 88C(4)(a), provision is made for the orders the Tribunal can made. In *(a*(i) provision is made for a determination of the maximum interest, fees or other charges for a period the Tribunal may deem fair and reasonable. This appears to be an expansion of the statutory *in duplum* rule and the question arises whether this should not be more clearly spelt out in the Bill.

4.12 In clause 10, in the insertion of section 88C(4)(d), provision is made for an order, setting conditions related to, among other, the attendance of a financial literacy or budgeting skills programme. The question arises as to who will be liable for the costs of such training and further, how will this condition be monitored or enforced.

4.13 With regard to section 88D, which provides for the effect of once-off debt relief, the question arises whether this section does not rather deal with the duties of the consumer who has applied for debt relief and the duties of the credit provider? Does subsection (1)*(a)*(i), for example deal with the effect of the debt relief or is it an aspect which occurs prior to the relief being given. Subsection (1) states that a consumer who has filed an application for debt relief may not incur further charges or enter into another credit agreement until the application is rejected by the NCR or the Tribunal. The same applies to subsection (2), regarding a credit provider who receives notice of application for debt relief.

Clarity in respect of the drafting of these clauses is required.

4.14 It is further suggested that provision be made for a process after the application has been granted, such as notification to the consumer and the credit provider/s.

4.15 In section 88D(2)*(a)*, reference is made to a Provincial Credit Regulator, but no other reference is made to such a Provincial Regulator in the Bill – in section 88B, it is the NCR which must evaluate the application and make a recommendation to the Tribunal. In terms of section 88D (6), it is the NCR who must be informed of changes in the financial circumstances of the consumer and who must evaluate the changes. The role of Provincial Credit Regulator, if any, needs to be considered.

4.16 In section 88E, which provides for a debt relief measure to be prescribed by the Minister, subsection (4)(c) states that after consideration of the comments, a report on the comments must be tabled in the National Assembly and the final debt relief measure that the Minister intends to introduce. However, no mention is made of the process to follow after the submission. Should the Minister indicate how the comments have been considered? Should Parliament approve the measures prescribed by the Minister?