OPINION

for

THE DEPARTMENT OF TRADE AND INDUSTRY

concerning

THE CONSTITUTIONALITY OF THE PROPOSED DEBT INTERVENTION PROCEDURE IN THE NATIONAL CREDIT AMENDMENT BILL, 2018

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5 March 2018

INTRODUCTION

1 We are requested to provide the Department of Trade and Industry with an urgent opinion on the constitutionality of the proposed debt intervention procedure in the draft National Credit Amendment Bill 2018 ("the Bill"). This Bill is intended to amend the National Credit Act 34 of 2005 ("the Act").

2 We are specifically asked to advise on two aspects of this proposed debt intervention procedure:

2.1 The constitutionality of sections 88A to 88E of the Bill, which will create this procedure; and

2.2 The constitutionality of section 88F of the Bill, which proposes to give the Minister of Trade and Industry ("the Minister") the power to create regulations establishing further debt intervention procedures.

3 This opinion does not address other provisions of the Bill which are not directly related to this debt intervention procedure.

4 For these purposes, we have been furnished with a copy of the draft Bill, as published in the *Government Gazette* on 24 November 2017. We have also been given documents summarising the submissions on the draft Bill that were presented to the Portfolio Committee on Trade and Industry. However, we have not been given the full set of submissions or the transcripts of the Portfolio Committee's hearings.

5 Due to the urgency of this request and the limited documentation made available to us, this opinion does not purport to be an exhaustive analysis of all the constitutional issues raised by the proposed debt intervention procedure. Instead, we address what we view as the most salient constitutional issues. We are available to provide the Department with further advice should this be required.

6 In what follows, we address the following issues in turn:

6.1 First, we provide a brief overview of the proposed debt intervention procedure and contrast this with the existing mechanisms in the Act;

6.2 Second, we address the constitutionality of sections 88A to 88D of the Bill;

6.3 Third, we address the constitutionality of section 88F of the Bill;

6.4 Finally, we conclude with a summary of our advice.

OVERVIEW OF THE PROPOSED DEBT INTERVENTION PROCEDURE

7 The debt intervention procedure proposed by the Bill has been described as a form of "*debt forgiveness*" for poor consumers. The explanatory memorandum accompanying the Bill indicates that its purpose is "*to provide for capped debt intervention to promote a change in the borrowing and spending habits of an over-indebted society.*"

8 The intended effect of this debt intervention procedure is to suspend and then extinguish the unsecured debts of vulnerable consumers who meet specified criteria.

Criteria for debt intervention

9 In terms of section 88A of the Bill, a consumer will qualify for debt intervention if he or she satisfies five cumulative criteria:

9.1 The consumer must be a South African citizen or permanent resident;[1]

9.2 The consumer's average income in the six-month period before applying for debt intervention must not exceed R7500 per month;[2]

9.3 The consumer must have no realisable assets,[3] defined as assets that could be "*swiftly converted to cash*" (subject to the list of excluded assets specified in section 88A(1)(b));

9.4 The consumer must not be subject to debt review in terms of section 86 of the NCA;[4]

9.5 The consumer's total unsecured debt on 24 November 2017 should be no more than R50,000.[5]

10 In terms of section 88A(2) of the Bill, debt intervention is intended to be a once-off measure, as a consumer will only be entitled to apply for debt intervention once.

[1] Section 88A(1)(a).
[2] Section 88A(1)(a)(i).
[3] Section 88A(1)(a)(ii).
[4] Section 88A(1)(a)(iii).
[5] Section 88A(2).

11 The Bill provides that certain unsecured debts will be excluded from the debt intervention procedure, including developmental credit agreements and agreements which are already subject to enforcement procedures under the Act.[6]

The application procedure

12 The Bill envisages a two-part application process.

13 First, a consumer must submit an application to the National Credit Regulator.[7] If the National Credit Regulator finds that the consumer qualifies then it must make a recommendation to the National Consumer Tribunal ("the Tribunal") that debt intervention be granted.[8]

14 Second, a single member of the Tribunal will then consider the National Credit Regulator's recommendations. If the Tribunal finds that the consumer qualifies for debt intervention, then it must engage in a two-stage process:

14.1 The Tribunal must first suspend all qualifying credit agreements in part or in full for a period of 12 months,[9] which may be extended for a further period of 12 months on application.[10]

14.2 After the expiry of this 12-month period (or any extension), the Tribunal must consider the consumer's financial circumstances and, if these

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[6] Section 88A(3).
[7] Section 88B.
[8] Section 88B(4).
[9] Section 88C(3)(a).
[10] Section 88C(3)(a)(i).

circumstances "*did not sufficiently improve*", the Tribunal must declare the qualifying debts to be "*extinguished*", in part or in full.[11]

Comparison with existing protections under the Act and other laws

15 The primary justification for this debt intervention procedure is that existing mechanisms under the Act and other laws are not sufficient to assist over-indebted consumers who have limited or no income and limited assets.

16 The Bill originates from a study commissioned by the National Credit Regulator, titled "*Feasibility of a Debt Forgiveness Programme in South Africa*", which found that there is a need for additional mechanisms to alleviate the debt-burden of low-income consumers.

17 The explanatory memorandum to the Bill echoes this study, as it states that:

> *"Without suitable, alternative debt intervention measures available to over-indebted individuals … especially in lower income groups who are unable to afford these other measures, escaping the debt trap is an unbeatable challenge for them to improve their financial position and become productive members of society.*"

18 Given these aims, it is helpful to place the proposed debt intervention mechanism in context by contrasting it with the existing measures to assist consumers.

19 The National Credit Act currently contains three such mechanisms to protect consumers. The draft Bill proposes to enhance these existing protections in various respects, although the details are not relevant for present purposes.

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[11] Section 88C(4).

