**EXPLANATORY STATEMENT**

Issued by the Authority of the Minister for Climate Change

and Energy Efficiency

*Building Energy Efficiency Disclosure Act 2010* (the Act)

*Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011* (the Determination)

The Act establishes a scheme for public disclosure of energy efficiency information relating to large commercial office spaces. The scheme is intended to enable prospective purchasers and tenants to access consistent and accurate energy efficiency information about office spaces, to better inform sale and leasing decisions.

Sections 11, 12 and 15 of the Act impose disclosure obligations on certain owners and lessors of 'disclosure affected buildings' and 'disclosure affected areas of buildings'. Broadly, owners and lessors are required to disclose energy efficiency information to prospective purchasers and lessees (including sublessees), by:

* having a valid and current 'building energy efficiency certificate' registered on the Building Energy Efficiency Register at the time of offering a building (or area) for sale, lease or sublease; and
* including an energy efficiency 'star rating' in any sale, lease or sublease advertisement.

Subsection 10(1) of the Act provides that the Minister may, by legislative instrument, determine that a specified kind of building is disclosure affected. Subsection 10(2) provides that the Minister may, by legislative instrument, determine that a specified kind of area of a building is disclosure affected.

The Determination specifies the kinds of buildings that are disclosure affected, and the kinds of areas of buildings that are disclosure affected. Details of the content of the Determination are set out in the Attachment.

The Determination replaces the *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2010* (No. 2). This new determination introduces new clauses 5(4) and 6(4) and amends the definition of major refurbishment. These changes have been undertaken following consultation with industry and are intended to clarify the operation of the major refurbishment exceptions and ensure consistency between this determination and the new *Building Energy Efficiency Disclosure Determination 2011*.

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003.* **ATTACHMENT**

**Details of the *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2011***

Clause 1 - Name of Determination

This is a formal clause setting out the name of the Determination.

Clause 2 - Commencement

This clause provides for the Determination to commence on registration on the Federal Register of Legislative Instruments.

Clause 3 – Repeal

This clause repeals the previous Determination, the *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2010 (No. 2).*

Clause 4 - Definitions

This clause specifies the meaning of a number of terms used in the Determination that are relevant to identifying whether a particular building or area of a building is disclosure affected (see clauses 5 and 6).

An inclusive definition of ‘area of a building’ is included for clarity. Consistent with the purpose of the Act, the formulation is intended to clarify, for example, that non-consecutive levels in a traditional commercial office tower that may be offered for let together are to be treated as being part of the same area. It is also intended to clarify that separate units in an industrial building with separate entrances and no internal access, for example, are separate areas. Further guidance on the application of this definition will be provided in published policy available at [www.cbd.gov.au](http://www.cbd.gov.au).

An amended definition of ‘major refurbishment’ has been included to clarify the meaning of this term in paragraphs 5(4)(a) and 6(4)(a). The definition contains two key concepts:

* Not every refurbishment is a major refurbishment. The terminology of ‘major refurbishment’ is intended to capture significant changes to a building, such as the installation of new equipment or structural changes, that have a direct impact on the energy efficiency rating of the building. Changes in an energy efficiency rating brought about without physical alteration of a building, such as changes in staff behaviour or operating hours are not intended to be considered a major refurbishment.
* A major refurbishment must also impact a building’s energy efficiency such that the base building rating after the major refurbishment, whether or not it can be produced, would be different from the rating that would have been produced if a rating had been performed before the refurbishment. The methodology currently used to produce base building ratings, the National Australian Built Environment Rating System (NABERS), rates buildings in half star increments. A major refurbishment must therefore alter a base building rating by at least half a star, higher or lower. Some buildings are unable to obtain a base building rating, for example due to a lack of data or sub-metering. For such buildings, a major refurbishment is one that would affect the energy efficiency rating of the building, if the rating was able to be produced, before and after the refurbishment.

Clause 5 - Disclosure affected buildings

This clause specifies, for the purposes of subsection 10(1) of the Act, the kinds of buildings that are disclosure affected.

