

REPUBLIC OF SOUTH AFRICA

HOUSING CONSUMERS PROTECTION MEASURES BILL

*(As amended by the Portfolio Committee on Housing
(National Assembly))*

(SELECT COMMITTEE ON PUBLIC SERVICES)

[B 76D—98]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP BESKERMINGSMAATREËLS VIR BEHUISINGSVERBRUIKERS

*(Soos gewysig deur die Portefeuljekomitee oor Behuising
(Nasionale Vergadering))*

(GEKOSE KOMITEE OOR OPENBARE DIENSTE)

[W 76D—98]

ISBN 0 621 28560 9

BILL

To make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration Council; and to provide for matters connected therewith.

ARRANGEMENT OF BILL

Section

1. Definitions

CHAPTER I

NATIONAL HOME BUILDERS REGISTRATION COUNCIL 5

2. Establishment of Council
3. Objects of Council
4. Composition of Council
5. Powers of Council
6. Staff of Council 10
7. Regulating measures
8. Report to Minister and Parliament
9. Access to information

CHAPTER II

REGISTRATION OF HOME BUILDERS 15

10. Registration of home builders
11. Withdrawal and suspension of registration
12. Home Building Manual

CHAPTER III

PROTECTION OF HOUSING CONSUMERS 20

13. Conclusion of agreements and implied terms
14. Enrolment

CHAPTER IV

FINANCIAL MATTERS

15. Funds of Council 25
16. Management of funds
17. Claims and recourse

CHAPTER V

LEGAL ENFORCEMENT

- | | |
|---|---|
| 18. Obligations of mortgagees, conveyancers and provincial housing development boards | |
| 19. Inspectors | 5 |
| 20. Interdicts | |
| 21. Offences | |
| 22. Review, arbitration and appeal | |

CHAPTER VI

MISCELLANEOUS MATTERS 10

- | | |
|----------------------------------|----|
| 23. Council Advisory Committee | |
| 24. Notices | |
| 25. Evidential matters | |
| 26. Delegation | |
| 27. Regulations | 15 |
| 28. Dissolution of Council | |
| 29. Exemption | |
| 30. Transitional provisions | |
| 31. Short title and commencement | |
| <i>Schedule</i> | 20 |
| Transitional provisions | |

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

- | | |
|--|----|
| 1. In this Act, unless the context indicates otherwise— | 25 |
| (i) “business of a home builder” means— | |
| (a) to construct or to undertake to construct a home or to cause a home to be constructed for any person; | |
| (b) to construct a home for purposes of sale or otherwise disposing of such home; | 30 |
| (c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or (b) as a principal; or | |
| (d) to conduct any other activity that may be prescribed by the Minister for the purposes of this definition, | |
| but does not include— | 35 |
| (i) the <i>bona fide</i> building of a home by any person for occupation by that person; | |
| (ii) the <i>bona fide</i> assistance to a person contemplated in paragraph (i) by a person who is not a registered home builder, in the building of a home; or | |
| (iii) the sale or disposal by a housing consumer of his or her <i>bona fide</i> home; | 40 |
| (iii) | |
| (ii) “Chief Executive Officer” means the Chief Executive Officer appointed in terms of section 6; (xii) | |
| (iii) “Companies Act, 1973” means the Companies Act, 1973 (Act No. 61 of 1973); (xx) | 45 |
| (iv) “competent person” is a registered person in terms of the Engineering Professions of South Africa Act, 1990 (Act No. 114 of 1990), or a person registered in terms of section 11 of the Natural Scientific Professions Act, 1993 (Act No. 106 of 1993), and holding the indemnity insurance prescribed by the Council in respect of the certification of— | 50 |
| (a) the appropriateness of design and construction of homes; | |
| (b) compliance with the Home Building Manual; and | |

- (c) any other matter that may be required to be certified in terms of the Home Building Manual; (iv)
- (v) “Council” means the National Home Builders Registration Council established by section 2; (xxvi)
- (vi) “Council Advisory Committee” means the Council Advisory Committee on National Home Builders Registration Council Matters established in terms of section 23; (i) 5
- (vii) “court” means a competent court within its area of jurisdiction; (xi)
- (viii) “Director-General” means the Director General of the Department of Housing; (v) 10
- (ix) “enrolment” means the submission by a home builder of a request for a particular home to be entered into the records of the Council and the completed acceptance thereof by the Council in terms of section 14(1) or (2), as the case may be; (xvi)
- (x) “enrolment fee” means a fee prescribed by the Council under section 7(1)(a)(iii); (xvii) 15
- (xi) “fund” means a fund contemplated in section 15(4) or (5); (vii)
- (xii) “funds advisory committee” means the funds advisory committee established in terms of section 16(2); (viii)
- (xiii) “home” means any dwelling unit constructed or to be constructed by a home builder, after the commencement of this Act, for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister; (xiii) 20
- (xiv) “home builder” means a person who carries on the business of a home builder; (xiv) 25
- (xv) “Home Building Manual” means the Home Building Manual published by the Council in terms of section 12; (xv)
- (xvi) “housing consumer” means a person who is in the process of acquiring or has acquired a home and includes such person’s successor in title; (ii) 30
- (xvii) “inspector” means an inspector referred to in section 19; (xviii)
- (xviii) “local government body” means a local government body as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993); (xxiv) 35
- (xix) “major structural defect” means a defect which gives rise or which is likely to give rise to damage of such severity that it affects or is likely to affect the structural integrity of a home and which requires complete or partial rebuilding of the home or extensive repair work to it, subject to the limitations, qualifications or exclusions that may be prescribed by the Minister; (vi) 40
- (xx) “MEC” means the member of the Executive Council of a province designated by the Premier of that province to be responsible for housing matters in the province; (xix)
- (xxi) “NHBRC Technical Requirements” means the requirements prescribed under section 7(2)(d); (xxii) 45
- (xxii) “occupation date” means the date on which the housing consumer first acquiring the home accepts the home as reflected in a document confirming such acceptance and, in the event of such document not having been received by the Council or the Council for any reason not being able to determine such date, the date reflected in the certificate of occupancy issued by the relevant local government body contemplated in section 14 of the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977); (xxiii) 50
- (xxiii) “organ of state” means an organ of state as defined in section 239 of the Constitution; (xxx)
- (xxiv) “prescribe” means, in relation to— 55
- (a) the Minister, except in section 4(6), prescribe by regulation in the *Gazette* after consultation with the Council; and
- (b) the Council, except in section 7(1), prescribe in a circular to all registered home builders; (xxxi)
- (xxv) “provincial housing development board” means a provincial housing development board referred to in section 8 of the Housing Act, 1997 (Act No. 107 of 1997), and any successor in title or any agent of such board, including any department responsible for housing in a provincial administration and any 60

- organ of state which may grant a state housing subsidy or any entity to which such power has been delegated or granted in terms of any law; (xxv)
- (xxvi) “Minister” means the Minister of Housing; (xxi)
- (xxvii) “registered home builder” means a home builder registered with the Council in terms of this Act; (ix) 5
- (xxviii) “regulation” means a regulation made under this Act; (xxviii)
- (xxix) “Rules” means the Rules of the Council prescribed under section 7; (xxvii)
- (xxx) “state housing subsidy” means any national housing programme under section 3(4)(g) of the Housing Act, 1997 (Act No. 107 of 1997), including the housing assistance measures referred to in section 3(5) of the said Act; (xxix) 10
- (xxxi) “this Act” includes any regulation, the Rules, the Home Building Manual and any circular prescribing any matter that a home builder has to comply with in terms of this Act. (x)

CHAPTER I

NATIONAL HOME BUILDERS REGISTRATION COUNCIL 15

Establishment of Council

2. The National Home Builders Registration Council is hereby established as a juristic person.

Objects of Council

3. The objects of the Council shall be— 20
- (a) to represent the interests of housing consumers by providing warranty protection against defects in new homes;
- (b) to regulate the home building industry;
- (c) to provide protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of this Act; 25
- (d) to establish and to promote ethical and technical standards in the home building industry;
- (e) to improve structural quality in the interests of housing consumers and the home building industry;
- (f) to promote housing consumer rights and to provide housing consumer information; 30
- (g) to communicate with and to assist home builders to register in terms of this Act;
- (h) to assist home builders, through training and inspection, to achieve and to maintain satisfactory technical standards of home building; 35
- (i) to regulate insurers contemplated in section 23(9)(a); and
- (j) in particular, to achieve the stated objects of this section in the subsidy housing sector.