20 The first mechanism is the debt review procedure which is available to "*over-indebted consumers*".

20.1 Section 79(1) of the Act provides that a consumer is regarded as over-indebted if the information available indicates that the consumer –

> "*is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's-*
>
> *(a) financial means, prospects and obligations; and*
>
> *(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment."*

20.2 In terms of section 86 of the Act, consumers who believe they are over-indebted may apply to a debt counsellor for a debt review and to have themselves declared over-indebted.

20.3 Any court[12] or the National Credit Regulator[13] may also initiate a debt review by referring a consumer to a debt counsellor if they believe the consumer is unable to meet his or her obligations under credit agreements.

20.4 If a debt counsellor concludes that the consumer is over-indebted, he or she may issue a proposal recommending that a Magistrate's Court make an order re-arranging the consumer's obligations under the credit agreements.[14]

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[12] Section 85.
[13] Section 139(1).
[14] Section 86(7)(c).

20.5 The study commissioned by the National Credit Regulator highlights that consumers currently bear the full cost of this debt review process. In the absence of any state subsidies for debt review, this procedure is inaccessible to many poor consumers:

> *"The debt review process is however not free, nor subsidized, and involves certain costs. Once-off fees include an application fee of RS0, a restructuring fee which is equal to the first instalment of the payment plan, capped at R6 000 and legal fees, typically for a consent order which costs R750. If the debt review application is rejected, the customer pays a rejection fee of R300. On-going or monthly fees include an after-care fee of five per cent of the monthly Instalment of the payment plan, capped at R400, for the first 24 months of the plan, thereafter reducing to three per cent, capped at R400. In addition, there is a Payment Distribution Agency (PDA) fee equal to three per cent of the monthly rehabilitation payment and capped at RS00.Should a consumer choose to end the debt review process, he/she would be subject to a fee equal to 75 per cent of the restructuring fee."*
>
> *…*
>
> *"According to bureau data, as at November 2015 there were 373 531 individuals with a debt review listing. While this is a sizeable segment of the market, this amounts to just 7.3% of the 5.1 million borrowers who are 90 days or more in arrears on one or more credit accounts."*
>
> *…*
>
> *"When the mechanism was first introduced the NCR subsidised fees of low income applicants with a personal income of less than R2 500 per month or a household income of less than R3500 per month. However, this subsidy was discontinued."*

21 The Act also provides mechanisms to address "*reckless credit*".

21.1 In terms of section 80(1), reckless credit arises where, at the time that a credit agreement was made or at the time that credit is increased, the credit provider either:

21.1.1 Did not conduct the necessary assessment under section 81(2) of the Act to check the consumer's financial status and whether he or she has sufficiently understood the risks and proposed obligations; or

21.1.2 After conducting the required assessment, the credit provider nevertheless proceeded to conclude the credit agreement despite indications that the consumer did not understand the agreement or it appeared that the credit agreement would result in the consumer becoming over-indebted.

21.2 Section 83(2) of the Act further provides that if a court or the Tribunal finds that an agreement is reckless, they may make an order:

> *"(a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or*
>
> *(b) suspending the force and effect of that credit agreement ....* "

22 Finally, the Act also protects consumers against unlawful credit agreements. Section 89(5) provides that if a credit agreement is unlawful:

> *"a court must make a just and equitable order including but not limited to an order that ... the credit agreement is void as from the date the agreement was entered into".*

23 The proposed debt intervention procedure is more expansive than these existing mechanisms. To qualify for debt intervention, a consumer does not need to be found to be over-indebted or the victim of reckless credit or unlawful credit agreements.

24 In addition to these mechanisms, other laws also provide mechanisms to come to the assistance of over-indebted consumers, although they present obstacles for consumers with limited or no income or assets:

24.1 The Insolvency Act 24 of 1936 provides for the voluntary or compulsory sequestration of insolvent estates. However, sequestration is only available where this would be to the advantage of creditors. As a result, consumers with little income and no realisable assets may be unable to make use of the sequestration procedure.

24.2 Section 74 of the Magistrates' Courts Act 32 of 1944 makes provision for administration orders for consumers with debts not exceeding R50,000. This is a cheaper and more accessible procedure for consumers where sequestration is not viable. However, the debt administration process is lengthy and administrators often charge high fees.

THE CONSTITUTIONALITY OF THE DEBT INTERVENTION PROCEDURE UNDER SECTIONS 88A TO 88E

25 As currently formulated, sections 88A to 88E of the Bill are potentially susceptible to constitutional challenge on two primary grounds:

25.1 First, they exclude certain classes of vulnerable consumers in an irrational or unfairly discriminatory manner, potentially in breach of sections 9(1) and 9(3) of the Constitution; and

25.2 Second, credit providers may also seek to attack these provisions as being an arbitrary deprivation of their property, in breach of section 25(1) of the Constitution.

26 In what follows, we address these potential constitutional challenges in turn.

Possible breaches of section 9 of the Constitution

27 It is unavoidable that the proposed debt intervention procedure will need to draw lines between consumers that qualify for debt intervention and those that do not. While line-drawing is inevitable, the Constitution requires that these lines must be drawn in a way that does not irrationally differentiate or unfairly discriminate between consumers and does not otherwise breach constitutional rights.

28 Section 9(1) of the Constitution, read with the section 1(c) principle of legality, prohibits irrational differentiation between persons. This requires that

differentiation must be rationally connected to a legitimate government purpose.[15]

28.1 In ***Prinsloo v Van der Linde***,[16] the Constitutional Court explained this principle as follows:

> *"[The state] should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."*

28.2 In ***Sarrahwitz v Maritz NO***[17] the Constitutional Court explained that this entails that where a law seeks to protect a vulnerable class of persons, it is impermissible to exclude others who are equally vulnerable, unless there is a legitimate purpose for this exclusion.

