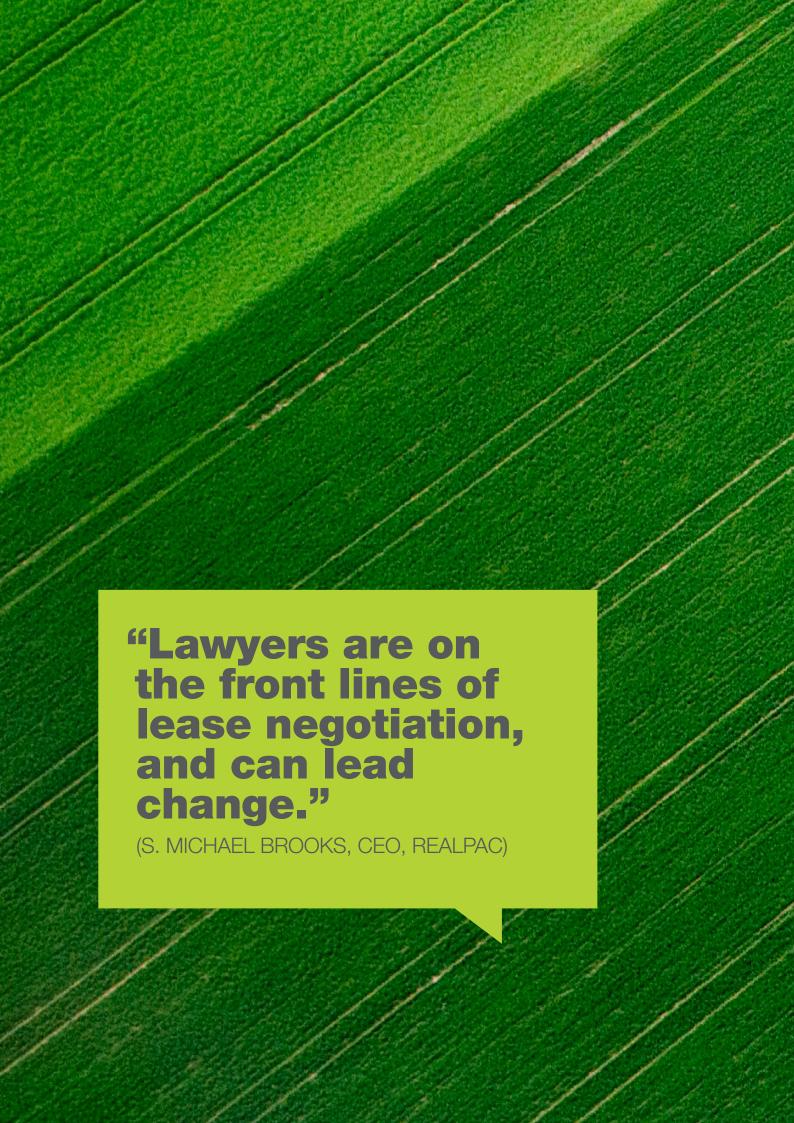


THE GESEN LEASE HANDBOOK

COUNCIL OF AUSTRALIAN GOVERNMENTS (COAG)
NATIONAL STRATEGY ON ENERGY EFFICIENCY

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CONTENTS

PART A - WHAT IS A GREEN LEASE?

WHAT IS A GREEN LEASE? 7 Why is it important to improve the 8 environmental performance of buildings? Myth vs truth 9 How can a green lease keep 10 the building green? Financial cost and reward 11 - the split incentive WHAT ARE THE BENEFITS OF **GREEN LEASES?** 13 Impacts for tenants 13 Impacts for Landlords 13 A whole new approach? 14 Identify and understand the risk 14 in green leases **GOVERNMENT AND PRIVATE** 15 INITIATIVES TO INFLUENCE CHANGE Effect of the Carbon Price 15 Mechanism (CPM) Government agencies leading by example 16 and self-imposing behavioural change Increased transparency and 16 better disclosure Incentives for change 16 Industry-wide collaboration for 17 greener buildings MOMENTUM FOR CHANGE 19 Global moves towards green leases 19

PART B – STRATEGIC APPROACH TO YOUR GREEN LEASE

WHICH RATINGS?	21
What may be targeted?	21
NABERS ratings tools	21
Green Star ratings tools	22
Comparison of ratings tools	23
IDENTIFYING KEY OBJECTIVES	24
Objectives of landlord and tenant	24
Understand corporate objectives/government policy	25
Objective of the lease document	25
Incorporate green details in terms sheet	25
TECHNICAL CONSIDERATIONS	28
What is the capacity of the relevant building or premises?	28
The importance of metering	29
Peculiarities among building types	29
"HARD" GREEN OR "SOFT" GREEN LEASE?	30
What is the difference?	30
Potential range of remedies for not meeting targets	30
Factors to consider in making the choice	30

PART C – DRAFTING YOUR GREEN LEASE? PART D – GREEN LEASES IN OPERATION

LEASE PROVISION OR SCHEDULE?	33	THE ADMINISTRATION OF	51
What may be targeted?	33	A GREEN LEASE	
RELATIONSHIP WITH OTHER	34	Who will administer?	52
PARTS OF THE LEASE		Costs of administration	52
Areas of new developments in sustainability measures	34	Integration into operational behaviour/management of building	53
Potential effect of green provisions	36	MANAGING THE RATINGS	54
on common lease terms		Ongoing obligation	54
KEY ELEMENTS OF A GREEN LEASE	38	If a rating is not achieved	54
The Importance of metering	38	REFLECTING PROVISIONS OF	55
GREEN TARGETS AND	39	GREEN LEASES IN RELATED CONTRACTS	
PERFORMANCE REQUIREMENTS		Design and construct contracts	55
Use of green targets	39	Facilities management contracts	55
Variation of green targets	39	Service and maintenance agreements	55
Green performance obligations	40	GREEN RATINGS IN	56
Management of green risks	42	BUILDING VALUATIONS	
Consequences of default - "hard" or "soft"	44	A green premium in value for office	56
Dispute resolution	45	buildings	
DATA REPORTING	46	The impact of green terms on valuation	56
AND SHARING		Valuation methodologies	56
Parties' reporting obligations	46	LINKS	57
Environment Management Plan	46	Relevant drafting examples	57
Environment Management Committee	46	Guides and reference material	57
SHARING THE COST OF CAPITAL IMPROVEMENTS	48	GLOSSARY	58
Legislative Response	48		
Commercial Response	49		
Other Considerations	49		



PARTA WHAT IS AGREN LEASE?

WHAT IS A GREEN LEASE?

A green lease provides a framework under which both landlord and tenant can achieve and maintain energy efficiency and other sustainability goals throughout the lease term.

A green lease enables better environmental and economic performance of a building.

A green lease can include information about:

WHAT

are the environmental measures to be taken under the lease?

HOW

will the parties cooperate to achieve these measures?

WHO

will monitor compliance with those measures?

WHAT

happens if the targets are not met?

There is no uniform model green lease that will be appropriate for every commercial premises. Like an ordinary lease, there is no one-size-fits-all model. However components of a green lease can be mixed and matched to suit the objectives and requirements of the parties.

It is not uncommon for the traditional landlord-tenant relationship to be an adversarial one. In contrast, green leases provide an opportunity for a collaborative approach to leasing at both the negotiation and agreement stage and throughout the life of the lease.

This is a developing area of practice, in which the relevant tools and practices will change over time.

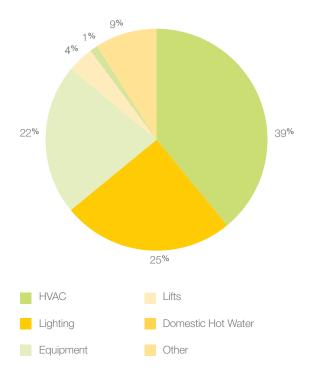
"A 'green lease' might seem more immediately appropriate for a modern building designed to high environmental standards but there is absolutely no reason why buildings... that have poor environmental credentials should not also be used in a manner that seeks to minimise their environmental impact."

(SUSAN BRIGHT, PROFESSOR OF LAND LAW, OXFORD UNIVERSITY, 2008)

WHAT IS A GREEN LEASE

WHY IS IT IMPORTANT TO IMPROVE THE ENVIRONMENTAL PERFORMANCE OF BUILDINGS?

In Australia, energy consumption of commercial buildings is approximately 25% of all energy consumption, which represents a significant proportion of total greenhouse emissions. This consumption relates to:1



Through the adoption of green technologies, design and operation of buildings, as regulated by (among other things) the terms of green leases, these rates of energy consumption can be reduced, resulting in reduced carbon emissions and lower operating costs for building owners and occupants.

Rating the environmental performance of commercial buildings starts with an analysis of the sustainable management of energy consumption. Studies in this area have shown that, by implementing energy efficiency measures, commercial buildings can reduce energy costs by 20-40%.²
Often, significant efficiencies can be made even without particular modification to a building's fabric or equipment.

In addition to improving energy efficiency, green leases can regulate better use of other resources - such as water, by appropriately distinguishing areas in which to utilise potable drinking water as opposed to areas in which treated and disinfected grey water or black water may be an appropriate alternative.

Australian commercial buildings currently consume around 10% of our total water demand. The sustainable management of water use through green lease provisions is another way in which the owners and occupants of commercial buildings can reduce resource consumption and hence expenditure. Sustainable building ratings systems can include ways in which to measure the best-practice management of water consumption, reflecting the performance of an individual building relative to the market.

Sustainable building ratings also provide ratings systems for offices in the areas of waste generation and recycling and the indoor environment, including lighting, temperature and office layout. All these areas may be improved and regulated by the incorporation of green lease terms.



"Brookfield and Investa have recently refurbished IAG House at 388 george street, a 30-storey commercial office block constructed in 1976, to greatly improve the efficiency of the building's energy and water usage, with dramatic environmental benefits and cost savings as a result.

Energy consumption has reduced by 1.9 million kWh per year, equivalent to taking 257 cars off the road. Water demand was reduced by 16 per cent, saving 5.5 million litres of water per year. "Upgrading IAG House was important for Brookfield, as we are committed to the continuous improvement of energy performance in existing buildings just as much as new buildings...our goal is to provide office space of the highest quality while reducing operating costs."

(KURT WILKINSON, CEO, BROOKFIELD OFFICE PROPERTIES AUSTRALIA)

¹ Data from Guide to Best Practice Maintenance & Operation of HVAC Systems for Energy Efficiency (January 2012), Council of Australian Governments (COAG) National Strategy on Energy Efficiency.

² NABERS < http://www.nabers.com.au/page.aspx?cid=533&site=2>.

³ Australian Government, Department of the Environment and Water Resources, ESD Design Guide: Office and Public Buildings (2007).

WHAT IS A GREEN LEASE

MYTH VERSUS TRUTH

MYTH

To implement a functioning green lease, you need to purchase state-of-the-art infrastructure and technology.

Green leases are only relevant to brand new buildings.

Green leases are simply some standard additional clauses that are "tacked on" to the back.

Once the lease is signed, the parties can just dump the whole lease, including any green provisions, in the bottom drawer and only pull it out if there is a dispute.

TRUTH

It is possible for property owners to raise their NABERS Energy rating to 4 stars by better management practices without major capital investment (Warren Centre for Advanced Engineering at Sydney University, Low Energy High Rise Building Research Report).

Existing buildings can be retrofitted to meet the requirements and standards of green leasing. In some cases, even heritage-listed buildings have been retrofitted to achieve a 6-star Green Star rating (The Perpetual Building, 39 Hunter Street, Sydney).

Green leases are the result of integrating environmental requirements into base lease documents to become a legally enforceable green lease regime. The terms of the green lease must be carefully adapted to the requirements of the parties and the particular terms of the base lease to ensure there is consistency and compatibility.

Achieving desired sustainability outcomes requires effective management during the lease term. This can be achieved through continuing obligations, energy performance measures, an environment management plan, metering and remedies for non-compliance. Green leases can create accountability by providing measurement tools, reporting requirements, audit opportunities and establishing a building environment management committee.



WHATIS A GREEN LEASE

HOW CAN A GREEN LEASE KEEP THE BUILDING GREEN?

What difference does a green lease make?

A green lease can provide tools for the better management and operation of buildings, including the collection and sharing of sustainability information, adoption of targets, management plans and mechanisms to facilitate building upgrades.

A green lease can often provide for an environment management committee **(EMC)** to develop, implement and monitor an environment management plan **(EMP)**. An EMC gives parties a meaningful forum in which to discuss relevant performance issues.

The EMC is not usually a decision-making committee: it does not exercise the powers of the landlord and tenant under the lease, but is intended to facilitate communication between the parties and manage risk and compliance with the green lease obligations. The EMP can set out mutually agreed management mechanisms to implement energy efficiency and environmental obligations relevant to the tenancy and the building. The EMC can monitor and report on compliance with the EMP and suggest improvements to the plan where and when necessary.

An effective green lease should:

- promote cooperation by requiring a landlord and tenant to work together to achieve mutually beneficial outcomes;
- include environmentally sensitive requirements, such as consideration of sustainable resource use and indoor environment quality;
- include flexible lease terms, as performance targets must be adaptable to changes in conditions as well as changes in the way sustainability in buildings is measured over time;
- introduce environmental targets in the sense that achieving particular goals will be critical to qualify for and maintain building ratings, which are likely to be specific obligations on both parties;
- necessitate data-sharing by requiring the monitoring and reporting of consumption by the landlord to the EMC, where applicable, or directly to the tenant; and
- utilise environment management plans.



