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THE MAINTENANCE OF ESSENTIAL SERVICES

A synopsis of the new Part 12 regulations- a paper written by Kim Lovegrove of Lovegrove Solicitors

Part 12 of the Building Regulations (“Regulations”) governs maintenance of Essential Safety Measures in Buildings. These regulations were augmented to provide for the safety of people in the built environment.

This paper provides a synopsis of the relevant provisions along with some of the more seminal issues that flow from the new regime.

There are three sub-divisions in Part 12

- Subdivision 1 is concerned with essential service measures (“ESM’s”) which are designated by the relevant building surveyor (“RBS”) in respect of post 1 July 1994 buildings
- Subdivision 2 applies to ESM’s in any buildings and places of public entertainment (“PPE”) that were built before the proclamation of the Building Act i.e. the first of July 1994
- The third subdivision concerns exit and paths that facilitate travel to and from buildings.

A synopsis of the relevant provisions is as follows.

Subdivision 1

1201

This subdivision applies to the following:-

- Class 1b, 2, 3,5,6,7,8 or 9
- A class 4 component of a building i.e. a care takers residence
- Places of public entertainment

Descriptions of the classes are also borrowed from the BCA as the reader needs to be across the full spectrum of buildings because only then will the reader appreciate the far reaching “purchase” of the maintenance obligations.

- *Class 1b. A class 1b encompasses boarding houses, guest houses, hostels or the like.... in which not more than 2 persons would be resident and where such buildings are not located above or below another building save for a garage*

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- *Class 2 buildings are those that contain 2 or more sole occupancy permits each being a separate dwelling*
- *Class 3 connotes residential buildings other than class 1's or 2's which are for common places of long term or transient living for a number of unrelated persons including; i.e. hotels, guest houses, boarding houses, back packer accommodation where there are by implication more than 2 occupants. Residential parts of hotel or motels, and residential parts of schools, accommodation for the aged, children or people with disabilities and the like are also captured.*
- *Class 5 captures office buildings for professional or commercial purposes (excluding classes 6,7, 8 or 9)*
- *A class 6 is a shop or other building used for the sale of goods by retail or the supply of services to the public*
- *A class 7a is a car park*
- *A class 7b is for storage or the display of goods or produce, or for the sale of goods by wholesale*
- *A class 8 is a laboratory or a building in which the processing, assembling, altering, packing and the like is carried out for trade sale or gain.*
- *A class 9a is a health care building including a laboratory*
- *A class 9b is an assembly including a trade work shop laboratory or the like in a secondary school*
- *A class 9c is an aged care building*

Definitions

1202

An essential safety measure (ESM) is an item under the Act that has to be provided to a building or a place of public entertainment (PPE). The ESM pertains to :-

- an item in tables 11.1 to 11.11 vol BCA
- an item listed in cl 11.2 vol 1 BCA
- any other item required by the Act for the safety of persons in the event of fire where there has been a designation by the RBS as an essential safety measure.
- Any other ESM within the meaning of Div 1, Part 12 of the interim regs 2005

The Building Commission Practise Notes 2006 -23 defines an ESM as being “*any measure required for the safety of persons using a building or place of public entertainment. It includes an item of equipment, form of construction or safety strategies*” (pg 10 of 15). *It is designed for the safety of people in a building or place of public entertainment*” (*ibid* page 1 of 15).

The above items refer to the essential service methods and regimes enunciated under the BCA.

A Maintenance determination

This is a determination made by a relevant building surveyor (RBS) under section 1204 of the Building Regulations.

Maintenance Schedule

This is a maintenance schedule prepared by a private building surveyor (“PBS”) or a municipal building surveyor (“MBS”).

1203

An occupancy permit (“OP”) for a building or a place of public entertainment must include a condition that lists all essential services. It also has to specify each performance measure and the level of performance required to enable the essential services measures to fulfil their objectives.

The RBS has to specify the performance thresholds and correlate them with the relevant building regulations that pertain to the esm. The RBS also has to specify the frequency by which the maintenance tasks have to be performed.