29 Section 9(3) of the Constitution further prohibits the state from unfairly discriminating against persons on the grounds listed in this provision or on grounds that are analogous to the listed grounds.[18]

29.1 In terms of section 9(3), any differentiation on listed or analogous grounds amounts to discrimination.

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[15] *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) at para *Sarrahwitz v Maritz NO and Another* 2015 (4) SA 491 (CC) at para 54.
[16] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para 25.
[17] *Sarrahwitz v Maritz NO and Another* 2015 (4) SA 491 (CC) at para 49.
[18] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 gives further content to section 9(3) of the Constitution. However, it does not apply where a litigant brings a direct challenge to legislation.

29.2 Discrimination is prohibited where it is unfair. In terms of section 9(5), discrimination on the listed grounds will be rebuttably presumed to be unfair.

30 We have identified four possible instances of irrational or unfairly discriminatory differentiation which will need to be addressed in further drafts of the Bill.

Exclusion of non-citizens who are not permanent residents

31 Section 88A(1)(a) provides that only South African citizens and permanent residents qualify for the debt intervention procedure.

32 This is a significant departure from the existing protections under the Act, which apply to all consumers who are natural persons, irrespective of nationality or immigration status.

32.1 The section 1 definition of a consumer contains no qualifications regarding nationality or immigration status.

32.2 As a consequence, the debt review mechanism and the protections against reckless credit and unlawful credit agreements apply to all consumers.

33 The explanatory memorandum to the Bill and the various background documents do not explain why the debt intervention procedure adopts a narrower definition of a consumer than the rest of the Act. In the absence of any legitimate government purpose, this exclusion is likely to be found to be irrational.

Exclusion of asylum-seekers and refugees

34 Even if there is some justification for withholding protection from some categories of non-citizens, this would not justify the exclusion of refugees and asylum seekers from the debt intervention process.

35 The Refugees Act 130 of 1998 provides that asylum-seekers and refugees are legally entitled to live, work and study in the country:

35.1 Asylum seekers are people who are in the process of applying for refugee status. All asylum-seekers must be issued with a section 22 permit which affords them the right to work and study pending the final determination of their asylum applications. In ***Minister of Home Affairs and Others v Watchenuka,***[19] the Supreme Court of Appeal confirmed that these rights flow from the constitutional right to dignity.

35.2 After a person has been granted asylum, section 27 of the Refugees Act guarantees that recognised refugees have full rights to live, work and study in the country and to access government services.

36 The exclusion of asylum-seekers and recognised refugees from the benefits of debt intervention would impact a large portion of the population. The United Nations High Commissioner for Refugees[20] estimates that by the end of 2015 there were some 1,096,063 asylum-seekers[21] and 121,645 refugees.

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[19] *Minister of Home Affairs and Others v Watchenuka* [2004] 1 All SA 21 (SCA) at paras 25 – 33.
[20] UNHCR *Global Trends: Forced Displacement in 2015* available at http://www.unhcr.org/uk/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html.
[21] There is some doubt as to the accuracy of this number given the absence of proper records.

37 There is no apparent justification for the exclusion of this vulnerable category of people. As a result, it will likely be found to be irrational and in breach of section 9(1) of the Constitution.

38 Furthermore, this exclusion is also likely to be found to be unfairly discriminatory, in breach of section 9(3).

38.1 In ***Union of Refugee Women***,[22] the Constitutional Court assumed without deciding that refugee-status is an analogous ground of discrimination that is protected under section 9(3) of the Constitution. In doing so, the Court recognised that refugees are a vulnerable group in society who are deserving of protection.[23] The courts have also repeatedly acknowledged that asylum-seekers are a vulnerable group who are often the victims of xenophobic violence and discrimination.[24]

38.2 Discrimination on the analogous ground of refugee-status does not attract the automatic presumption of unfairness under section 9(5) of the Constitution.

38.3 Nevertheless, our view is that the exclusion of refugees and asylum seekers from the debt intervention procedure would be unfair. This exclusion would perpetuate the social and economic marginalisation of this group. It would also send the wounding message that refugees and

[22] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC).
[23] Ibid paras 28 – 31.
[24] See Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another 2015 (3) SA 545 (SCA) at paras 1 -2.

asylum-seekers are less deserving of concern and protection than citizens and permanent residents.

38.4 There is no apparent reason for discriminating against refugees and asylum-seekers in this manner. Furthermore, any reason that may be provided is unlikely to outweigh the severe impact of this discrimination.

39 As a result, we recommend that the debt intervention mechanism should be made available to all consumers who are natural persons, consistent with the broad scope of the protections currently afforded by the Act.

40 If any restrictions are imposed on non-citizens, these restrictions should not exclude recognised refugees and holders of valid asylum-seeker permits under the Refugees Act.

Exclusion of spouses married in community of property

41 Several comments on the Bill call for special recognition of spouses married in community of property.

42 At present, the Bill provides that individual consumers with unsecured debt of less than R50,000 at 24 November 2017 are entitled to debt intervention. No provision is made for spouses married in community of property, whose joint household debts may exceed R50,000.

43 Marriage in community of property necessarily entails marriage in "*community of debt*", with the result that spouses stand as joint debtors.[25] Each spouse is therefore jointly and severally liable for the combined debts at the time of the marriage and any further debts incurred during the subsistence of the marriage (provided that the spouse incurring the debt had capacity to bind the joint estate).

44 As a result, the R50,000 limit threatens to exclude large numbers of spouses married in community of property. For example, spouses with a combined debt of R60,000 would be excluded, despite the fact that their respective contributions to this debt may be far less than R50,000.

45 In ***Van der Merwe v Road Accident Fund***,[26] the Constitutional Court expressed doubt as to whether the listed ground of "marital status" under section 9(3) protects against differentiation between marital property regimes. As a result, this exclusion may not amount to discrimination under section 9(3).

