

Balancing Responsibilities – Financial Literacy*

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Abstract

In Australia there is an obligation to promote the informed participation of financial consumers while in South Africa there is an obligation to educate consumers. The Australian obligation is concerned with the financial system as a whole while the South African obligation has generally been focused on general financial education as a tool to promote financial inclusion. There is no obligation for consumers to attain a minimum standard of literacy in credit or finance generally. Financial literacy is one among a number of strategies directed towards inducing changes in consumer behaviour. It sits between the old regulatory model which relies on disclosure of information for effective and rational decision-making and a newer regulatory model which takes into account individuals' perceptions and behavioural biases and may seek to accommodate for these by imposing obligations on financial services providers beyond the mere disclosure of information. Financial literacy is generally the ability to understand how money works, how a person can earn money or make it more. It specifically refers to the set of skills and knowledge that allows people to make informed and effective decisions with all of their financial resources. This article discusses Australian and South African legal obligations and social responsibilities aimed at promoting the financial literacy of consumers.

Keywords

Financial literacy; financial inclusion; financial education; consumer education; disclosure of information; legal obligation to educate consumers; legal obligation to disclose information.

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1 Introduction

Both providers' legal obligations and their social responsibilities are involved in the drive by nations to make their citizens financially literate. In Australia there is an obligation to promote informed participation while in South Africa there is an obligation to educate consumers.¹ The Australian obligation is concerned with the financial system as a whole while the South African obligation has generally been focused on general financial education as a tool to promote financial inclusion. In South Africa there is a statutory obligation to educate consumers regarding credit and their consumer-credit rights.² There is also a duty on the South African Financial Services Board to "provide, promote or otherwise support financial education, awareness and confidence regarding financial products, institutions and services".³ However, there are several changes to the regulatory architecture of the South African financial industry that have been proposed and that will in all likelihood bring about a stronger focus on educating consumers regarding the financial system as a whole and promoting informed participation.

Education is qualitatively different from participation based on information. We understand general literacy as the result of a basic level of education, yet financial literacy as it has come to be practised in Australia and other countries may encompass a wider range of skills, including one's own behavioural dispositions towards money. Financial literacy is generally the ability to understand how money works, how a person can earn money or make it more. It specifically refers to the set of skills and knowledge that allows people to make informed and effective decisions with all of their

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¹ See ss 3(e)(i) and 16(1)(a) of the *National Credit Act 34 of 2005* (South Africa) (the NCA); s 3(c) of the *Financial Services Board Act 97 of 1990* (South Africa) (FSB Act); s 1(2)(b) of the *Australian Securities and Investments Commission Act, 2001* (Cth); s 760A(a) of the *Corporations Act, 2001* (Cth) (Australia).

² Section 3(e)(i) read with s 16(1)(a)-(b) of the NCA.

³ Section 3(c) of the FSB Act.

financial resources.⁴ Financial literacy is the "possession of knowledge and understanding of financial matters". The Organisation for Economic Co-operation and Development (OECD) defines financial literacy as "a combination of awareness, knowledge, skill, attitude and behaviour necessary to make sound financial decisions and ultimately achieve individual financial well-being".⁵ Financial literacy often involves intimate knowledge of financial concepts like compound interest, financial planning, the mechanics of credit, advantageous savings methods, consumer rights, and the time value of money.⁶ In many nations financial literacy is promoted through media as diverse as billboards, comic strips, segments in television shows, educational programmes for school children, mandatory courses for adults, and the provision of digital material including phone apps and calculators.

The legal obligation of the regulators to educate and promote informed participation is mirrored by few obligations imposed on the consumer. There is no co-relative obligation for individuals to attain a minimum standard of literacy in credit or finance generally. Consumers may have obligations to give correct information to prospective credit providers,⁷ or to provide good-faith disclosure to prospective insurers,⁸ but this is different from a requirement to attain a degree of financial literacy. The expectation of the consumer is a social responsibility.

The "responsibilisation" debate has been cast in terms of making individuals responsible for their own financial futures in the face of a withdrawal by the state from providing for its citizens or the inability of the state to provide. It has also been linked to arguing that the state should not expect the vulnerable and the disadvantaged to take responsibility for themselves.⁹ More generally, a link is drawn between the overall well-being of national economies and the financial decisions taken by citizens.¹⁰ This is particularly the case with credit, where the indebtedness of individuals is linked to the indebtedness of the nation. The social responsibility of consumers generally to be financially literate is no longer contested.

⁴ See, eg, Wikipedia 2016 https://en.wikipedia.org/wiki/Financial_literacy for a general definition of financial literacy.

⁵ OECD INFE 2011 <https://www.oecd.org/finance/financial-education/49319977.pdf>.

⁶ See Investopedia 2016 <http://www.investopedia.com/terms/f/financial-literacy.asp>.

⁷ See s 81(1) of the NCA.

⁸ See s 13 of the *Insurance Contracts Act*, 1984 (Cth) (Australia); s 53 of the *Short-Term Insurance Act* 53 of 1998 (South Africa); s 59 of the *Long-Term Insurance Act* 52 of 1998 (South Africa).

⁹ Williams 2007 *Law and Policy* 226; Wilson 2012 *UNSWLJ* 501.

¹⁰ See, for instance, ASIC 2011 <http://www.financialliteracy.gov.au/media/218312/national-financial-literacy-strategy.pdf> 5.

However, the extent of that responsibility and the literacy expected of the vulnerable and disadvantaged are debated.

Financial literacy is one among a number of strategies directed towards inducing changes in behaviour.¹¹ It sits between the old regulatory model which relies on the disclosure of information for effective and rational decision-making and a newer regulatory model which takes into account individuals' perceptions and behavioural biases, and may seek to accommodate for these by imposing obligations on financial services providers beyond the mere disclosure of information. These obligations include limiting the provision of a service such as credit to those assessed as being able to repay, or even denying credit products with certain features to particular categories of persons. These suitability and safety obligations on providers have been put in place where literacy is not a sufficient safeguard from potentially bad decision-making by consumers, even with the help of third-party advisers.

There is a body of literature which suggests that financial literacy does not work in the way it was conceived of, as a body of knowledge that could be acquired and once gained would result in optimal choices.¹² This lack of efficacy of literacy in financial matters is not limited to the vulnerable and disadvantaged. If we take financial literacy as embracing a broad range of competencies, then it is acknowledged that even the sophisticated are unable to understand complex financial products.

In this article we discuss Australian and South African legal obligations and social responsibilities aimed at promoting the financial literacy of consumers. We also point out the interrelationship and interdependency between financial literacy and the disclosure of information.

¹¹ Thaler and Sunstein *Improving Decisions*. For a selection of international financial literacy strategies, see ASIC 2016 <http://www.financialliteracy.gov.au/research-and-evaluation/international-research-and-evaluation>.

¹² Commonwealth of Australia 2014 http://www.fsi.gov.au/files/2014/07/FSI_Report_Final_Reduced20140715.pdf 3-60. For two classic studies, see Willis 2008 *Iowa L Rev* 197; Willis 2009 *San Diego L Rev* 415.

2 Australian position

2.1 *The Ripoll Report, the Parliamentary Joint Committee on Corporations and Financial Services and the Australian Securities and Investments Commission (ASIC)*

There was a strand of thinking in Australian public life that emphasised deficits in financial literacy as the cause of imprudent decisions, debt spirals and the loss of assets. Providing more financial literacy was an answer to those who questioned how well other regulatory strategies, such as the disclosure of product information, actually protected consumers.¹³ The Ripoll Report published in 2009 followed catastrophic losses by investors lured into high-risk products with the promise of high returns, sold to investors because their advisors could earn high commissions.¹⁴ It noted that some sectors of industry blamed low levels of financial literacy for the situation, and that the regulatory regime assumes a certain degree of financial literacy.¹⁵ The Parliamentary Joint Committee on Corporations and Financial Services said:

... the reality is that better investor education is not the only answer to protecting investors from poor financial advice. It is a solution often proposed by those in the industry wishing to maintain the regulatory status quo, but is not in the Committee's view effective at protecting the most vulnerable investors.¹⁶

The Committee said that the Australian Securities and Investments Commission (ASIC) should do more to educate "key, higher risk, older demographic groups — such as retirees" and made a Recommendation to this effect.¹⁷

In 2008 ASIC took over responsibility for financial literacy from the Financial Literacy Foundation and in 2011 produced a National Financial Literacy Strategy, with assistance from the Australian Government Financial Literacy Board and other stakeholders. The focus of the initial strategy was on those groups such as school children where there was the greatest likelihood of generational change in financial literacy, those groups most in need of assistance including retirees, indigenous Australians and women, and the

¹³ On the limitations of disclosure, see eg Ben-Shahar and Schneider *Failure of Mandated Disclosure*; Ben-Shahar and Schneider 2011 *U Pa L Rev* 647.

¹⁴ Commonwealth of Australia 2009 www.aph.gov.au/binaries/senate/committee/corporations_ctte/fps/report/report.pdf (Ripoll Report).

¹⁵ Ripoll Report 69, 99.

¹⁶ Ripoll Report 101.

¹⁷ Ripoll Report 47.

issues dealt with included poorly understood products that could cause great harm.¹⁸ ASIC reported on its strategy and embraced a behavioural as well as a knowledge-based approach to financial literacy.¹⁹

2.2 The Murray Report

A review of the whole Australian financial system was reported in November 2014 (Murray Report).²⁰ A member of the review committee was a member of the government's Financial Literacy Board. The Murray Report commented on financial literacy in the context of "Consumer Outcomes". The main game, it said, in the face of collapses, the exploitation of behavioural biases and widespread distrust of financial bodies was to "rebuild consumer confidence and trust in the financial system".²¹ It supported the work by the industry and government towards financial literacy and financial inclusion, and said these should be continued.²²

The Murray philosophy was that consumers should be free to take financial risks and bear the consequences, but this must be in the context of the fair treatment of consumers. There was a problem for individual consumers and for the financial system when consumers took risks when they were not well informed and not well advised.²³ There was no explicit recommendation about financial literacy. The relevant recommendations of the Report for consumers were: 21, strengthen product issuer and distributor accountability; 22, introduce product intervention power; 25, raise the competency level of advisers; 24, align the interests of financial firms and consumers; 39, technology neutrality; and 23, facilitate innovative disclosure.²⁴ These recommendations addressed the complexity of products and conflicted sales practices, and looked to the future to explore smarter ways to convey information and decision-making aids to consumers. They were moving away from consumer protection based on disclosure and literacy.

Instead, the Murray Report critiqued aspects of the Financial Literacy Project. It acknowledged that if financial literacy were improved, consumers would be more engaged and would be able to make informed financial

¹⁸ ASIC 2011 <http://www.financialliteracy.gov.au/media/218312/national-financial-literacy-strategy.pdf> 6-7.

¹⁹ Ripoll Report 37; Commonwealth of Australia <http://www.financialliteracy.gov.au/media/218309/financial-literacy-and-behavioural-change.pdf>.

²⁰ Commonwealth of Australia 2014 <http://fsi.gov.au/publications/> (Murray Report).

²¹ Murray Report 28.

²² Murray Report 29.

²³ Murray Report 28, 197.

