

MORTGAGE ORIGINATION REGULATORY COUNCIL OF SOUTH AFRICA

REPRESENTATION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS IN RESPONSE TO THE CALL FOR COMMENTS IN RESPECT OF THE PROPERTY PRACTITIONERS BILL

1. SUBMITTING PARTIES

- 1.1. This representation is submitted on behalf of the mortgage origination industry by the Mortgage Origination Regulatory Council of South Africa (“**MORCSA**”) and is supported by its members.
- 1.2. MORCSA is an industry body that was established by the three largest origination corporations in South Africa, being ooba (Pty) Limited, BetterLife Group Limited and Multi Net Real Estate CC. The MORCSA objectives include co-operation with the South African government in relation to the efficient and effective operation of the industry and its regulation.
- 1.3. In addition to representing the major mortgage origination companies, MORCSA also represents approximately 500 to 600 individuals operating as “*bond brokers*” as that term is defined in the Property Practitioners Bill (the “**Bill**”).

2. ENGAGEMENT WITH THE MORTGAGE ORIGINATION INDUSTRY IN REGARD TO THE BILL

- 2.1. The mortgage origination industry first became aware of the inclusion of “*bond brokers*” in the draft legislation when they were provided by the Estate Agency Affairs Board with a copy of the “*secret version 8*” of the Property Practitioners Bill during April 2015. MORCSA provided comments to the Estate Agency Affairs Board as requested. Subsequently MORCSA also submitted comments to the Department of Human Settlements. However, such comments have effectively been ignored in their entirety. Yet there are material concerns arising out of the inclusion of “*bond brokers*” in the Property Practitioners Bill
- 2.2. One of the concerns that arises out of the foregoing is that it appears that in the preparation of the Property Practitioners Bill inadequate regard has been had to the Financial Sector Regulation Act, 2017 (the “**Financial Sector Regulation Act**”), which already regulates bond brokers and came into effect on 1 April 2018. *The fact that bond brokers are already regulated by the Financial Sector Regulation Act has been confirmed by Financial Sector Conduct Authority (previously known as the Financial Services Board) (“FSCA”).*
- 2.3. We draw to your attention that while addressing the Financial Sector Regulation Act prior to it becoming law, the report of the Select Committee on Finance on the Financial Sector Regulation Bill [B34B – 2015], dated 10 May 2017, included the following statement:

National Treasury indicated that current regulatory challenges in South Africa are that, too many regulators are involved with the financial sector; most financial firms are reregulated by different financial regulators and that there is a need to coordinate these regulators. ... Furthermore, peer review of the current legislation had shown the impact of poorly designed regulations and increasing costs on society in general, amongst other things.

The [Financial Sector Regulation Act] seeks to strengthen financial stability; improve market conduct; widen access to financial services and combat financial crime such as money laundering. In simple terms, the [Financial Sector Regulation Act] aims to make the financial sector safer and make it work more effectively in the interest of all South Africans. It intends to reduce potential threats to financial stability and better protect customers by ensuring that financial institutions treat customers fairly.

The main intents of the [Financial Sector Regulation Act]... are the development of the Prudential Authority, a body that would promote and enhance the safety and soundness of the financial institutions; the Financial Sector Conduct Authority (FSCA) that would protect financial customers; the Financial Services Tribunal, which will hear and decide appeals in a transparent manner and financial stability through the South African Reserve Bank (SARB) and the Financial Stability Oversight Committee, a committee that would coordinate financial stability issues.

- 2.4. As matters stand, bond brokers are regulated by the Financial Sector Regulation Act and bond brokers are required to comply with the “*market conduct*” rules of the FSCA. Such “*market conduct*” rules include consumer protection and ensuring access to the credit market. In other words, should the Property Practitioners Bill include bond brokers, then bond brokers will be regulated twice for the same purpose, once in respect of the financial service they provide, and a second time as the underlying asset class that is the security for the financial product offered happens to be an immovable property. As will become apparent further along, the regulation of bond brokers under the Financial Sector Regulation Act is significantly more appropriate because, simply put, a bond broker provides a financial service and advice regarding a lending product and does not provide advice in relation to property or offer any property related service.
- 2.5. In summary, as appears from the comments below, there appears to be a misapprehension as to the way the mortgage origination industry should be correctly regulated.

3. **INCLUSION OF BOND BROKERS INTO THE BILL / BOND BROKERS AS SERVICE PROVIDERS IN REGARD TO FINANCIAL PRODUCTS**

- 3.1. “*Bond brokers*” are included in the Bill by virtue of subsection (iv) of the definition of “*property practitioner*”. That definition includes any person or business undertaking that “*provides, procures, facilitates, secures or otherwise markets financing for or in connection with the management, sale or lease of a property or business undertaking, including a provider of bridging finance and a bond broker*”. Given the breadth of this inclusion, it was necessary to exclude “*financial institutions*” from the definition in (iv).
- 3.2. Bond brokers (known as mortgage originators in South Africa, the term “*bond broker*” being a term more common in the USA and other jurisdictions) market “*financing*” (i.e. market financial institution lending products) for the buyers in property transactions. Typically, a bond broker performs the following services:
 - 3.2.1. advising or assisting “*consumers*” in the completion and submission of applications to multiple credit providers for the credit agreement concerned, i.e. a mortgage agreement;
 - 3.2.2. advising and assisting consumers in regard to the credit applied for, including in regard to different mortgage agreements that may be available, the affordability of the mortgage agreement for the consumer submitting the application to the credit provider on behalf of the consumer and other aspects specific to the mortgage agreement application process, all of which are financial rather than property related. No property advice is ever given by bond brokers and nor do bond brokers offer property for sale or leasing or in any way concern themselves with the management of property.
- 3.3. The financial services and financial products offered by bond brokers and their marketing are regulated by the National Credit Act, 34 of 2005 (the “**NCA**”). Even more importantly, the “*consumers*” that a bond broker deals with (i.e. the “*mortgagor under a mortgage agreement*”) are “*consumers*” as defined in the NCA, while bond brokers are directly regulated under section 163 (3) of the NCA, including in regard to the disclosure of fees earned. Accordingly, the consumers in regard to the transactions which the Bill seeks to regulate are already afforded statutory protection under the NCA in respect of the specific financial transaction that the Bill seeks also to regulate.
- 3.4. Additionally, it should be noted that the ambit and scheme of the NCA includes the regulation of the credit market and the “*development of a credit market that is accessible to all South*

Africans, and in particular those who have historically been unable to access credit under sustainable market conditions”.

