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DEPARTMENT OF HUMAN SETTLEMENTS

NOTICE 246 OF 2017

PROPERTY PRACTITONERS BILL, 2016

I, Lindiwe Nonceba Sisulu, Minister for Human Settlements hereby publishes the Property Practitioners Bill, 2016 for public comment. A draft Bill is hereby attached

Any interested persons or institutions are hereby invited to submit written comments or representations with regard to the draft Bill within 30 days of the date of publication of this notice. All comments or presentations must be submitted in writing in one of the following ways:

(a) By post to: The Director General
Department of Human Settlements
Private Bag x 644
Pretoria
0001
For attention: [Mr T Khambule]

(b) Delivered to: The Director-General
Department of Human Settlements
260 Justice Mohamed Street
For attention: [Mr T Khambule]

(c) By electronic mail: [Thulani.Khambule@dhs.gov.za]

Enquiries: [Mr T Khambule 012 444 9088]

Comments received after the closing date may not considered.

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REPUBLIC OF SOUTH AFRICA

PROPERTY PRACTITIONERS BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. … of …) (The English text is the official text of the Bill)

(MINISTER OF HUMAN SETTLEMENTS)

[B —2016]

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GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

BILL

To provide for the regulation of property practitioners; to provide for the continuation of the Estate Agency Affairs Board as the Property Practitioners Regulatory Authority; to provide for the appointment of the members of the Board and matters incidental thereto; to provide for the appointment of the Chief Executive Officer and other staff members of the Authority; to provide for the establishment, appointment, powers and functions of the Property Practitioner's Ombud Office; to provide for compliance with and enforcement of the provisions of the Act; to provide for the continuation of the Estate Agents Fidelity Fund as the Property Practitioners Fidelity Fund; to provide for consumer protection, to provide for the repeal of the Estate Agency Affairs Act, 1976; and to provide for matters connected therewith.

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PREAMBLE

WHEREAS a healthy property market is a national asset that restores the dignity of all South Africans through the basic constitutional right to ownership of immovable property through security of tenure;

AND WHEREAS a property is an asset to enhance economic activity, growth and development;

AND WHEREAS patterns of property ownership are historically skewed;

AND WHEREAS, there are distortions within the property market, especially the secondary property market;

AND WHEREAS transformation of the property market will benefit the country;

AND WHEREAS consumers require assistance when conducting property transactions;

AND WHEREAS property practitioners can play an important role in providing such assistance;

AND WHEREAS it is necessary to ensure that such assistance is rendered in a professional way;

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AND WHEREAS it is necessary to regulate circumstances when such assistance is not rendered in a professional way;

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

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CHAPTER 1

DEFINITIONS, APPLICATION OF ACT, ESTABLISHMENT AND OBJECTS OF AUTHORITY

Definitions

1. In this Act, unless the context otherwise indicates—

"auditor" means a person registered in terms of section 37 or 38 of the Auditing Profession Act, 2005 (Act No. 26 of 2005);

"Authority" means the Property Practitioners Regulatory Authority established in terms of section 4;

"Board" means the Board of the Authority contemplated in Chapter 2;

"candidate property practitioner" means a person who has not yet met all the qualification or experience requirements as prescribed to practise as a property practitioner and who is undergoing training under the supervision of a property practitioner, or a program created by the Authority ;

"CEO" means the Chief Executive Officer of the Authority appointed in terms of section 17;

"Chairperson" means the Chairperson of the Board;

"code of conduct" means the code of conduct prescribed in terms of section 60;

"consumer" means a consumer as defined in section 1(a) or (c) of the Consumer Protection Act, 2008 (Act No. 68 of 2008);

"conveyancer" means a conveyancer as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979);

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"days" means calendar days including Saturdays, Sundays and Public Holidays but excluding the period between 15 December to 15 January of the preceding year;

"Department" means the National Department of Human Settlements;

"Estate Agency Affairs Act" means the Estate Agency Affairs Act, 1976 (Act No. 112 of 1976);

"Estate Agency Affairs Board" means the Estate Agency Affairs Board established by section 2 of the Estate Agency Affairs Act;

"Fund" means the Property Practitioners Fidelity Fund contemplated in section 33;

"Fidelity Fund certificate" means a Fidelity Fund certificate contemplated in section 46(1);

"immediate family member" means a parent, child, brother or sister, or any person married to such a person, or a life partner of such a person;

"inspector" means a person appointed in terms of section 27;

"mandatory disclosure form" means the form referred to in section 66;

"Minister" means the Minister of Human Settlements;

"Ombud" means the Property Practitioners Ombud appointed in terms of section 21;

"Ombud's office" means the Property Practitioners Ombud's office established in terms of section 20;

"property practitioner"—

(a) means any person or business undertaking who or which for the acquisition of gain on his, her or its own account or in partnership, in any manner holds himself, herself or itself out as a person or business undertaking who or which, directly or indirectly, on the instructions of or on behalf of any other person—

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(i) by auction, in sale of execution or otherwise sells, purchases, manages or publicly exhibits for sale property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser in respect thereof;

(ii) lets or hires or publicly exhibits for hire property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor in respect thereof;

(iii) collects or receives any monies payable on account of a lease of a property or a business undertaking;

(iv) provides, procures, facilitates, secures or otherwise obtains or markets financing for or in connection with the management, sale or lease of a property or a business undertaking, including a provider of bridging finance and a bond broker, but excluding any person contemplated in the definition of "financial institution" in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990);

(v) assesses property to determine the defects, value for money and fit for use as part of the conclusion of an agreement to sell and purchase, or hire or let a property;

(vi) in any other way acts or provides services as intermediary or facilitator with the primary purpose to, or to attempt to do so, effect the conclusion of an agreement to sell and purchase, or hire or let, as the case may be, a property or business undertaking, including, if performing the acts mentioned in this subparagraph, a home ownership association, but does not include—

(aa) a person who does not do so in the ordinary course of business;

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(bb) where the person is a natural person and that person in the ordinary course of business offers a property for sale which belongs to him or her in his or her personal capacity;

(cc) an attorney or candidate attorney as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979); or

(dd) a sheriff as defined in section 1 of the Sheriffs Act, 1986 (Act No. 90 of 1986), when he or she performs any functions contemplated in paragraph *(a)* of this definition, irrespective of whether or not he or she has been ordered by a court of law to do so; or

(vii) renders any other service specified by the Minister on the recommendation of the Board from time to time by notice in the *Gazette*;

(b) includes any person who sells, by auction or otherwise, or markets, promotes or advertises any part, unit or section of, or rights or shares, including time share and fractional ownership, in a property or property development;

(c) includes any person who for remuneration manages a property on behalf of another;

(d) includes a trust in respect of which the trustee, for the acquisition of gain on the account of the trust, directly or indirectly in any manner holds out that it is a business which, on the instruction of or on behalf of any other person, performs any act referred to in paragraph *(a)*;

(e) for the purposes of sections 33, 45, 47, 48, 58, 59, 60 and 64, includes—

(i) any director of a company or a member of a close corporation which is a property practitioner as defined in paragraph *(a)*;

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(ii) any person who is employed by a property practitioner as envisaged in paragraph (a) and performs on his, her or its behalf any act referred to in subparagraph (i), (ii), (iv), (v) or (vi) of that paragraph;

(iii) any trustee of a trust which is a property practitioner as envisaged in paragraph *(d)*;

(iv) any person who is employed by a property practitioner as envisaged in paragraph *(b)* and performs on its behalf any act referred to in subparagraph (i), (ii), (iv), (v) or (vi) of paragraph *(a)*; and

(v) any person who is employed by a property practitioner contemplated in paragraph *(a)* or *(b)* to manage, supervise or control the day-to-day operations of the business of that property practitioner;

(f) includes any person who is employed by or renders services to an attorney or a professional company as defined in section 1 of the Attorneys Act, 1979, other than an attorney or candidate attorney, and whose duties consist wholly or primarily of the performance of any act referred to in subparagraph (i), (ii), (iii) (iv), (v) or (vi) of paragraph *(a)*, on behalf of such attorney or professional company whose actions will be specifically covered by the Attorneys' Fidelity Fund and not the Property Practitioners Fidelity Fund;

(g) for the purposes of section 61 and any regulation made under section 70, includes any person who was a property practitioner at the time when he or she was guilty of any act or omission which allegedly constitutes sanctionable conduct referred to in section 61,

but does not include an attorney who, on his own account or as a partner in a firm of attorneys or as a member of a professional company, as defined in section 1 of the Attorneys Act, 1979, or a candidate attorney as defined in that section 1, who

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performs any act referred to in paragraph *(a)*, in the course of and in the name of and from the premises of such attorney's or professional company's practice, provided that such an act may not be performed—

(i) in partnership with any person other than a partner in the practice of that attorney as defined in section 1 of the Attorneys Act, 1979; or

(ii) through the medium of or as a director of a company other than such professional company,

and **"advertise"** for the purposes of this definition does not include advertising in compliance with the provisions of any other law;

"prescribe" means prescribe by regulation;

"property" means immovable property, and any interest, right or duty associated with it as contemplated in section 2;

"record" means any recorded information regardless of form or medium;

"registration certificate" means a registration certificate as contemplated in section 46(2);

"this Act" includes any regulations made under this Act.

Application of Act

2. This Act applies to the marketing, promotion, managing, sale, letting, financing and purchase of immovable property, and to any rights, obligations, interests, duties or powers associated with or relevant to such property.

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Objects of Act

3. The objects of the Act are to—

(a) provide for the regulation of property practitioners;

(b) provide for the establishment of the Authority;

(c) provide for the powers, functions and governance of the Authority;

(d) provide for the protection and promotion of the interests of consumers;

(e) provide for a dispute resolution mechanism in the property market;

(f) provide for the education, training and development of property practitioners and candidate Property Practitioners;

(g) provide for a framework for the licensing of property practitioners;

(h) provide for a just and equitable legal framework for the marketing, managing, financing, letting, renting, sale and purchase of property;

(i) promote meaningful participation of historically disadvantaged individuals and small, micro and medium enterprises in the property market;

(j) provide for the transformation of the property market to address the distortions, especially in the secondary property market;

(k) provide for the transformation of the property market that facilitate property ownership to more South Africans through structured interventions and the creation of property consumer ownership programs in the affordable and secondary market; and

(l) create a mechanism for responding and implementation of directives received from the Minister of Human Settlements, from time to time.

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Exemption from Act

4. (1) Any person (hereinafter referred to as the applicant) may, subject to the provisions of this section, be exempted from compliance with any specific provision of this Act.

(2) The applicant must, in the prescribed manner and form, submit the application for exemption to the Authority, accompanied by—

(a) an explanation of the reasons for the application; and

(b) any applicable supporting documents.

(3) The Authority may direct the applicant to—

(a) furnish additional information which may be relevant; and

(b) appear in person before the Authority to support his or her application and provide verbal responses to questions raised by the Authority.

(4) *(a)* Any person may raise an objection to the Authority as prescribed regarding the exemption which has been granted to a person or an entity in terms of this section.

(b) The Authority must consider the objection and determine whether such objection may be sustained.

(5) The Authority must consider and decide on the application, taking into account whether—

(a) the granting of the exemption is likely to impact negatively on the interests of the general public;

(b) the granting of the exemption is likely to impact negatively on competition in the property sector or the property practitioners' industry;

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(c) the granting of the exemption is likely to benefit one section of the property practitioners' industry to the detriment of another;

(d) appropriate, sufficient and effective regulatory protection of consumers' rights and interests exists; and

(e) the exemption would not defeat the objects of the Act.

(6) The Authority may—

(a) approve the application, together with a record of the matters contemplated in subsection (7): Provided that the exemption may not exceed three years and may not be applied retrospectively;

(b) decline the application; or

(c) refer the application back to the applicant for further investigation or consideration, as the case may be.

