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Building Energy Efficiency Disclosure – Update on requirements for sellers and landlords of large office buildings

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Amendments made to the building energy efficiency disclosure legislation in the middle of last year have changed and clarified the statutory disclosure requirements for sales and leases of affected buildings. Although the changed requirements and operation of the exemptions and exceptions have been in place for a number of months, their impact, in our experience, is still not fully understood and these are requirements which some parties may only encounter on an occasional basis, depending upon their property portfolio, and sale or lease transactions undertaken.

However, with significant penalties applying for non-compliance, it is essential that vendors, landlords, selling agents, property managers and their advisors and consultants are aware of, and compliant with, the disclosure requirements when marketing affected properties or in approaching any transaction. Buyers, tenants and their advisors also need to know what to look for when exemptions or exceptions are claimed from the disclosure requirements.

Amendments to the *Building Energy Efficiency Disclosure Act*

The *Building Energy Efficiency Disclosure Act 2010* (Cth)¹ (**BEED Act**) requires sellers and landlords of office spaces of 2,000 square metres or more (**large office space**) to provide energy efficiency information, in the form of a current Building Energy Efficiency Certificate (**BEEC**) to prospective buyers and tenants where those office spaces are offered for sale, lease or sublease.

The BEEC should be provided as early as possible in the transaction enquiry process, and must also be publicly accessible on the Building Energy Efficiency Register (**BEER**).

BEEC's include the following information:

- A tenancy lighting assessment of the relevant area of the building;
- The building's National Australian Built Environment Rating System (**NABERS**) energy star rating, which must also be included in any advertising for the sale, lease or sublease; and

- General energy efficiency guidance.

Several amendments to the BEED Act came into force on 1 July 2015, and these have affected the operation of the Commercial Building Disclosure Program (**CBD Program**), a unit which administers the BEED Act within the Commonwealth Department of Industry, Innovation and Science (**DIIS**). Here we provide an update on the disclosure requirements as a result of key amendments to the Act in 2015.

Do all large office spaces have to comply with the disclosure requirements?

Some buildings or areas of buildings are not affected by the CBD Program because they either:²

- Qualify as an exception to the program; or
- Are granted a temporary exemption from the program upon application.

Exceptions to the CBD Program

An exception to the CBD Program will apply where the building or area is not '*disclosure affected*', and therefore falls outside the disclosure requirements, by reason of qualifying for certain exception categories within the BEED Act and subordinate legislation and instruments, some of which changed since July 2015.

Exceptions are '*automatic*' in that unlike exemptions, dealt with below, they do not need to be formally applied for, and no register is kept of buildings that qualify for an exception. However, the DIIS may ask for information to substantiate the exception as part of their compliance monitoring activities.³ Exceptions relate to either the type of building or the type of transaction as detailed below.

1. CBD Exceptions - Types of buildings

Exceptions apply to:⁴

- New buildings where a certificate of occupancy (or its equivalent) has either not yet been issued or was issued less than 2 years earlier;
- Buildings which have completed a '*major refurbishment*' for which a certificate of occupancy (or equivalent) was issued less than 2 years earlier. Major refurbishments where no certificate of occupancy was issued would still need to apply for an exemption;
- Strata-titled buildings; and
- Mixed use buildings where the total office space comprises less than 75% of the building by net lettable area (or gross lettable area if net lettable area is unavailable).

A point to note in respect to buildings which have undergone refurbishment is that in order to qualify as a '*major refurbishment*', the seller or lessor must

have an assessment by an accredited assessor which verifies that the refurbishment has resulted in a change to the base building rating of at least half a star.⁵

2. CBD Exceptions - Types of transactions

The following transactions do not create a disclosure obligation, even if the space is disclosure affected:⁶

- The sale of a building through the sale of shares or units or the sale of a partial interest in a building;
- Leases and subleases of 12 months or less (including any option to extend). For instance, a 6 month lease with an option to extend for another 6 months would not trigger a disclosure requirement. However, a 6 month lease with an option to extend for 12 months would trigger a disclosure requirement.

Transactions (being an '*offer to enter into a contract*') between an entity and a wholly-owned subsidiary of the entity or wholly-owned subsidiaries of an entity⁷ are now outside the disclosure requirements on the basis that those transactions are considered to be '*non-market transactions*' given energy efficiency information would not influence the decision making process.⁸ This exception was introduced on 1 July 2015.