WHAT IS A GREEN LEASE

FINANCIAL COST AND REWARD - THE SPLIT INCENTIVE

Issues can arise where the costs and benefits of implementing sustainability measures are not aligned. In relation to green leases, this is commonly referred to as the "split incentive".

The "split incentive" is where:

- landlord cost the landlord is responsible for the cost of new plant and equipment or other capital investment that may improve the sustainability outcomes for the building; but
- tenant benefit the tenant reaps the rewards of an enhanced indoor environment and lower energy or other costs through reduced outgoings. This applies in the lease situation of a tenant paying building outgoings - in other words, a net lease.

Where a tenant pays no outgoings under a lease - in other words, a gross lease - then, in relation to base building upgrades, there is no split incentive, as the landlord benefits from the energy and other savings. Issues arising from the split incentive will still arise in the area of tenancy lighting where,

the landlord may own the lights and controls, but there is little incentive for the landlord to upgrade as the benefit would accrue to the tenant.

The split incentive can also exist in cases where a tenant seeks to invest in energy-saving plant and equipment that may not be relocatable at the end of the lease.

The issue of the split incentive is genuine, but this may oversimplify things, as there are other benefits to the landlord and tenant in having a more energy efficient building, as described in this handbook. Further, with some flexibility and creativity, the net cost to both landlord and tenant of implementing green measures may be offset by negotiating other arrangements for cost recovery by one party that reflects the other party's reduced expenditure otherwise payable under the lease.





WHAT ARE THE BENEFITS OF GREEN LEASES?

Green leases present an improved business model of building management for both tenant and landlord. The biggest rewards will be seen where the green aspects of the building are maintained throughout the full term of the lease.

IMPACTS FOR TENANTS

From a tenant perspective, a green lease can lead to significant cost savings, both direct (for example, in lower electricity bills) and indirect (where, through outgoings, a tenant contributes to wider building costs such as waste management, water usage and air-conditioning).

Aside from the usual profitability measures, green leases can enhance a tenant's reputation for corporate social responsibility (CSR), in the sense of doing the right thing for the environment, employees and the community. Enhanced CSR, in turn, can lead to better staff retention rates and improved employee wellbeing, resulting in improved productivity and reduced absenteeism.

Green leases, and the enhanced work environments they produce, e.g. through improved indoor air quality, can facilitate better organisational learning and a safer work environment overall, with fewer risks.

Green leases may help create a more productive work environment, and therefore, a tenant may be less likely to seek to relocate at the end of a lease term, lowering the tenant cost of future office relocation.

IMPACTS FOR LANDLORDS

From a landlord perspective, green leases may result in not only the cost savings associated with operating buildings more efficiently but also happier tenants, meaning longer-term leasing arrangements and fewer landlord-tenant disputes.

Often, "greening" a building will be seen as equating to expenditure - for example, on replacing or upgrading lighting, heating, ventilation and air-conditioning systems, adjusting external building facades to promote better temperature regulation, or making other changes to maximise natural light.

However, there is a clear green premium for office buildings adopting the types of energy efficiency and other measures associated with green leases. There is also a proven statistical correlation of green properties with higher gross rents, reduced vacancies, reduced outgoings and reduced incentives. (This is as shown by the Building Better Returns: A Study of the Financial Performance of Green Office Buildings in Australia (University of Western Sydney, University of Maastricht Netherlands, Jones Lang LaSalle and CBRE, September 2011), which found that NABERS energy and Green Star ratings

showed a measurable green premium. The findings of this study were adjusted to allow for the fact that many "green" buildings are also new buildings.)

For all of these reasons, green leasing has active support from professional property organisations, including the Australian Property Institute, the Property Funds Association of Australia , the Property Council of Australia and the Green Building Council of Australia.

Property industry CSR strategies that were originally a means of risk reduction, driven by government policy and legislation on sustainability, are now part of prudent investment and management decisions. The Green Star and NABERS ratings tools explored later in this handbook are central to the future of property investment and management in Australia, as evidenced by the active participation in the green lease area of all the major property investors. Green leases are not only about doing the right thing; there is a clear economic rationale for their uptake.

WHY THE INTEREST IN GREEN LEASES?

A WHOLE NEW APPROACH?

As green leasing provisions focus on cooperation and collaboration among landlords and tenants to be effective, green leases are sometimes seen as providing an opportunity to transform the current adversarial model of leasing.

The usual assumptions in a contractual relationship (including the landlord-tenant relationship) are that the parties are conducting an arm's-length transaction, with each side seeking only to promote its own interest and maximise its own profits according to the terms of the contract.

In the situation of a green lease, in order to achieve the desired sustainability outcomes of both parties, there may be more opportunities for a landlord and tenant to work together, on an ongoing basis.

A green lease may include the following features which encourage and require cooperation and collaboration between landlord and tenant:

- mutually agreed management mechanisms to implement energy efficiency and environmental obligations through the development of an EMP;
- the establishment of a building management committee to develop and manage the EMP - the EMC;
- ongoing monitoring and reporting of mutually agreed outcomes in relation to energy efficiency and sustainable obligations;
- the provision of regular energy consumption and maintenance reports by both parties.

IDENTIFY AND UNDERSTAND THE RISK IN GREEN LEASES

To be effective in achieving the environmental goals, green leases need to permit a degree of flexibility. Green lease provisions typically acknowledge that changes may be required during the term of the lease in order to ensure the identified targets are met. Indeed, the green lease provisions may even permit the targets themselves to be updated and modified during the term of the lease.

For this reason, it may not always be possible to identify at the beginning of the lease exactly what either party may be required to do in order to comply with green lease obligations. This introduces an element of risk for both lawyers and their clients.

However, this risk can be managed by:

- recognising that the actions of either party can impact on the ability of the other to achieve the desired rating;
- focussing on a co-operative approach to identify and address any issues that arise in the operation of the building;
- acknowledging that a breach of the green lease provisions is not in itself a breach of the lease that otherwise may lead to remedies like termination; and
- using different dispute resolution procedures, e.g. notification of faults, appointment of an expert arbitrator, etc.

¹ As identified by Christensen and Duncan in "Green Leases - A new era in landlord and tenant cooperation?" (2007) 15 Australian Property Law Journal.

GOVERNMENT AND PRIVATE INITIATIVES TO INFLUENCE CHANGE

The Commonwealth, State and Territory governments have introduced a range of programs to promote energy efficiency and sustainability measures in commercial buildings. These policies fall into three broad groups:

- those promoting behavioural change among government agencies;
- those providing better information on energy efficiency; and
- those encouraging market transformation through the use of pricing mechanisms or through offering "green" incentives.

The National Strategy for Energy Efficiency (NSEE) is designed to, among other things, drive significant improvement in minimum energy efficiency standards in new and existing commercial buildings. The NSEE is an umbrella strategy that encompasses the laws and incentives described in the following provisions, and aims to significantly increase over time the stringency of energy efficiency requirements for all buildings.

The commercial building sector is also independently taking significant steps to implement sustainability measures through better design technologies and management. This is driven by increasing demand for green buildings and competition within the market.

EFFECT OF THE CARBON PRICE MECHANISM (CPM)

The precise effect of Australia's new carbon price on building owners will depend on the type of building, location, and potential ways in which to shift to energy-efficient technologies.

The Property Council of Australia (PCA) commissioned a study which found that in 2012-13 the cost of operating buildings will rise as a result of the carbon price, through increased electricity costs, wages, taxes and charges (The Allen Consulting Group, The Carbon Price Mechanism and the Property Sector, October 2011).

For example, in Sydney:

- the running costs of a Class A office building with a net lettable area of 25,000m² will increase by approximately 1.8%; and
- the annual operating costs of a building with 3,000m² gross lettable area retail will increase by approximately 1.4%.

In each case, the increases largely flow from increased energy costs.

The PCA study highlighted the usefulness of building owners and managers (and tenants) minimising the impact of the carbon price through upstream cost management, by:

- adopting energy efficient equipment and waste minimisation strategies
- · utilising available government programs and incentives, and
- decreasing energy use.

These upstream cost minimisation strategies are the classic features of a green lease. So, the promotion and use of a green lease may be the best response of building owners, managers and occupants to the new carbon price.

GOVERNMENT AND PRIVATE INITIATIVES TO INFLUENCE CHANGE

GOVERNMENT AGENCIES LEADINGBY EXAMPLE

Commonwealth, State and Territory governments are attempting to improve energy efficiency in buildings through, among other things, changing governments' own behaviour as owners and users of commercial buildings. The following are examples of programs aimed at driving innovation more broadly, with the government leading change.

Operating since 2006, the Commonwealth Energy Efficiency in Government Operations (**EEGO**) policy aims to reduce the energy consumption of Commonwealth government operations, with a particular emphasis on building energy efficiency. The EEGO policy includes annual reporting of energy performance by agencies and minimum energy performance standards for office buildings.

The Commonwealth government has also introduced its own "Green Lease Schedule" (GLS), which must be incorporated into a lease where the Commonwealth government is the tenant. The GLS mandates that a landlord and tenant co-operate to bring about a sustainable use of the relevant building. It also encourages the voluntary uptake of green lease principles by other bodies.

The National Green Leasing Policy (**NGLP**) is the first step towards a national approach to green leasing. Developed by the Council of Australian Governments, in conjunction with the Ministerial Council on Energy and the Australasian Procurement and Construction Council, the policy establishes a nationally consistent green leasing policy and aims to achieve maximum consistency across jurisdictions.

CitySwitch Green Office is a national tenants energyefficiency program run by various participant cities and State government agencies. CitySwitch signatories commit to achieve and maintain an accredited 4 star or higher NABERS Energy rating for tenancy.

INCREASED TRANSPARENCY AND BETTER DISCLOSURE

One of the key barriers to markets operating effectively is a lack of clear information. The following are some examples of government policies that assist the market by making relevant sustainability information available. These programs require the provision of energy efficiency information to tenants and buyers of commercial buildings when they are looking for new premises.

Commercial Building Disclosure (**CBD**) is a national program applicable to both new and existing buildings. Under the Building Energy Efficiency Disclosure Act 2010, sellers and landlords of commercial properties of at least 2,000m² are

obliged to disclose NABERS Energy ratings in Building Energy Efficiency Certificates (BEEC), upon offering those properties for lease or sale. The BEEC also incorporates a tenancy lighting assessment to provide information to tenants in considering potential improvements.

The CBD program is part of the NSEE and is responding to the difficulty tenants have in understanding the energy performance of a building. The CBD program is also an attempt to provide an incentive for tenants and landlords to adopt energy-efficiency measures.

The National Greenhouse and Energy Reporting System (NGERS) is a mandatory reporting system established by the Commonwealth National Greenhouse and Energy Reporting Act 2007. The object of this Act is to gather and disseminate information related to greenhouse gas emissions, energy consumption and energy production to inform government policy and meet Australia's international reporting obligations. Under NGERS, corporations who operate above the required threshold are required to measure and report their greenhouse gas emissions, energy consumption and energy production.

INCENTIVES FOR CHANGE

The aim of the following described policies is to provide financial incentives to encourage sustainability measures in the property sector.

As mentioned earlier, the Australian carbon pricing mechanism is one such policy. The carbon price took effect from 1 July 2012 and is part of the Commonwealth government's push for improved energy efficiency across the economy. Assuming that electricity generators pass on their increased costs to consumers, the carbon price will provide a further incentive for the use of green leases. In addition to higher electricity costs, the carbon price is likely to affect building owners and occupants by flowing through to increased rates and land taxes, building administration fees, insurance, wages, waste disposal and cleaning costs.

A national working group has been set up to consider the benefits of a national Energy Savings Initiative (ESI), which, if adopted, could place obligations on energy retailers to help households and businesses, including commercial buildings, find and implement energy efficiency opportunities. After considering the findings of economic modeling and regulatory impact analysis, the Australian Government will make a decision on whether to bring forward a proposal for a national ESI for consideration by the Council of Australian Governments. Any decision to pursue a national ESI would be conditional on agreement that state-based schemes would be folded into any national scheme.

GOVERNMENT AND PRIVATE INITIATIVES TO INFLUENCE CHANGE

In May 2012 the Commonwealth Government introduced legislation to establish the Clean Energy Finance Corporation (CEFC) to facilitate increased flows of finance into the clean energy sector. The CEFC package includes \$10 billion to invest in the clean energy sector. The CEFC's function is to invest, directly and indirectly, in clean energies, which includes investment in businesses or projects for the development or commercialisation of clean energy technologies. These new technologies may include those for use in greening buildings and may flow on to new provisions in green leases.

In NSW, Environmental Upgrade Agreements (**EUAs**) facilitate a finance provider lending funds to building owners for water, energy and other environmental upgrades, and these low-risk loans are repaid through local council charges on the land. Tenants of commercial buildings can be asked to contribute to the costs, but these costs are offset by reduced energy and water bills.

The City of Melbourne's 1200 Buildings project will use EUAs to improve access to finance, to retrofit of 1,200 commercial buildings in the local government area to achieve improved energy and water efficiency and to reduce waste to landfill.

The NSW Energy Savings Scheme aims to assist households and businesses to reduce electricity consumption and electricity costs. Businesses that save energy by installing, improving or replacing energy savings equipment can access financial incentives by participating in the scheme.

Through its Building Innovation Fund the South Australian government is offering \$2 million in competitive grant funding to owners of office buildings that demonstrate innovative ways in which to reduce the energy use and greenhouse gas emissions of existing commercial buildings.

