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Commercial Property

Mandatory Disclosure under the *Building Energy Efficiency Disclosure Act 2010*

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Mandatory Disclosure under the *Building Energy Efficiency Disclosure Act 2010*: Implications for property owners and tenants

The Commonwealth Government's long-anticipated commercial building disclosure scheme is now law.

On 1 July 2010, the *Building Energy Efficiency Disclosure Act 2010* commenced, and since then, subordinate legislation has been released that provides more detail as to how this Act will affect commercial office building owners and tenants. The disclosure obligations under the Act come into effect on 1 November 2010.

This paper provides a guide to the commercial building disclosure scheme for property owners, tenants and financiers. It also provides information about the NABERS rating tool and the information required to obtain a NABERS rating.

What is the commercial building disclosure scheme?

In 2004, Commonwealth, State and Territory governments formed the National Framework for Energy Efficiency with a view to implementing measures to improve Australia's energy efficiency performance, and lower greenhouse gas emissions. In identifying opportunities to reduce energy usage in an economically efficient manner, the Framework identified that the commercial building sector contributes to around 10 percent of Australia's total greenhouse gas emissions. It also reported that energy efficiency performance of commercial buildings could be improved if market failures were addressed. As a consequence, commercial buildings were included in the Framework's Stage One policy packages.

In 2008, the National Framework for Energy Efficiency released the consultation regulation impact documentation, and entered into extensive community and industry consultation about the best options to address and improve these market failures. The Consultation Regulation Impact Statement states that mandatory disclosure of the energy efficiency of a building corrects market failures because prospective purchasers and tenants can compare buildings on a "like for like" basis. This arguably influences the prices that better-performing buildings can achieve, and "outs" underperforming buildings. Mandatory disclosure of energy efficiency ratings was accordingly the recommended policy option.[1]

The scheme applies to office buildings or premises with a net lettable area greater than 2000 square metres. It requires the owner or tenant of that office building or premises to disclose the energy efficiency rating for the building:

- to prospective buyers, tenants or subtenants when the owner is selling or leasing the building or the tenant is subleasing the building or a part of it;
- in any advertisement for the sale or lease of the building or sublease of an area of the building or part of it; and
- to a central registry that administers the scheme.

These disclosure obligations commence **1 November 2010**.

The following legislative instruments give effect to the scheme:

- *Building Energy Efficiency Disclosure Act 2010*;
- *Building Energy Efficiency Disclosure Regulations 2010*, released 13 July 2010;
- *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2010* (DAB Determination), released 27 July 2010; and

[1] Mandatory Disclosure of Commercial Office Building Energy Efficiency in the Consultation Regulation Impact Statement released by the Department of the Environment, Water, Heritage and the Arts, 18 December 2008

- *Building Energy Efficiency Disclosure Determination 2010* (BEED Determination), released 27 July 2010.

As always, the devil is in the detail, and this is found in the Regulations and Ministerial Determinations, which are designed to give the Government future flexibility to extend or amend the scope of the scheme - for example, by reducing the required size of the office space captured by the mandatory disclosure obligations or including industrial, hospital, hotel and retail buildings in the scheme.

Who does the Act apply to?

The Building Energy Efficiency Disclosure Act applies to any corporation that owns, leases or subleases a disclosure affected building or a disclosure affected area of a building.

To determine whether they fall within the scope of the Act, a property owner or tenant should consider the following factors:

- **Corporation:** Is the building or premises owned or let by a corporation?

  The Commonwealth Government's power to enact this legislation derives from the corporation's head of power under the Constitution. For that reason, the disclosure obligations will only apply to an owner or tenant of a building or area of a building that is a corporation under the Corporations Act.

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

  If the owner or tenant of the building or area is a private individual or a number of private individuals (for example, a partnership), the Act will not apply to their sale or leasing activities.

- **Disclosure affected buildings and areas of a building:** The term "office" is not specifically defined in the legislation. Instead, the DAB Determination sets out the criteria for a disclosure affected building and a disclosure affected area of a building as:

  - a building or area with a net lettable area of at least 2000 square metres. The net lettable area is calculated using the formula published in the Property Council of Australia's *Method of Measurement for Lettable Area*; and

  - the net lettable area covers administrative, clerical, professional or similar information-based activities, including any support facilities for those activities that are located in that area.

    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. 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.

  So, while "office" is not specifically defined, it is clear that the legislation only applies to buildings or areas that are used for office activities.

  There are two exceptions to a building being classed as disclosure affected under the Act:

- New buildings (a building is not disclosure affected if the certificate of classification/occupancy for the building was issued less than two years ago)

- Strata titled buildings, due to the difficulty in obtaining necessary energy consumption data

What must be disclosed?

Building Energy Efficiency Certificate

The Building Energy Efficiency Certificate is the centrepiece of the legislation, and from 1 November 2011, will replace the current NABERS Energy rating certificate as the required form of disclosure.