²⁴ Murray Report 28, 195.

decisions.²⁵ Yet it was clear: "increasing financial literacy is not a panacea".²⁶ Disclosure is a major regulatory tool for informed decision-making. There is an on-going debate about whether disclosure can be fixed to better assist consumers. The problem remains that disclosure is ineffective if there are low levels of financial literacy.²⁷ But increasing financial literacy will not fix disclosure.²⁸ There are limits to financial literacy in helping people understand complex products. Few lawyers or financial literacy specialists for instance, understand complex derivative products.²⁹

While it rejected financial literacy as the solution to fair treatment and better outcomes for consumers, the Murray Report certainly did not reject the objective of improving financial literacy in the nation. There is widespread buy-in for the Australian Financial Literacy Project. This is not entirely self-serving. In 2014 ASIC issued the National Financial Literacy Strategy for 2014-2017.³⁰ The Strategy makes clear what has been the case for a number of years and that a wide range of stakeholders is responsible: ASIC, business, community, government, and the education sector. The vision is to improve the financial well-being of Australians through improvements in financial literacy. Various strategies are set out. These include embedding financial literacy in the curriculum and teaching the next generation; increasing the use of impartial resources and tools such as the ASIC website Moneysmart; and providing targeted support for the disadvantaged and vulnerable.³¹

2.3 ASIC reports, codes of practice and other financial literacy initiatives and surveys

ASIC recognises the behavioural dimensions to improving financial literacy and better financial decision-making. In an earlier report, it pointed out that what people think they know is greater than what they actually know. People

²⁵ Murray Report 193.

²⁶ Murray Report 193.

²⁷ Murray Report 199; ANZ 2011 <http://www.financialliteracy.gov.au/media/465153/2011-adult-financial-literacy-full.pdf>; Commonwealth of Australia 2014 <http://fsi.gov.au/publications/interim-report/> 3-57.

²⁸ Ben-Shahar and Schneider *Failure of Mandated Disclosure*.

²⁹ Murray Report 209.

³⁰ Australian Government 2014 <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-403-national-financial-literacy-strategy-2014-17/>; Australian Government 2014 http://www.financialliteracy.gov.au/media/546585/report-403_national-financial-literacy-strategy-2014-17.pdf. For an account of this strategy see also OECD 2015 <http://www.oecd.org/daf/fin/financial-education/national-strategies-for-financial-education-policy-handbook.htm> 15.

³¹ Australian Government 2014 http://www.financialliteracy.gov.au/media/546585/report-403_national-financial-literacy-strategy-2014-17.pdf 1, 5-8.

are less confident in investing, superannuation and retirement products and more confident about budgeting, credit, savings and debt. There are barriers to making good decisions. These include understanding that people are "normal" rather than "rational"; that they are faced with too much information and a choice overload; that the information they have to process is complex and the decisions they need to make are often complex and uncertain; they are faced with time constraints and time pressures; there are issues with both over-confidence and under-confidence; some people are impulsive and have self-control problems; and the way in which information is framed or presented can impact on decision-making.³² In 2014 ASIC commenced six monthly tracking studies of Australian financial attitudes and behaviour, locating these in the context of current economic conditions. So far there have been four "waves" of reports.³³

ASIC's MoneySmart website has numerous aids for financial decision-making and placing those decisions in a national interest frame. The credit card debt clock shows two credit cards, one showing the total credit card debt owed by Australians, the other showing what this means per individual. There is also a credit card calculator to show how much individuals can save by paying off their credit card debts in full.³⁴ The MoneySmart website also has a budget planner.³⁵ This website is not just for awareness and decision-making; it also contains educational resources for teachers and others, including videos and interactive materials. These can be used in schools and other education venues.³⁶

Financial literacy initiatives are not just the province of government and its agencies. In 2004 the Australian Treasury established a Financial Literacy Taskforce and from this the Financial Literacy Foundation was established.³⁷ A prominent financial journalist and financial adviser was closely involved with this. Since then the work of the Foundation has been rolled into MoneySmart, which is supported by the Financial Literacy

³² Commonwealth of Australia 2011 <http://www.financialliteracy.gov.au/media/218309/financial-literacy-and-behavioural-change.pdf>.

³³ The sample size for wave 4 was 1, 363. Commonwealth of Australia 2016 <http://www.financialliteracy.gov.au/research-and-evaluation/financial-attitudes-and-behaviour-tracker>.

³⁴ See ASIC 2016 <https://www.moneysmart.gov.au/borrowing-and-credit/credit-cards/credit-card-debt-clock>.

³⁵ See ASIC 2016 <https://www.moneysmart.gov.au/tools-and-resources/calculators-and-apps/budget-planner>.

³⁶ See ASIC 2016 <https://www.moneysmart.gov.au/teaching>.

³⁷ See Australian Government 2004 <http://www.cfltaskforce.treasury.gov.au/content/releases.asp?NavID=3>.

Board.³⁸ Financial Counselling Australia, the peak body representing not-for-profit financial counsellors supports financial literacy education as it sees the results of poor financial literacy and poor decisions.³⁹

There is a sophisticated system of voluntary codes of practice and dispute resolution services such as the Banking Code of Practice "owned" by the Australian Bankers' Association and the Financial Ombudsman Service (FOS), which hears disputes on a range of financial matters. FOS has a community engagement strategy, which includes working with consumer advocates and financial counsellors to help them understand consumer rights. This is viewed as a contribution to bringing about practical financial literacy.⁴⁰ A wide range of Australian businesses support the national financial literacy strategy.⁴¹

In 2014 the OECD published Guidelines on Not-for-Profit Financial Education.⁴² The G20 leaders had approved High-Level Principles for National Strategies for Financial Education in 2012, and these Guidelines are part of the implementation strategy. The Guidelines stress that financial education is a public good. There should be coordination between public, private and not-for-profit stakeholders with no duplication. It is essential to monitor any conflicts of interest to ensure that financial education is not conducted for the profit of a private body. According to the Guidelines, the key criteria are objectivity, the quality of resources and trainers, monitoring and the evaluation of programmes, and compliance. The latter requires national authorities to consider the legal and other frameworks in which private financial literacy initiatives operate.

In Australia the banks have been involved in promoting financial literacy since at least 2002. The Australia and New Zealand Banking Group Limited (commonly called ANZ) runs the MoneyMinded programme in conjunction with a number of charitable bodies.⁴³ The Commonwealth Bank Foundation

³⁸ ASIC became responsible in 2008. See ASIC 2016 <https://www.moneysmart.gov.au/?referrer=understandingmoney.gov.au> and also ASIC 2016 <http://www.financialliteracy.gov.au/>.

³⁹ See FCA 2014 <http://www.financialcounsellingaustralia.org.au/Corporate/News/14-of-Australians-won't-understand-this-press-rele>.

⁴⁰ FOS 2014 see <https://www.fos.org.au/custom/files/docs/fos-submission-to-shaping-a-national-financial-literacy-strategy-for-201416.pdf>; FOS 2014 http://fsi.gov.au/files/2014/04/Financial_Ombudsman_Service_attachment_1.pdf.

⁴¹ See ASIC 2016 <http://www.financialliteracy.gov.au/supporters/business-and-industry>.

⁴² OECD 2014 <http://www.oecd.org/daf/fin/financial-education/guidelines-private-not-for-profit-financial-education.pdf>.

⁴³ See MoneyMinded date unknown http://www.moneyminded.com.au/?page_id=350.

was set up in 2003 for education programmes for young people.⁴⁴ It ran the Financial Literacy Assessment programme from 2003 to 2008 to assist teachers and provided financial literacy grants to schools.⁴⁵

The ANZ bank published its fifth survey of the financial literacy of the Australian population in May 2015.⁴⁶ It has been conducting regular surveys since 2003, when it published the first one. The Survey defines financial literacy as "the ability to make informed judgements and to take effective decisions regarding the use and management of money".⁴⁷ This encompasses skills, knowledge, attitudes and behaviours. Following the fourth survey in 2011, the current survey examines the following behaviours: keeping track of finances, planning ahead, choosing financial products, staying informed and financial control. The survey examines the following attitudes to money: dealing with money is stressful (an attitude that applies even when things are going well financially); impulsivity (acting before thinking things through); financial self-efficacy (self-belief in an ability to change one's financial situation); and financial aspiration (a desire to achieve financial success associated with a strong achievement orientation).

There are important differences that impact on financial literacy. One of these is gender, and the 2015 ANZ survey has a special section on women.⁴⁸ Women, noting that this is not a homogenous group, had higher scores than men on "dealing with money is stressful"; lower scores on impulsivity; lower scores on financial knowledge and numeracy; higher scores on keeping track of finances; and lower scores on staying informed. Other differences are age, education, household circumstances, financial knowledge, numeracy, and financial attitudes.

Several key findings emerge from the 2015 survey. Three-quarters of those surveyed try to save regularly and this is a small increase from the survey

⁴⁴ See CommonwealthBank 2016 <https://www.commbank.com.au/about-us/who-we-are/in-the-community/financial-education.html>.

⁴⁵ CommonwealthBank 2016 <https://www.commbank.com.au/about-us/in-the-community/understanding-money/commonwealth-bank-foundation/financial-literacy-teaching-resources/financial-literacy-grant.html>.

⁴⁶ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people.

⁴⁷ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 6.

⁴⁸ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 13.

conducted in 2002 and published in 2003, where the figure was two-thirds. There has been a decrease in the use of credit. There is a less frequent use of credit cards for goods and services, which is matched by an increased use of debit cards. There is also a lower incidence of owner/occupier mortgages.⁴⁹ The ways in which people use their credit cards and store cards is instructive. Ninety-three per cent checked their transactions; 70% understood that the primary card holder was responsible for the debt; and 65% paid the balance in full each month.⁵⁰ The latter is a decrease from 2011. Knowledge of the liabilities for jointly held loans such as mortgages is of concern. Only 78% were aware that all parties are responsible for payment and one in four women did not understand their potential legal obligations.⁵¹

The survey has developed an indicator of financial control relating to the ability to pay bills on time and save, and perceptions of comfort with current debt and feelings of control.⁵² In this survey 78% of the respondents reported feeling in control of their finances at least sometimes (a small decrease from 2011), and 3% reported feeling out of control all the time (an increase from 2011). Those with lower incomes and children at home as well as those with high mortgages were most likely to feel out of control. A reduced proportion of people, 75%, kept a close eye on their regular household and personal expenses.⁵³

In Australia a high proportion of savings is held in superannuation or mandatory retirement funds and people also invest independently for retirement income. Seventy-five per cent reported being in a superannuation fund and 15% in self-managed superannuation. One in five people surveyed was poorly equipped to make a decision about choosing or changing a superannuation fund, and there was a decline in the numbers understanding investment principles such as recognising that certain

⁴⁹ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 2.

⁵⁰ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 54-56.

⁵¹ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 2.

⁵² ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 139.

