

Flood & cyclone legal help

Produced by the Queensland Legal Assistance Forum



Property contracts

This factsheet considers, in general terms, the implications of the Queensland floods and cyclones on contracts for the sale and purchase of property. It is primarily intended to assist practitioners when advising a party to a contract that has been affected by flooding or cyclone between the contract and settlement date.

General considerations for all contracts

Passing risk

There is no automatic right to pull out of a contract because the property is damaged or affected by flooding or cyclone after the contract is entered into. This applies even where the building on the property is so badly damaged it needs to be demolished.

Most contracts state that risk of damage to the property passes to the buyer on or shortly after the contract is entered into (a common exception to this is 'off the plan' strata contracts where risk usually doesn't pass until settlement). This means the buyer has to settle and pay the full price. The buyer may be entitled to claim under their own insurance, provided damage from flooding or cyclone is covered.

An exception may arise in circumstances where the seller failed to take reasonable steps to protect the property against flood damage (for example if the damage could have been prevented by the seller sandbagging the property). This will depend on the circumstances.

There is also a statutory exception for residences (see the "Residential dwellings" section on page 2).

Is there a binding contract?

First, you need to consider if the contract has been formed (this usually happens when the seller accepts the buyer's offer and notifies the buyer or buyer's lawyer of the acceptance). Until this happens the buyer is free to withdraw their offer and recover the deposit.

Cooling-off period

For residential properties (including vacant residential land), a five business day cooling-off period applies in most cases.

The five business days starts on the day the buyer (or buyer's lawyer) receives a signed copy of the contract. A number of practitioner's offices have been closed due to flooding or cyclone. The cooling-off period will start at the time of delivery, regardless of whether the office was open. Conversely, in a number of cases, mail may have been held at the post office and not delivered to the buyer's lawyer's office. Practitioners asked to give advice should make appropriate inquiries to ascertain the true position and not just assume the cooling-off period has expired.

If the contract is still within the cooling-off period, the buyer may cancel the contract and recover the deposit (less a termination penalty of 0.25 percent of the purchase price). To properly cancel the contract a written notice stating the contract is cancelled under s. 370A of the *Property Agents and Motor Dealers Act 2000* must be given to the seller before the cooling-off period expires.

Other conditions or termination rights

If a binding contract has been entered into and the cooling-off period (if applicable) has expired or been waived, you should consider other contract conditions that may entitle a buyer to terminate (eg building inspection and finance clauses).

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You should also consider whether statutory termination rights may arise (eg due to non-compliance with s. 368A of the *Property Agents and Motor Dealers Act 2000* or Chapter 5 of the *Body Corporate and Community Management Act 1997*).

For lots in community titles schemes, you should consider whether circumstances may give rise to a breach of the warranty in s. 223(3) of the *Body Corporate and Community Management Act 1997* (where, at settlement, there are circumstances in relation to the body corporate affairs that materially prejudice the buyer).

What are the seller's obligations?

The general position is that after a contract is entered into, the seller is required to reasonably care for the property until settlement.

This probably means a seller will be required to remove water and mud from an inundated property to prevent further damage. The seller would not be required to make repairs (eg replace carpets, repaint) prior to settlement. However, the failure of a seller to clean up a property after flood inundation will only entitle the buyer to compensation and not a right to terminate.

Residential dwellings

Statutory right to terminate where a dwelling is not habitable

For houses and units used as residences, s. 64 of the *Property Law Act 1974* gives buyers a right to terminate the contract and recover the full deposit if the house or unit is damaged or destroyed so as to be "unfit for human habitation". The section applies despite anything to the contrary in the contract.

There are two limbs to s. 64 of the Act that must be satisfied to allow a buyer to terminate:

- › There must be damage to the house or unit.
- › The house or unit must be unfit for human habitation as a result.

Damage

Mere water inundation would not be enough to rely on this section; there must be some physical damage to the property that requires repair. It is suggested that where walls are watermarked and need repainting or replacing, or carpets need specialist treatment or replacing, this would fall within the usual meaning of the word 'damage'

In the case of a unit, the damage must be to the actual lot. Damage to common areas or common property will not allow you to rely on the section.

