REAL ESTATE BUSINESS OWNERS OF SOUTH AFRICA

SUBMISSION IN RESPECT OF THE PROPERTY PRACTITIONERS BILL, PUBLISHED IN GOVERNMENT GAZETTE NO. 41671 OF 31 MAY 2018 AS AMENDED BY THE PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS (NATIONAL ASSEMBLY)

CHAPTER 1

DEFINITIONS, APPLICATION, OBJECTS AND ESTABLISHMENT OF AUTHORITY

Definition of Property Practitioner

1. Generally:

a. It seems to us that for reasons we elaborate on further along, it would be practical to introduce, in addition to the concept of a "principal" property practitioner, also the concepts of (a) a "business" property practitioner, which is effectively the entity or business in the name of which the mandate is concluded and which is the entity or business which would be entitled to the financial reward upon the conclusion of a property -related transaction; (b) an "ordinary" property practitioner, which is a property practitioner which does not fall within either (a) foregoing; and (c) a "candidate" property practitioner.

b. We note that under the current regulations a distinction is already made between a "principal" property practitioner, an "ordinary" property practitioner and a "candidate" property practitioner. In this regard see the regulation entitled "Standard of Training of Estate Agents Regulations, 2008" which makes a distinction between a "principal estate agent" and a "non-principal estate agent". In our view it makes sense to embed this in the legislation, together with the additional category of "business" property practitioner as referred to in the previous paragraph.

c. While it would be necessary for all property practitioners to have the necessary qualifications to operate as such (and which would be NQF 5 in respect of "principal" property practitioners and NQF 4 in respect of "ordinary" property practitioners), introducing the concept of a "business" property practitioner would go a long way to simplifying the administration requirements of the draft legislation. In particular, only a "business" property practitioner should be entitled (as opposed to obliged) to operate a trust account and to receive money into trust; this would have the knock-on effect that only a "business" property practitioner would have the necessity (and the concomitant cost) of having an annual audit of a trust account. In light of that, only a "business" property practitioner would need to comply with the Financial Intelligence Centre Act, 2001. Furthermore, only a "business" property practitioner would be required to have a BEE certificate, in which regard please see our comments further along at paragraph 93. As is currently the situation, such a

"business" property practitioner would be required to hold its own fidelity fund certificate, independent of any fidelity fund certificates required to be held by "principal" property practitioners and "ordinary" property practitioners associated with that business entity. This would go a long way towards streamlining affairs and promoting business efficiency, which in turn would promote the entry of new participants into the industry.

2. Generally:

a. We are deeply concerned about the wideness of the definition of "*property practitioner*" and the effect it will have of drawing within its ambit a vast number of other persons and enterprises which are not currently regulated. It is clear that this is going to create significant additional administrative pressure for the Authority (currently known as the Estate Agency Affairs Board and which we refer to further along simply as "EAAB") with all the concomitant difficulties which may flow from that, including potential litigation should the Authority not be able to efficiently and adequately perform its functions as a result of the volume of what it is required to deal with.

b. Furthermore, the sheer number of other persons and enterprises which will be brought within the ambit of the Authority's regulatory power will significantly challenge the ability of the Authority to inspect, monitor and control the activities of such persons; yet at the same time, the Authority will have a statutory obligation to carry out in that regard.

c. It is also not clear what purpose there would be in requiring these "other categories" of property practitioners to hold fidelity fund certificates and to operate trust accounts and whether any element of public interest would truly be served by the inclusion of such a range of other persons and entities within the legislation.

d. As a consequence, in our view the legislation should only apply to (i) persons who are actually involved in broking transactions related to immovable property (that is to say, "estate agents proper") and (ii) so-called "rental agents". There seems to be little real public benefit to be obtained by throwing the ambit of the legislation wider than the foregoing; yet, a significant administrative burden which will result. It strikes us as being axiomatic that the more administrative pressure that is applied to the Authority in the performance of non-essential functions (viz., regulating persons who do not truly need to be regulated under this legislation), the less it will be able to properly and efficiently carry out those functions that truly do matter. Also, there would seem to be little purpose in including in the legislation bond originators and bridging financiers who will be regulated separately in terms of the Financial Sector Regulation Act, once it becomes law.

e. We are also of the view that there should be no exception provided for attorneys in relation to compliance with the legislation. The current exemption in relation to attorneys is creating problems, including by virtue of the fact that some attorneys are acting as estate agents (by way of broking the transaction in question) at very low (and sometimes close to zero) commission percentages simply so as to be able to secure the associated conveyancing work. It also appears that they often employ persons who do not hold NQF 4 qualifications. Not only would this appear to run contrary

to some of the principles expressed further along in the draft legislation but it also undercuts the property practitioner industry as a whole as other property practitioners are not able to compete on a level playing field as they are not in a position to effectively subsidise the sale process through the earning of conveyancing fees. This is damaging not only to the existing property practitioners' industry but also to the philosophy of black economic empowerment sought to be espoused by the draft legislation. Further, the provision of services by unqualified persons cannot be in the public interest.

f. We note that the definition of property practitioner relates only to a person who "*directly or indirectly, on the instructions of or on behalf of any other person*" engages in the activities concerned. This would appear, on the face of it, to have the effect that property developers are not clearly brought within the ambit of the legislation. Yet it is clear also that quite conceivably members of the public have been taken advantage of by property developers, bearing in mind in particular also the fact that funds are often placed on deposit by members of the public with property developers. For this reason we are of the view that property developers must be clearly brought within the ambit of the legislation, even in circumstances where they are selling their own properties.

g. As a matter of practice, some of the larger estate agencies employ senior management in various positions, including in relation to matters such as human resources, marketing and finance. They would therefore for example, have a human resources director, a financial director and a marketing director. We understand that as a matter of practice the EAAB upon application exempts such persons from having to hold fidelity fund certificates. Given the wideness of the definition of the term "*property practitioner*" we suggest that it be made clear that such persons who fulfil "ancillary roles" within an estate agency business (in other words persons who are not involved with the activities contemplated in the definition of "*property practitioner*") will not be regulated under the legislation.

3. Subsection (a): We question whether the inclusion of the words "*or indirectly*" is correct. It appears to be ambiguous and to potentially draw within the ambit of the legislation persons who should not be regulated by this legislation. For example, the inclusion of the words "*or indirectly*" would appear on the face of it to potentially draw within the legislation all those newspapers and online portals which publish property-related advertisements. If so, it would materially increase the burden on the Authority without providing any corresponding benefit to the public. In this regard, please also see our comments further along at paragraph 5.

4. Subsection (a) (i): The inclusion of the words "*or any business undertaking*" when read together with the words "*or negotiates*" and the words "*or indirectly*" (as referred to above) is impractical and will bring within the ambit of the legislation a very large number of business operations and enterprises which are not currently effectively regulated. Any party that is in any way concerned with negotiating the sale of any business (or indeed, the sale of shares relating to any business, regard being had to the "*or indirectly*" principle referred to above) will apparently be brought within the ambit of the legislation. This will include for example, corporate advisories which are concerned with major mergers

and acquisitions transactions in South Africa. The result will be that many persons and entities which are not currently effectively regulated by the Estate Agency Affairs Board will, in principle, be brought within the ambit of the legislation. Our proposal is that the reference to "*or any business undertaking*" be deleted in its entirety. There is no need for the disposal of business undertakings to be regulated in this legislation and, as a matter of practice while subsections (a) (i) and (ii) of the definition of "*estate agent*" in the existing Estate Agency Affairs Act, 1976 refers to "*any business undertaking*" such is in fact not effectively applied and the vast majority of transactions involving the disposal of business undertakings are conducted by persons who are not registered as estate agents.

5. Subsection (a) (i) and (ii): The words in (i) "publicly exhibits for sale" and in (ii) "lets or hires or publicly exhibits for hire" would appear to potentially bring within its ambit various online property advertising platforms (such as Airbnb), bearing in mind that such persons would be acting "on the instructions of" another person and would be acting "for the acquisition of gain" as contemplated in subsection (a). The words "or indirectly" as contemplated in subsection (a) also serve to potentially expand the effect. Again, the effect is to bring within the ambit of the legislation persons who are currently not effectively regulated and whom it may in many instances be impossible to regulate, given the nature of online platforms. We note for the sake of clarity that we have given consideration to the exclusion further along where it is stated "*and "advertise" for the purposes of this definition does not include advertising in compliance with the provisions of any other law*" but the position appears to remain unclear. There is no possible benefit in bringing the various elements of the advertising industry (and in particular media publications) within the ambit of the legislation and for that reason we advocate in the strongest possible terms that such organisations (who merely print and distribute the advertisements of the property practitioners) should be clearly stated to fall outside of the legislation.

