180731 pc Trade

Summary of submissions – National Credit Amendment Bill – clauses that were advertised in May 2018

1. Introduction

The Portfolio Committee on Trade and Industry published the following clauses of the Draft National Credit Amendment Bill, 2018 and the Memorandum on the Objects of the Bill for public comment on 28 May 2018:

- Clause 12(b) regarding the powers of the Court to reduce interest rates, charges and fees to zero for the period in 86A(6)(d) (5 years).
- Clause 29(a) in respect of the consultation between the Minister of Trade and Industry and the Minister of Finance on funding for financial literacy and capability programmes.
- Clause 29(b) in respect of the new subsection (2B) regarding an adjustment to[1]—
    - the maximum gross income figure (clause 1 – definition of "debt intervention applicant", par (b)) in respect of the longer term debt intervention measure set out in clause 13 – section 86A(6)(d) read with clause 14(b) – section 87(1A); and
    - the maximum total unsecured debt (clause 13 – section 86A(1)) in respect of the longer term debt intervention measure set out in clause 13 – section 86A(6)(d) read with clause 14(b) – section 87(1A).

Members of the public were invited to submit written comment on these clauses only by 11 June 2018. This summary provides an overview of the submissions received in relation to the abovementioned clauses. However, it does not capture any inputs that fall outside the advertised mandate.

2. List of stakeholders

The Committee received written submissions from the following ten stakeholders:

- Banking Association of South Africa (BASA)
- Black Sash
- Consumer Goods Council of South Africa (CGCSA)
- COSATU
- Debt Counsellors Association of South Africa (DCASA)
- First Rand Bank Limited (FRB) (Annexure A)
- Large Non-Bank Lender Association (LNBLA)

[1] This adjustment of the longer term debt intervention measure must be read with clause 13 – section 86A(12)(a) and clause 15 – section 87A, which clause shows that in respect of the shorter term measure as set out in section 87A, the amounts above may not be adjusted.

Matter	Proposed wording	Comments
		One of the concerns for a court to reduce the fees is that this includes credit life insurance which is merely collected on behalf of an insurer. This would effectively mean that only a portion of the premium can be transferred to the insurer and the insurance would lapse. Alternatively, they propose that: • The term of the interest, fees and charges reduction should be shortened and that the Minister may not extend same by way of regulation. • The clause should be subject to the affordability and eligibility criteria for concessions as envisaged in the TTA, as well as including the mandatory sale of certain assets like luxury items. • The debt counsellor, NCR, NCT and Magistrates' Court should be provided with clear guidance as to how interest, fees and charges should be reduced – that is incrementally and proportionately. • The reduction of interest, fees and charges should be fair and credit providers should be treated in a fair and reasonable manner taking into consideration whether credit agreements are secured or unsecured. • Secured credit agreements – like mortgage agreements and vehicle asset finance agreements should be excluded from the ambit of this clause. • There must be a floor limit to the reduction of interest, which must be higher than zero and which must be sufficient to cover the credit provider's cost of funding, capital provisioning cost and operating cost relating to the credit agreement. **Black Sash**: They welcome the amendment for court intervention because it provides an opportunity for the debtor to have recourse where there has been reckless lending on the part of the credit provider. Providing a recourse mechanism through the courts will provide more easy access to refer complaints. They recommend that the provision must elaborate on the procedure, the implication of legal costs and the liability for costs where the court intervenes, so that consumers are not penalised when credit is issued unlawfully and without informed consent to the most vulnerable, desperate and poor.

Matter	Proposed wording	Comments
		COSATU: No objection. **DCASA**: They strongly support the intention to allow the amendment of interest and fees in Debt Review and Debt Intervention matters, as it is essential to provide effective debt relief in line with the goal of the Bill. In order to remove any ambiguity, they recommend that the construct of (ccA) be improved. The Debt Review Process will benefit from this amendment, as debt Counsellors will continue to determine the affordability of Consumers and then apply (ccA) in the Debt Review system. All Debt Review systems will be able to incorporate (ccA) in their systems in a very short space of time. The insert of (ccA) to the Debt Review Process will make a significant impact on the Debt Counsellor's ability to assist Consumers and to reduce the rehabilitation period. The proposed (ccA) in Debt Review Applications can further be motivated by the principle of appropriate burden sharing. The Affordability Assessment conducted by Debt Counsellors will determine the appropriate debt repayment capacity and implementing (ccA) will shift some of the burden to Credit Providers while ensuring capital repayment by the Consumer. According to their calculations, if a Consumer can make repayments at 19% of their income, most applicants would be able to pay R50 000 debt within 60 months with (ccA) implemented. However, if this repayment is lowered to 12% then most would take longer than 60 months with (ccA) implemented. They therefore recommend that (ccA) would apply for 60 months and thereafter normal interest rates and charges should apply. **FRB**: They do not support this proposed amendment as, its scope is extremely broad and would not balance the rights and obligations of consumers and credit providers, as it would encapsulate: • All over-indebted consumers in debt review and debt intervention; • All credit agreements, including secured and unsecured; and • It would impact wealth creating credit agreements like mortgage agreements and vehicle and asset finance agreements.

