



SUMMARY OF THE PROVISIONS OF THE CO-OPERATIVE BANKS ACT

According to a survey carried out by FinScope Africa in 2006, 49% of the adult population of the Republic of South Africa did not have access to banking services, and with South African banking institutions having implemented Basel II with effect from 1 January 2008, it is anticipated that the 'gap' between the 'banked' and the 'un-banked' will further widen. Basel II, which, *inter alia*, requires that banks be more prudent in granting credit to so-called 'risky' counterparties, will likely increase the barriers to entry for the 'un-banked' to regulated financial services and in turn will likely result in the perpetuation of the 'un-banked' status of many South Africans.

The Co-operative Banks Act, 2007 (Act) attempts to bridge the divide between the 'banked' and the 'un-banked' by providing a sound legislative framework within which co-operative banks (Co-operative Banks) can provide financial services to their members, thereby enhancing the accessibility of financial services to all South Africans. Whilst Co-operative Banks will still have to comply with certain prudential requirements, these prudential requirements will, no doubt, be far less stringent than those imposed on banking institutions registered in terms of the Banks Act, 1990 (Banks Act).

OBJECTIVE AND LAYOUT OF SUMMARY

This summary is intended to provide a concise overview of the salient provisions of the Act and is not intended to constitute legal advice. For more information on the Act, please contact one of our lawyers listed at the end of this summary.

The Act was assented to by the President and was published in the Government Gazette on 22 February 2008, but has not yet been implemented. The date of implementation of the Act is still to be proclaimed by the Minister of Finance (Minister).

This document, to a large extent, is arranged along the lines of the specific chapters of the Act, and comprises the following key areas:

1. Purpose, Definition and Application
2. Nature and Scope of Co-operative Banks
3. Prudential Requirements and Large Exposures
4. Deposit Insurance Fund
5. Amalgamation, Division, Conversion, Transfer, Judicial Management and Winding-up
6. Representative Bodies and Support Organisations
7. Administration
8. Co-operative Banks Development Agency
9. Appeals and Appeal Board
10. Offences and Penalties
11. Conclusion

I PURPOSE, DEFINITION AND APPLICATION

1.1 Purpose

The purpose of the Act is stated as being the promotion and advancement of the social and economic welfare of all South Africans by enhancing access to banking services, as well as the development and regulation of Co-operative Banks.

1.2 Definition

A Co-operative Bank is defined as a Co-operative (Co-operative), registered as such in terms of the Co-operatives Act, 2005 (Co-operatives Act), and whose members:

- are of similar occupation or profession or who are employed by a common employer or who are employed within the same business district
- have common membership in an association or organisation, including a business, religious, social, co-operative, labour or educational group, or
- reside within the same defined community or geographical area.

1.3 Application

The Act applies to all incorporated Co-operatives registered as Co-operative Banks in terms of the Act, as well as to all Co-operatives incorporated as such in terms of the Co-operatives Act, which take deposits from the public and which meet the following criteria (Criteria):

- have 200 or more members; and
- hold deposits of members to the value of one million rand or more.

In the case of Co-operatives not registered as Co-operative Banks that meet the Criteria, the Act prescribes that such Co-operatives must register as Co-operative Banks within 2 months of meeting the Criteria. However, any such Co-operative that met the Criteria, provided services falling within the definition of the 'business of a bank' and operated under the exemptions in terms of regulations promulgated under the Banks Act at the commencement of the Act, is only obliged to apply for registration as a Co-operative Bank within 1 year of the commencement of the Act. The latter referenced Co-operatives would include certain credit unions and in certain instances may include village banks and stokvels.

2 NATURE AND SCOPE OF CO-OPERATIVE BANKS

The Act makes provision for registration as one of the following types of Co-operative Banks:

- a primary savings Co-operative Bank
- a primary savings and loans Co-operative Bank
- a secondary Co-operative Bank
- a tertiary Co-operative Bank.

The nature and scope of the different types of Co-operative Banks is discussed hereunder.

2.1 Primary savings Co-operative Banks

Primary savings Co-operative Banks may only provide, participate in or undertake the following banking services:

- the soliciting and accepting of deposits from its members

- the opening of savings accounts for its members, in the name of each member, into which that member may deposit or withdraw money and from which that member may instruct the Co-operative Bank to transfer or pay money
- the borrowing of money from the Development Agency for Co-operative Banks (Development Agency) and its members up to a prescribed percentage of the assets held by it
- the opening of a savings account or cheque account in the name of that Co-operative Bank with any banking institution
- the making, drawing, accepting, indorsing, or negotiating of negotiable instruments that are paid to the order of or made out and endorsed by that Co-operative Bank
- the providing of trust or custody services to members
- the conducting of any additional banking services as may be prescribed by the Minister
- the investing of money deposited with it in investments prescribed by the Minister.

