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Building Energy Efficiency Disclosure Bill 2010

Anita Talberg
Science, Technology, Environment and Resources Section

Elibritt Karlsen
Law and Bills Digest Section

Contents

Building Energy Efficiency Disclosure Bill 2010

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Portfolio: Climate Change, Energy Efficiency and Water

Commencement: Sections 1 and 2 commence upon Royal Assent while sections 3 to 72 commence on 1 July 2010.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The Building Energy Efficiency Disclosure Bill 2010 ('the Bill') creates a national scheme which requires disclosure of information about the energy efficiency of large scale commercial office spaces when those spaces are offered or advertised for sale, lease or sublease.

Background

In 2004, the Ministerial Council on Energy (MCE) announced the National Framework for Energy Efficiency (NFEE), which aims to unlock the significant but un-tapped economic potential associated with the increased uptake of energy efficient technologies and processes across the Australian economy. The NFEE aims to achieve a major enhancement of Australia's energy efficiency performance, reducing energy demand and lowering greenhouse gas emissions.[1] Stage One of the NFEE contained a package of policy measures that included mandatory disclosure of energy performance of both commercial and residential buildings.[2] It was stated that:

> ... these measures ... have the potential to save around 50PJ of energy a year by 2015, approximately equivalent to three times the electricity generated by the Snowy

1. Information about the National Framework for Energy Efficiency is available on the Department of Resources, Energy and Tourism website, viewed 20 May 2010, http://www.ret.gov.au/Documents/mce/energy-eff/nfee/about/default.html

2. Ministerial Council on Energy (MCE), *Statement on National Framework for Energy Efficiency Overview Plan of Stage One Measures 2005 – 2007*, December 2004, viewed 14 May 2010, http://www.ret.gov.au/Documents/mce/energy-eff/nfee/_documents/MCEStatementonNFEEOverviewStage1_dec04.pdf.

> Scheme annually, reduce greenhouse gas emissions by the equivalent of taking around 900,000 cars off the road and provide GDP benefits of up to $400 million a year.[3]

As part of its 2007 election policies the Australian Labor Party (ALP) stated that:

> A Rudd Labor Government will also work with the States and Territories, the building industry and other stakeholders to ... require disclosure of energy or environmental ratings for appropriate types of large commercial buildings at point of sale and point of lease. Mandatory disclosure will be phased in gradually, beginning with office buildings above a threshold of 5,000 [square metres].[4]

At its meeting of 30 April 2009, the Council of Australian Governments (COAG):

> reaffirmed a commitment to introducing a National Strategy for Energy Efficiency to help households and businesses reduce their energy costs. As a first step, COAG agreed to five key measures to improve the energy efficiency of residential and commercial buildings across Australia... [including] the phase-in of mandatory disclosure of the energy efficiency of commercial buildings and tenancies commencing in 2010.[5]

On 2 July 2009, COAG signed the National Partnership Agreement on Energy Efficiency[6], to deliver a nationally-consistent and cooperative approach to energy efficiency.[7]

Regulatory Impact Statement

A Regulatory Impact Statement (RIS) was commissioned by the Department of Environment, Water, Heritage and the Arts (DEWHA) on behalf of State and Territory Governments. The aim of the RIS was to assess the proposal under the NFEE to introduce

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3. Ibid., p. 1.
4. Australian Labor Party, *Clean Business Australia*, Australian Labor Party policy document, Election 2007, viewed 14 May 2010, http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/4NXO6/upload_binary/4nxo62.pdf;fileType=application/pdf#search=%22alp%202000s%202007%20green%20building%20fund%22
5. Council of Australian Governments, *Communiqué*, Hobart, 30 April 2009, viewed 20 May 2010, http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/20090430_communique.pdf
6. The text of the National Partnership Agreement on Energy Efficiency can be viewed at: http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/NP_energy_efficiency.pdf
7. Council of Australian Governments, *Communiqué*, Darwin, 2 July 2009, viewed 20 May 2010, http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/20090702_communique.pdf

a national scheme for the mandatory disclosure of the energy efficiency at the point of sale or lease for office buildings above certain size.[8]

The RIS found a number of factors in the market for commercial office space in Australia that impede the take-up of economically feasible energy efficiency improvements:

- building owners and prospective tenants or buyers do not always have equal information, so that tenants and buyers are placed at a disadvantage in understanding the energy efficiency performance of premises on the market
- those in the best position in the market to effect change (that is, building owners) have little or no incentive to do so, and
- organisational failures exist so that low, or no cost, opportunities for increased energy efficiency are not taken-up.[9]

The RIS explored three options to remedy these market failures:

- Option 1 — Mandatory disclosure of energy efficiency at the point of sale and lease. Under this Option property owners would have to report a National Australian Built Environment Rating System (NABERS) Energy star rating, tenant lighting details and energy efficiency guidance to buyers or tenants, where the property meets certain criteria. Two permutations of the size of properties to which obligations would apply were assessed, being a Net Lettable Area [NLA] larger than 2000 square metres or larger than 5000 square metres
- Option 2 — Industry code of practice. This Option is similar to Option 1, except that there is no explicit regulation. Instead, the industry (representing building owners) develops an industry code of practice, which participants can voluntarily adopt. By signing up to the code, building owners make a commitment to provide energy efficiency information in sale or lease transactions.
- Option 3 — Mandatory minimum energy efficiency standards. This Option moves away from an information approach to addressing the problem, instead mandating that building owners meet minimum energy efficiency standards within a stated timeframe. Where applicable, the triggers would be the same as for Option 1. That is, where the NLA is greater than 2000 square metres or greater than 5000 square metres.[10]

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8. Allen Consulting Group on behalf of the Department of Environment, Water, Heritage and the Arts, 'Mandatory disclosure of commercial office building energy efficiency', *Regulation Impact Statement*, Commonwealth of Australia, Canberra, November 2009, viewed 20 May 2010, http://www.climatechange.gov.au/en/what-you-need-to-know/buildings/commercial/~/media/publications/energy-efficiency/buildings/disclosure-ris.ashx
9. Ibid., p. v.
10. Ibid., p. vi.

Of these, Option 1—mandatory disclosure of energy efficiency at point of sale and lease for properties above 2000m^2, was the most cost effective option.[11]

Rejection of options 2 and 3

Option 2—based on an industry-led code of practice for disclosure of energy efficiency performance at the point of sale or lease—was not the preferred option. The RIS acknowledges that 'there is already some voluntary action being taken by industry', and that 'a code would have a positive impact on disclosure (compared with the current practice)'.[12] However it was considered that:

> it is likely that there would be positive bias in disclosure on a voluntary basis, in favour of better performing buildings. Such a scheme would therefore have lower benefit for buyers and tenants, as it would provide less information with which to compare properties, and would have reduced impact on the information in the market, compared with mandatory disclosure.[13]

In relation to option 3 which involved imposing minimum standards for energy efficiency for existing buildings, it was considered that:

> Mandatory minimum performance standards would impose the highest cost on building owners of all options, with benefits from energy savings not offsetting costs within a 10 year timeframe of the minimum standard being achieved. As such the net cost of the option would be $334 million for properties larger than 2000 square metres or $277 million for properties larger than 5000 square metres.[14]

Benefits of option 1

It was considered that the benefits of the scheme proposed in Option 1 would be:

- direct benefits to those tenants and/or prospective buyers who are able to use the disclosed ratings to choose a premise with a higher energy efficiency rating—the benefits achieved are through savings for these parties of occupying higher rated premises, and
- indirect benefits through voluntary energy efficiency improvements, and associated greenhouse gas abatement, that may occur with a better informed marketplace.[15]

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11. Ibid.
12. Ibid., p. xii.
13. Ibid.
14. Ibid.
15. Ibid., p. vii.