46 However, the Court emphasised that any differentiation between spouses married in community of property and those married out of community of property must satisfy the test for rational differentiation under section 9(1) of the Constitution.[27]

47 In this case, there appears to be no legitimate purpose for disproportionately excluding spouses married in community of property from the benefits of the debt intervention mechanism.

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[25] *Du Plessis v Pienaar* 2003 (1) SA 671 (SCA)
[26] *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) at paras 45 – 47.
[27] Ibid at paras 48ff.

48 This defect could be addressed by specifying a separate limit for spouses married in community of property. For example, the Bill could specify that where a consumer is married in community of property, their individual debts and the joint household debt should not exceed a higher threshold, such as R100,000.

The 24 November 2017 restriction

49 As presently formulated, the Bill provides that a consumer will only qualify for debt intervention if their total unsecured debt is no more than R50,000 on 24 November 2017. However, the Bill does not apply a cut-off at the time that the person applies for debt intervention.

50 This could result in irrational anomalies. For example:

50.1 A person with unsecured debts of R60,000 on 24 November 2017 would be excluded from debt intervention, despite the fact that their debts may be below R50,000 at the time that they wish to apply for debt intervention.

50.2 By contrast, a person with unsecured debts of R49,000 on 24 November 2017 whose debts have subsequently grown to over R500,000 would still be entitled to apply for debt intervention and could potentially have the full debt extinguished.

51 This differentiation appears to be arbitrary. It can be corrected by specifying that the R50,000 limit applies both at 24 November 2017 (or any revised date) and at the time that the consumer applies for debt intervention.

Possible breach of section 25(1) of the Constitution

52 Some of the submissions on the Bill have argued that the debt intervention procedure will result in the arbitrary deprivation of credit providers' property, in breach of section 25(1) of the Constitution.

53 It has also been suggested that the debt intervention procedure will result in the unlawful expropriation of property, in breach of section 25(2) of the Constitution. However, expropriation only arises where the state acquires property.[28] Accordingly, section 25(2) has no application here.

54 Three conditions must be satisfied to establish a limitation of section 25(1): a) the thing in question must be property; b) there must be a deprivation; and c) the deprivation must be procedurally or substantively arbitrary.[29]

55 If a limitation of section 25(1) is established, it must be demonstrated that this limitation is reasonable and justified under section 36 of the Constitution. However, the Constitutional Court has indicated that the section 36 analysis is likely redundant in these cases, as it is difficult to conceive of circumstances where an arbitrary deprivation of property could be justified.[30]

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[28] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 48.
[29] *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 (6) SA 331 (CC) at para 34.
[30] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 110.

Deprivation of property

56 In our view, the debt intervention procedure will certainly result in the deprivation of credit providers' property.

57 In ***National Credit Regulator v Opperman***,[31] the Constitutional Court acknowledged that personal rights in the law of contract, delict and unjustified enrichment may amount to "property" for the purposes of section 25(1).

57.1 In that case, the Court held that a credit provider's right to bring a claim under the law of unjustified enrichment for the repayment of money or the return of goods constituted property. Accordingly, the Court held that a previous version of section 89(5)(b) of the Act was unconstitutional to the extent that it barred credit providers from bringing such claims where a court declared a credit agreement to be unlawful.

57.2 While the Court did not explicitly hold that a credit provider's contractual rights under a credit agreement constitute "property", that conclusion now seems inevitable. Once it is accepted that claims under the law of unjustified enrichment constitute property, there is no apparent basis to exclude a credit provider's contractual rights to payment or the return of goods merely because they are grounded in contract.

[31] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 61. See also *Law Society of South Africa v Minister for Transport* 2001 (1) SA 400 (CC) 81 and 84 where the Court assumed without deciding that the right to bring a claim in delict amounts to property under section 25(1).

58 Only "*substantial interferences*" in property rights constitute a deprivation under section 25(1).[32] In our view, the debt intervention procedure would result in a substantial interference, given that a decision to grant a debt intervention application suspends credit agreements for a 12-month period (subject to extension) and may ultimately result in the debt being entirely extinguished

58.1 At present section 88C(4) of the Bill is unclear as to whether an order of "*extinguishment*" would deprive credit providers of a claim under the law of unjustified enrichment in circumstances where a debtor would be enriched by this order.

58.2 While a claim based on unjustified enrichment may ameliorate the deprivation to some extent, it would not erase it. In ***Chevron v Wilson***,[33] the Constitutional Court confirmed that the mere existence of a possible claim in the law of unjustified enrichment does not alter the fact of a deprivation of property.

59 This deprivation of property would only be found to be in breach of section 25(1) if the deprivation is procedurally or substantively arbitrary.

Procedural arbitrariness

60 There are two difficulties with debt intervention procedure, as presently formulated, which may result in it being found to be procedurally arbitrary.

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[32] *Jordaan v City of Tshwane Metropolitan Municipality* 2017 (6) SA 287 (CC) at para 59; *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 (6) SA 331 (CC) at para 47; *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at para 32.
[33] *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* 2015 (10) BCLR 1158 (CC) at paras 25 – 30.

61 First, the current formulation of the Bill does not appear to afford credit providers an adequate opportunity to make representations before decisions are taken affecting their rights.

61.1 There is a substantial overlap between the requirements of procedural fairness under section 25(1) of the Constitution and the requirements of procedurally fair administrative action under section 33 of the Constitution, as given effect by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The proposed powers of the National Credit Regulator and the National Credit Tribunal to conduct the debt intervention process would certainly constitute administrative action which must be procedurally fair.

61.2 The combined requirements of section 25(1) of the Constitution and just administrative action would entitle credit providers, at the very least, to make representations before a decision is taken on whether to suspend or extinguish existing credit agreements.

