To: **The Portfolio Committee on Trade and Industry**

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For Attention: **Mr A Hermans**

**SUBMISSIONS: DRAFT NATIONAL CREDIT AMENDMENT BILL, 2018**

1. INTRODUCTION
   1. We refer to the invitation to comment on the draft National Credit Amendment Bill 2018 (“**the Bill**”) published on 24 November 2017 in terms of Government Gazette No 41274.
   2. The Large Non-Banking Lenders Association ("**LNBLA**") is a voluntary association that represents various credit providers providing credit to consumers under the National Credit Act 34 of 2005 ("**NCA**" or “**the Act**”) with a total book size of approximately R32 billion. The LNBLA members include, amongst others,
      1. Sanlam Personal Loans (Pty) Ltd
      2. Old Mutual Finance (RF) (Pty) Ltd
      3. RCS Cards (Pty) Ltd
      4. Real People Home Finance (Pty) Ltd
      5. Bayport Financial Services 2010 (Pty) Ltd
      6. HomeChoice Holdings (Pty) Ltd.
   3. The LNBLA welcomes the Bill insofar as it wishes to address over indebtedness and aims to introduce measures aimed at curbing reckless lending. The LNBLA, however, has serious concerns regarding certain aspects of the Bill and particularly the severe impact that it will have on the unsecured credit industry as a whole. We believe that the Bill will introduce the potential for systemic risk and may ultimately lead to a situation where a substantial portion of credit consumers will face additional challenges to obtain affordable credit. This is not in line with the purpose of the NCA – which specifically provides for access to credit by previously disadvantaged consumers.
2. EXECUTIVE SUMMARY: PRINCIPAL SUBMISSIONS
   1. The introduction of debt intervention measures as envisaged by the Bill will have a severe impact on the unsecured credit industry as a whole. Systemic risk will be created. In addition, credit providers in the unsecured lending space may not be able or willing to service a class of lower income consumers who should in actual fact qualify for credit. Please refer to paragraph below for a more detailed discussion.
   2. The notion that credit provider’s assets must be sterilized under circumstances where credit providers have complied with the Act, were not reckless and/or consumers are not over indebted is unacceptable. Please refer to paragraph 3.4 below for a more detailed discussion.
   3. The Bill underestimates the complexity of determining reckless lending. The obligation to consider potential reckless lending practices of third party credit providers as part of the already complex affordability assessment process is therefore problematic. Please refer to paragraph below for a more detailed discussion.
   4. The enforcement provisions of the Bill – including the offences being created and the general regulation of compliance – are based on subjective interpretations of the NCA which may unfairly prejudice credit providers and directors. Please refer to paragraph below for a more detailed discussion.
   5. The proposed credit life provisions may create regulatory uncertainty in relation to maximum premiums and the extent to which a dual dispensation will apply. Please refer to paragraph below for a more detailed discussion.
   6. The Bill requires a free flow of information and communication between various different parties, including credit providers, the NCR, the NCT, credit bureaus and consumers. This will be challenging on a practical level, also considering that in most circumstances, no specific time frames for communication have been specified. Please refer to paragraph below for a more detailed discussion.
   7. We raise further matters of concern of a detailed nature in the Annexure 1 hereto.
3. The severe impact of debt intervention on the credit industry
   1. The Bill proposes assessment and qualification criteria for debt intervention by providing for a closed list of objective requirements that an applicant must meet. Although the intention of the proposed debt intervention provisions seems to be assistance to over-indebted consumers in the lower income sector who cannot afford debt review, over-indebtedness is not in fact a requirement that must be met by a debt intervention applicant. We propose that at the very least, only over-indebted consumers should qualify for debt intervention.
   2. The concerns regarding the process of evaluation include the following:
      1. the assessment will be conducted by a single member of the NCR without specifying any expertise required to fulfil this function;
      2. no provision has been made for explicit timeframes for decisions to be taken;
      3. indeterminate suspension of agreements is provided for; and