6. Subsection (a) (ii): the inclusion of the words "*canvasses*" and "*canvass*" will have the unintentional effect of bringing within the ambit of the legislation purely administrative personnel who work within property practitioner businesses. It is common for lower-level employees to be engaged in various activities which do not rise to the level of "property broking" proper. Thus for example people may be engaged to contact homeowners to ascertain whether they have any interest in selling their homes. Similarly, other people may be engaged simply to act as "house sitters" so that the property may be inspected by prospective purchasers but without such persons engaging directly with the purchasers in relation to any prospective transaction. These lower-level services are important as being entry points to the profession and often provide paid employment to aspirant property practitioners who have yet to complete their qualifications. This is not the type of activity which should be regulated by the legislation and if it is, it will undoubtedly destroy many such lower-level employment opportunities for various persons, including persons who are aspirant property practitioners. It is also likely to lie most heavily on black aspirant property practitioners and thus operate against the empowerment objectives of the draft legislation. For that reason we are of the view that it should be made clear that the type of canvassing that is being referred to is only the aspect pertaining to the arrangement of a transaction between the seller and a prospective purchaser. Provided that that is not engaged in, it should not be necessary for such persons to be regulated by the legislation.

7. Subsection (a) (ii): The addition of the words "*or by electronic or any other means*" by the portfolio committee does not read grammatically and the manner in which they have inserted should be reconsidered.

8. Subsection (a) (iv): The words "*provides… financing*", especially when considered in conjunction with the words "*or indirectly*" in subsection (a) will again bring within it many parties who have not previously been required to comply with the legislation regulating estate agents (property practitioners), such as financial institutions (other than Financial Institutions as defined in the Financial Services Board Act which are specifically excluded) which effectively do "*indirectly*" provide financing in relation to the matters concerned in the subsection. Private equity funds and other similar types of operations would not be excluded if they wanted to engage in property financing. Careful consideration should be given as to whether it is in the interests of either the Authority or the public for such persons who are not directly concerned with such financing to be regulated in terms of this legislation. Furthermore, consideration should be given to whether it is in the interests of the Authority or the public for such institutions which are not currently regulated by the Estate Agency Affairs Board to be brought within the ambit of the legislation. Consideration also needs to be given to the circumstances in which inclusion may result in duplicate regulation of certain financial service providers and the concomitant risk of conflicting regulation.

9. Subsection (a) (vi): Similar considerations to those referred to above arise in relation the words "*in any other way acts or provide services as intermediary or facilitator with the primary purpose, or to attempt to do so*".

10. Subsections (aa), (bb), (cc) and (dd): It seems to us that these qualifications are intended to qualify the entire concept of a "*property practitioner*" and as such it seems to us that consideration should be given to moving the qualifications to the end of the definition together with the qualifications relating to attorneys (if such is to remain, regard being had to the concerns raised at paragraph 2.e above. As matters currently stand, depending upon the approach taken to the interpretation of the definition, none of subsections (b), (c) or (d) would be qualified by these exclusions. The result might for example be that the sheriff of the High Court would nevertheless be deemed to be a property practitioner when the sheriff auctions properties (regard being had to the fact that the qualification might be considered not to apply to subsection (b)).

11. Subsection (bb): It is not clear to us why this exclusion needs to be introduced. Subsection (a) refers to a person who is acting "*on the instructions of or on behalf of any other person*". If that is taken as the key starting point (viz. the agency arrangement), then by definition a natural person acting on behalf of themselves cannot fall within the concept of a property practitioner. If that is correct, then subsection (bb) may be deleted in its entirety.

12. Subsection (bb): In the event that subsection (bb) is to be retained, then we suggest that it be extended to include the leasing of property by an individual for their own benefit.

13. Subsection (b): It is not clear to us why freehold title properties in developments are apparently excluded from this definition. The definition refers to "*any part, unit or section of, or rights or shares, including timeshare and fractional ownership*". Yet, many cluster home developments (amongst other things) confer freehold title on the owners (albeit subject to compulsory participation in a homeowners' association). It seems to us therefore that this is subsection (b) should be expanded to clearly also include freehold properties in a development.

14. Subsection (c): Depending upon one's interpretation in relation to how the exclusions contemplated in subsections (aa), (bb), (cc) and (dd) relate to subsection (c), this subsection would potentially include persons such as caretakers and factotums, bearing in mind that for each such person it is the primary activity in which they are involved and that they act on the instructions of others. It is not in the public interest for such persons to be regulated by the legislation.

15. Subsection (d): It is not clear to us why trusts are dealt with separately and not as part of what is addressed in subparagraph (e).

16. Subsection (f): The language of the subsection brings within the definition of "*property practitioner*" persons employed by attorneys who are "*specifically covered by the Attorneys Fidelity Fund and not the Property Practitioners Fidelity Fund*". It is not clear why one would seek to bring within the ambit of the legislation such persons who are already covered by the Attorneys Fidelity Fund; the effect would appear to be to bring employees of attorneys within the purview of two separate regulators in respect of one and the same activity. There does not appear to be any public benefit in doing so.

Other Definitions

17. Definition of "*Authority*": We note that the cross reference to section 4 is incorrect and that the reference should be to section 5. We also note that in general there are many cross-reference errors in the document and in some places we have, as a consequence, not been able to clearly understand the intention of certain provisions.

18. Definition of "*days*": The words "*of the preceding year*" do not seem to make complete sense. We suggest that they be deleted.

    Definition of "*days*": While we accept that the period running from 16 December to 02 January is normally regarded as the South African "long summer holiday" during which most businesses do not operate, it is not clear to us why the excluded period should include the period running from 03 January to 15 January. It seems to us that the excluded period should only run from 16 December to 02 January. On that basis the definition should read "'*days' means calendar days including Saturdays, Sundays and public holidays but excluding the period between 15 December and 03 January;*".

Application of Act

19. Section 2: The legislation is stated to apply also "*to any rights, obligations, interests, duties or powers associated with or relevant to such property*". We are of the view that this is both unnecessary and

potentially problematic. It throws the ambit of the legislation extremely wide indeed and creates many ambiguities and uncertainties. For example, it might bring within the ambit of the legislation persons such as land surveyors and matters such as those pertaining to servitudes relating to the immovable property. There also seems to be no particular reason for including financing within the ambit of the legislation. The only link between financing activities and the matters regulated in the proposed legislation, is the fact that the underlying asset which is financed is immovable property. Financing activities are already heavily regulated through a number of other enactments of Parliament and the Financial Sector Regulation Bill which we are given to understand has already passed through the National Assembly and is currently being addressed by the National Council of Provinces. We think it would be preferable to omit these words and to simply leave the statement at "*This Act applies to the marketing, promotion, managing, sale, letting and purchase of immovable property.*"

20. Section 2: The legislation should be stated to apply only to activities pertaining to immovable property located within the Republic; it should not have possible extra-territorial application. For example, a South African property practitioner that is active only in a foreign market should not be regulated under the legislation or, to the extent that it is active both in the domestic market and a foreign market, only its activities in the domestic market should be regulated by the legislation.

Objects of Act

21. Section 3 (b): We understand that the EAAB represents itself as being a world-class, leading regulator in its specific field. We suggest therefore that the language of this subsection be amended to read "*provide for the establishment of the Authority as a world-class regulator that leads by example*".

22. Section 3 (g): It is not clear to us why a reference is made to "*licensing*" of property practitioners in this subsection only whereas it is not referred to anywhere else in the draft legislation, other than in section 60. Please however note our suggestions further along in relation to the registration only of a property practitioner in circumstances where no trust account is operated by a property practitioner.

23. Section 3 (j): It seems to us that it may be useful to include a definition of the term "*secondary property market*" as it may not be immediately apparent to all parties as to what is being referred to and may otherwise potentially give rise to ambiguity.

24. Section 3 (l): We question whether the words "*A mechanism for responding and implementation of directives received from the Minister of Human Settlements, from time to time*" should not be an object of the Act. While we have not considered such in-depth, we query whether such would not offend against the constitutional principle of legality.

25. Section 3: It seems to us that it may be useful to include in the objects of the Act the following principles: (a) to ensure the efficient and effective regulation of the property sector by an authority established for that purpose and (b) the keeping of complete and accurate records by the established authority.

Exemption from Act

26. Section 4, generally: We note that the language of the section only provides for individual exemptions to be granted. It seems to us that it may be more useful to also allow for exemptions in relation to specific industries or classes of persons. This would likely relieve the burden on the Authority of having to deal with a large number of individual exemptions, depending upon the final position in relation to the definition of "*property practitioner*". It also follows that the Authority would not be obliged in any particular set of circumstances to grant an exemption in relation to a particular industry or class of persons as a whole and, should it be appropriate, the Authority would be able to insist upon individual applications.

27. Section 4 (6) (a): It is not clear to us that there is good reason for having an exemption only apply for a period of three years, particularly if an exemption could be granted in relation to a specific industry or class of persons. In such circumstances, it may be useful to have an exemption that applies indefinitely until withdrawn by the Authority. Furthermore, we think that as a general rule, it may be useful not to specify a maximum period for an exemption but rather a minimum period, the period of the exemption otherwise being left to the Authority and the Authority always having the right to withdraw a particular exemption should facts or circumstances come to its attention which justify its so doing.

28. Section 4 (7) (f): It is not clear what is sought to be achieved with the words "*does not create any special rights or legitimate interests*". It seems however that the intention is to address certain concerns of administrative law. If that is the case, while we have not considered matters in depth, we question whether such provision would survive judicial scrutiny.

29. Section 4 (8): The section is unnecessary as this principle is in any event a key principle of our administrative law and enshrined in the Promotion of Administrative Justice Act.