Exemptions from disclosure obligations under the CBD Program

The categories for exemption from the disclosure requirement under sections 11, 12 or 15 of the BEED Act are as follows:⁹

- a. Major refurbishments underway;
- b. Unsolicited offers;
- c. Non-assessable buildings; and
- d. The building or area of the building is used for police or security operations.

Categories a – c above are new categories, which were introduced effective 1 July 2015, by amendments to the BEED Act and the *Building Energy Efficiency Disclosure Regulations 2010* (Cth) (**BEED Regulations**).

Building owners and landlords can apply to the administering body, the CBD, for exemption under the above categories where they meet the criteria and wish to obtain the exemption.

Further details in relation to each of the above exemption categories are below.

1. Unsolicited offers

'*Unsolicited offers*' were introduced as a new exemption category in July 2015 due to their

unilateral nature and the fact that energy efficiency information is unlikely to influence a decision to purchase or lease.¹⁰

If a building owner or landlord receives an offer to purchase, lease or sublease large office space, from a person or entity (**offeror**) and the offer is unsolicited¹¹ they can either seek an exemption¹² from having to comply with the requirement to provide a BEEC, or provide the buyer, tenant or sub-tenant with a BEEC before continuing with those negotiations and entering into any contract for sale or lease.¹³

The '*unsolicited offer*' requirement would need to meet the requirements in s 5A of the BEED Regulations, which include a requirement for the building owner or landlord not to have, in the 6 months before the offer is made, any of the following:

- Made any offer to sell, let or sublet the building or the area;
- Invited any offer to purchase, lease or sublease the building or the area; or
- Advertised the building or the area for sale, lease or sublease.¹⁴

If the building owner or landlord wishes to apply for exemption under this category, they would also need to obtain a signed waiver from the offeror, by which the offeror waives its right to receive a current BEEC.¹⁵ The signed waiver must be lodged with the application for exemption under this category.¹⁶ Once obtained, exemptions granted under this category are valid for no more than 12 months from the date of issue,¹⁷ unless that period is extended for a further period of 12 months on the basis that negotiations to which the exemption relates are continuing.¹⁸

2. Major refurbishments underway

Before 1 July 2015, buildings undergoing major refurbishments which would affect the building's energy efficiency rating were exempt from disclosure due to a modification of the NABERS Energy Rating rules.¹⁹ This has now been formalised as an exemption category.²⁰

Ongoing major refurbishments to either the building or an area of a building are required to alter the NABERS rating by at least half a star to qualify for this disclosure exemption category.²¹ An application for this exemption category must include an assessment by an accredited assessor, showing that the refurbishment is a major refurbishment.

Once obtained, exemptions under this category are valid for a period of 12 months from the date the exemption is granted.

3. Non-assessable buildings

From 1 July 2015, an exemption may be granted for a disclosure affected building or area of a building where a Tenancy Lighting Assessment or NABERS Energy base building or whole building rating assessment is not possible.²²

'*Non-assessable buildings*' have been included as a new exemption category to clarify previous legal ambiguity for such scenarios.²³ A building or area of a building of large office space is '*non-assessable*' if it is not possible to do either of the following due to the characteristics of the building or relevant area of the building:

- Assign an energy efficiency rating to the building; or
- Assess the energy efficiency of lighting of the building or the area of the building in accordance with assessment methods and standards.²⁴

The applicant would need to include an assessment by an accredited assessor, showing that the building or the area is non-assessable with the application for exemption under this category.

4. Spaces used for Police or Security Operations

An exemption may be granted if a disclosure affected office is used by a federal, state or territory police or security agency.

Changes to exemption process

The July 2015 amendments to the BEED Act have also made several other changes to the exemption process, including:²⁵ pre-existing exemptions, listing exemptions on the register and declarations of conflict of interest as detailed below.

1. Pre-existing exemptions

There is no longer a requirement to pay twice for the same exemption. From 1 July 2015, current exemptions can be transferred to new owners and landlords on application without the need to re-apply or pay the application fee.²⁶

2. Listing exemptions on the Register

Exemptions will now also be listed on the BEER.²⁷ This will allow potential buyers and tenants to readily establish if a building being advertised without a BEEC has a valid reason for doing so.

