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SUBMISSION ON THE NATIONAL CREDIT ACT AMENDMENT BILL

To Ms J FUBBS, chairperson of
THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

For the attention of **Mr a HERMANS**
PO Box 15,
Parliament, Cape Town, 8000

PART A

1 In the few available days, I have to omit references and completeness of arguments. That will be attended to further when requested or at the hearing to which I may be invited.

2 My interest in credit affairs dates back to the Hire-Purchase Act 1942 on which I lectured at university. I wrote a book (two editions) on that statute; one on the Credit Agreements Act and the Usury Act; and did three publications on the National Credit Act 2005 ("the NCA"). While still a member of the National Consumer Tribunal (NCT) I observed certain problems at first hand. I have retired as deputy judge president of the High Court.

3 The acceptability of the Bill as a means of improving the operation of the NCA, requires criticism for what it fails to do (or to do satisfactorily) as much as studying the words that say something .. I will deal with the latter first.

PART B

4 The moving away of registrations and cancellations from the NCT [Bill section 7] is desirable. The NCT can be a "court" of first instance only for other things such as overseeing registered parties and filing consent orders but otherwise its role must be developed into an appeal facility for rearrangement of debts and perhaps other events

5 Section 8 (1) of the Bill should not refer to "all" credit providers. There are thousands. It is not clear why credit bureaus should be advised as nothing affects the creditworthiness or anything else of importance of the consumer. Sub-paragraph (a)(iii) is also too wide. Notice is appropriate only to consumers whose applications have not run their course to settlement or to a court determination. (The payment agents system is beyond the legality of the NCA and arose because of the failure of the NCA to create a working system. Lawful of unlawful, that "system" cuts out the debt counsellor except for his getting commission/fees out of consumer money for doing nothing further.)

6.1 The Bill's section 7(1)(a):. I think the word "repeatedly" must stay. Otherwise a harsh invasion follows on a small slip. It must also be remembered that the NCR standard conditions go very wide, to the extent that some of it is probably ultra vires. One condition is that the credit provider complies

with all the laws of the land. If the amendment is voted in you can lose your business existence if in one month you do not lodge your reports on due date or if you disobey a parking law. Good legislation should never hit with a broad bat at a fly.

6.2 The Bill's section 8(1) (b). What is the remedy for non-compliance? Why an affidavit? The debt counsellor has no legal right to transfer a consumer to anywhere. He cannot even transfer the consumer's pending or disposed of application or order. May "transfer" be done to various debt counsellors for various applications? What of the consumer who in the first place could choose to whom to apply and now is forced to a personality or to geographical locations that he does not want? Better to require in sub-paragraph (a) that the letter to the consumer should inform the consumer that he must urgently approach a new debt counsellor. [Who is now entitled to what commissions and what fees?]

7 The Bill's section 8(2). "Have ceased" (not "seized") implies a letter (surely not an affidavit !!) only after cessation. Why can the credit provider not say I will cease on 31 July (by implication "I carry on until then.")? Section 58 of the NCA stands. The proposed sub-section is not necessary because if the party does credit provider business after cancellation, it is as unlawful as if he never was a registered party. The NCA full deals with that. If for some reasons the proposed section survives, it should be stipulated that the debt counsellor may enforce contracts concluded before cancellation. The credit provider should be able to practice until the NCR informs him of the fact and date of cancellation.

8 Section 9 of the Bill. The proposal seeks to extend the right to act upon reckless debt to the NCT. Apart from efforts to enhance the status of the NCT, it is not clear why. It seems undesirable. The more so if it remembered that there is no possibility of an appeal by the consumer or a creditor. Rather then the NCA can hear appeals against rearrangement orders of magistrates.

The discretions involved in destroying contractual rights or suspending them is one that must be judicially exercised. Membership of the NCT is not guided by experience in balancing views or understanding the law and its effects. (Evidenced inter alia by its belief that a consumer who does not comply with an order can be "convicted" of contempt of "court".) The facts placed before the NCT in the course of its activities will not be an adequate basis for concluding about reckless credit.

If the proposal is nevertheless considered, we might see a judicial repeat performance of courts interpreting the NCA. The Bill will require attention to jurisdiction. Secondly, the NCT sits in Centurion and, except at the the cost of delay and lots of money, is not suited to attend to reckless debt at Willowvale where the consumer and all the creditors reside. Who appears for the consumer? Instead of established procedure for magistrates courts, there is no provision for appeals against the NCT whose members are not infallible and often not even trained in law.

