



## ENERGY EFFICIENCY DISCLOSURE FOR COMMERCIAL BUILDINGS

**Under the *Building Energy Efficiency Disclosure Act 2010 (the Act)*, from 1 November 2010, owners of certain commercial office buildings will need to disclose the energy efficiency of those buildings when they are sold or leased.**

The scheme is designed to make businesses more energy efficient, by improving base standards and star ratings for appliances, equipment and buildings and by phasing out inefficient technologies. It is also designed to give purchasers, lessees and sublessees more information about the efficiency of office spaces.

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### WHO IS CAPTURED BY THE ACT?

Vendors and lessors of commercial office spaces with an area of at least 2000 square metres are caught by the Act.

Provided certain requirements are met, leases and subleases for a period of less than 12 months (including any options to extend) will be automatically exempt from the requirements under the Act.

Other exemptions may be available by making an application prior to when disclosure is required. Building owners wishing to claim the exemption will need to support their claim with evidence.

### WHAT IS REQUIRED BY AN OWNER?

When selling or leasing, building owners caught by the scheme will need to provide a valid Building Energy Efficiency Certificate (BEEC) to prospective purchasers and lessees. The BEEC has three major components as follows:

- energy efficiency star rating based on the NABERS (National Australian Built Environment Rating System) scheme;
- energy efficiency assessment of the building; and
- an energy efficiency assessment report which provides suggestions on how to improve the building's energy efficiency.

Where an owner invites offers to purchase or lease, an owner is precluded from doing so unless a valid and current BEEC has been registered.

If a purchaser or tenant requests a copy of the registered BEEC, it must be provided "as soon as is reasonably practicable" after receiving the request. Therefore the disclosure obligations does not automatically arise when an owner lists a property for sale or lease but when the written request is received from the purchaser or tenant.

Also, any advertisement about the sale or lease must include the NABERS star rating.

The BEEC will be valid for 12 months however the energy efficiency guidance is only required to be updated every 7 years.

### HOW WILL THE SCHEME BE IMPLEMENTED?

The scheme will be implemented in two phases. The first phase will include large commercial office buildings and the second phase will involve other commercial building types, including hotels, retail building, schools and hospitals.

### COMPLIANCE

The Building Energy Efficiency Register will be established as a federal registry to hold records of all BEECs.

Owners who don't comply with the scheme will risk a penalty or prosecution. The primary enforcement mechanism for non-disclosure will be infringement notices however the administering body will have powers to formally inspect documents and information, obtain warrants and interrogate relevant persons.

### FURTHER STEPS

All owners and large tenants of commercial office buildings, their advisers and agents should be aware of the requirements of the new scheme and should familiarise themselves with the NABERS Energy base building assessment tool.

If you are planning on selling or leasing office space, the first NABERS Energy base building star rating can take time and you should prepare now for the introduction of the scheme.

Under the Act assessors have the ability to compel tenants to provide data which is required. Many owners will need to work with their tenants to collect the data and going forward, all leases should contain provisions for landlords to obtain the needed information.

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# CHANGES TO THE PROPERTY AGENTS AND MOTOR DEALERS ACT

The *Property Agents and Motor Dealers Act 2000 (Qld)* (PAMDA) was amended on the 17 August 2010 with the amendments to take effect on 1 October 2010. Comparative provisions of *Body Corporate and Community Management Act 1997 (Qld)* (BCCM) were also amended similar to the provisions of PAMDA.

The key consumer protection measures retained are:

- Cooling off periods;
- Warning statements (Form 30c) to be attached to each residential sale contract; and
- Retaining the distinction between a 'Proposed Relevant Contract' (a contract not yet signed by either party) and 'Relevant Contract' (a contract signed by both parties).

## WARNING STATEMENTS

Warning statements (Form 30c) for residential property contracts were initiated in Queensland when the PAMDA came into effect in 2000. Buyers have been successful in terminating their contracts due to the failure of the seller or their agent to provide the warning statement, or not in the correct order as prescribed by the legislation.

