

REPUBLIC OF SOUTH AFRICA

HOUSING CONSUMERS PROTECTION MEASURES AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory
summary of Bill published in Government Gazette No. 29521 of 21 January 2007)
(The English text is the official text of the Bill)*

(MINISTER OF HOUSING)

[B 6—2007]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

To amend the Housing Consumers Protection Measures Act, 1998, so as to amend certain definitions and to define certain words or expressions; to clarify the scope of application of the said Act; to make provision for late enrolment and non-declared late enrolment; to enable owner builders to apply for exemption; to extend claims to include roof leaks; to make further provision for the use of money in the funds contemplated in the said Act; to extend the offences created under the said Act; and to amend provisions pertaining to the granting of exemptions and to the lodging of appeals; and to provide for matters connected therewith.

Amendment of section 1 of Act 95 of 1998

1. Section 1 of the Housing Consumers Protection Measures Act, 1998 (hereinafter referred to as the principal Act), is hereby amended—
- (a) by the substitution in the definition of “business of a home builder” for paragraph (b) of the following paragraph:
- “(b) to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home;”;
- (b) by the substitution in the definition of “business of a home builder” for paragraph (d) and the words following that paragraph of the following paragraph:
- “(d) to conduct any other activity that may be prescribed by the Minister for the purposes of this definition[,
but does not include—
- (i) the *bona fide* building of a home by any person for occupation by that person;
- (ii) the *bona fide* assistance to a person contemplated in paragraph (i) by a person who is not a registered home builder, in the building of a home; or
- (iii) the sale or disposal by a housing consumer of his or her *bona fide* home];”;
- (c) by the substitution for the definition of “home builder” of the following definition:
- “‘**home builder**’ means—
- (a) a person who carries on the business of a home builder; or
- (b) an owner builder who has not applied for exemption in terms of section 10A;”;

- (d) by the insertion after the definition of “inspector” of the following definition:
 “**‘late enrolment’** means the submission by a home builder of a request for a particular home to be entered into the records of the Council after construction of such home has started in contravention of section 14;”;
- (e) by the insertion after the definition of “Minister” of the following definition: 5
 “**‘National Housing Code’** means—
 (a) the National Housing Code contemplated in section 4 of the Housing Act, 1997 (Act No. 107 of 1997); or
 (b) any other policy or administrative or procedural guidelines issued in terms of the Housing Act, 1997 (Act No. 107 of 1997), which repeals or replaces the National Housing Code;”;
- (f) by the insertion after the definition of “NHBRC Technical Requirements” of the following definition:
 “**‘non-declared late enrolment’** means enrolment where a home builder has not declared the fact that construction of the home had commenced at the time of enrolment and that fact is detected by the Council;”;
- (g) by the insertion after the definition of “organ of state” of the following definitions: 20
 “**‘owner builder’** means—
 (a) a person who builds a home for occupation by himself or herself; or
 (b) a person who is not a registered home builder and who assists a person contemplated in paragraph (a) in the building of his or her home;
‘PHP Project’ means a housing project approved in terms of Chapter 8 of Part 3 of the National Housing Code: Housing Subsidy Scheme: People’s Housing Process;”;
- (h) by the substitution for paragraph (b) of the definition of “prescribe” of the following paragraph: 25
 “(b) the Council, except in section 7(1) or 29(1), prescribe in a circular to all registered home builders;”.
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Insertion of section 1A in Act 95 of 1998

2. The following section is hereby inserted in the principal Act after section 1:

“Application of Act

- 1A.** (1) This Act applies to any home builder. 35
 (2) This Act does not apply to a person who uses his or her own labour to build a home for his or her occupation if the home is part of an approved PHP Project.”.

