

REPUBLIC OF SOUTH AFRICA

HOUSING CONSUMER PROTECTION BILL

*(As amended by the Portfolio Committee on Human Settlements (National Assembly
(proposed section 76)); explanatory summary of Bill and prior notice of its introduction
published in Government Gazette No. 44555 of 11 May 2021)
(The English text is the official text of the Bill.)*

(MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION)

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BILL

To provide for the protection of housing consumers; to provide for the continuance of the National Home Builders Registration Council as the National Home Building Regulatory Council; to provide for the registration of homebuilders; to provide for the enrolment of homes in order to be covered by the home warranty fund; to provide for the regulation of the conduct of homebuilders; to provide for the continuance of the home warranty fund; to provide for claims against the fund; to provide for the funds of the Council and for the management of those funds; to provide for procurement and contractual matters in relation to the building of a home; to provide for the enforcement of this Act; to repeal the Housing Consumers Protection Measures Act, 1998; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:

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CHAPTER I

INTERPRETATION

- Definitions** 25
- 1.** In this Act, unless the context indicates otherwise—
- “build”**, in relation to the structural integrity of a home, means the—
- (a) establishment;
 - (b) installation;
 - (c) repair; 30
 - (d) renovation;
 - (e) alteration; or
 - (f) extension,
- of a home, and **“construction”** and **“construct”** have the same meaning;
- “certification body”** means a legal person approved by the Council to provide certification services in respect of the design or compliance with the Home Building Manual through its certifier; 35
- “certifier”** means an employee or agent of a certification body appointed by the homebuilder to issue certificates in relation to a design or compliance with the Home Building Manual, but excludes an inspector appointed in terms section 69; 40
- “Chief Executive Officer”** means the Chief Executive Officer appointed in terms of section 15;
- “Chief Financial Officer”** means the Chief Financial Officer appointed in terms of section 15;
- “Companies Act”** means the Companies Act, 2008 (Act No. 71 of 2008); 45
- “competent person”** means a person who—
- (a) is qualified by virtue of his or her education, training, experience and contextual knowledge to make a determination regarding the performance of a building or part thereof in relation to a functional aspect; and
 - (b) where applicable, is approved and appointed in terms of the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977); 50
- “Council”** means the juristic person referred to in section 4, which comprises of the administration responsible for the management of the affairs and the execution of the operations of the Council, the implementation of the provisions of this Act, and which acts under the strategic direction of the Board; 55

- “**day**” means a calendar day for purposes of Chapter V, Part 2 and in all other instances day means a business day, excluding the period from 16 December of any year to 15 January of the following year, both days inclusive, Saturday, Sunday and a Public Holiday;
- “**developer**” means a person or organ of state who initiates or executes, or both initiates and executes, a project with the aim to provide one or more homes to housing consumers, including but not limited to— 5
- (a) any other delivery agent as defined in section 1 of the Social Housing Act;
 - (b) a social housing institution defined in section 1 of the Social Housing Act; or
 - (c) any agent acting on behalf of that person, organ of state, other delivery agent or social housing institution; 10
- “**funds advisory committee**” means the funds advisory committee established in terms of section 38(2)(b);
- “**head of department**” means the head of department responsible for human settlements in a province; 15
- “**home**” means a permanent structure intended to provide protection against the natural elements and which is suitable to be occupied for residential purposes or partially for residential purposes by the housing consumer or leased out by any person, and includes—
- (a) a structure to be occupied for residential purposes as contemplated in the definition of “social housing” as contained in section 1 of the Social Housing Act; 20
 - (b) a residential section registered in terms of the Sectional Titles Act, 1986 (Act No. 95 of 1986);
 - (c) a unit as contemplated in the Housing Development Schemes for Retired Persons Act, 1988 (Act No. 65 of 1988); 25
 - (d) a home forming part of a housing programme initiated by an organ of state;
 - (e) the private drainage system from the home up to the municipal connection or up to and including a conservancy or septic tank;
 - (f) water services in relation to a home, excluding the supply of water services from the point of supply to the point of discharge at fixtures and appliances; 30
 - (g) any buildings ancillary to a home, including but not limited to storerooms, covered walkways, garages and common facilities;
 - (h) any retaining wall necessary to ensure the structural integrity of the home;
 - (i) any building or wall or swimming pool on common property adjacent to the home, but only if it has the potential to cause a major structural defect to the home; 35
 - (j) homes that are co-owned in terms of the Share Blocks Control Act, 1980 (Act No. 59 of 1980), or the Property Time-Sharing Control Act, 1983 (Act No. 75 of 1983); 40
 - (k) boarding houses; and
 - (l) hostels;
- “**homebuilder**” means a person who—
- (a) builds or undertakes to build a home or to cause a home to be built for any person, including himself or herself; or 45
 - (b) builds a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home,
- irrespective of whether or not that person is registered in terms of this Act;
- “**home building contract**” means an agreement between two or more parties for the construction of a home, whether by prime or subcontract, and includes any form of contract contemplated in section 47; 50
- “**Home Building Manual**” means the Home Building Manual published by the Council in terms of section 85;
- “**home warranty fund**” means the home warranty fund contemplated in section 35(1);
- “**Housing Act**” means the Housing Act, 1997 (Act No. 107 of 1997); 55
- “**housing consumer**” means a person who has acquired, or is in the process of acquiring, a home for the purposes of owning that home, including but not limited to—
- (a) a co-owner of a home;
 - (b) the owner of a section registered in terms of the Sectional Titles Act, 1986; 60
 - (c) the holder of a housing interest as defined in section 1 of the Housing Development Schemes for Retired Persons Act, 1988;

- (d) the beneficiary in terms of a subsidy housing programme contemplated in the National Housing Code; and
- (e) the beneficiary of a housing development as contemplated in section 1 of the Social Housing Act,
- including that person's successor in title; 5
- “Housing Consumers Protection Measures Act”** means the Housing Consumers Protection measures Act, 1998 (Act No. 95 of 1998);
- “informal settlement”** means an area where primarily non-permanent structures have been erected for residential purposes, including but not limited to—
- (a) an unplanned settlement not having been upgraded in terms of the Less Formal Township Establishment Act, 1991 (Act No. 113 of 1991), prior to its repeal by section 59 of the Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013); or
- (b) a squatter settlement;
- “inspector”** means an inspector appointed in terms of section 69; 15
- “major structural defect”** means a defect as determined in the Home Building Manual which gives rise, or 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, and a structural defect has a corresponding meaning; 20
- “MEC”** means a member of the Executive Council of a province responsible for human settlements;
- “Minister”** means the Minister responsible for human settlements;
- “MMC”** means a member of the Municipal Council of a municipality responsible for human settlements; 25
- “municipality”** means a municipality as defined in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);
- “municipal manager”** means a person appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);
- “National Housing Code”** means the National Housing Code referred to in section 4 of the Housing Act, 1997; 30
- “National Regulator for Compulsory Specifications Act”** means the National Regulator for Compulsory Specifications Act, 2008 (Act No. 5 of 2008);
- “organ of state”** means an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996; 35
- “person”**, in addition to the meaning attached to it in section 2 of the Interpretation Act, 1957 (Act No. 33 of 1957), includes a trust as defined in section 1 of the Trust Property Control Act, 1988 (Act No. 57 of 1988);
- “prescribe”** means, in relation to—
- (a) the Minister, prescribe by regulation; or
- (b) the Council, prescribe by rule; 40
- “Promotion of Administrative Justice Act”** means the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
- “Public Finance Management Act”** means the Public Finance Management Act, 1999 (Act No. 1 of 1999); 45
- “social housing”** means housing provided as contemplated in the Social Housing Act;
- “Social Housing Act”** means the Social Housing Act, 2008 (Act No. 16 of 2008);
- “subsidy housing”** means housing projects and programmes contemplated in the National Housing Code or any other programme funded by government;
- “this Act”** includes the regulations, rules, Home Building Manual and any directive issued in terms of this Act; and 50
- “Technical Requirements”** means the Technical Requirements referred to in section 85(1), and technical standards have a corresponding meaning.

Application of Act

2. (1) The provisions of this Act apply to— 55
- (a) the building of a new home; and
- (b) any addition to, alteration, renovation or repair of a home, in so far as such addition, alteration, renovation or repair necessitates the submission of building plans to a municipality in terms of the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977), 60
- whether or not the home is acquired through social housing or subsidy housing.

- (2) This Act does not apply to—
- (a) a dwelling unit that does not have its own bathroom or kitchen;
 - (b) any temporary building as contemplated in the National Building Regulations issued in terms of the National Building Regulations and Building Standards Act, 1977; 5
 - (c) a shack or caravan;
 - (d) any structure forming part of an informal settlement;
 - (e) a hotel; or
 - (f) a motel.
- (3) Notwithstanding the provisions of subsection (1), the Minister must, by notice in 10 the *Gazette*, determine—
- (a) in relation to a category of a home, a date; and
 - (b) in relation to different categories of homes, different dates,
- when the provisions of Chapter IV will apply to any addition to, alteration, renovation or repair of, a home. 15
- (4) Notwithstanding the provisions of subsections (2) and (3), this Act applies to any addition, alteration, renovation or repair of which the purpose is to convert a commercial building or part of a commercial building to a home.
- (5) Notwithstanding the provisions of this Act, the Minister may, after consultation 20 with the Council, in exceptional circumstances—
- (a) on application in the prescribed manner, exempt a person or home from the provisions of this Act; or
 - (b) in the public interest, by notice in the *Gazette*, exempt certain persons or homes belonging to a category or class specified in the notice from the 25 provisions of this Act,
- either generally or subject to such conditions as may be specified.

Application of Public Finance Management Act

3. (1) The Council must prepare and submit budgets, financial statements, audits and annual reports, in accordance with the Public Finance Management Act.
- (2) The powers and duties of the Board and the Council must be exercised subject to 30 the Public Finance Management Act.

CHAPTER II

NATIONAL HOME BUILDING REGULATORY COUNCIL

National Home Building Regulatory Council

4. (1) The National Home Builders Registration Council established in terms of 35 section 2 of the Housing Consumers Protection Measures Act, continues to exist as a juristic person, known as the “National Home Building Regulatory Council”.
- (2) The Board is the accounting authority as contemplated in the Public Finance Management Act.
- (3) The Council must act independently and report in accordance with the Public 40 Finance Management Act.

Objectives

5. (1) The objectives of the Council are to—
- (a) represent the interests of all housing consumers;
 - (b) regulate the home building industry; 45
 - (c) ensure structural quality of homes in the interests of housing consumers and the home building industry;
 - (d) promote housing consumer rights; and
 - (e) provide information relevant to stakeholders in the home building industry.
- (2) The Council must advance the objectives referred to in subsection (1) in respect of 50 the subsidy housing sector.

Composition of Board

6. (1) The affairs of the Council must be overseen by a Board, which must, subject to the provisions of this Act, determine the policy and objectives of the Council and exercise control generally over the exercise of its powers, the performance of its functions and the execution of its duties. 5
- (2) The Board consists of at least seven, but not more than 15 non-executive members, appointed by the Minister in terms of subsection (4).
- (3) The Board must, when viewed collectively, consist of persons who have special knowledge and experience in— 10
- (a) consumer protection;
 - (b) the planning of human settlements;
 - (c) the regulatory and legal environment applicable to this Act;
 - (d) social housing;
 - (e) subsidy housing;
 - (f) town planning; 15
 - (g) home building, the supply of housing goods and services and the role of associated professions, including developers, in the provision of housing;
 - (h) the insurance industry;
 - (i) corporate governance and management; and
 - (j) financial management and management of funds. 20
- (4) The Minister must appoint the members of the Board only after inviting the nomination of persons as candidates through the media and by notice in the *Gazette*, and following a fair selection process.
- (5) The Minister must designate one of the appointed members as chairperson and another as deputy chairperson. 25
- (6) If the chairperson is unable to perform his or her duties in terms of this Act, the deputy chairperson acts as chairperson of the Board, and while the deputy chairperson is thus acting, he or she exercises all the powers and performs all the duties of the chairperson.
- (7) The Chief Executive Officer and the Chief Financial Officer are *ex officio* members 30 of the Board, but may not vote at a Board meeting.
- (8) The Board must perform its functions in accordance with the code of conduct prescribed by the Minister for the Board in terms of section 89(1).