30. Section 4 (9): We note that a person may request the Minister to review an exemption granted. We suggest that it may be useful to also provide for a right of ministerial review in relation to exemptions which have been refused.

31. Section 4 (9) (b): We think that the section could simply be amended to require that a person making application to the Minister must also notify the Authority. If the input of any third party is required, it seems to us that it should be the obligation of the Authority to seek and obtain the input of such third party and not the obligation of the applicant. It strikes us as being in any event unwise to seek to have such communications channelled through the applicant as, depending upon how such communications are handled, they could be "shaped" by the applicant with a view to seeking to achieve an advantage for the applicant.

Establishment of Property Practitioners Regulatory Authority

32. Section 5 (4): We question whether it is the role of the Authority to "*provide regulatory mechanisms*" in respect of the financing, marketing, managing, letting, hiring, sale, property consumer education

and purchase of property. Leaving aside the fact that such authority will certainly conflict directly with the authority of other regulators, it seems to us that in accordance with the principle of legality, this is the role of Parliament and that, again subject to the principle of legality, it is the function of the Minister to create the necessary regulations under the legislation. It is the function of the Authority to give effect to the regulatory mechanisms established by Parliament and, to the extent applicable, the Minister. We are also of the view that the wording of the section is in any event far too wide and generic to be practical.

33. Section 5 (4): We note the powers given to the Authority to "*do all that is necessary or expedient to achieve the object of this Act*". Again, it seems to us that the authority granted to the Authority is wider than that which would normally be countenanced by the principle of legality.

34. Section 5 (4): In relation to the regulation of marketing, we note that that this is already adequately addressed in terms of the Consumer Protection Act, 2008.

Functions of Authority

35. Section 6 (a) and (b): There are references in these subsections to "*estate agents*"; it is not clear to us why this is the case as previous versions of the draft legislation referred correctly to "*property practitioners*". We suggest that the correct reference is to "*property practitioners*" and not "*estate agents*".

CHAPTER 2

BOARD OF AUTHORITY

Composition and appointment of Board

37. Section 7, generally: Under the current legislation five members of the Board are appointed from within the property practitioner industry. We think that it is desirable that such a situation continue. In particular, we are of the view that the insight and experience which is garnered from the presence of such persons on the Board is invaluable to the Board and assists in ensuring that practical and appropriate decisions are taken by the Board in regulating the property practitioner industry. In the event that in the final analysis representatives of the property practitioner industry are not included as members of the Board, then at the very least, the Board should be obliged to consult with the property practitioner industry in relation to important initiatives undertaken which impact upon the property practitioner industry; this will avoid much difficulty down the line as the Board will obtain the benefit of the insight of the industry as to the practical effect of such proposed initiatives.

38. Section 7, generally: We suggest that it should also be provided, either in this section or elsewhere in the draft legislation that (a) every property practitioner should be a member of a national organisation which represents property practitioners in general, (b) that a consultative body of such national organisation be established on the basis of proportional representation and (c) that the Board should consult with such consultative body on a regular basis in order to obtain its input on initiatives emanating from the Board and the Authority.

39. Section 7, generally: We have noted that in section 7 (3) (a) reference is made to the Minister calling for nominations for the appointment of persons to the Board, which we welcome. However, it is not clear whether the Minister is constrained to appointing as members of the Board only such persons as have been subject to nominations (other than for the chairman, who is appointed directly by the Minister and possibly other than for the chief executive officer, in the event of the chief executive officer continuing as such). We think that this would be the preferred position and that matters should be made clear.

40. Section 7, generally: We think that the Board should be established on the basis that one third of the Board retires at intervals of three years (subject to possible reappointment); this will serve to ensure the continuity of the board and the passing on of institutional memory. Any risk that the entire board could be replaced at a single point in time should preferably be avoided (other than in circumstances where it is dissolved by the Minister for reasons of malfeasance). This will avoid a situation such as that which happened between January and July 2016 when there was effectively no Board, with all of the consequent ramifications which arise out of that.

41. Section 7 (2) (ii): It is not clear to us why the reference is to "*relevan*t" legal experience as opposed to "*sufficient*" experience as contemplated in the other subsections.

Disqualification from membership of the Board

42. Section 8 (g): Given that a person may be discharged from a position of trust for any number of reasons (including temporary incapacity), we suggest that the wording of section 50 (a) (v) should be used here as well, viz. "*has at any time in the preceding five years by reason of improper conduct been dismissed from a position of trust*".

43. Section 8 (i): We suggest that a person should not be precluded from being a member of the Board by reason of a minor infraction of the existing legislation; we suggest that this be limited to circumstances in which such person has either had a fine imposed upon them or has had their fidelity fund certificate validly withdrawn or has been a director or member of an entity which has had such fine imposed upon it or had its fidelity fund certificate validly withdrawn.

Powers and duties of Board

44. Section 9 (d): This subsection gives the Board the right to "*determine and enforce the broad policy framework within which the Authority must pursue its objects and perform its functions*". It seems to us however that the establishment of such policy framework is the function of Parliament and the Minister, not the Board. The correct function of the board is to give effect to the policy framework determined by Parliament and, to the extent applicable, the Minister.

Good governance and code of ethics

45. Section 10, generally: We suggest that any policy, code, protocol or guideline which is to apply to the Board should be the subject of consultation with the consultative body that we refer to further along in paragraph 38. We also suggest that any such policy, code, protocol or guideline, once adopted, should be made publicly accessible. This is in the interests of the constitutional requirements of transparency and accountability.

46. Section 10, generally: We further suggest that the Authority should not be entitled to adopt policies unless these have first been approved by the Board; further if and to the extent that any policy proposed to be adopted by the Authority will have external effects, then such should be the subject of a process of public consultation prior to such policy being adopted.

Conflict of interest of members of Board

47. Section 11, generally: Consideration should be given as to what is to happen if the individual who is obliged to recuse him or herself (or the individuals who are obliged to recuse themselves) represent certain of the defined skills required on the Board as contemplated in section 7 (2) (a) or otherwise are representatives of one of the ministers as contemplated in section 7 (2) (b) and as to whether the Board will be able to take appropriate and valid decisions in the absence of such individual or individuals.

Termination of Board membership

48. Sections 12 (1) (a) and (b): We suggest that the Minister must be obliged to dismiss a member of the Board in the relevant circumstances. There is no justification for the Minister retaining on the Board an individual who has failed to declare a conflict of interest or a person who has repeatedly and knowingly disregarded or contravened a code of ethics or other applicable law. Repeated transgressions should not be required; the fact that the member knowingly disregarded a code or law should suffice for his or her removal as a member of the Board. One should bear in mind the impression created upon the property practitioners' industry of the retention of such person or persons on the Board, particularly in circumstances where the property practitioners themselves are sought to be held to a high ethical standard.

49. Section 12 (1) (c): We suggest that the reference to "*consecutive meetings*" be amended to refer to any three meetings in a cycle of 12 consecutive months. If one simply leaves it at "*consecutive meetings*", this would mean that a member might be required to attend as little as one meeting out of every three, a situation that would be entirely unsatisfactory and deleterious to the good operation of the Board (and indeed the Authority and the industry as a whole) should a number of the members of the Board adopt such a course of behaviour. In this context, one should bear in mind that the draft legislation contemplates that the Board will meet once every three months.

50. Section 13 (3): The language of the section is ambiguous. Depending upon how one reads the section, the effect as currently drafted would be that the majority of the persons who happen to be present at a meeting would constitute a quorum. This approach would turn the concept of a quorum on its head; the purpose of a quorum is to ensure that the requisite number of people are present in order to enable the meeting to proceed. It seems to us that the language of the section should preferably read "*A quorum of the Board will be constituted by a majority of the members of the Board*".

Dissolution of Board

51. Section 15 (3): It would be preferable for the appointment of the administrator to be kept as short as possible. We would suggest that the maximum period of time be six months.

CHAPTER 3

CEO AND STAFF OF AUTHORITY

Appointment of CEO

52. Section 16, generally: We suggest that if for any reason the chief executive officer is not able to act (including by virtue of resignation or dismissal) that the chief financial officer should act in his stead pending the chief executive officer being able to act again or otherwise a new chief executive officer having been appointed. In this context, it should be borne in mind that there could be any number of reasons for the chief executive officer not being able to act, including by virtue of resignation, or incapacity or death and also that the appointment of a new chief executive officer is likely to require a period of time to be finalised; in the absence of the chief financial officer being able to act as the chief executive officer on an interim basis, there will likely be an adverse impact upon the day-to-day operations of the Authority.

53. Section 16 (8) as read with section 16 (10): Subsection (8) refers to "*removal*" whereas a subsection (10) refers to "*dismissal*". It is not clear to us why different terminology is used in the two subsections but we suggest that they be aligned with each other.

Delegation

54. Section 19 (1): It seems to us that the delegation of authority by the chief executive officer is a matter which should require the prior approval of the Board. In other words, as a practical matter we think that the chief executive officer should be entitled to propose a delegation to the Board but should not be entitled to effect the actual delegation unless and until the Board has approved such.