According to the Minister Assisting the Minister for Climate Change and Energy Efficiency, the scheme proposed in this Bill will:

> … not only help lead to more informed purchasers and lessees, it will also help to transition the market to a low-carbon future. It will reward current market leaders and encourage owners of inefficient buildings to pay more attention to energy efficiency opportunities ...[16]

The transition to a lower carbon future is relevant because, under the National Australian Built Environment Rating Systems (NABERS) standard, Australian offices average a rating of just two and a half stars of a possible five, and commercial office buildings account for approximately 2.7 per cent of Australian emissions.[17]

Calculating energy efficiency

The proposed scheme provides that:

- corporations must not offer to sell, lease or sublease premises without a Building Energy Efficiency Certificate (BEEC)
- owners, lessees and sublessees must not fail to provide genuine prospective purchasers, lessees or sublessees with the BEEC upon request, and
- corporations must not advertise premises for sale, lease or sublease without a valid and current energy efficiency rating (EER) included in the advertisement.

The BEEC contains three key components:

- an energy efficiency star rating (EER)
- an assessment of the energy efficiency of the lighting
- generic advice on how the energy efficiency may be improved.[18]

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16. G Combet (Defence Material and Science, Assisting Minister for Climate Change and Energy Efficiency), 'Second Reading Speech: Building Energy Efficiency Disclosure Bill 2010', House of Representatives, *Debates*, 18 March 2010, p. 2928.
17. C Cummins, 'A green dividing line emerging in property', *Sydney Morning Herald*, 15 February 2010, p. 8, viewed 14 May 2010, http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/AEWV6/upload_binary/aewv60.pdf;fileType%3Dapplication%2Fpdf; Senate Environment, Communications and the Arts Legislation Committee, *Building Energy Efficiency Disclosure Bill 2010 [Provisions]*, Commonwealth of Australia, Canberra, May 2010, p. 4, viewed 20 May 2010, http://www.aph.gov.au/senate/committee/eca_ctte/building_energy_efficiency/report/report.pdf.
18. Proposed clause 13.

The methods and standards of assessment to be used to calculate energy efficiency information will be determined by legislative instrument. The NABERS assessment methodology is expected to be adopted.[19]

Committee consideration

The provisions of the Bill were referred to the Senate Environment, Communications and the Arts Legislation Committee (the Committee) for inquiry and report by 11 May 2010. The purpose of the referral was to consider the regulatory burden which the Bill would impose, and to examine the changes in approach since the original scheme was announced by the government. This has arisen because the 'assumptions contained in the RIS have been widely challenged'.[20]

Although there was extensive consultation in the preparation of the RIS with some 40 written submissions received, the Committee received only five submissions.[21] From these five submissions it seems that the specific aim of the Government is largely supported and the Bill is seen as necessary by most stakeholders, but not without some amendments. Lend Lease Corporation (Lend Lease) is particularly concerned, claiming that the Bill will 'fail to provide a meaningful incentive for businesses to operate buildings efficiently and help to transition the market to a low carbon future'.[22]

The Committee tabled its report in Parliament on 12 May 2010. The Committee, by majority, recommended that the Senate pass the Bill subject to three recommendations discussed in further detail below.

Position of significant interest groups

Greens

The Australian Greens welcomed the Bill but support stronger market mechanisms in line with the Safe Climate (Energy Efficient Non-Residential Buildings Scheme Bill which

19. Explanatory Memorandum, Building Energy Efficiency Disclosure Bill 2010, p. 86.

20. Senate Selection of Bills Committee, *Report No.6 of 2010*, 18 March 2010, appendix 2, viewed 25 March 2010, http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2010/report0610.pdf

21. Allen Consulting Group on behalf of the Department of Environment, Water, Heritage and the Arts, op. cit., p. 59.

22. Lend Lease Corporation, Submission to the Environment, Communications and the Arts Legislation Committee, *Building Energy Efficiency Disclosure Bill 2010 [provisions]*, May 2010, p. 5, viewed 10 May 2010, http://www.aph.gov.au/senate/committee/eca_ctte/building_energy_efficiency/submissions.htm

was introduced in September 2009.[23] The Greens' Bill would establish a cap-and-trade scheme that limits the total energy use from commercial buildings and relies on permit trading to ensure that energy efficiency measures are undertaken at the lowest cost.[24]

Coalition

Although the NFEE and its measures were announced under the Howard government, mandatory disclosure of energy efficiency in commercial buildings was not an explicit element of the Coalition 2007 election policy, nor was it part of the Coalition's response to climate change, the Direct Action Plan.[25]

Importantly, the Coalition members of the Committee provided a minority report, recommending that the government reconsider the Bill and engage in further stakeholder consultation. Of concern to the Coalition Senators were:

> ... technical flaws in the National Australian Built Environment Rating System (NABERS); the inclusion of a tenancy lighting tool; the development of supporting

23. Further information about the Safe Climate (Energy Efficient Non-Residential Buildings Scheme) Bill 2009 is available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs733%22

24. C Milne, *Building efficiency disclosure welcome, but Greens' bill would deliver greater benefits*, media release, 18 March 2010, viewed 20 May 2010, http://greensmps.org.au/content/media-release/building-efficiency-disclosure-welcome-greens-bill-would-deliver-greater-benef; C Milne, *Greens introduce world-leading energy efficient building scheme*, media release, 17 September 2009, viewed 20 May 2010, http://christine-milne.greensmps.org.au/content/media-release/greens-introduce-world-leading-energy-efficient-building-scheme.

25. Although, the Energy Efficiency in Government Operations policy of 2006 outlines a 4.5 star requirement on contracts and leases over 2000 square metres where Government agencies are involved. See Department of Environment and Water Resources, *Energy Efficiency in Government Operations (EEGO) Policy*, 2006, Canberra, viewed 26 May 2010, http://www.environment.gov.au/sustainability/government/eego/publications/pubs/eego-policy.pdf ; Liberal Party of Australia and the Nationals, *Emerging renewable energy: part of our clean energy plan for Australia*, Coalition policy document, Election 2007, viewed 10 May 2010, http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/WOQO6/upload_binary/woqo65.pdf;fileType=application/pdf ; Liberal Party of Australia and the Nationals, *Direct Action Plan on the Environment and Climate Change*, Coalition policy document, 2 February 2010, viewed 10 May 2010, http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/UQLW6/upload_binary/uqlw61.pdf;fileType=application/pdf

> technical tools and availability of assessors; timeframes and the extent of details of the regime to be specified by Regulation.[26]

The Coalition Senators also questioned the Government's rationale for lowering the mandatory disclosure threshold from 5000 square metres (as stated in 2007 ALP election policy) to 2000 square metres.[27]

These issues are further elaborated below under 'Key issues'.

