FAR REACHING CHANGES: HOUSING CONSUMER PROTECTION BILL 2019

The period for written submissions in respect of this Bill has recently passed and, due to the substantial changes the draft legislation aims to introduce, the legislative committee will have a lot of feedback to consider. A summary of the substantial changes introduced follows in the link below.

The draft Bill can be viewed [here](#).

OVERVIEW

In August 2019, Cabinet approved the publication of the draft Housing Consumer Protection Bill 2019 for public participation and comment. The Bill seeks to repeal the current Housing Consumer Protection Measures Act, 95 of 1998 ('the current Act'). The Department of Human Settlements is in the process of conducting public information sessions in all provinces, as recommended by Cabinet.

The next few paragraphs summarise some of the most important provisions in this Bill. We include comment on the impact of certain provisions that have the (presumably unintended) consequence of imposing substantial new obligations on conveyancers and, to a lesser extent, the Registrar of Deeds.

1. What does the Bill set out to achieve?

The first two aims listed in the Bill coincide with those in the current Act. These are to provide for the protection of housing consumers; and to provide for a regulatory body (previously the 'National Home Builders Registration Council' which will now be named the 'National Home Building Regulatory Council').

The draft Bill sets as additional aims the following, namely to:

- provide for the registration of homebuilders * ;
- provide for the enrolment of homes in order to be covered by the home warranty fund;
- provide for the regulation of the conduct of homebuilders;
- provide for the continuance of the home warranty fund;
- provide for claims against the fund; to provide for the funds of the Council and for the management of those funds;
- provide for procurement and contractual matters in relation to the building of a home;
- provide for the enforcement of this Act;
- repeal the Housing Consumers Protection Measures Act, 1998.

2. The Bill has a much wider reach than before

It is not necessary to refer to all the new and amended definitions, except those that are most important from a property practitioners' point of view.

2.1 'Build' and 'construction'

* The Bill refers to 'homebuilders' as one word. Grammatically speaking it should be two words. In this article we follow the wording used in the Bill.

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The terms ‘build’ and ‘construction’, in relation to the structural integrity of a home, is defined in clause 1 to include the establishment, installation, repair, renovation, alteration and extension of a home. (The current Act has no definition of ‘build’ or ‘construction’.)

Section 2 of the Bill provides further that the Bill, once enacted, will find application when a home is built as well as for ‘any addition to, alteration, renovation or repair of, a home’ *insofar as the activity necessitates the submission of building plans to the local authority*.

2.2 *Which building activities?*

Whilst the current Act in essence requires compliance by those home builders who erect homes for ‘residential or partially residential’ purposes, the draft Bill extends the application of the regulated activity to include:

- a structure for residential purposes;
- a section in a scheme;
- a unit in a retirement scheme (where the Housing Development Schemes for Retired Persons Act applies);
- a home forming part of a housing programme initiated by an organ of the state;
- a private drainage system from home to the municipal connection;
- water services in connection with the home from point of supply to point of discharge at fixtures and appliances;
- any ancillary building including but not limited to storerooms, covered walkways, garages, and common facilities;
- any retaining walls required for structural integrity; and
- any adjacent building or wall on common property that has the potential to damage the home should it for any reason collapse.

This must be read in conjunction with the note at 2.1 above, i.e. building works, whether the erection of a new residential building or any of the listed building types, or the renovation, alteration, repair, etc thereof that *‘necessitate the submission of building plans to the local authority.’*

2.3 *Which builders?*

The Bill further extends beyond the realm of those who carry on the business of homebuilders, this being the main focus of the current Act. In essence, *any* homebuilder – whether a property developer or person who builds a home for himself – who ‘undertakes or commissions’ the building of a home must apply for registration with the renamed Council.

The wording ‘undertakes or commissions’ is problematic. For example, if a home owner ‘commissions’ building work by employing a builder to do renovations for him, does this mean that both the home owner and the builder are required to comply with the provisions of the Bill and register with the Council?

The draft Bill has no exemptions from the requirement to register. In the present Act a homebuilder is understood to be someone who carries on the business of a home builder; or an owner builder, the latter being able to apply for exemption.

Further, taking into account that the definitions of ‘home’ and ‘build’ in the Bill extends much further than in the current Act, many more building activities will now require registration with the Council and compliance with the new provisions.

In terms of clause 28, even unregistered home builders and developers remain accountable in respect of all their liabilities and obligations that the Bill may prescribe.

3. Register

All builders' details will be reflected on a public register which the Council must establish and maintain. This will include, for the first time, grading by including the performance record of homebuilders and developers. If a homebuilder or developer fails to complete a project within the time agreed upon, the consumer may report this to the Council and it could affect the builder's grading. Any penalty or sanction imposed on the builder will also be reflected on the register.

No person or developer may procure the services of a homebuilder or a developer that is not registered with the Council.

