

ESSENTIAL SAFETY MEASURES

1. Legislation

1.1 The *Building Regulations 2006* (**Regulations**) sets out a number of regulations dealing with the maintenance of buildings and essential safety measures to be complied with by owners. These regulations include the following:

- (a) Regulation 709 provides that hard-wired smoke alarms or detection system are to be installed in particular boarding houses, hostels, residential parts of hotels, motels etc and residential care buildings. The regulation is required to be complied with by the owner of the building.
- (b) Regulation 710 provides that automatic sprinkler systems in shared accommodation buildings are to be complied with by 14 June 2009. The regulation must be complied with by the owner of the building.
- (c) Part 12 sets out the requirements in respect to the maintenance of essential safety measures, including:
 - (i) Regulation 1207 - Maintenance schedule to be available for inspection.
 - (ii) Regulation 1209 - Owner of building or place of public entertainment to prepare an essential safety measures report.
 - (iii) Regulation 1211 – Annual reports and records required to be made available at the building.
 - (iv) Regulations 1214-1217 - Similar requirements for buildings constructed before 1 July 2004.
 - (v) Regulation 1218 - Maintenance of exits by **occupiers** of buildings or places of public entertainment.
 - (vi) Regulation 1219 – Fencing of swimming pools and spas for most classifications of buildings.
- (d) Section 251 of the *Building Act 1993* (**Act**) relevantly provides as follows:

“(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.*

...

(6) *This section applies despite any covenant or agreement to the contrary.*"

- (e) With the exception of regulation 1218, which provides that compliance is by the occupier of the building, the owner is responsible for compliance with essential safety measures.
- (f) Furthermore, section 251 ensures that it is the owner that is responsible for compliance, even if the owner attempts to pass on responsibility for compliance to the occupier.

2. Case Law - *Chen v Panmure Hotel Pty Ltd* [2007] VCAT 2464 (31 December 2007)

2.1 The facts of the matter were straightforward and as follows:

- Chen owned the hotel, which Chen leased to Panmure.
- The issue concerned the installation of hard-wired smoke alarms, exits and emergency procedures for the hotel.
- The Tribunal determined the matter as follows:
 - The installation of hard-wired smoke detectors was the obligation of Panmure under the lease, as Panmure was required to comply with all laws and regulations, except it was not required to carry out any structural works. The hard-wiring of smoke detectors was not determined to be structural.
 - The works with respect to exits to comply with regulation 1218 did involve the carrying out of structural works, as it required the replacement of one entire staircase. Although it was not structural, in the sense of any works to the supporting walls or roof, the extent of the works was regarded as part of the structure of the building and, as such, the responsibility was with Chen.
 - Compliance with emergency procedures did not involve structural works and was the responsibility of Panmure.
 - Whilst the installation of hard-wired smoke detectors was a lessee obligation under the lease, section 251 of the Act meant that the obligation was that of Chen and the Tribunal did not make any order against Panmure in that respect.
 - The net result of the decision is that, even though the lease attempted to impose certain obligations on Panmure (other than structural obligations), Panmure was effectively released from those obligations due to the operation of section 251 of the Act.
 - It should also be remembered that the *Retail Leases Act 2003*, although not dealing explicitly with essential safety measures, provides at section 52 as follows:

“(2) *The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into:*

- (a) *the structure of, and fixtures in, the retail premises; and*
- (b) *plant and equipment at the retail premises; and*

(c) *the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.*"

- The section provides that the landlord is not responsible where any repairs are required due to the tenant's misuse, or if the tenant owns the particular fixtures and fittings. Further, if the tenant carries out any urgent repairs, it is able to obtain the cost of those from the landlord.

