

Proposed Mandatory Disclosure of Commercial Building Energy Efficiency

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Corporate owners of commercial office buildings with a Net Lettable Area over 2000m² (or parts of those buildings that meet the 2000m² threshold) will be required to disclose the energy efficiency of those buildings when they are sold or leased under proposed new Commonwealth legislation anticipated to take effect from mid 2010.

Why is Mandatory Disclosure of Energy Efficiency Proposed?

Commercial buildings account for approximately 10% of Australia's carbon emissions with approximately 27% of those emissions coming from commercial office buildings. The Federal Government has recognised that one of the most cost effective abatement of emissions opportunities available lies in regulating the built environment.

The intention of the proposed legislation is to encourage owners through market forces to reduce emissions or improve the energy efficiency of commercial office buildings. The required disclosure of energy efficiency will allow prospective purchasers and tenants of commercial office buildings to compare buildings on a like for like basis in terms of their energy efficiency. This has not been possible to date as the energy efficiency of commercial buildings has been largely self regulated by the private sector. Consequently, there has been little incentive for landlords to improve the energy efficiency of their buildings other than to attract or retain large institutional tenants with corporate social responsibility requirements.

Proposed Disclosure Requirements

The Federal Government proposes to use the National Australian Built Environment Rating System (NABERS) as the standard which is a performance based rating system that measures a building's overall environmental performance on a 1 to 5 star scale (with 5 being the highest).

There are 3 proposed levels of disclosure obligations:

1. the owner must disclose the NABERS star rating in any advertisement for sale or lease of the building;
2. the owner must provide a central government registry with a Building Energy Efficiency Certificate (BEEC) and Energy Efficiency Assessment Report (EEAR) within 30 days after a proposed sale or lease is initially advertised. This obligation will also apply to sub-landlords in the case of a sublease. The BEEC discloses the energy efficiency of the current use of the building and is valid for 12 months. The EEAR, however, is proposed to provide details of opportunities to improve the energy efficiency of the building in areas such as air conditioning, lifts and lighting including potential implementation costs and is valid for 7 years;
3. the owner must provide a BEEC and an EEAR to any prospective purchaser or tenant of the building or part of the building (as the case may be). Prospective purchasers or tenants will be able to search the central government registry to verify the validity of the EEAR and BEEC supplied to them by the owner.

Proposed Compliance and enforcement

A range of enforcement measures are proposed for non-compliance including infringement notices and civil penalty orders and criminal offences for the provision of misleading material. Failure to disclose may also allow a purchaser under a contract for sale of land to withhold the balance of the purchase price until disclosure is made. This is likely to require amendment to the existing conveyancing disclosure requirements but has not been separately addressed to date.

Potential Impact on Owners

Aside from owners being required to comply with the disclosure obligations at the most basic level, it is likely that the shift in transparency of the commercial office industry in relation to energy efficiency will:

1. increase focus by developers and owners on the importance of a building's energy efficiency performance including setting efficiency targets and performance criteria for management and planning of current and future building;
2. require contract and lease documentation to incorporate efficiency targets and performance criteria including service and maintenance contracts;
3. require industry participants to gain awareness of NABERS and implement such ratings systems at a design and construction level in addition to the management level;
4. create opportunities for energy efficiency advisory services;
5. increase retrofitting of existing buildings to remain competitive with new 'green' buildings; and
6. increase tenants bargaining position in relation to its 'green' requirements.

The Property Council of Australia recently reported that properties with above average NABERS ratings delivered higher increases in annual rent and lower vacancy rates which in turn delivered faster increases in capital values. If the impact on the industry and emissions is as positive and material as this report indicates, then the disclosure obligations may be extended in the future to apply to retail and industrial buildings.

The draft Commonwealth legislation is expected to be made public in the next few months and a further update will be provided in Connections at that time.

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Truman Hoyle is a Sydney based law firm serving the new economy industries across the Asia Pacific region. Australasian Legal Business has recently ranked the firm's Telecommunications, Media & Technology and Intellectual Property practices as top-tier in Sydney. The firm was named Australian Law Firm of the Year in 2005 and again in 2006, for firms with 50 lawyers or less. In 2009 our firm was awarded the prestigious ACOMM Award for Professional Services Excellence at the annual Australian telecommunications industry awards.

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