

An opportunity for No Income No Asset (NINA) debtors to get out of check? – An evaluation of the proposed debt intervention measure

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OPSOMMING

'n Geleentheid vir geen-inkomste-geen-bates skuldenaars om uit skaak te kom? 'n Evaluering van die voorgestelde skuldintervensiemaatreeël

Die artikel ondersoek die haalbaarheid van die voorgestelde skuldintervensiemaatreeël as 'n oplossing vir sogenaamde geen-inkomste-geen-bates-skuldenaars se onhoudbare posisie. Die navorsing is belangrik aangesien bestaande skuldverligtingsmaatreëls geen verligting aan sodanige skuldenaars bied nie ondanks die feit dat die uitsluiting van hierdie groep skuldenaars moontlik ongrondwetlik is. Die aangeleentheid word aan die hand van bestaande statutêre skuldverligtingsmaatreëls, 'n ondersoek na die bepalings van die voorgestelde prosedure, internasionale beginsels en riglyne en 'n evaluering van die prosedure binne die konteks van geen-inkomste-geen-bates-skuldenaars nagevors. Die gevolgtrekking is dat die vraag na die haalbaarheid van die voorgestelde maatreeël meestal positief beantwoord moet word alhoewel sekere wysigings dit verder kan verbeter.

1 INTRODUCTION

In November 2017 the Portfolio Committee on Trade and Industry¹ published the Draft National Credit Amendment Bill, 2018² accompanied by the *Memorandum on the objects of the National Credit Amendment Bill, 2018*³ whereby the public was invited to submit comments. The Bill's major objective is to introduce "capped debt intervention"⁴ into the National Credit Act.⁵ It is supposed to afford the "group of vulnerable consumers" that are currently excluded from formal debt relief measures, namely, the sequestration procedure in terms of the Insolvency Act,⁶ the debt review procedure in terms of the NCA and the

1 Hereafter "the Portfolio Committee".

2 Hereafter "Bill".

3 Hereafter "*Memorandum*".

4 It is unclear what is meant by the term "capped". Although the proposed amendments to the NCA allows for "Debt intervention to be prescribed" by the Minister in specified economic circumstances, there is no indication that the general procedure discussed in this contribution will only be effective where the Minister so prescribes; See proposed s 88F. Therefore and due to the lack of indicators to the contrary, the procedure introduced by the Bill and that which the Minister may prescribe are regarded as two distinct processes.

5 34 of 2005 (hereafter "the NCA"); see "Objects of the Bill" *Memorandum* 1.

6 24 of 1936.

administration order procedure in terms of the Magistrates' Courts Act,⁷ a form of statutory recourse.⁸ It is anticipated that clause 14 of the Bill will insert the procedure into the NCA as chapter 4 part E, namely, "Debt intervention".

It is argued elsewhere that the exclusion of some natural person consumers from accessing the broader natural person insolvency system (namely, the existing statutory measures as a collective) is unconstitutional. This is because the majority of the excluded group of debtors, it is argued,⁹ consists of those with no income and no assets (the so-called No Income No Asset (NINA) debtors)¹⁰ who are unjustifiably and unfairly discriminated against on the basis of their socio-economic status.¹¹ In turn, such discrimination entrenches the duality of the South African economy by keeping the indigent in a state of perpetual poverty.¹² Therefore it is encouraging to note the proposed development in this field. However, the proposed debt intervention procedure is not the first and or only attempt by government to address the plight of this marginalised group of debtors as there are plans to include a pre-liquidation composition procedure in the Unified Insolvency Act.¹³ Unfortunately, it was already shown that, notwithstanding its noble objectives, the introduction of the suggested pre-liquidation composition measure will not alleviate a NINA debtor's plight. This is because the proposed pre-liquidation composition procedure is not suited to NINA debtors' specific needs as, amongst others reasons and paradoxically, they will not be able to afford

7 32 of 1944.

8 "Introduction" in *Memorandum* 40.

9 Coetzee and Roestoff "Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand" 2013 *Int Insolv R* 189.

10 Unfortunately, no empirical studies as regards the size of the South African NINA group of debtors are available. Inferences on the scope of the excluded group therefore are based on estimates; Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition" 2016 *Int Insolv R* 38. Included in the NINA concept are the low income and low assets (the so-called Low Income and Low Asset (LILA)) debtors. In England, the Department of Constitutional Affairs in 1998 announced a review of the enforcement of civil court judgments, which amongst others re-evaluated the English administration order scheme. Independent research commissioned by the department identified three types of debtors, namely, the so-called "could pays", "can't pays" (ie the NINA and LILA debtors) and "won't pays". See also McKenzie Skene and Walters "Consumer bankruptcy law reform in Great Britain" 2006 *Am Bankr LJ* 477 and Roestoff and Renke "Debt relief for consumers – The interaction between insolvency and consumer protection legislation" 2006 *Obiter* 108.

11 See Coetzee 2016 *Int Insolv R* 36 in general.

12 *Idem* 54.

13 It was initially proposed that provision be made for such composition by inserting a new s 74X into the Magistrates' Courts Act: South African Law Reform Commission *Report on the review of the law of insolvency: Draft Insolvency Bill and explanatory memorandum* (Project 63) 2000 and the 2000 Insolvency Bill sch 4. This proposal was also included in the report of the Centre for Advanced Corporate and Insolvency Law (SACIL) at the University of Pretoria titled *Final report containing proposals on a unified Insolvency Act* (January 2000) and in the latest version of the Insolvency Bill; see cl 118 of the 2015 Insolvency Bill. In the last-mentioned document it is envisaged that the proposed measure should be included in the new Unified Insolvency Act and not the Magistrates' Courts Act. The South African Law Reform Commission's initial proposal was also amended in substance. For an evaluation of the latest version of the procedure within the context of NINA debtors, see Coetzee "Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and if not, what would?" 2017 *THRHR* 18.

the procedure.¹⁴ In evaluating the proposed pre-liquidation composition procedure, it was suggested that a *sui generis* procedure should be implemented to cater for NINA debtors' specific needs. Another suggestion was that the National Credit Regulator¹⁵ could be considered as a supervising body as it is already tasked with regulating the consumer credit landscape including the debt review procedure. It was also suggested that special attention should be afforded to minimise costs as NINA debtors should have cost-free assistance.¹⁶

The aim of this research is to consider the second legislative attempt to address the plight of NINA debtors and more specifically whether the proposed debt intervention procedure will succeed where the planned pre-liquidation composition procedure fails to provide a solution to relegated consumer insolvents. Although the proposed debt intervention measure's substantive and procedural elements are extensive and may be analysed and evaluated from various angles, the focus of this contribution's evaluation of the procedure is on access to the proposed measure and the ultimate relief that it will provide when introduced as these are the most salient features from a debt-relief perspective. However, in order to conduct the evaluation and as the procedure has not been discussed before, the majority of its procedural features are set out and some preliminary commentary on procedural aspects are offered. Matters such as mandatory credit life insurance, the fact that secured credit is excluded from the process, the measure's effect on access to credit, early exit from the procedure by means of "rehabilitation" and the effects of the procedure beyond debt relief are not discussed in detail. After providing a cursory summary of existing debt relief measures for natural persons in order to illustrate the exclusion of the NINA group of debtors, the article describes the proposed debt intervention measure while introducing some introductory observations on the process. As a subtext, it also considers whether the Committee's proposals conform to international principles, guidelines and trends in relation to natural person insolvency law.¹⁷ This is followed by a focused evaluation of the proposed debt intervention procedure from a debt-relief perspective. In this respect, NINA debtors take centre stage. The article ends with some concluding remarks.