1204

This provision deals with the situation where an occupancy permit is not required but an emergency order or building order has been served, the RBS must determine the level of performance required to achieve the intended purpose.

The RBS will also create a maintenance schedule that articulates the ESM`s.

1205

Section 1205 provides that the owner must comply with the maintenance determination. It is a penalty offence for an owner to fail to comply with that order.

1206

An MBS or a PBS may on application of the owner create a consolidated list of EMS`s and the maintenance regime that applies to those measures.

1207

The maintenance schedule and maintenance determination must be made available for the MBS or the chief officer to inspect (Penalty section).

1208

Where a condition of an OP is such that there is an ESM or a maintenance determination the owner has to ensure that an annual ESM report is prepared in accordance with regulation 1209.

The report has to be prepared by the anniversary date. The anniversary date is the date of issue of the OP or the date of issue of a determination.

1209

The annual report has to:-

- be signed by the owner or the agent,
- include details of inspection report,
- include a statement that the owner or the agent has taken all reasonable steps to ensure that the operating level of the performance threshold has been achieved in accordance with the OP and will be fit for purpose
- include a statement to the effect that there have been no changes to materials such as to affect fire hazard properties
- attest to the fact that the required information is correct.

1211

The annual report has to be made available for inspection by an MBS or a chief officer subject to those persons giving the recipient 24 hours notice.

Subdivision 2

This division applies to buildings and PPE`s that were built before the first of July 1994. The subdivision applies to classes 1b, 2, 3, 5, 6, 7, 8 and 9.

1213

This section defines an ESM as being any measure required for persons using buildings or PPE's.

1214

The owner or the agent of a building or PPE has to ensure that an esm report is prepared in accordance with regulation 1215 for any ESM's that is provided for that building under the Act or the Regulations.

The first report has to be prepared by the 13th of June 2009 and every subsequent report has to be prepared exactly 12 months hence.

1215

For buildings that are constructed before that first of July there is a designated format. The report has to :-

- be in the prescribed form
- be signed by the owner or the agent
- include any inspection report made under section 227 of the building Act regarding any esm
- include a statement that the owner has taken reasonable steps to ensure that the esm is fit for purpose
- state that the ESM is both operational and maintained and achieving the requisite performance thresholds
- state that since the last esm report there have been no "*penetrations required for fire resisting construction, smoke curtains and the like in the building ... other than those for which a building permit has been issued*" (section 1215 of the regs.)
- state that no changes have been generated since the last esm report that would impact upon fire hazard qualities to be in the prescribed form.

Great care has to be taken by the owner in filling out these reports. They need there being any misrepresentation.

1216

The annual ESM report has to be made available for the inspection of an MBS or the chief officer upon the receipt of 24 hours notice (penalty offence.)

1217

The owner of a building has to ensure that all ESM's are maintained in a fashion that ensures that they are fit for purpose and fully operational. Furthermore the ESM is not to be removed save for maintenance purposes. (penalty provision)

Subdivision 3

1218

This provision requires that all exits and paths of travel to buildings and PPEs are maintained in respect of to classes 1b, 2, 3, 5,7,8 and 9. The occupier of such building has to ensure that:-

- all exits
- paths of travel to exits
- paths of travel on the allotment form the exits to the road

are kept functional and free of obstruction.

The Building Commission's Practise Notes

The Commission Practise Notes provide some useful amplification of the ESM measures and conditions that apply to the pre-1 July chapter. Although they are not regulations, courts would ordinarily have regard to them. In other words they do carry some legal weight.

It is noteworthy that the notes provide that *“the level of maintenance expected by inspecting authorities should not be greater than that required at the time the equipment, fitting or essential safety measure was installed”* (pg 10 of 15)

The notes also provide that in circumstances where there was no relevant maintenance standard in operation at the time, then the first published standard on point can be used as a guide or yardstick for the requisite level of maintenance.

