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No.***GENERAL NOTICE****Department of Trade and Industry***General Notice*

559 Draft National Credit Act Policy Review Framework, 2013: Invitation for the public to comment 3 36504

GENERAL NOTICE

NOTICE 559 OF 2013**DEPARTMENT OF TRADE AND INDUSTRY****DRAFT NATIONAL CREDIT ACT POLICY REVIEW FRAMEWORK, 2013****INVITATION FOR THE PUBLIC TO COMMENT ON THE DRAFT NATIONAL CREDIT
ACT POLICY REVIEW FRAMEWORK, 2013**

I, Dr Rob Davies, Minister of Trade and Industry, having obtained Cabinet approval, hereby publish the draft National Credit Act Policy Review Framework for broader public comments.

Interested persons may submit written comments on the proposed framework not later than thirty (30) days from the date of publication of this notice to:

Director-General, Department of Trade and Industry
Private Bag X84
Pretoria
0001

Or hand deliver to:

77 Meintjies Street
Block B, 1st Floor
Sunnyside
Pretoria

Tel : 012 394 5646

Fax No: 012 394 6646

Email : nca@thedti.gov.za

For Attention: Mr Klaas Mokaba



Dr Rob Davies (MP)
Minister of Trade and Industry
Date: 23 / 5 / 2013

**DOCUMENT IN RESPECT OF PROJECT
RE POLICY REVIEW OF THE NATIONAL CREDIT
ACT 34 OF 2005**

the dti

March 2013

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PART 1: BUILDING ON THE SUCCESSES OF THE PAST

1.1 INTRODUCTION AND BACKGROUND

- 1.1.1 The National Credit Act 34 of 2005 (NCA) introduced a new era of credit regulation into the South African legal system.

1.2 ACHIEVEMENTS OF THE NCA

- 1.2.1 It aims to promote and advance the social and economic welfare of South Africans.
- 1.2.2 The NCA has made progress in promoting its key policy aims: "A fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry."
- 1.2.3 It has consequently increased the protection afforded to consumers.

1.3 THE NATURE OF CREDIT

- 1.3.1 Credit touches the lives of many millions of South Africans, with about 19.69 million (September 2012) having active credit records.
- 1.3.2 It not only has the potential to create opportunities for individuals to access goods and services, start businesses, obtain education or improve living standards, but also serves as a shock-absorber during periods of financial hardship.
- 1.3.3 However, while credit can have positive implications for the person accessing it, it can also destroy a person's financial security.

1.4 THE NEW LEGISLATIVE FRAMEWORK

- 1.4.1 The full implementation of the NCA on 1 June 2007 replaced the Credit Agreements Act, 1980; the Usury Act, 1968, and its Exemptions; as well as the Integration of Usury Laws Act, 1996, and amended various other statutes.
- 1.4.2 It introduced initiatives to prevent reckless credit and a new debt-counselling industry to provide for debt restructuring for over-indebted consumers.
- 1.4.3 These new initiatives changed the dynamics between the stakeholders, including credit providers, potential new clients, over-indebted consumers, debt counsellors and the payment distribution agencies.

1.5 REVIEWING THE LEGISLATIVE FRAMEWORK

- 1.5.1 Some of the practical outcomes of the NCA suggest that the time has come to re-assess the original policies underlying the NCA.
- 1.5.2 In this regard, the initial reviews and subsequent policy framework, legislative drafting of the NCA, its interpretation and implementation were considered with the prospect of improving on what has transpired.
- 1.5.3 This document is contextually informed by the original policy framework embodied in the document titled *Making Credit Markets Work*. Unless specifically stated, the original policies are retained as the basis for the NCA.
- 1.5.4 The 2012 policy review of the framework, upon which the NCA is founded, has concluded that while the framework is sound and relevant, its intended outcomes have not always materialised as anticipated.
- 1.5.5 Since the scope and purpose of policy are outcome-based, the evaluation of outcomes indicates that there is a need for the enhancement of certain policies underlying the NCA, which may involve the further development of some of the provisions of the NCA.

1.6 POSITIVE CONTRIBUTIONS OF THE NCA

- 1.6.1 Given that a remedial review of this nature by necessity primarily focuses on the negative outcomes of the NCA, it is important to note the successes of the NCA and its policies to be able to provide a balanced assessment of the current framework.

1.7 TEMPERING THE GLOBAL FINANCIAL CRISIS

- 1.7.1 A significant feature of the NCA has been the impact it had in tempering the effect of the global financial crisis in South Africa.

1.8 CREATING AN AWARENESS OF THE CREDIT INDUSTRY, RIGHTS AND OBLIGATIONS

- 1.8.1 Market awareness and accurate assessment of the credit market have improved, to some extent, through the publication of certain aggregated statistics obtained from the statistical returns of credit providers and credit bureaux, the National Credit Regulator's (NCR) commissioning of research on market-related issues, and the improved analysis by market players of such data.
- 1.8.2 The creation of the NCA and NCR focused public attention on the realm of credit and awareness of the rights and obligations of both the consumer and credit provider.

1.8.3 There has been a positive transformation of the requirements for improved consumer protection, credit provider obligations and market responsibility.

1.8.4 As a policy intention of the NCA was always to balance the respective rights and obligations of consumers and credit providers, this approach has encouraged the consideration of the economic interests of all stakeholders in a responsible manner. So, for example, while a consumer may apply through the process of debt review for re-scheduling of debts, the rights of credit providers to ensure ultimate settlement of the consumer's obligations have remained.

1.9 ADDRESSING OVER-INDEBTEDNESS

1.9.1 In particular, the reckless lending and affordability assessment provisions of the NCA influenced the granting of credit so as to prevent and curb over-indebtedness and avoid to the excesses of the past.

1.9.2 The improvement of the affordability assessment by credit providers across the board is also a strong contribution of the NCA.

1.9.3 While the affordability assessments do not necessarily meet all the ideals of the policy, it is true to say that virtually every credit provider has improved on its evaluation processes and at least attempts such an evaluation prior to granting credit.

1.9.4 The debt review process was introduced in order to rehabilitate an over-indebted consumer through counselling and assistance to restructure his or her debt obligations, with a view to re-introduce the consumer, once rehabilitated, into the commercial world as an able credit user and asset to the economy. Notwithstanding the many obstacles to the successful policy outcomes in this regard, some 363 000 individuals have applied for debt counselling by the end of June 2012, and some R8.5 billion has been distributed to credit providers through the process.

1.10 ACCESS TO CREDIT

1.10.1 As affordability assessments have gained traction over income benchmarks, more consumers are now able to access credit. Given that this is a more sustainable approach for consumer and credit provider alike, this is an important success of the NCA.

1.10.2 The expense side of the balance sheet of households has been included in the credit granting process and widespread use of income benchmarks have fallen into disuse.

1.10.3 Middle-income groups, in particular, have enjoyed improved access to an increased choice of credit products, at more reasonable prices.

1.11 A SINGLE LEGISLATIVE FRAMEWORK FOR CREDIT

- 1.11.1 The NCA brought all credit providers under the ambit of one piece of legislation, and has provided standardised requirements by credit type.
- 1.11.2 The NCA introduced the registration and regulation of credit bureaux, as well as regulations regarding the removal of negative listings, cleaning of records and access to personal credit records.
- 1.11.3 In each case these regulations have done much to ensure more equitable and fair access to credit and encourage greater responsibility by credit providers when updating consumer credit information.

1.12 IMPROVING ECONOMIC WELFARE THROUGH CREDIT

1.12.1 The consumer credit landscape in South Africa

- 1.12.1.1 In 2002, credit to South African households amounted to some R360 billion, at the time roughly half of the total credit extension to the private sector of the economy (both households and firms).
- 1.12.1.2 At the time, it was estimated that there were about 19.8 million credit accounts. Registered banks accounted for around 89% of the consumer credit – including mortgages, vehicle finance, overdrafts, credit cards and other personal loans. Non-banks accounted for 11% of the credit granted, mostly in the form of store cards, instalment sales and micro loans.
- 1.12.1.3 By September 2012, consumer credit extension had ballooned to R1.39 trillion and about 68.28 million accounts. The value of credit granted has increased almost four-fold and the number of accounts has more than tripled. The banks' share of the credit extended has decreased slightly, accounting for 84% of all consumer credit extended. Conversely, the non-bank share has grown marginally to approximately 16% of all credit.

1.12.2 Economic Progress

- 1.12.2.1 The increase in the number of accounts has a number of contributing causes, including the economic transformation of the South African economy in terms of employment and economic empowerment of historically disadvantaged individuals.
- 1.12.2.1 The global period of easy money up to around the third quarter of 2008, together with robust domestic growth up to that period, contributed to an expansionary stance by credit providers, which contributed to the number of accounts per credit-active individual.

