



Financial Rights

LEGAL CENTRE

FACTSHEET



Financial Rights Legal Centre Inc.
ABN 40 506 635 273

Factsheets are information only and should not be relied upon as legal advice. This information only applies to NSW.

©2018 Financial Rights
All rights reserved.

FINANCIAL HARDSHIP

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

CASE STUDY

Joe had a car loan and a home loan with a bank. Joe had been working as a Storeman. The business Joe was working for went broke leaving Joe without a job. Joe started looking for another job but he knew he would not be able to make his next few repayments on his loans. Joe was confident he would get another job but he needed some breathing space. At first the lender was not sympathetic, so Joe sought legal advice about his rights under the credit law.

WHAT IS FINANCIAL HARDSHIP?

Financial hardship is difficulty in paying the repayments on your loans and debts when they are due. There are often two main reasons for financial hardship:

1. You could afford the loan when it was obtained but a change of circumstances has occurred after getting the loan; or
2. You could not afford to repay the loan when it was originally obtained.

If you are in the second category get legal advice immediately.

If you are in the first category of financial hardship you have certain rights if your loan is covered by the credit law: see our [Does the National Credit Law apply?](#) factsheet. If you have a credit card, personal loan, car loan or home loan the credit law will apply if the loan was taken out for personal purposes. Even if the credit law does not apply you can and should use financial hardship to try and negotiate a repayment arrangement.

FINANCIAL HARDSHIP AND THE CODE

[Schedule 1](#) of the *National Consumer Credit Protection Act 2009*, The *National Credit Code* ("the Code") has sections (72–75) that specifically deal with financial hardship. From 1 July 2010, all requests for hardship are under the Code even if the contract was entered prior to that date.

Section 72 of the Code covers the circumstances where you can request a repayment arrangement on the grounds of financial hardship. This is called a hardship variation.

financialrights.org.au



You must be having (or will have) trouble making your loan repayments because of reasonable cause (eg illness, family breakdown or unemployment). This is a very wide definition.

REMEMBER

You can ask for any type of repayment arrangement as long as it will reasonably repay the loan.

You are entitled to request financial hardship even if the other co-borrower does not agree or is unable to be contacted.

HOW TO APPLY FOR A HARDSHIP VARIATION UNDER THE CREDIT LAW?

You can call or write to the lender straight away requesting a repayment arrangement. Use our [Request for Hardship Variation](#) sample letter. Keep a copy of the letter you send. If you ask for it over the phone, keep notes on what was said.

When asking for a hardship variation, you should consider the following:

1. The lender is more likely to accept your request if it is reasonable. Try to strike a balance between what you can afford and trying to at least meet some of the loan commitments during your period of hardship.
2. Ask the lender to send out a financial statement to complete. You may consider seeking the assistance of a free financial counsellor to help you complete the form or work out an arrangement you can afford. For a referral, please call 1800 007 007 or visit our [Financial Counsellor Search Tool](#).
3. Do not commit to repayments you cannot afford.

This means giving details of:

- The reasonable cause for hardship, for example, doctor's certificates for an illness.
- Your current income and other major financial expenses, for example, other loans.
- What repayments you can afford.

There is no requirement that you give information that is not relevant to the application.



IMPORTANT

Even if the lender is demanding unrealistic repayments, it is in your interest to keep making some repayments to the loan. You should continue to pay whatever you can afford during negotiations.

A hardship variation may include, for example:

1. extending the term of the loan and adding arrears to the end of the loan;
2. reducing or freezing the interest rate for a period of time; or
3. waiving enforcement expenses (they don't have to, but ask!).

Under the Code the lender does not need to do this, but they may consider doing so for a credit card as a once off.

4. accepting less or reducing.

IMPORTANT: Applying for a hardship variation or having a hardship variation accepted will not effect your credit rating or be listed on your credit report. It is possible that late payments may be listed on your credit report even if you have an arrangements to pay less or not at all: see [Hardship Variations and Your Credit Report](#) below.