Financial implications

According to the Explanatory Memorandum, funding to support the development and implementation of the scheme will be $5.3 million over four years starting in the 2009-10 Budget:

> This funding is intended to cover both the initial phase of the scheme, covering office buildings, and the expansion of the scheme over the coming years to include other types of commercial buildings. Administration of the scheme will be undertaken with the objective of moving to full cost recovery at the cessation of this funding.[28]

Costs and benefits

A break-even analysis of mandatory disclosure was undertaken against a 'base case of no action' to determine the requirements for a net positive outcome. For this, it was estimated that the average cost of assessment to a property would be $5919 and that average turnovers of stocks are:

- 8 per cent of properties (2000 metres squared and above) sold annually and
- 6 per cent leased.[29]

This results in a total cost to owners of $18.7 million over ten years (net present value) for mandatory disclosure.[30]

It was concluded that for the direct benefits of the scheme to balance the costs, 3.9 per cent of annual transactions (or 114 transactions over the ten years of the program) must be influenced by mandatory disclosure. That is, in 114 cases the tenant or buyer must choose

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26. Environment, Communications and the Arts Legislation Committee, op. cit., pp. 27–34.
27. Ibid.
28. Explanatory Memorandum, op. cit.
29. Ibid., pp. 29 and 31; a breakdown of this costing is provided on page 31.
30. Ibid., p. 47; this includes costs to government of administering the scheme and costs to building owners of purchasing energy efficiency information and time costs in providing information for assessments on their property.

to rent or buy a property of an energy efficiency rating one star higher than other properties being considered. [31]

Key issues

Concerns over NABERS

The Bill does not specify the energy efficiency rating system to be used for the creation of BEECs. However, the Explanatory Memorandum states that:

> In practice, and for the foreseeable future, it is anticipated that the legislative instrument would state the energy efficiency rating of a building as the energy efficiency rating of a base building that is determined by NABERS Energy.[32]

NABERS is the National Australian Built Environment Rating System, a national initiative managed by the New South Wales Department of Environment, Climate Change and Water (NSW DECCW).[33] NABERS is just one rating system on the market. Others include GBCA's Green Star rating tool,[34] the Victorian Government's FirstRate5,[35] BERS (Building Energy Rating System) and more.

NABERS has been criticised by industry for 'inconsistencies in the methodology, which suggest that a particular star rating does not mean the same thing across state boundaries'.[36] The concern may be warranted, given that the system was originally designed for and with NSW information, standards and benchmarks, and then extended for application nationally. In its written submission to the Committee, the Property Council of Australia (PCA) supported NABERS but noted that it is currently under formal review. That being the case, the PCA considered that the 'review should be completed and the NABERS methodology revised before the disclosure regime comes into force'.[37] Lend

31. Ibid., p. 39.
32. Ibid., p. 86.
33. Further information about NABERS is available on the Department of Environment, Climate Change and Water (NSW) website, viewed on 20 May 2010, http://www.nabers.com.au/
34. Further information about Green Star is available on the Green Building Council Australia website, viewed on 20 May 2010, http://www.gbca.org.au/green-star/
35. Further information about FirstRate5 is available on the Sustainability Victoria website, viewed 20 May 2010, http://www.sustainability.vic.gov.au/www/html/1491-energy-rating-with-firstrate.asp
36. T Perinotto, 'NABERS readies for a tune up', *The Fifth Estate*, 11 March 2010, viewed 10 May 2010, http://www.thefifthestate.com.au/archives/10243
37. Property Council of Australia, Submission to the Environment, Communications and the Arts Legislation Committee, *Building Energy Efficiency Disclosure Bill 2010 [provisions]*, 7 April 2010, p. 2.

Lease is of the opinion that no rating system should be mandated, instead 'the Bill should describe the rules and process, not a proprietary tool'.[38]

The Committee took note of these comments but ultimately supported the use of NABERS because of its 'broad level of acceptance within the sector'. It furthers recommends that the use of NABERS within the BEEC be complemented by information from the National Greenhouse and Energy Reporting Scheme to future-proof the scheme to potential international carbon markets.[39]

Lighting component of the BEEC

The PCA raised concerns over the second part of the BEEC, information on the energy efficiency of the lighting, on the grounds that a tool for measuring the energy efficiency of lighting had not been finalised or tested and was not ready to deploy cost-effectively. The Committee recognised the importance of the lighting element to the scheme. It therefore recommended that this part of the BEEC be delayed until the measurement tool was ready and assessors had been appropriately trained in its usage.[40]

Assessors

There is a concern within the industry that the Bill might lead to a steep increase in the volume of commercial building energy assessments and subsequent problems. According to Lend Lease, new assessors will need to be recruited, trained and accredited under the new scheme. This has the potential to make the proposal costly, highly administrative and prone to bottlenecking.[41]

The Senate Committee came to a different conclusion. Of the approximately 2170 eligible buildings in Australia, an estimated 14 per cent are sold or leased each year. This creates a need for about 300 assessments annually. According to the Department of Climate Change and Energy Efficiency there are currently 585 accredited NABERS assessors.[42]

Penalties for non-compliance

The pecuniary penalties imposed in the Bill have been criticised for being excessive. Contravention of **proposed clause 11** (no sale, lease or sublease without a BEEC) and

38. Lend Lease Corporation, op. cit, p. 14.

39. Environment, Communications and the Arts Legislation Committee, *Building Energy Efficiency Disclosure Bill 2010 [provisions]*, Answers to questions on notice from the Property Council of Australia, p. 19.

40 Ibid., p. 22.

41. Lend Lease Corporation, op. cit, p. 4.

42. Environment, Communications and the Arts Legislation Committee, Answers to questions on notice from the Property Council of Australia, op. cit., p. 24.

proposed clause 15 (advertisements to include EER) attract a maximum civil pecuniary penalty of $110 000. In addition, a separate contravention will occur on each subsequent day of non-compliance with these disclosure obligations. Accordingly, a building owner that places three advertisements in a weeklong campaign failing to disclose an energy efficiency rating may incur a penalty of more than $2 million. According to the Explanatory Memorandum:

> This provision is necessary to support the rigorous application of the Bill and to ensure that a contravention does not continue beyond the initial day that it is identified.[43]

Contravention of **proposed clause 12** (rights of a prospective purchaser, lessee or sublessee) attract a maximum civil pecuniary penalty of $110 000 for a body corporate and $38 500 for an individual.

It should be noted that if an infringement notice is issued, the penalty imposed therein cannot be more than one-tenth of the maximum penalty a Court could impose for that contravention. For example, if the maximum civil penalty for contravention of a provision is 1000 civil penalty units ($110 000) the maximum penalty that could be imposed under an infringement notice for one contravention could only be $11 000. In the case of a contravention of **proposed clause 12**, the maximum penalty that could be imposed on an individual under an infringement notice would be $3 850.

The Committee report does not contain any specific analysis of proposed penalties. However the Committee recommended that the Government 'give consideration to whether the penalties proposed to be imposed by the Bill are appropriate'.[44]

According to the Explanatory Memorandum, compliance with this scheme is estimated to cost around $6 000 or $15 000 for more complex buildings. This is 'likely to be less than half a per cent of the overall value of the property transaction'.[45] Accordingly, there is a real danger in larger corporations simply treating the penalties imposed in this Bill as a minor transaction cost. Having two alternative enforcement mechanisms (infringement notice and Court order), arguably gives the scheme further flexibility to account for differences and for harsher penalties to be imposed appropriately and proportionately.

43. Explanatory Memorandum, op. cit., p. 77.
44. Environment, Communications and the Arts Legislation Committee, Answers to questions on notice from the Property Council of Australia, op. cit., p. 23.
45. Explanatory Memorandum, op. cit., p. 78.

