

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 203

Issued by the Authority of the Minister for Defence Materiel and Science
for the Minister for Climate Change, Energy Efficiency and Water

Building Energy Efficiency Disclosure Act 2010

Building Energy Efficiency Disclosure Regulations 2010
(the Regulations)

The principal objectives of the *Building Energy Efficiency Disclosure Act 2010* (the Act) are to:

- establish a national scheme for disclosure of energy efficiency information relating to large commercial office spaces (including whole buildings), at the point of sale or lease of those offices;
- provide for the form and nature of building energy efficiency certificates (BEECs), which contain the information that must be disclosed in compliance with the scheme requirements;
- establish an online register for publishing BEECs to meet disclosure requirements;
- establish a scheme for accreditation of persons to assess the energy efficiency of offices for the purposes of obtaining BEECs;
- provide for exemptions to be granted from the disclosure requirements of the scheme in certain circumstances;
- provide for a system of auditing and verification of assessments undertaken by accredited assessors; and
- provide the legal framework for the administration of the disclosure scheme.

Section 72 of the Act provides that the Governor General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

A number of provisions of the Act provide for regulations to prescribe certain matters relating to BEECs, exemption applications, becoming an accredited assessor, and methods for serving infringement notices (among others). The purpose of the Regulations is to prescribe these matters, and to prescribe additional matters which are necessary or convenient for giving effect to the Act.

In summary, the Regulations prescribe:

- information that must be included in BEECs;
- information that must be included in an application for exemption from an energy efficiency disclosure obligation;

- information that must be included in an application for exemption from a requirement that a person provide information in respect of, or access to, a building or area;
- information that must be included in an application to be made an accredited assessor;
- the training required to be undertaken by those wishing to be accredited as assessors;
- conditions that are imposed on the accreditation of all accredited assessors;
- the form that identity cards must take (in relation to auditors);
- the formula for indexation of prescribed fees by reference to CPI movements;
- criteria for the content of infringement notices, the method of service of infringement notices and certain other matters regarding infringement notices.

Details of the Regulations are set out in the Attachment.

The Regulations reflect the outcomes of comprehensive consultation with business and other stakeholders between December 2007 and June 2010, designed to create a commercial building energy efficiency disclosure scheme that provides meaningful energy efficiency information to the commercial office market without imposing an unnecessarily heavy compliance burden on business. Information forums were held in capital cities in January 2009 and again in November 2009, with over 1100 industry and government stakeholders participating in these forums. Draft regulations were consulted with a group of key industry stakeholders in June 2010, and where appropriate the feedback received has been incorporated into the Regulations.

The Regulations commence on the commencement of section 3 of the Act. Section 3 of the Act will have effect from 1 July 2010. Accordingly, the Regulations operate with retrospective effect from that date.

This retrospective operation is consistent with section 12(2) of the *Legislative Instruments Act 2003*. This is because the disclosure obligation provisions in the Act in sections 11, 12 and 15, do not commence until the implementation day fixed by Proclamation, by virtue of section 22 of the Act. The implementation day is 1 November 2010. Consistently with this, none of the provisions of the Regulations operate to:

- affect the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of registration so as to disadvantage that person; or
- impose liabilities on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of registration.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

ATTACHMENT

Details of the *Building Energy Efficiency Disclosure Regulations 2010*

Part 1- Preliminary

Regulation 1 - Name of Regulations

This regulation provides that the name of the Regulations is the *Building Energy Efficiency Disclosure Regulations 2010*.

Regulation 2 - Commencement

This regulation provides that the Regulations commence on the same day as section 3 of the *Building Energy Efficiency Disclosure Act 2010*, which is 1 July 2010.