Chapter 11 of PAMDA currently includes processes for the presentation and delivery of the proposed residential contract by a real estate agent or seller to the proposed buyer; section 364. A simple error in not faxing the Form 30c before the proposed contract in the same continuous fax, has provided the buyer a right of termination.

### *What will change?*

The amendment removes the strict requirement that a Form 30c be attached to the proposed contract as the 'first and top page' of the contract. For electronic methods of providing the proposed contract, it will be sufficient that the documents are provided '*as near as possible to the same time having regard to the normal operation of fax machines*', or by including in a single email.

Beware... if the seller or their agent fails to provide a warning statement they are deemed to commit an offence with a proposed penalty of \$20,000, sections 368A(6) and 368C(3).

To avoid suffering any penalty, the following documents **must** be provided in one continuous facsimile, one email or attached:

- Warning statement (Form 30c);
- BCCM Information sheet (if required); and
- Proposed Relevant Contract.

It will be sufficient to show that a buyer has been directed to their rights provided in the Form 30c, when they have signed the Form 30c.

If a seller or their agent notifies the buyer of the failure and complies before the Proposed Relevant Contract becomes a Relevant Contract, they may avoid the penalty. The notice provided by the seller must state the Proposed Relevant Contract is withdrawn and advise whether new documents complying with PAMDA will be given to the buyer.

## COOLING OFF PERIOD

The current cooling off period is 5 business days commencing on the date the buyer is bound by the Relevant Contract; section 364.

### *What will change?*

The amendments provide that the period of time will change to commence on the day a buyer receives a copy of the Relevant Contract from the seller. Where the buyer has signed the Relevant Contract after the seller, the buyer is taken to have received it at the time it is signed and communicates the acceptance of the offer to the seller.

## CHANGES TO TERMINATION RIGHTS

Under section 365 of PAMDA the parties are bound to a Relevant Contract when the buyer or their agent receives the Form 30c, BCCM Information Sheet (if applicable) and the Relevant Contract, along with a direction to the Form 30c warning statement. If the documents are not provided, or not in the correct order, the buyer will not be bound and can terminate or withdraw from the transaction anytime before settlement.

### *What will change?*

If a direction to the Form 30c is not given when the buyer first receives the Proposed Relevant Contract, under section 370 of the amendments, they can exercise a right of termination on or before 90 days after receiving a copy of the Relevant Contract from the seller. The notice of termination needs to be signed, dated and refer to the relevant termination section. If the buyer has signed the Form 30c, they effectively waive this right.

## TRANSITIONAL PROVISIONS

If a buyer has not exercised their rights under PAMDA to terminate the contract under the current PAMDA notice provisions, they will lose their rights following the commencement of the amendments on the 1 October 2010.



## RECOMMENDED PROCEDURES TO FOLLOW

For the seller until 30 September 2010:

- Current rights under PAMDA will terminate on 1 October 2010. It is recommended that any new Proposed Relevant Contracts include a Warning Statement (Form 30c) and the BCCM Information Sheet (if required) are provided in the correct prescribed order.
- Include an acknowledgement regarding the signing of the Form 30c before the Proposed Relevant Contract in all transactions;
- Record the dates relevant to the cooling off and termination limit.

For the seller following 1 October 2010:

- ensure the new Forms are used;
- check that the Form 30c has been executed by the buyer; and
- record the date of acknowledgement of acceptance of the buyer.

For the buyer until 30 September 2010:

- check whether the Form 30c was provided in compliance with PAMDA or BCCM;
- check the date that the Relevant Contract was executed & proposed settlement date; and
- if the buyer intends to terminate the contract, it must be done on or before 30 September 2010 if the seller or their agent failed to comply with the relevant provisions.

For the buyer following 1 October 2010:

- record the date of receiving the Proposed Relevant Contract, Warning Statement and any BCCM statements, and note if the seller has complied;
- record the date when acknowledgment of receipt of the Proposed Relevant Contract is given by the buyer; the 90 days for termination follows from this date; and
- in the event of non compliance with warning statements provided by the seller or agent, the buyer can provide notice in the required form to terminate.