- 1.12.2.1 Moreover, some providers opened accounts with consumers prior to the implementation date of the NCA (June 2007) in an attempt to pre-empt some of the provisions of the NCA such as affordability assessment processes (which were not retrospective).
- 1.12.2.1 Since that time, the Consumer Credit Market report shows a steadily growing gross debtors book.
- 1.12.2.1 The credit providers who publish annual reports have shown a sustainable and profitable credit market in spite of the subsequent down-turn in the South African economy, with a loss of over 1 million jobs, and the subsequent subdued global and domestic recovery.

Part 2: CHALLENGES THAT HAVE EMERGED

While the NCA and its underlying policy framework have achieved these successes, there have also been practical deficits in the outcomes. Therefore, while the consumer credit policy is largely sound, the following set out why the enhanced policy is called for. This means that the underlying policy is sound, but the legislative provisions relating to the policy must be enhanced to ensure positive outcomes.

2.1. CHALLENGE 1: ADDRESSING INEFFECTIVE AND INEFFICIENT LEGISLATIVE PROVISIONS

2.1.1 Overlaying policy recommendation

- 2.1.1.1 In the light of sound substantive policies underlying the NCA, the provisions of the NCA should be enhanced through amendments aimed at facilitating positive outcomes, strengthening existing mechanisms, achieving positive outcomes and addressing legislative failures.

2.1.2 Problem

- 2.1.2.1 The 2012 Review indicates that there is a need to amend the NCA and its policy framework, with the envisaged changes enhancing the relevant provisions of the NCA to provide for improved efficiency of the legislation.
- 2.1.2.2 The NCA and its underlying policy framework have achieved these successes, but there have been practical deficits in the outcomes.
- 2.1.2.3 The consumer credit policy is largely sound, but the following (that rely on a number of examples) set out why the enhanced policy is called for.
- 2.1.2.4 This means that the underlying policy is sound, but that the legislative provisions of the NCA are inadequate to meet the policy objectives.

2.1.3 Clarification

- 2.1.3.1 The enhancements should aim to ensure the desired outcomes, whether relating to registration, monitoring, enforcing or reporting requirements. The principles guiding the proposed enhancements are set out below.
- 2.1.3.2 The amendments to the NCA and its policy should address the practical problems that have arisen since its inception.
- 2.1.3.3 It should also aim to close the *lacunae* in the legislation that still allow for entities to avoid the provisions of the NCA where application was intended.

2.1.3.4 Legislative failures, including ambiguous drafting, incomplete provisions and unintended consequences relating to weak outcomes such as interpretation or implementation discrepancies, should be addressed. Some examples are set out below:

2.1.3.4.1 **Irregularities:** An example of a legislative oversight/incomplete provision is found in Section 101(2), where reference to an initiation fee is made limited to the amount 'permitted by regulation'. The regulations do not prescribe the permitted fee within the context of Section 101(2), i.e. the legislation limits the fee that can be charged, but does not prescribe the allowable amount.

2.1.3.4.2 **Errors:** An example of a typing/reference error can be found in Section 130(1)(a), which refers to 'a notice to the consumer as contemplated in Section 86(9)'. The only notice that the credit provider can send to the consumer in terms of Section 86 is notice of termination in terms of Section 86(10), i.e. the legislation is confusing and unclear as there cannot be adherence to the provisions of the legislation.

2.1.3.4.3 **Ambiguities:** An example of ambiguous drafting can be found in Sections 86(2) and 129, where a notice in terms of Section 129 refers a consumer to a debt counsellor, yet the provisions of Section 86(2) prevent a consumer from accessing debt review for a credit agreement in respect of which the credit provider has taken the steps contemplated in Section 129 – interpreted to mean the Section 129(1)(a) notice. This matter has been resolved by the courts, but the legislator will have to decide whether the court decision reflects the correct interpretation of the section.

2.1.3.4.4 **Harmonisation:** An example of drafting that does not conform to the South African legal position without any clear reason, therefore, is found in the definition of mortgage, which refers to a 'pledge'. In terms of South African law, only movable property can be subject to a 'pledge'. There are reasons for the extension of the definition of 'juristic person', such as limitation of the scope of the NCA, but this is also not unknown of in other statutes.

2.1.3.4.5 **Interpretational difficulties:** An example in this regard can be found in Section 129, where provision is made for the credit provider to 'draw the default to the notice of the consumer', i.e. in terms of which section of the NCA this should be done and whether this should come to the attention of the consumer or not. This has also been resolved by the courts by inter alia considering other pieces of legislation and practical challenges associated with the giving of notice.

2.1.3.4.6 **Implementation discrepancies:** An example in this regard can be found in Section 105 relating to fixed and variable interest rates, i.e. if the maximum allowable interest rate in terms of the NCA may never be exceeded, this means that interest fixed for the duration of the agreement must be lowered once if it will exceed the maximum rate where the latter is lowered. A further problem that

manifests is whether the rate can be increased to the fixed rate if the maximum rate is raised.

2.1.3.4.7 **Unintended consequences:** An example in this regard is where a consumer that has been under debt review can repay the original instalment in terms of the contractual agreement with the credit provider, but is still subject to the disabilities of debt review. This is particularly ineffective where a consumer's mortgage has been included under debt review and a consumer, who is in essence rehabilitated, cannot obtain any credit until the debt has been paid, which may be as long as 30 years.

2.1.3.4.7 **Judgements:** An example is the Western Cape High court judgment declaring section 89(5)(c) of the National Credit Act, 2005 (Act 34 of 2005) to be inconsistent with the constitution as it constituted arbitrary deprivation of property contrary to section 25 of the constitution. There is a need to amend the NCA accordingly.

2.1.3.5 Consumer credit legislation should be straightforward, clear and unambiguous.

2.1.3.5.1 In this regard, particular attention should be given to the definitions, scope and limitations of NCA in the context of what it wishes to achieve. Comprehensive regulation and correlation with the South African legal framework and principles are imperative.

2.1.3.5.2 The legislation should not be unintentionally in conflict with other statutes and bodies of law such as the common law.

2.1.3.5.3 Protective measures as embodied in the above should either be expressly excluded or included. Where legislation is expressly excluded, similar provisions, if specifically applicable to consumer credit, should be properly and comprehensively dealt with in the NCA.

2.1.3.6 Credit legislation should be predictable and commercially implementable.

2.1.3.6.1 In particular, the provisions relating to reckless credit and the development of proper and standardised evaluation mechanisms as well as effective remedial action to address non-compliance and enforcement of rights and obligations, need attention.

2.1.3.6.2 Predictability is further relevant to ascertaining the legal ramifications as well as consumers' expectations and the realisation thereof.

2.1.3.7 Policy considerations need to be informed both by an understanding of the capacities of the state and the problems the policy seeks to address.

- 2.1.3.8 The legislative outcomes should not disturb the credit market unnecessarily – specifically relating to the cost of credit to consumers (including the cost impact on households) or an undue shift in the balance between the rights of the consumer and the rights of the credit provider.
- 2.1.3.9 The NCA is in essence credit legislation where both the policy and legislation have always attempted to create a balance of rights, to ensure a sustainable consumer credit market.
- 2.1.3.10 The acknowledgement that credit extension is a high risk economic enterprise with many repercussions for the parties involved as well as third parties not directly involved in the credit granting, is implicit in the NCA. Given this approach, aspects that undermine the protection of the interests of both parties and compliance with the *audi et alteram partem* principle, should be addressed.
- 2.1.3.11 An unnecessary burden of compliance to credit providers should be avoided, including cost considerations such as:
- 2.1.3.11.1 The inability of credit providers to price risk accordingly or recover expenses incurred on a realistic scale.
 - 2.1.3.11.2 An unnecessary increase in reporting requirements, when a streamlining of such requirements is probably more appropriate.
 - 2.1.3.11.3 Litigation on a similar scale as has resulted from the current NCA should be avoided. Attempts to regulate aspects that exceed the mandate of the dti and/or the scope of the legislative framework, e.g. lack of capacity of the courts to deal with matters referred to it, should be avoided.
 - 2.1.3.11.4 An undermining of the capacity, resources and powers of the NCR, which will further create uneven playing fields and undermine the sustainability of certain providers.
- 2.1.3.12 It is of importance to realise the integrated nature of legislative provisions relating to credit. A problem may be addressed through alternative adaptations to the legislation ranging from extreme amendment of one section to less extreme interventions through synchronised amendments of related sections.

2.1.4 Solution

- 2.1.4.1 The legislative provisions relating to the policy must be enhanced to ensure positive policy outcomes.
- 2.1.4.2 A policy of enhancing the provisions of the NCA policies is recommended.
- 2.1.4.3 The amendments to the NCA and its policy should address the practical problems that have arisen since its inception.