Regulation 3 - Definitions

This regulation sets out the following definitions:

- **ABN** has the meaning given by section 41 of *A New Tax System (Australian Business Number) Act 1999*;
- **ACN** has the meaning given by section 9 of the *Corporations Act 2001*;
- **Act** means the *Building Energy Efficiency Disclosure Act 2010*;
- **ARBN** has the meaning given by section 9 of the *Corporations Act 2001* (the Corporations Act);
- **base building rating** has the meaning given by the National Australian Built Environment Rating System (NABERS) Energy rating rules;
- **Commercial Building Disclosure Program Module** would mean a course designed to provide competency in understanding and applying the provisions of the Act, these Regulations, and legislative instruments under the Act that relate to an accredited assessor's responsibilities.
- **GreenPower program** means the program known as the National GreenPower Accreditation Program, which is a joint initiative of agencies of the governments of New South Wales, Victoria, Queensland, Western Australia, South Australia and the Australian Capital Territory;
- **hours of occupancy**, for a building or an area of a building, has the same meaning as in the NABERS Energy rating rules;
- **NABERS Energy rating rules** means the document *Rules for collecting and using data: NABERS Energy and Water for offices*, dated 1 July 2010 and published by the NSW Environment Department, as in force from time to time. A note to the definition provides that the document titled *Rules for*

collecting and using data: NABERS Energy and Water for offices is available from the NSW Environment Department's website at <http://www.nabers.com.au>;

- ***National Australian Built Environment Rating System***, or ***NABERS***, means a performance-based rating system managed by the NSW Environment Department, that measures existing buildings' environmental performance during operation;
- ***net lettable area***, for a building or an area of a building, has the same meaning as in the document *Method of Measurement for Lettable Area*, dated March 1997, published by the Property Council of Australia Limited, as in force at the commencement of these Regulations. A note to the definition provides that the document titled *Method of Measurement for Lettable Area* is available from the Property Council of Australia Limited's website at <http://www.propertyoz.com.au>;
- ***NSW Environment Department*** means the Department of State of NSW that administers the *Protection of the Environment Administration Act 1991* (NSW);
- ***rated areas*** has the meaning given by the NABERS Energy rating rules;
- ***rating period*** has the meaning given by the NABERS Energy rating rules; and
- ***whole building rating*** has the meaning given by the NABERS Energy rating rules.

According to a note at the end of regulation 3, several others words and expressions used in the Regulations have the meaning they have in the Act, for example:

- accredited assessor;
- building energy efficiency certificate;
- energy efficiency obligation;
- issuing authority;
- transition period; and
- recognised rating.

Part 2 - Building energy efficiency certificates

Regulation 4 - Information included in certificates

Under subsection 13(3) of the Act, information may be included in a BEEC if it is of a prescribed kind. Subsection 13(4) of the Act provides that a building energy efficiency certificate is current for no more than 12 months from the date of its issue. Regulation 4 prescribes the following information for inclusion in a BEEC:

- the date the certificate was issued;

- a statement that the certificate ceases to be current 12 months from the date of its issue under subsection 13(4) of the Act, and the last day on which the certificate remains current;
- a unique identifying number for the certificate;
- the name of the owner of the building;
- if the building has a name — the building name;
- the street address of the building;
- if the certificate is for the building — the net lettable area of the building;
- if the certificate is for an area of the building — the net lettable area of the area of the building;
- the hours of occupancy for the building determined under the NABERS Energy rating rules;
- whether the energy efficiency rating for the building is a base building rating or a whole building rating;
- the energy consumption of the building, measured in MJ per year;
- the greenhouse gas emissions generated by the building:
 - emitted from rated areas for the rating period covered by the energy efficiency rating, measured in kg of carbon dioxide per year; and
 - not including the effect of any electricity purchased for the building or area under the GreenPower program;
- if electricity has been purchased for the building, or an area of the building, under the GreenPower program - an energy efficiency rating for the building that includes the effect of any electricity purchased under the GreenPower program, calculated using the NABERS Energy rating rules;
- the greenhouse gas emissions generated by the building, because of the energy consumed, per m² of the building during a year;
- the name of the assessor; and
- the registration number of the assessor.

Part 3 - Exemptions

Regulation 5 - Exemption from energy efficiency disclosure obligation

Under section 17 of the Act, persons who are subject to an energy efficiency disclosure obligation under sections 11, 12 and 15 of the Act may seek an exemption from the obligation in certain circumstances.