INDUSTRY-WIDE COLLABORATION FOR GREENER BUILDINGS

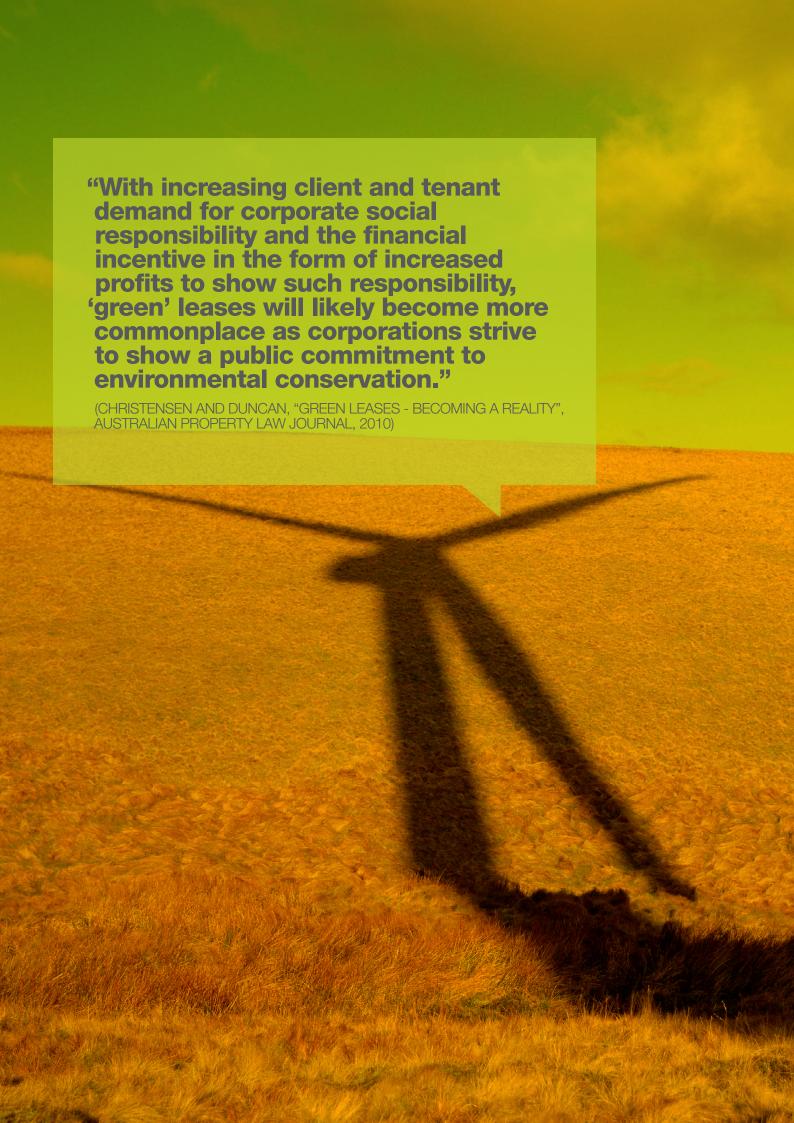
In the private sector, individual entities in the property industry are making significant investments in improving the environmental performance of their buildings. As part of this, many are also utilising green leases to ensure the desired outcomes are achieved and maintained over several years.

There is also considerable scope for industry bodies to assist in this regard.

The Green Building Council of Australia (GBCA) was established in 2002 to promote and support the Australian property industry's transition to greener buildings. The GBCA carries out this work by developing relevant Green Star ratings tools, educating groups about available sustainability measures, and lobbying government and other decision-makers for change where required.

The Property Council of Australia (**PCA**) works with all subsectors of the property industry to, among other things, highlight the commercial benefit of many sustainability measures. The PCA is undertaking research into the effect of the carbon price on the property industry and ways to minimise any associated negative impact on property owners and developers, such as through the adoption of green leases.

The Better Buildings Partnership (BBP) is a collaboration of a number of Sydney's leading public, private and institutional landlords. The BBP aims to improve the sustainability performance of existing commercial and public sector buildings across Sydney's local government area.





MOMENTUM FOR CHANGE

GLOBAL MOVES TOWARDS GREEN LEASES

So far, France is the only country to have directly legislated green lease provisions, but Australia's move towards green leasing is consistent with global developments.

Some examples include:

- In France, as part of the Grenelle Environment law,
 Article 8 of "Grenelle II" which applies to leases entered into
 or renewed on or after 1 January 2012 (retail and office spaces
 over 2,000m²) requires landlords and tenants to exchange
 information on the energy consumption of a leased property,
 and tenants must provide access to the leased premises for
 the execution of energy performance improvement work.
- The US Building Owners and Managers Association (BOMA)
 has published a guide to maintaining a green building through
 operations and management practices. This information
 aims to educate agents and prospective tenants about
 what it means to occupy a high-performance green building.
 The BOMA guide also communicates the responsibilities
 of all parties in the ongoing efforts to keep the building
 green. A link to the BOMA guide is provided at the end
 of this handbook.
- The UK Better Buildings Partnership: Green Lease Toolkit sets out the principles of green leases as well as best-practice recommendations, a model memorandum of understanding template for use by landlords and tenants as an overlay to a pre-existing lease, and model green lease clauses. A link to the UK toolkit is provided at the end of this handbook.
- The Real Property Association of Canada (RealPAC) has produced a National Standard Green Office Lease for Single Building Projects as well as a Green Lease Guide for Commercial Office Tenants. A link to the RealPAC guide is provided at the end of this handbook.



PARTB STRATEGIC APPROACH TO YOUR GREN LEASE



Energy efficiency and other sustainability goals, such as water and waste efficiency, and improved indoor air and light quality, can be measured by a variety of rating tools including the National Australian Built Environment Rating System (NABERS) and Green Star.

A green lease will often require a particular green rating to be achieved as a measure of the performance requirements required by either party, or both parties, for the term of the lease.

Often rating tools are seen as the best way of embedding a sustainable building outcome into a lease - as they focus the objectives and effectives of the parties.

However, it is important to have a clear understanding of the approaches used by the rating tools. For example, NABERS is a performance based rating tool, which rates buildings based on actual performance and historical data, while Green Star is a design based rating tool that evaluates the green attributes of buildings and measures buildings as a whole.

Often commercial building leases have relative long terms, and therefore, green leases should focus on on-going and actual performance to ensure good environmental outcomes are delivered throughout the lease term. A performance based rating tool is often used in green leases to monitor and verify the on-going performance of buildings. Design based tools provide a lot of useful information about building energy efficiency and can be used as a check list for items and activities that could be considered or referred to in the development of green lease or the environment management plan. For example, Green Star – Office Interiors provides ratings of tenancy fitouts with office buildings and contains useful information for tenants regarding tenancy efficiency.

WHAT MAY BE TARGETED?

Measures that can be regulated by a green lease include:

- Water: reducing potable water consumption through increased efficiency of fixtures, fittings and design, rainwater collection and water reuse
- Indoor Environmental Quality: improving the wellbeing of building occupants across the key areas of ventilation, indoor pollutants, lighting, acoustic comfort, thermal comfort and occupant comfort
- Energy: reducing energy consumption through, for example, increased efficiency or reduction in demand, consider generation of energy from alternative sources

- Materials: targeting the consumption of resources used in construction, rewarding buildings that reuse materials, recycling waste and selecting building products with the least harmful environmental impacts
- Land use and Ecology: reducing the impact on, and improving, ecological systems and biodiversity
- Emissions: reducing the environmental impacts of buildingrelated emissions including light pollution, stormwater, sewerage and ozone depleting substances
- Management: promoting sustainability throughout the entire life-cycle of a building and rewarding integrated approaches that deliver good environmental performance
- Innovation: encouraging development and use of innovative technologies, designs and processes, including finding new ways to resolve old problems

NABERS RATINGS TOOLS

Description:

- NABERS ratings measure and rate the energy and other resource consumption of a building, based on actual collected data. There are a range of NABERS office rating tools, which measure variously energy, water, waste and indoor environment. (There are also NABERS tools for buildings that are not offices.)
- NABERS is a rating scheme for existing buildings.
 Performance is measured by analysing the annual use of resources.

Aim:

- The aim of NABERS is to encourage innovation and market best practice to achieve positive environmental outcomes, including lower greenhouse gas emissions, reduced water consumption, less waste and healthier working environments.
- The Commercial Building Disclosure program presently uses NABERS Energy ratings to generate Building Energy Efficiency Certificates.

Administration:

• The NSW Government's Office of Environment and Heritage manages the NABERS program on behalf of the Commonwealth, State and Territory governments.



GREEN STAR RATINGS TOOLS

Description:

- Green Star is a voluntary environmental rating scheme that evaluates the environmental design and construction of buildings. Ratings are available as "design" (for a limited period only) and "as-built".
- The Green Star system assesses the environmental design and construction of buildings by considering their management, indoor environmental quality, energy use, transport proximity, water and materials use, land use and ecology, emissions, and innovative features.

Aim:

 Green Star was developed for the property industry in order to establish a common language of green building attributes, set a standard of measurement for green buildings, promote integrated, whole-building design, recognise environmental leadership, identify building life-cycle impacts, and raise awareness of green building benefits.

Administration:

 The Green Star system is administered by the Green Building Council of Australia, which is a national, not-for-profit organisation with the mandate of developing a sustainable property industry in Australia and driving the adoption of green building practices.



COMPARISON OF RATINGS TOOLS

Following is a table which provides a snapshot comparison of the NABERS and Green Star ratings tools for offices.

It is important to note that the NABERS ratings system is currently the only system focusing on building operations and, as such, is the more appropriate ratings tool for inclusion in relation to the ongoing performance requirements of a green lease. Green Star is currently developing a Green Star building "performance" tool, to be launched in 2013.

TOOL NAME	RATINGS AVAILABLE	CATEGORIES	KEY FEATURES	COMMENTS
NABERS	0 to 6 Stars in half star increments	Water Waste Indoor Environment	Categories are rated separately and	NABERS measures the actual performance of buildings based on
		Energy Rating type Tenancy: covers the tenanted space Base Building: covers central building services Whole Building: covers a combination of the above Tenant occupying a leased or privately owned office space within a commercial office building office building office building services Tenant occupying a leased 1. Energy consumption 2. Net lettable area 3. Number of occupants 4. Hours of occupancy Submetering is required or property manager in relation to tenancy or base building ratings. If there is inadequate submetering, a whole building rating should be performed.	independently, delivering a separate NABERS rating for each category	the twelve month worth of building operation data. A rating expires after twelve months of its release. Therefore, when negotiating and drafting a green lease, attention needs to be made to ensure that regular NABERS assessments are specified to monitor and verify the building's on-going energy efficiency performance.
GREEN STAR	4 Star, 5 Star and 6 Star Green Star There are no half star green star ratings	 Management Indoor Environment Quality Energy Transport Water Materials Land Use & Ecology Emissions Innovation Rating type Design: valuates the environmental potential of the design of commercial offices (base buildings), for both new and refurbished projects. A "design" rating expires two years after a building's practical completion; for a building to maintain a Green Star rating, an "as-built" rating is required. As-built: assesses the delivery of the same design criteria, but at construction completion. 	The holistic assessment framework addresses all categories to deliver a single Green Star rating	Green Star ratings are given upon design or after construction. No action is required to maintain the rating and the rating does not expire. Therefore, if Green Star is referred to in a green lease, attention needs to be made to ensure the green credentials of the building are maintained throughout the lease term at the same level as required for the initial Green Star rating.

IDENTIFYING KEY OBJECTIVES

OBJECTIVES OF LANDLORD AND TENANT

As already noted, there are a range of benefits of a green lease for both landlords and tenants. For this reason, when a party states "I want a green lease", it is important to look behind this statement at their motives - for example, to look at whether, whether there is an expectation that unless outcomes are achieved, then some form of penalty will be imposed or there is a tenant/landlord or market requirement that needs to be satisfied.

The aims of all involved parties should be considered before and during green lease negotiations. The objectives of the landlord and tenant are critical.

In the following table are some examples of questions a lawyer may wish to pose to their client, at an early stage. Some likely responses are included, to illustrate the range of possible responses.

KEY QUESTIONS	POSSIBLE ANSWERS
Do you want green lease provisions or is this required by another party?	 I want the green lease provision. I don't want it but it is required because: the other party insists on it government policy head office have told us that we have to do it
(Where applicable) Why do you want green lease provisions?	 I want to help save the world I want the building to be a showcase cutting-edge example of what is possible I want to save money in the operation of the building I want to do the minimum to earn the desired 'star' rating I want to secure new tenants and ensure my building does not become obsolete
What green aspects are you most interested in?	 Energy Water Indoor environment quality Waste Use of recycled materials Transport
Are you willing to pay more money to achieve green outcomes?	 Absolutely not If there are any increased costs, the other party should wear them Yes, in order to achieve the value outcomes we are looking for
Are you willing to change behaviour to achieve green outcomes?	 Yes, I am looking for a cultural change in behaviour in our organisation No, I want to use our existing resources, mindset and only provide lip service to our board direction/ government policy
Do you have particular targets in mind?	 Yes, I want to achieve a 6 NABERS or Green Star rating No, can you recommend a rating or ratings and explain why
What will it mean for you if these targets are not able to be met?	 I want to make sure it makes no difference whether the targets are met I will lose my job if the targets are not met It could impact on the valuation of the building and its ability to be let in the future
What resources do you have to continue to monitor and manage the green outcomes?	 That's a good question. I had not given that any thought There will be minimal resources available to manage a green lease commitment I would be surprised whether the skills and resources exist within our organisation to manage this

IDENTIFYING KEY OBJECTIVES

UNDERSTAND CORPORATE OBJECTIVES/GOVERNMENT POLICY

In many cases, one or both of the landlord or tenant will be required to have a green lease in order to comply with their material corporate objectives or, for government agencies, government policy.