- 2.1.4.4 It should also aim to close the *lacunae* in the legislation that still allow for entities to avoid the provisions of the NCA where application was intended.
- 2.1.4.5 Consumer credit legislation should be straightforward, clear and unambiguous.
- 2.1.4.6 Credit legislation should be predictable and commercially implementable.
- 2.1.4.7 Policy considerations need to be informed both by an understanding of the capacities of the state and of the problems that the policy seeks to address.
- 2.1.4.8 The legislative outcomes should not disturb the credit market unnecessarily
- 2.1.4.9 The NCA should preserve the policy of balancing of rights and should not prefer the rights of one stakeholder above the other. This is to ensure a sustainable consumer credit market.
- 2.1.4.10 An unnecessary burden of compliance to consumers credit providers should be avoided, including cost considerations.

2.2. CHALLENGE 2: ENHANCING THE INSTITUTIONAL ENFORCEMENT FRAMEWORK

2.2.1 Overlaying policy recommendation

- 2.2.1.1 Regulate the consumer credit industry participants in a comprehensive manner and through the use of various regulatory mechanisms.

2.2.2 NATIONAL CREDIT REGULATOR

2.2.2.1 Problem

- 2.2.2.1.1 The 2003 policy framework recommended the establishment of "an independent regulatory body directly accountable to Parliament, to license credit providers, monitor compliance and enforce the Consumer Credit Act", which was the basis for the creation of the NCR.
- 2.2.2.1.2 There is a need to amend the NCA to enhance the powers of the Regulator, specifically pertaining to strengthened enforcement and implementation of the provisions of the NCA.
- 2.2.2.1.3 Ostensibly, the NCR (then referred to as the Consumer Credit Regulator) has been successful in regulating the credit market, specifically stakeholders and market conduct.
- 2.2.2.1.4 However, legislative failures such as the scant provisions relating to debt review and limited or vague legislative powers have disempowered the NCR to some extent.
- 2.2.2.1.5 The legitimacy of certain reporting and complaints functions and processes of the NCR are in disrepute.

2.2.2.2 Clarification

- 2.2.2.2.1 Upon review of the implementation of the NCA to date, there is need for the powers of the NCR to be reviewed to deal directly with registration and de-registration processes. For example, the NCR should be able to de-register registrants that are not complying with the conditions of registration and commitments made towards such registration.
- 2.2.2.2.2 The review indicates that there are significant efficiencies that can be achieved by separating the administrative processes that can be adequately handled by the NCR from those that should be referred to the NCT. The powers of the NCR will still be reviewable at the NCT.
- 2.2.2.2.3 An efficient and effective consumer credit market requires an independent regulator that actively monitors the market, provides guidance to participants and can act speedily.
- 2.2.2.2.4 It was noted that the NCR should have the ability to de-register registrants such as credit providers and debt counsellors under circumstances that can be easily and objectively ascertained, such as a debt counsellor who no longer meets the statutory requirements for registration.
- 2.2.2.2.5 It was also noted that the NCR should have the ability to decide whether a registrant is a 'fit and proper person', for example, eligibility as a debt counsellor. As it stands, there is no capacity for the Regulator to act with discretion where, for example, the 'two years' working experience'is in an unrelated field, such as hairdressing.
- 2.2.2.2.6 However, the suggestion relating to the ability of the NCR to determine 'fit and proper' was received with disapproval for fear of the incorporation of an improper discretion. This is a matter that can be canvassed during broader public consultations.
- 2.2.2.2.7 There is a need for transparency in the reporting and complaints functions and processes of the NCR to legitimise regulatory compliance measures.

2.2.2.3 Solution

- 2.2.2.3.1 The NCR should have the ability de-register credit providers, alternative dispute resolution agents and debt counsellors under certain circumstances.
- 2.2.2.3.2 The NCR should have the ability to act with discretion when it comes to deciding whether to register a registrant in terms of the NCA.
- 2.2.2.3.3 The mandate of the NCR needs to include the ability to prescribe adapted reporting mechanisms that are conducive to the objective of gathering appropriate information that responds to the dynamics of the market.
- 2.2.2.3.4 Provision will have to be made for a method of recourse to appeal/review the decision of the NCR where a person is, for example, not registered or de-registered and wishes to oppose that decision (particularly if this needs to be done on an urgent basis). This is of particular importance where the NCR exercises a discretionary power.

2.2.3 NATIONAL CONSUMER TRIBUNAL (NCT)**2.2.3.1 Problem**

- 2.2.3.1.1 The mandate and practical functioning of the NCT should be enhanced to ensure more efficient and effective processes and increased output.

2.2.3.2 Clarification

- 2.2.3.2.1 Recourse to the NCT can be cost-effective and time saving if properly capacitated and mandated.
- 2.2.3.2.2 The review identified challenges in relation to court backlog in regards to NCA matters in areas where the NCT should be able to assist as an adjudication body.

2.2.3.3 Solution

- 2.2.3.3.1 The mandate and practical functioning of the NCT should be enhanced.
- 2.2.3.3.2 This can be done by providing the NCT with proper human resources (competency, experience and training), infrastructure and financial resources.
- 2.2.3.3.3 The NCT may be re-positioned as an appeals/review body for matters where the NCR is granted the authority to de-register parties under certain circumstances or to grant consent orders under section 86(7)(c) as well as 86(7)(b).

- 2.2.3.3.4 The NCT should have powers to serve as an alternative avenue for confirmation of agreed re-arrangement of debt which currently are matters that are referred to ordinary courts. This will alleviate the burden to courts by providing an avenue for a speedy resolution of matters and reduce costs to consumers.

2.2.4 INDUSTRY PARTICIPATION

2.2.4.1 Problem

- 2.2.4.1.1 The NCA provides only limited support for positive industry participation.

2.2.4.2 Clarification

- 2.2.4.2.1 Industry participation and support of the NCA are of cardinal importance in ensuring consumer protection and access to all its provisions.
- 2.2.4.2.2 Voluntary industry negotiated agreements, that complement and enrich the provisions in the NCA appear highly attractive and might play a positive role. However, there are serious concerns regarding voluntary mechanisms such as:
- 2.2.4.2.3 It will almost be impossible to identify cases of reckless lending as debt counsellors and magistrates will not be involved in the process;
- 2.2.4.2.4 Judgement creditors may act swiftly if cancelling the arrangement if the consumer defaulted and institute legal proceedings which will prejudice the consumer further; and
- 2.2.4.2.5 Given that the voluntary debt mediators will be funded and possibly allocated matters by the credit providers, there is the likelihood that the mediators will be biased towards credit providers to the detriment of the consumer.
- 2.2.4.2.6 There is a need and apparent value in investigating the creation of a framework for the development of cost and time effective solutions in line with the spirit and purposes of the NCA, where the latter does not prescribe a specific manner of addressing a particular problem such as court backlogs, indigent over-indebted persons or where the need for out- of- court settlements arise.
- 2.2.4.2.7 However, the positive role of industry codes and rules are undermined where there is uncertainty regarding the status of such codes and rules, both in terms of regulatory approval being withdrawn or the extent to which such codes are binding on industry participants.
- 2.2.4.2.8 Therefore, unless voluntary measures are appropriately monitored and regulated, the process can be used to circumvent the provisions of the NCA.

2.2.4.3 Solution

- 2.2.4.3.1 The NCA, either through legislation or specific enhancement of the powers of the NCR, should look into mechanisms by which it can support positive industry participation.
- 2.2.4.3.2 The NCA, either through legislation or specific enhancement of the powers of the NCR, should clarify aspects relating to outcomes of industry participation, such as the status of industry-developed codes and rules.
- 2.2.4.3.3 Provision should be made for the appropriate monitoring and regulation of voluntary measures to prevent the circumvention of the provisions of the NCA.
- 2.2.4.3.4 Minimum standards for regulation should be set out in legislation with appropriate and functional guidelines as to the aspects applicable to industry or voluntary regulation.
- 2.2.4.3.5 The role of the Regulator in approving industry codes and key industry-agreed rules needs to be unambiguously established. The NCR further needs to play an ongoing role in providing necessary guidance to the industry as the dynamics of the industry change.
- 2.2.4.3.6 There is a need to research further and to consult widely and extensively on voluntary mechanisms in order to determine the best possible model, if any.

2.2.5 REGISTRATION OF CREDIT PROVIDERS**2.2.5.1 Problem**

- 2.2.5.1.1 There is a need for appropriate market conduct regulation of credit providers who operate under the radar of enforcement bodies.

2.2.5.2 Clarification

- 2.2.5.2.1 Credit providers that do not comply with the provisions of the NCA is still a problem in South Africa. The NCR are not always aware of all credit providers and do not undertake investigations of all credit providers.
- 2.2.5.2.2 Consumers are also not aware of their rights and remedies, which allows non-compliance from unscrupulous credit providers without repercussions.