62 At the first stage of the debt intervention process, when the National Credit Regulator considers applications for debt intervention, the Bill does not expressly provide for representations from credit providers:

62.1 The Bill provides that the National Credit Regulator must notify all affected credit providers of the application.[34]

[34] Section 88B(1)(b)(i).

62.2 It further provides that credit providers must comply with the National Credit Regulator's reasonable requests and must "*participate in good faith in the application*".[35]

62.3 However, the Bill is silent on whether credit providers can make representations, either in writing or in person, to the National Credit Regulator during this process.

62.4 This is not a fatal defect, as the provisions of the Bill will need to be read subject to the provisions of PAJA, specifically the requirements of procedural fairness in section 3. In ***Zondi v MEC for Traditional & Local Government Affairs***,[36] the Constitutional Court explained this principle as follows:

> *"PAJA … governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA."*

62.5 Nevertheless, it would be preferable for the Bill to make explicit provision for credit providers' rights to make representations, coupled with appropriate procedures and timelines for these representations.

63 There are greater difficulties at the second stage, where the Tribunal considers the recommendations of the National Credit Regulator and decides on an

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[35] Section 88B(2)(b).
[36] *Zondi v MEC for Traditional & Local Government Affairs* 2005 (3) SA 589 (CC) at para 101.

appropriate order. As it is presently formulated, the Bill appears to exclude any possibility of representations from credit providers at this stage of the process.

63.1 Section 88C(1) of the Bill confines the Tribunal to the documents included in the referral from the National Credit Regulator:

> "88C. (1) An application for the debt intervention may be considered by a single member of the Tribunal, with reference to the documents included in the referral from the National Credit Regulator only, without further evidence being led."

63.2 If credit providers have been given an opportunity to make representations to the National Credit Regulator, this restriction would not necessarily be a problem at the stage where the Tribunal makes an initial decision on whether to suspend the credit agreement under section 88C(3).

63.3 However, this restriction is problematic at the stage where the Tribunal must make a further decision under section 88C(4) on whether to extinguish debts, after a 12-month period has elapsed.

63.4 At that stage, the Tribunal must consider further information on the consumer's financial circumstances which would not have been before the National Credit Regulator. Procedural fairness would require that credit providers be entitled to comment on the information presented to the Tribunal on the consumer's financial circumstances, to present further information on the consumer's financial circumstances, and to make further representations on the appropriate order, as necessary. However, this appears to be precluded by section 88C(1).

63.5 Section 88C(9) does, however, make provision for a credit provider to set the matter down for reconsideration, after the Tribunal has made a decision.

> *"(9) A credit provider affected by an order contemplated in subsection (2) may by notice to the debt intervention applicant and the National Credit Regulator, set down the matter for reconsideration of the order."*

63.6 Section 88D(7)(a) further entitles the Tribunal to rescind a decision where it is found that the consumer was dishonest in the initial application.

63.7 The possibility of reconsideration and rescission somewhat ameliorates the absence of any opportunity to make representations before a decision is taken. However, in our view, it is not sufficient to cure the procedural unfairness, particularly given the fact that the application to rescind or reconsider the application may only be heard long after a creditor provider's rights have been extinguished.

63.8 As a consequence, we suggest that section 88C must make explicit provision for the credit provider to submit representations to the Tribunal, at least at the stage where the Tribunal considers whether to extinguish credit agreements under section 88(4) of the Bill.

64 The <u>second</u> form of procedural arbitrariness arises from the Tribunal's apparent lack of a discretion to suspend credit agreements or to extinguish debts under sections 88C(3) and 88C(4).

65 The courts have held that a deprivation is procedurally arbitrary in circumstances where a court has been deprived of the discretion to make a "*just and equitable*" order.[37]

66 In ***Chevron v Wilson***, the Constitutional Court further explained that the following circumstances are indicative of a procedurally arbitrary decision-making process –

> *"the deprivation takes place without any consideration being given to: the conduct of the parties to the transaction; their respective financial positions; their levels of business and financial acumen; the possible apportionment of blameworthiness to the parties in relation to the unlawfulness of the agreement; and the extent to which the credit receiver has profited from the transaction."*[38]

67 At present, section 88C appears to deprive the Tribunal of any meaningful discretion:

67.1 Section 88C(3) provides that where a consumer satisfies the criteria for debt intervention, the Tribunal "*must*" suspend all qualifying agreements, in part or in full.

67.2 Section 88C(4) further provides that if the consumer's financial circumstances have not sufficiently improved, the Tribunal "*must*" extinguish the consumer's debts, in part or in full.

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[37] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 69; *Mohunram and Another v National Director of Public Prosecutions and Another* 2007 (4) SA 222 (CC) at para 121; *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* 2015 (10) BCLR 1158 (CC) at para 22 – 23.
[38] *Chevron v Wilson* ibid at para 23.

67.3 The Tribunal does not appear to have any discretion to refuse to grant these orders, even if it is of the view that they are not just and equitable in the circumstances.

67.4 While section 88C(2) lists a range of other orders that the Tribunal may grant, including a referral for debt review, this provision also does not appear to confer any discretion on the Tribunal to refuse to suspend or extinguish debts.

68 Therefore, to avoid a constitutional challenge to these provisions, it is advisable to amend the Bill to give the Tribunal the necessary discretion to make just and equitable orders.

Substantive arbitrariness

69 A deprivation is substantively arbitrary if it occurs without "*sufficient reason*". This standard of review is more demanding than mere rationality enquiry but less intrusive than a full-blown proportionality analysis under section 36 of the Constitution.[39]

70 In ***Prophet v National Director of Public Prosecutions***,[40] the Constitutional Court outlined the following considerations in assessing whether there is sufficient reason for a deprivation:

[39] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) at para 65.
[40] *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at para 62.

