

# Leasing Update - Going Green

*"We do not inherit the Earth from our ancestors; we borrow it from our children..."*

*Native American proverb*

## The New Commonwealth "Green Lease Schedule"

Environmental issues are highly topical at the moment. Without a great deal of public fanfare, however, recently the Commonwealth introduced its Energy Efficiency in Government Operations policy. The key element in the policy is the new "Green Lease Schedule", which affects all Commonwealth agencies and certain agencies funded by the Commonwealth (in total about 114 agencies).

Energy efficiency reduces costs and is of benefit to all parties, though the core aim of the policy is to reduce greenhouse gas emissions.

## Green Lease Schedule ("Schedule")

The Schedule attaches to leases affecting any of the target agencies ("Agencies"). It has 5 standard clauses, covering: the requirements for a 4.5 star Australian Building Greenhouse Rating (ABGR); separate metering for different elements of a building; an energy management plan; a building management committee; and dispute resolution provisions. Also, there are optional provisions that can be selected (dealing with water, car pooling, etc).

Agencies are bound by the Schedule. In reality, however, the lessor also has to comply; it would otherwise be impossible for the tenant to effectively comply. It is therefore critical that in any lease, a lessor and an Agency tenant work closely together to achieve the requirements of the Schedule.

## Pointing the way of the future

At the moment, private sector lessors will need to work with Agencies to ensure compliance with the Schedule. But it is not only the Agencies working towards such goals; the private sector is already involved. Westpac, for example, stands out for its efforts to reduce greenhouse emissions. It also participates in the Commonwealth's "Greenhouse Challenge Plus", where companies work in partnership with the government to improve energy efficiency.

It is reasonably foreseeable that in the short to medium term (by legislation or less coercive means), the Commonwealth government will seek to include most of the private sector in the goal of reducing greenhouse emissions.

## Some key issues arising from the Schedule:

- Is the tenant agency an agency affected by the Schedule? (look at funding, etc).

- Is the lease in question an affected lease (look at the size of the area leased, the length of the lease term, etc).
- Does an exemption possibly apply? (there are numerous grounds).

Once it is clear the Schedule applies, some key issues are:

- To determine the energy efficiency of the building, it is vital the parties are clear as to what makes up the base building and what makes up the tenant's fitout (some items are not clear cut).
- Monitoring is essential. This is done by regular reviews of data gathered from sophisticated metering devices. Without monitoring, the best designed building can become inefficient.

In short, there will be challenges for both the Agencies and the private sector in complying with the Schedule, but it is clearly the way of the future.

## IN BRIEF

### Oral exercise of option

- A recent NSW Court of Appeal decision upheld the oral exercise of a lease option. The lessor was estopped from denying that the lease had not been exercised. Ordinarily, a lease option must be exercised strictly in accordance with the lease (the lease provided that the option had to be exercised in writing).

### Rent review successfully challenged

- In a recent Supreme Court of Queensland case, a lessee successfully challenged the validity of a valuer's determination of rent payable at rent review. The lease provided that the valuer must *subjectively* determine the rental for the premises. The lessee argued that the valuer in fact used *objective* methods to value the rental. Accordingly, the valuer's determination was not pursuant to the lease and so was invalid.

## To discuss your needs or for further information contact:

**David Toole** ([david.toole@wln.com.au](mailto:david.toole@wln.com.au)) or **John Douglas** ([john.douglas@wln.com.au](mailto:john.douglas@wln.com.au)) on (02) 6263 9900.

## Disclaimer

This leasing update is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters.