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National Credit Amendment Bill – draft 6

2018.05.08



Where we are in the process

NA Rule	Activity
274(1)(a)	The Committee prepares a draft Bill
274(3)	The Committee must report to the House when it publishes the draft Bill. <ul style="list-style-type: none"> • <i>Interim report with publication dated 2017.11.14 : see ATC 2017.11.29.</i>
276(2) 275(a) and (b)	If a copy of the Bill is published in the <i>Government Gazette</i> , an invitation must be made for interested persons and institutions to submit written representations on the Bill. Interested persons must be given at least three weeks after publication to comment. <ul style="list-style-type: none"> • Government Gazette, 24 November 2017 – Note 922 of 2017 Relevant Department / Organ of State must be given sufficient opportunity to make submissions to the Committee
274(1)(b)	The Committee consults the JTM for advice on classification of the Bill. <ul style="list-style-type: none"> • Signed by JTM on 7 and 8 February 2018: section 76 process; Bill need not be referred to the National House of Traditional Leaders.
275(d)	<i>The Committee may make amendments to the draft Bill (deliberations).</i>

Where do we go from here

NA Rule	Activity
275(c)	The Committee consults the JTM for advice on classification of the Bill in the form that it will be introduced (final Bill).
279(4)	The Bill must be certified by the Chief Parliamentary Legal Adviser or a Parliamentary Legal Adviser designated by him or her as being consistent with the Constitution and existing legislation; and properly drafted in the form and style.
279(1) and (3)	The Committee introduces the Bill by submitting a copy thereof and a supporting memorandum to the Speaker.
280(3)	The findings of the JTM as per NA Rule 275(c) is tabled with the Bill when it is introduced.
282(1) 290(2)(b)	The Bill does not have a first reading – in stead it is placed on the order paper for Second Reading . At least three Assembly working days must elapse since the Bill was introduced before the Second Reading.

Main concerns raised by the public

Constitutionality

- **Equality:** Debt intervention to be available to all natural persons (not just citizens), as well as to persons who own a joint estate ✓
- **Deprivation of property:**
 - **Rationale: reason for deprivation must be clear**
 - Failure to provide a debt intervention measure for this group of consumer amounts to unfair discrimination on socio-economic reasons ✓
 - Least restrictive means + use existing measures; ✓
 - The impact of the Bill (minimise the negative impact where possible: incl systems, economic and moral hazard) ✓
 - **Proportionality (role of consumer / credit provider; consequences for consumer / credit provider)**
 - No requirement for the consumer to be over-indebted (i.e no need for assistance) ✓
 - The role of the consumer (may have been reckless) and the credit provider (may have been 100% responsible lending) are ignored ✓
 - Possible significant adverse consequences for credit providers, but minimal adverse consequences for the consumer ✓
 - **The process must be procedurally fair** (hearing both sides; discretion given to NCT) ✓



Main concerns raised by the public (2)

Rule of law: Retrospectivity

- “Weak retrospectivity”: it prospectively effects, or changes the consequences for the future of pre-existing transactions and matters.
 - Not unconstitutional to have retrospective laws;
 - A retrospective deprivation of property could be seen as a more severe form of deprivation. Thus, the Bill must have a compelling justification. ✓
 - It affects the impact of the Bill: Biggest impact is iro deprivation of property: thus must have clear, fair and certain processes ✓
- Clause 31 (transitional provision):
 - Because the current lack of a debt intervention for the vulnerable group amounts to unfair discrimination on socio economic grounds, there is a need for the Bill to have retrospective application.
 - If clause 31 is found unconstitutional it does not affect the rest of the Bill

Implementation challenges

- NCR / NCT capacity (providing a delayed operational date) ✓
- NCR role ✓ (concern: see discussion on reckless lending)

Drafting technicalities (aligning the Bill with the Act; terminology; better ways of wording clauses) ✓

Three main areas

- The Bill deals mainly with three areas of concern:
 - The prevalence of reckless lending despite the provisions of the Act
 - The absence of a debt intervention measure for a certain class of consumer
 - Compulsory credit life insurance

Reckless lending

- Clause 13 (S86): Debt counsellors must consider whether any of the consumer's credit agreements appear to be reckless – always: no longer only when the consumer asks.
- Clause 10 (S82A): Debt counsellors must report any credit agreement where there are reasonable grounds to suspect that it could be a reckless credit agreement to the NCR (if no debt review) or to a court (with a debt review).
 - A report to the NCR is deemed to be a complaint and must be investigated by the NCR in terms of s139
 - Section 150: "... the Tribunal may make an appropriate order in relation to ... required conduct in terms of this Act..."
 - Because of S150 no provision is made in this clause for penalties

