

# EXPLANATORY STATEMENT

## **Select Legislative Instrument No. 104, 2015**

### *Building Energy Efficiency Disclosure Amendment (Unsolicited Offers and Other Measures) Regulation 2015*

#### Issued by the Authority of the Minister for Industry and Science

The *Building Energy Efficiency Disclosure Act 2010* (the Act) provides for the establishment of the Commercial Building Disclosure (CBD) Programme. The CBD Programme requires energy efficiency information to be disclosed in most cases when commercial office space of 2,000 square metres or more is offered for sale or lease. The Act aims to ensure that credible and meaningful energy efficiency information is given to prospective purchasers and lessees of large commercial office space. This information helps purchasers or lessees to make more informed decisions and take account of the economic costs and environmental impacts associated with operating the buildings when they are intending to purchase or lease.

Since the establishment of the CBD Programme, there have been a number of proposed changes raised through the regular forums with key industry stakeholders to improve the Programme. Those changes require legislative amendments to the Act and associated legislative instruments including the Building Energy Efficiency Regulations and Determinations.

As part of this package of legislative amendments, the *Building Energy Efficiency Disclosure Amendment Bill 2014* (the Bill) was introduced to Parliament in October 2014 to streamline the administrative process of the CBD Programme, address stakeholders' concerns and reduce regulatory burden on industry. The Bill was passed by the Senate on 12 February 2015.

The *Building Energy Efficiency Disclosure Regulation 2010* (the Regulations) established by the Governor General under Section 72 of the BEED Act also need to be updated, both to enable changes specific to the Regulations and as a consequence of the amendments contained in the Bill.

The *Building Energy Efficiency Disclosure Amendment (Unsolicited Offers and Other Measures) Regulation 2015* (the Amendment Regulation) amends the Regulations to:

- provide for temporary exemptions from the mandatory disclosure requirements for building owners who receive unsolicited offers for the sale or lease of their office space. This will lead to \$0.3 million estimated reduction of regulatory burden on business;
- allow for a range of training providers to be appointed for the training associated with the accreditation of CBD assessors;
- create an exemption category for buildings currently undergoing major refurbishments; and
- implement consequential updates to the Regulations as a result of amendments to the BEED Act.

Details of the changes to the Regulations are set out in the [Attachment](#).

An exposure draft of the Amendment Regulation was released for public consultation from 5 to 22 March 2015. Feedback was considered and, where appropriate, incorporated into the amendments.

The Amendment Regulation commences on 1 July 2015.

## ATTACHMENT

### ***Details of the Building Energy Efficiency Disclosure Amendment (Unsolicited Offers and Other Measures) Regulation 2015***

#### Regulation 1 – Name of Regulation

This section sets out the name of the Regulation as the *Building Energy Efficiency Disclosure Amendment (Unsolicited Offers and Other Measures) Regulation 2015* ('the BEED Regulations').

#### Regulation 2 - Commencement

This section provides for the *Building Energy Efficiency Disclosure Regulations 2015* to commence on 1 July 2015.

#### Regulation 3 - Authority

This section provides that the power for making the Regulation is the *Building Energy Efficiency Disclosure Act 2010*.

#### Regulation 4 – Schedules

This section provides for the amendment and repeal of the *Building Energy Efficiency Disclosure Regulations 2010* as set out in Schedule 1.

## **Schedule 1 – Amendments**

### Part 1- Preliminary

Items 1 to 11 amend regulation 3 of the BEED Regulations ('Definitions') as follows:

- a) Item 1 has the effect of removing the words "in these Regulations" and inserts a note explaining that certain definitions are in the Act.
- b) Item 2 repeals the definition of ***base building rating*** and ***Commercial Building Disclosure Program Module*** as these are no longer required due to the repeal of Part 2 of the Regulations which used those terms.
- c) Item 3 inserts the definition of ***disclosure provision***. ***Disclosure provision*** refers to section 11, 12 or 15 of the Act. This definition is introduced to reflect amendments to the Act.
- d) Item 4 repeals definitions of ***GreenPower program*** and ***hours of occupancy*** due to the repeal of Part 2 which used those terms.
- e) Item 5 inserts the definition of ***major refurbishment***, which is further defined in regulation 5B. Regulation 5B is a new exemption clause of major refurbishments which are underway.
- f) Item 6 removes definitions of ***NABERS Energy rating rules***, ***National Australian Built Environment Rating System*** and ***net lettable area***, as a consequence of the repeal of Part 2 and regulation 8 which used those terms.

- g) Item 7 inserts a new definition of *NSW Environment Agency* as the New South Wales government agency or Department of State that manages the National Australian Built Environment Rating System (NABERS).
- h) Item 8 removes the definitions of *rated areas* and *rating period* as a consequence of the repeal of Part 2 which used those terms. The definition of **NSW Environment Department** is also repealed and replaced with a new definition of **NSW Environment Agency** as given at Item 7.
- i) Item 9 introduces the definition of an *unsolicited offer*, which is further defined in regulation 5A. Regulation 5A is a new exemption category for cases where a building owner or lease holder has been made an unsolicited offer.
- j) Item 10 repeals the definition of *whole building rating* due to the removal of Part 2 which used this term.
- k) Item 11 repeals the note at the end of regulation 3 as a consequence of the new note inserted by item 1. The note at item 1 explains that other definitions can be found in the *Building Energy Efficiency Disclosure Act 2010*.