(7) If the Authority approves the application, the Authority must publish the decision on its website, which must include—

(a) the provision of the Act from which exemption is granted;

(b) the person to whom the exemption applies;

(c) the date from which and the date up to when the exemption applies;

(d) any conditions that apply to the exemption, if any;

(e) the reasons for granting the exemption;

(f) a declaration that the granting of an exemption does not create any special rights or legitimate interests which may apply to the category of persons so exempted; and

(g) a declaration that any exemption granted may be amended or withdrawn subject to the provisions of this section.

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(8) Any person who is adversely affected by the decision of the Authority may request the Authority to provide written reasons.

(9) *(a)* Any person may at any time in writing request the Minister to review any exemption granted in terms of this section.

(b) The Minister must instruct the person requesting the review to notify the Authority as well as any other person specified by the Minister, for the account of the person requesting that review, and to submit any comments received to the Minister.

(10) The Authority may on good grounds amend, suspend or withdraw an exemption.

(11) The Authority must publish the exemption on its website.

Establishment of Property Practitioners Regulatory Authority

5. (1) There is hereby established a juristic person to be known as the Property Practitioners Regulatory Authority.

(2) The Authority is a National Public Entity subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(3) The Authority is governed and acts through a Board known as the Board of the Authority.

(4) The Authority must provide regulatory mechanisms in respect of the financing, marketing, managing, letting, hiring, sale, property consumer education and purchase of property, and may do all that is necessary or expedient to achieve the objects of this Act.

(5) The Authority is accountable to the Minister.

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Functions of the Authority

6. The functions of the Authority are to—

(a) regulate the conduct of the property practitioners in dealing with the consumers;

(b) to regulate the conduct of the property practitioners in so far as marketing, managing, financing, letting, renting, hiring, sale and purchase of property are concerned;

(c) regulate and ensure that there is compliance with the provisions of the Act;

(d) ensure that the consumers are protected from undesirable and sanctionable practices as set out in section 61 and section 62 ;

(e) regulate any other conduct which falls within the ambit the Act in as far as the property practitioners and consumers in this market are concerned;

(f) educate and inform consumers about their rights as set out in section 68;

(g) implement measures to ensure that the property sector is transformed as set out in section 69.

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CHAPTER 2

BOARD OF AUTHORITY

Composition and appointment of Board

7. (1) The Board consists of—

(a) not less than nine but not more than 12 non-executive members, including the Chairperson, appointed by the Minister; and

(b) the CEO, who serves on the Board by virtue of his or her office.

(2) The total number of the Board members contemplated in subsection (1)*(a)* must consist of—

(a) a combination of the following skills and competences:

(i) sufficient financial expertise;

(ii) relevant legal experience;

(iii) sufficient experience as property practitioners;

(iv) sufficient experience in the promotion and protection of consumer interests;

(v) sufficient experience in property management and financing; and

(b) at least—

(i) one member nominated by the Minister of Rural Development and Land Reform, in consultation with the Minister; and

(ii) one member nominated by the Minister of Public Works, in consultation with the Minister.

(3) *(a)* The Minister must prior to the appointment of members of the Board as contemplated in subsection (1)*(a)*, or filling a vacancy, issue an

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invitation in the *Gazette* and at least two newspapers circulating nationally in the Republic for the nomination of persons meeting the requirements to serve on the Board.

(b) A member of the Board contemplated in subsection (1)*(a)* who is not a public servant or in the full time employ of the State may be paid out of the funds of the Authority the remuneration and allowances that may be determined generally or in any particular case by the Minister in concurrence with the Minister of Finance.

(4) The Minister must ensure that—

(a) the appointment of members of the Board is governed by the overriding principle of selection based on merit, determined by an assessment of—

(i) the objects, functions and the operations of the Authority;

(ii) the competencies collectively required for serving on the Board, including the relevant skills, expertise and experience relating to governing an organ of state, having regard to subsection (2); and

(iii) the qualifications, skills, expertise and experience of each individual prospective candidate;

(b) the Board is broadly representative with regards to race, gender and disability; and

(c) the majority of persons serving on the Board are not public servants contemplated in section 8 of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

(5) When the Chairperson of the Board—

(a) is absent from the meeting of the Board, the remaining members must nominate one of them to act as Chairperson for that meeting; or

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(b) vacates his or her office, the Minister must within three months appoint a Chairperson in accordance with subsection (3).

(6) A non-executive member of the Board holds office for a period of three years.

(7) A member of the Board is upon completion of his or her term of office eligible for reappointment, but—

(a) no member may serve more than two consecutive terms of office; and

(b) the Minister may not reappoint more than five members of the same Board.

Disqualification from membership of Board

8. The Minister may not appoint a person to the Board—

(a) who is not a South African citizen;

(b) who is a member of Parliament, a member of a provincial legislature, a member of Cabinet or a Deputy Minister, a Premier or other member of a provincial executive council, a member of the National House of Traditional Leaders or a Provincial House of Traditional Leaders, or a mayor or other member of a municipal council;

(c) who or whose spouse, life partner, immediate family member, business partner or associate, holds an office in or is employed by or has any other interest whatsoever, whether direct or indirect, in any company or other entity which supplies goods or renders services to the Authority, unless such an interest is declared for purposes of considering that person's nomination;

(d) who is disqualified to act as a director of a company incorporated in terms of the Companies Act, 2008 (Act No. 71 of 2008);

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(e) who has been found in any civil or criminal proceedings by a court of law, whether in the Republic or elsewhere, to have acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty, or of any other offence for which such person has been sentenced to direct imprisonment without the option of a fine, other than an offence committed prior to 27 April 1994 demonstrably associated with political objectives;

(f) whose name, or the name of a juristic person of whom the person was a director, member, trustee, partner, shareholder, holder of membership or other beneficial interest has been listed by the National Treasury on its Register for Tender Defaulters established by section 29 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);

(g) who has been discharged from a position of trust;

(h) whose membership of a board or other accounting authority of a public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), has been prematurely terminated due to a dishonourable discharge;

(i) who has at any time been found to be in contravention of this Act or the Estate Agency Affairs Act, 1976;

(j) who is of unsound mind; or

(k) who is an unrehabilitated insolvent.

Powers and duties of Board

9. The functions of the Board are to—

(a) ensure that the Authority complies with this Act and any other applicable law;

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(b) ensure that the Authority performs its duties efficiently and effectively;

(c) provide corporate governance for the Authority;

(d) determine and enforce the broad policy framework within which the Authority must pursue its objects and perform its functions;

(e) ensure that the Authority exercises its powers in accordance with the principles of transparency and accountability;

(f) manage the marketing, promotion, sale, lease, financing, purchasing, registration and transfer of property of the Authority;

(g) advise the Minister on—

(i) the efficacy of this Act;

(ii) the state of transformation of the market;

(iii) prescribing of regulations;

(iv) education and training of property practitioners; and

(v) any other matter on which the Minister requires the advice of the Board;

(h) maintain the Fund and hold it in trust; and

(i) perform any other power or duty conferred on the Board by this Act or any other applicable law.

Good governance and code of ethics

10. (1) The Board must—

(a) approve codes of ethics applicable to all members of the Board and employees of the Authority, respectively; and

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(b) from time to time, review those codes to ensure compliance with all current law, principles of good governance and ethical behaviour.

(2) Nothing in this section prevents the Board from voluntarily adopting any code, protocol or charter not in conflict with any policy, code, protocol, guideline or similar document contemplated in subsection (1) and applicable to its members.

Conflict of interest of members of Board

11. (1) A member of the Board must upon appointment submit a declaration to the Minister, made under oath or by affirmation, to the effect that he or she is not disqualified from appointment as contemplated in section 8.

(2) A member of the Board or of a committee of the Board, as the case may be, must immediately when he or she becomes aware of any conflict of interest, in writing, inform the Chairperson of the Board or the chairperson of a Board committee, as the case may be, of such conflict, and the relevant chairperson must immediately excuse that member from participating and voting in any part of a meeting or proceedings where the matter that has caused such a conflict is considered.

(3) The Chairperson of the Board or of a committee of the Board must immediately when he or she becomes aware of any conflict of interest, in writing, inform the Board or the Board committee of such conflict, and the Chairperson must recuse himself or herself from participating and voting in any part of a meeting or proceedings where the matter that has caused such a conflict is considered.

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Termination of Board membership

12. (1) The Minister may, after having afforded a member of the Board a reasonable opportunity to make submissions in writing, terminate that member's membership of the Board if that member has—

(a) failed to immediately declare any conflict of interest as contemplated in section 11;

(b) repeatedly and knowingly disregarded or contravened any code of ethics contemplated in section 10 or any other applicable law; or

(c) failed to attend three consecutive meetings of the Board or a Board committee without the permission of the Chairperson or of the Board or the Chairperson of the relevant Board committee.

(2) The Minister must when terminating the membership of a member of the Board, in writing inform both the Board and that member of the reasons for that termination.

(3) If a member of the Board at any time during his or her term of office becomes disqualified to be a Board member on any one of the grounds contemplated in section 8, that member—

(a) must immediately in writing inform the Minister and the Chairperson of the Board of that disqualification, and once the Minister has been so informed he or she must forthwith in writing remove that member from the Board; and

(b) may not attend a Board meeting or a Board committee meeting from the time he or she has so become disqualified until he or she is removed by the Minister.

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(4) A member of the Board may resign by giving one month's notice in writing to the Minister.

(5) The termination of membership of the Board or resignation from the Board does not in any way prevent or influence the institution or continuance of proceedings against the person whose membership of the Board was terminated or who resigned from the Board, as the case may be.

Meetings of Board

13. (1) The Board must meet at least once in every three months.

(2) The Chairperson or Board must forthwith call a special meeting of the Board, if requested in writing to do so by at least three members of the Board.

(3) The majority of members present in a meeting of the Board constitute a quorum.

(4) The Chairperson has a casting vote only.

(5) Any minutes of a meeting, or a decision, signed by the Chairperson of the meeting, or by the chairperson of the next meeting of the Board, as the case may be, is evidence of the proceedings of that meeting or adoption of that decision, as the case may be.

(6) A meeting of the Board may be conducted by electronic communication and individual Board members may participate in a meeting by electronic communication, if the Board so approves, but the electronic communication facility employed must enable all persons participating in that meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.

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(7) The Board must in addition to this section adopt a charter setting out its rules of operation.

(8) The Board determines its own procedures at meetings of the Board.

Committees of Board

14. (1) The Board may appoint committees to assist it in efficiently and effectively performing its functions and exercising its powers in terms of the Act.

(2) The Chairperson of the Board may not serve on any of the Board's committees.

(3) The Board must determine the experience and qualifications of the members of the committees as well as the composition, period of service, rules and procedures of those committees.

(4) The Board remains responsible and accountable for anything done by its committees.

Dissolution of Board

15. (1) Subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), the Minister may dissolve the Board—

(a) if the Board collectively disregards or contravenes any document contemplated in section 10 or any applicable law; or

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(b) if the Auditor-General has for two successive years qualified his or her audit report or noted matters of emphasis or has declined to express an opinion on the accounts, financial statements and financial management of the Authority.

(2) Upon dissolution of the Board, the Minister must appoint an administrator to take over the functions of the Board and to do anything which the Board might otherwise be empowered or required to do by or under this Act, subject to such conditions as the Minister may determine.

(3) The appointment contemplated in subsection (2), may not exceed a period of 12 months.

CHAPTER 3

APPOINTMENT OF CEO AND STAFF OF AUTHORITY

Appointment of CEO

16. (1) The Board must, with the approval of the Minister, appoint a suitably qualified and experienced person as CEO for a period not exceeding five years.