CHAPTER 4

TRANSFORMATION OF PROPERTY SECTOR

Exemptions in respect of accounting records and trust accounts

55. Section 23: It is not clear to us as to why the exemptions and different dispensations contemplated in section 23 are included in the chapter dealing with transformation of the property sector and how section 23 is intended to be read and interpreted in light of that, viz. whether it is intended that such should only apply in a transformation context or whether such should apply in relation to property practitioners generally. If the former is the case, it is questionable. If the latter is the case, then the section should probably be sensibly relocated elsewhere within the draft legislation and the relationship between section 23 and sections 54 and 55 (4) should be better defined.

CHAPTER 5

COMPLIANCE AND ENFORCEMENT

Appointment of inspectors

56. Section 24 (1): We suggest that the language of the section be amended to make it clear that the chief executive officer must appoint "*one or more*" suitably qualified persons as inspectors.

Powers of inspectors to enter, inspect, search and seize

57. Section 25 (1): While we accept that as a matter of principle an inspector should be entitled to carry out routine inspections at the business premises of a property practitioner, we have great difficulty with the distinction between section 25 (1) and section 25 (2). It seems to us that there is no sound reason why an inspector should not give written notice of an intention to inspect under section 25 (1) as well. Furthermore, we note that the provisions of section 25 appear to only partially address the concerns raised by the Constitutional Court in the matter of *Estate Agency Affairs Board vs Auction Alliance (Pty) Ltd, Minister of Human Settlements and Minister of Finance*, CCT 94/13. It is not clear to us why this is the case and in particular why the draft legislation does not follow the wording recommended by the Constitutional Court in the order handed down by it in the above matter.

58. Section 25 (3): In our view this section should be removed from the draft legislation. The warrant should set out the parameters of its application and the provisions of subsection (3) may well be read as conferring wider authority on the inspector than the parameters reflected in the warrant. Subsection (3) also appears to conflict with subsection (5) which provides that the warrant must specify the parameters within which the inspector may perform an entry, search or seizure. We note in this case that the use of an electronic database as referred to further along at paragraph 75 would resolve this issue also.

Compliance notices

59. Section 26 (3): It is not clear to us why subsection (3) is required in addition to the penalty provisions proposed to be enacted by Parliament under the legislation. It seems to us that all contraventions that are of a substantial nature should be encapsulated in the legislation.

60. Section 26 (4), (5), (6) and (7): A mechanism should be provided for a property practitioner to dispute the validity of a compliance notice. The absence of an appropriate mechanism for disputing the validity of a compliance notice is likely to result in property practitioners applying to the High Court for relief against the Authority, which would be suboptimal.

Fine as compensation

61. Section 27 (1): There is a potential overlap in the jurisdiction of the adjudicator in section 30 (6) (b) as read with section 30 (7) and the Authority. It appears that in principle a consumer could stand to be compensated twice, viz. once by order of the adjudicator and once by order of the Authority. This issue needs to be addressed so as to ensure that the consumer is only compensated once for its losses.

62. Section 27 (2): Reference is made to the fact that "*no such payment [of a fine] may be made until all appeals in respect of the imposition of the fine have lapsed or have been finalised or abandoned*". Yet, no provision is specifically made in the draft legislation for any such appeal.

63. Section 29 (4) (b): It is not clear what the purpose of the certificate in question would be or what it is that the mediator is required to certify. In the absence of contextual content to that effect, the section is largely speculative in nature. We propose that this issue be clarified.

CHAPTER 7

PROPERTY PRACTITIONERS FIDELITY FUND

Primary purpose of Fund

65. Section 35 (1) (a): The draft language has the effect that the Fund only protects members of the public in instances of theft by a practitioner in circumstances where that property practitioner is in possession of a valid fidelity fund certificate at the time of such theft occurring. This seems to be a significant departure from the provisions of section 18 of the existing legislation which allows for the fund to compensate any person in respect of any money or other property entrusted by or on behalf of such person to an estate agent; the existing legislation seems to have no limitation such as that which is now sought to be introduced. The rationale for this is difficult to understand given that the additional restriction imposed here is likely to act most heavily against the poorest, most vulnerable and least knowledgeable members of our society. Consider then also the position where a property practitioner is not in possession of a valid fidelity fund certificate because of reasons of administrative delay on the part of the Authority. The legislation as currently crafted would in those circumstances make it unlawful for the Authority to compensate the consumer, which would clearly be inequitable. Further, it should be borne in mind that the inability of the Fund to compensate consumers in certain circumstances where it is generally perceived as being fair and reasonable for it to do so would be corrosive of public trust in property practitioners. We think that in the circumstances it would be preferable for the position to remain as it is under the current legislation.

66. Section 35 (1) (a): Furthermore, the draft language only protects the public in relation to "*trust money*". It would seem therefore that the public would be protected in circumstances where the property practitioner receives cash and deposits it in his trust account and subsequently withdraws it for his own illegitimate use but would not be protected in circumstances where the cash was never deposited into the trust account. There would seem to be little logic in this context and, as noted above already, it is the poorest and most vulnerable members of society who would be most likely to suffer as a consequence of this approach in the draft legislation. In our view therefore the legislation should allow for the fund to compensate members of the public in respect of any monies received by a property practitioner acting as such.

67. Section 35 (1) (a): Further to our comments in paragraphs 65 and 66, we draw to your attention that the capital of the Fund has for many years now exceeded a sum of R 500 million and that the Fund has over the last three years had an annual revenue of in excess R 50 million, which annual revenue far exceeded the average claims against the Fund over recent years. The position is such that in practice estate agents are only required to make a contribution to the Fund at the time that they are first issued with a fidelity fund certificate; no contributions are levied on estate agents in respect of any subsequent fidelity fund certificate issued to them. It is clear that there is no good reason why the scope of claims against the Fund cannot be broadened so as to provide a wider range of relief to the public who have been victims of dishonest property practitioners. In the circumstances we strongly

urge that serious consideration be given to expanding the protection provided to the public by the Fund. In this context, please also see our comments below at paragraph 72 in relation to section 38 (2).

Claims from Fund

68. Section 37 (2): If the ambit of potential claims from the Fund is expanded as suggested in paragraph 67, then the criminal charge requirement should only apply in the context of theft by a property practitioner.

69. Section 37 (3): It is not clear what bearing a decision of the adjudicator under section 30 would have upon the findings of the Authority; put differently, if the adjudicator was to find that the property practitioner had indeed stolen trust funds belonging to the consumer, would such a finding be binding on the Authority? Further in this regard, it would be undesirable for both processes to run in parallel with each other, particularly if there is any risk of conflicting decisions being made in that regard.

Payments from Fund

70. Section 38 (1) (e): It is not clear how the management fee due to the party to whom the administration of the Fund has been outsourced will be calculated. Consideration should be given to embedding a principle relating to the determination of such fee in the legislation. We suggest that it would be appropriate for an independent expert to determine a fair and reasonable management charge, or otherwise to determine the maximum management fee that may be paid.

71. Section 38, generally: There appears to be no equivalent to section 12 A of the current legislation (the Estate Agency Affairs Act 112 of 1976) which determines the difference between the income of the fidelity fund and the liabilities of the fund and then permits the balance to be used for alternative purposes such as those contemplated in section 39. This appears to be an important omission and should be rectified in order to preclude the capital of the Fund being used for purposes contemplated in section 39.

72. Section 38 (2): This section allows the Minister in consultation with the Board to limit the amount which may be paid out of the Fund in respect of any category of claims. Our view is that there is no need or justification for such a limitation if the Fund's liability is limited to the theft of trust monies. This is especially so when one considers the historical situation in which comparatively few claims were made against the Fund. Furthermore, there is a concern that such limitation may operate on a discriminatory basis and might well as a consequence lead to a loss of confidence on the part of the public in dealing with property practitioners. This seems to be both unnecessary and undesirable in light of the fact that such losses are effectively carried by property practitioners through the mechanism of their contributions to the fund. Our comments at paragraph 67 have application here as well.

73. Section 38 (3): The section requires any monies not immediately required for the purposes of the Fund to be invested with an institution approved by National Treasury. It is not clear how this is intended to fit with the provisions of section 36 (2) and (3) which allow for the outsourcing of the management of the Fund to a portfolio management company or an institution. There would be little point in allowing

for the funds to be managed by a portfolio management company or an institution if they are required to be invested with a specific institution approved by National Treasury.

Indemnity insurance

74. Section 40: It is not clear why mandatory insurance as contemplated in the draft section 57 is required in addition to the group insurance provided for in section 40. Group insurance will be more cost-effective because of economies of scale and it is proposed that the Authority should be obliged to arrange such group insurance.

CHAPTER 8

PROPERTY PRACTITIONERS

Application for Fidelity Fund certificate

75. Chapter 8, generally: It should not be necessary for physical certificates to be issued to property practitioners. In this regard, it is noted that the issuing of physical certificates is an expensive and time-consuming process which in practice adds a little or no value to the protection of the public from persons who are not registered as property practitioners. It would be far more practical and useful to provide for a publicly accessible electronic database of registered property practitioners, such that the public are able to ascertain whether any particular individual is registered as a property practitioner or not. While paper certificates are capable of being forged (outside of the fact that the public do not ask to see such certificates and are not aware of the role of such certificates), databases are not capable of being manipulated by external persons and are far more cost effectively and easily updated. Furthermore, while the amendment (as contemplated in the draft section 49) or withdrawal (as contemplated in the draft section 50) of a paper certificate may in the relevant circumstances require a period of time (with the effect that the property practitioner in question remains possessed of a paper certificate with which they are able to misrepresent their status) a database is capable of being immediately updated. That said, a physical certificate should **also** be capable of being issued but only to those property practitioners that specifically request a physical certificate.