Some examples of corporate objectives include:

- ISPT have committed to the Core Fund targeting a
 weighted portfolio average of 5 star NABERS Energy and
 4.5 star NABERS Water ratings by June 2012. This will be
 achieved through refurbishments, developments, on-site
 energy generation and sewage reclamation; and
- GPT is committed to achieving a weighted average 4.5 star NABERS Energy rating and 3.5 star NABERS Water rating across the office portfolio. GPT have signed a voluntary sustainability covenant with the Environment Protection Authority, a statutory authority under the Environment Protection Act 1970 (Victoria).

Some examples of government policy include:

- National Green Leasing Policy applicable to all Commonwealth, State and Territory governments. The policy includes targets of 4.5 star NABERS Energy ratings for base building and tenancy¹ and 4 star NABERS Water; and
- the Commonwealth Energy Efficiency in Government Operations policy which requires use of a green lease with targets of 4.5 star NABERS Energy for base building and tenancy.

It is important for parties to be fully aware of their own corporate objectives regarding sustainability as well as all relevant government policies at the negotiation stage.

This is required to:

- understand areas of acceptable and unacceptable risk;
- clearly identify the parameters within which negotiation of green lease provisions is possible; and
- enable the identification of acceptable compromise positions.

"DEXUS has since 2010 invested \$32m in energy efficiency upgrade works to achieve a 4.5 star NABERS Energy rating average across our office portfolio, in line with our commitment to minimise the environmental impact of our operations and future proof our high quality property portfolio for changing tenant demands. In addition, we have amended our standard office lease to include green provisions that will maintain our collaborative focus on energy efficiency with our tenants."

(Michael Lane, Head of Corporate Responsibility & Sustainability, DEXUS Property Group, 2012)."

This applies only to governments, e.g. the Australian Government's Green Lease Schedule, that elect to govern and deliver the tenancy requirement through the Green Leasing arrangement between the landlord and the government tenant. Individual governments may elect to specify and monitor their tenancy rating requirement through other government mechanisms, e.g. government directives, independently of the Green Leasing arrangement. In those cases, the other mechanisms will determine and prescribe the tenancy rating requirements.

IDENTIFYING KEY OBJECTIVES

OBJECTIVE OF THE LEASE DOCUMENT

Clear and measurable objectives of a green lease are crucial to its ongoing success as a working agreement.

The dual purpose of a green lease is to:

- establish the mechanism for achieving the sustainability objectives by imposing legal obligations to achieve stipulated targets and benchmarks; and
- provide the support tools to deal with issues relevant to the achievement of those targets and benchmarks and to allow preventative action to be taken before there is a failure to achieve or maintain those targets.

INCORPORATE GREEN DETAILS IN TERMS SHEET

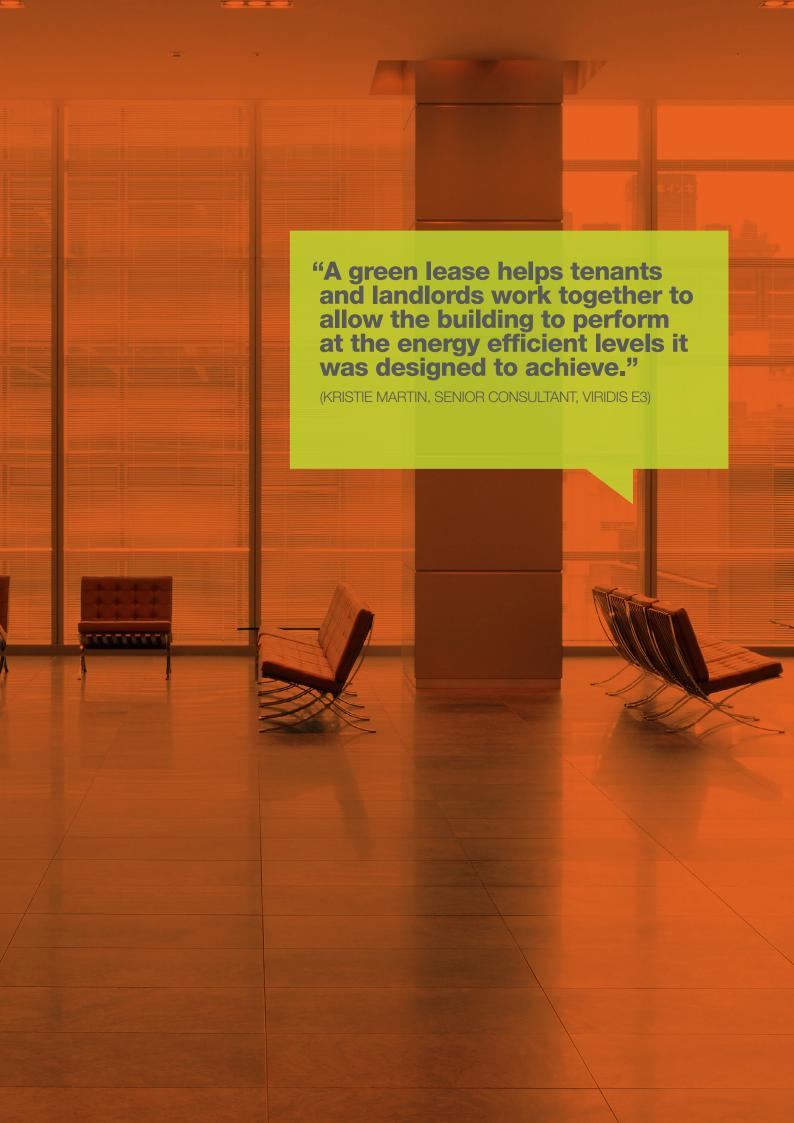
It is vital to the successful negotiation of a green lease for the principles to have been identified at an early stage in negotiations. Too often, the "green" terms are seen as an afterthought to the commercial deed or a "bolt-on" which do not require any modification or thought. When this is the case, the parties do not recognise the advantage of clearly setting out their green objectives in the commercial heads of agreement or terms sheet. Also, unless the green building outcomes are disclosed and understood early, then the commercial deed may have to be re-cut.

In practice, if the significant green lease terms are not incorporated in a terms sheet then it may be difficult to later insert them into a draft lease. This is because inclusion of the green provisions may:

This is because inclusion of the green provisions may:

- require behavioural change that, when identified late in the day, a party is not prepared to consider;
- require amendment of other, traditional elements of a lease; or
- introduce a new level or stage of risk which needed to be incorporated in the commercial discussions from the outset.





TECHNICAL CONSIDERATIONS

WHAT IS THE CAPACITY OF THE RELEVANT BUILDING OR PREMISES?

Once the objectives of the parties are explored and understood, it is necessary to turn to the physical capacity of the particular building and space. Despite any general aspirations, a green lease, and in particular the targets that are set, must be tailored to take into account the operational features and capabilities of the relevant property.

It is important to ensure that what is ultimately included in a green lease is actually achievable by the relevant building or tenancy - for example, that the building itself is eligible for the formal rating referred to and that the metering included in the project allows the required data to be obtained and the energy uses to be allocated appropriately.

It is not necessary to have state-of-the-art technology and new design to improve a building's sustainability outcomes. Simple measures to optimise performance can be effective. One of the most effective ways in which to optimise a building's performance under a green lease is to follow a simple and realistic environmental management plan, monitored and updated by the parties or an environmental management committee.

Consider how the following may be optimised in the particular premises:

- indoor environment quality (temperature, ventilation, light, space)
- energy use
- · water use
- · waste management
- choice of materials used in works (ie, sustainability and potential for recycling)

Following is a table which can be used when considering what is possible for particular premises. Many buildings will have a current energy rating which can be used as a base figure. This is particularly the case since the commencement of the Commercial Building Disclosure program. The next step is to consider whether there is scope for improvement of these ratings. It may be necessary to consult with an environmental expert to obtain detailed advice, particularly where parties are seeking to improve current performance.

MEASURE	CURRENT RATING	WAYS IN WHICH RATING COULD BE IMPROVED	PROPOSED TARGET RATING
ENERGY			
WATER			
WASTE MANAGEMENT			
INDOOR ENVIRONMENT QUALITY			

TECHNICAL CONSIDERATIONS

THE IMPORTANCE OF METERING

Good environmental management of a building requires separate and accurate metering to enable the green performance to be properly measured.

As an example, the Commonwealth Green Lease Schedule makes the landlord responsible for installing NABERS compliant electricity, water and gas metering. The landlord is required to ensure that, from the commencement date and during the term of the lease, the building and premises are separately metered for all services: electricity; water (hot and cold) and where practicable, separate water uses; and gas.

Separate and accurate metering is essential to the parties ability to:

- · obtain accurate tenancy and base building ratings;
- effectively manage energy consumption, by ensuring the tenancy and base building performance can be monitored effectively;
- purchase electricity in an efficient and cost effective manner; and
- · demonstrate value for money in purchasing electricity.

When later works are done, it is particularly important to ensure that the appropriate tenancy or base building meters are used so that the separate metering system is properly maintained.

PECULIARITIES AMONG BUILDING TYPES

Different building types, even in a commercial office context, present different challenges to operating and managing a green building.

Mixed-use buildings:

In order to acheive an accuarte NABERS Energy rating for an office premises that is part of a multi-tenanted mixed use building, it is important that sufficient metering is in place to isolate the energy consumption attributed to the office component from the rest of the building. Talk with your energy consultant to understand what is required.

Multi-tenanted buildings:

It is particularly important in multi-tenanted buildings to ensure that the building is properly metered to enable the collection of consumption data for each of the tenancies, as well as the base building.

The other key matter to consider with multi-tenanted buildings is the ways in which the actions of one tenant can impact on the ability of other parties to achieve ratings. One tenant ought not to be able to impact on the ability of another tenant to achieve a tenancy rating. However, the operations of a single tenant may have a negative impact on the landlord's base building rating for all other tenants. Different ways of managing this risk are considered in Part C of this handbook.

In summary, green lease negotiations must be specifically adapted to the circumstances and take into account the building as a whole. When the lease is drafted, knowing how the ratings tools work, appropriate to the premises, is vital to be able to achieve accurate and workable green lease provisions.

"Successfully achieving targeted energy ratings all comes down to metering. Potential arguments between a landlord and tenant regarding energy use can be avoided by accurate and appropriate metering."

(RORY EAMES, NSW/ACT MANAGER, VIRIDIS E3)

"HARD" GREEN OR "SOFT" GREEN LEASE?

WHAT IS THE DIFFERENCE?

As green leases are not uniform or "one size fits all", there are a variety of choices about the scope and nature of provisions to be included in a green lease. We use the terminology of "hard" green and "soft" green to explain the extremes at either end of the spectrum in relation to consequences of any breach of a green provision.

"Soft" green - generally, green leases are more likely to take a collaborative and cooperative approach, encouraging the parties to work together to identify any issues that may prevent the targets from being reached.

"Hard" green - although less common, there is scope for the lease to contain more punitive remedies for either party not meeting targets.

What if one party doesn't meet its energy consumption targets - is it a normal breach of the lease, or does it require some other remedy? Or are the green provisions just "best endeavours" clauses?

This is a threshold issue in negotiations. The approach taken to the consequences of default will flow through to the terms of the green lease and the relationship between the parties in its operation.

POTENTIAL RANGE OF REMEDIES FOR NOT MEETING TARGETS

Green lease provisions can range from a simple aspirational statement that the parties wish to take into account environmental considerations to an obligation to achieve specified ratings and other targets. Where targets are set, it is necessary to consider what the consequences will be if those targets are not achieved.

For a landlord default, this could include rent abatement, the non-application of an annual rent increase, or a reduction in outgoings payable by a tenant in respect of a period during which the building is operating below the required standard.

For a tenant default, it is not usually appropriate for the landlord to have a right to re-enter - instead, the landlord could raise the rent or outgoings or both for the period in which the tenant is non-compliant.

For either "soft" or "hard" green leases the principle of reciprocity is an important issue to explore in negotiations. It can be difficult to argue against an approach which seeks to impose both similar obligations on, and similar remedies for, both parties.

Part C of this handbook considers further the potential sanctions for inclusion in green leases.