⁵³ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 3.

investments might be too good to be true and the importance of diversification in an investment portfolio. There was also a decline in people holding managed investments.⁵⁴ With insurance, there was more awareness of its price than the level of cover.⁵⁵

Financial advice has been an ongoing issue for Australia. Whether people seek advice and other sources of information is important for investment decisions. Eighty-four per cent of those in the survey felt well informed but 55% do not use the finance sections of newspapers, magazines or internet sites, the latter being the most popular. In general, women have a low engagement with financial information. In the preceding 12 months, 75% had consulted others for financial advice. Those consulted were accountants (39%), friends or family (35%), bank managers or employees (30%) and financial planners/advisers (20%). Despite this seeking of advice, there is little trust in financial professionals.⁵⁶

In the past years there have been massive changes in the delivery of financial services and digitally available sources of information. There is frequent use of online banking as three quarters of those surveyed use this. Many, 46% of internet users, use a website, online calculator or mobile app to compare financial products. More men than women do this. To make comparisons of financial products and services users go to: websites of financial institutions (30%); Choice magazine website (16%); financial product rating agencies such as CanStar, InfoChoice or SuperRatings (15%) and government bodies such as ASIC's MoneySmart site (10%).⁵⁷

There was good awareness of consumer rights and responsibilities. Sixty-five per cent of those surveyed said they felt confident and knew how to make an effective complaint against a bank or other financial institution.⁵⁸

⁵⁴ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 3-4.

⁵⁵ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 6.

⁵⁶ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 4-5.

⁵⁷ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 5.

⁵⁸ ANZ 2015 <http://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>. This survey was based on a telephone survey of 3 400 randomly selected people 6.

There is consensus in Australia about the ongoing importance of financial literacy, even while recognising that it does not hold all the answers. One important indicator of this is the Financial Literacy Australia grants programme, which makes amounts available to a wide range of projects to continue fostering different kinds of financial literacy in different ways.⁵⁹

3 South African position

3.1 *The Financial Services Board, Financial Sector Charter and Broad-based Black Economic Empowerment Act of 2003*

In the past the South African Government, private sector providers, and non-governmental organisations (NGOs) had all undertaken consumer financial education and a lot of money was spent on it.⁶⁰ It soon became clear that the majority of these initial programmes had been either inappropriate, were marketing focused, or were a mere duplication of existing programmes, facts which limited the effectiveness of outreach.⁶¹ In an attempt to address this insufficiency, the South African Financial Services Board (FSB), established by the *Financial Services Board Act of 1990*,⁶² was specifically tasked in 2000 under the *Financial Services Board Act* to "provide, promote or otherwise support financial education, awareness and confidence regarding financial products, institutions and services".⁶³ The FSB is a juristic person responsible *inter alia* for supervising and enforcing compliance with laws regulating financial institutions and the provision of financial services in South Africa. With regard to the FSB's mandate to educate consumers, it developed a strategy document for this purpose. The FSB's Board accepted this strategy in October 2001. It followed international examples in Australia and the United Kingdom. In a study conducted in 2005 it was said that "since 2000, progress has been mixed which, it has been suggested, has been contributed to by a lack of capacity, skills and resources".⁶⁴ One of their strategies was to create a foundation as a repository for donor funding, which regrettably overlapped with the exit from South Africa of donors because of its middle-income status. Once again the view was that progress had been mixed, with their

⁵⁹ See ASIC 2016 <http://www.financialliteracy.gov.au/news/2016>.

⁶⁰ See Finmark Trust 2005 http://www.finmark.org.za/wp-content/uploads/2016/01/Note_finLit_SA_2005.pdf.

⁶¹ Finmark Trust 2005 http://www.finmark.org.za/wp-content/uploads/2016/01/Note_finLit_SA_2005.pdf 2.

⁶² *Financial Services Board Act* 97 of 1990.

⁶³ Section 3(c) of the FSB Act.

⁶⁴ See Finmark Trust 2005 http://www.finmark.org.za/wp-content/uploads/2016/01/Note_finLit_SA_2005.pdf 2.

main achievements being through support from the South African Insurance Association's (ie, the representative body for the short-term insurance industry)⁶⁵ consumer education programme under the South African Financial Sector Charter and various other smaller educational projects.⁶⁶

In the long Apartheid period, when racial discrimination had prevailed, two vastly different financial sectors had developed. On the one hand there was a highly developed, formal financial system (serving mainly middle and high-income and predominantly White consumers), the servicing being mainly by banks and other financial institutions, and on the other hand there was a large, informal financial market (serving low-income and largely historically disadvantaged (black) consumers), the servicing here being mainly by micro-lenders, loan sharks and pawnbrokers. Many low-income consumers who did not and still do not qualify for access to finance in the formal market also made use of stokvels⁶⁷ to gain access to finance and credit.⁶⁸ With the abolition of Apartheid a number of initiatives were launched to promote financial inclusion. The Financial Sector Charter and the *Broad-based Black Economic Empowerment Act of 2003*⁶⁹ (BBBEE Act) were the main pillars of transformation in the financial sector.⁷⁰

The Financial Sector Charter, signed in 2003 and implemented on 1 January 2004, was created in the terms of the BBBEE Act.⁷¹ The Charter is a voluntary transformational charter for the financial sector. It reflected an agreement by the members of the National Economic Development and Labour Council (NEDLAC), a multilateral social dialogue forum on social, economic and labour policy, to promote social and economic integration and access to the financial services sector. It commits its participants to

... actively promoting a transformed, vibrant, and globally competitive financial sector that reflects the demographics of South Africa, and contributes to the establishment of an equitable society by effectively providing accessible

⁶⁵ See SAIA's Consumer Education Booklet for consumers, which can be accessed at Beckitt 2012 <http://www.saia.co.za/info-center/saia-documents/publications/consumer-information/ddsf.pdf>.

⁶⁶ See Finmark Trust 2005 http://www.finmark.org.za/wp-content/uploads/2016/01/Note_finLit_SA_2005.pdf 2-3.

⁶⁷ This is an indigenous type of informal credit-rotating association in which a group of persons enters into an agreement to contribute a fixed amount of money to a common pool on a weekly or monthly basis, or as frequently as the members may agree upon. For a detailed discussion of stokvels, see Schulze 1997(1) *SA Merc LJ* 18; and Schulze 1997(2) *SA Merc LJ* 153.

⁶⁸ Kelly-Louw 2008 *SA Merc LJ* 204-205.

⁶⁹ *Broad-based Black Economic Empowerment Act* 53 of 2003.

⁷⁰ See BASA date unknown <http://www.banking.org.za/what-we-do/overview>.

⁷¹ For a copy of the Charter, see BASA 2004 <http://www.banking.org.za/docs/default-source/default-document-library/financial-sector-charter.pdf?sfvrsn=10>.

financial services to black people and by directing investment into targeted sectors of the economy.⁷²

After the signing of the Financial Sector Charter, the Financial Sector Charter Council⁷³ was created. It is the prime governance mechanism for empowerment in the sector. Although the targets contained in the Charter applied for the initial period of 1 January 2004 until 31 December 2014, the parties to the Charter agreed that the principles contained in the Charter would be relevant beyond 2015.

The Charter requires significant commitments to consumer education, and defines financial consumer literacy under the following heads:

- 8.4 Each financial institution commits, from the effective date of the charter to 2008, to annually invest a minimum of 0.2% of post tax operating profits in consumer education. Consumer education will include programmes that are aimed at empowering consumers with knowledge to enable them to make more informed decisions about their finances and lifestyle. ...
- 13.1 Each financial institution will have a target of directing 0.5% per annum of post tax operating profits to corporate social investment (CSI) between the effective date of the charter and 2014.
- 13.2 CSI means projects aimed primarily at black groups, communities and individuals that have a strong developmental approach and contribute towards transformation.
- 13.3 CSI projects may include, but will not be limited to –
Education: support for community education facilities; programmes at secondary and tertiary education level aimed at promoting the industry; bursaries and scholarships, which are oriented towards the hard sciences;
Training: community training; skills development for unemployed; adult basic education and training in communities; financial literacy programmes in communities;

As the Charter called specifically for financial service providers to engage in the delivery of consumer financial literacy programmes, it has been said that the South African government has a clear role to play in enabling and facilitating the environment for consumer financial education over the long

⁷² See para 1.2 of the preamble of the Financial Sector Charter. For a copy of the Charter, see BASA 2004 <http://www.banking.org.za/docs/default-source/default-document-library/financial-sector-charter.pdf?sfvrsn=10>.

⁷³ The Board of the Council consists of representatives from the community, government (the Department of Trade and Industry, the National Treasury and the Presidency), the Association of Black Securities and Investment Professionals, organised labour, and the financial sector trade associations, namely the Association for Savings and Investment South Africa, the BASA, the South African Insurance Association and the International Banking Association. The JSE is also represented through the Association for Savings and Investment South Africa.

term. A policy and monitoring role is implied thereby.⁷⁴ Consumer financial literacy is thus central to the success of the Financial Sector Charter.⁷⁵

The Charter was followed by the Financial Sector Code for Black Economic Empowerment, which came into effect on 1 January 2012.⁷⁶ In essence this Code provides the financial sector with a clear roadmap on how to build on existing achievements in black economic empowerment to the advantage of all stakeholders. The Code is also the benchmark against which the empowerment progress of the financial sector is measured and places strong emphasis on consumer education.⁷⁷

In 2012 the FSB conducted its first national baseline survey of financial literacy in South Africa.⁷⁸ This survey focused on four core domains, namely financial control, financial planning, choosing financial products and knowledge and understanding. These had been developed by the OECD International Network on Financial Education. The results of the baseline study confirmed that a considerable number of South Africans displayed very low levels of financial literacy, and that only a minority relied on experts for financial advice and guidance. It also found that a large proportion of the population was not adequately equipped to make sound financial decisions. The findings of the study therefore supported the provision of comprehensive, aggressive and multi-faceted programmes of consumer financial education.⁷⁹ The FSB identified the formal education sector as a key area for creating awareness about financial literacy and initiated campaigns to promote programmes enabling learners to exit the school system with sufficient information and skills to enable them to take responsibility for their financial future and make considered decisions. In 2012 the FSB therefore formally discussed the integration of financial education into the formal school curriculum with the Department of Basic Education.⁸⁰

⁷⁴ See Finmark Trust 2005 http://www.finmark.org.za/wp-content/uploads/2016/01/Note_finLit_SA_2005.pdf 2.

⁷⁵ Finmark Trust 2005 http://www.finmark.org.za/wp-content/uploads/2016/01/Note_finLit_SA_2005.pdf 2.

⁷⁶ It was issued in terms of s 9 of the *Broad-based Black Economic Empowerment Act*. For a copy of the Code see Gen N 997 in GG 35914 of 26 November 2012.

⁷⁷ See Cover 2013 <http://www.cover.co.za/news/10-years-on-the-financial-sector-code-launched>.

⁷⁸ See FSB 2012 <https://www.fsb.co.za/Departments/consumerEducation/Documents/Financial%20Literacy%20Booklet%202012.pdf>.

⁷⁹ FSB 2012 <https://www.fsb.co.za/Departments/consumerEducation/Documents/Financial%20Literacy%20Booklet%202012.pdf> 37-38.

⁸⁰ FSB 2013 <https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202013.pdf> 40.

The following formal education initiatives, among others, were reported in the 2013 annual report of the FSB:⁸¹

- The FSB and the South African Insurance Association developed a learning resource for Grades 10 to 12 teachers of the school subject mathematical literacy. The resource called "Managing Your Money" was made available electronically to ten thousand teachers.
- The "Money in Action" resource was developed for teachers in Grades R to 12 of the school subjects economic and management sciences and life orientation. Fifty-two thousand copies of the updated resource were printed in 2013-2014.
- In 2012-2013 several Further Education and Training Colleges hosted workshops in partnership with the Department of Higher Education with the aim of providing students with the knowledge needed to make informed financial decisions as they entered the world of work.

