

2008-2009-2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BUILDING ENERGY EFFICIENCY DISCLOSURE BILL 2010

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses
to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Climate Change, Energy Efficiency and Water,
Senator the Hon Penny Wong)

GENERAL OUTLINE

Amendments to the Building Energy Efficiency Disclosure Bill

The Building Energy Efficiency Disclosure Bill ('the Bill') provides for the establishment of a new national scheme (the Commercial Building Disclosure (CBD) Scheme or 'the scheme') for the disclosure of certain energy efficiency information relating to commercial office buildings.

These amendments to the Bill correct a small number of drafting errors, and also provide for:

- the exclusion from the scheme of certain short term leases;
- certain requirements in relation to recognising a person or body as an issuing authority;
- certain requirements for using energy ratings and assessments, other than those recognised as building energy efficiency certificates ('BEECs'), during the transition period; and
- the maximum penalties per day for continuing contraventions of a number of civil penalty provisions.

The Bill has been the subject of inquiries by the Senate Standing Committee on Environment, Communications, and the Arts, and the Senate Standing Committee for the Scrutiny of Bills. These amendments flow from matters raised in the course of those inquiries and recommendations made by the Committees.

The amendments relating to short term leases explicitly exclude leases and subleases of 12 months or less from the scope of the disclosure obligations under the scheme, provided certain criteria are met.

The amendments relating to the recognition of issuing authorities outline matters about which the Secretary must be satisfied before recognising a person or body as an issuing authority. Broadly, an issuing authority will only be recognised if it is competent in applying the methods and standards applicable to assessments undertaken for the purposes of obtaining BEECs, and able to establish appropriate administrative systems for the proper issuing of certificates.

The amendments concerning the transitional arrangements will provide transitional assistance to industry before and during the transition period for the scheme (the first 12 months of the scheme). The amendments do this by recognising certain non-BEEC energy ratings and assessments as sufficient to meet the disclosure obligations in the Bill during the transition period. The amendments also ensure that information required for the purposes of obtaining a recognised rating is able to be obtained, and that this information is not misused.

The amendments relating to penalties amend the provisions relating particularly to ongoing contraventions. The Bill provides that if a contravention of a civil penalty clause occurs, a new contravention occurs on each subsequent day that it is not

rectified. The amendments operate so that the maximum penalty that applies for contraventions on the second and subsequent days is lower than the penalty for the first day.

These amendments reflect the Government's cooperation with and assistance to industry in establishing a robust national scheme that will provide credible and meaningful energy efficiency information to prospective purchasers and lessees, while also helping to reduce Australia's greenhouse gas emissions.

Financial Impact Statement

Funding of \$5.3 million over four years was committed by the Government in the 2009-10 Budget to support the development and implementation of the scheme. The allocation of this funding commenced in 2009-10. 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.

NOTES ON CLAUSES

Item (1)

Clause 11 No sale, lease or sublease without a building energy efficiency certificate

1. These amendments to clause 11 operate to remove the disclosure obligations in circumstances where the lease or sublease has a term of 12 months or less from disclosure obligations, provided certain criteria are met.
2. New subclause (6) provides that the obligations under subsections (1) to (4) will not apply if an offer is made to let or sublet a building or an area of building, if:
 - at the time the offer is made, the proposed term of the lease or sublease is 12 months or less; and
 - a term of more than 12 months is not proposed at any time while the offer is continuing.

New subclause (8) provides that the proposed lease term includes any options to extend the lease or sublease. For example, if there was a proposed lease term of six months with an option to extend for another 12 months, the total proposed lease term would be 18 months. The clause 11 disclosure obligations would therefore apply in relation to that lease.

3. New subclause (7) provides that the obligations under subsections (1) to (4) will not apply if an invitation is made to make offers to let or sublet a building or an area of building, if:
 - at the time the invitation is made, the proposed term of the lease or sublease is 12 months or less; and
 - a term of more than 12 months is not proposed at any time while the invitation is continuing.
4. As noted above, subclause (8) provides that for the purposes of working out the proposed lease term, any options to extend the lease or sublease must be included.

Item (2)

Clause 12 Rights of a prospective purchaser, lessee or sublessee

5. This amendment to clause 12 limits the right of a prospective lessee or sublessee of a building to give a notice to provide a BEEC under clause 12. The amendment will mean that there is no right to give a clause 12 notice if the proposed lease or sublease is only for a short period, provided certain criteria are met. This is consistent with the amendments to clause 11 which exclude short term leases and subleases from the scope of the scheme in certain cases.

6. New subclause (5A) provides that no notice to provide a BEEC may be given under subclauses (2), (3), (4) or (5) if:
 - the term proposed for the lease or sublease at the time the offer or invitation is made is 12 months or less; and
 - a term of more than 12 months is not proposed at any time while the offer or invitation is continuing.
7. Consistently with the amendments to clause 11, any options to extend the lease must be included when working out the proposed term for the lease (see new paragraph (5A)(a).