Certificates will be issued by the New South Wales Department of Environment, Climate Change and Water, the authority appointed for the management and administration of the National Australian Built Environment Rating System (commonly known as NABERS).

The Building Energy Efficiency Disclosure Act and the BEED Regulations together outline the content of a Certificate, which must include the following information:

- The NABERS Energy rating for the building, including information on whether it is a base building rating or a whole building rating (as defined under the NABERS rules). Section 6 of the BEED Determination requires the NABERS Energy rating to be a base building rating unless it is not possible to work that out because utility meters are insufficient to distinguish between base building energy consumption and tenant energy consumption. In that case, a whole building rating is required;

- 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. This is contained in Schedules 1 and 2 of the BEED Determination; and

- Other information required by section 4 of the BEED Regulations, including:

  - the net lettable area of the building or area of the building (as relevant);

  - the hours of occupancy (under the NABERS rules);

  - the energy consumption of the building in megajoules per year (MJ/year);

  - the greenhouse gas emissions measured in kg of CO2 per year. GreenPower is not taken into account in this calculation, as it is a personal decision of the building owner and does not allow a prospective purchaser or tenant to make a "like for like" comparison between buildings or premises; and

  - if GreenPower is purchased by the building owner, the Certificate can include the NABERS Energy rating taking that into account, but this is additional to the standard base building energy rating above.

As the Department of Environment, Climate Change and Water will be responsible for issuing Certificates, the standard form (when issued) should comply with these requirements.

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

- **Current**: A Certificate 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 your legal compliance procedures that the Certificate be updated annually to avoid potentially detrimental delays.

- **Registered**: Each Certificate that is issued will be registered by the Department and will be available to the general public on an internet database, similar to the current database for NABERS ratings available here.

- **Valid**: The Certificate is valid if the Department is satisfied that the NABERS accredited assessor appropriately applied the assessment methods and complied with the conditions of his/her accreditation. As part of the integrity and compliance mechanisms the Department has in place, it is a requirement that every NABERS rating application is checked by the Department before the rating is issued. This is the first tier in the Department's two tier audit system. The second tier is a random and comprehensive audit of issued NABERS ratings, sometimes involving reinspection of the property, to ensure that the NABERS protocols have been complied with. As a consequence, it is possible that a revised rating may be issued.

NABERS Energy rating: sale or lease mandatory requirements

All advertisements for the sale or lease of an affected building or space must include the NABERS Energy rating for the building. The BEED Determination requires the advertisement to display the energy efficiency rating for the building as, for example, "4.5-star NABERS Energy rating". The rating must be clearly visible with font at least the size of the majority of the text in the advertisement.

When do these disclosure obligations start?

The Act contains a 12 month transitional period, which commences 1 November 2010, and this is when the disclosure obligations will commence.

The transitional period does not excuse the obligation to disclose the energy efficiency rating (that is, to have a NABERS rating). It only relates to the type of certificate being disclosed - whether that is a NABERS Energy rating certificate or a Building Energy Efficiency Certificate.

Until 1 November 2011, a registered NABERS Energy rating certificate, as currently issued by the Department, is sufficient to comply with the obligations under the Act. All provisions of the Act regarding Building Energy Efficiency Certificates then come into force on 1 November 2011, meaning that all owners must have a registered Certificate to avoid being in breach of the Act.

According to the Department's website, registered Certificates will start to be issued from mid-2011.

The obligation to have a registered NABERS rating certificate (pre-1 November 2011) or Building Energy Efficiency Certificate (thereafter) arises when:

- a corporate owner first offers to sell or lease a disclosure affected building or area; or

- a corporate tenant of a disclosure affected building or area first offers to sublet an area greater than 2000 square metres.

In practical terms, by way of example, if you instruct a real estate agent to start a marketing campaign for the sale or lease of the space, you must first have a registered NABERS Energy rating certificate or Building Energy Efficiency Certificate so that your prospective buyer or tenant can find that certificate on the NABERS website.

The obligation to disclose the NABERS Energy rating in all advertisements begins on 1 November 2010, and is not subject to a transitional period.

Are there any exceptions to or exemptions from the disclosure obligations under the Act?

As mentioned above, the DAB Determination provides that a building or an area in a building is not disclosure affected if the certificate of classification was issued less than two years ago or if the building is strata titled.

The Act also provides that disclosure is not required if the owner or tenant proposes to lease or sublease a disclosure affected building or space if the term of the lease or sublease (including options) is less than 12 months.

Exemptions from the obligations under the Act can be sought, although these must be made by application in writing to the Department and will be determined on a case by case basis. The BEED Regulations contain a comprehensive list of the information to be included in the written application for exemption.

If an application for exemption is made, it is important that sufficient time is allowed before the obligation to disclose arises. If sale or leasing activities are undertaken while an application for exemption remains undecided, the owner or tenant will be in breach of the Act and potentially liable for substantial penalties if the application is ultimately refused.