## **Part 2 – Building Energy Efficiency Certificates**

Item 12 repeals **Part 2 “Building energy efficiency certificates”** to reflect amendments to the Act. In particular, regulation 4 “**Information included in certificates**” is repealed as a consequence of the repeal of subsection 13(3) in the Act and a new subsection 13A(4) which provides for the Secretary to determine other information to be included in a certificate by legislative instrument. As a consequence, other information required in the Building Energy Efficiency Certificate will now be specified in the Secretary’s Determination rather than the Regulations.

## **Part 3 – Exemption Applications**

Item 13 replaces the heading of regulation 5 with “**5 Exemptions from disclosure provisions—applications**” for consistency with amendments to the Act.

Items 14 to 20 amend regulation 5 to provide for consistency with amendments to the Act as follows:

- a) Item 14 omits “exemption from an energy efficiency disclosure obligation” in subregulation 5(1) and substitutes “a building or an area of a building to be exempt from a disclosure provision or provisions”.
- b) Item 15 omits “disclosure obligation” in paragraph 5(1)(e) and substitutes “disclosure provision or provisions”.
- c) Item 16 omits “, or the area of the building, giving rise to the disclosure obligation” in paragraph 5(1)(f) and substitutes “or the area of the building”.
- d) Item 17 amends paragraph 5(1)(h) to state:  
“whether the application relates to the lighting energy efficiency assessment for the building or the area of the building;” to be consistent with changes to the definition of “lighting assessment” in the Act.

- e) Item 18 omits “disclosure obligation” and substitutes “disclosure provision or provisions” in paragraph 5(1)(i).
- f) Item 19 omits paragraphs 5(1)(k) to (m) and substitutes the same requirements for assessments to be made by an accredited assessor for a non-assessable building exemption application but expressed in simpler language. It also requires an assessor to declare any conflict of interest per subregulation 9(3A).
- g) Item 20 omits “disclosure obligation” in subparagraphs 5(1)(n)(i) and (ii) and substitutes “disclosure provision or provisions”.

Item 21 inserts a new paragraph (na) to clarify information required particularly for a corporation in an exemption application from an energy efficiency disclosure obligation.

Item 22 amends paragraph 5(1)(o) to extend the requirement for consent to both situations where information is provided in 5(1)(n) and 5(1)(na).

- a) It also introduces a new paragraph 5(1)(p) which expresses the required application information for an unsolicited offer exemption is given in 5(2).
- b) Paragraph 5(1)(q) specifies that an assessment made by an accredited assessor is required to verify a major refurbishment is underway per regulation 5B. The assessor must also declare any conflict of interest per regulation 9(3A).

Item 23 amends subregulation 5(2) to specify the requirements for an application for an unsolicited offer.

- a) Paragraph 5(2)(a) requires the offer recipient to provide a written statement confirming that the offer is an unsolicited offer. This will ensure the offer is a genuine unsolicited offer where the offer recipient has no intention to sell, let or sublet the building or area as per regulation 5A.
- b) Paragraph 5(2)(b) requires the offer maker to provide a written statement waiving their rights to be given a current building energy efficiency certificate (BEEC) for the relevant building or area for the period during which the exemption is in force. The intention of this requirement is to make sure the offer maker is otherwise aware they would be entitled to demand a copy of the building energy efficiency certificate under section 12 of the Act.

Item 24 amends subregulation 5(3) to clarify that all exemptions, excluding unsolicited offer exemptions, have a prescribed fee of \$350.

### **Regulation 5A – Unsolicited Offer Exemption**

Item 25 inserts a new regulation 5A, creating the exemption category for unsolicited offers. Regulation 5A allows the Secretary to grant exemptions from mandatory disclosure requirements to building owners or lessors who receive unsolicited offers for the sale or lease of their office space. This will reduce the regulatory burden on industry by providing a time limited exemption from the mandatory disclosure requirements for the two parties involved in a negotiation started by an unsolicited offer. The rationale is that the offer maker has already made a market decision and the obtaining of a BEEC will not meaningfully influence that decision. This change will lead to \$0.3 million estimated reduction of regulatory burden on business.

Subregulation 5A(1) defines the meaning of unsolicited offer for exemption applications. As a result of initial negotiations with a view to lease or purchase a building, an offer can only be made by one of the parties listed in 5A(1)(b), with only one offer being made as a result from

the negotiations as per 5A(1)(c). Subparagraph 5A(1)(b)(ii) allows for a representative of a person who starts negotiations to make an offer on their behalf. An entity which is created as a result of these negotiations can make this offer per 5A(1)(b)(iii). Paragraph 5A(1)(d) also lists the requirements that in the six months before the offer is made, the offer recipient has not advertised the building or area for sale or lease, or made an offer or invited an offer to sell, let or sublet the building or area of the building concerned. This is to ensure that the transaction is a genuine unsolicited offer.