      4. in terms of section 88C(4) of the Bill, debts could be extinguished following a 12 - month suspension *“if the financial circumstances of the debt intervention applicant did not sufficiently improve”.* This seems to suggest a subjective approach to determine whether there has been an improvement in the financial circumstances of the debtor, without affording the credit provider an opportunity to participate in the process. Even though the credit provider has no rights to participate, the result of the decision may be a deprivation of assets of the credit provider – in circumstances where the credit provider complied with its obligations in terms of the law. This creates an unfair and unjustifiable position for the credit provider. As referred to in clause above, no provision has been made for credit provider participation in the debt intervention process, including when a decision to extinguish the debt can be made. We propose that provisions for credit provider participation be included in the process, together with recourse following a rejection of an application for debt intervention - particularly if a significant period of time has elapsed under suspension. Consumers should know and understand the consequences of wasting time and money for unfound applications. Section 88C(1) states that an application may be considered by the Tribunal with reference to the documents included in the referral from the NCR only, without further evidence being led. Although the NCR may during the evaluation phase of the application, request information from the credit provider, section 88C(1) does not require it to do so. Therefore, there is no obligation on the Tribunal or the NCR to include credit providers in the process. This raises concerns around access to court and due process principles in terms of our law as well as creating difficulty for lenders to assess the grounds on which they would set down a matter for “reconsideration” [s88C(9)].
   3. We submit that the debt intervention process will create unintended consequences for responsible borrowers, the credit industry and credit providers, which include the following:
      1. The process potentially introduces systemic risk: The Bill impacts on cost provisions that need to be made by business on its income statement, which impacts profitability and sustainability of credit providers. This in turn impacts on the willingness of funders to fund credit providers. The willingness or cost of funding again has an impact on the ability of credit providers to sustain themselves and repay its funders. It also impacts on the ability to write off debt and the tax implications of large volumes of write offs will need to be considered.
      2. Impact on unsecured credit providers exclusively: The proposed debt intervention process will affect the providers of unsecured debt in particular in that the proposed debt intervention process will only apply to unsecured debt. In addition, consumers that have successfully applied for debt intervention will still be able to get access to alternative credit in the form of secured credit agreements and developmental credit.
      3. Impact on responsible consumers - cost of credit and ability to access credit: Risk models will be influenced by the intended debt intervention process in that all consumers that may on the face of it qualify for debt intervention (earning less than R 7500 per month), are likely to be considered higher risk consumers due to the possibility of these consumers applying for debt intervention and credit providers running the risk of having to write off debt incurred by these consumers. This could ultimately lead to a substantial portion of credit consumers that should in theory qualify for credit, not being able to obtain access to credit. The very same people that were intended to benefit from the NCA will be severely prejudiced.
      4. Imbalance between consumer and credit provider rights: The enactment of the NCA was aimed at, inter alia, promoting equity in the credit market and a balance between the respective rights and responsibilities of credit providers and consumers in order to provide a sustainable, effective and accessible credit market. The proposed amendment will not promote equity in the credit market as it will steadily erode the balance between the respective rights and responsibilities of credit providers and consumers. An applicant earning R7500/month with limited assets could have applied at the beginning of 2017 for a small credit line and been approved properly following a full and successful affordability assessment, and be continuously in an up-to-date status on her account, but still qualify to apply for debt intervention without any change in her circumstances.