WHAT IF THE LENDER SAYS “NO” OR DOES NOT RESPOND?

Under the Code if you request a variation of your contract on the grounds of financial hardship then:

1. The lender can request further information. This request must be made within 21 days of your request for hardship.
2. You must provide any relevant information requested.
3. The lender must then respond in writing within 21 days stating:
 - Whether the lender agrees to the change; and
 - If the credit provider does not agree to the change, notifying you of:
 - the contact details of the relevant independent dispute resolution scheme (**IDR**): see our [Dispute Resolution](#) factsheet
 - your right to go to external dispute resolution (**EDR**), and



- the lender's reasons for refusing the hardship application.

If the lender does not agree to the application for change then you can apply to EDR scheme for the requested change: see our [Dispute Resolution](#) factsheet.

If you are unsuccessful in EDR, or your lender is not a member, you still have the option of going to court but get legal advice before you do this.

HARDSHIP VARIATIONS AND YOUR CREDIT REPORT

When you ask for a hardship variation you should include a request that the lender does not:

- list a default on your credit report or
- report your payments as being overdue on your credit report.

As above, if the lender agrees to your repayment arrangement but refuses this request about your credit report, you should make a complaint to the relevant EDR scheme: see our [Dispute Resolution](#) and [Your Credit Report](#) factsheets

THE LENDER IS THREATENING TO TAKE ME TO COURT

If you have received a default notice and/or the lender is threatening legal proceedings, you need to act urgently. You should immediately:

1. Send a letter to the lender requesting a variation of your contract on the grounds of hardship (if you have not sent one). If this is not possible ring the lender and ask for a variation on the grounds of financial hardship.
2. Lodge an application in writing or online in EDR. The two EDR schemes are:
 - Financial Ombudsman Service [fos.org.au](https://www.fos.org.au)
 - Credit & Investments Ombudsman [cio.org.au](https://www.cio.org.au)

Call 1800 367 287 to check which EDR to lodge with.

IMPORTANT: The lender cannot commence court proceedings against you once you have lodged a written dispute with EDR until the dispute is determined (or the EDR considers that it cannot consider your dispute).

3. Get legal advice.



IF YOU HAVE RECEIVED A STATEMENT OF CLAIM

1. You have 28 days from the date you are served with a statement of claim to file a defence. After the 28 days has elapsed the lender can apply for default judgment. It is recommended you lodge in EDR rather than file a defence in Court. You must lodge in EDR before the lender can get judgment. So lodge in EDR as soon as possible: see point 2 above.
2. If you lodge online in EDR you will immediately get an acknowledgment that the dispute has been lodged.
3. Once you have lodged in EDR the lender must not apply to get judgment until the matter is dealt with by the EDR.
4. If the lender is still threatening to get judgment ring the EDR and let them know this and get legal advice.

WHAT IF I AM NOT ELIGIBLE FOR A HARDSHIP VARIATION UNDER THE CODE?

If your lender is bound by the Code of Banking Practice (banks), the Mutual Banking Code of Practice (credit unions / building societies) or a member of the Mortgage & Finance Association of Australia then those lenders have obligations to work with you if you are in financial hardship. These obligations may cover your loan even if the Code does not apply or you are a small business or investment borrower. You can use a breach of those obligations as a reason to complain to EDR.

You should still contact the lender and explain your situation. Ask for a reduction (or postponement) in your repayments for period of time. If the lender agrees, confirm the agreement in writing. Keep a copy of the letter. If the lender will not agree, you should keep making some of your repayments (if you can) and get advice from a financial counsellor and/or make a claim to an external dispute resolution scheme if your lender is a member.

If the lender will not agree to a change in repayments get advice. If court proceedings are commenced, you must get legal advice immediately.

If your financial difficulties are likely to be long term, it is recommended you get a financial counsellor to assist you.

NEED SOME MORE HELP?

See our [Getting Help](#) factsheet for a list of additional resources. If you are in financial hardship with a home loan see our [Mortgage Stress](#) factsheet.

Last Updated: March 2018