Except in the proposed new application, the NCT is really never involved in the extent of legal (financial) liability between the parties except via the consequences of a specific transgression. For this (and other) involvement a revision also of the NCT rules will be necessary and bearing in mind the NCT lack of insight into deficiencies, it should be doubted what could be fitted in without creating further

difficulties. [For getting the NCT out of its cumbersome qualities, some statutory amendments are necessary.]

9 Paragraph 11 of the Bill.

The proposal and its limited scope is probably due to the decision of the Constitutional Court to the effect that the forbidding a fair balance between the parties that is reached by means of a claim for enrichment is unconstitutional. The decision was essentially based on the destruction of property without compensation. The Court did not have to comment on the wider basis of the disproportionality of section 89(5). The Bill now unfortunately fails to show any re-think of the appropriateness of section 89(5).

It is as well at this stage to remind that the proposition that the NCA is there to protect the consumer, requires context. One of the other objects is that the consumer must pay all his debts in due course. For every object there is the need to bear in mind the authorised means. See the word "by" immediately before "(a)" in section 3. More recently courts have become clear about the needs of "fairness" and 'balancing the position of creditor and debtor'. Compare para 29 of Absa Bank Ltd v Mhkize 2013 ZASCA 139. And paragraph 51's 3rd sentence. See section 3 of the NCA.

What is the value that section 89(5) seeks to protect? What need is there to add to section 89(2)(d)(which is as equally inappropriate) in its context of operating in a well developed and fair system that deals with prohibited contracts and related consequences. [Compare paragraph 12 in National Credit Regulator v Opperman 2013 BCLR 170 CC.] The considerations about voidness, the equities position of parties; the appropriateness of relaxations (including the par delictum considerations); the effect of mutual full performance. Section 89(5) as amended by the Bill will continue to come before courts. The NCA has created enough harm to call for serious consideration of whether there should have been this legislative intervention and if so, whether the intervention that is considered is appropriate and fair and proportionate. Those are values of the Constitution

I draw attention to the fact that s 89(5) is not interested in whether the credit granted is innocuous or undesirable for the country. [Cf paragraph 18 of the Opperman decision.] It takes no interest in whether the consumer is done in or not. It leaves good faith and innocence of BOTH parties out of the equation. The only interest it takes is in the administrative function of the credit regulator so that he is informed. Voidness of the contract is "without sufficient reason". [See the Opperman case in paragraphs 68, 71 and 76.] To cater for what the NCR's administration may need there are effective remedies that can be created without the harshness of 89(5). [Compare Opperman at paragraphs 78. 79.]

The interest in the administrative explains why the NCA is happy to by-pass the voidness if registration **"had"** been sought (and obtained?). [The past tense adds to confusion? Section 89(4) causes the "void" contract to be valid for 30 days (plus some undefined time) before one knows that it is void after all!!!!!) If one here seeks "fairness in the credit market" (the NCA section 3) one must be mindful that the sellers of a goat or a second-hand car do not think of themselves as being "credit providers" that

require registration. And they sometimes will not be able to comply with the racist section 48(1)(a) or have the necessary educational standard. And noe they are faced with the need to PROVE enrichment instead of working on the clear-cut purchase price or loan amount.

I have pointed out that the statement that everything in the NCA is for the protection of a consumer is skew oversimplification. The consumer will be equally protected whether or not the credit provider is registered. The applicability and the application of the NCA depends on specific facts of which (except for section 89(5)) none has to do with registration. Secondly, it is easy to point out many sections that are not after protection of the consumer. Thirdly, to assume that the consumer is protected by voidness of the contract, is devoid of reality. For every sale of a share there is one party who thinks the share is overpriced and its price will fall but another party who thinks it is cheap or the price will rise. If the consumer borrows R 7 million from a friend who is not registered, the voidness deprives him of a low rate of interest and a sympathetic creditor and he must run to Shylock or to "bridging finance" or even totally fail to get alternative finance. The consumer who buys a second hand car may find that he cannot get delivery of the car and must now at his own cost and time seek another car before he finds a similar car at a higher price. How does protection operate if you don't even look at the facts to see whether there is disadvantage?

And then there is the discrimination. The credit provider who has performed is knocked unfairly hard but there is no bad consequence at all for the normal credit provider who has not performed.