Accredited assessors' information gathering powers

To ensure compliance with the legislation is not delayed by someone refusing to provide necessary information or access to the property, 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.

What are the penalties for non-compliance?

The penalties for breach of an obligation under the Act are substantial.

If an owner offers to sell or lease or invites offers to sell or lease without the NABERS rating (until 1 November 2011) or the Building Energy Efficiency Certificate (thereafter), the maximum penalty for the first day of the breach is $110,000.

Failure to include the NABERS rating in any advertisement also has an initial maximum penalty of $110,000.

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

- $22,000 for individuals; and
- $55,000 for a body corporate.

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

What is NABERS?

NABERS is an acronym for the National Australian Built Environment Rating System, managed by the Department of Environment, Climate Change and Water in New South Wales.

NABERS rating tools have been developed for offices, homes, hotels and retail buildings. For each of those building types, rules have been formulated for the measurement of actual energy consumption, water consumption, waste production and quality of indoor environment. Following an analysis of actual performance data under these rules, a star rating is issued. Five (5) stars represent market leading performance.

The star rating that is issued by the Department is relevant only to the market within which the building operates. The intent behind NABERS is that buildings in the same market can be compared on a like for like basis. It is likely that the same data for buildings in different locations will result in different ratings.

For the purposes of the commercial building disclosure scheme, the NABERS Energy rating for offices is the relevant tool.

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 tool has been developed for flexibility. 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 tenancy areas;

- a particular tenancy area for 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; and

- a whole building for the energy consumed by the central services and the building occupants. This rating is the only option if separate metering is not installed.

As mentioned above, the commercial building disclosure scheme contemplates a base building rating unless metering is insufficient to obtain that, in which case a whole building rating is required.

What information is required to obtain a NABERS rating?

The information that an accredited assessor will require is determined by the *Rules for collecting and using data* for NABERS Energy and Water ratings for offices. 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 manager for a NABERS Energy rating. Below is a summary of the information required:

- Details on the "rated area", being the net lettable area less any excluded areas. Excluded areas could be, for example, café areas open to the general public. Evidence required includes lease documents and third party survey plans that explicitly use the Measurement Standard for Rated Area (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 the building's operation (for example, electricity, diesel and gas). Original and complete utility invoices are required. This data must not end more than four months before the calculation is performed; and

- Evidence of accuracy of high voltage electricity meters and all other non-utility meters and records of readings of non-utility meters.

The accredited assessor will also require permission to speak to tenant office managers and building managers in order to verify the information and to arrange full access to the building.

Recommendations

If you are required to have a NABERS Energy rating under the commercial building disclosure scheme, we recommend that you approach at least three different accredited assessors for quotes. The fees charged by assessors are not prescribed by the Department or by the legislation, and can vary considerably.

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Conclusion

Given the substantial penalties for non-compliance, it is essential that owners, tenants and financiers of commercial office space are aware of the disclosure requirements and have sufficient information and opportunity to obtain a NABERS rating certificate.

Implications for owners

It's important for owners of relevant buildings or spaces, if they have not already done so, to talk with their tenants now about providing original utility invoices on a regular basis. This will ensure that if the owner wants to sell the building and has not yet obtained a NABERS Energy rating, there won't be further costs and delays due to insufficient data. When negotiating a new lease, the owner should ensure that the tenant has an obligation to provide this information, that the owner has an express authority to obtain this information from the utility provider, and that access required by an accredited assessor is permitted.

Implications for purchasers

A purchaser must ensure that the contract includes an obligation on the vendor to deliver no less than 12 continuous months of original utility invoices at completion. This ensures that if the rating expires soon after completion or is outdated due to installation of energy efficient devices, the purchaser has the information necessary to obtain a new rating. Consideration should also be given to including an obligation on the vendor to deliver the other data/records (outlined above) that will be required to obtain a NABERS rating (eg after hours air-conditioning logs).

Implications for financiers

Given the substantial financial penalties involved and the indiscriminate application of the legislation, banks and lending institutions should immediately revisit loan documentation to ensure that it is sufficient to protect the financier's position. The mortgagor should have a specific obligation to regularly provide the financier with the required energy consumption source data necessary for the financier to comply with the Act, should it take possession of the property and exercise power of sale. While the accredited assessor has information gathering powers, difficulty in obtaining information will only increase the cost of the NABERS rating for the owner.

Lastly, we point out that NABERS ratings for large commercial office buildings are not issued quickly due to the amount of data to be collated by the accredited assessor and the assessor's duty to interview the office managers for each of the tenants. Accordingly, owners and tenants looking to sell or lease a building or area greater than 2000 square metres cannot afford to delay the process. Steps should be taken now to ensure a prospective purchaser or tenant is not lost due to the delay.

HopgoodGanim's Commercial Property team can advise you on whether this legislation is applicable to your circumstances and, if it is, what you must do to comply.