



**the dti**

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Department:  
Trade and Industry  
**REPUBLIC OF SOUTH AFRICA**

**Consumer And Corporate Regulation Division**

**PRESENTATION TO PORTFOLIO COMMITTEE ON  
TRADE AND INDUSTRY ON THE NATIONAL CREDIT  
POLICY REVIEW**

**18 OCTOBER 2016**



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Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

**Presenter**

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## INTRODUCTION

- In 2014, Parliament amended the NCA by enacting the National Credit Amendment Act (NCAA) of 19 May 2014. The NCAA together with the National Credit Regulations came into effect on the 13 March 2015.
- The National Credit Regulations as published on the 13 March 2015, brought amongst others, the criteria for affordability assessments, powers of the NCR to investigate reckless lending and powers of the NCT to adjudicate reckless lending matters.
- Further regulations and interventions had to be formulated emanating from the NCAA. The Affordability Assessment Regulations, setting out the criteria for assessing a consumer's means to qualify for credit came into force on the 14 September 2015. The Review of Limitations on Fees and Interest rates Regulations, provided for the capping of fees and interest rates charged as cost of credit and this came into effect on the 6 May 2016.

## INTRODUCTION

- Due to the need to monitor and regulate all credit providers, the Minister of Trade and Industry issued a final Notice on the Threshold required for credit provider registration on 11 May 2016. The Credit Life Insurance Regulations are in the final stages of completion, these regulations will put a cap on the amount that a consumer is required to pay for insurance in order to cover the cost of credit granted by a credit provider should the consumer fail to repay a loan.
- Having implemented most of the above, **the dti** has realized that reckless credit lending continues unabated. This has prompted **the dti** and the NCR to approach the Portfolio Committee on Trade and Industry and propose, amongst others, extending the powers of the NCR to conduct pro-active investigations and impose administrative fines on perpetrators. As well as to empower the Minister of Trade and Industry to provide debt relief mechanisms through regulations.

## INTRODUCTION

- The Portfolio Committee on Trade and Industry (the Committee) approved the proposal to enhance the powers of the NCR and for the Minister to prescribe debt relief assistance measures by way of regulations.
- The Committee further approved that **the dti** can approach Cabinet for approval to introduce the proposed National Credit Amendment Bill to Parliament.

## PURPOSE/PROBLEM

- After the 2014 amendment of the NCA, it became clear that the implementation of the NCA is associated with problems that could not have been foreseen during the legislative amendments. Some of the challenges that have been exposed after the implementation of the NCA, as amended, are:
- The enforcement of the NCA should reside with the NCR to exercise administrative enforcement powers to realize the speedy and cost-effective resolution of disputes. To this end, the NCR should be given the power to order regulated entities to pay administrative fines and give redress to consumers. The NCT should serve as an appeal and review body for the decisions of the NCR.
- Referrals of cases to the NCT, by the NCR, consumers whose cases have not been entertained by the NCR and Debt Counsellors for debt review orders, amongst others, clogged the service delivery system of the NCT and rendered it inefficient;
- The fact that the Magistrate's courts have not yet commenced with the application of the affordability assessment criteria, forces the consumers and the NCR to refer cases to the NCT for adjudication, therefore adding to the backlogs at the NCT;

## PURPOSE/PROBLEM

- Prohibited conduct such as collection of prescribed debt and non-application of the Affordability Assessment Regulations can only be detected by the NCR and the NCT during investigation and adjudication respectively. The prohibited conduct is not treated as a reportable irregularity in terms of the NCA and other legislation such as the Companies Act, 2008 and the Auditing Profession Act, 2005;
- The resolution of consumer disputes expeditiously should be the core function of regulatory institutions where there are breaches of legislation. To this end, the NCR should be given a specific mandate to negotiate settlements of consumer disputes with regulated entities within a defined set of criteria. The objective of such settlements should be to provide redress to consumers and change the behaviour of the regulated entities. Settlements substantially minimise the time periods of resolving disputes and costs for both the regulator and the regulated entities.

## PURPOSE/PROBLEM

- A disturbing trend has started to develop on the functional nature of the NCT in relation to the adjudication process. The role of the NCT is anchored on it being an informal tribunal conducting its hearings in an inquisitorial manner as expeditiously as possible. It was meant to be easily accessible to the public, with minimal formalities.
- The reality is that its functionality has been reduced to that of a court of law. In a sense, the overall objective and purpose of the NCT of affording the credit industry a simpler informal process of resolving disputes has been lost as the adjudication process plays itself out. Its consumer protection mandate is not being adequately fulfilled.
- In particular, the over-reliance on rulings on technical points denies the parties an opportunity to resolve the merits of cases and provide redress to consumers in appropriate cases. This weakness has opened the space for private companies to take cases that could have been resolved by the NCT to courts on behalf of consumers.

