

# The mortgage stress handbook

A practical guide for people  
having trouble with their mortgage



# **The mortgage stress handbook: A practical guide for people having trouble with their mortgage**

5th edition

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The 5th edition was updated by Nerida Walker, Lody Stewart and Alice Lin. The 4th edition was written by Alexandra Kelly and Nerida Walker. The 2nd and 3rd editions were written by Katherine Lane. The 1st edition was written by David McMillan.

**This publication is a general guide to the law. You should not rely on it as legal advice and we recommend that you talk to a lawyer about your situation. The information is correct at the time of printing, however it may change.**

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## **Do you need help to contact us?**



If you need an interpreter, call the Translating and Interpreting Service (TIS National) on 131 450 (9am–5pm) and ask for LawAccess NSW.

## **Do you find it hard to hear or speak?**



If you are deaf, have a hearing impairment or have a speech impairment, contact us through the National Relay Service (NRS). Ask for LawAccess NSW on 1300 888 529.

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# 1. How to use this handbook

Getting behind on your repayments for a home loan is stressful. This handbook will help guide you to get a repayment arrangement in place with your lender.

## The handbook covers:

- what the lender has to do to take possession of your home,
- what you can do to stop the lender taking possession of your home,
- how to negotiate a repayment arrangement,
- what to do if the lender won't agree to a repayment arrangement,
- accessing your superannuation and mortgage assistance (if available),
- getting a stay if the lender has a court order to evict you from your home, and
- getting help.

## The handbook does not cover:

- getting a home loan,
- business loans,
- loans for investments other than residential property e.g. shares,
- other disputes such as if the loan was unfair or unaffordable, disputes over interest or fees or disputes with mortgage brokers.

This guide primarily covers financial difficulties – but **Chapter 4** has some information about what you can do about other complaints.

## What to do if you are having trouble with your mortgage – in brief:

- If you can keep going with your normal repayments for now but are **worried about what might happen if living costs rise or interest rates go up**, see a free financial counsellor. They can help you prepare a money plan and explain your options. See **Chapter 14** or call 1800 007 007.
- If you are **behind in payments** (or about to be) but have not received a default notice yet – **act quickly!** Your lender may agree to accept reduced repayments while you are in financial hardship. See **Chapter 6** for how to **negotiate a financial hardship arrangement with your lender**.
- If you and your lender cannot agree on a repayment arrangement, lodge a complaint with the **Australian Financial Complaints Authority (AFCA)**. AFCA is the best way for you to resolve your financial hardship complaint with your lender. The lender cannot start or continue legal action or take possession of your home while your matter is being considered by AFCA. See **Chapter 7** for how to lodge a complaint with AFCA.
- If you have received a **default notice, statement of claim** or **summons** from the court for possession of your home, **your situation is urgent**. See **Chapter 2** and **Chapter 3**.
- If the lender has obtained **judgment from the court**, **your situation is urgent. Get legal advice immediately**. See **Chapter 14** for where to get free legal advice and **Chapter 12** about getting a stay of an eviction from the court.

You may need to ask for legal advice more than once. Don't be afraid to keep getting legal advice or financial counselling assistance as your situation develops.

## 2. Is my problem urgent?



Your right to make a repayment arrangement depends on where the lender is up to in the process to take possession of your home. **Chapter 3** describes the steps the lender must take to get possession of your home.

### To work out what to do next you need to know:

- Has a default notice been sent to you? The default notice must give you at least 30 days to repay the arrears (the amount you are behind in repayments plus your normal repayment due that month).
- Have you received a statement of claim or summons from the court for possession of your home and/or the amount outstanding on your home loan? If so, when did you receive the statement of claim/summons? If you received a document called a notice to occupier, you may find the statement of claim or summons under that document.

- Has the lender obtained judgment from the court? If you received court documents some time ago, check with the court to find out if the lender has obtained judgment.
- The lender can apply for judgment at any time after the time for response to the court proceedings has expired. Details for contacting the court will be on the court documents. You may need to tell the court officer some details included in the court paperwork, so make sure you have it with you when you ring. See **Chapter 14** for court contact details.
- Have you received a notice from the court or Sheriff telling you to vacate your home? Does it have a date and time listed for the eviction?

If any of the previous steps has occurred your matter is urgent. If the lender has not obtained a court judgment you need to see **Chapters 6** and **7** immediately. If the lender has judgment, get legal advice (see **Chapter 14** for Useful contacts) and see **Chapter 12**.

## Australian Financial Complaints Authority

All home loan lenders must be members of the Australian Financial Complaints Authority (AFCA) – this is a free and independent complaint resolution scheme. AFCA can help with a range of complaints, including financial hardship or other issues with the loan.

AFCA can also investigate the lender's conduct in relation to its hardship obligations, including those set out in the Banking Code of Practice, and may make a formal decision that's binding on the bank if the decision is accepted by the borrower. The details are:

- Australian Financial Complaints Authority (AFCA)  
1800 931 678
- [www.afca.org.au](http://www.afca.org.au)

**AFCA is the best way for you to resolve your financial hardship complaint with your lender. This handbook will refer to AFCA throughout as it is the most important right you have.**

## When should I lodge a complaint with AFCA?

If you are unsure where you are up to in the possession process, you should consider lodging a complaint with AFCA immediately because:

- AFCA is free,
- the lender cannot start or continue legal action while your matter is being considered by AFCA, and
- it will give you the opportunity to negotiate with the lender (with the assistance of AFCA).