2.2.5.3 Solution

- 2.2.5.3.1 In this regard, it is suggested that all credit providers should be registered save for those who provide credit on an *ad hoc* basis i.e. not in the ordinary course of business.
- 2.2.5.3.2 This should be done instead of the current situation where some, based on the number or value of the credit extended and outstanding, are exempted from registration.
- 2.2.5.3.3 Credit providers that currently need not register, should be registered and rather benefit from exemptions from compliance and reporting burdens. This should be done in according with the scope and nature of these providers and the risks these providers present to consumer protection. This will provide for clarity and ease of oversight on the part of the NCR.
- 2.2.5.3.4 Registration and de-registrations need to be better monitored and specific powers given to the NCR to enforce same.
- 2.2.5.3.5 A review of the kind of reporting by registrants and its social value needs to be regularly made.

2.2.6 CLARITY OF ROLES IN DISPUTE RESOLUTION**2.2.6.1 Problem**

- 2.2.6.1.1 There is no precise and comprehensive definition in the NCA of Alternative Dispute Resolution (ADR). Whilst the definition of an "alternative dispute resolution agent" means a person who assists in the resolution of credit disputes through conciliation, mediation or arbitration, it does not explicitly exclude debt mediation as envisaged in the applicable section.
- 2.2.6.1.2 There is also a lack of delineation of the scope and application of the mechanism as well as the role players involved in the process.
- 2.2.6.1.3 Unlike debt counsellors, ADR agents are not regulated.
- 2.2.6.1.4 The status and role of the Credit Ombuds versus that of the NCR is not clear.

2.2.6.2 Clarification

- 2.2.6.2.1 It is presumed that the policy intention was to allow for resolution of disputes that did not necessarily involve over-indebted consumers i.e. the scope of the use of ADR was intended to be limited.

2.2.6.2.2 The lack of a clear prohibition in playing this role may allow arbitrage where ADR agents fulfil debt counsellors' duties without being so registered.

2.2.6.2.3 This results in ADR agents not being subject to the associated market conduct regulation of the NCR, e.g. the prescribed fee structure.

2.2.6.3 Solution

2.2.6.3.1 The definition, scope and application of the ADR mechanism including that of the Credit Ombuds should be clearly set out in the NCA.

2.2.6.3.2 The definition, duties, functions, standards and regulatory mechanisms should be clearly set out in the NCA or regulations promulgated in terms thereof.

2.2.6.3.3 The NCA should reserve certain functions for debt counsellors by specifically excluding these from the ambit of ADR agents.

2.2.6.3.4 The NCA should define and provide for the functions and duties of ADR agents.

2.2.6.3.5 The applicability of the NCA and the NCR to the activities and conduct of ADR agents should be prescribed and tailored to accommodate their broader mediation role.

2.2.6.3.6 Attention should also be given to the existence of any other legislation governing a person involved in ADR to prevent over-regulation.

2.2.7 PAYMENT DISTRIBUTION AGENCIES

2.2.7.1 Problem

2.2.7.1.1 Payment Distribution Agencies (PDAs) were not envisaged by the pre-NCA review or the subsequent legislation but introduced as a role player by the NCR through entering into service level agreements.

2.2.7.1.2 PDAs present an additional cost to the over- indebted consumer.

2.2.7.1.3 The value of PDAs is questionable.

2.2.7.1.4 There is the risk that if a PDA fails to pay the credit providers, the consumer will be in a worse position.

2.2.7.2 Clarification

2.2.7.2.1 The NCA provides that a debt counsellor may distribute funds for and on behalf of the consumer, provided that the NCR is made aware of this practice.

2.2.7.2.2 However, wary of possible abuses and malpractices, the NCR has, through conditions of registration, elected to prohibit the distribution of funds by debt counsellors.

2.2.7.2.3 The required behaviour of and fees chargeable by PDAs are set out in service level agreements with the NCR.

2.2.7.3 Solution

2.2.7.3.1 The value of PDAs needs a deeper and thorough investigation and wider public consultations and if there is value in using them, the NCA should regulate PDAs as industry participants.

2.2.7.3.2 If it is found that there is value in using PDAs, they should also be included as registrants.

2.2.7.3.3 The NCA should regulate, or allow for the regulation, of the conduct and operations of PDAs with the aim of reducing the risk to the consumer.

2.2.7.3.5 The use of the services of the PDA should be discretionary, and where a consumer or debt counsellor elects to use a PDA, safety mechanisms should be provided for by the NCA particularly to prevent and compensate the consumer for theft of monies or fraud and to regulate fees.

2.2.7.3.6 Regulatory prescriptions as to the use of the interest accumulated on distribution accounts must be provided.

2.2.8 LACK OF ENFORCEMENT AND REDRESS

2.2.8.1 Problem

2.2.8.1.1 The policy that consumer credit legislation should make provision for proper enforcement mechanisms and consumer redress mechanisms is sound.

2.2.8.1.2 However, the lack of efficient enforcement and redress mechanisms in the NCA resulted in ineffective legislative provisions. The redress mechanisms of the NCA determine, to a large extent, the effectiveness of the legislation and its underlying policy. The NCA is only as strong as its enforcement and insufficient enforcement provisions and enforcement actions were identified in the 2012 Review as major obstacles in achieving the objectives of the NCA.

2.2.8.2 Clarification

- 2.2.8.2.1 The scope of this deficiency includes a lack of adequate legislative sanctions, lack of proper mandate or authority to sanction and the inability to uncover and address irregularities.
- 2.2.8.2.2 The insufficiency of the application and enforcement of protective and regulatory measures has adverse effects on various stakeholders, for example:
 - 2.2.8.2.2.1 The consumer who does not enjoy the tangible benefit of statutory protection such as a natural person who signs surety for a juristic person in respect of which the NCA does not apply or only applies to a limited extent, does not enjoy the protection of the NCA; and
 - 2.2.8.2.2.2 Inefficient enforcement of compliance with the NCA results in the creation of an unfair competitive advantage for the credit provider who does not comply with strict requirements such as exceeding the maximum allowable interest rate prescribed by the NCA. Credit providers who do not adhere to the provisions of the NCA are still a reality in the South African credit market that needs to be addressed. This in turn affects the consumer.

2.3. CHALLENGE 3: ENHANCING RESPONSIBILITY IN THE CREDIT MARKET**2.3.1 Overlaying policy recommendation**

- 2.3.1.1 Encourage fair and responsible lending and borrowing.
- 2.3.1.2 The enhanced policy should be conducive to encouraging responsible lending and borrowing. While specific legislative changes are necessary, consumer education and proper enforcement of the relevant provisions will assist in meeting these objectives.

2.3.2 RECKLESS LENDING**2.3.2.1 Problem**

- 2.3.2.1.1 The policy of prevention of over-indebtedness and reckless credit is sound.
- 2.3.2.1.2 There are various problems with the reckless lending provisions in the NCA, ranging from the lack of incentives to comply with the provisions to inadequate detail on the scope, limit and enforcement of agreements that were entered into in a reckless manner.

- 2.3.2.1.3 Specifically, problematic issues relating to drafting, interpretation and implementation in the context of reckless credit, over-indebtedness and consumer redress exist in terms of the NCA.

2.3.2.2 Clarification

- 2.3.2.2.1 The policy provisions regarding reckless credit, over-indebtedness and consumer redress are sound and have improved the consumer's position in some ways.

- 2.3.2.2.2 However, issues relating to drafting, interpretation and implementation in this area have reduced the effectiveness of the NCA as well as its applicability and accessibility to all consumers on an economically-inclusive basis.

- 2.3.2.2.3 In particular, the legislative failure in terms of lack of procedural remedies which has led to implementation failure of the provisions needs to be addressed, including:

- 2.3.2.2.3.1 Minimum standards relating to affordability assessment mechanisms including the recommendations relating to pre-contractual and contractual disclosure; and

- 2.3.2.2.3.2 Procedural guidelines on dealing with reckless credit extension in a cost and time effective manner by the Regulator, for example a provision needs to be made for all debt counsellors, alternative dispute resolution agents and ombudsmen with jurisdiction to report all suspected reckless credit to the NCR. The NCR should be enabled to act against the credit provider where a determination is made that the provider did not do an affordability assessment on the consumer. Where the failure to do an affordability assessment was prejudicial to the consumer, the consumer should still be able to enforce the remedies currently contained in the NCA. There is also a need for consumer education on rights and remedies.

- 2.3.2.2.4 There is a need to address the incentives that encourage reckless credit provision, even while being prohibited by law. Giving the court the jurisdiction to lower priority in terms of restructured payments and applying an interest and fee reduction in the case of credit providers who provided credit recklessly, might start to address some of the inherent incentives that motivate some credit providers.

- 2.3.2.2.5 Providing for proper judicial oversight where the court official duly considers the provisions and prohibitions of the NCA in the granting of emolument attachment orders may also contribute to a shift in the behaviour of providers.

