Tuesday, 27 April, 2010

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

e-mail: eca.sen@aph.gov.au

Dear Mr Palethorpe,

***Building Energy Efficiency Disclosure Bill* 2010**
Supplementary Submission

This is a supplementary submission that complements the Property Council's testimony to the Senate Environment, Communications and the Arts Legislation Committee on Monday, 12 March, 2010.

Several questions were asked in relation to this testimony. These questions, and the Property Council's answers, are set out below.

1. "You noted during the hearings that you support the aim of the Bill. Do you support the Bill itself?"

The Property Council agrees with the policy objective behind this Bill, but is concerned that it is **logistically impossible** to achieve such goals within the proposed timeframe. Response two (below) sets out the reasons why the industry cannot be 'disclosure ready' by October 2010.

The Property Council believes the Bill requires the following revisions in order to achieve the transformation of market behaviour sought by the Government:

1.1 Delete or delay the tenancy lighting tool and disclosure requirements:

Despite the imminent implementation date, the tenant lighting tool is still being developed.

Even if the tool is finalised in the next few weeks, assessors will still need to be trained in its use.

They will also need to be accredited under Part 3 of the Bill.

These are major logistical hurdles.

LEVEL 1, 11 BARRACK STREET, SYDNEY NSW 2000
PH 02 9033-1900 - FAX 02 9033-1966
Email info@propertyoz.com.au - www.propertyoz.com.au

PROPERTY COUNCIL of Australia

Above all, the marketplace holds grave concerns about the practicality of the draft tool, which will involve physical inspections of floors – this is not even required for a NABERS base building rating.

In short, the tool will involve greater cost and effort than NABERS itself.

This will inevitably impede the industry's logistical capacity to comply with the Bill's disclosure requirements.

It is important to note that the costs associated with the implementation of the tenancy lighting metric were not explicitly factored into the RIS, and have not been properly assessed – how could they when the tool is still yet to be finalised?

In order for the scheme to operate effectively, the implementation of the lighting tool should be delayed until:

- the tool has been properly tested with key stakeholders; and
- assessors are properly trained to use it.

However, given the questionable usefulness of the data it will produce, the best course of action is to remove the tool from the scheme altogether.

1.2 Provide an alternative compliance pathway:

Problems with the NABERS rating system have been well-documented both in submissions to the Senate Committee and more broadly by industry.

While the Property Council continues to support NABERS, there needs to be an alternate compliance pathway that provides a reliable guide to base building performance, in addition to NABERS.

The Property Council is working with industry to develop such a compliance pathway.

1.3 Remove the requirement for mandated third party assessment:

The Property Council agrees that the Bill should establish an obligation to disclose environmental performance under an approved method.

However, the plan to establish and empower third parties to conduct assessments is misconceived.

The Bill rightly mandates an obligation on building owners to disclose honestly, as is currently the case with NGERS and EEO – neither of these schemes create the third party mechanism envisaged by this Bill.

Drawing an analogy with Australia's self-assessment taxation system, property owners are able to self-assess their tax bills, but under the Bill are not trusted to take responsibility for assessing the environmental performance of their buildings (in line with the approved methodology, once adopted).

If self-assessment serves obligations as important as tax disclosures, why can it not be employed for the proposed mandatory environmental disclosure regime?

Given the extensive audit and checking powers under the Bill, there is no need for third parties to be empowered by legislation.

1.4 Extend the transition period until NABERS is fixed – for at least two years:

The NABERS rating scheme is currently under formal review, however this review is still in its early stages – the Industry Advisory Committee has not even been established.

Given the weaknesses in the tool, it would be sensible to extend the transition period until NABERS is fixed, to avoid legislating for the ongoing disclosure of faulty or misleading data.

1.5 Remedy other technical issues, including definitions and exemptions:

There are several other technical issues that need to be addressed before the Bill is ready to be implemented (please see Appendix One for further detail).

For example, the current wording of the Bill means that industrial space could be captured under the definition of an "office" if the Secretary chooses not to specify that the scheme captures:

- only Class 5 buildings (as defined by the Building Code of Australia); and
- only spaces within this category that can be appropriately rated.

Unless the Bill can be quarantined to office space, the practical difficulty of measuring mixed-use premises will create considerable hurdles.

Similarly, the Bill ought to establish clear categories of automatic exemption, particularly for new buildings.

1.6 Revisit the penalty regime:

The Bill sets penalties for non-compliance under the scheme at an unrealistically high level.

The penalties under the Bill should be reduced to reflect more accurately the nature of the offence, and should not be applied on a per-advertisement/per-day basis.

Penalties upward of $110,000 per day are applied to criminal offences such as passport fraud, and are unreasonable in relation to the incorrect disclosure of an energy efficiency rating, which is often a matter of expert opinion.

There are many examples of experts disagreeing on NABERS ratings.

The above are the bare minimum adjustments we believe are required to make the scheme work in a practical manner.

The Property Council would be inclined to support the legislation if the proposed revisions are enacted.

2. "Can you clarify the basis upon which you said during the hearings that you are 'happy' with the figure that 8% of properties of more than 2000m^2 are sold each year?"