> *"1. the relationship between the purpose of the deprivation and the person whose property is affected;*
>
> *2. the relationship between the purpose of the deprivation, the nature of the property affected and the extent of the deprivation;*
>
> *3. a more compelling purpose is required where the property rights involved are the ownership of land or corporeal movables;*
>
> *4. the reasons should be more compelling as more incidents of ownership are affected;*
>
> *5. depending on the nature and extent of the rights affected, the test is one that comprises elements of rationality and proportionality, moving closer towards proportionality as the effects increase; and*
>
> *6. the inquiry takes full account of the relevant circumstances of each case."*

71 In this case, the extent of the deprivation is potentially severe, given that a credit providers' rights under a credit agreement may be entirely suspended and then extinguished.

71.1 While the individual amounts of debt involved are likely to be small, the cumulative impact of this deprivation on major credit providers is likely to be substantial.

71.2 The extent of this deprivation is compounded by the fact that it will apply retrospectively to credit agreements concluded before the Bill is enacted. There is nothing inherently unconstitutional in the retrospective application of civil laws,[41] as opposed to criminal laws.[42] Nonetheless, the potential unfairness resulting from the retrospective application of this law would be a factor in assessing the extent of the deprivation.

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[41] *S v Mhlungu* 1995 (3) SA 867 (CC) at para 65.

[42] Section 35(3)(l) of the Constitution provides that an accused person has a right not to be convicted of an act or omission that was not an offence at the time of commission. See further *Savoi v NDPP* 2014 (5) SA 317 (CC) paras 75-78.

71.3 Many credit providers would have concluded credit agreements with consumers without factoring in the risk that these agreements would be suspended or extinguished. Had they been aware of these risks, they may not have concluded the agreement on the same terms or at all.

72 As a result, the debt intervention procedure will likely be subjected to a more stringent standard of review that moves closer to a full-blown proportionality analysis. A compelling justification will be required.

73 The purpose of the debt intervention mechanism in attempting to alleviate over-indebtedness is important and laudable. However, it will be necessary to show that this purpose outweighs the impact on credit providers.

74 Several considerations will be important in this balancing exercise.

75 First, the extent to which the deprivation of property advances the purpose of alleviating over-indebtedness will be an important consideration.

75.1 As has been pointed out above, the debt intervention procedure would apply to all consumers who satisfy the requirements under section 88A, irrespective of whether they are in fact over-indebted.

75.2 As a result, this procedure is likely to result in the suspension and cancellation of debts in circumstances where the consumer may be fully capable of meeting their financial obligations.

75.3 This disjuncture between the purpose and the deprivation would not necessarily be fatal – whenever legislation confers benefits on a class of

persons there will always be some undeserving cases that "*slip through the cracks*". However, this disjuncture would weaken the case for this debt intervention measure considerably and may incline a court to find that it is disproportionate.

75.4 To avoid this risk, the debt intervention measure could be confined to those consumers who satisfy the criteria in section 88A and are, in fact, found to be over-indebted.

75.5 Another possibility, outlined above, is to afford the Tribunal the broad discretion to grant debt intervention only where it deems this to be just and equitable in the circumstances.

76 Second, the availability of less restrictive alternatives will likely be a substantial consideration. In ***Opperman***, the Constitutional Court confirmed that this is a relevant and important consideration in assessing substantive arbitrariness.[43]

76.1 As indicated above, the explanatory memorandum to the Bill places much emphasis on the fact that existing debt relief measures, including debt reviews, are currently inaccessible to the poor.

76.2 The primary reason put forward for the inaccessibility of debt review is that the costs of this process currently fall entirely on the consumer. The study commissioned by the National Credit Regulator notes that, in the past, the National Credit Regulator subsidised this procedure for low-income consumers. It is unclear why these subsidies were discontinued.

[43] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at paras 70 – 71.

76.3 From the documents and information made available to us, it is not apparent whether the drafters and sponsors of the Bill have commissioned any further studies or research to investigate the feasibility of reintroducing state-subsidised debt review procedures as an alternative to the proposed debt intervention mechanism.

76.4 If this research has not already been done, it would be advisable to commission this research now in order to refine the draft Bill and to prepare for any potential constitutional challenges.

76.5 If subjected to a constitutional challenged, the state would need to be in a position to support its claims about the inaccessibility of subsidised debt review with sufficient evidence. In ***NICRO***,[44] the Constitutional Court explained the burden on organs of state to provide factual evidence as follows:

> *"Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends."*

76.6 The Court has further explained that where a litigant presents expert evidence in support of a constitutional challenge to legislation, the state will be under a duty to meet that evidence with expert evidence of its own:

> *"[W]here one party has put forward cogent expert documentary evidence indicating that the impugned provisions do not pass constitutional muster, the party seeking to uphold the validity of those provisions must advance evidence of a similar nature if he or she is to have any hope of success…."*[45]

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[44] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* 2005 (3) SA 280 (CC) at para 36.
[45] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para 96.

76.7 As a result, it would be prudent for the Department or other supporters of the Bill to ensure that studies on the feasibility of state-subsidised debt review are done now, before the Bill is enacted.

77 Finally, the extent of the Tribunal's discretion to authorise deprivations of property is relevant in assessing both the procedural and substantive arbitrariness of the deprivation. As indicated in ***Opperman*** and ***Chevron***, in most cases least restrictive alternative to achieve the purpose of a deprivation is to give a court or tribunal the power to authorise deprivations only where this is just and equitable.[46] As a result, we repeat that the Bill could be strengthened by affording the Tribunal this discretion.

78 We express no final views on whether the Bill, as presently framed, would result in substantively arbitrary deprivations of property. However, the prospects of defending against a constitutional challenge would be substantially improved by tailoring this procedure more carefully to its intended purpose and by ensuring that sufficient research has been done to compare the costs and benefits of this measure with the available alternatives, including subsidised debt review.

[46] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at paras 69, 76; *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* 2015 (10) BCLR 1158 (CC) at para 33.

