

The National Credit Act

Reckless credit



What is reckless credit?

The National Credit Act (“the Act”) aims to increase access to credit to as many consumers as possible, while simultaneously preventing over-indebtedness. One of the mechanisms introduced by the Act to counter over-indebtedness, is the concept of reckless credit. The Act obliges the credit provider to conduct a proper assessment of each consumer’s ability to meet their obligations, taking reasonable steps to investigate and evaluate the consumer’s:

- understanding and appreciation of the obligations of the proposed agreement, and
- their ability to meet those obligations in a timely manner.

Failure to conduct such an assessment might lead to a setting aside of the consumers obligations or a suspension of the credit agreement. However, if the court is satisfied that the consumer failed to fully and truthfully answer any question for information, the court will not declare credit to be reckless.

In order to meet the requirements of the Act, and to avoid entering into a reckless credit agreement, the credit provider has to ensure that the consumer understands and appreciates the risks, costs and obligations under the agreement, and needs to conduct an affordability assessment to ensure that the consumer will be in a position to meet their obligations under the proposed agreement.

Understanding the terms of the agreement

The content of the Pre-Agreement Statement (required in terms of section 92 of the Act) should provide the consumer with sufficient information to ensure the he or she understands and appreciates the obligations under the agreement. In summary, the Pre-Agreement Statement should contain, for

example, at least the following information:

- Credit advanced or the value of goods or services provided on credit;
- Instalment, including interest, fees and credit life insurance, excluding optional insurance;
- Deposit, deducted from credit advanced;
- Number of instalments;
- Instalments payable - *specify: monthly / weekly / other*
- Total of all instalments, including interest, fees & credit life insurance, excluding optional insurance;
- Initiation fee, which will be added to the credit advanced;
- Annual Interest Rate;
- Monthly service fee, included in instalment;
- Credit life insurance, included in instalment.

In those instances where there are special or unusual risks or obligations (for example, where a loan is secured by a pension fund), special care should be taken to ensure that the consumer understands these risks. In these instances it is proposed that the credit provider explains the special risks to the consumer.

Affordability assessment

An affordability assessment should be done to ensure that the credit provider is satisfied that the consumer has the ability to meet his obligations in a timely manner. The National Credit Regulator has indicated that credit providers may use the content of Form 16 of the Regulations made in terms of the National Credit Act, as published in the Government Gazette No 28864, as a basis for such an assessment. In brief, the content of Form 16 relates to the following:

- Personal details, including:
 - name, initials and surname;
 - identity number, if the consumer does not have an identity number, the passport number and date of birth;
 - postal and physical address;
 - contact details.
- All income, inclusive of employment income and other sources of income.
- Monthly expenses, for example:
 - taxes
 - unemployment insurance fund
 - pension

- medical Aid
 - insurance
 - court orders
 - other (specify)
- List of all debts, disclosing monthly commitment, total balance outstanding, original amount and amount in arrears (if applicable), for example:
 - home loans
 - furniture retail
 - clothing retail
 - personal loans
 - credit card
 - overdraft
 - educational loans
 - business loans
 - car finances and leases
 - sureties signed
 - other (specify)
- Living expenses, for example:
 - groceries
 - utility and continuous service
 - school fees
 - transport costs
 - other (specify)

In order to verify some of the information provided by the consumer, the credit provider may conduct a credit check with a registered credit bureau, and may also consult the National Credit Register, once the Register is established.

Consequences

The court may declare an agreement to be reckless in any of 3 instances:

1. Where the credit provider *failed to conduct an assessment* as required by the Act, irrespective of what the outcome of such an assessment might have concluded at the time;
2. Where the credit provider, having conducted an assessment, entered into the credit agreement with the consumer despite the fact that the information available to the credit provider indicated that the *consumer did not generally understand or appreciate* the consumer's risks, costs or

obligations under the proposed credit agreement;

3. Where the credit provider, having conducted an assessment, entered into the credit agreement with the consumer despite the fact that the information available to the credit provider indicated that entering into that credit agreement would *make the consumer over-indebted*.

If a court declares that a credit agreement is reckless in terms of 1 or 2 above, the court may either

- set aside all or part of the consumer's rights and obligations under that agreement, or
- suspend the force and effect of that credit agreement.

If a court declares that a credit agreement is reckless in terms of 3 above, the court may

- suspend the force and effect of that credit agreement until a date determined by the Court, and
- restructure the consumer's obligations under any other credit agreements – such a restructuring might entail the lengthening of the term of the agreement and a reduction in the monthly payment by the consumer.

The consequences for a credit provider, should a credit agreement be declared reckless in terms of the Act, are severe. If an agreement is *set aside*, the credit provider will have no legal right to claim either payment for any outstanding amount, or the return of goods purchased on credit in terms of the agreement. If the agreement is suspended, for the duration of the suspension, the

- the consumer is not required to make any payment required under the agreement;
- no interest, fee or other charge under the agreement may be charged to the consumer, and
- the credit provider's rights under the agreement are unenforceable.

After a suspension of the force and effect of a credit agreement ends all the respective rights and obligations of the credit provider and the consumer under that agreement are revived, and are fully enforceable, and for greater certainty, no amount may be charged to the consumer by the credit provider with respect to any interest, fee or other charge that were unable to be charged during the suspension.

Thus, credit providers have to ensure that they do not enter into and agreements with consumers that might be classified as reckless credit. It is proposed that credit providers

- keep a record (even if it is in electronic form) of the affordability assessment and the pre-agreement disclosure statement; and
- consider including a declaration/statement in the affordability assessment, to be signed by the consumer, where the consumer declares that he
 - understands the costs, risks and obligations contained in the agreement, and
 - that he fully and truthfully answered all requests for information.

Queries: Dr Johan Erasmus – jerasmus@deloitte.co.za

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