

**the dti**

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**CONSUMER AND CORPORATE  
REGULATIONS DIVISION  
SOUTH AFRICA**

**CREDIT LAW REVIEW:  
A discussion document**

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## 1. EXECUTIVE SUMMARY

- 1.1 The introduction of legislated Debt Relief measures, by the Portfolio Committee on Trade and Industry (the Committee), stems from the desire to alleviate household over-indebtedness in South Africa. These debt relief measures may assist in alleviating the impact of over-indebtedness and to some extent limit the impact of other socio-economic challenges faced in the country.
- 1.2 A study commissioned by the National Credit Regulator (NCR) on the “*Feasibility of a Debt Forgiveness Programme in South Africa*”, confirmed the need for the National Credit Act (NCA) to make provision for debt relief measures to alleviate household over-indebtedness and proposals were made to the Committee.
- 1.3 The Committee requested permission to introduce to the House the National Credit Amendment Bill, 2017 (Committee Bill). The request was made in terms of Rule 273 (1) of the Rules of the National Assembly. On 2 March 2017 the National Assembly accordingly approved the request of the Committee.
- 1.4 The Committee Bill aims to amend the NCA, to primarily make provision debt relief measures, provide simpler and more rigorous enforcement of the NCA and provide for criminal prosecution for contraventions of the NCA. Further, the Committee Bill seeks to provide legal certainty to *in duplum* debt accumulation and an effective debt counselling framework for low income workers.
- 1.5 It is proposed that the NCA should make provision for debt relief measures, implementable from time to time, in different economic circumstances to alleviate household over indebtedness. The criteria for debt relief should be informed by the prevailing economic conditions within a sector or section of the community. There should be clear criteria for eligibility of beneficiaries. Specific debt relief measures should be legislated and applicable in identified instances. Provision must also be made to outline the process within which the debt relief measures will be implemented.
- 1.6 It is proposed that the NCA should provide debt relief for *Retrenched Consumers*, *Victims of Unlawful Emolument Attachment Orders (EAOs)*, *Victims of Unlawful Social Grant Deductions* and *Victims of Reckless Credit Granting*. Remedies should

be prescribed to alleviate consumer over-indebtedness resulting from prejudicial behaviour by unscrupulous credit providers.

## 2. BACKGROUND

- 2.1 The Department of Trade and Industry (**the dti**) has recently introduced numerous preventative measures in an attempt to reduce and prevent future household over-indebtedness. The *Affordability Assessment Regulations* outline the affordability criteria that credit providers must adhere to and came into effect on 14 September 2015. The reviewed *Limitations on Fees and Interest Rates Regulations* came into effect on 6 May 2016. The *Threshold for Credit Provider Registration* was issued on 11 May 2016 to compel the registration of all credit providers regardless of size. The *Credit Life Insurance Regulations* issued on 9 February 2017 will become effective on 10 August 2017. The impact of these will be assessed, a period of three years from the date of implementation is often considered sufficient for this purpose.
- 2.2 The NCA currently makes provision for *Debt Review* as a debt relief measure. Debt relief through this measure is provided to consumers, mainly through *Restructuring of Loans* to reduce instalments burdens, *Reducing Interest rates* to pre-determined levels and *Waiving of Fees* by credit providers. The *Debt Counselling Rules System (DCRS)* provides for industry agreed concession rules to be used by Debt Counsellors to assist over-indebted consumers within *Debt Review*. Over-indebtedness however remains a challenge for many South Africans, specifically amongst the poor, many of whom are unable to afford *Debt Review*.
- 2.3 The National Credit Regulator (NCR) commissioned a study on the “*Feasibility of a Debt Forgiveness Programme in South Africa*”. The study confirmed the need for the NCA to make provision for debt relief measures and proposals were made to the Committee. The study covered international debt forgiveness case studies including amongst others;
- (a) The “Fresh start” Scheme by Croatia for low income customers with no property and no savings. Municipalities, utility and telecoms providers, tax authorities and banks were required to clear some of the debt and absorb

the losses themselves. Although it is too soon to fully assess the impact the measure could have on economic growth, the writing-off of debt by banks and private institutions could lead to imposition of higher interest or fees to other consumers and lead to an increased reluctance by credit providers to lend to worthy low income consumers in future.

(b) The “Debt Waiver and Debt Relief Scheme to Small & Marginal Farmers” by India for over-indebted rural farmers. Farmers pledged land as collateral, within prescribed thresholds to qualify for either unconditional full debt relief or conditional and partial debt relief subject to repayment of the balance. Government recapitalized the loans written off for the full amount. According to the World Bank, borrowers in areas with a high number of debt relief cases started defaulting in large numbers and banks reallocated their credit away from these districts.