10 Bill's para 12

The words "such a" should perhaps be "that".

This is like s 89 (2)(d) and s89 (5) a trap for the innocent. Secondly, if this is required or is good law, introduce it for all consumers or allow the common law as amended by legislation to operate. Avoid a multitude of corners for contracts of the same situations. Each government department can not have its own law of persons, law of contract, administrative law.

What is the proposed remedy?

11 Paragraph 14 of the Bill. "delivered" should be replaced by "sent".

12 Paragraph 15 calls for realising that a consumer is free and should remain free to choose his mediator or "dispute resolutor" or arbitrator. Both fairness and prospects of success are undermined if the credit provider finds a listed but unacceptable person foisted on him. "Accreditation" by the NCR takes matters the wrong way. The section should make clear that it is only a list to assist the consumer to find a person. The opening words could be along the lines: "To assist the finding of an alternative resolution mediator, arbitrator, or....., the NCR may maintain a register of available persons....."

13 Paragraph 16. The choice of words to be inserted in the Insolvency Act is not happy but a proposal about wording will have to await clarity about what precisely inspired the formulation.

14 I prefer not to comment on relatively minor aspects of the Bill.

PART C

Turning to amendments that are required but are omitted by the Bill;

15.1 Important protection for the consumer that was destroyed by the NCA, is not restored;

15.2 Is the deletion of the definition of "lease" because it is seen a superfluous? Or is the intent that lessees now become protected? In the latter case additional statutory intervention is necessary.

15.3 Why do Mohammedans not have the protection of the NCA?

15.4 Why, if the NCA is desirable law, does it not protect all consumers? One only has to look at newspaper letter columns to see how intelligent and moneyed people invest in schemes and sign contracts without reading them. Or make aspirational purchases of cars and watches. Or feel obliged to arrange a costly funeral . And so forth.

15.5 Why tolerate undue discrimination. Next year when interest rates rise, the ordinary rise of one percentages point translates into a rise of 2.2% for the "consumer"

15.6 Section 5 about "incidental credit" (or"incidental ....agreements") is not necessary or productive. It is confusing andilt is not possible to understand its system or sub-parts thereof. Repeal or amendment to the point of clarity should be sought.

15.7 It is desirable to re-appraise attitudes or prejudices and learn objectively from the history of section 74 of the Magistrates' Court Act. The Bill touches upon one only of the deficiencies in debt counselling provisions after the NCA did not even try.

15.8 Starting with a really clean slate to avoid that prejudices or bias interferes with clear thinking, cooperation between Trade and Industry and Justice could lead to quite different result: Remove or improve the problems with administration orders and garnishee orders; have the settlement or the court order for rearrangement of debt regarded as an administration order (which is really its nature) enforceable by a garnishee order that excludes every other garnishee orders. The NCA did not seek any improvals in system but ignored deficiencies and introduced a similar system with even more inadequacies.

PART D

16 As in that context, it is appropriate to be mindful of the question whether the road to a required end result is really open and transparent.

17.1 The NCA seemingly wanted a smooth passage after attaining success in creating debt re-arrangement

The NCA takes care of settlements reached after alternative dispute resolution (section 134) or some other participations (section 138). All of that deals with "disputes" and sometimes only with "disputes" of a specific type. No particular care is taken about dispute-free consent debt re-arrangements.

Both for dispute-originated and for other agreements, it may be desirable that the NCT takes care of ALL consensual rearrangements by mere filing (by the debt collector or whoever). It eliminates the severe expense of involving attorneys and the costs of a full application. If the agreement is executed it then operates quietly until exhausted. If there is a breach, it can be taken for enforcement or cancellation to court (the current rules may perhaps suffice) or to the NCT where the debt collector will have the right to appearance. Why should the debtor not be entitled to personally appear at the NCT in a consent matter?

17.2 Settlements taken to the magistrate's court should be required and permitted only to the extent just indicated or if the settlement is reached as part of the processes of considering overindebtedness.

17.3 In various contexts the question arises about the interplay between NCA-controlled debt and other debt. It is, with respect, the duty of the legislature to give clarity. If the debt counsellor and the court may not involve non-NCA debt, how can the rearrangement ordered by a court survive alongside other debts that simply have to be paid? The point will be taken at one time or another. At the moment all affected parties (from the NCR to the counsellor) do things that do not accord with law in order to get effectiveness for the NCA or for their own survival. To him who believes that the NCA gives authority to involve none-NCA debt, the challenge: From where that empowerment?

