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LAWYERS

*Building Energy Efficiency  
Disclosure Act 2011:*  
Your mandatory disclosure  
rights and obligations

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On 24 June 2010 the *Building Energy Efficiency Disclosure Act 2010* (BEED Act) was passed by Federal Parliament. The Act commenced on 1 July 2010.

The BEED Act gives effect to the Commonwealth Government Commercial Building Disclosure (CBD) Scheme initially proposed in the Coalition of Australian Government's National Strategy on Energy Efficiency published in July 2009. The Strategy sets out a number of agreed measures to accelerate energy efficiency efforts and help households and businesses prepare for the introduction of the now defunct Carbon Pollution Reduction Scheme (CPRS). Notwithstanding the demise of the CPRS, the Strategy continues to be the base policy document for the implementation of building energy efficiency measures.

The CBD Scheme is enacted through the following legislative instruments:

- the BEED Act;
- *Building Energy Efficiency Disclosure Regulations 2010* (the Regulations);
- *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (the DAB Determination); and
- *Building Energy Efficiency Disclosure Determination 2011* (the BEED Determination).

Much of the detail to the CBD Scheme is found in the Regulations and Ministerial Determinations, giving the Government the flexibility contemplated in the National Strategy on Energy Efficiency to extend the scope of the scheme hotel, retail, school and hospital buildings.<sup>1</sup> The Standing Committee on Energy is due to start further consultation on that expansion this year. If that consultation process is successful, the program may expand into those areas as soon as 2014.

## Who does the BEED Act apply to?

A disclosure obligation under the BEED Act may arise when a person or corporation owns, leases or subleases a disclosure affected building (DAB) or a disclosure affected area of a building (DAAB).

The Commonwealth Government's power to enact this legislation derives from the corporations head of power under the Constitution. Accordingly, the provisions of the Act are directed at constitutional corporations, which is likely to capture the vast majority of sale and lease activities for disclosure affected buildings and areas.

If the owner or tenant is a corporate trustee, its activities will be captured by the legislation (regardless of whether the beneficiaries are private individuals or corporate entities).

It is important for private individuals that own relevant buildings under this Act to be aware that they may be caught by the disclosure obligations. The following provisions of the Act apply to **'persons'**:

- Section 12: Where a corporation is a prospective purchaser or tenant and that corporation requests a building energy efficiency certificate (BEEC) from a **person** that owns or leases a DAB or a DAAB, then that **person** must deliver the BEEC as soon as reasonably practicable after the request. Significant penalties apply for non-compliance. The practical effect of this provision is that all owners of a DAB (for example, the partners of a partnership) should have a BEEC in place before offering to sell the property or lease a disclosure affected area in the building.
- Section 18: If an Accredited Assessor issues a notice requesting information necessary to complete the assessment required for the constitutional corporation to comply with its disclosure obligations, the person must comply with that notice. This is addressed in more detail below when considering Accredited Assessor powers.

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<sup>1</sup> Commonwealth of Australia and Council of Australian Governments, *National Strategy on Energy Efficiency* (2010). Available at COAG (2012) <http://www.coag.gov.au/reports/index.cfm>

Aside from the provisions above, the main disclosure obligations in sections 11 and 15 of the BEED Act apply only to constitutional corporations.

What is a disclosure affected building (DAB) and a disclosure affected area of a building (DAAB)?

A DAB is a building that is used or capable of being used as an office **and** of a kind determined by the Minister to be disclosure affected.<sup>2</sup>

A DAAB is an area of a building that is used or capable of being used as an office **and** of a kind determined by the Minister to be disclosure affected.<sup>3</sup>

While “office” is not defined in the BEED Act, the DAB Determination provides guidance.

Section 5(2) of the DAB Determination provides that a building is disclosure affected if:

- at least 75 percent of the space in the building by net lettable area<sup>4</sup> is for administrative, clerical, professional or similar information-based activities, including any support facilities for those activities (referred to here on as office activities); **and**
- the net lettable area of the space in the building used for office activities is at least 2000 square metres.

**Support facilities** are parts of a building that are not used for administrative, clerical, professional or similar information-based activities but that occupy a space that is **fit to be used** for those activities and is exclusively for the use of office tenants.<sup>5</sup> Tenant bathrooms, kitchens, server rooms and reception areas would in most cases be included in the net lettable area calculation. A café in the foyer of a building that is open to the general public would not.

