

FAQS - REIQ CONTRACT WEBINAR 18/01/2022

EXTENSION OF SETTLEMENT DATE

1. What can I do to avoid a party needing to extend the settlement date?

By encouraging realistic time frames for settlement, the need to extend under this new clause can be avoided altogether. The most common cause for delay in practice, for both sellers and buyers, is the parties' financiers not being given enough time to settle. You should encourage the parties to speak with their financiers and confirm their current processing times to ensure contract dates are realistic.

2. If an Extension Notice is issued, does the other party have to agree to extend settlement?

If an Extension Notice is validly issued by one party to the other, the settlement date will be extended. The other party does not need to agree as this is a unilateral contractual right. The agent should keep the possibility of extension in mind when discussing settlement with the parties.

3. Can this new clause 6.2 be waived by the parties?

This clause can be waived by the parties by including a special condition amending the standard terms. The agent should not provide any advice to the parties about waiving this clause as this may constitute the provision of legal advice (which agents are not permitted to provide). Moreover, such advice may have significant financial ramifications for either party if it is waived.

4. How is an Extension Notice given, is there a standard form? Do the parties need to have a reason for the extension included with proof?

The Extension Notice will be prepared and sent by the extending party's solicitor. They do not need to specify a reason for the extension, nor do they need to provide proof to the other party. The extension can be for any reason and will most commonly be used where a party's financier is not ready to settle on time.

5. For how long can settlement be extended in total?

Regardless of how many notices are given, and by which parties, settlement cannot be extended beyond a total of 5 business days from the settlement date under clause 6.2. If settlement does not occur by 4:00 pm on the 5th business day, the party that cannot settle on that day will be in default (whether that is the buyer or the seller) and the other party can terminate. Of course, the parties can extend for longer if they mutually agree in writing. This should be formalised by the parties' solicitors.

6. Does this new clause 6.2 apply to settlement dates that have already been extended mutually?

A party can issue an Extension Notice to extend the "scheduled settlement date" which includes a settlement date that has already been extended by mutual agreement, due to a delay event or if an electronic settlement system is not available.

7. Can the seller charge penalty interest for failing to settle on the original settlement date, if the buyer issues an Extension Notice?

The Seller's right to charge penalty interest is only available if the buyer does not pay an amount when due. If the buyer issues a valid Extension Notice prior to 4pm on the Settlement Date, then the balance purchase price will become due on the extended settlement date. The buyer will not be in default for failing to pay on the original date and the seller is not entitled to charge penalty interest.

EXTENSION OF SETTLEMENT DATE CONTINUED

8. What happens if there are contemporaneous settlements, other contracts or properties involved?

If the parties intend to enter other contracts that settle contemporaneously, they should always seek legal advice first. The parties' solicitors can draft a special condition to allow for flexibility so that if a preceding contract is extended, it will not cause the subsequent contract to fall over. You may have concerns about the application in practice however the parties' solicitors can draft appropriate special conditions that achieves the parties' desired outcomes and allows flexibility depending on the specific circumstances of the transactions.

9. How will an extension effect settlement adjustments?

Notwithstanding any extensions of settlement under clause 6.2, adjustments are calculated based on the settlement date (including any extended settlement date).

10. What if the parties suffer loss because an Extension Notice is served on the settlement date? Are they entitled to compensation or other legal recourse?

There has always been an inherent risk to both parties in relying on settlement to occur on time. There is no right in the Contract to claim compensation for costs incurred by one party if the other party needs to extend. The risk of arranging to move on the settlement date or close to it should be explained to the buyer/seller by their solicitor in advance. There may be many practical options available to the parties to avoid costs being incurred if settlement is delayed. As the agent, you may bring this to the parties' attention when a settlement date is chosen.

11. Does the new settlement extension clause apply in the case of auction as well?

Yes, unless the parties amend the standard terms, this clause will apply to all residential contracts of sale even those formed under auction conditions.

12. If settlement is scheduled earlier than 4:00 pm on the settlement date, do the parties still have until 4:00 pm to give an Extension Notice?

Yes, because the parties have until 4pm on the Settlement Date to complete settlement. If the parties schedule settlement for 1:00 pm but for some reason (such as payout figures not being received, cheque directions not being sent in time, the incoming bank not being ready) settlement is delayed, they are able to reschedule until 4:00 pm before it is deemed to be a default of the Contract.

13. Why are the parties allowed to extend by 4:00 pm on the day of settlement and not the day before?

In practice, the parties' solicitors and financiers will work towards settlement being completed on the due date. There are a plethora of issues that can arise on the day of settlement which can cause delay for either party. The banks will often confirm they can work towards a date for settlement but will not guarantee that they will be ready on that date (even with a booking) and may only advise that they cannot settle a short time before settlement. When 11th hour issues arise on the settlement date, unfortunately, the parties' solicitors will not usually advise the agent of what issues have arisen with the settlement and the work they are undertaking to get settlement done. Although sometimes it can be foreseen if a settlement may be delayed, a buyer or seller will not be willing to seek an extension in advance and will opt to "wait and see" if settlement can happen on time, despite receiving legal advice of the likelihood that settlement will be delayed.

COVID-19 DELAY EVENT

14. What if the Seller or the Buyer are infected with COVID-19 prior to settlement, what can they do?

If a party has been infected with COVID-19 and are too sick to do a thing required for settlement, settlement can be extended under the new clause 6.2 by giving an Extension Notice. If there is a government regulation (such as a COVID-19 restriction) that prevents the parties from settling, the obligations of the parties are suspended until the delay event ceases to affect the parties.