Composition of Council

4. (1) The Council shall consist of at least seven but not more than 15 members, including a chairperson and deputy chairperson, appointed by the Minister for the period determined by the Minister, but not exceeding three years at a time. 40
- (2) The Minister shall ensure that the Council consists of persons—
- (a) who are representative of the interests of housing consumers;
- (b) who are broadly representative of the interests of home builders, the suppliers of housing goods and services and associated professions; 45
- (c) having skills and experience regarding—
- (i) structural defects in homes and the prevention thereof; and
- (ii) the management of funds; and

- (d) who are representative of the interests of the national government departments responsible for housing, trade and industry, finance and public works, which persons shall as far as possible reflect broadly the race, gender and geographic composition of South Africa.
- (3) The members of the Council shall be appointed only after— 5
- (a) the Minister has through the media and by notice in the *Gazette* invited nominations of persons as candidates for the respective positions on the Council; and
- (b) the Minister has consulted with the MEC of every province and the parliamentary committees for housing of the National Assembly and the National Council of Provinces. 10
- (4) When a vacancy occurs in the ranks of the members appointed in terms of subsection (2), the Minister shall fill the vacancy by the appointment of another person whom the Minister considers representative of the relevant interest group referred to or having the skills and expertise referred to in subsection (2)(c), for the unexpired part of the period for which his or her predecessor was appointed. 15
- (5) A member of the Council shall vacate his or her office if he or she—
- (a) becomes insolvent;
- (b) is absent from three consecutive ordinary meetings of the Council without the permission of the Council; 20
- (c) becomes of unsound mind;
- (d) is convicted of an offence and is sentenced to imprisonment without the option of a fine;
- (e) resigns by written notice to the Minister;
- (f) becomes a member of Parliament, a provincial legislature, a Municipal Council, the Cabinet or the Executive Council of a province; or 25
- (g) is removed from office by the Minister for reasons which are just and fair.
- (6) The Minister may prescribe the necessary matters and procedures relating to meetings of the Council.
- (7) A member of the Council who is not in the full-time employment of the State or an organ of state may be paid from the Council's funds from money approved by the Minister for that purpose the allowances which the Minister may determine in general or in a specific case in concurrence with the Minister of Finance. 30

Powers of Council

5. (1) The Council—
- (a) shall establish a remuneration committee which shall advise the Council on the remuneration of the staff appointed in terms of section 6 and shall review such remuneration regularly; and 35
- (b) shall establish an industry advisory committee, the funds advisory committee, a registration committee and a disciplinary committee and may establish any other committee that it considers appropriate for the functioning of the Council; 40
- (c) may appoint the members of the committees contemplated in paragraphs (a) and (b), who may include members of the Council or outsiders, or both such members and outsiders, as the case may be; and
- (d) may prescribe the powers, composition, procedures and rules pertaining to such committees: Provided that the Minister shall prescribe the procedures of the disciplinary committee. 45
- (2) For the purposes of subsection (1)(c), “outsiders” include—
- (a) the chair of the disciplinary committee who shall be legally qualified; and
- (b) other persons with the expertise, experience or representative capacity necessary for the functioning of such committees. 50
- (3) The industry advisory committee shall advise the Council on any matter referred to it by the Council in respect of this Act.
- (4) The Council shall—
- (a) keep a register of home builders and register and deregister home builders in accordance with criteria prescribed by the Minister; 55
- (b) enrol and inspect the categories of homes that may be prescribed by the Minister;
- (c) enter into agreements generally and specifically with provincial housing development boards regarding services to be rendered in respect of projects 60

- for the construction of homes, the acquisition of which, except in respect of any deposit that may be payable, will be financed solely from the proceeds of a state housing subsidy;
- (d) establish, maintain and administer a fund contemplated in section 15(4) to provide assistance to housing consumers under circumstances where home builders fail to meet their obligations in terms of section 13(2)(b)(i); 5
 - (e) assist in the resolution of disputes between registered home builders and housing consumers;
 - (f) engage in communications to inform housing consumers of their rights under this Act and other relevant matters; 10
 - (g) provide information to financial institutions, conveyancers, provincial housing development boards and any other interested person in order to assist them to comply with their obligations in terms of this Act;
 - (h) establish grading categories and criteria in respect of home builders with a view to encourage good building practice and discourage bad building practice; 15
 - (i) determine criteria to be applied in the grading of home builders in different categories for the purposes of differentiated enrolment fees;
 - (j) investigate, at the request of the Minister, the integration of the register of home builders into a possible general register of builders and make recommendations to the Minister; and 20
 - (k) advise the Minister on any matter referred to it by the Minister in respect of the protection of housing consumers or the objectives of this Act.
- (5) The Council may—
- (a) engage in undertakings to promote improved structural quality of homes constructed in the Republic; 25
 - (b) engage in undertakings to improve ethical and technical standards in the home building industry;
 - (c) establish, maintain and administer different funds for different purposes contemplated in section 15(5); 30
 - (d) keep a record of competent persons;
 - (e) issue circulars to be complied with by registered home builders;
 - (f) acquire, register, deal with and dispose of any trade mark;
 - (g) make recommendations to the Minister in respect of any amendment to this Act that it deems advisable; and 35
 - (h) generally do all things necessary or expedient to achieve its objects and the objectives of this Act.

Staff of Council

6. (1) The Council shall appoint a person as Chief Executive Officer who shall be responsible for the day to day management of the affairs of the Council. 40
- (2) The work incidental to the carrying out of its functions by the Council shall be performed under its directions and control by persons appointed by the Council.
- (3) The Chief Executive Officer and the persons contemplated in subsection (2) shall be appointed on the conditions of service that the Council may determine.
- (4) The Council shall ensure that all inspectors appointed in terms of section 19(1) 45 have appropriate experience or qualifications.

Regulating measures

7. (1) The Council may, by publication in the *Gazette*—
- (a) make Rules—
 - (i) regulating the conduct of registered home builders; 50
 - (ii) prescribing procedures for the registration of home builders and the expiration of registration;
 - (iii) prescribing enrolment fees in respect of homes or categories of homes and other fees, excluding the fees contemplated in subsection (2);
 - (iv) prescribing procedures for enrolment and cancellation of enrolment; 55
 - (v) prescribing procedures for the consideration of applications for assistance by housing consumers from its funds or a fund;

- (vi) prescribing the procedures for resolution of disputes by conciliation or arbitration and providing for the payment and refunding of deposits or fees for such conciliation or arbitration;
- (vii) prescribing procedures to be complied with by housing consumers, relating to the lodgement of complaints with the Council; 5
- (viii) recommending terms to be included in or excluded from agreements between home builders and housing consumers in respect of the construction or sale of homes;
- (ix) prescribing a code of conduct; and
- (x) prescribing forms for the purposes of the Council; and 10
- (b) prescribe any matter which is necessary or desirable to be prescribed by the Council in order to achieve the objectives of this Act.
- (2) The Minister shall prescribe—
 - (a) application fees, registration fees and annual registration renewal fees;
 - (b) the terms and conditions for the registration and renewal of registration of home builders; 15
 - (c) procedures for disciplinary proceedings before the disciplinary committee in respect of alleged misconduct of home builders and make provision for fines and other penalties to be imposed on home builders who contravene the code of conduct prescribed by the Council; 20
 - (d) requirements applying to a home builder for the design and construction of prescribed homes in respect of structural strength and stability, serviceability, behaviour in fire, drainage and storm water management; and
 - (e) the minimum and maximum amounts which may be expended under section 17(1) in respect of any home pursuant to the failure of a home builder to meet his or her obligations in terms of section 13(2)(b)(i). 25
- (3) The Council shall give home builders reasonable notice of proposed changes to the Rules or the NHBRC Technical Requirements.