Exclusions and exemptions

The obligation contained in **proposed clause 11** to not sell, lease or sublease premises without a BEEC has been drafted 'in order to account for standard property transactions and some of the more complex transactions'.[46] These appear to include:

- standard sales, leases and subleases that take place through advertisement, negotiation, contract exchange and settlement procedures
- call options, put options, put and call options, right of pre-emption, agreement for lease and sale by court order, sale by sale of shares or units and sale of a partial interest.[47]

According to the Mallesons Stephen Jaques law firm, 'not all transactions which have the effect of transferring the economic benefits of ownership or leasing of an office building will be caught'.[48] For example:

- the sale of units in a trust that owns an office building
- the sale of shares in a company that owns an office building
- the assignment of a lease of an office building, even a long term lease
- a mortgagee exercising a power of sale (although the obligation may still be imposed on the mortgagor).[49]

The Energy Efficiency Council has also criticised the Bill for not applying to governments as well as the private sector.[50] The Crown is not a constitutional corporation, as defined and therefore the obligations imposed on constitutional corporations under this scheme will not be imposed upon federal, state and territory governments. Nonetheless, the Explanatory Memorandum notes that 'a disclosure obligation, or an obligation to provide access or information, may be triggered where a government is involved in a sale, lease or sublease transaction involving a constitutional corporation'.[51] According to the

46. Ibid., p. 77.
47. Ibid., p. 77.
48. Mallesons Stephen Jaques, 'Release of Building Energy Efficiency Disclosure Bill 2010 - 1 April 2010', Mallesons Stephen Jaques website, viewed 12 May 2010, http://www.mallesons.com/publications/2010/Apr/10293709w.htm
49. Ibid.
50. Energy Efficiency Council, Submission to the Environment, Communications and the Arts Legislation Committee, *Building Energy Efficiency Disclosure Bill 2010 [provisions]*, viewed 12 May 2010, http://www.aph.gov.au/senate/committee/eca_ctte/building_energy_efficiency/submissions.htm
51. Explanatory Memorandum, op. cit., p. 76.

Department, this is the majority of government transactions.[52] It is not clear whether the obligation to disclose the energy efficiency star rating of premises when advertising will also apply to the government.

In terms of specific exemptions from the scheme, the PCA maintained that the 'provisions are inadequate'.[53] Exemptions can only be granted upon request and at the discretion of the Secretary.[54] The PCA recommended that exemptions be clearly defined and automatic. Failing this, penalties not apply during the application for exemption period.[55]

Transition period

The commencement date for this Bill is 1 July 2010. The implementation date is to be determined by proclamation by the Governor-General. However, COAG undertook to have the measure implemented from 2010.[56] A transition period of 12 months begins on the first day of implementation. During the transition period, a valid NABERS Energy rating, on its own, acquired before the implementation date, can be used in lieu of a BEEC.[57]

Some industry players are using this transition period as motivation to invest in a NABERS Energy rating assessment prior to the commencement of the scheme.[58] The PCA however claimed that the transition period is too short in light of uncertainties that exist in the tenancy lighting efficiency measurement tool, especially given the excessive penalties. [59]

Thresholds for property sizes: 2000m^2 or 5000m^2

In 2007, the ALP policy outlined a mandatory disclosure to be phased in gradually, starting with office buildings above 5000 square metres.[60] The RIS provides an analysis of

52. Environment, Communications and the Arts Legislation Committee, *Building Energy Efficiency Disclosure Bill 2010 [provisions]*, Answers to questions on notice from the Department of Climate Change and Energy Efficiency, 12 April 2010, question 14.
53. Property Council of Australia, op. cit., p. 3.
54. Explanatory Memorandum, op. cit., p. 82.
55. Property Council of Australia, op. cit., p. 3.
56. Explanatory Memorandum, op. cit., pp. 87, 60.
57. Explanatory Memorandum, op. cit., p. 87.
58. Mallesons Stephen Jaques, 'Release of Building Energy Efficiency Disclosure Bill 2010 - 1 April 2010', Mallesons Stephen Jaques website, viewed 12 May 2010, http://www.mallesons.com/publications/2010/Apr/10293709w.htm
59. Property Council of Australia, op. cit., p. 2.
60. Australian Labor Party, *Clean Business Australia*, op. cit.

this approach against one with a Net Lettable Area (NLA) threshold of 2000 square metres. It concludes that:

> ... a 2000m^2 NLA threshold is preferred because it presents greater scope for benefit (as it influences a larger proportion of the building stock), but its costs are still at a low level and within a reasonable range (i.e. only requiring a small proportion of direct benefit means that there is strong scope for a net benefit to be achieved — i.e. benefits to be greater than costs).[61]

According to the Coalition Senators' Additional Comments in the Committee Report, reducing the NLA threshold from 5000 square metres to 2000 square metres includes an additional 996 buildings in the scheme, specifically 'second tier and smaller property owners' who may find the compliance costs burdensome. The Coalition Senators called for further stakeholder consultation on this issue.[62]

Regulation-heavy scheme

The Bill itself leaves much of the detail to subordinate legislation. This arguably provides the scheme with flexibility and adaptability to new information. It also leaves the potential for linkage with future international greenhouse gas reduction schemes. The Green Building Council Australia (GBCA) believes this approach to be a necessary one, and calls for further stakeholder consultation with each decision within the regulations.[63] The Department of Climate Change and Energy Efficiency has confirmed that 'any changes would not be taken arbitrarily by the secretary or the department ...there would not be just an arbitrary change without consultation'.[64]

However, the PCA fears a lack of clarity (and therefore assessment) on the requirements of the sector. It would like more detail included in the Bill, specifically:

- 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

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61. Explanatory Memorandum, op. cit., p. 46.
62. Environment, Communications and the Arts Legislation Committee, op. cit., p. 28.
63. Green Building Council of Australia, Submission to the Environment, Communications and the Arts Legislation Committee, *Building Energy Efficiency Disclosure Bill 2010 [provisions]*, viewed 11 May 2010, http://www.aph.gov.au/senate/committee/eca_ctte/building_energy_efficiency/submissions.htm
64. Environment, Communications and the Arts Legislation Committee, op. cit., p. 9.

- the accreditation requirements for registered assessors.[65]

Main provisions

Part 1—Preliminary

Proposed clause 3 contains definitions to be used in the Act. Of particular note are the proposed definitions of the terms ***'disclosure affected area of a building'*** and ***'disclosure affected building'***. Importantly, those definitions apply to an area which is 'used or capable of being used as an office'. That being the case, the scheme established by this Bill does not regulate residential buildings.

Proposed clause 4 establishes the circumstances in statute under which a person is considered to have offered to sell or is inviting offers to purchase a building thus triggering an energy efficiency disclosure obligation. For example, **proposed subclause 4(1)** provides that a person is deemed to offer to sell a building if they offer to enter into a contract in which a contingent obligation or right to sell the building would be created. **Proposed clause 5** similarly establishes the circumstances in statute under which a person is considered to have offered to let or sublet or is inviting offers to lease or sublease a building or an area of a building. For example, **proposed subclause 5(1)** provides that that a person is deemed to offer to let a building or an area of a building if they offer to enter into a contract in which a contingent obligation or right to let the space would be created. The Explanatory Memorandum notes that these statutory 'triggers' mean that disclosure will be required before substantive negotiations begin.[66] Significantly, it also notes that 'the action of selling or purchasing an area of a building, such as may occur when a building is strata titled, does not trigger a disclosure obligation under the scheme'.[67] **Proposed clause 6** provides that any further subleasing of a building or area of a building is also subject to the energy efficiency disclosure obligation.