- 3.5. Furthermore, under the “twin peaks” model of financial sector regulation contemplated in the Financial Sector Regulation Act any service related to the provision of credit is included in the definition of “*financial service*”, in which regard see section 3 (1) (g) of that Act. Consequently, bond brokers are regulated by the Financial Sector Regulation Act and bond brokers are required to comply with the “*market conduct*” rules of the FSCA. Such “*market conduct*” rules include consumer protection and ensuring access to the credit market. It is unclear why the legislator would seek duplicated regulation of bond brokers, i.e. under both the Property Practitioners Bill and the Financial Sector Regulation Act.
- 3.6. As is apparent from the words “*too many regulators are involved with the financial sector*” and the related language quoted in paragraph 2.3 above, National Treasury is already concerned in relation to the duplicate regulation of the financial sector. It would therefore be difficult to understand in light of that concern on the part of National Treasury why bond brokers should be regulated under both the Property Practitioners Act and the Financial Sector Regulation Act, once both have been enacted.
- 3.7. As a matter of practice it is also the case that “*financial institutions*” require bond brokers to disclose the commission earned by the bond broker from the “*financial institution*” to the “*consumer*” (as required in section 163 of the NCA) and for the bond brokers to stay abreast of the provisions of the NCA and the Code of Banking Practice.
- 3.8. Viewed differently, it appears that bond brokers are being brought within the ambit of the Bill only because the underlying asset class being financed is “*property*” as defined by the Bill. In the same way, one could argue that “*car finance service providers*” should be regulated with car sales people, given that the underlying asset class is cars. Whilst there is a logic to that, it is more appropriate for credit providers, lenders, financial institutions and their agents, brokers or intermediaries (be they bond brokers or car finance service providers) to be regulated by the regulatory framework that relates to the actual service and product being offered (i.e. financial products and credit agreements and the offering of a financial advice service in regard to those financial products). Bond brokers do not give property advice or in any manner offer property for sale or leasing. Certainly, this is the approach of the Financial Sector Regulation Act.
- 3.9. It is significant that the Preamble to the Bill does not refer to financing and refers only to assistance in regard to property transactions, i.e. the services provided by real estate agents, now referred to as “*property practitioners*” under the Bill. These services would be “*marketing, managing, letting, renting, sale and purchase of property*”. Seemingly, the drafter has as an afterthought added the “*financing*” aspect into the Bill so as to include bond brokers and bridging financiers. By contrast, the Estate Agency Affairs Act (that the Bill seeks to replace) does not refer at all to “*financing*” as being a property related service. Indeed, the Estate Agency Affairs Act does not refer to “*financing*” at all.
- 3.10. By way of distinction, the Financial Sector Regulation Act is specifically focussed on regulating and supervising financial product providers and financial services providers and on improving market conduct to protect financial customers, as is recorded in the Preamble thereto. Similarly, the “*Objects of Act*” in the Financial Sector Regulation Act include “*the fair treatment and protection of financial customers*” and “*financial inclusion*” and “*transformation of the financial sector*” of which bond brokers and bridging financiers most certainly form a part.
- 3.11. It will be appreciated that bond brokers, given their origination expertise are able to originate finance applications for multiple products and not just bonds. If bond brokers are to be regulated under the Property Practitioners Bill, then nonetheless by parity of reasoning bond brokers that originate finance for assets other than property would be required to be regulated by multiple regulatory authorities who are concerned with the asset classes in question. Thus for example, if a bond broker was to originate financing for motor vehicles, then it would have to be subject to the authority of a regulator concerned with motor vehicles and motor vehicle sales personnel. Yet it is clear that in fact their business expertise is in relation to finance applications (and not motor vehicles or houses), understanding a client’s financial needs and affordability and related matters and not the underlying assets. If a bond broker originates a

personal loan, that in principle should then also require a category of regulation. However, as is self-evident the question is not asked as to in respect of which asset class the personal loan is to be advanced (i.e. to finance a car or a television, finance a deposit on a home, finance a share investment or just settle a debt). A bond broker is an intermediary in regard to finance and the regulatory focus should be on the role as financial intermediary and the advice that is given in respect of the credit advanced. No reference should need to be had to the underlying asset class, whether it is property, a vehicle or an investment. It should also be appreciated that as matters currently already stand, a bond broker may originate finance secured by a mortgage bond secured by property where there is no sale or lease of a property involved (i.e. a further advance or second bond); in other words, the mortgage bond over the property is merely the security offered for a pure lending transaction.

- 3.12. As will appear from our further representations below, the premise (the underlying asset class rather the nature of the actual financial product or service provided) results in bond brokers being included in the legislative scheme of the Bill as the proverbial “*square peg in a round hole*”. This is manifested through challenges such as:
- 3.12.1. fidelity fund certificates, trust accounts and trust account audits being required for bond brokers in circumstances where bond brokers do not hold or otherwise deal with any consumer monies or operate trust accounts;
- 3.12.2. bond brokers being subject to a single code of conduct under section 60 of the Bill, where the regulation required for other categories of “*property practitioners*”, primarily, estate agents and estate agencies, will not be apposite to bond brokers. By way of illustration, and on the basis that the existing Estate Agents Code of Conduct will be applicable to “*property practitioners*” in terms of Bill, the code of conduct will regulate:
- 3.12.2.1. **Property mandates / sole mandates** in circumstances where bond brokers are brokers or intermediaries for financial institutions in terms of the NCA and would not hold property mandates or sole mandates from consumers. In point of fact, within the mortgage origination industry, obtaining a sole mandate from a consumer could be considered “unethical” as it may restrict access to financing options and the role of bond brokers is to increase that access;
- 3.12.2.2. **Duties of disclosure** in regard to the property when the bond broker has no knowledge or insight in regard to the property that is the underlying asset class given as security. The bond broker has exclusive focus on the “*financial product*” offered (i.e. the NCA “*mortgage agreement*”). A bond broker does not in any manner deal with or hold him- or herself out as dealing with, property or acting as a property expert;
- 3.12.2.3. **Marketing regulation**, in circumstances where the marketing of financial products and services, i.e. the mortgage lending is fully regulated under the NCA and in a manner appropriate to financial products and services (i.e. interest rates; finance charges, disclosures in marketing, etc.);
- 3.12.2.4. **Duties in regard to offers and contracts**, in circumstances where pre-agreement statements and quotations relevant to mortgage lending are fully regulated under the NCA in a manner appropriate to a financial product in the interests of consumer protection. Bond brokers do not deal with the preparation, drafting or conclusion of sale agreements for property;
- 3.12.2.5. **Remuneration from consumers / commissions**, in circumstances where bond brokers are not remunerated by consumers. In this regard, bond brokers are remunerated by the financial institution in whose favour the mortgage bond is registered. Within the bond broking business sphere, it is considered “unethical” for a bond