2.2 Primary savings and loans Co-operative Banks

Primary savings and loans Co-operative Banks may, in addition to the services that may be provided by primary savings Co-operative Banks, provide the following banking services:

- the granting of secured and unsecured loans to its members to a prescribed maximum aggregate value prescribed by the Minister
- the conducting of any additional banking services and the investing of money deposited with it in any investments prescribed by the Minister.

2.3 Secondary Co-operative Banks

Secondary Co-operative Banks may, in addition to the banking services provided by primary savings and loans Co-operative Banks also provide the following banking services:

- the trading of financial instruments on behalf of its members
- the opening of an account with a bank registered under the Banks Act to facilitate foreign currency transactions

- the conducting of such additional banking services and the investing of money deposited with it in any investment prescribed by the Minister.

2.4 Tertiary Co-operative Banks

Tertiary Co-operative Banks may, in addition to services provided by secondary Co-operative Banks, conduct such additional banking services and invest money deposited with it in any investments prescribed by the Minister.

2.5 Registration requirements

In order to qualify for registration, a proposed Co-operative Bank will need to demonstrate in its application to the supervisor defined below, *inter alia*, that:

- the application has been made in accordance with the Act
- the business it proposes to conduct is that of a Co-operative Bank of the type to which the application relates
- it has sufficient human, financial and operational capacity to function efficiently and competently as a Co-operative Bank
- every person that is to be a director, managing director or executive officer of the proposed Co-operative Bank has the necessary experience, knowledge and qualifications to operate the proposed Co-operative Bank and is a fit and proper person
- the composition of the board of directors of the proposed Co-operative Bank is appropriate, having regard to the nature and scale of the business to be conducted
- the establishment of the proposed Co-operative Bank will be in the public interest
- the proposed Co-operative Bank complies with all of the provisions in the Act relating to the constitution of Co-operative Banks (see paragraph 2.6 below)
- the proposed name of the Co-operative Bank complies in all respects with the appropriate provisions of the Act pertaining to the names of Co-operative Banks.

The aforementioned application for registration must be accompanied by, *inter alia*, copies of the constitution of the proposed Co-operative Bank, a savings policy, a lending policy (if applicable) and the prescribed application fee.

2.6 Constitution and functions

The Act lists certain provisions that must be contained in the constitution of a Co-operative Bank, and it sets out the general functions which a Co-operative Bank may perform in addition to those referred to in the Co-operatives Act. These additional functions include:

- receiving grants and donations
- in relation to a secondary or tertiary Co-operative Bank, applying for registration as a representative body or accreditation as a support organisation
- being a member of and entering into an agreement with a representative body or support organisation
- establishing a dispute resolution scheme, together with other Co-operative Banks of the same type
- acting as an agent of its members or in the interest of its members as an intermediary of a banking institution, other Co-operative Bank, Co-operative, pension fund, provident fund, medical scheme, or insurance business.

2.7 Management

The Act further sets out the duties of directors and officers of a Co-operative Bank, which match those of directors and officers of other corporate entities. In addition, the provisions of chapter 5 of the Co-operatives Act (which regulates the management of Co-operatives and, in particular, sets out the provisions relevant to the directors of Co-operatives) apply concomitantly to the provisions of the Act dealing with the management of Co-operative Banks.

3 PRUDENTIAL REQUIREMENTS AND LARGE EXPOSURES

3.1 Prudential requirements

A Co-operative Bank must meet and maintain certain prescribed minimum capital requirements, minimum asset quality, minimum liquidity (to be held in addition to any surplus reserves required to be held in terms of section 46 of the Co-operatives Act), and surplus reserves required to be held in terms of section 46 of the Act. Section 46 of the Act provides that a Co-operative must establish a reserve fund and deposit at least 5% of its surplus into such reserve for distributions amongst its members during each financial year of the Co-operative.

The inability of a Co-operative Bank to meet or maintain the above-mentioned prudential requirements may result in de-registration or suspension of registration of the Co-operative Bank, or alternatively the supervisor may condone the Co-operative Banks inability to meet or maintain the requirements, subject to the imposition of certain conditions.

3.2 Reporting

The supervisor of Co-operative Banks must, at intervals prescribed to the Co-operative Bank by the supervisor, report on its compliance and maintenance of the prudential requirements imposed upon it.

3.3 Large exposures

A Co-operative Bank is limited with regards to the making of investments and the granting of loans. The making of investments with any one person or the granting of loans to any one member, which investment or loan, alone or together with all previous investments or loans made or granted to that person or member, exceeds a prescribed percentage of its total investments or loans, is not permitted without certain approval from the supervisor of Co-operative Banks.

