



Environmental Defender's Office ACT Inc.



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15 June 2011

Mr Shane Rattenbury MLA
Greens Member for Molonglo and Spokesperson for Attorney-General
Legislative Assembly of the ACT
GPO Box 1020
Canberra ACT 2600

By email: rattenbury@parliament.act.gov.au

Dear Mr Rattenbury

The Environmental Defender's Office (ACT) (EDO) welcomes the opportunity to comment on the Greens Private Members legislation – *Residential Tenancies (Minimum Housing Standards) Amendment Bill 2011*.

As you know the EDO is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental Defender's Offices in each State and Territory of Australia. We provide legal representation and advice, take an active role in environmental law reform and policy formulation and offer education programs designed to facilitate public participation in environmental decision-making.

The EDO supports the intent of the *Residential Tenancies (Minimum Housing Standards) Amendment Bill 2011* which we understand is to assist as a step towards:

- reducing greenhouse gas emissions by ensuring greater energy efficiency in public and tenanted houses – therefore a measure to assist meet the Government's legislated target of a 40% reduction in GHG by 2020
- reducing water consumption – therefore a measure to assist in meeting water saving targets set out in the ACT Water Strategy *ThinkWater ActWater*
- ensuring social equity so that low income or disadvantaged groups do not end up living in rental or public housing that is not safe or expensive to run.

Our comments on the Bill are framed around the likely delivery of the above objectives as well as consideration of the legal components.

1) EER rating process

To achieve the Bill's objectives relies on a reliable and effective Energy Efficiency Rating (EER) process and reports. Historically there have been a number of issues regarding EER reports including:

- limitations of the software
- lack of qualifications of EER assessors
- lack of training for EER assessors

- lack of coverage of all matters affecting an EER rating – i.e. slope, impacts of deciduous or evergreen trees, overshadowing
- the EER does not advise on other environmental performance measures such as water conservation measures
- EER does not reflect the actual performance of a building as management of buildings can be a significant factor in reducing GHG emissions as much as the actual design factors
- does not include fixed appliances – such as hot water services, air-conditioning units or photovoltaic cells
- an EER does not indicate the energy efficiency intensity of a building – for example a large 300sqm house with one resident with a 5 star rating may use more energy than a small 1 star house with three residents.

Some of these issues may be addressed through amendments to the *Construction Occupations (Licensing) Act 2004*¹ which went through the Legislative Assembly in August 2010. The amendments require that an energy efficiency rating be prepared by a licensed building assessor² and done in accordance with a code of practice (if any); or any regulations [s.123AC-AE]. Previously assessors had to be registered.

In addition to become a licensed building assessor certain qualifications are required. The new provisions relating to EER came into effect on 1 March 2011 and include a transitional period of 12 months where previously registered assessors will be automatically considered 'licensed'.

The EDO supports these changes. However the EDO is concerned that the Code of Practice is not yet finalised.

The EDO suggests the Code of Practice require that the section within an EER on design options should include as much information as possible so landlords are aware of the options they have to improve their energy efficiency rating – i.e. the EER could also fulfil the function of an audit (see section 8). The EDO recommends EER assessors must include all measures that may improve the star rating of the property – including the number of points any measures may contribute to an improved star rating.

2) EER and behavioural change

While the EDO supports mandatory disclosure of the EER of residential and other buildings at both point of lease and sale we do note that an EER in itself does not necessarily correlate with a reduction in greenhouse gas emissions. There are many other factors including personal behaviour that will affect the energy efficiency of a building. Tenants may choose not to close curtains at night, may still use inefficient additional heating / cooling devices. They may leave appliances on even if not being actively used and may not replace light fittings with energy efficient ones even if the property was originally fitted with these by the landlord. Any legislative measures need to be complemented by other policy and program measures – such as community education, rebates, financial incentives etc to ensure the policy goals are achieved.

3) Advertising EER of rental properties

The EDO supports the disclosure of environmental performance of buildings at time of sale or lease. As of May 2011 an energy efficiency rating performance statement is a requirement under

¹ *Construction Occupations Legislation Amendment Act 2010 (No 2) 2010*

² *Construction Occupations (Licensing) Act 2004* [s.8]

the COAG National Strategy for Energy Efficiency at point of sale for residential properties and some commercial buildings.

