

Article Information

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Shock to the system - new defibrillator legislation and the impact on owners/landlords

The *Automated External Defibrillator (Public Access) Bill 2022* (AED Bill) has passed both houses of the South Australian Parliament and is presently awaiting royal assent. The AED Bill will in certain instances require owners (as opposed to occupants) to install automated external defibrillators inside buildings or facilities they own - the AED Bill will also hold owners responsible for repairs and maintenance of automated external defibrillators and the display of conspicuous signage, and also requires owners to comply with certain reporting obligations.

Owners will assume these obligations statutorily and, by virtue of this, the implication is that owners may assume a broader duty of care to ensure automated external defibrillators are functional, fit for purpose, located in suitable/accessible positions to facilitate the most effective use, conspicuously identified and capable of being used for their intended purpose if and when the need arises. In addition, the AED Bill places more of a burden on owners to ensure the use of defibrillators is properly managed to avoid any negative ramifications arising from improper use.

Importantly, the AED Bill does not impose any obligations on occupants/tenants to install automated external defibrillators within their leased/licensed premises. This is not to say that these obligations may not arise under other legal principles including negligence.

What kind of asset requires a defibrillator to be installed?

The provisions of the AED Bill applicable to owners will come into force and effect on 1 January 2025. The AED Bill will require owners to install a defibrillator in their building in the following circumstances:

1. where a building used for commercial purposes commences construction after 1 January 2025 and has a floor area of more than 600m²;
2. where an existing building used for commercial purposes has had "major works" (exceeding \$100,000.00) done to it after 1 January 2025, following which, the floor area of that building is more than 600m²;
3. where a building with a floor area greater than 600m² (whether constructed before or after 1 January 2025) is the subject of a change in use for commercial purposes after 1 January 2025; and
4. where a building is used for commercial purposes, and has a floor area greater than 1,200m².

Owners caught by the AED Bill must ensure that there is one automated external defibrillator installed for every 1,200m² of floor area. For buildings mandated to install an automated external defibrillator with a floor area less than 1,200m², the requirement is limited to one automated external defibrillator.

Failure to comply with the requirements set out above constitutes an offence attracting a maximum penalty of \$20,000.

Other Obligations

Owners caught by the installation requirements set out above will be required to maintain, and to test at least once in every 12 month period, each defibrillator installed. Owners should attempt to recover the costs associated with installing, maintaining and testing mandated defibrillators as an outgoing from occupants and it would be prudent for owners to ensure that the outgoings regime in any commercial lease is suitably worded to permit a recovery of costs incurred by an

owner complying with the AED Bill. The explicit recovery of such costs as a recoverable outgoing in a commercial lease will be critical to safeguard enforceability for the purposes of section 26 of the Retail and Commercial Leases Act 1995 (SA). In addition, commercial leases should incorporate certain landlord reservations allowing owners suitable access to the premises where required to meet the maintenance and testing requirements contemplated by the AED Bill.

Leases should also require tenants to do all things required to facilitate compliance by the owner (as landlord) with the AED Bill and tenants should indemnify the owner where the tenant, by act or omission, does something which impedes on an owner's ability to comply with the AED Bill or will result in the owner contravening the AED Bill (including removing, without landlord approval, a defibrillator or damaging a defibrillator and failing to notify the landlord).

In addition, tenants should release and indemnify landlords for any claims arising from the use of (or failure to use) defibrillators within their tenancy, and leases should also require tenants to ensure there are personnel which are appropriately trained and qualified to operate and use defibrillators according to manufacturing guidelines.

The AED Bill also requires owners to:

- provide the Minister with details of the location and the times during which the defibrillator will be accessible by the public to enable the Minister to maintain a register of all installed defibrillators; and
- erect signage near the defibrillator, as well as outside and near the entrance of the relevant building indicating that a defibrillator is nearby.

Ambiguities and Concerns

The AED Bill does not include a definition for "*commercial purpose*" (which is an essential element in determining whether an owner will be subject to the AED Bill) with the implication being that this term may be interpreted broadly to capture all forms of uses which have a purpose to do with commerce. This results in area (rather than use) being the primary determining indicia as to whether an owner is caught by the obligations under the AED Bill.

As drafted, the AED Bill will not apply to buildings used for domestic purposes (unless there is a commercial enterprise being conducted in association with this use) and it is not clear whether owners of purpose built student accommodation assets will be caught by the AED Bill (as it is arguable that there is no commercial enterprise in existence for this type of asset class depending upon the owner's service offering to residents).

Other concerns with the AED Bill include:

1. the requirement with regards to "major works" does not indicate whether this is in aggregate or isolation, and any improvements, repairs or other physical changes to a building could be co-ordinated in a way to not exceed the threshold of \$100,000 which is not subject to any form of temporal requirement (giving rise to ambiguity);
2. floor area is not defined so the method of measurement to be applied for the purposes of the AED Bill is not clear (including whether the Property Council of Australia Limited's method of measurement is of any relevance); and
3. there are no prescriptions in the AED Bill with regards to where defibrillators should be installed and whether defibrillators should be installed in publicly accessible locations (specifically common areas) where there is scope to do so. In addition, it is not clear where defibrillators should be installed when a tenant leases the entire building (with no publicly accessible spaces). Owners/landlords will need to be discerning with regards to where defibrillators (which may be difficult in multi-tenanted buildings) are installed and owners/landlords should ensure the locality of defibrillators are conspicuously identified.

Concluding Remarks

At the centrepiece of the AED Bill are obligations imposed on owners. This negates logic in the context of whole of land lease arrangements (where possession and control of the building is entirely with the occupant). The other concern is that owners are identified as the primary target for compliance which potentially broadens an owner's culpability where defibrillators are not installed in suitable locations, not properly maintained and not conspicuously identified or operated correctly. For this reason, leases should be designed to shift many of these responsibilities (and the risks associated with the installation, maintenance and use of defibrillators) to tenants by appropriately worded covenants, releases and indemnities.