4 DEPOSIT INSURANCE FUND

The Act requires that the Development Agency must establish the Co-operative Banks Deposit Insurance Fund (Fund), which the Development Agency will hold in trust and manage and administer in accordance with the Act. The Fund will be funded by contributions

that Co-operative Banks are required to make to the Fund in terms of the Act (as prescribed by the Minister) as well as from interest derived from investments that the Fund may make in terms of the Act, funds appropriated by Parliament and money accruing to the Fund from any other source.

The Fund will use these funds to compensate members of Co-operative Banks that paid contributions to the Fund, for deposits lost as a result of that Co-operative Bank having been unable to repay the deposits received from its members, up to a percentage determined by the Minister. The Fund will also use the money under its control for expenses incurred by the Development Agency in the control and management of the Fund.

5 AMALGAMATION, DIVISION, CONVERSION, TRANSFER, JUDICIAL MANAGEMENT AND WINDING-UP

Save for primary savings Co-operative Banks which may convert into primary savings and loans Co-operative Banks, the Act provides that Co-operative Banks may not convert into any other type of corporate or incorporate entities. A Co-operative Bank may, however, amalgamate with another Co-operative Bank and transfer its assets, rights, liabilities and obligations to such other Co-operative Bank in accordance with the provisions of the Act and section 57 of the Act.

Section 57 of the Co-operatives Act provides that the board of directors of each amalgamating Co-operative must submit the proposed agreement to amalgamate to a general meeting of each amalgamating Co-operative. The said amalgamation agreement must be approved by special resolutions of each amalgamating Co-operative and, if approved, the constitution of the amalgamated Co-operative must be submitted to the registrar of Co-operatives for approval, together with a notice of its registered office, a notice of the directors of the amalgamated Co-operative and the prescribed fee.

In addition, section 57 of the Co-operatives Act provides that a declaration by the directors of each amalgamating Co-operative must be attached to the constitution of the amalgamated Co-operative establishing that the relevant provisions of their constitutions have been complied with in approving the amalgamation, and that there are reasonable grounds to believe that:

- the amalgamated Co-operative will be able to pay its liabilities as they become due
- the realisable value of the amalgamated Co-operative's assets will not be less than the total of its liabilities, share capital and reserves
- the interests of creditors will be protected.

The registrar of Co-operatives must then issue a certificate of registration in the name of the amalgamated Co-operative if satisfied that the amalgamating Co-operatives have complied with all the relevant provisions of their constitutions and of the Co-operatives Act, and the name and constitution of the amalgamated Co-operative comply with the relevant provisions of the Co-operatives Act.

6 REPRESENTATIVE BODIES AND SUPPORT ORGANISATIONS

A representative body means a secondary Co-operative (which is defined, in terms of the Co-operatives Act, as a Co-operative formed by two or more primary Co-operatives to provide sectoral services to its members), irrespective of whether it is also a secondary Co-operative Bank, that represents more than one Co-operative Bank in interactions with organs of state, the private sector and stakeholders.

A support organisation is a representative body accredited under the provisions of the Act and which will support other Co-operative Banks as contemplated in terms of section 37 of the Act, by assisting such other Co-operative Banks in maintaining the prescribed prudential requirements, and which will provide other support functions to such Co-operative Banks in the form of education and training of members, directors and other personnel of such Co-operative Banks. The Act sets out the requirements and the procedure for the registration of representative bodies and for the registration and accreditation of support organisations.

7 ADMINISTRATION

The South African Reserve Bank must, with the approval of the Minister, appoint a suitable employee in its service as the supervisor of primary Co-operative Banks that hold deposits in excess of R20 million, secondary Co-operative Banks and tertiary

Co-operative Banks. A primary Co-operative Bank that holds deposits of R20 million or less will be subject to the supervision of a supervisor similarly appointed by the Development Agency. Where deposit-holding in primary Co-operative Banks moves above or below the R20 million mark, supervision will pass to the appropriately authorised supervisor. The two supervisors must act in a co-operative and coordinated manner with each other.

The Act lists the general powers and functions of the supervisor and confers on the supervisor the power to prescribe rules with regard to any matter that is required or permitted to be prescribed in terms of the Act. The general powers and functions of the supervisor as set out in the Act *inter alia* include:

- the power to take such steps that the supervisor considers necessary to protect the public in their dealings with Co-operative Banks
- the power to furnish information acquired by the supervisor under the Act to any person charged with the performance of a function under any law
- the power to issue guidelines to Co-operative Banks, members, supporting institutions and auditors on the application and interpretation of the Act and provide them with information on market practices or market or industry developments within or outside of South Africa
- the power to take any other measures that the supervisor considers necessary to enable the supervisor to properly perform and exercise his or her functions or duties or for the implementation of the provisions of the Act.