## PURPOSE/PROBLEM

- There is a need for the NCA to make provision for the introduction of debt relief or debt forgiveness measures to alleviate household over-indebtedness in different economic circumstances. The criteria for this should be informed by the prevailing economic conditions in the country. In this regard the Minister should be given the power to prescribe debt relief measures through regulation. The circumstances to be outlined under such regulations may include, but not limited to, prevailing economic circumstances in the country or sector or section of the community.
- In law, writing-off of a debt by a credit provider does not relieve the debtor of their obligation to repay the debt, per se, thus credit providers often sell the loan book and the buyer is entitled to reclaim payment on the debts written-off in that loan book.
- The right of consumers to challenge the sale of repossessed motor vehicles where they believe that the price obtained was not reasonable should be extended to immovable property. This would afford consumers an opportunity to seek redress where their properties are sold for a fraction of their market value through sales in execution. The NCR should be empowered to issue guidelines to the industry to provide best practices on the sale of repossessed goods, motor vehicles and properties by banks and other credit providers.

## PURPOSE/PROBLEM

- The NCR should be given the power to declare credit agreements reckless and unlawful, and to declare provisions of credit agreements unlawful in line with its assumption of administrative enforcement powers.
- In order to curb the problem of reckless and unlawful lending, these two practices should be criminalized in addition to being conduct prohibited by the NCA. The directors responsible for the management of regulated entities should be held personally accountable for these practices. Directors of credit providers who are habitual transgressors of the NCA are not declare delinquent directors, in terms of the NCA. Therefore there is a need for the NCR to apply to the High Court, so as to have them declared delinquent.
- There is a lack of coordination amongst enforcement agencies, in relation to their enforcement activities. There is a need to enhance the coordination to be in line with the coordination envisaged in section 17(4) of the NCA, as amended, to other enforcement agencies in government. Section 17(4) provides for a mandatory coordination between the NCR and the registrar of banks to share information without encroaching on each other mandates.

## PURPOSE/PROBLEM

- The National Student Financial Aid Scheme plays an important role of facilitating access to higher education by many students from different backgrounds. Its ability to collect student loans once the students are employed is important. NSFAS should be empowered to collect student loans from the salaries of employed students. The repayment amount should be determined with agreement of the former beneficiary provided that an affordability assessment is conducted to determine affordability, the employer should not be forced to deduct jointly or severally by Emolument Attachment Orders (EAO) more than one quarter (1/4) of a former beneficiary's salary in this regard.
- In view of the above, there is a need to amend the NCA in order to address these and other issues, so as to strengthen the implementation of the NCA.

## DISCUSSION

### CHALLENGE 1: THE NCR IS NOT EMPOWERED IN TERMS OF THE NCA TO IMPOSE FINES AFTER COMPLETION OF THEIR INVESTIGATIONS

#### PROBLEM

- When the NCA empowered the NCR to investigate reckless lending practices unlawful and refer them to the NCT, the NCT was empowered to review and impose fines accordingly.
- This means that the NCR can no longer efficiently execute the NCA. As a result there is no deterrent on reckless lending and it continues unabated.
- The high volumes of referrals to the NCT are overwhelming and the NCT is unable to also execute or implement the NCA efficiently.
- As such the consumer is left with no proper redress.

## DISCUSSION

### CHALLENGE 1: THE NCR IS NOT EMPOWERED IN TERMS OF THE NCA TO IMPOSE FINES AFTER COMPLETION OF THEIR INVESTIGATIONS

#### SOLUTION

- To extend the powers of the NCR to impose administrative fines on credit providers involved in reckless lending and other prohibited conduct.
- The imposition of fines will be akin to imposition of fines by other regulatory agencies, such as, South African Reserve Bank (SARB) and Financial Services Board (FSB).