2 STATUTORY DEBT RELIEF MEASURES IN SOUTH AFRICA

There are three statutory debt relief measures available to overcommitted South African debtors.¹⁸ These procedures stem from various pieces of legislation and

14 Coetzee 2017 *THRHR* 25.

15 The National Credit Regulator (hereafter "NCR") is an independent statutory body established through the NCA. The NCR is only subject to the Constitution of the Republic of South Africa, 1996 and the law; NCA s 12.

16 Coetzee 2017 *THRHR* 26.

17 In this respect, the most recent internationally regarded report, namely, the 2011 World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group (Hereafter "World Bank") *Report on the treatment of the insolvency of natural persons* serves as the primary source. The two editions, in 2001 and 2011 respectively, of the International Federation of Insolvency Professionals (hereafter "INSOL International") *Consumer debt report: Report of findings and recommendations* are also referred to. The second edition of the report is mostly an expansion and clarification of the first report, accompanied by country reports: Van Appeldoorn in the foreword to the 2011 report.

18 See Steyn *Statutory regulation of forced sale of the home in South Africa* (LLD thesis UP 2012) 349ff for a comprehensive explanation and consideration of the statutory measures.

only the sequestration procedure¹⁹ in terms of the Insolvency Act provides for a discharge of pre-insolvency debt.²⁰ Since successful sequestration proceedings lead to a discharge of pre-sequestration debt it is deemed to be the primary South African debt relief measure.²¹ However, the discharge is not the main aim of the procedure and merely a consequence thereof.²² In order to qualify for the “privilege” of a sequestration order and therefore also for the eventual discharge that it brings about, an applicant has to prove, amongst others, that sequestration will be to the advantage of creditors.²³ As Erasmus J remarked: “[T]he whole tenor of the Act, inasmuch as it directly relates to sequestration proceedings is aimed at obtaining a pecuniary benefit for creditors.”²⁴ This results in many debtors being excluded from the procedure. The other two statutory debt relief measures, which are (in light of the sequestration procedure) regarded as alternative measures, are the administration order procedure in terms of section 74 of the Magistrates’ Courts Act and the debt review procedure in terms of section 86 of the NCA. Both of these procedures are essentially repayment plans and do not provide any actual debt relief in the form of a discharge. It seems that these procedures were not intended as remedies for hopeless financial situations and were devised to assist only the “mildly” over-indebted during a period of temporary financial misfortune. Indeed, the majority of hopelessly over-indebted natural persons do not have access to any statutory debt relief measure due to the cumulative effect of the differentiation brought about by the entry requirements of the individual procedures. The major stumbling block in obtaining a sequestration order is the already-mentioned “advantage for creditors” requirement. As the sequestration procedure is in essence an asset liquidation process, it differentiates between debtors on the basis of those with and those without assets. As far as the administration order procedure is concerned, only debtors with less than R50 000 in outstanding debts are allowed access to the procedure.²⁵ Consequently, this measure excludes those with outstanding debt of more than the threshold from its application. The debt review procedure in turn poses a number of access obstacles, amongst others, that only credit agreements as defined in the NCA are subject to the procedure²⁶ and that agreements in terms of which credit providers have commenced individual enforcement procedures are excluded.²⁷ However, more relevant to the present discussion is the fact that both alternative procedures indirectly require the debtor to have some form of disposable income available, thus once again drawing a distinction between those debtors “with” and those “without” (income in this instance).²⁸ As was noted in the introduction to the article and is illustrated by the above

19 The sequestration procedure can be described as an asset liquidation procedure.

20 S 129.

21 See Coetzee and Roestoff 2013 *Int Insolv R* 193.

22 See *Ex parte Ford* 2009 3 SA 376 (WCC) 383 and *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) in general.

23 See ss 6, 10 and 12.

24 *BP Southern African (Pty) Ltd v Furstenburg* 1966 1 SA 717 (O) 720.

25 S 74(1)(b) read together with GN R1411 in *GG* 19435 of 30 October 1998.

26 See s 4.

27 See s 86(2).

28 See Coetzee and Roestoff 2013 *Int Insolv R* para III for a detailed discussion of the individual procedures’ entry requirements as well as their cumulative effect.

explanation, the majority of debtors who are excluded from the broader natural person insolvency system resort under the NINA category of debtors.

3 PROPOSED DEBT INTERVENTION MEASURE

3.1 Objectives of debt intervention

The long title of the Bill states that it intends to amend the NCA

“so as to provide for debt intervention; to include the evaluation and referral of debt intervention applications . . . as part of the enforcement functions of the National Credit Regulator; to include the consideration of a referral as a function of the Tribunal;²⁹ . . . to provide for a court to refer a matter for debt intervention; to provide for an application for debt intervention and evaluation thereof; to provide for orders related to debt intervention and rehabilitation in respect of such an order; to enable the Minister to prescribe a debt intervention; . . . to provide for offences related to debt intervention; . . . to provide for the Tribunal to change or rescind an order under certain circumstances; to require the Minister to prescribe a financial literacy and budgeting skills programme; and to provide for matters connected therewith”.

