



The New Affordability Assessment Regulations

Background

The National Credit Amendment Act was published on 13 March 2015. In addition, the Department of Trade and Industry published the amended National Credit Act Regulations, including the affordability assessment regulations, on the same day.

The Amendment Act was enacted pursuant to the outcomes of an assessment on the effectiveness of the National Credit Act ("NCA") performed by the Department of Trade and Industry (the NCA policy review framework). The assessment revealed that certain gaps in the legislative provisions of the NCA need to be addressed in order for the NCA to reach its full potential, and that the regulation of credit providers needed to be improved.

The purpose of the Amendment Act is to amend and clarify certain provisions of the NCA to ensure that the aims set out in the NCA may be achieved. The Amendment Act recognises that, whilst the framework of the NCA and its underlying policy rationale was sound, the application of the legislative provisions of the NCA often failed to ensure the best possible outcomes for consumers, thereby resulting in "practical deficits". The NCA policy review framework also highlighted a number of issues with the reckless lending provisions set out in the NCA (including inadequate detail on the scope of the reckless lending provisions) and proposed that minimum standards in this regard would be required. The Affordability Assessment regulations represent these minimum standards.

Very importantly, both the National Credit Amendment Act and the Affordability Assessment Regulations are effective as at their date of publication, being 13 March 2015. Consequently, credit providers have not been given much lead time to implement the required amendments and to embed the necessary enhanced procedures into their business operations, and all credit providers who have not done so will be in breach of the amended provisions (to date, the National Credit Regulator has not indicated whether any "grace period" will apply to credit providers in their implementation of the amendments).

A crucial first step for all credit providers regulated by the National Credit Act is to review the amendments in order to understand the impact that they will exert on their current "business as usual" in respect of the granting of credit. Once this has been done, any updates to process, procedures or systems should be performed on a priority basis, as credit providers will otherwise run the risk of being in contravention of the amendments which are already legally binding and enforceable.

Affordability assessment

The Affordability Assessment regulations in particular, by setting out defined criteria to be considered in conducting affordability assessments together with benchmarks, represent a marked departure from current industry practice, where each credit provider was largely given leeway to determine their own affordability assessments, based on general principles that applied to prevent reckless lending. The removal of the credit agreement volume and value thresholds that previously applied to credit providers under the National Credit Act will mean that all credit providers entering into credit agreements as defined will be required to comply with the affordability assessment regulations (the purpose of the removal of the previous thresholds is to ensure that no credit providers remain under the radar of the National Credit Regulator, and thus able to flout the legislative provisions of the NCA to the detriment of consumers).



We set out below a few highlights of the Affordability Assessment Regulations, together with our observations:

- The regulations apply to current, prospective and joint consumers applying for credit and to all credit agreements regulated by the National Credit Act;
- The regulations require a credit provider to take practicable steps to assess the consumer's discretionary income to determine whether the consumer has the financial means to pay the proposed credit instalments; which require amongst other things:
 - Validating a consumer's gross income by requiring bank statements and payslips (all documentation is required to be authentic), and where these show a material variance, using the average gross income over a period of not less than 3 months (no guidance is provided as to when a variance will be considered "material").

We understand that not all credit providers currently require 3 months bank statements and payslips, however, as this is now mandatory these credit providers will be required to amend their processes and procedures to acquire same.

The regulations do however allow for consumers who do not receive a salary to provide other "documented proof of income," together with bank statements. No guidance is given as to what will constitute proof of income upon which a credit provider may rely, in these circumstances;

- Assessing a consumer's existing financial means, prospects and obligations by utilising the table of minimum expense norms set out in the Affordability Assessment Regulations. This table sets out various income bands and a calculation of how to determine minimum living expenses per income band (a monthly fixed factor is provided, which must be utilised depending on where in that particular band that employee falls).

A credit provider is not permitted to deviate from this table of minimum expense norms save in "exceptional circumstances" and this deviation must be fully justified.

Annexure A sets out the declaration that must be completed where living expenses less than the defined minimum per income band are declared, together with the reasons for this (a consumer is obliged to declare the monthly amount spent, per expense type, and provide an explanation for this –for example, monthly accommodation expenses are low because a consumer resides with family members, and the details for these family members must also be provided).

The purpose of this table is to prevent a consumer (or even credit provider) from understating their monthly expenses and being entitled to access credit where they should otherwise not be entitled to do so, or to access larger amounts of credit. Credit providers must be able to prove that, in every instance where less than minimum monthly expense norms as per the table have been declared, the reasons for this are fully documented. Further, even in circumstances where the consumer does complete Annexure A, the credit provider must still make a determination as to whether or not, based on the reasons supplied, the deviation is justified (note the language employed in the affordability assessment regulations – the grant of credit is not mandatory where Annexure A has been completed).

- Additionally, in calculating existing financial means and obligations, statutory deductions (such as employee taxes and maintenance obligations) and existing credit arrangements and debt instalments under these must be taken into consideration. Maintenance judgments are required in terms of the amendments, to be included in credit bureau information. Of course, due to administrative reasons and irregularities in obtaining orders, the orders may not always be up to date and credit providers may have difficulty in relying on credit bureau records to reflect statutory deductions. Also, there are various categories of statutory deductions in addition to maintenance obligations that may be required to be considered (for example, garnishee orders). A further complication in this regard (and highlighted in the NCA policy review framework) relates to capacity and competency restraints in Magistrates courts where maintenance and garnishee orders are obtained, which may mean that credit providers will be unable to access information in respect of statutory deductions in a timely manner.

We have set out only a few items from the Affordability Assessment Regulations that merit discussion. We recommend that all credit providers assess the impact of the Affordability Assessment Regulations on their current practices as a matter of urgency if this has not already been done.

Conclusion

The Affordability Assessment regulations seek to establish rules to ensure that reckless lending is avoided and also to ensure uniformity in the provision of credit. Although there are certainly enhanced obligations for credit providers and additional enquiries required to be performed emanating from these legally binding regulations, credit providers will not be the only impacted persons. The Affordability Assessment regulations also set out definite rules and benchmarks to be employed, and will facilitate compliance reviews to be conducted by the National Credit Regulator. From a consumer's perspective, it may mean that consumers who previously enjoyed access to credit (based on more lax rules), may no longer be eligible to access this. With South Africa being a market that relies heavily on credit, it remains to be seen the impact that these rules will have in the consumer lending space.

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