Apart from these formal educational initiatives the FSB also liaised and partnered with several networks in order to fulfil its mandate through multi-faceted community education in order to provide financial education to the mix of low and high income South African consumers. These initiatives included community educations presentations and workshops, liaison with organisations such as the South African Council of Churches, and several media initiatives such as radio broadcasts.⁸²

In the FSB's 2013 report on financial literacy in South Africa (prepared by the Human Sciences Research Council), the following aspects were highlighted, among others:⁸³

- The demand for greater financial consumer education still exists.
- The government is committed to responding to the dire need for financial consumer education.
- Generally, South African consumers of financial services have limited resources and skills to understand the complexities of the financial sector, which makes many consumers vulnerable.

⁸¹ FSB 2013 <https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202013.pdf> 40-41.

⁸² FSB 2013 <https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202013.pdf> 42-43.

⁸³ See Struwig, Roberts and Gordon 2013 <http://www.hsrb.ac.za/en/research-outputs/view/6780>.

- National Treasury's national policy for consumer financial education places emphasis on overcoming the challenges of consumers by empowering them and them giving skills and knowledge.

The FSB's 2014 report on financial literacy in South Africa (also prepared by the Human Sciences Research Council) revealed that South African consumers have an average financial literacy index, implying that there is room for improvement. The results also underscored the importance of giving consumers the information and resources they need to make sound and informed financial decisions.⁸⁴ In 2014 the FSB introduced its first consumer website www.mylifemymoney.co.za, which forms part of the FSB's mandate to provide guidance to consumers in order that they may make better financial choices and live financially successful lives. The MyLifeMyMoney website alerts consumers to the facts so that informed decisions can be made. The website introduced so-called Life Stages guiding consumers through every stage of life. The website also provides weekly financial tips and interesting articles dealing with complex financial matters, guidance to teachers, budgeting templates and calculators.

From the FSB's perspective, it is submitted that one of the biggest challenges remaining is to recognise that there is no one-size-fits-all model for consumer education and literacy programmes, especially in a country such as South Africa with its hybrid of consumers with different levels of financial literacy. A further challenge is therefore to create literacy and education programmes, media outreach initiatives and training programmes that are relevant and understandable and targeted at specific groups, instead of following a one-size-fits-all-approach.⁸⁵

3.2 The National Credit Act of 2005 and the National Credit Regulator

The South African *National Credit Act* of 2005 (NCA)⁸⁶ became fully operative in 2007.⁸⁷ With the introduction of the NCA the level of financial inclusion for low-income, particularly historically disadvantaged consumers increased. The NCA's overarching purpose is to create a single system of consumer-credit regulation and a South African National Credit Regulator

⁸⁴ See FSB 2014 *2014 Annual Report* <https://www.fsb.co.za/NewsLibrary/FSB%20Annual%20Report%202014.pdf>.

⁸⁵ See Lusardi and Mitchell 2013 <http://arno.uvt.nl/show.cgi?fid=129675> 37, where it is submitted that only financial literacy initiatives targeted at specific groups are successful in changing behaviour.

⁸⁶ *National Credit Act* 34 of 2005.

⁸⁷ See Proc 22 in GG 28824 of 11 May 2006.

to administer the consumer-credit industry. Several factors led to the promulgation of the NCA.⁸⁸ The global economy boomed for several years, largely because credit was easily granted and accessible.⁸⁹ This, however, led to an unprecedented number of individuals and businesses being over-indebted.⁹⁰

Legislation protecting debtors and aimed at preventing the problems of overspending is now an international phenomenon, though it differs from country to country, depending on local needs.⁹¹ Generally, though, it seeks to address the imbalance between the bargaining power of credit providers and consumers, to combat malpractices by identifying and prohibiting such malpractices, and to limit the free exercise of legal remedies.⁹² In 2001 INSOL International⁹³ recommended that governments, quasi-governmental or private organisations globally should set up educational programmes and improve information and advice on the risks attached to consumer credit. INSOL further recommended that the provision of educational programmes in the form of advice, budgeting support, financial literacy courses and budgeting administration should be compulsory.⁹⁴

The South African Government identified the benefits of a working credit industry that helps consumers to accumulate assets, exploit economic opportunities and establish businesses.⁹⁵ For the enjoyment of those benefits, though, the industry needs to be regulated, simply to ensure that consumer abuses are minimised.⁹⁶ The South African Law Reform Commission,⁹⁷ when investigating the industry, received several requests for the industry's deregulation.⁹⁸ However, the Commission stated that consumer credit legislation is essential even in market-oriented and capitalist economic systems, and that in fact it is in countries with the most

⁸⁸ For a discussion of the background and history of the NCA, see Kelly-Louw *Consumer Credit Regulation* 13-18 and Kelly-Louw 2008 *SA Merc LJ* 203-207. For a further discussion of some of the reasons why the Act was created, see Woker 2010 *Obiter* 217. Also see Otto 2010 *Fundamina* 257.

⁸⁹ Roestoff and Renke 2003 *Obiter* 1.

⁹⁰ Roestoff and Renke 2003 *Obiter* 4-6, referring to "The Preface to the International Federation of Insolvency Practitioners Debt Committee" of INSOL's report, INSOL 2001 <https://www.insol.org/pdf/consdebt.pdf>.

⁹¹ Otto *National Credit Act* 1.

⁹² Roestoff and Renke 2003 *Obiter* 16.

⁹³ Roestoff and Renke 2003 *Obiter* 4-7.

⁹⁴ INSOL 2001 <https://www.insol.org/pdf/consdebt.pdf> 28-29; Renke and Roestoff 2005 68 *THRHR* 115.

⁹⁵ DTI *Consumer Credit Law Reform* 6.

⁹⁶ DTI *Consumer Credit Law Reform* 6.

⁹⁷ See in the SALC *Working Paper 46, Project 67* "Part III: Policy Considerations and the Essentials of Consumer Legislation" 47-66.

⁹⁸ SALC *Working Paper 46, Project 67* 54.

unregulated economies that one finds the most comprehensive consumer protection legislation.⁹⁹ Some writers, merchants and financiers argue that consumer protection and credit legislation should be abolished. They claim that contract law is based on freedom of contract and that supply and demand alone should regulate the credit industry.¹⁰⁰ One should keep in mind, though, that the credit provider and the consumer are not of equal standing and that free competition will not eliminate malpractices, simply because there are greedy financiers in every society.¹⁰¹ Consumer protection can be best achieved, therefore, by regulating the credit industry. Appropriate legislation is aimed primarily at protecting consumers. At the same time, credit providers' reasonable expectations of making a profit must also be protected.¹⁰²

Since the free market had not functioned properly in apartheid South Africa, there was a need for comprehensive credit legislation that regulated the market in almost every aspect of credit provision.¹⁰³ The most important objectives of consumer-credit legislation identified by the South African Law Reform Commission were that it must address the consumer's unequal bargaining position, curb malpractices, curb the exercise of remedies by credit providers, protect only the consumer community, educate consumers, and provide consumers with relevant information.¹⁰⁴ Given the considerable imbalance of power between credit providers and consumers, low education levels, poorly informed consumers, weak disclosure requirements and deceptive marketing practices, many South African consumers had concluded unaffordable credit contracts, and their over-indebtedness had led to many social problems.¹⁰⁵ These were some of the factors that contributed to the NCA's being passed by the South African Parliament. This Act protects a wide range of consumers, including all private individuals, whatever their financial position. It lays the foundation for a regulated credit market that contributes to unlocking the economic potential of South Africans while also reducing the social and economic costs of credit. The purposes of the Act are to promote and advance the social and economic welfare of South Africans; encourage a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry; protect consumers by addressing and preventing over-

⁹⁹ SALC *Working Paper 46, Project 67 54*.

¹⁰⁰ SALC *Working Paper 46, Project 67 54*.

¹⁰¹ SALC *Working Paper 46, Project 67 54-55*.

¹⁰² SALC *Working Paper 46, Project 67 58-59*.

¹⁰³ Eg, from marketing to default (SALC *Working Paper 46, Project 67 60*).

¹⁰⁴ SALC *Working Paper 46, Project 67 61-64*.

¹⁰⁵ DTI *Consumer Credit Law Reform 7*. Also see Wilson "Responsible Lending or Restrictive Lending Practices?" 95.

indebtedness; and provide mechanisms for preventing and resolving over-indebtedness.¹⁰⁶ A related purpose of the Act is to help consumers to make informed choices regarding credit and to provide consumer education.

The South African Department of Trade and Industry (DTI) identified consumer education as one of the measures that assist consumers to make informed choices.¹⁰⁷ The aim of this measure is to enable consumers to convert credit information into effective knowledge by ensuring, among other things, that they have basic literacy and numeracy skills.¹⁰⁸ Since South Africa and other developing countries face an incredibly difficult task in this regard, the South African Law Reform Commission was of the view that South African consumer-credit policy should address consumer education at the levels of adult education and school learners; and it recommended that institutional and financial support be provided for the implementation of education by the consumer-credit regulator.¹⁰⁹ Despite the Law Reform Commission's recommendations, the NCA did not implement all these education measures. However, the NCA has conferred a general duty on the South African National Credit Regulator (NCR) to promote and support the development of an accessible and transparent credit market and industry in order to serve the needs of historically disadvantaged persons, low-income persons and people living in remote or isolated communities.¹¹⁰ Section 3(e)(i) of the NCA provides that one of the Act's purposes is to protect consumers by addressing and correcting imbalances in negotiating power between consumers and credit providers, and to do that by providing consumers with education about credit and consumer rights. The NCR is specifically responsible for increasing knowledge of the nature and dynamics of the consumer-credit industry, promoting public awareness of the provisions of the Act by providing education, and providing guidance to the credit industry through issuing explanatory notes outlining the NCR's procedures or non-binding opinions on the interpretation of the Act.¹¹¹

¹⁰⁶ Section 3 of the NCA. See Roestoff and Renke 2003 *Obiter* 1, where the authors investigated whether SA consumer protection legislation was equal to the task of combating overspending and over-indebtedness. Also see Roestoff and Renke 2005 *Obiter* 562.

¹⁰⁷ DTI *Consumer Credit Law Reform* 27.

¹⁰⁸ DTI *Consumer Credit Law Reform* 27; Renke and Roestoff 2005 *THRHR* 116. Also see Pearson "Financial Literacy" 3-27 for Australian perspectives on the issue of financial literacy; and Boraine "Reform of Administration Orders" 203.

¹⁰⁹ DTI *Consumer Credit Law Reform* 27.

¹¹⁰ Section 3 of the NCA.

¹¹¹ Section 16(1)(a)-(b) of the NCA.