In turn, the preamble to the Bill acknowledges that the purpose of the NCA

“is to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market industry; and to protect consumers”

and that certain categories of consumers cannot access the existing statutory debt relief measures due to either the benefit for creditors requirement or the costs involved in such procedures. The preamble further indicates that the legislature is mindful of the fact that the lack of “suitable alternative debt interventions” prohibits excluded natural person debtors from reaching a position where they would be able to manage or improve their financial positions and thereby “become productive members of society”. The preamble therefore recognises that, in order to give effect to the NCA’s purpose, all consumers “must be afforded protection through fair, transparent, sustainable and responsible processes”. Government’s realisation that all consumers should be afforded protection, irrespective of whether there will be benefit for creditors in employing debt relief measures, is in line with the universally accepted principle that all honest but unfortunate debtors should have access to debt relief measures.³⁰

Clause 28 of the Bill proposes the amendment of the NCA’s long title to provide for debt intervention. In turn, clause 1 suggests that section 3 of the

29 The National Consumer Tribunal (hereafter “NCT”) was established through s 26 of the NCA. It has jurisdiction throughout South Africa and is a juristic person and tribunal of record. It exercises functions in accordance with the NCA and other legislation; s 26(1). According to s 27, the NCT (or a member of the NCT acting alone in terms of either the NCA or the Consumer Protection Act 68 of 2008) may adjudicate any application made to it in terms of the NCA and make any order provided for in the NCA. It may also adjudicate accusations of prohibited conduct by determining whether it occurred and if so impose a remedy in terms of the NCA. It may further grant cost orders as provided for by the NCA and exercise any other power as conferred on it by law.

30 See World Bank *Report* 97–98 136. See further Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis UP 2015) 93 for a summary of the access principle extracted from international reports and trends.

NCA be amended to include debt intervention as a “tool to promote and advance the social and economic welfare of South Africans”.³¹ In this respect section 3(g), (h) and (i) are to be amended. All three subsections deal with the NCA’s consumer protection objective and emphasise specific ways in which the NCA strives to fulfil this purpose. While paragraph (g) presently emphasises “the principle of satisfaction by the consumer of all responsible financial obligations” as regards measures for resolving over-indebtedness stemming from the NCA in all instances, the Bill proposes an addition which will have the effect that such principle will only apply “where the consumer’s financial situation so allows, or may so allow in the foreseeable future”. The shift to a position where the payment of all obligations under all circumstances is not regarded as canon law is preferred as the exclusion of a group of consumers on the basis of their socio-economic status is considered to be unconstitutional.³² As regards paragraph (h), which currently sets out the purpose of protecting the consumer by amongst others “providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements” the Bill omits the word “consensual”. The omission is in line with international principles and guidelines as the World Bank views the benefits of negotiated settlements as mostly illusory.³³ The amendment of paragraph (i) fits in with the amendment of paragraph (g). At present, paragraph (i) provides that the NCA strives to protect the consumer by

“providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements”.

Here, the Bill recommends that the phrase “debt intervention” be added between the words “restructuring” and “enforcement”. Of importance is that it adds “where the consumer’s financial situation so allows, or may so allow in the foreseeable future” as a tailpiece to the paragraph.

3.2 Access to and application for debt intervention

As regards the procedure’s field of application, it was to be expected that, as is the case with the debt review procedure which also resorts under the NCA,³⁴ the legislature intends debt intervention to apply only to natural person consumers.³⁵ Further, such consumers must be citizens or permanent residents of the

31 *Memorandum* 3.1.

32 See Coetzee 2016 *Int Insolv R* 54. In this respect, the Belgian Constitutional Court in April 2003 found that the exclusion of debtors who are unable to pay a substantial part of their debt from relief violates the Belgian Constitution. In the matter, a debtor’s level of income was found to be an unjustifiable ground to refuse a plan that would discharge all pre-petition debt; Order no 3/2003 (3 April 2003), available at <https://bit.ly/2IpjWXC> (accessed on 16 December 2014); see further Coetzee 2016 *Int Insolv R* 47 and secondary sources referred to in fn 68.

33 Although negotiated settlements between parties offer some (theoretical) advantages, eg, reduced stigma, lower costs and increased flexibility, the World Bank *Report* is sceptical thereof. Some of the reasons for the scepticism are that it is difficult to reach agreement with all creditors and that informal procedures are usually plagued by delays. There is also a risk of creditors pressuring debtors to enter into non-viable plans. See in general World Bank *Report* 45–49 129–130. For criticism of the requirement of negotiation within the NINA context see Coetzee 2017 *THRHR* 25.

34 See s 78(1).

35 See cl 3 which proposes the amendment of s 6 of the NCA to exclude juristic persons from the debt intervention procedure’s application.

Republic.³⁶ Although there are a number of substantive access requirements, it seems strange that insolvency or over-indebtedness is not one of them.³⁷ The access requirements stem from the definition of “debt intervention applicant”³⁸ and the proposed measure’s procedural prescripts.³⁹ It appears strange that a disabled person, a minor and a woman heading a household are specifically included in the description of a “debt intervention applicant”.⁴⁰ As regards the access requirements, the individual must firstly qualify as a consumer under a credit agreement.⁴¹ This requirement excludes a number of NINA debtors from the procedure’s reach as not all debt qualifies as credit-agreement debts.⁴² Secondly, the person should receive no income or where the consumer does receive an income or has a right thereto, such “gross income” must not on “average for the six months” before the date of application exceed R7 500 per month.⁴³ In the third instance, the consumer must not own any realisable assets,⁴⁴ that is to say, assets that “can swiftly be converted into cash”.⁴⁵ It is clear that the second and third requirements are aimed at limiting the proposed procedure’s relief to NINA and LILA debtors. Fourthly, the consumer should not be subject to debt review.⁴⁶ It seems that the procedure is intended as a once-in-a-lifetime

36 Proposed s 88A(1)(a).

37 Internationally regarded principles and guidelines prefer the liquidity test for insolvency as an access requirement and that assessment should be based on the debtor’s current inability to meet present debts. See World Bank *Report* 62–63 and Coetzee *LLD thesis* 93.

38 Proposed s 88A(1)(a).

39 See the proposed s 88A in general.

40 Proposed s 88A(1)(iii). The inclusion of the first and last-mentioned individuals are obscure as such individuals obviously have full contractual capacity. It is unclear what the Commission intends with such a provision. Perhaps it envisions that the procedure would also find application to households as such. However, the question then arises as to whether households headed by men are excluded and if so why.

41 Proposed s 88A(1)(a).

42 See ss 4 and 8 of the NCA. Excluded debts include delictual claims, clothing accounts, professional services and municipal accounts where no interest is charged. Also, some credit agreements entered may be excluded where the NCA limits the protection afforded to the consumer under such an agreement, for instance a credit guarantee where the principal agreement does not fall within the ambit of the NCA; see s 4(2)(c) of the NCA.

43 Proposed s 88A(1)(a)(i).

44 Proposed s 88A(1)(a)(ii). Realisable asset is defined as: “An asset that can swiftly be converted into cash at a value that reasonably reflects the second-hand market value of that asset, but does not include – (i) Necessary tools and implements of trade, stock and agricultural implements up to a maximum of R10 000; (ii) Professional books, documents or instruments necessarily used by that debt intervention applicant in his or her profession up to a maximum of R10 000; (iii) Necessary household furniture and household utensils up to a maximum of R10 000; (iv) Necessary beds, bedding and wearing apparel of the debt intervention applicant and of members of his or her immediate household; (v) The supply of food and drink in the residence of the debt intervention applicant sufficient for the needs of that debt intervention applicant and of his or her immediate household, for a period of one month; and (vi) A fund such as a pension fund or retirement annuity that has a future realisation date.”

