

Mandatory Disclosure – Top Ten Legal Tips

The Federal Government proposes to require mandatory disclosure of energy efficiency information at the point of sale, lease or sub-lease of office space of more than 2,000 m². The scheme is intended to allow potential buyers and tenants to compare the energy efficiency of commercial office buildings on a ‘like for like’ basis.

Anticipated to commence in the second half of 2010, this regime will impose significant new obligations on owners, managers and in some cases lessees of commercial property, and will put building energy efficiency performance into the public domain. This briefing note contains ten practical tips to inform and prepare the property sector for these proposed changes and to manage the associated business risks. ¹

¹ This note has been prepared on the basis of consultation documents released in November 2009 and will need to be reviewed and updated once draft legislation is released.

1. Understand whether the scheme will apply to your building and organisation

Mandatory disclosure will apply to all office buildings, or parts of buildings, with a Net Lettable Area (NLA) of more than 2,000 m². Disclosure will be required whenever such space is offered for sale, lease or sub-lease. Initially the scheme will apply only to BCA Class 5 Buildings (office buildings used or designed for professional or commercial purposes) but other classes are likely to be introduced into the scheme over time.

Mandatory disclosure will **not** apply to you if:

- the building (or part of building) offered for sale or lease is less than 2,000 m² NLA;
- your organisation is not a corporation – for example if you are an individual, a partnership or a government department (although governments are likely to participate voluntarily);
- the building is not a BCA class 5 building (for example if it is retail, car park, hotels, or health care facility);
- the building is less than 12 months old or, in the case of an offer to lease, it is a short term lease of less than 12 months (that is not renewed); or
- an exemption applies. Although not yet finalised, likely exempt categories will include places of worship; temporary buildings; and buildings to be demolished.

2. Know what must be disclosed, by whom, and when

Buildings or tenancies subject to mandatory disclosure will be required to provide two key pieces of information:

- a NABERS Energy Rating which is less than 12 months old; and
- a Building Energy Efficiency Certificate (BEEC) containing guidance on potential energy efficiency improvements, which is less than 12 months old.

The NABERS Energy rating must be disclosed in any advertising material, and a valid BEEC must be disclosed to all prospective buyers and tenants, and to a central registry. **Disclosure must be made by the**

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building owner (in the case of a sale or lease), or by the head lessee where space greater than 2,000 m² is offered for sublease.

Examples:

Whole building > 2000 m ² NLA			
	Sale	Lease	Sub-lease
Base building rating	✓*	✓*	If available
Tenancy lighting details	✓ (for all tenancies in building)	✓	✓
Base building guidance	✓	✓	If available
Tenancy guidance	✓ (for all tenancies in building)	✓	✓

Part building > 2000 m ² NLA			
	Sale	Lease	Sub-lease
Base building rating	× (Strata titles excluded)	✓*	If available
Tenancy lighting details	✓	✓	✓
Base building guidance	× (Strata titles excluded)	✓	If available
Tenancy guidance	✓	✓	✓

This table has been replicated from DEWHA's 'Mandatory Disclosure of Commercial Office Building Energy Efficiency' Regulation Document dated November 2009
 * When a building has inadequate metering to obtain a base building rating a whole building rating must be disclosed.

3. Understand what's involved in a NABERS rating, and get your data organised

NABERS is a performance-based energy rating system that measures actual operating performance of a building. Initially, mandatory disclosure will only apply to the NABERS Energy rating tool, but over time other tools may be introduced. NABERS ratings can apply to the base building, or to tenancies, or to the whole building. A NABERS tenancy rating tool is currently in development.

Star ratings are based on actual energy data from the previous 12 months and a rating is derived by calculating the amount of annual carbon dioxide emissions per m² of NLA.

Key requirements:

- NABERS Energy ratings for mandatory disclosure cannot include green power.
- NABERS Energy rating and the BEEC must be less than 12 months old.
- NABERS Energy requires twelve contiguous months of metered fuel data (electricity, gas, diesel etc). Data must be in the right format (for example, LPG must be measured in MJ, not litres) and the most recent data collected must be less than 4 months old.
- The base building energy rating includes energy used by common services such as cooling and ventilation systems, lifts, hydraulics, car parks and lobbies.

Key questions to ask in your business:

- Do you record and retain the necessary energy/fuel data, in the right format?
- Do you have adequate and effective metering or submetering? If not, you may be required to disclose a whole building rating.
- Do you understand which areas can be excluded from 'base building'? Both vacant areas and non-office areas can be excluded from the rated area.