The previous consumer-credit legislation in South Africa¹¹² did not require credit providers to make proper disclosure to consumers. It required that only basic disclosures had to be made to the consumers. In practice only selective disclosures were made, and it regularly happened that not all the costs of credit were disclosed. In reality, it was only interest rates that were disclosed and there were also no penalties for non-compliance. Prior to the NCA's coming into effect, the DTI had mandated Rudo Research and Training to conduct market research on the apparent weaknesses in the prior consumer-credit legislation.¹¹³ Their research indicated that consumers were not aware of their credit rights. Consumers also generally did not receive a copy of their credit agreement beforehand, and contracts were often quite lengthy, leaving consumers with no time to read through them before signing the contracts. The language used in contracts was also too difficult for ordinary consumers to understand, even if they did read the contracts. Hence, consumers realised the complete impact of the credit agreement only when they received their first account.¹¹⁴

The NCA addressed many of these weaknesses and vastly improved on the range of disclosures that need to be made to consumers. The NCA deals with the issues relating explicitly to a credit agreement, including the disclosures that are required before an agreement may be concluded, the form or format in which such an agreement must be made, and the cancellation, rescission and alteration of the agreement. It also expressly states that credit agreements must be in plain and understandable language.¹¹⁵ In addition, consumers also have the right to receive any document and information in any one of South African's eleven official languages.¹¹⁶ Of course, as has been said earlier, merely ensuring that the credit information is disclosed in a standardised format and in plain understandable language will not in itself be enough to ensure that consumers fully understand the impact of their credit agreements. This is where consumer education at school and adult education level will be crucial in producing a well-informed financial consumer.¹¹⁷

The role and value of disclosure has been pointed out above, and it needs to be stressed once again that disclosure is ineffective if there are low levels of financial literacy. In the absence of detailed provisions in the NCA

¹¹² See the repealed *Credit Agreements Act 75 of 1980* and *Usury Act 73 of 1968*.

¹¹³ See *DTI Market Research Report*.

¹¹⁴ Kelly-Louw 2008 *SA Merc LJ* 212-213.

¹¹⁵ See s 64 of the NCA.

¹¹⁶ See s 63(1) of the NCA.

¹¹⁷ See Kelly-Louw 2008 *SA Merc LJ* 214.

addressing the education of consumers, the NCA relies strongly on disclosure as a tool to protect and educate consumers, rather than focussing on promoting financial literacy amongst consumers. Grové and Otto¹¹⁸ identify the three levels of disclosure, all of which were made compulsory under the NCA: (1) seeking business; (2) entering into a contract; and (3) post-contract disclosure. The first stage of disclosure entails seeking business in the form of credit advertising and issuing credit quotations.¹¹⁹ This stage includes marketing and credit quotations. The marketing of credit and certain marketing practices are regulated under sections 74 to 77 of the NCA, and under section 92 of the NCA a credit provider is required to give a consumer a pre-agreement statement and quotation in the prescribed form before entering into a credit agreement. Furthermore, the pre-agreement statement and quotation must set out specific prescribed information depending on the size of the proposed credit agreement. The second stage is where the parties enter into a contract, and includes the formalities and disclosures in the contract document.¹²⁰ Although the NCA does not prescribe the formalities, it does under section 93 require a credit provider to deliver without charge a copy of his credit agreement to the consumer or to send it in printable electronic form to the consumer. Section 93 read with regulations 30 and 31 made under the NCA requires a contract to disclose certain prescribed information depending on the size of the credit agreement, so credit agreements are more or less required to be standardised.¹²¹ The third stage of disclosure involves post-contract disclosure where, for instance, a copy of the instrument of debt, periodic statements and statements on request are sent to the consumer.¹²² This stage includes the provision of a copy of the debt instrument and periodic statements to the consumer. The NCA under sections 107-115 read with regulation 35 sets out detailed provisions on statements of account in respect of content, form and frequency. In addition, as said above, section 93 requires a credit provider to deliver without charge a copy of his credit agreement to the consumer or to send it in printable electronic form to the consumer.¹²³

¹¹⁸ Grové and Otto *Consumer Credit Law* 27, 84-89.

¹¹⁹ Grové and Otto *Consumer Credit Law* 84-85. Also see Stoop 2009 *SA Merc LJ* 377-381.

¹²⁰ Grové and Otto *Consumer Credit Law* 85-89.

¹²¹ Stoop 2009 *SA Merc LJ* 381-383. See Otto 2014 *THRHR* 159-164, where it is pointed out that the disclosure requirements related to the contents of credit agreements lead to lengthy and verbose credit agreements, and that very few people read documents containing too much information.

¹²² Grové and Otto *Consumer Credit Law* 89.

¹²³ See Stoop 2009 *SA Merc LJ* 383-384.

The focus and reliance of the NCA on disclosure as a tool to protect and educate consumers rather than on promoting financial literacy amongst consumers is a concern, as there are several factors that are likely to limit a consumer's ability to overcome a lack of disclosure and transparency, irrespective of a credit provider's compliance with the disclosure requirements. These factors include (a) consumers' disinclination to read detailed contractual terms; (b) consumers' pre-existing expectations suggesting a successful contractual relationship, which would obviate certain contractual terms coming into play; (c) consumers' not reading contractual terms properly, as they have other complex decisions to make (such as whether to contract in the first place); (d) consumers' not understanding the formal terms, irrespective of their transparency; (e) consumers' idea that they do not need to understand the contractual terms, as suppliers are unlikely to change them; (f) consumers' not understanding how a term will affect them in practice; and (g) competitors' expressing equivalent terms differently, which makes it difficult for consumers to draw comparisons.¹²⁴ However, the other side of the coin is that disclosure at least provides some basis upon which consumers may give informed consent, and it enables them to ascertain their rights and duties in the event of a dispute. Although the standardisation of the way in which credit agreements and terms of credit agreements are presented (for example in terms of section 93 read with regulations 30 and 31) may speak to some of the issues identified above, it will still not address all of these issues. It may not make it more likely that a consumer with a low level of financial literacy will actually read and understand his credit agreement – hence the importance of measures aimed at improving the financial literacy of consumers.

Despite the focus and reliance of the NCA on disclosure, the NCR is actively involved in educating consumers.

The NCR has, since its establishment in June 2006, been involved in educating consumers, credit providers, debt counsellors and other role-players in the consumer-credit industry. One of the NCR's strategic objectives is to educate and create awareness around the protection that it offers consumers. In doing so, the NCR promotes public awareness around

¹²⁴ For reasons why consumers accept standard terms without reading them, and related issues, also see Naudé 2006 *Stell LR* 366-369. Also see Donnelly and White "Effect of Information Based Consumer Protection" 283-284 (the limits of transparency, and an essential presumption underlying fairness in the form of disclosure – consumers will act rationally on the basis of information received). See further Paterson 2003 *MULR* 951-956.

consumer-credit matters and raises public awareness around the NCR's role and activities by implementing education and information measures.¹²⁵ For instance, the NCR regularly places important information and consumer tips on its website;¹²⁶ holds educational workshops; makes presentations at conferences; communicates with the industry; provides educational brochures in all eleven South African official languages; erects educational billboards on major highways and roads; runs educational adverts and campaigns; and holds media (television and radio) interviews.¹²⁷

During the financial year 2014/2015 the NCR had direct engagements with more than 31 132 consumers and featured in 391 radio interviews and 60 television interviews.¹²⁸ It conducted 313 workshops, mounted 85 exhibitions, activations and roadshows, and hosted 43 stakeholder meetings of which 82 workshops and 18 exhibitions and road shows were directed at educating consumers on the NCA and the amendments made to this Act by the *National Credit Amendment Act* of 2014,¹²⁹ which came into operation on 13 March 2015. Thirteen of the workshops that were conducted were with colleges and universities, in partnership with the South African Savings Institute. Seventeen of the workshops held throughout South Africa were debt counselling educational workshops, which focused on educating consumers and raising awareness of the debt counselling process and consumers' rights and responsibilities.¹³⁰ The DTI provided funding for various educational campaigns, which included television and radio programmes, print advertisements and workshops. The NCR ran a number of other campaigns and projects in partnership with the DTI and the South African National Consumer Commission (NCC). For instance, the NCR partnered with the DTI for its annual "Spend Wisely, Borrow Wisely Campaign" and with the NCC for two projects: the "Misleading Advertising and Over-indebtedness Campaign" and the Honourable Deputy-Minister Mzwandile Masina's Imbizo in KwaThema, Springs. Other campaigns included the "Consumer Rights Awareness Campaign" held in March 2015

¹²⁵ See NCR 2015 <http://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20ANNUAL%20REPORT%202014-15.pdf> 13, 19.

¹²⁶ See NCR 2016 <http://www.ncr.org.za>.

¹²⁷ For details of the earliest consumer-education initiatives and a list of the awareness activities the NCR undertook, see the National Credit Regulator's 2007 Annual Report at NCR 2007 <http://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20ANNUAL%20REPORT%202007.pdf> 19-22.

¹²⁸ NCR 2015 <http://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20ANNUAL%20REPORT%202014-15.pdf> 19.

¹²⁹ *National Credit Amendment Act* 19 of 2014.

¹³⁰ See NCR 2015 <http://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20ANNUAL%20REPORT%202014-15.pdf>.

at a shopping centre in Johannesburg and a two-phased "Debt Counselling Campaign".¹³¹

The NCR commissioned Developmentnomics (Pty) Ltd to conduct a literature review on the impact of the NCA on the South African consumer-credit market.¹³² The final report was published in June 2012. The report *inter alia* considered the impact of the educational workshops and programmes that had been offered. The research showed that there was an increased awareness of the NCA and the NCR, including amongst low-income consumers, and the debt counselling process and its benefits were receiving greater recognition. Nevertheless, the research indicated that in 2010 the awareness appeared to be static and no longer growing. The actual knowledge of underlying concepts like the consumer protection qualities of the NCA, general financial terminology and contracting information was still limited. Only a slight improvement was shown in the understanding of the redress and complaints mechanisms. This coincided with the outcome of a report where mystery shopping was done. Consumers were aware of their rights, but they were easily fooled, for example, with regard to what comprised a quotation. The report emphasised that there was a need for greater intensity of the education of consumer in their rights and more enforcement around bad marketing practices, which still existed in many places.¹³³ The report acknowledged that in terms of information campaigns, it was evident that lots of electronic information was available to internet-capable consumers, as nearly every stakeholder went through effort to provide explanatory notes, brochures and guidance around the NCA on their websites.¹³⁴ The research found that no approach would work for every group of the population, so creativity and diversification in targeted communication strategies would be vital. As the awareness seemed to be stagnating and not growing at that point, the report recommended that

¹³¹ NCR 2015 <http://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20ANNUAL%20REPORT%202014-15.pdf>.

¹³² See NCR 2012 http://www.ncr.org.za/documents/pages/research-reports/jun13/NCR_NCA%20IMPACT%20LITERATURE%20REVIEW_FINAL%20REPORT_260612.pdf.

¹³³ NCR 2012 http://www.ncr.org.za/documents/pages/research-reports/jun13/NCR_NCA%20IMPACT%20LITERATURE%20REVIEW_FINAL%20REPORT_260612.pdf 67.

