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Property Law E-alert

Owners beware – essential safety measures

Pre-1994 constructions: the eleventh hour

Owners of buildings and places of public entertainment constructed before 1 July 1994 (as well as those constructed after that date to which the measures already apply) are now required to complete an annual essential safety measures report (“**Report**”) before 13 June 2009 and thereafter before each anniversary of 13 June 2009. Failure to comply is an offence that carries 10 penalty units.

What are essential safety measures?

Regulation 1213 under the *Building Act 1993* defines essential safety measures as any measure (including item of equipment, form of construction or safety strategy) required for the safety of persons using a building or public place of entertainment. These are mainly the fire and life safety items installed within a building including fire fighting equipment, smoke detectors, fire isolated stairwells, exits, emergency lighting, lifts, sprinkler systems and egress from the building.

What level of maintenance is required?

Building owners should consider engaging a suitably qualified person (i.e. a registered building surveyor or other qualified person or corporation) to establish the essential safety measures and outline the level of maintenance required.

If no specific standard was in force at the time of installation of the measure then any applicable Australian Standard available at that time may be used as a guide. In the absence of an applicable Australian Standard, the first published edition of a relevant standard should be used.

Does it affect you?

The regulations will affect all buildings and places of public entertainment constructed prior to 1 July 1994 (and after that date under the existing Regulations) except detached dwellings, garages, carports, sheds and the like.

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What must be reported?

Regulation 1215 provides that the Report must be in a form approved by the Building Commission and include statements:

1. that the owner (or owner’s agent) has taken all reasonable steps to ensure the essential safety measures are operating and have been maintained in a state that enables the fulfilment of their purpose;
2. that since the last Report there have been no penetrations to required fire-resisting construction, smoke curtains and the like in the building or place, other than those for which a building permit has been issued; and
3. that since the last Report there have been no changes to the materials or assemblies that must comply with particular fire hazard properties, other than those for which a building permit has been issued.

The Report must include any details of any inspection report made by a chief officer or municipal building surveyor about essential safety measures.

Quickstep guide to compliance

Building owner-occupiers and landlords should undertake the following steps to comply prior to 13 June 2009 by:

1. Determine whether you wish to internally manage the compilation of a maintenance schedule or outsource the task. Note: for older buildings detailed inspection and research of historical documents may be required;
2. If outsourcing, employ a registered building surveyor or other suitably qualified person to establish the essential safety measures and outline the maintenance required.

3. Complete any maintenance tasks highlighted by the surveyor to ensure relevant standards are met;
4. Formulate a Report containing the information as indicated above;
5. Ensure hard copies of all Reports and documents about the essential safety measures are kept on premises for inspection by a municipal building surveyor upon request;
6. Update the Report annually prior to 13 June.

Leases and compliance

A significant number of buildings covered by the Regulations will be tenanted. Can an owner pass on to a tenant the requirements to complete the Report and maintain the safety measures?

As the report is an annual requirement we recommend the responsibility of its formulation and updating remains with the landlord.

Landlords should also determine whether their leases:

- Allow entry and inspection of the premises to ensure requirements of essential safety measures are being observed;
- Include provisions ensuring the tenant uses the property in a manner consistent with compliance with essential safety measures; and
- Insofar as it is the tenant's responsibility, allow rectification of essential safety measures that do not comply with the regulations at the tenant's expense and where it is the landlord's responsibility, allow rectification by the landlord.

Landlords about to enter into a new lease should ensure that the premises have been inspected, the essential safety measures determined and maintenance tasks dealt with prior to commencement of the lease.

Section 251 of the *Building Act 1993*

In undertaking their respective obligations, landlords and tenants must be aware of the effect of section 251 of the Building Act 1993.

Section 251 provides:

Occupier or registered mortgagee may carry out Work

- (1) *If the owner of a building or land is required under this Act or the regulations to carry out any work or do any other thing and the owner does not carry out the work or do the thing, the occupier of that building or land or any registered mortgagee of the land or the land on which the building is situated, may carry out the work or do the thing.*
- (2) *An occupier may –*
 - (a) *recover any expenses necessarily incurred under subsection (1) from the owner as a debt due; or*
 - (b) *deduct those expenses from or set them off against any rent due or to become due to the owner.....*
- (6) *This section applies despite any covenant or agreement to the contrary.*

So if a landlord fails to obtain the Report or carry out the required maintenance then the recent VCAT decision of ***Chen –v– Panmure Hotel Pty Ltd*** confirms that a tenant can obtain the Report and carry out the maintenance and then claim back expenses incurred from the owner as a debt under section 251 of the *Building Act 1993*. The VCAT member decided that, if the tenant refuses to comply with the essential safety measure maintenance covenants under a lease, VCAT will not order the tenant to comply (ie make an order for specific performance against the tenant) as the tenant is able to claim the expenses back from the landlord because of the above section.

The examples below reveal the complexity of application of the measures under the regulations and under leases.

Examples of Obligations

Requirement for maintenance of exit signs (an essential safety measure).

A landlord in a lease can require a tenant to be responsible for the maintenance of exit signs. However, should the tenant refuse to comply on the reasoning in the above decision, the landlord could not terminate the lease or recover the cost of maintenance of the exit lamps. This would be because section 251 provides that if the owner fails to complete works required under the regulations, the tenant can complete the works and claim back expenses incurred. In this case the lease provisions will be overridden by the Act.

Requirement for maintenance of exit pathways (an essential safety measure).

A landlord in a lease can require a tenant to be responsible for the maintenance and clear paths of travel to exits. However, Regulation 1218 provides that it is the responsibility of the occupier, not the owner, to ensure compliance with this measure. Consequently, the tenant cannot rely on section 251 to excuse it should it choose not to undertake the works required or keep the travel paths to the exits clear.

Seek Advice

The Building Commission website (www.buildingcommission.com.au) is extremely useful with further information on essential safety measures and a format for a Report.

We have prepared specific essential safety measures clauses to insert into leases and would be pleased to provide advice on an owner's or landlord's obligations under current or prospective lease agreements and the application of section 251. Please contact Neil Malcolm or Bill Hazlett on 8602 9200.

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