Term of office

7. (1) A member of the Board holds his or her office for a period of three years, and that member may be reappointed at the expiry of his or her term of office, taking into consideration representivity, expertise and previous performance. 35
- (2) A person may not hold office as a member of the Board for more than two consecutive terms.
- (3) One third of the members of the Board must be reappointed, but if it is not possible 40 to do so, a number as close to a third of the members as possible may be so appointed.
- (4) When a vacancy occurs in the ranks of the members of the Board appointed in terms of section 6(4), the Minister must fill the vacancy for the unexpired part of the period for which the member's predecessor was appointed, by the appointment of another person who has special knowledge, skills or expertise similar to that possessed 45 by his or her predecessor, as contemplated in section 6(3).
- (5) Notwithstanding the period of the term of office referred to in subsection (1), any member holds office until the Minister has appointed another member to replace that member after the expiry of his or her term of office, provided that such extended period does not exceed a period of six months after such expiry, within which period the 50 Minister must appoint the replacement.

Disqualifications, vacation and removal from office

8. (1) A person may not be appointed as a member of the Board if he or she—
- (a) is not a resident of the Republic;
 - (b) is an unrehabilitated insolvent; 55
 - (c) is declared by a court to be mentally unfit;
 - (d) is convicted, in the Republic or elsewhere, of any offence involving dishonesty; or

- (e) is removed from a position of trust on account of misconduct that involves dishonesty.
- (2) A member of the Board must vacate his or her office if he or she—
 - (a) becomes subject to any disqualification mentioned in subsection (1);
 - (b) becomes an office-bearer as defined in section 1 of the Independent Commission for the Remuneration of Public Office-Bearers Act, 1997 (Act No. 92 of 1997);
 - (c) tenders his or her resignation as a member to the Minister; or
 - (d) has been absent without the leave of the Board from three consecutive meetings of the Board.
- (3) The Minister may, in writing and after following a fair process, remove a member of the Board from office if he or she—
 - (a) has transgressed the code of conduct contemplated in section 89(1);
 - (b) did not comply with his or her fiduciary duties in terms of section 9;
 - (c) commits an act of financial misconduct as contemplated in the Public Finance Management Act;
 - (d) has been found guilty of violation of any law; or
 - (e) has become unable to perform his or her duties in terms of this Act.

Fiduciary duties and disclosure

- 9.** (1) A member of the Board on appointment must submit to the Minister and the Board a written statement declaring any direct or indirect financial interest, which could reasonably be perceived to compromise the objectivity of that member in the execution of his or her duties as member of the Board.
- (2) A member of the Board may not be present, or take part in, the discussion of or the taking of a decision on any matter before the Board, including a committee or subcommittee of the Board that he or she has been assigned to, in which that member or his or her spouse, partner, close family member, business partner or associate has a direct or indirect financial interest.
- (3) If a member of the Board acquires an interest that could reasonably be perceived to be an interest contemplated in this section, he or she must immediately in writing declare that interest to the Board, and if applicable, to the committee or subcommittee to which he or she has been assigned.
- (4) A member of the Board must at all times exercise utmost good faith, honesty, integrity, care and diligence in performing his or her functions as member of the Board, and in furtherance of this duty, without limiting its scope—
- (a) must take reasonable steps to become informed about the Board, its objectives and functions and the circumstances in which it operates;
 - (b) must take reasonable steps to obtain sufficient information and advice about all matters to be decided by the Board to enable that member to make conscientious and informed decisions;
 - (c) must regularly attend all meetings;
 - (d) must exercise an active and independent discretion in respect of all matters to be decided by the Board;
 - (e) must exercise due diligence in relation to the business, and necessary preparation for and attendance at meetings, of the Board and any committee to which that member is appointed;
 - (f) may not engage in any activity that may undermine the integrity of the Council; and
 - (g) must treat any confidential matters relating to the Council, obtained in his or her capacity as member of the Board, as strictly confidential and not divulge them to anyone without the authority of the Board or as required as part of that person's official functions as member of the Board.
- (5) This section must be interpreted as adding to, and not deviating from, the duties imposed on members of the Board in terms of the Public Finance Management Act.

Remuneration of members of Board and Compliance and Enforcement Committee

- 10.** (1) A member of the Board or the Compliance and Enforcement Committee who is not in the full-time employment of the State, may be paid from the Council's funds the remuneration and allowances as determined by the Minister, in consultation with the Minister of Finance.

(2) A member of the Board or the Compliance and Enforcement Committee who is in the full-time employment of the State may not, in respect of the duties performed by him or her as member in terms of this Act, be paid any remuneration in addition to his or her remuneration as an employee of the State, nor may he or she be paid any allowance in respect of subsistence and transport at a rate exceeding the rate applicable to him or her as such an employee. 5

Meetings of Board

11. (1) The Board—

(a) holds meetings at such times and places as may from time to time be determined by the Board; and 10

(b) must hold a minimum of four meetings annually.

(2) The chairperson or, in his or her absence, the deputy chairperson, presides at every meeting of the Board.

(3) If both the chairperson and the deputy chairperson are absent from a meeting of the Board, the members present must from among their number elect a person to preside at the meeting. 15

(4) The quorum for a meeting of the Board is a majority of all its members.

(5) If a member of the Board in his or her personal capacity, or his or her spouse, partner, close family member, business partner or associate, has a direct or indirect financial interest in any matter to be dealt with at any meeting of the Board, such member— 20

(a) must immediately after the interest has come to his or her attention, disclose that interest to the chairperson;

(b) may not attend that meeting during the consideration of that matter;

(c) may not in any manner take part as a member in the consideration of such matter by the Board; or 25

(d) may not in any manner endeavour to influence the opinion or vote of any other member of the Board in connection with such matter.

(6) The decision of the majority of the members of the Board present at a meeting constitutes a decision of the Board, and in the event of equal votes, the member presiding at that meeting has a casting vote, in addition to his or her deliberative vote. 30

(7) A decision taken by the Board or act performed under the authority of the Board is not invalid merely by reason of an interim vacancy on the Board, or because a person who was not entitled to sit as a member or attend such meeting sat as such member or attended such meeting at the time when the decision was taken or the act was authorised, if the decision was taken or the act was authorised by the requisite majority of the members who were present at the time and who were entitled to sit as members of the Board or attend the meeting. 35

(8) The procedures to be followed at meetings of the Board must be determined by the Board. 40

(9) The Board must cause minutes to be kept of every meeting thereof.

(10) The minutes referred to in subsection (9) must be kept at the office of the Council.

Committees of Board

12. (1) Subject to subsection (2), the Board may from time to time appoint one or more committees that it considers appropriate for the effective functioning of the Board, excluding the Compliance and Enforcement Committee. 45

(2) The Board must—

(a) assign members of the Board to serve on a committee, based on their knowledge and skills;

(b) determine— 50

(i) the terms of reference of a committee;

(ii) the composition of a committee;

(iii) the tenure of members on a committee;

(iv) the reporting mechanisms of a committee; and

(v) the methods and reasons for the removal of a member from a committee. 55

(3) The Board may co-opt any person to a committee to support that committee in relation to his or her technical expertise, and such co-opted person does not have voting powers.

(4) A person co-opted in terms of subsection (3) who is not in the full-time employment of the State, may be paid such remuneration or allowances as the Board may determine.

(5) Unless specifically delegated by the Board, a committee has no decision-making powers and can only make recommendations to the Board. 5

(6) A committee may meet as often as is necessary in order to carry out its functions and may determine its own procedures, subject to the directions of the Board.

Delegation and assignment of functions by Board

13. (1) The Board may—

(a) excluding the powers and duties in relation to the Compliance and Enforcement Committee and subject to subsection (5), delegate any of its powers and assign any of its duties to any member of the Board or any committee established in terms of section 12, to the Chief Executive Officer, the Chief Financial Officer or any employee of the Council; and 10

(b) amend or revoke that delegation or assignment. 15

(2) Notwithstanding a delegation or assignment contemplated in subsection (1), the Board is not divested of the power or relieved of the duty so delegated or assigned.

(3) Any delegation contemplated in subsection (1)—

(a) may be made subject to such conditions as the Board determines; and

(b) must be communicated to the delegate or assignee in writing. 20

(4) The written communication contemplated in subsection (3) must contain full particulars of the matters being delegated or assigned and of the conditions subject to which the powers may be exercised or the duty must be performed.

(5) The Board may not delegate the power—

(a) to make rules as contemplated in section 87; 25

(b) to appoint the Chief Executive Officer or the Chief Financial Officer; and

(c) to decide on the strategic corporate plan of the Council.

(6) The Board may enter into an agreement with any person for the rendering of any specific expertise or service to assist the Board in performing its functions or duties.

Functions of Council 30

14. (1) Subject to section 5, the Council must—

(a) establish and maintain an integrated database, which is able to integrate with the database contemplated in section 6 of the Housing Act, and which consists of—

(i) a register of homebuilders and developers; 35

(ii) a register of enrolment of homes; and

(iii) any other register that the Council considers appropriate;

(b) maintain and administer the fund contemplated in section 35 or 36;

(c) register and deregister homebuilders in accordance with requirements and procedures prescribed in terms of this Act; 40

(d) enrol homes in accordance with the categories prescribed by the Council;

(e) for the purpose of ensuring the structural integrity of a home, enter into agreements generally or specifically with MECs regarding services to be rendered in respect of projects for the construction of homes, the acquisition of which, except in respect of any deposit that may be payable, is financed solely from the proceeds of a State housing subsidy; 45

(f) inspect or ensure the inspection of homes in terms of this Act in the manner prescribed by the Council;

(g) provide training to homebuilders to achieve and maintain satisfactory technical standards in the home building industry; 50

(h) inform housing consumers of their rights and duties in terms of this Act and other matters relevant to the objects of this Act;

(i) provide information to financial institutions, conveyancers, property practitioners, social housing institutions, delivery agents as contemplated in the Social Housing Act, stakeholders in housing development projects as defined in the Housing Act, and any other interested person in order to assist them to comply with their obligations in terms of this Act; 55

(j) determine criteria for the determination of fees as envisaged in section 39, and the differentiation between those fees based on justifiable criteria;

- (k) advise the Minister on any matter referred to the Council by the Minister in respect of the protection of housing consumers or the objectives of this Act;
 - (l) engage in undertakings to promote improved structural quality of homes;
 - (m) engage in undertakings to improve ethical and technical standards in the home building industry; 5
 - (n) prescribe the requirements for—
 - (i) the approval of a certification body; and
 - (ii) the listing of a competent person; and
 - (o) determine the minimum level of indemnity insurance required to be held by a certification body or a competent person in the circumstances contemplated in section 49(1)(b). 10
- (2) The Council may—
- (a) approve a certification scheme which has as its purpose the certification of performance-based methods of construction as determined in the Home Building Manual; 15
 - (b) approve a legal person as a certification body which is authorised to provide certification of a design or compliance with the Home Building Manual through its certifier;
 - (c) through Board approval as contemplated in section 36, and only after consultation with the Minister and the Minister of Finance, establish, maintain 20 and administer different funds for different purposes as contemplated in Part 1 of Chapter V;
 - (d) keep a record of competent persons;
 - (e) acquire, register, deal with and dispose of any trade mark;
 - (f) make recommendations to the Minister in respect of any amendment to this 25 Act;
 - (g) issue directives to a person or group of persons in relation to compliance with this Act; and
 - (h) generally do all things necessary or expedient to achieve its objectives in terms of this Act. 30

Appointment of Chief Executive Officer and Chief Financial Officer

15. (1) The Board must appoint a Chief Executive Officer and a Chief Financial Officer to ensure that the Council meets its objectives.

(2) The Board must invite applications for the positions of Chief Executive Officer and Chief Financial Officer by publishing advertisements in the media. 35

(3) A person appointed as Chief Executive Officer or Chief Financial Officer must have qualifications and experience relevant to the functions of the Council as determined in terms of a job evaluation system approved by the Board.