Proposed clause 7 provides that this proposed energy efficiency disclosure scheme will only displace or limit a law of a State or Territory which similarly imposes disclosure obligations in relation to the sale, lease or sublease of a building or an area of a building if it is directly inconsistent with this scheme. **Proposed clause 8** provides that the Crown is to be bound by this Act but significantly, the Crown is not a constitutional corporation, as defined and therefore the obligations imposed on constitutional corporations under this scheme will not be imposed upon federal, state and territory governments. Nonetheless, the Explanatory Memorandum notes that 'a disclosure obligation, or an obligation to provide access or information, may be triggered where a government is involved in a sale,

65. Property Council of Australia, op. cit.

66. Explanatory Memorandum, op. cit., p. 74.

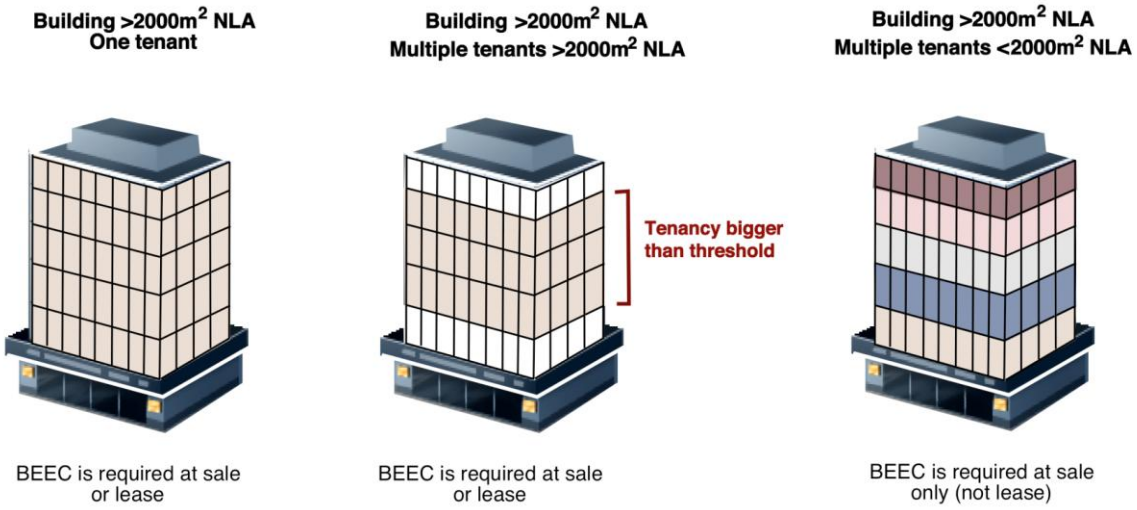
67. Ibid., p. 75.

lease or sublease transaction involving a constitutional corporation'.[68] However, **proposed subclauses 7(2)** and **(3)** state that the Crown (not an authority of the Crown) will not be liable to pecuniary penalties or prosecution under this scheme.

Part 2—Obligations to disclose energy efficiency information

Proposed clause 10 provides that the Minister may determine that a specified kind of building or area of a building is 'disclosure affected'. Such a determination is to be by way of legislative instrument.[69] Although the Explanatory Memorandum predicts that the scheme will mainly apply to offices that are larger than 2000 square metres there is no specific reference to the applicable area of a disclosure affected building in the Bill.[70]

The RIS provides the following pictorial of the office areas which will be captured by the Bill.



Proposed clause 11 generally prohibits a constitutional corporation from selling, leasing or subleasing a disclosure affected building or area of a building without a BEEC.[71] The

68. Ibid., p. 76.

69. As to disallowance of legislative instruments, see *Legislative Instruments Act 2003*.

70. Explanatory Memorandum, op. cit., p. 76.

71. **Proposed clause 3** defines 'constitutional corporation' as 'a corporation to which paragraph 51(xx) of the Constitution applies. Paragraph 51(xx) of the Constitution in turn states 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.

maximum civil penalty for doing so is 1000 penalty units ($110 000).[72] In addition, **proposed subclause 11(5)** provides that a constitutional corporation commits a separate contravention on each day that it fails to comply with the requirements of this clause.
Not all property transactions involving constitutional corporations are caught by the scheme, for instance as previously mentioned, the action of selling or purchasing an area of a building, such as may occur when a building is strata titled, is not expected to trigger a disclosure obligation because there is currently no practicable method for assessing the energy efficiency of such offices.[73]

Proposed clause 12 provides constitutional corporations that have a good faith interest in buying, leasing or subleasing a disclosure affected building or a disclosure affected area of a building, with the right to require the owner, lessor or sublessor of a building or area of a building to provide a BEEC. Such a request must be in writing and may be made at any time while the offer or invitation continues. **Proposed subclause 12(6)** establishes the maximum civil penalties that may be applied for failure to provide a valid and current BEEC 'as soon as is reasonably practicable'. Namely, 350 penalty units ($38 500) for an individual and 1000 penalty units ($110 000) for a body corporate.

Proposed clause 13 relates to the contents of the BEEC. **Proposed subclause 13(1)** lists what a BEEC must contain if it pertains to a building:

- the energy efficiency rating for the building
- an assessment of the energy efficiency of the lighting for the building that might reasonably be expected to remain if the building is sold, let or sublet, and
- guidance of a kind determined by the Secretary by legislative instrument on how energy efficiency might be improved.

Similarly, **proposed subclause 13(2)** lists what a BEEC must contain if it pertains to only an area of a building:

- the energy efficiency rating for the building in which the area is located
- an assessment of the energy efficiency of the lighting for the area that might reasonably be expected to remain if the area is let or sublet, and
- guidance of a kind determined by the Secretary by legislative instrument on how energy efficiency might be improved.

72. Section 4AA of the *Crimes Act 1914* defines 'penalty unit' as $110.

73. Explanatory Memorandum, op. cit., p. 75.

Significantly, the regulations may prescribe that additional information must be included in the BEEC.[74] According to the Explanatory Memorandum, such information 'may include details of on-site renewable or low-emissions energy sources, green power usage, and past years' energy efficiency ratings'.[75]

Under this scheme, a certificate must be valid *and* current. A BEEC is only ***current*** for 12 months beginning on the date it is issued.[76] It appears that a BEEC will only be issued after both energy assessments and the guidance for improvement are completed even if these three assessments occur at different times.

Proposed subclauses 13(5) and **(6)** contain the requirements that make a BEEC ***valid*** for a building and an area of a building respectively. In brief, a BEEC is valid if the issuing authority is satisfied that:

- the energy efficiency rating is appropriate for the building when applying the assessment methods and standards, *and*
- the assessment of the lighting energy efficiency is appropriate for the building or area of the building when applying the assessment methods and standards.

If an audit reveals that an assessor had not appropriately applied the assessment standards and methods, the BEEC would presumably not therefore be valid and a new BEEC would need to be issued.[77]

Proposed subclauses 13(7) and **(8)** provide that the Secretary may, by instrument, (though not a legislative instrument) recognise a person or body as a BEEC issuing authority. The Explanatory Memorandum notes that this is expected to be the NSW Government department responsible for the administration of NABERS Energy.[78]

Proposed clause 14 relates to the creation of a Building Energy Efficiency Register (the register). According to the Explanatory Memorandum, it is expected that this online register will be established and administered by the NSW government department responsible for NABERS and will be similar to the database that currently exists for buildings that have been assessed under NABERS Energy.[79] The Bill does not appear to require owners, lessors or sublessors to register BEECs. **Proposed subclause 14(1)**

74. Proposed subclause 13(3).
75. Explanatory Memorandum, op. cit., p. 79.
76. Proposed subclause 13(4).
77. Explanatory Memorandum, op. cit., p. 79.
78. Ibid., p. 79.
79. Ibid., p. 80.

provides that the Register will contain *particulars* of valid BEECs. However, such particulars may include information from both current as well as lapsed BEECs.[80]