(c) The “No Income, No Assets Debt Relief” (NINA debtors) interventions by New Zealand, England and Wales where debtors are unable to pay their debt obligations due to changes in their (consumer’s) circumstances rather than irresponsible borrowing. Debt relief was granted where a debtor had liabilities, assets, monthly and discretionary income which are less than the prescribed threshold. The debt relief was subject to certain restrictions relating to the debtor’s individual behaviour, if the debtor adhered to all requirements of the NINA process then their debts were discharged

2.4 The Committee held engagements with numerous key industry stakeholders on the extent of over-indebtedness, the socio-economic impact on society and measures that could provide debt relief. During the engagements it was highlighted that numerous *Voluntary Debt Relief Measures* exist in the credit industry and the Banks in particular, depending on the needs of the consumer. Amongst others, these measures include *Payment Moratoriums*, *Rescheduling* of credit agreements and other *Bespoke Arrangements* made depending on the merits of each case. It is the consumer’s responsibility to approach a credit provider to benefit from the debt relief.

2.5 During the engagements with the Committee, the credit industry highlighted their reluctance for a legislated debt relief process outside of the current existing *Debt*

*Review process and the existing Voluntary Debt Relief Measures already in place within the industry.*

- 2.6 The credit industry, in particular the Banks amongst other credit providers, cautioned against legislated debt relief measures and the unintended consequences. There was great support for refining the current *Debt Review* processes to make provision for low income consumers and the broad utilization of the *DCRS* industry agreed concession rules.
- 2.7 Other stakeholders, in particular Trade Unions and Pro-Consumer bodies, did however support debt relief for retrenched consumers with no income and insufficient or no credit insurance to pay off their debts. They also supported debt relief for victims of child support grant abuses, reckless credit lending and unlawful EAOs, amongst others.
- 2.8 Having concluded the engagements with industry stakeholders, the Committee proceeded to request permission of the National Assembly to introduce the Committee Bill to the House. On 2 March 2017 the National Assembly granted the Committee permission to develop and introduce a Committee Bill in the House.
- 2.9 The Committee requested the technical support and resources of **the dti** officials within the *Consumer and Corporate Regulations Division (CCRD)* to complete a *Policy Review* and to conduct a *Socio-Economic Impact Assessment (SEIAS)*, to assist the Committee in the development of the Committee Bill.
- 2.10 The NCR submitted to **the dti** that its administrative powers should be extended to allow it to amongst others, impose remedial sanctions for contraventions to the NCA, without referrals to NCT, in order to effectively enforce the NCA. The National Consumer Tribunal (NCT) submits that the Chairperson should have the discretion to allocate simple matters to a single Tribunal member as opposed to a panel of three members, amongst other suggestions, to improve efficiency within the NCT.
- 2.11 The NCR and NCT proposals have been approved by the Minister, to assist the Committee to achieve the aims of the Committee Bill.

### 3. PURPOSE AND PROBLEM STATEMENT

- 3.1 The **Purpose** of the *Policy Review* is to propose legislative amendments to the NCA through a Committee Bill and to inform the *SEIAS* analysis to be conducted on the Committee Bill.
- 3.2 The **Problems** which the *Policy Review* seeks to address are as follows:
- 3.2.1 The NCA, *per se*, makes no provision for debt relief measures to alleviate household over-indebtedness. Debt relief measures may be required from time to time;
- 3.2.2 To address the impact of high over-indebtedness, debt relief measures could be afforded to over-indebted households within a sector or section of the community. The prevailing economic conditions, such as the prevailing *Drought* and conditions in the *Steel* and *Mining* sectors may be considered as examples which ought to warrant the granting of debt relief;
- 3.2.3 The NCA provides no criteria within which the Minister is empowered to isolate specific over-indebted consumers as the eligible beneficiaries for debt relief measures. The NCA should require the Minister to consult with the credit industry before the Minister makes any regulations. These criteria ought to be used from time to time to identify prospective beneficiaries;
- 3.2.4 The NCA does not empower the NCR to impose remedial sanctions such as fines, after completion of their investigations. Referrals to the NCT for this purpose renders the NCR ineffective in enforcing the NCA;
- 3.2.5 The service delivery system of the NCT is hampered and rendered inefficient by referrals from the NCR, applications by consumers whose cases have not been entertained by the NCR and Debt Counsellors for orders within the *Debt Review* process;
- 3.2.6 Prohibited conduct such as collection of *Prescribed Debt* and non-application of the *Affordability Assessment Regulations* can only be detected by the NCR and the NCT during investigation and adjudication respectively. The prohibited conduct is not treated as reportable irregularities in terms of the NCA and other legislation

such as the Companies Act, 2008 and the Auditing Profession Act, 2005 for harmonization;