**For further assistance, please contact our Property Division on 1300 369 581.**

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# WHAT A NUISANCE!



**Cigarette smoke can be more of a nuisance for some people than others. In the recent QCAT decision of *Norbury v Hogan* [2010] QCAT 296 the President of the Tribunal had to consider the effect of Ms Norbury's smoking on her neighbor Mr Hogan. The QCAT decision was an appeal on a question of law from a departmental adjudication.**

## SMOKING AS A NUISANCE

Mr Hogan had originally taken his complaint about Ms Norbury's smoking to departmental adjudication. At the adjudication he led evidence of his medically diagnosed sensitivity to cigarette smoke. Mr Hogan alleged that cigarette smoke from Ms Norbury in Lot 2 drifted into his Lot 5, causing him a significant nuisance. Mr Hogan asserted that Ms Norbury's smoking amounted to a breach of Section 167 of the *Body Corporate and Community Management Act 1997* ("BCCM ACT") which provides that:

*"The occupier of a lot included in a community titles scheme must not use or permit the use of, the lot or the common property in a way that –*

*causes a nuisance or hazard; or*

*interferes unreasonably with the use or enjoyment of another lot included in the Scheme; or*

*interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property."*

## THE ADJUDICATORS DECISION

In the first instance the Adjudicator found there was a reasonable likelihood that persons smoking on Lot 2, including Ms Norbury, or the adjacent common property, might cause nuisance to Mr Hogan, including by unreasonably interfering with his use of his lot. The Adjudicator also found that Ms Norbury was aware of the harm the cigarette smoke was causing Mr Hogan, due to his medical sensitivity, and that she did not take reasonable steps to minimise the effects of her smoking.

Taking this into account the Adjudicator ordered that Ms Norbury give consideration to the effects of cigarette smoke on Mr Hogan, that she take reasonable steps to ensure that smoking in Lot 2 or adjacent common property did not cause a nuisance to Mr Hogan or to cause unreasonable interference with his use and enjoyment of Lot 5.

The Adjudicator's decision followed a number of earlier decisions and took into account the Tobacco and Other Smoking Products Act 1998. The Adjudicator's orders followed two key findings of the Adjudicator being:

That the cigarette smoke emanating from Lot 2 was, on a subjective test (that is, with specific regard to Mr Hogan) unreasonably interfering with his use and enjoyment of his lot; and

Because of Mr Hogan's particular sensitivity there was a reasonable likelihood that the cigarette smoke would, in fact, cause nuisance or unreasonable interference with Mr Hogan's use and enjoyment of his lot.

Cigarette smoke is just one of a number of different types of nuisance that can arise in a community titles scheme context. Noxious fumes, dust, noise, vibration, sewerage, odours and light are all types of nuisance which can also arise. While considering Mr Hogan's plight the Tribunal President also considered the application of the common law principles of nuisance within the community titles scheme context.

*Continued overleaf*

## THE LAW OF NUISANCE *continued*

The resulting decision provides a useful précis of the law including:

While the BCCM Act does not expressly confer a right on an owner to use the common property in a manner, or for a purpose, that does not unreasonably interfere with the exercise of similar rights by others, that is implicit in section 167.

There is no statutory definition of 'nuisance' or 'unreasonable interference' and therefore recourse to the common law is required.

Private nuisance is an unlawful and unreasonable interference with an occupier's use and enjoyment of their land or some other right over, or in connection with, it.

Unreasonable interference will depend on the circumstances of each case but inconvenience must materially interfere with the ordinary notions of "plain and sober" persons and not merely the "elegant or dainty" habits of a complainant.

The nuisance must result in a substantial degree of interference according to reasonable standards for the enjoyment of the affected premises.

Give and take will apply in residential areas so that an ordinary and accustomed use of premises will not be considered a nuisance even if inconvenience to a neighbour is caused.

Nuisance does not necessarily arise because the complainant is abnormally sensitive to the nuisance being complained of.

