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The Director General
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Attention: Lisa Masilo and Rose Murray

Dear Mbulelo

PUBLIC SUBMISSION: HOUSING CONSUMER PROTECTION BILL ("BILL") 2019, [NO. 42669]

The Banking Association South Africa ("The Banking Association") would like to thank The Department of Human Settlements (DHS) for the opportunity to comment on the above-mentioned Bill.

As The Banking Association we acknowledge the importance of collaborative efforts between government and key stakeholders towards the creation of sustainable human settlements and will continue to be an active role player in support of this objective.

Who we are

We are an industry body representing all banks registered and operating in South Africa. Currently, The Banking Association has 35 member banks which include both South African and International banks. All licenced banks are members of The Banking Association. Our vision and role, together with our areas of focus, including a list of our members may be found on our website, www.banking.org.za.

As the mandated body for commercial banks we have, over the years, had the opportunity to work very closely with the Department working towards improving access to housing finance and to accelerate housing delivery, for which we thank you.

Context

We have over the years publicly promoted and continue to promote the need for cohesive protection of housing consumers, as we hold the view that this would be in the

interest of the public and the broader housing sector. We also recognize and support the need for the Department of Human Settlements, Water & Sanitation to transform the home building sector and offer improved safeguards to housing consumers. We are therefore inclined towards, and would like to add our 'in principle' support for this Bill.

Comments

Section 2 (2) – Application of Act:

"The Act does not apply to –
Homes that are co-owned in terms of the Share Blocks Control Act or the Property Time-Sharing Control Act".

We do not understand why the Bill would seek to exclude consumers who purchase/part purchase a home in either a Share Block or Time-Sharing Scheme, as this will result in these consumers being vulnerable to defective workmanship, financial/other losses and homes that may not be compliant to the prescripts of this Bill. Such consumers therefore need to also enjoy the protection of this Bill.

Recommendation

Our recommendation is that the Bill should broaden its scope and definition of "home" to make provision for the protection of housing consumers who own/part own homes in Share Block or Time-Sharing Schemes.

Section 14 (e) – Functions of Council:

We fail to understand the need for inclusion of point (*e*), as State subsidy houses are included within the scope of this Bill. There is therefore no need to include a specific listed function of the Council to be engagement with MECs concerning State subsidy homes.

We certainly would not care to see scope for any deviation/relaxation/concessions to any of the prescripts that this Bill imposes, especially as State subsidy schemes provide housing for the most vulnerable of our society.

Recommendation

We recommend that point *(e)* be deleted.

Section 23 – Register of homebuilders and developers:

We hold the view that a register of homebuilders and developers is a much-needed mechanism that would allow for greater transparency and would potentially be an invaluable information platform for potential homeowners/ homeowners seeking to effect alterations/renovations, provided this is easily accessible to the public. The Bill is silent on whether the register would be made available to the public on an electronically based platform.

Recommendation

Our recommendation is that an additional clause be added to this section of the Bill which compels the NHBRC to make available an electronic register for access and use by the public.

Section 26 – Requirements for registration:

Section 26 speaks to the requirements for the registration of homebuilders, but it does not address instances of late registrations.

Recommendation

It is our recommendation that the Bill should clearly address how late registrations will be dealt with, the process that will be followed in considering late registrations and outline the likely circumstance(s) in which a late registration may be considered.

Section 27 (3) – Cancellation, suspension or amendment of homebuilder's or developer's registration or grading:

We acknowledge the importance of a homebuilder or developer being made aware of any cancellation, suspension or amendment of their registration or grading. If however the homebuilder or developer has a financing agreement with a financier, the financier also needs to be duly notified of the cancellation, suspension or amendment of the homebuilder/ developer registration or grading. A mortgage represents a "real right" which financiers possess over the property and so there is legal compulsion on the NHBRC to notify any holder of a "real right" (a mortgagee) that their security may be adversely affected by an action of the Council. Moreover, failure to do so could also result in the financier making subsequent erroneous payments to that homebuilder or developer.

Recommendation

Our recommendation is that this clause be amended to reflect that the NHBRC also be compelled to notify holders of real rights should the NHBRC cancel/suspend/amend registration or the grading of builders/developers.

Section 32 (2) – Duties in respect of a subsidy housing project:

Line 3: We suggest is that the sentence "… *appointment of a home builder*…" should be changed to read "…*appointment of a registered home builder*…" By adding in the word registered it makes explicit what is complicit, and thus ensures that only builders registered with the NHBRC may be used for State subsidy projects.

Recommendation

As per the above comments.

Section 40 – Fees:

It is our understanding that the Bill will promote the differentiated grading of builders/developers. It follows that there should be scope for differentiated fees for different grades of builder/developer to be charged.

Recommendation

We recommend that section 40, clause (4) be amended to read "… in relation to different categories of homes *and the grading of a builder/developer*."