45 *Ibid.* Although the requirement relating to assets supports the attempt to ring fence the procedure so that it is only available to its intended beneficiaries, the definition of “realisable asset” will in some instances have the opposite effect. That is because individuals with strong balance sheets but who experience liquidity problems will be able to qualify for the procedure where, for instance, the market for their secondary properties is bust.

46 Proposed s 88A(1)(a)(iii).

opportunity as the fifth requirement stipulates that the applicant may apply for the procedure only once.⁴⁷ Lastly, the applicant must not have had a “total unsecured debt”⁴⁸ of more than R50 000 on 24 November 2017.⁴⁹ The *Memorandum* does not explain why this date was chosen.

As is the case with the debt review procedure,⁵⁰ incidental credit agreements will be subject to the procedure.⁵¹ However, developmental credit agreements are excluded.⁵² Also akin to the debt review procedure,⁵³ agreements where credit providers have “proceeded to take the steps contemplated in section 130 to enforce the agreement” are excluded.⁵⁴ Nevertheless, it seems that such agreements are taken into account when the total unsecured debt is calculated.⁵⁵

As regards the actual application, the debt intervention applicant will have to apply to the NCR in a manner and form that will probably be prescribed by regulation.⁵⁶ The application must be supported by substantial prescribed documents and information.⁵⁷

3.3 NCR’s evaluation of the application

Upon receipt of the proposed section 88A application, the NCR must provide the applicant with proof thereof⁵⁸ and, in the manner and form to be prescribed, inform all credit providers listed in the application and all registered credit

47 Some foreign jurisdictions regard the application of a NINA procedure as a once-in-a-lifetime opportunity. See, eg, the New Zealand no asset procedure; s 363(1)(c) of the New Zealand Insolvency Act 2006. The fact that a debtor has only one opportunity to make use of the no asset procedure is an attempt to manage the risk of abuse: Keeper “New Zealand’s no asset procedure: A fresh start at no cost?” 2014 *QUT LR* 86 and authorities cited.

48 “[T]otal unsecured debt” is defined as “The total of money or other consideration contemplated in section 101(1) due by the debt intervention application under all the unsecured credit agreements to which the debt intervention applicant is a party.”

49 Proposed s 88A(2). The R50 000 ceiling is akin to that of the administration order procedure; see § 2 above.

50 See s 5.

51 See cl 2 which proposes the amendment of s 5 of the NCA to render debt intervention applicable to incidental credit agreements.

52 Proposed s 88A(3)(a).

53 See s 86(2).

54 Proposed s 88A(3)(b).

55 Proposed s 88A(3).

56 Proposed s 88A(2). Cl 23 of the Bill proposes the insertion of a s 157A which provides that the intentional submission of false information in an application for debt intervention or the presentation of information in such an application which is intended to mislead the NCR or NCT constitutes an offence. Also, any person who deliberately amends financial circumstances to qualify for the procedure is guilty of an offence.

57 According to the proposed s 88A(4), these are: “(a) Proof of the debt intervention applicant’s daily, weekly or monthly income and expenses, supported by the most recent proof thereof in the possession of the debt intervention applicant; (b) Information confirming the total unsecured debt; (c) Credit agreements that relates [sic] to the total unsecured debt; (d) Credit insurance agreements, if any, pertaining to the debt intervention applicant’s indebtedness; (e) Agreements, if any, entered into with creditors related to restructuring any of the debt intervention applicant’s debt; (f) A set out of all the assets owned by the debt intervention applicant; and (g) Such other information as may be prescribed.”

58 Proposed s 88B(1)(a).

bureaus of the application.⁵⁹ The NCR must also provide such credit providers with a summary of the applicant's income, assets and liabilities.⁶⁰ As is the case with the debt review procedure, although in relation to the debt counsellor's functions,⁶¹ the applicant and each affected credit provider are expected to comply with reasonable requests by the NCR in its evaluation of whether the applicant qualifies for the procedure.⁶² Also similar to the debt review procedure,⁶³ the applicant and credit providers concerned must in good faith partake in the application.⁶⁴

The NCR must evaluate the application and in so doing ascertain whether any of the credit agreements "making up the debt under consideration" possibly constitute reckless lending, an unlawful transaction or a transaction stemming from prohibited conduct or dereliction of requisite conduct.⁶⁵ If it is found to be the case, section 55 of the NCA applies⁶⁶ and the NCR must separate that agreement from the application.⁶⁷ The NCR must also determine whether an agreement is secured or one contemplated in the proposed section 88A(3), namely, a developmental credit agreement or one where debt enforcement in terms of section 130 has commenced.⁶⁸ In such a case it must draw the NCR's attention thereto in that such agreements should not form part of the eventual debt intervention order.⁶⁹ The NCR must consider whether an agreement is subject to credit insurance and if so, assist the applicant to claim against the insurance.⁷⁰ It must further draw the NCR's attention to such agreement to ensure that any part of the agreement that qualifies for the insurance does not form part of the debt intervention order.⁷¹

The proposed section 88B(4) sets out the steps that the NCR must take following upon and depending on the outcome of its evaluation of the information contemplated in the proposed section 88A(4) against the criteria set out in the proposed section 88A(2) and (3). It provides that where the NCR reasonably concludes that the applicant does not qualify for the procedure, it *must* reject the application.⁷² However, where the applicant does not qualify for the measure

"but is nevertheless experiencing, or is likely to experience, difficulty satisfying all the debt intervention applicant's obligations under credit agreements in a timely manner, the National Credit Regulator *must*⁷³ refer the debt intervention applicant

59 Proposed s 88B(1)(b).

60 Proposed s 88B(1)(c).

61 See s 86(5)(a).

62 Proposed s 88B(2)(a).

63 S 86(5)(b).

64 Proposed s 88B(2)(b).

65 Proposed s 88B(3)(a).

66 S 55 relates to compliance notices issued by the NCR.

67 Proposed s 88B(3)(a).

68 See para 32 above.

69 Proposed s 88B(3)(b).

70 Proposed s 88B(3)(c).

71 *Ibid.*

72 Proposed s 88B(4)(a). In this respect, ss 140(1)(a) and 141 apply with the necessary contextual changes; see proposed s 88B(4)(5).

