

Cooling-off

Section 31 of the *Sale of Land Act* 1962

A purchaser has a statutory right, in certain circumstances, to bring the contract to an end within three clear business days of the signing of the contract by the purchaser: section 31 of the *Sale of Land Act* 1962 (s 31). This is despite the fundamental principle of contract law that once a contract is signed, the parties are bound.

A purchaser who exercises this right to cool-off is entitled to a refund of the deposit less \$100.00 or 0.2% of the purchase price, whichever is greater. In this event, it is unlikely that the vendor is under an obligation to pay a commission to the agent.

Exceptions

The cooling-off period does not apply if:

- the property is not residential;
- the land is used primarily for industrial or commercial purposes or is more than 20 hectares in size and used primarily for farming;
- the parties have previously entered into a similar contract for the same property;
- the purchaser is an estate agent or a corporate entity;
- the contract is signed at or within three days before or after a publicly advertised auction (a “boardroom auction” or “mini auction” held at the office of the agent is not an auction for the purpose of the exclusion).

Time limits and commencement

- The period commences once the purchaser has signed the contract.
- The day of signing is excluded and it is generally considered that the purchaser can cool-off right up until midnight on the last of the three business days.
- If the vendor makes a counter-offer the time recommences from when the purchaser re-signs (and therefore accepts the counter-offer). That is, the period will not commence until the purchaser first signs the contract in the form that ultimately becomes the contract. In these circumstances, the “prior contract” exclusion does not apply.
- If the vendor has not signed the contract but the purchaser has signed, then the purchaser may still have lost the right to cool-off after the three day period has expired. However, the purchaser may simply withdraw the offer under the normal principles of contract law and will not need to rely on cooling-off rights.

Contracting out

The right to cool-off cannot be excluded, modified or restricted; and any agreement to this effect is void and of no effect.

Section 31 notice in contract

The notice must be conspicuous. If the cooling-off notice is not included in the contract, the purchaser may rescind the contract at any time before the time of settlement.

The notice electing to exercise the right has no particular format but needs to be in writing; a letter should be sufficient.

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Pre-contract advice

It is preferable that a purchaser appoints a lawyer and receives advice prior to signing a contract.

The purchaser does not need to provide a reason to cool-off, but avoidance pursuant to section 32 of the *Sale of Land Act 1962* (s 32) is more complex and problematic. There may be matters raised in the contract or under s 32 that when explained to a purchaser, may cause the purchaser to re-think the decision to purchase, but the purchaser's right to rescind pursuant to s 32 may be restricted.

The purchaser may not be able to rescind if a court is satisfied that a vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and if the purchaser is in substantially as good a position as if all relevant provisions had been complied with. The purchaser must establish that the breach has caused some detriment and is such that the purchaser would not have purchased the property if disclosure had been made.

The case law in relation to avoidance pursuant to s 32 is not clear cut, with decisions decided on their particular facts and, in some cases, appearing to contradict each other.

It's important to note that cooling-off comes at a cost of 0.2% of the purchase price. On a substantial property this cost may be significant. Despite the conspicuous notice, many purchasers are unaware of the cost involved until advised.