Suspension of reckless credit agreements by the NCR

- Clause 10: S82A Because of delays – instruction to empower the NCR to suspend reckless credit agreements.
 - Concern: Investigator and adjudicator in its own investigation
 - Proposal: Consider other regulators + allow for an appeal
- No similar process with any other regulator
- Constitutional concern (S33 Just administrative action):
 - Changing the role of the regulator so that it is not independent.
 - De Lange v Smuts CCT 26/97 (regarding decisions taken by an official presiding at an insolvency hearing – may issue a warrant to imprison recalcitrant witnesses)
 - Par 46: “Rule of law” (on which our Constitution is moulded) includes the interpretation that “. . . disputes as to the legality of acts of government are to be decided by judges who are independent of the executive”.
 - Par 63: “Judicial officers enjoy complete independence from the prosecutorial arm of the state, and are therefore well-placed to curb possible abuse of prosecutorial power. However, were executive branch officials to be invested with the power to compel, upon pain of imprisonment, cooperation with their investigative demands, this necessary check on the prosecutorial power would vanish, because it would allow the executive to pass judgment on the lawfulness of its own prosecutorial decisions.”
 - Par 71: “It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.”

Proposals iro reckless credit

- NCR proposal: Mediation
- NCT proposal: Specialised consumer courts to deal with appeals
- PLA proposal:
 - First determine where the delays are.
 - Is it that there are insufficient reporting? The Bill attempts to address this.
 - Is it that NCR does not have sufficient capacity to investigate?
 - Is it that NCT does not have sufficient capacity to adjudicate?
 - Is it that the appeal process takes long?



DI Applicant ✓
Application to NCR
- Free of charge
- Similar to debt review (repeat s86 with necessary changes)



NCR evaluates +
- provide counselling to the applicant on financial literacy and – capability (defined in clause 1)
- provide access to training on these

Outcome of evaluation 1

- Reject
- Voluntary debt rearrangement
- Refer reckless agreements to NCT

Outcome of evaluation 2

Applicant can solve within 5 years

Refer to the Tribunal for rearrangement of obligations
- S87: same as with a referral by a debt counsellor

Applicant cannot solve within 5 years

Refer to the Tribunal for other debt intervention options:
- Suspension (12 months)
- Extension of suspension (12 months)
- Extinguish debt



Debt Intervention: Application and evaluation: Clause 14 (S86A(1) to (5)):

- Similar to debt review, so the credit provider may have acted 100% in accordance with the Act.
- NCR plays the role of “debt counsellor” for debt intervention applicants:
 - Over-indebted natural persons
 - who earn (or jointly earn) R7500 or less
 - only have unsecured credit agreements
 - is not sequestrated or under administration
 - has a total unsecured debt (capital amount) of a maximum of R50,000
 - *(Note: Consider if the amount of R7500 and R50,000 should not be changeable by the Minister as the “debt counsellor” role of the NCR will be long term)*
- Applicant applies to the NCR to be declared over-indebted and have their obligations rearranged.
- The NCR follows a process similar to debt review, but free of charge i.e.:
 - Notification of applicant, credit providers and credit bureaux;
 - Assessing over-indebtedness (of the applicant) and recklessness (iro credit agreements) + provide counselling to the applicant on financial literacy and – capability (defined in clause 1) + provide access to training on these.
 - The role of the applicant and credit providers are the same as in a debt review process

Debt intervention: Outcome of evaluation

Clause 14, 15 (S86A (6) to (11), S87)

- The decisions are the same as can be made by a debt counsellor:
 - Reject (applicant may approach the court directly to re-arrange);
 - Recommend voluntary debt rearrangement (if no agreement, refer the recommendation to the Tribunal);
 - Refer possible reckless credit agreements to the Tribunal;
 - **Step 1:** If the applicant can solve within 5 years (or as prescribed), refer to Tribunal for rearrangement of obligations;
 - Section 87 is amended to provide for the Tribunal to conduct a hearing and re-arrange the applicant’s obligations (similar to the role of the court when a debt counsellor refers a matter to it for rearrangement of obligations)
 - **Possible step 2:** If the applicant cannot solve within 5 years, refer to Tribunal for an order in terms of section 87A.
 - Under this referral, the NCR must inform credit providers and invite representations in the prescribed form, manner and time.
 - This referral is subject to the “sunset clause” (section 87A(12)).
- Provision is made for the credit provider to terminate the review, after a prescribed period, if the applicant is in default