      5. Debt Counselling: The LNBLA is concerned that a new mechanism is created which will effectively undermine the debt counselling process and the progress made in streamlining debt counselling. Debt counselling fees could have been subsidized through a Government programme. Instead of streamlining and supporting debt counselling, an additional mechanism is introduced – at the cost of credit providers. Unfortunately, the processes are not clear, and the proposed solution is administratively overburdened. In addition, the following should be noted:
      * The proposed amendment to section 86(6) will make it mandatory for debt counsellors to investigate whether a credit agreement “appears to be reckless”. It is uncertain what would qualify a credit agreement as “appearing to be reckless”. This could open the door to frivolous and vexatious requests for documents / records to credit providers or their agents and frivolous and vexatious allegations of reckless lending;
      * The draft debt counselling fee structure published by the NCR together with the fact that debt counsellors could be subjected to a fine if they do not report a suspicion of reckless lending, will result in credit providers being inundated with requests for information / documents / records from debt counsellors in order for the debt counsellors to investigate an alleged reckless credit agreement;
      * Considering that credit providers already have to deal with large volumes of debt counsellors requests on a daily basis and within limited time frames, we submit that having to provide additional information without limitation will be too burdensome on credit providers to sustain. There should at least be a prescribed limitation on the information / documents / records that debt counsellors may request in order to investigate an alleged reckless credit agreement;
      * It is further suggested that (i) reasonable and realistic timeframes be specified and (ii) debt counsellors be required to prove the assessments conducted that resulted in their suspicion that a credit agreement “appears to be reckless”.
4. Constitutional concerns
   1. The LNBLA submits that allowing for a credit provider’s property rights to be suspended, to be reduced in value or extinguished completely, with no fault on the credit provider’s side, would amount to arbitrary deprivation of a credit provider’s right to property. The Constitutional Court have held that the purported rights of a credit provider under a credit agreement is property within the meaning of section 25 of the Constitution of the Republic of SA, 1996.[[1]](#footnote-1) In terms of section 25(1) “no law may permit arbitrary deprivation of property.” The right to property is equally a right of a company as it is a right of an individual.[[2]](#footnote-2) Deprivation of property is arbitrary as meant by section 25 when the law does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.[[3]](#footnote-3) Sufficient reason may be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.[[4]](#footnote-4)
   2. In this regard:
      1. It is submitted that allowing for a credit provider’s property rights to be suspended, to be reduced in value or extinguished completely, with no fault on the credit provider’s side and no consideration as to the consumer’s ability to honour obligations under the agreement, would amount to arbitrary deprivation of credit provider’s right to property;
      2. It is submitted that the proposed powers to be given to the Minister are so widely cast that it would make it impossible for credit providers to price for the risk that such measures may introduce. The powers are not limited to address the plight of the poorest of the poor or over-indebted consumers who are not able to be assisted under current debt relief measures or debt administration or sequestration laws. The powers seem excessive considering that the Minister is not required to follow the Minister of Finance and is not required to conduct a proper regulatory impact ordinary parliamentary process, not clearly required to work in consultation with the assessment prior to introducing debt intervention measures which will result in the deprivation of credit provider’s property. In this respect, it is submitted that the powers are arbitrary and may have unintended disastrous systemic consequences on South Africa’s economy;
      3. The retrospective nature of the Bill in that it affects loans already granted and granted in compliance with the Act, after the fact, is of great concern. Credit providers did not price for debt relief intervention.

