

Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (1)

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OPSOMMING

Registrasie van kredietgewers

In die onderhawige artikel word die vereiste wat ingevolge die National Credit Act 34 of 2005 (hierna die Kredietwet of die Wet) op sekere kredietgewers geplaas word om as sodanig by die Nasionale Kredietreguleerder te registreer, in oënskou geneem. Dit word aan die hand van die doelstellings van die Kredietwet, die beleidsoorwegings onderliggend aan die registrasievereiste, die geskiktheidsvereistes ten einde as kredietgewer ingevolge die Wet te kan registreer en die tersaaklike drumpelbepalings ingevolge artikel 40 van die Wet (saamgelees met die regulasies wat die drumpels neerlê) gedoen. Wat die geskiktheidsvereistes ten einde vir registrasie as kredietgewer ingevolge die Kredietwet te kwalifiseer aanbetref, word aan die bepaling van die Verenigde Koninkryk se Consumer Credit Act 1974 (soos gewysig) aandag geskenk. Daar word ook van die bepaling, of gebrek daaraan, in die Europese Unie (waarvan die Verenigde Koninkryk 'n lidland is) se nuutste direkief insake verbruikerskredietreg melding gemaak. Laastens word na aanleiding van die bogenoemde en die regspraak wat ten opsigte van die artikel 40-drumpelbepalings in oorweging geneem is, sekere aanbevelings gemaak.

1 INTRODUCTION

The purposes of the National Credit Act¹ are “to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers”.² This is done by *inter alia* ensuring that different credit products and different credit providers are treated in a consistent manner³ and by promoting equity in the credit market by striving to balance the respective rights and responsibilities of credit providers and consumers.⁴ The NCA also aims to provide “for the general regulation of consumer credit”.⁵

1 34 of 2005, hereafter “the NCA” or “the Act” which was put into operation on 1 June 2006, 1 September 2006 and 1 June 2007 – see Proc 22 in GG 28824 of 11 May 2006.

2 S 3.

3 S 3(b).

4 S 3(d).

5 The preamble to the Act.

When one has regard to the regulatory range of the NCA it becomes clear that such range is vast: it covers aspects such as the classification and categorisation of credit agreements, establishment of consumer credit institutions such as the National Credit Regulator and the National Consumer Tribunal, consumer rights, credit marketing practices, debt relief for over-indebted consumers and reckless credit, unlawful agreements and provisions, disclosure, interest, charges and fees, collection and debt enforcement, dispute settlement and enforcement of the Act. Although the NCA therefore seeks to balance the rights and obligations of consumers and credit providers, it is also clear that by regulating the consumer credit industry in the various manners as mentioned, it seeks to ensure sufficient protection for consumers.

In terms of the preamble to the Act, it also provides for a pivotal regulatory instrument, the “registration of credit bureaux, credit providers and debt counselling services”. It is therefore significant that now, for the first time in the history of South African consumer credit legislation, specific provision is being made under Part A of Chapter 3 of the NCA for a general requirement that compliant credit providers should register as credit providers⁶ with the National Credit Regulator, being the body tasked with the regulation of the credit industry⁷ – by registering credit providers⁸ – and the enforcement of the Act.⁹

The prerequisite for the abovementioned regulatory provisions to apply to a specific instance of course requires that the NCA must apply to the credit agreement in question.¹⁰ However, it also goes without saying that the protective measures incorporated in the NCA will not serve their purpose if the providers of credit that fall within the scope of application of the NCA are not adequately regulated to ensure that they operate within the parameters of the Act.

The aim of this research is to provide perspectives on selected aspects of the registration of credit providers in terms of the NCA. This will be done by comparing the registration of credit providers under the NCA with the registration or licensing of credit providers in the United Kingdom. In view thereof that the United Kingdom’s licensing system directs its specific and elaborate focus at the “fitness” to be a credit provider and does not contain any specific threshold requirements regarding the number or type or amount of credit agreements for

6 Prior to the NCA small loans were exempted from the Usury Act 73 of 1968 and the interest rate caps in terms thereof on certain conditions, for example that the creditor had to be registered with the Micro Finance Regulatory Council (the MFRC). These exemptions were granted in terms of exemption notices, the final notice applicable upon repeal of the Usury Act 73 of 1968 being the 2005 Exemption Notice (Notice 1406 of 2005 in GG 27889 of 8 August 2005). See Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* (LLD thesis UP 2012) 347 463. It is important to note that the MFRC did not have any statutory powers over lenders not registered with it – The Department of Trade and Industry South Africa report *Credit Law Review*, Hofmeyer Herbstein & Gihwala Inc (Willemsse and Mxunyelwa) (December 2002) 4.

7 See in general Vessio “What does the National Credit Regulator regulate?” 2008 20 *SA Merc LJ* 227ff.

8 And credit bureaux and debt counsellors – s 14(a).

9 S 15. The National Credit Regulator’s future role under the so-called “Twin Peaks” model of financial regulation is under consideration and has not been clarified yet – Scholtz in Scholtz (ed) “Commentary” *Guide to the National Credit Act* (2008) (last update 2014) para 3.2.12.

10 See, in this regard, para 4.2.3 below.

licensing as is required by the NCA, the authors have deemed it fit to first address the fitness to be a credit provider¹¹ and thereafter the thresholds under the NCA which require the credit provider to be registered.¹² Part 1 will therefore consider the policy considerations underlying the registration of credit providers requirement in the NCA and an investigation into the “fitness” to be a credit provider in terms of the Act. In this context the fitness requirement in terms of the consumer credit licensing regime in the United Kingdom will be addressed in detail.¹³ The reason for selecting this jurisdiction is that the United Kingdom’s Consumer Credit Act 1974, in the words of Goode¹⁴ is “probably the most advanced, and certainly the most comprehensive, Code ever to be enacted in any country in the sphere of consumer credit”. After its amendment in terms of the Consumer Credit Act of 2006, the Act provides for a strengthened fitness test for credit providers. Such an investigation will also probe into the consequences of non-compliance with the fitness test under consumer credit law in the United Kingdom. In Part 2 the scope and extent of the NCA’s registration requirements for credit providers with reference to the threshold requirements in section 40 will be investigated with the aim to identify problematic issues. Non-compliance with the registration requirements in terms of the NCA will then be addressed. In the final instance, conclusions will be drawn and suggestions will be made towards the improvement of the current South African system pertaining to the registration of credit providers.

