

Australian Capital Territory

Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2024

Disallowable instrument DI2024–7

made under the

Construction Occupations (Licensing) Act 2004, s 126A (Codes of Practice)

EXPLANATORY STATEMENT

Overview

This instrument is made under section 126A of the *Construction Occupations (Licensing) Act 2004* (the *Act*).

Section 126A of the Act allows the Minister to make codes of practice for a construction occupation, a class of construction occupation or a construction service. Building Assessors are a construction occupation.

This instrument approves the *Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2024* (the **2024 code of practice**).

Section 123AB of the Act provides that a energy efficiency rating must be prepared by a licensed building assessor and in accordance with any code of practice in relation to the statement.

2024 Code of Practice

The 2024 edition of the Code of Practice includes updates to:

- a) ensure consistent application of terminology across the ACT Energy Efficiency Rating Disclosure Scheme;
- b) align with the terminology used throughout the building code;
- c) provide clarity of definitions and obligations;
- d) make clear distinctions between the software used for EER statements and Nationwide House Energy Rating Scheme (NatHERS) software used for building approval purposes;

- e) remove outdated sections dealing with building code transition arrangements from 2012;
- f) simplify when an energy efficiency certificate can be used as the EER Rating statement for new premises;
- g) remove unnecessary requirements for statutory declarations as a red tape reduction measure; and
- h) replace references to the *Tree Protection Act 2004* with the *Urban Forest Act 2023*, which commenced on 1 January 2024.

ACT Energy Efficiency Rating (EER) Disclosure Scheme

The ACT introduced its mandatory residential EER Disclosure Scheme in 1999. The scheme requires that a home's energy efficiency rating (EER) is disclosed at the time of sale or lease through the provision of an energy efficiency rating statement.

The scheme is established through the following:

- *Civil Law (Sale of Residential Property) Act 2003* (the ***Civil Law Act***)
- *Residential Tenancies Act 1997* (the ***Residential Tenancies Act***)
- *Construction Occupations (Licensing) Act 2004* (**COLA**)
- *Building Act 2004* (the ***Building Act***)

EERs provide the market, industry and consumers with a quantifiable measure of the thermal performance of residential premises, and therefore a comparison of relative energy efficiency across buildings of the same type and size. An EER is expressed as a star rating and is based on the theoretical amount of energy required to heat and cool the home to a comfortable temperature. It relates only to the building and relevant external objects that may shade the building and does not consider the effect of occupant behaviour or the appliances used in the building.

Part 3 of the ***Civil Law Act*** provides that an energy efficiency rating (EER) must be declared when premises that may lawfully be used for residential purposes are advertised or offered for sale. Some dwellings, such as student accommodation, mobile homes and nursing homes are exempted from these requirements. An EER statement contains information on certain elements that relate to the energy efficiency of the habitable part of the premises and opportunities to improve its energy efficiency. The EER statement must form part of the contract of sale.

Similar requirements for the disclosure of an EER exist under the ***Residential Tenancies Act*** when leasing or advertising a residential property for lease in cases where an EER has been prepared for the property and is not false or misleading.

An EER statement must still be current, valid and complete in accordance with section 12 of the code to be provided. However, if it is, it must be advertised and provided in accordance with the ***Civil Law Act*** and ***Residential Tenancies Act***.

Regulatory Impact Statement (RIS)

Section 34 of the *Legislation Act 2001* provides that if a proposed subordinate law or disallowable instrument (the proposed law) is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law must arrange for a regulatory impact statement to be prepared for the proposed law.

A Regulatory impact statement for the 2024 code of practice is not required under the *Legislation Act 2001* as it does not impose appreciable costs on the community or a part of the community. The 2024 Code of Practice does not introduce new requirements for preparing an EER statement. It makes a new code with substantially the same content as the code it replaces.

The ACT EER Disclosure Scheme which mandates the requirements for EER statements to be provided is long established and an impact analysis was carried when the licensing of building assessors providing EER statements was introduced in 2010 by the *Construction Occupations Legislation Amendment Act 2010 (No 2)*.

Human Rights

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters.

Since the Code of Practice was first introduced, the ACT has included the right to work in its *Human Rights Act 2004*. Section 27B (1) of the HRA expressly provides that the practice of a trade, occupation or profession may be regulated by law. Codes of Practice are a common element of licensing schemes and set ongoing standards that licensed persons must meet to either maintain their licence or meet as part of their licensing obligations.

Building Assessors have been licensed for the purposes of providing ERR statements since 2010 and subject to a Code of Practice for EER statements since 2012.