18 An impression is that some of the difficulties of the NCA arose because of confluence and perhaps confusion was caused by the lack of clarity about what precisely is the problem and what is the solution. Thus debt re-arrangement comes in with reckless credit. Reckless granting of credit is only one possible cause of financial embarrassment. An opportunity for the debtor first to do something about debt comes in as a sub-aspect of "disputes". That is only one overindebted situation and there can be recklessness without overindebtedness.

Then there is section 129. It is in the hands of the Constitutional Court at this moment so that until after that judgment I go low on comments apart from having pointing out that the legislature jumped to the "dispute" feature. If the creditor knows that the problem is one of lacks of funds and not the existence of a dispute or that is subsequently proven to be the case, should the creditor not be excused from doing what section 129 says?

At the same time section 129 is very uninformative and unhelpful to the consumer. This should be materially changed. It is in fact in some ways misleading. Attending here firstly to someone who <u>does</u> have a "dispute", the creditor is required to invite visiting a debt counsellor. Without telling the debtor that a debt counsellor is not registered, trained or equipped for handling a "dispute"!!. The consumer is not told that the ombud will handle only disputes with financial institutions (how defined?). The consumer is not told that the consumer court, if not unconstitutional, may only deal with something of which a "business practice" is made. He is not told that for a defective washing machine the Consumer

There is now already judicial acknowledgement that the view that registered post is "better" is unsound. I agree. Registered post is slower. This instead of protecting the consumer, cuts in on his ten days. If the consumer moved to Johannesburg from East London, he has to go to East London to prove his identity. If he moved from Hazelhurst to Greenside, he could ask the residents in Hazelhurst to open and read the ordinary post letter or he could sent his child to fetch the ordinary letter but to get a registered letter he may lose a day's work and income and pay travelling expense to get to Greenside. Do-gooding harms the intended beneficiary. Rectification is needed.

19.4 The Supreme Court of Appeal held that a debt counsellor "must" draw a proposal for an overindebted debtor despite the actual word in the NCA being "may". There would have been no difficulty if that court had held that a debt counsellor's discretion would be wrongly exercised if he did not draft a proposal, except if there was acceptable reason for not doing so. The Supreme Court of Appeal, however, created an absolute duty. [The National Credit Regulator v Nedbank Ltd, SALR 2011-3-581 SCA.]

There may be many reasons why a debt counsellor should have the right not to proceed. The debtor's income or cash position may have improved. Or he did not provide the counsellor with the costs of going to the magistrates' court. Or the consumer discovered that debt rearrangement is very expensive. Or that it has become clear that the debtor has misrepresented his position to the extent that the counsellor would not have accepted the application but for the lying; and so forth.[Section 86(7)(c).

19.5 The NCA commendably sometimes mentions an end result and then spells out what to do about that. Compare section 130 (4). Section 86(7) also follows that pattern. But, as the Supreme Court of Appeal held, some mistake slipped in. However, that Court's rectification was the wrong choice.

The defects in section 86(7) and in particular the absence of a bridge between (1) the debt counsellor's part in section 86 and (2) the court's involvement in section 87, in my view arose clearly because of the following:

The NCA Bill in s86 (7) created an obvious split:

(a) If the debtor is not overindebted, his application is refused; OR

(b) If the debtor IS overindebted, the debt counsellor drafts a proposal for re-arrangement.

in sections 86 (7)(a) and 86(7)(b) respectively.
Section 87 (8) thus created a complete pattern without the gap between section 86 (8) and section 87.

Then, somewhere in the parliamentary process it was felt that the rejected applicant may be on the way to trouble and it was felt that the counsellor must at least convey his view of a gathering storm. Thus a new (different) section 86(7)(b) made its appearance to require fatherly advice. The (b) subsection so had to become a new (c) subsection. But then came the mistake. The reference in section 86(8) back to section 86(7)(b) was not changed to read "subsection (7)(c)" .

The result was that the person who was NOT overindebted became dealt with as if overindebted and the person who IS overindebted lacked a bridge to the section 87. Unlike for the other situations there was no remedy for the overindebted. The prize of the overindebted was given to the not-overindebted who should have received nothing but fatherly advice.