2 POLICY UNDERLYING REGISTRATION OF CREDIT PROVIDERS

2.1 Introduction

In terms of the Policy Framework for Consumer Credit¹⁵ that preceded the NCA, the Government’s intention was for South Africa “to introduce consumer credit legislation and establish a regulatory framework that is modern and meets international consumer protection norms, but that is adapted to the needs of the South African population”.¹⁶ Effective consumer protection must be provided “without setting standards that are inappropriate for South Africa, and that does not undermine the objective of ... increased credit market efficiency”.¹⁷ The

11 See para 3.2.2 below.

12 See para 4 below.

13 See the discussion in para 3.1 below. It is interesting to note that Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers which repeals Council Directive 87/102/EEC, as amended and corrected, (the most recent European Union Consumer Credit Directive), does not contain any prescriptions to the Member States of the European Union (including the United Kingdom) in respect of the registration of credit providers. Directive 2008/48/EC follows an approach of total harmonisation, meaning that Member States may not maintain or introduce in their national law provisions diverging from those laid down in the Directive. This restriction only applies where the Directive contains harmonised provisions and Member States are therefore otherwise free to maintain or introduce national legislation. See Renke *Thesis* (fn 6) 26–27.

14 Goode *Consumer Credit Act 1974* (1974) iii.

15 The Department of Trade and Industry South Africa *Consumer credit law reform: Policy framework for consumer credit* (August 2004) hereafter Policy Framework.

16 Policy Framework (fn 15) 39.

17 *Ibid.*

Policy Framework dealt with a variety of aspects, *inter alia* the need for a regulated consumer credit market and its reform.¹⁸

2.2 A regulated consumer credit market

A variety of factors, such as the imbalance of power between consumers and credit providers, necessitated the regulation of the consumer credit industry.¹⁹ At the end of the day the aim is to prevent or minimise the potential abuse of consumers.²⁰ However, a balanced approach to regulation is required. A fine line should therefore be drawn between the protection of the consumer on the one hand and the regulatory burden that is placed on credit providers on the other hand.²¹

2.3 Why reform was necessary

The Department of Trade and Industry's task team that conducted the review of the legislation that had an impact on consumer credit in South Africa prior to the NCA identified a number of problems with the previous legislative framework, accordingly rendering the reform thereof necessary.²² The previous framework was *inter alia* dated and ineffective and was characterised by limited consumer protection.²³ It distorted the credit market by not treating different credit providers and credit products equally.²⁴ Inconsistent regulatory requirements applied to financial transactions that were in essence very similar. Differences in compliance standards and registration costs consequently existed.²⁵

As a result of the abovementioned and other problems with the previous consumer credit legislative framework, it was *inter alia* foreseen by the Department of Trade and Industry that

- (a) the new credit legislation would apply equally to all credit transactions, and to all credit providers;²⁶ and
- (b) a suitably empowered statutory regulator would be established to regulate the credit industry.²⁷

2.4 Other

Finally, mention should be made of remarks made by Ms Astrid Ludin²⁸ during a National Credit Bill briefing that was held in 2005 in respect of the registration

18 *Idem* 5ff.

19 *Idem* 6–7.

20 *Idem* 6.

21 *Idem* 7.

22 See, in general, *idem* 12–13 22–23. See also *Report prepared for FinMark Trust, South Africa* by Goodwin-Groen (with input from Kelly-Louw) *The National Credit Act and its regulations in the context of access to finance in South Africa* (November 2006) (hereafter Goodwin-Groen and Kelly-Louw) 12–14.

23 Policy Framework (fn 15) 12–13. See also Goodwin-Groen and Kelly-Louw (fn 22) 12 and The Department of Trade and Industry South Africa *Credit Law Review* “summary of findings of the technical committee” (August 2003) 12.

24 Policy Framework (fn 15) 13 22.

25 *Idem* 22.

26 *Idem* 23.

27 *Idem* 34.

28 At the time, a Deputy Director-General at the Department of Trade and Industry.

of credit providers.²⁹ According to her the Bill, once accepted, would not require all credit providers to be registered: the government would not be able to regulate the Matshonis³⁰ and small lenders would be excluded. The Act would still apply to such lenders but there would be no need for them to be registered. She also said that “[t]he government could not and would not attempt to regulate everyone because the costs would be prohibitive and the benefits would decline”. When asked how her Department would monitor unregistered micro lenders Ms Ludin replied that it was hoped that the Act would provide the ultimate penalty for unregistered lenders because they would not be able to enforce their contracts. Ultimately, this would depend on the Department’s capacity to enforce the legislation.³¹

3 FITNESS TO BE A CREDIT PROVIDER

3.1 Licensing under the British Consumer Credit Act 1974³²

3.1.1 General

The Consumer Credit Act 1974, since its coming into operation on 31 July 1974, has formed the foundation of consumer credit law in the United Kingdom.³³ Substantial modifications to this Act were brought about by the Consumer Credit Act 2006.³⁴

The White Paper *Fair, clear and competitive: The consumer credit market in the 21st Century*,³⁵ which preceded the 2006 reforms, identified the need to create a fairer and more modern framework for consumer credit as a driver for reform, in order to address the unfair business practices that existed at the time.³⁶ It was therefore proposed, *inter alia*, to strengthen the credit licensing system introduced by the original Consumer Credit Act 1974 and to root out irresponsible and unfair lending practices.³⁷ A strengthened fitness test to gauge a credit provider’s suitability to hold a credit licence, as well as improved monitoring of fitness throughout the period of the licence were consequently proposed to

29 Available at <http://bit.ly/1nd9THO> (last visited on 25 September 2013).

30 “Matshonisa” means “[i]nformal money lenders in townships of South Africa” – Mutezo *Obstacles in the access to SMME finance: An empirical perspective on Tshwane* (LLM-dissertation Unisa 2005) 46.

31 See fn 29 above.

32 See, in general, Rosenthal *Consumer credit law and practice – A guide* (2008) 247ff and Popplewell in Philpott *et al The law of consumer credit and hire* (2009) (hereafter Philpott *et al*) 71ff.

33 Howells and Weatherill *Consumer protection law* (2005) 296; Ramsay *Consumer law and policy: Text and materials on regulating consumer markets* (2007) 53.

34 The implementation of the Consumer Credit Act 2006, which received Royal Assent on 31 March 2006, took place in stages – Makin *et al* in Goode Division 1 “Commentary” *Consumer credit law and practice* (1977) para 27.2 and 21.46 (para 21 and 27 last updated 2013).