## DISCUSSION

### CHALLENGE 2: BACKLOGS AT THE NCT

#### PROBLEM

- Referrals from the NCR, in particular the once caused by lack of imposition of fines make it impossible for the expeditious finalisation of matters.
- Direct referrals by consumers to the NCT cause the NCT not to cope with the volumes.
- Currently consumers refer reckless lending cases to the NCT. Under the ideal situation, there should also be referrals to the Magistrates court, and these challenges are being addressed by the Department of Justice and Constitutional Development (DOJ) through the Courts of Laws Amendment Bill 2016.
- Part-time NCT membership, being the presiding officers, is also causing unwarranted delays and unnecessary postponements of matters.

## DISCUSSION

### CHALLENGE 2: BACKLOGS AT THE NCT

#### SOLUTION

- More capacity to be given to the NCT through additional resources, such as, human capital, IT and financial capacity.
- Additional retired judges should be appointed on a full time basis. The independence of the NCT will therefore be enhanced.
- The issue of unwarranted postponements will come to an end. In this regard rules or practice notices on postponement of cases should be formulated and implemented.

## DISCUSSION

### CHALLENGE 3: NON-REPORTABLE IRREGULARITIES IN TERMS OF NCA

#### PROBLEM

- Prohibited conduct and reckless lending are not regarded as reportable irregularities in terms of the NCA and other legislation, such as, the Companies Act, 2008 and the Auditing Profession Act, 2005.
- There is a lack of coordination amongst enforcement agencies, in relation to their enforcement activities. There is a need to enhance the coordination to be in line with the coordination envisaged in section 17(4) of the NCA, as amended. Section 17(4) provides for a mandatory coordination between the NCR and the registrar of banks to share information without encroaching on each other mandates.

## DISCUSSION

### CHALLENGE 3: NON-REPORTABLE IRREGULARITIES IN TERMS OF NCA

#### SOLUTION

- The NCA should be amended in order for the prohibited conduct and reckless lending to be treated as “reportable irregularities” in terms of the NCA.
- Enforcement agencies such as IRBA, SAPS, SARS, NCC and NPA should coordinate their enforcement strategies as envisaged in section 17(4) of the NCA.
- The respective Minister’s and Directors-General should enter into memoranda of understanding to ensure effective implementation to the coordination of enforcement strategies.

## DISCUSSION

### CHALLENGE 4: DEFINED CRITERIA ON SETTLEMENT OF CASES

#### PROBLEM

- There are no criteria set for settlement of cases between the regulator and regulated entities; as a result, the settlement between the two does not take into account consumer interest or redress.
- The lack of this criteria leads to the behaviour of regulated entities not abated and therefore not deterrent to reckless lending of prohibited practice.
- Further, there is a need to deal with matters expeditiously for the purposes of resolving or providing quick redress to consumers.

## DISCUSSION

### CHALLENGE 4: DEFINED CRITERIA ON SETTLEMENT OF CASES

#### SOLUTION

- The NCR should be empowered to negotiate settlement of consumer disputes with regulated entities within a defined set of criteria.
- The objective of such settlements should be to provide redress to consumers and change the behaviour of the regulated entities.
- Settlements would substantially minimise the time periods of resolving disputes and costs for both the regulator and the regulated entities.

## DISCUSSION

### CHALLENGE 5: TOO FORMALISTIC APPROACH OF THE NCT

#### PROBLEM

- NCT is operating too much as a court of law, as it is too involved with legal technicalities. Formalistic approach should not take precedence over informal/inquisitorial approach, which is the purpose of the tribunal.
- There is over-reliance on rulings on technical points that deny the parties an opportunity to resolve the merits of cases and provide redress to consumers in appropriate cases.
- Parties that are legally represented take advantage of this legal technicalities and the consumer is left without redress.

## DISCUSSION

### CHALLENGE 5: TOO FORMALISTIC APPROACH OF THE NCT

#### SOLUTION

- The NCT must desist from acting as a court of law and be concerned about fairness and equity. The main objective for the establishment of the NCT was to resolve consumer problems fairly, equitably and expeditiously.
- The NCT must always deal with the merits of each case in an informal manner, notwithstanding the legal technicalities that might have arisen.
- Whether or not parties are legally represented, the informal inquiries should lead to expeditious redress to consumers.

## DISCUSSION

### CHALLENGE 6: PRESCRIPTION OF DEBT RELIEF MEASURES

#### PROBLEM

- There is no empowering section in the NCA for the Minister to prescribe debt relief for categories of persons or sector of the economy or community during hard economic conditions.
- No empowering section in terms of the NCA for the Minister to prescribe debt forgiveness under adverse economic conditions.
- The previous processes resorted to regarding the removal of adverse credit information is not the same as prescription by the Minister through regulations to provide for debt relief or forgiveness measures.