2.3.2.3 Solution

- 2.3.2.3.1 Provision needs to be made for minimum standards relating to affordability assessment mechanisms.
- 2.3.2.3.2 Provision needs to be made for procedural guidelines on dealing with reckless credit extension in a cost- and time-effective manner.
- 2.3.2.3.3 The NCR should be enabled effectively act against a credit provider, where a determination is made that the provider did not do an affordability assessment on the consumer. Where the failure to do an affordability assessment was prejudicial to the consumer, the consumer should still be able to enforce the remedies currently contained in the NCA.
- 2.3.2.3.4 Providing for proper judicial oversight where the court official duly considers the provisions and prohibitions of the NCA in the granting of emolument attachment orders may also contribute to a shift in the behaviour of providers.
- 2.3.2.3.5 Consumers need to be educated on their rights and the remedies available.

2.3.3 EDUCATION

2.3.3.1 Problem

- 2.3.3.1.1 Consumer education is a catalyst for the proper outcome of many of the objectives of the NCA.
- 2.3.3.1.2 The mandate of **the dti** is limited to credit matters and consumer education in relation to credit matters.

2.3.3.2 Clarification

- 2.3.3.2.1 Effective and implementable consumer credit education remains a challenge.
- 2.3.3.2.2 Legislative intervention in consumer education is only effective to some extent but there appears to be a divergence between the education policy and how it has been expressed in the NCA.
- 2.3.3.2.3 The existing policy framework provides for consumer education as a purpose of the NCA and a function of the NCR, but mostly refers to providing certain information to the consumer.
- 2.3.3.2.4 However, receiving information does not necessarily ensure the correct interpretation and understanding thereof.

- 2.3.3.2.5 The NCA has not succeeded in addressing the issue of lack of consumer knowledge or low financial literacy. The problem in this regard is that the policy is not adequately embodied in the legislation and any improvement in consumer knowledge cannot solely be attributed to legislative provisions or the activities of the dti.
- 2.3.3.2.6 Research prior to and after the implementation of the NCA indicates that consumers are not always aware or properly informed of the costs of credit.
- 2.3.3.2.7 It has been noted that consumers do not feel adequately informed of the actual costs of credit which realisation only occurs when the first repayment becomes due.
- 2.3.3.2.8 Furthermore, the consumer's approach to the signing of the contract as a mere formality, in many instances neglecting to read same, throws into stark relief the prescriptions for the form and contents of the contract.
- 2.3.3.2.9 In many cases, consumers are only interested in the monthly instalment and where the instalment reflected does not incorporate all the costs, this may differ from the amount actually due and payable on a monthly basis.
- 2.3.3.2.10 In many cases, the consumer's ability to make informed choices is curbed, particularly if the pre-agreement disclosure phase is skipped or only adhered to in an almost automated manner. Education is needed for consumers to make informed choices, demand better services (increase quality of supply), right the balance between consumer and credit provider and improve competition in the credit market.
- 2.3.3.2.11 Provision of comprehensive information alone does not have the intended effect on the cognitive functions and behaviour of the consumer who lacks basic literacy and numeracy and financial literacy skills.
- 2.3.3.2.12 Credit education encompasses more than simply addressing the informational imbalance between the consumer and credit provider.

2.3.3.3 Solution

- 2.3.3.3.1 Consumer education needs to be improved.
- 2.3.3.3.2 The participation of stakeholders that interact with consumers is needed to improve consumer education as it relates to more than just the provision of information.
- 2.3.3.3.3 Legislative provisions, Government and industry participation is necessary.

2.3.4 CREDIT INFORMATION

2.3.4.1 Problem

- 2.3.4.1.1 The NCA introduced, for the first time, registration of credit bureaux and regulations regarding the removal of negative listings, cleaning of records and access to personal credit records. In each case, these regulations have done much to ensure more equitable and fair access to credit and ensure greater responsibility by credit providers when updating consumer credit information.
- 2.3.4.1.2 The National Loans Register has not come into being, and *contra* to the policy aims, reporting to credit bureaux by credit providers has not been fully enacted. These factors undermine the value of the affordability assessment.
- 2.3.4.1.3 The mandatory updating of registered credit bureaux needs to be ensured as it appears that the need for a National Loans Register has fallen away.

2.3.4.2 Clarification

- 2.3.4.2.1 The notion that sharing of such information is voluntary needs to be challenged if affordability assessment is to be taken seriously.
- 2.3.4.2.2 There also needs to be reconsideration of the manner in which credit bureaux receive and avail credit information in order to provide for the optimal and useful exchange and provision of the information.
- 2.3.4.2.3 Legislation should not be so confined that it disallows innovative mechanisms of assessing the risk of the consumer and the corresponding cost of credit apart from credit bureaux, provided that the assessment and resultant cost to the consumer is fair and justifiable.

2.3.4.3 Solution

- 2.3.4.3.1 The updating of registered credit bureaux should be mandatory.
- 2.3.4.3.2 The legislative provisions should be flexible enough to allow for credit providers to develop innovative measures to assess the risk of the consumer and price the credit appropriately.

2.3.5 DISCLOSURE AND TRANSPARENCY

2.3.5.1 Problem

2.3.5.1.1 The policy framework and the NCA introduced extensive measures to improve disclosure of terms and conditions of credit granting and/or related aspects by credit providers and agents to consumers.

2.3.5.1.2 Disclosure and transparency needs to be enhanced as the information disclosed is not "accessible" by financially illiterate consumers and the detail of the disclosures differs. Moreover, enforcement of disclosure is lacking given a failure both of legislation and implementation.

2.3.5.2 Clarification

2.3.5.2.1 Given that the NCA has been unable to change the long-ingrained habit of the South African consumer to take credit where it is first found, the policy and legislative emphasis on pre-agreement disclosure has not been entirely effective.

2.3.5.2.2 In this regard, the setting out of the full cost of credit and the required form for this disclosure should apply both to the pre-agreement disclosure and the first page of the contract. Moreover, the fact that a form has been prescribed only for small agreements is not particularly functional for the consumer.

2.3.5.2.3 The total cost of credit must be presented to the consumer in an understandable manner and be all inclusive. Moreover, the complete monthly instalment due and payable by the consumer should be disclosed. This should be included in awareness campaigns (financial literacy programmes) as well as be actively enforced with strict penalties for non-complying credit providers. Similar provision should be made for debt counsellors' (and PDAs' if permitted) costs where the consumer utilises the services of these role players.

2.3.5.2.4 There has been a major improvement in regulating marketing and sales but enforcement in cases of non-compliance remains a problem. Consumers can be specifically susceptible to misleading advertising and there is no redress mechanism for an affected consumer. Therefore, whilst misleading practices may be curbed, the assessment and restitution of the consumer's position, where the consumer has been adversely affected, remains a concern. This relates to products of credit providers as well as services of other role-players such as debt counsellors.

2.3.5.3 Solution

2.3.5.3.1 The full cost of credit and the required form for this disclosure should be drafted and displayed on both the pre-agreement disclosure and the first page of the contract.

2.3.5.3.2 Forms should be prescribed for all sizes of agreements, not just small agreements.

- 2.3.5.3.3 The total cost of credit must be presented to the consumer in an understandable manner and be all inclusive.
- 2.3.5.3.4 The complete monthly instalment due and payable by the consumer should be disclosed.
- 2.3.5.3.5 This should be included in awareness campaigns (financial literacy programmes) as well as be actively enforced with strict penalties for non-complying credit providers.
- 2.3.5.3.6 Similar provision should be made for debt counsellors' (and PDAs' if permitted) costs where the consumer utilises the services of these role players.
- 2.3.5.3.7 Provision should be made for a redress mechanism for consumer that has been adversely affected by misleading advertising practices. This should relate to products of credit providers as well as services of other role-players such as debt counsellors.

2.3.6 CHARGES FOR CREDIT AND OTHER SERVICES

2.3.6.1 Problem

- 2.3.6.1.1 There is evidence that most providers are now charging the maximum permissible fees and some are switching to other sources of income currently not capped, like credit life insurance, to meet production costs.

2.3.6.2 Clarification

- 2.3.6.2.1 During the period of implementation of the NCA, the regulated interest rates for most categories of credit have fallen with the SARB Repo Rate (South African Reserve Bank Repurchase Rate). However, the maximum interest rates introduced by the NCA were generally considerably higher than those applicable under the Usury Act.
- 2.3.6.2.2 At the same time, the permissible fees have remained static since 2007.
- 2.3.6.2.3 The legislation currently makes provision for the Minister to adapt the costs of credit upon recommendation from the NCR and upon consideration of certain factors set out in the NCA.
- 2.3.6.2.4 There has been no revision of the costs of providing credit, even though these are linked to a rise in cost of administration and expenditure of providers.

2.3.6.3 Solution

- 2.3.6.3.1 It is suggested that the Minister should publish the outcome of the tri-annual review alternatively; provision needs to be made for some automaticity of the revision of such fees, perhaps linked to a fixed index, should the review not be performed on a regular basis.