A building is disclosure affected if:

1. the following criteria are met:

* *at least 75% of the space in the building by net lettable area (or gross lettable area where net lettable area is not available) is for administrative, clerical, professional or similar information‑based activities, including any support facilities for those activities*. The terms ‘net lettable area' and ‘gross lettable area’ are defined in clause 4. Net lettable area remains the preferred method for measuring floor space in a building. However, in some mixed use buildings such as combined office/warehouses, gross lettable area may be the industry standard for measurement. In this case, if net lettable area is not available, gross lettable area may be used instead. The phrase ‘administrative, clerical, professional or similar information-based activities’ is intended to encompass all activities that would usually take place in a commercial office space. The term ‘support facilities’ is defined in clause 4. Mixed use buildings where less than 75% of the space is dedicated to these activities are not disclosure affected. It is intended to review this position during the transition period (prior to 1 November 2011); and
* *the net lettable area (or gross lettable area where net lettable area is not available) of the space in the building that is for administrative, clerical, professional or similar information‑based activities, including any support facilities for those activities, is at least 2000 square metres.* This paragraph is intended to exclude smaller office buildings;

and

1. neither of the following three exceptions apply:

* *the building is new and a certificate of occupancy (however described) indicating that the building is safe for occupancy is required to be issued by a local authority under a law of a State or Territory in order for the building to be occupied and the certificate has not yet been issued or was issued less than 2 years before the day..* This exception is intended to cover new constructions in relation to which a certificate of occupancy or equivalent requirement is required under a law of a State or Territory prior to the building being occupied. It is intended to except such buildings up to two years after the issue of the certificate; or
* *the building has had a major refurbishment and a certificate of occupancy (however described) indicating that the building is safe for occupancy was required to be issued by a local authority under a law of a State or Territory in order for the building to be occupied and the certificate was issued less than 2 years before the day*. Major refurbishment is defined in clause 4. This exception is intended to cover major refurbishments in which a certificate of occupancy or equivalent authorisation is required under a law of a State or Territory prior to the building being occupied following the conclusion of the major refurbishment. It is only intended to exempt such buildings once the certificate of occupancy is issued. Whilst a major refurbishment is currently being undertaken, entities to which a disclosure obligation applies, may be able to apply for an exemption under s 17(3)(b) of the Act; or
* *the building is held under a strata title system (however described).* This exception recognises the difficulty that is likely to be encountered in assessing the energy efficiency of strata titled offices at this time. It is intended that this exception will be reviewed when an appropriate assessment methodology becomes available.

Clause 6 - Disclosure affected areas of a building

This clause specifies, for the purposes of subsection 10(2) of the Act, the kinds of areas of buildings that are disclosure affected.

An area of a building is disclosure affected if:

1. the following criteria are met:

* *at least 75% of the space in the building by net lettable area(or gross lettable area where net lettable area is not available) is for administrative, clerical, professional or similar information‑based activities, including any support facilities for those activities*.This paragraph is the same as paragraph 5(2)(a). It gives effect to the intention that any building where less than 75% of the space is dedicated to usual commercial office activities is neither a disclosure affected building nor contains any disclosure affected areas. It is intended that this treatment will be reviewed during the transition period (prior to 1 November 2011); and
* *the net lettable area (or gross lettable area where net lettable area is not available) of the space in the building that is for administrative, clerical, professional or similar information‑based activities, including any support facilities for those activities, is at least 2000 square metres.* This paragraph is intended to exclude smaller office areas;

and

1. neither of the following three exceptions apply:

* *the building in which it is located is new; and a certificate of occupancy (however described) indicating that the building is safe for occupancy is required to be issued by a local authority under a law of a State or Territory in order for the building to be occupied and the certificate has not yet been issued or was issued less than 2 years before the day.* This exception is the same as in clause 5; or
* *the building in which it is located has had a major refurbishment; and a certificate of occupancy (however described) indicating that the building is safe for occupancy was required to be issued by a local authority under a law of a State or Territory in order for the building to be occupied and the certificate was issued less than 2 years before the day.* This exception is the same as in clause 5; or
* *the building is held under a strata title system (however described).* This exception is the same as in clause 5.