Amendment of section 7 of Act 95 of 1998, as amended by section 1 of Act 27 of 1999

3. Section 7 of the principal Act is hereby amended— 40
 (a) by the substitution in subsection (1)(a) for subparagraphs (iii) and (iv) of the following subparagraphs, respectively:
 “(iii) prescribing enrolment fees and late enrolment fees, including the method of calculating such fees, in respect of homes or categories of homes and other fees, excluding the fees contemplated in subsection (2); 45
 (iv) prescribing procedures for enrolment, late enrolment, non-declared late enrolment and cancellation of enrolment;”;
- (b) by the insertion in subsection (1)(a) after subparagraph (iv) of the following subparagraph: 50
 “(ivA) governing the application of NHBRC Technical Requirements to homes financed by a state housing subsidy;”;
- (c) by the substitution in subsection (2) for paragraph (e) of the following paragraph: 55
 “(e) the minimum and maximum amounts which may be expended under section 17(1) in respect of any home pursuant to the failure of a home builder to meet his or her obligations in terms of section

13(2)(b)(i), and for the purposes of section 17(1) the Minister may prescribe which costs may be included in a claim and which costs may not be included in a claim.”.

Insertion of section 10A in Act 95 of 1998

4. The following section is hereby inserted in the principal Act after section 10: 5

“Owner builder exemption

10A. An owner builder may, in terms of section 29, apply to the Council for exemption from sections 10 and 14.”.

Amendment of section 14 of Act 95 of 1998, as amended by section 2 of Act 27 of 1999 10

5. Section 14 of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“A home builder shall not commence the construction of a home the acquisition of which[, **except in respect of any deposit payable,**] will be financed solely from the proceeds of a state housing subsidy, unless—”. 15

Insertion of section 14A in Act 95 of 1998

6. The following section is hereby inserted in the principal Act after section 14:

“Late enrolment and non-declared late enrolment

14A. (1) Where a home builder—

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| <p>(a) in contravention of section 14 submits an application for the enrolment of a home to the Council after construction has started; or</p> <p>(b) does not declare the fact that construction has commenced at the time of enrolment and the Council becomes aware of that fact, the Council shall require the home builder to satisfy the Council that the construction undertaken at the time is in accordance with the NHBRC Technical Requirements and shall take prudent measures, contemplated in section 16(1), to manage the risks pertaining to the fund.</p> <p>(2) In the case of late enrolment and non-declared late enrolment, the home builder shall—</p> <p>(a) submit to the Council such documentation and information as may be prescribed in the Council Rules;</p> <p>(b) at the request of the Council, pay a prescribed late enrolment fee in an amount determined by the Council for a special inspection to be undertaken by the Council to enable an inspector to determine compliance with NHBRC Technical Requirements, prior to the acceptance of enrolment;</p> <p>(c) at the request of the Council, and prior to the acceptance of the enrolment, rectify any defects detected during the inspection contemplated in paragraph (b)—</p> <p style="padding-left: 20px;">(i) that may influence the structural integrity of the home; or</p> <p style="padding-left: 20px;">(ii) that constitute non-compliance with the NHBRC Technical Requirements,</p> <p style="padding-left: 20px;">at the home builder’s cost and under the supervision of a competent person appointed by the home builder;</p> <p>(d) at the request of the Council, in circumstances where an inspector is unable to determine compliance with the NHBRC Technical Requirements, for whatever reason, appoint a competent person—</p> <p style="padding-left: 20px;">(i) to inspect the home; and</p> <p style="padding-left: 20px;">(ii) to complete a late enrolment report in the form prescribed in the Council Rules to confirm compliance with the NHBRC Technical Requirements;</p> <p>(e) undertake any work, and pay for any costs resulting from such work, to expose work already done in order to enable the competent person</p> | <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p> <p>50</p> |
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- to address all questions raised in the late enrolment report contemplated in paragraph (d)(ii); and
- (f) at the request of the Council provide any surety, guarantee, indemnity or other security considered reasonable by the Council to satisfy its obligations under section 16(1).
- (3) Notwithstanding the provisions of this section, the Council may prescribe disciplinary measures for late enrolment and non-declared late enrolment which are not inconsistent with this Act.”.