4.3 Senior Counsel opinion was obtained that confirmed the LNBLA’s views as set out in this paragraph – please refer to ANNEXURE 2.

1. Considering potential reckless lending practices of third party credit providers AND CAPCITY ISSUES
   1. The Bill introduces a requirement to consider potential reckless lending practices of third party credit providers and to report *suspected* reckless lending of these third- party credit providers. Even though no specific criteria have been specified, non-compliance carries a severe penalty. The underlying problem here is the incorrect assumption that a reckless lending determination is an easy task. A true assessment can only be made on the basis of accurate and up to date “live” bureau information. In the absence hereof, credit providers can only work on the information available from the bureau at the time and develop their own rules, assumptions and models to interpret credit bureau data in a sensible manner. In many instances loans are paid off but credit bureau data is not updated and what appears to be reckless will prove not to be the case. Credit providers will of course not have the data available that third partycredit providers had when they granted a particular loan and therefore they could never be in a position to express judgment on compliance by their peers when granting earlier loans.
   2. From a system’s point of view the technical requirements required to comply with these provisions are very onerous and would require a minimum compliance window of 18 months to adopt, similar to what was required when debt review was introduced and when past affordability assessment changes were introduced.
   3. The capacity of the NCR and NCT to consider reports of suspected reckless lending under the new section 82A is of great concern. In order to assess the recklessness or not of a loan, it is essential that the relevant individuals should have qualifications and expertise in relation to credit data and bureaux practices. The process for reporting has not been specified in any detail, and no time frames are provided for. We submit that the NCR and NCT are already struggling with capacity and they will not be able to service consumers and credit provider in the manner intended by the Bill.
2. enforcement provisions of the bill
   1. The Bill introduces general offences relating to credit agreements, including offences in relation to reckless lending. This is especially problematic, considering that our law is not settled on the criteria for reckless lending. It is also not clear whether the Bill intends for retrospective “punishment” for failure to identity reckless lending by other providers.
   2. The LNBLA therefore strongly opposes the criminalization of credit providers and directors introduced by the Bill. In a worst-case scenario, directors could face imprisonment on the basis of a single (reckless) loan granted on the back of incorrect or incomplete bureau data.
   3. Directors’ duties and responsibilities are already included in the Companies Act which deals extensively with various appropriate remedies, including the possibility to hold a director or prescribed officer personally liable for damages and to declare a person delinquent. It goes against the principles of company law to find directors and prescribed officers personally guilty of an offence when acting in their capacity as directors of a company.
3. credit life provisions
   1. It is regrettable that the benefits of credit life were not appreciated when premiums for credit life were capped and that the benefit of compulsory credit life is only now appreciated. Unfortunately, regulatory uncertainty is created in respect of what is anticipated in relation to maximum premium and the extent to which a dual dispensation will apply. Credit life premiums are capped at a level where there cannot be an expectation for it to be reduced for the more risky segment of the market (loans longer than 6 months under R50000). There is a problem with the scope of regulation. Credit life for a specific segment of the market is required to be in place, it must have certain benefits and it must not cost more than a prescribed cap. This is potentially very onerous for credit providers whose core product is credit, not credit life insurance. It is akin to requiring that every appliance sale at a retailer must have an extended warranty attached, without differentiation. The basis for requiring a credit provider to insist on credit life in the case of a credit card for a retired person who has significant assets is not clear. Policies are furthermore issued by insurers who are subject to risk related statutory requirements.
4. Information and communication
   1. The Bill envisages the free flow of consumer credit information by e-mail. There is a need for more secure channels of communication, on-going follow-ups, keeping of diaries. Changes will be required at SACRRA and Bureau level to note consumers subject to the debt intervention process. It would not be possible for a credit provider with no exposure to a consumer, to identify whether a debt intervention application is pending. It is not practical that each provider keeps its own tags or code to derive conclusions. As we learned from debt counselling, the changes to and development of systems to accommodate the flow of information envisaged by the Bill would require considerable time and money to implement.
   2. The LNBLA proposes that credit bureaus should receive reports relating to the applications for debt intervention as soon as the consumer applies with the NCR (so as to prevent the consumer from becoming further financially distressed and over-indebted) and the status of debt intervention applications (for example, when the debt intervention order is granted by the NCT or when the debt intervention status must be removed). In this regard, the proposed sections 88B(1)(b) and 88(8)(b) do not provide a specific timeline within which the NCR is required to report debt intervention applications and orders to the bureaus and the Bill does not provide for the reporting of rejected applications of rehabilitation orders.
   3. In order to ease the administrative complexity of the Bill, Guidelines or draft regulations will be required on the:
      1. manner and form of the debt intervention application by the consumer to the NCR;
      2. exact information which must support a debt intervention application by a consumer to the NCR;
      3. manner and form in which the NCR must notify credit providers and credit bureaus of the debt intervention application;
      4. manner and form of notification by NCR to credit providers and credit bureaus of the debt intervention orders granted by the Tribunal.
5. conclusion and proposals
   1. The Bill in its current format will have a detrimental effect on the unsecured credit industry.
   2. The LNBLA therefore proposes that at the very least, the following should be considered:
      1. Debt intervention qualification criteria to be amended and be strictly limited to over indebted consumers with strict criteria to prove the debt intervention case;
      2. Process to allow for participation by credit providers;
      3. Debt never to be extinguished and a maximum intervention of 12 months allowed to reduce the potentially for systemic risk;
      4. Criteria for suspected reckless lending to be reported by debt counsellors to be specified. No reporting by credit providers;
      5. No offences for directors;
      6. No compulsory prescribed credit life with unrealistic caps for specific segments of the market;
      7. No sterilisation of assets where credit providers were not reckless and acted in compliance with the NCR;
      8. A detailed process, including time lines for information and responses to be received by the relevant parties;
      9. Measures be taken to ensure the NCR and NCT have the necessary capacity and expertise to make decisions affecting credit providers.
   3. Ultimately the LNBLA is of the view that whilst the intention to assist consumers in financial difficulty is good, the mechanism proposed to achieve the objective is flawed and the preferred option would be to support, streamline and broaden the debt counselling process. It should also be said, respectfully so, that it is difficult to promote responsible borrowing in a context where consumers effectively get a message that they do not need to borrow responsibly because Government will come to their rescue because it will effectively cause credit providers to write off debt or remove credit information from bureaux.