2.3.7 FIXED INTEREST RATES

2.3.7.1 Problem

- 2.3.7.1.1 The NCA limits the maximum allowable interest rate through a formula linked to the SARB Repo Rate for some categories of credit.
- 2.3.7.1.2 Where the interest rate is fixed at a set percentage, permissible in relation to the maximum allowable rate that prevails when the agreement is entered into, may, in the case of a subsequent reduction in the SARB repo rate, exceed the permissible limit.
- 2.3.7.1.3 The issue of fixed and variable interest rates are of importance as the legislation is not clear on the proper definition of these forms of interest, especially where both are – by virtue of the formula used to calculate the maximum allowable interest rate – fixed to some extent.

2.3.7.2 Clarification

- 2.3.7.2.1 From a consumer perspective, it would be problematic to allow fixed rates higher than the prescribed maxima to prevail. This would encourage providers to keep pricing at the maxima when a rate cut is anticipated. Given that credit providers are likely to have an information advantage over consumers as to when this is likely to happen, consumers may be prejudiced.
- 2.3.7.2.2 Practical issues such as the course to follow when a fixed interest rate is higher than the maximum allowed if the Repo Rate is lowered after the agreement was entered into, remain problematic.

2.3.7.3 Solution

- 2.3.7.3.1 It would be prudent to ensure clarity that even a fixed rate must fall with the maximum prescribed rate.

2.3.8 THIRD PARTIES AND AGENTS

2.3.8.1 Problem

- 2.3.8.1.1 The NCA does not provide for the quantification or limitation of the fees of agents, whether acting on behalf of a debt counsellor or credit provider or not, as there is no prescribed remuneration in the regulations as referred to in the NCA.
- 2.3.8.1.2 Furthermore, there is no limitation on fees and expenses incurred through the use of various intermediaries that, for example, source consumers and then refer the loan agreement for and on behalf of the consumer for a fee or manage or facilitate matters on behalf of debt counsellors for an additional fee where the latter should be capable of providing the services rendered.
- 2.3.8.1.3 Third parties who are not agents of debt counsellors and/or credit providers are not consistently regulated for compliance with the provisions of the NCA and the fees are not regulated.

2.3.8.2 Solution

- 2.3.8.2.1 The following needs to be addressed:
- 2.3.8.2.1.1 The quantification or limitation of the fees of agents, whether acting on behalf of a debt counsellor or credit provider or not;
- 2.3.8.2.1.2 A limitation on fees and expenses incurred through the use of various intermediaries especially where the management or facilitation could be provided by a party such as a debt counsellor that also receives remuneration from the consumer;
- 2.3.8.2.1.3 The regulation of third parties who are not agents of debt counsellors and/or credit providers for compliance with the provisions of the NCA as well as the fees of these third parties.

2.3.9 CREDIT LIFE INSURANCE

2.3.9.1 Problem

- 2.3.9.1.1 The provision of credit life insurance can be abused.
- 2.3.9.1.2 There is no standardised or even explicit disclosure of the nature of the cover offered by credit life insurance.

2.3.9.2 Clarification

- 2.3.9.2.1 Credit life insurance, which is not subject to price regulation, there appears to be room for price arbitrage, especially where a provider has its own cell-captive license (and hence the returns to the insurance offering accrue to the holding company that provides the credit).

- 2.3.9.2.2 In this case, while interest and fees must be disclosed, the disclosed interest rate may reflect losses to the credit provider, although these apparent losses are then recouped in terms of the premium payable in terms of the credit life offering.
- 2.3.9.2.3 Even when this is not so, the differential treatment of credit life insurance in terms of disclosure distorts the ability of consumers to understand the costs. There is no standardised or even explicit disclosure of the nature of the cover offered by credit life insurance.
- 2.3.9.2.4 One policy may include disability or retrenchment, and another not.
- 2.3.9.2.5 The consumer is mostly unaware as to the nature of the cover, or the exclusions. This makes the possibility of allowing the consumer to substitute the credit provider's policy with an alternative, vexing for both the consumer and the credit provider.
- 2.3.9.2.6 The joint Task Team (involving the National Treasury, Financial Services Board, NCR and the Competition Commission) on Consumer Credit Insurance (CCI) has recently appointed an actuarial firm to analyse and produce a report on the responses received from credit insurers on two information requests issued by the FSB and NCR. In due course, these findings will hopefully feed into the policy debate on credit life insurance and whether it needs to be capped.

2.3.9.3 Solution

- 2.3.9.3.1 The findings of the joint Task Team should be considered to within the context of the policy debate on credit life insurance and whether it needs to be capped.
- 2.3.9.3.2 Regardless of the outcomes of the CCI task team, the policy of the NCA should require that the total costs of credit, inclusive of credit insurance and credit life insurance, become part of standard disclosure in the contract as well as pre-agreement disclosure.
- 2.3.9.3.3 A standardised form on the nature of the cover needs to be developed with the industry to enable a better-informed consumer body.

2.3.10 SECTION 103(5)

2.3.10.1 Problem

- 2.3.10.1.1 There are interpretational difficulties with this section.
- 2.3.10.1.2 The inclusion of credit insurance into the ambit of Section 103(5) was raised as a challenge.

2.3.10.2 Clarification

- 2.3.10.2.1 Examples of interpretational difficulties include the lack of clarity relating to 'default', whether it only relates to payment default and curing of same (or more) and practices that may initiate abuses by consumers to obtain an unfair advantage.
- 2.3.10.2.2 Credit insurance is necessary to protect the consumer against unforeseen events and the consumer should not be deprived of this right. However, as set out above, credit insurance provision can be a fertile ground for abuse.

2.3.10.3 Solution

- 2.3.10.3.1 The interpretational difficulties should be addressed by providing clarity in areas such as whether:
- 2.3.10.3.1.1 The state of 'default' should be legislated or left to the discretion of the parties to determine;
- 2.3.10.3.1.2 'Default' only relates to payment default and curing of default or whether the scope and application is broader to include breach of contract; and
- 2.3.10.3.1.3 The legislative amendments will be able to curb practices that may initiate abuses by consumers to obtain an unfair advantage through defaulting on the credit agreement.
- 2.3.10.3.2 The Legislator should first consider provisions aimed at curbing the abuses in relation to credit life insurance as set out above and in the report, whereafter consideration should be given to exclude credit insurance premiums from the ambit of Section 103(5).

2.3.11 DEVELOPMENTAL CREDIT

2.3.11.1 Problem

- 2.3.11.1.1 The inclusion of developmental credit into the NCA is based on the policy objective of economic growth, as per national objectives.
- 2.3.11.1.2 The policy relating to the notion of developmental credit is sound.
- 2.3.11.1.3 The provisions for developmental credit are wanting and have failed to stimulate developmental credit in the economy.

2.3.11.2 Clarification

- 2.3.11.2.1 It was noted that the recorded incidences of developmental credit provision have not fully eventuated.
- 2.3.11.2.2 While some incentives for the provision of developmental credit have been incorporated into the NCA, such as exemptions of certain aspects of the NCA, their usefulness is uncertain.
- 2.3.11.2.3 In this regard, apart from the proper definition of the scope and limits of developmental credit in the NCA, the practical implementation, regulation and curbing of possible abuses relating to developmental credit seem to be largely untested in its current legislative form.
- 2.3.11.2.4 It has been suggested that credit providers do not disclose the existence of developmental credit agreements as separate agreements when reporting to the NCR, but include this under the general reporting sections.
- 2.3.11.2.5 It can be difficult to ascertain whether a credit provider truly provides developmental credit in accordance with the spirit and purpose of the NCA.
- 2.3.11.2.6 Some of the exemptions unintentionally make the compliance burden on the developmental credit providers higher than for other providers – as they have to design forms and obtain approval for them – rather than merely adopt what the Regulator has designed.
- 2.3.11.2.7 The scope of developmental credit and the variety of types and forms thereof necessitated that the basic regulatory framework be legislated.
- 2.3.11.2.8 Developmental credit may be restricted through the application of the current reckless credit assessments insofar as the salary advice and credit record of the consumer are required. Strictly applied, this may pose a barrier to accessing credit for business development. Instead, a developmental approach aimed at small business development should more appropriately include an assessment of the prospective business proposal of the applicant.
- 2.3.11.2.9 Furthermore, in the light of the advocated importance and government focus on economic development of South Africans, including small business development, previously disadvantaged persons and the general optimal utilisation of the potential and resources of South Africa, the financial support by government for developmental credit providers can and should be strengthened.

2.3.11.3 Solution

- 2.3.11.3.1 The definition of developmental credit could be expanded to provide for more clarity on the scope and limits thereof in order to provide for "true" developmental credit, but the practical regulation thereof should be left to the regulatory body.
- 2.3.11.3.2 A developmental approach aimed at small business development should more appropriately and specifically include an assessment of the prospective business proposal of the applicant.
- 2.3.11.3.3 The financial support by Government for developmental credit providers can and should be strengthened.