76. Chapter 8, generally: Further to our comments in paragraph 75, we note that the EAAB has already effectively implemented a system which already serves, at least in part, as an electronic database which enables members of the public to verify that an individual is indeed a registered property practitioner and the holder of a fidelity fund certificate. In this regard we refer to the "PrivySeal" system which has been adopted by the EAAB. Details of this can be found at "www.privyseal.com". According to the publicly available information "*PrivySeal confirms the authenticity of qualifications, communications and other critical information in real time*". As a matter of practice, every email communication sent by an estate agent includes the relevant PrivySeal link. By simply clicking on the relevant link, the consumer is immediately taken to the electronic database in question and is able to verify that the individual concerned is indeed a registered estate agent and holder of a currently valid fidelity fund certificate. This process is of far greater value to the public than any paper-based fidelity fund certificate system. Experience shows that a minute percentage of persons with whom estate agents engage actually request to see their fidelity fund certificate as the public is not generally aware of the legislation and the requirements in that regard; moreover, it requires an inspection of the fidelity fund certificate at the offices of the estate agent. Not only is this inefficient but it is entirely out of step with commercial practice in the contemporary environment. The electronic database model (as implemented practically by means of PrivySeal) is far more practical and serves far more usefully to effectively inform and protect the public. Moreover, a paper-based fidelity fund certificate system lends itself far more readily to fraudulent activities than an electronic online database system does. Not only does the use of an online electronic database system resolve a number of the concerns which arise

out of the current draft legislation (and which we have commented on in greater detail elsewhere in this document) but the fact that it has already been successfully adopted as proof that incurring the costs of issuing paper-based fidelity fund certificates to estate agents is unnecessary and in principle simply amounts to wasteful expenditure.

77. **Please note that while we comment further along on certain aspects relating to the issuing and possession of paper-based fidelity fund certificates, our position is and remains that such should be done away with entirely other than in circumstances where a property practitioner specifically requests a paper-based fidelity fund certificate in addition to the electronic database referred to above.**

78. Chapter 8, generally: A fidelity fund certificate should in principle remain valid indefinitely until revoked, provided that the property practitioner concerned effects payment of the relevant fees.

79. Chapter 8, generally: An "ordinary" property practitioner (as referred to above in paragraph 1.a above) should not have to apply for a new fidelity fund certificate when switching from one estate agency (or "business" property practitioner, also as referred to above in paragraph 1.a above) to another; rather the "ordinary" property practitioner should simply be obliged to notify the Authority of its switch from one agency to another. Ancillary to that, it should be a legally required precondition for such notification by an "ordinary" property practitioner to the Authority that such "ordinary" property practitioner should already be in possession of a letter issued by the "business" property practitioner from which it is departing, acknowledging the termination of the employment of the "ordinary" property practitioner with such "business" property practitioner, failing which the "ordinary" property practitioner should be subject to penalty in terms of the legislation. We note that as a matter of practice it is already the case that estate agents update their details online. In this context, it should be borne in mind that the issuing of a replacement fidelity fund certificate is likely to incur a delay of time (regard being had to the provisions of section 49) during which period of time the "ordinary" property practitioner will effectively not be entitled to act as such. This has a material adverse economic impact upon "ordinary" property practitioners and comes across as unfair. By dispensing with the requirement for a "ordinary" property practitioner to have to apply for a new fidelity fund certificate this is avoided and, provided that the concept of the "business" property practitioner as referred to in paragraph 1.a is adopted, there is no risk to the public. We note that in this context as well the use of a publicly accessible electronic database which is quickly and easily updated would go a long way to resolving this concern.

Application for Fidelity Fund Certificate

80. Section 47 (1): We suggest that the reference to section 34 should perhaps rather be a reference to section 41 (1) (a).

Prohibition on rendering services without a Fidelity Fund certificate

81. Section 48: The requirement that all directors of companies (or members of close corporations) should hold fidelity fund certificates appears to create an administrative burden and to impose a cost upon

the property sector without bearing any corresponding benefit to the public or society at large. It is therefore suggested that no such certificate should be required provided that (a) at least one (or worst scenario at least half) of the directors of the company or members of the close corporation in question hold both a fidelity fund certificate and an NQF 5 qualification and (b) all of those persons employed by the company who act as property practitioners hold the necessary fidelity fund certificate. This will broaden the ownership of estate agency operations and promote transformation opportunities within the property sector. In this regard, consideration should also be given to the fact that worldwide there is an increasing disassociation between ownership and professional responsibility of organisations. The pharmacy profession in South Africa has in recent years seen enormous liberalisation, with concomitant benefits to the ordinary public in reduced pricing and increased availability of products and services. Dischem is a prime example of this. We note that in the United Kingdom, similar events are happening in relation to the attorneys' profession.

82. Section 48: Although section 49 (1) provides for an obligation on the part of the Authority to issue a fidelity fund certificate within a defined period of time, the time periods in section 49 collectively appear to amount to nearly 2.5 months (and which period may again be extended in terms of section 49 (2)). Although section 48 has now been amended by the portfolio committee to refer to a fidelity fund certificate having been "*issued*", section 53 requires that the physical certificate be displayed and section 56 (5) provides that if a certified copy is not provided to the conveyancer, the property practitioner is not entitled to receive payment; the implication is that they cannot be compliance with these requirements unless the property practitioner has physical possession of the fidelity fund certificate, notwithstanding. It should be borne in mind in this context that it may be through no fault of the property practitioner that it is not in possession of a current fidelity fund certificate at the time of the relevant act occurring. In our view, the physical possession of the relevant fidelity fund certificate should not be a requirement but rather the mere fact that it has been issued should be sufficient to bring about compliance on the part of the property practitioner. We note that in this case also, the use of an electronic database as referred to previously at paragraphs 75 and 76 would go a long way towards resolving these concerns. Our comments further along at paragraphs 115 and 117 have application here as well.

83. Section 48 (4): There appears to be a conflict of philosophy between this subsection and subsection 56 (3). Subsection 48 (4) contemplates that a person who is not in possession of a valid fidelity fund certificate must "*upon receipt of a request from any relevant party in writing repay any amount received*" whereas subsection 56 (3) contemplates that the property practitioner must "*immediately pay that amount to the Fund*" and that the affected person may then claim the amount from the Fund. The position should be made consistent. In this regard, please also see our comment at paragraph 118.

Mandatory time periods for issuing certificates

84. Section 49 (1): It seems to us that the period of 30 days is excessively long given the relatively simple administrative process concerned in examining the documents submitted by the property practitioner

and issuing a fidelity fund certificate. We suggest therefore that a period of 10 working days be allowed for instead.

85. Section 49 (2): The subsection states that the period for the issue of a fidelity fund certificate will commence anew if the Authority requests the applicant to submit additional information or to correct the application. We think that this should be qualified by stating that the period in question will commence afresh "*unless the Property Practitioner can provide reasonable evidence that such additional information had in fact already been submitted by the property practitioner to the Authority*".

86. Section 49 (3): While the intention behind the subsection is understood, the practical effect is questionable. If the Authority has not been able to issue the fidelity fund certificate within the required period of 30 days, there is no reason to suggest that it will be able to comply with the mandatory 10 day period in the subsection. Furthermore, the remedy of the property practitioner for a failure to comply with either the 30 day period or the 10 day period remains the same, viz. an urgent application to court to compel compliance by the Authority. In the interim, the difficulty of the property practitioner is that it effectively cannot carry on business in the meantime or, if it can carry on business, it is not entitled to any reward. The position is iniquitous for a property practitioner. We suggest that the correct position should be that a property practitioner who has made application within the stipulated time frames should be entitled to continue operating on its existing fidelity fund certificate until the Authority has either validly refused to issue a new fidelity fund certificate or has issued the new fidelity fund certificate. This will solve all potential concerns and also obviate the need for unnecessary litigation. Yet again, the use of an electronic database as referred to previously at paragraphs 75 and 76 would go a long way towards resolving these concerns.

Disqualification from issue of fidelity fund certificates

87. Section 50, generally: Section 27 of the current legislation contains a provision which reads, in relation to qualifications pertaining to the issue of fidelity fund certificates "*Provided that if in respect of any person who is subject to any disqualification referred to in this section, the board is satisfied that, with due regard to all the relevant considerations, the issue of a fidelity fund certificate to such person will be in the interest of justice, the board may issue, and on such conditions as the Board may determine, a fidelity fund certificate to such person when he or she applies therefor.*" No such provision has been included in the current draft legislation and in our view this is a very material and serious omission as it entirely removes any discretion on the part of the Authority to issue a fidelity fund certificate where it is fair and reasonable to do so. We are of the view that it is absolutely essential that the identical provision also be included in section 50.

88. Section 50 (a) (i): The words "*is not a South African citizen*" should be deleted. Everyone legally residing in South Africa should be able to obtain a fidelity fund certificate.