Subregulation 5A(2) specifies the conditions for the Secretary to grant an exemption on the basis of an unsolicited offer, based on the power in section 17(3)(c) of the Act. Paragraph 5A(2)(a) requires the unsolicited offer must be attached to a particular building or a particular area of a building. Paragraph 5A(2)(b) clarifies that the purpose of the exemption is to allow further negotiation after the building owner or the lessor seriously considers to sell or let. This is so the offer recipient can be assured they can proceed to sell or let the building or space without being in breach of the Act. Paragraph 5A(2)(c) excludes a case where the building owner or the lessor has been granted an unsolicited offer exemption within six months before the application for the exemption.

Subregulation 5A(3) outlines the period of an unsolicited offer exemption. The period of the exemption starts from the time the exemption is granted by the Secretary. An initial exemption cannot be valid for longer than 12 months. The exemption will cease on the earliest of the dates arising from the circumstances set out in 5(3)(a) to (e). The matter is no longer considered a genuine unsolicited offer once the offer recipient starts negotiations with someone other than the offer maker (per 5A(3)(d)).

Subregulation 5A(4), provides the option to extend an unsolicited offer exemption for a further 12 months if a written statement is provided to the Secretary to verify the negotiation process is continuing.

### **Regulation 5B – Major Refurbishments Underway Exemption**

Item 25 also inserts a new regulation 5B to outline the exemption process for a building undergoing major refurbishments. The basis for exempting buildings undergoing major refurbishments from disclosure arises from issues with obtaining an accurate and appropriate rating.

Subregulation 5B(1) gives the definition of major refurbishments. A refurbishment is considered to be a major refurbishment if the ongoing works alter the base building rating by at least half a star. An assessor must make an assessment regarding this star rating variation by applying the NABERS Energy Rating rules, per subregulation 5B(2).

Subregulation 5B(3) specifies conditions for the Secretary to determine granting an exemption for major refurbishments, which is based on the definition given in 5B(1) and 5B(2).

Subregulation 5B(4) allows this type of exemption to be in force for 12 months from the day the exemption is granted. If the major refurbishments are not complete within this period of time, the applicant can simply reapply for another exemption as there is no exclusion period.

Item 26 repeals regulation 6 “**Exemption from requirement to provide information or access**” as a consequence of amendments made to section 18 in the Act.

## **Part 4- Assessors**

Item 27 amends the heading to regulation 7 to “**7 Accreditation of assessors—applications**”. Regulation 7 sets out the application requirements for assessors.

Item 28 replaces “Department” with “Agency” under paragraph 7(1)(b). This has been updated to reflect current administrative arrangements of the NABERS program in the New South Wales government.

Item 29 amends regulation 8 to provide greater flexibility for training and for assessor accreditation by allowing for a range of providers, in addition to the NSW Environment Agency, to be appointed to deliver training associated with the accreditation of CBD assessors. Subregulation 8(5) is included to assist readers as an approval under subregulation 8(4) is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003.

Item 30 inserts a new subregulation 9(3A). This subregulation requires assessors to declare any conflict of interest when making an assessment in relation to an exemption under section 17 of the Act.

Item 31 amends subregulation 9(4) to extend the provision to cover declarations of conflict of interest for exemption applications as per 9(3A), as well as 9(3).

Item 32 amends subregulation 9(7) to (9), with 9(9) being repealed. The new subregulation 9(7) permits the Secretary to require an assessor, in writing, to complete any further professional development. An assessor, per 9(8), must either be registered as a NABERS accredited assessor in relation to energy efficiency of offices by the NSW Environment Agency or appointed as a NABERS auditor. This is a simplification of the previous provisions.

## **Part 5 – Identity Cards**

No changes have been made to this Part.

## **Part 6 – Indexation of Fees**

No changes have been made to this Part.

## **Part 7 – Infringement Notices**

No changes have been made to this Part.

## **Part 8 – Transitional Provisions**

Item 33 inserts Part 8 which contains transitional provisions. Subregulation 18(1) specifies that the amendments of the Amendment Regulation apply to applications for an exemption from the commencement date, and to applications to become an accredited assessor made before, on or after the commencement of the amendments.

Subregulation 18(2) provides that the amendments apply to all accredited assessors whether or not accreditation occurred before, on or after the commencement of the amendments.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Building Energy Efficiency Disclosure Amendment (Unsolicited Offers and Other Measures) Regulation 2015***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The *Building Energy Efficiency Disclosure Amendment (Unsolicited Offers and Other Measures) Regulation 2015* is necessary due to changes to the overarching *Building Energy Efficiency Disclosure Act 2010*. Two new exemption provisions have been created for unsolicited offers and for buildings undergoing major refurbishment.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Minister for Industry and Science, the Honourable Ian Macfarlane MP**