2.3.12 RELATED LEGISLATION**2.3.12.1 Problem**

- 2.3.12.1.1 The core aspects of the NCA relating to the financial situation of the consumer such as over-indebtedness, debt rehabilitation, curbing of abuses and consumer protection cannot be viewed in isolation.
- 2.3.12.1.2 The use of mechanisms outside of the NCA, such as garnishee orders, seems to be problematic notwithstanding the provision in section 3 of the NCA, regarding non-preferential treatment of credit providers.
- 2.3.12.1.3 Irregularities pertaining to garnishee orders and administration orders are prevalent and these impact consumers and their financial situation.
- 2.3.12.1.4 Capacity and competency constraints in the Magistrates' Courts impact the outcomes of the NCA.

2.3.12.2 Solution

- 2.3.12.2.1 An all-inclusive approach needs to be taken when considering amendments to core aspects of the NCA that relate to the financial situation of the consumer.
- 2.3.12.2.2 Abusive practices and irregularities in other spheres of the consumer's financial world need to be addressed holistically.
- 2.3.12.2.3 Mechanisms such as garnishee orders and administration orders should be regulated insofar as these relate to credit agreements in order to curb abuses in the credit sphere.
- 2.3.12.2.4 Capacity and competency constraints in the Magistrates' Courts should be addressed.

2.4. CHALLENGE 4: DEALING WITH DEBT

2.4.1 Overlaying policy recommendation

- 2.4.1.1 Providing for a mechanism for dealing with debt that is accessible and viable to successfully assist consumers that experience financial difficulties.
- 2.4.1.2 One of the aims of the NCA is “addressing the over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations”.
- 2.4.1.3 This is achieved, amongst others, by “providing for a consistent and harmonised system of debt restructuring, enforcement and judgment” as well as “providing a consistent and accessible system of consensual resolution of disputes arising from credit agreements”.
- 2.4.1.4 Effective consumer redress is the cornerstone of consumer protection legislation.
- 2.4.1.5 Various debt relief remedies and debt collection mechanisms exist in the South African legal sphere.
- 2.4.1.6 These remedies and mechanisms are provided for in different pieces of legislation as well as different government departments.
- 2.4.1.7 The policy regarding debt relief is sound and should be retained.

2.4.2 DEBT COLLECTION

2.4.2.1 Problem

- 2.4.2.1.1 Certain aspects that are of particular importance to the proper functioning of the credit market and that influence the outcomes of the NCA, such as debt collection, are not within the scope of the NCA or mandate of the dti.

2.4.2.2 Clarification

- 2.4.2.2.1 Issues not specifically regulated by the NCA but relevant to the matter as identified in the 2003 Review, pertaining to debt collection mechanisms including garnishee and administration order irregularities, have not been resolved successfully – in part because the jurisdiction of the governing legislation falls outside the mandate of the dti.

2.4.3 DEBT RELIEF REMEDIES AND OPTIONS AVAILABLE TO THE CONSUMER

2.4.3.1 Problem

- 2.4.3.1.1 The different forms of debt relief have effective entry thresholds, which determine whether a consumer can access a particular option or not. Under certain circumstances, this may have the effect that none of the options or more than one option may be available to a consumer.
- 2.4.3.1.2 In the context of the NCA, at present, it is difficult for a consumer to effectively access the remedy of debt review for purposes of resolving default relating to difficulty in payment of a credit agreement, as the section 129 letter may be sent immediately upon default.
- 2.4.3.1.3 The problems relating to the debt review remedy is primarily legislative failures, examples of which are set out hereafter, due to:
- Limited regulation of the industry through the NCA;
 - Legislative loopholes;
 - Practical implementation and judicial interpretation of the provisions of the NCA;
 - The lack of trust between participants of the industry, although this has improved.
- 2.4.3.1.4 Non-NCA related matters identified in the 2003 Review pertaining to debt collection mechanisms have not successfully been resolved where the jurisdiction of the governing legislation falls outside the mandate of the dti.

2.4.3.2 Clarification

- 2.4.3.2.1 Some consumers will not qualify for *any* of these processes and hence will be indebted indefinitely.
- 2.4.3.2.2 The sequestration procedure in terms of the Insolvency Act of 1936 has the benefit of a statutory discharge, i.e. the consumer is relieved from repaying the whole of the debt.
- 2.4.3.2.3 Remedies such as administration and debt review do not offer the same manner of relief. In some instances it can be argued that such remedies actually burden the consumer further – given that little apparent caution or care is taken in limiting the collection and other legal fees which subsequently become for the account of the consumer in these cases.

2.4.4 DEBT REVIEW**2.4.4.1 Problem**

2.4.4.1.1 The success of the debt review process has been compromised by the lack of clarity in terms of processes, conflicting judicial interpretations and the availability of proficient debt counsellors. The lack of capacity and competency of the Magistrates' Courts are also a cause for concern.

2.4.4.1.2 Recently, the status of industry agreements and codes of conduct as well as divergent views on the role and position of the NCR in this regard, have come to the fore.

2.4.4.2 Clarification

2.4.4.2.1 The results of a number of court decisions have curbed the ability of the consumer to successfully access the debt review remedy and for a credit provider to enforce its rights through legal action.

2.4.4.2.2 These have generated preventative actions and avoidance behaviours by industry stakeholders that have had considerable cost implications.

2.4.4.2.3 If the process does not perform properly, consumers will be denied the opportunities and protection envisaged when debt review was created.

2.4.4.2.4 Statistical evidence shows that, whilst a large number of consumers are over-indebted and many apply for debt counselling, very few consumers actually go through the process.

2.4.4.2.5 The logical conclusion is therefore that debt counselling is working, but only for a limited few.

2.4.4.2.6 Judicial interpretation of certain aspects of the debt review process has resulted in consumers either not being able to access the remedy or being prevented from successfully completing the process.

2.4.5 SECTIONS 86(2) AND 129**2.4.5.1 Problem**

2.4.5.1.1 The Supreme Court of Appeal interpreted the provisions of Section 86(2) read with section 129, to prevent a consumer from including an agreement in terms of which a Section 129(1) (a) notice was sent (informing the consumer of his or her default and of his or her options to resolve the matter namely to contact, amongst others, a debt counsellor) into the debt review process.

2.4.5.2 Clarification

- 2.4.5.2.1 At present, it is difficult for a consumer to effectively access the remedy of debt review for purposes of resolving default relating to difficulty in payment of a credit agreement, as the Section 129 letter may be sent immediately upon default.
- 2.4.5.2.2 It is seldom of assistance to include only those agreements in terms of which the consumer has not defaulted, particularly where the consumer cannot negotiate effectively with the credit provider with whom the consumer entered into the agreement upon which the latter defaulted.
- 2.4.5.2.3 Another reason is that some consumers only become aware of the option of debt review upon receipt of a notice in terms of Section 129 (1) (a).
- 2.4.5.2.4 A plausible and cost effective solution needs to be found to balance the costs and time to the consumer and the credit provider in informing the former of his or her rights and the latter in exercising enforcement of the consumer's obligations upon default.

2.4.6 SECTION 86(10)**2.4.6.1 Problem**

- 2.4.6.1.1 Various logistical difficulties relating to Section 86(10) and the various outcomes of the judicial interpretation of the section can be abused by both consumer and credit provider.

2.4.6.2 Clarification

- 2.4.6.2.1 Section 86(10) provides that a credit provider may terminate a debt review in respect of the agreement in terms of which the provider is a party if the consumer is in default under the credit agreement and 60 business days have elapsed since the consumer applied for debt review with the debt counsellor.
- 2.4.6.2.2 This option exists until a debt review order has been granted notwithstanding that the matter has been referred to court.
- 2.4.6.2.3 However, a variety of factors such as lack of co-operation of credit providers and court backlogs prevent some consumers from timeously obtaining these orders.
- 2.4.6.2.4 On the other hand, as the debt review process initiates a moratorium on enforcement of the consumer's payment obligations, a debt review process that is unnecessarily prolonged can detrimentally affect the interests of the credit provider.

2.4.6.2.5 The principle of balancing the interests of the consumer and credit provider needs to be carefully considered in the light of the mechanism of Section 86(10), which allows one of the parties to terminate a duly instituted court process without notice or oversight by the judiciary to whom the matter has been referred.

2.4.6.2.6 While recognising the purposes for which Sections 86(10) and (11) were created, the remedy contained in Section 86(11), as interpreted, seldom provides effective checks and balances to Section 86(10).

2.4.7 INDUSTRY INVOLVEMENT

2.4.7.1 Problem

2.4.7.1.1 The current situation relies to a large extent on the good faith participation and willingness of the parties to bring the process to a successful conclusion.