Debt intervention: If the consumer cannot solve

Clause 16 (S87A)

- May be considered by a single member of the Tribunal:
 - Must consider the referral from the NCR and any representations from credit providers.
 - Must consider the circumstances of the applicant, the role of the applicant and the role of the credit provider, whether the applicant is a minor / woman or disabled person heading a household / elderly.
- If the Tribunal grants debt intervention, the following are the steps in the process:
 - 12 month suspension, in part or in full of all qualifying credit agreements;
 - After 8 months, NCR to review the circumstances of the applicant and if the applicant can solve, refer the matter for re-arrangement of obligations / If not, refer for an extension of the suspension (+ notification to credit providers).
 - Tribunal may suspend the qualifying credit agreements for a further 12 months.
 - After 8 months, NCR to review the circumstances of the applicant and if the applicant can solve, refer the matter for re-arrangement of obligations / If not, refer for an extinguishing (defined) (+ notification to credit providers).
 - Tribunal may extinguish all or a percentage of the total unsecured debt.
 - Must consider the circumstances of the applicant, the role of the applicant and the role of the credit provider, whether the applicant is a minor / woman or disabled person heading a household / elderly, the credit history of the applicant, the number and period of credit agreements involved and the total unsecured debt.
- Sunset clause – subsection (12): effective for 24 months
 - *(Note: If the Minister is given the power to extend this period, and given that the process before the NCT is at least 24 months, it is recommended that this “sunset” be extended to 36 or 48 months. That would allow sufficient data for an impact study)*

Debt Intervention: Consequences for consumer and credit providers

- Clause 17 (S88A) From the application, the consumer may not enter into more credit agreements and the credit providers may not litigate.
 - From the credit provider’s perspective, any credit agreement entered into may be reckless, regardless of the requirements of S80 and if the applicant applies for / enters into, he or she may not apply for debt intervention in respect of that agreement.
- Extinguish (only possible for 24 months from effective date):
 - No more obligations, whether from the contract or common law;
 - Applicant’s right to apply for credit limited to at least **12/24** months and then for a further (discretionary) total limitation period of **24 / 36 / 48 / 60** months; (*Note: Committee still to confirm periods*)
 - Applicant must attend a financial literacy / capability programme;
 - Applicant may apply for rehabilitation to escape the limitation period (must have paid all cost of credit as of date of the order, completed the training and have improved his / her financial circumstances)

Compulsory credit life insurance

- Credit agreement term > 6months
- Principal debt < R50,000
 - Credit provider must require the consumer to enter into and maintain credit life insurance
 - The Minister must, in consultation with the Minister of Finance, prescribe the limit iro the cost of such insurance.



A few specific comments

- Record of DI applications
 - Separate clause (clause 6 – section 69A)
 - Not public – may be published by consent or if required by law
- Credit bureaux (clauses 8 – section 71 and 9 – section 71A):
 - NCR must issue a clearance certificate, as debt counsellors must do, iro applicants whose obligations were rearranged;
 - NCR must serve orders iro suspension / extinguishing on credit + end date of suspension and limit iro section 60 on credit providers, credit bureaux
 - With this served on them, credit bureaux has sufficient information to add and remove consumer credit information.
- Financial literacy / capability
 - Both are provided for (NT gave definitions)
 - NCR must counsel applicants on both
 - NCR must provide access to applicants iro training on both
 - Section 171 (regulations): The Minister must make regulations regarding participation in these programmes (thus broad to allow a link with NT programmes)
- Prescribed measure: Now in Section 171 (Regulations)
 - Only in the event of a significant exogenous shock (no clear definition yet) or a regional natural disaster.
 - Only iro indigent, persons who earn less than R7500 per month, mass retrenchments in a sector
 - Only a rearrangement type measure or a suspension / extinguish type measure
 - Concerns: wide delegation powers; constitutionality of delegation given vague terms

A few more specific comments

- Penalties
 - Remained the same (10 years), save iro
 - Offences related to the measure (2 years); and
 - Reckless lending as offence removed
 - too many different calculations possible = legal uncertainty
- Commencement:
 - No change as Interpretation Act provides that the current wording allows for different times of operation.



Thank you