broker to charge a raising or other fee to the consumer. Self-evidently, commissions payable by financial institutions do not need to be regulated in the same manner as “*commissions*” payable by a consumer, given the considerable market power held by the financial institutions, and the competitive environment and its regulation by the Competition Commission authorities. Additionally, as noted above, disclosure of bond brokers’ commissions is already legislated for under the NCA;

3.12.2.6. **Trust money and interest**, given (as noted above) that bond brokers do not hold any consumer monies in any circumstances and do not and have not ever operated trust accounts;

3.12.3. bond brokers being subject to continuing education and training requirements designed for property practitioners that deal in property as opposed to financial transactions. Bond brokers self-evidently will require “*financial products and financial services*” training, including, for example, in regard to the NCA and the regulatory environment applicable to lending transactions. That training is best regulated by an Act that is designed to regulate the provision of financial services, such as that contemplated by the Financial Services Regulation Act.

3.13. From the foregoing it would seem to be evident that there is no need to bring bond brokers within the ambit of the Bill (including because it will result in duplication of regulation). However, if bond brokers are to remain within the ambit of the Bill, then an entirely different regime will need to apply to bond brokers as opposed to other categories of property practitioners. This will significantly complicate not only the Bill but also the underlying regulations. We elaborate on this point further below.

3.14. Accordingly, it is MORCSA’s submission that bond brokers should be omitted from the ambit of the Property Practitioners Bill and should rather be regulated in conjunction with the “*credit providers*” and “*financial institutions*” for which they act as brokers or intermediaries and by the same laws and regulations that regulate the employees of the financial institutions that provide the same service, i.e. the Financial Sector Regulation Act. This would be consistent with bond brokers also being regulated by the Financial Sector Charter, as is currently applicable. There does not seem to be a need for bond brokers to be regulated by both of the Financial Sector Conduct Authority and by the Property Practitioners Authority. Furthermore, it may well be that such dual regulation may impose conflicting requirements on the mortgage origination industry, aside from the requirement in itself to comply with duplicated regulation.

3.15. If bond brokers are to be regulated under the Bill, for reasons explained further along under paragraph 4, bond brokers will need to be regulated as an independent category of “*property practitioner*” distinct from estate agents and, as noted above, a distinction will need to be drawn throughout the Bill between “*property transactions*” and “*financial transactions*”. Doing so will allow for appropriate and separate regulation to be applied to “*property practitioners*” that deal with consumers in regard to “*property*” and “*bond brokers*” that deal with consumers in regard to financial services and financial products. Similar logic would apply to the providers of bridging finance (who are credit providers regulated by the NCA and other legislation), as well as to valuers. By way of illustration, neither of the aforesaid would accept sole mandates or deal with commissions, or for that matter hold trust accounts or consumer’s monies.

4. **SQUARE PEG IN A ROUND HOLE – REGULATING FOR BOND BROKERS AS PROPERTY PRACTITIONERS**

4.1. If, notwithstanding that set out in paragraph 3 above, bond brokers are to be regulated as “*property practitioners*” (in addition to as “*financial service*” providers under the Financial Sector Regulation Act), then we would submit that such regulation would need to be adapted to take into account that different categories of “*property practitioner*” require different (and indeed, independent) categories of regulation. These categories of regulation would include:

4.1.1. **A distinction being drawn between “*property transactions*” and “*financial transactions*”**. At the risk of oversimplifying, a “*financial transaction*” clearly does not require mandatory disclosure in regard to property defects. Similarly, while it

is proposed that an estate property practitioner owes a duty of care to both the seller and buyer of the property, in contradistinction a bond broker can only ever owe a duty of care to the buyer and the financial institution for which he or she acts as broker or intermediary. Significant regulation of bond brokers would be aimed at addressing the broker or intermediary relationship between the bond broker and the financial institution and this would not be considered as naturally falling within the domain of the Department of Human Settlements or the Authority. The Bill currently does not deal at all with that key bond broker relationship and the fiduciary duties and obligations owed in terms of that relationship;

- 4.1.2. **Different certification** as “*bond brokers*” do not hold consumer monies, and therefore have no requirement for trust accounts and associated audits and accordingly, a bond broker should only be required to hold a registration certificate and not a fidelity fund certificate.
 - 4.1.3. **Different training** requirements inasmuch as bond brokers would require financial products and training that is mortgage lending related and not property sale related;
 - 4.1.4. **Different transitional** provisions in regard specifically to training, as estate agent property practitioners have had a long phasing in period in regard to their training requirements, and bond brokers will require a similar phasing in requirement. As with estate agents, there will need to be recognition of prior training and experience prior to the regulation under the Bill and such cannot be achieved by simply referencing training under the Estate Agents Affairs Act;
 - 4.1.5. **Different Codes of Conduct** to recognize the vastly different businesses and consumer engagements that exist for real estate practitioners (sole mandates, trust accounts, consumer paid commissions, property marketing and property defects, etc.) as compared to those that relate to bond brokers (financial service provision, no trust accounts, no sole mandates, marketing regulation under the NCA and brokers or intermediaries of financial institutions, etc.).
- 4.2. A manner in which this could be achieved would be to separate out the definition of “*bond broker*” from being a sub-category of “*property practitioner*”. In this way one could amend the definition of “*property practitioner*” as currently defined in the Bill to remove “*bond broker*” from (iv) and then create an independent definition of “*bond broker*”. In this way:
- 4.2.1. “*property practitioner*” would relate to persons and undertakings that conducted business in regard to “*property*” and were involved in “*property transactions*” or the valuation of property; while
 - 4.2.2. “*bond broker*” would relate to persons and undertakings that conduct business in regard to “*property finance transactions*” related to, inter alia, the “*providing, procuring, facilitating, securing or otherwise obtaining or marketing of financing in relation to a property transaction*”.
- 4.3. The effect would be that the scheme of the Bill would allow for separate regulation of “*bond brokers*” as financial service providers as compared to other categories of “*property practitioners*” (i.e. estate agents, developers, valuers and others) that provide services in regard to the marketing, selling and leasing of property. That separate regulation would thus in a systematic and structured manner be able to provide for, inter alia:
- 4.3.1. **Different certification** in that while a fidelity fund certificate may be required for other categories of property practitioners only a “*registration certificate*” should be required for “*bond brokers*”, given that the latter do not hold trust accounts or consumer monies;
 - 4.3.2. **Different training requirements** given that bond brokers would likely need to be affiliated with BankSETA and would certainly require financial product training

