

## Property Alert

# Commercial Building Disclosure

October 2011

The Transition Period is ending under the Commercial Building Disclosure (CBD) program. From 1 November 2011, sales, leases and subleases of affected commercial office premises may require a Building Energy Efficiency Certificate (BEEC) to be disclosed.

Currently, owners, lessors and sublessors offering commercial office premises with a net lettable area of 2,000m<sup>2</sup> or more for sale, lease or sublease are required to disclose a NABERS Energy rating under the *Building Energy Efficiency Disclosure Act 2010* (Cth) (**Act**) and accompanying Regulations.

The NABERS Energy rating which is issued by the New South Wales Office of Environment and Heritage (**OEH**) must be disclosed by owners, lessors and sublessors in advertising material and must be registered on the online Building Energy Efficiency Disclosure Register.

From 1 November 2011, corporate owners, lessors and sublessors will also have to obtain, register and disclose a Building Energy Efficiency Certificate (**BEEC**) if they want to deal with commercial premises of 2,000m<sup>2</sup> or more.

### What is a BEEC?

A BEEC is issued by the Commonwealth Department of Climate Change and Energy Efficiency (**DCCEE**). A BEEC has 3 components:

- the NABERS energy rating (exclusive of GreenPower) for the building or part of the building;
- the CBD tenancy lighting assessment (for the part of the building subject to the eligible transaction); and
- general energy efficiency guidance. The energy efficiency guidance is generic and not specific to the particular building.

The BEEC will be valid until the earlier of the expiry of the NABERS energy rating or the expiry of the lighting assessment.

An application for a BEEC can only be made by a CBD Accredited Assessor.

### Which premises are affected?

A "disclosure affected building" is a building or area in a building:

- with a net lettable area of 2,000m<sup>2</sup> or more; and
- which is used as a commercial office.

## When must disclosure be made?

A corporation which owns or grants leases of a disclosure affected building, or leases an area in a disclosure affected building must not:

- offer or continue to offer to sell, lease or sublease without a registered BEEC;
- invite, or continue to invite, offer to sell, lease or sublease without a registered BEEC;
- advertise or continue to advertise for the sale, lease or sublease of a disclosure affected building or area;

without disclosing the energy efficiency rating in the advertisement.

While many of the obligations in the Act apply to constitutional corporations, it is important to note that owners, lessors and sublessors who are not constitutional corporations (i.e. individuals, partnerships) will have obligations under the Act. This includes the obligation to register and provide a valid, current BEEC as soon as reasonably practicable if a BEEC is requested by a constitutional corporation that is a proposed purchaser or lessee (unless an exception or exemption applies, see below).

## What transactions are affected?

Disclosure is required if you are the seller or lessor entering into any of the following transactions:

- standard sales, leases and subleases that can take place through advertisement, negotiation, contract exchange and settlement procedures; and
- the more complex call options, put options, put and call options, rights of pre-emption, agreements for lease and sale by court order.

## What transactions are not affected?

There is no obligation to disclose for:

- the sale of a building through the sale of shares in the owner;
- the sale of units or the sale of a partial interest in a building;

- short term leases and subleases in which the total term (including options for renewal) is 12 months or less;
- assignments of existing leases; and
- exercises of option for further terms or extensions of an existing lease (unless there are variations).

## Which premises are excluded?

Transactions involving the following types of premises do not require disclosure:

- mixed use buildings with less than 75% net lettable commercial office space;
- buildings less than two years old;
- buildings that have undergone a major refurbishment and a certificate of occupancy has issued in the last 2 years; and
- strata titled offices.

## Which premises can be exempted from the CBD requirements?

An exemption may be applied for if:

- the building has undergone a major refurbishment and no certificate of occupancy has been issued by the relevant authority; or
- the building or area is used for police or security operations; or
- it is impossible to assess the building for a BEEC (as determined by an accredited assessor).

If you think your building or area may be eligible for an exemption, an application along with the application fee (currently \$350.00) has to be made to the Secretary of the DCCEE. The Secretary has the discretion as to whether the exemption will be granted.

## What happens if you do not comply?

The CBD program will be enforced through civil penalties for non-compliance either by way of court proceedings for more serious offences or an infringement notice.

## Court imposed penalties

A breach of the nominated civil penalty provisions will attract a maximum civil pecuniary penalty of \$110,000 for a body corporate and \$38,500 for an individual (with exceptions).

In addition, each day of a continuing breach there will be a separate contravention attracting a separate penalty. Currently the maximum penalty is \$11,000 per day.

## DCCEE imposed penalties

The DCCEE can impose a penalty of up to one tenth of the maximum court imposed penalty by way of an infringement notice.

The DCCEE will review advertisements and transactions to catch breaches of the disclosure requirements. Repeat offenders (i.e. two or more breaches during a 12 month period) could be named on the publicly accessible Energy-Efficiency Non-disclosure Register.

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