(2) The CEO is accountable to the Board and is responsible and accountable for the day-to-day management and operations of the Authority.

(3) The Board must prior to the appointment of the CEO satisfy itself that the person whom it intends to appoint has a suitable combination of qualifications, skills and experience to lead and manage the Authority.

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(4) The appointment of the CEO is subject to the conclusion of a written performance contract entered into between the CEO and the Board within three months of the appointment of the CEO.

(5) The CEO may not trade with the Authority within six months after the termination of his or her employment by or resignation from the Authority.

(6) A CEO may be re-appointed after the expiration of his or her term of office for one additional term of five years.

(7) The CEO may resign by giving three months' notice in writing to the Board, unless the parties agree on a shorter period.

(8) Upon resignation or removal of the CEO, the Board must as soon as possible appoint a new CEO or another suitable person as acting CEO on the terms and conditions determined by the Board, until a new CEO is appointed.

(9) If the Board has not appointed a new CEO within six months after the position of the CEO became vacant, the Board must within 14 days after the expiry of such six months period report to the Minister the reasons why it has not done so.

(10) The Board may suspend, discipline and recommend the dismissal of the CEO with the approval of the Minister after it has followed all due processes under the laws of the country.

(11) The termination of the CEO's employment contract or the CEO's resignation does not in any way prevent or influence the institution or continuance of legal or disciplinary proceedings against him or her.

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Staff of Authority

17. (1) The CEO must appoint suitably qualified persons to assist the CEO to efficiently and effectively perform his or her functions under this Act, in accordance with an employment policy approved by the Board.

(2) The CEO must ensure that all employees of the Authority are adequately qualified and trained for their respective positions.

(3) The code of ethics for employees of the Authority contemplated in section 10(1) applies to all employees of the Authority to the extent indicated in the code.

Conflict of interest of employees

18. (1) An employee of the Authority must, on appointment, submit to the CEO a statement in writing in which that person declares whether or not he or she has any direct or indirect interest, financially or otherwise, which—

(a) may constitute a conflict of interest in respect of his or her functions as a member of staff of the Authority; or

(b) could reasonably be expected to compromise the Authority in the performance of its functions.

(2) If an employee of the Authority acquires an interest contemplated in subsection (1), he or she must immediately in writing declare that fact to the CEO.

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(3) An employee of the Authority may not be present at, or take part in, the discussion of or the taking of a decision on any matter before the Authority in which that member has an interest contemplated in subsection (1).

(4) An employee of the Authority may not use his or her position or privileges, or confidential information obtained as a member of staff of the Authority, for personal gain or to improperly benefit another person.

(5) The Authority must institute disciplinary proceedings against any employee of the Authority who fails or refuses to comply with or contravenes a provision of subsections (1), (2), (3) or (4) in accordance with applicable employment and labour law.

(6) The Authority must keep a register of the interests of members of staff disclosed in terms of subsections (1) and (2), and must update that register every three months.

Delegation

19. (1) The CEO may, in writing, delegate any of his or her functions or powers to any of the staff members of the Authority subject to any qualifications he or she may determine.

(2) The delegation of any function or power under subsection (1), does not preclude the CEO from exercising such function or power.

(3) The CEO remains responsible and accountable for all acts and or omissions in terms of or under such a delegation.

(4) The CEO may in writing revoke any delegation under subsection (1).

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(5) The CEO must maintain a register of all delegations under subsection (1).

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CHAPTER 4

ESTABLISHMENT, APPOINTMENT, RESOURCES, POWERS AND DUTIES OF PROPERTY PRACTITIONERS OMBUD

Establishment of Property Practitioners Ombuds Office

20. (1) There is hereby established the Property Practitioners Ombuds Office.

(2) The Ombud's Office is independent.

(3) The objective of the Ombud's Office is to—

(a) consider and dispose of complaints lodged in terms of this Act in respect of the financing, marketing, managing, letting, hiring, sale and purchase of property;

(b) provide mechanism for the resolution of those complaints; and

(c) generally, ensure that the complaints are disposed of in a procedurally and substantively fair, informal, economical and expeditious manner.

(4) The functions of the Ombud's Office are performed by the Property Practitioners Ombud.

Appointment of Property Practitioners Ombud

21. (1) The Ombud's Office must be headed by a fit and proper person with a legal background and relevant experience, appointed by the Minister as the Property Practitioner's Ombud.

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(2) The Ombud is appointed for a term of five years and may be reappointed for one or more additional terms of five years.

(3) The Ombud is accountable to the Minister.

(4) The appointment of the Ombud is subject to the conclusion of a written performance contract entered into between him or her and the Minister.

(5) The remuneration and other terms of appointment of the Ombud must be determined by the Minister.

(6) The code of ethics for employees of the Authority contemplated in section 10(1) applies to the Ombud and all employees of the Office.

(7) The Ombud may resign by giving three months' notice in writing to the Minister unless the parties agree to a shorter period.

(8) The Minister may, on good cause shown, remove the Ombud from office on the grounds of misconduct, incapacity or incompetence, after affording the Ombud reasonable opportunity to be heard.

(9) The Minister must, in writing, appoint a suitable person to act as Ombud if the Ombud—

(a) is temporarily unable to perform his or her functions in terms of the Act; or

(b) has vacated or been removed from office and a new Ombud has not yet been appointed.

(10) An acting Ombud may exercise all the powers and must perform all the duties of the Ombud.

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Staff and resources of Ombud

22. (1) The Ombud must, in accordance with an employment policy of the Ombud's Office, appoint suitably qualified persons which include administrative staff, investigators, legal officers, mediators and adjudicators to assist the Ombud to perform his or her functions effectively and efficiently in terms of the Act.

(2) The Department must provide the Ombud's Office with necessary resources which include financial and any other resources required to assist the Ombud to execute its functions efficiently and effectively.

Lodging of complaints

23. (1) Any person may, after he or she or it has exhausted all the internal remedies of the Authority, lodge a complaint with the Ombud in the prescribed form against a property practitioner in respect of financing, marketing, management, letting, hiring, sale or purchase of property.

(2) The Ombud must in writing acknowledge receipt thereof and inform the complainant of the case number assigned to the complaint.

(3) After receiving the complaint, the Ombud may require the complainant to submit further information or documentation in relation to the complaint.

(4) The Ombud may—

(a) in the prescribed manner, deal with the matter himself or herself;

(b) refer the matter for mediation as contemplated in section 24; or

(c) refer the matter for adjudication as contemplated in section 25.

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Mediation

24. (1) The Ombud must—

(a) if he or she believes that a complaint may be resolved through mediation; or

(b) on application by the person concerned,

allocate the matter to a mediator in such a manner and within such a period as may be prescribed.

(2) The Ombud must ensure that—

(a) the matter is set down for mediation; and

(b) the notice of the mediation as prescribed is given to all parties concerned;

(3) The mediator must hear the matter within 30 days of receipt of the allocation.

(4) At the commencement of mediation, the mediator must inform the parties of the following:

(a) The purposes of mediation and its objective to facilitate settlement between the parties;

(b) the facilitative role of the mediator as an impartial mediator who may not make any decisions of fact or law and who may not determine the credibility of any person participating in the mediation;

(c) the inquisitorial nature of mediation proceedings;

(d) the rules applicable to the mediation session;

(e) all discussions and disclosures, whether oral or written, made during mediation are confidential and inadmissible as evidence in any court, tribunal or other forum, unless the discussions and disclosures are recorded in a

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settlement agreement signed by the parties, or are otherwise discoverable in terms of the rules of court, or in terms of any other law;

(f) the mediator may during the mediation session encourage the parties to make full disclosure if in the opinion of the mediator such disclosure may facilitate a resolution of the complaint between the parties;

(g) no party may be compelled to make any disclosure, but a party may make voluntary disclosures with the same protection referred to in paragraph *(e)*;

(h) the mediator will assist to draft a settlement agreement if the complaint is resolved; and

(i) if the complaint is not resolved, the mediator will refer the complaint back to the Ombud.

(5) A mediator must, within five days of the conclusion of mediation, submit a report to the Ombud informing him or her of the outcome of the mediation, issues in dispute, levels of complexity, number of days required for adjudication and any other information which may assist the Ombud when scheduling the matter for adjudication.

(6) If the mediation fails—

(a) the mediator must issue a certificate stating the outcome of the mediation;

(b) the Ombud must serve a copy of that certificate on each party to the dispute or the person who represented a party in the mediation proceedings; and

(c) the mediator must file the original of that certificate with the Ombud.

(7) A party may, on written application and with notice to the other party, apply in writing to the Ombud for a settlement agreement to be made and have effect as an adjudicators order.

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(8) The mediator may postpone or extend the lifespan of a mediation process if the parties agree.

(9) *(a)* The mediator must assist the parties to resolve the dispute.

(b) If the parties come to an agreement which resolves the matter, the mediator must record that agreement in writing and conclude the proceedings.

(c) Once the agreement is reached by the parties, it is enforceable as an order of the magistrate's court.

(10) The Ombud must keep the records of all settlement agreements reached through mediation proceedings.

(11) Notwithstanding the provisions of subsection (1), property practitioners may consent to refer an inter-property practitioners' dispute for mediation by the Ombud, and the Ombud may provide such mediation service on a cost recovery basis.

(12) If a matter is not resolved as contemplated in this section, the matter must be adjudicated in accordance with section 25.

Adjudication

25. (1) If the complaint is not resolved under the mediation, the Ombud must allocate the complaint to an adjudicator for adjudication.

(2) The Ombud may appoint assessors to assist the adjudicator in adjudicating any complaint, depending on the complexity of the matter.

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(3) Within 14 days after the Ombud has allocated the matter to the adjudicator, the adjudicator must set the matter down for hearing within 30 days and must give notice as prescribed to all parties concerned.

(4) The adjudication must be held informally and expeditiously, subject to upholding the rules of natural justice and in accordance with the prescribed procedure.

(5) The adjudicator must upon conclusion of the adjudication make a determination as to whether the complaint is upheld or not.

(6) If the complaint is upheld, the adjudicator must make an order which in the circumstances is appropriate, and such an order has the status of an order of a magistrate's court and must be executed accordingly.

(7) The order contemplated in subsection (6) may include—

(a) a fine which may not exceed the amount determined by the Minister of Justice for the purposes of section 29(1)*(a)* of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944); and

(b) if appropriate in the circumstances, an order that the Authority pays not more than 80 percent of the fine as a compensation award to the complainant.

(8) The adjudicator must upon finalisation of the adjudication process provide written reasons for any of his or her determinations or orders.

(9) The Ombud must keep the records of all hearings, including the orders made and written reasons provided by the adjudicator, as prescribed.

(10) Subject to the provisions of subsection (7)*(b)*, any fine paid pursuant to an order made by the adjudicator accrues to the Fund.

(11) Notwithstanding the provisions of subsection (1), property practitioners may consent to refer an inter-property practitioners' dispute for final

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adjudication by the Ombud, and the Ombud may provide such service on a cost recovery basis.

(12) An order of the Ombud is final and binding and may only be reviewed by the High Court.

Accounting and Reporting by Ombud

26. (1) The Ombud must cause the required accounting and other records to account for all monies received or paid by the Ombud.

(2) The Ombud must, within five months after the end of each financial year, submit to the Minister an annual report on the activities of the Ombud's Office during the previous financial year.

(3) The Ombud must report to the Minister on the activities of the Ombud's Office or provide the Minister with information regarding the activities of the Office as and when requested to do so by the Minister.

(4) The Minister must table the report contemplated in subsection (2) in Parliament within one month of receiving such report from the Ombud, if Parliament is in ordinary session or, if Parliament is not in ordinary session, within 14 days after the commencement of its next ordinary session.