FACTORS TO CONSIDER IN MAKING THE CHOICE

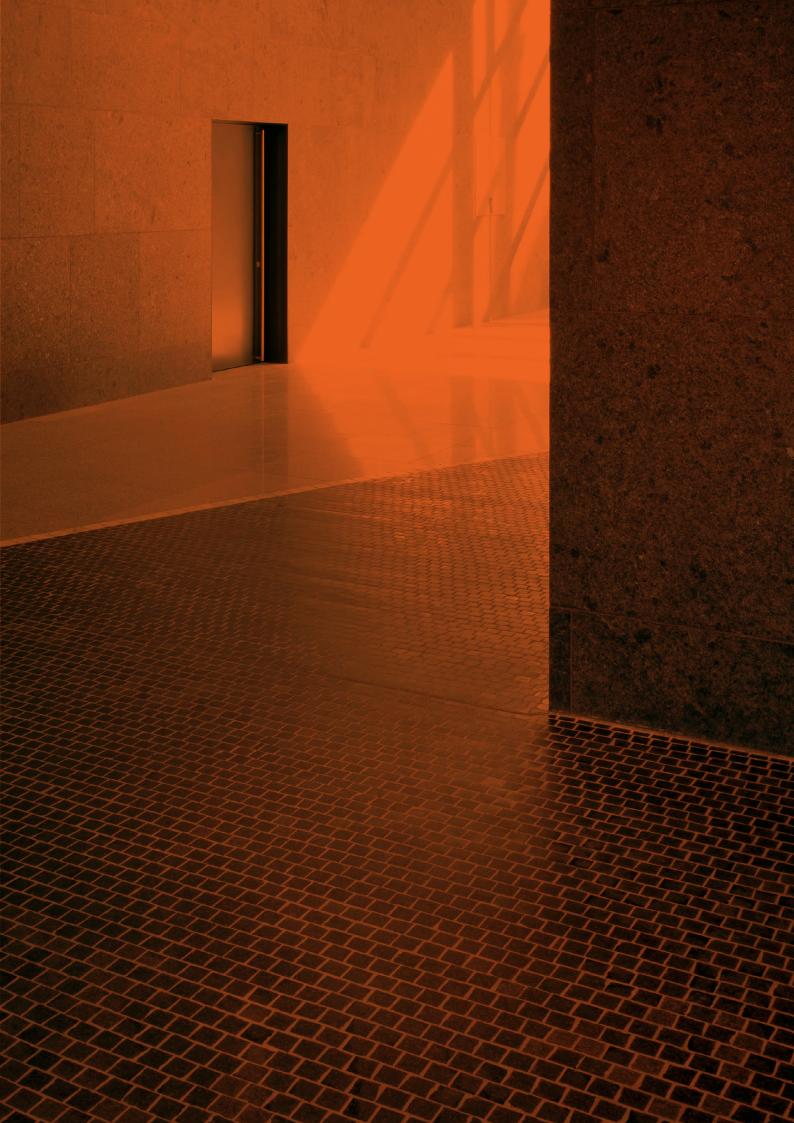
The following queries may assist in helping to decide whether a "soft" or "hard" approach is preferable in particular circumstances:

 Is the other party equally committed to implementing green initiatives?

Yes - where both parties are committed a "soft" approach can be effective. It may provide the best environment to aim for "stretch" targets and innovative approaches.

No - where one party is less motivated, having the threat of a "hard" remedy can help to get their attention. This is particularly the case where the "hard" remedy has an obvious financial impost.

- What are the true consequences of default by the other party? If their default would cause actual loss, this may best be reflected in "hard" green provisions.
- How experienced are the parties at managing green lease obligations? Those parties who are new to green lease obligations may be more concerned about the risk and may find it easier to accept these new obligations when coupled with "soft" remedies.





PART C DRAFTING YOUR GREEN LEASE

LEASE PROVISION OR SCHEDULE?

Energy efficiency and other sustainability goals, such as water and waste efficiency, and improved indoor air and light quality, can be measured by a variety of rating tools including National Australian Built Environment Rating Scheme (NABERS) and Green Star.

A green lease will often require a particular green rating to be achieved as a measure of the performance requirements required by either party, or both parties, for the term of the lease.

WHAT MAY BE TARGETED?

Green terms can be included:

- in the body of a lease; or
- · as an additional schedule; or
- as a separate side arrangement.

In some cases, "green" concepts can be incorporated into a lease through a very short and apparently simple clause, referring typically only to the tenant co-operating with the landlord to achieve the landlord's environmental goals.

Where a lease contains green provisions scattered throughout, careful drafting is required, not to mention careful analysis by the tenant. In particular, care is required in drafting the default and termination provisions. Otherwise, a breach of the green provisions may unintentionally constitute a breach of the lease.

More often the green lease terms take the form of a schedule to the lease - separating the ordinary terms from the green overlay. Even in these circumstances, consideration needs to be given to the relationship between the traditional lease terms and the green provisions. The Commonwealth green lease schedule (GLS) is a publicly available template schedule. There is a link to the GLS at the end of this handbook. The National Green Leasing Policy also promotes use of a green lease schedule. Keep an eye out for the National Green Leasing Policy Toolkit (not yet available but which will bring together all government green lease schedule templates and guidance notes).

The advantages of a separate schedule include:

- Some parties may be more comfortable particularly as it helps to clearly identify or isolate the "green" elements of the lease rather than having to sift out the additional terms or modifications to the lease.
- It provides more flexibility to parties to appropriately modify the green provisions to meet their particular objectives.
- Those parties responsible for the ongoing management of the green lease provisions are able to easily identify the key provisions for them.
- A green schedule typically includes within it the consequences that flow from a failure to meet the relevant green targets, which are separate from the usual remedies for breach contained in a lease.

Where parties would like to add green requirements to a lease already entered into, they may wish to execute a variation, ancillary agreement or even a separate memorandum of understanding containing those green terms, to be read alongside the lease. This alternative is open to parties at any time during the lease term.

RELATIONSHIP WITH OTHER PARTS OF THE LEASE

AREAS OF NEW DEVELOPMENTS IN SUSTAINABILITY MEASURES

In the case of a traditional lease:

- most obligations are imposed on the tenant and relatively few on the landlord;
- there is no mention of "green" ideas and goals in the recitals or operative provisions in the lease;
- the obligations are designed to be clear and fixed for the term of the lease.

The introduction of green terms to a lease (even where these are contained in a separate schedule) may have implications for other more traditional lease provisions. In this context, following is a table setting out those parts of a lease which may be affected by a decision to adopt energy efficiency and other sustainability measures. The traditional lease terms may well need to be modified in order to facilitate the parties in achieving their sustainability aspirations.

"Despite a growing awareness of the need to reduce environmental impacts from the operation of commercial office buildings — expressed in community concern, emerging rating schemes, tenant requirements, staff expectations, and emerging regulations, including disclosure regulations—the structure and content of commercial leases can impose significant constraints on the ability of buildings to be adjusted/updated."

(A. CRAIG ROUSSAC AND SUSAN BRIGHT, "IMPROVING ENVIRONMENTAL PERFORMANCE THROUGH INNOVATIVE COMMERCIAL LEASING: AN AUSTRALIAN CASE STUDY" (2012) INTERNATIONAL JOURNAL OF LAW IN THE BUILT ENVIRONMENT, 4:1)



RELATIONSHIP WITH OTHER PARTS OF THE LEASE

Potential effect of green provisions on common lease terms

ITEM NO	PROVISION	POSSIBLE GREEN ADJUSTMENT		
Payment provisions				
1.	Outgoings	Often, the outgoings contributions payable by a tenant will lump together payment for energy, water and waste costs with other costs of running and managing the building. In this way, the tenant merely pays a proportion of the building's overall costs. Where services to each tenant's premises are not separately metered, there is no real incentive for any single tenant to reduce their use of electricity, water or other services. In addition, there is no ability for the tenant to inspect the energy reports for the building, or negotiate the adoption of particular energy providers or types. A green lease will typically provide for separate metering and information sharing between landlord and tenant about energy consumption.		
2.	Capital costs	In a traditional lease, capital costs are usually borne by the landlord. Without agreement between the parties, this would also usually be the case for green refurbishment, even though a substantial part of the benefit may accrue to tenants through reduced energy outlay. This is the "split incentive" discussed earlier. Green leases can introduce ways in which landlords and tenants may cooperate to share both the costs and benefits of green upgrades.		
3.	Rent review	In a green lease, parties may require market rent reviews to also consider the energy performance rating of a building for the period preceding the review.		
4.	Reimbursement or payment of costs clauses	Parties to the lease must consider who will be responsible for additional "green"- related expenses, such as the cost of obtaining, or adjusting, a rating such as NABERS and even the additional cost of managing sustainability arrangements.		
Works, fito	ut and repair			
5.	Materials and repair	Where the Green Star rating tool is used, green materials take on importance for the ratings of a building. The use of green materials may then be mandated in a green lease's fitout, repair, maintenance and make good provisions.		
6.	Landlord's right of access	 The landlord's right to access the premises may be modified to allow: entry by landlords and environmental auditors in relation to environmental audits of the premises; and landlords to undertake any works necessary for energy efficiency reasons (with appropriate protections for the tenant's use and enjoyment of the premises). 		
7.	Removal of fixtures	Provisions governing the removal of fixtures - for example, as part of make good - in a green lease may more readily facilitate the recycling or re-use of fitout where appropriate.		
8.	Landlord's consent to alterations	Provisions governing a landlord's consent, or refusal to provide consent, to alterations typically do not allow a landlord to refuse alterations that would otherwise have a detrimental effect on the energy efficiency of a building. A green lease may introduce this idea as a means of ensuring that all fitout and other works undertaken by tenants will be consistent with the sustainability goals of the building. This may range from requirements regarding the types of materials used to review of design to ensure there will not be an adverse impact on the desired ratings. For example under these provisions, a landlord may require a tenant to install supplementary (tenant) air-conditioning to service meeting rooms or a computer room rather than inefficiently servicing these higher-demand areas from the base building system.		

ITEM NO	PROVISION	POSSIBLE GREEN ADJUSTMENT
Other		
	Transparency and communication	In a traditional lease there is no requirement for the level of transparency of information that is required for the successful operation of green leases. There is usually no facility at all for landlord-tenant communications in this area.
		In contrast, a green lease may set up an environment management committee, comprising representatives of each party, and setting shared goals for environmental efficiency measures. In addition, there will be information sharing requirements to enable the gathering of information relating to energy efficiency and environmental performance.
	Waste disposal	Waste disposal provisions may specify the recycling of certain materials, such as by using separate bins and services not otherwise available to the tenant.
	Assignment and subletting	Christensen and Duncan (2010) suggest that assignment and subletting terms may be broadened so that the landlord's consent to assignment or subletting the premises may be expressly conditioned upon being satisfied that the prospective tenant can meet their environmental obligations as well as the usual financial and use obligations. Similarly, a green lease may be explicit in stating that the landlord can withhold consent where the tenant will not guarantee compliance with the building's EMP. In a standard lease format, if these are not express provisions then the landlord may not be able to take them into account.
	Performance standards	There is potential for real tension between the setting of performance standards and the achievement of sustainability outcomes. In particular, performance standards around indoor temperatures - for example, requiring consistent temperatures to be maintained at all times - can be inconsistent with the energy performance requirements of green leases. Building in more generous temperature ranges, or not specifying indoor temperatures, may allow for proportionately large energy savings under green leases. The parties should carefully consider all performance standards to ensure that they are consistent with the energy and other sustainability performance requirements of their green lease. These may relate to lighting and air-conditioning zoning and control, operating hours, supply of hot water and lift services.
	Breach, notice and termination	A traditional lease may include a strict penalty for breach of an essential term of the lease, leading to the right of either party to terminate for default. In the interest of preserving a collaborative relationship between landlord and tenant to maintain the sustainability measures of a green lease, a green lease often provides a separate default and dispute resolution procedure for the green provisions of the lease. Default provisions in a green lease may focus on remedying any default in a way that promotes a continued and effective operation of the lease, rather than facilitating its early termination.

KEY ELEMENTS OF A GREEN LEASE

THE IMPORTANCE OF METERING

A green lease establishes the mechanism for achieving stated energy efficiency outcomes by imposing a suitable legal framework of rights and obligations. It also provides the support tools to deal with relevant issues that may arise during the term of the lease. The following sections will detail the various types of provisions that are customary or can be included in drafting a green lease.

A green lease may include:

- · green targets including:
 - target ratings and performance requirements for both Landlord and tenant; and
 - the consequences if ratings are not achieved;
- a dispute resolution scheme relating purely to the green provisions.
- information reporting and sharing requirements including:
 - a management plan or strategies for developing one; and
 - information on how the green lease should be administered;
- Although not so commonly seen, green leases can also Include provisions which:
 - permit and facilitate the landlord in carrying out environmental upgrades during the term of the lease; and
 - include arrangements for the sharing of the costs of such works.

"Sustainability is a core part of Grocon's business and we are always exploring new ways to achieve better outcomes, including through our green leases.

Where the tenant shares these values, as ANZ Banking Group did with our 242 Pitt Street development in Sydney, we are able to achieve innovative green lease provsions that meet the desired objectives of both parties."

(DAN MCLENNAN, GROUP CAPITAL AND TRANSACTIONS MANAGER, GROCON GROUP)

GREEN TARGETS AND PERFORMANCE REQUIREMENTS

USE OF GREEN TARGETS

Although not used in all green leases, clear and realistic green targets are an important part of an effective green lease.

Clearly, sustainability concepts can be incorporated into a green lease without the need to specifically identify any target ratings. However there is no doubt that the setting of green targets provides a clear and measurable indication of the success of the sustainability measures undertaken. Since the introduction of the Commercial Building Disclosure program, most landlords are effectively required to maintain a current BEEC (and therefore maintain a current NABERS Energy rating) in any event - mandatory disclosure requires provision of a current BEEC before offering any regulated premises for lease or sale. Further, it is becoming more common for landlords to also maintain such ratings for their own monitoring and reporting requirements.

Another consideration is whether the target ratings incorporated in the green lease will be "comfortable" or "stretch" targets. A "stretch" target may inspire more innovation and ultimately lead to better environmental outcomes. However, whether a party will accept a stretch target will ultimately come down to the consequences of any failure to achieve the target.

Every measurable target of a green lease should be accompanied by dates for reaching that target, and methods of monitoring the parties' compliance with those targets.

For example, the parties may agree:

- under an agreement for lease in relation to a building construction:
 - a specified Green Star design rating; and/or
 - in relation to NABERS, an expert opinion from a NABERS Accredited Assessor that the building has been designed and constructed in a way such that it is capable of achieving the desired rating. In order to provide this opinion, the Assessor will need to make assumptions regarding the use of the premises by the tenants including in relation to hours of operation, occupancy rates and heat load. This can also be achieved through a NABERS Energy Commitment Agreement. The actual NABERS rating will not be available until the building has been operated for a sufficient period to collect the required data.
- · under the lease, once the building is operational:
 - a specified Green Star as built rating; and/or
 - specific NABERS ratings for both landlord (base building) and tenant (tenancy), which are required to be maintained throughout the term of the lease.
 - Evidence of compliance is demonstrated by certificates provided at specified dates, agreed in advance by the parties.

