

Treatment of Certain Property Transactions

The energy efficiency disclosure obligations in section 11 and subsection 12(6) (disclosure obligations) of the [Building Energy Efficiency Disclosure Act 2010](#) (BEED Act) apply where there is an offer or an invitation to offer to sell, lease or sublease a disclosure affected building or a disclosure affected area of a building.

The purpose of this Guidance Note is to provide general guidance on how the Department will treat the following types of property transactions in administering the Act:

- Entering into a new lease
- Assignment of a lease
- Exercising an option to renew a lease
- Extension of an existing lease.

Independent legal advice should be sought to determine whether the disclosure obligation imposed under the BEED Act applies to a specific property transaction.

Entering into a new lease

The disclosure obligations imposed under the BEED Act will apply to commercial leasing transactions in which a landlord offers to let or invites an offer to enter into a new lease, unless a term of 12 months or less is proposed (including any option to extend).

What kind of conduct would constitute an offer to let?

Examples of conduct which would constitute an offer to let include:

- issuing a lease proposal or heads of agreement outlining the terms on which the landlord will agree to let a disclosure affected building or a disclosure affected area of a building,
or
- engaging in negotiations with a prospective tenant during which the landlord discusses terms to let or accept an offer to lease a disclosure affected building or a disclosure affected area of a building are discussed.



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What kind of conduct would constitute an offer to lease?

An example of conduct which would constitute inviting an offer to lease include:

- issuing a lease for execution by a prospective tenant on the provision that the prospective tenant make an offer to lease a disclosure affected building by executing the lease and returning it to the landlord within a specified timeframe,
- or
- issuing a lease for execution by a prospective tenant on the provision that the prospective tenant make an offer to lease a disclosure affected area of a building by executing the lease and returning it to the landlord within a specified timeframe.

Assignment of a lease

What is an assignment of a lease?

An assignment of a lease occurs where a tenant (the assignor) transfers all of its interest in a lease to a third party (the assignee) for the whole of the unexpired term of the lease. The assignee effectively is substituted for and steps into the shoes of the assignor and will be subject to the same rights and liabilities as the assignor under the lease.

Does an assignment of a lease trigger the disclosure obligations?

No. The disclosure obligations apply to subletting or subleasing a disclosure affected building or a disclosure affected area of a building. An assignment of a lease is legally different to a sublease and the original tenant (the assignor) is not offering to sublet or inviting an offer to sublease a disclosure affected building or a disclosure affected area of a building.

Exercise of an option to renew, and extension of an existing lease

Does the *exercise* of an option to renew a lease trigger the disclosure obligations?

No. The disclosure obligations do not apply to the exercise of an option to renew a lease. An option is an offer that is made once, on the day the lease containing the option is granted, and remains open for a specified period until the conditions (if any) for exercising the option set out in the lease are satisfied, or the lease comes to an end. The landlord will not be engaging in conduct that constitutes an offer to let or inviting an offer to lease at the time the option to renew a lease is exercised.



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Example 1 – Contractual option to extend

AAA Offices Pty Ltd.'s 5 year lease agreement with BldgOwner is about to expire but they want to extend their lease agreement. AAA Offices Pty Ltd is choosing to use the provision to extend which is in their current lease agreement with BldgOwner. As this option to extend is not regarded as a new offer and no new terms are negotiated, the BldgOwner is not required to provide a BEEC.

Will an extension of an existing lease trigger the disclosure obligations?

No, provided the lease terms otherwise remain the same. The extension of the term of an existing lease of a disclosure affected building or a disclosure affected area of a building is a variation of the lease and does not require an offer to let or inviting an offer to lease. If the terms of the lease are altered, this may constitute the grant of a new lease and the disclosure obligation may apply.

Example 2 – Offer to extend

AAA Offices Pty Ltd's 5 year lease agreement with BldgOwner is about to expire but they want to extend their lease agreement for another 5 years, though there is no option to extend offered in their current lease. As the extension contains the same pricing, leased area and conditions, the contract is not viewed as a new offer. This means BldgOwner would not be required to provide a BEEC.

Example 3 – Extension – change in contract terms

AAA Offices Pty Ltd's 5 year lease agreement with BldgOwner is about to expire but they want to extend their lease agreement for another 5 years. In addition to the current space leased, AAA Offices Pty Ltd wishes to lease additional space in the building but at a lower cost per square metre. As the terms of the previous lease are altered, this would be regarded as a new offer and therefore require a current BEEC, assuming the building meets the current disclosure conditions.



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Further information

This document contains reference to terms that are defined in the BEED Act and assumes in each example given that all of the other criteria in the BEED Act have been met. You should refer to the BEED Act for the meaning of the terms contained in this document, and seek appropriate professional advice about applying them in your specific circumstances. The BEED Act, the *Building Energy Efficiency Disclosure Regulations 2010*, other subordinate legislative instruments and associated information can be obtained at the program website: www.cbd.gov.au. Further information about NABERS Energy ratings is available at www.nabers.gov.au.