Report to Minister and Parliament

- 8. (1) The Council shall annually, not later than six months after the end of each financial year, submit to the Minister a report on all its activities during the previous year, including— 30
 - (a) the audited financial statements of the Council referred to in section 15(6)(d);
 - (b) a report on the affairs of the Council during the relevant financial year;
 - (c) a report on the administrative efficiency of the Council; and 35
 - (d) a report on the financial position of the Council, including any fund.
- (2) The report referred to in subsection (1) shall be laid upon the Table in Parliament within 30 days after it was received by the Minister, if Parliament is then in session, or, if Parliament is not then in session, within 30 days after the commencement of its next ensuing session. 40

Access to information

- 9. (1) The Council shall keep up and provide access to an information database on the home builders registered, suspended and deregistered in terms of this Act.
- (2) The database contemplated in section 9(1) shall include—
 - (a) the names and identity numbers of the directors, members, trustees or partners of such companies, close corporations, trusts, partnerships or sole traders; 45
 - (b) the number of homes enrolled by such home builders;
 - (c) the number of complaints, considered valid by the Council and requiring on-site conciliation, received from housing consumers;
 - (d) the grading of those home builders; and 50
 - (e) any other information deemed appropriate by the Council to assist housing consumers to assess the track record of a home builder.
- (3) The Council shall provide access to the information database services referred to in subsections (1) and (2)—

- (a) free of charge where this access is for the *bona fide* use of such information by a housing consumer for his or her own non-commercial use;
- (b) free of charge to mortgagees, conveyancers and provincial housing development boards to assist them to meet their obligations in terms of section 18, and may prescribe fees for the provision of information services used for commercial or other purposes. 5

(4) Any person may have access to the Rules, the Home Building Manual and all circulars or other documents issued by the Council, at the places and times prescribed by the Council and may obtain copies of any such document against the payment of the fees prescribed by the Council. 10

CHAPTER II

REGISTRATION OF HOME BUILDERS

Registration of home builders

10. (1) No person shall—
- (a) carry on the business of a home builder; or 15
 - (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless that person is a registered home builder.
- (2) No home builder shall construct a home unless that home builder is a registered home builder. 20
- (3) The Council shall register a home builder, on application in the form and manner prescribed by the Council, if the Council is satisfied that the home builder—
- (a) meets the criteria prescribed by the Minister under section 7(2);
 - (b) will in carrying on the business of a home builder comply with the home builder's obligations in terms of this Act; and 25
 - (c) has appropriate financial, technical, construction and management capacity for the specific business carried on by the home builder in order to prevent housing consumers and the Council from being exposed to unacceptable risks.
- (4) Registration of a home builder shall be subject to the terms and conditions prescribed by the Minister under section 7(2) or imposed in any particular case, and the Council may register a home builder provisionally on the conditions that the Council deem fit. 30
- (5) The Council may, without prejudice to the generality of subsections (3) and (4), require any suretyship, guarantee, indemnity or other security that the Council may in its discretion deem necessary to satisfy itself in respect of the requirements contemplated in subsection (3). 35
- (6) The Council may, in addition to any other category that the Council may deem appropriate, in the registration of home builders distinguish between—
- (a) home builders themselves having the capacity to undertake the physical construction of homes or to manage the process of the physical construction of homes; and 40
 - (b) home builders who in the normal course need to enter into agreements with other home builders in order to procure the capacity referred to in paragraph (a).
- (7) A home builder registered in terms of subsection (6)(b) shall be obliged, for the purposes of the physical construction of homes, to appoint a home builder registered in terms of subsection (6)(a). 45
- (8) If an application for the registration of a home builder has been made and the Council is of the opinion that the registration of that homebuilder should be refused, the Council shall notify that home builder in writing of its intention and reasons therefor. 50
- (9) A home builder contemplated in subsection (8) shall be entitled to make representations in writing to the Council in response to any reason provided in terms of that subsection.
- (10) If the Council, after consideration of the representations contemplated in subsection (9), is of the view that the home builder has not satisfied the Council regarding the requirements of subsection (3), the Council shall notify that home builder accordingly. 55
- (11) A home builder contemplated in subsection (10) may request the Council within 30 days of receipt of a notification referred to in that subsection, to allow the home builder to present its case to a registration committee established by the Council for that 60

purpose, whose decision shall be the decision of the Council and which shall, subject to section 22(2), be final.

(12) If a home builder fails to exercise its rights in terms of subsection (11), the decision contemplated in subsection (10) shall, subject to section 22(2), be final.

(13) Unless it is approved by the Council and subject to the terms and conditions that the Council may impose, the registration of a home builder with the Council shall not be transferred to any other person. 5

(14) The Council shall provide information regarding home builders to housing consumers and shall publish lists of home builders and their grading and lists of deregistered home builders. 10

(15) The Council, a member of the Council or any person in the service of the Council or acting on its authority shall not be liable for any loss or damage resulting from anything done or omitted in good faith in terms of section 9, 10 or 11 of this Act.

Withdrawal and suspension of registration

11. (1) The Council may withdraw the registration of a home builder where the home builder has been found guilty by the disciplinary committee on a charge that such home builder— 15

(a) has failed to comply with any provision of or obligation in terms of this Act and fails to comply with a notice from the Council requiring rectification of that failure; 20

(b) has consistently failed to comply with any one or more provision of or condition or obligation in terms of this Act—

(i) where the Council has notified the home builder of its intended withdrawal of the home builder's registration with the Council, and has requested the home builder to provide reasons as to why the Council should not withdraw the home builder's registration with the Council; and 25

(ii) where the Council is not satisfied, on reasonable grounds, that the home builder will comply with any particular provision of or condition or obligation in terms of this Act; 30

(c) has failed to comply with a notice from the Council requiring the home builder to pay amounts due to the Council on account of any fee, charge or levy or any costs incurred or expended by the Council related to the failure of the home builder to comply with section 13(2)(b)(i);

(d) has contravened the code of conduct made under the Rules; or 35

(e) has failed to respond to correspondence from the Council.

(2) The provisions of section 10(8), (9), (10), (11) and (12) shall, with the necessary changes, apply to a withdrawal of the registration of a home builder.

(3) Where the Council has information that would—

(a) enable the Council to act in terms of subsection (1); and 40

(b) require immediate intervention by the Council in the interest of housing consumers,

the Council, after having notified the home builder and after having allowed the home builder an opportunity to urgently respond to the Council, may suspend the registered home builder's registration or refuse to enrol homes for the period that the Council deems to be necessary to investigate the matter or until the registered home builder has complied with the relevant provision of or condition or obligation in terms of this Act, as the case may be. 45

Home Building Manual

12. (1) The Council shall, for the purposes of this Act, publish a Home Building Manual containing— 50

(a) the NHBRC Technical Requirements; and

(b) guidelines prescribed by the Council to comply with the NHBRC Technical Requirements,

with which registered home builders shall comply. 55

(2) The Home Building Manual may require plans and associated documents to be approved by competent persons, and different requirements may be determined in respect of different categories of homes or different types of building techniques or materials.

(3) The Council shall give home builders reasonable notice of any amendment or substitution of the Home Building Manual.