- 3.2.7 No predetermined criteria exist to regulate the development of *Settlement Agreements* between the NCR and transgressors of the NCA. In most cases, it would appear that the consumer is left without redress when such agreements are entered into;
- 3.2.8 The NCT seems to be operating too much as a court of law, as it is too involved with legal technicalities. The NCT should be inquisitorial and must be guided by principles of fairness, equity and redress, regardless of whether or not the threshold of legal technicalities has been resolved;
- 3.2.9 There is no legal certainty on the application of the *in duplum* rule regarding debt accumulation. Clarity is important to determine when the date of default is, also what should occur when a consumer defaults and then starts paying again. It should also be clear that not just interest but all fees and charges are included in the calculation for determining *in duplum*;
- 3.2.10 The *DCRS* concession rules are not effectively and widely used by all Debt Counsellors and Credit Providers to the benefit of over-indebted consumers. The NCA should require mandatory application of the *DCRS* by all Credit Providers and Debt Counsellors;
- 3.2.11 The *Debt Review* system does not accommodate low income consumers. There should be an effective debt counselling framework which provides an incentive for Debt Counsellors to provide assistance, through *Debt Review*, to low income consumers;
- 3.2.12 Although the NCA prohibits reckless credit lending, amongst other conduct, the prohibition does not deter credit providers from lending recklessly. Credit providers' lack of compliance should be criminally punished and the NCA rigorously enforced.

## **4. DISCUSSION**

**4.1** The Committee's engagements with industry stakeholders on the provision for debt relief highlighted the following:

### **4.2 CHALLENGE 1: PROVISION FOR DEBT RELIEF**

#### **4.2.1 Problem**

4.2.1.1 The NCA makes no provision for debt relief measures to specific categories of persons or sector of the economy or community.

4.2.1.2 No provision for the Minister to prescribe debt relief, from time to time, under adverse economic conditions.

#### **4.2.2 Solution**

4.2.2.1 The NCA should make provision for the prescription of debt relief measures to alleviate household over-indebtedness.

4.2.2.2 The Minister should be empowered to prescribe debt relief measures, from time to time, through regulations.

4.2.2.3 The circumstances to consider for debt relief for a particular sector or section of the community may include but not limited to prevailing economic circumstances, from time to time. The prevailing economic conditions may include *retrenchments* in certain sectors due to the persisting *Drought* or conditions in the *Steel, Mining and Poultry* sectors which warrant the granting of debt relief.

### **4.3 CHALLENGE 2: NO CRITERIA FOR DEBT RELIEF**

#### **4.3.1 Problem**

4.3.1.1 The NCA prescribes no criteria to be considered when granting debt relief measures.

#### **4.3.2 Solution**

4.3.2.1 Criteria should be developed to guide the prescription of debt relief measures.

Such criteria should be used from time to time and utilized for the reduction of household over-indebtedness in required circumstances. It is proposed that such criteria may include, but not limited to, debt relief for *Retrenched Consumers*, *Victims of Unlawful Emolument Attachment Orders (EAOs)*, *Victims of Unlawful Social Grant Deductions* and *Victims of Reckless Credit Granting*. Remedies should be prescribed to alleviate consumer over-indebtedness resulting from prejudicial behaviour by unscrupulous credit providers

4.3.2.2 The *Credit Industry* should participate and recommend to the Committee the criteria within which the Minister may prescribe debt relief measures.

#### **4.4 CHALLENGE 3: ELIGIBILITY FOR DEBT RELIEF**

##### **4.4.1 Problem**

4.4.1.1 *Retrenched Consumers* are not considered for debt relief. These consumers, whether in possession of a *Credit Life Insurance policy* or not, are often unable to fulfil their outstanding obligations owing to the loss of income. Retrenchments often occur due to circumstances beyond the consumer's control, such as prolonged strikes and industrial actions, due to various economic circumstances or occur unlawfully leading to loss of income and over-indebtedness.

4.4.1.2 *Victims of unlawful Emolument Attachment Orders (EAOs)* are not considered for debt relief. Such EAOs are as a result of illegal consents to jurisdiction, criminality by clerks of the courts or due to exorbitant recovery fees beyond the normal rates. The victims continue to be bound to these unlawful *EAOs* which contribute to their over-indebtedness. The gravity of the abuse of *EAOs* was highlighted by the *Stellenbosch Judgment*, ultimately the Judiciary left it to the Legislature to intervene and grant relief.

