Wednesday, 7 April, 2010

Mr Stephen Palethorpe
Secretary
Senate Environment, Communications and the Arts Legislation Committee
Parliament House
CANBERRA ACT 2600

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Dear Mr Palethorpe,

***Building Energy Efficiency Disclosure Bill* 2010**

Thank you for the opportunity to comment on the *Building Energy Efficiency Disclosure Bill* 2010 (the Bill).

The Bill leaves many specifics to be finalised through subordinate legislation. These more specific and practical issues are crucial to assessing the legislation's industry-wide impact.

Nevertheless, the Property Council believes there are several revisions to the Bill that would:

- help meet the public policy goals the legislation seeks to achieve; and
- ensure fair and efficient implementation.

1. Transition period

Despite claiming to provide a 12 month transition period, any owner who does not have a NABERS rating before the scheme commences will have no transition window at all.

A transition period should take account of the fact that the tenancy performance metric has not yet been finalised.

Even if the practical start date for the legislation were delayed until October, there is not enough time to survey all Australian office buildings that include tenancies of more than 2000 square metres.

It is simply unfair to expect an industry to comply with a performance metric that does not yet exist.

There has been no analysis of the industry's practical capacity to undertake the required assessments in time.

This is a crucial issue in light of the massive penalties proposed by the Bill.

Even if the capacity exists, the industry requires more time to gear up.

This point is particularly important given that the only rational response to the Bill will be to obtain or refresh NABERS base building ratings as close as possible to the legislation's commencement date.

In short, the current proposal will encourage a massive traffic jam that will exhaust NABERS rating resources, such as they are.

The Bill should be altered to deal with the large number of buildings which will not be covered by the current transition period, and will need to be rated in the first year.

Recommendations

1.1 The transition period for the sale of buildings should be lengthened to 24 months.

1.2 The disclosure requirements for leasing transactions should be delayed for two years, until the proposed tenancy metric has been released, tested and reviewed in line with industry capacity.

2. The NABERS rating scheme

The NABERS rating methodology is currently under formal review.

Ideally, this review should be completed and the NABERS methodology revised before the disclosure regime comes into force.

Given that the purpose of the legislation is to foster a more informed marketplace and to overcome information asymmetries, it is only logical that building purchasers are provided with an accurate assessment of a building's environmental performance.

The Property Council supports NABERS. Nevertheless, NABERS contains well known weaknesses.

For example, the methodology used to provide NABERS ratings does not provide consistent results between states.

Victorian buildings suffer an effective penalty of up to one Star compared to NSW – this means that a 3 Star building in Sydney may only achieve a 2 Star NABERS rating in Melbourne.

While this flaw might be overlooked if investors only compared homogenous markets, the reality is that multiple geographical markets are often considered before investment decisions are made.

In this example, Victorian buildings would be unfairly disadvantaged.

There are many other methodological issues associated with NABERS that should be resolved before it is mandated as the sole tool for disclosure purposes.

Recommendation

2.1 An alternative rating system to NABERS that delivers accurate environmental performance disclosure should be negotiated with industry to provide a complementary compliance pathway.

3. The exemption provisions are inadequate

The Act makes it unreasonably difficult to gain an exemption.

Even in cases where it is not possible to obtain a rating for a new building, exemption is at the discretion of the Secretary.

This creates unnecessary uncertainty, and penalty risks for owners who are not guaranteed an exemption.

Additionally, penalty provisions are not suspended while an application for exemption is assessed.

Recommendations

3.1 The Bill should provide clear, automatic exemption in situations where it is not possible to get a rating (such as in new buildings).

3.2 Penalty provisions should be suspended for the period between an application for exemption and the Secretary's decision.

4. The Bill's language is unclear

The language in the Bill does is not consistent with the usual use of many words in the property industry.

Some words are used in a manner that is unclear, and there is a general lack of definition around central terms, including 'office' and 'contract'.

As standard definitions (such as those already laid out in the Building Code) have not been used, there will be confusion about the application of the scheme.

The Bill should clearly define all key terms, in a manner consistent with existing standard definitions.

Recommendations

4.1 The Bill should be amended to:

- include definitions of key terms as noted in Appendix A; and
- use words in a manner that is consistent with general industry usage, to avoid confusion.

5. The penalties are disproportionate

The proposed penalties under the Bill are utterly inconsistent with the nature of the offences.

The maximum penalty for not disclosing information in strict compliance with the Bill is $110 000, which can be imposed each day (and for each non-complying advertisement).

To put this in perspective, other offences with the same penalty level include passport forgery and major pollution incidents.

