Affordability Assessment Regulations

April 2016

Regulatory context
The National Credit Amendment Act (NCAA) was enacted in May 2014, amending the National Credit Act of 2005. Additionally, the Department of Trade and Industry (DTI) published the amended National Credit Act Regulations, which included the Affordability Assessment Regulations (AARs). Both the NCAA and the AARs became effective on 13 March 2015. The AARs have made South Africa’s credit arena one of the most stringent and regulated in the world.

The main objective of the AAR’s is to curb ‘reckless/indiscriminate lending’. Regulators are of the opinion that the absence of standardised, consistent and uniform regulation resulted in significant amounts of credit being granted to consumers thereby increasing the level of household indebtedness. According to Zodwa Ntuli, Deputy Director-General of the Consumer and Corporate Regulation Division of the DTI, “The introduction of the Affordability Assessment Regulations is necessary and urgent to address the prevalence of reckless lending in South Africa.”

Affordability Assessment Criteria
The regulations call on credit providers to take practical steps to assess a consumer’s income status to ascertain whether a loan can be repaid. The assessment criteria for credit providers include:

- Validating gross income by referring to three months recent pay slips; three month’s recent bank statements; and any other similar credible confirmations
- Calculating consumer’s income and expenses
- Taking into account all debts and debt repayment history
- Ensuring that the prospective consumer is informed of the cost of credit which includes the principle debt, interest, initiation fee and service fee
- Considering a consumer’s credit profile as published by the credit bureau

In addition to stipulating criteria for providers, consumers are required to supply the credit provider with authentic documentation, proof of income and expenses, and details of all financial obligations, to enable the credit provider to carry out the affordability assessment effectively.

Enforcement authority
The Affordability Assessment Regulations (AARs) fall within the ambit of the National Credit Act Regulations. The National Credit Act is governed by the National Credit Regulator (NCR), hence, the NCR has the jurisdiction over the AARs. Furthermore, appeal against any decisions taken by the NCR may be made before the National Consumer Tribunal (NCT).

Investigation focus of the NCR include:
- Reckless lending
- Excessive or prohibited costs of credit, e.g. charging interest above the rate allowed by the NCA
- Unlawful provisions in a credit agreement
- Complaints relating to credit life insurance
- Illegal advertisement of credit
- Lack of pre-agreement statements and quotations.

Scope
The AAR is applicable to current, prospective and joint consumers; all credit providers and all credit agreements to which this Act applies.
Consequences of non-compliance

Non-compliance with the AAR's will lead to the application of procedures and remedies prescribed under the NCAA:

- The relevant credit agreement could be declared to be ‘reckless’ by the NCR. This would give a court or tribunal the power to either set aside the consumer’s rights and obligations under that agreement, or suspend the enforceability of that agreement.
- Non-compliance could also lead to restriction of activities by unregistered persons, issuance of compliance notices and cancellation of registration.

Consumer grievance process

- A consumer aggrieved by an outcome of an appeal may approach the National Credit Regulator (NCR). Appeals can be made with the NCT against decisions made by the NCR.

Other international laws on responsible lending

UK: Financial Conduct Authority’s (FCA’s) Consumer Credit Sourcebook (CONC)

Firms providing consumer credit need to ensure that they comply with the requirements set out in the FCAs CONC which came into effect in October 2014. The FCAs CONC seeks to ensure that lending is responsible and that a proper assessment has been done on whether the consumer can afford and sustain relevant debt payments.

Australia: National Consumer Credit Protection Act 2009 (National Credit Act)

Credit providers must not enter into a credit contract with consumers who are unsuitable for the loan, and would be unable to repay the loan without suffering hardship. They are required to refrain from entering into a contract that does not meet the consumer’s financial requirements and objectives.

Some examples of global fines and penalties imposed on ‘reckless’ lending

- An Australia and New Zealand Banking Group paid a penalty of AUD212,500 for breaching responsible lending laws when offering overdrafts. The Australian Securities and Investments Commission (ASIC) found that:
  - Customers were not given an option to elect a different overdraft amount; and
  - Customers were not given an alternative limit option if they responded to the offer via mail or in person at a branch.

These were breaches on the bank’s obligation to make reasonable inquiries about the credit limit a customer requires. The requirement to make reasonable inquiries regarding a consumer’s required maximum credit limit was introduced into the National Consumer Credit Protection Act 2009 by Parliament in 2011 to reform the practice by lenders of making unsolicited offers of credit to customers. [ASIC, March 7, 2016]

- A car finance provider, paid penalties totalling AUD391,000 and had a license condition placed on its Australian credit license following concerns raised by the ASIC that the company breached important consumer protection provisions relating to responsible lending and the repossession of motor vehicles. The license condition requires the organisation to appoint a compliance consultant. The organisation was found to have failed to make reasonable inquiries and verifications consumers’ stated living expenses, income and cash at bank, and their capacity or plans to repay substantial balloon repayments due at the conclusion of the loan term. [ASIC, February 2, 2016]

- In October 2015, a UK payday lender, was ordered by the FCA to refund GBP15.4million to customers after regulators found it was lending more to borrowers than they could afford to repay. [The Guardian, October 26, 2015]

National Credit Regulator (NCR) Initiatives

Since the AARs’ coming into force in September 2015, from Q1 2016, the NCR is busy undertaking investigations to see whether the financial services sector is complying with the AARs to curb ‘reckless lending’, as announced by the DTI during a briefing on the regulations in parliament this week.

— In February 2016, the NCR referred 13 small credit providers to the National Consumer Tribunal for various breaches of the National Credit Act, as part of its crackdown efforts. Offences included reckless extension of credit; failure to provide pre-fees; the unlawful retention of personal identity documents of clients as surety, and failure to maintain records.

Jacqueline Boucher NCR manager of investigations and enforcement stated, “The NCR is intensifying its effort to detect reckless lending and the retention of consumer bank cards and identity documents.” “The NCR will continue to conduct industry-wide investigations to root out breaches of the National Credit Act and abuse of vulnerable consumers.”

The NCR’s enforcement actions also extend to large retailers who charge customers club fees in credit agreements in contravention of the National Credit Act.

Contact: Nicky Kingwill M: +27 082 718 7291 E: nicky.kingwill@kpmg.co.za