



Financial Rights

LEGAL CENTRE

FACT SHEET



Financial Rights Legal Centre Inc.
ABN 40 506 635 273

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MORTGAGE STRESS

This fact sheet is for information only. It is recommended that you get legal advice about your situation.

This fact sheet should be read with the following fact sheets:

1. Fact Sheet: Financial Hardship
2. Fact Sheet: Mortgage stress – do I need to sell my home?
3. Fact Sheet: Dispute Resolution

CASE STUDY

Jacob & Emma have three young children. They decided to buy a home. They shopped around and got a home loan with BIG BANK. Their house secured the home loan. Jacob lost his job and although Emma worked part-time they could not afford to make their mortgage repayments. A few weeks after Jacob & Emma had missed their second payment they received a letter from BIG BANK.

The letter said Jacob & Emma were in default and had to pay \$1200. It said they had 30 days to pay this and the repayment due next week; otherwise BIG BANK may begin court proceedings. The letter was combined with a notice under section 57(2)(b) of the Real Property Act (NSW).

Jacob & Emma were worried but decided that there was no way they could come up with their next repayment and \$1200. They decided to pay \$200 and hope that they could catch up soon. Two months later they were handed a Statement of Claim from the Supreme Court of NSW seeking repossession of their home. Worse Emma notices from the Statement of Claim that they only have 28 days to respond!

WHAT IS REPOSSESSION?

If you decide to buy a home you will probably need to borrow money from a lender. The lender will take a mortgage over the house you are buying to secure the home loan. The lender takes your home as security so that it can be taken from you and sold (this is called repossession) if you do not keep to your home loan contract with the lender. If you are in the second category get legal advice immediately.

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WHEN CAN THE LENDER REPOSSESS MY HOME?

The lender can only take possession of your home if:

- (a) There is a mortgage over your home

AND

- (b) You have “defaulted” on the loan agreement (for example, failed to make repayments, failed to keep your home (building) insured etc.)

AND

- (c) You have been sent a Default Notice under s88 of the National Consumer Credit Protection Act (2009) combined with a section 57(2)(b) of the Real Property Act (NSW). This notice gives you 30 days to fix the default otherwise the lender can proceed to take possession of and sell your home. This notice can be sent by ordinary post. If you do not fix the problem within that time (for example, payment arrears or insuring the home). This notice will include an acceleration clause. This means that if the arrears are still outstanding after the 30 days has lapsed, the entire loan becomes payable. The lender cannot commence court action or take possession of your home until this notice has been sent and the notice period has expired without you fixing the default. This notice can be sent by ordinary post.

IMPORTANT: If the credit law does not apply, you do not receive a s88 Default Notices **You should seek urgent legal advice** (see **Fact Sheet: Does the credit law apply?**)

IF YOUR HOME IS VACANT: If your home is vacant or you have vacant land, and the default period has expired unfixed, the lender can take VACANT POSSESSION, change the locks and sell the property. If your home is vacant you should get urgent legal advice.

IF YOUR HOME IS NOT VACANT: If your home is not vacant, the lender will issue court proceedings called a statement of claim. Seeking a court order for possession. If you get a statement of claim and you do not file a defence (or do not have a defence) or lodge in EDR the court will grant the lender an order for possession.

WHAT CAN I DO?

The following sections discuss your options:

1. Before you have received a default notice, but you are having trouble paying your loan
2. After you have received a default notice



3. When you have received a Statement of Claim
4. After the lender has a court judgment

This means giving details of:

1. **BEFORE YOU HAVE RECEIVED A DEFAULT NOTICE, BUT YOU ARE HAVING TROUBLE PAYING YOUR LOAN (E.G. YOU HAVE SKIPPED A PAYMENT BUT HAVE NOT RECEIVED A DEFAULT NOTICE YET).**

The most important thing is to immediately get legal advice as soon as you are going to miss a repayment or you have not made a repayment. The sooner you act the better chance you have of sorting a repayment arrangement out to either catch up or make reduced repayments while you are experiencing temporary difficulties.

WARNING: Do not think that it will be ok that you have missed a repayment. Unless you are sure you can make up the missed repayment within 4 weeks and keep making the required repayments as well you must get legal advice and take action to get a negotiated repayment arrangement in place.

It was the case in the past that lenders would take many months to begin court proceedings against you if you miss a repayment(s). This is no longer the case. Lenders work to a timetable to begin court proceedings and this can be very difficult to stop once this process has started.