The Code of Practice supports the reasonable expectation of the community that licensed building assessors preparing EER statements are subject to a level of accountability and regulatory oversight in providing those services.

The amendments contained in this edition of the Code of Practice do not introduce any additional obligations on licensed building assessors or impact their licence or right to undertake assessments required to produce an EER statement. Industry have been informed of the changes contained in this edition of the Code.

Any engagement with or limitation on the right to work in section 27B of the HRA is considered reasonable and justifiable.

Clause Notes

Clause 1 names the instrument the *Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises code of Practice 2024*.

Clause 2 provides that this instrument commences on 15 January 2024.

Clause 3 contains the approval of Schedule 1 (the Code of Practice) of the instrument.

Clause 4 displaces the requirements in the Legislation Act, section 47 (5) and section 47 (6) consistent with section 126A (2) and (4) of *COLA* that establish the power to make the Code of Practice.

Clause 5 revokes the *Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2020* (DI2020-269).

Schedule 1 is the Code of Practice. The code of practice provides for the types of EER statements allowed for the purposes of compliance with the ACT EER Disclosure Scheme. The Code prescribes requirements for assessing, reporting and advertising the energy efficiency of residential premises for compliance with the ACT EER Disclosure Scheme. It includes procedures and methodologies for technical assessment of dwellings, building elements and external features. The code of practice applies to building assessors undertaking an energy efficiency assessment for the purposes of compliance with the ACT EER Disclosure Scheme. The Code complements (it does not replace), the more detailed modelling methods and instructions that form part of approved software, associated user manuals and training in the operation of software. It provides an overview of assessment procedures and principles and additional requirements for the collection and verification of data and energy efficiency as it relates to existing premises. An explanation of the provisions of the code is provided below.

Schedule 1 Code of Practice

Part 1

Part 1 provides general information about the name of the code, the inclusion of dictionary terms and the offences and other consequences that may arise from contravention of the code.

A number of enforcement mechanisms and offences relate directly to the building assessor and the preparation and provision of an EER statement. Other mechanisms in the *Civil Law Act* and the *Residential Tenancies Act* relate to people reporting or advertising false or misleading EERs. These provisions may relate to building assessors, real estate agents, sellers and lessees.

Part 2

Part 2 provides information about the object of the code and the application of the code to licensed building assessors.

It gives meaning for terms in the code, specifically outlining the different types of EER assessment that may become part of an EER statement provided for in the code. In addition to assessments of existing premises, assessments can be made of new buildings and alterations and additions to a building using methods approved under the *Building Act*.

Section 4 outlines that the code provides for EER assessments and reporting for all residential premises for which an EER statement must be prepared.

Section 5 applies relevant parts of the code of practice to licensed building assessors. Energy efficiency rating statements can only be prepared by a person licensed in the ACT to provide a building assessment service for energy efficiency. Assessors of an existing home must hold a Class A licence, which includes assessment with an on-site component.

Section 6 provides that a term used in the code of practice has the same meaning as the term has in certain specified legislation unless the code provides a different meaning for the term.

Section 7 provides that for the purposes of the code, an EER assessment means the assessment process used by a licensed building assessor to produce an EER statement. An EER statement is performed on an existing property by a licensed building assessor using endorsed software. It is used for the purposes of disclosure at the point of lease or sale.

Section 8 gives a meaning for deemed EER statements. These statements are produced using an alternative energy rating assessment method other than an energy rating assessment.

Section 9 gives a meaning for alternative EER assessments. These assessments differ from standard EERs for existing premises and may be produced using different software, modelling methods, technical information or procedures.

Section 10 defines an energy efficiency certificate as having the same meaning as in the *Building Act* (s 139C).

Part 3

Part 3 outlines the requirements for EERs statements, including deemed statements for certain buildings, when prescribed software may not be used, reporting and advertising of ratings.

Section 11 provides for the types of EER statements allowed for the purposes of disclosure requirements in the *Civil Law Act* and the *Residential Tenancies Act*, including deemed EER statements.

It also provides for when an EER statement must be accompanied by a written statement. There is a positive obligation on building owners to confirm that an EER statement is current, valid and complete.

The *Civil Law Act* provides that a new EER must be prepared after any building work. However, many alterations to a building and its fabric can be made that do not fall within the definition of building work, including installation of floor coverings, insulation, and shading devices. Changes made external to the building, such as erecting a fence or the construction of a neighbouring premises can have a substantial effect on the energy efficiency of a premises.