Item (3)

Clause 13 Building energy efficiency certificates

8. New subclause (7A) provides that a person or body will not be recognised as an issuing authority unless the Secretary is satisfied that the person or body:
 - has the competency to apply the assessment methods and standards determined under clause 21; and
 - has systems in place to ensure that BEECs are issued in good faith.
9. Subclause (7A) limits the general discretion of the Secretary to recognise a person or body as an issuing body under subclause (7). The requirements of competency and good faith will provide guidance for the Secretary or delegate and assist in any review of a decision to recognise an issuing authority.

Item (4)

Clause 14 Building Energy Efficiency Register

10. This amendment corrects a drafting error by substituting 'or' for 'and' in subparagraph 14(3)(b)(i). This brings the power of the Secretary to delete BEEC particulars of an area of a building in line with the power in relation to a whole building (in paragraph 14(3)(a)). It is intended that the inappropriateness of either the energy efficiency rating or the lighting assessment of an area will be sufficient to give the Secretary grounds for deleting the particulars of a BEEC on the Register. It is not intended that the inappropriateness of both is required.

Item (5)

Clause 15 Advertisements to include energy efficiency ratings

11. This amendment to clause 15 operates to remove the obligation to include energy efficiency ratings in advertisements for leases or subleases that have a term of 12 months or less. Any options to extend the lease must be included

when determining whether the proposed lease has a term of 12 months or less. For example, a six month lease term that includes an option to extend for another 6 months would fall within the exception. However, the exception would not apply in the case of a proposed six month lease term with an option to extend the lease for another twelve months.

Item (6)

Clause 23 Satisfying energy efficiency disclosure obligations during the transition period

12. These amendments to clause 23 relate to the recognition of non-BEEC ratings as sufficient to satisfy disclosure obligations during the transition period.
13. Subclause (1) specifies that the transition period is for 12 months beginning on the day of implementation.
14. Subclause (2) will now operate to recognise certain ratings given during the transition period as well as before. A rating will be recognised if it is made before or during the transitional period by a person or body that is recognised as an issuing authority at the start of the transition period. It is presently expected that the NSW Department of Environment, Climate Change and Water will be recognised as an issuing authority at the start of the transition period.
15. By extending recognised ratings to include those made within the transition period, these amendments make it easier for persons who are not yet ready to apply for BEECs on the implementation date. This provides a greater period of transition and is especially important for persons who are already in the process of obtaining a rating but will only obtain it after the implementation date.
16. The following subclauses operate so that a recognised rating will in effect be equivalent to a BEEC, for the purposes of satisfying a disclosure obligation, if the rating is valid, current and registered (as set out in subclauses (9) to (11) - see notes on those subclauses below). Both buildings and areas of buildings are covered by these subclauses.
17. Subclauses (3) and (4) have the effect that a valid, current and registered recognised rating will satisfy the obligations in clause 11 that require a valid and current BEEC to be registered at the time of any offer or invitation to sale, lease or sublease.
18. Subclauses (5) and (6) have the effect that giving a person a copy of a valid, current and registered recognised rating will satisfy the requirement in subclause 12(6) to give to another person a valid, current and registered BEEC.

19. Subclauses (7) and (8) have the effect that a valid and current recognised rating will satisfy the requirement in clause 15 to include a valid and current energy efficiency rating in an advertisement for the sale, lease or sublease of a building or an area of a building.
20. Subclause (9) provides that a rating will be valid if the issuing body considers that the rating is appropriate, based on assessment methods and standards that are substantially similar to those determined under paragraph 21(1)(a). It is intended that the assessment of a recognised rating should be substantially the same as the assessment of a BEEC.
21. Ratings issued before the transition period will need to be assessed according to substantially similar standards that are in effect at the start of the transition period. This is important to ensure, for example, that for those ratings made a reasonable period prior to the implementation of the CBE Scheme, recognition will only occur where the assessments for those ratings are consistent with those of the BEEC Scheme. Ratings made during the transition period will need to be assessed according to standards (which are substantially similar to the paragraph 21(1)(a) standards) that are in force at the time the ratings are issued.
22. Subclause (10) provides that a rating will be current in the period beginning at the time it is issued and ending either at the time stated on the rating as the expiration date of the rating, or the end of the transition period, whichever is earlier. The effect of this is that all recognised ratings must expire at the end of the transition period if not before. This would ensure that the recognised rating is not relied upon indefinitely and the transition period is actually used to transition towards obtaining a BEEC within 12 months of the implementation date.
23. Subclause (11) provides that a rating will be registered if it is included in a register electronically maintained by the issuing authority and if that register is available for inspection on the internet. This establishes registration requirements which are substantially similar to those that apply in relation to BEECs under subclause 14(6).
24. It should be noted that the issuing authority will be required to handle any personal information contained on recognised ratings in accordance with relevant privacy legislation.

23A Information gathering during the transition period

25. This additional clause provides the circumstances in which the information gathering powers of clause 18 apply in relation to assessments carried out for the purposes of obtaining recognised ratings.

