

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Resources, Energy and Northern Australia

Building Energy Efficiency Disclosure Act 2010 (the Act)

*Building Energy Efficiency Disclosure (Disclosure Affected Buildings)
Determination 2016* (the Determination)

Purpose and Operation

The Act establishes the Commercial Building Disclosure (CBD) Programme, which requires public disclosure of energy efficiency information relating to large commercial office spaces. The CBD Programme 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.

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.

Following amendments to the Act and the *Building Energy Efficiency Disclosure Regulations 2010* (the Regulations) which took effect from July 2015, changes to the former Determination were needed.

The purpose of the Determination is to specify the kinds of buildings, and areas of buildings, that are disclosure affected. The Determination outlines key considerations to determine whether or not a building, or area of a building, is disclosure affected or not. The considerations vary depending on whether the determination is being made before or after 1 July 2017

The Determination lowers the mandatory disclosure threshold for disclosure affected buildings, and areas of a building, from 2000 square metres to 1000 square metres, with effect from 1 July 2017.

The Determination amends the definition of ‘major refurbishment’ to ensure it is consistent with the definition used in the amended Regulations.

The Determination is made under section 10 of the Act and is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Determination repeals and replaces the *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2015* (F2015L01074).

Consultation

The Office of Best Practice Regulation (OBPR) acknowledged that a targeted group of stakeholders were consulted in development of the first Regulatory Impact Statement (RIS) on proposed changes to the Commercial Buildings Disclosure (CBD) Program in 2015. However, OBPR did not consider this group were fully representative of all stakeholders who would be most affected by the changes to the Program and recommended a full public

consultation should be undertaken before the RIS was submitted for a second-pass final assessment.

In response to OBPR's recommendation, The Department of Industry, Innovation and Science undertook public consultation, from 4 February – 12 March 2016, on the RIS and proposed changes to the CBD Program. Over 51 submissions were received from building owners, assessors, facility managers, NGOs and Industry.

Stakeholder input was taken into account in drafting the Determination.

Detailed description of provisions in the *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2016*

Clause 1 - Name of Determination

This is a formal clause setting out the name of the Determination as the *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2016*.

Clause 2 - Authority

This section sets out the provision of the *Building Energy Efficiency Disclosure Act 2010* (the Act) under which the Determination is made.

Clause 3 - Commencement

This provision sets out the commencement arrangements for the Determination.

Clause 4 – Repeal

This provision repeals the *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2015* (F2015L01074).

Clause 5 - Definitions

This section specifies the meaning of a number of terms used in the Determination.

Several words and expressions used in the Determination have the meaning given to them by section 3 of the Act, or section 3 of the *Building Energy Efficiency Disclosure Regulations 2010*.

Clause 5 - Disclosure affected buildings

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

The section outlines the criteria for determining whether a building is disclosure affected from the commencement of the Determination until 1 July 2017.

The criteria allows for the space in a building to be calculated on a net lettable area. Where the net lettable area is not available, the gross lettable area can be used. 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 measured space is defined in sub-sections 5(2)(a) and 5(3)(a) as ‘*at least 75% of the space in the building ... is for administrative, clerical, professional or similar information-based activities, including any support facilities for those activities*’. 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 purpose of sub-sections 5(2)(b) and 5(3)(b), which refer to an area of less than 2000 square metres prior to 1 July 2017 and an area of less than 1000 square metres post 1 July 2016, is to exclude smaller office buildings from being disclosure affected.

Subsections 5(4), 5(5) and 5(6) provide exceptions to a building that would otherwise be disclosure affected. Subsection 5(4) is intended to cover new constructions and provide an exception up to two years after the issue of a certificate of occupancy. Subsection 5(5) is intended to exempt buildings up to two years after the issue of a certificate of occupancy once they have undergone a major refurbishment.

Whilst a major refurbishment is being undertaken, entities to which a disclosure obligation applies, may be able to apply for an exemption under paragraph 17(3)(c) of the Act relating to section 5B of the *Building Energy Efficiency Disclosure Regulations 2010*. Once the major refurbishment is complete, it is intended that this exception category will apply.

The final exception is contained in sub-section 5(6) and exempts buildings 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 provision specifies, for the purposes of subsection 10(2) of the Act, the kinds of areas of buildings that are disclosure affected.

From the commencement of the Determination until 1 July 2017, an area of a building is disclosure affected if:

- a) 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.*
 - These criteria are the same as subclause 5(2). 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; 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

- b) 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.

From 1 July 2017, the applicable 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 1000 square metres. Otherwise, the criteria and exceptions for the areas of buildings that are disclosure affected are the same.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2016

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Building Energy Efficiency Disclosure (Disclosure Affected Buildings) Determination 2016* specifies the kinds of buildings, and the areas of buildings, that are disclosure affected.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Minister for Resources, Energy and Northern Australia the Honourable
Josh Frydenberg MP**