It is best to lodge a complaint with AFCA before a court judgment is entered. A judgment is considered entered when it is recorded in the court's computerised record system, or signed and sealed by a judicial officer or registrar.

If you lodge with AFCA after judgment is entered, AFCA can only require the lender to give you extra time to refinance or sell the home, or to move if you are facing personal hardship (such as temporary serious illness or incapacity). AFCA can no longer give you a payment arrangement to remain in the home. If you receive court documents you must lodge a complaint with AFCA immediately, as they will not be able to review that complaint once judgement is entered except in this limited way. See **Chapter 7** for how to lodge a complaint with AFCA.

**If a lender obtains judgment, it means that the court agrees that you must pay back the debt to the lender immediately (to cover the loan amount, arrears, interest and legal costs) and that the lender is entitled to take possession of your home.**



### 3. Can the lender take my house? What is the process?




The lender must take a number of steps before it can take possession of your home. The sooner you act in the process, the more likely it is that you can make a repayment arrangement.

**Default (you missed a repayment)**




**Default notice under Section 88 of the credit law**


Note: You may get other default or late payment notices but the important default notice is the one that gives you at least 30 days to fix the default and has a Form 12 or 12A attached (see page 13).




At least 30 days to pay the amount of the default and the usual repayment.




If the default and usual repayment are paid then the contract goes back to normal (the lender cannot commence legal action).




If not, the lender can make the whole loan repayable.







Take possession of your home (without commencing court proceedings) to recover the whole debt.




Statement of claim or summons served on you for the arrears and/or the whole debt and/or the possession of your home. These documents may have another document called 'Notice to occupier' on top.




You have a fixed number of days (depending on the State or Territory you live in) from the date of service of the statement of claim/summons to file a defence or lodge your complaint with the free complaint resolution scheme, AFCA.




Lender applies for a writ (an order) to take possession of your home.



If you do nothing, or file a defence and lose, the lender gets a court judgment.



Letter telling you when the Sheriff will come to change your locks (e.g. Notice to vacate)



Sheriff comes to your home, evicts you and changes the locks



**It gets very hard to negotiate a repayment arrangement to save your home or even to get time to sell your home after the lender has obtained judgment. Take action before that if you possibly can. If there is a judgment, get legal advice. See Chapter 14 Useful contacts and Chapter 12 Getting a stay of an eviction.**



### **Doesn't the lender have to go to court to get possession of my home?**

No, they do not have to go to court; but they do in almost every case. This is so they can get a Sheriff to make you leave and change the locks on your home.

If the property is vacant or undeveloped land, the lender may not go to court but they usually need to wait for the default notice to expire before they take possession of the property.

If your home is rented the lender may enter into possession and receive the rent without a court order. The lender can end the tenancy by getting an order of the Supreme Court.

If these situations apply to you, your matter is urgent and you need to act as soon as you have received a Form 12 or 12A default notice (see below to see what these notices look like).



## This form will be attached to the default notice:

### **Form 12 Information about debtor's rights after default Paragraphs 88 [3] [f] and [g] of the Code regulation 86 of the Regulations**

#### **If you cannot make a repayment:**

##### **1. Contact us immediately**

Contact us [*insert telephone number or email address for dealing with financial hardship applications*] to discuss your situation. If there is a reason why you cannot make repayments we may be able to help you by agreeing to vary your contract. The sooner you contact us the easier it will be to assist you.

You have specific legal rights to request changes be made to your contract to help you repay the debt if you:

- cannot make repayments due to hardship [for example, illness, unemployment or some other good reason]; and
- you expect to be able to make the repayments if the terms of your contract are changed; and
- entered into your contract:
  - on or after 1 July 2010 and the amount you have borrowed is less than \$500,000; or
  - before 1 July 2010 and the amount you have borrowed is less than the relevant threshold\*.

You may request that we:

- extend the term of your contract and reduce repayments; or
- extend the term of your contract and delay payments for a set time; or
- delay payments for a set time without extending the term of your contract.

Alternatively, you may request that we negotiate with you to postpone any further action that we may take against you.

If you do not contact us **before** [*insert default notice period end date*], we may commence further action against you.

### **IMPORTANT**

There is no guarantee that we will agree to change your contract or postpone any further action.

After we receive your application, we will provide you with a written notice within 21 days stating whether or not we agree to the change.

If we agree, you will receive a written notice detailing the agreement within 30 days.

If we refuse, we will provide you with reasons. You have the right to have the decision reviewed.

### **2. Right to review**

If we refuse your request to change your contract, you can ask us to reconsider. If we still refuse, or if we do not respond to your request within 21 days, you can go to the AFCA scheme by [*insert contact details and method(s) for lodging complaints*]. You should apply as soon as we refuse your request or fail to respond.

### **THE AFCA SCHEME IS A FREE SERVICE ESTABLISHED TO PROVIDE YOU WITH AN INDEPENDENT MECHANISM TO RESOLVE SPECIFIC COMPLAINTS.**

If we fail to respond, we may have breached our obligation to you. You can contact the Australian Securities and Investments Commission (ASIC) on 1300 300 630 or through ASIC's website at [asic.gov.au](http://asic.gov.au)

Alternatively, if we refuse, you can ask a court to make changes to your contract.