35 CM 6040 HM Stationery Office (2003); hereafter the White Paper.

36 White Paper (fn 35) 5–6.

37 *Idem* 6 26 and Makin *et al* (fn 34) para 27.11ff. See also Lomnicka “The reform of consumer credit in the UK” 2004 *JBL* 139–140 for problems posed by the pre-2006 licensing regime.

encourage fair conduct among creditors.³⁸ To achieve these goals, guidance by the Office of Fair Trading (hereafter the OFT, the regulatory body for consumer credit law in the United Kingdom) on the fitness standards required to carry on a credit business assessment,³⁹ a risk-based approach⁴⁰ and the granting of improved powers of investigation⁴¹ to the OFT⁴² were proposed, amongst others. The replacement of five-year licences with licences granted for an indefinite period of time was also recommended.⁴³ These proposals resulted in the enactment of sections 23 to 58 of the Consumer Credit Act 2006,⁴⁴ creating a uniform,⁴⁵ centralised⁴⁶ consumer credit licensing system for the United Kingdom.

Under the Consumer Credit Act 1974, a licence is required⁴⁷ to carry on a consumer credit business,⁴⁸ consumer hire business⁴⁹ or an ancillary credit business.⁵⁰ It should also be mentioned that⁵¹ a licence to carry on a business covers all lawful activities conducted in the course of that business. It is irrelevant whether those activities are carried out by the licensee or by a person on his behalf.⁵² Provision is made for standard or group licences.⁵³

38 White Paper (fn 35) 46. It was proposed that the Office of Fair Trading (OFT) should also be enabled to consider a credit provider's future fitness to conduct his credit business, in contrast to regarding his past conduct only. The ability to only consider the latter was seen to be one of the weaknesses of the pre-2006 test. Makin *et al* (fn 34) para 27.24 put it as follows: "In the past the criteria for granting licences had concentrated on the negative – convictions, complaints etc. In future the licensing system was to concentrate on the positive. In short, the question will no longer be 'is this applicant unfit?' but 'is this applicant fit?'"

39 White Paper (fn 35) 47.

40 In other words, an approach to enforcement aimed at striking a balance between fitness monitoring and the risk posed to the consumer by the credit activity. Such an approach also entails a proportionate licensing regime that places a greater focus on the creditors and credit activities causing concern – *idem* 47–48.

41 Eg, the power to seek additional information from licensees and third parties.

42 White Paper (fn 35) 48–50.

43 *Idem* 47. It was reasoned that by reducing the administrative burden caused by the renewal of licences, the regulator would be enabled to focus more time and energy on monitoring the more risky businesses and credit activities. See also Popplewell (fn 32) 109.

44 These provisions, which came into operation on 6 April 2008, amended existing sections and inserted new sections into the Consumer Credit Act 1974 – Makin *et al* (fn 34) paras 27.41–27.43.

45 Makin *et al* (fn 34) para 27.30.

46 *Idem* 27.51.

47 S 21(1). For a full exposition of who needs a licence, see Makin *et al* (fn 34) para 27.61ff.

48 "Consumer credit business" is defined in s 189(1) as "any business being carried on by a person so far as it comprises or relates to (a) the provision of credit by him, or (b) otherwise his being a creditor, under regulated consumer credit agreements."

49 The definition of "consumer hire business" in s 189(1) is very similar to the above definition of consumer credit business, but instead refers to "the bailment or (in Scotland) the hiring of goods by him" in (a) and "otherwise his being an owner" in (b) under regulated consumer hire agreements.

50 "Ancillary credit business" is defined by s 145(1) and includes any business in so far as it comprises or relates to *inter alia* a credit brokerage, debt-counselling and the operation of a credit reference agency.

51 Subject to the terms of the particular licence.

52 S 23(1). A separate licence is accordingly not required for, for instance, an agent of the credit provider who does not himself carry on a licensable business. However, it is of significance that the OFT nevertheless regulates the activities of such an agent as part of the regulation of the credit provider's business – Makin *et al* (fn 34) para 27.68.

3.1.2 *Fitness to hold a credit licence*

Before the strengthened fitness test for holding a credit licence is considered, a few general comments would be appropriate. The test should also be placed in context. The first important aspect is that an applicant for a licence who satisfies the fitness requirements has a right to be granted the licence.⁵⁴ Secondly, where previously the OFT could only either grant a licence or refuse it, the regulator now has the authority to grant a different licence than applied for, or to grant the licence subject to limitations.⁵⁵ Thirdly, it should be noted that provision is now being made for the granting of indefinite licences.⁵⁶ This was intended to provide for a proactive approach whereby a licence holder's fitness could be reviewed on a continuous basis.⁵⁷

Section 25 deals with the fitness test to hold a licence.⁵⁸ Its relevant parts state as follows:

- “(2) In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things) –
- (a) the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit businesses;
 - (b) such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;
 - (c) practices and procedures that the applicant proposes to implement in connection with any such business;
 - (d) evidence of the kind mentioned in subsection (2A).
- (2A) That there is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present)⁵⁹ or, where the applicant is a body corporate, any person appearing to the OFT to be a controller⁶⁰ of the body corporate or an associate of any such person, has –
- (a) committed any offence involving fraud or other dishonesty or violence;

53 S 22. In what follows, the law pertaining to standard licences only will be addressed.

54 S 25(1) of the Consumer Credit Act 1974. However, it will be seen below that in applying the statutory fitness criteria, the regulator inevitably exercises his discretion. See Makin *et al* (fn 34) para 27.115.

55 S 25(1)(1AA) and (1AB). See Makin *et al* (fn 34) para 27.102 27.116 27.125. The OFT now also has new powers to impose a requirement or requirements on the original granting of a licence or during the currency thereof if it feels dissatisfied. See, in this regard, s 33A–E Consumer Credit Act 1974; General guidance by the Office of Fair Trading for licensees and applicants on fitness and requirements *consumer credit licensing*, OFT 969 (January 2008) (hereafter OFT Guidance 2008) para 4.5ff and Makin *et al* (fn 34) para 27.312ff.

56 S 22(1A)(a) and (1C).

57 This new approach is in contrast to the reactive process followed pre-2006, under which the OFT could suspend or cancel a licence upon the receipt of a complaint. Under the previous dispensation, the applicant for a licence only had to satisfy the regulator of fitness when applying for the licence and then again when applying for renewals. See Makin *et al* (fn 34) para 27.124.