89. Section 50 (a) (ii): This section prohibits the issuing of a fidelity fund certificate to a practitioner who has been "*found guilty of contravening this Act, the Estate Agency Affairs Act, 1976 or any similar legislation in any other jurisdiction*". The draft legislation however recognises the possibility of minor

infractions in respect of which either compliance notices may be issued or administrative penalties may be imposed. Such matters should never result in a prohibition on the issuing of a fidelity fund certificate.

90. Section 50 (a) (iii): In our view the inclusion of the words "*unprofessionally*" and "*dishonourably*" take the prohibition too far. There are any number of activities that could potentially be regarded as falling within such terminology, particularly when one considers the fact that the provision also applies to civil proceedings, in which context a court only needs to make a finding on a balance of probabilities as opposed to "beyond a reasonable doubt" as required by criminal proceedings. We suggest that these words be deleted from the draft legislation.

91. Section 50 (a) (viii): There appears to be no cogent reason for requiring a tax clearance certificate as a precondition for the issue of a fidelity fund certificate as tax matters are the subject of an entirely independent legislative and regulatory environment. Accordingly, we are of the view that the subsection should be deleted in its entirety. Furthermore, there are material and justifiable concerns about the potential difficulties or delays in obtaining tax clearance certificates from SARS, none of which would necessarily be the fault of the property practitioner but which nevertheless would impact the ability of the property practitioner to operate and earn a living given the requirement under the current draft to the effect that a property practitioner must be in possession of a fidelity fund certificate. In this context it should be borne in mind that SARS will be required to issue tens of thousands, if not hundreds of thousands more tax clearance certificates than it otherwise would and that this likely to increase the administrative pressure on the relevant department of SARS. We suggest therefore that the entire section be deleted.

92. Section 50 (a) (x): The draft section contemplates that a fidelity fund certificate may not be issued to any person who "*has been found guilty by a competent tribunal or a court of law of unfairly differentiating, distinguishing or excluding directly or indirectly anyone on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth*". We think that this goes too far inasmuch as there is a certain degree of ambiguity around the term "*unfairly*" bearing in mind that it can sometimes be very difficult to distinguish clearly between unfair and fair discrimination and that a wide range of sanctions may apply, from as little as an order that an apology be issued. Furthermore, we note that the prohibition applies in perpetuity. The result is that a person who may at some point in time have had an error of judgement of a comparatively minor nature is permanently precluded from earning a living as an estate agent. In so doing, the provision effectively penalises a person twice and potentially with the extreme harshness in relation to what may be considered (legally and morally) a comparatively minor infraction inasmuch as it is potentially able to entirely destroy the livelihood of the individual concerned. In our view the section should be entirely deleted.

93. Section 50 (a) (xi): As a matter of principle, the possession of a "*BEE certificate*" should not be a precondition for the issuing of a fidelity fund certificate but, should it remain, it should rather be a compliance issue (as for example is currently the situation in relation to trust accounts). Furthermore,

the section does not make any allowance for the position in respect of exempted micro-enterprises (being in terms of the Property Sector Code, businesses with annual turnovers of R 2,500,000 or less) or start-up enterprises, neither of which are required to have BEE certificates, in relation to which a specific exemption should be provided for. We also note that given that section 50 (a) deals with natural persons (section 50 (b) dealing with corporate entities); the effect is that the section as it currently reads provides that an individual who is not in possession of a "*BEE certificate*" may not be issued with a fidelity fund certificate. The correct position however should be that only a "business" property practitioner (as referred to in paragraph 1.b above) should be required to hold a BEE certificate.

94. Section 50 (b): The subsection effectively provides that if any person who is a director of a property practitioner that is a company (or a member in the case of a close corporation) is in default of any of the sub elements contemplated in subsections (i) to (iv), that that property practitioner in its entirety is prevented from operating. This cuts right across the objectives of the Act in section 2 insofar as they relate to promoting participation in the property sector. There is no precedent or similar provision in our company law that provides that a company ceases operating if one of the directors contravenes the law or is otherwise in default of an obligation. If this were the case, it would significantly inhibit the establishment and operation of companies, which are fully recognised as being essential to the economy and the public well-being. We are therefore of the view that the whole of section 50 (b) should be deleted. The position should rather be one in which the Authority may compel such person to cease being a director of such company (or a member in the case of a close corporation) and only failing compliance with such requirement may be fidelity fund certificate of the company or close corporation subsequently be withdrawn.

95. Section 50 (b): Furthermore, the subsection extends the effect of the foregoing to any "*member of management*". This takes matters too far and in our view the reference to management members should be deleted from the section.

96. Section 50 (d): Currently as a matter of practice and pursuant to the corresponding provision in the current legislation (being section 27 (1) (b) of the Estate Agency Affairs Act, 1976) the Board refuses to issue a fidelity fund certificate to any person who was a director of a company (or a member of a close corporation) which company (or close corporation) had its fidelity fund certificate withdrawn or which was prohibited from operating its trust account. This has the effect that a person who is no longer associated with an entity that is a property practitioner that is in default, is precluded from being issued with a fidelity fund certificate. This also is not in the public interest. Firstly, the individual in question may have resigned for entirely legitimate reasons (such as, for example, an objection to the property practitioner in question not being in full compliance with the requirements of law) and secondly, it is likely to inhibit the reporting of infringements by such persons to the Authority (bearing in mind that one would in fact wish to encourage such resigning persons to report serious non-compliance issues to the Authority). In this context, regard must also be had to the exception that is made for persons who are directors of companies but not property practitioners, as for example in the case of financial directors and marketing directors. As noted earlier, in practice, currently an exception is made for such persons in relation to the holding of fidelity fund certificates. There would probably be no sense in

precluding such a person from holding a fidelity fund certificate should they at a later date decide that they wish to qualify as a property practitioner in the normal course. While we are alive to the fact that there is a concern about estate agents who do not operate businesses properly (including as to the accounting records), abandon such businesses and then open a new business, we do not think that this is the correct way of addressing that concern. Consideration should therefore be given to clarifying the position in relation to persons who were previously associated with "business" property practitioners (as we have defined that term in paragraph 1.c) so as to not operate unfairly against people who ceased to be associated with any such "business" property practitioner in a legitimate manner.

97. Section 50 (d): The words "*referred to in paragraph (b) of the definition of "property practitioner*" do not seem to make sense given the content of paragraph (b) of the *" in section 1*definition of "property practitioner". As such words do not seem to be required for the section to be effective, we suggest that the words simply be deleted.

Amendment of fidelity fund certificates

98. Section 51 (4) (b): It is not clear what "*other person*" is being contemplated or referred to.

99. Section 51 (5): It is not clear that the exchange of the old fidelity fund certificate for the amended fidelity fund certificate will occur on a simultaneous basis. This should be provided for in light of the fact that, as noted earlier, a property practitioner cannot be in compliance in the absence of **possession** of the physical fidelity fund certificate, in which regard see for example section 53 relating to the display of fidelity fund certificates and section 56 (5) which requires that the conveyancer be provided with a copy of the fidelity fund certificate. We highlight here again the point made above in paragraph 82 about the issuing of a fidelity fund certificate and in paragraphs 75 and 76 about the use of electronic databases and online fidelity fund certificates, both of which would serve to alleviate the foregoing concern.

Withdrawal or lapse of fidelity fund certificates

100. Section 52, generally: A certificate should not be capable of being withdrawn or suspended without (a) prior notice of a defined period to the property practitioner concerned, (b) proper processes (including disciplinary processes, where applicable) first having been followed and (c) that property practitioner having been permitted to make a representation in relation to such proposed withdrawal or suspension. This comment arises out of a concern that currently certificates are suspended or withdrawn without any prior notice to the property practitioner concerned.

101. Section 52 (1) (b): In regard to this section, we draw attention to what we have said above at paragraph 81 in relation to the holding of fidelity fund certificates by the directors of companies and members of close corporations.

102. Section 52 (8): We previously made the point that there is no sound reason in morality or law why the Authority should not be liable in relation to the withdrawal or lapse of a fidelity fund certificate; that a property practitioner may suffer significant loss because of the failure on the part of the Authority to

act with due care towards the property practitioner; that we note that the legislation seeks to impose onerous obligations upon property practitioners but at the same time appears to seek to absolve itself of all liability in respect of the performance of its own obligations. Since we have made such comments, the words "*except where the withdrawal was due to the Authority's negligence*" have been introduced. This however fails to answer the situation in which the authority acts with intent and also fails to answer the situation in which the Authority fails to issue fidelity fund certificates in a timely and appropriate manner. We therefore remain of the view that the entire subsection 52 (8) should be deleted. We note also that we are of the view that the subsection is of questionable constitutional validity.

Mandatory display of fidelity fund certificates

103. Section 53, generally: Attention is drawn to the comments made earlier at paragraphs 75 and 76 about the use of electronic databases and online fidelity fund certificates.

104. Section 53 (1) (b): Given the nature and proliferation of marketing material, it is not practically possible for the prescribed sentence to be included on all marketing material. Accordingly, the words "*or marketing material*" be deleted.

