|  |  |  |
| --- | --- | --- |
| 10 August 2018 |  |  |
|  |  |  |
| National Assembly Committee on Human Settlements  PO Box 15 Address  Cape Town  8000 | Doc Ref: | PIERREV/#244271\_V1 |
|  | Your ref: | Pierre Venter |
|  | Direct 🕿: | 011 645 6717 |
|  | E-**🖂**: | [pierrev@banking.org.za](mailto:pierrev@banking.org.za) |
|  |  |  |

Per email: [kpasiya-mndende@parliament.gov.za](mailto:kpasiya-mndende@parliament.gov.za)

Dear Ms Koliswa Pasiya-Mndende

**PUBLIC SUBMISSION: PROPERTY PRACTITIONERS BILL (“BILL”), [B 21- 2018]**

The Banking Association South Africa (“The Banking Association”) would like to thank The Department of Human Settlements (DHS) and the National Assembly Committee on Human Settlements for the opportunity to comment on the above-mentioned Bill.

**Who we are**

The Banking Association South Africa (The Banking Association) is an industry body representing all banks registered and operating in South Africa. Currently, The Banking Association has 34-member banks which include both South African and International banks. All licenced banks are members of The Banking Association. Our vision and role, together with our areas of focus, including a list of our members may be found on our website, [www.banking.org.za](http://www.banking.org.za)

The Banking Association as the mandated association for commercial banks has had the opportunity to work very closely with the Department over the years to improve access to housing finance and to accelerate housing delivery, for which we thank you.

**Context**

The Banking Association has publicly promoted the need for all property intermediaries to be regulated, as we believe that this is in the interest of the public. We are therefore favourably disposed towards and would like to add our support for this Bill.

We also recognize and support the need for DHS to transform the property sector and are pleased to note the inclusion of capacity building and training support that the Board intends providing to Black intermediaries and home owners alike. We believe that such capacity building and training should however be extended to include the rental market, which we comment on below.

We further welcome the inclusion of Mortgage Origination in the ambit of the Bill which is positive for the industry. We mention that careful consideration be given to the Code of Conduct, as envisaged in the Bill, particularly as it pertains to origination and it may be well served to review the Mortgage Origination framework in the United Kingdom (considered to be an example of a well-regulated Origination industry).

**Comments**

**CHAPTER 1- Definitions**

We welcome the inclusive list of “property practitioners” as defined within the Bill. We do however believe that the wording for two categories of “property practitioners” as defined within this Bill require re-definition, namely:

***Clause (a)(i):*** Sheriffs are regulated by the Sheriffs Act, 90 of 1986, amendments thereto, as well as by specific Regulations and a Code of conduct relating to this Act. The clause relating to (a)(i) should therefore exclude Sheriffs from being included within the definition of “property practitioners”. By including the words “sale in execution” this implies that Sheriffs are included within the definition of a “property practitioner”. Sheriffs are appointed by the courts to fulfill this role. No private sector intermediaries (auctioneers) are entitled to fulfill this function i.e. they may only conduct a voluntary auction sale.

***Recommendation***

We accordingly recommend that the clause should read as follows “…by auction or otherwise…”

***Clause (a)(v):*** The wording of this clause could be read to include bank property assessors, NHBRC assessors and Municipal Valuers. Our view is that there are two distinct types of assessors, namely those who act on behalf of a buyer/seller and those who represent either the NHBRC/a Municipality or a mortgagee. We agree that a property assessor who acts on behalf of a buyer/seller to “determine the defects, value for money and fit for use as part of the conclusion of an agreement to sell and purchase, or hire or let a property” should be included as a regulated intermediary as this will safeguard the public. However, a property assessor who is appointed by a bank to assess a property undertakes this task solely for the bank, where his/her assessment is purely to determine the suitability of the property for bank security purposes. There is therefore no need for a bank appointed property assessor to be governed by this Bill.

Further, property assessors are governed by the South African Council for the Property Valuers Profession (SACPVP) which is a statutory body established in 1983 to govern the professionalism of and training standards for a valuer, amongst others. In turn the SACPVP is governed by the Built Environment Act 43 of 2000, which includes, amongst others governance within the profession, as well as Codes of Conduct for each of the six professions (includes valuers) within the scope of this Act.

***Recommendations***

We recommend that the wording of this clause be altered to expressly exclude the need for bank appointed property assessors, Municipal valuers and NHBRC assessors to be governed by this Bill.