and experience, as opposed to property marketing and sale experience and training in regard to estate agent trust accounts;

4.3.3. **Different transitional** provisions specific to bond brokers given that bond brokers have not previously been regulated under the Estate Agency Affairs Act, 1976;

4.3.4. **Different Codes of Conduct** recognising the vastly different businesses and consumer engagements that exist for bond brokers, as opposed to other categories of property practitioners such as real estate agents (for bond brokers unlike other categories of property practitioners there are amongst other things, no sole mandates, no trust accounts, no consumer paid commissions, no property marketing and no property defect disclosure obligations).

4.3.5. **Different Regulations** given the vastly different businesses and consumer engagements that exist for bond brokers, as opposed to other categories of property practitioners such as real estate agents and that the Minister will be required to prescribe separate regulations for the different categories of practitioners.

4.4. For the reasons detailed elsewhere, duplicated regulation (under the Bill and the Financial Sector Regulation Act) of the financial services offered by the bond brokers is not desirable or pragmatic and indeed, would seem on the face of it to cut across the objectives of National Treasury with the Financial Sector Regulation Act.

5. ADDITIONAL COMMENTS ON THE BILL

5.1. As MORCSA's position is that regulation of bond brokers (who are financial service providers and who as such are regulated under the Financial Sector Regulation Act) does not fit within the scheme of the Bill (irrespective that the underlying asset class that is the security might be "*property*"), MORCSA's first objective remains that "*bond brokers*" should be excluded from the ambit of the Bill either through the deletion of (iv) of the definition of "*property practitioner*" or otherwise through a specific exclusion such as that currently proposed in relation to attorneys.

5.2. If this exclusion cannot be achieved, then the Bill should be revised to include an independent definition of "*bond broker*" (as proposed in paragraph 4.2.2 above and elaborated further upon in paragraph 5.5 below) and a distinction drawn between "*property transactions*" and "*financial transactions*" under the Bill. This will allow for separate and appropriate regulation of "*bond brokers*".

5.3. Further, to the extent that bond brokers are included, then it would be inconsistent to exclude bond brokers employed by, or acting as agents for, "*financial institutions*" as defined in section 1 of the Financial Services Board Act, 1990 (Act 97 of 1990). This inconsistency is currently in the scheme of the Bill as all "*financial institutions*" are excluded from the "*bond broker*" portion of the definition of property practitioner. If this inconsistency were to remain, then the "*bond brokers*" that are employed by, or act as agents for, financial institutions would not be competing on a level playing field and would be unregulated in regard to property transactions specifically. It will be appreciated that financial institutions through their employed "*bond brokers*" and agents compete directly with the mortgage origination industry and seek direct access to estate agents, property developers and consumers. Such financial institution employed "*bond brokers*" and agents provide advice to consumers and property practitioners on their home loan products on the same basis as the members of the mortgage origination industry. Accordingly, such "*bond brokers*" and agents employed by financial institutions should be included in the definition of "*bond broker*" and should be regulated on the same basis as all other bond brokers in regard to property transactions.

5.4. Irrespective of the Committee's view on the foregoing (and should bond brokers not be excluded from the ambit of the Property Practitioners Bill), MORCSA wishes to comment further on the Bill by:

- 5.4.1. Endorsing the comments made by REBOSA in its submission to the Department of Human Settlements (which has now also been submitted to the Parliamentary Portfolio Committee on Human Settlements), it being noted that we have had sight of those comments prior to submission of the same to the Department of Human Settlements; and
- 5.4.2. noting the comments below which are specific to the bond broking (mortgage origination) industry.
- 5.5. Each comment below is referenced to a section in the Bill:

Section in Bill	Comments on the assumption that bond brokers are to be regulated under the Bill
Definition of "bond broker"	<p>Create an independent definition of "bond broker" and delete "bond broker" from (iv) of the definition of "property practitioner".</p> <p>Proposed definition:</p> <p><i>"bond broker" means any person or business undertaking who or which for the acquisition of gain on his, her or its own account or in partnership, in any manner holds himself, herself or itself out as a person or business undertaking who or which, directly or indirectly, on the instruction of or on behalf of any other person, procures, facilitates, secures or otherwise obtains or markets financing for or in connection with a property transaction, but excluding any person contemplated in the definition of "financial institution in section 1 of the Financial Services Board Act, 1990 (Act No.97 of 1990)"</i></p>
New definition of "property transaction"	<p><i>"property transaction" means in relation to any immovable property, any transaction by which any person sells, purchases, manages or publicly exhibits for sale any immovable property or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or a purchaser in respect thereof, including any auction or sale in execution."</i></p>
New definition of "finance transaction"	<p><i>"finance transaction" means, any transaction in terms of which any person is assisted or facilitated to procure, secure or otherwise obtain financing for or in connection with a property transaction."</i></p>
Definition of "registration certificate"	<p>This would also have to refer specifically to a "bond broker".</p>
Definition of "Code of Conduct"	<p>This should be amended to refer to "Codes of Conduct" (i.e. the plural) to permit separate codes of conduct appropriate to bond brokers as compared to the other categories of property practitioners.</p>
Section 4	<p>"Bond brokers" should be exempted in the Bill from provisions relating to "fidelity fund certificates" and "trust accounts" on the basis that they do not hold "consume" monies in trust or otherwise.</p>
Section 7 – Composition and	<p>Specific provision should be made for representatives of the mortgage origination industry or persons who have "bond broker" expertise to be included on the Board.</p>

