



HopgoodGanim

LAWYERS

Commercial and Retail Leasing

A Guide to Legal Issues for Landlords and Tenants after the Queensland Floods

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In the aftermath of Queensland's recent flood crisis, it is important for both landlords and tenants to carefully consider their rights and obligations under their leases for property that has been affected by flooding.

There are many issues to consider, and this Guide outlines the essential steps landlords and tenants should take right now to ensure their interests are protected.

1. Issues for both landlords and tenants

1.1 Check your lease for rent abatement and termination rights

- (a) Generally, most commercial and retail leases (including HopgoodGanim's current standard lease documentation) provide for the following:

(1) **Abatement of rent for damage or destruction**

If the leased premises is damaged by flood so that the tenant's use of it is substantially reduced, then the rent and other costs payable under the lease (such as the outgoings, direct charges and promotion levy) and any covenants to repair and maintain the premises are reduced in proportion to the nature and extent of the damage sustained, until such time as the premises has been restored.

(2) **If the landlord does not fix the damage, the tenant can terminate**

If the landlord does not, within a reasonable time, restore the premises after the damage occurs, the tenant may serve a notice on the landlord. If the landlord does not, within a reasonable time after receiving that notice, restore the premises, the tenant may terminate the lease by issuing a further written notice to the landlord.

- (b) What a "reasonable time" is always depends on the circumstances of each case, including the nature and extent of the damage caused by the flooding.
- (c) Some leases (again, including HopgoodGanim's current standard lease documentation) will also provide that if the premises is totally destroyed or otherwise rendered inaccessible or unfit for occupation, then the landlord may also terminate the lease by issuing a written notice to the tenant.
- (d) Obviously, this will **not** reflect all leases (or for that matter, recent HopgoodGanim leases which have been relevantly amended), and it is critical that both landlords and tenants check their own lease documents to confirm the rights and obligations of the parties, the relevant time periods for notices, and any other relevant details. Our Commercial and Retail Leasing team is happy to assist landlords and tenants with their leases in this regard.
- (e) Other provisions of leases may also be applicable in the circumstances, such as those dealing with tenant's indemnities, insurance and the tenant's general obligation to repair and maintain the premises (although these repair and maintenance provisions usually exclude damage from floods or other natural disasters).
- (f) It's critical that, after flooding, both landlords and tenants carefully consider all the terms of the lease, as each lease is potentially different, and each leased premises faces its own unique set of circumstances.

1.2 The Property Law Act may assist tenants

- (a) If your lease does not deal with abatement of rent in the event of flood, then section 105 of the *Property Law Act 1974* (Qld) will likely apply, as this section is an implied lease term (subject to any exclusion of implied terms in the lease itself).

- (b) Section 105 largely reflects paragraph 1.1(a)(1) above (but not paragraph 1.1(a)(2)), but does not apply to covenants to repair and maintain. Section 105, however, does go further to provide that in addition to an abatement of rent, the lease provisions relating to remedies for recovery of rent shall also be suspended until the premises is again made fit for occupation.
- (c) Section 105 will most likely not apply in the case of a license to occupy (that does not otherwise contain an abatement clause), as opposed to an overt lease. The challenge in those circumstances for a licensee will be to argue that the license itself in fact amounts to a lease at law, and therefore section 105 will apply. If the license is in fact only a license at law, the implied term in section 105 will not apply.

1.3 Check your lease for time limits

In particular, landlords and tenants need to be aware of, and strictly comply with, all relevant time limits in the lease (be sure to diarise the time limits) for things like the service of notices concerning the repair, abatement and termination provisions under the lease, if applicable. Any such service of notices will need to be in compliance with the notice requirements of the lease, and it is recommended that both landlords and tenants engage a solicitor to effect any such notice to ensure compliance.