## DISCUSSION

### CHALLENGE 6: PRESCRIPTION OF DEBT RELIEF MEASURES

#### SOLUTION

- There is a need for the NCA to make provision for the introduction of debt relief/forgiveness measures to alleviate household over-indebtedness in different economic circumstances.
- The criteria for this process should be informed by the prevailing economic conditions in the country.
- The Minister should be given power to prescribe debt relief measures through regulations.
- The circumstances to be considered under such regulations may include but not limited to prevailing economic circumstances in the country or sector or section of the community

## DISCUSSION

### CHALLENGE 7: DEBT WRITING OFF NOT LEADING TO DEBT RELIEF

#### PROBLEM

- In law, writing-off of a debt by a credit provider does not necessarily relieve the debtor of their obligation to repay the debt, thus credit providers often sell the loan book and the buyer is entitled to demand payment on the debts written-off in that loan book.
- The loan book mostly consist of prescribed debt and credit providers always have an option to revive the claim that might have been temporarily suspended due to the impossibility to recover such a debt. The debt therefore is not extinguished by writing it off and if circumstances become conducive, on the side of the debtor, the credit provider can always revive his/her option to claim from the debtor.
- Writing-off of the debt does not necessarily mean that the debtors credit record is no longer impaired or removed from the Credit Bureau

## DISCUSSION

### CHALLENGE 7: DEBT WRITING OFF NOT LEADING TO DEBT RELIEF

#### SOLUTION

- In all the circumstances where the Minister, through regulations, has prescribed debt relief/forgiveness measures, the credit providers should be barred from invoking the right to claim after writing off of the debt.
- Credit bureau should also remove adverse credit information against all persons whose credit records have been “cleared”.
- The Bill may provide that, for the purpose of the Bill, writing off of a debt may mean extinguishing of the debt. Qualification criteria may need to be developed in this regard.

## DISCUSSION

### CHALLENGE 8: RESALE OF REPOSSESSED PROPERTY WITHOUT COMPENSATION TO THE CONSUMER

#### PROBLEM

- As for now, credit providers are able to repossess properties that are almost paid up, and resell them. Even if such property is sold at an astronomical amount, the consumer is not reimbursed the difference of the owed amount and the profits from the sale of the property.
- The right of consumers to challenge the sale of repossessed motor vehicles, where they believe that the price obtained was not reasonable should be extended to immovable property.
- The NCR is not empowered to issues guidelines to the industry to provide best practices on the sale of repossessed goods, motor vehicles and properties by banks and other credit providers.

## DISCUSSION

### CHALLENGE 8: RESALE OF REPOSSESSED PROPERTY WITHOUT COMPENSATION TO THE CONSUMER

#### SOLUTION

- Where goods are repossessed for resale by the credit provider, at an astronomical or a fraction, the NCR should be empowered in terms of the NCA to provide for guidelines to regulate repossession of such property.
- The guidelines on repossession of goods should also be applicable to immovable property.
- The Minister may at any time, on recommendation by the NCR, issue the guidelines or best practices of the of NCR, as regulations for the resale of repossessed goods.

## DISCUSSION

### CHALLENGE 9: DECLARATION OF CREDIT AGREEMENTS RECKLESS AND UNLAWFUL BY THE NCR

#### PROBLEM

- The NCR does not have the power to declare credit agreements, including pawn transactions, as reckless and unlawful.

#### SOLUTION

- The NCA should be amended to give powers to the NCR to declare credit agreements, including pawn transactions, as reckless and unlawful.

## DISCUSSION

### CHALLENGE 10: DELINQUENCY OF DIRECTORS IN TERMS OF THE NCA

#### PROBLEM

- Directors of credit providers who are habitual transgressors of the NCA are not declared delinquent directors, in terms of the NCA.
- Contraventions of the provisions of the NCA are not viewed as maladministration leading to delinquency declaration in terms of the Companies Act.

#### SOLUTION

- The NCA should be amended in order to deal with habitual transgressors as delinquent directors in terms of the Companies Act.

## DISCUSSION

### CHALLENGE 11: PERSONAL LIABILITY OF DIRECTORS AND MANAGEMENT OF THE CREDIT PROVIDERS

#### PROBLEM

- Where directors and management of credit providers have been habitual transgressors of the NCA, the Act does not view them as people who should attract personal liability when the company is sued (subject to legal proceedings) for such an abuse.