The notes state that *“ as part of the enforcement process consideration should be given to upgrading the ESM to current standards or practises.... The level of maintenance expected in the future by inspecting authorities should not be greater than that required at the time the initial maintenance requirement was determined for that ESM”*(*ibid*)

This is a little bit vexing, on the one part the note states that consideration should be given to upgrading, but by the same token by implication, a failure to do so does not mean that those charged with enforcement will take issue if such upgrading has not occurred.

To reiterate at common law regard will be had to these practise notes and the mere mention of the need for consideration to be given to the upgrading of ESM`s could conceivably dictate that the Courts will have an expectation that this occurs. Furthermore in circumstances where it does not occur a dim view could be taken by the bench.

Enforcement Powers and Offence Provisions

Note 12 of the practise notes provides that the Commissioner, an MBS or the chief officer can issue on the spot notices in circumstances where they harbour a suspicion that the ESM`s are not being maintained in accordance with the Act.

With regards to subdivision 1 the Notes provide that the chief officer or an MBS can carry out inspections regarding ESM`s jointly or separately. The failure to maintain an ESM is an offence under section 40 of the Building Act.

Furthermore failure to complete the required documentation is also an offence. Item 13 of the Practise Notes identifies other offences;

- *Failure to comply with a maintenance determination*
- *Failure to make maintenance determination available for inspection*
- *Failure to complete an annual essential safety inspection report.. before each anniversary of the OP or RBS`s determination*
- *Failure to keep all ESM reports and record on the premises for inspection purposes. (pg 11 of 15)*

Subdivision 2 offences include neglect in the maintenance of safety equipment and the removal of esm equipment from a designated location

Subdivision 3 dictates that it is an offence to neglect the maintenance of exits and paths where such neglect retards safe egress.

What must Owners do Now?

- Prepare and have executed any agency instruments that are required for the carrying out of ESM reports and tasks
- Engage qualified persons to prepare the annual ESM report
- Ensure that a regime is introduced for the carrying out of annual inspections and the generation of annual reports
- Ensure that one has in place auditors to monitor active systems

particularly where there have been alternative solutions sanctioned under the occupancy permit. Quarterly audits may also need to be augmented in certain instances.

Who is in the gun if it doesn't happen?

Owners

The practise notes and the Regulations provide that it is the property owner who is the primary custodian of the responsibility for ESM compliance. Owners have to ensure that EMS's are maintained, records of inspections, maintenance and repairs are kept. They also have to ensure that the annual report on the anniversary date is prepared, completed and signed off.

Item 16 of the Practise Notes state that

“ some owners engage an agency to carry out inspections, testing or completion of the annual ESM report. In this case the law of agency applies, and it is prudent to ensure that the correct written authority is provided by the owner, including any limitations on that authority, when providing documentation”.

If an owner has not prepared such an agency instrument, then the owner should do so poste haste, because the practise note has flagged the necessity and it could place an owner in a parlous position if it does not do so. *Feel free to contact our office if you need an agency document generated.*

There could even be two sets of agencies. Many occupiers have property managers and body corporate managers who are appointed by their owner clients to look after all property matters. The first agency agreement would vest that responsibility with such persons as part of their general managerial retainer.

An additional agency agreement however would be required to ensure that a

qualified person is appointed to carry out the ESM tasks.

Whereas in the past the emphasis on building safety was of a more construction persuasion or to put it another way “pre occupancy permit”, these new regulations by virtue of the legislative codification and increased penalty orientation make the class of owners very visible. Visible in the sense that they are vested with very clear statutory accountabilities. It thus follows that any shying away from the discharge of those responsibilities will on the one part attract penalties and on the other part will attract civil liability. This would particularly be the case where there is public liability.

