THE MANDATORY BUILDING ENERGY EFFICIENCY DISCLOSURE SCHEME – THE COMPLETE PICTURE

The Building Energy Efficiency Disclosure Act 2010 (Act) provides for the establishment of a national mandatory disclosure scheme (Scheme) for owners and tenants of certain commercial office buildings in relation to the energy efficiency of those buildings. A new Ministerial Determination was issued on 26 November 2010, which clarifies the application of the Scheme, particularly, in relation to mixed use buildings.

In addition to explaining the implications of the new Ministerial Determination, this Update:

• describes the legal architecture of the Scheme;
• explains the main obligations;
• discusses rating systems that are recognised under the Scheme;
• identifies the buildings covered under the Scheme and those that are exempt;
• discusses the transactions and entities the Scheme applies to;
• describes the consequences of non-compliance with the Scheme’s obligations;
• discusses the main implications of the Scheme for the range of affected entities.

Introduction

The Scheme, which started on 1 November 2010, is part of the Federal Government’s National Strategy on Energy Efficiency. This strategy seeks to accelerate efforts to achieve energy efficient outcomes – including for buildings – to help reduce Australia’s greenhouse gas emissions. Estimates indicate that buildings account for around 18% of Australia’s total greenhouse gas emissions, with 8% attributable to commercial buildings and 10% attributable to residential buildings.

The Scheme is designed to give purchasers, lessees, and sub-lessees more information about the energy efficiency of large commercial office spaces they are considering acquiring or leasing. The Scheme will assist these entities to consider energy efficiency in their decision-making. In turn, it is hoped that this will drive an increased uptake of energy efficiency in Australian commercial office buildings, of which there are more than 3,900 amounting to in excess of 21 million square metres of commercial office space. It has been estimated that every one-star increase in an office building’s energy rating will result in 15% saving in energy costs per year.
Legal architecture

The Scheme comprises the following legal instruments:

- **Building Energy Efficiency Disclosure Act 2010 (Cth)**
- **Building Energy Efficiency Disclosure Regulations 2010 (Cth)**
- Two Ministerial determinations issued under the Act, namely:
  - **Building Energy Efficiency Disclosure Determination 2010**
  - **The Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2010(No.2)***

These instruments need to be read together to understand the scope of application of the Scheme and its various requirements.

The government has also issued a number of guidance notes to assist with the application of these requirements, namely:

- **Treatment of certain property transactions for the purposes of the Building Energy Efficiency Disclosure Act**: This guidance note provides general guidance on how particular types of property transactions will be treated for the purposes of the Scheme.

- **Organising advertising for commercial office space of 2,000m² or more**: This guidance note provides guidance regarding the Scheme’s advertising requirements.

- **NABERS-Accredited Assessors and the Commercial Building Disclosure Program**: This guidance note explains the Scheme’s requirements that are most relevant to assessors accredited under National Australian Built Environment Rating System (NABERS). These assessors may undertake energy efficiency assessments under the Scheme.

What are the main obligations?

There are three key obligations under the Act.

**Disclosure at time of sale, lease, sublease**

A corporation must not sell, lease or sublease or offer to sell, lease or sublease a disclosure affected building or part of a disclosure affected building without a current, registered NABERS rating or a Building Energy Efficiency Certificate (BEEC). This means that the owner or tenant must register the NABERS rating or BEEC before it offers to sell or lease or invites offers to purchase or lease the building.

**Disclosure at time of advertising**

A corporation must not advertise for sale or lease or allow the continuance of an advertisement for sale or lease without a valid, current energy efficiency rating for the building. The rating must be prominently displayed in the advertisement so that it is clearly visible, using font that is the same size or larger than the majority of the other text contained in the advertisement. Advertising includes banners on buildings, foyers and perimeter fences and advertising in newspapers, brochures, magazines and Internet sites.

**Providing information before sale, lease or sublease upon request**

A person must provide all prospective purchasers or tenants that are constitutional corporations with a copy of the current, registered NABERS rating or BEEC as soon as reasonably practicable upon written request.

**Recognised ratings under the Scheme**

The Scheme’s obligations commenced on the implementation day, namely 1 November 2010. However, a transition period applies between 1 November 2010 and 31 October 2011. During this transition period, a NABERS rating may be used. Thereafter, full disclosure through a BEEC is required.

