**[TO BE PLACED ON LETTERHEAD OF THE CGCSA]**

Ms J Fubbs

Chairperson: Portfolio Committee on Trade and Industry

Attention: Mr A Hermans

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15 January 2018

Dear Madam

**RE: SUBMISSIONS on the draft National Credit Amendment Bill, 2018 (“the Bill”) (as initiated by the portfolio committee on trade and industry)**

**Introduction**

1. We write to you on behalf of the credit providers in the consumer goods industry who wish to make submissions on the areas of concern arising from the National Credit Amendment Bill (Gazette No. 41274 of 24 November 2017) as initiated by the Portfolio Committee on Trade and Industry.
2. We the CGCSA respectfully wish to record our dissatisfaction at the unreasonable period of time made available to interested parties over the festive season to comment on the Bill. This despite a written motivation for an extension being submitted to your offices at the beginning of December by ourselves. This has left the credit industry with the unfortunate impression that Parliament is following an automated process when it comes to public participation rather than seeking out a genuine, effective and Constitutionally compliant process.
3. Despite the unreasonable period imposed and the unavailability of certain key representatives of our industry and their external advisors, we have made every effort to comprehensively review and prepare coordinated submissions on the Bill. Our general, overarching submissions on the Bill are set out first, followed by our submissions on individual sections of the Bill under separate headings.

**General submissions on the Bill**

*No proper impact assessment*

1. The focus of the Bill is to introduce into the Act a new process that will allow qualifying consumers the ability to apply for debt intervention that could result in the extinguishment of their unsecured debts. The fact that a Bill would be introduced to provide for debt relief has been widely publicised for over a year, and undertakings were given that there would be a full socio-economic impact assessment study carried out. As far as we are aware, no such impact assessment has been made available to interested parties for comment.
2. It was reported in October this year that the South African Reserve Bank (“**SARB**”) also called for a quantitative impact assessment on the proposed debt relief measures to be conducted. The SARB also cautioned the Parliamentary Committee that financial stability needs to be protected. Please advise whether that quantitative impact assessment has been conducted and if so, where interested parties can access the results.
3. If the necessary impact assessment has not been conducted, we respectfully submit that the Bill is premature, as it is vital that the impact on credit providers, job creation and access to credit is first understood before implementing the Bill in these extremely difficult economic times. It is essential that Parliament only introduces the Bill after fully comprehending the impact of the Bill on the South African economy.

*Cost and capacity impact underestimated*

1. The likely cost and NCR-capacity requirements of the measures proposed in the Bill, especially the debt intervention measures, are not dealt with in the Bill or in the Memorandum to the Bill. Publicising the availability of the debt intervention relief will require significant efforts and marketing costs. The NCR’s existing, strained capacity will have to be significantly increased in order to adequately deal with the proposed new aspects set out in the Bill, especially the proposed reckless credit and debt intervention measures that the NCR will be responsible for implementing. The possibility of future debt intervention events will also require enhanced capacity and infrastructure. Please advise where the necessary funding will come from to enable the NCR to adequately fulfil its obligations in this regard.
2. Furthermore, there will be extra costs that credit bureaus will incur as a result of the additional reporting obligations contained in the Bill, and additional costs that credit providers will bear to defend their position on particular debt intervention and reckless credit proposals made by the NCR and NCT. In the end, it is unfortunately ultimately the consumer who bears these additional financial burdens.