Subregulation 5(1) sets out the information that must be included in an exemption application under paragraph 17(2)(b) of the Act, whether the application is from a person or a corporation. Note that only corporations have disclosure obligations under sections 11 and 15 of the Act, but a disclosure obligation under section 12 may be imposed on any legal person (including an individual).

Subregulation 5(1) provides that an application for an exemption from an energy efficiency disclosure obligation must include the following information:

- relevant identifying information about the applicant, such as name, telephone number, postal and email address details, and ABN, ACN or ARBN if the applicant is a corporation;

- information about the building, or area of a building in respect of which the application for exemption is being made;
- information about the nature of the exemption;
- information about the nature of the applicant's interest in the building or relevant area; and
- details of any steps taken by the applicant to comply with the disclosure obligation including anticipated timeframes to achieve compliance in the future.

In the event the application relates to paragraph 17(3)(b) of the Act the applicant is required to attach a supporting statement from an accredited assessor that verifies the claims made in the application. Paragraph 17(3)(b) of the Act states that the Secretary may grant an exemption if, because of the characteristics of the building or the area of the building it is not possible to assign an energy efficiency rating. Assessors are required to disclose contact and accreditation information and state that they have complied with subregulation 9(3), which deals with disclosure of conflict of interest.

Subregulation 5(1) also requires the disclosure of any other person who has interests in the building or the area of the building which is the subject of the exemption application, or interests in an area of the building that is not the subject of the application if such person's interests:

- relate to the disclosure obligation;
- would be affected by the disclosure obligation;
- would be of assistance to the Secretary in determining the application; and
- that person has consented to the disclosure of their details.

Subregulation 5(2) provides that subregulation 5(1) applies to an application for exemption from an energy efficiency disclosure obligation that is made during the transition period, but modified so that:

- each reference to “accredited assessor” is a reference to “issuing authority assessor”; and
- each reference to “energy efficiency rating” is a reference to “recognised rating”.

Subregulation 5(3) establishes that the prescribed fee for an application for exemption under paragraph 17(2)(c) of the Act is \$350.

Regulation 6 - Exemption from requirement to provide information or access

Under section 18 of the Act, accredited assessors, who have been asked to assess a building or an area of a building by a person applying for a BEEC in order to satisfy an energy efficiency disclosure obligation, are granted powers to require the applicant in question to either provide information about or access to the building or area of the building which is the subject of the relevant application.

Under subsection 18(8) of the Act, an owner, lessee or sublessee of a building or an area of a building may apply to the Secretary for an exemption from the obligation to provide information or access. Paragraph 18(9)(b) of the Act requires such

applications to include information of a 'prescribed kind'. Subregulation 6(1) sets out the nature of such information, including:

- relevant identifying information about the applicant (whether a natural person or a corporation);
- information about the building, or area of a building in respect of which the application for exemption is being made;
- information about the nature of the exemption;
- information about the nature of the applicant's interest in the building or relevant area;
- details of any steps taken by the applicant to comply with the obligation to provide information or access under section 18 of the Act including anticipated timeframes to achieve compliance in the future; and
- information disclosing any other person who has interests in the building or the area of the building which is the subject of the exemption application, or interests in an area of the building that is not the subject of the application if such person's interests:
 - relate to the disclosure obligation;
 - would be affected by the disclosure obligation;
 - would be of assistance to the Secretary in determining the application and
 - the person has consented to the disclosure of their details.

Subregulation 6(2) establishes that the prescribed fee for an application for exemption under paragraph 18(9)(c) of the Act is \$350.

Part 4 - Assessors

Regulation 7 - Accreditation of assessors

To ensure the quality and credibility of BEECs, assessors who are engaged to apply the assessment methods and standards that underpin BEECs are required to become accredited under the scheme. Section 26 of the Act provides that applications for accreditation must be made in writing to the Secretary in an approved form and include certain prescribed information which will enable the Secretary to determine whether accreditation should be granted.