¹³⁴ NCR 2012 http://www.ncr.org.za/documents/pages/research-reports/jun13/NCR_NCA%20IMPACT%20LITERATURE%20REVIEW_FINAL%20REPORT_260612.pdf 67.

alternative measures of getting the message out that were more impactful had to be considered.¹³⁵

After the publication of the report, the NCR also commissioned research, through Topline Research Solutions, to measure the impact of the NCR's educational workshops and media campaigns in South Africa, focussing specially on 2012. The survey was executed through a literature review, qualitative in-depth interviews with stakeholders and credit industry bodies, focus-group discussions with credit consumers, and quantitative surveys with credit consumers.¹³⁶

The survey demonstrated that consumers were relatively familiar with credit-industry players, (e.g. credit bureaus, debt counsellors and the NCR). Certain general credit topics were well known, particularly blacklisting, over-indebtedness, credit agreements and consumer rights and responsibilities. The survey indicated that this could be attributed to the provision of the various educational initiatives. In spite of this, the survey showed that more detailed knowledge of the fundamental features of the NCA and the industry role of the NCR itself appeared to be limited.¹³⁷ The credit industry, both credit consumers and key stakeholders, stressed that education on the basics (e.g. what to do when faced with a credit problem) was needed. Consumers were of the view that credit was a complex matter, that the products bought on credit were complex, and that the institutions in the credit industry were also complex. Consumers did not feel confident of their ability to understand financial transactions, or their ability to manage their budget constraints. The survey suggested that this sense of incompetence reduced consumers' confidence that they would ask the right questions or could usefully engage in research before confronting their credit providers when there were disputes. The survey suggested that some of the topics identified for inclusion in educational efforts should be: (1) education on the basics (e.g. agreements, budgeting); (2) demand-side versus supply-side rights and responsibilities; and (3) the positive side of credit (i.e. investment versus consumption).¹³⁸

¹³⁵ NCR 2012 http://www.ncr.org.za/documents/pages/research-reports/jun13/NCR_NCA%20IMPACT%20LITERATURE%20REVIEW_FINAL%20REPORT_260612.pdf 67.

¹³⁶ See NCR 2013 <http://www.ncr.org.za/documents/pages/research-reports/july13/NCR%20Outcomes%20evaluation%20of%20educational%20workshops.pdf>.

¹³⁷ NCR 2013 <http://www.ncr.org.za/documents/pages/research-reports/july13/NCR%20Outcomes%20evaluation%20of%20educational%20workshops.pdf> 5.

¹³⁸ NCR 2013 <http://www.ncr.org.za/documents/pages/research-reports/july13/NCR%20Outcomes%20evaluation%20of%20educational%20workshops.pdf> 6.

The survey showed that credit bureaus, debt counsellors and the NCR were mostly associated with credit education itself. Interestingly, credit providers (e.g. banks and financial institutions) were not associated with credit education. Consumers had a negative view of credit bureaus as they were viewed as barriers instead of facilitators in the procurement of credit. A few stakeholders requested that a distinction be made between awareness campaigns and educational campaigns, arguing that the former were non-specific while the latter were relevant for fixing immediate problems of over-indebtedness. The NCR seemingly tended to focus more on awareness creation rather than on credit education *per se*. Some of the industry stakeholders insisted that education had to be prioritised.¹³⁹

The survey revealed that credit consumers have a tendency to obtain their credit information mainly through television, radio and the internet rather than via workshops. These were followed by roadshows and newspapers rather than workshops. Consumers viewed roadshows as being more interactive and entertaining than workshops, which were viewed as rigid one-way communication exercises.¹⁴⁰

Government stakeholders and private institutions concurred that as far as media campaigns were concerned the NCR was effectively utilizing many available media types to create awareness, but needed more visibility in the broadcast media, particularly in television. The NCR billboard campaigns were generally praised for their simplicity and appeal, and the empowering messages communicated on each of them. However, the location of the NCR's billboard was criticised as it was felt that it did not reach many audiences.¹⁴¹

The survey reached the following conclusion:¹⁴²

Overall, in spite of some significant indications of awareness of various players as well as roles and responsibilities, there was limited evidence of impact on current educational campaigns in terms of causing behaviour change. More research could reveal underlying causes of current consumer behaviour and provide guidance for progress. A preventative focus could change future statistics, particularly the credit impaired. Positive, entertaining messages shared through national broadcast media would prove to be more

¹³⁹ NCR 2013 <http://www.ncr.org.za/documents/pages/research-reports/july13/NCR%20Outcomes%20evaluation%20of%20educational%20workshops.pdf> 6.

¹⁴⁰ NCR 2013 <http://www.ncr.org.za/documents/pages/research-reports/july13/NCR%20Outcomes%20evaluation%20of%20educational%20workshops.pdf> 6-7.

¹⁴¹ NCR 2013 <http://www.ncr.org.za/documents/pages/research-reports/july13/NCR%20Outcomes%20evaluation%20of%20educational%20workshops.pdf> 7.

¹⁴² NCR 2013 <http://www.ncr.org.za/documents/pages/research-reports/july13/NCR%20Outcomes%20evaluation%20of%20educational%20workshops.pdf> 7.

impactful. Broadcast media was also most preferred by consumers. More personnel could maximize regional outreach and address language requirements.

Unfortunately, the NCR does not have something similar to the ASIC's MoneySmart website. Having such a website in South Africa would be useful. The MoneySmart website assists Australian consumers with becoming educated on the basics (e.g. how to budget), something that the Topline Research Solutions' 2013 report said South African consumers still lacked. The MoneySmart website is also not only a useful tool for creating a financially literate consumer, but also provides teachers at schools and other educational institutions with educational resources and materials they can use when teaching children and students about financial matters.

Taking into account all the NCR's annual reports published since 2007, it is clear that the NCR has seriously increased its educational and awareness programmes. Many industry role players, such as credit providers, consumer organisations, trade unions, legal academics and consumers, feel that it is important to empower consumers through financial education, as this enables them to have knowledge of and take responsibility for their credit matters in addition to encouraging them to read any contracts relating to credit before signing them. They also believe that programmes on money management for use in schools should be made compulsory, to raise awareness levels and establish financial literacy from an early age. Consumer education must be used to its full potential as an indirect measure to prevent consumer over-indebtedness. Managing finances is an important life skill and it would help children to have a familiarity with money matters at an early age. The general feeling in South Africa is thus that financial education should form part of the subject called "life skills" currently taught at schools.¹⁴³

However, not all South Africans are enthusiastic about consumer-credit education, and criticism of this form of education has been expressed in the past. The argument is that:¹⁴⁴

[c]onsumers are very unlikely ever to be able to differentiate between the real cost of different loan products with different repayment terms and features, even if accurate disclosure is enforced on a uniform basis (which must be done). In the end, associations and perceptions will dictate where consumers will shop. We must be realistic in terms of what we can expect of consumers

¹⁴³ See Rudo Research and Training 2002 http://www.ncr.org.za/documents/pages/background_documents/Summary%20of%20Findings.pdf 9-10; Kelly-Louw 2008 *SA Merc LJ* 211.

¹⁴⁴ See Willemsse and Mxunyelwa *Report for the Purposes of the Credit Law Review* para 6.6.

and consumer education. What should be promoted is the role of consumer credit analysts and independent reports by experts or regulating agencies. Such reports must receive maximum exposure in the media. That will get competition going.

Accurate and consistent disclosure is, however, a precondition for creating awareness and also to facilitate such research. Whether consumer education targets in terms of proposed legislation will achieve anything is doubtful.

3.3 The Banking Association of South Africa and Code of Banking Practice

South African banks are not statutorily obliged, for example by the *Banks Act* of 1990,¹⁴⁵ to provide education to consumers or to create financially literate consumers, but they do so as part of their corporate social responsibility and their obligation in terms of the Financial Sector Charter and Code. The banking industry, by way of the Banking Association of South Africa (BASA) (an industry body representing all registered banks in South Africa) developed a Code of Banking Practice (the Code)¹⁴⁶ to which the banks subscribe and which is regularly updated. The Code sets out the minimum standards of service a customer can expect from his bank with regard to the services and products it offers.¹⁴⁷ The Code was created *inter alia* to increase transparency so that consumers could have a better understanding of what they could reasonably expect of bank products and services.¹⁴⁸ The Code places various responsibilities on a bank. For instance, a bank has to provide the consumer with adequate information, including the terms and conditions of the various products and services it offers, and the interest rates and fees and charges connected with them, in a plain and understandable language format.¹⁴⁹ In addition, the Code also places a number of balancing responsibilities on a consumer that a bank may reasonably expect the consumer to fulfil in his relationship with his bank.¹⁵⁰ For example, it is a consumer's responsibility to disclose all relevant information as part of any credit application to his bank so that the bank can make an informed decision whether or not to grant credit to him. A consumer is also expected to ensure that he does not extend himself beyond his financial means. Where credit is granted to a consumer it is his (the consumer's) responsibility to ensure that sufficient credit insurance cover is in place to protect him or his family in the case of losing his regular income

¹⁴⁵ *Banks Act* 94 of 1990.

¹⁴⁶ BASA 2012 <http://www.banking.org.za/consumer-information/legislation/code-of-banking-practice>. The Code has been in operation since 1 January 2012.

¹⁴⁷ The Code applies to the personal and small business customers of a bank only.

¹⁴⁸ See art 2.2 of the Code.

¹⁴⁹ See arts 3.1 and 6.5-6.7 of the Code.

¹⁵⁰ See art 3.2 of the Code.

(e.g. loss of employment, disability, or death). The Code also makes the point that although a bank has a duty to take all reasonable steps to advise and inform a consumer of the terms and conditions all its products and services are subject to, it is also the consumer's responsibility to read and understand these terms and conditions.

In the Code the BASA also makes certain commitments to consumers.¹⁵¹ For instance, it undertakes to promote better informed decisions about banking products and services by providing effective and adequate disclosure of information to consumers and explaining (when asked) the contents of brochures and other written information about banking services or products.

BASA believes that "Financial Literacy is the core platform for Financial Inclusion and the basis for equitable and sustainable socio-economic development".¹⁵² It adds that the "[p]rinciples of financial inclusion include: access, affordability, appropriateness, usage, quality, consumer financial education, innovation and diversification, and simplicity".¹⁵³ The BASA has therefore made Financial Literacy and education a priority.¹⁵⁴

Together with various industry players the BASA runs and/or supports various financial literacy initiatives to promote the skills, knowledge, attitudes and behaviours required by consumers to be financially independent.¹⁵⁵ The BASA's flagship generic financial literacy programme, created in 2008, is called the StarSaver™ (formerly Teach Children to Save South Africa™). Through this programme the banking industry and the greater financial sector collaboratively teach children to save, while encouraging volunteerism. For instance, volunteer bankers and financial sector professionals deliver annually a 67-minute savings lesson (aligned with the 67 minutes of South Africa's annual Mandela Day) to inspire learners to be lifelong savers.¹⁵⁶ Through this programme the BASA

¹⁵¹ See art 4 of the Code.

¹⁵² See BASA 2016 <http://www.banking.org.za/what-we-do/corporate-citizenship/financial-literacy>.

¹⁵³ See BASA 2016 <http://www.banking.org.za/what-we-do/overview>.

¹⁵⁴ The BASA defines financial inclusion as "the access and usage of a broad range of affordable, quality financial services and products, in a manner convenient to the financially excluded, unbanked and under-banked; in an appropriate but simple and dignified manner with the requisite consideration to client protection" (see BASA 2016 <http://www.banking.org.za/what-we-do/overview/fi-definition>).

¹⁵⁵ For full details of these initiatives see BASA 2016 <http://www.banking.org.za/what-we-do/corporate-citizenship/financial-literacy>.