*Qualifying thresholds of R7500 and R50000 inappropriate*

1. Please advise how Parliament arrived at the qualifying thresholds for a consumer to apply for debt intervention, namely maximum earnings of R7500 per month and a maximum level of unsecured debt of R50000? The purpose of the Bill is to assist indigent consumers. According to the NCR’s Quarterly Consumer Credit Market reports, over the last 5 years approximately 48% of the unsecured credit applications (excluding development credit) came from consumers earning less than R7 500 per month[[1]](#footnote-1). Please refer to Schedule 3. During the last 5 years, unsecured credit transactions worth R172.5 billion were concluded with consumers earning R7500 or less. This amounts to 48% of the total number of unsecured transactions concluded over this period, with these consumers. There were 46.1 million transactions concluded with consumers earing R7500 or less and the average value per unsecured credit transaction was R3738. Consumers who earn less than R7500 per month cannot be regarded as indigent as they make up a large proportion of the credit applications. We submit that the R7500 threshold is far too high and that further work needs to be done to establish what a more realistic threshold should be to qualify a person for debt intervention.
2. Similarly, the R50000 debt threshold for unsecured credit is too high. On analysis of the NCR’s Quarterly Consumer Credit Market Reports for the last five years (see Schedule 2), it is apparent that the industry average of consumer unsecured debts falls well below the qualifying criteria currently provided for in the Bill. The average unsecured debt per agreement is merely R12000. At the end of December 2016, there were 32.4 million unsecured credit agreements in place with aggregate unsecured debt of R389 billion outstanding (refer to the top block in Schedule 2). It is unthinkable what the consequences would be if a large proportion of these debts were extinguished pursuant to the proposed debt intervention process. Certain Industries could be significantly affected and companies wiped out.
3. Similarly, the last 5 years’ data of credit granted each year has been extracted from the NCR’s Quarterly Consumer Market Reports in Schedule 1. The top block is an accumulation of the last 5 years credit granted and the blocks below that are the individual years. The right hand columns analyse secured credit which appears as one number on the left hand side and mainly pertains to motor financing. What is clearly evidenced in the left hand columns is that there were 95.7 million unsecured credit transactions during that 5 year period and that the average value of these transactions was R8364 across all income bands. This again indicates that the R50 000 limit has not been properly considered.

*Qualifying criteria for debt intervention inadequate*

1. At the very least additional qualifying criteria ought to apply before a consumer is eligible to apply for debt intervention. The proposed criteria only considers the income and assets of the consumer. Consideration should also be given to whether the consumer can afford the instalments after taking into account the living expenses and debt obligations of the customer. We submit that to qualify for debt intervention, the consumer must also be over-indebted (as contemplated in s79 of the Act read together with Reg 23A and Reg 24). The determination can only be made after considering all of the consumer’s financial means, prospects and obligations (including his monthly expenses and debt obligations). It is overly broad to simply allow consumers who earn less than R7500 per month and who have no realisable assets, the opportunity to extinguish their debts.
2. The concept of no realisable assets is a complex and extremely difficult matter to monitor. Firstly, once you set aside implements of trade of R10 000, professional instruments of R10 000, necessary household furniture of R10 000, and necessary beds, bedding and wearing apparel, most families will not have much left over to realise, especially as the second-hand value for these necessary items is low. For example, a second-hand lounge suite or fridge could be worth as little as 30% of its original value. As a result of low re-sale values, more items will fall to be included into the “necessary” asset classification leaving less for the “realisation” asset classification, causing more consumers to incorrectly fall into the “no realisable” asset classification net.
3. Secondly, section 88A(1)(b) states that the realisable assets need to be “swiftly” convertable to cash at a value that “reasonably reflects the second-hand market value of that asset”. How will the NCR be able to assess whether an asset can be sold “swiftly” and what a reasonable value should be? It is extremely difficult to assess second-hand values as prices differ dramatically depending on how “swiftly” the goods are sold. The consumer would need to sit down before an individual and discuss his financial affairs and his assets in depth. Consideration should also be given to unnecessary expenditure incurred by the consumer. This assessment should be the function of someone like a debt counsellor, which would allow for the careful monitoring of consumers to ensure that they realise the assets at reasonable values. Consumers unfortunately might also sell assets because they have a drug or gambling problem but they can still hold down a job and service their debt obligations. We submit that it is much more effective to assess the customer’s ability to service his/her debt obligations as triggering the need for debt intervention rather than having regard to the customer’s pool of realisable assets. Experts like local debt counsellors need to be involved as the NCR does not have the capacity nor the physical footprint to deal with this type of detailed assessment and monitoring.

1. The proposed debt intervention relief should be limited to vulnerable consumers who cannot meet their debt obligations, such as retrenched customers (not dismissed customers) who do not have credit life insurance. To simply allow any consumer, in the ordinary course, without any negative circumstances having befallen them, the ability to apply for debt intervention if they earn less than R7 500 per month and have no realisable assets, is overly broad and far-reaching and will have a significant negative effect on credit provider debtor books and the economy.
2. Furthermore, we propose that debt intervention assistance should only be available to consumers who have already paid off a reasonable portion of their debt and who have an “impaired record” and should only be allowed in exceptional circumstances, as it encourages irresponsible consumer behaviour. To allow a consumer the ability to extinguish his debts when he has not made any (or made very few) payments towards them, or who is successfully paying his instalments every month, should not be allowed,