Trust account

105. Section 54 , generally: It is undesirable to impose a requirement that every property practitioner have a trust account. We estimate that in excess of 70% of property practitioners do in fact not utilise trust accounts (any payments by way of deposits in relation to property transactions typically being made into the trust accounts of conveyancing attorneys). A property practitioner should not be required to open and operate a trust account unless it actually needs to do so by virtue of taking money into trust (as would be the case in the instance of letting agents). Annually auditing a trust account that is not used imposes an unnecessary financial burden; again, this is counter-productive in the context of an objective of transforming the property sector. It should be borne in mind that the very fact that an agent has a trust account may be used by that agent to induce the public to deposit funds with it; in that sense therefore the presence of a trust account actually increases the risk to the public (and thus the Fund) rather than reduces it. The logical consequence is that it is in the interests of the public and the Fund that agents who do not need to operate trust accounts should in fact not be required to do so. Further, if there is a trust account but it has been dormant for a period of time exceeding one year, then (a) the property practitioner should notify the Authority to this effect and (b) only a review audit (as opposed to a full audit) certifying the dormancy should be required; the auditor will be able to determine as to whether or not the claim as to dormancy is correct. Based upon the foregoing, each sale agreement concluded by a property practitioner should include a statement as to whether or not that property practitioner operates a trust account and, if it operates a trust account, details of the trust account.

106. Section 54, generally: It is not clear what the relationship is between section 54 and section 23 which deals with exemptions in relation to certain matters addressed in section 54. The relationship between the two sections should be more clearly addressed.

107. If the mandatory requirement for the opening of a trust account by a property practitioner is dispensed with, then given that there is a relationship between a trust account and the issuing of a fidelity fund certificate, consideration should be given to only requiring a registration certificate in respect of property practitioners who do not operate trust accounts.

108. Section 54, generally: The draft legislation appears to be silent as to what happens in relation to the interest that is earned on trust accounts. Such interest should be dealt with in the same manner as under the existing legislation and in which regard reference may be made to section 32 (2) (c) of the existing legislation.

109. Section 54 (4): It is not clear what the rationale is for requiring such certificates from banks to be issued if the trust accounts are in any event going to be audited. This simply appears to be the imposition of an unnecessary administrative burden on property practitioners and banks and will serve little real purpose in light of the audit requirements.

Duty of property practitioner to keep accounting records and other documents

110. Section 55 , generally: Failure by a property practitioner to comply with this section should not amount to an offence in terms of the legislation but rather be dealt with as a compliance issue, other than in the context of subsections (1) (d) and (4).

111. Section 55 (1) (e): The subsection contemplates that a property practitioner must keep copies of all advertising and marketing material put out by that property practitioner for a period of at least 10 years. It is not practically possible for property practitioners to comply with such a requirement, in particular section 54 (1) (e) which contemplates the retention of all advertising and marketing material; property practitioners generate an enormous volume of such material and it would impose a considerable burden upon a property practitioner to retain copies of all such information. It is also not clear why the information should be retained for a period of 10 years when the default period of prescription in our law is a period of 3 years. In light of that, one would imagine that a period of 3 years would be sufficient.

112. Section 55 (3): Given the volume of marketing material that property practitioners deal with, it is almost inevitable that there will not be absolutely perfect record keeping. For that reason a failure to comply with section 55 (1) (e) should rather attract an administrative penalty than being an offence as currently contemplated. Accordingly, section 55 (1) (e) should be excluded from the operation of section 55 (3).

113. Section 55 (4): It should be made clear that the obligation to retain accounting records only applies to the activities of the property practitioner as a property practitioner and not to the private activities of the property practitioner; where the property practitioner is employed by a "business" property practitioner (as contemplated in paragraph 1.a above), the requirement should solely be that such "business" property practitioner keep such records (compliance by the "business" property practitioner would effectively constitute compliance by the individual property practitioner concerned).

114. Section 55 (4) (b): While accepting that "business" property practitioners (as referred to above in paragraph 1.a) should always have their trust accounts audited, be previously noted that we think that

it should not be necessary for a property practitioner to have **all** of its business accounting records audited and that the records should be capable of only being reviewed as well. We note that section 23 on the face of it appears to be designed to address this issue, at least in part but again, the relationship between section 55 (4) (b) and section 23 is not clear. It is desirable that clarity be introduced into the legislation in this regard.

Property practitioner not entitled to remuneration in certain circumstances

115. Section 56 (1): The section effectively still requires that a property practitioner have "*possession*" of a fidelity fund certificate in order to be entitled to any remuneration for the services rendered by it. Existing legislation in the form of the Estate Agency Affairs Act, 1976 at sections 26 (1) and 34A (1) only requires that a certificate has been "*issued*". The distinction is important and we suggest that the word "*issued*" continue to be used in the current draft legislation. See also our comments further along in paragraph 117 in relation to the same consideration under section 56 (5). Our comments at paragraph 82 in relation to section 48 have application here as well.

116. Section 56 (1) (b): Following from our comments above in paragraphs 2.g and 96, we suggest that there should be no need for financial directors, marketing directors and other directors who perform similar roles and functions within an estate agency to hold fidelity fund certificates. We suggest that an exemption be stated in the draft legislation for such persons; alternatively, the application of our suggestion in paragraph 81 that only half the directors be required to hold a fidelity fund certificate might well resolve the difficulty. We also suggest that the requirement that every director hold a fidelity fund certificate operates against the transformation objectives of the draft legislation inasmuch as it makes it more difficult to introduce black senior management into estate agency operations.

117. Section 56 (5): There seems to be no rationale for requiring a copy of the fidelity fund certificate which is to be provided to the conveyancer to have to be certified. In this context also, the earlier comments about a publicly accessible online database have application as well as the existence of such a database would enable the conveyancer to establish that the property practitioner concerned has been issued with a fidelity fund certificate; furthermore, it would be comparatively easy to print a copy of the relevant fidelity fund certificate and for such to be provided to the conveyancer. We draw attention here as well to our concerns noted earlier that the effect is that the property practitioner is required to be in possession of the fidelity fund certificate notwithstanding that the Authority may only have issued such and may not yet have provided possession to the property practitioner.

118. Section 56 (5): The effect of this section would appear to be that if the conveyancer has not received a certified copy of the fidelity fund certificate in question, that the conveyancer would be obliged to pay the amount to which the property practitioner would otherwise be concerned, to the seller (being the party who is normally liable for the commission of the property practitioner). This is potentially a concern given that the unavailability of the fidelity fund certificate may be through no fault of the property practitioner (it might for example be a matter of an administrative error on the part of the Authority). For that reason, we think that it would be appropriate to provide that the conveyancer will hold the relevant funds in trust for a period of six months and only after such period has expired without

the matter having been resolved, may the conveyancer then discharge the funds. Further, the section should provide that the payment should be to the Fund and not to the seller, regard being had to the provisions of section 56 (3).

119. Section 56 (3): We note that the restrictions imposed upon conveyancers do not effectively address what may possibly be the biggest area of theft of trust monies, namely that of theft by rental agents.

120. Section 56 (3): There appears to be a conflict between sections 56 (3) and the provisions of section 35 (1), which do not appear to allow for claims against the Fund as contemplated in section 56 (3).

Mandatory indemnity insurance

121. Section 57, generally: It is not clear what the justification is for requiring mandatory insurance over and above the group insurance provided for under section 40 and the existence of the Fund, which in and of itself constitutes a form of insurance scheme designed to protect members of the public and in relation to which the contributions by the property practitioners may be fairly equated to insurance premiums; if anything, it may be more practical to extend the ambit of the events to which the Fund applies and in respect of which claims may be made against the Fund, in which regard our comments at paragraphs 65, 66 and 67 have application. The effect of such mandatory indemnity insurance, when taken together with the existence of the Fund and the provision allowing for group insurance in respect of the Fund effectively amounts to a triplication of matters. Again the point is made that by imposing such additional cost burdens on property practitioners, the barrier to entry is raised and thereby the objective of transformation contradicted. Consideration should also be given to the question of whether it will be possible for a property practitioner to practically obtain insurance of such nature and to such extent as may be prescribed by the Minister either at all or at an acceptable cost. In addition, it should be noted that caution should be exercised in relation to the possibility of prescribing the taking out of insurance with a particular insurer; as is consonant with the practice in other areas of our law, property practitioners should be entitled to choose the insurer with whom they wish to place their insurance. In summary, we think that the provision is unnecessary and should be deleted in its entirety.

Limitation on relationships with other property market service providers

122. Section 58 (1): The subsection prohibits a property practitioner from so much as informally encouraging a consumer to use a particular service provider. We are concerned about the practical implications of this as very often sellers and purchasers rely upon estate agents for recommendations as to appropriate conveyancers or other service providers to use. The subsection has the effect that the property practitioner may not even so much as mention the name of an appropriate conveyancer or other service provider at the risk of contravening the law, despite the fact that such conveyancer or service provider may have an excellent reputation and may provide the relevant service at far better value than is normally the case. The net effect is that the consumer is deprived of information which would be of utility to it and which may well save it money. Furthermore, it is not hard to see the prospect of a seller or purchaser raising an allegation of such encouragement on the part of a property

practitioner solely with a view to avoiding the commission which would otherwise be due to the property practitioner. For this reason, while we are of the view that the prohibition on obliging a consumer to enter into any particular arrangement should remain, we are of the view that the words "*or encouraged*" should be deleted.