Conditions of appointment of Chief Executive Officer and Chief Financial Officer

16. (1) The appointment of the Chief Executive Officer and the Chief Financial Officer is subject to the conclusion of an annual performance contract with the Board. 40

(2) The Chief Executive Officer and the Chief Financial Officer are appointed for a term of five years and may be re-appointed for only one additional term of five years.

(3) The Chief Executive Officer and the Chief Financial Officer hold office on terms and conditions determined by the Board. 45

(4) The Chief Executive Officer and the Chief Financial Officer are entitled to a remuneration package determined by the Board.

(5) The Chief Executive Officer and the Chief Financial Officer are accountable to the Board.

Acting Chief Executive Officer and Acting Chief Financial Officer 50

17. (1) The Board may in writing appoint any person who has the appropriate knowledge and skills to act as Chief Executive Officer or Chief Financial Officer when the holder of that office—

- (a) is temporarily unable to perform the duties connected with that office; or
- (b) has vacated or been removed from that office and a new Chief Executive Officer or Chief Financial Officer, as the case may be, has not yet been appointed. 55

(2) An acting Chief Executive Officer or acting Chief Financial Officer may exercise all the powers and must perform all the duties of the Chief Executive Officer or Chief Financial Officer, as the case may be.

(3) The appointment of an acting Chief Executive Officer or acting Chief Financial Officer may not exceed a period of six months. 5

Functions of Chief Executive Officer and Chief Financial Officer

18. (1) The Chief Executive Officer is the head of the administration of the Council.

(2) Subject to directives issued by the Board, the Chief Executive Officer is responsible for the efficient management and administration of the affairs of the Council.

(3) The functions of the Chief Executive Officer and the Chief Financial Officer are as provided for in terms of section 57 of the Public Finance Management Act, and as may be delegated or assigned by the Council in terms of section 56 of that Act. 10

Delegation by Chief Executive Officer and Chief Financial Officer

19. (1) The Chief Executive Officer or the Chief Financial Officer may delegate or assign any of his or her powers and duties to a member of staff of the Council. 15

(2) Any delegation contemplated in subsection (1)—

(a) may be made subject to such conditions as the Board may determine;

(b) must be communicated to the delegatee or assignee in writing; and

(c) may be amended or withdrawn in writing by the Chief Executive Officer or Chief Financial Officer, as the case may be. 20

(3) Notwithstanding a delegation or assignment contemplated in this section, the Chief Executive Officer or the Chief Financial Officer, as the case may be, is not divested of the power or relieved of the duty so delegated or assigned.

Staff of Council

20. The Chief Executive Officer must— 25

(a) subject to the approval of the Board, determine the organogram of the Council's structure; and

(b) appoint the staff,

necessary to enable the Council to perform its functions.

Access to information 30

21. The Council must provide access to any of its records subject to the provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

Disestablishment of National Home Building Regulatory Council

22. (1) The Council may only be disestablished by an Act of Parliament.

(2) The Council may not be declared insolvent in terms of the Insolvency Act, 1936 (Act No. 24 of 1936). 35

CHAPTER III

REGISTRATION OF HOMEBUILDERS

Register of homebuilders and developers

23. (1) The Council must establish and maintain a register of homebuilders and developers as contemplated in section 14(1)(a)(i). 40

(2) The purpose of the register contemplated in subsection (1) is to—

(a) facilitate risk management in the tendering process in relation to the building of a home;

(b) facilitate the assessment of the performance of a homebuilder or a developer in the execution of home building contracts; 45

(c) provide a performance record of homebuilders and developers;

(d) facilitate the regulation of the conduct of homebuilders and developers;

(e) promote minimum standards and best practice in the home building industry;

- (f) store and provide data on the size and distribution of homebuilders and developers;
- (g) reflect the volume and nature of different categories of homebuilders and developers;
- (h) facilitate economic and strategic research in relation to the home building industry; and 5
- (i) reflect any other information that the Council considers necessary in relation to the purpose of this Act.

Contents of register

- 24.** (1) The register contemplated in section 23 must be accessible to the public and must at least reflect— 10
- (a) the identification particulars of a homebuilder or a developer;
 - (b) the registration number of a homebuilder or developer in terms of this Act, and, if applicable, the Companies Act or the Trust Property Control Act, 1988 (Act No. 57 of 1988); 15
 - (c) the period of validity of the registration of a homebuilder or a developer;
 - (d) the grading category of a homebuilder or a developer;
 - (e) any limitation placed on the homebuilder or a developer;
 - (f) any penalty or sanction imposed on a homebuilder or developer in terms of this Act, but that penalty or sanction may not be reflected in relation to a transgression by a homebuilder or developer before any process contemplated in Chapter VII, or any court process, has been finalised; and 20
 - (g) any claim against the home warranty fund for work conducted by the homebuilder or developer or their employee or agent, but no information regarding that claim may be reflected until any adjudication of that claim has been finalised in terms of Chapter VI or a court process. 25
- (2) The reflection of the status of a homebuilder or developer as registered on the register contemplated in section 23 is confirmation of that homebuilder or developer's registration.
- (3) The Council may, on payment of a prescribed fee, issue to a homebuilder or a developer a certificate of proof of registration valid for a period determined by the Council. 30

Homebuilder or developer to be registered

- 25.** (1) A homebuilder or developer who intends to undertake or to commission the building of a home, as the case may be, must in the manner prescribed by the Council apply for registration as a homebuilder or a developer in terms of this Chapter. 35
- (2) A person, developer or an organ of state may not procure the services of a homebuilder or a developer who is not registered in terms of this Chapter.
- (3) A homebuilder or developer may not commence with, allow or instruct the commencement of the building of a home if that homebuilder or developer is not registered in terms of this Chapter. 40
- (4) The registration of a homebuilder or a developer is valid for a period prescribed by the Council.
- (5) A homebuilder or a developer must, on application for registration, pay the registration fee determined by the Council in terms of section 39. 45
- (6) A homebuilder or a developer must on the date of the anniversary of the registration of that homebuilder or developer, pay an annual or renewal fee prescribed by the Council in terms of section 39.

Requirements for registration

- 26.** (1) The Council, in consultation with the Minister, must prescribe a system and the requirements for the registration of homebuilders and developers, which system must provide for the registration of a homebuilder or a developer in a grade that reflects the level of competence of that homebuilder or developer; and for which the criteria are fair and objectively determinable. 50
- (2) The determination of the level of competence referred to in subsection (1) must take into account the financial, technical, construction and management requirements that are necessary to build a home. 55

(3) The Council must evaluate every application for registration of a homebuilder or a developer in accordance with the requirements prescribed by the Council in terms of subsections (1) and (2).

Cancellation, suspension or amendment of homebuilder's or developer's registration or grading status 5

- 27.** (1) Subject to subsection (2), the Council may—
- (a) cancel or suspend the registration of a homebuilder or developer or amend the grading of that homebuilder or developer as contemplated in section 26; or
 - (b) refuse to assess or action any application for registration, including renewal of a registration, of that homebuilder or developer. 10
- (2) The Council may only exercise the powers referred to in subsection (1), if it is satisfied on reasonable grounds that—
- (a) the homebuilder or developer failed to comply with an administrative penalty notice or a compliance notice issued in terms of section 63 or section 64 respectively, and did not— 15
 - (i) make any objection to the Compliance and Enforcement Committee as contemplated in terms of section 63(6) or section 64(6) against that administrative penalty notice or compliance notice; or
 - (ii) institute any review proceedings in terms of the Promotion of Administrative Justice Act within the prescribed time periods for such objection or review; and 20
 - (b) the Council notified the homebuilder or developer in writing of its intention to act in accordance with this section, and did not receive any correspondence from that homebuilder or developer in reply to that notice.
- (3) In the event of any cancellation, suspension or amendment contemplated in this section, the Council must notify the homebuilder or developer in writing of that cancellation, suspension or amendment. 25
- (4) The registration and continued registration of a homebuilder or a developer is subject to the code of conduct contemplated in section 89(2), compliance with this Act and such other conditions that the Minister may prescribe. 30

Liability of unregistered homebuilder or developer

28. Failure by a person to register, or to retain the registration status, as a homebuilder or developer does not affect that person's liability and obligations in terms of this Act.

CHAPTER IV

ENROLMENT 35

Register of enrolments

- 29.** (1) The Council must establish and maintain a register of enrolment of homes, which must be able to interface with any other register established in terms of this Act.
- (2) The purpose of the register contemplated in subsection (1) is to facilitate— 40
- (a) the identification of enrolled homes and informing housing consumers thereof;
 - (b) a cost-effective procurement process in relation to the building of a home;
 - (c) the inspection of enrolled homes;
 - (d) the operation of the home warranty fund and the management of claims from the fund; and 45
 - (e) economic and strategic research in relation to the home building industry.
- (3) The register referred to in subsection (1) must be accessible to the public and, subject to the Promotion of Access to Information Act, 2000, must reflect—
- (a) the geographical location of every enrolled home;
 - (b) the homebuilder who enrolled the home; 50
 - (c) if applicable, the developer in relation to an enrolled home;
 - (d) any finalised claim against the home warranty fund that has been instituted in relation to an enrolled home; and
 - (e) any other information that is reasonably necessary in relation to the purpose of this Act. 55

(4) The reflection of an enrolment on the register of enrolments is proof that the home concerned is enrolled in terms of this Chapter.

Enrolment of home

30. (1) A homebuilder or developer, as the case may be; may not commence with the construction of a home unless that home is enrolled with the Council in the manner and on the conditions prescribed by the Council in consultation with the Minister. 5

(2) In the case where a home is part of a development, the developer concerned must enrol each home within that development.

(3) The Council may, in terms of subsection (1), prescribe different procedures and conditions in relation to different categories of homes. 10

(4) The Council must evaluate the application for enrolment of a home in the manner prescribed by the Council.

(5) The Council may not enrol a home unless—

(a) the Council is satisfied that the conditions contemplated in subsection (1) are met; and 15

(b) the fees payable by a homebuilder or a developer as prescribed by the Council in accordance with section 39 are paid by that homebuilder or developer.

(6) A homebuilder or developer, as the case may be, must notify the Council of the date of commencement of the construction of a home.

(7) When a homebuilder or developer, as the case may be, has complied with the provisions prescribed in terms of subsection (1), the Council must update the register of enrolments indicating the enrolment status of the home concerned. 20

(8) The Council may refuse to enrol a home submitted for enrolment by a homebuilder or a developer if the Council is satisfied that the homebuilder or developer failed to comply with an administrative penalty notice or compliance notice issued in terms of section 63 or 64, as the case may be. 25

(9) Notwithstanding subsection (8), the Council may not refuse to enrol a home in the case where an objection was lodged against that administrative penalty notice or compliance notice in terms of section 63(6) or 64(6), as the case may be.

(10) Where a homebuilder fails to complete the construction of a home within the time period agreed to, the housing consumer must notify the Council, and the Council must update the register of enrolments and the register of homebuilders accordingly, and act in terms of Chapter VII against that homebuilder. 30

(11) Where a home as contemplated in subsection (10) is part of a development, the Council must update the register in relation to the developer concerned and act against that developer in terms of Chapter VII. 35

(12) Where a housing consumer as contemplated in subsection (9) or in the case of a development, the developer concerned, appoints a new homebuilder to complete the home concerned, that new homebuilder must notify the Council of such appointment, and the Council must update the register of homebuilders and the register of enrolments accordingly. 40

(13) The enrolment fee is not refundable after the expiry of the warranty period.

Failure to enrol home

31. (1) A homebuilder or a developer who failed to enrol a home in terms of section 30, must— 45

(a) immediately upon being notified by the Council, or otherwise becoming aware, of such failure, apply for the enrolment of that home as contemplated in section 30; and

(b) where construction has already commenced, immediately stop the construction until given approval by the Council to proceed with such construction. 50

(2) The Council may, before giving the approval contemplated in subsection (1)(b), require the homebuilder or developer to—

(a) satisfy the Council, in the prescribed manner, that the home complies with the Technical Requirements; and

(b) provide a financial guarantee to the amount prescribed by the Council in relation to that home's compliance with the applicable Technical Standards. 55

(3) The homebuilder or developer must, at the request of the Council and prior to the approval of the enrolment of a home by the Council, rectify any defects detected at the homebuilder's or developer's cost.