Since 1999 it has been a requirement that all residential houses for sale have an EER and more recently a requirement to advertise the EER for leased properties where there is an existing EER. Currently it is an offence in the ACT to advertise a residential property for lease without advertising **any existing** EER statement. The Green's bill proposes a change to ensure there must be a **current** EER. The definition of current being that it reflects the status of the rateable building elements at the time the EER is used by the lessor. This has the advantage that landlords do not have to commission a new EER every time the property is put onto the market for lease.

However the EDO is concerned that it may be difficult to determine when a new EER may be required. For instance renovations or changes to the construction materials obviously will impact on the EER. However the EER also covers curtains, awnings and floor coverings and it is unclear if a change to any of these building elements requires a new EER in order that it be considered current at time of lease.

Likewise a landlord may have a strategy of progressively upgrading their property – i.e. making improvements every year yet then they may be required to get a new EER at any change of lease – even though it is an improvement on the EER. In this situation it places pro-active landlords at a disadvantage for taking action as it will then require a new EER at point of lease.

In addition it is probable that over time there will be changes to the EER rating scheme and hence even without any changes to a property the EER rating of a property in 2011 might be quite different in 2015 – although under this Bill a 2011 EER would potentially be able to be listed as 'current' in 2015.

To overcome these difficulties the EDO recommends that the definition of a current EER be made more specific and consideration be given to require that EERs must be updated within timeframes – i.e. an EER must be prepared at least every five years even if no changes have been made to the property. In addition it is recommended that if improvements have been made to the property likely to enhance the EER then no new EER is required at point of lease. Although of course the lessor may decide to undertake one if they wish.

4) Statement regarding other minimum housing standards

Under the proposed new amendment 7 [s12(3)(c)] the lessor is required to provide the tenant with certain information including a statement setting out the minimum housing standards. There is no obligation on the lessor to provide a statement on whether the minimum housing standards are being met.

The EDO recommends that consideration be given as to whether, in addition to providing information on what the standards are, the lessor should also be required to provide a statement setting out whether the minimum housing standards are met. If this recommendation were adopted then consideration would need to be given to who prepares this statement and / or any qualifications they may need to be able to verify that the minimum housing standards are being met.

Alternatively the EDO recommends consideration be given to changing the Energy Efficiency Rating to an Environmental Efficiency Rating to allow for assessment of water conservation measures and other environmental housing standards in one statement. The EDO notes a

consideration under this option would be whether one assessor would have all the appropriate qualifications.

5) Transitional measures

The EDO recommends that if the Bill is passed, during the transitional period the Government ACTSmart program be specifically adapted to ensure appropriate rebates or other financial incentives are available to assist and encourage landlords meet the new requirements.

Currently there are a range of products and ways of improving the energy efficiency of buildings and the insulating value and cost of these varies greatly. Therefore it is recommended that landlords should have access to appropriate information sources on the most cost-effective and efficient way of meeting the standards.

6) Public consultation

The EDO recommends that the bill provide that the development of any ACT specific minimum housing standards include a timeframe and mechanism for the process – such as public consultation.

7) Exemptions

As currently drafted the Bill allows the Minister to exempt properties from meeting the minimum housing standards on the basis of unreasonable cost and any exemptions are disallowable instruments [proposed s.35L].

To ensure greater efficiency the EDO suggests that it may be more appropriate for a public servant to make decisions on exempting properties, rather than require Ministerial exemption as a disallowable instrument. If this were adopted it is recommended that the decision maker could only exempt premises from the standard if satisfied on reasonable grounds that the premises comply with criteria prescribed by regulation. The criteria should include a guide to unreasonable cost.

Whether issued by the Minister or a public servant the EDO suggests that exemptions should not be disallowable instruments given the potential quantity of exemptions and the implications if an exemption is disallowed.

Whatever mechanism is used there should be a maximum time for making a decision on exemption requests.

