
GENERAL NOTICE

NOTICE 2646 OF 2003**DEPARTMENT OF HOUSING****DRAFT HOUSING CONSUMERS PROTECTION
MEASURES AMENDMENT BILL, 2003**

The Department of Housing hereby publishes the **draft Housing Consumers Protection Measures Amendment Bill, 2003** for public information, discussion and comment.

Interested persons and institutions are invited to submit written comments on the draft legislation on or before **28 November 2003** to the Director-General, Department of Housing, for the attention of the following person:

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REPUBLIC OF SOUTH AFRICA

**HOUSING CONSUMERS PROTECTION MEASURES AMENDMENT BILL,
2003**

(MINISTER OF HOUSING)

[B – 2003]

Secret

GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Housing Consumers Protection Measures Act, 1998, so as to provide for certain revised definitions and the insertion of a new definition of “owner builder”; to make provision for the application for exemption of owner builders; to transfer the powers of granting exemption from the Minister to the National Home Builders Registration Council; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:

Amendment of section 1 of Act 95 of 1998

1. Section 1 of the Housing Consumers Protection Measures Act, 1995 (hereinafter referred to as “the principal Act”), is hereby amended by:

(a) the substitution in the definition of “business of a home builder” for paragraph (b) of the following paragraph:

“(b) to construct a home for purposes of sale, renting, leasing or otherwise disposing of such a home.”

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(b) the substitution in the definition of "business of a home builder" for paragraph (d) 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) the insertion after the definition of "organ of state" of the following definition:

" 'owner builder' means -

- (i) the *bona fide* building of a home by any person for occupation by that person; or
- (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.

unless such person is guilty of conduct as prescribed by the Minister."

Insertion of section 10A in Act 95 of 1998

2. The following section is hereby inserted after section 10 of the principal Act:

10A(1) An owner builder must apply in terms of section 29 of the Act to the Council for exemption from the application of sections 10 and 14 of the Act.

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- (2) The provisions of this section will not apply to a person who physically uses his/her own labour to build a house for his/her occupation if the house is part of an approved Project Linked Housing Subsidy Project: People's Housing Process Route, until the Minister issue regulations in this regard.

Amendment of section 14 of Act 95 of 1998

3. Section 14 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) 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-
- (a) the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner;
 - (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council; and
 - (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder; and
 - (d) the provincial housing development board has paid the prescribed fee to the Council in terms of the agreement contemplated in section 5(4)(c).”

Amendment of section 18 of Act 95 of 1998

4. Section 18 of the principal Act is hereby amended by:
- (a) the substitution for the heading of the following heading:
“18. Obligations of mortgagees, conveyancers [and], MEC and local government.”
 - (b) the insertion after subsection (4) of the following subsection:

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(5) The relevant local authority shall be responsible for informing any prospective home builder or owner builder of the possible application of the provisions of this Act, prior to granting municipal approval for the commencement of the construction of a home."

Amendment of section 21 of Act 95 of 1998.

5. Section 21(1) of the principal Act is hereby amended by the substitution 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

6. Section 22 of the principal Act is hereby amended by the insertion after subsection (4) of the following subsection:

"(5) Irrespective of subsections (1) to (4), any person who feels aggrieved by any decision that the Council has made in terms of section 29 of this Act, 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 such decision, and thereupon the Minister may confirm, set aside or amend such decision of the Council."

Substitution of section 29 of Act 95 of 1998

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

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- “(1) The [Minister] Council may, [on the recommendation of the Council] on application made to it, in the prescribed format, 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 –
- (a) the granting of the exemption would be in the public interest;
 - (b) the granting of the exemption would not undermine the objective of this Act, or the effectiveness of the Council; or
 - (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 must 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.”

Short title and commencement

8. This Act is called the Housing Consumers Protection Measures Amendment Act, 2003, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE HOUSING CONSUMERS PROTECTION MEASURES AMENDMENT BILL, 2003

1. The Bill seeks to rectify problems that have arisen in respect of the interpretation and implementation of the Housing Consumers Protection Measures Act, 1995 (Act No 95 of 1998), hereinafter referred to as "the Act".
2. The following definitions in the Act requires amendment:
 - 2.1 The definition of "business of a home builder" needs to be amended in two ways:
 - (a) to ensure that the purpose for which a home is constructed is dealt with as comprehensively as possible, the expressions "renting" and "leasing" are inserted in paragraph (b) of the definition.
 - (b) paragraph (d) of the definition has proven to be problematic. In terms of various legal opinions, including that of the Chief State Law Adviser, it has been established that the current wording of paragraph (d) excludes so-called "owner builders" from the scope of application of the Act. Although the aim and purpose of the Act is to provide protection to all housing consumers, it was recognised that in some cases consumers would wish to build a home for occupation by themselves, using own resources. These resources would include both labour and the financing of building costs. In such cases the application of the Act would in effect mean that consumers are being protected against themselves, which for obvious reasons does not make sense.

It was, however, never the intention of the legislature to totally exclude these owner builders from the application of the Act, but rather that they be entitled to apply for exemption from the provisions of the Act, so as to ensure that they are indeed *bona fide* owner builders, and not just builders trying to take advantage of the situation. As mentioned, paragraph (d) of the definition of "business of a home builder" has not achieved this, and it has been decided to rather delete paragraph (d) and make provision for a substantive definition of the expression "owner builder".
 - 2.2 A definition of "owner builder" is therefore inserted after the definition of "organ of state". The term "owner builder" extend to persons who, with or without the assistance of a person who is not a registered homebuilder, construct a home for themselves, using mostly own resources.
3. Section 10A is inserted to –
 - (a) enable the newly defined "owner builder" to apply for exemption from the application of the provisions of the Act in terms of the process set out in section 29 of the Act.
 - (b) exclude from the application of the Act, at least until such time as the Minister has issued regulations on the matter, persons who physically build their own home as part of an approved Subsidy Project in terms of the People's Housing Process programme. These persons are essentially in the same position as owner builders but for the fact that these homes fall within the low cost housing category.
4. Section 14 is amended to exclude the expressions "except in respect of any deposit payable" and "solely" as these expressions have become obsolete within the housing subsidy framework. These expressions were included to specifically ring fence the

portfolio of properties to be affected by the Minister's discretion regarding the application of the provisions of the Act at a later stage. In view of the fact that the Minister has decided that all houses must be enrolled, the qualification has become obsolete.

5. Section 18 is amended by substituting the heading to include a reference to "local government", and by inserting a new subsection (4). It has been found that a lot of confusion and delays are caused by the fact that consumers, particularly in the owner builder category, are unaware of the existence and implications of the Act. It mostly comes to the attention of consumers at a stage when building has already commenced, which then causes obvious delays and frustration. A new subsection has therefore been inserted to oblige local authorities to inform applicants of the existence of the Act. It is foreseen that this would merely amount to a small administrative change to already existing forms.
 6. Section 21(1)(b) is amended by adding section 18(2) to the list of contraventions of the Act which constitutes offences. Section 18(2) pertains to the duty of a conveyancer to ensure that a homebuilder is registered before attending to the registration of a mortgage bond.
 7. Section 22 of the Act is being amended by the insertion of subsection (5), which enables 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 fact that section 29 is being amended to allow the Council, and not the Minister, to grant or refuse applications for exemption.
 8. Section 29 is amended to allow the Council to grant or refuse applications for exemption. In its current format the section empowers the Minister to consider applications for exemption, based on recommendations provided by the Council. As this process firstly 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 to ensure that exemptions are not refused unreasonably.
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