Amendment of section 16 of Act 95 of 1998, as amended by section 3 of Act 27 of 1999

7. Section 16 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) If at any time the funds of the Council appear insufficient to meet anticipated demands, the Council may, on the recommendation of the funds advisory committee and after the procedures referred to in section 17(3), (4) and (5), with the necessary changes required by the context, have been followed, increase the fees payable by home builders and MEC in respect of the enrolment of homes contemplated in [section] sections 14 and 14A.”.

Amendment of section 17 of Act 95 of 1998, as amended by section 4 of Act 27 of 1999

8. Section 17 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) within—

(i) five years of the date of occupation, a major structural defect has manifested itself in respect of a home as a result of non-compliance with the NHBRC Technical Requirements and the home builder has been notified accordingly within that period;

(ii) 12 months of the date of occupation, a roof leak attributable to workmanship, design or materials has manifested itself in respect of a home and the home builder has been notified accordingly within that period;”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) Subject to subsections (3), (4) and (5), if money is not available or is expected not to be available for that purpose due to future demands on the fund, the Council may **[reduce any amount,]—**

(a) subject to section 7(2)(e), reduce any amount that may be expended in terms of subsection (1);

(b) in exceptional circumstances, instead of having a defect rectified, make payment to the housing consumer in full and final settlement of any claim; or

(c) refuse [such claims] any claim.”; and

(c) by the substitution in subsection (5) for paragraph (b) of the following paragraph:

“(b) prescribe increased enrolment fees or late enrolment fees under section 16(6),”.

Amendment of section 21 of Act 95 of 1998

9. Section 21 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) contravenes **[a provision of]** section 10(1) or (2), 13(7), 14(1) or (2), 18(1) or (2) or 19(5),”.

Amendment of section 22 of Act 95 of 1998

10. Section 22 of the principal Act is hereby amended by the addition of the following subsection:

“(5) Notwithstanding subsections (1) to (4), any person who feels aggrieved by any decision that the Council has made in terms of section 29 may, within one month from the date on which such decision was made known by the Council, lodge an appeal in writing with the Minister against the decision, and thereupon the Minister may confirm, set aside or amend such decision of the Council.”. 5

Substitution of section 29 of Act 95 of 1998

11. The following section is hereby substituted for section 29 of the principal Act: 10

“Exemption

29. (1) The [Minister] Council may, [on the recommendation of the Council] on application made to it in the format prescribed by the Council by notice in the *Gazette*, in exceptional circumstances and on the conditions that the Minister may [determine] prescribe in general or in any particular case, exempt a person or a home from any provision of this Act, if the [Minister] Council is satisfied that— 15

- (a) the granting of the exemption would be in the public interest;
- (b) the granting of the exemption would not undermine the objectives of this Act, or the effectiveness of the Council; or 20
- (c) should the exemption not be granted, the effect would be extremely prejudicial to the interests of the applicant and housing consumers.

(2) The Council shall reach and make known a decision within 60 days of receipt of an application made to it.

(3) An exemption contemplated in subsection (1) is not transferable.”. 25

Short title and commencement

12. This Act is called the Housing Consumers Protection Measures Amendment Act, 2007, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE HOUSING CONSUMERS PROTECTION MEASURES AMENDMENT BILL, 2007

1. BACKGROUND

The Bill seeks to rectify certain interpretation and implementation problems which have arisen since the promulgation of the Housing Consumers Protection Measures Act, 1998 (Act No. 95 of 1998) (the Act).

2. OBJECTS OF BILL

2.1 The Bill seeks to amend the definition of “business of a home builder” by—

- (a) inserting the words “leasing” and “renting out” in paragraph (b) of the definition, which deals with acts that are regarded as constituting disposal of a home; and
- (b) deleting the references to “owner builders” in paragraph (d) of the definition.