26. Subclause (1) provides that the information gathering powers will apply when a person requests an assessment from an issuing authority assessor (which is defined in subclause (2)). The request must occur before or during the transition period. The person must be requesting the assessment so that the person can apply for a recognised rating in order to satisfy an energy efficiency disclosure obligation. This extends the operation of subclause 18(1) to recognised ratings.
27. An issuing authority assessor is defined in subclause (2) as a person accredited by the issuing authority to perform assessments of buildings for the purpose of applying for recognised ratings.
28. Subclause (3) has the effect that the powers given to accredited assessors under subclauses 18(2)-(12) that relate to information gathering will apply equally to an issuing authority assessor before or during the transition period.
29. Subclause (4) provides that the information gathering powers under clause 18 apply where a notice is given by an issuing authority assessor under subclause (3). This means that an issuing authority assessor has the same information gathering powers as an accredited assessor. This also means that a person who receives a notice from an issuing authority will have to comply with clause 18 in the same way as if that person received the notice from an accredited assessor.
30. Any confidential information given to an issuing authority assessor will be protected. The issuing authority will be required, under an agreement with the Commonwealth, to ensure that the contract of engagement between the issuing authority and the issuing authority assessor includes appropriate clauses dealing with the handling of confidential information.
31. Subclauses (5) and (6) provide for exemptions to be granted by the Secretary from a requirement to provide information. Persons may apply to the Secretary for an exemption, in accordance with the requirements of subclauses 18(8) and 18(9). The Secretary may grant an exemption in relation to any matter that is set out in subclause 18(10). Any exemption is taken to be granted under subclause 18(10). This means that the Secretary will be required to notify the applicant about the outcome of the exemption application, in accordance with subclause 18(11).
32. Subclause (7) provides that the offences created under subclause 19 do not apply if the information was given to the issuing authority assessor in compliance with a notice given by the issuing authority assessor under subclause (3). This provides protection for the issuing authority assessor that is equivalent to the protection (in subclause 19(2)(a)) that is accorded to information copied, recorded, used or disclosed for the purpose of obtaining a BEEC.

Item (7)

Clause 33 Auditing Authority

33. The amendment to this clause changes a reference to 'the' auditing authority to 'an' auditing authority in subparagraph (4)(a)(ii). This corrects a drafting error and makes the subparagraph consistent with the rest of the clause.

Item (8)

Clause 33 Auditing Authority

34. This amendment corrects a drafting error by substituting 'or' for 'and' in subparagraph 33(4)(b)(i). This brings the obligation of an auditing authority to notify the Secretary in relation to the appropriateness of a rating or assessment for an area of a building in line with the obligation in relation to a whole building in paragraph 33(4)(b). It is intended that the inappropriateness of either the energy efficiency rating or the lighting assessment of an area will be sufficient to give rise to an obligation to notify the Secretary. It is not intended that the inappropriateness of both is required.

Item (9)

Clause 34 Auditors

35. The amendment to this clause changes a reference to 'the' auditing authority to 'an' auditing authority in subclause (4). This corrects a drafting error and makes the subclause consistent with the rest of the clause.

Item (10)

53 Civil Penalty Orders

36. The clause is amended to include additional subclauses (5A), (5B), (5C) and (5D) and to make subclause (5) subject to these additional subclauses. The amendments limit the penalty for certain contraventions where the contravention continues for more than one day. Under the civil penalty provisions in clauses 11, 15 and 18 of the Bill, each new day of contravention is a separate contravention to which the maximum penalty can be attributed. The effect of these amendments will be that for every day after the first day of contravention, the maximum penalty is less than the maximum penalty for the first day of the contravention.
37. Subclause (5A) relates to ongoing contraventions of clause 11. Clause 11 imposes disclosure obligations on constitutional corporations in the context of selling, leasing and subleasing buildings and areas of buildings. New subclause (5A) operates to limit the pecuniary penalty given in respect of each

day after the first day on which a contravention of clause 11 continues. The amendment operates so that, in cases of ongoing contraventions, the maximum civil penalty for each day after the first day of contravention is reduced to 100 penalty units.

38. Subclause (5B) relates to ongoing contraventions of clause 15. Clause 15 imposes obligations on constitutional corporations in relation to advertising buildings and areas of buildings for sale, lease and sublease. New subclause (5B) operates to limit the pecuniary penalty given in respect of each day after the first day on which a contravention of clause 15 continues. The amendment operates so that, in cases of ongoing contraventions, the maximum civil penalty for each day after the first day of contravention is reduced to 100 penalty units.
39. Subclause (5C) operates to limit the pecuniary penalty given in respect of each day after the first day on which a contravention continues in relation to giving information within a period specified in a notice under subclause 18(2). New subclause (5C) operates so that, in cases of ongoing contraventions, the maximum civil penalty for each day after the first day of contravention is reduced to 20 penalty units for an individual and 50 penalty units for a body corporate.
40. Subclause (5D) operates to limit the pecuniary penalty given in respect of each day after the first day on which a contravention continues in relation to giving access to a place at a day and time specified in a notice under subclause 18(4). New subclause (5D) operates so that, in cases of ongoing contraventions, the maximum civil penalty for each after the first day of contravention is reduced to 20 penalty units for an individual and 50 penalty unites for a body corporate.