A space is **fit to be used** if that space is:

- fit for continuous occupation for the performance of the relevant activities; and
- has lighting and ventilation that is adequate and suitable for those activities that is of at least the standard provided for most of the building.<sup>6</sup>

The provisions under section 6 relating to a DAAB are similar. However, rather than referring to the building, reference is to an **area of a building**. An area of a building includes physically separate spaces within the building that share access to the outside of the building or that are linked internally to a space that provides such external access and that may be grouped together for the purposes of offering to let or sublet. The CBD Scheme website gives an example of a classic office tower, and suggests that building owners considering leasing more than one floor in such buildings simultaneously should aggregate the net lettable area on each floor for the purpose of determining whether the area meets the 2000 square metre threshold.<sup>7</sup>

By way of summary:

- A building is disclosure affected if at least 75 percent of the net lettable area for the building is for office activities and that 75 percent is equal to 2000 square metres or more. The disclosure obligations would arise on the sale or lease of the whole building.

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<sup>2</sup> *Building Energy Efficiency Disclosure Act 2010* (Cth) s 3

<sup>3</sup> *Building Energy Efficiency Disclosure Act 2010* (Cth) s 3

<sup>4</sup> *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (Cth) s 4 provides that net lettable area has the same meaning as in the document *Method of Measurement for Lettable Area*, dated March 1997, published by the Property Council of Australia

<sup>5</sup> *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (Cth) s 4

<sup>6</sup> *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (Cth) s 4

<sup>7</sup> Department of Environment and Climate Change (Cth), *Commercial Building Disclosure* (2012) <http://www.cbd.gov.au/FAQs.aspx#disclosure-affected-area>

- An area of a building is disclosure affected if at least 75 percent of the net lettable area for the building is for office activities and the net lettable area of the subject **area** is at least 2000 square metres. The disclosure obligations would arise for any proposed leasing activities of an area of 2000 square metres or more.
- If the building has less than 75 percent of net lettable area for office activities, then the building is not a DAB, nor does it contain any disclosure affected areas.

The 75 percent rule is an interim measure only until the NABERS protocols are developed to accurately assess energy performance of mixed use buildings. The 75 percent rule was due for revision in mid-2011, but the outcome from that revision is yet to be published.

## Exceptions

There are a number of exceptions to the above:

- New buildings: Neither a building nor an area in a building is disclosure affected if, on a particular day:
  - the building is new; **and**
  - a certificate of occupancy is required to be issued by a local authority in order for the building to be occupied and it has not issued yet **or** it issued less than two years before the day.<sup>8</sup>
- Major refurbishments: Neither a building nor an area in a building is disclosure affected if, on a particular day:
  - the building **has had** a major refurbishment (that is, the major refurbishment has been completed). A major refurbishment is one that affects the energy efficiency rating of the base building.<sup>9</sup> The CBD website states, as a guide, that a refurbishment that is expected to result in at least a .5 star change in the NABERS Energy rating will be regarded as substantial<sup>10</sup>; **and**
  - a certificate of occupancy is required to be issued by a local authority in order for the building to be occupied and it issued less than two years before the day.<sup>11</sup>
- Strata titled buildings.<sup>12</sup>

## When is disclosure required?

Disclosure obligations arise when a corporation proposes to:

- offer to sell a DAB;
- invite offers to purchase a DAB;
- offer to let a DAB or a DAAB;
- invite offers to let a DAB or DAAB;

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<sup>8</sup> *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (Cth) ss 5(3) and 6(3)

<sup>9</sup> *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (Cth) s4

<sup>10</sup> Department of Environment and Climate Change (Cth), *Commercial Building Disclosure* (2012) <http://www.cbd.gov.au/FAQs.aspx#disclosure-affected-area>

<sup>11</sup> *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (Cth) ss 5(4) and 6(4). Note the difference between new buildings and major refurbishments in relation to certificates of occupancy.

<sup>12</sup> *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (Cth) ss 5(5) and 6(5)

- offer to sublet a DAAB; or
- invite offers to sublet a DAAB.