(5) The report contemplated in subsection (2) must contain, amongst other matters, a summary of —

(a) all complaints lodged with the Ombud which have been resolved;

(b) steps taken by the Authority to resolve complaints;

(c) all complaints lodged with the Ombud which have not yet been resolved and the reasons for their non-resolution;

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(d) all complaints lodged with the Ombud in respect of which the Authority has failed or refused to take steps; and

(e) complaints relating to systemic failures or shortcomings.

CHAPTER 5

COMPLIANCE AND ENFORCEMENT

Appointment of inspectors

27. (1) The CEO—

(a) must appoint any suitably qualified person as an inspector; and

(b) must issue each inspector with a certificate in the prescribed form stating that the person has been appointed as an inspector in terms of this Act and with the inspector's identification card.

(2) When the inspector performs his or her functions in terms of this section, the inspector must—

(a) be in possession of a certificate of appointment or an inspector's identification card issued to that inspector in terms of subsection (1)*(b)*;

(b) immediately show that certificate or inspector's identification card to any person who—

(i) is affected by the inspector's actions in terms of this Act; or

(ii) requests to see the certificate or inspector's identification card; and

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(c) have the powers of a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and may exercise the powers conferred on a peace officer by law.

Powers of inspectors to enter, inspect, search and seize

28. (1) An inspector may at any reasonable time and without prior notice conduct an inspection to determine whether the provisions of this Act are being or have been complied with, and for that purpose may without a warrant—

(a) enter and inspect any business premises of a property practitioner;

(b) require the property practitioner, manager, employee or an agent of the property practitioner to—

(i) produce to him or her the fidelity fund certificate of that property practitioner;

(ii) produce to him or her any book, record, or other document related to the inspection and in the possession or under the control of that property practitioner, manager, employee or agent; or

(iii) furnish him or her with such information in respect of the fidelity fund certificate, book, record or other document at such a place and in such manner as the inspector may determine;

(c) examine or make extracts from, or copies of, any such fidelity fund certificate, book, record or other document; and

(d) seize and retain any such fidelity fund certificate, book, record or other document that may afford evidence of sanctionable conduct under this Act:

Provided that the person from whom the fidelity fund certificate, book, record

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or other document was taken shall, at his or her request and at his or her expense, be allowed to make copies thereof or extracts therefrom, under the supervision of the inspector concerned.

(2) Where a property practitioner conducts his or her business at his or her private residence, the inspector must notify the property practitioner in advance and in writing before conducting the inspection in terms of subsection (1), and set out the details of the inspection.

(3) An inspector may on authority of a warrant—

(a) enter and search any premises;

(b) search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or record that has a bearing on the inspection;

(c) examine any article or record that is on or in those premises that has a bearing on the inspection;

(d) request any person on the premises to unlock or otherwise provide unhindered access to any safe, storage facility or other receptacle on the premises, or to point out any other person on the premises who can do so;

(e) request information about any article, document or record;

(f) take extracts from, or make copies of, any book, computer, document or record that is on or in the premises and that has a bearing on the inspection;

(g) use any computer system on the premises that has a bearing on the inspection, or require assistance of any person on the premises to use that computer system, to—

(i) search any data contained in or available on that computer system; or

(ii) reproduce any record from that data;

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(h) seize any output from that computer for examination and copying; and

(i) attach and if necessary remove from the premises for examination and safekeeping anything that has a bearing on the inspection: Provided that the person from whom the fidelity fund certificate, book, record or other document was taken shall, at his or her request and at his or her expense, be allowed to make copies thereof or extracts therefrom, under the supervision of the inspector concerned.

(4) The warrant contemplated in subsection (3) may only be issued by a judge or a magistrate if it appears from the information given by the inspector under oath or affirmation that—

(a) there are reasonable grounds for suspecting that a contravention of the Act has occurred or is occurring;

(b) a search of the premises is likely to yield information pertaining to the alleged contravention; and

(c) the search is reasonably necessary for the purposes of enforcing the Act.

(5) The warrant must identify the premises that may be entered and searched and specify the parameters within which the inspector may perform an entry, search or seizure.

(6) The warrant is valid only until—

(a) the warrant is executed;

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose of issuing it has lapsed; or

(d) the expiry of one month after the date it was issued, whichever occurs first.

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(7) The warrant may be executed only during the hours of 08h00 and 17h00 of a day other than a Saturday, Sunday or public holiday, unless the judge or the magistrate who issued it authorises that it may be executed at any other time that is reasonable in the circumstances.

(8) Immediately before commencing with the execution of a warrant, the inspector executing that warrant must either—

(a) if the owner or person in control of the premises to be searched is present—

(i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and

(ii) hand exact copies of the warrant and of this section to that person or to the person named in it; or

(b) if no people is present, affix an exact copy of the warrant at the entrance to the premises in a prominent and visible place.

(9) The inspector authorised to conduct search entry and siezure in terms of a warrant issued in terms of subsection (3) may be accompanied and assisted by one or more police officers.

(10) The inspector and any police officer accompanying the inspector must, when entering and searching any premises in terms of a warrant, conduct that entry and search with strict regard to decency and every person's right to dignity, freedom, security and privacy.

(11) During any search, only a female inspector or police officer may search a female person and only a male inspector or police officer may search a male person.

(12) An inspector who removes anything from premises being searched must—

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(a) issue a written receipt for it to the owner of or person in control of the premises in sufficient detail to identify each specific thing so removed; and

(b) return it as soon as practicable after achieving the purpose for which it was removed to the person from whose control it was taken, unless it is to be used as evidence in any subsequent proceedings, in which case the inspector must forthwith in writing inform the person from whose control it was taken of that fact.

(13) During a search conducted under a warrant, a person may refuse to permit the removal of an article, document or record on the grounds that it contains privileged or protected information, but that person may not cause such article, document or record to be amended, altered or destroyed until the inspector has been afforded a reasonable time to act under subsection (14).

(14) If the owner or person in control of an article or document refuses to give the article, document or record to the inspector conducting the search, that inspector may in writing request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article, document or record for safe custody until a court determines whether or not the information is privileged or protected.

(15) A police officer who is assisting the inspector in terms of this section may use as much force as is necessary, including breaking a door or window of the premises, or the breaking of any lock which prevents the search of any safe, storage facility or other receptacle on the premises, to overcome resistance by any person to the entry and search.

(16) Before using force a police officer must audibly demand admission or access and must announce the purpose of entry, unless it is

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reasonable to believe that doing so may induce someone to destroy, dispose of or conceal an article, document or record that forms part of the search or is otherwise relevant to the search.

(17) A person who submits any information to an inspector or makes any statement to him or her may indicate to the inspector that he or she claims confidentiality in respect of any information or statement so provided, and the inspector must deal with such information in accordance with the relevant law.

Compliance notices

29. (1) The Minister must, from time to time determine—

(a) contraventions of the Act that are of a minor nature; and

(b) contraventions of the Act that are of a substantial nature.

(2) The Minister must publish the determinations referred to in subsection (1) by notice in the *Gazette* and the Authority must publish the determinations on its website and via any other medium it deems fit.

(3) The Minister must by notice in the *Gazette* prescribe the maximum fines in respect of each type of contravention which the Authority may determine for the purposes of subsection (5): Provided that such a maximum fine may not for a particular year exceed the amount prescribed in respect of one year of imprisonment in accordance with the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), at any particular moment in time.

(4) The Authority may, where an inspection or investigation by an inspector indicates a contravention of this Act which is of a minor nature as determined under subsection (1), issue a compliance notice in the prescribed format

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to the person so allegedly contravening this Act, calling on that person to comply with this Act within a period specified in the compliance notice, which period must be reasonable in the circumstances.

(5) The Authority may, in the compliance notice, determine a fine to be paid by the person concerned if such person in writing on the compliance notice acknowledges his, her or its failure to comply with this Act as stated in the compliance notice.

(6) The fine contemplated in subsection (5) must be paid to the Authority within a period specified in the compliance notice.

(7) Any fine paid in consequence of a compliance notice accrues to the Fund, and the person named in that notice may not be prosecuted for having committed such contravention.

(8) Any contravention of a minor nature may not be taken into consideration when considering any application by or other proceedings against the person concerned.

(9) (a) A person issued with a compliance notice in terms of subsection (4) must comply with that notice.

(b) A person who refuses or fails to comply with such compliance notice is guilty of an offence.

Fine as compensation

30. (1) The Authority may, whenever a fine has been imposed on a property practitioner under this Act and taking into account any amounts paid under the mandatory indemnity insurance contemplated in section 56, if any, order that any

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portion of the fine be applied towards the payment of compensation to any person who suffered a pecuniary loss as a result of the conduct of that property practitioner.

(2) The Authority may on receipt of a fine imposed on a property practitioner make the payment contemplated in subsection (1), but no such payment may be made until all appeals in respect of the imposition of the fine have lapsed or have been finalised or abandoned.

CHAPTER 6

FINANCES

Funds of Authority

31. (1) The funds of the Authority consist of—

(a) monies appropriated by Parliament;

(b) fees paid to the Authority by property practitioners;

(c) all monies derived from any investments in terms of section 32(2); and

(d) all other monies which may accrue to the Authority from any other source.

(2) The Authority must utilise its funds to defray the expenses incurred by it in the performance of its functions and the exercise of its powers, but—

(a) any monies or other property donated or bequeathed to the Authority must be utilised in accordance with the conditions of such donation or bequest; and

(b) if the Authority—

(i) after an inspection or investigation has found that a property practitioner failed to comply with any duty imposed upon him or her in terms of this Act;

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(ii) has incurred any liability to pay costs in respect of any proceedings instituted by it in terms of this Act for the recovery from a property practitioner of any amount which is payable by him, her or it to the Authority or the Fund, or

(iii) has incurred any liability to pay audit fees in respect of an audit done on the instructions of the Authority in a case where an audit contemplated in section 53 has not been done,

the Authority may recover the costs of such inspection or investigation in so far as it relates to such duty or the taxed amount of such costs on an attorney and client scale or the amount of such audit fees, as the case may be, from the property practitioner concerned.

(3) The Minister must by notice in the *Gazette*, prior to the commencement of this Act and thereafter annually prior to the beginning of a financial year of the Authority, after consultation with the Board, determine the fees payable in terms of or under this Act.

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Financial year and deposits

32. (1) The financial year of the Authority is the period from 1 April in any year to 31 March in the following year, but the first financial year of the Authority begins on the date that this Act comes into operation, and ends on 31 March following that date.

(2) The Authority may invest or deposit money of the Authority that is not immediately required for contingencies or to meet current expenditures on a call or short-term fixed deposit account with any bank approved by the National Treasury.

CHAPTER 7

PROPERTY PRACTITIONERS FIDELITY FUND

Property Practitioners Fidelity Fund

33. (1) The Fund established by section 12 of the Estate Agents Affairs Act, 1976, known immediately before the commencement of this Act as the Estate Agents Fidelity Fund, continues to operate as if it were established in terms of this Act, under the name Property Practitioners Fidelity Fund.

(2) The following must be paid into the Fund:

(a) All monies paid as fees in accordance with this Act to or on account of the Fund;

(b) income derived from the investment of monies in the Fund in terms of section 32(2);

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(c) all monies recovered by or on behalf of the Fund in the exercise of any right of action conferred by this Act;

(d) all monies received on behalf of the Fund from any insurance company;

(e) interest paid to the Fund; and

(f) any other monies accruing to the Fund from any other source.

Primary purpose of Fund

34. (1) Subject to the provisions of this Chapter, the Fund must be maintained and applied to reimburse persons who suffer pecuniary loss by reason of—

(a) theft of trust money committed by a property practitioner who was in possession of a Fidelity Fund certificate at the time of the theft; or

(b) the failure by a property practitioner to comply with section 46(1) or (4).