73 My emphasis.

to a debt counsellor for debt review or assistance with a voluntarily [sic] plan of debt re-arrangement".⁷⁴

In the event that a credit agreement forming part of the application possibly constitutes reckless lending, an unlawful agreement or one resulting from forbidden behaviour or dereliction of mandatory conduct, the NCR may make a recommendation to the NCT to make the appropriate declaration.⁷⁵ Finally, where the NCR reasonably concludes that the application under consideration qualifies for the debt intervention measure⁷⁶ it must recommend to the NCT that the debt intervention be granted to the applicant.⁷⁷

3.4 Debt intervention orders

It is anticipated that the NCT, and a single member at that, may consider the application for debt intervention.⁷⁸ The NCT's function is in line with international principles and guidelines which prefer that courts should only be involved in insolvency procedures in exceptional circumstances. Furthermore, the World Bank favours "increased specialization and administrative processing particularly for the large percentage of NINA . . . debtors".⁷⁹ The NCT will consider the matter with reference only to the documents forming part of the NCR's referral.⁸⁰ Thus, no further evidence needs to be led.⁸¹

In addition to its existing powers in terms of the NCA, the proposed section 88C(2) sets out the orders that the NCT may make following its consideration of a referral in terms of proposed section 88B(4)(c) or (d), namely, a referral related to reckless lending, unlawful agreements, agreements resulting from prohibited conduct or dereliction of required conduct or debt intervention, and any other applicable information. The NCT *may*

- "(a) make an order that the debt intervention applicant does not qualify for the debt intervention and reject the application;
- (b) request the National Credit Regulator to refer the debt intervention applicant to a debt counsellor for debt review or assistance with a voluntarily [sic] plan of debt re-arrangement;
- (c) where the Tribunal is of the view that debt intervention applicant [sic] could satisfy payment requirements, but an order contemplated in paragraph (b) would not be effective, determine the –⁸²
 - (i) maximum interest, fees or other charges under a qualifying credit agreement for such a period as the Tribunal deem [sic] fair and reasonable but not exceeding twelve months, before the expiry of which the debt intervention applicant must present his or her financial circumstances to the Tribunal for an extension of the determination for a period not exceeding twelve months or another order contemplated in

74 Proposed s 88B(4)(b).

75 Proposed s 88B(4)(c).

76 The proposed subsection merely states "qualifies" without indicating whether it is the applicant or the estate that should qualify.

77 Proposed s 88B(4)(d).

78 Proposed s 88C(1).

79 World Bank *Report* 55–56.

80 Proposed s 88C(1).

81 *Ibid.*

82 The orders referred to in proposed s 88C(2)(c) are subsequently referred to as "NCT-ordered debt restructuring procedure".

- this subsection: Provided that the maximum interest, fee or other charge may be zero; and
- (ii) maximum monthly instalment that the debt intervention applicant can be expected to pay to the affected credit providers during the period contemplated in subparagraph (i);
- (d) declare –
- (i) a credit agreement reckless as contemplated in section 55⁸³ read with 83;⁸⁴ or
 - (ii) a credit agreement or a provision of a credit agreement void for being unlawful, resulting from prohibited conduct or the dereliction of required conduct as contemplated in section 55;⁸⁵
- (e) grant an order in accordance with subsections (3), (4) or (5) related to the debt intervention; or
- (f) grant a combination of orders”.

The NCR must notify the applicant of any of the orders listed above. It must also, in the prescribed manner and form, serve a copy of the order on every credit provider that is listed in the application and every registered credit bureau.⁸⁶ International principles and guidelines suggest that creditor participation in insolvency procedures should as a matter of course be excluded, except in instances where the estate represents significant value,⁸⁷ which is clearly not applicable to NINA debtors. Therefore, the commission is applauded for not allowing needless creditor participation. However, the procedure remains mindful of creditor interests by including proposed section 88C(9) which provides that “[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”.

Proposed section 88C(3) and 88C(4) is of especial importance since it provides for the debt intervention measure’s actual debt relief orders. Proposed section 88C(3)(a) provides the orders that the NCT must make upon a determination that the applicant qualifies for debt intervention. These are that all the qualifying agreements must be suspended in part or in full for a twelve-month period. Before the expiration of such period the applicant must present his or her financial situation to the NCT for an order to either extend the suspension for a further twelve months or an order contemplated in proposed subsection (4). Section 84 of the NCA⁸⁸ applies to a suspension contemplated in proposed subsection (3).⁸⁹ Before the conclusion of the second twelve-month period, where applicable, the applicant must present his or her financial circumstances to the NCT for an order set out in either proposed subsection (4) or an order that the NCT considers properly considering the financial circumstances of the

83 The reference to s 55 is peculiar since the section regulates compliance notices issued by the NCR.

84 S 83 sets out the powers of the court upon a determination of reckless lending.

85 See the comment above as regards s 55.

86 Proposed s 88C(8).

87 World Bank *Report* 68–69 132.

88 See Van Heerden in Scholtz *et al Guide to the National Credit Act* (2008ff) para 11.5.7 regarding the suspension of an agreement in terms of s 84.

89 Proposed s 88C(6).

applicant.⁹⁰ The final order set out in proposed subsection (3) relates to credit insurance. Where an agreement is partly or wholly subject to credit insurance and where the claim has not been finalised when the debt intervention order is granted, the NCT may postpone the order in respect of the particular agreement for a period that the NCT regards reasonable to finalise the claim.⁹¹

Proposed section 88C(4) is remarkable as it offers the long-awaited discharge under NINA circumstances. It is significant because one of the principal objectives of an insolvency system for natural persons is economic rehabilitation.⁹² The section provides that where the NCT is of the view that the applicant's financial circumstances did not sufficiently improve⁹³ during the first or, where relevant, second twelve-month period set out in proposed subsection (3)

“to justify an order releasing the debt intervention applicant from the debt intervention process, or an order contemplated in subsection (2)(b),⁹⁴ (c)⁹⁵ or (f),⁹⁶ the Tribunal *must* declare the debt under the qualifying credit agreements extinguished: Provided that the extinguishment –

- (a) may be a percentage of the debt due; and
- (b) must apply equally to all the qualifying credit agreements”.⁹⁷

The proposal provides for a discharge in the not too distant future which is in line with international principles and guidelines. More specifically, the World Bank considers a period of more than three years irresponsible from a social point of view.⁹⁸ Also in line with preferred international practice is the fact that the proposed provision does not link the discharge to a certain level of payment to creditors which accords with the prohibition against discrimination on financial grounds.⁹⁹ Unfortunately and contrary to international principles and guidelines as it may hinder a fresh start, the discharge is not as wide as possible as only debt resulting from qualifying agreements, namely, NCA-regulated agreements where enforcement has not commenced, will be discharged.¹⁰⁰

90 Proposed s 88(3)(b). It is not clear what such orders may entail as the subsection does not refer to a specific provision of the NCA. This is strange as the NCT does not have inherent jurisdiction as is the case with the High Court. I propose that the proposed provision be read as other orders that the NCT may make in terms of the NCA or the law.