The inclusion of other work or alteration of a building or external elements in considering the currency and validity of an EER statement is important as there are many changes outside of building work that can be made that can impact the energy efficiency rating of a building.

The lessee, rather than a building assessor, is obliged to verify the currency or validity of an EER statement to be used. It is expected that where in doubt the lessee would seek independent advice. Examples of changes that may affect a premises' energy efficiency rating are provided in the code. Section 25 also provides guidance on the elements that could affect the energy efficiency rating of a building.

Section 12 outlines requirements concerning the currency, validity and completeness of EER statements. It also provides for the documentation that must be used as an EER statement. This is necessary to ensure that information provided to prospective purchasers and tenants is consistent, and an accurate basis on which to make a comparison between properties and a decision on a purchase.

Section 13 provides for situations where the allowed software cannot accurately assess a particular building, or part of that building. This section recognises that software has limitations and non-standard building configurations or designs may not be able to be assessed using prescribed software. Other forms of software, such as that used for building code assessments, may provide a more appropriate assessment in certain circumstances, noting that all software has limitations and some building elements may not be able to be adequately assessed in any of the available assessment or rating tools.

Where the software cannot assess the building, and no provision in the code is prescribed for the situation, a building assessor must notify the construction occupations registrar and comply with any direction to complete the assessment using either a prescribed method, or an alternate form of EER. The construction occupations registrar must provide this direction within 5 working days of receipt of the notification from the building assessor.

Section 14 outlines the requirements for a deemed EER statement if an alternative EER must be produced under section 13.

Section 15 provides for deemed EER statements to be used for completed new buildings in certain instances. This is necessary to allow for the use of standard documentation certifying compliance with minimum energy efficiency performance standards and detailing elements of an energy rating for new premises to be used.

Section 16 outlines provisions for documentation that forms a deemed EER statement for premises that are sold prior to completion of construction. This is necessary to avoid the need for preparation of separate ratings for the sale where compliance with energy efficiency requirements for new buildings can be demonstrated. This clause also allows for standard documentation demonstrating energy efficiency performance to be used for consistency of information.

Section 17 provides for deemed EERs statements for substantially altered premises. Currently the energy efficiency of a dwelling to be sold is calculated using FirstRate 4, a ‘first generation’ thermal modelling software tool developed by the Victorian Government. The software provides a level of detail suitable for most of the dwellings in the Territory but is no longer used for assessment of buildings in building regulation.

The ACT building code incorporates the national Building Code of Australia (BCA). The BCA has regulated the adoption of national protocols and standards for the energy efficiency of new dwellings including houses, units and apartments. The ACT also applies energy efficiency minimum standards to alterations and additions to dwellings.

While the BCA provides various methods to assess the energy efficiency of a dwelling, one of the deemed to satisfy options is to provide an energy efficiency certificate prepared on accredited “second generation” Nationwide House Energy Rating Scheme (NatHERS) software. Although assessment of a new building has different parameters to that for a completed dwelling to be sold, the software generations are broadly correlated to 6 stars.

Section 18 outlines reporting requirements for EERs. This is important as the EER must be used in all advertising, the EER statement and other associated documents, and is the primary point of comparison between premises.

Ratings in software for sale of premises are based on the theoretical amount of energy to keep the dwelling within a specified temperature range. All software used for regulation in the ACT is based on a single 10 star scale developed under the Nationwide House Energy Rating Scheme (NatHERS). Standard sale of premises software can report up to the 6 star increment of the scale. The scale includes half star (0.5) increments starting at 0. A rating represents that the energy use falls within a certain rating band (star band). This section clarifies that where smaller increments are included by software providers, they do not form a regulatory or reportable rating.

This section also includes reporting requirements for certain new buildings that have not demonstrated compliance with building standards using an EER. The compliance methods in the building code are intended to produce similar levels of performance. The provisions allow a nominal rating no greater than the minimum in place for a premises of the type being assessed to be declared. This nominal rating is not valid for subsequent disclosures after the building is occupied.

Section 19 outlines requirements for advertising of energy efficiency star ratings. The EER may only be reported using the rating calculated in accordance with section 18. No other rating generated by software may be advertised as the EER for the premises.

Part 4

Part 4 provides for the preparation of an EER statement. It provides technical definitions and parameters for assessing building elements and external objects to a premises and methods of inputting information and values that are assigned to the element or object. This is necessary to ensure that EERs are produced on a consistent

basis, and that a statement, including the rating, is accurate to the degree that is reasonable and is relevant to the climate in which the premises is located.