We also recommend that DHS engages with executives which oversee both the SACPVP and the Built Environment Act, to ensure that this Bill does not conflict/duplicate with their roles and/or create the need for compliance to two Codes of Conduct.

**2. Application of the Draft Bill**

Section 2 proposes that the proposed law will apply to:

(i) The marketing, promotion, sale, letting, financing and purchase of immovable property; and

(ii) Any rights, obligations, interests, duties or powers associated with or relevant to such property.

However, the definition of property practitioner consistently refers to persons executing actions in respect of property or "any business undertaking". No definition for “business undertaking” appears in the Bill.

***Recommendation***

We recommend that this section includes a definition of “business undertaking”.

**3. OBJECTS OF THE ACT**

In respect of **Clause (K)**, we are of the view that there is as pressing a need for tenants to also be included within the scope of training which DHS envisages fulfilling. Care should however be taken for DHS is terms of this Bill, not to duplicate on the role of the Office of the Ombud for the Community Scheme Ombuds Service Act, 2011 (CSOS), as one of the roles which this office envisages is the provision of training for both body corporate trustees and sectional title owners alike.

***Recommendation***

We recommend that this clause within the Bill be amplified to include the need for tenant education and to exclude any training which the Office of the Ombud intends undertaking in terms of the CSOS.

**Section 6 – Functions of Authority**

The Bill refers to estate agents in clause (a), (b) and (e), however, this is inconsistent with the Bill as the purpose is to regulate property practitioners and not only estate agents.

***Recommendation***

We recommend that estate agent be replaced with property practitioner in this section.

**Section 23 - Lodging of Complaints to the Ombuds Office**

We are of the view that the scope of the Ombuds office should be extended to include hearing industry complaints against the Property Practitioners Board, especially where matters are not being resolved that are affecting the ability of a practitioner to continue operating and in extension, the livelihood of the practitioners in that agency become affected. This will also ensure that there is balance in respect of the role that the Ombuds fulfils.

***Recommendation***

We recommend that an additional clause as suggested above be included within this section of the Bill.

**Section 25 – Adjudication**

While we welcome an adjudication process, which may reduce the burden of our courts, we have identified two matters of concern with the adjudication process as outlined in the Bill. Firstly, the Bill does not make mention of a time limit that dictates the length of a matter in the adjudication process. This can hinder a fair and just adjudication process, as a dispute can be held up indefinitely, due to an order being withheld.

The second issue regarding the adjudication process is the Bill non-recognition of Section 34 of the Constitution of the Republic of South Africa. The Bill indicates that an adjudicator’s order can be referred to the Ombud for final adjudication. However, the Bill makes no mention of a consumer’s right of recourse to the Court’s in the event of their being unhappy with the decision of the Ombud. A previous version of this Draft Bill, section 25 (b) (12) stated that “An order of the Ombud is final and binding and may only be reviewed by the High Court.” This clause has since been removed.

***Recommendation***

We recommend that a “time frame” clause be inserted in the Bill which prescribes a time frame for matters in the adjudication process.

We further recommend that clause 25 (b) (12) “An order of the Ombud is final and binding and may only be reviewed by the High Court.” be reinstated.

**Section 46 - Fidelity Fund Certificates**

Section 46 proposes that a property practitioner must apply annually for a fidelity fund certificate and pay the prescribed annual fee.

The possession of a Fidelity Fund certificate will be a mandatory requirement for acting as a property practitioner.

In instances where a juristic person participates as a property intermediary every director of the company will be required to be in possession of a certificate. The same applies to:

(i) All members of a close corporation;

(ii) All trustees of a trust; and

(iii) All partners of a partnership.”

We believe that this requirement will place an undue burden on all directors/members/trustees/partners to possess a fidelity certificate as such entities employ specialists to fulfil particular roles without their having any knowledge of the property industry e.g. financiers.

***Recommendation***

We recommend that at least one director/member/trustee/partner should be required to be in possession of a fidelity fund certificate only.

**Section 49 - Disqualification from issue of Fidelity Fund Certificate**

The Draft Bill proposes a long list of mandatory reasons for the Property Practitioners Regulatory Authority to withhold a Fidelity Fund certificate, and thereby the ability for them to earn an income.

A number of these grounds may, depending on the circumstances, be contrary to the principle that the punishment must fit the crime and, more importantly, the Constitutional limitation of rights considerations. There is also a concern of potential abuse of processes for *ultra vires* reasons. Grounds based on court orders tend to hold more *gravitas* and be more immediately justifiable. We note that these same grounds are not reflected in the grounds for disqualification from the Board or Authority itself?