4. Know what's involved in BEECs

Building energy efficiency certificates will summarise key information about the building including detailed energy consumption and greenhouse gas emissions data for the base building.¹ There will be an option to

¹ For sales involving strata titles, base building rates will not need to be disclosed

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include information about offsets, such as green power.

The BEEC must include energy efficiency guidance information for the base building and relevant tenancies. This will require a building and tenancy specific energy efficiency assessment report to be carried out. The BEEC should identify opportunities to improve a building's energy efficiency through changes such as improvements in heating, ventilation and air-conditioning systems; lighting systems; hot water systems; and office equipment.

Key points:

- BEECs will need to be updated every 12 months
- BEECs will need to include energy efficiency guidance information tailored for the base building and also the relevant tenancies
- Do you know what you need to know about your tenants' operations to equip you for disclosure?

5. Budget for the cost of compliance

Building owners and managers, as well as lessees who are looking to sublet space of more than 2,000 m² will need to prepare for the cost of obtaining NABERS Energy Ratings and BEECs – which must be less than 12 months old. Owners and managers should also assess whether energy efficiency is a part of regular maintenance plans, since improvements achieved here may result in improved energy ratings.

6. Establish organisational responsibility for energy efficiency

Affected organisations should appoint someone, preferably a director or senior manager, to be responsible and accountable for energy efficiency reporting, and for compliance with mandatory disclosure.

At a compliance level, businesses need to ensure that the appointed person has the right skills, organisational reach, and access to budget, to manage and comply with disclosure obligations.

Owners and managers of office space with an NLA greater than 2000m² will need to factor in time for the preparation of disclosure documents prior to offering their property for sale or lease.

7. Plan for energy efficiency and consider opportunities to improve

Responsibility for monitoring a building's ongoing energy efficiency performance will likely lead to increased focus on commissioning, operation and maintenance of plant and equipment. But there are opportunities here too, since there are often low-cost abatement measures which can improve a building's energy efficiency.

- Look for opportunities to reduce CO₂ emissions in existing buildings. Energy efficiency in the built environment offers some of the lowest cost greenhouse gas abatement opportunities available.
- Opportunities may exist to improve the efficiency of motor systems; commercial air handling; and commercial lighting in your building.
- Consider energy efficiency at the design stage of new buildings.

8. Watch out - beware enforcement and penalties for non-compliance

Although not yet finalised, the legislation is expected to include a range of civil and criminal penalties for non-compliance.

Penalties may range from civil penalties of up to \$100,000 for each offence of non-disclosure, to a power for purchasers to withhold the balance of purchase money until the energy efficiency information is provided. It will also be a criminal offence to provide false and misleading information.

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9. Review your leases and seek legal advice

Given the information needed in order to obtain a NABERS Energy rating, and to enable the preparation of a compliant BEEC, building owners and managers urgently need to consider whether they have access to all the data they need. Existing leases should be reviewed to check whether a building owner can compel tenants to provide information, in a timely manner and in the correct and verifiable format. Key terms of leases, such as base building service hours, will also be relevant to the NABERS Energy rating.

- review existing leases to check if tenants can be compelled to provide the information you need
- ensure that new leases include such an obligation
- know what commitments have been made regarding base building hours of service
- anticipate the additional data that will be needed if Mandatory Disclosure extends to other NABERS rating types in future.

10. Find out if you are eligible for a green building fund grant for your project

The Federal government's Green Building Fund will provide \$90 million in grants over five years from 2008-9, to assist in reducing the energy consumed in the operation of commercial office buildings. Three rounds of grants have been made since the Fund was announced.

"Stream A" grants are available to owners of existing commercial buildings to help them reduce energy consumption by retro-fitting or retro-commissioning projects. Grants of up to \$500,000 are available for up to 50% of project costs. To be eligible, a project must be completed by 31 December 2011.

To qualify for a grant, building owners must be able to demonstrate the level of greenhouse gas emissions prior to the commencement of the project, as well as the projected savings in greenhouse gas emissions likely to result from the project, by providing a statement from a NABERS assessor (see tip no 3).

More information about grants is available at

www.ausindustry.gov.au

Examples of eligible projects could include:

- common area lighting
- heating, ventilation and air-conditioning systems
- the building fabric, for example glazing and shading
- monitoring equipment, building automation systems, and control systems linked to improving the energy efficiency of the building.

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Property Council resources:

www.propertyoz.com.au and www.yourbuilding.org

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