**NABERS**

NABERS is a performance-based rating system for existing buildings. Under this system, a building is rated on the basis of its measured operational impacts on the environment, including in relation to the energy consumed by the building.

Under this system, a building’s environmental performance is rated on a scale of 1 to 5 stars, with 1 star being poor and 5 star showing excellence. The greater the number of stars in a NABERS Energy rating, the lower the greenhouse gas emissions for the rated premises. The number of stars for offices is calculated by benchmarking the energy consumption and comparing it against buildings of the same category using 12 months of actual data.

**BEEC**

A BEEC is a comprehensive statement of a building’s energy efficiency and must include 3 main components:

- **An energy efficiency rating for the building** – that is, a base building NABERS rating (which involves an assessment of greenhouse gas emissions associated with the energy consumed in supplying building central services to office lettable and common spaces) or, where this cannot be achieved, a whole of building rating (which involves an assessment of greenhouse gas emissions associated with the energy used by office tenancies and base building services to office lettable and common spaces). Twelve consecutive months of metered fuel data will be required in order to make an energy efficiency assessment.

- **An energy efficiency assessment of the building’s lighting** – accredited assessors will benchmark existing tenancy lighting against best practice.

- **An energy efficiency assessment report giving guidance on how building efficiency could be improved** – the Minister has made a determination listing a variety of ways in which energy efficiency could be improved.
The Minister has determined that a building is disclosure affected if:

(a) at least 75% of the space in the building by net lettable area (or gross lettable area where net lettable area is not available) is for administrative, clerical, professional or similar information-based activities, including any support facilities for those activities;

(b) the net lettable area (or gross lettable area where net lettable area is not available) of space in the building that is for administrative, clerical, professional or similar information-based activities, including any support facilities for those activities, is at least 2000 square metres.

A ‘disclosure affected area of a building’ is defined in similar terms. The Minister has also determined that an area of a building includes physically separate spaces within a building that are connected in such a way that the space is not physically separate. For this purpose, the Minister has also determined that an area of a building includes areas that share access to the outside of the building.

In summary, a building or an area within a building will be subject to the Scheme’s disclosure obligations if:

- the building is ‘capable of being used as an office’ – that is, for administrative, clerical, professional or similar information-based activities, including any support facilities for those activities;

- at least 75% of the net lettable area (or gross lettable area) is for these activities - the Method of Measurement for Lettable Area published by the Property Council of Australia must be used to determine whether or not a building falls below the 75% threshold; and

- the net lettable area (or gross lettable area) that is used for these activities is at least 2000 m².

With respect to mixed use buildings, which combine office space with other functions such as warehouses, medical centres, hotels or retail outlets, an interim approach has been adopted whereby such buildings are not subject to the Scheme where less than 75% of the space is dedicated to office activities. The rationale for this approach is the fact that mixed use buildings often share energy metering and, as a result, it can be difficult to provide an accurate energy rating for the separate spaces. However, this approach will be reviewed by a panel of industry experts during the transition period.

In 2012, the federal government will consider expanding the disclosure obligations to other commercial building types, including hotels, retail buildings, schools and hospitals.

Which buildings are exempted from the Scheme?

All leases or subleases of 12 months or less are automatically exempt from the Scheme’s disclosure requirements. Other exemptions for certain types of buildings are available upon application.

Under the Act, exemptions may be granted for:

- Buildings used for police or security operations;

- Buildings with characteristics that make assessment of the energy efficiency or lighting impossible under standard assessment methods;

- Buildings that fall into a class prescribed by the Regulations as being exempt (as yet, exempt buildings have not been prescribed in the Regulations).

The Minister has also determined that the Scheme’s obligations do not apply to:

- Newly constructed buildings or areas within such buildings where the certificate of occupancy was issued less than 2 years beforehand.

- Major new refurbishments for two years from when the certificate of occupancy is issued.

- Strata-title buildings.

Which transactions does the Scheme apply to?

The Scheme’s obligations apply to the following transactions in relation to disclosure affected buildings and disclosure affected areas of a building:

- Sale: sale, options to sell, offers to sell, invitation of offers to sell.
Lease: leases, options to lease, offers to lease, invitation of offers to lease.
Subleases: subleases, options to sublease, offers to sublease, invitation of offers to lease.
Advertisements: advertisements for sale, lease or sublease.