Duties in respect of subsidy housing project

- 32.** (1) A head of department or municipal manager or his or her delegate may not release any funds in relation to any housing project, unless the requirements of this Act have been met in relation to that project.
- (2) The developer or organ of state in relation to a subsidy or social housing project must, in the manner prescribed by the Council, inform the Council of the appointment of a homebuilder in relation to a subsidy or social housing project, and the Council must update the register of homebuilders accordingly. 5
- (3) In the case where a subsidy is provided to an individual under a subsidy programme, the relevant organ of state must notify the Council of the approval of the application for a subsidy for that individual and must notify that individual of his or her obligation to appoint a registered homebuilder, who must ensure enrolment of that home in terms of this Act. 10
- (4) A MEC or MMC or his or her delegate must ensure, through oversight, compliance with this Act in relation to a subsidy or social housing project. 15

Failure of MEC, MMC, social housing institution or delivery agent to comply with Act

- 33.** (1) Where the Council becomes aware that a MEC or MMC failed to comply with the provisions of this Act in relation to appointing only registered homebuilders, or ensuring that every home forming part of a subsidy housing or social housing project is enrolled, the Council must, subject to subsection (2), report that failure to the Minister. 20
- (2) The Council must, before reporting the failure by the MEC or MMC in terms of this section, notify that MEC or MMC of its intention to report him or her.
- (3) Where a social housing institution or other delivery agent fails to ensure that every home that forms part of a social housing funded project is enrolled, or that only a homebuilder registered in terms of this Act is appointed, the Council must report that failure to the Social Housing Regulatory Authority established in terms of section 7 of the Social Housing Act. 25

CHAPTER V

FINANCIAL MATTERS 30

Part 1

Funds and fees

Funds of Council

- 34.** (1) The funds of the Council consist of—
- (a) any fee, or any interest on a fee, or any penalty on a fee, which becomes due and payable in terms of this Act; 35
 - (b) interest derived from investments;
 - (c) surplus to the warranty fund;
 - (d) money appropriated by Parliament; and
 - (e) any money which may accrue to the Council from any other source. 40
- (2) The Council must pay from its funds any amount required to meet the operational costs of the Council, in accordance with an annual budget for each financial year approved by the Board.
- (3) The funds referred to in subsection (1)(c) may be applied in relation to developmental programmes for the home building industry. 45

Home warranty fund

- 35.** (1) The home warranty fund established in terms of the Housing Consumers Protection Measures Act, continues to exist for the purpose of payment of claims submitted by a housing consumer as contemplated in section 41, where a homebuilder or developer, as the case may be, fails or is unable to meet his or her obligations in terms of this Act. 50

(2) The Council may, in accordance with section 41, pay out of the home warranty fund in respect of a claim contemplated in that section.

Additional fund

36. The Board may, subject to section 14(2)(c), establish any additional fund for the purposes of achieving the objectives of the Council, including for the purpose of underwriting the home warranty fund liability. 5

Bank account

37. Subject to the Public Finance Management Act, the Council must open a bank account with any bank, mutual bank or other similar institution, registered in terms of the Banks Act, 1990 (Act No. 94 of 1990), for the purpose of the Council's funds or any fund contemplated in this Part. 10

Management of funds

38. (1) The Council must take prudent measures—
- (a) to manage the risks pertaining to the home warranty fund and any other fund, including its own funds as contemplated in section 34(1); and 15
 - (b) to ensure that the fees and penalties payable to the Council in terms of this Act are at levels which are sufficient, in aggregate, to meet the financial obligations of the Council, including the home warranty fund.
- (2) The Board must appoint—
- (a) a person who is authorised in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), and who has appropriate experience in respect of— 20
 - (i) investment fund management and appropriate financial and risk management expertise to act as a fund manager;
 - (ii) investment fund administration to act as an investment fund administrator; and 25
 - (iii) investment fund advice to act as an investment fund adviser, in respect of a fund established in terms of this Act; and
 - (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 and risk management expertise. 30
- (3) The Chief Executive Officer and the Chief Financial Officer are *ex officio* members of the funds advisory committee.
- (4) The funds advisory committee advises the Council on the prudent management of its funds and the risks pertaining to it, and makes recommendations to the Council regarding procedures and policies for approval by the Board and implementation by the Council, relating to— 35
- (a) money to be paid into its funds;
 - (b) money to be paid out of its funds generally, and specifically for rectification costs contemplated in section 42(3); 40
 - (c) the administration of its funds;
 - (d) the investment of money in its funds;
 - (e) the management of the risks pertaining to its funds; and
 - (f) the lowering of the enrolment fee as contemplated in subsection (7).
- (5) The funds advisory committee reports quarterly to the Board on the status of the Council's funds and, where necessary, makes recommendations to the Board in respect of the fees and the penalties payable to the Council contemplated in subsection (1). 45
- (6) The funds of the Council may, subject to subsection (4) and the Public Finance Management Act, be invested in accordance with a policy approved by the Board.
- (7) The Minister may, if an actuarial assessment indicates excess free reserves in the funds of the Council, instruct the Council to lower any enrolment fee prescribed by the Council under section 39. 50

Fees

39. (1) Subject to subsections (2) and (3), the Council may determine the following fees by notice in the *Gazette*: 55

- (a) A once-off registration fee to be paid by a homebuilder or developer on application for registration in terms of section 25(5), which fee may be calculated in the manner prescribed by the Council;
 - (b) an annual fee to be paid by the homebuilder or developer as contemplated in section 25(6) for renewal of registration, which may provide for programmes and projects aimed at supporting homebuilders and developers in relation to the acquisition of information, and their development; 5
 - (c) an enrolment fee calculated in the manner prescribed by the Council; and
 - (d) any other fee which the Minister authorises by regulation.
- (2) The Council must, before making the determination contemplated in subsection (1), detail the criteria used to calculate the relevant fee, which criteria and proposed fees must be published by notice in the *Gazette* for comment for a period of 30 days. 10
- (3) The Council may, after evaluation of the comments received, amend the fees published in terms of subsection (2) and, subject to the approval of the Board, publish the final fees by notice in the *Gazette*. 15
- (4) The Council may differentiate between different categories of fees in relation to different categories of homes, and different categories of homebuilders and developers based on grading status.
- (5) The Council may escalate the fees prescribed in terms of subsection (1) in accordance with this section, but if the Council escalates those fees in excess of the most recent publication by Statistics South Africa of the Consumer Price Index, the Council must obtain the approval of the Minister, prior to the publication of the notice contemplated in subsection (1). 20

Part 2

Claims and recourse against home warranty fund 25

Commencement date and duration of warranty

- 40.** (1) The duration of a warranty cover in relation to a structural defect occurring in a home, is the period from the date of commencement of construction of a home, plus a period of five years after the finalisation of the construction of a home, calculated as prescribed by subsection (6), (7) or (8), as the case may be. 30
- (2) The duration of a warranty cover in relation to a roof leak occurring in a home, is the period commencing at the date of commencement of construction of the roof concerned plus a period of two years after the finalisation of the construction of a home, calculated as prescribed by subsection (6), (7) or (8), as the case may be.
- (3) Notwithstanding subsections (1) and (2) the Minister may, by notice in the *Gazette*, extend the period of the warranty cover. 35
- (4) Before the Minister extends the period of the warranty cover as contemplated in subsection (3), the Council must undertake an actuarial assessment to determine whether the home warranty fund is able to provide for the additional period.
- (5) The enrolment fee must, subject to section 39(2), be proportionally adjusted in accordance with the extended period of the warranty cover as contemplated in subsection (3). 40
- (6) Subject to subsection (7), the periods of five and two years, respectively, as contemplated in subsection (1) or (2), are calculated 90 days from the date on which the final inspection of a home was conducted by an inspector appointed in terms of this Act, irrespective of whether that home has been occupied or not. 45
- (7) If the outcome of the final inspection contemplated in subsection (6) identifies an instance of non-compliance with the Technical Requirements, the periods contemplated in that subsection are calculated 90 days from the date on which the inspector has certified compliance with the Technical Requirements. 50
- (8) In the event that a final inspection referred to in subsection (6) is not performed due to an omission on the part of the Council or its inspector, the commencement date of the warranty is deemed to be 90 days after the housing consumer has been granted the right of occupation, irrespective of whether or not the housing consumer occupies that home. 55

Claims and limitations

41. (1) The Council is not liable to pay out of the home warranty fund in respect of any claim contemplated in section 42(1) in relation to a home that is not enrolled in terms of this Act.

(2) In the case of a dispute being declared or a claim being lodged against the home warranty fund in terms of subsection (3), the homebuilder or the developer concerned is liable to rectify that home in accordance with any finding in terms of Chapter VII or the finding of an adjudicator as contemplated in Part 3 of Chapter VI. 5

(3) A housing consumer may institute a claim against the home warranty fund where — 10

(a) there is a major structural defect, or a roof leak, that is attributable to non-compliance with the Technical Requirements; and

(b) the homebuilder or the developer is unable, or fails to rectify a structural defect within the period prescribed by the Council, or if the homebuilder or developer no longer exists or cannot be traced. 15

(4) The Council must reject a claim contemplated in subsection (3) in the case of that major structural defect or roof leak having been caused by—

(a) wilful acts or wilful omissions of the housing consumer or persons residing in the home;

(b) fire, explosion or damage caused by a third party; 20

(c) lightning storm, flood or earthquake or any other natural occurrence;

(d) inadequate maintenance or abnormal use of the home or the imposition of any load greater than that for which the structure of that home was designed, or the use of the home for any purpose other than that for which it was designed;

(e) subsidence or landslip or landslide from any cause not related to non-compliance with the Technical Requirements; 25

(f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds or the impact of aircraft or other aerial devices or articles dropped or falling therefrom;

(g) destruction of or damage to a home or any loss of expense arising therefrom, or any liability of whatsoever nature related to ionising radiations or contamination by radioactivity from whatever cause or from nuclear weapons material; 30

(h) war, invasion, act of a foreign enemy, hostilities (whether declared or not), civil war, revolution, rebellion, insurrection or military or usurped power, strike, riot or civil commotion; 35

(i) loss or damage to any finishes unless they must be repaired or replaced due to a major structural defect in the residential structure;

(j) anything which is of a maintenance nature which any housing consumer could reasonably be expected to rectify himself or herself; or 40

(k) abuse, failure to undertake reasonable maintenance or abnormal use of that home's private drainage system.

(5) The home warranty fund does not cover consequential damages not related to the structure of a home which are caused by a major structural defect.

(6) A competent person or certification body must attest to the circumstances contemplated in subsection (4), except in the case of the circumstances referred to in subsection (4)(b), (c), and (i). 45

Claims and recourse

42. (1) Subject to subsection (3), the Council pays out of the home warranty fund an amount for rectification of an enrolled home, where a major structural defect or a roof leak has manifested itself within the relevant period contemplated in section 40 in respect of that home. 50

(2) Any payment from the home warranty fund for a major structural defect or roof leak during the construction of a home must be deducted from the amount prescribed by the Minister in terms of section 43, and the balance constitutes the amount of warranty cover for the enrolled home concerned for the remainder of the warranty period. 55

(3) Where a homebuilder or developer in relation to an enrolled home is unable or fails to rectify the structural defect as contemplated in section 41, or such homebuilder or developer no longer exists, the Council may pay out of the home warranty fund the

amount determined in terms of section 43 for the rectification of the home by another homebuilder, on the conditions contemplated in section 43.

(4) Notwithstanding subsection (3), in the case where there are reasonable grounds to believe that the cause underlying the dispute or claim can be attributed to any action or omission by the developer or organ of state concerned, or the certification body or competent person, the Council may hold that developer or organ of state or the certification body or competent person accountable for the rectification, or the cost of rectification, of that home. 5

(5) The Council may—

- (a) subject to section 43, reduce any amount that may be expended in terms of subsections (1) or (3); or 10
- (b) in exceptional circumstances prescribed by the Council, instead of having a defect rectified, make payment to the housing consumer in full and final settlement of any claim.