You can also ask a court to delay enforcement action against you. You may wish to get legal advice, for example from a community legal centre or Legal Aid office, on how to go about this.

There are other people, such as financial counsellors, who may be able to help.

\* You can find out what the relevant threshold is by referring to this website – [www.moneysmart.gov.au](http://www.moneysmart.gov.au) or contacting ASIC on 1300 300 630.

## **Form 12A Information about debtor's rights after default Paragraphs 88 [3] [f] and [g] of the Code regulation 86 of the Regulations**

### **IMPORTANT**

**You are in default of your credit contract because you have not made a payment [alternative wording can be used if the default is not the result of failing to make a payment]**

### **YOU NEED TO CONTACT US IMMEDIATELY**

#### **1. Are you in financial hardship? Contact us immediately**

Contact us\* [*insert telephone number or email address for dealing with financial hardship applications*] to discuss your situation. We may be able to help you to repay your debt by agreeing to vary your contract (for example, changing the amount or timing of your repayments). The sooner you contact us, the easier it will be to help you.

If you do nothing **before** [*insert default notice period end date*], we can commence enforcement action against you.

If we refuse to change your contract, we will notify you in writing and you can seek a review of our decision by going to the AFCA scheme by *[insert contact details and method(s) for lodging complaints]*.

If you go to the AFCA scheme, you may have enforcement action put on hold while your complaint is considered. You are not bound by the decision that the AFCA scheme makes and you can still apply to a court if you are not satisfied.

## **THE AFCA SCHEME IS A FREE AND INDEPENDENT SERVICE TO RESOLVE COMPLAINTS.**

### **2. If you are having financial difficulties you can also contact a financial counsellor on 1800 007 007 (free call)**

For information about your options for managing your debts, ring 1800 007 007 from anywhere in Australia to talk to a free and independent financial counsellor.

### **3. Your other rights**

You have other rights, including the right to ask us to postpone any enforcement action before *[insert default notice period end date]*.

*\*Credit providers may replace the word “us” with the name of a relevant area. For example: “Contact our Hardship Team”.*



## 4. What if I think the lender or mortgage broker has done something unfair?



When you are in mortgage hardship it can feel unfair that the lender is demanding to be paid when you are doing your best to catch up. Sometimes, there might be more to the unfairness than your inability to meet your mortgage repayments. There may be something unfair about your contract with the lender, or the way the loan was given.

The checklist below is a guide to when the “unfairness” may be worth investigating as a legal complaint with the lender. If some or any of the checklist below applies to you then get legal advice. The checklist does not mean you will win your complaint, it just means you should get legal advice about what, if anything, you can do about it.

## Checklist

- Do you have any concerns about the amount you are being chased for?
- Did the lender or mortgage broker tell you to sign a declaration that the loan was for a business when it was really a loan to refinance your home loan or other personal purposes?
- When you got the loan did the lender or mortgage broker know (or should the lender/mortgage broker have known) you could not afford to repay the loan?
- Were you misled about the loan? e.g. told you could refinance after 12 months to a lower rate when this was not true.
- Did you only sign for the loan to help a family member or friend?
- Did you sign the loan documents and/or the mortgage? If not, you may be the victim of fraud.
- Did someone threaten you into signing documents or getting the home loan?
- Were you unable to read or understand an explanation of the contract? e.g. you don't speak English or you cannot read.
- Were you unable to protect your own interests when you got the loan? e.g. you were experiencing family violence, or you had some mental or physical health problems at that time.
- Is there anything else that you feel is unfair?

If you answered yes to any of these questions, see **Chapter 14** to find some services that can give you legal advice.

Just because the lender did something unfair does not mean you do not have to repay your home loan. If you received the benefit of purchasing or staying in your home, then you will usually need to at least repay the principle amount of the loan. You may be able to successfully dispute the interest and fees charged by the lender.

Each person's situation is different – get legal advice.

## 5. Catching up on repayments: my options



Below is a list of options to consider to help you catch up on your mortgage payments. As none of the options below are certain to work, you **MUST** still make a repayment arrangement based on your income (see **Chapter 6**).

There is no point selling your possessions, accessing your superannuation or getting further loans if you will need to sell your home anyway.

- Do a budget and cut down on unnecessary expenses. A free financial counsellor can help. See **Chapter 14**.
- Rent out your home and live (hopefully rent free or cheaper) somewhere else until you can manage your repayments.
- Take in a boarder.
- Get mortgage assistance (if available). See **Chapter 11**.

- Access your superannuation (if available). See **Chapter 10**.
- Sell some of your possessions.
- Consider refinancing your home loan (only if you can get a cheaper rate **and** you can afford the new repayments. **Beware** of predatory lenders (see below).
- Ask for a repayment arrangement on other debts while you catch up on your mortgage. Do not simply ignore other debts as you can eventually lose your house because of unsecured debts like credit cards – it just takes a bit longer.
- Consider changing your loan to an interest-only loan for a fixed period (this will reduce your repayments during this period).



### **Beware of predatory lenders**

If you are considering refinancing your home loan be careful to avoid high cost, exploitative lenders.