The wording of paragraph (d) has resulted in so-called “owner builders” being excluded from the application of the Act. In broad terms an owner builder is a person who wishes to build a home for occupation by himself or herself, and who utilises own resources such as labour and financing. In these cases application of the Act would result in an absurd situation where the mentioned person is in fact protected against himself or herself.

Although this fact is recognised, it was never the intention of the legislature to totally exclude such “owner builders” from the application of the Act, but rather that they be entitled to apply for exemption from the provisions of the Act, thereby ensuring that they are indeed owner builders, and not just builders wishing to escape from the letter of the law.

As paragraph (d) of the definition has not achieved this, it is proposed that it be amended and that a substantive definition of and provisions pertaining to “owner builders” be added.

2.2 The definition of “home builder” is to be amended in order to include “owner builders” who have not been exempted in terms of the Act.

2.3 Definitions for “late enrolment” and “non-declared late enrolment” are proposed. Although these issues have in the past been dealt with in regulations issued under the Act, they are not defined in the Act, nor does the Act contain any specific provisions pertaining thereto. The Bill seeks to rectify this situation by the insertion of those definitions, as well as making specific provision for them in the proposed section 14A, dealt with below.

2.4 Definitions for “National Housing Code” and “PHP project” are also proposed as these expressions are contained in substantive provisions proposed by this Bill.

2.5 A new section 1A is proposed in order to provide for the scope of application of the Act.

2.6 Section 7 of the Act, dealing with measures that the Council and the Minister may prescribe, is to be amended in order to include measures pertaining to late enrolment, non-declared late enrolment and fees for late enrolment.

2.7 A new section 10A is proposed to enable “owner builders” to apply for exemption from section 10 (registration of home builders) and section 14 (enrolment) of the Act.

2.8 A new section 14A is proposed to provide for, and to regulate, late enrolment and non-declared late enrolment. The proposed section 14A consists of a revised combination of the existing regulations 14 and 15, as contained in the Council Rules published under Regulation No. R.1408 dated 1 December 1999 (*Gazette* No. 20658).

2.9 Section 17 of the Act is to be amended in order to extend the cover provided by the Council’s warranty scheme to include roof leaks and to enable the Council in exceptional circumstances, instead of having a defect rectified, to make payment to the housing consumer in full and final settlement of a claim.

2.10 The list of contraventions of the Act that constitute offences, as set out in section 21 of the Act, is amended to include the section 18(2) duty of a conveyancer to ensure that a home builder is registered before attending to the registration of a mortgage bond.

2.11 Section 22 of the Act is to be amended by the addition of a new subsection that will enable persons who are aggrieved by any decision made by the Council in terms of section 29 to lodge an appeal with the Minister. This is necessitated by the proposed amendment of section 29 of the Act.

2.12 Section 29 of the Act is to be amended to allow the Council to grant or refuse applications for exemption. In its current form the section empowers the Minister to consider applications for exemption based on recommendations provided by the Council. As this process causes lengthy delays due to the extensive responsibilities of the Minister, and as the technical expertise necessary to properly evaluate applications is not available in the Department of Housing, the responsibility is best vested in the Council. A safeguard in the form of an appeal process is, however, built into section 22 of the Act in order to ensure that exemptions are not refused unreasonably.

3. PERSONS CONSULTED

The Bill was published in the *Gazette* for public comment on 25 August 2006. In addition, invitations to comment were sent to *inter alia* the NHBRC, the Banking Association of SA, all major Banks, the national departments of Justice and Constitutional Development, Agriculture and Land Affairs, Provincial and Local Government, the nine provincial housing departments, SALGA, the Master Builders Association, the Building Industry Federation of SA, COSATU and SAPOA.

Comments were received from nine institutions.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Housing are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution of the Republic of South Africa, 1996, since it falls within functional areas listed in Schedule 4 to the Constitution, namely “Consumer protection” and “Housing”.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.