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		LNBLA: This will constitute deprivation of property. This is not subject to a credit provider being at fault or providing credit recklessly or whether the consumer is able to afford paying interest and fees. They are of the view that the debt review process works well and does not deprive credit providers of their rights in terms of the credit agreement entered into. A similar approach should therefore be followed for lower income consumers. Credit providers should be allowed to make representations to the court or the NCT before such a determination can be made. This would further discount the cost of providing credit and maintaining these agreements and could sterilise its ability to do business. **MFSA**: They submit that Courts should not be allowed to exercise broad and unrestricted powers in respect of credit agreements without the appropriate guidance and criteria for assessing the merits of granting the extent of such concessions. The insertion of this provision enables Courts to further reduce the consumers' financial obligations when these have already been restructured under the debt counselling framework. They propose that should Courts be enabled to make such a determination that this is undertaken with due consideration of the consumer's circumstances including their performance to date, under debt counselling. Accordingly, if consumers have demonstrated that they are able to meet their financial obligations as restructured under debt counselling, there is in principle no need to further reduce and eliminate their obligations entirely. **NCRF**: This provision is contrary to common law, particularly the sanctity of contracts and will have a negative impact on credit providers. Reducing the interest rate to less than what was agreed may lead to the costs of credit in general increasing across the credit granting industry as credit providers will need to factor in the possibility of not being allowed to charge interest and fees for an extended period once a consumer applies for debt counselling or debt intervention. The court should factor in representations by the credit provider and the possibility of the consumer being able to rehabilitate. The draft Bill thus needs to be clear that once a consumer rehabilitates, the terms of the credit agreement as it relates to interest and fees will be re-instated.

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		CGCSA: While they wholly support the rolling out of financial education and counselling programmes to consumers, they are concerned on how the NCR proposes to staff and fund the counselling and training programme. The NCR's existing, strained capacity will have to be significantly increased to adequately deal with the proposed new aspects. Based on the introduced sub-section, it appears that there is no current plan for how these initiatives will be funded or rolled out, which is concerning, as the legislation makes certain counselling and training mandatory. This aspect should be included in the scope of the Impact Study, and the results of such study closely assessed before introducing compulsory legislative obligations that cannot practically be met. **COSATU**: No objection. **DCASA**: Offering financial literacy training and advice at the point when Consumers experience financial stress is, based on their extensive experience, very effective and lasting. To implement financial literacy training and advice therefore could be very effective if Consumers are contacted when they are experiencing or about to experience financial stress. If the Consumer is contacted at that point they are very likely to accept financial advice from a trusted independent Coach to identify and fix their cash flow problem. This early intervention will assist more than 80% of Consumers to fix their money problem by amending spending behaviour. Based on the above, they recommend that compulsory proactive intervention is implemented at point of default. This can be funded by a small levy for instance on Debit Orders or Credit Agreements. **FRB**: They support this proposed provision. **MFSA**: They are of the view that the DTI and the NCR should assume the responsibility and thus the costs of financial literacy and capability programmes which should benefit all consumers. These programmes should not only be preserved or made available for consumers who have qualified for and entered into debt interventions measures.

