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The Honourable Ms N Bhengu
Chairperson of the Portfolio Committee on Transport
Parliament of the Republic of South Africa
PO Box 15
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Cc: Valerie Carelse
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Dear Ms Bhengu

LEGAL OPINION: TRANSPORT LAWS AND RELATED MATTERS AMENDMENT BILL [B30-2012]

INTRODUCTION

1. The Transport Laws and Related Matters Amendment Bill [B30-2012] ("the Bill"), was introduced in Parliament on the 4 October 2012 and is currently before the Portfolio Committee on Transport ("the Committee"). During the deliberations in the Committee on 19 February 2013, the Committee requested an opinion as to whether the National Credit Act, 2005 (Act No. 34 of 2005) ("the NCA"), is applicable to the collection of toll.

DISCUSSION

The purpose of the Bill is to provide more effectively for the collection of toll and to facilitate effective law enforcement in relation to toll roads. The levying of toll is provided for in section 27 of The South African National Roads Agency Limited and

National Roads Act, 1998 (Act No. 7 of 1998) ("SANRAL Act"). The tolls are payable at a toll plaza by the person driving or using the vehicle, or by means of pre-payment.

Toll is not defined in the SANRAL Act. Toll is defined in the dictionary as "an amount of money levied, especially for the use of certain roads, bridges etc., to cover the costs of maintenance."¹ The South African National Road Agency Limited ("SANRAL") is in charge of the financing, management, control, planning, development, maintenance and rehabilitation of the South African National Roads system.² The Bill also seeks to provide that the amount of toll that may be levied for the use of a toll road may differ in respect of the means of payment, including pre-payment of toll liability and the means by which the passage of a vehicle beneath or through a toll plaza is identified and the liability to pay toll is recorded.³

SANRAL has advised that the conventional toll collection does not create any issues relating to the NCA as it is collected at a plaza and the late payment of toll is not possible. The proposed electronic tolling is a prepaid system and SANRAL does not extend credit to road users. SANRAL has also advised that 'the toll roads have road signs warning road users that they are entering a toll road and that they will be liable to pay tolls if they continue on the road. Road users may register to obtain an e-tag and receive a discount or register on their vehicle licence number and pay the standard tariffs. Occasional road users may register for a day pass that is also pre-paid to allow them on the toll roads for a 24 hour period. A road user can then elect to continue or to leave the road. Payment within the grace period is regulated by regulations. A seven day grace period for the payment of tolls is provided for to enable road users to pay the tolls after incurring the liability to pay tolls.'⁴

National Credit Act

Section 4 of the NCA provides that the NCA is applicable to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, with certain exceptions specified in section 4(1)(a)-(d), and subject to sections 5 and 6 of the NCA.

Section 8 of the Act defines **credit agreement** as follows:

(1) Subject to subsection (2), an agreement constitutes a credit agreement for the purposes

¹ Page 1620 Collins English Dictionary, Third Edition

² Section 2 of SANRAL ACT

³ The proposed section 27(3)(b)(v) and (vi)

⁴ SANRAL response to queries put to them by the Office of the Chief State Law Adviser

of this Act if it is—

- (a) a credit facility, as described in subsection (3);
 - (b) a credit transaction, as described in subsection (4);
 - (c) a credit guarantee, as described in subsection (5); or
 - (d) any combination of the above.
- (2) An agreement, irrespective of its form, is not a credit agreement if it is—
- (a) a policy of insurance or credit extended by an insurer solely to maintain the payment of premiums on a policy of insurance;
 - (b) a lease of immovable property; or
 - (c) a transaction between a stokvel and a member of that stokvel in accordance with the rules of that stokvel.
- (3) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4 (6) (b), constitutes a credit facility if, in terms of that agreement—
- (a) a credit provider undertakes—
 - (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
 - (ii) either to—
 - (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or
 - (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
 - (b) any charge, fee or interest is payable to the credit provider in respect of—
 - (i) any amount deferred as contemplated in paragraph (a) (ii) (aa); or
 - (ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.
- (4) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is—
- (a) a pawn transaction or discount transaction;
 - (b) an incidental credit agreement, subject to section 5 (2);
 - (c) an instalment agreement;
 - (d) a mortgage agreement or secured loan;
 - (e) a lease; or
 - (f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of—
 - (i) the agreement; or
 - (ii) the amount that has been deferred.
- (5) An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.
- (6) If, as contemplated in subsection (1) (d), a particular credit agreement constitutes both a credit facility as described in subsection (3) and a credit transaction in terms of subsection (4) (d)—
- (a) subject to paragraph (b), that agreement is equally subject to any provision of this Act that applies specifically or exclusively to either—
 - (i) credit facilities; or
 - (ii) mortgage agreements or secured loans, as the case may be, and
 - (b) for the purpose of applying—
 - (i) section 108, that agreement must be regarded as a credit facility; or
 - (ii) section 4 (1) (b) read with section 9 (4), that agreement must be regarded as a large agreement if it is a mortgage agreement.

Taking into account the aforesaid we are satisfied that the collection and levying of tolls does not fall within the ambit of "credit agreement" as provided for in section 8 of the NCA.

Section 1 of the Act defines incidental agreement as follows:

"incidental credit agreement" means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

(a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or

(b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.

Underlining is our emphasis indicating the relevance to the collection of tolls.

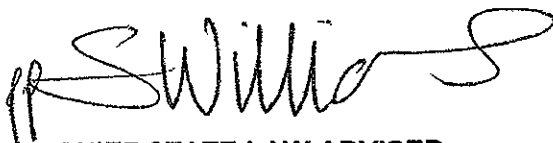
Section 5 of the NCA provides for the limited application of the NCA to incidental credit agreements and that the parties to the incidental credit agreement are deemed to have made that agreement on the date of 20 days after the supplier of the services first charges a late payment fee in respect of that account or a pre-determined higher price for full settlement of account first becomes applicable, unless the consumer has fully paid the settlement value before that date. We are of the view that section 5 of the NCA is applicable to the recovery of outstanding toll monies.

CONCLUSION

Clause 6 of the Bill seeks to amend the heading of section 60 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998) ("SANRAL Act"), and to provide for the exclusion of the SANRAL Act from the ambit of the NCA, in relation to the levying and collection of toll. This exemption will therefore seek to exempt incidental credit agreements which may occur when tolls are collected from the toll road user after he or she has used a toll road and has not prepaid the toll fees.

We are available to discuss any aspect of our opinion.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Williams', with a stylized flourish at the end.

CHIEF STATE LAW ADVISER

S. WILLIAMS