Put and call options will be caught as well as unsolicited offers if the owner or lessee intends to accept the offer. We refer to all of these activities from here on as **disclosure activities**.

Transfers of shares in a company or units in a trust do not fall with the disclosure activities.

In relation to leasing activities:

- Leases or subleases for a term of less than 12 months, including options, are excluded from the disclosure obligations.<sup>13</sup>
- An assignment of lease will not trigger the disclosure obligations.<sup>14</sup>
- If a tenant exercises an option to renew an existing lease, this will not be captured as a disclosure activity provided the terms of renewal are in accordance with the existing lease. A re-negotiation of terms for what is effectively a new lease may be captured by the disclosure obligations.<sup>15</sup>
- If an existing tenant seeks to remain in the premises after the expiry of a lease, then the negotiation of a new lease will fall under the disclosure activities.

What are the disclosure obligations?

## Building Energy Efficiency Certificate (BEEC)

**Before** a disclosure activity commences, the owner or tenant must have a valid, current and registered BEEC for the building being sold or leased or the relevant area being leased or sublet.

The BEEC contains the following information:

- The NABERS Energy rating for the base building, including information on whether it is a base building rating or a whole building rating.
- An assessment of the energy efficiency of the lighting in the building that is expected to remain after the building is sold, let or sublet.
- General guidance material about how to improve the energy efficiency of the building.

Once a BEEC has issued, the owner must ensure that it is:

- **Current:** A BEEC is only current for 12 months from the date of issue. For some corporate owners (those continually involved in leasing activities of disclosure affected areas), it will be an essential part of legal compliance procedures to update the BEEC annually to avoid potentially detrimental delays.
- **Registered:** Each BEEC that issues will be registered by the Department of Environment and Climate Change (referred to from here on as the Department) and will be available to the general public on the CBD website.

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<sup>13</sup> *Building Energy Efficiency Disclosure Act 2010* (Cth) ss 11(6) to 11(8)

<sup>14</sup> Department of Environment and Climate Change (Cth), *Treatment of Certain Property Transactions for the Purposes of the BEED Act* (February 2011) <http://www.cbd.gov.au/FactSheets.aspx>

<sup>15</sup> Department of Environment and Climate Change (Cth), *Treatment of Certain Property Transactions for the Purposes of the BEED Act* (February 2011) <http://www.cbd.gov.au/FactSheets.aspx>

- **Valid:** The BEEC is valid if the Department is satisfied that the Accredited Assessor appropriately applied the assessment methods and complied with the conditions of his/her accreditation.

## NABERS Energy rating

All advertisements for the sale or lease of a relevant building or area must include a current NABERS Energy rating in the advertisement. The rating must be clearly visible with font at least the size of the majority of the text in the advertisement. It is to be expressed as follows: “[X]-star NABERS Energy rating”.<sup>16</sup>

## Exemptions from the disclosure obligations

A person who would be subject to an energy efficiency disclosure obligation may apply to the Secretary for an exemption from the obligation.<sup>17</sup>

Section 17 of the BEED Act provides that the Secretary may grant an exemption if:

- the DAB or DAAB is used for policy or security operations; **or**
- due to the characteristics of the building, it is not possible to assign a NABERS Energy rating. In this case, a supporting statement from the Accredited Assessor is required.<sup>18</sup> An exemption must be obtained for:
  - vacant buildings; and
  - a building that is currently undergoing a major refurbishment or where no certificate of occupancy has issued following a major refurbishment.

The exemption will be determined on a case-by-case basis. If the Secretary does not grant the exemption, the relevant person or entity may be liable for non-compliance with the disclosure obligations between when the obligation arose and when the Secretary makes a determination.

The BEED Regulations contain a comprehensive list of the information to be included in the written application for exemption.<sup>19</sup>

## Accredited Assessors’ information gathering powers

To ensure compliance with the legislation is not frustrated by any person refusing to provide necessary information or access to the property, section 18 of the Act provides that the Accredited Assessor can issue a notice requesting:

- information, if he or she reasonably believes the person possesses the information. The person must be given at least 14 days to deliver that information; and
- access to the building or area. The access must be sought only on a day and at a time that is reasonable.