## **Things to look out for and warning signs that the loan might be high cost**

- The loan is described as a business/investment loan or you need to sign a declaration to state that the credit law does not apply.
- The lender is not a member of the free complaint resolution scheme AFCA. You can check on the AFCA website at [www.afca.org.au/make-a-complaint/findafinancialfirm](http://www.afca.org.au/make-a-complaint/findafinancialfirm).
- The mortgage broker charges a large fee.
- The loan is for a short term.
- The loan is for interest only for a term but you cannot afford to repay principle and interest repayments.

- High interest rates, and/or high default interest rates or fees.
- Interest rates quoted “per month” instead of “per annum”.
- You do not have to make repayments for a set period, or the whole loan, but the whole loan amount is payable within a short time (less than 5 years).

Do not refinance if the repayments on the new loan will be higher than the repayments you are currently required to pay! You do not want to still be forced to sell your home a few months or years down the track, but after having lost all the equity (savings) you’ve built up through high interest and fees by refinancing into the wrong loan.

## 6. Making a workable repayment arrangement – your rights



When you are in mortgage stress there are two main things you have to do:

1. keep making repayments to your home loan (of an amount you can afford), and
2. negotiate an affordable and realistic repayment arrangement with your lender.

### Making repayments

Your home loan repayments are your highest priority because:

- if you do not pay, the lender can take your home (after completing certain steps),
- it is a large debt so interest will accumulate fast, and

- it is easier to make repayment arrangements (or even arrangements where you do not make any repayments for some months) on smaller debts like credit cards.

**If you cannot pay your mortgage in full, then pay as much as you can on a regular basis.**

It is better to pay an amount on a regular basis and try to pay more when you can than paying lump sums on an irregular basis. This is because with regular repayments the lender can see how much you can afford and that you will keep to a regular repayment amount.

If you have a number of different debts, talk to a free financial counsellor for independent advice on how best to manage each debt. See **Chapter 14**.

Don't forget to pay your strata levies – that is a high priority housing debt as well. Get legal advice early if you have any issues with strata debt, and do this urgently if you owe close to or over \$10,000.

### **The problem with direct debits and mortgage stress**

If there is not enough money in your savings account to cover the full repayment, the direct debit will be rejected (“dishonoured”) and you will not make any repayment at all. This will cause further financial hardship as you may be charged fees on your savings account and your home loan.

If you cannot make the full loan repayment then you need to either:

- contact your lender and lower the direct debit to an amount you are sure you can afford, or



- cancel the direct debit and make repayments using another method e.g. BPay, direct credit.

If your income is irregular, you can set up a direct debit for a regular lower amount and use another payment method to make extra payments when you can. Whatever you choose to do you need to do it as soon as possible. You have a right to cancel your direct debit by notifying the bank, credit union or building society where your savings are held.

Some lenders insist on repayments by direct debit only. If you are having trouble finding another way to pay your lender, get advice.

## Negotiating a repayment arrangement

### Your rights

The credit law gives you some important rights when you are in financial hardship:

1. You have a right to reduce or postpone your payments if you are in short-term hardship because of something outside your control (eg. you lost work or were sick). You can do this over the phone or in writing. Tell the lender that you are struggling with payments and you need help. Explain what has happened and what your plan is – for instance, you've lost your job and you need your payments postponed for 6 months while you look for another job, then you can go back to normal repayments (or you can offer to pay extra to catch up the arrears if you can afford it).

It is important you have a reasonable plan to pay off the mortgage, because the lender does not have to agree to a hardship change if they do not think you can afford to repay the loan.

2. Within 21 days, the lender can ask you for more information, for example, payslips, medical certificate and/or a current statement of your financial position (showing your income/expenses). You must provide the requested information if it is relevant.
3. The lender must give you an answer to your hardship request within 21 days of your request or after you have provided any additional information requested. The lender's response must be in writing if the agreed arrangement is over 90 days. Their response must tell you:
  - a. whether the lender agrees to the change, and
  - b. if the lender does not agree, they must tell you why they are refusing to agree and how to complain to the free complaint resolution scheme AFCA.
4. After you ask for hardship, the lender cannot go to court until they respond to you (under point 3 above) if this is your first hardship request in the last 4 months.
5. If the lender agrees to the suggested change and the repayment plan is over 90 days, the lender must put the details in writing to you within 30 days after the agreement is made.
6. If the lender does not agree to the change, your next step is to complain to the complaint resolution scheme, AFCA.
7. If you are unsuccessful with AFCA you still may have the option of going to court – but get legal advice first.

## Industry codes of practice

Many lenders agree to comply with an industry code of practice. There are three main codes of practice. In each code of practice there are sections that cover financial hardship and how the lender should respond to your request for a repayment arrangement. See **Chapter 13** for the relevant sections of the codes of practice.

## Working out what you want to ask for

### Step 1

Before you do anything you need to work out what you want to offer as a repayment arrangement. The repayment you offer must be affordable. You must be able to make the repayment each month. **Do not offer to make repayments you cannot afford.**

There are several ways to work out what repayment you can afford.

1. Call a free financial counsellor for assistance on 1800 007 007,
2. Do a budget. See [www.moneySMART.gov.au](http://www.moneySMART.gov.au).

You need to make sure you have income left for basic needs such as food and medicines.

Don't forget you can also make hardship arrangements with your other creditors, like your credit card and energy providers.

If you cannot afford to make any repayments then you will need to ask for a period of time of making no repayments.