VARIATION OF GREEN TARGETS

Green leases may also contemplate that the target ratings can be varied during the term of the lease.

This may be a variation to:

- Reduce the target rating where parties are no longer able to meet agreed targets, these targets may be modified; or
- Increase the target rating green lease targets may be increased where further efficiencies have been achieved through technical innovation and/or changes to the fabric of a building.
- The modification of targets in this manner requires either an agreement between the parties, or binding expert determination.

Another approach which is less common but which may be considered in relation to increasing ratings is the adoption of a 'ratchet'. When a party achieves an actual rating higher than its target rating, this will effectively increase the target rating and the party will agree to maintain the higher rating. The advantage of this approach is that it would be self-executing and not require further agreement or expert determination. However, there is a risk that some parties would be discouraged from achieving a higher rating, as it would then need to be maintained.

GREEN PERFORMANCE OBLIGATIONS

Set out below are some examples of green performance obligations which may be incorporated in a green lease, ranging from stricter absolute obligations to softer aspirational statements.

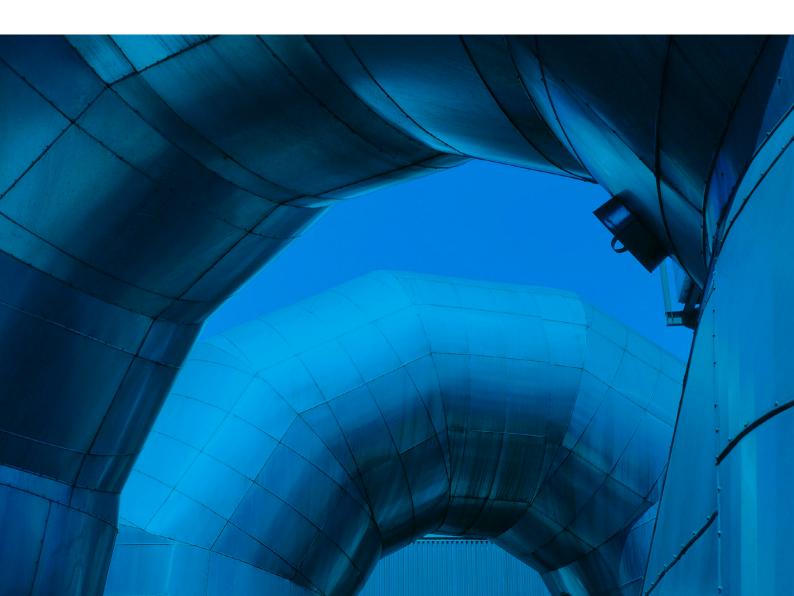
CLAUSE TYPE	SUMMARY EXAMPLES	COMMENT
Absolute obligation on landlord	 The landlord must: achieve the target base building rating within 15 months of the lease commencement and maintain it throughout the term; and arrange for an annual environmental audit of base building services. The landlord must implement: energy, waste and water use monitoring at least quarterly, with a process for identifying potential consumption savings initiatives; energy monitoring specific to each tenancy/floor of building; energy consumption reduction targets; regular maintenance of air conditioning and ventilation services; use of low environmental impact cleaning products; and procurement of low environmental impact consumables (paints, light fittings, ceiling tiles, flooring, etc) for all works in the building. 	This provision contains a hard obligation on the landlord to maintain the specified rating. A landlord may only agree to a lower rating than it believes will be obtained to build in comfort that this obligation will be met - a 'stretch' target is highly unlikely. In addition to the energy rating, the obligations also relate to: • waste; • water; • low environmental impact cleaning products and consumables.
Absolute obligation on tenant	The tenant must achieve the target tenancy rating within 15 months of the lease commencement and maintain it throughout the term. The tenant must: use low environmental impact materials; procure low environmental impact consumables (paints, light fittings, ceiling tiles, flooring, etc) for all fitout works; not adversely alter any energy or water saving equipment installed in the premises by the landlord; participate in (minimum quarterly) energy, waste and water monitoring and energy consumption reduction targets; and use cleaning products with low environmental impact.	This provision is in similar terms to the landlord obligations.

CLAUSE TYPE	SUMMARY EXAMPLES	COMMENT
Best or reasonable endeavours	During the term the landlord / tenant must use reasonable endeavours to maintain the NABERS rating.	It is quite common for green lease ratings provisions to be couched as best endeavours or reasonable endeavours obligations. This may reduce over time as parties become more comfortable with the rating tools and more aware of what is actually required to maintain the ratings.
Collaboration and co-operation	Each party will cooperate with each other and act in good faith to achieve energy efficiency and other sustainability goals. The tenant must to the extent reasonable co-operate with the landlord to achieve and maintain the landlord's environmental objectives. The tenant will, wherever practicable and reasonable, cooperate with the landlord's initiatives to reduce energy consumption, water and waste and to increase recycling, having regard to the extent of any works required to do so, the cost of those works and the extent of interference to occupiers of the building arising from any such works.	 Although these types of provisions may appear attractively simple, care should be taken in their drafting and negotiation. In particular: Good faith obligations are real and require a higher level of behaviour. To the extent possible, the desired environmental goals should be identified. Clauses of this nature do contain obligations and may impact on the tenant's decisions regarding the operation of its business and the landlord's decisions regarding the operation, maintenance and refurbishment of its building. Both parties should carefully consider the extent to which this is acceptable to them in the context of meeting the environmental objectives. The advantage of these provisions is that they do introduce flexibility which better permits the parties to take advantage of opportunities for better environmental performance over the life of the lease.
Aspirational	The landlord and the tenant are committed to managing and operating the building and the premises to promote energy efficiency and minimise the environmental impact of the use and occupation of the building. The parties will consult with each other on issues or circumstances that may enhance environmental performance and will consider undertaking all such opportunities which are expected to have a positive impact on the work environment subject to an analysis of the costs and benefits.	These provisions are soft and contain no real teeth. While some parties may prefer this type of green obligation, it will not be acceptable to those parties whose corporate or other policies require clear green objectives to be met.

MANAGEMENT OF GREEN RISKS

We have seen that green provisions in leases may introduce an unprecedented level of uncertainty for landlords and tenants. Not only is it a relatively new area for many parties but green leases also commonly incorporate collaborative obligations which requires the parties to work together to achieve the outcomes.

Further, it is to some extent in the nature of the ratings that the actions of one party can impact on the other party's ability to achieve its own desired rating. For example, the way in which a tenant uses its space will impact on how hard the base building air-conditioning system will need to operate to maintain a comfortable temperature range in the premises. An extra load can be placed on the air-conditioning system through high equipment load (such as in a computer room), high occupancy rates or inefficient tenancy lighting which increases heat in the premises.



Set out below are examples of provisions which seek to address or manage these risks.

CLAUSE TYPE	SUMMARY EXAMPLES	COMMENT
Control other party's actions	 Set parameters of tenant behaviour in relation to: weekly number of hours air-conditioning provided, and the temperature range maximum occupant density maximum equipment load density of lighting modifications in fitout requirement for occupancy detection lights requirement for blinds to be shut against direct sunlight maximum annual electricity consumption by tenancy specific placement of temperature sensors The tenant must comply with the stated performance assumptions. 	These provisions seek to provide more certainty that the ratings will be achieved by controlling how the tenant will operate its business and occupy the premises. Over the term of the lease, this may become a major restriction for tenants and warrants careful consideration. Expert technical advice will be required in relation to the setting of the performance assumptions. Often, these are based on the assumptions used by energy consultants who have assessed the likely ratings at the design stage which will be achieved by a new building or an existing building following a refurbishment.
No adverse effect	The tenant commits not to do anything that may adversely affect the energy efficiency and environmental performance of the building or the premises. The tenant must not do or permit to be done anything that is likely (in the landlord's reasonable opinion) to impact on any environmental efficiency rating of the building from time to time including but not limited to the NABERS rating for the building. The tenant must not, by any act, omission, negligence or default, including in exercising any rights it has under this lease, do anything which decreases or adversely affects the energy efficiency and environmental performance of the building or the premises including a NABERS rating	Although these provisions do not specify performance assumptions, they may have the same result of controlling the tenant's occupation of the premises, where this can be shown to impact on the base building rating. Although these example provisions apply to tenants, there is no reason in principle that landlords should not be under a similar obligation.
Conditional on other party's performance	The tenant acknowledges that its own behaviour regarding electricity use/performance assumptions can jeopardise the target base building rating. The landlord is not in breach of these green lease provisions if the base building targets are not achieved where this is due to the tenant occupying the premises other than in accordance with the performance assumptions. The landlord is not in breach where it is prevented from complying with its obligations because of the acts or omissions of other tenants in the building which are beyond its control provided that the landlord uses its reasonable endeavours to remove or mitigate their effects as expeditiously as possible. The tenant's obligation to achieve the target tenancy rating is subject to the landlord achieving the target base building rating (and vice versa).	Under these provisions, the tenant is permitted to occupy their premises as they see fit but the landlord will not be in breach if this impacts on the landlord's ability to achieve their base building rating.

CONSEQUENCES OF DEFAULT - "HARD" OR "SOFT"

The most appropriate remedies will differ for different premises and different parties. Some of the relevant factors are considered in Part B of this handbook. In particular, before incorporating "hard" remedies, parties should consider whether the presence of these types of remedies will:

- Reduce the level of obligations which a party will be willing to accept.
- Stifle innovative approaches to new sustainability measures.
- Prevent the parties from co-operating and collaborating effectively.

Following are some examples of provisions setting out the consequences of breach, ranging from 'hard' to 'soft'.

CLAUSE TYPE	SUMMARY EXAMPLES	COMMENT
Default under lease	The usual default regime is triggered, potentially permitting termination of the lease by the non-defaulting party.	If this approach is adopted, parties will also need to consider if the environmental obligations will be classified as essential terms of the lease.
Rent abatement	If the required rating is not obtained within [] months of the commencement date, []% of the rent will abate until such time as the rating is achieved. If the landlord is in breach of its obligation to meet base building environmental targets, the rent will abate for the amount of electricity costs and outgoings that are greater than would have been the case if the environmental target had been achieved.	These provisions are relatively rare, as green leases generally adopt a more collaborative approach. Rent abatement provisions can be drafted as the 'final' step after the parties have attempted other approaches. Although no example is provided here, a similar approach can be taken to breach by the tenant. This could perhaps be a discount from the base rent that the tenant is only entitled to while it maintains its target tenancy rating.
Cure or remedial plans	Either party may request evidence from the other about compliance with its green obligations under the lease. In addition, either party may request an environmental audit at any time. The expert conducting the audit will determine: • any non-compliance with green obligations; • who or what is responsible for the non-compliance; • what needs to be done to rectify the non-compliance; • which party is responsible for the costs of such rectification; and • the reasonable costs that one side must pay to the other as reimbursement of costs reasonably incurred as a result of the non-compliance.	The identification of the cause of any non-compliance requires particular technical expertise and so the appointment of the expert requires consideration. It is often the case that there is no single reason that a target rating has not been achieved - it is usually a combination of factors, some of which are in the control of the landlord and some the tenant. In these circumstances, the determination of what actions should be taken is less clear and may be a source of dispute. Where the expert's determination is to be binding the parties may also wish to consider monetary caps on the expenditure required.

CLAUSE TYPE	SUMMARY EXAMPLES	COMMENT
Self-help and set off	Costs payable by one party to another under these green lease provisions may be set off against other payments due under the lease. If the base building services do not meet the targets, the tenant may: • require the landlord to carry out actions to ensure compliance with the targets; and • if this does not cure the problem, the landlord must • present the tenant with a comprehensive cure plan, for the tenant's approval, then implement it; and • if the landlord does not present and implement a cure plan, the tenant may take steps to remedy the fault, at the landlord's cost; and • if landlord does not pay the relevant costs, the tenant can set-off these costs against the rent due.	Self-help remedies are attractive as they put the non-defaulting party in control of rectifying the breach. However, parties should consider any potential impact on warranties or existing maintenance contracts. Although these example provisions are drafted in relation to breach by a landlord, this approach can also be adopted for a tenant breach. This may lead, for example, to a landlord installing more efficient tenancy lighting at the tenant's cost.
No consequences	The environmental objectives are not binding on either party and a breach of any or all of them by either party will not constitute a breach of this lease.	This represents the ultimate of a 'soft' green lease. It is most likely to be used in conjunction with the purely aspirational obligations.

DISPUTE RESOLUTION

Where specified green ratings targets are set, it will be clear whether or not those ratings have been achieved, as evidenced by a certificate from an Accredited Assessor. However, compliance with other green provisions will be less clear cut and it is in these areas that disputes are more likely to arise. Depending on the actual terms of the green lease, these disputes may relate to:

- · why a specified rating has not been achieved;
- what steps are required to ensure that it is achieved next time;
- who is responsible for undertaking the required works or other changes.

It may be appropriate to include a dispute resolution procedure specific to the green lease provisions, rather than relying on any general procedure applicable to the remainder of the lease.

For example, a green lease may incorporate a dispute resolution clause which applies to any dispute arising under the green lease terms - either directly between the parties or between their environment representatives. Most commonly, this will provide for expert determination with the expert being an appropriate and independent practising professional with relevant expertise in the subject matter of the dispute.