¹⁵⁶ Full details of the Mandela Day Initiative see Nelson Mandela Foundation 2016 <http://www.mandeladay.com/>.

introduced an annual Financial Literacy (FinLit) Spelling Bee for Grades 7 to 9 learners from different schools in South Africa. Words for the competition are drawn from accounting and business science dictionaries. It is believed that spelling is a doorway to reading and writing and that the spelling bee will improve learners' retention of financial concepts that touch on their daily lives. The FinLit Spelling Bee followed on from the South Africa Department of Basic Education's Spelling Bee South Africa programme, which was launched in 2014 for the intermediate phase, Grades 4 to 6. The BASA supported the Gauteng Department of Education in the roll-out of its 2014 spelling bee, saw an opportunity to expand it, and designed the FinLit Spelling Bee for Grades 7 to 9, adding the financial literacy dimension. The objective of the StarSaver™ programme is to instil a culture of saving in children.¹⁵⁷ BASA supports the Johannesburg Stock Exchange (JSE) National Financial Literacy Day. The aim of the JSE initiative is to demystify the stock market and assist to develop confidence in future investors by educating the youth about how the JSE functions. BASA also supports a Gauteng Department of Education pilot Teacher Development programme that aims to re-orientate teachers within the Economic Management Sciences field. Furthermore, BASA also supports a banking safety education initiative delivered by the South African Banking Risk Information Centre through the StarSaver™ platform. This initiative aspires to provide communities with information that will help both the banked and the unbanked to avoid becoming victims of banking crimes.

The BASA also runs and/or supports various educational initiatives.¹⁵⁸ As 41,3% of the households in South Africa are female-headed the BASA focuses specifically on educating women on their finances.¹⁵⁹ One such initiative is the Men in the Making initiative of the Tracker organisation in collaboration with Metro FM radio station, which was launched in March 2009 with support and endorsement from the South African Department of Basic Education. This initiative focuses on "empowering and developing boy children through exposing them to positive role models, career guidance

¹⁵⁷ According to the BASA the StarSaver™ programme, since its inception, has reached almost one million learners, and many more through programme integration, in over 3 000 schools nationwide. There are also 19 banks and 43 financial institutions that participate in the StarSaver™ programme aligned to the annual Mandela Day. See in general Starsaver 2016 <http://starsaver.co.za/>.

¹⁵⁸ For full details see BASA 2016 <http://www.banking.org.za/what-we-do/corporate-citizenship/financial-literacy>.

¹⁵⁹ See BASA 2016 <http://www.banking.org.za/news-media/association-news/women-and-finance>.

and the working world".¹⁶⁰ Together with Tracker the BASA aims to make an impact on grade 10-12 boys from pre-selected schools, who are familiarised with what BASA and the industry as a whole are about. Through the StarSaver™ programme BASA, together with two subsidiaries of the South African Reserve Bank (ie the South African Mint Company and South African Bank Note Company) teaches school children about "investment money or making money out of buying and selling money". As part of the programme they are also inviting learners from various schools to learn through tours within the two money making institutions, how money is made. Since 2008 BASA has also supported initiatives aimed at improving school children's mathematical skills. For instance, it sponsors the Siyakhanyisa Study Support Initiative, a complementary initiative to StarSaver™ programme, which offers maths motivational workshops aimed at eradicating the maths anxiety for teachers and learners.

3.4 Finmark Trust

Finmark Trust was established in March 2002 with funding from the United Kingdom's Department for International Development. It also receives funding from others, for example the UNCDF (ie, the United Nation's capital investment agency for the world's least developed countries),¹⁶¹ the Bill and Melinda Gates Foundation, and the MasterCard Foundation. FinMark Trust is an independent trust based in Johannesburg, South Africa, whose business is controlled by five trustees from countries in Southern Africa. The Trust aims to promote and support policy and institutional development towards the objective of increasing access to financial services by the un- and under-banked in Africa.¹⁶² They do this by promoting and supporting financial inclusion, as well as institutional and organisational development, in order to increase access to financial services for the un-served and under-served. FinMark Trust regularly commissions research to identify the general constraints that prevent financial markets from reaching out to these consumers and by encouraging change on the basis of its research findings.¹⁶³ FinMark Trust focuses strongly on consumer financial literacy because it believes that "[t]he goal of making financial markets *work* for the poor depends on the poor being sufficiently able to engage with such

¹⁶⁰ See Tracker 2016 <http://www.tracker.co.za/Pages/About%20Us/CSI/MenInTheMaking.aspx>.

¹⁶¹ See UNCDF 2016 <http://www.uncdf.org/en>.

¹⁶² For more information, see Finmark Trust 2016 <http://www.finmark.org.za/>.

¹⁶³ For the full details regarding all their research conducted on financial literacy, see Finmark Trust 2016 <http://www.finmark.org.za/?s=financial+literacy>.

markets from an empowered base".¹⁶⁴ They trust that if people become financially capable they will be able to "manage their day-to-day finances, provide for anticipated future expenses, understand and protect against risks, and select and use the appropriate financial products and services based on their own personal circumstances".¹⁶⁵ The Trust developed the FinScope Tool, including both the FinScope Micro, Small and Medium Enterprises Survey and the FinScope Consumer Survey.

The Trust has implemented FinScope Consumer Surveys in South Africa since 2002. It conducts surveys in 22 countries (17 in Africa and 5 in Asia) and will soon launch a survey in India.¹⁶⁶ It makes use of various syndicated members (eg, banks, insurers, NCR, and government) to conduct these surveys.¹⁶⁷ This allows for cross-country comparison and the sharing of findings, which is vital in assisting on-going growth and strengthening the development of financial markets. These surveys show how the consumers of a specific country are sourcing their incomes and how they manage their financial lives, while providing insight into their attitudes and perceptions regarding financial products and services. The surveys define financial inclusion as adults (16 years and older) who have/use financial products and/or services formally by financial institutions (banks and non-banks) and/or informally (i.e. financial products and/or services which are not regulated, e.g. farmer associations, savings clubs/groups, private money-lenders). Those financially excluded are defined as adults who do not have/use any financial products and/or services – if borrowing, they rely only on friends/family; and if saving, they save at home.

The 2012 FinScope Survey revealed that in 2004 there were only about 13 million adults, or 46% of the population of South Africa, that were banked, while in 2012 there were 22.5 million banked adults in South Africa, or 67% of a total 16 years and older population of 33.7 million, based on the Statistics South Africa's 2011 mid-year population estimate.¹⁶⁸ The Survey found that the key banking development in 2012 was the roll-out of the new

¹⁶⁴ See Finmark Trust 2005 http://www.finmark.org.za/wp-content/uploads/2016/01/Note_finLit_SA_2005.pdf 1.

¹⁶⁵ See Finmark Trust 2016 <http://www.finmark.org.za/what-we-do/financial-inclusion/financial-literacy/>.

¹⁶⁶ See Finmark Trust 2014 <http://www.banking.org.za/docs/default-source/financial-inclusion/finscope/finscope-sa-2014.pdf>.

¹⁶⁷ See Finmark Trust 2016 <http://www.finmark.org.za/finscope-surveys/>.

¹⁶⁸ See BusinessTech 2012 <http://businesstech.co.za/news/banking/25527/south-africas-banking-population-revealed/>.

South African Social Security Agency (SASSA) MasterCard. It is believed that this development led to many social grant holders becoming banked.

The 2012 survey divulged that there had been notable growth since 2004 in the number of entrants to pension funds, provident funds, and retirement annuities. There was also growth in the membership of informal savings or investment groups and *stokvels*. It also showed, however, that long-term saving was still a challenge for the majority of South Africans. The survey disclosed that 48% of South Africans were worried that they would not have enough money for old age or retirement, and 83% admitted that they did not have any formal retirement product. Only 25% of adults claimed to have enough money left to save after covering all their spending needs. The survey found that there had been an increase in the purchase of personal life insurance since 2004.

The 2012 survey stressed that although vast progress had been made since 2004 on financial inclusion, there were still areas that created cause for great concern. It highlighted that only 29% of South African adults were engaged in full-time employment, thus placing limits on the roll-out of many financial products. South Africa has a very high unemployment rate. Statistics South Africa stated that the rate of unemployment for the first quarter of 2016 was 26.7% (ie 5.714 million people were unemployed).¹⁶⁹

The 2014 Finscope Survey for South Africa acknowledged that since 2004 both the public and private sectors in South Africa have given a lot of attention to promoting financial inclusion so that people can access appropriate and affordable financial services.¹⁷⁰ The Survey sets out the different commercial and legislative initiatives undertaken in South Africa since 2004 to promote financial inclusion. It found that 80% of adults (16 years and older) are formally served by both bank and other formal non-bank financial products/services (in 2004 it was only 50%), while 75% of adults were banked (compared with the situation in 2004, when only 46% were banked). The survey revealed that 52% have/use other formal (non-bank) products/services; and 56% have/use informal mechanisms to manage their finances. It found that 14% have/use non-financial products/services to manage their finances. If they save, they keep their money at home, and if they borrow they rely on family and friends only. The Survey found that consumers generally used a combination of financial

¹⁶⁹ Statistics South Africa 2016 <http://www.statssa.gov.za/?p=7965>.

¹⁷⁰ Finmark Trust 2014 <http://www.banking.org.za/docs/default-source/financial-inclusion/finscope/finscope-sa-2014.pdf>. For the 2014 survey 3 900 face-to-face interviews were conducted with South Africans older than 16 years between June and July 2014.

products and services to meet their financial needs. For instance, an individual could have a bank account and also belong to a burial society. The Survey showed that the rate of overall financial inclusion (i.e. of individuals who have/use formal and informal mechanisms) increased from 61% in 2004 to 86% in 2014. In number terms this means that 17.7 million of the adult population were financially included in 2004, while the number increased to 30.8 million of the adult population in 2014. Financial inclusion was also found to be more prevalent amongst women, the White Population, and adults living in urban areas.

According to the 2014 survey 68% of South African adults do not save. Of the 32% that were saving, the majority made use of banks and other formal savings products from non-bank financial institutions (e.g. a unit trust). Eleven per cent of consumers said they were saving at home. Forty per cent of adults did not have any kind of financial product covering risk (e.g. life assurance, funeral cover, asset insurance, or health insurance). The 2014 survey revealed that there had been a slight growth since 2012 in the ratio of entrants into provident funds (from 10% in 2012 to 11% in 2014) and personal life insurance (from 13% in 2012 to 15% in 2014).