***Recommendation***

We recommend that this section of the Bill be redrafted to include commentary as per our concerns detailed above.

We further recommend that consideration be given to including this content for a Board/Authority.

**Section 53 - Trusts**

In terms of Regulations in support the Banks Act No.94 of 1990, a bank may not open a trust account for a property practitioner unless they are registered with the Property Practitioners Board. Clause 53(1)(b) is therefore incorrect as it should require a property practitioner to register with the Property Practitioners Board and only to approach a bank thereafter for a trust account to be opened.

We assume that the Property Practitioners Board, when approving the registration of a Property Practitioner would ensure that the name used for the trust account is appropriate and that the descriptor name clearly identifies that the trust account is for a property practitioner, as currently some of the name descriptors used by Estate Agents/Estate Agencies make it impossible for banks when undertaking a search of their computer database to determine that the account is in fact a trust account or the purpose for what it is to be used.

***Recommendation***

We recommend that Clause 53(1)(b) be amended accordingly. This includes the need for the Property Practitioners Board to approve the descriptor name that the property practitioner intends using.

**Section 54 - Duty of Property Practitioner to Keep Accounting Records and Other Documents**

In section 1 (g) a record is defined as “means any recorded information regardless of form or medium”. However, in the heading of section 54 the Bill makes mention of accounting records but the clauses of section 54 implies that records as defined in section 1(g) are being referred to. This creates confusion as to what is being referred to, if it solely accounting records or all records.

***Recommendation***

We recommend that two sections be created, a section dealing with records and a separate section thereafter specifically dealing with accounting records. The clauses of section 54 can then be allocated either to the section referring to general records or to the section specifically dealing with accounting records.

**Section 65 – Prohibition on conduct to influence issue of certain certificates**

We submit that the list is incomplete as property owners are compelled by legislation to provide a certificate which confirms that gas and security electrical fencing is compliant.

***Recommendation***

We recommend that a clause (d) and (e) be added to this section of the Bill to include gas and security electrical fencing.

**Section 67(1) Language of Agreements**

The requirement that sale/lease agreements be prepared in the language of choice of the purchaser/lessee may be problematic considering the 11 official languages in South Africa and the fact that the agreements need to be understandable to all stakeholders in the property sale/letting process, inclusive of seller, originators, financial institutions, conveyancers etc.

***Recommendation***

We recommend that this provision be changed and aligned to the provisions of the National Credit Act which deals with Language Statement of Intent, and which dictates that the official version be provided in English and copies be made available in the language of choice, upon request.

We further draw your attention to the Rental Housing Amendment Act, 2014, more specifically Section 8 (1)(i) which states that “the Minister must develop a pro-forma lease agreement in all 11 official languages, containing the minimum requirements set out in this Act, which may be used as a guideline by the tenants and the landlords”. We therefore recommend the need for an alignment between this specific section and this Bill i.e. the Minister needs to draw up pro-forma contracts in all 11 official languages for both sale and lease contracts.

**Section 69(4) – Property Sector Transformation**

We are supportive of transformation within the property sector, including property intermediaries. However, the wording within clauses 69.(3) and 69 (4) go beyond the intent of the Bill, which is to regulate and transform the property **intermediary** sector. As this is a Property Practitioners Bill, envisaged transformation and the creation of a transformation fund should therefore be restricted to expenditure used to transform property practitioners operating within the sector, including the upskilling of potential homeowners and property practitioners. In our view, the purpose of the transformation fund should be to provide opportunities for historically disadvantaged individuals including women and youth to become property practitioners and thereafter to be able to compete with their established competitors only. Other entities within DHS focus on access to finance etc.

***Recommendation***

We recommend that clauses 69(3) and (4) be amended accordingly.

**General Comment**

The Financial Intelligence Centre Act (FICA) 38 of 2001 contains a definition of an Estate Agent within its Schedule 1. This schedule describes the parties affected by this Act. It highlights estate agents as defined in the Estate Agency Affairs Act 112 of 1967. As the Bill is repealing the Estate Agency Affairs Act, there will be a need for this section within FICA to be amended and for this to be replaced by the Property Practitioners Act and further that reference be made to the definition of property practitioners.

**Conclusion**

Whilst we have highlighted a few aspects which we believe needs address, we are fully supportive of the strategic intent of this Bill.

Yours sincerely

Pierre Venter

General Manager

Market Conduct Division