Section 42(4) (j) – Claims and Limitations:

This clause refers to anything which is of a "*petty"* nature being rejected by the Council. There is no definition for what is meant by the word "*petty*" within the Bill and so this introduces ambiguity unless the Bill clearly defines what is meant by usage of this word i.e. what the Council may deem to be of a "*petty*" nature, may be considered as being material by a home owner/housing consumer.

Recommendation

Either this clause should be deleted, or the Bill needs to define what is meant by the word "*petty"* within the "*Definitions"* section of the Bill.

Section 43 (2) - Claims and Recourse:

We deem Clause 43. (2) to be problematic. The Bill is styled "Housing Consumer Protection Bill". One needs to therefore question why the Council should be allowed to deduct any payment from a structural defect or roof leakage from the amount prescribed by the Minister in terms of section 46 if a repeat structural defect/roof leakage occurs. The Council plays an oversight role in the appointment of a builder to repair the initial and repeat structural defect/roof leakage and if **their** appointed builder repairs the defect in a defective manner and if the cost of again remedying this exceeds the amount prescribed by the Minister, this should be for the cost of the Council, failing which the consumer would incur financial losses through no fault of their own.

Recommendation

We recommend that this clause be deleted.

Section 43 (5) (b) - Claims and Recourse:

Similarly, we also deem clause (5) *(b)* to be problematic. We believe that the Council should not have the option of making a payment to the housing consumer in full and final settlement of any claim instead of repairing the structural defect/roof leakage. Ultimately the homeowner will be faced with a defective home where the cash payment will in all probability be insufficient to repair this defect (otherwise why would the Council opt to pay cash in lieu of repairing the home?). Moreover, the real right that a mortgagee possesses would be adversely affected if the property is not repaired, and/or the homeowner does to utilise these monies to either repay the debt or repair the home (dilution of the security value of the home).

Recommendations

We recommend that this clause should either be deleted or alternatively if the Council seeks to retain this clause then both the homeowner and the mortgagee need to consent in writing to the payment in cash in lieu of the repair of the home. Further, an additional clause needs to be inserted into this section which compels the Council to pay such cash payments to the mortgagee and not the homeowner (in instances where a mortgage is registered over the property and there are outstanding monies owed to the mortgagee).

Section 53 - Entitlement to progress payments:

We find this section to be problematic as the Council is seeking to overwrite legally binding home building contracts and the law of contract. In many instances, homeowners conclude a home builder contract which provides for full payment (with retention monies for snags) upon completion of a home and where the builder is not entitled to receipt of progress payments. This section seeks to outlaw such contracts.

Recommendation

We recommend that this clause be deleted.

Section 54 (3) – Right to suspend performance for non-payment:

Again, Council is seeking to impose conditions upon a homeowner which matter is governed within legally binding contracts and the law of contract and where the remedy for breach is governed by the courts. Further, this section may potentially have a negative implication for mortgagees if the client does not service their building loan during the construction phase and interim interest on outstanding monies which have been paid from the mortgage loan for progress payments erodes available funds for payment of a builder.

Recommendation

We recommend that this section be deleted from the Bill.

Part 3 Adjudication of contractual disputes – right to refer disputes to adjudication

Whilst we are in principle supportive of an adjudication process that provides for a speedy and cost-effective mechanism for the resolution of disputes, the inclusion of such an adjudication clause should only be encouraged as opposed imposed by the Council. Again, the Bill seeks to impose conditions within building contracts, which imposition is outside of the mandate of the Council, as this is governed by the law of contract.

Recommendation

We recommend that this section be deleted.

Section 58 - Council to act on behalf of certain housing consumers:

The Bill seeks to afford housing consumers with a warranty in the event of the defective structural integrity/roof leakage of constructed units premised on an enrolment fee paid to the Council for such a warranty. We also understand that the Bill seeks to introduce an arbitration option which seeks to provide an expeditious and cost-effective mechanism for such disputes. We therefore do not understand why the Bill seeks to limit the monetary support for certain classes of consumer in respect of this dispute mechanism. Clauses 58 (1) and (2) seek to differentiate between the monetary support afforded to the State and certain classes of homeowners (a bias) as opposed to other consumers. Unless a differentiated fee is to be levied to compensate the Council for the potential additional arbitration costs incurred by the Council for State subsidy/social housing schemes/a certain class of homeowner, this reflects cross-subsidisation from other classes of private sector home-owners, which we deem to be unacceptable.

Recommendation

We recommend that this section should highlight that the Council will pay arbitration costs on behalf of all consumers.

Section 64(7) (b) – Administrative non-compliance with Act:

If a homebuilder or developer is to be ordered to stop the construction of a home without the knowledge of the financier of the home, this may negatively impact the financier and subsequently the housing consumer. Our comments in respect of section 27 are pertinent.