STEPS TO GET A REPAYMENT ARRANGEMENT

- Work out why you are getting behind. Is the change that is causing financial hardship for you temporary or permanent?
 - **Example 1:** You are permanently injured due to a work injury. You have received compensation but that is all you will get. The compensation made a small dent in your mortgage. You now cannot afford the repayments on your loan. You do not have enough superannuation to help. Your income will never service the mortgage.
 - ◇ You may need to consider selling your home and arranging time to do this with your lender. See Fact Sheet: Mortgage Stress – do I need to sell my home?
 - **Example 2:** You have lost your job. You are looking for work while receiving Centrelink benefits. You hope to get a job soon. You need to get a repayment arrangement in place with the lender to reduce your repayments while you are seeking work.
 - ◇ You may fit the criteria for a hardship variation under the credit law. See Fact Sheet: Financial hardship. Even if you are not covered by the hardship variation provisions of the credit law, your lender may have obligations to work with you to



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overcome your financial difficulties (for example, by reaching a repayment arrangement) as a result of an Industry Code of Practice such as the Code of Banking Practice or the Mortgage Finance Association of Australia Code of Practice.

- ◇ If you realistically believe you can repay your loan if your payments are reduced temporarily then you must get a written repayment arrangement in place that you can afford until your financial circumstances improve.

■ If you want to negotiate a reduced repayment arrangement you must keep making payments (as much as you can afford) to your loan.

- Whatever your temporary financial difficulty is, if you want to make a repayment arrangement, you must keep making repayments (of whatever you can afford) to your loan. Do not stop making payments of some amount!
- If you are going to convince the lender to agree to a reduced repayment arrangement you must show you are serious by continuing to make payments of as much as you can afford.

REMEMBER: Your home loan is a high priority debt and needs to be paid first.

■ Ring the lender and explain your situation

This should be done as soon as you have obtained legal advice or, if you are not getting legal advice, straightaway.

Don't be scared. Lenders make repayment arrangements all the time. Be as clear as you can about why you are in financial hardship.

WARNING: Do not promise to make repayments you cannot afford. If you promise a payment and then break the promise, it will be more difficult to negotiate in the future.

- **Example 3:** You have had to take unpaid leave from work due to illness (severe depression). You are taking medication and hope to get better in a few months with treatment. You know you will have a job to return to. When you ring the lender you should say: I am in financial hardship. I have had to take unpaid leave from work due to illness and in particular, severe depression. I am seeking treatment. I wish to seek a change in repayments on the grounds of hardship. I can send you a medical certificate. Can I have the address where I can send my medical certificate. I hope to be back to work in 6 months. I can afford to pay \$(insert amount) per month to my loan. Once I return to work, I want to the arrears to be capitalised on to the loan and the loan term extended accordingly.

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Then, you make a note of that phone conversation and send a letter to the lender confirming what you said. Keep a copy. If you can apply for a hardship variation use [Sample Letter: Request for Hardship Variation](#).

WARNING: Make sure you think through your plan as to when you will resume making payments. Do not promise something you are not certain you can achieve or is not realistic. If you don't know when things will improve ask for an initial arrangement to be reviewed at the end of the agreed repayment arrangement.

- If the lender says no to your proposed repayment arrangement check if the lender is in an independent external dispute resolution scheme (EDR).

Keep making the repayments even if the lender tells you it is not enough.

Next – Find out which External Dispute Resolution (EDR) scheme (either the Financial Ombudsman Service or Credit Ombudsman Service Ltd) your lender is a member. You can do this by ringing 1300 780 808. Once you have made a complaint to EDR, the lender cannot take any legal action against you until your dispute has been considered by the EDR. The EDR will assist you to negotiate an arrangement with the lender. If the lender does not agree and the EDR considers that the lender should give you a repayment arrangement, it can make a finding or determination that the lender must do so. It is important to keep making payments. The EDR scheme may not find in your favour if you cannot show you are realistically able to afford the regular payments in future, If EDR closes your file, your only avenue is court. Court can be very expensive.

If your lender is not in EDR, get legal advice.

- Try to get money to catch up arrears from other sources.

Other avenues you can try are:

- If you have a relevant insurance policy – make a claim under that insurance policy;
- Investigate the early release of any superannuation you have. You should contact your Superannuation fund and the Department of Human Services at (<http://www.humanservices.gov.au/customer/services/centrelink/early-release-of-superannuation>)
 - ◇ Do not get early release of superannuation unless your problems are temporary. If you use up what is available from your superannuation and are still unable to meet your repayments, you may find you lose your house anyway, and you also have less superannuation when you retire. You should try to negotiate to capitalise arrears and extend the loan term before considering superannuation.



IMPORTANT

Do not stop making payments and trying to get a repayment arrangement. You always need to pursue a number of options. If you are not sure you will ever be able to make the regular payments again in the future, consider putting your house on the market whilst pursuing a repayment arrangement and increasing your income.

2. AFTER YOU HAVE RECEIVED A DEFAULT NOTICE

When you receive a default notice(s) from the lender you need to take immediate action. When you receive a default notice you will receive a combined notice under:

- (i) Section 57(2)(b) under the Real Property Act (NSW); and a
- (ii) Notice under section 88 of the National Credit Code (if you borrowed the money to buy or renovate your home, or you purchased the house as an investment. You will not get this notice if you borrowed the money secured over your home for business or other investment purposes like buying shares).