Minimum and maximum amount payable 15

43. The Minister may, by notice in the *Gazette*, determine—

- (a) the minimum and maximum amounts which may be expended under section 42 in respect of any home due to a major structural defect or a roof leak; and
- (b) which costs may, or may not, be included in a claim contemplated in section 42. 20

CHAPTER VI

COMPULSORY INFORMATION AND CONTRACTUAL MATTERS

Part 1

Compulsory information and prohibition

Definition 25

44. For the purposes of this Part, “employer” means a developer, person or organ of state that enters into a home building contract with a homebuilder.

Prohibition on award of home building contract to certain person

45. (1) The Minister must prescribe the information to be required, in addition to the information required in terms of the Public Finance Management Act or the Local Government: Municipal Finance Management Act, (Act No. 56 of 2003), and the legislation as contemplated in section 217 of the Constitution of the Republic of South Africa, 1996, in the case of an invitation for the expression of interest, submission of a tender offer or request for quotations, for the building of a home that forms part of a subsidy or social housing project. 35

(2) An employer may not award a home building contract that forms part of a subsidy or social housing project to a homebuilder who—

- (a) at the date of the commencement of the evaluation of a bid—
 - (i) is not already registered as a homebuilder in terms of this Act; or
 - (ii) in his or her expression of interest, tender offer or quotation relies on experience of home building in relation to a home that was not enrolled in terms of this Act; 40
- (b) was requested previously by the Council to rectify structural defects, and failed to do so, or did not complete such rectification, without having reasonable grounds not to rectify or complete the rectification; 45
- (c) is a principal or employee of the homebuilder or a contractor contemplated in paragraph (b), whom the homebuilder or contractor envisages to engage in performing the work as per the tender specifications; or
- (d) failed to disclose the mandatory information as prescribed by the Minister.

(3) An employer must within 21 days of rejecting an expression of interest, tender offer or quotation in terms of subsection (2), notify the Council in writing of that rejection, including the details of the relevant homebuilder. 50

- (4) A person who was awarded a bid for the construction of a home may not subcontract that construction or part of it to a homebuilder—
- (a) who was requested to rectify a structural defect or roof leak and failed to do so, or did not complete that rectification without reasonable grounds; or
 - (b) who is not registered as a homebuilder in terms of this Act. 5

Prohibition to continue building or effecting payment in certain circumstances

- 46.** (1) Subject to subsection (2), an employer or housing consumer may not instruct continuation of the building process or effect payment where—
- (a) an inspector inspected a home; and
 - (b) that inspection indicates that the building works do not comply with the Technical Requirements to such an extent that the non-compliance may result in a major structural defect or roof leak; or
 - (c) any dispute arising from the outcome of the inspection was not resolved to the satisfaction of the Council, as per the applicable enforcement or dispute resolution procedures contemplated in Chapters VI or VII. 10 15
- (2) The prohibition to effect payment contemplated in subsection (1) does not extend to payments for labour or materials already completed or costs already incurred which—
- (a) do not form part of the dispute; or
 - (b) did not, indirectly or directly, cause the risk to the structural integrity of the home. 20

Part 2

Contractual matters

Definition

- 47.** For the purposes of this Part and Part 3, “contract” includes an agreement between— 25
- (a) a housing consumer and a homebuilder;
 - (b) a housing consumer and a developer;
 - (c) a homebuilder or a housing consumer and a certifying body; or
 - (d) a homebuilder or a housing consumer and a competent person.

Contract 30

- 48.** (1) Where a contract relates to the building of a home and other matters, this Part applies only in so far as it relates to the building of that home.
- (2) The contract between a homebuilder or a developer and a housing consumer for the construction or sale of a home is deemed to include warranties that— 35
- (a) the homebuilder or the developer or both are registered in terms of this Act;
 - (b) the home is enrolled in terms of this Act;
 - (c) the home, depending on whether it has been constructed or is to be constructed—
 - (i) is or must be constructed in a workmanlike manner;
 - (ii) is or must be fit for habitation; and 40
 - (iii) is or must be constructed in accordance with—
 - (aa) the Technical Requirements to the extent applicable to the home at the date of enrolment of the home in terms of this Act; and
 - (bb) the terms, plans and specifications of the contract concluded with the housing consumer as contemplated in subsection (1); 45
 - (d) the homebuilder or the developer, as the case may be, must subject to the limitations and exclusions contemplated in section 41, at his or her own cost and on demand by the housing consumer—
 - (i) rectify major structural defects in the home caused by the non-compliance with the Technical Requirements and occurring within a period which must be set out in the contract, which period may not be less than five years as from the date determined in accordance with section 40(1), (6), (7) or (8), as the case may be; 50
 - (ii) rectify non-compliance with or deviation from the terms, plans and specifications of the contract or any deficiency related to design, 55

- workmanship or material occurring within a period which must be set out in the contract, which period may not be less than 90 days from the date on which the final inspection of a home was conducted by the inspector appointed in terms of this Act;
- (iii) repair roof leaks attributable to workmanship, design or materials occurring within a period which shall be set out in the contract, which period may not be less than 24 months as from the date determined in accordance with section 40(2), (6), (7) or (8), as the case may be. 5
- (3) Where the housing consumer has already moved into a home in relation to which a major structural defect is identified, and has to vacate that home and relocate to other suitable accommodation due to a rectification as contemplated in this section— 10
- (a) the homebuilder or developer, as the case may be, is liable; or
- (b) in the case where the homebuilder and the developer are involved, both are jointly and severally liable, 15
- for the reasonable cost of that relocation and accommodation. 15

Contract with certifying body or competent person

- 49.** (1) Where a homebuilder or housing consumer appoints a certifying body or a competent person as required in terms of the Home Building Manual, it is deemed that the appointment is made on condition that—
- (a) the certifying body or the competent person concerned must apply reasonable skill, care and diligence in the execution of the work; and 20
- (b) the certifying body or competent person has indemnity insurance cover—
- (i) as prescribed by the relevant professional body; or
- (ii) as determined by the Council by notice in the *Gazette*, in the case where— 25
- (aa) the relevant professional or statutory body has not prescribed the nature and amount of indemnity insurance cover; or
- (bb) the competent person is not registered with a professional or statutory body.

Cession of rights 30

50. Any successor in title to the housing consumer has all the rights under this Part exercisable by, or available to, a housing consumer within the period contemplated in section 41.

Prohibition of certain conditional payment provisions

- 51.** (1) Subject to subsection (2), a home building contract may not contain any provision making payment conditional on the payer receiving payment from a third person, but excluding a payment from an institution defined by section 1 of the Home Loan and Mortgage Disclosure Act, 2000 (Act No. 63 of 2000), or established or deemed to have been established in terms of section 3(4)(h) of the Housing Act. 35
- (2) A provision making payment under a contractor's home building contract conditional on the payer receiving payment from a third person is enforceable where— 40
- (a) a court order to begin business rescue proceedings has been made in terms of section 131 of the Companies Act; or
- (b) any person becomes insolvent as contemplated in section 2 of the Insolvency Act, 1936 (Act No. 24 of 1936). 45
- (3) Where a provision is rendered ineffective by subsection (2), the parties may agree on other terms of payment.

Entitlement to progress payments

- 52.** (1) Notwithstanding anything to the contrary in any home building contract, any person who has carried out any construction work, or delivered any goods or services under a home building contract, is entitled to a progress payment in respect of the work carried out and goods or services delivered. 50
- (2) If the home building contract does not provide for regular and reasonable intervals in which progress payments must be made, a homebuilder, supplier or service provider

may submit monthly invoices or tax invoices in relation to construction works completed and goods or services delivered.

(3) The date of liability in respect of progress payments and the process in relation to that payment is as prescribed by the Minister, unless the home building contract provides otherwise. 5

Right to suspend performance for non-payment

53. (1) Where a sum due under a home building contract is not paid in full by the final date for payment, and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his or her obligations under that contract to the party by whom payment ought to have been made, hereafter called “the party in default”. 10

(2) The right to suspend performance may not be exercised without first giving to the party in default at least 10 days’ notice of the intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

(3) The right to suspend performance ceases when the party in default makes payment in full of the amount due. 15

(4) Any period during which performance is suspended in pursuance of the right conferred by this section is disregarded in computing for the purposes of any contractual time limit, the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right. 20

Prohibition and validity of contract

54. Any provision contained in a home building contract that excludes or waives any provision of this Part is void, but the fact that such a provision is void does not render the entire contract invalid.

Part 3

25

Adjudication of contractual disputes

Right to refer disputes to adjudication

55. (1) A party to a contract has the right to refer a dispute arising under that contract for adjudication under a procedure complying with this Part or the procedure prescribed by the Council, and for the purpose of this Part “dispute” includes any difference between the parties in relation to the contract. 30

(2) A dispute must be referred to an adjudicator in accordance with the procedure prescribed by the Council.

(3) A contract must—

- (a) provide for the parties to the contract to appoint an adjudicator agreed on, and failing agreement, an adjudicator determined by the Council; 35
- (b) enable a party to give notice at any time of his or her intention to refer a dispute to adjudication;
- (c) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him or her within seven days of such notice; 40
- (d) require the adjudicator to reach a decision within 31 days of the referral;
- (e) allow the adjudicator to extend the period of 31 days as agreed on by the parties, but that contract may not extend the date of the decision of the adjudicator beyond 45 days after the date of the referral notice; 45
- (f) impose a duty on the adjudicator to act impartially; and
- (g) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(4) For the purpose of adjudication in terms of this Part, the period from 16 December to 15 January, both days inclusive, may not be counted in the time allowed for in this Part.

Adjudication

56. The Minister may prescribe the powers of the adjudicators, the process of adjudication and any other matter necessary in relation to adjudication.

Adjudication at cost of Council

57. The Council may prescribe the conditions, including a monetary threshold, under which an adjudicator may be appointed at the cost of the Council, to make a determination regarding a dispute lodged by a housing consumer. 5

Effect of adjudicator's decision

58. (1) Where an adjudicator has made a decision and either party to the dispute is not satisfied with that decision, that party may, subject to subsection (2), refer that dispute to arbitration as contemplated in the Arbitration Act, 1965 (No. 42 of 1965), within 14 days of the ruling of the adjudicator, or take any other legal action available in law. 10

(2) Notwithstanding any intention to take the decision of the adjudicator on arbitration or to court, the parties must give immediate effect to the adjudicator's decision after the delivery of the decision. 15

CHAPTER VII

ENFORCEMENT AND ALTERNATIVE DISPUTE RESOLUTION

Part I

Enforcement

System for enforcement of Act 20

59. (1) This Act must be enforced in terms of an administrative enforcement procedure and system as prescribed by the Minister.

(2) The Minister must prescribe an enforcement system categorising transgressions of this Act into administrative non-compliance and substantive non-compliance with this Act. 25

(3) The Council may determine the penalty in relation to an administrative non-compliance.

(4) The Compliance and Enforcement Committee imposes an administrative fine as contemplated in section 65, in relation to substantive non-compliance, on request of the Council. 30

Compliance and Enforcement Committee

60. (1) The Compliance and Enforcement Committee is hereby established and must exercise its functions in terms of this Act objectively.

(2) The Minister—

(a) must appoint the members of the Compliance and Enforcement Committee; 35
and

(b) may remove a member, after following a fair process, on account of misconduct, incapacity or incompetence.

(3) The term of office of members of the Compliance and Enforcement Committee may not be less than four years. 40

(4) The Minister may not appoint any person who is an employee of the Council or member of the Board, or who is disqualified from being a member of the Board, as a member of the Compliance and Enforcement Committee.

(5) The Minister must prescribe the terms and conditions of service of, the reporting mechanisms of, and the process for the removal of a member from, the Compliance and Enforcement Committee. 45

(6) The Compliance and Enforcement Committee must consist of at least—

(a) two persons who have at least 10 years' experience in the fields relevant to the subject matter over which the Compliance and Enforcement Committee has jurisdiction in terms of this Act; and 50

(b) a person qualified in law and who has at least 10 years' experience in law.

(7) The person referred to in subsection (6)(b) acts as the chairperson of the Compliance and Enforcement Committee.