Proposed clause 15 relates to the disclosure of energy efficiency ratings in advertisements. This clause requires a constitutional corporation that owns or leases a disclosure affected building or a disclosure affected area of a building wanting to sell, lease or sublease the building or area to include in such advertisements an energy efficiency rating for the entire building.[81] The Secretary will determine by way of legislative instrument, the manner in which the rating is to be expressed in the advertisement. Failure by a constitutional corporation to comply with these requirements attracts a maximum civil penalty of 1000 penalty units ($110 000). A corporation that contravenes a requirement of this clause (that is, an energy efficiency rating is not included in the advertisement or the assessment is not expressed in a manner consistent with the Secretary's determination) in relation to a continuing advertisement commits a separate contravention in respect of each day during which the person fails to comply with that requirement, including the day of the making of a relevant civil penalty order and any subsequent day.[82]

Proposed clause 17 provides that an application may be made in writing to the Secretary for an exemption from the requirement to not sell, lease or sublease without a BEEC as per clause 11; to not fail to provide a copy of a BEEC to a prospective purchaser, lessee or sublessee as per subclause 12(6) and to not advertise without an energy efficiency rating as per clause 15.[83] Such an application will attract a fee yet to be prescribed. The proposed statutory circumstances in which an exemption *may* be granted include:

- if the building or the area of the building is used for police or security operations
- if the characteristics of the building or the area of the building make it not possible to assign an energy efficiency rating to the building, or assess the energy efficiency of lighting of the building or the area of the building, or
- if the building or area of the building fall within 'any other class prescribed by the regulations'.

Proposed clause 18 provides 'information gathering powers to all parties that may have a disclosure obligation under the scheme'.[84] Under **proposed subclause 18(2)** an assessor may require an owner, lessee or sublessee to provide specific *information* that is necessary

80. Proposed subclause 14(2).

81. The term '*energy efficiency rating*' for a building is defined in **proposed clause 16** as the energy efficiency rating that is specified in the BEEC for the building. The rating is valid and current only if the BEEC for the building is valid and current.

82. Proposed subclause 15(5).

83. See definition of the term 'energy efficiency disclosure obligation' in **proposed clause 3**.

84. Explanatory Memorandum, op. cit., p. 83.

for the purpose of the assessment if they reasonably believe the person has the information. A person must not be required to produce such information in less than 14 days. Under **proposed subclause 18(4)** an assessor may also require an owner, lessee or sublessee to provide *access* to 'a place in or associated with the building or area' if such access is necessary for the purpose of conducting the assessment and the assessor reasonably believe the person 'either occupies or controls access to the place'. The timeframe in which such access is required must be reasonable.[85] Failure by an individual to comply with these requirements attracts a maximum 200 civil penalty units ($22 000) while failure by a body corporate attracts a maximum 500 civil penalty units ($55 000).[86] **Proposed subclause 18(7)** provides that a person who fails to provide information within the specified period commits a separate contravention on each day after the specified period including the day when the civil penalty order was made and any subsequent day. Similarly, a person who fails to provide access at the specified time commits a separate contravention on each day after the specified period including the day when the civil penalty order was made and any subsequent day.

Exemptions from this clause may be granted by the Secretary. All applications for exemption must be in writing and be accompanied by a fee to be prescribed. **Proposed subclause 18(10)** states that the Secretary may approve an exemption in relation to:

- access to a building specified in the exemption
- access to an area of a building specified in the exemption
- access to an area associated with the building specified in the exemption
- access to a building or an area of a building on a day or at a time specified in the exemption, or
- a class of information specified in the exemption.

The Explanatory Memorandum notes that:

> It is expected that the administrative arrangements for the Act will be structured such that a person will not be subject to a civil penalty under subclauses (6) and (7) in the time between making an application for an exemption under subclause (8) and receiving written notification of the Secretary's decision under subclause (11). However, an explicit legislative provision to this effect has not been included in the Act as it may have the undesired effect of exemptions being sought as a delaying tactic by applicants wishing to avoid their obligations without good reason.[87]

85. Proposed subclause 18(5).

86. Proposed subclause 18(6).

87. Explanatory Memorandum, op. cit., p. 85.

Proposed clause 19 creates offences for persons who misuse information that is acquired under clause 18. **Proposed subclause 19(1)** provides that a person commits an offence if they acquire information for the purposes of a BEEC and they copy, use or otherwise disclose such information to another person. The maximum penalty for such an offence is two years imprisonment. However, **proposed subclause 19(2)** generally permits the information to be:

- copied, recorded, used or disclosed for the purposes of obtaining a BEEC
- copied, recorded, used or disclosed in, or in connection with an audit under the scheme
- copied, recorded, used or disclosed in circumstances in which the conduct is permitted under the Act
- copied, recorded, used or disclosed for the purposes of proceedings for various offences under the *Criminal Code* relating to false or misleading information or documents and obstruction of Commonwealth public officials
- copied, recorded, used or disclosed with consent, or
- copied, recorded, used or disclosed if the information is already publicly available.

Proposed clause 20 provides that if an owner, lessor, lessee or sublessee of a building or area of a building suffers damage as a result of an assessor's failure to comply with a duty under this clause, they may recover damages for any loss suffered as a result of that failure. **Proposed subclauses 20(1)** and **(2)** set out assessors' duties when conducting an assessment for a BEEC in a building or an area of a building respectively. Such duties include applying the assessment methods and standards determined under **proposed clause 21** but also to comply with the assessor's conditions of accreditation.

Proposed subclause 21(1) provides that the Secretary may, by legislative instrument determine the assessment methods and standards to be applied in:

- working out the energy efficiency rating of a building
- assessing the energy efficiency of lighting for a building that might reasonably be expected to remain if the building is sold, let or sublet, and
- assessing the energy efficiency of lighting for an area of a building that might reasonably be expected to remain if the area is let or sublet.

Proposed subclause 21(2) provides that for the purpose of determining an assessment method and standard the Secretary can apply, adopt, or incorporate, with or without modification, any matter contained in any other instrument or writing as in force at a particular time or as in force from time to time. This means that, whilst the stated intention of the Government is to use the NABERS assessment methodology, it is possible that a different methodology could be used in the future. **Proposed clause 22** provides that obligations arising under proposed clause 11 (to not sell, lease or sublease without a BEEC), clause 12 (to provide a BEEC to prospective purchasers, lessees or sublessees) and clause 15 (to not advertise without an energy efficiency rating for the building) will

apply on or after the *implementation day*, which will be a day to be fixed by the Governor General in a proclamation.[88] However, if proclamation does not occur within six months from the commencement of the Act, the implementation day will be the day after the end of that period (six months from the day on which the Act commences).

Proposed clause 23 provides that for the 12 months after the implementation day ('the transition period') a valid and current BEEC will be taken to be registered if:

- a rating of the energy efficiency of the building has been issued before the start of the transition period,
- the rating was issued by a person or body that is recognised as an issuing authority at the start of the transition period
- the issuing authority is satisfied that the rating is appropriate for the building, based on assessment methods and standards substantially similar to those determined under section 21 as 11 in force at the start of the transition period
- the rating has not expired, and
- the rating is included in a register maintained by the issuing authority by electronic means and available for inspection on the internet.[89]

Proposed subclause 23(3) specifies when the energy efficiency rating of a building will expire and **proposed subclause 23(4)** provides that for the purposes of clause 15, it will be valid until the rating expires.