91 Proposed s 88(3)(c).

92 See World Bank *Report* para 354.

93 Bearing in mind the fact that insolvency or over-indebtedness is not an access requirement, the legislature probably refers to a change in the monthly income of the debtor or the realisable assets that the consumer holds.

94 A request to the NCR to refer the applicant to a debt counsellor for a debt review or assistance with a voluntary arrangement.

95 An NCT-ordered debt restructuring procedure where the NCT is of the opinion that a traditional debt review procedure would not be effective.

96 A combination of the orders contemplated in proposed s 88C(2).

97 My emphasis.

98 World Bank *Report* 85–86 135.

99 See Coetzee *LLD thesis* 94 for a summary of internationally-favoured principles in this respect.

100 *INSOL International Report* (2001) 22 and (2011) 20. See also World Bank *Report* 118–122 139.

The Bill provides for possible conditions that the NCT *may* set when granting orders envisaged in proposed subsections 2(c),¹⁰¹ (e)¹⁰² or (f).¹⁰³ Five such conditions stem from proposed subsection 88C(5). The first is that the NCT may set conditions relating to the notification of credit providers and the implementation of the order.¹⁰⁴ Secondly, and subject to proposed section 88D(5),¹⁰⁵ the NCT may order conditions relating to a limitation of the applicant's right to apply for credit¹⁰⁶ for a period that the NCT regards fair and reasonable and not exceeding the maximum periods set out in proposed subsection (7).¹⁰⁷ Thirdly, conditions may be set in respect of any credit agreement that qualified for the procedure.¹⁰⁸ In the fourth instance, the NCT may order the applicant to attend a "financial literacy or budgeting skills programme" to support the applicant in the management of his or her financial situation.¹⁰⁹ Finally, the NCT may set any condition that in its opinion will assist the applicant "to manage or improve his or her financial position and become a productive member of society".¹¹⁰

3 5 Effect of debt intervention

A debt intervention application affects all interested parties. Proposed subsection 88D(1) sets out some consequences for the applicant. It firstly provides that a debtor who filed a debt intervention application¹¹¹ "may not incur any further

101 An NCT-ordered debt restructuring procedure where the NCT is of the opinion that a traditional debt review would not be effective.

102 An order in relation to proposed subsections (3), (4) or (5) as regards the debt intervention.

103 A combination of the orders contemplated in proposed s 88C(2).

104 Proposed s 88C(5)(a).

105 Proposed s 88D deals with the effects of debt intervention and in this instance that a successful debt intervention applicant may apply for developmental or public interest credit contemplated in the NCA; see ss 10 and 11 respectively.

106 As envisaged in s 60.

107 Proposed s 88C(5)(b) read together with proposed s 88C(7). In terms of the latter provision, the limitation to apply for credit may not exceed 36 months. Further, the following factors need to be considered when devising the fitting period: "(a) The amount in respect of which the debt intervention is sought; (b) The number of credit agreements that submitted [sic] for debt intervention; (c) The period of qualifying credit agreements; (d) The debt intervention applicant's credit record; and (e) The debt intervention applicant's credit behaviour in respect of the qualifying credit agreements." It is difficult to comprehend the reason for linking the determination of the period during which the applicant may not apply for credit to (a) to (d) above as these factors do not necessarily relate to possible *mala fides* or negligent past behaviour as regards credit usage. Nevertheless, the last factor is appropriate. I propose that, subject to compelling circumstances relating to the applicant's behaviour, the period for which the applicant is prohibited from applying for credit should coincide with the period for which the procedure is in force or in other words the period before a discharge is granted. This is because before such time the matter has not been finalised and a solution to the situation is still sought.

108 Proposed s 88C(5)(c). It is not clear what such conditions may be. Perhaps the section refers to, amongst others, the consequences relating to reckless credit extension found in s 84.

109 Proposed s 88C(5)(d).

110 Proposed s 88C(5)(e).

111 In terms of proposed s 88A(2).

charges under a credit facility or enter into any further credit agreement”.¹¹² He or she must also comply with applicable provisions relating to the debt review procedure or debt re-arrangement where the NCR and NCT referred him or her to a debt counsellor for such procedure or assistance and where he or she accepted the referral.¹¹³ Where applicable, the applicant must comply with conditions that the NCT may impose in instances where a debt intervention order was granted.¹¹⁴

The prohibition on taking up further credit does not apply in five instances:¹¹⁵

- (a) the NCR or NCT rejects the debt intervention application;¹¹⁶
- (b) the NCT declared all the agreements forming part of the application reckless or void;¹¹⁷
- (c) the applicant does not accept a referral by the NCR or the NCT to a debt counsellor “for debt review or assistance with a voluntarily [sic] plan of debt re-arrangement”;¹¹⁸
- (d) the process in terms of the referral to a debt counsellor was terminated or concluded in terms of the NCA;¹¹⁹ or
- (e) the period for which the debt intervention order or NCT-ordered debt restructuring procedure was set has expired.¹²⁰

Thus, the prohibition on taking up further credit is valid for the period during which the following are in effect: some of the NCT’s orders relating to a NCT-ordered debt restructuring procedure; a suspension for the first or where applicable second period of twelve months; the postponement of the NCT’s order to allow for the finalisation of a claim against credit insurance; the extinguishing of debt by the NCT; or conditions set by the NCT.¹²¹ However, the applicant may enter into a developmental credit agreement or a public interest credit agreement.¹²²

Another obligation of the applicant is that he or she must notify the NCR of a change in financial circumstances.¹²³ This is irrespective of whether the change occurred in the period between the date on which the application was submitted and the date on which the decision was communicated to the applicant¹²⁴ or where an order relating to a NCT-ordered debt restructuring procedure, a suspension for the first or where applicable second period of twelve months, the extinguishing of debt, conditions set by the NCT or a combination of NCT

112 Proposed s 88D(1)(a).

113 Proposed s 88D(1)(b).

114 Proposed s 88D(1)(c).

115 Proposed s 88D(1)(a).

116 Proposed s 88D(1)(a)(i).

117 In terms of the proposed s 88C(2)(d); proposed s 88D(1)(a)(ii).

118 Proposed s 88D(1)(a)(iii) read together with (b).

119 Proposed s 88D(1)(a)(iv).

120 Proposed s 88D(1)(a)(v) read together with proposed ss 88D(4) and 88C(2)(c) or (e) and 88C(3), (4) or (5).

121 Proposed s 88D(4) read together with proposed s 88C(2)(c) and (e) and s 88C(3), (4) and (5).

122 Proposed s 88D(5). See ss 10 and 11 of the NCA regarding the two types of credit agreements.

123 Proposed s 88D(6)(a).

124 Proposed s 88D(6)(a)(i).

orders was made during the relevant period.¹²⁵ Such notification must take place within 60 days (presumably business days)¹²⁶ from the incident that effected the change in circumstances.¹²⁷ This obligation also has consequences for the NCR which must evaluate the change and, where it occurred during the period between the date on which the application was submitted and the date of its decision, adjust the information accordingly.¹²⁸ Where an NCT order as discussed above is already in effect and the change in circumstances impacts on the efficiency of the order or justifies an amendment thereof, the NCR must refer the matter to the NCT for an amendment.¹²⁹