Powers and duties of Compliance and Enforcement Committee

- 61.** (1) The Compliance and Enforcement Committee— 5
- (a) must adjudicate objections contemplated in section 64(6) during substantive non-compliance procedures, and section 63(6) during administrative non-compliance procedures, in accordance with the procedures, powers and limitations prescribed by the Minister;
 - (b) may confirm, modify or set aside all or part of a decision of the Council, 10
irrespective of whether such modification is more prejudicial to the person than the original Council decision that forms the subject of the objection concerned;
 - (c) may impose an administrative fine as contemplated in section 65 on the implicated person; 15
 - (d) may in the case where the implicated person is a homebuilder or a developer, determine that the registration of that homebuilder or developer is—
 - (i) suspended for a specified period of time; or
 - (ii) cancelled, subject to the rules prescribed in terms of section 87(1); and
 - (e) may impose any alternative or other appropriate relief in line with the 20
objectives of this Act, depending on the circumstances of the matter.
- (2) Where the Compliance and Enforcement Committee has to adjudicate any factual disputes as part of the objection contemplated in subsection (1), the party who alleges any given fact must prove that fact on a balance of probabilities: Provided that the Council at all times bears the burden of proof to justify its decision objected to, on the 25
bases required by any applicable law.
- (3) Where the Compliance and Enforcement Committee—
- (a) consists of more than three members, and certain members do not agree with the Compliance and Enforcement Committee's finding, the decision of the majority of the members constitutes the decision of the Compliance and 30
Enforcement Committee; or
 - (b) consists of an even number of members and there is a split decision on any matter, the Chairperson has an additional deciding vote.
- (4) A decision of the Compliance and Enforcement Committee is binding, subject to any right to refer that decision for review by a court. 35
- (5) The prohibitions and duties imposed on employees and inspectors in section 70(2) and (3), apply *mutatis mutandis* to any member of the Compliance and Enforcement Committee.

Initiating of complaint into suspected non-compliance

- 62.** (1) Any person, including any organ of state, may file a complaint in writing with 40
the Council in respect of any person or organ of state suspected of not complying with a provision of this Act.
- (2) A complaint may be initiated by the Council, if information is at the Council's disposal which indicates that a person or organ of state may not have complied with any 45
provision of this Act.
- (3) If the Council is of the opinion that a homebuilder does not comply with this Act, the Council may, despite the imposition of any penalty in respect of administrative or substantive non-compliance, and in addition to any other right or remedy that the Council may have, at any time on notice to the homebuilder apply to a court for an 50
order—
- (a) directing that homebuilder to comply with the relevant provision of this Act;
 - (b) stopping the construction of a home; or
 - (c) granting any other relief appropriate in the circumstances.

Administrative non-compliance with Act

- 63.** (1) The following transgressions are administrative non-compliance with this Act: 55
- (a) Failure to register as a homebuilder or a developer as required in terms of this Act;

- (b) failure by a homebuilder or a developer to renew his or her registration as required in terms of this Act;
 - (c) failure to furnish, produce or make available information, documents or things as required in terms of this Act;
 - (d) failure to inform the Council of a change in address or other details as required in terms of this Act; 5
 - (e) failure by any person to pay fees to the Council as required in terms of this Act;
 - (f) failure to apply for the enrolment of a home in terms of this Act;
 - (g) failure to pay the enrolment fee in terms of this Act; 10
 - (h) the building of a home, or allowing or instructing the building of a home, by a homebuilder who is not registered in terms of this Act;
 - (i) failure to comply with any other duty imposed by the Council in terms of this Act, but excluding those instances of non-compliance categorised as substantive non-compliance in terms of section 64; 15
 - (j) suspension of the construction of a home without just cause; or
 - (k) any other non-compliance of a similar nature, as may be prescribed by the Council.
- (2) If the Council is satisfied that there are reasonable grounds for a complaint of administrative non-compliance against a person, it must issue to that person an administrative penalty notice directing the person to do any of the following: 20
- (a) Cease, correct or reverse any action in contravention of this Act before a date determined in the notice;
 - (b) take any action required by this Act on or before a date determined in the notice; 25
 - (c) take any other steps reasonably related to the instance of non-compliance concerned, and designed to rectify its effect on or before a date determined in the notice; or
 - (d) any combination of one or more of the actions referred to in paragraphs (a) to (c). 30
- (3) The Minister must prescribe—
- (a) the penalty amount thresholds that the Council may impose in instances of administrative non-compliance contemplated in this section;
 - (b) the form and contents of the administrative penalty notice;
 - (c) the manner in which the person who is responsible for the administrative non-compliance must be notified by the Council of the administrative penalty notice; 35
 - (d) the manner in which a person who is responsible for the non-compliance referred to in subsection (1), must pay the penalty to the Council;
 - (e) the payment and manner of calculation of the accrual of interest in relation to late payment of fees to the Council; 40
 - (f) the manner of application for remittance of any amount referred to in an administrative penalty notice;
 - (g) the criteria in terms of which the Council may remit, or refuse to remit in whole or in part, any amount referred to in an administrative penalty notice; 45
 - and
 - (h) any other matter ancillary to the process applicable to administrative non-compliance.
- (4) Any amount of penalty prescribed by the Minister in terms of subsection (3) may be— 50
- (a) remitted by the Council on good cause shown and upon application by the affected person;
 - (b) doubled by the Council in the case of a second similar incident of non-compliance by the same person; or
 - (c) tripled by the Council in the case of a third or more, similar incidents of non-compliance by the same person. 55
- (5) Any penalty amount as contemplated in subsections (3) and (4) is due and payable to the Council on the date stated in the administrative penalty notice, which date may not be earlier than 30 days after the implicated person has been served with the notice.
- (6) Any person who is aggrieved by— 60
- (a) an administrative penalty notice; or
 - (b) a decision of the Council on a remittance application as contemplated in subsection (3)(f) and (g),

may in the form and manner prescribed by the Minister, object against such decision to the Compliance and Enforcement Committee.

Substantive non-compliance with Act

- 64.** (1) The following transgressions are substantive non-compliance with this Act:
- (a) Failure by a homebuilder or a developer, as the case may be, to rectify a defect or a roof leak as and when required in terms of this Act; 5
 - (b) failure by a homebuilder or a developer to comply with any technical standard or a Technical Requirement identified by an inspector in an inspection report;
 - (c) failure to comply with the ruling of an adjudicator in terms of Chapter VI;
 - (d) failure by a property practitioner, financial institution or conveyancer, or any person in the employ of a property practitioners, financial institution, or conveyancer, to comply with section 81, 82 or 83, as the case may be; 10
 - (e) failure to comply with the code of conduct referred to in section 89(2);
 - (f) the wilful, or grossly negligent making of a determination by a competent person regarding the structural integrity of a home, which determination causes, or fails to prevent, a major structural defect; or 15
 - (g) any other non-compliance of a similar nature, as prescribed by the Council.
- (2) The Council may decide not to investigate a complaint of substantive non-compliance if—
- (a) the complaint appears to be frivolous or vexatious; 20
 - (b) the complaint does not allege any facts that, if proven, would constitute grounds for a remedy under this Act;
 - (c) the basis for the complaint relates to a contractual dispute referred to in Chapter VI, and that dispute does not relate to a homebuilder's or a developer's failure to comply with the Technical Standards; 25
 - (d) the complaint does not fall within the mandate of Council; or
 - (e) the subject matter of the complaint resides under the auspices of another regulatory body, and is referred to that body by the Council.
- (3) The investigation of a complaint of non-compliance must be performed as prescribed, and an investigation report must be submitted to the Council. 30
- (4) On receipt of the investigation report, and if the Council is satisfied that the implicated person had reasonable opportunity to state his or her case before the conclusion of the investigation into a matter of substantive non-compliance, the Council may issue a compliance notice, in the form, manner and with the content prescribed by the Minister, to any person or persons whom the Council on reasonable grounds believes— 35
- (a) contravened this Act; or
 - (b) assented to, or directly or indirectly benefited from, a contravention of this Act.
- (5) A compliance notice may require the person to whom it is addressed to do any of the following: 40
- (a) Cease, correct or reverse any action in contravention of this Act;
 - (b) take any action required by this Act;
 - (c) take any other action reasonably necessary to rectify the contravention and its effect; or 45
 - (d) any combination of one or more of the actions referred to in paragraphs (a) to (c).
- (6) A person issued with a compliance notice may, in the manner and within the period prescribed by the Minister, object to that notice to the Compliance and Enforcement Committee. 50
- (7) If a person issued with a compliance notice fails to comply with the notice, and did not object to the compliance notice as contemplated in subsection (6), the Council may request the Compliance and Enforcement Committee to impose an administrative fine as contemplated in section 64.

Administrative fine

55

65. (1) The Compliance and Enforcement Committee may impose an administrative fine for failure to comply with a compliance notice as contemplated in section 64.

(2) An administrative fine imposed in terms of this section may not exceed the following values:

- (a) In the event of the implicated person being an organ of state failing to comply with the procurement provisions contained in Part 1 of Chapter VI, 10 per cent of the value of the home building contract or the tender value;
 - (b) in the event of a homebuilder or developer who without reasonable justification fails to rectify a major structural defect or roof leak pursuant to a claim against the home warranty fund to the satisfaction of the Council and the housing consumer, 100 per cent of the aggregate of the payment made from the warranty fund, and any other costs incurred by the Council to ensure that the homebuilder rectifies the defect; or
 - (c) in any other event, a fine not exceeding—
 - (i) 10 per cent of the implicated person's turnover for the period during which that person failed to comply with the compliance notice; or
 - (ii) the maximum fine prescribed by the Minister, whichever is the greater.
- (3) When determining the amount of an appropriate administrative fine, the Compliance and Enforcement Committee must consider the following factors:
- (a) The nature, duration, gravity and extent of the contravention;
 - (b) any loss or damage suffered by any person as a result of the contravention;
 - (c) the behaviour of the respondent;
 - (d) the market value of the home concerned, if applicable, as determined by a professional valuer registered in terms of section 20 of the Property Valuers Profession Act, 2000 (Act No. 47 of 2000), or the building costs associated with the home concerned, or both;
 - (e) the level of profit derived from the instance of non-compliance;
 - (f) the degree to which the implicated person has co-operated with the Council; and
 - (g) the disciplinary record of the respondent with the Council.
- (4) An administrative fine payable in terms of this section must be paid into the bank account of the Council.
- (5) The Minister—
- (a) must prescribe the maximum amount of an administrative fine, which maximum amount must be equal to or more than R1 000 000.00;
 - (b) may prescribe reimbursement to the housing consumer concerned, for any losses he or she has suffered as a result of the non-compliance concerned, which reimbursement may only be paid from administrative fines that have already been paid as contemplated in subsection (4).

Part 2

Alternative dispute resolution

Objection against other decisions of Council

66. Any person or organ of state aggrieved by a decision of the Council, other than a decision in relation to administrative or substantive non-compliance, may, in the form and manner prescribed by the Minister, object against that decision, and that objection must be resolved in accordance with section 67 or 68.

Alternative dispute resolution

- 67.** (1) The Council may appoint an alternative dispute resolution agent, on the conditions and in the manner prescribed by the Minister, to resolve objections contemplated in section 66.
- (2) An alternative dispute resolution agent—
- (a) must adjudicate the objection in terms of the procedures prescribed by the Minister; and
 - (b) may make any order that is just and reasonable in the circumstances.
- (3) The Minister must prescribe—
- (a) procedural aspects relevant to the alternative dispute resolution proceedings;
 - (b) the rights, duties and powers of the parties involved in the alternative dispute resolution proceedings; and
 - (c) any matter ancillary to the alternative dispute resolution proceedings.