Where nuisance is unreasonable liability will normally only be imposed where the harm or risk to the complainant is greater than ought be borne by them.

## THE CORRECT TESTS FOR NUISANCE

Applying these principles to Mr Hogan's complaint the President found that the Adjudicator erred in two critical respects. The first is that the cigarette smoke emanating from Lot 2 or the adjacent area of common property had to be of such a character or quantity that it would affect the use and enjoyment of Lot 5 even if Mr Hogan was not overly sensitive to cigarette smoke. In other words, an objective test of whether the cigarette smoke constituted an unreasonable interference was required and not a subjective test.

Secondly, the Adjudicator's decision could not be allowed to stand because, in effect, the Adjudicator had made no finding with reference to an objective test. In other words, the Adjudicator had only made findings in relation to the likelihood of the nuisance in light of Mr Hogan's particular sensitivities and not a "normal" person using and occupying Lot 5.

## SO WHEN IS SMOKING A NUISANCE?

The decision is useful because it provides some certainty to smokers and non-smokers alike. If cigarette smoke emanating from a lot is of such a volume, quality or character as to be an unreasonable interference to the use and enjoyment of another "normal" owner's lot then that smoking will be caught under Section 167. Unfortunately it may take clouds of noxious smoke over prolonged periods, in high concentrations. The additional benefit of the decision however is the President's dissertation on the common law principles of nuisance, which may be relevant in the application of Section 167 to other disputes. Body Corporate Managers, Resident Unit Managers and Lot Owners should take note of those principles if they are ever party to a complaint that may be caught by Section 167.

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# RETAIL SHOP LEASES – DISCLOSURE CHANGES

BY LISA SYLVESTER

**Amendments to the *Retail Shop Leases Regulation 2006 (Qld) (Regulation)* were made on the 26 August 2010 to take effect from 1 January 2011.**

## LESSOR DISCLOSURE REQUIREMENT CHANGES

A lessor of a retail shop is required to provide disclosure of prescribed information to a prospective lessee under section 22 of the Retail Shop Leases Act 1994 (Qld) (Act) at least 7 days prior to entering into a lease.

Section 3 of the Regulation detailing the lessor disclosure obligations has been expanded to include the following information or further clarification of existing obligations:

- The date or *estimated* date the lease starts;
- The date the lessee is entitled to occupy the leased shop if different to the date or estimated date the lease starts;
- Details of any option to renew the lease including:
  - The date by which the lessee must exercise the option; and
  - The option period;
- Further details regarding rent including:
  - The starting annual base rent;
  - The method of payment;
  - Any rent free period;
  - Any rent adjustment and the method of calculation;
  - Any turnover rent and the method of calculation
- If turnover rent is not payable, whether the lessee is required to give information to the lessor on turnover;
- The date any outgoings are to commence and the amounts;
- Lessee liability to any promotion amounts and items under section 48(2) of the Act including:
  - Survey fees;
  - Obtaining mortgagee consent;
  - Lease duty;
  - Registration costs.
- The core trading hours for the leased shop or shopping centre, and if the lessee is entitled to operate outside of those hours, what cost if any is payable;
- If the leased shop is in a centre, the number of retail shops in the centre; the centre's lettable area and any lessor assurances regarding the nature of other businesses operating in the retail shopping centre;
- Any costs associated with the lessor providing the lessee with specific services, facilities, structures, fixtures, plant, equipment, and fit out by the lessor;
- Any contribution by the lessor or lessee to the fit out and standards required;
- Details of any current legal proceeding in relation to the lawful use of the leased shop, leased building or the centre.

The amendments were introduced in order to harmonise retail tenancy disclosure statements in Queensland, New South Wales and Victoria, by streamlining the requirements for landlords who own multiple shopping centres across the states, as well as providing more detailed disclosure to prospective retail shop lessees.

The Form currently in use for disclosure has not yet been amended, and is expected to be available from the Department of Justice and Attorney General Queensland web site.

**For further assistance, please contact Property Section Partners Chris Studach or Peter McLeod on 1300 369 581.**