Part 3—Accreditation of assessors

Division 1—Accreditation

Proposed clause 25 sets out the circumstances in which the Secretary must refuse an application to become an accredited assessor and the circumstances in which the Secretary has discretion to refuse an application. More explicitly, **proposed subclause 25(1)** provides that the Secretary *must* refuse to accredit a person (an applicant) as an assessor if:

- they have not successfully completed the prescribed training
- the Secretary is satisfied that the applicant has provided false or misleading information in, or in connection with the energy efficiency rating of a building, or

88. Commencement at time of proclamation enables the government to delay operation of specific provisions of a statute until administrative arrangements are in place to enable the statute to operate. Commencement by proclamation is notified as a Legislative Instrument on the Federal Register of Legislative Instruments (FRLI) on ComLaw.

89. Proposed subclause 23(2).

- the applicant has been convicted of an offence against Division 137 of the *Criminal Code* for the provision of false or misleading information in, or in connection with:
  - an application for a BEEC
  - an audit conducted under Part 4, or
  - an application for accreditation or renewal of accreditation.

Proposed subclause 25(2) provides that the Secretary *may* refuse to accredit a person if he/she is satisfied that the applicant:

- needs to undertake further training in applying the assessment methods and standards
- does not have the qualifications or experience necessary to properly apply the assessment methods and standards, or
- will not be able to satisfy a condition of accreditation.

If an applicant has previously been accredited as an assessor, the Secretary *may* also refuse their application for accreditation if:

- the applicant has been found in proceedings for damages under the Act or the Secretary is otherwise reasonably satisfied that the applicant has not properly applied the assessment methods and standards for the purposes of working out an energy efficiency rating or performing an assessment as to the energy efficiency of lighting, or
- the applicant has failed to comply with a condition of accreditation.

If none of the above circumstances apply, the Secretary *must* approve the application to be an accredited assessor.[90] The period of accreditation is set at a minimum of 12 months and a maximum of three years.[91]

Regulations may prescribe conditions which can be imposed on the accreditation of all, or a specified class of, assessors and the Secretary may impose additional conditions on the accreditation of an individual assessor.[92]

Division 2—Suspension and revocation of accreditation

Proposed clause 28 empowers the Secretary to suspend the accreditation of a person as an assessor if:

- the applicant has been found in proceedings for damages under the Act or the Secretary is otherwise reasonably satisfied that the applicant has not properly applied

90. Proposed subclause 25(3).

91. Proposed clause 26.

92. A notice advising of such a condition and the variation or revocation of such a condition is not a legislative instrument: **proposed subclauses 27 (5)** and **(6)**.

the assessment methods and standards for the purposes of working out an energy efficiency rating or performing an assessment as to the energy efficiency of lighting, or

- the applicant has failed to comply with a condition of accreditation.

In turn, **proposed clause 29** empowers the Secretary to lift such a suspension if satisfied that the issues that resulted in the suspension have been addressed, and any other action necessary to ensure the person will properly apply the assessment methods and standards and comply with the conditions of accreditation has been, or will be, taken. **Subclauses 29(2)** and **(3)** make provision for arrangements when expiry of accreditation occurs prior to the lifting of a suspension.

Proposed clause 30 governs the revocation of accreditation as an assessor. The circumstances in which the Secretary *must* revoke an accreditation are set out in **proposed subclause 30(1)** and these largely mirror the circumstances in which an application for accreditation must be refused under **proposed subclause 25(1)**. The circumstances are:

- the Secretary is satisfied that the person has provided false or misleading information in, or in connection with the energy efficiency rating of a building, or
- the person has been convicted of an offence against Division 137 of the *Criminal Code* for the provision of false or misleading information in, or in connection with:
  - an application for a BEEC
  - an audit conducted under Part 4, or
  - an application for accreditation or renewal of accreditation.

The circumstances in which the Secretary *may* revoke the accreditation of a person as an assessor are set out in **proposed subclause 30(2)**. The circumstances are:

- the person has been found in proceedings for damages under the Act or the Secretary is otherwise reasonably satisfied that the person has not properly applied the assessment methods and standards for the purposes of working out an energy efficiency rating or performing an assessment as to the energy efficiency of lighting, or
- the applicant has failed to comply with a condition of accreditation.

Division 3—General provisions relating to accreditation

Proposed clause 31 provides that an online register containing the name of each accredited assessor any other information considered relevant to a person engaging an assessor is to be set up. **Proposed clause 32** provides that holding oneself out to be an accredited assessor when one is not is punishable by 60 penalty units ($6600).

Part 4—Auditing accredited assessors

Division 1—Appointment of auditing authority and auditors

Part 4 creates an auditing system to ensure that accredited assessors are correctly applying the assessment methods and standards. **Proposed subclause 33(1)** provides that the Secretary may appoint a person or body as an auditing authority. The function of the auditing authority is to direct auditors to ensure that:

- accredited assessors properly apply the assessment methods and standards in carrying out assessments for BEECs only, and
- assessments are not influenced by any conflict of interest.[93]

The auditing authority must perform these functions in accordance with any policies notified by the Secretary and must report directly to the Secretary if the energy efficiency rating or the assessment of the energy efficiency of the lighting in a BEEC is not appropriate for the building or an area of a building.[94] There is no requirement to notify the Secretary if an accredited assessor is found to have a conflict of interest.

Under this proposed scheme, only a public servant or a person engaged by the Commonwealth may be an auditor. The functions of an auditor are set out in **proposed subclause 34(3)**. These include conducting audits of assessments for BEECs and documentation/record keeping of such assessments. It also includes supervising assessments to ensure the methods and standards are properly applied and documented.

Division 2—Powers of auditors

An auditor's powers are set out in **proposed clauses 37 and 39**. They include:

- entering a building, an area of a building, or any place associated with the building or area if voluntary consent is provided by its occupant or under a monitoring warrant
- exercise 'monitoring powers' such as observing any activity, inspecting something, making copies of documents, operating electrical equipment (such as computers) and so forth, and
- ask any question and seek production of any document relating to whether an assessor has properly applied the assessment methods and standards set out in clause 21.[95]

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93. Proposed subclause 33(2).

94. Proposed subclauses 33(3) and (4).

95. A person commits an offence punishable by 30 penalty units ($3300) if they fail to comply after entry has been obtained under a monitoring warrant: **proposed subclause 39(3)** though note exceptions contained in (4) and (5).

Division 3—Obligations of auditors

Proposed clause 40 governs consent by an occupier to enter a building, area of a building or an associated place. It clarifies that an occupier may refuse consent and any consent given must be voluntary. Consent can also be limited during a particular period and can cease to have effect. **Proposed clauses 41, 42 and 43** in brief provide that an auditor entering under a monitoring warrant must announce that they are authorised to enter unless they believe on reasonable grounds that immediate entry is required. Once entry is achieved they must make a copy of the warrant available to the occupier (or another person apparently representing the occupier) and inform them of their rights and responsibilities (outlined below).

Division 4—Occupier's rights and responsibilities

An occupier is entitled to observe the execution of the warrant under **proposed clause 45** however, such a right ceases if the occupier or another person impedes that execution. The warrant may also be executed simultaneously in two or more areas. Under **proposed clause 46** an occupier, or another person who apparently represents the occupier, must provide the auditor and any assistant with 'all reasonable facilities and assistance for the effective exercise of their powers'. Failure to comply attracts a penalty of 30 penalty units ($3300).

Division 5—Monitoring warrants

Proposed clause 47 relates to monitoring warrants. It provides that an auditor may apply to a magistrate for a warrant in respect of a building, an area of a building or any place associated with a building or an area of a building. The magistrate must be satisfied on the basis of information provided by the auditor or some other person on oath or by affidavit that access is reasonably necessary for determining whether an assessor has properly applied the assessment methods and standards determined under proposed clause 21.[96]

Division 6—Powers of magistrates

The power to issue a warrant is conferred on a magistrate in a personal capacity and not as a court or a member of a court under **proposed subclause 48(1)**.