(2) No person has any claim against the Authority as contemplated in subsection (1) unless the claimant has—

(a) within three years after the circumstances giving rise to a claim came into being, given notice to the Authority of such claim as contemplated in section 36; or

(b) within the three years period contemplated in paragraph *(a)* after a written request was sent to him or her by the Authority, furnished to the Authority such proof as it may reasonably require.

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Control and management of Fund

35. (1) Subject to subsections (2) and (3), the Authority is responsible for the management and administration of the Fund.

(2) The Authority may, with the approval of the Minister, outsource the management and administration of the Fund to any portfolio management company or a financial institution in terms of the Financial Services Board Act, 1990, on the terms and conditions approved by the Minister, subject to subsection (3).

(3) Each member of the Board, or of the management and administration of the Fund has been outsourced to any portfolio management company or institution as contemplated in subsection (2), that portfolio management company or institution, owes a fiduciary duty and a duty of care and skill to the Fund, and any such portfolio management company or financial institution may be held liable in accordance with the principles relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the Fund as a consequence of any breach by such portfolio management company or financial institution of such a duty.

Claims from Fund

36. (1) A claim for compensation from the Fund must be lodged with the Authority in the prescribed manner.

(2) A person is not entitled to claim against the Authority in respect of theft of trust money by a property practitioner unless such a person has, before lodging a claim with the Authority, laid a criminal charge against that property practitioner.

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(3) The Authority must hold an inquiry in the prescribed manner into any claim lodged with the Authority in respect of the Fund.

Payments from Fund

37. (1) Subject to the provisions of this Act, the following must, whenever required, be paid out of the Fund:

(a) The amount of all claims, including costs, allowed or established against the Fund as provided for in this Chapter;

(b) in the discretion of the Board, any contribution in respect of any expense incurred by any claimant in establishing a claim;

(c) all legal, accounting and other expenses incurred in investigating and defending claims made against the Fund or otherwise incurred in relation to the Fund;

(d) all premiums payable in respect of contracts of insurance entered into by the Authority in terms of section 39;

(e) the expenses incurred in the management, control and administration of the Fund by the Authority, or if the management and administration of the Fund has been outsourced to a portfolio management company or financial institution as contemplated in section 35(2), by that institution, as the case may be, in accordance with the terms and conditions approved by the Minister;

(f) grants as contemplated in section 38; and

(g) any other monies which may be paid out of the Fund in accordance with this Act.

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(2) The Minister may, in consultation with the Board, by notice in the *Gazette* limit the amount which may be paid from the Fund in respect of any category of claims.

(3) Any monies in the Fund not immediately required for the purposes of the Fund must, on the terms and conditions approved by the Minister be invested with or in an institution approved by the National Treasury.

Authorisation of grants

38. (1) Subject to the terms and conditions that it may determine, the Board may authorise grants from the Fund—

(a) with regard to—

(i) research in fields of activity relevant to the business of property practitioners;

(ii) the maintenance and promotion of the standard of conduct of property practitioners;

(iii) the maintenance and promotion of the training standards of property practitioners;

(iv) the education and training of property practitioners; and

(v) transformation of the property sector;

(b) to any association or society of property practitioners for the purpose of enabling that association or society to maintain and promote the interests of property practitioners; and

(c) of the amount that it may determine for the purposes of—

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(i) advertising and promoting the services and facilities offered by property practitioners in general; or

(ii) promoting public awareness in respect of consumer rights in matters relating to immovable property.

(2) The Board may at any time revoke any authorisation contemplated in subsection (1) on reasonable grounds.

Indemnity insurance

39. The Authority may in the public interest arrange any group insurance scheme with any insurer registered as a short-term insurer in terms of the Short-term Insurance Act, 1998 (Act No. 53 of 1998), for the provision of insurance to cover property practitioners' liability to members of the public on the grounds of malpractice, up to an amount determined by the Board.

Fees payable by property practitioner

40. (1) A property practitioner must annually pay to the Fund—

(a) a prescribed application fee for a Fidelity Fund certificate in accordance with the provisions of section 46; and

(b) any amount that the Minister may, after consultation with the Board, determine from time to time by notice in the *Gazette*.

(2) The Minister must in exercising the powers conferred upon him or her by subsection (1) specify a method or standard to determine the percentage

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by which the amounts contemplated in paragraphs *(a)* and *(b)* of that subsection are automatically adjusted annually on 1 April of every subsequent year, but—

(a) the Minister may at any time override such an automatic adjustment by making a new determination in terms of subsection (1); and

(b) the Minister must not later than five years after making a determination contemplated in subsection (1) or paragraph *(a)*, as the case may be, make a new determination in terms of subsection (1).

Co-operation by claimant

41. (1) A person who has lodged a claim contemplated in section 36(1) must upon request by the Authority participate, co-operate and assist the Authority in respect of any matter concerning the claim.

(2) The Authority may withhold payment from the Fund of any amount payable to a person who fails or refuses to substantially comply with any reasonable request made in writing by—

(a) the South African Police Service or other organ of state responsible for investigating or monitoring crime or criminal activity, to co-operate and assist in its investigation of any criminal charge laid against a property practitioner;

(b) the National Directorate of Public Prosecutions, any other prosecuting authority or any organ of state responsible for asset forfeiture investigations or proceedings, in respect of any investigation or proceedings in a court of law of which the relevant property practitioner is the subject or defendant, as the case may be; or

(c) the Authority to co-operate and assist in—

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(i) the investigation of any complaint against the relevant property practitioner; or

(ii) the exercise of the Authority's rights and remedies against the relevant property practitioner pursuant to the provisions of this Act.

(3) Neither the Fund nor the Authority is liable for payment of interest on any amount withheld as contemplated in subsection (2).

Actions against Authority in respect of Fund

42. (1) No person may commence any action against the Authority for payment from the Fund after the expiry of three years from the date of a written notification by the Authority addressed to the claimant, or his, her or its legal representative, if any, informing the claimant that the Authority—

(a) rejects the claim to which the action relates; or

(b) requires compliance with section 40.

(2) No person may recover from the Authority any amount larger than the difference between the amount of the loss suffered by him or her and the amount or value of all monies or other benefits which he or she received or is entitled to receive out of any other source in respect of such loss.

(3) No right of action lies against the Authority in respect of any loss suffered by—

(a) the spouse, life partner, business partner or immediate family member of a property practitioner by reason of any negligent or intentional conduct including theft committed by such property practitioner; or

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(b) any property practitioner by reason of any negligent or intentional conduct including theft committed—

(i) by his, her or its business partner;

(ii) if such property practitioner is a company, by any director of such company;

(iii) if he or she is a director of a company, by any co-director in such company;

(iv) if such property practitioner is a close corporation, by any member of such corporation;

(v) if he or she is a partner in a partnership, by any other partner of such partnership; or

(vi) by any person employed by him or her as a property practitioner;

(c) any person as a result of negligent or intentional conduct including theft, or as a result of any other act or omission in connection with trust monies held or received on account of any other person, by any person referred to in paragraph *(d)* of the definition of "property practitioner" in section 1.

Application of insurance monies

43. (1) No claimant having a claim against the Authority under this Chapter has by virtue of any contract entered into in terms of section 39 by the Authority with an insurer, have any right of action against that insurer.

(2) No claimant having a claim against the Authority under this Chapter has any right or claim in respect of any money paid or payable to the Authority by an insurer in accordance with a contract entered into in terms of section

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32, but such money must be paid into the Fund and applied by the Authority in accordance with the provisions of this Chapter to settle any relevant claim.

Transfer of rights and remedies to Authority

44. If the Authority settles in full or in part any claim under this Chapter, all the rights and remedies of the claimant in respect of such claim against the property practitioner concerned or any other person or, in the case of the death, insolvency or other legal incapacity of that property practitioner or other person, against the estate of that property practitioner or other person shall pass to the Authority, without qualification or diminution, to the extent of such settlement.

Fund exempt from insurance laws

45. No provision of any law relating to insurance applies to or in respect of the Fund.

CHAPTER 8

PROPERTY PRACTITIONERS

Application for Fidelity Fund certificate

46. (1) Every property practitioner excluding a property practitioner referred to in paragraph *(g)* of the definition of "property practitioner" in section 1, must, within the prescribed period and in the prescribed manner, annually apply to

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the Authority for a Fidelity Fund certificate, and such application must be accompanied by the fees contemplated in section 33.

(2) A property practitioner referred to in paragraph *(d)* of the definition of "property practitioner" in section 1, must, within the prescribed period and in the prescribed manner, apply to the Authority for a registration certificate, and such application must be accompanied by the fees contemplated in section 33.

(3) Subject to sections 42 and 51, the Authority must, upon receipt of an application contemplated in subsection (1) or (2) and the relevant fees, if the applicant concerned—

(a) meets or has met all requirements provided for in or under this Act; and

(b) is not disqualified in terms of section 47 from being issued with a Fidelity Fund certificate,

issue to the applicant concerned a Fidelity Fund certificate in the prescribed form, which is valid until 31 December of the year to which such application relates.

(4) A property practitioner who applies to the Authority for a Fidelity Fund certificate or a registration certificate, after the prescribed period referred to in subsection (1) or (2), or whose application is not accompanied by the fees referred to in section 33, must in addition to the applicable fee pay a prescribed penalty to the Authority and the Authority may not issue a Fidelity Fund certificate to the property practitioner concerned until the penalty has been paid.

(5) A property practitioner may not use or display a lapsed Fidelity Fund certificate.

(6) A property practitioner must, upon request from any relevant party, produce a Fidelity Fund certificate or certified copy thereof.

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(7) A property practitioner whose contact details change during the period of validity of his, her or its Fidelity Fund certificate, must within 14 days of such a change taking place in writing provide the Authority with his, her or its new contact details.

Prohibition on rendering services without Fidelity Fund certificate

47. (1) No person or entity may act as a property practitioner unless, in addition to any other requirements provided for in or under this Act—

(a) he or she or it is in possession of a Fidelity Fund certificate contemplated in section 46; or

(b) if he or she or it employs any other person as a property practitioner, that person is also in possession of a Fidelity Fund certificate contemplated in section.

(2) If an entity is—

(a) a company;

(b) a close corporation;

(c) a trust; or

(d) a partnership,

every director of such a company, every member of such a close corporation, every trustee of such a trust and every partner of such a partnership, as the case may be, must be in possession of the Fidelity Fund certificate contemplated in section 46.

(3) Any person who contravenes or fails to comply with subsection (1) is guilty of an offence.

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(4) A person who contravenes or fails to comply with subsection (1) must immediately upon receipt of a request from any relevant party in writing repay any amount received in respect of or as a result of any property transaction during such contravention.

(5) A person who fails to comply with a request contemplated in subsection (3) is guilty of an offence.

(6) The provisions of this section apply irrespective of—

(a) what appellation a person or entity is described by; or

(b) whether he, she or it is registered, certified or appointed or acts in terms of or under or for purposes of any other Act.

Mandatory time periods for issuing certificates

48. (1) The Authority must, within 30 working days, consider any application submitted to it in terms of this Act, which fully meets the prescribed requirements, unless the Authority on good grounds in writing informs the applicant of the reasons why that period is to be extended, provided that such extension may not exceed 20 working days.

(2) The period of 30 working days contemplated in subsection (1) commences afresh if the Authority requests the applicant to submit additional information or to correct the said application.

(3) If the Authority has failed to comply with subsection (1), the application is deemed to have been approved and the Authority must, upon written request by the applicant within 10 working days, issue the applicant with the relevant certificate.