### **There are serious disadvantages to making no repayments at all:**

- your lender is less likely to consider further requests for hardship if you have been making no repayments at all,
- your debt will grow very fast, and
- you will get out of the habit of making regular repayments.

## **Step 2**

You need a plan on how you will return to making the usual repayments.

If you are not going to be able to return to making the usual repayments to pay off the loan, then you need to consider selling your home. Hardship is only for short-term difficulties. See **Chapter 8**.

In many situations you may not know when you will be able to return to making the usual repayments, for example, if you are ill or looking for work. In these situations you need to estimate how long you will need and ask for further time, if required.

### **Case study**

Coco has just become unemployed. When Coco approached her lender for a repayment arrangement she asked for a reduced repayment arrangement for 6 months. Coco believed she could get a job in 6 months. Coco managed to get a job after 4 months. She returned to making her usual repayments, the arrears were added to the loan and the term of the loan was extended.



## Calling the lender

When you call the lender, make sure you do the following:

- 1.** Make a note of the phone conversation (use page 32 to make notes).
- 2.** Ask to be transferred to the financial hardship team (if there is one).
- 3.** Tell the lender you are in financial hardship and why (eg. you have lost work, or are sick).
- 4.** Tell the lender what you can afford to pay per month.
- 5.** State how long you need to make reduced repayments for. If you are unsure how long, you should ask for between 3 and 6 months with a review at the end of that time.
- 6.** Ask how much your new repayments will be at the end of the variation. If you won't be able to afford these new repayments, insist on extending the term of the loan

instead, so the missed repayments can be added to the end of the loan and you can go back to making your normal repayments instead.

7. Ask that all legal action, default fees and default interest stop while the lender considers your request.
8. Ask that the lender not list a default on your credit report and ask the lender how they will report your repayment history while the arrangement is in place.
9. Ask the lender to send you the details of the agreement in writing. Put reminders in your calendar so you remember when payments will start or change.

## Writing to the lender

If you are not comfortable calling the lender, you can write instead. A sample letter is at the end of this chapter. If you have tried calling the lender without success, you might want to try writing to the lender instead.

If you have received court documents, or you have a default notice due to expire then you need to act immediately.

Instead of calling or writing to the lender, first lodge a complaint with AFCA straight away and then write to the lender immediately afterwards.

## Completing a statement of financial position

The lender may ask you to complete a statement of financial position (which is a budget or money plan). You should agree to do this. You can get help from a free financial counsellor in completing this form. Tell your lender if you need time to see a financial counsellor.

It is important that your statement of financial position shows that your repayment request is fair and affordable. You need to show you can keep to the arrangement.

If your statement of financial position shows that you have more money available than you are offering in reduced repayments:

- Check that you have included all your essential expenses. If you have done so, then you need to consider offering more in repayments.
- If your statement of financial position includes expenses the lender may consider frivolous, or unnecessary, you need to ask yourself whether you can do without those things.

If you have checked your income and expenditure is correct, and there is nothing you can change to increase your income or lower your expenditure so you can go back to your normal repayments after your hardship ends, then you need to offer less and/or consider selling your home (see **Chapter 8**).

## Take notes when you call the lender

Date ..... / ..... / ..... Time: .....

Lender Reference (who you spoke to):

.....  
.....  
.....

Date ..... / ..... / ..... Time: .....

Lender Reference (who you spoke to):

.....  
.....  
.....

Date ..... / ..... / ..... Time: .....

Lender Reference (who you spoke to):

.....  
.....  
.....



## Sample letter requesting a repayment arrangement

*Please delete those parts of the sample letter that do not apply to your circumstances.*

Manager

Use contact details for the lender at [www.afca.org.au](http://www.afca.org.au)

.....  
Dear Manager,

**Re: Hardship notice Loan account no:**

I/we ask for a hardship arrangement under section 72 of the National Credit Code.

**Change requested**

I/we request the following change:

- Reduce each repayment to \$ per fortnight/ month, for (number of months) months. After this time I/we will return to making the normal scheduled repayments. The term of the loan to be extended and any arrears to be added to the loan. OR
- no repayments for 3 months with my circumstances to be reviewed at the end of this period to discuss if a further extension of time is needed. After the agreed period, I/we return to making the normal scheduled repayments, the term of the loan is extended and the arrears added to the loan. OR
- I/we continue making scheduled repayments and any arrears accumulated during my/our recent period of financial hardship are added to the loan and the term of the loan extended. OR

- no repayments or reduced repayments of \$ per month for (number of months) months to exchange an unconditional sale contract on my/our home.

I/we assume that you will not continue to charge default fees, default interest or make a default listing on my/our credit report while my/ our hardship request is being considered.

**Supporting information**

The reason for our financial hardship is [explain why you can't pay – eg. you are sick, or lost your job)

I/we expect that (choose from the following or add your own explanation about how you will pay the mortgage long-term):

- when I return to work I will be able to afford the scheduled repayments
- when I have recovered from my illness I can return to work and can afford the scheduled repayments.
- the loan will be repaid from the sale of my home

Please send me/us a Financial Statement of Position to complete, if required.

I/we await your reply in writing within 21 days of the date of this letter.

Yours faithfully

Name .....

Address .....

