

# Credit act may affect retirement funds

**T**RUSTEES of retirement funds should be aware of the application and the implications of the National Credit Act if housing loans are granted by it to their members under section 19(5) of the Pension Funds Act.

The commencement date of the National Credit Act was June 1 this year, with certain sections becoming operative on later dates. It has important implications for a retirement fund if the fund is a credit provider and enters into credit agreements as defined by the act.

Retirement funds typically provide housing loans to members in one of two ways, either by providing direct loans or by providing a guarantee in respect of loans taken out by members with a bank or financial institution. It is the provision of direct housing loans that causes a retirement fund to fall within the definition of a credit provider.

The first immediate and important implication of the act for retirement funds that fall within its ambit is that all credit providers are required to register with the National Credit Regulator (the regulator).

Registration had to be done within 40 business days of the commencement date of the act. The act says that a credit provider that is required to be registered cannot enter into a credit agreement or agree to do any of these things unless it is registered. There are prescribed thresholds which determine whether a credit provider must register, namely, at least 100 credit agreements have to have been concluded or the total principal debt in respect of all outstanding credit agreements exceeds the currently prescribed threshold of R500 000.

Although many sections of the National Credit Act which have important implications for credit providers only come into effect on June 1 next year, it is important for retirement funds to be aware of these provisions and that there is a definition of a "pre-existing agree-

ment" in schedule 3 to the act.

The act provides that the regulator is required to establish a national register of credit agreements. Although the effective date is June 1 next year, the regulator has advised that it expects the register to be operational only in early 2008. Once this has been established, all credit agreements, when concluded or amended, must be reported by the credit provider either to the register or to a credit bureau. This reporting will have to take place by a fund every time it concludes or amends a direct housing loan.

The National Credit Act creates certain bodies to monitor and enforce its application, being the regulator as well as a national consumer tribunal. There are sections concerning initiating complaints to the regulator or applications to the tribunal, informal resolution or investigation of complaints, the tribunal's consideration of complaints, applications and referrals to it and orders that it may make. All of these provisions apply fully in terms of schedule 3 to the National Credit Act to all pre-existing agreements from the effective date which is June 1.

**T**HE act also provides for an alternative dispute resolution (ADR) process as an alternative to filing a complaint with the regulator. This involves referring a matter to an ombud, a consumer court or an alternative dispute resolution agent for conciliation, mediation or arbitration.

It is important for retirement funds to be aware that the complaints procedure in the National Credit Act is detailed and the functioning of and procedures before the regulator and the tribunal can be more complicated than the complaints procedure before the Pension Fund's Adjudicator. As a credit provider, the fund may be party to complaints and ADR procedures, which may be costly and time consuming.

The remainder of this article seeks to highlight some of the important provisions of the National Credit Act and the implications for retirement funds as credit providers, bearing in mind that while many sections of the act only become effective on June 1 next year, there are sections that apply fully to pre-existing credit agreements at present.

The act has a chapter on consumer credit policy. Of importance are the sections regarding consumer rights and protections. Importantly these sections apply to pre-existing credit agreements only with respect to acts or omissions that occur after the effective date of June 1 2007. Consumer rights are the right to apply for credit, the right to reasons for credit being refused, the right to information in official and in plain and understandable language. A credit provider may not unfairly discriminate directly or indirectly against a consumer or prospective consumer on any of the grounds set out in the constitution or in the Promotion of Equality and Prevention of Unfair Discrimination Act.

This has implications for retirement funds in that they will have to ensure that they are in a position to comply with all the consumer rights and protections set out in the act. The consequence of non-compliance may result in a complaint to the regulator or to the tribunal, the institution of proceedings before the Constitutional Court and adverse orders may be granted against funds in these forums.

There are provisions of important significance in the National Credit Act regarding over-indebtedness and reckless credit. These concepts have been introduced by the act in order to achieve its objective of regulating the credit industry.

The act provides that a consumer is over-indebted if the available information indicated that the consumer is or will be unable to satisfy in a timely manner all obligations under all the credit agreements to

**CREDIT ACT NECESSITATES REASSESSMENT BY PENSION FUNDS**

Trustees of retirement funds need to be aware of the implications of the National Credit Act if housing loans are granted by it to their members under the Pension Funds Act

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which the consumer is a party.

A credit agreement is reckless if at the time it was concluded, a credit provider failed to conduct an assessment or despite having conducted a proper assessment concluded the agreement when the available information indicated that the consumer did not generally understand the proposed agreement or that the transaction would render the consumer over-indebted.

Although they do not apply to pre-existing credit agreements, the implications for funds is that they must have proper evaluation mechanisms, policies and procedures for the assessment of and granting of housing loans in order to ensure that in future housing loan agreements do not fall foul of the over-indebtedness and reckless credit provisions in the act. The consequence of a

reckless credit agreement is that a court may declare the agreement to be reckless and if it does, the court may order the setting aside of all or part of the consumer's rights and obligations under the agreement.

There are also important consequences if a credit agreement is unlawful in that it is void from the date entered into.

Trustees of retirement funds that provide direct housing loans to members will need to, if they have not already, register the fund as a credit provider.

However it is even more important for a fund to decide whether it has the ability and capacity to function as a credit provider in terms of the act.

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