1.4 Check your insurance rights

- (a) Again, both landlords and tenants should check their leases to confirm their insurance obligations.
- (b) If you have not done so already, contact your insurer and advise them of your situation and any damage suffered, and enquire as to the terms of your policy and what steps you need to take to make a claim. You should obtain a claim reference number from your insurer for subsequent communications.
- (c) Your insurer may require you to follow a specific process before engaging any contractors for repair works. You may need to notify your insurer of the contractor's details before authorising them to carry out any repairs.
- (d) You should take dated photographic evidence, including photographs and video, of the damage, noting particularly the date of inundation and the date(s) of any repair works. You should also prepare a detailed list or inventory of damaged property, items and stock. This evidence may prove critical in supporting any claim.
- (e) You should keep records of all costs incurred in the clean-up and retain copies of all invoices and receipts.
- (f) Disputes with insurers may arise as to whether or not an existing policy does indeed cover the flood damage. Disputes over terminology and definitions, such as whether "storm and tempest" cover could apply, or whether "river" as opposed to "riverine" or "creek" flooding, or "overflow of water" are covered, are foreseeable in the weeks and months ahead. If an insurer rejects a claim for damage, we suggest you contact us to discuss a way forward. For example, you may be able to lodge a formal dispute with the Financial Ombudsman Service. However, before such a dispute can be lodged, you typically must first notify your insurer of your complaint and give your insurer a reasonable opportunity to resolve the dispute with you through an internal review.

1.5 "Frustration" of the lease may apply

- (a) Frustration of a contract (and a lease is, after all, a contract) occurs where a supervening event occurs without fault of either party, which significantly renders the contractual rights and obligations of the parties different from what was contemplated at the time of the contract's execution.
- (b) There may be some limited scope to apply the doctrine of frustration to leases due to the recent flooding. However, in our opinion, these cases will be rare. Any such application will be determined by factors such as the nature of the lease (and in particular, whether flood damage was contemplated in the lease itself, as is often the case) and the length of time of non-occupation compared to the total term of the lease.
- (c) If you would like further advice on the possible frustration of your lease in the circumstances, please contact us.

2. Specific issues to consider for landlords

2.1 Abatement of rent

Generally, the onus will be on tenants to prove that premises are unfit for occupation in support of a claim for rent abatement. As such, landlords should continue to issue rent invoices until an abatement notice is received. In past disputes considering abatement, the Courts have taken into account landlords providing temporary arrangements to alleviate a tenant's inability to use the whole of the affected premises, but a landlord is not obliged to provide temporary or alternative premises unless required under the lease contract.

2.2 Keep good records

Keep documentary evidence of the timing of inundation and when the premises are operational again (either fully or partially).

2.3 Do not admit liability

If a claim for abatement is received from a tenant, any admission of liability by the landlord could affect its insurance claim for (among other things) the abated rent. As such, until confirmation is obtained from the landlord's insurers to the contrary, any response to any claim from a tenant should not admit liability, and should be referred to the landlord's insurers.

2.4 Take control of the repair works

Landlords need to arrange their own staff and contractors to check and action issues such as safety, structural integrity and electrical compliance. Generally, landlords would be liable to rectify structural issues and also anything else owned or supplied by the landlord, such as walls, floors, the roof, and electrical and air conditioning equipment. If, on the other hand, the tenant constructed its own fit-out, then generally the tenant would be responsible for rectifying its own property. Each case will very much depend on its own facts and circumstances.

2.5 Repair works should be carried out quickly and properly

Given the common lease provisions for abatement and the tenant's right to terminate, the obvious recommendation for a landlord who wants the lease to continue is to:

- (a) promptly take control of the property and situation;
- (b) have any damage the landlord is responsible for repaired and certified (where necessary) as soon as possible;
- (c) notify the tenants when the repair works are completed and relevant services are reinstated, so as to cease any abatement; and
- (d) record documentary evidence that the landlord has tried to reinstate the premises within a reasonable time.

3. Specific issues to consider for tenants

3.1 Keep an open dialogue with the landlord

Tenants should contact the landlord or property agent regularly and request updates on:

- (a) when the premises is likely to be reopened;
- (b) the status of the repair works;
- (c) when essential services (such as electricity, air conditioning and gas) will be up and running; and

- (d) the status and timing of inspections and approvals for reoccupation by fire services and any other relevant government authority.

3.2 Abatement of rent

The tenant should inspect the premises thoroughly with its contractors and consultants, and prepare necessary reports and surveys (if appropriate in the circumstances and available under the lease) to support a claim for abatement and/or termination. The advice above regarding documentary evidence for the timing of inundation and when the premises are operational again will be important in this regard.

3.3 Repair works

Tenants need to check the lease to confirm what repair works they may be liable for under the lease. For example, if the tenant constructed its own fit-out and/or signage, then the tenant is generally responsible for rectifying its own property.

This Guide is not intended as comprehensive legal advice, as the unique circumstances of each property and lease will be the key determining factors in each case. As such, it is critical that both landlords and tenants review their leases as soon as possible, and if there is any concern or doubt, seek legal advice.

Further information

For more information on leasing issues following the Queensland floods, please contact HopgoodGanim's Commercial and Retail Leasing team.

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