4.4.1.3 *Victims of unlawful Social Grant Deductions* are not considered for debt relief. Social Grant recipients, whose government social grants are unlawfully, used to service debt obligations or where unlawful deductions are made to social grant funds. The victims become over-indebted where social grants are unlawfully deducted and used for a purpose which is not intended. Recent Court Judgments have also highlighted the gravity of the abuse.

- 4.4.1.4 *Victims of Reckless Credit Lending* are not considered for debt relief. Reckless lending is done in contravention of the NCA and contributes to over-indebtedness. There is no punishment or deterrent for reckless lending. Credit providers persist with their unlawful lending practices without reproach which leads to consumer over-indebtedness, without any form of redress to the prejudiced consumer.
- 4.4.1.5 Debt relief is not considered where consumers become over-indebted and suffer prejudice as a result of Unscrupulous Credit Providers in continuous transgression of the NCA. In addition to prohibiting reckless credit lending, the NCA prohibits the sale and recovery of *Prescribed Debts* (A contractual debt is completely extinguished after expiry of the prescription period, the complete extinction has the effect that no natural obligation remains and the extinguished debt cannot be resurrected by an acknowledgement of debt (see *Leonie and Others v Nelson Attorneys* unreported case no. 2645/2011, at [16], Eastern Cape Local Division, Port Elizabeth)). The NCA also prohibits mis-selling of *Credit Life insurance* (retrenchment benefit sold to pensioners) and prohibits charging of unlawful credit related charges, such as club fees (Abuse highlighted through cases brought by NCR against EDCON and the recent judgment therein). Yet such prohibited conduct persists, leading to over-indebtedness, without any form of redress to the prejudiced consumer.
- 4.4.1.6 The *Debt Review* process does not provide the much needed debt relief to lower income consumers. Debt Counsellors are reluctant to assist low income consumers primarily due to financial issues, as the current fee structure provides no incentive for assisting such consumers. As such low income consumers are prejudiced by being unable to benefit from the provision of *Debt Review* and are left with any form of debt relief or redress.
- 4.4.1.7 The interpretation of the *in duplum* rule in debt accumulation should be clarified. It should be clear that not just interest, but all fees and charges are included in the calculation. Clarity is also needed as to determine when the date of default is and what ought to happen when a consumer defaults and then starts paying again.

## 4.4.2 Solution

- 4.4.2.1 For *Retrenched Consumers*, the NCA should provide for the partial or total extinguishing of the credit obligations and prohibit the collection of the outstanding balance, depending on the duration of the agreement and considering the portion already performed. It may also be necessary for every mandatory *Credit Life Insurance Policy* to provide for the full discharge of all outstanding balance as a form of debt relief. It is important to consider that a *Credit Life Insurance Policy* may in particular instances extinguish the outstanding balance fully, in some instances it may fall short and certain instances no such policy exists to the benefit of the consumer. Where a debt is written-off, the debt should not be later collected on, as such the writing off should have the effect of completely extinguishing all obligations.
- 4.4.2.3 For *Victims of Unlawful EAOs*, the NCA should prohibit the collection of funds resulting from unlawful EAOs. There should be refunds to affected consumers and a fine or penalty for the unlawful act. Where a debt is written-off, the debt should not be later collected on, as such the writing off should have the effect of completely extinguishing all obligations. Parliament should consider retrospective relief granted from the date the prohibition provisions came into effect.
- 4.4.2.4 For *Victims of Unlawful Social Grant Deductions*, the NCA should provide for the total extinguishing of all credit obligations and prohibit collection of the outstanding balance. There should be refunds to affected consumers. Parliament should consider retrospective relief from the date the prohibition provisions came into effect.
- 4.4.2.5 For *Victims of Reckless Credit Lending*, the NCA should provide for total extinguishing of all credit obligations and prohibit collection of the outstanding balance of a reckless loan. There should be refunds to affected consumers. Parliament should consider retrospective relief from 2007/ the date the prohibition provisions came into effect. Reckless credit lending should attract criminal and personal liability as punishment. The NCA should contain provisions akin to the “Delinquency of Directors” provisions within the Companies Act.