123. Section 58 (2): The Minister should only be entitled to exercise the right to prohibit any relationship which could harm the interests of consumers after a process of consultation with the property practitioner industry.

124. Section 58 (3): The intended purpose and effect of the section is unclear. The nature of the type of arrangements which are sought to be restricted by section 58 are such that typically the "reward" would pass from one service provider to the other and the consumer itself would not be called upon to effect any "*remuneration, payment or consideration*". We accordingly suggest that 58 (3) be deleted.

CHAPTER 9

CONDUCT OF PROPERTY PRACTITIONERS

Application of Chapter 9 and Chapter 10

125. Section 60: The section states that the provisions of Chapter 9 and Chapter 10 apply with the necessary changes to any person who performs any function or renders any service contemplated in the definition of "*property practitioner*" in section 1, irrespective of whether or not that person is registered with or licensed by the Authority. We do not understand the logic of the section as, save for exemptions granted under section 4, all persons to whom the legislation has application are required to be registered. The language seems to anticipate that there is a category of persons to whom such registration or licensing would not apply. It would be strange indeed to contemplate by implication that only the provisions of Chapters 9 and 10 apply to persons who are otherwise in breach of the remaining provisions of the legislation. We also note that the section refers to "*licensing*" which is not a concept which is applied elsewhere in the legislation other than for a reference in section 3 (g). We suggest that the references to licensing both in section 60 and in section 3 (g) be removed.

Code of conduct for property practitioners

126. Section 61 (1): The code of conduct which is to be prescribed for property practitioners should be the subject of prior consultation with the property practitioners industry.

127. Section 61 (5): The norms and standards which are to be prescribed in respect of advertising and marketing by property practitioners should be the subject of prior consultation with the property practitioners industry. It is questioned as to whether there is a need for section 61 (5) at all in light of the provisions of the Consumer Protection Act which have application to property practitioners and their activities; it is not inconceivable that conflicting requirements may be imposed upon property practitioners. Accordingly, we think that section 61 (5) should be deleted in its entirety.

Sanctionable conduct

128. Section 62 (1) (i): The period of 14 days allowed for notification to the Authority by a property practitioner of a change in contact details should preferably be a period of 30 days.

129. Section 62 (1) (j): The comment at paragraph 96 above applies equally here.

Undesirable practices

130. Section 63 (1): The Minister should only declare a particular business practice in the property market to be an undesirable practice (and consequently prohibited) after a process of consultation with the property practitioner industry.

Candidate property practitioners

131. Section 64 (1): The section prohibits a candidate property practitioner from in any way drafting or completing any document or clause in a document relating to a mandate or the sale or lease of a property. The position should rather be that a candidate practitioner should not be entitled to finalise any sale agreement or lease agreement (meaning that they should not be entitled to have it signed by the parties to the transaction) unless the supervising property practitioner has first approved the final draft of the document. This will adequately protect the public, the property practitioner and the fund. In this regard we also note that it is common in the attorneys profession for candidate attorneys to draft documents by way of training but that no such document is normally sent to a client unless it has first been reviewed and approved by the attorney under whose supervision such candidate is working. The purpose of this is to enable the candidates to obtain the necessary experience in preparing documents while at the same time ensuring that those are of the necessary quality and standard required in order to protect the public. We suggest that a similar approach be taken in the context of candidate property practitioners as to do otherwise will effectively prevent candidate property practitioners from gathering the experience that they need in order to be able to later operate effectively as property practitioners, a situation which will run contrary to the public interest.

132. Section 64 (3): The subsection provides that it is no defence for a property practitioner that he or she was not aware of the acts or omissions of the candidate property practitioner. The way the provision is cast, it is absolute; yet the property practitioner concerned may be as much a victim of the activities of the candidate in question as any other person is. The test should surely rather be whether the property practitioner was negligent in his or her supervision or not; if there was no such negligence, then the property practitioner should in all fairness not be automatically held responsible for malpractice by the candidate property practitioner.

Franchising

133. Section 65, generally: We suggest that the definition of "franchise agreement" contemplated in section 1 of the Consumer Protection Act, 2008 be adopted for purposes of the Property Practitioners Bill. The definition clearly distinguishes between "franchising" and other arrangements which may have certain features which may be found in franchising arrangements but which do not amount to franchising. It is important that the distinction be made clear.

134. Section 65 (1): With reference to our comments earlier in the document at paragraph 1, we suggest that at least one of the property practitioners in control of a franchisee must hold an NQF5 qualification.

135. Section 65 (2): The subsection requires a franchisee to disclose clearly and unambiguously in all written communications, advertising and marketing materials that it operates in terms of the franchise agreement and to disclose the name of the franchisor. There should be no need to disclose the name of the franchisor given that there is no direct contractual link between the public and the franchisor.

136. Section 65 (3): The subsection provides that a fidelity fund certificate may be withdrawn if there is an infraction of section 65 (2) (as referred to above). However, no such withdrawal should be effected unless a compliance notice has first been issued and not complied with. It is in any event difficult to understand why section 65 (3) is required as the Authority in any event has the power to withdraw the fidelity fund certificate of any property practitioner in the event of a material contravention of the legislation. It seems anomalous to call out specifically contraventions of sections 65 (1) and (2). Consideration should be given to deleting section 65 (3).

CHAPTER 10

CONSUMER PROTECTION

Mandatory disclosure form

137. Section 67, generally: It is noted that property practitioners in any event as a matter of practice carry out property condition reports given the requirements of the Consumer Protection Act. It should not be necessary for these property condition reports to be attached to the sale agreement but only for the parties to have signed the property condition report; that should be sufficient to protect the parties in relation to the transaction in question. Furthermore, the draft subsection (2) may work to the enormous detriment of a good faith seller who has made full disclosure and signed the document together with the purchaser in that regard but is not aware of the attachment requirements stated in that subsection. It would seem to be completely inequitable for a seller in that position to then find itself in a position as if it had never made disclosure, notwithstanding that it in fact had done so. It also enables the purchaser to in principle unfairly claim losses against the property practitioner, notwithstanding the fact that it had in reality known about the defects in the property at the time that it concluded the sale agreement. This would be entirely iniquitous and, if anything, would give purchasers a perverse incentive to try to avoid the attachment of the list of defects to the sale agreement.

138. Section 67, generally: This section should not apply at all to lease arrangements. We draw to your attention to the fact that the requirement for disclosure is already a requirement in terms of the Rental Housing Act, 1999 and in particular section 5 thereof. It would seem to be unnecessary to add to what is already contemplated in that legislation and furthermore, it would create difficulties if there were potential conflicts between the two sets of legislative requirements.

139. Section 67 (1): We note that the form prescribed by the EAAB is not user-friendly and that for that reason many estate agents have set up their own forms which apply the content prescribed by the EAAB. We suggest that this state of affairs be permitted to continue and that the property practitioner not be obliged to use the actual form of the Authority but only to ensure that the form used by the property practitioner reflects the operative content prescribed by the Authority. Furthermore, the section should only apply to sales and not rentals given what we have stated immediately above relating to the Rental Housing Act, 1999.

140. Section 67 (3): For the reasons already referred to above at paragraph 137, section 67 (3) should be deleted in its entirety.

Duty of Care

141. Section 69 (2): The imposition of a duty of care on the property practitioner in relation to purchasers is of considerable concern. If the property practitioner has a duty of care to the purchaser, it is difficult to know where the outer limit of that duty of care lies or how it would be possible for the property practitioner to effectively "serve two masters" with conflicting interests. By way of illustration, a property practitioner may know that a particular seller wishes to achieve a certain price if possible but is willing

to settle for a significantly lower price if within a given period of time the higher price has not been achieved. It would seem that, as the section currently reads, the property practitioner would be obliged to disclose this fact to the purchaser; yet the property practitioner could not do so without doing a disservice to the seller and possibly exposing itself to a claim by the seller for making such disclosure; yet on the other hand, should the purchaser subsequently become aware of such facts, the property practitioner might well face a claim by the purchaser. This is only one illustration of circumstances in which the conflicting obligations imposed by this section would place the property practitioner in a position where it would unavoidably have to breach one or the other duty of care; it is not difficult to imagine other such circumstances which may arise. Section 69 (2) should therefore be deleted in its entirety.

CHAPTER 11

GENERAL

Regulations

142. Section 70 (2) (b): The subsection provides for the Minister to publish proposed regulations for public comment and allows for a period of 30 days for such comment. We suggest that the period of 30 days be 90 days as a 30-day period is not adequate for a proper process of consultation.

Penalties

143. Section 71: The section provides for "*a fine or imprisonment for a period not exceeding 10 years*" in respect of any offence under the Act. This seems excessive and furthermore, it seems inappropriate to allow for one standard for all offences under the Act. It is preferable that a graduated approach be taken, as is common in South African legislation.

Transitional Provisions

144. Section 75 (6): this section provides that all existing regulations made in terms of the Estate Agency Affairs Act, 1976 will remain in full force and effect as if they had been made under the new legislation. We note however that in a number of instances the provisions of those regulations would conflict with the content of the proposed legislation. This is likely to give rise to confusion and potential difficulties.