Penalties may apply if the person does not give the information or provide the access required by the Assessor. Note that an exemption can be sought from this obligation too. However, in this case, an unsuccessful exemption application issued some weeks after an information notice is received from the Assessor will mean that the person is in breach of section 18.

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<sup>16</sup> *Building Energy Efficiency Disclosure Determination 2011* (Cth) s6

<sup>17</sup> *Building Energy Efficiency Disclosure Act 2010* (Cth) s 17

<sup>18</sup> *Building Energy Efficiency Disclosure Regulations 2010* (Cth) s 5(1)(k)

<sup>19</sup> *Building Energy Efficiency Disclosure Regulations 2010* (Cth) Part 3

## Penalties for non-compliance

The penalties for breach of a disclosure or information obligation under the Act are substantial and the penalty provisions state that there is a separate contravention for each day of non-compliance.

The penalty (maximum) for the first day of a breach of sections 11, 12 (for a corporation) or 15 is 1000 penalty units. For an individual in breach of section 12, the maximum penalty is 350 penalty units.

If an Accredited Assessor requests information or access from a person and that person fails to comply within the time allowed, the penalty is:

- 200 penalty units for individuals; and
- 500 penalty units for a corporation.

Failure to include the NABERS rating in any advertisement also has an initial maximum penalty of 1000 penalty units.

Further penalties apply for each day that any of the above breaches continue after the first day.

The Department will keep and maintain an interest based (publicly available) energy efficiency non-disclosure register for frequent (more than two) offences within 12 months.

## NABERS Energy

The National Australian Built Environment Rating System (NABERS) - formerly the Australian Building Greenhouse Gas Rating or ABGR - is a performance based rating system that measures the actual environmental impact of operating a building.<sup>20</sup>

For the purposes of the CBD Scheme, the NABERS Energy protocol for offices is the relevant tool and will be the focus of this overview.

NABERS is managed by the New South Wales Office of Environment and Heritage. The Office of Environment and Heritage, overseen by the NABERS National Steering Committee, is responsible for the administration of the system, including training and accrediting Accredited Assessors and auditing NABERS ratings to enforce the integrity of the system.

The protocols (the rules for collecting and using data that an Accredited Assessor must apply) for NABERS Energy for offices have been around for quite some time. Relatively new protocols have been developed for hotels, retail centres and residential buildings, while protocols for hospitals, schools and commuter transport are currently under development. For each building type, different elements can be measured. For example, protocols have been developed to measure energy, water, waste and indoor environment quality for office buildings.

The environmental element being measured is reported by reference to a star rating. The rating scale for NABERS Energy and Water for offices, hotels and retail centres is now 6 stars, where 1 star represents poor performance and 6 stars represents market leading performance.

It is important to appreciate that the NABERS Energy protocol takes into account the actual environment in which a building operates by applying the building's energy performance against the NABERS benchmarks. The benchmarks are weighted by region, as some regions have access to cleaner, greener power than others. For example, South Australia currently has better wind power generation infrastructure than New South Wales, which is more reliant on brown coal.<sup>21</sup> As a consequence, the same energy data for buildings in different locations can result in different NABERS Energy

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<sup>20</sup> Department of Environment, Climate Change and Water (NSW), *NABERS Energy and Water for offices, Rules for collecting and using data Version 2.0* (2010). Available at NABERS (2012) <http://www.nabers.com.au/news.aspx?type=5&code=LIBRARY&site=2>

<sup>21</sup> Green Building Council of Australia, *Green Star and NABERS Energy fact sheet* (2009) <http://www.gbca.org.au>

ratings. This allows buildings in the same region to be compared on a “like for like” basis, but obviously restricts the comparison of buildings between two different regions.

Given the broad variety of office building types in the market and non-uniform metering standards across local government areas and States, the NABERS Energy protocols also accommodate a variety of metering systems. A rating can be obtained for either:

- the base building for energy consumed by central services only, for example, common area lighting, lifts and air conditioning. These services must be separately metered from services to tenanted areas;
- a particular tenancy area and the energy consumed by the occupants in that area. Energy consumption must be separately metered from the base building services in order to obtain this rating; or
- a whole building for the energy consumed by the central services and the building occupants. This rating is the only option if separate metering has not been installed.