Subregulation 7(1) sets out the prescribed information necessary for an application for accreditation, including:

- relevant identifying information about the applicant, such as the name, date of birth, contact telephone number and the address of the applicant's place of business;
- if the applicant has a registration number that has been issued by the NSW Environment Department on successful completion of training mentioned in regulation 8 - that registration number;
- if the applicant is employed - the employer of the applicant, the position the applicant holds with the employer, and the address of the employer's place of business;
- if the employer is a corporation, the corporation's ABN, ACN or ARBN;

- details of indemnity certificates or any other documents evidencing professional or public liability insurance held by the applicant;
- details of documents showing the applicant has completed the training referred to in regulation 8; and
- details of whether the applicant has ever been convicted of an offence mentioned in subsection 25(1) of the Act.

Subregulation 7(2) establishes that the prescribed fee for an application under paragraph 24(2)(c) of the Act is \$350.

Regulation 8 - Training of assessors

Under paragraph 25(1)(e) of the Act, the Secretary must refuse to accredit a person as an assessor, if (among other things) the person has not completed the prescribed training.

Subregulation 8(2) sets out the training that is prescribed for the purposes of becoming an accredited assessor, including the following training provided by the NSW Environment Department:

- the course known as the Introduction to NABERS Seminar;
- the course known as the Accredited Assessor Training Course in relation to:
 - the National Australian Built Environment Rating System for Energy Efficiency for Offices; and
 - the National Australian Built Environment Rating System for Tenancy Lighting Assessment for Offices; and
- the course known as the Commercial Building Disclosure Program Module.

Subregulations 8(3) and 8(4) prescribe some of the standards that are required in relation to completion of both theoretical and practical components of the training.

A note to proposed subregulation 8(4) provides that information about the Introduction to NABERS Seminar and the Accredited Assessor Training Course is available on the NABERS website at <http://www.nabers.com.au>.

Subregulation 8(5) provides that in regulation 8, NABERS supervisor would mean a person appointed by the NSW Environment Department to supervise assessments done by persons undertaking the training mentioned in subregulation 8(2).

Regulation 9 - Conditions of accreditation

Subsection 27(1) of the Act provides that the regulations may prescribe conditions to be imposed on the accreditation of all or a specified class of assessors.

Regulation 9 sets out the conditions that are imposed for the purposes of subsection 27(1) of the Act.

Subregulation 9(2) requires that all assessors must:

- be covered by professional indemnity insurance adequate to cover claims arising out of assessments carried out under the Act; and

- be covered by public liability insurance of at least \$10 million in relation to his or her functions as an accredited assessor.

This requirement allows for an assessor to maintain his or her own insurance cover, or to be covered by insurance maintained by another person (for example, the assessor's employer).

Subregulation 9(3) requires accredited assessors to disclose in writing to an issuing authority any material interest the assessor has in the issue of a certificate if that interest could conflict with the proper performance of his or her functions as an accredited assessor.

Subregulation 9(4) clarifies that such interests may be pecuniary or not and must be disclosed whether acquired before or after the assessor's accreditation.

Subregulation 9(5) requires assessors to identify themselves to the owner, lessee or sublessee of the building or relevant area of the building before accessing the building or area to perform a function under the Act and subregulation 9(6) states that identification must be made by providing the registration number assigned to the assessor under the Act.

Subregulation 9(7) mandates that assessors must complete any further professional development training that the NSW Environment Department requests that the assessor complete.

Subregulation 9(8) requires assessors to be registered as NABERS Accredited Assessors by the NSW Environment Department within two months after the date the person is accredited under the Act and subregulation 9(9) defines who is a NABERS Accredited Assessor. Assessors must maintain their NABERS accreditation while they are accredited under the Act.

Part 5 - Identity cards

Regulation 10 - Identity cards

Under section 35 of the Act, auditors must be issued with identity cards and carry such cards when performing the functions of an auditor. Subsection 34(1) of the Act specifies who the Secretary may appoint as an auditor. The purpose of the identity card is to demonstrate that an auditor has authority to enter buildings and gather information while performing an audit. Paragraph 35(2)(b) of the Act provides that an identity card issued to an auditor must contain a recent photograph of the auditor.