- 4.4.2.6 For Contraventions to the NCA by Unscrupulous Credit Providers, the NCA should provide for total extinguishing of all credit obligations and prohibit collection of outstanding balances. There should be refunds to affected consumers. Parliament should consider retrospective relief from 2007/ the date the prohibition provisions came into effect. Poor market conduct should further attract a penalty or fine, redress to consumers and publication of the names of offenders and the nature of the contravention. Unlawful lending should attract criminal and personal liability.
- 4.4.2.7 The *Debt Review* process should be incentivised to encourage Debt Counsellors to assist more low income over-indebted consumers. The fee structure should be revised to support the inclusion of low income consumers and create an appetite for Debt Counsellors to assist them. It has been proposed that a subsidy should be re-introduced by the NCR for this purpose. The re-introduction of a subsidy is supported and Parliament should consider sanctioning the re-introduction of the subsidy for this purpose.
- 4.4.2.8 The interpretation of the *in duplum* rule in debt accumulation should be clarified. It should be clear that not just interest, but all fees and charges are included in the calculation. Clarity is also needed as to determine when the date of default is and what ought to happen when a consumer defaults and then starts paying again. It is important to note that including all interest, fees and charges in the calculation for the purpose of determining *in duplum*, may in itself provide great debt relief for defaulting consumers.

## **CHALLENGE 6: TECHNICAL AMENDMENTS**

### **4.5.1 Problem**

- 4.5.1.1 This *Policy Review* contains a lot of technical amendments that are associated with issues raised above. Other technical amendments which may arise during the Parliamentary consultations with stakeholders will be attended to accordingly.

- 4.5.1.2 The issue of writing off of a debt in the ordinary meaning should also be interrogated by the Committee, as it means that a debt may later be collected upon.
- 4.5.1.3 The issue of retrospectivity may also need to be closely scrutinized, considering the presumptions against retrospectivity and other associated legal positions.
- 4.5.1.4 The Committee should consider the involvement of other Parliamentary Committees such as the Portfolio Committees on Human Settlements, Social Development, Justice and Correctional Services and the Standing Committee on Finance, amongst others, considering that greater debt relief may be achieved with their involvement.

## **5. SUMMARY OF RECOMMENDATIONS**

- 5.1 In making provision for debt relief measures within the NCA, the committee should consider an approach which ensures that the legislated debt relief does not suppress the use of *Voluntary Debt Relief Measures* currently existing in the credit industry.
- 5.2 The Committee should consider providing tangible debt relief to victims of, *Unlawful EAOs, Unlawful social grant deductions, Reckless Credit lending* by granting total extinguishing of all credit obligations, prohibiting collection of outstanding balance of a reckless loan and causing refunds to consumers, for the undue benefit received the unscrupulous credit providers. The Committee should seriously consider granting retrospective debt relief from the date the prohibition provisions came into effect for both punitive and deterrence purposes.
- 5.3 Unscrupulous Credit Providers should be penalised for contravening the NCA. The NCA should provide for total extinguishing of all credit obligations, prohibiting collection of outstanding balance of a reckless loan and refunds to consumers, where credit providers are found to have contravened the provisions of the NCA. Contravening the NCA should attract criminal and personal liability for delinquency.
- 5.4 Poor market conduct should further attract a penalty or fine, redress to consumers, in the form of full refunds and publication of the names of offenders and the nature

of the contravention. Unlawful lending should attract criminal and personal liability for delinquency.

- 5.5 Where a debt is totally extinguished as part of debt relief, the debt should not later be collected on. This position may imply that the state ought to absorb a portion of the costs of the relief or losses suffered by the credit industry. As previously recommended by the NCR, the Committee may consider looking at redirecting surpluses of funds within various state entities to fund debt relief measures, where possible.
- 5.6 Although numerous credit providers submitted that beneficiaries of debt relief should be listed in the credit bureaus, such a situation is not to be advised considering the spirit of the *Removal of Adverse Credit Information* initiative. It is however important to monitor the beneficiaries to determine the effectiveness of the measures.
- 5.7 The NCA should be rigorously enforced and the NCR should be afforded the administrative functions and capacity to effectively enforce the NCA. The current administrative capabilities of the NCR may need to be enhanced for this purpose. Enhancing the functions of the NCR may mean transferring some administrative functions currently residing with the NCT to the NCR.
- 5.8 The current debt review process should be incentivised through the re-introduction of a subsidy, in order for the process to be inclusive of lower income consumers. The subsidy may be partially funded by the industry.
- 5.9 The use of the *DCRS* concession rules should be mandatory for all parties involved in the *Debt Review* process to the benefit of the consumer. *Debt Review* should be refined to optimize and ensure its effectiveness.

## **6. CONCLUSION**

- 6.1 The main aim for the *Policy Review* is to deal with the provision for debt relief as is the intention of the Committee.
- 6.2 As a result the Committee is requested to approve this *Policy Review* and its legislation for wider public consultation.