#### SOLUTION

- The Companies Act provision dealing with personal liability of directors emanating from abuse or misconduct should apply where reckless lending or prohibited or prohibited conduct have taken place.

## DISCUSSION

### CHALLENGE 12: NSFAS UNABLE TO COLLECT FUNDS FROM FORMER BENEFICIARIES

#### PROBLEM

- NSFAS beneficiaries do not repay the funds that were used to assist them during their studies, even after they have completed. As a result NSFAS always encounters problems of self-sustainability.
- The NCA does not empower the NSFAS to do proper collections which, if done properly, would help future NSFAS beneficiaries.
- During debt collection, employers do not conduct repayment affordability leading to employee's salaries being attached through Emolument Attachment Orders (EAO's). This leaves the employee without money to live on

## DISCUSSION

### CHALLENGE 12: NSFAS UNABLE TO COLLECT FUNDS FROM FORMER BENEFICIARIES

#### SOLUTION

- NSFAS should be empowered through the NCA to be able to properly notify the former beneficiaries and their employers to collect the debt.
- Where there is EAO's NSFAS should conduct repayment affordability with the incumbent and it should not collect, jointly or severally with other creditors, one quarter (1/4) from an employee's salary.

## DISCUSSION

### CHALLENGE 13: TECHNICAL AMENDMENTS

#### PROBLEM

- This policy review contains a lot of technical amendments that are associated with issues raised above. As a consequence of that, the technical amendments may arise during consultations with stakeholders and they will be attended to accordingly.

## DISCUSSION

### CHALLENGE 13: TECHNICAL AMENDMENTS

#### PROBLEM

- Retrenchment: Paid by UIF to retrenched employees normally over a period of 6 months: this might not be enough to pay off outstanding debt, especially since a full salary is not paid over that period;
- UIF – payment for debt forgiveness is not covered in the mandate of the UIF– **the dti/ NCR/UIF/DoL** will have work together to assist the DoL to propose amendment to their legislation. The Acting Commissioner is very supportive of this. The Minister of the DoL has already been consulted by the Hon. Chair, Ms Fubbs, and is reported to also be supportive;
- Debt Forgiveness to include one level up above retrenched miners/steel workers: DPSA study indicated that Government Employees especially, teachers, police and nurses are over-indebted.

## CHALLENGE 13: TECHNICAL AMENDMENTS

### PROBLEM

## DISCUSSION

- Debt Forgiveness to include one level up above retrenched minors/steel workers: DPSA study indicated that Government Employees esp., teachers, police and nurses are over-indebted.
- Constitutional court judgment i.r.o EAO – DoJ – doesn't go far enough, tariffs charged by attorneys.
- Consumers who will be illegible for debt forgiveness are those whose over-indebtedness has resulted from changes in circumstances rather than unnecessary borrowing.
- Investigations/audits i.r.o Retailers who extend(ed) consumption loans (e.g. store cards) to students: NCR powers would need to be enhanced.
- Ministers of Labour, Public Service and Administration, Social Development and Trade and Industry should ensure that there is coordination on the issues of debt relief.
- The issue of “Indigent” needs to be defined in a coordinated manner. The above mentioned portfolios need to consult and come with one coordinated definition.
- In all these issues, NEDLAC will have to be consulted as we are dealing with socio-economic issues of the country. NEDLAC should be consulted at an early stage to perfect the definition.

## RECOMMENDATIONS

- This Draft Bill at the extreme, the state should not be a debt collector in the area of garnishee orders
- The Bill should address proper mandate on coordination of debt relief informed by the definition of “Indigent”.
- The issues dealing with changing circumstances of an individual or a class of people should be broadly defined to deal with issues such incapacity.
- People who are not employed or not having a sustainable form of income should not be given credit.
- No Income No Assets (NINA) should be considered under strict criteria as it may foster the culture of non payment or abuse of the system.
- Repetitive transgressor of the NCA, the Regulator should be empowered to deregister the credit provider as a last resort. When compliance has been ignored on several occasion.
- The directors also be declared delinquent Directors in terms of the Companies Act, 2008.

## RECOMMENDATIIONS

- Shareholder activism in terms of the Companies Act, 2008 should be fostered as these are issues of Corporate Governance.
- Debt writing-off for the purposes of this Bill should mean no redress, provided issues of abuse are dealt with comprehensively.
- Settlement agreements should be to the ultimate benefit of the consumer .



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THANK YOU