(4) The Council shall submit the Home Building Manual and any amendment thereof to the Council of the South African Bureau of Standards contemplated in section 6 of the Standards Act, 1993 (Act No.29 of 1993), to consider possible conflict with and integration into the regulations made under the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977).

(5) Nothing in this Act shall exempt any person from any provision of the National Building Regulations and Building Standards Act, 1977.

CHAPTER III

PROTECTION OF HOUSING CONSUMERS

Conclusion of agreements and implied terms

13. (1) A home builder shall ensure that the agreement concluded between the home builder and a housing consumer for the construction or sale of a home by that home builder—

- (a) shall be in writing and signed by the parties;
- (b) shall set out all material terms, including the financial obligations of the housing consumer; and
- (c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body.

(2) The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that—

- (a) the home, depending on whether it has been constructed or is to be constructed—
 - (i) is or shall be constructed in a workmanlike manner;
 - (ii) is or shall be fit for habitation; and
 - (iii) is or shall be constructed in accordance with—
 - (aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and
 - (bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);
- (b) the home builder shall—
 - (i) subject to the limitations and exclusions that may be prescribed by the Minister, at the cost of the home builder and upon demand by the housing consumer, rectify major structural defects in the home caused by the non-compliance with the NHBRC Technical Requirements and occurring within a period which shall be set out in the agreement and which shall not be less than five years as from the occupation date, and notified to the home builder by the housing consumer within that period;
 - (ii) rectify non-compliance with or deviation from the terms, plans and specifications of the agreement or any deficiency related to design, workmanship or material notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than three months as from the occupation date; and
 - (iii) repair roof leaks attributable to workmanship, design or materials occurring and notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than 12 months as from the occupation date.

(3) The failure to comply with a provision of subsection (1)(a) and (c) shall not render an agreement referred to in that subsection invalid.

(4) Where a housing consumer has sold or disposed of a home to another housing consumer within the period contemplated in subsection (2)(b)(i), the housing consumer having sold or disposed of the home shall be deemed to have ceded his or her rights under subsection (2) to such subsequent housing consumer.

(5) Subsection (4) shall also apply to any subsequent sale or disposal during the period contemplated in subsection (2)(b)(i). 5

(6) Any provision in an agreement contemplated in subsection (1) that excludes or waives any provision of this section shall be null and void.

(7) A home builder may not—

- (a) demand or receive from a housing consumer any deposit for the construction or sale of a home unless an agreement between the home builder and the housing consumer has been concluded in terms of subsections (1) and (2); and 10
- (b) receive any other consideration unless the provisions of section 14(1) or (2), as the case may be, have been complied with.

(8) A housing consumer or a home builder may refer a complaint in respect of this section to the Council, who shall investigate such complaints in terms of the prescribed procedures and any agreement contemplated in section 5(4)(c). 15

Enrolment

14. (1) A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless— 20

- (a) the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner;
- (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council; and 25
- (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder.

(2) A home builder shall not commence the construction of a home the acquisition of which, except in respect of any deposit payable, will be financed solely from the proceeds of a state housing subsidy, unless— 30

- (a) the home builder has submitted the prescribed documents and information to the Council in terms of the agreement contemplated in section 5(4)(c);
- (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council;
- (c) the Council has issued a certificate of proof of enrolment of the project in the prescribed form and manner to the home builder; and 35
- (d) the provincial housing development board has paid the prescribed fee to the Council in terms of the agreement contemplated in section 5(4)(c).

(3) A home builder shall provide the housing consumer with a copy of the certificate contemplated in subsection (1)(c) or (2)(c), as the case may be. 40

(4) The enrolment of a home with the Council may be cancelled or suspended by the Council prior to the occupation date of the home if—

- (a) the Council, on reasonable grounds, is not satisfied that the home has been constructed in accordance with the NHBRC Technical Requirements to the extent that it may apply to that home; or 45
- (b) the home builder, having commenced construction in respect of a home, has failed to complete the construction of that home and another home builder continues that construction without complying with the provisions of subsection (7).

(5) The enrolment of a home with the Council shall be deemed automatically to have been cancelled by the Council— 50

- (a) on the granting of an order by a court for the provisional liquidation or the sequestration of a home builder;
- (b) on the withdrawal of the registration of the home builder with the Council in terms of section 11; or 55
- (c) on the suspension of the registration of a home builder with the Council in terms of section 11,

where any such event occurs prior to the occupation date.

(6) The Council may reinstate an enrolment contemplated in subsection (4) or (5) within its discretion: Provided that if the Council does not reinstate such enrolment, it shall repay to the home builder, or any person entitled thereto, the enrolment fees less the reasonable costs incurred by the Council in respect of the matter. 60

(7) If a registered home builder fails to complete the construction of a home contemplated in subsection (1), no home builder shall complete the construction of that home without informing the Council and without assuming the obligations of the home builder in terms of section 13(2)(b)(i) or the reasonable obligations that the Council may require. 5

(8) The Council may refuse to enrol a home submitted for enrolment while the home builder's registration is suspended in terms of section 11(3).

(9) Where an enrolment has been suspended or cancelled in terms of subsection (4) or (5), the Council shall seek—

- (a) to inform the relevant housing consumer and the persons referred to in section 18 of such action; and 10
- (b) to advise the housing consumer on the options available to him or her.

CHAPTER IV

FINANCIAL MATTERS

Funds of Council 15

15. (1) The funds of the Council shall consist of—

- (a) any fee or charge payable by home builders or a provincial housing development board;
- (b) interest derived from investments; and
- (c) any money which may accrue to the Council from any other source. 20

(2) Subject to section 17(2), the Council shall pay out of its funds—

- (a) any amount contemplated in section 17(1); and
- (b) any amount required to meet the operational costs of the Council, in accordance with an annual budget for each financial year approved by the Council. 25

(3) The Council shall open an account with a financial institution and shall deposit in that account the money received by it in terms of this Act.

(4) The Council shall establish a fund for the purposes of providing assistance to housing consumers under circumstances where a home builder fails to meet his or her obligations under section 13(2)(b)(i). 30

(5) After consultation with and in a manner prescribed by the Minister, the Council may establish a fund or funds for the purposes of providing assistance to housing consumers—

- (a) where a registered home builder has failed to meet his or her obligations to the housing consumer under section 13(2)(b)(iii); 35
- (b) where a registered home builder has failed to complete an enrolled home and the enrolment of that home has been suspended or cancelled in terms of section 14(4) or (5);
- (c) where a registered home builder has misappropriated a deposit from a housing consumer; or 40
- (d) for any other purpose, including the training of historically disadvantaged home builders, to enhance housing consumer protection measures covered within the scope of this Act.

(6) The Council shall—

- (a) keep accounting records in order to fairly present the financial position of the Council, including any fund, and to explain the transactions of the Council; 45
- (b) as soon as possible, but not later than six months, after the end of each financial year of the Council ending in each year on a date determined by the Council, with the approval of the Minister, cause annual financial statements in respect of the Council, including any fund, to be prepared, showing, with all the appropriate particulars, the moneys received and expenditure incurred during, and assets and liabilities at the end of, the said financial year; 50
- (c) cause the accounting records and annual financial statements of the Council, including any fund, to be audited by the Auditor-General; and
- (d) submit to the Minister— 55
 - (i) the audited annual financial statements of the Council, including any fund, as contemplated in section 8; and

(ii) at the end of every quarter, financial and statistical reports in respect of the Council.

(7) The Chief Executive Officer shall be the accounting officer charged with the responsibility of accounting for money and expenditure incurred by the Council.