4. Warranty fund and risk-based insurance

In clause 35, the draft Bill provides that the existing Fund shall remain in place. A new provision provides that it is in the discretion of the Board also to establish an additional fund for the purposes of underwriting the existing fund.

The draft Bill also suggests that the renamed Council may establish a non-profit company with a purpose to create mechanisms for risk-based insurance offerings relative to the structural integrity of a home. The Council must demonstrate that there is a need for risk-based insurance offerings in accordance with business practices in order to achieve the goals of the Council that the non-profit company will benefit the industry.

5. Major structural defects, roof leaks and claim time limitations

The definition of a major structural defect remains substantially the same, except that it excludes the authority on the hands of the Minister to limit, qualify or exclude the stretch of the definition, as per the present Act. (Such limitations may still be included in the regulations to be published.)

Repairs to roof leaks attributable to poor workmanship can now be done within two years after the finalisation of the construction of a home as opposed to 12 months of the date of occupation. The time to claim for repairs to major structural defects remains five years, which is calculated from finalisation of construction.

Clause 49(3) states that should a housing consumer detect a major structural defect after occupation of the home, and has to vacate the home and move into suitable alternative accommodation for repairs to take place:

(i) either the homebuilder or developer; or

(ii) in the case where both the homebuilder and the developer are involved, both are jointly and severally

liable for the reasonable cost of that relocation and accommodation.

6. Failure to enrol a home

Clause 31 provides that should a home builder fail to enrol the home (as defined) with the Council, he must forthwith apply for enrolment when notified by the Council. Had the homebuilder already commenced with construction, the building activities must immediately cease. There is no similar provision in the current Act: Section 14A deals with issues surrounding non-registration and late registration and provides for safety measures and risk mitigation. The new provision could cause severe delays in building projects.

In terms of the current Act, any person who contravenes the Act or permits such contravention shall be guilty of an offence and liable on conviction to a fine not exceeding R25,000 or imprisonment for one year. In terms of the draft Bill, the person responsible will be liable to a fine not exceeding R1,500,000.

7. Prescribed content for contracts

Chapter 6 of the Bill has compulsory clauses that must be part of any contract before construction starts. These include warranties and also prohibitions on payments should the home builder fail to register or enrol the property. The Home Builder may also in terms of the Bill suspend building due to non-payment, a term not found under the Act.

8. Obligations on conveyancers

In section 18 of the current Act, an obligation is imposed on conveyancers attending to bond registrations for 'housing consumers' who are borrowing funds to purchase a home from a home builder (such as plot-and-plan transactions), to ensure that the home builder is registered in terms of the Act and the home enrolled. Failure to comply is an offence (section 21) and the conveyancer can be fined up to R 25,000.

Clause 84 of the Bill stretches further. It requires of conveyancers, both in the registration of a mortgage bond and transfer, to determine whether the home on the property being transferred or mortgaged, is a home which has to be enrolled. If it transpires that it is such a home and it is not enrolled, the conveyancer has an obligation to inform the Council and the Registrar of Deeds accordingly. The Council may report a conveyancer who does not comply with the provisions of this clause to the applicable law council. (Estate agents selling homes are also required to make such determination and advise the Council of a transgression.)

A similar duty is placed on the Registrar of Deeds, before he or she registers a deed, to determine whether that registration relates to a home which has to be enrolled as required in the Bill. No registration is allowed in the case of non-compliance. (In conveyancing practice this will presumably involve a new practice requirement from the Deeds Office to demand that conveyancers either certify regarding enrolment, where required; or that conveyancers provide some certification from the Council to this effect.)

Clause 2 of the Bill confirms that the Bill relates to all building work, additions, alterations or renovations that require the submission of building plans to a local authority. These homes must be enrolled with the Council, because the activity constitutes building work as governed by the Bill.

As it is required of a conveyancer to determine whether (i) a home to be transferred or mortgaged requires enrolment and if so, that this was attended to; (ii) a Registrar may not pass transfer without this confirmation; (iii) the conveyancer will become unable to pass transfer unless he or she has proof or could reliably confirm that approved building plans were obtained for any building work or renovations on the relevant property.

It appears that, inadvertently, the conveyancer will be required to police compliance with the municipal requirement to obtain approved building plans, for the benefit of the local authority and purchaser! This is likely to cause long delays in the registration process. Presumably the requirement to determine whether it is a home that requires enrolment (which would include a home to which renovations and changes were made which required municipal building plan approval) will relate only to such building activities after the Bill comes into operation.

CONCLUSION

The Bill introduces many far-reaching changes to the existing system of consumer protection for housing consumers. Some of these relate to the duties of conveyancers when registering transfers of property or mortgage bonds. The additional duties are quite substantial, and the extent thereof possibly unintended. Changes may still be made once the final version of the Bill is published and we will in due course furnish a further discussion of the provisions.