appointment of the Board	
Section 10 – Good corporate governance and code of ethics	As noted above, the protocols and charters of the various categories of practitioner falling within the ambit of the Bill's regulation would differ enormously and bond brokers would require a separate code of conduct. The Code of Conduct applicable to MORCSA members is attached here as Schedule 1 for your reference.
Section 23	The jurisdiction of the Ombud to deal with any complaint in respect of " <i>financing, marketing, management, letting, hiring, sale and purchase of property</i> " is wide and would appear to impact upon the jurisdiction of other authorities, including the Credit Ombud and the provincial Rental Housing Tribunals.
Section 34 – Primary purpose of the Fund	The primary purpose of the Fund is to reimburse persons who suffer pecuniary loss by reason of theft of trust money. Bond brokers never hold any trust money. It is therefore not conceivable that any bond broker customer would ever suffer a pecuniary loss in the manner contemplated as being the primary purpose of the Fund as described in section 34. This should be recognized by a " <i>fidelity fund certificate</i> " not being required for bond brokers.
Section 46 – Application for Fidelity Fund Certificate	This section should be amplified to deal with the bond brokers only being required to apply for a " <i>registration certificate</i> ". Doing so will allow for different requirements to be imposed not only in relation to trust accounts and funds held on behalf of consumers, but also regarding training requirements, transitional provisions and related matters. Additionally, currently the mortgage origination industry does not have any fidelity fund certificates (if applicable) or registration certificates issued. Accordingly, a phasing in process would need to be provided for.
Section 49(b)(ii) and (iii) – Prescribed standards of training and practical experience	The mortgage origination industry does not currently have any industry prescribed standards of training. These would need to be developed within the industry and a transitional period would be required. The Authority would need to develop approved training in conjunction with the relevant SETA (currently BankSETA and in some instances ServicesSETA). This will require a phasing in period.
Section 53 – Trust Account	" <i>Bond brokers</i> " do not hold any client monies and should not be required to open trust accounts. Client monies are paid by the mortgagee bank on registration of transfer of the mortgage bond concerned directly to the conveyancing attorneys. If " <i>bond brokers</i> " are required to open trust accounts, then they would be brought within the scope of accountable institutions in terms of FICA. That would imply an administrative burden and the incurrence of costs without any possible benefit to the public, given that bond brokers never receive deposits or trust monies from members of the public.
Section 57 – Limitation on relationships with other property market	Referrals between real estate agencies, estate agents, property developers and bond brokers are common place in the industry. Such relationships have pro-consumer benefits, including through the sharing of information and the

<p>service providers</p>	<p>promotion of competition. It is important to emphasise though that at no point would a referral oblige a consumer to use the services of a bond broker.</p> <p>The mortgage origination industry plays a powerful "pro-competitive" role in the context of the provision of property financing to consumers. Consumers do not obtain the best possible rates or the best possible access to credit when they approach their own financial institutions directly. The data shows that consumers have obtained better rates since the advent of the services provided by mortgage originators. More importantly, and regarding access to finance, a consumer is more likely to obtain financing using the services of a bond broker than would otherwise be the case. Expressed in simple terms, bond brokers effectively empower consumers to obtain the best possible financing and credit options from amongst a range of financial institutions. In the absence of the service provided by bond brokers it would be very difficult – if not altogether impossible – for the consumer to achieve the same access to competitive financing options and credit.</p> <p>Bearing in mind that consumers do not pay for the bond brokers' service (the financial institution lender being the party that rewards the bond broker), it is strongly in the interests of consumers that the mortgage origination industry be permitted to continue operating on the current basis. It is key to achieving such a "pro-competitive" environment that estate agents be able to refer consumers to bond brokers as this is the primary channel through which consumers are informed of their ability to use the services of bond brokers so as to obtain the best possible rates and access to credit for the financing that they wish to raise. Put differently, precluding estate agents from referring consumers to bond brokers would effectively be "anti-competitive" and "anti-consumer" and would limit "consumer access" to the customer value proposition that bond brokers offer. In this context, it should also be borne in mind that the consumers who probably benefit the most from the services of bond brokers are the historically disadvantaged who have the greatest challenges in accessing financing and credit on competitive terms.</p> <p>That said, we agree that a property practitioner should never "<i>oblige</i>" a consumer to use a particular service provider. However, many consumers request guidance and it is in the best interests of the consumer for the estate agent to be able to introduce possible service providers to the consumer as an option.</p> <p>In summary, if "encouraging" per se were to be precluded by the Bill, that would foreclose the mortgage origination industry in competing with "<i>financial institutions</i>" to the detriment of consumers. That would be a retrograde step and out of keeping with other pro-consumer legislation.</p> <p>We accordingly suggest that the words "<i>or encouraged</i>" in section 57 be deleted.</p> <p>If "<i>or encouraged</i>" is not deleted, then recognition must be given to the benefits flowing from referral agreements as noted above, with the regulation targeted at harmful practices and not the "encouragement" that facilitates access to finance. That could for example be achieved by including reference to encouragement only being permitted where the same is not for good cause or pro consumer purposes.</p>
<p>Section 60 – Code of conduct for property practitioners</p>	<p>As noted, provision should be made for each category of property practitioner to have a Code of Conduct appropriate to its industry. See MORCSA's Code of Conduct attached as Schedule 1.</p>

Section 63 – Supervision of candidate property practitioners	<p>The training requirements in relation to the bond brokers of a mortgage originator are vastly different to those of any other property practitioner. In particular, the NQF4 and NQF5 qualification requirements do not apply to, and have no relevance in respect of, bond brokers. Nor does the mortgage origination industry have any form of formal standardised internship training and accordingly, the concept of a "<i>candidate property practitioner</i>" has no meaning in the context of the mortgage origination industry. Given that position, it appears that section 63 should not apply to "<i>bond brokers</i>".</p> <p>If section 63 is to apply to "<i>bond brokers</i>", then the provisions of section 63 will need to be adapted to recognise the difference between the role played by estate agents and bond brokers. In addition, it will need to be recognised that there will need to be a lengthy transitional period as training and qualification standards will need to be developed and then phased in over a period of time.</p>
Section 66 – Mandatory disclosure form	This section must clearly not apply to bond brokers as the provisions are inappropriate to the providers of financial products.
Section 68(2)	This section must not apply to bond brokers as the provisions are inappropriate to the providers of financial products. In particular, a bond broker has no contractual or business relationship with the seller of a property.
Section 69 (1)	We note that the mortgage origination industry has never been consulted in respect of the Property Sector Transformation Charter and nor has the charter previously applied to the mortgage origination industry.
Section 75 (6)	The section provides that all current regulations made in terms of the Estate Agency Affairs Act will remain of full force and effect as if made under the legislation. This can manifestly not be the case in relation to bond brokers as the nature and content of the existing regulations would in many instances be inappropriate for application to bond brokers.