Section 21 outlines the types of information a building assessor must collect to undertake an assessment. It emphasises that regardless of whether building plans or other documents exist, an assessor must verify all relevant information by a visual inspection as far as is reasonable. This is important as the assessment is not of a building design, but of a premises after it has been constructed. The responsibility for the accuracy of the information that can be verified lies with the licensed building assessor producing the EER statement.

Subsection (4) outlines limitations on the collection of evidence from a person for whom a conflict of interest exists under section 123AE of the *Act*. Accepting a declaration from a person with a conflict of interest where the information is not verified independently is a breach of the code.

Section 22 provides for recording evidence in relation to the assessment, particularly notes and other information from a visual inspection. This is important as in many cases available building plans may not represent later alterations to the building or surrounds.

This section also requires licensed building assessors to record details on assumptions and limitations in collecting or verifying information. This is necessary as the EER statement is not an inspection report and does not contain these details. Recording this information is required for auditing and compliance purposes when documents are subsequently submitted to the construction occupations registrar. These records also give both the assessor and premises owner clear information about the inspection and where details were not able to be obtained due to limited access.

Sections 23 and 24 outline that the EER statement must be prepared on permitted software the licensed building assessor is specifically endorsed to operate.

Section 25 outlines the elements of a premises and external to that premises that must be assessed. It also provides that the licensed building assessor is to model the premises being sold or leased. If a fixture or fitting relevant to the EER will not be part of the transaction it must be excluded from the assessment.

Section 26 provides for the type of assumptions licensed building assessors may use in preparing an EER statement. This is to standardise the basis of assessments. While there will be a level of discretion in the assessment to determine the most appropriate value to be assigned to an element, how these should be assessed are described in the code and in software user instructions. Assessors must not assume a level of performance for building, building element or external object above that which can be verified. This is important to ensure that the performance of the building is not inflated and advertised at an efficiency that could not be established by the assessment.

Section 27 provides for standard software setting that must be used for the assessment. The assessment must be undertaken in the correct climate zone and using the entire climate, behavioural settings and algorithms set in the software. An assessor

must not change the assumptions on occupant behaviour or climate data and cannot change how the rating is calculated.

This does not mean defaults for an input must be used. For example if the default for window coverings is ‘Holland blinds’ and the window has no covering an assessor must not leave the default value but assess the element as it is in the property.

As ACT legislation can apply in the Jervis Bay Territory, climate zones for that Territory are also provided.

Section 28 provides the manner in which orientation must be calculated.

Section 29 and **section 30** provide for the measurement of floor areas and the zoning of areas into conditioned areas, those that will require heating and cooling, and unconditioned areas. The determination of the amount of area to be conditioned is fundamental to the EER.

Sections 31, 32 and 33 provide for the assessment of attached garages, adjacent and adjoining properties.

Section 34 provides for the modelling of obstructions to a window. An obstruction that is sited within the distances outlined in the section must be input in the assessment, as these obstructions will shade the window. The amount of shading is determined by the software based on the dimensions of the obstruction. A diagram is provided to help licensed building assessors determine whether an obstruction should be assessed.

Section 35 outlines the obligation for the assessor to include protected trees in the assessment where they meet the criteria in section 34 and refers to schedule 6 for the calculation of the dimensions to be input to the software. This provides a simple, standard methodology for measuring the obstruction provided by a tree.

Sections 36, 37 and 38 provide for the assessment of ventilation, air infiltration and leakage values. The tables in the referenced schedules confirm values and defaults that must be used in the assessment.

Section 39 provides that wall types not listed in the software must use the “Wall Selector” option to determine their equivalency.

Section 40 provides for the calculation of effective insulation values. The resistance to heat flow, known as thermal resistance and indicated by a resistance or R value can be affected by things such as material being compressed and gaps in the coverage of the insulation. Therefore, the R value of the product as installed or after deterioration with age may be less than the value on the product label or specified on a building plan.

Section 41 outlines the requirements for determining properties of bulk insulation. The section requires the licensed building assessor to make a visual inspection of the property and defines reasonable access to perform an inspection. As insulation is one of the major influences of the energy efficiency of a property, the assessment of

insulation is central to the accuracy of the rating. The definition of *reasonable access* is consistent with provisions of the ***Building Act*** relating to the installation of insulation and with Australian standards for building inspection.

Recognising that in some instances, an inspection is not feasible post-construction due to the design of the premises or obstructions to access points, the section also provides for determining insulation properties where reasonable access to relevant space in a building does not exist.