The 2015 FinScope survey was expanded to allow for greater data interrogation.¹⁷¹ It showed that in South Africa the levels of overall financial inclusion remained steady at 87% compared with 86% in 2014. In 2014 there were 31.4 million of the adult population that were financially included and in 2015 the number had increased to 32.5 million. Approximately 84% of adults are formally served – have a bank and other formal non-bank product/services – compared with 80% in 2014. Still more females (90%) were included than men (84%). While general inclusion figures had not changed significantly, the composition of inclusion in terms of product usage had changed. The percentage of those that were banked had increased from 75% in 2014 to 77% (28.7 million) in 2015, while the percentage of adults relying exclusively on informal mechanisms to manage their money

¹⁷¹ See Finmark Trust 2016 http://www.finmark.org.za/wp-content/uploads/2016/03/Broch_FinScopeSA2015_Consumersurvey_FNL.pdf. For this survey field-work was conducted from 14 July – 02 September 2015 and it consisted of Computer Aided Personal Interviews conducted face-to-face (which was a change from the 2014 survey, when it was conducted with pen and paper). The design of the questionnaire included the reordering of some questions and the addition of new questions. It was also translated into isiXhosa, isiZulu, Sesotho, Setswana, Sepedi and Afrikaans. A total of 5 000 interviews were conducted and included were individual respondents and households. Also see Finmark Trust 2016 http://www.finmark.org.za/wp-content/uploads/2015/11/PRES_FSSA2015_Consumersurvey_Launch.pdf.

declined from 6% in 2014 to 3.4% (i.e. 1.3 million) in 2015. There were around 8.5 million unbanked adults.¹⁷²

The 2015 survey said that "[p]ayments and transactions, credit, insurance and savings are the four main components of good financial management". The 2015 survey included a new and extensive measurement tool, the Quality of Inclusion Measure indicator (Q-FIM), aimed at understanding financial products/services usage and optimisation. For instance, (a) the ability to use a transactional account to purchase goods and services, (b) a savings account to preserve wealth, (c) access to credit to increase productive capacity, and (d) to use insurance services as a protection against unforeseen events and risks. The Q-FIM illustrated that high levels of inclusion did not automatically mean that people were benefitting from the financial products that they have. For instance, 50% of the financially included adults were "thinly served" (ie, consumers who had a non-optimal portfolio of financial products). It stressed that the high ratio of the thinly served amongst those that were financially included was driven by the low usage of digital payments. For example, only 13.7 million (37%) adults use digital payments on a monthly basis. The others use the traditional methods to pay bills, send remittances or transfers. Thus, by not making use of transactional products they were incurring more transactional costs and transport costs and losing time due to having to queue.

The survey disclosed that 56% of the salaried adults did not have retirement financial products. It did, however, show that there had been an increase in savings,¹⁷³ which could possibly be attributed to the South African Government's push on tax-free savings. Quite a significant number of salaried people were saving for short-term needs (that is emergencies (44%), school fees/education (20%) and food (19%)), while 6.9 million (56%) of salaried people did not have long-term savings. For those saving on a long-term basis, 42% was for emergencies and 18% to provide for the family in case of death. Only 19% was for retirement. There were 6% (2.1 million) that kept all their savings only at home (i.e. they did not have or use any formal or informal savings products or mechanisms).

Only 61% of the South African population knew which bank account was best suited to them. Fifty-nine per cent felt that banking fees were too

¹⁷² Finmark Trust 2016 http://www.finmark.org.za/wp-content/uploads/2016/03/Broch_FinScopeSA2015_Consumersurvey_FNL.pdf 7.

¹⁷³ In 2014 68% did not save, compared with 64% in 2015. The two main reasons advanced for not saving were unemployment and that the consumer had never thought of doing so.

expensive. The main reasons for choosing a bank were (1) cheaper costs (35%); and (2) great customer service (29%). Forty-four per cent of the population understood the differences between banks, while just 42% understood the differences between the banking products that were offered.

The survey stated that low financial products optimisation was driven by the lack of product knowledge and the lack of innovative products that met consumers' needs. The survey showed for instance that 5.5 million adults had funeral cover from two or more different providers, while innovative and product consolidations for funeral cover could greatly increase the benefits and possibly reduce the monthly premiums.

The 2015 survey showed that 50% of adults did not have any kind of financial product covering risk.¹⁷⁴ This meant that only about 18.5 million people were insured – but only 6.6 million had non-funeral insurance and 5.5 million had two or more funeral cover products. There was a decline in the purchase of life insurance products evident amongst the 18-29 year old category, from 24% in 2014 to 15% in 2015, and among those earning between ZAR 1 000 – ZAR 2 999. Thirteen point seven million people were considering cancelling their insurance and investment policies to pay back money that they had borrowed.

More South Africans (47%) were accessing credit, mostly via formal products.¹⁷⁵ The increase in the taking of credit was driven largely by the unsecured loan environment, and consumers were using credit for short-term immediate needs such as food (26%), emergency (26%), transport fees (12%), bills (10%), and clothes (10%). Only 11% were using credit to buy, renovate or build homes.¹⁷⁶

The survey showed that, although 18.9 million South African adults had smartphones, only 40% of them were using smartphone apps, and merely 31% of them were using mobile phones to manage their finances. Mobile phones were used mainly to buy airtime, with around 2 million adults remitting money through these phones (an increase of 27% from 1.5 million in 2014). Thirty-seven per cent of the population used digital payment mechanisms on a monthly basis.

¹⁷⁴ Finmark Trust 2016 http://www.finmark.org.za/wp-content/uploads/2016/03/Broch_FinScopeSA2015_Consumersurvey_FNL.pdf 9.

¹⁷⁵ Finmark Trust 2016 http://www.finmark.org.za/wp-content/uploads/2016/03/Broch_FinScopeSA2015_Consumersurvey_FNL.pdf 9.

¹⁷⁶ Finmark Trust 2016 http://www.finmark.org.za/wp-content/uploads/2016/03/Broch_FinScopeSA2015_Consumersurvey_FNL.pdf 2015 9, 11.

The 2015 survey indicated that more consumers were struggling to survive on their money. For example 28% had problems making ends meet in 2015 as opposed to 24% in 2014. The survey also revealed that people desire financial security (70%). During 2015 about 10 million people (26%) were unemployed and 11 million were using social grants.

The survey was intended to determine the level of financial inclusion, which was defined as thinly served due *inter alia* to the low rate of the usage of digital payments; insurance being driven by multiple funeral cover; a lack of relevant retirement products aimed at salaried low-income earners; and an increase in unsecured lending generally used for short-term purposes.

In 2015 it was estimated that the adult population stood at 37.3 million.¹⁷⁷ Although financial inclusion has improved drastically since 2004 the 2015 survey illustrated that 13% of the adults were still financial excluded (ie they did not use any financial products/services, formal or informal) to manage their financial lives.

FinMark Trust has also commissioned Genesis Analytics to develop a Financial Education Toolkit,¹⁷⁸ which aims to assist the providers of financial education in South Africa as well as in other countries (such as Mauritius) to improve their skills and programmes. As part of the project, over 90 financial education programmes from across 30 developed and developing countries, with a particular focus on sub-Saharan Africa, were reviewed. The toolkit offers different on-line modules. For instance it teaches providers how they can design their financial education programmes, develop their material and identify the right teaching strategies and communications channels for their particular consumers. It is a practical step-by-step guide on best practices in financial education interventions at both the national and programme levels.

3.5 Proposed changes to the regulatory architecture of the South African financial industry

Several changes to the regulatory architecture of the South African financial industry have been proposed. In terms of the proposed changes South Africa will adopt the Australian Twin Peaks-model. The *Financial Sector Regulation Bill* of 2015¹⁷⁹ proposes a prudential regulator accountable to

¹⁷⁷ See Finmark Trust 2016 http://www.finmark.org.za/wp-content/uploads/2016/03/Broch_FinScopeSA2015_Consumersurvey_FNL.pdf 3.

¹⁷⁸ See Finmark Trust 2013 <http://www.finmark.org.za/wp-content/uploads/2016/01/financial-education-toolkit-unabridged.pdf>.

¹⁷⁹ *Financial Sector Regulation Bill* 34 of 2015.

the South African Reserve Bank, which would also interact with the Ministry of Finance and a market conduct regulator whose management would be appointed by the Ministry of Finance.¹⁸⁰ The object of the Bill, among others, is to promote financial inclusion and achieve a financial system that works in the interests of financial customers, and supports balanced and sustainable economic growth in South Africa by establishing, in conjunction with the other financial sector laws, a regulatory and supervisory framework that promotes the fair treatment and protection of financial customers. The objects of the Bill will be achieved by protecting the interests of customers acquiring or using financial products and financial services by ensuring that financial institutions treat customers fairly and providing financial customers with financial education programmes. The market conduct regulator, the Financial Sector Conduct Authority (FSCA), will be established in terms of section 56 of the Bill. The FSCA's obligations include providing financial customers and potential financial customers with financial education programmes and promoting financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions. The FSCA's obligations are therefore concerned with the financial market as a whole.

3.6 Responsibilities of consumers

Although the BASA's South African Code of Banking Practice places some responsibilities on a consumer (a bank customer) to attain a minimum standard of literacy in credit and finance generally, South African legislation does not. The legislation places a duty on the regulators to educate consumers, but places no co-relative duty on consumers to get a minimum standard of education or literacy in credit and finance. As stated earlier, consumers are statutorily obliged only to provide correct financial information to credit providers, financial institutions and insurers.

4 A few closing comments

Due to South Africa's history, it is clear that the duty to educate in South Africa is focused on improving the financial inclusion of South Africans rather than improving informed participation amongst South Africans. Although many strides have been made in improving financial inclusion in South Africa, there are still many financially excluded consumers. It is expected (or rather hoped) that once South Africa has achieved optimal

¹⁸⁰ See the Explanatory Summary of the *Financial Sector Regulation Bill*, 2015 published in GN 749 in GG 39127 of 21 August 2015.

financial inclusion, the financial regulators and industry will start to shift their focus to promoting informed participation and creating truly financially literate consumers. Hopefully, when the *Financial Sector Regulation Bill* of 2015 becomes a reality it will bring about this shift in regulators' and financial institutions' focus.

In Australia, as well as in South Africa, the governments, regulators, financial institutions, and other not-for-profits all take responsibility for maintaining and increasing financial literacy. Financial institutions no longer believe that advocating financial literacy will cure all, can forestall regulation, and is the answer to poor decision-making. There is recognition that financial literacy is not just a question of knowledge and emphasising the importance of individual attitudes and behaviours. The question still remains: how responsible can all individuals (including the vulnerable) be for their own financial literacy? If financial literacy cannot substitute for other robust regulatory strategies, the responsibility still lie with financial services providers to ensure that the market is fair, and this requires legal and social responsibilities beyond financial literacy.

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List of Abbreviations

ANZ	Australia and New Zealand Banking Group Limited
ASIC	Australian Securities and Investment Commission
BASA	Banking Association South Africa

BBBEE Act	Broad-based Black Economic Empowerment Act
CSI	Corporate social investment
DTI	Department of Trade and Industry
FCA	Financial Counselling Australia
FOS	Financial Ombudsman Service
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
Iowa L Rev	Iowa Law Review
JSE	Johannesburg Stock Exchange
MULR	Melbourne University Law Review
NCA	National Credit Act
NCC	National Consumer Commission
NCR	National Credit Regulator
NEDLAC	National Economic Development and Labour Council
NGOs	Non-governmental Organisations
OECD	Organisation for Economic Co-operation and Development
OECD INFE	Organisation for Economic Co-operation and Development International Network on Financial Education
Q-FIM	Quality of Inclusion Measure
SA Merc LJ	South African Mercantile Law Journal
SAIA	South African Insurance Association
SALC	South African Law Commission
San Diego L Rev	San Diego Law Review
SASSA	South African Social Security Agency
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
U Pa L Rev	University of Pennsylvania Law Review
UNCDF	United Nations Capital Development Fund
UNSWLJ	University of New South Wales Law Journal