Agents and Property managers

As many landlords appoint property managers to manage their property affairs such persons or agents will need to pay heed to the practise note and ensure that the correct agency instruments are generated. Although the owner is ultimately responsible, if the agent is tardy or neglectful in the assumption of the esm compliance responsibility on behalf of the owner, then the agent will be called to account to his client. Reason being the landlord, particularly the absentee landlord will be expecting great things of the property manager, because the manager is being paid to ensure that matters such as regulatory compliance are in order.

By way of reiteration an added complication is that the property agent will by and large lack the requisite qualifications to carry out inspections and testing, so the property manager on behalf of the owner will have to appoint an “agent” who is qualified to inspect and test. Hence there will conceivably be two sets of agencies pertaining to many properties, particularly larger properties where there is an absentee owner or landlord.

A not unrelated Issue - AS1851

This standard has recently become a consolidating standard to govern the way by which fire systems and fire suppression equipment is maintained. AS1851-2005, released in August 2005, sets out requirements for the inspection, test, preventative maintenance and survey (ITM&S) of fire protection systems and equipment.

From a regulatory point of view, this standard has not been called up in any legislation or Practice note in Victoria. Where new OP's or maintenance determinations it has been deemed that the RBS to determine whether it is referenced or not.

In an article that we have on our web site that was also published in fire Australia (and that you have attached) we emphasised that it was prudent for property owners to take cognisance of this standard. The reason for this is that even though it is not called up by the BCA, the fact that it is a standard generates some persuasive legal standing

An ACT Supreme Court case *Enzi Cardine v Trustees of the Christian Bros SC609 OF 1991 [ACTSC]* is a case on point. His Honour said that *"in my view whatever may have been reasonable in 1966, once it became standard for safety glass to be installed, it was negligent for the defendant not to ensure that relevant glass panels were replaced with safety glass as soon as practicable after it became aware of that safety standard. It is only necessary to conclude that such replacement, being both practicable and affordable, should have been attended to shortly after 1972 and well before the plaintiff's accident in 1987"*

Conclusion

The changes are far reaching in terms of the *"upping the anti"* with regards to

compliance and they capture a massive portion of the property sector.

Part 12 adds to an increasingly exacting regulatory and compliance regime that governs the construction and the use of buildings. These regulations work "in synch" and in some respects philosophically duplicate OH&S legislation requirements.

OH&S legislation dictates that owners and occupiers can be prosecuted for workplace safety neglect. The changes are hot on the heels of the amendments to section 28 of the OH&S Act. These amendments came in at the beginning of the financial year. They make it a prosecutable offence for designers who fail to design safe work laces.

The net effect of all of this is that the cost of regulatory compliance will increase and the cost of building ownership will increase discernibly.

In additional the risk paradigm for property owners has increased significantly as statute has made it clear that property owners have to embrace rigorous safety compliance regimes. Moreover there has been the quasi crimilisation of the failure to implement and maintain such regimes.

The reforms have "come in under the radar" in that there has been little publicity on point, but as ignorance is no excuse there may be many people and corporations who in light of their ignorance of the reforms will inadvertently break the law.

Nevertheless historically there has been insufficient regard and emphasis brought to bear upon property maintenance matters. The emphasis has been to ensure that the building is built safely rather than a preoccupation with the "post occupancy permit chapter". It follows that whereas in the past the greatest segment of litigation was focused upon negligent

construction, the new regulations, in that they have so clearly codified ESM regulations, could herald a new sector in the litigation industry i.e. the proliferation of law suits to do with negligent essential service maintenance.

In this new paradigm the defendants interestingly will be the owners, along with those who built the buildings.

About the author

Kim is principal of Lovegrove Solicitors a construction law firm. He is the immediate past president of the Australian Institute of Building (Vic Chapter), was the principal legal adviser on the development of the Building Act 1993 and is a former deputy executive director of the Australian Building Codes Board. In that capacity he had legal input into the development of BCA 1996. He has written or co-authored 14 books on construction law. He is a past legal columnist for the Australian, the Age and has recently started a fortnightly legal column for the commercial property section of the Herald Sun. To find out more about Kim and Lovegroves log into www.lovegrovesolicitors.com.