Section 42 provides for assumptions that can be made where a building plan or other relevant documentation for the building is not available and insulation values could not be reasonably determined by an inspection.

Section 43 details where a correction must be made for a gap or gaps in ceiling insulation. These provisions are consistent with existing requirements under building regulation and standards for installation of insulation.

Section 44 provides for modelling of reflective foil insulation.

Section 45 prohibits the inclusion of a value for slab edge insulation in the assessment. FirstRate 4 cannot calculate its effect on the thermal performance of the building.

Sections 46, 47, 48, 49, 50, and 51 relate to modelling of glazing, windows, window covering and shading.

Section 52 requires an assessment to be undertaken in accordance with the user instructions of the prescribed software used for the assessment where an instruction for assessing an element is not provided in the code. The software instructions, including help files and manuals, provide detailed information about the assessment of elements and the operation of the software. Adherence to the user instructions means a greater degree of consistency in assessments and that the software is being used as intended and within its parameters.

Section 53 requires that the EER statement, which is a report directly generated by the prescribed software using the inputs provided by the licensed building assessor, includes only the information generated by the software. This does not prevent the assessor marking the document in accordance with section 54 or providing a document to the construction occupations registrar with an electronic mark.

Section 54 provides that documents must be marked by the licensed building assessor that has prepared the EER statement. The mark will identify the date of issue for the EER statement and the licensed building assessor's details, including their licence number. This section also requires a licensed building assessor to provide relevant documents to the person who commissioned the EER.

Part 5

Part 5 provides for the submission of documents to the construction occupations registrar. Documents must be provided within 10 working days from the date of the assessment. Officers authorised under the Act may audit the documents and perform a

compliance check on the EER or the EER statement. A building assessor is not required to submit any document he or she obtained from the building file kept by the construction occupations registrar unless additional or amended information has been included on the document.

Schedules to the Code

The schedules to the Code provide approved forms, technical data collection, assessment and calculation methods for preparing an EER. The schedules should be read in conjunction with the relevant section of the code.

Schedule 1 provides an approved form for a written statement made under section 15 for a nominal energy rating for a new, unoccupied premises or an incomplete or proposed building that was approved, or will be approved, using a compliance method that does not include an EER.

Schedule 2 provides the points and associated rating bands for software approved for use for the assessment of existing premises for sale and lease disclosure.

Schedule 3 provides the adjusted heating and cooling loads and rating bands for software approved for use under the building code.

Schedule 4 outlines different zones in the building and whether they must be assessed as conditioned or unconditioned.

Schedule 5 provides a calculation for tree dimensions. This calculation is to be used over any method in the user instructions.

Schedule 6 describes subfloor ventilation types.

Schedule 7 describes roof ventilation types.

Schedule 8 provides for air infiltration and air leakage input values. It outlines the default values to be used if a higher performance cannot be verified by a visual inspection and describes requirements for 'downlight' covers to meet electrical safety standards. The safety of the building is not secondary to its efficiency.

Schedule 9 describes a more detailed method for calculating and measuring resistance values for insulation. The schedule gives guidance to licensed building assessors as to the type of information and evidence of compliance for 'downlight' covers that must be obtained to allow the cover to be recognised in the assessment. This is critical so that potentially unsafe practices are not rewarded in the EER. Clearances assumed for recessed luminaries are consistent with electrical safety standards.

The section also provides a table and method for calculating the reduction in R value to be used where there are gaps in insulation. The calculation is based on the building code tables for additional insulation required for gaps up to 5 per cent of the ceiling area.

Schedule 10 allows for values for insulation to be determined if section 42 applies. The building code provides two compliance methods for residential buildings, one which uses an EER, the other requiring each element of the building to meet certain minimum standards. Due to the mandatory requirement to provide an EER under the *Civil Law Act*, the majority of buildings in the ACT were approved under the EER pathway.

It is incorrect to assume that each element of a building that has a compliant EER would meet the same requirements as for the other compliance method. Therefore, the values in the table have been developed using the prevalent construction practice at the time.

Schedule 11 provides pre-calculated effective resistance values for ceiling insulation.

Schedule 12 describes types of window coverings and how they are to be assessed.

Schedule 13 provides calculation or eaves values for three scenarios. These assessment methods override some parts of the user instructions and clarify the requirements for shading devices that are not horizontal.

Schedule 14 provides approved forms of the mark licensed building assessors must make on relevant documents.