*Negative impact of the Bill*

1. Not only does the Bill put at risk huge proportions of credit providers’ *current* debtors’ books through the debt intervention process in section 88A (with the associated risk of retrenchments), but it also introduces ongoing *future* risk to credit providers and their ability to recoup debts owing to them. This is due to the Bill empowering the Minister to introduce alternative future debt intervention measures in terms of section 88F. This creates great uncertainty and increased risk for lenders and will result in much stricter credit application and approval processes for consumers. A consumer earning less than R7500 per month will now be seen as a high-risk consumer to lenders (contrasted with the current position where 48% of unsecured credit applications come from this category of consumer).
2. Contrary to the aims of the Bill, the medium to long-term impact of the Bill will end up negatively affecting the average South African consumer. Many consumers who can afford credit will effectively be precluded from participating in the credit market because of credit providers tightening their credit granting parameters to minimise the risk of having to extinguish debts owing to them. Credit providers will also look to charge higher interest rates and impose stricter lending conditions to counter the higher risk attaching to their loans, making it much more expensive for these consumers to obtain credit.
3. The macro-economic effects of the Bill need to be carefully considered. The impact on investor confidence and South Africa’s credit rating if lenders are compelled by legislation to write-off large amounts of debt upon the direction of the Minister will seriously affect investor perception and the stability of the credit market, and should be carefully considered before implementing the Bill.

*Better ways to achieve the ends*

1. If the mischief that the Bill is seeking to address is assistance for over-indebted customers who were advanced credit recklessly by unscrupulous lenders, then we submit that the Act already provides remedies for these consumers. Section 86(6(b) places a statutory obligation on debt counsellors to investigate reckless lending allegations during the debt review process. Section 83 of the Act allows a court to set aside all of the consumer’s obligations under that agreement, without in any way impairing the customer’s credit profile at the Bureaux. Debt intervention applicants will have their credit profiles affected. In addition, s103(5) of the Act assists the over-indebted consumer by limiting the amount of interest and charges that may accrue during the time that the consumer is in default in a far more extensive way than under the common law.
2. [Debt review](https://nationaldebtadvisors.co.za/debt-review/) and [loan consolidation](https://nationaldebtadvisors.co.za/debt-consolidation/) remain responsible, effective ways to assist over-indebted consumers. Through these processes, the consumer is also educated on how to budget, plan, manage their payments, and communicate with creditors. This process and learning, benefits the consumer much more than a once-off debt write-off which only serves to encourage irresponsible borrowing.
3. As per the Memorandum on the Objects of the Bill (page 36), a key problem is that the debt review process is not cost effective for debt counsellors when considering applications of lower income customers. The solution should therefore address the problem of the debt review fee structure for low income consumers, rather than create new problems by introducing a new and complicated debt intervention process which ultimately achieves similar results to the debt review process. The existing debt review process could be further refined to better cater for those consumers who cannot afford the debt review process and to incentivise debt counsellors to assist these consumers. A government subsidy in this regard would alleviate the problem of an over-indebted consumer not being able to afford debt review. In our assessment of the situation this is by far the most important factor and most obvious solution.