Proposed section 88D also has an effect on credit providers' rights. A credit provider who received notice of the debt intervention application¹³⁰ "may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until" one of four events has occurred.¹³¹ The introduction of a moratorium on debt enforcement is in line with international principles, although it should become effective once a debtor applies for the procedure.¹³² The events that will uplift the moratorium on debt enforcement are:

- (a) the NCR or NCT rejects the debt intervention application;¹³³
- (b) the applicant does not accept a referral to a debt counsellor for debt review or assistance with a voluntarily plan;¹³⁴
- (c) the referral process to a debt counsellor was terminated or concluded;¹³⁵ or
- (d) processes initiated by an NCT-ordered debt restructuring procedure, a suspension for the first or where applicable second period of twelve months, the postponement of the NCT's order to allow for the finalisation of a claim against credit insurance, the extinguishing of debt by the NCT or conditions set by the NCT are terminated or concluded in terms of the NCA.¹³⁶

Proposed section 88D(3) sets out an important feature from a debt relief perspective because of its link to the central issue of the discharge. The section provides that once the NCT ordered that debt is extinguished or that a credit agreement was reckless or void, the credit provider may not "exercise or enforce by litigation or other judicial process any right or security under that credit agreement".

Finally, proposed section 88D(7) provides that the NCT may rescind or amend a debt intervention order where there is sufficient information to show that the applicant was dishonest in his or her application.¹³⁷ Such rescission or amendment

125 Proposed s 88D(6)(a)(ii).

126 See s 2(5) of the NCA as regards the calculation of business days.

127 Proposed s 88D(6)(b).

128 Proposed s 88D(6)(c)(i) read together with proposed s 88D(6)(a)(i).

129 Proposed s 88D(6)(c)(ii) read together with proposed s 88D(6)(a)(ii) and proposed s 88C(2)(c), (e) or (f) respectively.

130 As envisaged in proposed s 88B(1)(b).

131 Proposed s 88D(2).

132 INSOL International *Report* (2001) 16–17 and (2011) 17.

133 Proposed s 88D(2)(a).

134 Proposed s 88D(2)(b) read together with proposed s 88B(4)(b) or proposed s 88C(2)(b).

135 Proposed s 88D(2)(c).

136 Proposed s 88D(2)(d) read together with proposed ss 88C(2)(c) and (e) and 88C(3), (4) and (5).

137 Proposed s 88D(7)(a).

may also take place where a consumer who is subject to a debt intervention order fails to comply with conditions accompanying the order¹³⁸ or to adhere to requirements in terms of this subsection as discussed above.¹³⁹

3 6 Rehabilitation application

Proposed section 88E relates to an application for rehabilitation. The proposed section provides that an applicant who is subject to an order stemming from proposed section 88C(2)(c),¹⁴⁰ (e)¹⁴¹ or a combination thereof may apply to the NCR for a rehabilitation order to be granted by the NCT.¹⁴² The applicant may apply at any time after the order(s) was granted. He or she must submit proof that either the obligations on the date of application were fulfilled¹⁴³ by payment in full of the obligations and interest¹⁴⁴ or by agreeing with the relevant credit provider that the value of the obligation plus interest have been fulfilled to the credit provider's satisfaction.¹⁴⁵

The application for rehabilitation should be accompanied by supporting documents in the form of a letter from each affected credit provider confirming (a) receipt of the full payment or that an agreement was entered into¹⁴⁶ and (b) that the applicant notified the credit provider in writing of his intention to apply for rehabilitation.¹⁴⁷ Where the credit provider fails or refuses to provide such confirmation, the applicant must submit proof of payment in full or of the agreement between the applicant and credit provider where relevant.¹⁴⁸ Further documents that must be submitted are proof of the applicant's income and expenditures,¹⁴⁹ a list of the applicant's assets¹⁵⁰ and information that the Minister may prescribe.¹⁵¹ The NCR must consider the application and if it complies with the stated requirements refer the application to the NCT for consideration.¹⁵²

Upon receipt of the application, the NCT must notify affected credit providers of the date on which the application will be considered.¹⁵³ The NCT must consider the application and grant the order for rehabilitation if it is satisfied that the applicant has complied with the requirements¹⁵⁴ and "has shown that his or her financial position has improved to such an extent that he or she can again participate in the process of applying for credit".¹⁵⁵

138 Proposed s 88D(7)(b) read together with proposed s 88C(5).

139 Proposed s 88D(7)(b) read together with proposed s 88D(1), (4) or (6) respectively.

140 NCT-ordered debt restructuring procedure.

141 Orders in accordance with s 88C(3), (4) or (5) related to debt intervention.

142 Proposed s 88E(1).

143 Proposed s 88E(2).

144 Proposed s 88E(2)(a). The interest is calculated at the prescribed rate and from the date of application.

145 Proposed s 88E(2)(b).

146 Proposed s 88E(3)(a)(i).

147 Proposed s 88E(3)(a)(ii).

148 Proposed s 88E(3)(b).

149 Proposed s 88E(3)(c).

150 Proposed s 88E(3)(d).

151 Proposed s 88E(3)(e).

152 Proposed s 88E(4).

153 Proposed s 88E(5).

154 Proposed s 88E(6)(a).

155 Proposed s 88E(6)(b).

The proposed section regulating rehabilitation also refers to orders in terms of proposed section 88C(5)(b).¹⁵⁶ This section refers to debt relief orders and the NCT's power to set conditions limiting the applicant's right to apply for credit for a period that the NCT deems fair and reasonable, but which may not exceed 36 months.¹⁵⁷ Where the NCT did make an order limiting the applicant's right to apply for credit, the applicant may apply to the NCT to revise the order.¹⁵⁸ The application must be substantiated by a certificate indicating that the applicant "successfully completed an approved financial literacy or budgeting skills programme."¹⁵⁹ If the NCT is satisfied with the certificate it may amend the limitation period to end on the day of the rehabilitation hearing.¹⁶⁰

The rehabilitation order or an order to amend the period during which the applicant's right to apply for credit is limited results in the applicant's rights in terms of section 60, namely to apply for credit, being restored.¹⁶¹

