

LEGAL REQUIREMENTS FOR ESSENTIAL SAFETY MEASURES

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Introduction

Essential safety measures are measures in a building for the purpose of protecting people. They appear to be primarily concerned with fire safety.

When the construction of a building or place of public entertainment is complete, the building owner is responsible for the upkeep and maintenance of any required safety measures.

Part 12 Division 1 Sub-divisions 1 and 2 of the *Building Regulations* 2006 (Regulations) govern the requirements regarding the maintenance and reporting on essential safety measures.

Sub division 1 provides the requirements for buildings which were constructed after 1 July 1994 being the date of the introduction of the current Building Act. Relevant buildings constructed under this regime are required to have occupancy permits which identify the essential safety measures in the building and the maintenance obligations attached to those measures.

Sub division 2 provides the requirements for buildings that do not have occupancy permits issued under the current legislation i.e. they were constructed prior to 1 July 1994.

Crown and local government immunity

Section 5 of the *Building Act* 1993 (the Act) provides that, except to the extent set out in Part 12 Division 6, the Act does not bind the Crown or a public authority.

Section 3 defines a “public authority” as a body established for a public purpose by or under an Act and includes a council.

Councils therefore are bound by the following parts of the Building Act: 2,3,4,5,5A,5B,7,9,10,11 and 12A.

The Building Regulations 2006 are made under part 2 of the Act and therefore Council is bound by them (certainly at least to the extent that the Regulations deal with the safety of buildings).

Council is not bound by Part 8 of the Act (being the part that deals with enforcement of safety standards).

Council may not be prosecuted for breaches of the Act (s217(4)).

At first glance therefore it could appear that a Council need not comply with the Regulations as the Regulations cannot be enforced against it.

However, the Minister may, pursuant to Part 13 of the Act, cause an Inquiry to be held into whether a Council has been carrying out any function given to it under the Act and to formally order the Council to carry out such function within a specified time. The Minister may also bring proceedings against a Council to recover costs and expenses.

Further in the event a fire does occur in a council owned building and an essential safety measure has not been maintained Council could be held liable in respect of any death or injury.

Council should in any event, as an arm of government, comply with such regulations particularly as the core issue is the safety of persons.

2 Categories

Part 12 Division 1 Sub-divisions 1 and 2 of the Regulations govern the requirements regarding the maintenance and reporting on essential safety measures.

There are 2 different categories of requirements for Essential safety measures. Sub-division 1 applies to buildings and places of public entertainment constructed on or after 1 July 1994. Sub-division 2 deals with buildings or place of public entertainment which were constructed prior to 1 July 1994. Each has a different legal definition of “essential safety measure”, but they both encompass similar items.

Sub-division 1

a) Application

Regulation 1201 provides that Sub-division 1 applies to class 1b, 2, 3, 5, 6, 7, 8 and 9 buildings, class 4 components of a building and places of public entertainment, i.e. all buildings other than a single dwelling and non-habitable buildings.

b) “Essential safety measure”

Regulation 1202 of the Regulations defines “essential safety measure” to include the following:

1. an item listed in tables I1.1 to I11.11 of the Building Code of Australia (BCA);

2. an item listed in clause I1.2 volume 1 of the BCA;
3. any other item required by the Act for the safety of persons in the event of fire where it has been designated as an essential safety measure by the registered building surveyor (RBS); and
4. any other essential safety measure within the meaning of Division 1, Part 12 of the *Building (Interim) Regulations 2005*, as in force before their revocation.

Tables I1.1 to I11.11 and clause I1.2 currently include the following measures:

1. fire rated materials;
2. fire curtains, doors and windows;
3. path of travel to exits;
4. exits;
5. doors;
6. fire isolated areas;
7. signs;
8. emergency lighting;
9. fire hydrants and hoses;
10. sprinkler systems;

- 11.fire control centers;
- 12.fire detection and alarm systems;
- 13.smoke alarms and emergency warning systems;
- 14.standby power supply system;
- 15.open spaces and vehicular access around large isolated buildings;
- 16.emergency lifts;
- 17.air conditioning systems and ventilation;
- 18.hot and warm water systems and water cooling systems.

c) Maintenance determinations and maintenance schedules

Regulation 1203 provides that, where an occupancy permit is issued for a building or place of public entertainment where Essential safety measures are required, the RBS must make conditions to the occupancy permit regarding essential safety measures.