6. SUMMARY

- 6.1. Neither the Estate Agency Affairs Board nor the Department of Human Settlements engaged in a meaningful manner with the mortgage origination industry prior to the publication of the Bill. Similarly, it appears that possibly neither the Estate Agency Affairs Board nor the Department of Human Settlements have engaged with the Department of Finance regarding the dual regulation of bond brokers that may result.
- 6.2. "*Bond brokers*" have been included in the Bill by virtue of subsection (iv) of the definition of "*property practitioner*". That has apparently been done without adequate insight into the consequences of the Bill for the mortgage origination industry, without recognition of the regulation of bond brokers under the Financial Sector Regulation Act and without cognizance of the concerns of National Treasury in relation to the fact that as it is, too many regulators are involved with the financial sector.
- 6.3. If bond brokers are to be included in the Bill (which it is submitted is not appropriate), then the Bill should recognise that bond brokers provide a service in regard to financial products (i.e. "*mortgage loans*" regulated by the National Credit Act) and not in regard to property, and that bond brokers are also regulated by the Financial Sector Regulation Act. This service provided by bond brokers in regard to financial products is considerably different to the marketing, managing, selling and leasing of immovable property, and must be regulated differently in regard to, amongst other things:

- 6.3.1. registration certificates (as opposed to fidelity fund certificates), as bond brokers do not operate trust accounts or otherwise interact with consumer monies;
 - 6.3.2. the code of conduct that is applicable to bond brokers as opposed to other categories of “property practitioners”;
 - 6.3.3. differential continuing education and training requirements (i.e. education and training for “*bond brokers*” must be financial transaction related and not property related or estate agent related);
 - 6.3.4. affording of a transitional period for bond brokers given that they have not been regulated under the scheme of the Estate Agency Affairs Act that is being replaced by the Bill.
- 6.4. If bond brokers are included in the Bill, they should then be excluded from regulation under the Financial Sector Regulation Act. Inevitably, including bond brokers into both the Bill and the Financial Sector Regulation Act can only result in over-regulation, duplication of regulation, and potentially conflicting regulation.
- 6.5. It is MORCSA’s submission that if bond brokers are included in the Bill this will, at a minimum, require “*bond brokers*” to be regulated entirely separately from the other categories of “*property practitioners*” contemplated in the Bill. Certainly, until these aspects and the question of potential duplication of regulators have been fully addressed, bond brokers should not be included in the Bill.

SCHEDULE 1: THE MORCSA CODE OF CONDUCT

CODE OF PRACTICE OF THE MORTGAGE ORIGINATION REGULATORY COUNCIL OF SOUTH AFRICA ("THE ASSOCIATION")

Overview of the Code of Practice

1. Introduction

- 1.1 A **"Code of Practice"** is a developed statement of principles dealing with industry practices designed to set a standard of good industry practice and fair dealing between Consumers and Members. The Code of Practice aims to instil public confidence in the operations of Members. The Code of Practice is binding on Members.
- 1.2 The Association believes that by Members making a commitment to good industry practice and fair dealing in the mortgage finance marketplace, and putting that commitment into practice, the confidence of both Consumers and the public generally will be enhanced.
- 1.3 Mortgage finance plays a pivotal role in the South African residential property market. It is thus imperative that Consumers have confidence in their dealings with mortgage originators.
- 1.4 Membership of the Association is "accreditation" that a person has met the Association's standards to be admitted as a Member and so has the right to publicly proclaim membership of the Association. The Association believes that this is not simply an empty phrase. It is the outward sign of a Member's commitment to good industry practice and fair dealing. **"MCAA"** and **"AMC"** or the various other Association accreditations stand as the sign of a skilled professional who not only has this commitment but who puts that commitment into practice. Accreditation must have value to both Consumers and Members of the Association themselves.
- 1.5 This Code of Practice specifies minimum standards of professional conduct and good industry practice to be adhered to by Members. It also specifies minimum requirements of professional qualifications and/or experience and Professional Indemnity Insurance applicable to Members.

2. Consumer Complaints Handling

- 2.1 Complaints against Members are dealt with via one or more of the following three dispute resolution procedures:
- 2.1.1 through **Internal Dispute Resolution Procedures ("IDRPs")** covering complaints made directly to the Member concerned regarding that Member or any of its staff;

- 2.1.2 through the **Disciplinary Tribunal** where the complaint relates to an alleged breach by a Member of the Code of Practice, IDRPCs and / or the Constitution; or
- 2.1.3 through the **Ombudsman** where the Complainant has suffered financial loss and where the IDRPCs have failed to produce an outcome satisfactory to the Complainant and where the complaint meets the criteria for consideration by the Ombudsman.
- 2.2 The Association has promulgated, *inter alia*, the IDRPCs and Ombudsman Rules, amended from time to time as provided therein, with which every Member must comply and copies of which are available on the Association's website and from the Association's offices.
3. **Independent Ombudsman for Origination of Mortgages**
- 3.1 Under powers contained in the Constitution, the Association has established an Independent Ombudsman for Origination of Mortgages ("**Ombudsman**") and the Ombudsman Committee. The Ombudsman rules made by the Ombudsman Committee ("**Ombudsman Rules**") set out how the Ombudsman will deal with complaints by Complainants against Members and also how disputes will be resolved.
- 3.2 A copy of the Ombudsman Rules can be obtained from the Association's website or from the Association's offices.