The parties may stipulate the matters to be taken into account by the expert in determining the dispute. In the Commonwealth green lease schedule, these "resolution criteria" include:

- the terms and conditions of the GLS and the respective rights and obligations of the parties under it;
- the extent to which each party has acted reasonably and co-operatively in relation to the subject matter
 of the difference, dispute or issue; and
- the need to ensure that any remedial action is consistent with the outcomes deliverable under the GLS.

DATA REPORTING AND SHARING

Data reporting and sharing is a new element of a green lease that is not characteristically part of lease arrangements. It is vital to the successful implementation of a green lease. Without gathering and sharing actual data, the parties will not be able to identify and understand how the building is currently operating or those areas in which there is scope for improvement.

PARTIES' REPORTING OBLIGATIONS

Reporting obligations ensure that relevant acquired data is maintained and shared.

This is required to:

- support the achievement of the required ratings and compliance with the green lease;
- obtain data necessary to assess ratings; and
- provide parties with an audit train of performance and compliance.

The lease should identify the data that must be maintained, as well as the data to be provided by each party. Depending on the ratings being targeted, the landlord may agree to provide to the tenant energy and water data and the tenant may agree to provide to the landlord energy data.

The reports to be provided by each party should also be specified - either in the lease itself or the Environment Management Plan. These may include reports in relation to engineering, mechanics, electrical lifts, hydraulics, fault, capital works, minor works, OH&S, service, energy accounts, 30-minute metered data, tenant light and power and building services, mandatory maintenance and testing, Building Management System, planned maintenance, out-of-hours operation log and accounts.

ENVIRONMENT MANAGEMENT PLAN

A landlord and tenant may sign up to an Environment Management Plan (**EMP**), also known as a Building Management Plan, or an Energy Management Plan, which is separate to the lease. This plan can include strategies for managing the energy consumption of both tenant and base building.

An EMP typically includes descriptions of all of a building's mechanical and electrical systems and equipment, preventative maintenance required, and occupancy schedules and run-times.

At its essence, an EMP is about maintaining the green ratings associated with a building. An EMP requires periodic and transparent monitoring by an environmental auditor. Both parties should sign up to the EMP in the lease document, and must provide regular access to the building for this purpose. Parties to a green lease typically agree to share the cost of environmental audits in agreed proportions.

Christensen and Duncan (2010) suggest an EMP should set out:

- the type of energy consumed in building
- maximum energy consumption targets for an established period
- how energy use is being monitored in respect of common and individual use
- the nature and extent of energy consumption reduction measures being implemented in the building
- the aspirations of both lessor and lessees to use best endeavours to meet these targets
- protocols for the recording, keeping and dissemination of data obtained through the monitoring process
- short, medium and long term goals for energy consumption reduction
- the establishment of an Energy Management Committee (EMC), including its constitution, membership, objectives and functions, including meeting frequency and powers.

The EMP is not a place to set out penalties for non-compliance - if there are to be penalties, then these should go in the lease. The EMP is merely a management tool, and it will need to be flexible enough to change over time to meet changing regimes.

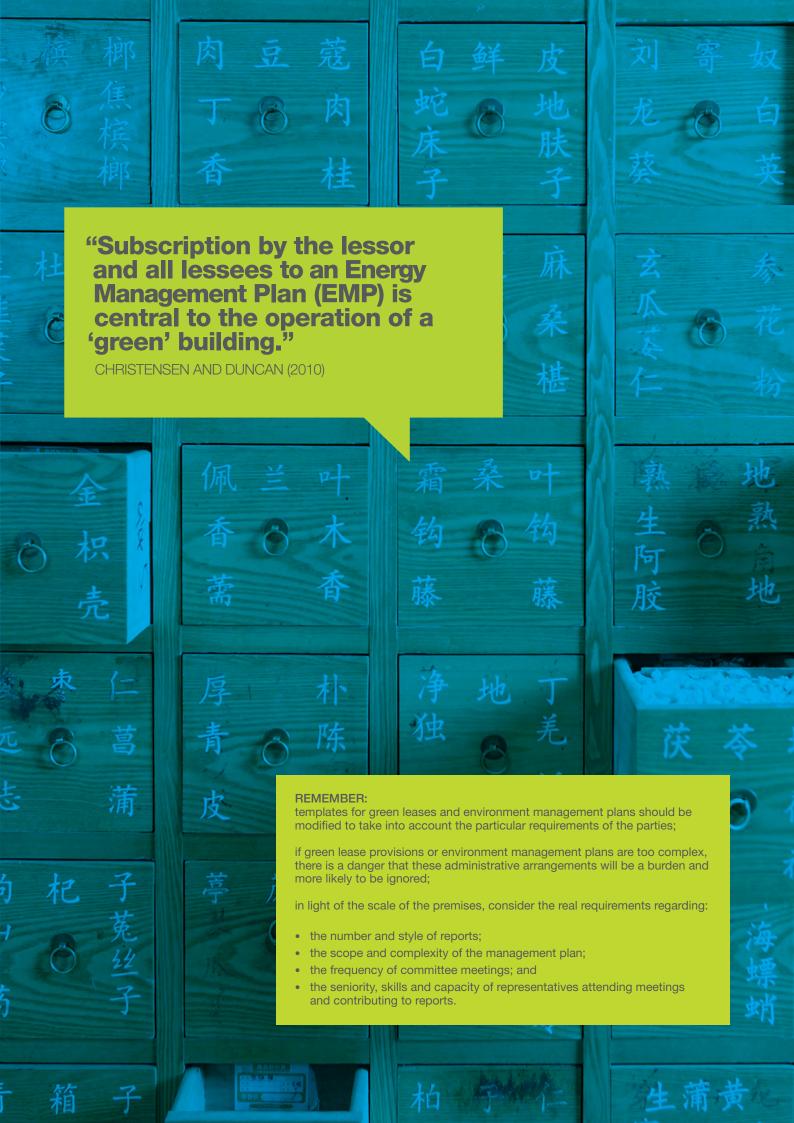
ENVIRONMENT MANAGEMENT COMMITTEE

The EMC is the machinery of a green lease. Typically, an EMC is formed from both tenant and landlord representatives. These personnel are authorised to act on behalf of the tenant or landlord in relation to the implementation of the green lease and the EMP.

Regarding the EMP, an EMC may:

- have access to all and monitor relevant data and reports;
- act as a repository for all reports and information needed to enable an assessor to assess compliance with green lease obligations;
- update the EMP as required;
- liaise with government and with contractors;
- keep all parties interested in the building informed of new developments, both internal and in laws, policies, etc;
- publish an annual report of energy usage; and
- be across all fitouts, recycling and other processes of the building.

It is a reality that, where there is high staff turnover in relation to either the landlord or the tenant, particularly in relation to larger commercial office buildings, it is hard to maintain commitment to an EMC. This is something to be mindful of when drafting the EMP - the requirements regarding the EMC should be as simple and as realistic as possible.



SHARING THE COST OF CAPITAL IMPROVEMENTS

Previously discussed in Part A was the concept of the "split incentive" that can act as a barrier to landlords investing in energy efficiency and other building upgrades. This issue arises where the cost of carrying out the upgrade works is borne by the landlord (as capital works) but a substantial part of the benefit is enjoyed by the tenant (through reduced outgoings).

Various approaches have been developed in Australia and internationally to overcome the adverse impacts of the split incentive and encourage landlords to undertake environmental upgrades of buildings. The focus is on improving the environmental operation of existing buildings through measures such as upgrading aging equipment or the introduction of new equipment.

Both legislative and commercial solutions are being explored. The following are a few examples.

LEGISLATIVE RESPONSE

In New South Wales, under Environmental Upgrade Agreements (**EUAs**) participating councils are able to enter into tripartite agreements with building owners and finance providers to fund building works to improve energy, water or environmental efficiency or environmental sustainability.

Low Carbon Australia, working with NAB and Eureka Funds Management, has established The Australian Environmental Upgrade Fund (**TAEUF**), specifically to provide finance for EUAs.

- TAEUF lends funds to a building owner, and these funds are repaid through a local council charge on the land itself.
- Tenants may be asked to contribute to the cost, but the legislation guarantees that benefits in the form of reductions in energy and water bills will be equal to or higher than the cost.

Similarly, in Victoria, TAEUF advances funds to commercial building owners for environmental retrofitting works. Funds will be recovered by the City of Melbourne through a charge linked to rates collection.

Retail lease legislation provisions that usually stipulate that a tenant cannot be asked to contribute to capital upgrades of buildings may, where relevant, be overwritten by the legislation that introduces these new arrangements in each jurisdiction.



SHARING THE COST OF CAPITAL IMPROVEMENTS

COMMERCIAL RESPONSE

Investa Property Group has built into its own precedent green lease provisions that seek to share with tenants the costs of "green improvements" ordinarily payable by the landlord (because they are capital improvements to a building). In this situation, the tenant agrees to pay an agreed proportion (based on the tenant's NLA relative to the entire building) of the cost of those improvements as a "Green Improvement Charge", which is additional to the outgoings payable under the lease. The improvements themselves are carried out by the landlord following a "consultative period" with the tenant on the landlord's business case for carrying out the green improvements.

In New York City, a working group of major building owners, tenants, property managers, lawyers and engineers have also agreed an approach to overcome this common issue—the energy aligned lease. Their proposed commercial solution was based on their agreement that actual commercial energy retrofit savings are generally within 20% of predicted savings. As a result, the building owners wished to recoup the capital costs of efficiency retrofit measures based on a prediction of energy savings, and the tenants agreed to this on the condition that the tenants were protected against underperformance.

 Solution: The building owner's cost recovery is based on a prediction of savings as determined by an energy specialist agreed upon by both parties, but the owner's capital expense pass-through is limited to 80% of such predicted savings in any given year. A key conclusion of the working group was that energy efficiency retrofits in multi-tenant commercial buildings are not a zero sum game. In almost all cases, the use of the above pass-through structure makes energy retrofits net present value positive to both owners and tenants - a true win-win situation. (See financial modelling, and a template "energy aligned" lease provision at www.nyc.gov).

Consideration needs to be given to the application of retail and commercial leasing legislation in each Australian jurisdiction when considering introducing private contractual terms that are not underpinned by supporting legislation.

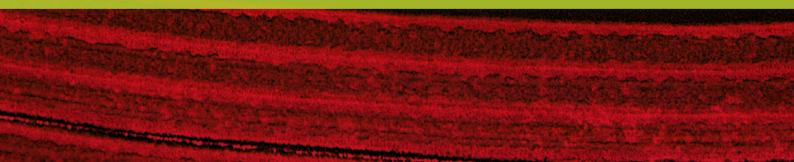
OTHER CONSIDERATIONS

As these upgrades are being undertaken while tenants are still in occupation of the building, these provisions should also address issues regarding the timing and co-ordination of works to ensure that the impact on the tenant's use and enjoyment of the premises is kept to a minimum.

There are some examples of provisions which appear to require the tenant to waive its right to quiet enjoyment where the landlord is undertaking 'green' improvement works. Regardless of the question of whether or not such a provision is enforceable, this would not seem appropriate unless the tenant is receiving some other form of compensation due to the conduct of the works, such as rent abatement.







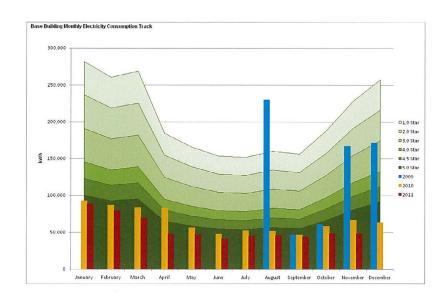
The real value of a green lease is in ensuring that the building is effectively managed and operated in as efficient a manner as possible. The green lease is the tool to facilitate best practice management of energy and other resource consumption in relation to buildings. The green lease is also the mechanism through which the design and financial goals of the building owner can be preserved throughout the life of the building.

However, the green lease itself will not work unless it has people to drive it.



Commonwealth Attorney-General's Department (AGD) building: in one of the first operational examples of a Commonwealth Government green lease, the AGD building utilised a very simple green lease schedule that provided for the base building and the fitout to have a 4.5 star NABERS Energy rating and for those ratings to be maintained throughout the term of the lease. In order to actively involve AGD staff, a Green Committee was established, which included AGD staff and the energy assessor. A Building Management Committee was formed very early in the project and is a critical element of the building continuing to meet its green outcomes. The BMC membership includes representatives from AGD's property section, the property developer, the facility manager and the energy assessor, who was appointed the head of the BMC. In support of the BMC is the Green Committee.

Below is a table showing how the AGD's Building Management Committee tracks the building's energy usage monthly.



THE ADMINISTRATION OF A GREEN LEASE

WHO WILL ADMINISTER?

The effective implementation of sustainability initiatives under a green lease requires the ongoing contribution and commitment of both parties.

It is possible that a number of different people may need to be actively involved. These may be:

- representatives of the landlord;
- representatives of the tenant and possibly an employee group;
- facilities manager;
- · environmental consultant.

If there is an environment management committee (**EMC**), this committee will act as a vehicle for discussion, consultation and providing recommendations and solutions to the parties on matters arising from or relevant to the green lease. The EMC can also then pass relevant information on to other parties involved with the management of the building, including in the form of updates as environmental policies and technologies change over time.

The actual requirements will vary for different buildings and different tenancies. This needs to be understood when preparing a green lease. While template management plans exist, they need to be modified to suit the particular circumstances. For example, a comprehensive environment management plan is likely to be viewed as an imposition (rather than a benefit) by a smaller tenant. The management arrangements ought to realistically reflect the potential benefits for the parties. Otherwise, green leases run the risk of being viewed only as creating costly obligations for minimal return.