58 See, in general, Popplewell (fn 32) 93ff.

59 See with regard to “associate” ss 184 and 25(3) and the discussion by Makin *et al* (fn 34) para 27.135ff.

60 Defined in s 189(1) Consumer Credit Act 1974.

- (b) contravened any provision made by or under –
 - (i) this Act; . . .
 - (iii) any other enactment regulating the provision of credit to individuals or other transactions with individuals; . . .
 - (d) practised discrimination in, or in connection with, the carrying on of any business; or
 - (e) engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not).
- (2B) For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.⁶¹

The above subsections should be read in conjunction with OFT Guidance 2008. The Guidance was published by the OFT under section 25A⁶² and provides “what might be termed the infrastructure for the new fitness test”.⁶³

With regard to the way that the section 25 fitness test is to be applied⁶⁴ it will suffice to say that the OFT fulfils a regulatory and not a judicial function, and that regard should, therefore, be given to evidence that tends to indicate a relevant matter.⁶⁵ The test is to be applied to the applicant for the licence.⁶⁶

The approach followed by the OFT in respect of the application of the fitness test is of significance, especially as far as responsible lending is concerned. In accordance with the White Paper,⁶⁷ a risk-based approach is applied.⁶⁸ The aim is to “ensure an appropriate standard of consumer protection that supports a well-functioning market”.⁶⁹ In assessing fitness, the OFT particularly concentrates on the integrity of the individuals involved in the carrying on or controlling of a licensed business and on high-risk business activities.⁷⁰

Evidence of past misconduct, in respect of “standards of business behaviour” and failures to comply with the law, could put the applicant’s integrity in question. Evidence of any business practice appearing to the OFT to be “deceitful or oppressive or otherwise unfair or improper” is pertinent.⁷¹ Evidence of irresponsible lending could, in turn, be included.⁷²

61 S 29(2) Consumer Credit Act 2006 substituted subs (2) as originally enacted with subs (2), (2A) and (2B) which set out the revised fitness test.

62 S 25A(1) and (5) respectively make provision for the OFT to prepare and publish guidance in relation to “how it determines, or how it proposes to determine, whether persons are fit persons as mentioned in section 25” and to have regard to the guidance when it carries out its licensing functions (under Part III of the Consumer Credit Act 1974).

63 Makin *et al* (fn 34) para 27.122.

64 See Makin *et al* (fn 34) para 27.126ff.

65 It is irrelevant whether the matter is proved by the evidence – Makin *et al* (fn 34) para 27.130.

66 Makin *et al* (fn 34) para 27.132ff. However, the OFT clearly has to consider the attributes of other persons whom the applicant proposes will participate in the business that would be carried on by him under the licence as well – s 25(2)(b) and (2A). See also Popplewell (fn 32) 106ff.

67 See para 3.1.1 above.

68 OFT *Guidance* 2008 (fn 55) paras 2.3 and 2.4. Applications posing a higher risk are, therefore, subject to closer scrutiny.

69 Para 2.3. At the same time it is strived that unnecessary burdens not be placed on business.

70 *Ibid.*

71 Para 2.5. See also s 25(2A)(e).

72 Para 2.5.

Risk assessment must be conducted with regard to the negative factors indicating risk in section 25(2A).⁷³ In addition, where the applicant engages in or applies to engage in “other types of high risk credit activities with potential for serious consumer detriment”,⁷⁴ he would likely be required to submit a Credit Risk Profile⁷⁵ which would also be considered in order to assess risk.⁷⁶ In respect of these high-risk activities and with specific reference to section 25(2B),⁷⁷ the OFT emphatically states the ensuring of responsible lending as one of its main regulatory interests.⁷⁸

Evidence of credit competence is also considered, including the skills, knowledge and experience of the applicant and of those involved in his business.⁷⁹ The same holds true for any practices and procedures that the applicant intends to implement as part of conducting his business.⁸⁰ Different levels of competence are required, depending on the credit activities involved.⁸¹ Where a fitness guide already exists to set out the minimum standards for a particular high-risk credit activity, a Credit Competence Plan⁸² could be required.⁸³ The CCP is a mere summary of the steps taken to ensure that a business is credit competent.⁸⁴

The focus in section 25(2) on credit competence and in section 25(2A) on credit risk and on the applicant’s integrity clearly indicates that a binary approach to licensing is followed by the legislature and, therefore, by the OFT. On the one hand, the approach is negative and focuses on the presence of negative factors or a black mark against the applicant’s name, indicating that the applicant poses a credit risk. The aim is, therefore, to avoid risk and to ensure that the consumer is not subjected to unnecessary risk. On the other hand, the approach is positive and accentuates the applicant’s ability to run the credit business in a proper manner. The binary nature of the fitness test is underlined by the fact that section 25(2) is plainly linked to section 25(2A).⁸⁵

A factor which obviously plays a significant part in relation to fitness assessment for holding a credit licence is irresponsible lending. This is especially true in connection with the risk assessment part of the test discussed above. Once again, part of what has to be considered by the OFT to determine fitness to hold a credit licence is evidence of the kind mentioned in section 25(2A).⁸⁶ This includes the catch-all phrase in section 25(2A)(e): in other words, evidence

73 S 25(2)(d) read with s 25(2A).

74 Eg, secured sub-prime lending and lending in the home.

75 Or “CRP”.

76 OFT *Guidance* 2008 (fn 55) paras 2.12 and 2.13.

77 Read with s 25(2A)(e). See the discussion below.

78 OFT *Guidance* 2008 (fn 55) para 2.13.

79 Para 2.6. See also s 25(2)(a) and (b).

80 Para 2.6. See also s 25(2)(c).

81 Para 2.7.

82 Or “CCP”.

83 OFT *Guidance* 2008 (fn 55) para 2.10ff.

84 It is regarded as a practical way to oblige the credit provider etc to keep his business under constant review and credit competent – paras 2.10 and 2.11. It is also aimed at ensuring adherence to issued guidances.

85 See s 25(2)(d) above, which provides that, in determining whether an applicant for a credit licence is a fit person to hold that licence, regard should also be given to “evidence of the kind mentioned in subsection (2A)”. See also Makin *et al* (fn 34) para 27.153.

86 S 25(2)(d).

tending to show that the applicant⁸⁷ has engaged in business practices which appear to be oppressive, deceitful or otherwise unfair or improper (whether unlawful or not). Then follows the all-important section 25(2B), which specifically provides that such business practices include any practice “in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending”.⁸⁸ Section 25(2A)(e) accordingly has to be read in conjunction with section 25(2B).