3. Declaration of conflict of interest

Assessors will now be required to declare a conflict of interest²⁸ when making an assessment in relation to any exemptions on application.²⁹

Penalties for failure to comply with disclosure obligations

The penalty for failing to comply with the disclosure obligations for individuals is 350 penalty units or \$63,000 and for a body corporate is 1,000 penalty units or \$180,000.³⁰

Conclusion

The BEED disclosure regime has been in place for some time now, and all sellers and landlords of large office buildings and spaces need to be aware of, and compliant with, its operation at the time of considering any proposed sale or lease transaction.

The above changes seek to reduce the regulatory burden on building owners and landlords, and improve the efficiency of the administrative processes around the exemption process, but there are a number of technicalities to be aware of.

Whether the policy aims and objectives of the building energy efficiency disclosure legislation are achieved or improved by these amendments will remain to be seen. For parties that do not deal regularly in large office sales or leases, there is some prospect of inadvertent breaches of these disclosure requirements, and it is not clear what approach will be taken to auditing and enforcement. But with substantial penalties potentially applying for non-compliance, all affected parties need to be across the disclosure requirements.

¹ Subordinate pieces of legislation include: *Building Energy Efficiency Disclosure Regulations*; *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2015* (Ministerial Determination) (Cth) and the *Building Energy Efficiency Disclosure Determination 2015* (Secretarial Determination) (Cth).

² Commercial Building Disclosure, *Exceptions and Exemptions* (17 November 2015) Australian Government Department of Industry, Innovation and Science <<http://cbd.gov.au/does-this-apply-to-me/exceptions-and-exemptions>>.

³ Ibid.

⁴ *Building Energy Disclosure (Disclosure Affected Buildings) Determination 2015* (Cth), s 5.

⁵ See the regulation 5B, *Building Energy Efficiency Disclosure Regulations 2010* (Cth).

⁶ Commercial Building Disclosure, *Exceptions and Exemptions* (17 November 2015) Australian Government Department of Industry, Innovation and Science <<http://cbd.gov.au/does-this-apply-to-me/exceptions-and-exemptions>>.

⁷ *Building Energy Efficiency Disclosure Act 2010* (Cth) s 5A.

⁸ Ibid n 2.

⁹ Commercial Building Disclosure, *Exemption Application Form – Guidance* (2014) Commonwealth of Australia <<http://www.cbd.gov.au/files/files/CBD%20Policy%20Documents/exemption%20guidance.pdf>>.

¹⁰ Commonwealth of Australia, *CBD Legislative Changes – Guidance* (2014) <<http://www.cbd.gov.au/files/files/CBD%20Policy%20Documents/Guidance%20Notes%20on%20Legal%20Changes.pdf>>.

¹¹ *Building Energy Efficiency Disclosure Regulations 2010* (Cth) r 5A(1).

¹² *Building Energy Efficiency Disclosure Act 2010* (Cth) s 17(3)(b).

¹³ Ibid s 11.

¹⁴ *Building Energy Efficiency Disclosure Regulations 2010* (Cth) r 5A(1) (d).

¹⁵ Commonwealth of Australia, *Unsolicited Offer Exemption – Guidance* (2014) <<http://www.cbd.gov.au/files/files/CBD%20Policy%20Documents/Guidance%20Note%20on%20Exemption%20Application-Unsolicited%20Offer.pdf>>.

¹⁶ *Building Energy Efficiency Disclosure Regulations 2010* (Cth) r 5(2)(b).

¹⁷ Ibid r 5A(3).

¹⁸ Ibid r 5A(4).

¹⁹ *Building Energy Efficiency Determination 2011* (Secretarial Determination) (Cth).

²⁰ *Building Energy Efficiency Disclosure Regulations 2010* (Cth) r 5B.

²¹ Ibid r 5B(1).

²² Commercial Building Disclosure, *Exceptions and Exemptions* (17 November 2015) Australian Government Department of Industry, Innovation and Science <<http://cbd.gov.au/does-this-apply-to-me/exceptions-and-exemptions>>.

²³ Ibid n 2.

²⁴ *Building Energy Efficiency Disclosure Act 2010* (Cth) s 17(3)(b).

²⁵ Ibid n 2.

²⁶ *Building Energy Efficiency Disclosure Act 2010* (Cth) s 17(5).

²⁷ Ibid s 14(2).

²⁸ *Building Energy Efficiency Disclosure Regulations 2010* (Cth) r 9(3A).

²⁹ *Building Energy Efficiency Disclosure Act 2010* (Cth) s 17(2)(b).

³⁰ Ibid s 12(6).

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