The Regulation Impact Statement released in November 2009 states that 14% of properties over 2,000 square metres are transacted (sold or leased) each year – the 8% figure refers only to sales.[1]

However, further research indicates:

- Typically 300-400 buildings of more than 2,000sqm are sold every year – this alone accounts for 1.6 million sqm (the actual number of sales varies considerably each year – 331 in most recent pre-GFC year); [2]

- 1.3 million sqm of leased premises above 2,000 sqm[3] were transacted in the most recent pre-GFC year – under the legislation these will also require a base building rating.

The combined 2.9 million square metres represents an enormous amount of space to be audited and made 'disclosure ready' – this volume of space cannot be rated within the proposed timeframe for several reasons:

- there are not enough assessors to deal with the *current* level of demand, let alone a new mandated scheme;

- all assessors will need to be reaccredited under the new scheme;

- zero assessors have any experience with the new tenant lighting tool – it cannot be used until assessors are appropriately trained; and

- the current backlog of assessments will only get worse as building owners try to refresh their ratings in time for the transition period.

The Property Council has recommended a solution to this problem - extend the transition period, and scrap the tenancy rating section of the BEEC at least until:

- the new tool has been finalised and proven to meet the obligations of the legislation; and

---

[1] "Each year, on average:
- 8 per cent of properties in this size range are sold; and
- 6 per cent are leased."

Regulation Impact Statement, November 2009, p32

[2] Real Capital Analytics

[3] Savills – this survey only covers five states, so the actual number of transactions will be even higher.

- there are enough accredited assessors to meet industry demand – that is, the industry has the capacity to meet the obligations established by the Bill.

3. "The Bill relies on discretionary decisions to govern a number of matters including the kind of buildings captured by the scheme (cl 10), setting minimum standards for disclosure (cl 15), granting exemptions (cl 17), determining the methods and standards of assessment (cl 21). In your view are the discretionary powers appropriate?"

As stated in the Property Council's main submission to the inquiry, it is difficult to assess the full impact of the Bill when important operational details are at the discretion of the Secretary.

Leaving central aspects of the Bill's operation to be decided through regulation, and therefore subject to the Secretary's discretion, is unfair given the harsh penalties proposed for non-compliance.

In our view, given the imminent enactment of obligations set out by the Bill, critical operational details should be included in the enabling legislation, or tabled immediately in draft subordinate legislation.

4. "Are there areas that are proposed to be covered by regulation that would be better included in the Bill?"

Ideally, all the central factors of the scheme would be laid out in the Bill, including:

- exactly which buildings, or parts of buildings, will be captured by the scheme;
- what information will be disclosed in the BEEC;
- clear grounds for exemptions to be granted, including automatic exemption for new buildings until two years after a certificate of practical completion is issued; and
- the accreditation requirements for registered assessors.

The Property Council and industry have legitimate concerns about the potential content of the regulation.

Laying out all the operational information in the main Bill is necessary to ensure that:

- there is clarity from the start about the industry's obligations;
- the obligations enacted under the scheme can be assessed before implementation; and
- any future changes to the legislation are subject to the appropriate level of scrutiny by Parliament.

5. **"Can you provide the committee, on notice—to the extent that you are able, and, if you are unable, please indicate why—with the documents and information and material that is in the process of being prepared and that you are trying to have a look at, and the time frame. Set it against the scene—you have just said, 'the last three or four years,' but when did you or your council start agitating for that bit of information or that material? And when are you told you will get it?"**

We believe that government officers involved in the development of the scheme have acted in good faith.

However the consultation processes carried out have been sub optimal.

Given its lengthy gestation period, it is difficult to isolate the timeframes around each consultation document involved in the process of developing the scheme.

However, we have been able to identify some of the hurdles experienced by the Property Council:

- We have experienced difficulty in accessing modelling assumptions used by the department, specifically the information relied on to prepare the latest version of the RIS;
- the Property Council has been given access to many documents on a limited circulation basis, meaning they could not be widely tested by members – the draft tenant lighting tool is the latest example;
- a critical meeting regarding the development of the enabling legislation was confidential, so the proceedings could not be related to members;
- some documents have been provided with very little time for consultation – in one case a document relating to the energy efficiency guidance material was released on a Monday afternoon, with a Friday deadline for feedback; and
- the delay in finalising the tenancy rating tool is an example of a sub optimal engagement process.

The consultation loop could have been more structured throughout the process, to avoid instances where multiple iterations and short timeframes resulted in the negative externalities summarised by this submission

Conclusion

The Property Council has made a series of recommendations to improve the Bill to a point where it can achieve its aims.

Changes we have recommended include:

- scrapping the tenant lighting tool;
- provision of an alternative compliance pathway that satisfies the Government's public policy goals;
- allowing owners to self-assess their buildings, while still subject to rigorous audit and verification processes;

- extension of the transition period;
- revising NABERS before the transition period concludes;
- training and accreditation of enough assessors to meet demand; and
- correction of technical issues, including the provision of clear exemptions pertaining to new buildings and clarity in the definitions of key terms such as 'office'.

The Property Council strongly recommends further industry consultation in order to overcome the issues outlined in our two submissions.

I am very happy to elaborate on any aspect of this submission.

Yours respectfully

Peter Verwer
Chief Executive
Property Council of Australia

pverwer@propertyoz.com.au

Appendix One: specific concerns (from the Property Council's previous submission to the committee)

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
April 7, 2010