In addition the EDO suggests there is a variety of other situations other than cost that may warrant the granting of an exemption including:

- short term leases – i.e. a house has had a 1 star rating for many years and the owners will re-locate for one year requiring the property to be tenanted
- housing in areas subject to zoning for higher density, as well as areas under moratorium pending consideration for higher density housing – existing houses in these areas are generally defined as “knock-down and re-build” and it would be a waste of resources and counter-productive in term of reducing GHG³ – for landlords to invest in improving such properties.

³ The greenhouse gases created in producing, transporting and disposing of the materials needed to improve a properties EER need to be considered, particularly if the measures are only in place for a few years.

8) Exemptions and energy audits

The proposed regulation 4 will mean the Minister can only exempt a premise from the minimum energy efficiency standard if the lessor has obtained an energy audit and undertaken certain measures recommended in the report.

As above the EDO supports the intention however suggests this may still place unreasonable requirements on landlords in some situations.

The EDO is concerned that this provision also creates a dual system of building assessors who must have certain qualifications and comply with regulatory requirement in preparing EER statements and another system of an authorized energy auditor – where the only requirement is that they be authorized by the Minister.

The EDO recommends that it would be preferable if audits were undertaken within the existing EER legal framework and that the Code of Practice for EER specifically include requirements that the EER detail recommendations of energy efficiency improvements. The existing EER statements already have a section called “Design Options”. While an EER relates only to certain aspects of the energy efficiency of a building the EDO suggests expanding this to include other recommendations – even if they will not improve the star rating, but will nonetheless improve the overall performance of the energy efficiency of the house.

9) Offences / Non-compliance

The EDO notes that while the Bill requires that premises must comply with minimum housing standards [proposed s.35D] there is no penalty associated with non-compliance. Whilst it will be an offence to publish an advertisement without a current EER statement, the Bill does not propose to make it an offence to lease, or advertise for lease, a property which does not meet the minimum housing standard. For example, if a property is put onto the market for lease and has an EER less than required by the legislation – i.e. 2 star by 30 June 2013 and 3 star by 30 June 2015 and no exemption has been provided under the legislation, there is no penalty provided for in the legislation.

The only way to remedy non-compliance is for a tenant giving a rectification notice [proposed s.35E] or asking the Commissioner to investigate [proposed s.35F and G] or the Commissioner may investigate on his/her own initiative [proposed s.35H].

So in the absence of it being an offence to lease a property which does not meet the minimum housing it appears it will be tenants who will seek compliance under the proposed bill. The EDO is concerned that this is a very conflictual model and unlikely to deliver the desired environmental and social justice outcomes as tenants may be unwilling to raise the issue.

The EDO recommends that consideration be given to whether the Bill should make it an offence to lease a property that does not meet the minimum housing standards unless an exemption has been issued.

If penalties are an option consideration needs to be given to any regulatory structure – i.e. who monitors compliance, what form of notice of an offence is given, at what point does a matter need to go to court and the size of the penalties.

10) Review of the provisions

As with any new legislative measures the EDO supports a statutory requirement for review of the legislation to ensure it is meeting its objectives, even in this case if the review is only specifically related to the provisions regarding minimum housing performance. The EDO suggests an initial first review should occur two years after the Act commences – i.e. in 2015 with other statutory reviews incorporated into the legislation.

Given the centrality of the EER scheme to the operations of the ACT and the new provisions coming into effect in regard to EER the EDO recommends the first statutory review also include a review of the *Construction Occupations (Licensing) Act 2004* as it relates to EERs.

11) Energy efficiency intensity and water use intensity

As indicated earlier if the objective is to reduce greenhouse gas emissions then it is useful to also consider energy use intensity rather than simply the EER rating of a building. Energy use indicators are energy use per resident or energy use per square metre. Currently ACTEW-AGL provide consumers of their annual energy use of the current and previous year and associated GHG emissions. It would be useful if in addition the information could be adapted to include energy use intensity as well as benchmarks for high average and low energy use in the residential sector in the ACT.

The EDO recommends that consideration be given to make such reporting a mandatory requirement for energy retailers.

We would welcome the opportunity to discuss these matters with you further. You can contact me on 0419 266 110 or the EDO Principal Solicitor, Kirsten Miller on 02 6243 3460.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'C. Henderson', with a long horizontal flourish extending to the right.

Clare Henderson
EDO Advisor