

Property Alert August 2010

The Building Energy Efficiency Disclosure Scheme applies to sales leases and subleases of commercial office property from 1 November 2010. Penalties apply for non-compliance.

Are you looking to sell, lease or sublease commercial office premises with a net lettable area of 2,000m² or more? If so, you should be aware that the *Building Energy Efficiency Disclosure Act 2010* (Cth) (**Act**) and accompanying Regulations commenced on 1 July 2010.

Overview

The Act establishes the building energy efficiency disclosure scheme (**Scheme**) that has been some 6 years in the making. The Act is considered to be just the first step towards a lower carbon future in the commercial property industry.

One of the assumptions of the Scheme is that purchasers and lessees who are better informed about the energy efficiency of buildings will make buying decisions which favour commercial office buildings with a higher energy efficiency rating. In turn, this will provide an incentive to developers and property owners to upgrade the energy efficiency of existing buildings and build more new energy efficient buildings.

Timing

The disclosure obligations under the Act apply from 1 November 2010 with a transition period of 12 months between 1 November 2010 and 31 October 2011.

During the transition period, National Australia Built Environment Rating System (NABERS) Energy ratings issued by the New South Wales Department of Environment, Climate Change and Water (DECCW) will need to be disclosed in advertising material and registered on the online Building Energy Efficiency Disclosure Register (Register). The Register is able to be searched.

As and from 1 November 2011, it will be necessary to also provide a Building Energy Efficiency Certificate (BEEC) and register the BEEC on the Register.

What premises are affected?

The Scheme applies to buildings or areas which are 'disclosure affected' and this means that:

- (a) the building or area has a net lettable area of 2,000m² or more; and
- (b) the area is for a commercial office (or in other words, for administrative, clerical or professional or similar information-based activities, including any support facilities for those activities that are located in that area).

It is expected that the threshold of 2,000 m² will reduce in time which means that a wider class of buildings is likely to be affected. Also, the Commonwealth Department of Climate Change and Energy Efficiency (DCCEE) has indicated that the second phase of the Scheme will extend to other commercial building types, including hotels, retail buildings, schools and hospitals.

What premises are exempt?

Exemptions are available but they are not automatic. An application for exemption has to be made to the Secretary of the Commonwealth DCCEE (Secretary). The Secretary has the discretion as to whether the exemption will be granted. Exemptions may be available if:

- (a) the building or area is used for police or security operations;
- (b) it is impossible to assess the building for a BEEC;
- (c) the building is strata titled; or

- (d) a local authority has issued a certificate of occupancy (however described) less than 2 years prior (to the disclosure obligation arising).

What transactions are affected?

The Scheme requires disclosure for:

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

There is no obligation to disclose for:

- (a) the sale of a building through the sale of shares in the owner;
- (b) the sale of units or the sale of a partial interest in a building; and
- (c) short-term leases and subleases of 12 months or less.

What must be disclosed

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

- (a) offer or continue to offer to sell, lease or sublease without a registered BEEC;
- (b) invite, or continue to invite, offers to sell, lease or sublease without a registered BEEC;
- (c) 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.

Owners, lessors and sublessors are required to provide a BEEC to genuine purchasers, lessees and sublessees as soon as reasonably practicable. This means that owners, lessors and sublessors wanting to sell, lease or sublease should ideally have the BEEC in place, or at least be sure that it will soon be issued.

Also, non-corporate owners, lessees and sublessees (ie. individuals or partnerships) must provide genuine prospective corporate purchasers, lessees or sublessees with a BEEC upon request.

State based disclosure (such as is required for general conveyancing and retail and some commercial leasing) remains unaffected by the Scheme.

BEEC

Broadly speaking, a BEEC will be valid for 12 months from its date of issue.

The BEEC has the 3 part function of providing the energy efficiency rating, tenancy lighting assessment and energy efficiency guidance.

Neither the tenancy lighting assessment nor the energy efficiency guidance will be required during the 12 month transition period.

The NABERS Energy rating is an acceptable energy efficiency rating. The base building rating (i.e. central services and common areas) must be disclosed unless there is insufficient separate metering, in which case a whole building rating will be required.

The BEEC will contain generic energy efficiency guidance not specific to the particular building.

Information gathering

Both auditors and accredited assessors have information gathering powers under the Act so that they can properly discharge their functions. The ability to gather information without impediment is considered to be an essential aim of the Act so that the Scheme can be properly administered.

Civil penalties

The Scheme will be enforced through civil penalties for non-compliance either by way of an infringement notice or court proceedings for more serious offences. Much has been written about the excessiveness of the potential 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.

Offences

There are a number of criminal offences under the Act which are not designated as civil penalty provisions. For example, it is an offence under the Act to misuse information gathered under the Act and failing to answer questions or produce information requested by an auditor. Possible penalties include fines and imprisonment.

The name and shame register

Be aware of the online electronic '*name and shame*' Energy Efficiency Non-disclosure Register which is capable of being searched by prospective purchasers and lessees. The Act empowers the Secretary to maintain the Energy Efficiency Non-disclosure Register and to record 2 or more instances of non-disclosure by an owner, lessor or sublessor within any 12 month period.

Concluding comments

If you require advice in respect of your obligations under the Act or if you have any questions in respect of the Scheme, please contact a member of our property team below.

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