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Disqualification from issue of Fidelity Fund certificate

49. The Authority may not issue a Fidelity Fund certificate to—

(a) any person who—

(i) is not a South African citizen or does not lawfully reside in the Republic;

(ii) has at any time in the preceding five years been found guilty of contravening this Act, the Estate Agency Affairs Act, 1976, or any similar legislation in any other jurisdiction;

(iii) has been found in any civil or criminal proceedings by a court of law, whether in the Republic or elsewhere, to have acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty, or of any other offence for which such person has been sentenced to imprisonment without the option of a fine;

(iv) is of unsound mind;

(v) has at any time in the preceding five years by reason of improper conduct been dismissed from a position of trust;

(vi) is an unrehabilitated insolvent;

(vii) is not in possession of a valid tax clearance certificate;

(viii) whose name, or the name of a juristic person of whom the person was a director, member, trustee, partner, shareholder, holder of membership or other beneficial interest has been listed by the National Treasury on its Register for Tender Defaulters; or

(ix) has been prohibited by any legislation, enacted in the Republic or elsewhere, from practicing as a property practitioner or from occupying

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a position of trust, including any juristic person to whom the disqualifications in subparagraphs (ii), (iii), (vi) and (vii) apply with the necessary changes;

(x) 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;

(xi) is not in possession of a BEE certificate,

(b) any property practitioner who or, if such property practitioner is a company, any director or member of management of that company, or if such property practitioner is a close corporation, any member referred to in paragraph (a) of the definition of "property practitioner" in section 1, or if such property practitioner is a trust, any trustee, or if such property practitioner is a partnership, any partner, who—

(i) in the preceding five years has been found guilty of contravention of this Act or the Estate Agency Affairs Act, 1976;

(ii) does not comply with the prescribed standard of training;

(iii) does not have the practical experience determined by the Authority; or

(iv) has at any time been guilty of any act or omission in respect of which any person had to be compensated pursuant to the provisions of section 38 from the Fund, unless the property practitioner has repaid the relevant amount in full to the Authority, or the Authority is of the opinion that satisfactory arrangements for the settlement of such amount have been made and has confirmed such arrangements,

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(c) any property practitioner contemplated in paragraph *(a)* of the definition of "property practitioner" in section 1 if such property practitioner carries or intends to carry on business as a property practitioner under a trade name which is identical or confusingly similar to the trade name of another property practitioner—

(i) already issued with a Fidelity Fund certificate; or

(ii) whose Fidelity Fund certificate is suspended or has lapsed or been withdrawn in terms of this Act; or

(d) any property practitioner who is a director of a company, or who is a member referred to in paragraph *(b)* of the definition of "property practitioner" in section 1, of a close corporation—

(i) of which the Fidelity Fund certificate was withdrawn by the Authority in terms of section 51; or

(ii) which was prohibited in terms of section 47 from operating in any way on its trust, savings or other interest-bearing account referred to in terms of that section.

Amendment of Fidelity Fund certificate

50. (1) For the purposes of this section, "holder" means the holder of a Fidelity Fund certificate.

(2) The Authority may, at any time in writing, inform the holder that the Authority intends to amend any particulars of the Fidelity Fund certificate held by the holder, and the Authority must—

(a) provide reasons for the proposed amendment; and

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(b) invite the holder to submit a written response within a prescribed period.

(3) The Authority may after due consideration of any response received, including that of any person other than the holder, amend the particulars of the Fidelity Fund certificate and issue an amended Fidelity Fund certificate to the holder.

(4) When issuing the Fidelity Fund certificate contemplated in subsection (3) the Authority must, simultaneously in writing—

(a) provide the holder with reasons for the amendment;

(b) provide the holder with a copy of any response received from the other person; and

(c) request the immediate return of the original Fidelity Fund certificate.

(5) A person who, in terms of paragraph *(c)*, is requested to return the original Fidelity Fund certificate to the Authority, must—

(a) do so forthwith; or

(b) if that Fidelity Fund certificate cannot be returned, submit a declaration made under oath or affirmed to the Authority as to the reasons and circumstances preventing that person from doing so.

(6) An amended Fidelity Fund certificate comes into operation on the date on which it is served by the Authority on the holder.

(7) If the holder prevents delays or avoids service of the amended Fidelity Fund certificate by the Authority or attempts to do so, the amended Fidelity Fund certificate comes into operation on the date on which the Authority first attempted to serve the amended Fidelity Fund certificate on the holder.

(8) If the Authority attempted to serve the amended Fidelity Fund certificate on the holder but was unsuccessful for the reason that the holder

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prevented, delayed or avoided the Authority from doing so, the Authority must, for the general public's information, publish the date on which the amended Fidelity Fund certificate came into operation, and the nature or contents of the amendment, in any medium which it deems adequate for this purpose.

Withdrawal or lapse of Fidelity Fund certificate

51. (1) The Authority may, whether on its own initiative or pursuant to an instruction issued by a court of law or an adjudicator contemplated in section 25, withdraw a Fidelity Fund certificate issued to—

(a) any person, partnership or trust summoned in the prescribed manner to appear before the Authority if that person or trust without just cause fails to comply with the summons and prior to the date of the appearance stated in the summons has not been excused in writing by the Authority, from so appearing;

(b) a company or close corporation, if—

(i) the Fidelity Fund certificate of any director of the company or of any member of the corporation has lapsed in terms of subsection (5); or

(ii) any director of such company, or any member, referred to in paragraph *(a)* of the definition of "property practitioner" in section 1, of such corporation, has lapsed in terms of subsection (5), or any trustee of a trust or the person responsible for the trust, becomes subject to any disqualification referred to in section 49*(b)*(ii) and (iii) or section 49*(c)*,

(c) a person or trust becomes subject to any disqualification referred to in section 49*(b)*(ii), (iii) or section 49*(c)*.

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(2) A person who is in possession or of control any Fidelity Fund certificate which has been withdrawn in terms of subsection (1) must refrain from using or displaying that Fidelity Fund certificate.

(3) A court may, on good cause and upon application by the Authority or any other competent person, withdraw any Fidelity Fund certificate issued to any person, and thereupon order that the person contemplated in subsection (2) or any other person to immediately refrain from using and displaying that Fidelity Fund certificate.

(4) A Fidelity Fund certificate lapses immediately and is of no force and effect if the person to whom it has been issued—

(a) in the case of a natural person, the person to whom it has been issued dies or becomes subject to any disqualification referred to in section 490*(a)*(ii) to (vi);

(b) is a company or a close corporation, and the company or close corporation is being wound up, whether provisionally or otherwise, or is deregistered, as the case may be;

(c) is a partnership, and one of the partners is sequestrated; or

(d) in the case of a trust with only one trustee, that trustee is sequestrated.

(5) A person who is in possession or control of a Fidelity Fund certificate which has been withdrawn or has lapsed must immediately return that certificate to the Authority, or if that Fidelity Fund certificate cannot be returned, submit a declaration made under oath or affirmed as to the reasons and circumstances preventing the property practitioner from doing so.

(6) A person whose Fidelity Fund certificate has been withdrawn in terms of subsection (1) or has lapsed in terms of subsection (4), may not directly or indirectly participate in the management of any business carried on by a property

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practitioner in his, her or its capacity as such, or participate in the carrying on of such business, or be employed, directly or indirectly, in any capacity in such business, except with the written consent of the Authority and subject to the conditions that the Authority may determine.

(7) A property practitioner may not directly or indirectly in any capacity whatsoever employ a person contemplated in subsection (6), or allow or permit such person directly or indirectly to participate in any capacity in the management or the carrying on of his, her or its business as a property practitioner, except with the consent in writing of the Authority, and subject to the conditions that the Authority may impose.

(8) The Authority has no liability whatsoever in respect of the withdrawal or lapse of a Fidelity Fund certificate.

(9) A person, partnership or trust whose Fidelity Fund certificate has been withdrawn or lapsed in terms of this section may re-apply for a Fidelity Fund certificate when it, he or she again qualifies for such a certificate.

(10) A person who uses or displays the Fidelity Fund certificate contemplated in subsection (2), is guilty of an offence.

Mandatory display of Fidelity Fund certificate

52. (1) A holder of a Fidelity Fund certificate must—

(a) prominently display his, her or its Fidelity Fund certificate in every place of business from where he, she or it conducts property transactions, to enable consumers to easily inspect it;

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(b) ensure that the prescribed sentence regarding holding a Fidelity Fund certificate is reproduced in legible lettering on any letter head or marketing material relating to that property practitioner;

(c) in any agreement relating to property transactions entered into by him or her or by his, her or its company, close corporation, partnership, trust or other entity permitted to conduct the business of a property practitioner, include the prescribed clause which ensures that he, she or it guarantees the validity of the certificate.

(2) A person who contravenes subsection (1) is guilty of an offence.

Trust account

53. (1) Every property practitioner—

(a) must open and keep one or more separate trust accounts, which must contain a reference to this section, with a bank registered in terms of the Banks Act, 1990, (Act No. 94 of 1990);

(b) must immediately after opening a trust account contemplated in paragraph *(a)* appoint an auditor as prescribed;

(c) must immediately after opening a trust account as contemplated in paragraph *(a)* and appointing an auditor as contemplated in paragraph *(b)*, provide the Authority as prescribed with all information in respect of such account or accounts and such auditor; and

(d) or his, her or its responsible or designated employee, as the case may be, must immediately deposit all trust money held or received by or on behalf of that property practitioner in the relevant trust account.

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(2) Despite subsection (1), any property practitioner may invest in a separate savings or other interest-bearing account opened by him, her or it with any bank any monies deposited in his, her or its trust account which are not immediately required for any particular purpose, provided that—

(a) savings or other interest-bearing account must contain a reference to this subsection; and

(b) property practitioner must as prescribed provide the Authority with all information in respect of such account.

(3) A property practitioner must retain all trust money deposited in terms of subsection (1) or invested in terms of subsection (2), until he, she or it—

(a) is lawfully entitled to such money; or

(b) is lawfully instructed in writing to make payment therefrom to any person.

(4) Any bank which manages trust accounts for purposes of this Act must from time to time as prescribed submit a certificate to the Authority declaring the interest in that account.

(5) Every property practitioner must—

(a) keep separate accounting records of all monies deposited by him, her or it in his, her or its trust account and of all monies invested by him, her or it in any savings or other interest-bearing account contemplated in subsection (2);

(b) balance his, her or its books and records relating to any account contemplated in paragraph *(a)* at intervals of not more than one month, and cause them as well as all his, her or its business accounts or any other account into which moneys are deposited in connection with any property transaction to be audited by the same auditor contemplated in subsection

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(1)*(b)*, within six months after the final date of the financial year of the property practitioner concerned; and

(c) administer the accounts referred to in subsections (1) and (2) in the prescribed manner.

(6) A property practitioner must forthwith after receipt of an audit report contemplated in subsection (5)*(b)* submit that report to the Authority, but a property practitioner who submits that report later, may upon payment of a prescribed penalty make a late submission of that report.

(7) Despite subsection (5), the Authority may on good cause at any time order a property practitioner by notice in writing to submit to the Authority within a period stated in such notice, but not less than 30 days, an audited statement prepared by an auditor fully setting out the state of affairs in respect of the matters referred to in subsection (5)*(a)*.

(8) The Minister may prescribe circumstances under which a property practitioner may be exempted from keeping a trust account.

(9) A court may on good cause, upon application by the Authority or any other competent person, prohibit any property practitioner from operating in any way his, her or its trust, savings or other interest-bearing account contemplated in subsection (2) and may appoint a curator bonis to control and administer such trust, savings or other interest-bearing account, with the rights, duties and powers that the court deems fit.