Recommendation

We believe that the financier (mortgagee) of that home must be notified (our comments as per section 27 refers) as any penalty or stopping of the building process may have serious financial implications to the client, and interim interest payable on the mortgage

loan for outstanding monies may erode the balance available to the builder for completion of the home.

Section 66 Clause 2 (a) and Clause 2 (c) - Administrative Fine:

Clause 2 (a) and clause 2 (*c*) (i) are contradictory. On the one hand if a State organ is the transgressor, their penalty is restricted to "*10% of the value of the home building contract or the tender value"*, but on the other hand if the transgressor is not the homebuilder or developer, their fine is "*10% of the implicated person's turnover for the period during which that person failed to comply with the compliance notice…"* We believe that this contradiction should be remedied, failing which it will deemed to be discriminatory.

Recommendation

We recommend that the envisaged fine which is to be imposed on a State organ should also be applied to the transgressor who is not a homebuilder or developer.

Section 66 - Administrative fine (3) (d):

This section of the Bill refers to the amount of an appropriate administrative fine, where the Compliance and Enforcement Committee must among other factors consider the "*…market value of the home concerned, as determined by a professional valuer registered with the South African Council of Property Valuers".*

Recommendations

The correct wording for the applicable body to undertake this task is "*valuers registered in terms of section 2 of the Property Valuers Professions Act (2000) by the South African Council for the Property Valuers Professions".*

We further recommend that this section of the Bill be redrafted to include commentary on an appropriate administrative fine that may be considered to allow for the building costs of the home concerned to be taken into account and not the consideration to the market value, as the Bill relates to building costs and not market value.

Sections 82 - (Duty of estate agent), Section - 83 (Duty of financial institution), Section - 84 (duty of conveyancers) and Section - 85 (Duty of Registrar of deeds):

We believe that sections 82, 83 and 85 of the Bill should be deleted as they reflect a duplication of duty, hence adding additional complexity and unnecessary costs to these parties, as section 84 ("*Duty of conveyancer*") requires the conveyancer before effecting transfer to determine that the home was enrolled in terms of Chapter iv of this Act. It

is therefore superfluous and a duplication for estate agents, financial institutions and the Registrar of Deeds to have to do the same.

Further, if an insertion into section 84 required that a conveyancer has a duty to determine whether Chapter iv of this Act is complied with in instances where further mortgage loans are to be used to effect alterations/renovations etc. this would obviate other party duplication of this duty too.

In respect of alterations, renovations etc. salient to the prescripts of this Bil, a municipality should be held responsible for ensuring that a registered builder is used, and that the property has been enrolled with the Council when they approve a municipal building plan. We highlight that in many instances where homeowners effect alterations/renovations that they do not register a further mortgage bond against their property, as they effect such improvements by way of surplus cash or alternative forms of finance e.g. a personal loan. In such instances a financial institution would have no knowledge that such loans are to be used to effect home improvements which require both an approved municipal plan, the work needs to be carried out by a builder registered with the Council and/or that a salient enrolment fee is required to be paid to the Council.

Recommendation

We recommend that sections 82, 83 and 85 be deleted, and that section 84 be redrafted to include further mortgage bonds and that a new section (Duty of Municipality) be compiled.

In addition, we highlight that the Estate Agents Affairs Board Act has be repealed and replaced by the Property Practitioners Act (2019) and that the Financial Services Board has been replaced by the Financial Sector Conduct Authority (2018).

Section 89 (1) (h) – Rules:

Clause (*h*) represents a "catch all" clause which state law advisors in other Bills deem to be unacceptable/unwarranted and they have therefore removed such ambiguous all-encompassing clauses from these Bills.

Recommendation

We recommend that this clause be deleted.

Clauses (4) and (5)

Whilst we recognize that there may be circumstances that the Council is required to immediately publish a Rule, this should not obviate them from being required to obtain public commentary retrospectively on the merits of its introduction. Further, the Minister

when approving the immediate introduction of a Rule in terms of clauses (4) and (5) should only approve this on an intermediate basis until such time as public commentary provides him/her with independent clarity on the merits or otherwise of such an approved Rule.

Recommendation

We recommend that clauses (4) and (5) be amended as per our comments.

Section 95 (9) – Administrative fine:

Section 95 (9) reads that 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.

While we recognise why the Council has included this in the Bill, we are of the view that this may unduly affect (have unintended consequences) the informal/small builder sector.

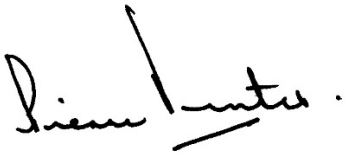
Recommendation

Our recommendation is that the Council undertake a special project / drive to facilitate a process of registering emerging / small builders to mitigate the potential loss of livelihood for builders that are not registered with the Council.

Conclusion

Whilst we have highlighted aspects which we believe need addressing/amendment, we are supportive of the strategic intent of this Bill. Should the Department wish to engage on any of our comments, we would welcome such engagements.

Yours sincerely



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