

7 December 2012

Secretary of Parliament  
Room V20  
Old Assembly Building  
Parliament Street  
P. O. Box 15  
Cape Town  
8000

Dear Sir

**NOTICE 941 OF 2012 (Government Gazette 35876 dated 16 November 2012) - INVITATION TO COMMENT ON DRAFT NATIONAL CREDIT ACT AMENDMENT BILL**

1. Thank you for the opportunity to make representations prior to the introduction of the draft Bill.
2. While paragraph 5, below, deals with the substance of the two amendments contained in the Bill, paragraphs 3 and 4 provide a brief history of the National Credit Act (“the Act” or “NCA”), particularly in relation to debt review, and a synopsis of the initiatives by credit providers since 2010 to facilitate consensual debt resolutions through the NDMA. In view of the history and initiatives discussed, we request, in conclusion of this overview, that Parliament awaits the outcome of a policy review currently underway at the Department of Trade and Industry, and not proceed with amendments to the NCA at this time.
3. *History of debt review since inception of the NCA*
  - 3.1. The National Credit Act was signed into law in March 2006.
  - 3.2. One of its objectives is to provide for a “harmonised system of debt restructuring, enforcement and judgment, which placed priority on the eventual satisfaction of all responsible consumer obligations under credit agreements” (section 3(i) of the NCA).
  - 3.3. The Act introduced debt review as an alternative to the standard mechanism of debt recovery through legal process. The debt review process is set out in sections 86 and following, of the Act.
  - 3.4. The financial crisis of 2007 to 2009 revealed serious defects in certain of the features of the debt review provisions. Foremost among these were –
    - 3.4.1. no selection criteria by which to disqualify unsuitable candidates from debt review ;
    - 3.4.2. over-reliance on and inadequate qualifications standard for debt councillors;
    - 3.4.3. over-reliance on the Magistrates’ Courts to resolve over-indebtedness (capacity constraints meant that fewer than 10% of applications received in the crisis period could be handled);

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- 3.4.4. no express provision or incentive for a debt resolution by consent between the parties.
- 3.5. As a consequence of these and other factors, a backlog of R 27 billion in value of unresolved debt reviews had built up in the banking sector by 31 July 2010.
- 3.6. Late in 2009, in response to the systemic crisis that was then looming on account of these problems, the National Credit Regulator convened a Task Team to find workable solutions.
- 3.7. The Task Team was comprised of representatives of the various parties involved in debt review, namely debt counsellors, credit providers, and payment distribution agencies.
- 3.8. In May 2010, the Task Team published its recommendations. The most important of these recommendations that have been implemented since that time, are –
  - 3.8.1. agreed industry norms and procedures to speed up the submission of debt restructuring proposals;
  - 3.8.2. a set of rules for debt restructuring, which includes the forfeiting of interest where necessary, to achieve affordability;
  - 3.8.3. rules and processes for resolving over-indebtedness by consensus outside of the Courts;
  - 3.8.4. the implementation of Codes of Conduct by debt counsellors and credit providers to enforce responsible behaviour by members of these sectors.
- 3.9. An important consequence of these initiatives has been a very significant decline in the number of debt review matters that require a hearing before a Magistrates' Court, and a very sharp increase in the number of matters resolved by consensus.
4. *Credit industry initiatives in debt resolution and the role of the NDMA*
  - 4.1. The NDMA was established in 2008 and officially launched in May 2009, initially to co-ordinate the efforts that were required from credit providers in order to implement debt review as introduced under the Act.
  - 4.2. The NDMA's members include most of the registered banks, retailers that sell on credit, motor financing houses, and micro-finance providers.
  - 4.3. Since May 2010, the NDMA has also been the vehicle through which the credit industry has implemented the voluntary concessions and processes, agreed to by representatives on the NCR Task Team, and to give effect to the Task Team recommendations.
  - 4.4. The NDMA currently facilitates an average of 3193 debt review applications containing an average of 32084 credit agreements per month through a specialised system that automates the acceptance of debt restructuring proposals, and binds credit providers to the outcome when proposals meet with certain criteria.
  - 4.5. Since April 2011, a minimum of 28 968 applications for debt review have been resolved in this manner, that is in excess of seventy percent (70%) of 48 483 applications captured for a limited period of only 20 months. Compared to a much longer period of July 2007 to Feb 2012 only 39306 orders (as reported by the NCR) were made by Magistrates' Courts over a much longer period of fifty seven (57) months. The contrast is even greater in view of the fact that a percentage of the cases brought before the Magistrates' Court is merely for the ratification of matters already resolved by consent.