(10) If—

(a) the Authority refuses under the provisions of this Act to issue a Fidelity Fund certificate to any property practitioner who applied for a Fidelity Fund certificate;

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(b) a Fidelity Fund certificate issued to any property practitioner has been withdrawn or lapsed without being renewed;

(c) any property practitioner ceases to act as such; or

(d) any property practitioner becomes subject to any disqualification contemplated in section 49,

the property practitioner concerned must immediately wind up his, her or its trust account, savings account or other interest-bearing account in the prescribed manner and pay out in the prescribed manner the amount standing to the credit of any such account to the persons entitled to it.

(11) Any property practitioner who winds up an account as contemplated in subsection (10) which contains unclaimed or unidentifiable money, or who has held moneys in his, her or its trust account of which the owner or beneficiary could for longer than three years not be identified, must pay that money into the Fund to be held in trust, but the Fund must upon application in the prescribed manner by the owner or beneficiary of such money and with the provision of sufficient proof pay that money to that owner or beneficiary.

(12) Any money paid into the Fund in accordance with subsection (11) which has remained unclaimed by the person entitled thereto for a period of 30 years as from the date upon which such person became entitled to claim that money, is forfeited to the Fund.

(13) Despite any other law, the amount standing to the credit of the trust, savings or other interest-bearing account contemplated in subsections (1) and (2) of a property practitioner, does not under any circumstances form part of the assets of such property practitioner or, if he or she was a natural person and has died or has become insolvent, of his or her deceased or insolvent estate.

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(14) Despite any other law, no trust money which may have been paid into any account other than an account contemplated in subsections (1) or (2), whether erroneously or not, under any circumstances becomes part of any such account, and does not lose its nature or characteristics as a result of being paid into such other account.

(15) A property practitioner must annually confirm or update the details of his, her or its auditor as prescribed.

Duty of property practitioner to keep accounting records and other documents

54. (1) Despite any other law, a property practitioner must for a period of 10 years in respect of—

(a) all documents exchanged with the Authority;

(b) if applicable, correspondence with his, her or its employer or franchisor;

(c) any agreement incidental to his, her or its carrying on the business of a property practitioner;

(d) any agreement, mandate, mandatory disclosure form or other document relating to the financing, sale, purchase or lease of a property;

(e) any advertising or marketing material related to his, her or its carrying on the business of a property practitioner; and

(f) any other document prescribed by the Minister,

from the date of the document or the probable date of the document retain that document and must upon request forthwith provide the Authority with a legible certified copy of that document.

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(2) The documents contemplated in subsection (1) may be stored electronically if such storage meets the requirements of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

(3) A property practitioner who contravenes subsection (1) is guilty of an offence.

(4) In addition to the duties contemplated in section 54, a property practitioner must in respect of his, her or its activities—

(a) keep in one of the official languages at an address in the Republic the accounting records that are necessary fairly to reflect and explain the state of affairs—

(i) of all monies received or expended by him, her or it, including monies deposited to a trust account referred to in section 53(1) or invested in a savings or other interest-bearing account referred to in section 53(2);

(ii) of all his, her or its assets and liabilities; and

(iii) of all his, her or its financial transactions and the financial position of his, her or its business; and

(b) cause the accounting records contemplated in paragraph (a) to be audited by an auditor within six months after the final date of the financial year of the property practitioner, which final date may not be altered by him, her or it without the prior written approval of the Authority.

Property practitioner not entitled to remuneration in certain circumstances

55. (1) A property practitioner is under no circumstances entitled to any remuneration or other payment in respect of or arising from the performance of any

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act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph *(a)* of the definition of "property practitioner" in section 1, unless at the time of the performance of that act—

(a) the property practitioner; and

(b) if the property practitioner is a company, every director of such company or, if such property practitioner is a close corporation, every member referred to in paragraph *(b)* of the definition of "property practitioner" in section 1, of that corporation,

is in possession of a Fidelity Fund certificate.

(2) A person referred to in paragraph *(f)* of the definition of "property practitioner" in section 1, and a property practitioner who employs such person, is not entitled to any remuneration or other payment in respect of or arising from the performance by that person of any act referred to in that paragraph, unless at the time of the performance of the act that person is in possession of a registration certificate.

(3) A property practitioner, or anyone who performs any functions or exercises any powers normally performed or exercised by a property practitioner, who has received remuneration or other payment contemplated in subsections (1) and (2) must immediately pay that amount to the Fund, and any affected seller, purchaser, lessor or lessee may within three years of that money having been paid to the Fund submit a written claim in respect thereof to the Fund, together with the necessary proof, and the Fund may pay that amount or a portion thereof to that applicant which is equitable in the circumstances.

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(4) Any amount paid to the Fund contemplated in subsection (3) which is not claimed within three years irrevocably becomes the property of the Fund.

(5) A conveyancer may not pay any remuneration or other moneys to a property practitioner unless that property practitioner has provided the conveyancer with a certified copy of his, her or its Fidelity Fund certificate valid during the period or on the date of the transaction to which such payment relates, and on the date of such payment.

(6) Nothing in this section prevents the institution, conducting and conclusion of criminal or any other proceedings in respect of any act contemplated in this section or in sections 35, 43 or 44.

Mandatory indemnity insurance

56. (1) The Minister may, for the purposes of providing redress in respect of the contravention of a code of conduct contemplated in section 60 or sanctionable conduct contemplated in section 61, prescribe indemnity insurance which a property practitioner must take out and maintain.

(2) The Minister may, when acting under subsection (1), on reasonable grounds differentiate between—

(a) categories of property practitioners to whom a regulation applies;

(b) the minimum insured amounts in respect of which such insurance must be taken out and maintained;

(c) the extent to which conduct in contravention of a code of conduct and sanctionable conduct qualifies for redress under such insurance; and

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(d) the maximum amounts payable in terms of such insurance.

Limitation on relationships with other property market service providers

57. (1) A property practitioner may not—

(a) practise in association with any person which or who is prohibited by any law, any professional code of conduct, any code of ethics or protocol, report or charter on corporate governance, from doing so; or

(b) enter into any arrangement, formally or informally, whereby a consumer is obliged or encouraged to use a particular service provider to render any service or ancillary services in respect of any transaction of which that property practitioner was the effective cause.

(2) The Minister may by regulation prohibit any relationship which could harm the interests of consumers.

(3) A person who renders any service in contravention of this section is not entitled to any remuneration, payment or consideration in respect of such services rendered, and if the consumer has paid any remuneration, payment or consideration the relevant service provider must immediately upon request in writing by any affected party repay any such remuneration, payment or consideration, together with interest.

(4) A person who, within one month of being requested to do so, fails to repay any such remuneration payment or consideration together with interest is guilty of an offence.

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Insolvency or liquidation of property practitioner

58. (1) A property practitioner who—

(a) commits an act of insolvency;

(b) is insolvent; or

(c) is placed under liquidation, whether provisional or final,

is immediately disqualified to be a holder of a Fidelity Fund certificate and must within a period of 30 days—

(i) inform the Authority in writing of any matter contemplated in paragraphs *(a)*, *(b)* or *(c)*;

(ii) refrain from using and displaying that Fidelity Fund certificate;

(iii) inform his, her or its auditor and the bank holding his, her or its trust account in writing about the disqualification;

(iv) cease to perform the functions of a property practitioner;

(v) inform his, her or its clients, employees or employers or any other affected person in writing of that disqualification;

(vi) hand over the administration of his, her or its trust account, together with all relevant information and records, to the Authority; and

(vii) cause any outstanding matters in consultation with any affected person to be taken over by another property practitioner.

(2) A person who fails to comply with subsection (1) commits an offence.

(3) The Authority must wind down the trust account of a property practitioner contemplated in subsection (1) and effect payment of any trust moneys in accordance with the rights of affected consumers and other persons.

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(4) In the event of insolvency or liquidation of a property practitioner, trust moneys in the trust account of that property practitioner do not form part of the insolvent estate.

CHAPTER 9

CONDUCT OF PROPERTY PRACTITIONERS

Application of Chapter and Chapter 10

59. The provisions of this Chapter and of 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, and in this Chapter and Chapter 10, any reference to a "property practitioner" includes any such person.

Code of conduct for property practitioners

60. (1) The Minister must, after consultation with the Authority, prescribe a code of conduct which every property practitioner must comply with.

(2) The chief information officers of respectively the Authority and the Department, as the case may be, must on their respective websites publish the code of conduct current at the time.

(3) A property practitioner must on request from a consumer provide him or her with a copy of the code of conduct.

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(4) The Board must annually advise the Minister on the efficacy of the code of conduct current at the time.

(5) The Minister may, after consultation with the Authority, prescribe norms and standards in respect of advertising and marketing by property practitioners.

Sanctionable conduct

61. (1) A property practitioner is guilty of sanctionable conduct if he or she or it—

(a) in the same transaction acts as a property practitioner on behalf of two or more persons whose interests are not in all material respects identical in respect of that transaction, and receives remuneration from all parties concerned in respect of such transaction, unless all affected persons in writing agree thereto;

(b) fails in respect of any act performed by him or her or it as a property practitioner to give a full and proper explanation in writing, within 30 days of being called upon by the Authority in writing to do so, to any person having a material interest in the performance of such act;

(c) fails to pay any money due to the Authority or in respect of the Fund within one month after such monies become due;

(d) fails to furnish in writing within a period determined by the Authority any information that the Authority has requested in writing and reasonably requires in order to properly exercise its powers under this Act;

(e) fails to comply with or contravenes any provision of the code of conduct;

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(f) fails to comply with or contravenes any provision of section 33, 41, 42, 43, 45, 51, 55, 56, 57, or 58;

(g) in his or her capacity as a director of a company, or member contemplated in paragraph *(b)* of the definition of "property practitioner" in section (1), of a close corporation, or trustee of a trust, which is a property practitioner and which failed to comply with section 49 or 50, did not take all reasonable steps to prevent such failure;

(h) carries on an undesirable practice prohibited under section 62;

(i) commits an offence involving an element of dishonesty;

(j) fails to inform the Authority within 14 days of a change in his, her or its contact details;

(k) differentiates distinguishes or excludes consumers directly or indirectly on the basis of their race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or commit a criminal offence while performing a function of a property practitioner; or

(l) fails to comply with or contravenes any provision of this Act.

(2) Subsequent ratification or correction of any conduct contemplated in subsection (1) does not constitute a defence.

(3) The Authority may, in the prescribed manner, investigate any complaint of sanctionable conduct against a property practitioner.

(4) If a property practitioner is found guilty of sanctionable conduct by the Authority, the Authority may after the application of sections 3 and 5 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)—

(a) withdraw the Fidelity Fund certificate of that property practitioner;

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(b) impose on that property practitioner a fine not exceeding the maximum amount determined by the Minister of Justice for the purposes of section 29(1)*(a)* of the Magistrates' Courts Act, 1944; or

(c) reprimand such property practitioner and note his, her or its transgression on its website:

Provided that the Authority may suspend payment of a fine or any portion thereof or the withdrawal of any Fidelity Fund certificate for a period not exceeding three years and on the further conditions that the Authority may determine.

(5) (a) If the Parties are satisfied with the finding of the Authority in terms of this section, the Authority must refer the finding to the Ombud, to be made an order of the Ombud.

(b) Where any party is unsatisfied with the finding, the matter may be referred to the Ombud for a resolution, and the Ombud must deal with the matter in accordance with the provisions of chapter 4.

(6) The acquittal or conviction of a property practitioner by any court of law upon any criminal charge is not a bar to proceedings against him or her or it under this Act on a charge of sanctionable conduct, despite the facts set forth in the charge of sanctionable conduct constituting, if proved, the offence set forth in the criminal charge on which he, she or it was so acquitted or convicted or any other offence on which he, she or it might have been convicted at his, her or its trial on that criminal charge.

Undesirable practices

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62. (1) Subject to subsection (2), the Minister may, after consultation with the Board, by notice in the *Gazette*, declare a particular business practice in the property market to be undesirable and consequently prohibited.