## 7. What can I do if the lender says “no” to a repayment arrangement?



This chapter covers:

- If the lender says “no” to your proposed repayment arrangement or does not respond.
- The lender said “yes” to your original proposal but you still need more time.
- You agreed to a repayment arrangement you could not afford and are now missing payments again.

### 1. If the lender says “no” to your proposed repayment arrangement or does not respond

You have two options, if the lender says no or doesn’t respond:

- continue to try and negotiate with your lender (only do this if the lender is NOT proceeding with any legal action), or
- lodge a complaint with the complaint resolution scheme, AFCA.

You must lodge a hardship complaint with AFCA before the lender obtains a court judgment. So if you think that may happen soon, you should immediately lodge with AFCA.

You can also lodge with AFCA earlier to prevent court action being started by the lender. So if your 30 day default notice is about to expire, lodge with AFCA.

All lenders have a process in place to cover when a person gets behind on their home loan. The main problem you will face is trying to stop that process. It is very common for lenders to commence legal proceedings while you are trying to make a repayment arrangement. You cannot afford to ignore the enforcement steps the lender is taking. See **Chapter 3** for the enforcement process.

## 2. The lender said “yes” to your original proposal but you still need more time

It is definitely worth trying to make another repayment arrangement.

Contact the lenders hardship team again.

If the hardship team will not help, try calling the complaint resolution contact for the lender. You can find those details by going online to (or calling) AFCA. See **Chapter 14** for contact details.

Make sure you are making regular repayments of an amount you can afford so the lender can see you are trying to pay the mortgage and can keep to regular repayments.

Hardship is short-term, so the longer you are in hardship for the same reason, the harder it can be to keep getting more time as your lender may start questioning if your plan to return to normal repayments is realistic (eg. if you have been looking for work for over 6–12 months).

But if you need more time because something different and outside your control has happened, you have a right to ask for a new hardship variation. For example, if the lender gave you three months hardship because you were off work sick but then your spouse became ill, you are entitled to ask for more hardship if you need additional time off work to be their carer for a few months before you can both return to work.

### **3. You agreed to a repayment arrangement you could not afford and are now missing payments again**

Lenders may ask you to make repayments that are more than you can afford. If you felt pressured into making a repayment arrangement you could not afford you need to go back to the lender and say this. Tell the lender the original repayment arrangement was unsuitable, and it needs to be changed.

#### **What if my lender is not a member of the complaint resolution scheme AFCA?**

If your lender stopped making loans before 1 July 2010, they are not required to be a member of AFCA. If your lender does not agree to a repayment arrangement, and they are not in AFCA, get legal advice.

### **Lodging a complaint with the complaint resolution scheme AFCA**

There are three parts to lodging a complaint with AFCA.

- 1.** Lodging your complaint.
- 2.** Conciliation/settlement negotiations.
- 3.** Determination.

## Lodging your complaint

You can lodge your complaint in a number of ways.

1. Complete an online application form at [www.afca.org.au](http://www.afca.org.au).
2. Print out an application form from [www.afca.org.au](http://www.afca.org.au) and email or post it to AFCA.
3. Call AFCA on **1800 931 678** and ask them to send you a form to complete.
4. If you have a disability or you will have difficulty completing the application, you can ask AFCA to complete the application over the phone.
5. If you need an interpreter, AFCA will organise a telephone interpreter for you for free.

## A sample of the main information required to apply to the complaints resolution scheme AFCA

### If you are having problems completing the form either contact AFCA or get advice.

You need to outline your complaint and what result you want. You can choose one of the following options to complete those sections of the form. If your situation is not covered below, get advice.

### Complaint details

1. I have a mortgage with [lender] with \$..... owing. I fell behind in my payments around [month/year] because [explain why – e.g. you lost your job, or fell sick].
2. I contacted (*name of lender*) to ask for a hardship variation on my home loan on ..... /..... / ..... . A copy of that letter is attached [OR give details of the phone conversation if by phone].

**OR**

3. I am applying to (*name of lender*) for a hardship variation on my home loan.
4. [Add if relevant] I received a *Statement of Claim or Summons* on ..... / ..... / .....

**Delete the options that are not applicable:**

1. I received a reply from the (*name of lender*) on ..... / ..... / ....., rejecting the application, a copy of which is attached.

**OR**

2. I have not yet received a reply from (*name of lender*).

**OR**

3. I am not satisfied with the lender's response and I want a more appropriate arrangement.

## **Fair and reasonable resolution of the complaint requested**

I request the following:

**Delete the options that are not applicable:**

1. A change in repayments:
  - a. repayments reduced to \$..... per fortnight for (number of months) months; OR
  - b. repayments reduced to nil for (number of months)

2. After that time:
  - a. I will return to normal repayments and the term of the loan is extended and the arrears are added to the loan; OR
  - b. I will return to normal repayments plus \$..... per [fortnight or month] to catch up on missed repayments OR
  - c. I need a review in case I need an extension if I am still unwell/unemployed.; OR
  - d. I will have exchanged an unconditional contract for sale, for the sale of my/our home
3. A refund of any default and enforcement fees and default interest charged since the date I first asked for hardship.
4. No default listing on my credit report.
5. [If there is court action but no court judgment] The Statement of Claim or Summons is discontinued.