Guidance for Creditors by the Office of Fair Trading *Irresponsible Lending*⁸⁹ is an important source with regard to the regulator’s approach to irresponsible lending.⁹⁰ Its primary objective is to give clarification of business practices which could be considered as irresponsible lending practices by the regulator for the purpose of section 25(2B).⁹¹ The said document, therefore, plays a vital role in consumer credit licensing.⁹² Although irresponsible lending is only one of the factors that would be considered by the regulator in the context of the section 25(2A) risk assessment,⁹³ it may well be the most significant, according to Makin, Mawrey and Walton.⁹⁴

OFT *Guidance to Creditors* 2010 addresses responsible lending⁹⁵ in the wide sense.⁹⁶ Chapter 2 of the Guidance sets out “a number of overarching principles of consumer protection and fair business practice which apply to all consumer credit lending” and is, therefore, addressed below.⁹⁷ The other chapters set out examples of what, according to the OFT, constitute irresponsible lending practices during the various stages of the lending process.⁹⁸

Before considering the provisions of chapter 2 of the OFT *Guidance to Creditors* 2010, it should be noted that the regulator summarises irresponsible lending as a failure “to take reasonable care in making loans or advancing lines of credit, including making only limited or no enquiries about consumers’ income before offering loans, and failing to take full account of the interests of consumers in doing so”.⁹⁹ Chapter 2 provides as follows:¹⁰⁰

87 Or anybody who is involved in his business.

88 See Popplewell (fn 32) 104 for a brief discussion of the background to the inclusion of s 25(2B).

89 OFT 1107 (March 2010) (updated February 2011) hereafter OFT *Guidance to Creditors* 2010.

90 One of the reasons is the absence of a definition of “irresponsible lending” in the Consumer Credit Act 1974 – Popplewell (fn 32) 104.

91 Practices which may influence the OFT to consider fitness to hold a credit licence are thus involved – OFT *Guidance to Creditors* 2010 (fn 89) 4 12.

92 This is especially true with regard to the application of s 25(2A) discussed above. According to Makin *et al* (fn 34) para 27.172, the guidance on irresponsible lending should be read in conjunction with OFT *Guidance* 2008 (fn 55), the OFT’s general guidance for licensees and applicants discussed above.

93 OFT *Guidance* 2008 (fn 55) 6 8 30.

94 Makin *et al* (fn 34) para 27.172.

95 Or irresponsible lending.

96 The OFT put it as follows: “This guidance covers each stage of the lending process from the pre-contractual stage of advertising and marketing through to a consideration of issues such as the handling of arrears and default.” See OFT *Guidance to Creditors* 2010 (fn 89) 10.

97 It is specifically stated that creditors would be expected to comply with these principles in order to avoid conducting irresponsible lending – *idem* 16.

98 Chs 3–6 deal with explanations of credit agreements, assessment of affordability, pre-contractual issues and contractual and post-contractual issues respectively.

99 OFT *Guidance* 2008 (fn 55) 30.

“In general terms, creditors should:

- not use misleading or oppressive behaviour when advertising, selling ...
- make a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner
- explain the key features of the credit agreement to enable the borrower to make an informed choice.

In addition to the above there should be:

- **transparency** in dealings between creditors and borrowers, with information and documentation directed at – or provided to – borrowers being compliant with relevant legislative requirements and not being in any way misleading. This would include – but not be limited to – all advertising and marketing materials, web-sites and pre- and post-contract information. This principle applies to documents and information provided throughout the credit cycle and regardless of whether they are directed at potential borrowers or existing customers.
- disclosure of key contract terms and conditions (including rates and charges), ensuring terms and conditions are **fair** (including ensuring that they are not unfairly balanced in favour of the creditor), **clear** and **intelligible**, so as to be understandable by borrowers. The OFT expects all pre-contract and contract documentation to comply with all relevant legislative requirements including the Consumer Credit (Disclosure of Information) Regulations 2010 and the Consumer Credit (Agreements) Regulations 2010 and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs).
- **fair treatment of borrowers.** Borrowers should not be targeted with credit products that are clearly unsuitable for them, subjected to high pressure selling, aggressive or oppressive behaviour or inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not. Borrowers who may be particularly vulnerable by virtue of their current indebtedness, poor credit history . . . or for any other reason, should, in particular, not be targeted or exploited.”¹⁰¹

3 1 3 *Licensing as an enforcement tool*

The various types of events that may affect a consumer credit licence under the Consumer Credit Act 1974 are expiry,¹⁰² termination,¹⁰³ revocation,¹⁰⁴ suspension,¹⁰⁵ voluntary surrender¹⁰⁶ or variation.¹⁰⁷ Refusal to renew a licence naturally affects a licence as well.

100 Irrelevant matter is omitted.

101 OFT *Guidance to Creditors* 2010 (fn 89) 14–16.

102 Unless a consumer credit licence comes to an end earlier (eg as a result of the death of the licensee) it expires upon the expiration of the period for which it was issued or renewed – Makin *et al* (fn 34) para 27.373.

103 The death or bankruptcy of an individual who holds a licence causes the termination of that licence. The same holds true where the individual begins to lack the capacity to carry on the activities under the licence – s 37(1). See also Makin *et al* (fn 34) para 27.361ff.

104 See discussion immediately below.

105 Suspension of a licence is dealt with under ss 32 and 33. Although suspension is potentially a powerful remedy in the hands of the regulator, as it puts the licensee out of business for the period of the suspension, it has not been used, according to Makin *et al* (fn 34) para 27.384, in the last ten years.

106 S 37(1A) and (1B) regulates the process of surrendering a licence. Once the surrender of a licence has become effective, the licence cannot be revived – Makin *et al* (fn 34) para 27.352ff.

Licensing is an effective and powerful enforcement tool in the hands of the regulator. The powers to revoke a licence¹⁰⁸ or to refuse to renew¹⁰⁹ an existing licence are of special significance in this regard in light of their effect when applied.¹¹⁰ The following remarks by Makin, Mawrey and Walton¹¹¹ summarise this point:

“The linchpin of the CCA 1974 enforcement machinery is the licensing system, operated centrally by the OFT. Licensing under a centralised system has many advantages as a method of control. Firstly, it provides an extremely powerful sanction against deliberate law breaking and, under the CCA 1974, against unfair or improper trading which is not necessarily unlawful at all. The offender risks not merely the loss of an occasional civil suit or even the occasional fine, but the more drastic penalty of being put out of business altogether. It is rarely necessary for enforcement agencies to exercise a sanction of this kind. The mere threat suffices to discourage the licensee from sailing too close to the wind.”

The significance of the OFT’s powers to revoke a consumer credit licence as a tool to specifically combat irresponsible lending should be pointed out. Popplewell¹¹² said in this respect that “the ultimate sanction for engaging in irresponsible lending is the revocation of a consumer credit licence”.