The penalties ought to be lowered to a sensible figure in line with the offence.

Recommendations

5.1 The penalties in the Bill should be significantly reduced.

5.2 Penalties should not be calculated separately for each day *and* for each advertisement.

6. The regulator has excessive power

The Bill gives assessors and auditors powers comparable to those of ATO investigators.

Giving auditors broad powers, including the ability to use monitoring equipment, is unnecessary to police this kind of scheme.

These powers should be rationalised to reflect the nature of the investigation that auditors will realistically need to undertake.

Recommendation

6.1 The powers assigned to assessors and auditors to gather information should be rationalised to reflect the nature of the information being gathered.

7. Conclusion

The Property Council has provided specific recommendations to improve the Bill, including:

- an extension of the transition period;
- the provision of an alternative approach to NABERS;
- simplified exemption provisions;
- clearer definitions of key terms;
- reduced penalties; and
- more rational powers for auditors.

Please refer to Appendix A for a more detailed outline of the Property Council's concerns with specific sections of the Bill.

The Property Council is happy to elaborate on any area of this submission.

Yours sincerely

Peter Verwer
Chief Executive
Property Council of Australia

Appendix A: specific concerns

The Property Council has identified the following specific sections of the Bill as in need of amendment:

Definitions

- The definition of "office" is not anchored to the Class 5 classification under the Building Code of Australia. This opens the door for a broader definition of "space that may be used as an office", and for more buildings to be captured.

- The word "contract" is not defined, and this means that the threshold for triggering disclosure obligations could be very low. Again, this creates uncertainty.

- The use of the word "buildings" (rather than "land") means that the scheme could capture shares in trust. These should explicitly be made exempt from the scheme.

- The use of the word "area" in s11 is unclear, and should be clarified.

Section 5

- Section 5 of the Bill should exclude transactions between related parties, for example when different divisions of one organisation have a subletting arrangement regarding office space.

Section 13

- Section 13(3) says that "other information" may be required for inclusion in a BEEC. This wording leaves open the possibility of new requirements being added to the scheme at any time. The clause should be modified so that only parliament can increase the compliance burden associated with the scheme.

Section 14

- Section 14 of the Bill specifies that space cannot be sold or leased without a valid BEEC. However, there is no requirement for notification by the Secretary if a building's BEEC is deregistered. This means that vendors or lessors could be liable even if they are acting in good faith, and will result in lawyers having to constantly check the register as part of due diligence requirements.

- Section 14(1) creates a register which is effectively duplicating the existing NABERS register. Steps should be taken to ensure that the legislation aligns with NABERS processes wherever possible.

- Section 14(3) specifies that the rating should be "appropriate for the building", but there is no explanation of how this will be determined.

- Section 14(3)(a)(ii) could result in discrepancies if tenants do not comply with "make good" provisions – in this case the auditor should check the currency of the BEEC, rather than the accuracy of the lighting rating.

Section 15

- Section 15(5) could expose owners to multiple penalties if an agent advertises space after a rating expires, especially if multiple advertisements are placed or the agent is slow to withdraw advertisements once notified. The multiple penalty regime should be scrapped. However if retained, it should not be triggered where breaches occur in circumstances created by third parties.

Section 17

- Section 17 should provide clear, upfront exemptions rather than requiring an application to be made. The current process is inefficient and creates uncertainty for owners who are unsure if they will receive an exemption.

Section 18

- Section 18(1)(a) should be redrafted to specify the precise party empowered to request a rating, and s18(2) should also include confidentiality provisions.

- Section 18(4) should specify that obligations under the legislation will be deferred while an exemption is sought.

- In general, section 18 takes an unnecessary amount of control of the BEEC process away from the landlord.

Section 24

- Section 24 requires assessors to be accredited by the Secretary. This appears to apply on top of the accreditation process they have already undertaken to become NABERS assessors. This will result in extra unnecessary fees and paperwork for assessors.

Section 26

- The period of accreditation under section 26 should be set at three years.

Division 2

- The powers given to auditors are far beyond what is needed to ensure compliance with the scheme. There is no basis for the monitoring powers that allow auditors to collect what may well be commercially sensitive information.

Section 65

- The Register under section 65, which is intended to publicly 'name and shame' those who do not comply, has an extremely low threshold – a person may be named on the list if they receive infringement notices for one non-compliant advertisement that is published for two days. Only serious offences should be included on the register.

Section 71

- Section 71 should specify that the Secretary can delegate powers only to individuals with sufficient experience and knowledge to make informed decisions.

The Property Council recommends that these issues be corrected before the enactment of the legislation.

Property Council of Australia

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