**Submissions on specific sections of the Bill**

1. Section 4 (amending section 15 (Enforcement functions of the NCR)):
   1. The Bill seeks to give the NCR the power to suspend a credit agreement pending a final determination by the NCT. This power to suspend is an adjudicatory power that rightly belongs with the NCT and not with the NCR whose powers are correctly limited to monitoring, evaluating, investigating, issuing and enforcing compliance notices, and referring matters to the NCT. The power to suspend a reckless credit agreement is a power that rests with the NCT in terms of section 83. Suspension is an available remedy *after* the agreement has been declared reckless by the NCT and should not be capable of being imposed by the NCR prior to a proper determination of all the facts by the NCT.
   2. If the amendment is introduced as currently proposed, what relief will a credit provider have if a credit agreement that was suspended by the NCR is subsequently ruled not reckless by the NCT. The credit provider will be compromised and forego the interest, charges and payments during the time that the agreement was wrongly suspended by the NCR.
   3. The NCR already has capacity constraints with its existing workload. If this amendment is introduced, what measures will be introduced to ensure that reckless lending matters are dealt with by the NCR efficiently and without enormous backlogs forming?
2. Section 6 (amending section 43(1)(a) by inserting a new (v) (credit bureaux)): The proposed new words “*successful debt intervention applications*” suggest that it will only be debt intervention applications that are *successfully* granted to applicants that will be received by the credit bureau. This is not correct as the proposed new section 88B(1)(b)(ii) obliges the NCR to notify the credit bureau of all debt intervention applications received. The mere fact that a consumer has applied for debt intervention should be referenced against that consumer’s profile at the bureau, so that if the consumer applies for further credit during the time that his application is being assessed, credit providers can see that the consumer is subject to a debt intervention process and therefore no further credit should be granted. Proposed new section 88B(1)(b)(ii) obliges the NCR to notify the credit bureau of a debt intervention application, so the information is available to the bureau to receive and report on. We recommend changing the words to read “*(v) applications for debt intervention;*”.
3. Section 9 (amending section 70(1)(a) (credit bureau information)): Similarly, the proposed words “debt intervention *granted*” should be changed to “*applications for debt intervention*” in this new section.
4. Section 9 (amending section 70(2) by inserting a new (aA) (credit bureau information)): Likewise, the proposed words “*successful debt intervention application*” should be changed by deleting the word “*successful*”.
5. Section 10 (new section 71A(3A) (removal of listing)): This section places the obligation on credit bureaux to remove the listing of a successful debt intervention within a stated short period of time after certain events take place. No indication is given as to whether it is the responsibility of the NCR or the NCT to furnish the information on time to the relevant Credit Bureaux in order for them to act in accordance with this section.
6. Section 11 (new section 82A(1) (NCR to suspend reckless credit agreement)):
   1. The Bill places a whistle-blowing obligation on credit providers and debt counsellors to report credit agreements that they reasonably suspect are reckless, failing which an administrative fine can be levied.
   2. Credit providers are not in a position to police other credit providers. The duty to police reckless lending rests with the NCR, and with debt counsellors when assessing consumers’ financial situations during debt review. It is not healthy to create an environment in which industry assists in witch-hunts and reporting competitors. What if a credit provider wrongly reports a competitor? Will the competitor be able to claim against the reporting credit provider for losses suffered as a result?
   3. It is also a totally impractical and unworkable obligation to place on credit providers. How is it envisaged that credit providers will be able to reasonably suspect reckless lending on the part of other credit providers? Credit providers’ affordability assessment systems are automated and are not programmed to suspect reckless lending. This would require being able to consider the level of indebtedness of the consumer at the time when a particular credit agreement was entered into. Credit providers assessing credit “today” are not able to see what the other credit provider saw at the time of granting credit on the previous agreements. That level of information has to be called for out of the archives of that particular credit provider by the debt counsellor to assess an allegation of reckless credit. It is very specific information at a point in time and is not available to a credit provider as a matter of course.
7. Section 11 (new section 82A(2)(b)): Typo. The cross-reference to section 86(7)(b) in proposed new section 82A(2)(b) should be to section 86(7)(c).
8. Section 11 (new section 82A(3): The proposed new section 82A(3) is unnecessary as section 151(1) already permits the NCR to impose administrative fines in respect of *required* conduct that is not carried out.
9. Section 11 (new section 82A(4)): Proposed new section 82A(4) states that the NCR must investigate a report from a credit provider or debt counsellor of alleged reckless credit “*in accordance with s139*”. Section 139 contemplates the NCR referring a reckless lending complaint to a debt counsellor to deal with. If the NCR determines that it is reckless credit, the matter is handled in terms of proposed new section 82A(5) (and not in terms of s139(1)(b)).
10. Section 14 (new section 88A(1)(a)): Debt Intervention