2.4.7.1.2 However, notwithstanding a major improvement in the relationship between industry participants, there still remains a lack of trust which negatively impacts on the proper functioning and further development of the debt review industry.

2.4.7.2 Clarification

2.4.7.2.1 Provisions which allow for a more informal form of debt rehabilitation, whether through direct negotiation with credit providers to reduce interest rates, later to be accepted by the court, or assistance in reducing an exorbitant lifestyle, must be further emphasised in the enhanced policy.

2.4.7.2.2 Industry collaborations have been beneficial in streamlining the process and in this regard support for a supervised limited self-regulatory space is encouraged, for example, with regard to industry acceptable repayment periods, early rehabilitation and the reduction of obligations towards the credit provider.

2.4.7.2.3 The NCR as regulatory body should determine whether industry guidelines are reasonable and do not unjustly prejudice the rights of any specific group of stakeholders, or insist that consumers waive their rights to reckless lending review, etc.

2.4.8 UNINTENDED CONSEQUENCES

2.4.8.1 Problem

2.4.8.1.1 The NCA does not allow for magistrates to reduce interest rates by mutual agreement between the parties as the court is limited by the provisions of section 86. A mechanism of consent to reduction of debt could assist in alleviating the

debt burden of the consumer whilst still safeguarding the interests of the credit provider.

- 2.4.8.1.2 The NCA further does not allow for the statutory 'downscaling' of debts and, if the parties agree thereto, it has to be done on an informal basis.
- 2.4.8.1.3 A consumer is subject to the restraints of debt review until all the debts subject to the debt review have been paid:
- 2.4.8.1.4 Where a consumer has a long-term agreement such as a mortgage bond, the consumer cannot obtain a clearance certificate until the agreement is repaid even though the consumer may be able to afford the original instalment or even a higher instalment;
- 2.4.8.1.5 The consumer can then also not obtain credit until a clearance certificate is provided by the debt counsellor.
- 2.4.8.1.6 Industry collaborations have been beneficial in streamlining the process and in this regard support for a supervised limited self-regulatory space is encouraged e.g. with regard to industry acceptable repayment periods, early rehabilitation and the reduction of obligations towards the credit provider.
- 2.4.8.1.7 The NCR as regulatory body must be empowered to assess whether the terms of industry collaborations are reasonable and do not unjustly prejudice the rights of any specific group of stakeholders, or insist that consumers waive their rights to reckless lending review, etc.

2.4.8.2 Solution

- 2.4.8.2.1 The underlying principles of the different debt relief remedies differ and as such, the benefits that accrue to both consumer and credit provider.
- 2.4.8.2.2 Care should be taken not to hastily cross-apply mechanisms without proper investigation of whether the benefits will actually accrue to the consumer while still safeguarding the interests of the credit provider.
- 2.4.8.2.3 Although the policy regarding the purpose of debt review is to assist the consumer to satisfy his or her obligations, consideration should be given to earlier rehabilitation of a consumer at a determined point in time where a debt counsellor can provide a clearance certificate at a stage prior to satisfying all the debts.
- 2.4.8.2.4 A compulsory annual review, as mentioned above, would assist in this regard. This would allow the consumer to enter the credit market again.

- 2.4.8.2.5 It is recommended that the purpose of debt review remains to assist the consumer to repay his or her debts.
- 2.4.8.2.6 The consumer further has to be in the financial position to repay all the debts within a reasonable period of time as negotiated by the industry.
- 2.4.8.2.7 The policy regarding the eventual satisfaction of all proper debt obligations is an important measure to retain and ensure responsibility and sustainability in the credit market. In this regard, any financial debt relief such as a reduction of obligations towards credit providers should be allowed on a consensual basis.
- 2.4.8.2.8 Debt counselling is not a feasible option for all consumers particularly consumers with no income and no assets or low income and limited assets.
- 2.4.8.2.9 It is, therefore, submitted that Government should investigate the development of alternative or additional debt relief measures to assist those over-indebted consumers for which debt review is not a viable option. These suggestions would probably form part of the insolvency regime and thus fall outside of the mandate of the dti.
- 2.4.8.2.10 Provision should be made for legislative/regulatory support for a supervised limited self-regulatory space.
- 2.4.8.2.11 The NCR as regulatory body must be specifically empowered to assess whether the terms are reasonable and do not unjustly prejudice the rights of any specific group of stakeholders.
- 2.4.8.2.12 Due to the *interrelation* of the provisions of the NCA relating to debt review, care should be taken to decide whether amendments should be limited to major changes to selected provisions or whether lesser changes to holistically address the issue, should be made. In this regard, refer to the main report for specific illustrations of this concept within the context of debt review.
- 2.4.8.2.13 Capacity and competency constraints in Magistrates' Court should be addressed.

PART 3: CONCLUSION AND CONSULTATION

3.1. Concluding remarks

- 3.1.1 Various issues have been identified that have hampered the proper achievement of the intended outcomes of the NCA. These are noted *inter alia* in stakeholder submissions, research reports commissioned prior to this review, academic and other writings as well as court cases.
- 3.1.2 The examples set out above do not necessarily reflect on poor policy choices for the original framework as embodied in *Making Credit Markets Work*.
- 3.1.3 The problematic aspects of the NCA relate primarily to:
- Legislative failures such as drafting irregularities,
 - Issues with the interpretation or application of the legislation. Some examples as stated by stakeholders, in respect of which the opposite can also be argued by an opposing stakeholder, include:
 - Provisions in terms of which ambiguity and confusion still exists in respect of the scope of a provision of the NCA (such as the scope of default in relation to section 103(5)); or
 - Provisions in terms of which ambiguity and confusion still exists in respect of the application of a provision of the NCA (such as whether a consumer with no intention or ability to repay his or her debts to a credit provider can still apply for debt counselling in terms of section 86 even though it is not a viable option for the consumer, resulting in prejudice to the credit provider); or
 - Provisions in terms of which the courts have provided clarity, but which has had unintended consequences (such as the inability of some consumers to obtain debt review orders prior to a credit provider terminating the debt review in terms of section 86(10)); or
 - Provisions in terms of which the courts have provided clarity but which may not conform to the policy intention of the legislator (such as mandating a credit provider to send a section 129(1) (a) letter to the consumer to refer the consumer to a debt counsellor but then preventing the consumer from applying for debt review in respect of the agreement in terms of which the section 129(1) (a) notice was sent).
- 3.1.4 In this respect, the issues are not necessarily policy related but directly related to the drafted legislation. Therefore, policies relating to the drafting of the legislation as well as the enhancement of some of the provisions of the NCA have been developed.

3.2 Recommendations for the evaluation of proposed legislative amendments

3.2.1 Insight

3.2.1.1 The legislature needs to have/ have made:

- A clear understanding of the issue at hand,
- A sound analysis of whether the issue requires legislative intervention; and
- A well-defined objective as to what any intervention seeks to achieve with due consideration of the cost of implementation and regulatory burden involved for both compliant and non-compliant stakeholders.

3.2.1.2 In this regard the legislator should consult with stakeholders on proposed amendments and undertake a preliminary (envisaged) regulatory impact assessment on proposed legislative amendments.

3.2.1.3 Various problems, if not all, have been identified through *inter alia*:

- Previous reports commissioned by **the dti** and the NCR;
- Stakeholder submissions on proposed amendments made to **the dti**;
- The main report and annexures/ stakeholder submissions to this project.

3.2.2 Remedial action

3.2.2.1 The problems that have hampered the proper achievement of the intended outcomes of the NCA, which should be considered and addressed.

3.2.2.2 Careful remedial corrective measures should be taken to address these issues and enhance the realisation of the potential of the NCA.

3.2.3 Cautionary approach

3.2.3.1 However, a conservative approach to introducing further dramatic aspects into the credit sphere, particularly as the NCA, coupled with additional economic and social factors, has had a notable impact on the industry to which the latter had to adapt in a relatively short period.

3.2.3.2 This caution should not preclude the consideration of necessary changes as have been highlighted above, in the main report, other reports and stakeholder submissions to **the dti**.

3.2.3.3 The abovementioned cautionary approach should also prevail when amending the existing legislative framework in order to avoid unintended consequences.

3.2.4 Proper consultation

3.2.4.1 It is, therefore, imperative that **the dti** undertakes proper consultation and careful consideration of industry submissions on draft legislative amendments.

3.2.4.2 The 2013 policy review policy document will be published and all stakeholders will have an opportunity to submit public comment.

3.2.4.3 Consultation with stakeholders, including labour, business and community will take place.

3.2.4.4 Consultation with a number of national government departments, including the Department of Justice with jurisdiction over the Magistrates' Courts Act, and the National Treasury, with jurisdiction over the financial sector, must be conducted.

3.2.4.5 The feedback that is received will be integrated into the revised policy and Bill that will be presented to Parliament and the Parliamentary committee.

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