Kind Regards

Rudolph Willemse

Chairperson: LNBLA

**ANNEXURE 1**

**ADDITIONAL MATTERS OF CONCERN**

1. **Prescription**

Credit providers will be challenged to determine prescription in the context of various suspensions. It is proposed that once a suspension is lifted, credit providers should be allowed a reasonable time to collect the debt.

1. **NCT members**

It is of concern that one member of the NCT can make a determination and issue an order, which order can have a material impact on lenders.

1. **Information provided to the credit provider**

Despite the requirement that an application must be supported by proven expenses [s88A(4)(a)], in terms of s88B(1)(c), the NCR need only provide credit providers with a summary of the applicant’s income, assets and liabilities. It does not require the NCR to provide a list of the applicant’s expenses. A DSTV account, for example, is neither income, asset nor liability. We propose that credit providers also receive information on expenses.

1. **Vagueness of definition and determination of “realisable assets”**

The definition includes for example the following elements: “swiftly converted to cash”, “reasonably reflects the second-hand market value”, exclusion of “necessary” assets, in cases where assets exceed R10 000 the determination of which assets are/aren’t realisable etc. It is not clear how and by who these determinations will be made and whether it will be made subjectively or objectively?

1. **Discrimination with regards to definition of “debt intervention applicant”**

The Draft Bill limits the applicability of debt intervention regulations to only South African citizens or permanent residents, whereas the right to apply for credit under the Act is afforded to every adult natural person. Such a limitation in the Bill seems unjustifiably discriminatory.

1. **Section 88C(5)(c) – “conditions to any credit agreement”**

This clause allows the NCT to set conditions to any credit agreement that qualified for debt intervention – no limit or guidance on the conditions appears to be provided. The Bill does not even limit these conditions to the provisions of the credit agreement that are relevant in terms of the intervention proceedings.

**ANNEXURE 2**

**COUNSEL OPINION**

**EXECUTIVE SUMMARY**

* 1. In summary, this opinion expresses my view that the provisions in the Bill relating to applications for debt intervention are unconstitutional.
  2. This is because these provisions:
     1. Amount to arbitrary deprivation of property in contravention of section 25 (1) of the Constitution, which is not justifiable in terms of section 36 of the Constitution, because:
        1. They are - without sufficient justification - retrospective in effect;
        2. The criteria in terms of which debt intervention applications are granted:
           1. Are not rationally related to the purpose of assisting over-indebted persons, as they refer to such person’s income and assets only, and not their expenses, an essential component in assessing over-indebtedness;
           2. Are overbroad, in that they include many persons who could not be described as over-indebted, and thus operate unfairly to credit providers;
           3. Contain perverse incentives and unintended consequences which run counter to the stated aims of the Bill and the NCA, thereby also creating a significant moral hazard; and
           4. Are procedurally arbitrary.
     2. Constitute infringements of the dignity of relevant credit consumers, in that they treat such consumers as unable to manage their finances merely because they have relatively insignificant incomes and no realisable assets, and in doing so, affect their ability to access credit in the future.
     3. Constitute unjustifiable infringements of the right of credit providers to have disputes resolved by the application of law before an independent and impartial tribunal, in particular in that there is an absence:
        1. of any real discretion on the part of the Tribunal; or
        2. any provisions enabling a credit provider to make representations, or lead any evidence to meaningfully affect the Tribunal’s discretion.

1. National Credit Regulator v Opperman 2013 (2) BCLR 170 (CC) [57] [↑](#footnote-ref-1)
2. First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC) [44 -45] [↑](#footnote-ref-2)
3. First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC) the Constitutional Court stated [100] [↑](#footnote-ref-3)
4. First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (CC)the Constitutional Court stated [100] [↑](#footnote-ref-4)