(8) The financial statements and accounting records of the Council shall be kept at the registered office of the Council. 5

Management of funds

16. (1) The Council shall take prudent measures to manage the risks pertaining to the business of the Council, including any fund, and to secure that the fees or charges payable by home builders and provincial housing development boards to the Council are prescribed at levels which will be sufficient, in aggregate, to meet expected demands on the funds of the Council. 10

(2) The Council shall, subject to section 6, appoint—

(a) a person having appropriate expertise in respect of fund management and appropriate financial and risk management expertise to act as a fund manager to any fund; and 15

(b) a committee, called the funds advisory committee, comprising not less than three and not more than seven persons having expertise in respect of fund management or appropriate financial or risk management expertise.

(3) The Chief Executive Officer shall *ex officio* be a member of the funds advisory committee. 20

(4) The funds advisory committee shall advise—

(a) the Council on the prudent management of its funds or any fund and the risks pertaining to it and shall make recommendations to the Council regarding procedures and policies for approval and implementation by the Council, relating to— 25

(i) money obtained to be paid into its funds;

(ii) money obtained to be paid out of its funds generally and specifically for the purposes of section 15(2)(a) and (b), respectively;

(iii) the administration of its funds and any fund; 30

(iv) the investment of money in its funds or any fund; and

(v) the management of the risks pertaining to its funds or any fund;

(b) the Council Advisory Committee on any matter contemplated in section 23(9); and

(c) the Minister on his or her powers in terms of section 7(2)(e) and subsection (8). 35

(5) The funds advisory committee shall report quarterly to the Council on the status of its funds or any fund and shall, where necessary, make recommendations to the Council in respect of the fees, levies and charges of the Council contemplated in subsection (1). 40

(6) Subject to section 17(3), (4) and (5), at any time the funds of the Council appear insufficient to meet anticipated demands, the Council may, on the recommendation of the funds advisory committee, increase the fees payable by home builders and provincial housing development boards in respect of the enrolment of homes contemplated in section 14. 45

(7) The funds of the Council or any fund may, subject to subsection (4) and subject to the approval of the Minister with the concurrence of the Minister of Finance, be invested in accordance with the policies approved by the Council—

(a) with a financial institution as defined in section 1 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984); 50

(b) with the Public Investment Commissioners;

(c) in commercial paper, the issuers of which have been approved by the Council on advice of the funds advisory committee; or

(d) in any other debt instrument that may be approved by the Council on the advice of the funds advisory committee. 55

(8) The Minister may, if an actuarial assessment indicates excess free reserves in the funds of the Council or any fund, on the advice of the funds advisory committee, instruct the Council to lower any enrolment fee prescribed under section 7(1)(a)(iii).

Claims and recourse

17. (1) Subject to subsection (2), the Council shall pay out of the fund established for that purpose in terms of section 15(4), an amount for rectification where— 60

- (a) a major structural defect has manifested itself in respect of a home within five years of the date of occupation and has been notified to the home builder within that period and as a result of non-compliance with the NHBRC Technical Requirements;
- (b) the home builder is in breach of the home builder's obligations in terms of section 13(2)(b)(i) regarding the rectification of such defect; 5
- (c) the relevant home was constructed by a registered home builder, had been enrolled with the Council and, at the occupation date, the home was enrolled with the Council subject to section 14(4), (5) and (6);
- (d) the home builder no longer exists or is unable to meet his or her obligations; 10
and
- (e) in the case of a home that has been enrolled with the Council on a project basis in terms of section 14(2), the application has been made by the provincial housing development board pursuant to an agreement in terms of section 5(4)(c). 15
- (2) Subject to subsections (3), (4) and (5), if money is not available or is expected not to be available for that purpose due to future demands on the fund, the Council may, reduce any amount, subject to section 7(2)(e), that may be expended in terms of subsection (1) or refuse such claims.
- (3) Prior to exercising its powers in terms of subsection (2), the Council shall consult 20
with and make recommendations to the Minister in respect of its obligations under section 16(1) and 16(6).
- (4) The Minister shall make a decision on any recommendation contemplated in subsection (3) within a period of three months.
- (5) The Council may not— 25
- (a) exercise its powers in terms of subsection (2); or
- (b) prescribe increased enrolment fees under section 16(6)
- unless the Minister has approved such action or the period referred to in subsection (4) has expired.
- (6) Subject to section 13(2), no housing consumer shall have a claim against the 30
Council pursuant to the failure of a home builder to meet his or her obligations in terms of this Act.
- (7) If the Council has incurred costs or expenditure contemplated in subsection (1), a home builder who fails to meet his or her obligations in terms of section 13(2)(b)(i) shall, on demand by the Council, reimburse the Council with all reasonable costs or 35
expenditure incurred by the Council as a result of the failure of the home builder.
- (8) If a home builder registered in terms of section 10(6)(a) fails to meet his or her obligations in terms of section 13(2)(b)(i), the home builder having constructed a home enrolled with the Council in terms of an agreement concluded pursuant to the provisions of section 10(6)(b) shall be liable to perform the obligations of the defaulting home 40
builder in terms of section 13(2)(b)(i) or to reimburse the Council in respect of the costs or expenditure of the Council where the Council, after having obtained judgment against the defaulting home builder, or after insolvency proceedings having been instituted against the defaulting home builder by any person, has been unable to obtain settlement of the Council's claim against such defaulting home builder. 45
- (9) If the Council has incurred costs or expenditure where a home builder has failed to meet his or her obligations in terms of section 13(2)(b)(i), the Council shall be entitled to institute any action which the housing consumer or home builder may have or would have had in contract or in delict against any person for having caused or contributed to the failure of the home builder in respect of his or her obligations in terms of section 50
13(2)(b)(i).
- (10) The provisions of this section shall apply, with the necessary changes, to any other fund established in terms of section 15(5).

CHAPTER V

LEGAL ENFORCEMENT

55

Obligations of mortgagees, conveyancers and provincial housing development boards

18. (1) No financial institution shall lend money to a housing consumer against the security of a mortgage bond registered in respect of a home, with a view to enabling the housing consumer to purchase the home from a home builder, unless that institution is 60

satisfied that the home builder is registered in terms of this Act and that the home is or shall be enrolled with the Council and that the prescribed fees have been or shall be paid.

(2) Any conveyancer attending to the registration of a mortgage bond in favour of an institution contemplated in subsection (1) shall ensure that the home builder is registered in terms of this Act, has enrolled the home with the Council and has paid the prescribed fees in respect of that enrolment. 5

(3) A provincial housing development board shall not—

(a) approve a housing development project in respect of which a housing consumer is eligible for a state housing subsidy in respect of a dwelling unit that has been or is to be constructed as part of that project; 10

(b) grant a state housing subsidy to a housing consumer for the construction or sale of a home by a home builder; or

(c) pay a home builder any portion of housing subsidy funds in respect of a housing development project approved by it,

unless that home builder is registered in terms of this Act and has enrolled the home in terms of section 14(2). 15

(4) A provincial housing development board shall enter into an agreement with the Council in terms of section 5(4)(c).

Inspectors

19. (1) The Council shall for the purposes of this Act— 20

(a) appoint inspectors in terms of section 6; and

(b) enter into agreements or liaise with local government bodies or other bodies or persons for the inspection of homes.

(2) An inspector may, for the purpose of inspecting a home during its construction, enter and inspect the premises constituting the site of the construction at any reasonable time. 25

(3) For the purposes of an investigation, an inspector may—

(a) require the production of the drawings and specifications of a home or any part of a home, including plans approved by the local authority and plans and specifications prescribed in the Rules or the Home Building Manual, for inspection from the home builder and may require information from any person concerning any matter related to a home or any part of a home; 30

(b) be accompanied by any person employed or appointed by the Council who has special or expert knowledge of any matter in relation to a home or part of a home; and 35

(c) alone or in conjunction with any other person possessing special or expert knowledge, make any examination, test or enquiry that may be necessary to ensure compliance with the Home Building Manual.