THE CODE OF PRACTICE

1. Interpretation

All definitions and interpretations used in the Constitution shall have the same meaning in this Code of Practice, unless the context indicates otherwise. For the sake of convenience certain of these definitions are repeated hereunder. In this Code of Practice, the following words and phrases have the meanings and references set out below:

- 1.1 "**Association**" means the Mortgage Origination Regulatory Council of South Africa;
- 1.2 "**Code of Practice**" or "**Code**" means this Code of Practice as promulgated by the Exco from time to time;
- 1.3 "**Constitution**" means the Constitution of the Association;
- 1.4 "**Consumer(s)**" means members of the public who deal with Members whether as borrowers, applicants, guarantors, prospective borrowers or prospective guarantors, or who in any other way seek the services of Members in the ordinary course of business in the Industry;
- 1.5 "**CE**" means the Continuing Education obligations placed on Members and scored on a points system as provided for in the Code and as required pursuant to the Code for the renewal of Membership;

- 1.6 **“Complainant”** means a Consumer who lodges a complaint with a Member about that Member’s conduct and / or the provision of Mortgage Origination services to that Consumer by a Member;
- 1.7 **“Credit Provider”** means any individual, corporation, bank, financial institution or other entity that lends or provides mortgage secured finance to Consumers;
- 1.8 **“Determination”** means an agreement, settlement or award made pursuant to the Ombudsman Rules;
- 1.9 **“Disciplinary Rules”** means the Disciplinary Rules as promulgated by the Association from time to time in terms of the Constitution;
- 1.10 **“Exco”** means the Executive Committee of the Association from time to time;
- 1.11 **“IDRM”** means an individual (or that individual’s replacement from time to time) employed by or consulting to a Corporate Member who has been nominated as its "Internal Dispute Resolution Manager" who is authorised by that Corporate Member to resolve complaints against that Corporate Member in terms of the Association’s Internal Dispute Resolution Procedures (**“IDRPs”**), unless that individual is conflicted in relation to that complaint, in which case the Corporate Member shall appoint, on an ad hoc basis, another individual employed by or consulting to that Corporate Member, who is not conflicted, to action the relevant complaint;
- 1.12 **“IDRPs”** means the Internal Dispute Resolution Procedures, as amended by the Exco from time to time;
- 1.13 **“Industry”** means the Mortgage Origination Industry in South Africa;
- 1.14 **“Member”** means any person or entity entered in the National Register of Members of the Association as a Corporate Member, an Accredited Mortgage Consultant or a Mortgage Consultant Awaiting Accreditation;
- 1.15 **“Tribunal”** or **“Disciplinary Tribunal”** means the Disciplinary Tribunal established pursuant to the Constitution and the Disciplinary Rules and regulated by the Exco from time to time to handle Consumer complaints relating to breaches by Members of the Association’s policies, rules or procedures.

2. **Name of Code**

This code is the Association’s Code of Practice.

3. **Objectives of the Code**

The objectives of the Code are:

- 3.1 to establish professional standards of Consumer/Member dealings in the Industry;

- 3.2 to promote commitment by Members to compliance with:
 - 3.2.1 the applicable national laws and regulations applicable to the conduct of Mortgage Origination business; and
 - 3.2.2 the rules, policies and procedures that Members are subject to by virtue of their Membership to the Association;
- 3.3 to promote the maintenance of the high public standing of the Association's accreditation of Members;
- 3.4 to promote ethical and fair business practices to the benefit of Consumers and Members; and
- 3.5 to promote continual education and professional programs for Members.

4. **Ongoing relevance of the Code**

The Association will actively review changes in the Industry with a view to ensuring the maintenance of good practice standards at all times and the Exco will amend this Code where there is a need or benefit to Consumers and / or the Industry in doing so.

5. **Application of the Code**

- 5.1 This Code of Practice applies to and is binding on every Member.
- 5.2 This Code applies to and binds and continues to apply to and to bind a Member to whom the Code applies, or has applied, notwithstanding that the Member has ceased for any reason to be a Member of the Association, or has been suspended from Membership, after the date (or, when more than one, on the last of such dates) upon which the facts giving rise to the complaint by the Consumer occurred.
- 5.3 The Exco may from time to time prescribe that this Code applies to a particular class of transaction not otherwise referred to in this Code. Any such prescription shall as between a Member and the Association, or as between Members, be final and binding.

6. **Qualifications and Experience of Members**

- 6.1 Members must keep up to date with the laws and practices in the Industry as they change and evolve. In this regard, individual/natural person members must undertake CE programs recognised by the Exco and earn sufficient CE points for each relevant period as determined by Exco from time to time to maintain membership.
- 6.2 Corporate Members must ensure, where relevant, that at all times they employ/contract Accredited Mortgage Consultants or Mortgage Consultants Awaiting Accreditation and have the CE points and experience necessary to deal competently and professionally with Consumers.

7. Professional Indemnity Insurance

- 7.1 All Individual and Corporate Members must at all times maintain Professional Indemnity insurance:
- 7.1.1 of not less than such amount determined by the Exco for any one claim in the aggregate / on a per claim basis, and
 - 7.1.2 endorsed to cover a Determination made by the Ombudsman; and
 - 7.1.3 provided by an insurer approved by the Exco; and
 - 7.1.4 provided in terms of a policy in a form approved by the Exco from time to time; and
 - 7.1.5 that provides, where the policy is extended to insure agents, sub-agents and/or consultants, that such persons and/or companies are named as an "insured person" on the policy.
- 7.2 The terms and conditions of the Professional Indemnity insurance must at all times meet other minimum standards as may be set by the Exco from time to time.
- 7.3 The purpose of the requirement for Professional Indemnity Insurance is to ensure that any third party Consumer who has suffered a loss due to some act or default of a Member has recourse to the proceeds of the insurance policy irrespective of the Member's own financial capacity to meet a determination or award by the Ombudsman against that Member.

8. Practice Standards for Association Members

The Practice Standards set out hereunder apply to and bind Members.

- 8.1 A Member must always comply with this Code and all other laws and regulations applying to the submission of mortgage finance loan applications and the process of mortgage origination.
- 8.2 A Member must suggest or recommend to a Consumer only those arrangements for finance that the Member reasonably believes are appropriate to the needs of that Consumer and must never exert undue pressure on a Customer to select a particular finance arrangement.
- 8.3 A Member must always disclose to a Consumer all relevant details known to the Member about a proposed mortgage finance product at the time of application, other than proprietary information.
- 8.4 A Member must deal correctly and efficiently with any questions that a Consumer may have pertaining to interest rate structures and mortgage finance products offered from time to time by Credit Providers, and any other matter that may be of assistance to the Consumer.