3 1 4 *Sanctions for unlicensed activities*

Various sanctions are provided for non-compliance with the provisions on licensing contained in Part III of the Consumer Credit Act 1974. These sanctions, in a nutshell, entail that:

- (a) a person who engages in a licensable activity while not being licensed to conduct that activity, commits an offence;¹¹³
- (b) for failure to comply with a requirement imposed by the OFT¹¹⁴ it may impose a civil penalty;¹¹⁵ and

107 Variations of licences take place under ss 30 and 31. See Makin *et al* (fn 34) para 27.342ff.

108 Under s 32 Consumer Credit Act 1974. It should be noted that the OFT does not have the power to revoke a licence straight away. It must first inform the licensee of its intention to revoke the licence, whereafter the latter has the opportunity to make representations in that respect – s 32(2). Notice should also be taken of the fact that the licensee has a right to appeal the OFT’s decision to revoke the licence – ss 41ff (for a full exposition of the licensee’s right to challenge licensing decisions, see Makin *et al* (fn 34) ch 27A). Revocation only becomes effective upon expiry of the appeal period – s 32(7).

109 In terms of s 29(3) the preceding provisions applicable to the original application for a licence apply to renewals as well. Included is, therefore, s 27(1), which prescribes the procedure where the OFT is of the mind to refuse the application. In such a case the OFT must inform the licensee of its intention whereupon the latter may make representations.

110 Prior to the 2006 reforms these tools (as well as suspension mentioned above) were the only enforcement and regulatory measures at the disposal of the regulator – Makin *et al* (fn 34) para 27.381. The situation changed when the Consumer Credit Act 2006 granted further intermediate powers to the OFT to regulate the conduct of licensees and thereby strengthened the hand of the regulator. Included are the powers of the OFT to impose requirements or special conditions on a licensee in terms of ss 33A-33E and the accompanying power to impose a civil penalty in respect of such requirements. See wrt the ss 33A-33E requirements and the civil penalty para 3 1 2 above and para 3 1 4 below respectively.

111 Makin *et al* (fn 34) para 27.6.

112 Popplewell (fn 32) 105.

113 S 39(1) Consumer Credit Act 1974.

- (c) an unlicensed trader¹¹⁶ may not enforce a regulated agreement against the debtor or hirer unless the OFT has made an order to that effect.¹¹⁷

3 1 5 *Future developments*

In terms of “A new approach to financial regulation, *transferring consumer credit regulation to the Financial Conduct Authority*”,¹¹⁸ the United Kingdom government is committed to transfer consumer credit regulation from the OFT to the Financial Conduct Authority (FCA) in April 2014.¹¹⁹ The aim is to ensure that the consumer credit regulatory regime is equipped to deliver more robust consumer protection in the future.¹²⁰

3 2 Provisions of the NCA

3 2 1 *General*

It has already been mentioned¹²¹ that the NCA requires the registration¹²² of compliant credit providers,¹²³ debt counsellors¹²⁴ and credit bureaux.¹²⁵ In what follows attention will be paid to the registration of credit providers only, with the focus on a person’s “fitness” to be registered as a credit provider.¹²⁶ In addition to the fitness requirements, the Act also sets thresholds in section 40 regarding the obligation to register as a credit provider. These threshold requirements will be dealt with at a later stage in paragraph 4. Finally, enforcing compliance with the registration requirements will be addressed.¹²⁷

3 2 2 *“Fitness” to be registered as a credit provider*

In order to form a picture of the evaluation of a credit provider’s competence or “fitness” to be registered as a credit provider under the NCA, attention has to be paid to a number of aspects. These entail the disqualifications applicable to registration, the application for registration and the conditions of registration. It

114 Under s 33A, 33B or 36A mentioned in para 3 1 2 above.

115 In terms of s 39A. The penalty may not exceed £50 000. Ss 39B and 39C contain further provisions wrt such penalties. See also Makin *et al* (fn 34) para 27.421ff.

116 The term “trader” is used in the Act to denote a person who has made a regulated agreement or agreements in the course of a consumer credit or consumer hire business and who was not licensed to conduct the particular credit business covering the making of that agreement or agreements – s 40(2).

117 S 40(1), (1A) and (2) Consumer Credit Act. S 40, therefore, deals with the civil liability for conducting a credit business without a licence or the correct licence. See Makin *et al* (fn 34) para 27.401ff.

118 HM Treasury and Department for Business Innovation and Skills (March 2013) hereafter New Approach .

119 The current regulator, the OFT, will then cease to exist – New Approach (fn 118) 3.

120 New Approach (fn 118) 5.

121 Para 1 above.

122 See ss 39–59 in this regard. For a discussion of the registration requirements in terms of the Act, see Van Zyl in Scholtz (ed) ch 5.

123 Ss 40–42.

124 S 44.

125 S 43. In terms of the National Credit Act Amendment Act of 2014 provision is now also made for the registration of other role players but this will not be dealt with.

126 Para 3 2 2 below.

127 Para 5 below.

should be noted that the NCA does not set specific fitness requirements pertaining to a person's capacity to act as a credit provider.

The Act, however, disqualifies certain persons from being registered as a credit provider.¹²⁸ Thus it basically takes a negative approach by using disqualification or non-fitness to indirectly determine a person's fitness to be a credit provider. As far as natural persons are concerned, a person is disqualified from registration if such a person is an unrehabilitated insolvent.¹²⁹ In terms of section 46(3), the same holds true for a person who *inter alia*:

- (a) is under the age of 18 years;¹³⁰
- (b) was declared to be mentally unfit or disordered by a competent court;¹³¹
- (c) has been removed from an office of trust "on account of misconduct relating to fraud or the misappropriation of money", irrespective of whether it took place in South Africa or elsewhere;¹³²
- (d) has been a director or a member of a governing body of an entity which, while the person was serving in that capacity, has been involuntarily deregistered,¹³³ brought the consumer credit industry into disrepute or acted with disregard for consumer rights in general; or
- (e) has been convicted during the previous 10 years, in South Africa or elsewhere, of certain offences, such as theft, fraud or a crime that involved violence against another natural person, and has been sentenced to imprisonment without the option to pay a fine.¹³⁴

If a natural person becomes disqualified after his registration as a credit provider he must be deregistered by the National Credit Regulator.¹³⁵

The fact that a person, who alone or in conjunction with others, exercises general management or control over a juristic person or an association of persons, would be disqualified for individual registration as a credit provider in terms of section 46(3),¹³⁶ also disqualifies that juristic person or association from registration as a credit provider.¹³⁷ The Act also makes provision for the case where such a natural person becomes disqualified from individual registration under section 46(3) after the particular business was registered as a credit provider in terms of the Act. The natural person must inform the National Credit Regulator and the particular registrant¹³⁸ of the disqualification in the prescribed manner and form.¹³⁹ If that natural person holds an interest in that business, he must dispose of it within the period determined by the regulator.¹⁴⁰ However, if that natural

128 See, in general, s 46(2) and (3) in respect of natural persons and s 47(2)–(6) with regard to juristic persons.

129 S 46(2).

130 S 46(3)(a).

131 S 46(3)(c).

132 S 46(3)(d).

133 In terms of a public regulation.

134 A grant of amnesty of free pardon for the offence constitutes an exception – s 46(3)(f).

135 S 46(5).

136 See items (a)–(e) above.

137 S 47(2).

138 A person who has been registered in terms of the Act – s 1.

139 S 47(3)(a). Form 6 must be utilised to inform the regulator and the registrant and this must be done within 30 business days of becoming disqualified – reg 5.