    1. To qualify for debt intervention, the consumer must be South African, earn less than R7500 per month, have no realisable assets and not be subject to debt review. We submit that these qualifying criteria are deficient in a key area; that is, they fail to consider whether the consumer is over-indebted having regard to his monthly living expenses and monthly debt obligations (refer to regulation 24(7)).
    2. To qualify for debt intervention, the consumer should also be over-indebted (as contemplated in section 79), and not merely a consumer with income of less than R7500 per month with no realisable assets. There are many consumers in that category who are quite capable of managing their financial affairs and meeting their monthly debt commitments. We submit that a further qualifying criterion should be added to section 88A(1); namely that the applicant is over-indebted at the time of application.
    3. Section 88A(4) requires an applicant to submit to the NCR proof of income and of expenses, and information concerning total unsecured debt. Certain expense and debt information is placed before the NCR at the time of considering an application. We earnestly suggest that all the information required in terms of Regulation 24 be submitted here as well, so as not to create another list of requirements which does not fully record all the consumers expenses and obligations. It is vital that all the information must be available to the NCR to make a proper determination.
11. Section 14 (new section 88A(1)(a)):
    1. The definition of “debt intervention applicant” specifically includes “*a disabled person, a minor heading a household, or a woman heading a household.*” It is unnecessary to specifically separate out these categories of consumer from the general category of consumer that section 88A applies to (that is, “a natural person” who falls within (i), (ii) and (iii)). Disabled people, minors and women consumers would naturally fall within the section.
    2. It must be noted that there are many *women heading a household* with income of less than R7 500 per month who are quite capable of meeting their monthly debt commitments and are included in the statistics attached.
12. Section 14 (new section 88A(1)(b)):
    1. The definition of “realisable asset” excludes necessary tools, books, and furniture up to R10,000 for each category, as well as necessary beds, bedding, “wearing apparel”, food and pension funds of the applicant. Absent from this list of exclusions are the consumer’s primary residence and vehicles. This means that if a consumer owns a property or car, these assets constitute “realisable assets” which means that the consumer is ineligible to apply for debt intervention. We recommend that this be recorded specifically in the section to clarify the position that the consumer will not qualify for debt intervention if he owns a property or vehicle.
    2. With reference to the definition of “*total unsecured debt*”, *secured* debt falls outside of the ambit of debt intervention. Section 88B(3)(b) obliges the NCR to determine whether the debt intervention application incorrectly includes any secured agreements, in which case the NCT must be informed that such secured agreement does not form part of the debt intervention order. The Bill does not deal with the situation where the NCR fails to notice that a credit agreement is secured and should be omitted from the application. In such circumstances, the secured creditor must be placed in a position to be able to oppose the application?
    3. The Bill does not prevent a secured creditor (who is excluded from the debt intervention process) from proceeding against the consumer who is subject to debt intervention, with a court application for the attachment or repossession of the secured creditor’s collateral. This important point ought to be stated explicitly in the Bill.
13. Section 14 (new section 88A(2)):
    1. This section makes it clear that the debt intervention provisions contemplated in s88A are not perpetual in nature and will only be available to consumers who have less than R50,000 debt as at 24 November 2017.
    2. The new provisions envisaged in this Bill could come into effect months after 24 November 2017, rendering the November date quite arbitrary in its application. The debts of consumers who qualify for relief as at 24 November 2017 might look very different in, say, June 2018, either as a result of paying down debt or as a result of additional purchases, interest and charges pushing the debt over R50,000. If the 24 November 2017 debt exceeds R50,000 at the time the Bill comes into force, the consumer should not qualify for debt relief, as the relief only applies up to the R50,000 limit. This section should clarify the position.
    3. We submit that there should be a cut-off date by when an application for debt intervention can be brought. This form of debt relief is intended to be once-off and should not be allowed to create an open-ended liability for credit providers. We submit that there should be a 6 month period after the amendments take effect for qualifying consumers to bring their debt intervention applications.
14. Section 14 (new section 88B(2)):
    1. This section obliges credit providers to comply with any reasonable requests by the NCR to facilitate the evaluation of a debt intervention application. The section should also *oblige the NCR* to engage with all of the credit providers to obtain their response and position in regard to the application so that the NCT is properly informed of the facts and to limit unnecessary litigation after the application has been submitted.
    2. The Bill should impose a time period in which the NCR must evaluate a debt intervention application and reach a conclusion contemplated in section 88B(4). We submit that a period of 60 business days (3 months) would be reasonable.