Council's authority to settle dispute

- 68.** (1) Notwithstanding the provisions of section 67, the Council may settle any dispute arising from an objection contemplated in section 66.
- (2) The Minister must prescribe—
- (a) any factors that the Council must take into consideration in deciding whether to settle a dispute referred to in subsection (1); 5
 - (b) conditions limiting the Council's authority to settle;
 - (c) the form and manner of settlement;
 - (d) any procedural aspects relating to a settlement; and
 - (e) any matters ancillary to a settlement. 10

Part 3

Appointment and powers of inspectors, and matters ancillary to inspectors

Appointment of inspectors

- 69.** (1) The Council may appoint so many persons as the Council considers necessary, and who are in possession of a qualification as approved by the Council, as inspectors. 15
- (2) The Council must issue an appointment certificate and identification card to an inspector appointed in terms of subsection (1).
- (3) The powers of an inspector appointed in terms of this section may be limited in accordance with his or her qualifications and experience.
- (4) When an inspector performs his or her functions in terms of this section, he or she must— 20
- (a) be in possession of a certificate of appointment or an inspector's identification card issued to him or her in terms of subsection (2);
 - (b) produce that certificate or identification card to any person who— 25
 - (i) is affected by the inspector's actions in terms of this Act; or
 - (ii) requests to see the certificate or identification card.

Duties of inspectors and employees

- 70.** (1) For the purposes of subsection (2), "gratification" has the same meaning as defined in section 1 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004). 30
- (2) An inspector or employee of the Council (including a temporary employee) must, without delay, report to the Council any knowledge or suspicion he or she has, of any person giving or offering gratification to any inspector or employee appointed in terms of this Act, as a reward or incentive for that inspector or employee to do anything he or she should not do, or not to do anything he or she should do, in terms of this Act. 35
- (3) An inspector or employee may not—
- (a) engage in any activity that may undermine the integrity of the Council;
 - (b) engage in any act he or she is not authorised to perform in terms of this Act, concerning a matter in respect of which that inspector or employee has a direct or indirect financial or any similar personal interest; 40
 - (c) make private use of, or profit directly or indirectly from, any confidential information obtained as a result of performing his or her official functions; or
 - (d) divulge any information referred to in paragraph (c) to any third party, except as required as part of that inspector's or employee's official functions in terms of this Act. 45

Powers of inspectors

- 71.** (1) An inspector may, for the purpose of inspecting a home during construction, to determine compliance with this Act and the Home Building Manual, enter and inspect the premises constituting the site of the construction at any reasonable time.
- (2) For the purposes of an investigation, an inspector may— 50
- (a) require—
 - (i) the production by the homebuilder 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; and
- (ii) information from any person concerning any matter related to a home or any part of a home;
- (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
- (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.
- (3) The Council may recover the costs of any examination or test contemplated in subsection (2)(c) from a homebuilder where the homebuilder has failed to comply with the Technical Requirements.
- (4) No person may 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.
- (5) When an inspector performs any function of an inspector regarding inspection of a home in terms of this Act, that inspector—
- (a) has the powers of a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and may exercise the powers conferred on a peace officer by law; and
- (b) has those powers and duties prescribed by the Minister.
- (6) The Council may not prejudice a housing consumer in the assessment of a claim where an inspector wilfully neglects his or her duty as contemplated in section 70, except where the housing consumer wilfully participated in the inspector's conduct.

Part 4

Criminal offences and penalties

Disclosure of confidential information

- 72.** (1) Subject to subsection (2), it is an offence to disclose any personal or confidential information concerning the affairs of any person obtained—
- (a) in carrying out any function in terms of this Act; or
- (b) as a result of initiating a complaint or participating in any proceedings in terms of this Act.
- (2) Subsection (1) does not apply to information disclosed—
- (a) for the purpose of the proper administration or enforcement of this Act; or
- (b) for the purpose of the administration of justice.

Hindering administration of Act

- 73.** It is an offence to hinder, oppose, obstruct or unduly influence any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by or under this Act.

Offences pertaining to functions of Compliance and Enforcement Committee

- 74.** A person commits an offence if that person—
- (a) does anything calculated to improperly influence any member of the Compliance and Enforcement Committee;
- (b) anticipates any finding of the Compliance and Enforcement Committee in a way that is calculated to influence the proceedings or findings; or
- (c) wilfully interrupts the proceedings of the Compliance and Enforcement Committee.

Offences relating to compliance or administrative penalty notice

- 75.** It is an offence to fail to comply with an administrative penalty notice or compliance notice, except where in respect of a compliance notice, the decision of the Compliance and Enforcement Committee to impose an administrative fine in terms of section 65 is taken on review before a competent court.

Offences relating to Chapter VI

76. (1) Any natural or legal person, including an employee of an organ of state but excluding the organ of state itself, commits an offence if that person wilfully or in a grossly negligent manner fails to comply with Part 1 of Chapter VI.

(2) It is an offence to submit false information in relation to any application, or during the course of proceedings, investigation or inspection, or any other matter, in respect of which information is required in terms of this Act. 5

Offence in relation to registration or enrolment

77. (1) It is an offence to purport to be registered as a homebuilder or developer in terms of this Act, while not being registered as such in terms of this Act. 10

(2) It is an offence to purport that a home has been enrolled in terms of this Act, while it is not so enrolled.

Penalties for criminal offences

78. Any person, including any director, trustee, managing member or officer of a homebuilder or developer, who is convicted of an offence in terms of section 72, 73, 74, 75, 76 or 77, is liable to a fine not exceeding R1,5 million or to imprisonment for a period not exceeding 10 years. 15

CHAPTER VIII

MISCELLANEOUS

Vicarious liability and law of agency 20

79. If an agent of a person is liable in terms of this Act for anything done or omitted in the course of that agent's activities on behalf of their principal, that principal is jointly and severally liable with that agent.

Liability of homebuilder or developer

80. In the case where the homebuilder or a developer is a partnership, trust, company or close corporation, a principal of that homebuilder or developer may be held personally liable in terms of this Act, and may be prevented from registering as a homebuilder or enrolling a home in terms of section 25 or 30, as the case may be, by the Council, before he or she has complied with any instruction in terms of this Act, and on the conditions and in the manner prescribed by the Minister. 25
30

Duty of property practitioner

81. (1) A property practitioner must, before becoming involved in the sale of a home in his or her capacity as a property practitioner, take reasonable steps to determine whether that sale relates to a home which has to be enrolled in terms of Chapter IV, or which is covered by the home warranty fund. 35

(2) The property practitioner referred to in subsection (1) must, in the case where the sale relates to a home contemplated in subsection (1), determine whether the home concerned is enrolled in terms of Chapter IV.

(3) If that home has not been enrolled in terms of Chapter IV, the property practitioner concerned must— 40

(a) notify the Council accordingly; and

(b) inform any prospective buyer that the home concerned has not been so enrolled, and of the consequences of that failure.

(4) The Council may report a property practitioner who does not comply with the provisions of this section, to the Property Practitioners Regulatory Authority, established in terms of section 5 of the Property Practitioners Act, 2019 (Act No. 22 of 2019). 45

Duty of financial institution

82.(1) A financial institution—

- (a) as defined by section 1 of the Home Loan and Mortgage Disclosure Act, 2000 (Act No. 63 of 2000); or
- (b) established or deemed to have been established in terms of section 3(4)(h) of the Housing Act, 5

must, before approving a mortgage bond application or financing the building of a home, alterations or additions thereto, determine whether that application relates to a home which has to be enrolled in terms of Chapter IV, or which is covered by the home warranty fund. 10

(2) The institution referred to in subsection (1) must, in the case where the mortgage bond application relates to a home that has to be enrolled in terms of Chapter IV, determine whether the home concerned has been enrolled in terms of Chapter IV.

(3) If the home concerned is not enrolled in terms of Chapter IV, the institution concerned must notify the Council accordingly, and that institution may not process any further payments in terms of the mortgage bond or other financing method before the home concerned is enrolled. 15

(4) The Council may report an institution that does not comply with this section to the Financial Sector Conduct Authority established in terms of section 56 of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or to the Minister in the case of an institution established or deemed to have been established in terms of section 3(4)(h) of the Housing Act. 20

Duty of conveyancer

83. (1) A conveyancer must, before he or she finalises the transfer of a property, determine whether or not that property relates to a home which has to be enrolled in terms of Chapter IV. 25

(2) The conveyancer must, if the property relates to a home contemplated in subsection (1), determine whether the home concerned has been enrolled in terms of this Act.

(3) If that home is not enrolled, the conveyancer must immediately inform the Council accordingly. 30

(4) The Council may report a conveyancer who does not comply with the provisions of this section to the South African Legal Practice Council established by section 4 of the Legal Practice Act, 2014 (Act No. 28 of 2014).

Recovery of fees 35

84. The Council may, in the manner prescribed by the Minister, recover any—

- (a) cost incurred by the Council in terms of this Act, and attributable to an action or omission of a third party;
- (b) fee;
- (c) penalty; 40
- (d) interest;
- (e) fine; or
- (f) other monetary loss to the Council.

Home Building Manual

85. (1) The Council must, by notice in the *Gazette* and subject to the approval of the Board, publish a Home Building Manual containing— 45

- (a) Technical Requirements providing for the structural integrity of a home; and
- (b) guidelines prescribed by the Council on how to comply with the Technical Requirements.

(2) The Technical Requirements referred to in subsection (1) are binding upon, and must be adhered to by homebuilders and developers in the home building process, and may be enforced by the Council in terms of Chapter VII. 50

(3) The Home Building Manual may require a plan and associated documents to be approved by a competent person, and different requirements may be determined in respect of different categories of homes, or different types of building techniques or materials. 55

(4) The Council must give homebuilders reasonable notice of any amendment to, or substitution, of the Home Building Manual.

(5) The Council must submit the Home Building Manual and any subsequent amendment to the National Regulator for Compulsory Specifications, established in terms of section 3 of the National Regulator for Compulsory Specifications Act, 2008 (Act No. 5 of 2008), to ensure consistency with and integration into the regulations made under the National Building Regulations and Building Standards Act, 1977. 5

(6) Except where expressly excluded in this Act or by the Minister in terms of an empowering provision, nothing in this Act exempts any person from any provision of the National Building Regulations and Building Standards Act, 1977. 10

Regulations

86. (1) The Minister may make regulations not inconsistent with this Act with regard to any matter that is required or permitted to be prescribed in terms of this Act, and any other incidental or administrative matter necessary for the proper administration and implementation of this Act. 15

(2) Before the Minister makes any regulation under this section, he or she must publish a draft of the proposed regulation in the *Gazette* together with a notice calling on interested persons to comment, in writing, within a period stated in the notice, which period may not be less than 30 days from the date of publication of the notice.

(3) If the Minister amends the draft regulations as a result of any comment, he or she need not publish those amendments before making the regulations. 20

(4) The Minister may, if circumstances necessitate the immediate publication of a regulation, publish that regulation without consultation as contemplated in subsection (2).

Rules

87. (1) The Board may, on recommendation of the Council, make rules with regard to any matter that is required or permitted to be prescribed in terms of this Act and any other incidental or administrative matter necessary for the proper administration and implementation of this Act, including but not limited to— 25

(a) regulating the conduct of registered homebuilders and developers; 30

(b) prescribing procedures for the registration of homebuilders and developers and the expiry of that registration;

(c) prescribing procedures for enrolment of homes;

(d) regulating the application of Technical Requirements to homes financed by a State housing subsidy; 35

(e) prescribing procedures for the consideration of applications for assistance by housing consumers from a fund or funds of the Council;

(f) prescribing a code of conduct;

(g) prescribing the conditions on which a homebuilder whose registration was cancelled in terms of this Act, may re-register in terms of Chapter III; 40

(h) prescribing grading categories and criteria in respect of homebuilders with a view to encourage good building practice and discourage bad building practice;

(i) prescribing the manner of service of notices or any documents required to be served in terms of this Act; and 45

(j) prescribing any matter which is necessary or desirable to be prescribed by the Board, in order to achieve the objectives of this Act.

(2) Before the Board makes any rules under this section, it must publish a draft of the proposed rules in the *Gazette* together with a notice inviting interested persons to comment, in writing, within a period stated in the notice, which period may not be less than 30 days from the date of publication of the notice. 50

(3) If the Board amends the draft rules because of any comment, it need not publish those amendments before making the rules.

(4) The Board may, if circumstances necessitate the immediate publication of a rule, publish that rule without consultation as contemplated in subsection (2). 55

Liability of member, staff, accredited representative, expert and adviser of Council

88. A member of the Council, member of staff, an accredited representative, expert or adviser to the Council is not personally liable by virtue of any report, finding made or expressed in good faith in terms of this Act.

Code of conduct 5

89. (1) The Minister must, by notice in the *Gazette*, publish a code of conduct for members of the Board.