An agreement for lease or lease that requires the landlord to obtain and maintain a certain NABERS Energy rating should make it very clear whether that rating will be for energy consumed by the base building, the premises or the whole building.

While the NABERS website allows a self-assessment to be carried out, an official rating can only be issued by an Accredited Assessor. An Accredited Assessor is any person that holds the appropriate qualifications as certified by the Department. A full list can be found on the NABERS website.

To undertake a NABERS Energy rating, the Accredited Assessor will require information as determined by the relevant protocol, which for office buildings is the document entitled *NABERS Energy and Water for offices, Rules for collecting and using data Version 2.0*. These rules are available on the NABERS website.

Appendix A to the Rules sets out a comprehensive list of information required from the building owner or property manager before a NABERS Energy rating can be issued. That information includes:

- details on the “rated area”, being the net lettable area less any excluded areas (as defined in the Rules). Evidence required includes lease documents and third party survey plans that explicitly use the *Method of Measurement for Lettable Area 1997 (Property Council of Australia)*;
- documentation verifying hours of occupancy - for example, lease documents or correspondence between the landlord and tenant. For a base building rating, this is the agreed hours per week for which services are provided by the landlord to the tenants;
- after hours air conditioning request logs;
- 12 continuous months of consumption data for all energy sources and fuels consumed for building operation (for example, electricity, diesel and gas). **Original** and complete utility invoices are required. The data must not end more than four months before the calculation is being performed; and
- evidence of accuracy of high voltage electricity meters and all other non-utility meters and records of readings of non-utility meters.<sup>22</sup>

If the relevant area is occupied by a tenant, the Accredited Assessor will also require permission to speak to the tenant’s office manager and any building manager to verify information and gain full access to the building. This requirement must be kept in mind when considering access rights under a lease.

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<sup>22</sup> Department of Environment, Climate Change and Water (NSW), *NABERS Energy and Water for offices, Rules for collecting and using data Version 2.0* (2010). Available at NABERS (2012) <http://www.nabers.com.au/news.aspx?type=5&code=LIBRARY&site=2>

By applying this data (which ultimately calculates the emissions of carbon dioxide per square meter) against the NABERS benchmarks, the Accredited Assessor can calculate the star rating for that building's performance.

The NABERS Energy rating is valid for 12 months after it issues.

Property managers and owners who regularly carry out leasing activities must have monitoring systems in place to ensure that their NABERS Energy rating does not expire, restricting the ability to lease premises in the building. This is particularly important if the building falls within the scope of the Building Energy Efficiency Act.

## NABERS Commitment Agreement

Given that a NABERS rating is calculated using 12 months of actual performance data, it necessarily follows that there is a lag time between a building reaching 75 percent occupancy<sup>23</sup> and the achievement of a NABERS rating.

As an incentive for building owners to adopt NABERS at the earliest possible stage, the owner may enter into a NABERS Energy Commitment Agreement with the Office of Environment and Heritage, which allows the owner to promote a new development or proposed refurbishment with a forecast NABERS Energy rating of 4 stars or higher. The benefit for the owner is that it can attract quality tenant - for example, State and Commonwealth Government Departments which require at least a 4.5 star NABERS Energy and Water rating for any new lease of commercial office space.

## Summary

Despite the current global economic environment and the impact on domestic property transactions, the Commonwealth and State Governments have pushed on with policy aimed at improving the energy efficiency of Australia's building stock.

Given the significant penalties that a company can potentially be liable for under the BEED Act, it is essential that all owners and tenants of large commercial office space be aware of their disclosure obligations if they intend to carry on sale, lease or sublease activities.

The Commonwealth Government has made it very clear that disclosure obligations will be expanded to capture a broader range of buildings and that expansion program is due for consultation this year. Whether that expansion will proceed or not is unknown. The only certainty there is about the future of green property is that it is more than a mere trend and will become increasingly prevalent in the everyday activities of property developers and investors Australia-wide.

The contents of this paper are not intended to be a complete statement of the law on any subject and should not be used as a substitute for legal advice in specific fact situations. HopgoodGanim cannot accept any liability or responsibility for loss occurring as a result of anyone acting or refraining from acting in reliance on any material contained in this paper.

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<sup>23</sup> 75 percent occupancy is the minimum occupancy level required for a NABERS Energy rating to be calculated