15. Section 14 (new section 88B(3)(a)): This section states that if the NCR finds that a credit agreement may constitute reckless lending or an unlawful transaction, section 55 applies and that agreement must be separated out from the application of the debt intervention. Section 55 deals with when compliance notices should be issued and contemplates the notice setting out the steps that must be taken to regularise the misconduct. It is submitted that the cross-reference to section 55 in this context is not correct. Reckless lending should be dealt with as contemplated by the proposed new section 88B(4)(c) which specifically caters for the situation where the NCR concludes that an agreement is reckless or unlawful. In such event the NCR may make a recommendation to the NCT for an appropriate declaration.
16. Section 14 (new section 88B(3)(c):
    1. Please insert the words “*(where appropriate)*” after the words “*assist the debt intervention applicant to claim against that credit insurance*” in the second line. Merely because a consumer has credit insurance does not mean that he will necessarily have a valid insurance claim at the time of applying for debt intervention. For example, if the consumer was dismissed from his employment for misconduct, his credit life insurance will not pay out. Care should be taken in the Bill to avoid creating false expectations for consumers.
    2. Furthermore, a consumer who has been dismissed for some irregularity at work should not be entitled to apply for debt intervention. Section 88A(1)(a) should be amended accordingly to exclude consumers who have been lawfully dismissed from work, or who excessively use drugs or alcohol, who have broken the law, have a gambling addiction, etc. The credit provider cannot be expected to be held accountable for these types of occurrences.
17. Section 14 (new section 88B(4)): The Bill does not make it clear on what basis a qualifying applicant will qualify for debt intervention. Section 88B(4)(b) states that if a consumer is experiencing difficulty in satisfying all his debt obligations in a timely manner the NCR must refer the consumer for debt review. However, the Bill does not clearly stipulate what circumstances will qualify an applicant for debt intervention. The Bill should clearly state what factual circumstances must exist in order for the NCR to reasonably conclude that the applicant qualifies for debt intervention and must be referred to the NCT for a ruling in this regard.
18. Section 14 (new section 88B(4)): The section should also oblige the NCR to notify the credit bureau and all credit providers listed in the debt review application of the outcome of the debt intervention application (the NCR’s decision in this regard) and update the consumer’s profile on a similar basis to the initial notification contemplated in section 88B(1)(b). This is vital given that a credit provider may recommence charging interest and/or seek to enforce a credit agreement if the debt intervention application is rejected by the NCR.
19. Section 14 (new section 88C(1)): This section seems to suggest that the application for debt intervention is brought before the NCT on an *ex parte* basis by the NCR, with reference to the NCR’s papers alone, and with no further evidence being led. On what basis should an affected credit provider who objects to the NCR’s proposals be excluded from the application before the NCT? Affected credit providers should be permitted to file opposing papers before the NCT to ensure that their side of the matter gets heard. Section 88C(2)(c) and (d) have very serious consequences for credit providers and at the very least, the NCT should be statutorily obliged to have regard to the opposing papers of the credit providers.
20. Section 14 (new section 88C(2)(c)): If the NCT is of the view that the applicant could satisfy payment requirements, *but an order requesting the NCR to refer the applicant to a debt counsellor for debt review would not be effective*, the NCT is empowered to restructure the applicant’s debt. What circumstances are contemplated here where a referral to a debt counsellor would not be effective but an order by the NCT restructuring the consumer’s debt would be, and where the consumer could satisfy his debt payment requirements?
21. Section 14 (new section 88C(3)(a) and (b)):
    1. As per paragraph 39 above, the Bill does not make it clear on what basis a qualifying applicant will qualify for debt intervention. Something more than having difficulty in satisfying debt obligations in a timely manner is required, but what? The Bill should clearly stipulate the test that needs to be met before the NCT can conclude that the applicant qualifies for debt intervention relief.
    2. Furthermore, the NCT is required to make a determination after the initial 12 months as to whether the consumer is entitled to an order extending the period by a further 12 months. How is the NCT going to have the capacity to do this without the NCR’s input and reassessment of the consumer? In addition, if the credit provider stands to have its fees and income withheld for a further 12 months, the credit provider should be allowed to file opposing papers to the additional 12 months suspension. This is an extremely important matter as many credit agreements have 24 months or 36 months terms. To have credit providers potentially lose out on a full two years’ worth of income without a proper hearing, would be unfair and inequitable.
22. Section 14 (new Section 88C(4)): If the consumer’s financial circumstances did not sufficiently improve during the 12 month period, then the NCT must declare the debt extinguished. Again, the capacity to complete such reviews by the NCT on its own, based only on the consumer’s papers, must be questioned. The input of the NCR and the NCR’s reassessment of the consumer’s circumstances will be necessary. Furthermore, the credit provider must be given the opportunity to file opposing papers. This is only fair and equitable.