Part 5—Enforcement

Division 1—Obtaining information and documents

Proposed clause 49 enables the Secretary to obtain information or documents if he or she reasonably believes that a person has knowledge of information or custody or control of documents relating to whether a civil penalty provision has been complied with. A person

96. **Proposed subclauses 47(2)** and **(3)**. See (4) for the specific contents of a warrant.

must be given at least 14 days to comply with a request for information. Failure to comply with this clause is an offence of strict liability punishable by a maximum 30 civil penalty units ($3300). A person is not required to comply if the information or document might tend to incriminate or expose them to a penalty or if they are not capable of complying.[97]

Division 2—Civil penalties

Proposed clause 52 provides that the Act will apply to a person who is involved in the contravention or attempted contravention of a civil penalty provision, for example, a person who attempts to contravene such a provision or conspires with others to do so.[98]

Proposed clause 53 provides that the Secretary may apply to a Court for an order that a person who has contravened a civil penalty provision pay a pecuniary penalty. In determining the appropriate penalty to be imposed, the Court must have regard to 'all relevant matters' including:

- the nature and extent of the contravention
- the nature and extent of any loss or damage suffered
- the circumstances in which the contravention took place
- whether the person has previously been found to have 'engaged in any similar conduct' in proceedings under the Act
- the extent to which the person has cooperated with the authorities.[99]

In relation to continuing and multiple contraventions, **proposed subclause 53(6)** provides that the Court has discretion to make a single civil penalty order against a person for multiple contraventions of a civil penalty provision if it is founded on the same facts or if the contraventions form part of a series of contraventions of the same or a similar character. However, in doing so the penalty must not be greater than the sum of the maximum penalties that could be imposed if a separate penalty was ordered for each of the contraventions.

If conduct contravenes more than one civil penalty provision, proceedings may be initiated in relation to the contravention of any one or more of those provisions. However, a person is not liable to a penalty in respect of one provision for the same conduct.[100]

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97. Proposed clause 50.
98. See **proposed subclause 52(1)** for an exhaustive list of prohibited activity.
99. Proposed subclause 53(4).
100. Proposed subclause 53(7).

Under **proposed clause 57**, a person is not liable if they were under a mistaken but reasonable belief about facts, which if true, would mean there was no contravention. However, a person wishing to rely on the defense of mistake of fact bears the evidential burden of proof.

Division 3—Infringement notices

Under **proposed clause 58**, the Secretary *may* issue an infringement notice if he/she reasonably believes that a person has contravened a civil penalty provision. The matters that must be included in an infringement notice are set out in **proposed clause 59** though provision is made for regulations to set out other matters. An infringement notice must, amongst other things, state:

- the pecuniary penalty that is payable (significantly, this must not be more than one-tenth of the maximum penalty that could be imposed by a Court for the contravention)
- if the penalty is paid within 28 days after the notice is given, court proceedings will not be commenced against the person unless the notice is withdrawn
- the person may apply to have the period in which to pay the penalty extended[101]
- if the person chooses not to pay the penalty, court proceedings may be commenced in relation to the alleged contravention, and
- the person may seek the withdrawal of the notice.[102]

Though payment of an infringement notice within 28 days discharges any liability of the person for the alleged contravention, the Act does not impose an obligation on the Secretary to require an infringement notice to be issued to a person. Further, if the Secretary subsequently chooses to withdraw an infringement notice (and refund any money already paid), civil proceedings can still be brought against the person in respect of an alleged contravention.[103]

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101. **Proposed clause 60** provides that the Secretary may extend the period more than once, but if the Secretary does not approve an extension, payment must be made by 28 days of the original notice being given to the person or seven days after the person is given notice of the decision not to extend, whichever is the later.

102. **Proposed clause 61** provides that the Secretary may withdraw an infringement notice even if the person who was issued the notice has not made written representations seeking the withdrawal. Proposed subclause (5) lists the matters that the Secretary *may* take into account in deciding whether or not to withdraw an infringement notice. Significantly, if a notice is withdrawn, court proceedings may still be commenced against the person in respect of the conduct to which the notice relates (**proposed subparagraph 59(1)(n)(ii)**).

103. Proposed subclause 62(2).

Division 4—Other matters

Proposed clause 65 obligates the Secretary to maintain an online Energy Efficiency Non-Disclosure Register. This register appears to be designed to 'name and shame' people who continually demonstrate a disregard for the requirements of the Act and will thereby 'discourage industry from discounting the cost of penalties as a minor transaction cost'.[104]

Where there are two or more instances of non-disclosure in twelve months the Secretary *may* record the number of instances of non-disclosure and the date on which each instance occurred or began. An 'instance of non-disclosure' is triggered if a person is issued with an infringement notice or the Court makes a civil penalty order against a person for a contravention.[105]

The Secretary may withhold or delete an entry on the register if he/she are satisfied that the instance is not part of a continuing pattern of conduct demonstrating a disregard for the requirements of the Act. The Secretary must also remove an entry if infringement notice is subsequently withdrawn or a court order is subsequently overturned on appeal.[106]

Part 6—Miscellaneous

Proposed clause 67 sets out what types of decisions under the scheme are reviewable internally by the Secretary.[107] **Proposed clause 69** provides that the Secretary's decision may be reviewed independently by the Administrative Appeals Tribunal (AAT) as can the reviewable decisions set out in clause 67 which are made by the Secretary personally.

Proposed clause 71 enables the Secretary to delegate any or all of the Secretary's powers or functions under the Act (other than those listed in paragraphs (a)-(k)) which include such things as determining assessment methods and standards, determining manner of advertisement, and internal review of certain decisions.

Proposed subclause 71(2) enables the Secretary to delegate to the issuing authority any of the Secretary's powers and functions under Part 3 (Accreditation of assessors) but in exercising such delegated powers or functions, the delegate must comply with any directions of the Secretary.[108]

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104. Explanatory Memorandum, op. cit., p. 100.
105. Proposed subclause 65(3).
106. Proposed subclause 62(5).
107. **Proposed clause 68** describes the mechanisms of the internal review in further detail.
108. Proposed subclause 71(3).

Concluding comments

The broad objective of this Bill is to improve the energy efficiency of large commercial office buildings and thereby reduce Australia's greenhouse gas emissions. The mandatory energy disclosure scheme proposed in this Bill will, to a certain extent, achieve this goal. As an information-based scheme, the Bill makes public the sorts of data needed to assist the market in transitioning to a lower-carbon future. However it is only a first step. To become a fully market-based instrument and thereby take advantage of the efficiencies offered by the market, this Bill must be accompanied by real and measurable incentives. These complementary measures must impart confidence to the sector and provide the motivation needed to stimulate innovation and transformation in the building industry.

The concerns about the ability of this scheme to be effectively implemented are legitimate. The Committee inquiring into the provisions of the Bill has, in response to industry concerns, recommended that the lighting component of the disclosure regime be delayed to enable an appropriate assessment tool to be rolled-out. There is some unease over the tools and systems proposed for the energy efficiency assessment. These are yet to be tested and in the case of NABERS, still under review. This puts into question the impact analyses undertaken in the preparation of the Bill.

Finally, there are many uncertainties caused by existing and potential exemptions and exclusions from the obligations under the scheme, and as a result of the Bill leaving much of the detail of the scheme to subordinate legislation.

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