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		to manage debt intervention. A "debt management agency" could be established to oversee the Financial Literacy or Financial Capability Programme Fund, so that the powers between the regulator and the management and oversight of a fund can be separated.
Clause 29*(b)* iro the new subsection (2B) regarding an adjustment to-- - the maximum gross income figure (clause 1 – definition of "debt intervention applicant", par *(b)*) in respect of the longer term debt intervention measure set out in clause 13 – section 86A(6)*(d)* read with clause 14*(b)* – section 87(1A);	<u>(2B) *(a)* The Minister may, by notice in the *Gazette* and after having considered the following factors, adjust the amount contemplated in section 1 in respect of the maximum gross income of a debt intervention applicant:</u> <u>(i) the gross income required by a consumer to be an economically viable client for a debt counsellor as at the time of the proposed adjustment;</u> <u>(ii) the cost associated with an administration and sequestration order as at the time of the proposed adjustment; and</u> <u>(iii) inflation.</u>	**BASA**: S 171(2B) creates uncertainty around the category of persons (in terms of gross income) that may be included in debt intervention. This will make it difficult for credit providers to plan in terms of lending and determining the associated credit risk. If sudden large changes are made to the gross income amount threshold; credit scoring systems may not be aligned resulting in credit providers reaching inaccurate credit assessment outcomes. Credit providers will have to adjust their credit appetite and lending practices which could result in the access to responsibly granted credit reducing – including credit used for wealth creation like mortgage agreements. They are of the view that the Minister should not be granted this authority, as it is too broad, rather that the Minister should be required to give effect to this authority within the purposes of the NCA. The factors the Minister must consider in this regard should include: • To ascertain the impact on the credit market and credit industry (including the sustainability of the credit market); • The balancing of the rights and obligations of consumers and credit providers; • To ascertain the impact on already established contractual rights of credit providers; • To ascertain the impact on the greater economy (including the access to credit); • The availability or reform of other debt intervention mechanisms for these consumers; • To publish the proposed adjustment in the Government Gazette for public comment; and • To consult with the credit industry regarding the proposed change. All these proposed steps must be undertaken prior to the adjustment being approved by the National Assembly. They also propose that the Minister be required to commission and obtain an impact assessment from a macro and micro economic perspective and commission an assessment on the impact of the proposed adjustments. The impact assessments should be published along with the proposed

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		DCASA: If Clause 12(b) (regarding the powers of the Court to reduce interest rates, charges and fees to zero for the period in 86A(6)(d) (5 years)) is introduced for Debt Intervention and Debt Review, the proposed maximum gross income and total unsecured debt figures are only relevant to determine which Consumers are provided with assistance at no cost. This could also affect the level at which subsidised access is required. **FRB**: Contrary to the purpose of the Act (see Section 3) the proposed provision provides the Minister with broad authority to alter the legislated debt intervention in such a way that future credit lending would be negatively impacted without requiring consultation with those stakeholders impacted. They do not support this proposed provision and would propose its removal. However, should it be retained, then: The Minister should consider the following: • The impact on the credit market and credit industry (including the sustainability of the credit market); • The balancing of the rights and obligations of consumers and credit providers; • The impact on already established contractual rights of credit providers; • The impact on the greater economy (including access to credit); and • The availability or reform of other debt intervention mechanisms for these consumers. The proposed clause should require the Minister to publish the proposed adjustments in the Government Gazette for public comments and consult with the credit industry in this regard. **LNBLA**: They do not support this amendment, as such regulation does not call for public consultation even though the National Assembly must be consulted. Broadening the criteria to qualify for debt intervention will create uncertainty, as it will deprive the right to property being afforded arbitrarily. Therefore, credit providers will not be able to determine credit risk effectively. **MFSA**: The powers for the Minister to adjust both the maximum gross income and total unsecured debt cannot be justified on the basis of inflation considerations. Furthermore, a consumer's monthly

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		The provision for the adjustment of both the maximum gross monthly income and total unsecured debt presents an unquantifiable risk specifically to micro-financiers that only offer short-term unsecured loans. **NCRF**: The extinguishment of debt (and cost of credit such as interest or fees) owing to credit providers in terms of this Bill, is arbitrary as it is not based on facts which confirms that over-indebtedness is solely caused by credit providers. The State will have to subsidise debt interventions as none of these circumstances are a result of any wrongdoing by credit providers who already follow what is set-out in current legislation and should reimburse credit providers for the loss of debts and for any tax paid over to the fiscus in this regard. Furthermore, there is no research undertaken to determine that the Minister must acquire such powers and it appears that the NINA debt relief programme applied in New Zealand and India did not include this. A further concern is that the Minister may amend such amounts without first having to go through a public participation process. Obtaining the approval of the National Assembly does not confirm that public participation will be done by way of invitation for verbal or written comments. Lastly, the credit provider industry must be given 60 business days to comment on any draft regulations. **Nedbank**: This creates uncertainty and inconsistency in the Act on how pricing should be determined. Wider criteria should be considered in determining adjustments.
Clause 29*(b)* iro the new subsection (2B) regarding an adjustment to-- - the maximum total unsecured debt (clause 13 – section	*(b)* The Minister may, by notice in the *Gazette*, adjust the amount of the qualifying total unsecured debt contemplated in section 86A(1), after having considered the effect inflation	**BASA**: They are not in support of the Minister being empowered to adjust the maximum amount of total unsecured debt for legislated debt intervention. If the total unsecured debt amount increases, credit providers may be forced to reconsider their involvement in this market. If this is to be retained, they propose including the factors mentioned above. **Black Sash**: They acknowledge the right of the Minister to adjust the amount of the qualifying unsecured debt considering inflation, which will widen the net for people qualifying for debt review.