(4) The Council may recover the costs of any examination or test contemplated in subsection (3)(c) from a home builder where the home builder has failed to comply with the NHBRC Technical Requirements. 40

(5) No person shall hinder, obstruct, interfere with or withhold information from an inspector, or attempt to do so, in the exercise of a power or performance of a duty in terms of this Act.

Interdicts 45

20. If the Council is of the opinion that a home builder does not comply with this Act, the Council may, despite the imposition of any penalty in respect of that non-compliance and in addition to any other right that the Council may have, at any time on notice to the home builder apply to a court for an order, irrespective of whether any other remedy is available to the Council or not— 50

(a) to direct that home builder to comply with the relevant provision;

(b) to stop construction of a home; or

(c) to grant any other assistance that may be appropriate in the circumstances.

Offences

21. (1) Any person who— 55

- (a) knowingly withholds information required in terms of this Act or furnishes information that he or she knows to be false or misleading; or
- (b) contravenes a provision of section 10(1) or (2), 13(7), 14(1) or (2), 18(1) or 19(5),

and every director, trustee, managing member or officer of a home builder who knowingly permits such contravention, shall be guilty of an offence and liable on conviction to a fine not exceeding R25 000, or to imprisonment for a period not exceeding one year, on each charge. 5

(2) Notwithstanding anything to the contrary in any other Act, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act. 10

Review, arbitration and repeal

22. (1) Without prejudice to the constitutional right of any person to gain access to a court of law, the proceedings of the Council may be brought under review before any division of the High Court within its area of jurisdiction.

(2) A home builder whose application for registration has been finally declined in terms of section 10 or withdrawn in terms of section 11, may lodge an appeal with any division of the High Court within its area of jurisdiction. 15

(3) The Council shall establish an internal complaints procedure for housing consumers and home builders to review any decision or action of the Council's staff or its agents. 20

(4) After exercising his or her rights in terms of subsection (3), a housing consumer or a home builder may refer—

- (i) any decision or action of the Council, its staff or its agents to the Public Protector for review in terms of the Public Protector Act, 1994 (Act No. 23 of 1994); or
- (ii) any decision of the Council to arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965). 25

CHAPTER VI

MISCELLANEOUS MATTERS

Council Advisory Committee 30

23. (1) The Minister shall appoint a Council Advisory Committee on National Home Builder Registration Council Matters within two years of the commencement of this Act.

(2) The Council Advisory Committee shall consist of at least three but not more than seven members, including a chairperson. 35

(3) The Minister shall ensure that the Council Advisory Committee consists of persons having skills and experience regarding housing consumer protection, insurance, competition and regulation matters, and construction dispute resolution.

(4) The members of the Council Advisory Committee shall be appointed only after—

- (a) the Minister has through the media and by notice in the *Gazette* invited applications for the respective positions; and
- (b) the Minister has consulted with the MEC of every province and the parliamentary committees for housing of the National Assembly and the National Council of Provinces. 40

(5) The Director-General may pay to a member of the Council Advisory Committee, who is not in the full-time employ of the State or an organ of state, from money appropriated by Parliament for that purpose, the allowances which the Minister may determine in general or in a specific case, in consultation with the Minister of Finance. 45

(6) A member of the Council Advisory Committee shall hold office for the period that the Minister may determine and shall be eligible for reappointment upon the expiration of the period of his or her office. 50

(7) Section 4(4), (5) and (6) shall, with the necessary changes, apply to the Council Advisory Committee.

(8) The Council Advisory Committee shall in respect of witnesses and their evidence have the powers of a commission duly appointed under the Commissions Act, 1947 (Act No. 8 of 1947). 55

(9) The Council Advisory Committee shall, after consultation with the funds

advisory committee, after five years from the date of commencement of this Act, submit proposals to the Council, for recommendation to the Minister, regarding—

- (a) the feasibility of introducing a requirement that a home builder's obligations in terms of section 13(2)(b) shall be insured by an insurer exempted from the provisions of the Insurance Act, 1943 (Act No. 27 of 1943); 5
- (b) the availability of catastrophic loss insurance to reinsure the exposure of an insurer contemplated in paragraph (a);
- (c) differentiation between inspection and administration fees payable to the Council and premiums payable to an insurer contemplated in paragraph (a);
- (d) the relevant categories of homes in respect of which such insurance shall be required; 10
- (e) measures to ensure the availability of actuarial and risk related information in order to enable all insurers wishing to participate, to participate;
- (f) the conversion of any fund into an insurer contemplated in paragraph (a), registered under section 21 of the Companies Act, 1973; 15
- (g) measures to ensure that insurers contemplated in paragraph (a) shall compete on an equal basis;
- (h) measures to avoid adverse selection and discriminatory practices and to ensure that home builders from historically disadvantaged backgrounds shall not be prejudiced; 20
- (i) the contribution by insurers contemplated in paragraph (a) to the operational costs of the Council; and
- (j) any other relevant matter.

(10) Subject to subsection (5) and section 5, the Minister may refer any matter in respect of any objective or provision of this Act to the Council Advisory Committee for investigation and recommendation. 25

Notices

24. Any notice or document required to be served in terms of this Act may be served by hand or sent by telefacsimile or registered letter addressed to the person to whom notice is to be served at that person's registered address or telefacsimile number, as the case may be, and knowledge of the contents shall be deemed to exist— 30

- (a) where the notice or document was hand delivered, when it was delivered;
- (b) where the notice was sent by telefacsimile, upon the recordal thereof by the sending station; and
- (c) where the notice or document was posted, 21 days after it was sent, 35

in the absence of evidence to the contrary that the person on whom it was served, acting in good faith, through absence, accident, illness or other cause beyond that person's control, did not receive the notice, or did not receive the notice until a later date.

Evidential matters

25. A statement as to— 40

- (a) the registration or non-registration of any home builder or the enrolment or non-enrolment of any home; or
- (b) any fact relating to any matter which is apparent from the records or the information technology system of the Council,

purporting to be certified by the chairperson of the Council or the Chief Executive Officer is, without proof of the office or signature of the chairperson or Chief Executive Officer, receivable in evidence, in the absence of evidence to the contrary, as proof of the facts stated therein for all purposes in any court proceedings or criminal prosecution. 45

Delegation

26. (1) The Council may on any condition that it deems fit delegate any of its powers, obligations or duties in terms of the Act, save a power to prescribe anything, to either the 50

chairperson of the Council or the Chief Executive Officer, or to a committee of the Council.

(2) The Chief Executive Officer may delegate any power, obligation or duty conferred upon him or her by the Council to an employee of the Council.

(3) A delegation in terms of subsection (1) or (2) shall not prevent the exercise of the delegated power, obligation or duty by the Council or Chief Executive Officer. 5

(4) The Council may enter into any agreement for the rendering of any specific expertise or service to assist the Council or to perform any specific power on behalf of the Council: Provided that the powers contemplated in sections 7, 12, 14(1) and (2), 16(1) and 17(1) shall be exercised by the Council itself. 10

Regulations

27. (1) The Minister may make regulations in respect of any matter which is required to be prescribed by the Minister or which is necessary or desirable in order to achieve the objectives of this Act, and any such regulation may create offences and provide for penalties in respect thereof. 15

(2) Without prejudice to the generality of subsection (1), the Minister may make regulations regarding the protection of persons or housing institutions established to provide housing to persons on a tenure basis other than the direct sale and transfer of homes in private ownership to housing consumers.

(3) In the exercise of his or her powers under subsection (1), the Minister shall be obliged to consider the recommendations of the Council but shall not be obliged to accept such recommendations. 20

(4) The Minister shall publish any regulation to be made under subsection (1) for comment and information in the *Gazette* prior to such regulation coming into effect.