POOL COMPLIANCE CERTIFICATES

15. Do I attach the Pool Compliance Certificate to the Contract, or do I just tick yes in the Schedule?

It is sufficient to just tick the yes box for the Pool Compliance Certificate when entering the Contract however the seller will still need to provide a copy at or before settlement. However, you may choose to attach the Certificate to the contract provided that it will be valid up to the day of Settlement.

16. How do I give a Notice of No Pool Safety Certificate?

The Notice of No Pool Safety Certificate is a QBCC form available at:

<https://www.qbcc.qld.gov.au/sites/default/files/Form36-NoticeOfNoPoolSafetyCertificate.pdf>

The agent/seller can complete the details in the form and the seller can sign the declaration on page 3. If there is no pool compliance certificate, this notice must be given to the buyer before the Contract is entered, ie. when giving the buyer an EOI form or first draft Contract or at any time prior to the buyer signing the contract.

17. What does the Seller need to provide for a Lot in a Community Title Scheme?

If there is a non-shared pool (a pool that only the seller can use on their lot):

- The same terms apply as for houses and land, ie. the seller has to provide either a Pool Compliance Certificate or Notice of No Pool Safety Certificate prior to entering the Contract, or otherwise provide a Pool Compliance Certificate at or before settlement.

If there is a shared pool (a pool that all lot owners in the scheme can use):

- There are no contractual requirements to provide a Pool Compliance Certificate however the seller will still need to comply with disclosure and notification obligations under the Building Act and relevant regulation. The seller can request this from the body corporate and should obtain legal advice as to what is required.

SMOKE ALARMS

18. Does the seller need to provide a smoke alarm compliance certificate from a qualified tradesman?

The seller does not need to provide a certificate to confirm the smoke alarms installed are compliant. The seller only needs to tick yes or no to the relevant box in the schedule of the Contract.

19. Who checks that smoke alarms are compliant? Who pays for it?

Before selling the property, the seller should ensure the smoke alarms installed are compliant in accordance with its legal obligations under the Fire and Emergency Services Act. The buyer is entitled to arrange an inspection of the smoke alarms (separate to any building and pest condition) with a qualified inspector of its choosing and at its own cost.

20. What happens if the smoke alarms are not compliant? What if the Contract is unconditional?

If the smoke alarms are not compliant, the buyer is entitled to an adjustment of 0.15% of the purchase price in their favour (if requested on or before settlement). That is the buyer's only remedy; they cannot terminate the contract, delay settlement or seek compensation from the seller after settlement. It does not matter if the Contract is conditional or unconditional at the time.

21. What happens if a Contract was entered before 20 January 2022, can the parties rely on the new Contract edition clauses?

The parties can only rely on the terms of the Contract they have entered. If they have entered the prior edition before 20 January 2022, then they will be bound by those terms and will not be able to rely on the new clauses contained in the new editions. Given the transitional obligations imposed on property owners under Fire and Emergency Services Act, if a party has a query about their legal obligations for the relevant property, they should be directed to a solicitor for legal advice.

SMOKE ALARMS CONTINUED

22. If a property is being sold with the intention of demolishing, is it still necessary to have compliant smoke alarms?

The property may qualify for exemption under the relevant legislation. The seller should obtain legal advice to determine if an exemption would apply in their circumstances.

23. What are my responsibilities as the agent for the smoke alarm compliance?

As the agent, you should ask the seller if the smoke alarms are compliant when preparing the Contract. If the seller has queries about compliance and their legal or contractual obligations, you should tell them to direct their queries to their solicitor. You can note that the buyer is entitled to an inspection of the smoke alarms to confirm if they are compliant. Generally speaking, you are not responsible if the smoke alarms are not compliant or if the seller fails to meet its legal or contractual obligations. Agents should be aware that property owners may engage an agent to undertake smoke alarm related activities on their behalf. On that basis, a selling agent should make the scope of their engagement terms clear and ensure that sellers understand that the obligation to meet smoke alarm safety requirements rests with them unless otherwise agreed.

24. What are the requirements for smoke alarms if the property is a Lot in a Community Titles Scheme?

The seller's obligations are the same for a lot in a CTS as it is a legal requirement for compliant smoke alarms to be installed in all domestic dwellings. The owner of the lot (which is the seller, not the body corporate) is responsible for installing compliant smoke alarms.

PAYMENT OF THE DEPOSIT

25. If the deposit is received and receipted before the due date, is written notice still necessary?

It is only necessary to give a Notice of Deposit Payment if payment is confirmed under clause 2.2(3), that is:

- a) The buyer has effected payment electronically on a date before or on the deposit due date;
- b) The buyer has provided the agent with evidence confirming payment; and
- c) Through no delay from the buyer, the deposit is not actually received in the agents trust account until a later date.

If the funds are received, cleared in your trust account and receipted prior to or on the due date, there is no need to confirm payment under clause 2.2(3) as the buyer will have satisfied the requirement to make payment of the deposit by the due date. You should still provide a trust account receipt and confirmation.

26. Do I receipt monies in trust before they have cleared if the buyer provides a confirmation that they have made payment?

You must comply with all statutory requirements of trust accounting. You must not receipt any amount into your trust account which has not been cleared in the account. The Notice of Deposit Payment is to confirm the deposit has been paid by the buyer even though the funds have not been received at the time the notice is issued.

27. What evidence is required for payment confirmation of deposit?

You should request evidence to satisfy yourself that a payment has been made to the correct account on a certain date. You should request a payment confirmation receipt generated by the buyer's bank which includes the details of the buyer's account, amount paid, date of payment and destination account details.