(2) The Council must, by notice in the *Gazette*, publish a code of conduct for homebuilders and developers and may publish a code of conduct for other role-players within the home building industry. 10

State bound

90. This Act binds the State.

Repeal of laws

91. The Housing Consumers Protection Measures Act is hereby repealed.

Savings 15

92. Any regulation made in terms of a provision that is repealed under section 91 remains valid to the extent that it is consistent with this Act and must be regarded as having been made in terms of this Act.

Transitional provisions

93. (1) Any reference in any document, including a contract, or legislation to the National Homebuilders Registration Council established in terms of section 2 of the Housing Consumers Protection Measures Act, is deemed to be a reference to the National Home Building Regulatory Council referred to in section 4 of this Act. 20

(2) The home warranty fund established in terms of section 15(4) of the Housing Consumers Protection Measures Act, continues to exist. 25

(3) Any claim that has been initiated in terms of the Housing Consumers Protection Measures Act must be finalised in terms of that Act.

(4) Any person employed by or appointed in terms of a contract to provide a service to the National Homebuilders Registration Council continues to be employed or appointed by the National Home Building Regulatory Council. 30

(5) Any provision of this Act that imposes a duty, which did not exist before the commencement of this Act, on a person, applies only in relation to a home that is enrolled in terms of Chapter IV of this Act after the date of commencement of this Act.

(6) Part 1 of Chapter VI of this Act applies only to invitations for tenders or requests for expression of interest, published or communicated by employers after the commencement date of this Act. 35

(7) Any expression of interest, tender offer or quotation submitted in relation to an invitation for an expression of interest or tender offer that was issued before the commencement date of this Act, may be evaluated in accordance with the conditions under which that invitation for an expression of interest or tender offer was requested. 40

(8) Parts 2 and 3 of Chapter VI of this Act apply only to a home building contract entered into after the commencement of this Act, and any payment or dispute resolution in terms of those contracts entered into before that date of commencement of this Act, must be made or settled in terms of the contracts.

(9) A homebuilder that undertakes repairs, alterations and additions to a home where the construction thereof commences after the commencement date of this Act, must be registered as a homebuilder. 45

(10) Any transgression of this Act that is committed before the date of commencement of this Act must be investigated and the disputes arising therefrom must be resolved in terms of the Housing Consumers Protection Measures Act, and for that purpose, the Disciplinary Committee established in terms of that Act continues to exist. 50

(11) Anything done or any permission granted or restriction imposed in terms of the Housing Consumers Protection Measures Act, is deemed to have been done, granted or restricted in terms of this Act.

(12) The members of the Council established in terms of section 2 of the Housing Consumers Protection Measures Act, continue to act as such after the commencement of this Act, until the date on which the Minister has appointed the members to the Board in terms of section 6 of this Act. 5

(13) The Minister must appoint the first Board in terms of this Act within six months after the commencement of this Act.

(14) The Council may lift the suspension of a homebuilder whose registration was suspended before the commencement of this Act in terms of the Housing Consumers Protection Measures Act, if the lifting of the suspension does not affect the housing consumer concerned adversely. 10

(15) The Council is not liable for any loss or damage suffered by a homebuilder or a developer as a result of the suspension contemplated in subsection 14. 15

Short title and commencement

94. (1) This Act is called the Housing Consumer Protection Act, 2021.

(2) This Act commences on a date determined by the Minister by notice in the *Gazette*, and different dates may be determined in relation to different sections of this Act. 20

(3) Notwithstanding subsection (2), the Minister may relax any provision of this Act for a period not exceeding two years, with a view to the equitable implementation of this Act.

MEMORANDUM ON THE OBJECTS OF THE HOUSING CONSUMER PROTECTION BILL, 2021

1. PURPOSE OF BILL

- 1.1 The Housing Consumer Protection Bill, 2021 (“the Bill“), seeks to repeal the Housing Consumers Protection Measures Act, 1998 (Act No. 95 of 1998) (“the Act”).
- 1.2 The Act came into effect on 4 June 1999 and has been amended at least three times by the Housing Consumers Protection Measures Amendment Act, 1999 (Act No. 27 of 1999), the Housing Amendment Act, 2001 (Act No. 4 of 2001), and the Housing Consumers Protection Measures Amendment Act, 2007 (Act No. 17 of 2007), respectively. The Department of Human Settlements and the National Home Builders Registration Council (“the Council”), have since identified certain challenges with key provisions of the Act, which impact negatively on the efficient execution of the Council’s mandate, as requiring review.
- 1.3 To this end, the Bill seeks to ensure adequate protection of housing consumers and effective regulation of the home building industry by, *inter alia*, strengthening the regulatory mechanisms, strengthening the protection of housing consumers, introducing effective enforcement mechanisms and prescribing appropriate penalties or sanctions to deter non-compliance by homebuilders.
- 1.4 In addition, the Bill seeks to address the economic transformation of the industry through the introduction of provisions relating to the warranty fund surplus which may be utilised towards developmental programmes for the homebuilding industry.
- 1.5 The Bill seeks to create an enabling environment for new entrants into the home building industry through the introduction of contractual provisions that ensure their sustainability in the market.
- 1.6 The Bill further seeks to align and create synergy with other relevant pieces of legislation such as the Public Finance Management Act, 1999 (Act No. 1 of 1999), and the Promotion of Administrative Justice Act, 2000 (Act No. 2 of 2000).

2. SUMMARY OF PROVISIONS OF BILL

- 2.1 Chapter I of the Bill deals with definitions, application of the Act and application of the Public Finance Management Act to the Council.
- 2.2 The Bill makes provision for, *inter alia*, the definition of “build“ to expand the protection afforded housing consumers by including repairs, renovations, alterations and additions to an existing home under the Council’s regulatory regime.
- 2.3 The scope of application of the legislation is extended to include not only builders who undertake home building as a business, but also owner-builders. Owner-builders are included in the definition of a “homebuilder“ and are required to register with the Council.
- 2.4 Chapter II of the Bill seeks to provide for the continuation of the Council, established in terms of section 2 of the Act, as a juristic person to be known as the National Home Building Regulatory Council. It further seeks to provide for the objectives of the Council, governance and structures of the Council.
- 2.5 Chapter III of the Bill seeks to provide for the registration of homebuilders and developers, the establishment of a register of homebuilders, the

requirements for registration, suspension of registration, grading of homebuilders and liability of an unregistered homebuilder or developer.

- 2.6 Chapter IV of the Bill seeks to provide for the establishment of a register of enrolments, the enrolment of a home prior to the commencement of its construction by a homebuilder, consequences for failure to enroll a home, duties in respect of a subsidy housing project and the consequences of a failure by a Member of an Executive Council or Member of Mayoral Committee, responsible for human settlements, a Social Housing Institution or a subsidy housing delivery agent to comply with the provisions of the Act.
- 2.7 Chapter V of the Bill seeks to provide for the funds of the Council, the home warranty fund, additional funding through monies appropriated by Parliament as the Council's regulatory mandate is a public function, management of funds, the fees of the Council, commencement and duration of the warranty, the maximum and minimum amount payable from the warranty fund, claims and limitations.
- 2.8 Chapter VI of the Bill seeks to prohibit the procurement of services to build a home, which forms part of the subsidy housing project, from a homebuilder who is not registered with the Council, relies on a home that was not enrolled with the Council in his tender submission, who previously failed to rectify or complete the rectification of structural defects, as directed by the Council, without reasonable grounds, or who failed to disclose any information prescribed by the Minister of Human Settlements ("the Minister").
- 2.9 Chapter VII of the Bill seeks to provide for the enforcement of the provisions of the Bill, once enacted. It also seeks to provide for the appointment and duties of inspectors, the establishment and powers of the Compliance and Enforcement Committee, matters relating to administrative and substantive non-compliance and penalties relating thereto. The chapter further seeks to provide for alternative dispute resolution, criminal offences and sanctions.
- 2.10 Chapter VIII of the Bill seeks to provide for various matters including the Home Building Manual, the making of rules by the Council and of regulations by the Minister, the recovery of fees, vicarious liability, the personal liability of the members, directors, trustees of a homebuilder, duties of estate agents, financial institutions, conveyancers, the codes of conduct for Council members, homebuilders, developers and other industry role players. This Chapter also deals with transitional matters.
- 2.11 Economic, employment and infrastructure development
- 2.11.1 As noted above, the Bill seeks to provide for the warranty fund surplus to be utilised towards transformative human settlements developmental programmes which facilitate growth, skills development and economic transformation in the home building industry.
- 2.11.2 The Bill seeks to provide emerging homebuilders greater access and protection through equitable registration requirements, a grading system, the regulation of certain contractual matters and continuous development and training. The proposed provisions covering the contractual matters between homebuilders, developers and employers are meant to contribute towards the sustainability of emerging homebuilders and the growth of the home building industry.

2.12 Socio-economic Impact Assessment

A socio-economic impact assessment (SEIAS) was conducted on the Bill by the Department together with the Department of Planning, Monitoring and Evaluation and the Department was granted permission to proceed with the Bill.

3. DEPARTMENT/BODIES/PERSONS CONSULTED

- 3.1 The Bill was developed in close consultation with the Council and has undergone intensive pre-parliamentary consultation processes with both internal and external stakeholders to ensure transparency and involvement of key stakeholders at an early stage of the legislative process.
- 3.2 The following industry stakeholders were consulted, through road shows at the initial stages of drafting the Bill, namely: the Banking Association of South Africa (BASA), the Council for Built Environment (CBE), the Cement and Concrete Institute (CCI), the Construction Industry Development Board (CIDB), the Concrete Manufacturers Association, Western Cape (CMA/WC), the Council for Scientific and Industrial Research (CSIR), the Chief Registrar of Deeds (DEEDS), the Engineering Council of South Africa (ECSA), the Housing Development Agency (HDA), the Industry Advisory Committee to the NHBRC (IAC), the Institute of Timber (IoT), KHUTHAZA, the Law Society of South Africa (LSSA), the Masters Builders Association (MBA), in various provinces, the National Black Contractors and Allied Trade (NBCAT), the National Consumer Forum (NCF), the National Regulator for Compulsory Specifications (NRCS), Rabie Property (RABIE), the South African Bureau of Standards (SABS), the South African Council for Quantity Surveyors (SACQS), the South African Institute for Architects (SAIA), the South African Institute for Consulting Engineers (SAICE), the South African Property Owners Association (SAPOA), the South African Wood Preservers Association (SAWPA), the Social Housing Regulatory Authority (SHRA) and the Estate Agency Affairs Board (EAAB).

4. FINANCIAL IMPLICATIONS FOR STATE

- 4.1 The Department will incur the costs for the publication of the Bill for public comments in the Government Gazette, information sessions, translations and other incidental costs. The said costs will be defrayed from the Department's budget.
- 4.2 The Council will continue to fund its affairs and mandate from the revenue generated from the registration fees, annual renewal fees and enrolment fees. In addition, the Bill makes provision for additional funding of the Council to be received from monies appropriated by Parliament.

5. IMPLICATIONS FOR PROVINCES

The Bill should be dealt with in terms of the procedure stipulated by the provisions of section 76 of the Constitution as the provinces and the national Government have concurrent jurisdiction in the matters that the Bill is seeking to address. Therefore, the provinces will be consulted during the processing of the Bill.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Human Settlements are of the opinion that the Bill should be dealt with in terms of the procedure prescribed by the provisions of section 76 of the Constitution since it falls within the functional areas listed in Schedule 4 to the Constitution, namely "consumer protection", "housing" and "building regulations".
- 6.2 The principles in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) (the "*Tongoane case*"), are important when determining if a Bill ought to be tagged as either a section 75 or 76 Bill. The test laid down in that case for determining the procedure to be followed in enacting a Bill is whether the provisions of the Bill fall within a functional area listed in Schedule 4 or, in substantial measure, affect the interests of the provinces.

- 6.3 The tagging of the Bill requires firstly, considering all the provisions of the Bill and determining whether they substantially impact the interests of the provinces. Thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial must be carried out. The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them.
- 6.4 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not directly affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities and does not pertain to any matter referred to in section 154(2) of the Constitution.

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