- 8.5 Notwithstanding the provisions above, in dealing with a Consumer a Member shall not:
- 8.5.1 discriminate unfairly against a Consumer on the grounds that the Consumer will not, or is unlikely to, make use of mortgage finance facilities made available to the Consumer by a Credit Provider through the Member's efforts; or
 - 8.5.2 discriminate unfairly against any person on any of the grounds listed in section 9(3) of the Constitution of the Republic of South Africa, Act 108 of 1996; or
 - 8.5.3 claim or hold itself out to be an expert or to have specialised knowledge in respect of any Mortgage Origination service if, in fact, the Member is not such an expert or does not have such special knowledge.
- 8.6 A Member must submit a loan application to a Credit Provider or Credit Providers, whenever possible, within 3 Business Days (but in any case promptly) after receipt of a duly completed application, supplying all information required by the Credit Provider(s) (including but not limited to supporting documentation) to make the decision whether or not to grant the loan for which applied.
- 8.7 A Member must always keep a Consumer informed of all relevant information known to the Member relating to a loan, prior to registration of the related mortgage bond, to the extent that that information applies to that Consumer.
- 8.8 Where a Credit Provider requires or requests further information from a Member in relation to any loan application, such requirement or request must be communicated to the Consumer by the Member within 3 Business Days (but in any case promptly) of receipt of such notification from the Credit Provider.

9. Outcome of Loan Application

A Member must advise a Consumer of the outcome of the loan application, whenever possible, within 3 Business Days (but in any case promptly), of the loan decision being notified in writing by the relevant Credit Provider to the Member, and the Member should not otherwise indicate the outcome of the loan application to the Consumer until receiving such notice.

10. Confidentiality

A Member must at all times respect and maintain the highest levels of confidentiality with regard to information which of necessity the Member elicits from a Consumer and must not disclose such information to any party, save as is required by law or with the Consumer's consent, not having a *bona fide* interest in the information and that is involved in the process of compiling an application for a loan, submitting such application, having such application granted and subsequently having any loan secured by the registration of a mortgage bond.

11. Fees and Commissions Disclosure

If a Member is not an agent or employee of a Credit Provider and such Member solicits from, completes for or concludes a mortgage finance loan agreement with a Consumer for or on behalf of a Credit Provider (whether pursuant to an agreement between such Member and a Credit Provider or between such Member and another Member), such Member must disclose to the Consumer prior to conclusion of the mortgage finance loan agreement any fee or commission, and the amount thereof, payable to such Member in terms of the credit agreement.

12. Skill, Care and Diligence

- 12.1 A Member must act with all due care, skill and diligence in their Industry dealings, including adherence to the reasonable instructions of Consumers.
- 12.2 A Corporate Member must always ensure that it and, where applicable, its staff are thoroughly knowledgeable in those areas and aspects of the Industry in which they participate.
- 12.3 A Member must undertake all necessary education, CE and other Association endorsed programs to maintain and further their and, where applicable, their staff's professionalism.

13. Honest and Honourable Dealings

- 13.1 A Member must deal with all persons with whom they may come into contact in the course of their professional and commercial activities honestly, honourably and in good faith.
- 13.2 At the time of the first engagement with a Consumer, a Member must advise a Consumer of its or its employer's terms and conditions of service and must give the Consumer reasonable notice before any variation thereof takes effect.
- 13.3 A Member must not engage in any acts or omissions of a misleading, dishonest, deceptive or fraudulent nature.
- 13.4 A Member's advertising must not be misleading, dishonest or deceptive.

14. Complaints Handling

- 14.1 A Member must and any staff member of a Corporate Member must be instructed to always tell a Complainant, the name of the Corporate Member's IDRMs.
- 14.2 A Corporate Member must always ensure that its IDRMs has the written authority to determine and respond to any complaint made by a Complainant.
- 14.3 A Member must always comply with the Association's IDRs.
- 14.4 A Member must not, subject to statutory requirements, impose any fee on a Complainant.

- 14.5 An IDRМ must always advise a Complainant about the Ombudsman and about how, and to whom, to make a complaint whenever a Complainant informs a Corporate Member that the complaint has not been dealt with to the Complainant's satisfaction.
- 14.6 During or after the lodgement of the complaint, the Complainant may not be prejudiced by the actions of any Member, such as through the levying of any charges or the withdrawal of any applications for mortgage finance.
- 14.7 A Member must always respond in writing to the Ombudsman, whenever possible, within the period laid down in the Ombudsman Rules after receipt by a Member of a written complaint against that Member referred by the Ombudsman to that Member for response.
- 14.8 A Corporate Member must always maintain a record of written complaints made against that Member and its staff in the form and manner stipulated by the Ombudsman and / or Exco from time to time.

15. **Conflict of Interest**

A Member must fully disclose to a Consumer any actual or potential conflict of interest of which a Member is aware to the extent that such a conflict of interest may affect a Consumer's decision in respect of its mortgage finance application.

16. **Member Dealings with the Association and other Members**

- 16.1 An AMC or MCAA who receives an application for mortgage finance in the course of his or her employment with a Corporate Member may only submit such application through such Corporate Member, save with the prior written permission from and / or in terms of a written contract with such Corporate Member. Any Member who accepts a mortgage finance application from an employee of another Corporate Member without that Corporate Member's prior written consent shall be in breach of this Code.
- 16.2 A Member must always conduct that Member's Mortgage Origination business in accordance with the Constitution, this Code of Practice, the Disciplinary Rules, the IDRPs, the Ombudsman Rules and any other policies, rules or procedures made by the Association and / or the Exco and / or the Ombudsman from time to time, and must at all times act in a professional and courteous manner towards Consumers and fellow Members, and refrain from any conduct that may embarrass, impugn or discredit the Association or bring the Association, its Members or the Industry in general into disrepute.
- 16.3 A Corporate Member may only:
- 16.3.1 employ MCAA's and / or AMC's in order to interact with Consumers for the purposes of Mortgage Origination; and

16.3.2 other than normal Industry related interactions with Consumers, conduct its Mortgage Origination business with other Members and/or Credit Providers.