The supervisor may impose an administrative penalty on a Co-operative Bank for any failure to comply with a provision of the Act, which administrative penalty may not exceed the amount prescribed by the Minister. The supervisor may, on written notice to a Co-operative Bank, require that a Co-operative Bank submit information or a report on any matter specified in the notice. In addition, the supervisor must itself provide access to information and report to the Minister on the exercise and performance of his or her powers and functions. Moreover, the supervisor must keep records of certain documents for at least 10 years, which documents shall include the constitution or any alterations to the constitution or name of the Co-operative Bank, copies of all documents submitted to him or her by a Co-operative Bank or its auditor, and financial statements of the Co-operative Bank.

8 CO-OPERATIVE BANKS DEVELOPMENT AGENCY

8.1 Establishment and functions

The Act establishes the Development Agency, which must perform its functions and exercise its general powers in terms of the Act, but is also subject to the Public Finance Management Act, 1999 (PFMA).

The Act prescribes the mandatory functions of the Development Agency as well as the additional functions that the Development Agency may perform. The mandatory functions of the Development Agency *inter alia* include:

- supporting, promoting and developing Co-operative Banking
- promoting the establishment of representative bodies and support organisations
- registering and regulating representative bodies and accrediting and regulating support organisations
- providing financial support to Co-operative Banks through loans or grants
- managing the Fund
- assisting Co-operative Banks with liquidity management
- interacting with any regulatory authority to ensure appropriate regulation of co-operative banking and Co-operative Banks
- monitoring trends and patterns in the development of co-operative banking and Co-operative Banks.

The Act also confers upon the Development Agency certain powers, which include the power to make rules regarding, *inter alia*, the exercising of any of its functions, or that would facilitate the better execution of the Act or a function or power provided for in the Act.

8.2 National government oversight and executive authority

The Minister is the executive authority for the Development Agency in terms of the PFMA and the Development Agency is accountable to the Minister.

9 APPEALS AND APPEAL BOARD

9.1 Establishment and composition of appeal board

The Act establishes an appeal board, which will consist of at least 3 members appointed by the Minister and must include:

- an advocate or attorney with at least 10 years experience in the practice of law to be the chairperson
- a person with knowledge and experience in Co-operative Banks
- a person registered as an auditor under the Auditing Profession Act, 2005.

9.2 Appeal against decision of supervisor

A Co-operative Bank, representative body or support organisation may appeal to the appeal board against any decision of the supervisor or a decision of the Development Agency on the registration or accreditation or cancellation of registration or accreditation of a representative body or support organisation.

The appeal board may, at the conclusion of the appeal, confirm, set aside or vary the relevant decision of the supervisor on the decision of a majority of the members of the appeal board. However, an appeal lodged in terms of this section does not suspend any decision of the supervisor pending the outcome of an appeal.

10 OFFENCES AND PENALTIES

10.1 Specific Offences

The Act makes it an offence:

- for any person who is not registered as a Co-operative Bank to use or refer to him or herself in any manner whatsoever that would lead persons to infer that such person is a Co-operative Bank registered as such under the Act or to purport to be a Co-operative Bank; or to use, in respect of any business, a name or description that includes the expression 'Co-operative Bank', 'Co-op Bank' or any derivative thereof
- for any person, other than a person incorporated as a Co-operative under the Co-operatives Act and registered

as a Co-operative Bank, to conduct the business of any Co-operative Bank

- for a Co-operative Bank to provide, participate in or undertake banking services other than the services authorised in respect of the type of Co-operative Bank it is registered as in terms of the Act
- for any person in connection with an application for registration as a Co-operative Bank to provide any information which, to the knowledge of such person, is untrue or misleading in any material respect
- for any director, managing director or executive officer of a Co-operative Bank to, directly or indirectly, be involved in or take part in the management of a Co-operative Bank while the business of the Co-operative Bank is carried on recklessly, with intent to defraud creditors of the Co-operative Bank or creditors of any other person, or for any other fraudulent purpose
- for any person other than a director, managing director or executive officer to knowingly, directly or indirectly, benefit from, be involved in or take part in the management of a Co-operative Bank while the business of the Co-operative Bank is carried on recklessly, with intent to defraud creditors of the Co-operative Bank or creditors of any other person, or for any fraudulent purpose.

In addition to these specific offences, the Act also provides for certain general offences for Co-operative Banks, representative bodies, support organisations or for any other person where such entity or person has failed to comply with sections 3(2) (failure to register as a Co-operative Bank within 2 months of meeting the Criteria), 10, 21(1), 23 or 25(4) of the Act, or with any directive in terms of the Act, or where such entity or person submits a document or provides information or makes a statement which such entity or person knows is untrue or misleading.

10.2 Penalties

Any person convicted of an offence is liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.

II CONCLUSION

Cliffe Dekker Hofmeyr's Finance, Projects and Banking practice, having identified the potential impact that the Act will have on the financial services sector, have been closely monitoring the Act and its progression through the legislative process so as to ensure that we are well-equipped to attend to our client's needs.

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