Regulation 1204 provides that where an essential safety measure has been required by a building order, emergency order or by building work the RBS must make a maintenance determination regarding the Essential safety measures. Thus, where a building order or emergency order is made requiring an essential safety measure, it will be dealt with under sub-division 1.

In each instance, the conditions/maintenance determination must identify the following:

1. The required Essential safety measures;
2. the relevant regulations regarding installation and maintenance; and
3. the frequency and type of maintenance required.

Regulation 1205 provides that an owner must comply with a maintenance determination.

Regulations 1206-1207 allow the owner to request that the RBS create a schedule of Essential safety measures. If one exists it must be made available for the MBS or the chief officer to inspect.

d) Reports

Regulation 1208 provides that the owner must ensure that an essential safety measure report is prepared in accordance with regulation 1209. The report has to be prepared by the anniversary date of the date of the making of the condition or the date of issue of the determination.

Regulation 1209 prescribes the following requirements for the form and content of the report:

1. be in a form approved by the Building Commission;
2. be signed by the owner or an agent of the owner;

3. specify the address of the building or place of public entertainment that it relates to;
4. include the details of any inspection report made under section 227E of the Act in respect of each essential safety measure. A report made under section 227E is a report following an inspection of safety or emergency installations or the relevant records. Thus, the report must be a “warts and all” report; and
5. contain a statement that the owner, or their agent, has taken all reasonable steps to ensure the following:
 - a. that each essential safety measure is operating at the required level of performance and has been maintained in accordance with the relevant occupancy permit or maintenance determination and will fulfill its purpose;
 - b. since the last annual essential safety measures report, there have been no penetrations to required fire-resisting construction, smoke curtains and the like in the building or place of public entertainment, other than those for which a building permit has been issued;
 - c. since the last annual essential safety measures 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; and
 - d. that the required information is correct.

Regulation 1211 provides that the report must be made available for inspection by the Municipal Building Surveyor or the Chief Officer subject to those persons giving the owner 24 hours notice.

Sub-division 2

a) Application

Regulation 1212 provides that Sub-Division 2 applies to all class 1b, 2, 3, 5, 6, 7, 8 and 9 buildings and places of public entertainment constructed before 1 July 1994.

b) “Essential safety measure”

Regulation 1213 defines “essential safety measure” as any measure (including an item of equipment, form of construction or safety strategy) required for the safety of persons using a building or place of public entertainment.

This would include similar items to those required by the BCA.

c) Reports

Regulation 1214 provides that the owner of a building or place of public entertainment must ensure that an essential safety measure report is prepared in accordance with regulation 1215 for any Essential safety measures that are provided for under the Act or the Regulations. The date that the essential safety measure report must first be made is **14 June 2009** and it must be made yearly before the anniversary date.

It is important that, if you have not already prepared the report, that they begin now.

Regulation 1215 makes requirements for the content and form of the essential safety measure report.

The requirements are the same as those for a report made under Sub-Division 1, save for one important difference, being the first statement that the owner is required to make on the report.

By way of re-iteration, a report made under Sub-Division 1 must state that the owner has taken all reasonable steps to ensure that each essential safety measure is operating at the required level of performance and has been maintained in accordance with the relevant occupancy permit or maintenance determination and will fulfill its purpose.

In contrast, a report made under Sub-Division 2 must state that 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 the essential safety measure to fulfill its purpose.

This is because under Sub-Division 2 there is no condition in an occupancy permit or maintenance determination which sets a required level of performance.

Regulation 1216 provides that the essential safety measure report has to be made available for the inspection of an municipal building surveyor or the chief officer upon receipt of 24 hours notice.

d) Maintenance

Regulation 1217 provides that the owner must ensure that all Essential safety measures are maintained in a fashion that ensures that they are fit for purpose and fully operational. Further, that the essential safety measure is not to be removed, except for maintenance purposes.

Building Commission Practice Notes 2006

In addition to the legislative requirements, the Building Commission Practise Note 2007-23 provides some guidance on the level of maintenance expected by inspecting authorities.

The Practise Note states as follows:

“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.

If there was no specific standard of maintenance in force at the time, then any relevant Australian Standards available at the time may be used as a guide to the level of adequate maintenance. If there was no relevant Australian Standard in existence at the time of installation, then the first published edition of a relevant standard may be used as a guide to what may be adequate maintenance”.

In other words, the standard of maintenance of an ESSENTIAL SAFETY MEASURE that is expected is the same as that which existed at the time it was installed.

Although the Practise Notes are not binding, a court may have regard to them at common law.