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REAL ESTATE UPDATE

ESSENTIAL SAFETY MEASURES REPORTS – THE HOUR APPROACHES

Owners of multiple occupancy buildings and places of public entertainment in Victoria have long been familiar with their obligations to monitor, maintain and produce annual compliance reports under the building regulations. However up until now, those regulations only applied to buildings constructed on or after 1 June 1994. As a consequence of the amended *Building Regulations 2006 (Vic)*, there is now an obligation on all owners of multiple occupancy buildings to prepare an Annual Essential Safety Measures Report.

The *Building Regulations 2006* oblige an owner of a multiple occupancy building to:

- Maintain existing essential safety measures.
- Inspect, maintain and repair essential safety measures in accordance with the required standards.
- Record the maintenance inspections of the essential safety measures.
- Prepare an Annual Essential Safety Measures (AESM) Report.

For buildings constructed before 1 July 1994, the AESM Report must now be prepared before 13

June each year with the first one due before 13 June 2009.

Exempt from the reporting requirements of the regulations, but not the requirements to maintain and inspect, are Class 1a buildings, which are essentially a detached house or one of a group of two or more attached dwellings separated by fire resisting walls – eg terrace houses, townhouses or villa units.

WHAT IS TO BE REPORTED?

Essential safety measures are defined to mean any measure (including an item of equipment, form of construction or safety strategy) required for the safety of persons using the building or place. That will therefore include fire fighting equipment, exits, fire rating of structures,

emergency lighting, smoke detectors, lifts, means of progress through the building and to the exits and onto the street.

The owner should record evidence of maintenance and compliance for the building on a regular basis in a schedule designed for this purpose. This schedule will then serve as the basis for the preparation and signing of the AESM Report annually. Both the report and records of all maintenance checks and any service or repair work carried out on an essential safety measure must be available for inspection at any time on request after 24 hours notice.

While buildings constructed prior to 1 June 1994 may not have fire services installed, there is a reporting obligation for all buildings to inspect and maintain passive essential safety measures such as paths of travel to exits, means of exit (doors and handles) and penetrations to fire resisting structures.

WHAT FORM SHOULD THE REPORT TAKE?

The report must be in the form approved by the Victorian Building Commission and must include statements:

- That the owner or an agent of the owner has taken all reasonable steps to ensure that each essential safety measure is operating and has been maintained in a state that enables it to fulfil its purpose.
- That since the last report there have been no penetrations to required fire-resisting construction, smoke curtains or the like other than those for which a building permit has been issued.
- Since the last report there have been no changes to materials or assemblies that must comply with particular fire hazard properties other than those for which a building permit has been issued.
- That the information in the report is correct.

DEALING WITH TENANTS

Most multi-occupancy buildings will be tenanted. Building owners cannot avoid their obligations in regards to safety measures by seeking to pass on those obligations under a lease. Nevertheless owners would be well advised to check their leases to ensure that they have:

- The right to enter and inspect the premises to ensure that all requirements are being observed.
- Provisions which require the tenant to construct their fitout and use their tenancy in a manner which ensures compliance with essential safety measures.

- Allowing the landlord at the tenant's expense to rectify matters within a tenancy if it does not comply with the essential safety measures insofar as they are the tenant's responsibility.
- Allowing the landlord access to carry out works to ensure compliance with essential safety measures insofar as they are issues that are the landlord's responsibility.

A relevant VCAT case

An example of the difficult issues that landlords may be exposed to can be found in the case *Chen v Panmure Hotel Pty Ltd (Retail Tenancies)* [2007] VCAT 2464.

In this case, the Tribunal considered section 251 of the Victorian *Building Act* 1993 (**Act**) which states:

- (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 to the occupier; or*
 - (b) *deduct those expenses from or set them off against any rent due or to become due to the owner.*
- (3) *A registered mortgagee may—*
 - (a) *recover any expenses necessarily incurred under subsection (1) from the owner as a debt due to the mortgagee; or*
 - (b) *give notice in writing of those expenses to the mortgagor.*
- (4) *On the giving of notice under subsection (3)(b), the expenses are deemed to be added to the principal sum owing under the mortgage.*
- (5) *If the mortgagor is not the owner the mortgagor may recover the amount deemed under subsection (4) to be added to the principal sum from the owner as a debt due to the mortgagor.*
- (6) *This section applies despite any covenant or agreement to the contrary.*

The lease in question said:

- 'The tenant must comply with all laws relating to the use or occupation of the premises.
- The tenant must comply with any Acts, rules, by-laws and regulations affecting or relating to the premises.
- But the tenant is not required to carry out structural repairs or make payments of a capital nature unless the need for them results from -
...
• (c) the tenant's use of the premises.'

The Tribunal held:

- That as between landlord and tenant the lease made the tenant responsible for the provision of hard-wired smoke detectors, but because the Building Regulations imposed that obligation on the owner of the premises, that, combined with section 251 of the Act, enabled the tenant to recover the cost. Therefore the Tribunal would not make any order against the tenant.
- That the Building Regulations imposed the obligation in relation to emergency exits on the occupier of the premises. As between landlord and tenant, as these entailed structural works and were not necessitated by some special or excessive use of the premises, the landlord could not compel the tenant to undertake the works, but that the

regulations appeared to impose a public law duty on the tenant to carry out the works.

- That if the implementation of emergency procedures is mandatory by statute or regulation, the landlord is entitled by the terms of the lease to require the tenant to comply.

IMPLICATIONS

Building owners must start implementing the necessary investigations and reporting mechanisms now, well before the first report is due. If your building is non-compliant you need to know now, and be taking steps to ensure it is compliant when the time to report comes. If that entails work to be done and you think your tenant(s) may be responsible for either doing the work, or meeting the cost, that also needs to be thoroughly investigated at this stage, and having regard to the case mentioned, that may involve seeking some expert advice.

The Building Commission provides a comprehensive Essential Safety Measures Maintenance Manual as well as practice notes on its website at www.buildingcommission.com.au

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