The Act does not apply to the following transactions in relation to disclosure affected buildings and disclosure affected areas of a building:
- the assignment of a lease;
- exercise of an option to renew a lease;
- extension of an existing lease;
- the sale of units in a trust that owns an office building;
- the sale of shares in a company that owns an office building;
- a mortgagee exercising a power of sale.

Consequences of non-compliance
A breach of any of the Scheme’s obligations may attract a maximum penalty of 1000 penalty units or $110,000 for each breach. An additional penalty may be incurred for every day that a vendor or lessor remains in breach with a maximum of 100 penalty units or $11,000 per day.

The Department of Climate Change and Energy Efficiency maintains an Energy Efficiency Non-Disclosure Register, which identifies entities who fail to comply with the Scheme’s requirements and have either been issued with an infringement notice or are subject to a civil penalty imposed by the Court. As a matter of practice, details of non-compliance will usually be listed on the Energy Efficiency Non-Disclosure Register where there have been two or more instances of non-disclosure by an individual or corporation in a period of twelve months.

There are also a number of criminal offences under the Act. For example, it is an offence to misuse information gathered under the Act and for failing to answer questions or produce information requested by an auditor. The consequences of failing to comply with these obligations include fines and imprisonment.

Practical implications of the Scheme
Set out below is a summary of the main implications of the Scheme for the range of affected entities.

Owners and landlords
Owners and landlords of disclosure affected buildings and areas of buildings will need to:
- put in place procedures and allocate resources to ensure compliance with the Scheme’s obligations, including:
  - collecting and maintaining data required for obtaining a BEEC;
  - reviewing the BEEC annually to ensure its ongoing validity and currency.
- consider any energy efficiency upgrades or major refurbishments that would increase the building’s energy efficiency or, alternatively, may qualify the building for an exemption.
- review leases to account for obligations imposed under the Scheme, including:
  - imposing obligations on tenants regarding site access and provision of information;
  - pass through of costs to tenants to cover compliance with the Scheme;
  - restricting use and operation of tenancy to ensure that the building’s overall energy efficiency rating is not reduced;
  - expanding the landlord’s rights to carry out any upgrade works to comply with the Scheme and, if possible, recover the cost of these works from the tenant.

Owners will clearly bear additional costs and administrative burden as a result of complying with the Scheme. However, those owners that use the Scheme as an opportunity to increase the energy efficiency of their buildings could stand to gain in the markets for sale or lease, where greater energy efficiency could attract a significant premium.
Head tenants

Head tenants that are seeking to sublease large commercial office buildings, or parts thereof, will face similar costs and challenges in complying with the Scheme as owners.

In addition, these tenants may need to obtain information from their landlords in order to comply with the Scheme. This information may not always be easy to come by. Lease arrangements may need to be reviewed in order to facilitate access to information in these circumstances.

Existing tenants

All tenants – whether those intending to sublease or otherwise – will need to be aware of additional obligations to which they could be made subject as a result of the Scheme, including:

- paying increased costs to cover the landlord’s compliance with the Scheme;
- providing relevant information and access to the premises for the purposes of ensuring the landlord’s compliance with the Scheme;
- being prevented from operating a tenancy in such a way that could reduce the building’s overall energy efficiency rating.

Prospective purchasers and tenants

Prospective purchasers and tenants of a disclosure affected buildings and areas of buildings will need to review the NABERS or BEEC rating prior to concluding a purchase or lease.

In the case of tenanted buildings, prospective purchasers will also need to consider whether the procedures and lease arrangements in place with existing tenants are adequate to meet the compliance requirements of the Scheme.

Conclusions

It is important to recall that the Scheme’s primary objective is to require disclosure of energy efficiency ratings for large commercial office buildings. The Scheme does not oblige owners and head tenants to increase the performance of their buildings in terms of energy efficiency.

Therefore, the success of the Scheme in terms of increasing energy efficiency of large commercial office buildings will ultimately depend upon how responsive prospective purchasers and tenants are to information concerning energy efficiency.

If, over time, energy efficiency ratings prove to be an important deciding factor for prospective purchasers and tenants, it will be more likely that the Scheme will act as a strong incentive for owners and landlords to increase the energy efficiency of their buildings.

Time will tell as to whether, in the minds of purchasers and tenants, the premium payable to buy or rent more energy efficient buildings will be outweighed by the clear benefits of reduced energy consumption and lower greenhouse gas emissions.

1 This Determination repealed a previous Determination – Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2010.
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