23. Section 14 (new section 88C(9)): This section gives the affected credit providers the right, by notice to the debt intervention applicant and the NCR, to set the matter down for “*reconsideration of the order*”. This concept is very short on detail. Is this a right of appeal? How does that work practically if the credit provider is not a party to the original debt intervention application? Who will hear the matter? Will it be the same member of the NCT who first heard the matter or another member (or a full bench)? The credit provider should also have the right to appeal the reconsidered order to a higher court. It is especially important to clarify these matters as the current Bill seems to envisage the debt intervention application being brought on an *ex parte* basis by the NCR without allowing the credit providers an opportunity to file papers before the NCT. This cannot be constitutionally sound.
24. Section 14 (new section 88D(6)) (changed financial circumstances): This section places a statutory duty on the debt intervention applicant to notify the NCR of any changes in his financial circumstances. Practically however which debt intervention applicant will report a positive change in their financial circumstances and how does the NCR intend to police all debt intervention applicants’ financial circumstances?
25. Section 14 (new section 88E(2)): In order to qualify for a rehabilitation order, the applicant has to show that he has fulfilled the obligations that were due on the date of the application for debt intervention by paying in full to the credit provider the value of such obligations plus interest on that amount at the prescribed rate from the date of the application. However, the NCT has the power to determine/suspend not only interest, but also fees and other charges in terms of Section 88(C)(2)(c) and (e). Accordingly, in order to qualify for a rehabilitation order, we submit that the applicant must pay the debt as at the date of the application for debt intervention, plus all interest, fees and charges incurred (and not only interest as currently contemplated in the Bill).
26. Section 14 (new section 88E(7)(b) (application to revise order)): This application must be supported by a certificate from an accredited financial institution stated that the applicant successfully completed an approved financial literacy or budgeting skills programme. No reference, however, is made to who will be responsible for the financing and running of such programmes.
27. Section 14 (new section 88F(1)):
    1. This section empowers the Minister to prescribe debt intervention measures to alleviate household debt (including the extinguishment of debt) where there is:
       1. a “significant exogenous shock” causing widespread job losses;
       2. a regional natural disaster of grave public interest; or
       3. economic circumstances that affect indigent persons, persons earning less than R7500 per month, persons suffering from mass retrenchments, or persons subject to adverse conditions identified by the Minister.
    2. This power is extremely broad and amongst a number of options also allows the Minister to fully extinguish debt without any impact assessment being conducted. All that the section obliges the Minister to do is consult with various parties including the credit industry, and publish a notice in the Gazette allowing interested parties 30 days to comment. Again, we would like to bring to your attention that one of the qualifying features is income of less than R7500 which affects 48% of all unsecured credit transactions undertaken by consumers on an annual basis. Refer Schedule 3 attached.
    3. The Minister should be obliged to obtain a full impact assessment report from an independent and appropriately qualified third party before introducing any such debt intervention measures. Such report should be made available to those persons with whom the Minister is obliged to consult, including the credit industry.
    4. The Minister should be obliged to consider the effect that the proposed debt intervention will have on the credit industry, and be restrained from introducing such debt intervention if, for example, credit providers’ financial positions will be significantly impaired, or if it will result in job losses, or if the barriers to enter the credit market become too high for consumers who benefit from credit the most.
    5. We further submit that 30 days is too short a period for the credit industry to meaningfully engage with a debt intervention proposal, especially if the proposal is published for comment over a holiday period or traditionally very busy retail period such as the Christmas holiday season.
28. Section 14 (new section 88F(5)(c)):
    1. This sub-section contemplates the Minister being able to propose debt intervention measures that fall *outside* of the parameters contemplated in subsections (2), (3) and (4). Those subsections themselves specifically state that the measures may “only” benefit certain listed consumers, and may “only” consist of certain listed measures. They do not allow for consumers or measures that fall outside of the listed parameters to be included by the Minister.
    2. It is therefore completely irregular for subsection (5)(c) to allow the Minister to broaden the scope of the debt intervention parameters contemplated in this section without a proper consultative process. The Minister must act within the scope of the Act and cannot simply obtain National Assembly permission to proceed otherwise. Accordingly, we are of the opinion that this does not meet constitutional muster.
29. Section 17 (new section 106(1A)): The language used in this section must be amended as it is not correct to say that the credit provider and consumer “enter into credit life insurance”. The credit provider is not the insurer and therefore does not itself enter into the insurance policy. The section should rather make it clear that credit life insurance is required as a condition to entering into the type of credit agreement concerned. Furthermore the credit provider cannot force the consumer to take out an insurance policy with a particular insurer. Presumably no liability will attach to a credit provider where the consumer has his own credit life insurance at the time of concluding the credit agreement but then subsequently cancels the policy unbeknownst to the credit provider? We earnestly recommend that this clause be presented to the Financial Services board as they are the lead Regulator on Insurance matters and should be consulted when Insurance matters are legislated via the NCA.