(2) When deciding whether or not a declaration contemplated in subsection (1) should be made, the Minister and the Board must consider—

(a) the right of every citizen to freely choose their trade, occupation or profession;

(b) that the practice concerned, directly or indirectly, has or is likely to have the effect of—

(i) damaging the relations between property practitioners, or any specific property practitioner, on the one hand, and any specific consumer, category of consumers or the general public on the other hand;

(ii) unreasonably prejudicing any consumer or category of consumers;

(iii) deceiving any consumer or category of consumers; or

(iv) unfairly affecting any consumer or category of consumers; and

(c) that if the practice is allowed to continue, one or more of the objects of this Act as contemplated in section 2 will or is likely to be defeated.

(3) A property practitioner is not entitled to any remuneration or other payment in respect of or arising from the performance of any property purchase transaction prior to the transfer of the property and registration in the name of the purchaser.

(4) The Authority may issue a compliance notice contemplated in section 29 directing a property practitioner who, on or after the date of the publication of a notice contemplated in subsection (1) carries on a business practice in contravention of that notice, to rectify to the satisfaction of the Authority anything which was caused by or arose out of the carrying on of the business practice

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concerned, or otherwise deal with the matter as authorised by this Act or any other applicable law.

Supervision of candidate property practitioners

63. (1) A candidate property practitioner may not draft or complete any document or clause in a document—

(a) conferring any mandate on any property practitioner to perform any act referred to in paragraph *(a)*, *(c)* or *(d)* of the definition of "property practitioner" in section 1; or

(b) relating to the sale or lease of property.

(2) A person who contravenes subsection (1) and a property practitioner who allows an act contemplated in subsection (1) is not entitled to any payment, remuneration, consideration or damages in respect of or by reason of any document contemplated in that subsection or for bringing about the transaction or agreement embodied in that document.

(3) In any proceedings in respect of sanctionable conduct, it is no defence that the principal property practitioner was not aware of the acts or omissions of the property practitioner or the candidate property practitioner.

(4) A principal property practitioner who conducts business from more than one business premises must supervise and control the property practitioners and candidate property practitioners in his, her or its employ, despite the fact that those property practitioners conduct their business in branch or other offices.

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Franchising

64. (1) A franchisee property practitioner may not carry on business under the name of a franchise unless he, she or it personally is the holder of a Fidelity Fund certificate.

(2) A franchisee property practitioner must disclose clearly and unambiguously in all his, her or its written communication, advertising and marketing materials that he, she or it operates in terms of a franchise agreement, as well as the name of the franchisor.

(3) The Authority may withdraw the Fidelity Fund certificate of a franchisee property practitioner who carries on business in contravention of subsections (1) or (2).

(4) The Authority may hold the franchisor responsible for prohibited or sanctionable conduct of the franchisee to the extent that the franchisee is responsible in terms of this Act.

Prohibition on conduct to influence issue of certain certificates

65. (1) A property practitioner may not in any way offer a financial or other incentive to, or otherwise influence, a person who at the request of a seller or lessor issues a certificate required by law, based on his or her expert opinion, in respect of—

(a) the condition or defects of electrical wiring;

(b) the presence of vermin;

(c) the presence of water or damp; or

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(d) any other relevant matter or condition which may be provided for in any law.

(2) A property practitioner who contravenes subsection (1) or a person who accepts any such incentive is guilty of an offence.

CHAPTER 10

CONSUMER PROTECTION

Mandatory disclosure form

66. (1) A property practitioner—

(a) may not accept a mandate unless the seller or lessor of the property has provided him or her with a fully completed and signed mandatory disclosure in the prescribed form; and

(b) must provide a copy of the completed mandatory disclosure form to a prospective purchaser or lessee who intends to make an offer for the purchase or lease of a property.

(2) The completed mandatory disclosure form signed by all relevant parties must be attached to any agreement for the sale or lease of a property, and forms an integral part of that agreement, but if such a disclosure form was not completed, signed or attached, the agreement must be interpreted as if no defects or deficiencies of the property were disclosed to the purchaser.

(3) A property practitioner who fails to comply with subsection (1) may be held liable by an affected consumer.

(4) Nothing in this section prevents the Authority from taking action against a property practitioner or imposing an appropriate sanction.

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(5) Nothing in this section prevents a consumer, for his or her own account, from undertaking a private property inspection to confirm the state of the property before finalising the transaction.

Language of agreements

67. (1) An agreement to sell and purchase or to let and hire property, or the mandatory disclosure form contemplated in section 66, must be drafted by the developer or seller, as the case may be, for his, her or its own account, in an official language that is requested by the purchaser or the lessee.

(2) The Authority must publish from time to time an updated version of guideline agreements on its website.

Consumer education and information

68. (1) The Authority must from time to time conduct campaigns to educate and inform the general public of their rights in respect of property transactions and property practitioners of their functions, duties and obligations.

(2) The Property Practitioner owes a buyer and a seller a duty of care.

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CHAPTER 11

GENERAL

Property sector transformation

69. (1) The Property Sector Transformation Charter as amended from time to time applies to all property practitioners.

(2) When procuring property related goods and services, all organs of state must utilise the services of property practitioners who comply with the broad-based black economic empowerment and employment equity legislation and policies.

(3) The Authority must from time to time—

(a) implement and assess measures to progressively promote an inclusive and integrated property sector;

(b) implement appropriate measures and assess the state of transformation within the property sector; and

(c) introduce measures to be implemented which may include incubation and capacity building programmes to redress the imbalances of the past.

Regulations

70. (1) The Minister may, subject to subsection (2), make regulations regarding any matter that may or must be prescribed in terms of this Act or any incidental matter of a procedural or administrative nature that the Minister considers necessary to prescribe in order to achieve the objects of this Act.

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(2) Before making any regulation the Minister must—

(a) consult the Board; and

(b) publish the proposed regulations for public comment and allow at least 30 days for submission of such comment.

Penalties

71. A person convicted of an offence in terms of this Act is liable to a fine or to imprisonment for a period not exceeding 10 years

Delegation of powers by Minister

72. (1) The Minister may, subject to subsections (2) and (3), delegate any power or duty assigned to him or her in terms of this Act, excluding the power to make regulations contemplated in section 70, to the Director-General or to any other senior official in the Department;

(2) A delegation in terms of subsection (1)—

(a) is subject to any limitations, conditions and directions the Minister may impose;

(b) must be in writing;

(c) may include the power to sub-delegate; and

(d) does not divest the Minister of the responsibility concerning the exercise of the power or the performance of the duty.

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(3) The Minister may confirm, vary or revoke any decision taken in consequence of a delegation or sub-delegation in terms of a provision of this Act or the Estate Agency Affairs Act, 1976.

(4) A quarterly report must be submitted to the Minister in respect of any power or duty delegated in terms of subsection (1).

Legal proceedings against Authority

73. (1) Any legal proceedings against the Authority must be instituted in accordance with the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act No. 40 of 2002).

(2) The Authority is, for the purposes of subsection (1), deemed to be an organ of state contemplated in paragraph *(c)* of the definition thereof in section 1 of the said Act.

Use of name of Authority

74. (1) Unless authorised in writing by the Authority to do so, no person other than the Board or authorised employees of the Authority may in any way—

(a) use the name of the Authority;

(b) represent or make use of descriptions, logos, designs or advertising material used or owned by the Authority, or anything which a reasonable person will interpret to refer to the Authority except as provided for in this Act; or

(c) use a description signifying or implying some connection between that person and the Authority, except as provided for in this Act.

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(2) Any person who contravenes subsection (1) is guilty of an offence.

Transitional provisions

75. (1) Upon the commencement of this Act—

(a) the juristic person known as the Estate Agency Affairs Board established by section 2 of the Estate Agency Affairs Act, 1976, and any committee of the Estate Agency Affairs Board appointed in terms of that Act, is hereby disestablished;

(b) the members of the Estate Agents Affairs Board in office immediately before this Act takes effect, become members of the Property Practitioners Board, and must be regarded as having been appointed to the Property Practitioners Board in terms of section 7;

(c) the members contemplated in paragraph *(b)* hold office for the unexpired period for which such members have been appointed as members of the Estate Agents Affairs Board, as at the date of such members' assumption of office in the Property Practitioners Board in terms of paragraph *(b)*;

(d) every person employed permanently by the Estate Agency Affairs Board immediately prior to the commencement of this Act is regarded as having been appointed in terms of section 17;

(e) the remuneration and other terms and conditions of service of any person contemplated in paragraph *(d)* may not be less favourable than the remuneration, terms and conditions applicable to that person immediately before the commencement of this Act and he or she remains entitled to all

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rights, benefits and privileges to which he or she was entitled immediately before that date, including—

(i) employer contribution to a pension fund;

(ii) employer contribution to a medical aid scheme;

(iii) employee contributions in connection with membership of a pension fund or medical aid scheme;

(iv) accrued pensionable service;

(v) accrued leave benefits; and

(vi) retirement at a specific age;

(f) every person contemplated in paragraph *(d)* remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the commencement of this Act; and

(g) any proceedings against a person which were instituted in terms of or under the Estate Agency Affairs Act, 1976, immediately before the commencement of this Act, must be disposed of as if that Act had not been repealed.

(2) For the purposes of the Income Tax, 1962 (Act No. 58 of 1962), no change of employer is regarded as having taken place when a person is appointed by the Authority in terms of section 17.

(3) Upon the commencement of this Act—

(a) all movable, immovable and intellectual property of the Estate Agency Affairs Board, including all financial, administrative and other records of the Estate Agency Affairs Board and all documents in the possession of the Estate Agency Affairs Board, is transferred to the Authority, which then acquires such property;

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(b) the rights, duties, liabilities and obligations relating to the Estate Agency Affairs Board are transferred to the Authority;

(c) the Estate Agency Affairs Board is substituted by the Authority as a litigant in all pending litigation or proceedings; and

(d) all valid and binding agreements entered into by the Estate Agency Affairs Board shall be binding on the Authority as if the Authority had been the contracting party.

(4) All funds of the Estate Agents Fidelity Fund immediately before the commencement of this Act are upon commencement of this Act transferred to the Fund, and a claim for compensation instituted against the Estate Agents Fidelity Fund before commencement of this Act must be paid from the Fund if such claim is successful.

(5) Any claim with regards to the theft of trust money by a property practitioner committed before the commencement of this Act or the failure of a property practitioner to comply with section 35(1) or 35(2)(e) of the Estate Agency Affairs Act, 1976, in respect of which no proceedings were instituted before the commencement of this Act, must within two years of the commencement of this Act be instituted, and then finalised in accordance with the Estate Agency Affairs Act 1976, as if that Act had not been repealed.

(6) All regulations made in terms of the Estate Agency Affairs Act, 1976, remain in full force and effect as if they had been made in terms of or under this Act.

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Repeal and amendment of legislation

76. The laws mentioned in Schedule 1 are hereby repealed or amended to the extent set out in the third column of that Schedule.

Short title and commencement

77. (1) This Act is called the Property Practitioners Act, 2016, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

(2) Different dates may be fixed in respect of different provisions of this Act

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Schedule 1

(Section 75)

LAWS REPEALED OR AMENDED

Act No. and Year	Short Title	Extent of amendment or repeal
Act No. 112 of 1976	Estate Agency Affairs Act, 1976	The whole
Act No. 114 of 1998	Debt Collectors Act, 1998	Amendment of section 1 by the substitution for paragraph *(a)* of the definition of "debt collector" of the following paragraph: "*(a)* a person, other than an attorney or his **[or]**, her or its employee or a party to a factoring arrangement or a property practitioner as defined in section 1 of the Property Practitioners Act, who for reward collects debts owed to another on the latter's behalf.".