**Note: If you do not know what change in repayments you want, you can instead write “I need time to see a financial counsellor to work out what I can afford”. Make sure you book an appointment with a free financial counsellor immediately.**

### What if my lender does not agree to discontinue the court action?

Get legal advice. Some lenders may want to keep the court proceedings active while they wait to see if you can keep on top of the agreed hardship variation. This is risky for you, because if you miss a payment even slightly they can get a court judgment and take possession of your home. AFCA will not help with financial hardship complaints after a judgment is entered.



## Conciliation conferences

Once you have lodged a complaint with AFCA you may be asked to:

- complete a statement of financial position, and
- attend a telephone conciliation conference with your lender.

### Statement of financial position

You can get help completing the financial statement from a free financial counsellor. See page 31 for information on completing a financial statement yourself.

It is important your statement of financial position is accurate. AFCA and the lender will use it in negotiations or making decisions about what you can afford and whether to give you hardship. If you are having trouble working out your living expenses, you can ask AFCA for more time to get help from a free financial counsellor.

### Telephone conciliation conference

A conciliation conference is simply a conversation between you, your lender and an independent person from the complaint resolution scheme, AFCA.

The person from AFCA will talk to both parties to understand the issues.

A telephone conciliation conference is an opportunity for you and the lender to negotiate a repayment arrangement.

You must attend the telephone conciliation conference. Do not agree to a time for the conference that you may not be able to

attend. If something happens and you cannot attend, ring AFCA as soon as possible and reschedule the conference.

AFCA has a guide for telephone conciliation conference at [www.afca.org.au](http://www.afca.org.au).

Some tips to remember when you are at the conciliation conference:

1. Get **financial counselling** or **legal advice** before the conciliation conference to discuss what a realistic outcome should be.
2. Remain calm. Try not to take anything personally; just concentrate on getting an arrangement that suits you.
3. You **do not** have to come to an agreement at the conference. If you do not agree, AFCA still has the power to determine your financial hardship complaint.
4. Do **NOT** agree to an arrangement that is:
  - a. not affordable,
  - b. requires the payment of a lump sum you are not sure you can get,
  - c. is not long enough or the lender won't agree to review it after an initial period if needed,
  - d. requires you to agree to a court judgment,
  - e. does not cover what will happen at the end of the agreed period of lower repayments/no repayments, or
  - f. is not suitable for you.
5. Make sure your settlement is a workable arrangement. See the following checklist.

## Settlement checklist

This checklist is a guide to what your agreed hardship arrangement should cover.

- An agreed repayment arrangement.** Some examples are:
  - Repayments of \$..... per fortnight/month for 6 months with the term of the loan extended and the arrears added to the loan. After 6 months return to the normal scheduled repayments.
  - Return to making the normal scheduled loan repayments of \$..... per fortnight/month on (date) with the term of the loan extended and the arrears added to the loan.
  - Make no repayments for 4 months and then return to making the normal scheduled loan repayments with the term of the loan extended and the arrears added to the loan.
  - Make reduced repayments or no repayments for 5 months, then make higher repayments with the arrears added to the loan with the loan term remaining unchanged.
  - Make reduced repayments of \$ per fortnight until the loan is repaid. The term of the loan is extended. (Only for small home loans and the repayments must repay the loan within a reasonable term.)
  
- Does the repayment arrangement need to be reviewed?** If you are unemployed or ill then you may not know when you can return to work. You should make it clear that the agreement is for an initial period and is subject to review and a request for an extension of the arrangement. **Remember:** this will not be able to continue indefinitely.
  
- What happens at the end of the reduced repayment arrangement?** You can offer to pay extra to catch up missed payments, or you can ask to go back to normal repayments by having any missed payments added to the loan and extending the loan term. Pay the arrears in full.



**Do not agree to this unless you are sure you can do it. Insist that the lender agrees to notify you about what the new higher repayments will be at the end of the reduced repayment arrangement.**

- If you need time to sell your home** (see **Chapter 8**), you can ask for postponed or reduced payments until your home is sold.
- Your credit report.** Ask that any default listing on your credit report is removed (if a listing has been made). This won't always be possible, but it is always worth asking, particularly if your lender knew you were experiencing financial hardship when they made the listing.
- Legal costs and default fees.** If you have asked for financial hardship previously and the lender did not respond reasonably, then you should ask for all legal costs and default fees to be refunded from the date you first asked for hardship.
- If a statement of claim/summons has been issued** (see **Chapter 9**), ask the lender to discontinue the statement of claim or summons. This means that the lender withdraws the court proceedings.
- Your repayment history on your credit report may also have been affected.** You should ask about this also. If you have been reported as paying late after the lender knew you were in hardship, get legal advice.
- You do not have to agree to a payment plan at the end of the conciliation.** If you are not sure, you can ask the lender to leave the offer open for a few weeks so you can get some free financial counselling or legal advice about whether it is a good offer and whether you can afford it.



**Do not agree to the lender getting judgment without getting legal advice.**

## Determination

If you and the lender cannot agree on a hardship arrangement, AFCA can determine (decide) the matter. AFCA will consider:

- Are you in hardship because of unemployment, illness or other reasonable cause?
- Can you afford the new repayment arrangement requested?
- How long have you been in hardship? Are you still in hardship for the same reason, or have other events have happened?
- Will you get back on track with normal payments within a reasonable time? Or if not, are you able to pay out the whole loan within a reasonable time (eg. by selling the home)?
- What assistance has the lender offered you?