Dissolution of Council 25

28. The Council shall be dissolved only by an Act of Parliament.

Exemption

29. The Minister may, on the recommendation of the Council on application made to it, in exceptional circumstances and on the conditions that the Minister may determine in general or in any particular case, exempt a person or a home from any provision of this Act, if the Minister is satisfied that— 30

- (a) the granting of the exemption would be in the public interest;
- (b) the granting of the exemption would not undermine the objectives of this Act, or the effectiveness of the Council; or
- (c) should the exemption not be granted, the effect would be extremely 35
prejudicial to the interests of the applicant and housing consumers.

Transitional provisions

30. On the commencement of this Act the provisions of the Schedule shall apply in respect of sections 4, 6, 7, 12, 13, 14 and 17.

Short title and commencement 40

31. This Act shall be called the Housing Consumers Protection Measures Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

Composition of Council Transitional Provisions

1. (1) On the commencement of this Act, the council of the “National Home Builders Registration Council”, an association incorporated under section 21 of the Companies Act, 1973, and with the registration number of 95/08647/08, shall be deemed to constitute the Council.

(2) On the first meeting of the Council after the appointment of the members of the Council as contemplated in section 4(1)—

(a) all liabilities, rights and obligations of the associations referred to in subitem (1) and item 2(1) shall pass to the Council; and

(b) anything done by or on behalf of the said association shall be deemed to have been done by the Council, subject to this Act.

(3) The Council constituted as contemplated in subitem (1) dissolves immediately before the first meeting of the Council appointed as contemplated in section 4(1).

(4) The first meeting referred to in subitem (3) must be held within one year after the commencement of this Act.

Fund and assets

2. (1) The “National Home Builders Registration Council Fund” being an association incorporated under section 21 of the Companies Act, 1973, and with the registration number 96/03550/08, shall cease to function on the meeting contemplated in item 1(3).

(2) The members of the associations referred to in item 1(1) and subitem (1), may, before or after the commencement of this Act, but before their deregistration contemplated in item 3, make a determination in respect of its assets in accordance with section 21(2)(b) of the Companies Act, 1973, and may, notwithstanding that section, determine that such assets be transferred to the Council.

Deregistration of companies

3. (1) The Director-General shall as soon as practical after the appointment of the members of the Council in writing notify the Registrar of Companies thereof and of the relevant provisions of this Schedule.

(2) On receipt of the notification contemplated in subitem (1) the Registrar of Companies must deregister the associations referred to in items 1(1) and 2(1).

(3) No transfer duties, stamp duties, fees or taxes have to be paid for the purposes of this Schedule.

Staff

4. (1) The Chief Executive Officer and every person who was in the service of the association referred to in item 1(1) immediately before the commencement of this Act shall, as from the commencement, be deemed to be transferred to the service of the Council and be deemed to be appointed in terms of section 6.

(2) The remuneration and other terms and conditions of service of any person transferred as contemplated in subitem (1), may not be less favourable than the remuneration, terms and conditions applicable to that person immediately before the commencement of this Act, and he or she remains entitled to all rights, benefits and privileges to which he or she was entitled immediately before that date, including—

(a) membership of a pension fund;

(b) membership of a medical aid scheme;

(c) employer contributions in connection with such membership;

(d) accrued pensionable service;

(e) accrued leave benefits; and

(f) retirement at a specific age.

(3) Every person transferred as contemplated in subitem (1) remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the commencement of this Act.

(4) For the purposes of the Income Tax Act, 1962 (Act No. 58 of 1962), the persons referred to in subitem (1) shall be deemed to have remained with the same employer.

General

5. (1) The Rules and the Standards and Guidelines, the standard warranty, and all circulars or documents issued by the association referred to in item 1(1) prior to the commencement of this Act, shall be deemed to have been prescribed in terms of this Act and shall be binding on all home builders until amended or substituted in terms of this Act.

(2) The Standards and Guidelines referred to in subitem (1) shall be deemed to be the Home Building Manual.

(3) Any power exercised or any agreement entered into by the association referred to in item 1(1), its members, directors or employees prior to the commencement of the Act, shall be deemed to have been exercised or entered into in terms of the provisions of this Act.

(4) Any housing consumer who has acquired benefits under a standard warranty referred to in subitem (1) issued prior to the commencement of this Act, shall be entitled to the benefits set out in section 17(1) of the Act, subject to the limitations set out in that section.

MEMORANDUM ON THE OBJECTS OF THE NATIONAL HOME BUILDERS REGISTRATION COUNCIL BILL, 1998

1. Introduction

The aim of the National Home Builders Registration Council Bill is to regulate the activities of persons who are involved in the business of home building. The objectives of the Bill are to—

- (a) create a national registration board with the powers to regulate the home building industry effectively;
- (b) provide consumers with protection by creating a deemed home builders warranty that forms part of every agreement for a newly built home;
- (c) establish mechanisms to set minimum national quality standards for all home builders, including the subsidy sector;
- (d) enable subsidy housing providers to conclude agreements with the new national regulatory body to monitor construction quality of registered home builders;
- (e) create a national fund or more than one such funds to carry out repairs on new homes, on a non-compulsory basis, where home builders have failed to honour their warranty obligations to consumers; and
- (f) make provision for the evolution of consumer protection in the new home building market into a competitive market based on insurance backed warranties.

These objectives will be achieved without discrimination by race or geographical area.

2. Agreements with housing consumers

The Bill makes provision for all agreements between home builders and housing consumers to contain deemed warranties that the home builder will—

- (a) rectify any defects notified to him or her within three months of the occupation date;
- (b) repair any roof leak reported to him or her within one year of occupation; and
- (c) repair any major structural defect notified to him or her within five years of the date of occupation.

This minimum level of contractual obligations shall apply to all homes built by persons in the business of home building.

In addition, the Bill places an obligation on the home builder to ensure that the written agreement includes the financial obligations of the consumer and that the plans and specifications are attached to the agreement document. The agreement will also include deemed terms that the home will be constructed in a workmanlike manner and is fit for habitation.

The housing consumer may enforce these contractual rights in any competent court. These minimum contractual rights are, however, insufficient in themselves to redress the balance between consumers and home builders or to ensure a progressive improvement in the construction quality of the nation's housing.

3. The National Home Builders Registration Council

To ensure progressive improvement in the quality of home building, the Bill establishes a board to be known as the National Home Builders Registration Council. Its objectives will be to—

- (a) to represent the interests of housing consumers by providing warranty protection against defects in new homes;
- (b) to regulate the home building industry;
- (c) to provide protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of this Act;

- (d) to establish and to promote ethical and technical standards in the home building industry;
- (e) to improve structural quality in the interests of housing consumers and the home building industry;
- (f) to promote housing consumer rights and to provide housing consumer information;
- (g) to communicate with and to assist home builders to register in terms of this Act;
- (h) to assist home builders, through training and inspection, to achieve and to maintain satisfactory technical standards of home building; and
- (i) in particular, to achieve the stated objects of this section in the subsidy housing sector.

The Bill dissolves the existing self-regulatory body, the National Home Builders Registration Council (the “NHBRC”), and establishes a new statutory board. The structure and systems already developed by the NHBRC for the affordable mortgage bond market will be absorbed into the new board and these resources will be extended to cover all new homes.

The NHBRC was created in June 1995 to provide a self-regulatory mechanism for the home building industry and to provide additional methods of redress for consumers in response to mounting concern from consumer bodies and mortgage lenders.

From the experiences of the Housing Consumer Protection Trust (the “HCPT”), Lawyers for Human Rights and other consumer groups, it was clear that the methods of legal redress available to consumers were inadequate. For example in 1994 the HCPT received 40 000 complaints from consumers. Over 60% of complaints related to problems with developers and homebuilders. This led to 11 000 files being opened. Only 60 of these led to summons being issued and only two of these had a successful outcome.

In addition, the mortgage lending industry was faced with large scale bond boycotts in the early 1990s where construction defects and irresponsible behaviour by certain home builders were primary contributing factors. Of the 50 000 repossessed homes, a significant percentage was due to alleged construction defects. A total of 462 areas had also been identified by mortgage lenders as areas in which new mortgage lending had ceased.