30. Section 17 (new section 106(8)(b)): This new subsection *obliges* the Minister (as opposed to simply empowering the Minister) to publish regulations that limit the cost of mandatory credit life insurance contemplated in new subsection 106(1A). It is unclear why the existing credit life regulations that came into force in August 2017 are not regarded as being sufficient in this regard? What more is contemplated here? In any event, it is submitted that the existing provisions of section 106(8) are sufficiently wide to empower the Minister to prescribe the limit in respect of the mandatory cost of credit life insurance as well, so the proposed new wording is unnecessary and should be deleted.
31. Section 18 (new section 129(4)(d): The new subsection states that a credit provider may not revive or reinstate a credit agreement after the NCT has ordered that the credit agreement was reckless. However, a reckless credit agreement may still be enforceable (e.g. if it was only *partially* set aside as contemplated in s83(2)(a), or if it was only *suspended* for a stated period as contemplated in s83(3)(b)(i)). Accordingly, this new subsection should only include agreements that have been declared reckless and set aside in full.
32. Section 19 (new section 130(4)(e)(ii): Similarly, this new subsection should read “*was declared reckless and set aside in full or declared void by the Tribunal, or the Tribunal ordered that…*” If a reckless credit agreement is still partially enforceable (as contemplated in s83(2)(a)) a credit provider ought to be able to enforce those remaining provisions in the event of default by the consumer.
33. Section 21 (new section 142(3A): This proposed new subsection is unnecessary given that it is already catered for in the new section 88C(1). We wish to state once again that it is highly irregular not to obtain a proper response and position from the credit provider so that the NCT can properly consider the matter and to limit the need for unnecessary litigation after the application has been submitted.
34. Section 22 (new section 152(eA) and (eB): Section 152 is necessary to bind, by legislation, certain bodies that are not necessarily party to the litigation before the Tribunal but who may otherwise be faced with the same consumer matter in another forum (e.g. provincial consumer protection authorities, debt counsellors and magistrate’s courts). It is therefore unnecessary for these proposed new subsections to be added; obviously the affected parties themselves who are before the Tribunal (namely the credit provider and the consumer) will be bound by the Tribunal’s ruling; that has always been so.
35. New offences generally:
    1. The Bill introduces a host of new listed offences in a context where, in line with best international practice, the South African legislature has been at pains in the last decade to decriminalise statutory non-compliance in business legislative instruments in favour of more effective means of encouraging lawful conduct (e.g. in the Companies Act, Consumer Protection Act and National Credit Act). The Act envisages a system of *administrative* enforcement instead of criminal sanctions to ensure compliance, and established the NCR and the NCT to drive such enforcement.
    2. It is therefore discouraging to see the legislature taking a step backwards in this regard by seeking to introduce so many new individual offences in the Bill. With the introduction of new offences comes the need for effective enforcement to drive compliance. This will increase the burden on an already over-burdened National Prosecuting Authority and criminal court system, and will place a higher burden of proof (beyond reasonable doubt) for successful prosecution. Criminal matters are also very expensive and time consuming to prosecute to finality and will force credit providers, individuals and directors of companies to litigate to the end as the penalties are so severe. The credit industry, NCR and NCT will be choked by litigation going forward which will not benefit the economy, industry or consumer.
    3. Criminalising non-compliance with statutory obligations does not effectively drive compliance with the statute. The remedies contained in sections 55 (compliance notices) and 151 (administrative fines running up to 10% of the respondent’s annual turnover) are much more efficient and effective ways to incentivise compliance with the Act, together with the other remedies contemplated in section 150 (e.g. cancelling a registrant’s registration, and requiring payment to the consumer(s)).
    4. Furthermore, many of the new offences listed in section 157B already have their own remedies specifically catered for elsewhere in the Act, and some of them are already covered by the existing listed offences in the Act.
36. Section 23 (new section 157A): Both of the proposed new offences related to debt intervention in new section 157A are already covered in the listed offences in 160(2)(a) and (d) of the Act and therefore there is no need to add further unnecessary content and offences to the Act.

Should any of our submissions above be unclear, please let us know and we will gladly supplement them.

Yours faithfully,

**Patricia Pillay**Head Consumer Goods Industry Affairs

1. Attached as Schedule 4 is a more detailed explanation of how these figures (referred to here and elsewhere in these submissions) were arrived at. Schedule 4 also encloses an example of one of the five years of NCR Quarterly Consumer Credit Market reports (the one for Quarter 4 of 2016) from which we extracted data to arrive at these figures. If you require any further information in this regard, or a more detailed explanation, please let us know and we will gladly provide it. [↑](#footnote-ref-1)