

Flood & cyclone legal help

Produced by the Queensland Legal Assistance Forum

Small business

Do I need to make a claim on insurance?

Usually the first thing you need to do when recovering from a disaster is notify an insurer of a claim under any relevant insurance policies. It is important to:

- make sure you have a copy of your policy and read it carefully to check if you are covered
- notify your insurer as soon as you can
- remember to take photographs and/or digital video and keep other documentary evidence of the nature and extent of the damage to support your claim, especially for damaged stock that may need to be disposed of
- take any steps required in the policy wording, including protecting property from damage or removing articles that pose a health hazard.

For more information, visit www.legalaid.qld.gov.au/floods

What if I can't pay my normal business loan payments on time?

Contact your financial institution and discuss payment options with them.

Is financial assistance available to small businesses?

The Queensland Government, through the Queensland Rural Adjustment Authority (QRAA), is providing grants and low-interest loans to small businesses to re-establish after being directly affected by flooding. Initial grants of \$5000 are available to start work and a subsequent grant of \$20,000 is available to recover costs paid in order to repair direct flood damage.

Low-interest loans of up to \$250,000 are also available for small businesses as a part of the Natural Disaster Assistance for Small Businesses. For more information, visit www.qraa.qld.gov.au

Do I need to worry about business or personal solvency?

It is important that your company or business does not carry on trading while insolvent as there are significant penalties and personal liability for company directors if they do. The Australian Securities and Investments Commission (ASIC) and volunteer insolvency practitioners can advise business owners on:

- guidance about business interruption and alternatives to corporate or personal insolvency
- appropriate liaison with your bank
- access to employee entitlement schemes relevant to your individual circumstances.

For more information, contact the the ASIC on 1300 300 630 or visit www.asic.gov.au

What do I do about the business premises?

In summary:

- Landlords (of multi tenanted buildings) will generally be responsible for the structure of the premises' building.
- The obligation to make structural repairs to stand alone buildings will depend on the lease.
- Tenants will generally be responsible for the fixtures, fittings and stock in the leased premises.
- Landlords and financiers may have their respective interests noted on various insurance policies that can give them a right to be paid first.
- The lease will deal with many issues such as cleaning up, repairs and making good, but often the tenant must make good the premises and reinstate them irrespective of whether the damage is covered by insurance.
- Landlords are not usually liable to tenants for interrupted services or restricted access to premises caused by natural disasters.
- If a portion of the premises is damaged or destroyed, the lease may contain a clause that reduces a pro rata amount of the rent (and possibly outgoings) payable depending on the extent of damage.

- If premises are substantially destroyed so as to be unfit for their occupation or use, then the lease may contain a right of either party to terminate.
- Consider carefully the risks employees and tradespeople will be exposed to in cleaning up affected premises and take any possible steps to avoid injuries.

Do I have to pay my contractors for work done?

Yes, you must pay contractors for work that has already been done for you, even if the work has been damaged or destroyed by the flooding or cyclone. You may be able to put any further work on hold if your contract with the contractor contains a clause that suspends certain obligations in cases of unforeseen events such as flooding. These clauses are usually called ‘force majeure’ clauses.

You should have a copy of any agreement with a contractor and determine if its operation is suspended for the natural disaster’s duration or for a specified time after it where you may still be prevented from operating.

How do I defer or cancel orders and regular supplies?

Many supply agreements contain a ‘force majeure’ clause that deals with the suspension of some or all of a party’s obligations due to certain events occurring, such as a natural disaster caused by floods. These clauses usually put performance of certain obligations on hold for a particular period, which may include a disruption time after the natural disaster occurred.

‘Take or pay’ agreements can require the buyer to pay for orders or to regularly accept orders of a given level even if the buyer cannot use the supply because it is physically unable to trade.

Agreements can become frustrated (ie capable of being cancelled) because their terms cannot be complied with due to external forces beyond either party’s control.

As a supplier you may not be able to meet your contractual commitments to meet regular orders to your customers due to a reduced quantity or stock range, or because existing logistical delivery channels are disrupted.

Suppliers should discuss problems with supply shortages and delivery disruption with their customers as soon as possible so their customers can make alternative arrangements to reduce their loss.

A supply contract may contain an indemnity for loss suffered by a party as a result of the other party’s failure to perform their obligations.

It may also be possible to negotiate a suspension of supply with customers and suppliers.