3. Issues in lease drafting

- 3.1 It is common practice in lease negotiations for a tenant to be liable to comply with all laws and regulations in relation to the leased premises, but excluding works of a capital or structural nature. The terms "capital" and "structural" are far from clear, but lawyers tend to use those words, as the alternative is to embark on a detailed drafting exercise of defining in detail the extent of capital and structural works, which would undoubtedly lead to a protracted negotiation. So convenience dictates the use of the words "capital" and "structural" as exclusions from a tenant's usual obligations under the lease.
- 3.2 One qualification to the above, in most leases, is that a tenant will be liable for "capital" or "structural" works, where the tenant's particular use of the premises, default or negligence has brought about the need for such "capital" or "structural" works. For instance, if a tenant leases a shop and wants to convert it to a restaurant and the Regulations require the installation of male and female toilets, although these works may be seen as "capital", it would usually be the tenant's obligation to install those toilets at its cost. This is because the tenant's particular use has mandated that capital works be carried out and, in such circumstances, it is reasonable that the tenant be liable to incur such costs.
- 3.3 Whilst the outcomes specified in the above paragraphs are not necessarily optimal, they represent a standard manner in which landlords and tenants divide up the responsibilities for works between themselves under most commercial leases. Of course, there are numerous exceptions and many instances where a landlord will contribute to a tenant's fitout costs or provide premises ready for a tenant to occupy. But in those instances, the matters are dealt with clearly in an agreement for lease or a lease document, reflecting the commercial negotiations agreed between the parties.
- 3.4 Unfortunately, the Building Regulations and the operation of section 251 of the Building Act do not necessarily reflect the generally accepted position between landlords and tenants as to the carrying out of works in compliance with laws and regulations. The Regulations and the Act can operate to the detriment of both the landlord and the tenant. For example:
- (a) The landlord and tenant may agree that the installation of hard-wired smoke detectors does not constitute capital or structural works, as VCAT determined in *Chen v Panmure Hotel Pty Ltd*. Nevertheless, regulation 709 of the Building Regulations imposes the obligation on the landlord and, by virtue of section 251 of the Act, it will be the landlord that has the obligation to carry out the works, or if the works are carried out by the tenant the landlord is obliged to reimburse the tenant for the cost of those works.
 - (b) Regulation 1218 of the Building Regulations imposes obligations on an occupier to ensure exits and paths of travel to exits are maintained in an efficient condition and readily accessible. This obligation could involve the undertaking of capital or structural works, as was the case in *Chen v Panmure Hotel Pty Ltd* where the replacement of a staircase was deemed to be structural. So in this instance, whilst the tenant was not obliged under the terms of the lease with the landlord to replace the staircase, it was obliged pursuant to regulation 1218 to carry out those works.

- 3.5 The Building Regulations and the Building Act can create difficulties for landlords and tenants, and in particular for landlords. A tenant can effectively contract-out of regulation 1218 by providing that where compliance with regulation 1218 requires capital or structural works, the landlord must carry out those works or reimburse the tenant for doing so. Whilst the tenant will still be liable under the regulation, at least the tenant has the right to pass the obligation onto the landlord under the lease, or at least seek payment from the landlord.
- 3.6 However, for a landlord, the situation is different. Whilst the landlord can also seek to pass on obligations to the tenant (noting that the landlord is still liable under those regulations) section 251 of the Building Act effectively prevents a landlord from passing on those obligations to a tenant. Section 251 operates despite “*any covenant or agreement to the contrary*”. As seen in *Chen v Panmure Hotel Pty Ltd*, the Tribunal would not enforce an obligation against the tenant, even though it was required under the lease, in circumstances where section 251 had the effect of nullifying the obligation on the tenant under the lease.
- 3.7 How should a lease be drafted to protect the landlord?
- (a) If premises are leased to a tenant for a particular purpose (eg a boarding house or hostel) the landlord will be responsible to ensure that the premises comply with the Building Regulations, other than perhaps compliance with regulation 1218 which imposes obligations on an occupier.
- (b) If premises are leased to a tenant and a tenant wants to use the premises for a different purpose, to which the premises had been used, careful consideration will need to be given as to how the lease is drafted. A change in use may result in various regulations applying to the premises, which may well be required to be complied with by the landlord. The landlord would need to ensure that:
- The tenant is required to carry out all works required to ensure the premises comply with the Building Regulations.
 - If the tenant fails to do so, it will be a breach of an essential term of the lease, giving the landlord the right to terminate the lease.
 - If the landlord is required under the Building Regulations to incur any expense, as a result of any activities of the tenant (such as the change in use), this would give the landlord the option to terminate the lease without payment of any compensation to the tenant.

You will note that the above section does not require the tenant to pay any expenses to the landlord, as this is effectively prohibited pursuant to section 251 of the Act, but gives the landlord the right to terminate the lease for breach by the tenant, or to terminate the lease because the landlord is required to incur an expense. This should serve as some protection for the landlord as, presumably, a tenant would wish to avoid the lease being terminated.

Another possible remedy for a landlord is to have the directors of the tenant provide an indemnity to the landlord for any expense incurred by the landlord in complying with any building regulations which arise due to the tenant’s particular use or change in use of the premises. This does not seem to be in breach of section 251 of the Act but, of course, is open to attack from the tenant and the relevant directors.

A particular problem for councils is where clubs construct buildings on council land. Clubs believe that they are the owners of the buildings and this may have some merit at law. However, under the Building Act, “owner” is defined as follows:

“Owner in relation to a building, means the owner of the land on which a building is situated.”

In this circumstance, council would be the party responsible for compliance with the Building Regulations, even though the building has been constructed by a club. Accordingly, council should give careful consideration to including clauses (like those specified above) in leases where its occupants are undertaking construction of a building, or major changes, which may impact on the Building Regulations.