These consumer and mortgage lender concerns were addressed in the Botshabela Accord (concluded between various stakeholders in the delivery of housing); the Record of Understanding agreed to between the Government and the banking sector; and the Government’s White Paper on housing. All the above envisaged the creation of a regulatory environment for the home building industry supported by a defects warranty scheme.

The Government originally supported the self-regulatory approach adopted by the construction industry on the basis that it would receive united industry support to work effectively. While the NHBRC has become established within the home building industry, it has nevertheless been resisted by groupings within the home building industry.

In the absence of this united support from key stakeholders within the industry, the Government has taken the step to legislate.

4. The Registration of Home Builders

The primary means by which the home building industry will be regulated by the Council will be through the registration of persons in the business of home building. This will not include owner builders or the people’s housing process.

The Council shall register a home builder if it is satisfied that the home builder can meet his or her obligations in terms of this Act and that he or she has appropriate financial, technical and construction or management experience for this specific business.

The Council may refuse to renew or withdraw registration in certain circumstances. For example, this may be where the home builder is in breach of his or her obligations in terms of the Act.

Registered home builders will be obliged to comply with good building practices, to be known as the NHBRC Technical Requirements, laid down by the Council. The Council shall publish a Home Building Manual that provide guidance to home builders to assist them to comply with these Requirements.

The Council may require appropriate good building practices to be followed for different categories of housing. In particular it will be requested by the Minister of Housing for the Council to create minimum good building practices for the subsidy-supported product.

The National Building Regulations remain unaffected. The NHBRC Technical Requirements shall be submitted to the South African Bureau of Standards for integration into the National Building Regulations. The Home Building Manual shall be submitted for recognition as the equivalent of the SABS 400 for construction.

5. Protection of Housing Consumers

The Bill makes provision for prudent public administration and management of the funds of the Council, including—

- (a) the appointment of a funds advisory committee with appropriate financial and risk management experience;
- (b) the restriction of investment policy to defined investments;
- (c) the ability of the Minister to carry out an actuarial assessment to lower fees; and
- (d) the establishment of various funds for different purposes.

In addition, the Bill also makes provision for the annual report of the Council to be submitted to Parliament. The annual report shall cover such matters as the financial position and the administrative efficiency of the Council.

The income of the Council shall be generated primarily from the enrolment fees of homes with the Council by homebuilders or any fees generated from agreements with subsidy providers. These enrolment fees will come from new homes on which mortgage loans have been extended or those that have been prescribed by the Minister for enrolment.

The Council currently enrolls homes of between R20 000 and R250 000. The upper limit was introduced as an interim measure to allow the NHBRC to become established and to develop appropriate good building practices for homes above R250 000. The limit will be removed on enactment of this Bill. This is necessary to—

- (a) provide the same level of consumer protection to all new home buyers;
- (b) provide effective regulation of home builders;
- (c) avoid discrimination;
- (d) spread the cost and risk of the scheme across the industry as a whole; and
- (e) make the scheme affordable for all new home buyers.

While all new home buyers will have the benefit of the deemed warranties set out in the Bill, only homes with a purchase price exceeding an amount determined by the Minister will be enrolled. It is envisaged that providers of Government housing subsidies will conclude agreements with the Council to ensure quality control in the subsidies market.

Where the home is enrolled, the Council shall, subject to the availability of funds for that purpose, pay out of its funds (or a special fund established for that purpose) for the rectification of a home where—

- (a) the home is built by a registered home builder;
- (b) the home is enrolled with the Council;
- (c) the home builder no longer exists or is unable to meet his or her obligations; and
- (d) the home builder is in breach of his or her warranty obligations.

Where the home has been built with the assistance of subsidy finance, the Council shall, subject to the availability of funds for that purpose, pay out of its funds (or the fund established for that purpose) for the rectification of the home where—

- (a) the home is built by a registered home builder;
- (b) the subsidy provider has an agreement with the Council for the monitoring of construction quality on the project;
- (c) the subsidy provider applies for payment under the terms of that agreement;
- (d) the home builder no longer exists or is unable to meet his or her obligations; and

(e) the home builder is in breach of his or her warranty obligations.

The Government intends that the enrolment fees shall be paid by home builders. Within a period of three years, the Council shall introduce fee scales that reward good construction and penalises poor construction. These fees will be related to the specific performance of the homebuilder.

No consumer shall be able to make a claim against the Council for failure of a homebuilder to meet his or her warranty obligations. The consumer will have no contractual link with the Council. The lack of ability by the consumer to claim against the Council is essential to ensure that the liability for the home building industry's mistakes does not fall back onto the public purse. Equally, there must not be an open-ended liability on the majority in the home building industry to pay for the mistakes of the few. It is intended, subject to the availability of funds for that purpose, that all valid complaints of a structural nature will be repaired.

6. Enrolment

The provisions of the Bill, once enacted, will be enforced through—

- (a) obligations placed on mortgage lenders, conveyancers and subsidy providers to ensure that homes receiving mortgage bonds or receiving housing subsidies are being built by a registered homebuilder, or subsidy housing project, the home is enrolled with the Council; and
- (b) the inspection of homes by the Council's inspectors. These may be direct employees of the Council or the services may be contracted out. The Council may enter into agreements with local authorities for such services.

It shall be an offence, subject to a fine not exceeding R25 000 or imprisonment of one year or both where—

- (a) a person carries out the business of a home builder while not registered with the Council;
- (b) a person in the business of home building constructs a home while not registered with the Council;
- (c) a home builder commences the construction of a prescribed home without enrolment of that home with the Council;
- (d) a mortgage lender lends money on a new home where it has not satisfied itself that the home is enrolled with the Council and that the home builder is registered with the Council;
- (e) a person hinders or obstructs an inspector of the NHBRC;
- (f) a home builder misappropriates a housing consumer's deposit; or
- (g) a person knowingly withholds or furnishes false information.

In addition, it will be an offence for any director, trustee or managing member of a homebuilder to knowingly concur in furnishing such information or contravention of the enacted Bill.

7. Competition and Evolution

The Government has taken the view that the provision of insurance-backed new home warranties is at present not feasible for all sectors of the industry and all consumers, without substantial discrimination in availability, costing and scope of insurance cover. However, the Government does not wish to provide consumer protection when this can be delivered by the private sector to all or specific sectors of the market without discrimination.

The Bill makes provision for an Advisory Committee on NHBRC Matters to submit proposals after a period of five years regarding the introduction of competition into warranty provision and the conversion of any specially established fund into a not-for-profit insurer.

8. Consultation

The Bill, in its previous form, had been published in the *Government Gazette* for comment. A total of 63 organisations and several individuals responded. Most of the substantive comments have been accommodated. The following entities are some of the many which were consulted:

Agrément South Africa
Alliance of Development Professionals
Black Housewives League of South Africa
Building Industries Federation of South Africa
Building Materials Suppliers of South Africa
Competitions Board
Council of South African Banks
Department of Constitutional Development
Department of Finance
Department of Public works
Department of Trade and Industry
E F K Tucker Inc.
Housing Consumer Protection Trust
Master Builders Association
National Black Consumers Union
People's Dialogue
South African Bureau of Standards
South African Institute of Architects
South African Institute of Civil Engineers
South African National Consumer Justice
South African Property Owners Association
South African Residential Developers Association

9. Constitutional Matters

The Department of Housing and the State Law Advisers are of the opinion that the Bill should be dealt with in accordance with section 76 of the Constitution. Although the Bill intends to establish a professional body to regulate the building profession to the extent of home building and the business of home building, the main object of the establishment of the Council and further provisions of the Bill is to provide protection to the consumer who has a home built for him or her and to encourage better service to that consumer.