Unfit for human habitation

The issue of whether a dwelling is fit for human habitation is a question of fact and degree in each case. There is limited case law on the operation of s. 64 of the Act. However, generally, if the property is unsafe or it is impossible to live in with any reasonable comfort, the property would be regarded as unfit for human habitation.

A property that has been completely inundated and is covered in a layer of mud may be considered unfit for habitation. Where the only damage to a property is to the meter board, and as a result power cannot be reconnected, it would be highly questionable whether s. 64 of the Act would apply.

Can the seller rectify the damage?

There are two possible interpretations of s. 64 of the Act:

1. The termination right arises immediately the residence becomes uninhabitable.
2. The buyer must wait until settlement and may only terminate the contract if the property remains uninhabitable at that date.

Sellers and their legal advisors should consider whether, arguably, the seller can avoid having this section of the Act apply to them by carrying out works in order to reinstate the property to a habitable condition prior to settlement. The seller should consider whether its insurance covers the cost of the work.

Unlike in some other states, there is no ability to extend the settlement date to allow works to be carried out (except by agreement of the parties).

Practical issues and examples

I signed a contract to buy a property and want to go ahead, but my bank has been delayed in finalising the mortgage documents due to the flood or cyclone and will not be ready to settle on time. Can I get an extension because of the flood or cyclone?

In Queensland, most contracts say that "time is of the essence". This means time limits must be strictly observed in all circumstances and there is no automatic right for a party to extend dates because of delays. (Unlike most building contracts, property contracts usually do not have a concept of "force majeure".)

Most sellers are likely to be understanding in the circumstances. Speak to the seller as soon as possible if a delay is likely. However, you need to be aware that the seller could potentially terminate the contract and forfeit the deposit or charge default interest. Every effort should therefore be made to source alternate funds.

I have signed a contract to purchase a property that is “subject to finance”. The bank is still processing my loan application, which has been delayed because of the flood or cyclone. Can I get the finance date extended because of the delay?

You are only entitled to an extension if the seller agrees to an extension (see the previous question for more information). However, if the bank does not have time to approve your loan and the seller will not allow more time, as long as the contract is subject to finance you will be able to get your deposit back.

I signed a contract to purchase a property that was “subject to finance”. The bank told me finance was approved but since then the property was inundated by flood water and the bank says it has withdrawn the finance. Can I get out of the contract?

No, unfortunately if you have already notified the seller of finance approval, you cannot rely on the “subject to finance” clause to cancel the contract if the bank later withdraws the finance offer.

I signed a contract to buy a property in Brisbane that was affected by the 2011 flood. I have since been told the property was also affected by the 1974 flood but neither the seller or the real estate agent told me about this. Do I have any claim against the seller or the agent for not disclosing this?

There is no duty on a seller or agent to disclose that a property was flood affected in the past. You will not have any rights because of non-disclosure unless you specifically asked about flooding and the seller’s or agent’s answer was misleading or incomplete.

My property was seriously damaged by the flood and there is a mortgage on the property. Do I have to tell the bank?

A property that has been used as security for a loan acts as a protection for the lender if you default (miss payments) on the loan. If the property was damaged, you still need to make regular loan payments. Usually you need to tell the lender as soon as possible about any damage to the property that was being used as security. It is important that you check the obligations you have under your mortgage.

If the property is damaged or destroyed, the lender will usually require that you pay them any insurance money you get. After this happens, you and the lender will work together to use that money for repairs, replacements and rebuilding. You can expect that the lender will take control of any negotiations with the insurer. Not all arrangements work like this though. Check your mortgage document’s terms.

If the property was not insured against flood, the lender may require you to give more security or pay the loan, or they may want the loan paid in full or in part.

I was building or renovating my home at the time of the flood or cyclone and the building work is damaged. What should I do?

Usually, you still have to pay for work that tradespeople or your builder did under the contract. The builder’s general construction insurance may cover the damage. You will still have a contract between yourself and the builder. It is possible that your insurance covers any renovations that were taking place.

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