The notices have to be sent to you by the lender if they want to take possession of your home in the future and sell it.

The notices give you a minimum of 30 days to pay any outstanding arrears and any payment that falls due within the 30-day notice period.

If you do not pay the arrears and your repayment due during the 30-day notice period:

- The whole loan becomes due and payable after the 30 days ends; and
- The lender can take action to sell your home

If at all possible pay the outstanding arrears and your normal payment before the 30 days expires! If you do that both notices are satisfied and you are no longer in default.

If you can't manage to pay the arrears and your normal repayment then you should:

- Get a repayment arrangement in place and confirm it in writing; or
- Apply to EDR

Before the 30 days expires.

3. AFTER YOU HAVE RECEIVED A STATEMENT OF CLAIM

You need to get legal advice immediately!



A Statement of Claim for Possession is a document that must be filed in the Supreme Court and served on you (generally given to you in person or left in your presence) before the lender can get a court order to take possession of your home. The Statement of Claim is usually also served with a Notice to Occupier. (The Notice to Occupier is for tenants or an occupier of the land that may have a legal right but is not already named as a defendant. If you are the owner of the home and are already named as defendant you can ignore this notice.) You have 28 days from the date you were served with the Statement of Claim to file a defence. After the 28 days has expired the lender can then apply to get a court judgment for possession and/or the debt owed to the lender.

If you think you have a defence you should seek legal advice. A defence may be that you never received a benefit from the loan (the money went to a third person) or you could never afford the repayments.

IMPORTANT: You can lodge in EDR after you have received the Statement of Claim and any time up until the lender gets a judgment in Court. If you receive a Statement of Claim you should immediately lodge in EDR and get advice.

4. AFTER YOUR LENDER HAS OBTAINED JUDGMENT AGAINST YOU

If you think you have a defence and you had a good reason why you did not file a defence before the lender obtained judgment then you need to seek legal advice immediately.

WHAT HAPPENS AFTER JUDGMENT?

The Sheriff (an officer who enforces court orders) serves a **Notice to Vacate** and you will need to move out. The Sheriff must give you a minimum of 30 days notice the first time a **Notice to Vacate** is served. You may be able to apply for an extension of time in which to move out of your house or stay all action depending on your circumstances. You must get urgent legal advice. See [Fact Sheet: Getting Help](#).

If you are unable to get to see a solicitor in time, you may be able to seek an urgent stay of all action (including enforcement of judgment) by seeing a Duty Registrar (an officer of the court) at the Supreme Court. To get an urgent stay you need to see the Duty Registrar 7 days before the scheduled eviction.

You will need to complete a **Notice of Motion** and an **Affidavit in Support** setting out your reasons for requesting a stay. These forms are available from the Supreme Court. Reasons could include that you are in the process of imminently selling the house (show evidence of the appointment of a real estate agent or a contract of sale), or imminently refinancing (show evidence of your loan application), or you are suffering



severe hardship in relation to moving (bring along medical evidence, for example or evidence of alternative rental accommodation).

You will not be given a stay for an indefinite period. The Duty Registrar will grant a stay of 7 days at the most. Your case will be listed in the court at the end of that period, and you will be given a few days to provide all of the evidence and reasons as to why you need to be granted a further stay and, if so, for how long. Your matter will be listed in court and you will need to appear with the lender representative. They will be there to either negotiate an arrangement with you or to argue why the Court should not give you more time. You should take along all your evidence (such as relevant documents) for the court to consider.

BEWARE OF REFINANCING TO SAVE YOUR HOME WHEN YOU ARE ALREADY IN DEFAULT

If you are in financial difficulty you may consider going to a lender of “almost last resort” or “last resort”. There are lenders who specialise in desperate borrowers. Those lenders often advertise with slogans like: “bad credit-no problem”, and “sheriff at the door”. You can tell if you are at a lender of last resort because:

- The loan term will usually be 12 months (definitely less than 5 years);
- The mortgage broker will charge you a (large) fee;
- You will have to borrow a lot more to cover all the fees;
- You will be told you have to sign a declaration that loan is for business/investment purpose even if it is not;
- They will find a solicitor for you that you have to pay.

Because your loan will increase significantly on refinance you will probably have difficulty making repayments. This may lead to you losing your home anyway (with a lot less equity left in your home)!

So what can you do? Firstly, get advice, the earlier the better! It may be possible to follow the steps above to negotiate with your existing lender. Even if your situation is hopeless it may be better for your home to be sold than to refinance and increase your loan considerably just to live in it for one more year.

NEED SOME MORE HELP?

See [Fact Sheet: Getting Help](#) for a list of additional resources.

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