SECTION 88F: THE MINISTER'S POWER TO MAKE DEBT INTERVENTION REGULATIONS

Overview of section 88F

79 In terms of section 88F(1), the Minister is given the power to create regulations prescribing further debt intervention measures "*to alleviate household debt*", over and above the debt intervention procedure established in sections 88A to 88E.

80 The Minister's powers under section 88F(1) are subject to four requirements.

80.1 First, section 88F(2) provides that any further debt intervention measures established by the Minister must address certain specified economic circumstances:

> *"(2) A debt intervention measure contemplated in subsection (1) must address economic circumstances that—*
>
> *(a) constitute a significant exogenous shock that caused widespread job losses;*
>
> *(b) were caused by a regional natural disaster or similar emergency and that is of grave public interest, which was identified by the Minister by notice in the Gazette as such; or*
>
> *(c) affect any of the groups of persons referred to in subsection (3) in such a way that no efficient or effective method to alleviate household debt is available to them."*

80.2 Second, section 88F(3) identifies the categories of persons that may benefit from these measures:

> *"(3) A debt intervention measure contemplated in subsection (1) may only benefit one or more of the following consumers:*
>
> *(a) Indigent persons;*

(b) persons with an income of less than R7500, which includes disabled persons, minors heading a household and women heading a household;

(c) persons who suffered an unforeseen loss of income in a sector identified by the Minister by notice in the Gazette as being subject to mass retrenchments; or

(d) persons who are subject to adverse conditions in a sector or region identified by the Minister by notice in the Gazette as such."

80.3 Third, section 88F(4) prescribes the form that these measures may take:

"(4) A debt intervention measure contemplated in subsection (1) may consist of one or more of the following measures only:

(a) Determining the maximum interest, fee or other charges applicable under a credit agreement for a specific period;

(b) suspending the enforcement of a credit agreement for a period of not more than 12 months: Provided that the period may be extended for a further period of 12 months;

(c) declaring debts under a credit agreement as extinguished;

(d) providing for a liquidation process for consumers with minimal assets and minimal income; or

(e) providing for a combination of any of the measures contemplated in paragraphs (a) to (d)."

81 While sections 88F(2)-(4) purport to limit the scope of the Minister's delegated legislative powers, the broad language confers a largely unrestricted discretion to prescribe debt intervention measures whenever and however the Minister chooses.

81.1 For example, the combined effect of sections 88F(2)(c) read with section 88F(3) is that if the Minister could determine that the existing mechanisms under the Act are insufficient to address household debt and proceed to suspend or extinguish all debts of all persons who earn under R7500.

81.2 The broad sweep of section 88F(3)(c) and (d) also affords the Minister the power to extend these measures to persons who earn more than R7500 per month. For instance, the Minister could use this power to suspend or extinguish all debts in the Eastern Cape Province, having determined that household debt in this region is too high.

81.3 These are extreme examples, but they illustrate the broad and largely unconstrained discretion that would be afforded to the Minister.

82 These regulatory powers are expanded even further by section 88F(5)(c) which provides as follows:

> *"(5) Before prescribing a debt intervention measure contemplated in subsection:*
>
> *…*
>
> *(c) consult the National Assembly referred to in section 42(1)(a) of the Constitution, and where the debt intervention measure proposed falls outside of the criteria referred to in subsections (2) and (3), or if a different debt intervention measure from that contemplated in subsection (4) is proposed, obtain the permission of the National Assembly to proceed."*

83 The effect of this provision is that the Minister could prescribe any further debt intervention procedure in whatever manner the Minister chooses, beyond even the limited constraints imposed by sub-sections 88F(2)-(4). The only requirement is that the Minister would need to obtain the National Assembly's permission.

Relevant principles on delegated legislative powers

84 The Constitution does not impose an absolute prohibition on Parliament delegating its legislative powers. Such delegations of power will often be necessary for effective law-making. In ***Executive Council, Western Cape Legislature v President of the Republic of South Africa***[47] the Constitutional Court explained this principle as follows:

> *"In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies."*

85 However, Parliament may only delegate legislative powers where the Constitution permits this, either expressly or by necessary implication.[48]

86 The Constitutional Court has relied on a number of factors in determining whether the Constitution permits a particular delegation of legislative power. These include:[49]

86.1 The text of the Constitution;

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[47] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 51.
[48] *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) at paras 54 and 65.
[49] See *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC) at para 19; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC); *South African Reserve Bank and Another v Shuttleworth* 2015 (5) SA 146 (CC)

86.2 The nature and extent of the delegation; and

86.3 The nature and subject matter of the power sought to be delegated;

86.4 The identity of the person or institution to whom the power has been delegated.

87 Since ***Executive Council,*** the Court has routinely emphasised that there is a difference between the delegation of the power to make subordinate legislation and the delegation of "*plenary*" legislative powers, which are assigned exclusively to Parliament. The Constitution prohibits the delegation of plenary powers, which include the power to amend or repeal original legislation.[50]

88 In ***Justice Alliance,***[51] the Court emphasised that delegated legislative powers should, ordinarily, be narrowly circumscribed. These powers are usually delegated to another person or institution to "*fill in the detail*" of an existing statute rather than serving as an open-ended licence to legislate.