The key requirement for the success of a green lease is that the individuals involved in the management, whether through an EMC or otherwise, are sufficiently:

- knowledgeable and have the skills and ability to properly review and interpret the technical information provided; and
- motivated to gather and review the information and consider improvements. This motivation may come through a personal commitment to sustainability or financial incentives or both.

Issues can arise where appropriate people are not engaged or empowered to fill these ongoing management roles. Where the representatives of one of the parties (either the landlord or the tenant) is not willing or able to participate in the green lease management, this is likely to lead to:

- poor management;
- frustration of the other parties;
- a need to rely on the terms of the lease remedies for default and dispute;
- missed opportunities to improve the sustainable operation of the building.

COSTS OF ADMINISTRATION

One of the barriers to the effective implementation of green leases is the perception of the cost involved compared with the benefits to be achieved.

In relation to costs, the first aspect to consider is identifying the potential source of additional management costs. These are likely to include the costs of assessors in obtaining ratings as well as the costs of managers (and possibly external experts) in collecting and assessing information, considering ways to improve performance and attending meetings.

Tips for managing costs:

- tailor the administration requirements for the particular building and premises. This is important to ensure that the potential benefits to be gained are considered when determining the level of management required. This will influence:
 - the frequency of the meetings;
 - the number of people required at meetings;
 - whether external consultants are retained;
 - the range and complexity of reports prepared;
- consider whether it is appropriate to roll the meetings into general building administration meetings, covering a broader range of building matters;
- where external consultants are retained, consider if there are efficiencies if both parties use the same consultant.

The second aspect to consider in relation to costs is the question of who bears these costs. This will depend on the terms of the lease and the extent and nature of recoverable outgoings. It is not unusual that each party is required to bear its own costs with an agreement that these costs are not to form part of outgoings. However, without an express provision of this nature, it is likely that the costs incurred by the landlord would form part of the building outgoings recoverable from

THE ADMINISTRATION OF A GREEN LEASE

INTEGRATION INTO OPERATIONAL BEHAVIOUR/MANAGEMENT OF BUILDING

In order to be effective, the green objectives need to be clearly communicated to the occupants of the building and the day to day managers of the building to ensure that these goals are taken into account in its daily use and management. It should be recognised that the green lease is an "active" document which needs to be managed, complied with, and, if necessary, enforced during the life of the lease. Proactive management will ensure that the benefit of the green lease is not compromised as well as minimise the risk of default and disputes and the resultant costs.

The Building Management Committee (or EMC) may include occupants of the building also. Alternatively, there may be a separate occupier committee or group established for the Building. There are likely to be many ways in which the behaviour of individual occupants can impact on the optimal operation of the building. These range from the most effective use of blinds and windows to use of after hours air-conditioning services and the turning off of lights.

Some of these matters previously controlled by occupants have become more automated through new technologies such as movement sensor lights, automatic taps and 'sleep' settings on computers and printers. This technology is being used to improve the operation of the building - rather than relying on the actions of individual occupants. This is reflective of the difficulty in bringing about behavioural change in a widespread and long lasting manner. Nevertheless, many employers still actively seek to engage and involve their staff in programs to improve awareness and minimise resource consumption and as a means of enhancing staff engagement.

MANAGING THE RATINGS

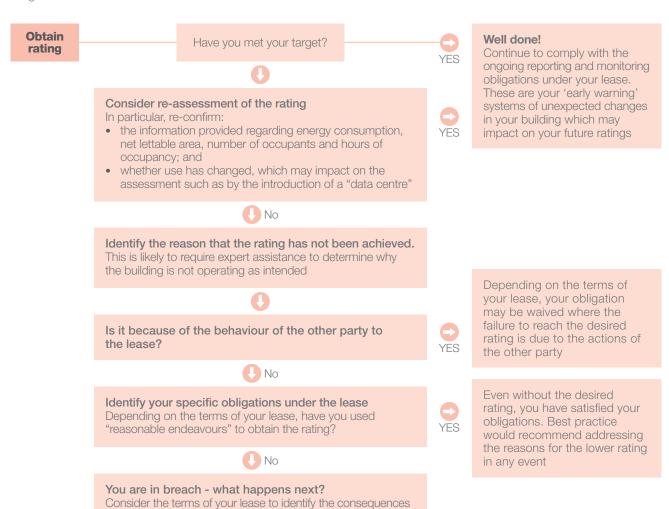
ONGOING OBLIGATION

Where green leases include specific target ratings, there is usually the ongoing obligation of obtaining these ratings each year during the term of the lease. This includes the obligation to ensure the metering is correctly installed, that later works such as supplementary air-conditioning units are running off the correct boards and collecting all of the required data.

Accredited Assessors measure parties' compliance with green lease target rating obligations. Ongoing achievement of NABERS target ratings is typically evidenced by an accredited NABERS rating certificate provided by the landlord and tenant on dates specified in the lease. However, representatives from both the landlord and tenant are usually required to collect the necessary information and liaise with the Assessor in this regard.

IF A RATING IS NOT ACHIEVED

Following is a flow chart depicting how parties may address the situation of a particular green rating not being achieved at any time during the term of a lease:



of default. This will depend on whether your lease is a 'hard'

green or 'soft' green lease

REFLECTING PROVISIONS OF GREEN LEASES IN RELATED CONTRACTS

The provisions of a green lease should be carried through to relevant aspects of all agreements associated with the operation of a building. This is a key part of risk management for the landlord (and to the extent applicable, the tenant).

DESIGN AND CONSTRUCT CONTRACTS

In relation to the development of a new building, if a landlord is required to obtain green ratings once the building has been completed, the landlord will want to pass through these obligations so far as possible to its builder. The building contract ought to clearly set out the obligations in relation to design and construction of a building designed to achieve the required ratings. This will be a key part of the landlord's risk management strategy in this regard.

CASE STUDY SOUTHERN BUILDERS, INC. V SHAW DEV., LLC, NO. 19-C-07-011405 (MD CIR. CT 2007)

America's first green building litigation. The plaintiff contractor sued to foreclose on a construction lien. The defendant developer filed a counterclaim seeking over \$600,000 in lost tax credits, alleging that the plaintiff breached its contract by failing to construct a building that met LEED Silver Certification.

At issue was whether the contractor was obligated to do so, when the only mention of LEED or sustainability in the contract was a single sentence that stated: "Project is designed to comply with a Silver Certification Level according to the U.S. Green Building Council's Leadership in Energy and Environmental Design ("LEED") rating system..."

Commentary: The case appeared to settle before the date set for trial, but demonstrates the risks involved if the obligations are not clearly set out under the terms of the contract. It is not unusual.

In relation to 'operational' ratings such as NABERS Energy, the actual rating is not available until the building has been occupied and operated for at least 12 months. For this reason, the obligations in construction contracts are more likely to refer to the building being designed and built to achieve the rating than to actually obtain the certification. However, in some circumstances, an owner may insist that final bonds or guarantees will not be released until the certification is achieved.

FACILITIES MANAGEMENT CONTRACTS

The requirement to achieve target ratings and other sustainability goals should be clearly specified in facility management agreements. The facilities manager will be responsible for the day to day operation of the building and the services. The approach taken to the commissioning, maintenance and operation of services can greatly impact on the efficient operation of the building. Accordingly, it is important for contracts to clearly set out the sustainability goals and, where appropriate, to reinforce these with financial incentives.

One area which needs to be carefully considered is the tension between meeting performance standards (such as maintaining the air-conditioning within a tight temperature band) on the one hand and the most efficient operation of services on the other. Clear guidance will be required from the landlord as to which of these requirements is to be given priority if they come into conflict.

SERVICE AND MAINTENANCE AGREEMENTS

In a similar fashion, all contractors working on the building and particularly the building services need to be made aware of the green targets or aspirations of the owner. All contracts should include information regarding the required ratings of the building or other sustainability requirements together with obligations to ensure these are not adversely impacted by the works being carried out.

In addition to the development of green leases and green buildings, related arrangements such as maintenance schedules are being reconsidered with a sustainability focus. Various groups are working on the development of Green Maintenance Schedules, which are collaborative arrangements among building owners and maintenance contractors. Green Maintenance Schedules monitor maintenance work that is carried out on buildings, ensuring that the maintenance work upholds the green commitments contained in leases associated with, and any other sustainability requirements of, buildings.

If there is an EMC, that committee might be involved in approving appropriate contractors to undertake maintenance and works, so that all such activities are in accordance with the EMP.

GREEN RATINGS IN BUILDING VALUATIONS

A GREEN PREMIUM IN VALUE FOR OFFICE BUILDINGS

A building with good green ratings is a more valuable asset than one without. This proposition is supported by detailed studies both in Australia and internationally. Further, as more and more buildings are rated (particularly since the introduction of the mandatory reporting under the Commercial Building Disclosure program), the data set available for analysis continues to grow.

In particular, it can be seen that efficient buildings outperform other 'conventional' buildings with respect to increased rental rates, higher occupancy rates and higher sale value as well as lower operating expenses. Put simply, improving the energy efficiency of a building can help to ensure it does not become obsolete in the marketplace.

Green buildings confer a direct economic benefit, through savings in energy and water costs, the advantage of which is likely to increase with the introduction of the carbon price. In addition, they can also bring with them indirect benefits such as increased productivity and reputational equity.

CASE STUDY BANDAR PROPERTIES LTD V JS DARWEEN (SUCCESSORS) LTD

A Study of the Financial Performance of Green Office Buildings in Australia (University of Western Sydney, University of Maastricht Netherlands, Jones Lang LaSalle and CBRE, September 2011), found that a green premium in value for office buildings was evident across Australia. In particular:

- a 5 star NABERS Energy rating delivered a 9% green premium in value;
- a 3-4.5 star NABERS Energy rating delivered a 2-3% green premium in value; and
- a Green Star rating delivered a green premium in value of 12%."

THE IMPACT OF GREEN TERMS ON VALUATION

As part of the valuation process, valuers take into account the key terms of the leases in place, including the green lease terms.

Valuers will consider the nature of the obligations imposed on the landlord and tenant, the ability of that party to comply with their obligations and the consequences of any failure to comply. This is particularly relevant for a 'hard' green lease which may include financial penalties such as rent abatement. In this situation, if the valuer believes that there is a real risk of non-compliance, the presence of this remedy may have an immediate impact on the valuation of the building.

VALUATION METHODOLOGIES

International Valuation Standards recognise three basic valuation approaches:

- Sales comparison;
- income capitalisation; and
- discounted cash flow.

The extent of the impact a green lease or the green credentials of a building may have on a valuation may be affected by the type of valuation approach used.

The Green Building Council of Australia recommends that discounted cash flow is the most 'transparent and explicit' approach for green star buildings. It allows the valuer to consider income and expenditure over the cashflow period. In this way, the valuer is able to expressly take into account matters such as the likelihood of renewal of any expiring leases and the anticipated capital expenditure required. The existing green characteristics of a building are likely to influence these calculations.

Aspects that may be price affected by a green lease include:

- Rental growth higher rated buildings are likely to out-perform lower rated buildings as the pool of tenants with corporate social responsibility requirements (which favour green buildings) continues to grow.
- Capital expenditure as more buildings are constructed or retro-fitted to reach environmental targets, increased capital expenditure will be required for other properties to keep pace with the market.
- Outgoings sustainable buildings and green lease terms encourage the use of fewer resources and as a result less will be spent on air-conditioning, electricity, water etc.

LINKS

RELEVANT DRAFTING EXAMPLES

Commonwealth Green Lease Schedule, Environment Management Plan and Building Management Protocols

REALPAC template green lease and guide (includes a template environment management plan and technical specifications)

PlaNYC material

GUIDES AND REFERENCE MATERIAL

National Green Leasing Policy

NSW Green Lease Guide

US BOMA guide (includes sample clauses/templates)

London BBP Toolkit (includes sample clauses/templates)

"As buildings become refurbished and sustainability benchmarks for commercial buildings are raised it is clear that business as usual at major commercial assets will result in a relative decline in the asset when compared to its peers in the marketplace. The benchmarks are constantly changing and this issue will need to be addressed and understood by the valuation profession."

(SUSTAINABILITY AND THE VALUATION OF COMMERCIAL PROPERTY (AUSTRALIA) RICS AUGUST 2011)



GLOSSARY

BBP Better Buildings Partnership BEEC Building Energy Efficiency Certificates BOMA Building Owners and Managers Association (US) CBD Commercial Building Disclosure CEFC Clean Energy Finance Corporation CSR Corporate social responsibility EEGO Energy Efficiency in Government Operations (Australian Government) EMC Environment management committee EMP Environment management plan
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EEGO Energy Efficiency in Government Operations (Australian Government) EMC Environment management committee EMP Environment management plan
EMC Environment management committee EMP Environment management plan
EMP Environment management plan
ESI Energy Savings Initiative
EUA Environmental upgrade agreements
GBCA Green Building Council of Australia
GLS Green Lease Schedule (Australian Government)
HVAC Heating, ventilation, and air conditioning
NABERS National Australian Built Environment Rating System
NGERS National Greenhouse and Energy Reporting System
NGLP National Green Leasing Policy
NLA Net lettable area
NSEE National Strategy on Energy Efficiency
PCA Property Council of Australia
PlaNYC New York City Plan
Real Property Association of Canada
TAEUF The Australian Environmental Upgrade Fund

THE GREEN LEASE HANDBOOK

Written by Chris Wheeler, Alison Pratt and Beth Cox of King & Wood Mallesons

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