Under paragraph 35(2)(a) of the Act, identity cards are required to be in the form prescribed by the regulations.

Regulation 10 sets out the required form of such identity cards by prescribing information that must be included on an identity card, including the auditor's full name and signature, a unique card number, the date of issue of the card, a statement

that the person is an auditor appointed by the Secretary under section 34 of the Act, and a statement that the person to whom the card is issued is either:

- an APS employee;
- a member of the civil or public service of a state or territory; or
- a person engaged by the Commonwealth as an auditor under contract or otherwise.

Part 6 - Indexation of fees

Regulation 11 - Indexation of fees

Regulation 11 deals with the indexation of fees that are prescribed under the Regulations, by reference to increases in the All Groups Consumer Price Index number published by the Australian Statistician (CPI). Under subregulation 11(2), if the CPI number for a financial year is greater than the CPI number for the previous financial year, fees in the regulations are to increase on July 1 of the next financial year by reference to the increase in CPI. Subregulation 11(1) provides for a number of definitions related to calculating the indexation of fees in accordance with the formula provided in subregulation 11(2). Subregulation 11(3) provides for rounding of amounts to the nearest whole dollar.

Part 6 - Infringement notices

Division 1 - Contents of notice

Regulation 12 - Infringement notices - contents of notice

Section 59 of the Act sets out matters that are to be included in an infringement notice issued for breaches of civil penalty provisions in section 11 or 15 of the Act. In addition to the other matters listed under section 59, paragraph 59(1)(p) states that such notices must include such other matters (if any) as are specified by the regulations. Subregulation 12(2) provides that an infringement notice must state that, if the contravention continues beyond a date (or dates) specified in the notice, a fresh liability will arise even if the notice is paid.

Division 2 - Other provisions for infringement notices

Regulation 13 - Other provisions for infringement notices

Section 64 of the Act provides that the regulations may make additional provisions in relation to infringement notices. This is designed to allow procedural and administrative matters which relate to the infringement notice system to be prescribed. Regulations 14 through 17 prescribe such additional matters.

Regulation 14 - Method of service of infringement notices

Section 58 of the Act sets out the circumstances in which the Secretary can issue an infringement notice.

Regulation 14 sets out the manner in which infringement notices may be validly served on either an individual or a corporation.

Subregulation 14(1) provides that in the case of an individual, service may be made personally or by post, or by leaving the notice at the last known place of residence or business or the person, or with a person over 16 years of age who appears to live or work at such place.

Subregulation 14(2) provides that in the case of a corporation, service may be made by leaving the infringement notice at the head office, a registered office or principal office or the corporation, or by posting it to such address. Alternatively, subregulation 14(2) allows service to be made by providing an infringement notice to an officer or employee of the corporation at one of those places, or to someone who the person giving the notice reasonably believes is an officer or employee of the corporation.

Regulation 15 - Infringement notices - evidentiary certificates

Regulation 15 establishes an evidentiary certificate system in respect of infringement notices. Under subregulation 15(2), such evidentiary certificates are evidence of the matters specified in the certificate in proceedings for the contravention of a civil penalty provision mentioned in an infringement notice.

Subregulation 15(1) states that the Secretary may sign a certificate which states that any of the following occurred in relation to an infringement notice served on someone:

- the penalty specified in the infringement notice was not paid within the specified time;
- that the Secretary granted, or refused to grant an extension of time to the person to pay the infringement notice;
- that the infringement notice was not paid within the period specified in the extension; or
- that the infringement notice was withdrawn under subsection 61(1) of the Act on the date specified in the certificate.

Regulation 16 - Payment of infringement notice penalty: cheques

Regulation 16 provides that if a person pays an infringement penalty by cheque, payment is not taken to have been made until the cheque has been honoured on presentation.

Regulation 17 - Payment by instalment

This regulation provides that payment of an infringement notice penalty may be made by instalment if the Secretary agrees to such a method of payment. This regulation would assist persons who may find it difficult to make a lump sum penalty payment due to financial hardship or other exceptional circumstances.