- 4.6. Credit providers affiliated to the NDMA have forfeited monthly fees and charges as well as contractual interest due by means of concessions made. These concessions include the reduction of interest: on unsecured agreements concessions of down to zero percent were granted, and for secured agreements an interest rate reduction of down to repo rate plus two percent. These concessions were made in order to facilitate the resolution of over-indebtedness and rehabilitation of consumers who could otherwise not afford to repay contractual obligations.
- 4.7. The maximum time taken to finalise a consensual resolution is 39 days, compared to periods of up to 18 months for matters referred to the Magistrates' Court.

## 5. *NDMA response to proposed amendments*

- 5.1. From the history and overview set out above, it will be clear that there have been significant developments in practice beyond the processes originally envisaged under section 86 and following of the NCA.
- 5.2. Some of the debt review process details in section 86, and other provisions of the Act remain highly problematic.
- 5.3. It seems to us that the amendments proposed in the Draft Bill achieve little more than a "tweaking" of a fundamentally flawed process.
- 5.4. Partly in response to some of the factors mentioned above, the Department of Trade and Industry has commissioned a comprehensive policy review into consumer credit and the impact of the NCA. This review is well advanced.
- 5.5. The NDMA would consequently urge Parliament to wait for the outcome of the Review, before considering interim amendments to the Act.
- 5.6. If amendments are proposed at the conclusions of the Review, these should be the outcome of a broad consultation, and subjected to a stringent impact assessment.
- 5.7. The problems of the recent past have demonstrated the impact that consumer credit legislation can have on the credit industry and on the broader economy, and a degree of caution in the further development of consumer credit regulation is therefore justified.
- 5.8. In case Parliament decides to proceed with the proposals at hand, we comment as follows on the two amendments proposed –

### 5.8.1. Proposed amendment of the definition of 'consumer' under section 1 of the NCA:

- 5.8.1.1. The NDMA agrees that some difficulty has been experienced in the case of business transactions.
- 5.8.1.2. Section 4(1)(a)(i) provides that the Act does not apply to a credit agreement in terms of which the consumer is a juristic person, where that consumer has an asset value or annual turnover in an amount determined by the Minister.
- 5.8.1.3. By virtue of section 6 of the NCA certain chapters of the NCA do not apply to any credit agreement in terms of which the consumer is a juristic person, with no further requirement as to asset value or annual turnover.
- 5.8.1.4. We propose that the problem of 'business to business' transaction can be adequately dealt with within the ambit of these sections as they are currently worded. If necessary

the qualifying thresholds in section 4(1)(a)(i) could be lowered by proclamation, without the need for an amendment to the Act.

5.8.2. With regard to the proposed amendment of section 86 of the NCA:

- 5.8.2.1. The NDMA agrees that there are many obstacles to a successful debt resolution through the Magistrates' Court, as required under section 86.
- 5.8.2.2. The NDMA would prefer a change of focus however, in which debt resolution by consensus becomes the norm.
- 5.8.2.3. In such a case, interest forfeits and other concessions are made on a voluntary basis and the solution is agreed to between credit providers, instead of being enforced against them.
- 5.8.2.4. We believe that a consensual resolution of over-indebtedness agrees with the objectives of the NCA as set out in section 3 of the Act.

We thank you again for the opportunity to make representations at this time.

Yours faithfully,

(Signed)  
Louis Reynders  
Company Secretary - NDMA