> *"Delegation is the conferral of a power for a specific reason, often a pragmatic grant of power to fill in the detail of a policy laid down by primary legislation. <u>It is not power which has been transferred to the final decision-maker, to be used as they see fit, or alienated by them in turn</u>."*[52]

89 In ***Shuttleworth***,[53] the majority of the Court held that, in exceptional circumstances, it is permissible to delegate wide and unconstrained legislative powers where a swift response is required. That case concerned the delegation

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[50] *Executive Council* ibid at para 51.
[51] *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC) at para 61.
[52] Ibid at fn 61.
[53] *South African Reserve Bank and Another v Shuttleworth* 2015 (5) SA 146 (CC).

of legislative power to the President to make regulations dealing with exchange controls. Moseneke DCJ, writing for the majority, concluded that even though this delegated power was "*conspicuously abundant*", the subject matter required such wide powers:

> *"That the Constitution affords an express mandate for protecting the value of the currency demonstrates the exceptional significance of the issue. Currency moves with lightning speed. Money has long ceased to be a hand-held commodity or physical article of trade for exchange purposes. The internet and electronic communications enable it to be moved from and between locations and jurisdictions almost instantly. Hence the need for special regulation. Hence also the need for special amplitude of regulatory power. The nature of the power the Act confers on the President to make regulations in regard to currency is unusually wide. but its unusual width meets the unusual circumstance of the subject-matter."*[54]

90 However, in ***Dawood***,[55] the Court cautioned that where Parliament confers a power that may impact on constitutional rights, it is often necessary to lay down clear guidelines for the exercise of those powers:

> *"We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights.*"

91 While the Court made these statements in the context of powers afforded to low-level officials, these statements are also relevant to the delegation of open-

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[54] Ibid at

[55] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 54,

ended, unconstrained legislative powers that may impact on constitutional rights.[56]

The application of these principles to section 88F

92 Sections 88F(2)(a) and (b) of the Bill identify emergency circumstances ("*exogenous shocks*" and "*natural disasters*") where there is likely a need for the Minister to take swift and flexible action to address over-indebtedness. These provisions provide some degree of guidance as to the precise circumstances where these broad legislative powers may be exercised. These provisions could be improved by including definitions of these terms to better guide the Minister's discretion. Nevertheless, these provisions appear to be constitutionally compatible.

93 By contrast, when section 88F(2)(c) is read with sections 88F(3)(c)-(d) and 88F(4), the Minister's powers are largely unconstrained. Section 88F(5)(c) takes these powers even further, by removing any guidelines for when or how these delegated legislative powers should be exercised.

94 These broad powers do not entail "*filling in the detail*" of an existing legislative scheme. Instead, they give the Minister the power to establish entirely new debt intervention mechanisms that could potentially override or replace the existing mechanisms under the Act and the proposed debt intervention procedure under

[56] See the minority decision of Froneman J in *Shuttleworth* at paras 113 – 114.

sections 88A-E of the Bill. Such wide powers begin to resemble Parliament's plenary powers to amend or repeal legislation, which may not be delegated.

95 These broad powers could potentially result in significant deprivations of property and other constitutional rights. As a result, there is a greater need for guidance as to when and how these powers should be exercised. There is no such guidance in the current version of the Bill.

96 The fact that the section 88F(5)(c) power is ultimately subject to the approval of the National Assembly would not remedy this potentially unconstitutional delegation. In ***Executive Council***,[57] the Court held that if a delegation of legislative powers is unconstitutional, the existence of Parliamentary controls or oversight over those powers does not rescue this delegation. The Court put the point as follows:

> *"[The respondents] placed considerable reliance on the fact … that Parliament retains control over the functionary to whom plenary legislative power is delegated and can withdraw it if the power is not exercised in accordance with its wishes. … But, if Parliament does not have the constitutional authority to delegate this power to the Executive or to any other body, the reasonableness of the delegation or the absence of objection is irrelevant. The only way in which Parliament can confer power on itself to act contrary to the Constitution is to amend the Constitution. And this was not done in the present case."*

97 As a result, our view is that the delegated legislative powers under section 88F are susceptible to constitutional challenge. To avoid this constitutional challenge it would be necessary to remove the section 88F(5)(c) power. It is also advisable

[57] *Executive Council* at para 64.

to either remove or substantially curtail the broad powers provided under section 88F(2)(c) read with sections 88F(3) and 88F(4).

CONCLUSIONS

98 In sum, we advise as follows:

98.1 The section 88A qualifying criteria are susceptible to constitutional challenge based on the section 9 right to equality. We advise the following amendments to the Bill:

98.1.1 All consumers who are natural persons should be afforded access to the debt intervention procedure, irrespective of nationality or immigration status, to ensure that this procedure is consistent with the existing protections available under the Act;

98.1.2 If any restrictions on non-citizens are imposed, these restrictions should not exclude asylum-seekers and refugees.

98.1.3 Special provision should be made for spouses married in community of property;

98.1.4 The R50,000 limit on unsecured debt (or any revised limit) should also apply at the time that the consumer applies for debt intervention.

98.2 Sections 88A to 88D are potentially susceptible to constitutional attack on the grounds that the debt intervention procedure arbitrarily deprives credit providers of property, in breach of section 25(1) of the Constitution. The

prospects of defending the debt intervention procedure would be improved by taking the following steps:

98.2.1 Credit providers should be afforded express rights to make representations, either in writing or verbally, to the National Credit Regulator and the Tribunal.

98.2.2 The Tribunal could be afforded the discretion to suspend credit agreements and extinguish debts only where it finds this to be just and equitable in the circumstances.

98.2.3 The debt intervention procedure could be further confined to consumers that are, in fact, found to be over-indebted.

98.2.4 Further research may be required into the feasibility of subsidised debt reviews for low-income consumers, either as an alternative to or as a complement to the proposed debt intervention procedure.

98.3 Section 88F is also susceptible to constitutional challenge on the basis that it sanctions an impermissibly broad delegation of legislative powers to the Minister. The prospects of defending this provision would be substantially improved by:

98.3.1 Deleting the Minister's broad power to make regulations under section 88F(5)(c).

98.3.2 Either removing or substantially curtailing the broad powers currently provided under section 88F(2)(c), read with sections 88F(3) and 88F(4).

99 We make no guarantees as to whether the suggested alterations to the draft Bill will protect it from possible constitutional challenges. However, these amendments would improve the prospects of defending the Bill against these challenges.

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5 March 2018