140 This period may not exceed three years – s 47(3)(b)(i).

person is a manager or controller of the business, the regulator may impose reasonable conditions on the continuation of the registration of that business.¹⁴¹ These provisions apply *mutatis mutandis* to a natural person who meets any of the section 46(3) disqualifying criteria and who acquires a financial interest in a juristic person or assumes a management or control function with the juristic person after the registration of that juristic person as a credit provider.¹⁴²

Section 47(2) and (3) above do not apply to a regulated financial institution,¹⁴³ obviously because the regulating legislation pertaining to these institutions sets provisions akin to section 47(2) and (3) in respect of those institutions.¹⁴⁴ If a juristic person becomes disqualified after it has been registered as a credit provider, the National Credit Regulator must deregister that juristic person.¹⁴⁵

It was seen above¹⁴⁶ that compliant credit providers must apply to the National Credit Regulator for registration. The application must be in the prescribed form and must be accompanied by a prescribed registration fee.¹⁴⁷ In the latter respect an initial registration fee is payable followed by subsequent yearly registration renewal fees.¹⁴⁸ The regulator may require further information relevant to the application¹⁴⁹ and refuse to register the applicant if the requested information is not provided by the applicant as prescribed.¹⁵⁰

The prescribed application form for registration as a credit provider is Form 2.¹⁵¹ It is submitted that only paragraphs 14, 15 and 17 of Part 1 and Part 7 of this form could have a direct bearing on the “fitness” of a person to provide credit. In terms of paragraph 14, the applicant for registration must provide detail of the credit products he is involved in, for instance mortgages, credit facilities and/or vehicle finance. Paragraph 15 requires information in respect of the ancillary financial products¹⁵² the applicant sells in conjunction with its credit products.

The aim of paragraph 17 of Form 2 is to indicate the extent, if any, of the applicant’s compliance with the provisions of section 48(1)(a) and (b) of the Act. This significant subsection provides that if a person qualifies to be registered as a credit provider, the National Credit Regulator must further consider the application, relating to the following criteria:

- (a) The applicant’s (or any associated person’s) commitment, if any, in terms of black economic empowerment.¹⁵³

141 S 47(3)(b)(ii).

142 S 47(5)(a) and (b). See also Van Zyl (fn 122) para 5.2.2.2.

143 S 46(4).

144 See *inter alia* ss 11–18 and 23–29 of the Banks Act 94 of 1990 and ss 9–15 and 21–26 of the Mutual Banks Act 124 of 1993.

145 S 47(6).

146 Para 1.

147 S 45(1) read with s 51(1)(a). See also reg 4(1)(c). See GN R949 in GG 29245 of 21 September 2006 in connection with the prescribed registration fees.

148 S 51(1). The annual renewal fees are payable until the deregistration of the credit provider.

149 S 45(2)(a).

150 S 45(2)(b). In terms of reg 4(3) the requested information has to be provided within 15 business days from the date of delivery of the request to the applicant.

151 Reg 4(1)(a).

152 Eg, credit life insurance and short term insurance.

153 S 48(1)(a). For this purpose, and to the extent that it is appropriate, the nature of the applicant has to be considered. The same holds true for the purpose, objects and provisions of the Broad-based Black Economic Empowerment Act, 53 of 2003.

- (b) The applicant's (or any associated person's) commitment, if any, in connection with combating over-indebtedness. In this regard the regulator must also consider whether the applicant or associated person has subscribed to any relevant industry code of conduct approved by the regulator or other regulatory authority.¹⁵⁴

It is submitted that Form 2 serves to extend the fitness requirement in respect of the registration of credit providers under the NCA.

Part 7 of Form 2 concerns the disqualification of natural persons. Form 2 makes it clear that Part 7 must be completed and signed in respect of each natural person who exercises general management or control of the applicant.¹⁵⁵

Section 48(3) enables the National Credit Regulator to propose¹⁵⁶ conditions on the registration of an applicant.¹⁵⁷ This has to be done by having regard to the objectives and purposes of the Act,¹⁵⁸ the circumstances of the application and the section 48(1) criteria mentioned above.

An example of a notice of proposed conditions on the registration of an applicant as a credit provider¹⁵⁹ indicates that the National Credit Regulator imposes general and specific conditions. From the document it appears that the general conditions are *inter alia* proposed “[t]o enable the National Credit Regulator to assess and monitor the compliance of the registrant with the Act, with the relevant regulations and with the conditions of registration”.¹⁶⁰ The specific conditions¹⁶¹ are imposed to promote the objectives of the Act with regards to Black Economic Empowerment and the combating of over-indebtedness.

The applicant must be informed in writing of any such conditions and the reasons for them.¹⁶² The only qualification placed on such conditions under the Act is that they must be “reasonable and justifiable in the circumstances”.¹⁶³

154 S 48(1)(b). See wrt the subscription to industry codes of conduct Kelly-Louw and Stoop *Consumer credit regulation in South Africa* (2012) 132 fn 65 and para 12.3.2. See also the 2013 *Credit industry code of conduct to combat over-indebtedness in terms of section 48(1)(b) of the National Credit Act (NCA)*, which became effective on 1 May 2013, <http://bit.ly/1hmJYpT> accessed on 3 Oct 2013. This code, in our opinion, does not contain or prescribe criteria in terms of which the fitness to be a credit provider under the NCA could be measured.

155 However, Part 7 exempts an applicant from completing Part 7 where the applicant is a bank as defined in the Banks Act 94 of 1990.

156 The legislature probably uses the word “propose” due to the fact that the applicant, as will be seen below, has the opportunity to respond to the regulator in connection with the conditions. However, in the form used to inform the applicant of such conditions (Form 7 – see below) the words “imposition”, “imposes” and “imposed” are used.