You should get a copy of your supply agreement’s terms and determine if obligations are on hold under a ‘force majeure’ clause, and for how long the suspension will apply.

What do I have to do with employees?

There are a number of employment issues associated with a small business affected by a natural disaster such as flooding. For more information, visit www.legalaid.qld.gov.au/floods

I have lost my security documents/titles and registration licences/mortgages/contracts. Who might have a copy of these?

You should thoroughly search your home and business premises, including any safes and safe deposit boxes at your financial institution for copies of documents.

Your solicitor or accountant may hold security documents in safe custody. Similarly, your bank, financial planner or stockbroker may hold security documents. Copies of property documents (eg mortgages, title deeds, title searches, registered leases etc) may also be obtained from the Land Titles Office (there may be a fee). Your property agent may hold copies of leases and your insurance broker may have a copy of any insurance policies your business holds.

Your bank or financial provider will have a copy of any mortgage document over property, and you can ask them for a copy. If the mortgage is registered in the Land Titles Office, losing the copy of the document does not affect the mortgage’s validity in any way.

Registration certificates, such as those for business names, companies and intellectual property such as trade marks, patents and designs, can all be reproduced easily by the relevant registries. Relevant renewal dates can also be obtained from the registries.

What do I have to consider if I want to close down my business?

There are many issues you need to consider when deciding whether to close down a business. These include:

- Supply agreements, contracts and leases, including your premises’ lease, may have to be terminated or your release negotiated. There could be financial consequences in doing this.
- Staff may have to be made redundant and paid redundancy pay and entitlements (visit www.fairwork.gov.au).
- Services may need to be disconnected, including electricity, internet and telephone lines.

- Taxation returns and BAS may need to be finalised (visit www.ato.gov.au).
- Creditors will need to be paid, including paying any loans that may become immediately due if you cease to trade.
- Trading corporations may need to be wound up or de-registered with the ASIC and have their assets sold, creditors paid and the balance divided among shareholders (visit www.asic.gov.au).
- Business names may need to be de-registered (visit www.fairtrading.qld.gov.au).
- Business licences may need to be cancelled.
- Consider if you have signed over rights to your stock, goods or personal assets to creditors or suppliers, and if these can be released (eg a personal guarantee for business equipment).

You should get professional advice about your particular circumstances.

What happens to my tax liabilities?

The Australian Taxation Office is offering the following to people suffering from financial hardship due to the flooding:

» deferred lodgement and payment dates for December monthly activity statements » fast tracked tax return refunds » extended time, where eligible, to pay outstanding tax debts (the ATO may waive the general interest charge).

For more information, visit www.ato.gov.au

While some tax issues may be deferred, GST, payroll tax and income tax will continue throughout this period. Following recovery, the tax implications of insurance proceeds, loss of profits, replacement of assets, receipt of financial assistance etc will need to be considered. You should get professional advice about these issues.

What happens to damaged goods from suppliers?

Most supply agreements outline when title (ownership) and risk (responsibility) for goods passes from a supplier to a purchaser. In many agreements, responsibility for the goods is passed to a purchaser before payment occurs or ownership of the goods is transferred. Often responsibility for damage or loss will sit with a purchaser from delivery or dispatch and a 'retention of title' clause will only transfer ownership to the goods once they are paid for.

If you have received goods from suppliers that have subsequently been lost, damaged or destroyed by a natural disaster such as a flood, it is important to check your supply arrangement's terms as you may still be obliged to pay for them.

What about damaged equipment owned by other parties (eg leased or hire purchase equipment)?

Most agreements governing these arrangements deal with what happens when the equipment is destroyed — usually (but not always) you are required to replace the equipment if it is damaged while in your possession. If you have business insurance that covers the equipment, your policy may respond to repair or replace the damaged equipment. Sometimes, your landlord's insurance policies may respond, or your own building or contents insurance (if applicable) may respond. There may even be more than one policy in place that might respond to assist you.

You should check the terms of your lease/hire purchase/ other agreements about damaged equipment. You should also check the terms of any relevant insurance policies you or your landlord/business partners may have in place.

What should I do about security?

It is important to secure your business premises against looting and property damage. Looting is stealing and is a criminal offence. During episodes of looting, criminal damage to property is common. You should report any wilful destruction of property or looting to the police.

Property that has become lost in the floods may not be abandoned and may be subject to normal salvage rights.