3 7 Evaluation of proposed debt intervention procedure in context of NINA debtors

The proposed procedure succeeds where the planned pre-liquidation composition measure that was also designed with marginalised debtors in mind fails to provide a solution in hopelessly insolvent cases. The procedure improves notably on the pre-liquidation composition procedure by disregarding peremptory negotiated settlements and excluding unnecessary creditor participation in NINA circumstances. This is a progressive step as it is nonsensical to force NINA debtors into negotiation proceedings as they do not have notable income and assets and therefore no negotiating power. Furthermore, since negotiations are doomed from the outset such endeavours result in wasteful costs which a NINA debtor obviously cannot afford. Because NINA estates do not represent significant value, the exclusion of pointless creditor participation in the evaluation and decision-making phases is welcomed. Another major stride is the proposed employment of the NCR and NCT as supervising and decision-making bodies. This is because international principles and guidelines propose that courts should only be involved in extraordinary circumstances and that specialised services and administrative processing are preferred in the management of NINA cases. The most prominent attributes of any debt relief procedure relate to access to the procedure and the ultimate relief that it offers. These features are paramount in devising a solution for NINA estates as such debtors do not have the benefit of either at present. Therefore, the fact that NINA debtors will be able to access a procedure tailored to their specific needs is a major victory and the proposed access requirements for the procedure are for the most part satisfactory. However, some proposed provisions which will or could have an effect on access deserve the legislature's further attention. These are that only qualifying credit agreements resorting under the NCA are included and only where enforcement procedures in terms of such agreements have not commenced. Where a debtor

156 Proposed s 88E(7)(a).

157 Proposed s 88C(5)(b) read together with proposed s 88C(7).

158 Proposed s 88E(7)(a).

159 Proposed s 88E(7)(b). The Minister must by *Gazette* provide a list of accredited institutions and programmes: proposed s 88E(7)(c).

160 Proposed s 88E(7)(d).

161 Proposed s 88E(8).

owes debt resulting from sources other than NCA-regulated credit agreements or where some credit providers have already taken steps to enforce agreements, using the debt intervention procedure will at best lead to a fragmented approach to and eventual solution of such debtors' predicament and at worst exclude the viability of the procedure altogether. Although the exclusion of debt other than credit agreements could be explained by the fact that the NCA is only concerned with such debt, the *Memorandum* does not provide an explanation for the exclusion of agreements where enforcement has commenced. The exclusion of such agreements is especially peculiar in NINA circumstances as individual execution proceedings will not extract value due to the nature of such estates. Another provision that could have a negative impact on access to the procedure is the arbitrary R50 000 unsecured debt ceiling which is introduced without an explanation as to its actuality. The proposed debt intervention procedure's provisions relating to the extinguishing of debt is applauded and for the first time will provide such relief to South African NINA debtors. It is heartening that the period after which a discharge may be granted is not too distant in future and that the discharge is not linked to a certain level of payment to creditors both of which attributes are in line with international principles and guidelines.

4 CONCLUDING REMARKS

From a debt relief perspective, the proposed debt intervention measure signals a major shift from the South African insolvency law's obsession with advantage for creditors to a more balanced approach where the interests of consumers are truly recognised and procedurally secured. From a NINA debtor's perspective it is an improvement when compared to the planned pre-liquidation composition procedure as it caters for such debtors' specific needs. Its introduction into the NCA will increase access to debt relief measures and the eventual discharge of NINA debtors' debt without the necessity of a forced negotiation phase as an entry requirement. Therefore, the procedure has the potential to remedy the unconstitutional state that the broader insolvency system brings about due to its unfair and unjustifiable discrimination against NINA debtors on the basis of their socio-economic status in disallowing them access to debt relief measures and a consequent discharge. Furthermore, the procedure conforms to international principles and guidelines relating to NINA debtors by amongst others excluding creditor participation as a matter of course and reducing court involvement. Instead of involving the courts and in line with international principles and guidelines, the NCR and NCT as specialised bodies already familiar with the consumer credit landscape are tasked with the regulation and decision-making functions. It is submitted that the NCR and NCT are uniquely situated and may develop "increased specialization and administrative processing" which are internationally preferred in the management of NINA estates. Also, the proposed measure builds on some of the NCR and NCT's current functions, for instance those relating to reckless credit, thereby supporting and strengthening existing powers and procedures.

Unfortunately, the procedure will not provide a solution to all marginalised debtors as some of its access requirements will exclude many debtors from its ambit. Some of the access requirements, for instance the ceiling on the average gross income of R7 500 per month and the fact that the procedure can only be applied for once in a lifetime, are reasonable and necessary to limit the

procedure's application to its intended beneficiaries and to manage the risk of abuse whilst others are in need of a rethink. A reconsideration is necessary where prohibitive requirements will stifle a holistic approach to solving consumers' predicament or where they could exclude deserving debtors from the procedure altogether. Such undesirable requirements are amongst others that the procedure will only apply to qualifying credit agreements subject to the NCA where no enforcement processes have commenced and that the consumer's total unsecured debt must have been less than R50 000 on 24 November 2017. A final remark relating to access is that although the NCR and NCT's involvement and the fact that intermediaries are not mentioned have the potential to ensure easy and cost-free access, the exact manner in which a consumer will have to apply for the procedure and the possibility of cost-free assistance will be determinant of the procedure's eventual success as a debt relief measure. Excessive costs and procedural hurdles may undo the noble objectives of the procedure. Therefore, the regulations should be drafted with these realities in mind.

It is difficult to criticise the proposed debt relief orders and the cascading manner in which they are to be implemented. The procedure is in line with international principles and guidelines and succeeds in striking a balance between avoiding the perception that the procedure provides an easy way out and unnecessarily disheartening or alienating debtors from society by unnecessary restrictions. In this respect it allows for a total discharge in destitute circumstances while a partial discharge may be awarded in other instances. Also, once the determination that the consumer qualifies for debt intervention is made, the NCT must first suspend qualifying agreements for a first and in some instance second twelve-month period before awarding the partial or total discharge and only after the NCT is satisfied that the applicant's financial circumstances did not sufficiently improve to render an alternative order appropriate. Another positive attribute from a debt relief perspective is that the possibility of a discharge is not too distant in the future as in some instances it may materialise as early as one year from the first suspension order and at worst after two years. These periods are in line with international recommendations as the World Bank *Report* regards a period of longer than three years as irresponsible. The fact that the discharge is not based on a certain level of payment to creditors also links with international principles and guidelines. Unfortunately, the discharge is not as wide as it may possibly be due to the exclusion of debt other than that resorting from qualifying credit agreements and agreements where debt enforcement has commenced, both of which prohibitions also have an impact on access to and the application of the procedure.