157 See, in general, with regard to conditions of registration Van Zyl (fn 122) para 5.4.

158 Eg, the objective to discourage reckless credit granting by credit providers and contractual default by consumers – s 3(c)(ii) NCA.

159 This example was obtained in the course of one of the authors assisting a client with registration as a credit provider.

160 An example of such a general condition is that “[t]he registrant must submit the reports and returns as required in the regulations applicable to the registrant, within the specified time period”.

161 Eg, that “[t]he registrant must annually on anniversary of registration provide a report to the National Credit Regulator on its compliance with the commitments made in terms of the applicable legislation or code in respect of black economic empowerment”.

162 S 48(3). Form 7 is used for this purpose – reg 6.

163 S 48(4)(a). In the case of a financial institution such conditions must also be consistent with its licence s 48(4)(b).

The applicant is afforded the opportunity to respond to the National Credit Regulator in respect of proposed conditions of registration.¹⁶⁴ If the applicant consents to such conditions, the regulator must register the applicant, subject to the proposed conditions only.¹⁶⁵ If the applicant responds but does not consent to the proposed conditions, the regulator must consider the applicant's response, may finally determine the conditions to be imposed and register the applicant.¹⁶⁶ The applicant must be informed in writing of the regulator's decision.¹⁶⁷

In terms of section 49(1) of the Act the National Credit Regulator may review conditions of registration and propose new conditions:

- (a) upon request by the registrant;¹⁶⁸
- (b) if at least five years have passed since the last review and variation of conditions;
- (c) if the registrant has contravened the Act; or
- (d) if the registrant:
 - (i) has not satisfied any condition attached to its registration;
 - (ii) has not met a commitment or undertaking that was made with regard to its registration; or
 - (iii) has breached an approved code of conduct applicable to it, and is not in a position to provide adequate reasons for its conduct.

A section 49(1)(c) or (d) condition may only be imposed after the registrant was provided with a reasonable opportunity to remedy the shortcoming in his conduct.¹⁶⁹ New or alternative conditions may be imposed only in the case of a section 49(1)(c) or (d) review "to the extent that the conditions are reasonable and justifiable in the circumstances that gave rise to the review".¹⁷⁰

Compliance with the provisions of the NCA is a standard condition of every registration issued in terms of the Act.¹⁷¹ Similarly, compliance with the provisions of the Financial Intelligence Centre Act 38 of 2001 constitutes a standard condition of registration.¹⁷²

In our opinion section 48(3), read in conjunction with section 49(1), further extends the fitness to be a credit provider requirement and constitutes a powerful regulation tool in the hands of the National Credit Regulator as far as the fitness of a person to register as a credit provider in terms of the NCA is concerned.

Finally, section 45(3) is of significance. The said subsection provides that "[i]f an application complies with the provisions of this Act and the applicant meets the criteria set out in this Act for registration, the National Credit Regulator, after considering the application, must register the applicant, subject to section 48".

164 S 48(5). The applicant has 20 business days within which to respond. However, the regulator may permit a longer period for this purpose – s 48(5)(a) and (b) respectively.

165 S 48(6)(a).

166 S 48(6)(b). The same applies where the applicant does not respond to the proposed conditions.

167 S 48(7)(a). In terms of s 48(7)(b) reasons have to be provided if any previously proposed conditions have been altered.

168 Form 8 must be used for this purpose and a R1 000 fee is payable – item 6 of Sch 2 to the regulations, read with reg 7.

169 S 49(2).

170 In the case of a regulated financial institution the conditions also have to be consistent with its licence – s 49(3)(a) and (b).

171 S 50(2)(b)(i).

172 S 50(2)(b)(ii).

3 2 3 *Future developments regarding fitness to register as a credit provider*

The National Credit Amendment Bill, 2013¹⁷³ will bring into effect the following noteworthy amendments regarding fitness to be a credit provider in terms of the South African consumer credit law:¹⁷⁴

- (a) Section 45(3) of the NCA,¹⁷⁵ providing that the National Credit Regulator must, subject to certain conditions, register an applicant, now ends with the proviso “unless the National Credit Regulator after subjecting the applicant to a fit and proper test or any other prescribed test, is of the view that there are other compelling grounds that disqualify the applicant from being registered in terms of this Act”.¹⁷⁶
- (b) Section 45 is also amended by the addition of the following subsections:¹⁷⁷
 - “(4) The Minister may prescribe the criteria to be considered in conducting a fit and proper test contemplated in subsection (3).
 - (5) The Minister may prescribe –
 - (a) the criteria for registration;
 - (b) the duties and obligations of a registrant; and
 - (c) the fees that may be charged by a registrant.”
- (c) Section 48(1) of the NCA,¹⁷⁸ after its substitution, will provide that “[i]f a person qualifies to be registered as a credit provider, the National Credit Regulator must further apply the following criteria [as stated in section 48(1)(a), 48(1)(b) as amended¹⁷⁹ and section 48(1)(c)] in respect of the application.”¹⁸⁰
- (d) It is further to be noted that section 48(1)(b) has been amended to refer to:
 - “the commitments, if any, made by the applicant or any associated person in connection with combating over-indebtedness and compliance with a prescribed code of conduct as well as affordability assessment regulations made by the Minister on the recommendation of the National Credit Regulator”.¹⁸¹
- (e) The amendment of section 49(1)¹⁸² is proposed by the insertion of a paragraph (e) that will allow the National Credit Regulator to review conditions of registration, and propose new conditions on, any registration “if the National Credit Regulator, on compelling grounds, deems it necessary for the attainment of the purposes of this Act and efficient enforcement of its functions”.¹⁸³

(to be continued)

173 Which has been approved by Parliament and is awaiting signature by the President.

174 See further para 7 1 below.

175 Mentioned in para 3 2 2 above.

176 Cl 13 National Credit Amendment Bill, 2013.

177 *Ibid.*

178 See para 3 2 2 above.

179 See below.

180 Cl 15 of the National Credit Amendment Bill, 2013.

181 *Ibid.* The Bill (cl 15) has added a s 48(1A) which allows the Minister to prescribe affordability criteria and measures to determine the outcome of affordability assessments.

Cl 16 of the National Credit Amendment Bill, 2013, inserted s 48A in the Act to provide that the Minister has the authority to prescribe a code of conduct as contemplated in s 48(1)(b).

182 Para 3 2 2 above.

183 Cl 17 of the National Credit Amendment Bill, 2013.