If AFCA has told you that your matter will now go to determination or is pressuring you to settle or drop your complaint, get legal advice immediately.

## 8. Do I need to consider selling my home?



This is the hardest decision. You need to consider selling your home if you will continue to be unable to afford your loan repayments for some time to come.

You need to make this decision as early as possible because:

- **it is better to sell your home yourself rather than have the lender sell the home for you, and**
- **you are more likely to get a better price for your home and avoid lots of legal costs if you sell your own home.**

The decision whether to sell your home is most difficult when:

1. you are unemployed and trying to get a job, or
2. you are ill and trying to get well but you just don't know when you will recover, or
3. you are waiting for a compensation payment or a family law settlement.

In these situations you are hoping that you can make the loan repayments soon but you don't know when this will happen or if it will happen before the lender goes to court to take possession of the home. You can ask the lender for hardship, ask for extensions, and take the matter through AFCA to buy time – but the difficulty is that as time goes on things are going to get worse and you will get further and further behind on your loan repayments.

You may be better off selling earlier to avoid extra interest, fees and legal and court costs, and walking away with as much money as you can.

In these circumstances, you should consider:

1. making a repayment arrangement with the lender for up to 6 months, and
2. if by the end of the 6 months you still cannot make the loan repayments, go back to the lender and negotiate a further arrangement on the basis that you are selling your home.

If you get a job, get well or get a large lump sum of money before your home sells, you still have the option of trying to negotiate a further arrangement on the basis you can now pay the loan although this will be more difficult if the lender has obtained a court judgement.

## **By when do I have to make a decision?**

You need to make a decision to sell your home as early as possible and preferably BEFORE the lender commences any legal proceedings. It is never too late to ask for time to sell, but the lender is less likely to agree later in the enforcement process and court and legal costs will be added to your loan.

You need to give yourself as much time as possible to sell your home and get a good price for it.

## I've decided to sell my home. What do I do now?

### Step 1

You need to place your home on the market. You need to price the home realistically so that it will sell but for the best price possible in the circumstances. If you are using a real estate agent you should explain what time frame you need to sell the home within. This will usually be under 6 months but could be under 3 months depending on what arrangement you make with your lender.

### Step 2

You need to give copies of evidence that you are selling your home to the lender. This evidence should include (where available):

- a. a copy of the contract with your real estate agent,
- b. evidence that you are advertising your home,
- c. the front page of the contract of sale, and
- d. your marketing plan for selling the home.

### Step 3

Negotiate a repayment arrangement on the grounds of financial hardship with your lender. See **Chapter 5**.

You are negotiating the arrangement on the basis that:

- a. you are in financial hardship,
- b. you can make regular repayments of what you can afford until the home is sold (or you can ask to postpone payments if you cannot afford anything),
- c. you have a reasonable time to exchange contracts for the sale of your home (ask for 6 months but you may need to consider agreeing to 3 to 4 months), and
- d. when the home is sold, your loan will be repaid.



## Step 4

If you sell the house, you need to notify the lender as soon as possible and provide evidence of the sale.



### **You should lodge a complaint with AFCA immediately if:**

- you are unable to make a repayment arrangement with the lender,
- the lender is threatening to commence legal action,
- your 30 day default notice is about to expire,
- the lender has issued you with a statement of claim or summons but has not obtained a court judgment,
- you have lodged a defence in court but have not taken a (significant) step beyond that. (If in doubt, lodge your complaint to AFCA anyway, then get advice), or
- you have received a notice to vacate with an eviction date. You should also get urgent legal advice immediately because AFCA may not have time to help you if you lodge too close to the eviction date.

The complaint resolution scheme, AFCA, is free and lodging before the lender obtains a court judgement stops legal action while AFCA considers your hardship complaint. However, lodging with AFCA after the lender has obtained a court judgement may not stop an eviction if you lodge too close in time to the eviction date. You must lodge with AFCA as soon as you receive a notice to vacate from the Sheriff and get legal advice at the same time.

## **What if my home is worth less than the amount of my loan?**

If you think your home may be worth less than the amount you owe on your home loan, get legal advice.

You can still negotiate to sell the property yourself, but if the net sale price will not be enough to pay the mortgage off in full, get your lender's permission to sell at that price first – get legal advice if your lender refuses.

## 9. The lender has taken action against me in court



If you receive a court document called a statement of claim, summons or a writ then the lender may be taking legal action for:

- the whole debt, and/or
- the arrears (the amount you are behind in repayments), and/or
- possession of your home.

You can tell you have received a statement of claim, summons or writ because:

1. It will have a stamp from the court on the document.
2. It will have the lender's details and your details.
3. It will be titled statement of claim, summons or writ.

4. It will have details of the mortgage and that you failed to make certain payments as required under the loan.
5. It will tell you how long you have to respond to the statement of claim, summons or writ.

If you are unsure whether you have received a statement of claim or summons get legal advice. Sometimes you may get another document called a notice to occupier sitting on top of these documents.



**You only have a short period to respond to a statement of claim, summons or writ – between 7 and 28 days (depending on where you live in Australia) to respond. If you do not respond within the required time then the lender can apply to the court for judgment for possession of your home.**

When you get a statement of claim, summons or writ, you have three options.

1. Lodge a complaint with the free complaint resolution scheme AFCA asking for financial hardship.
2. Lodge a defence and cross claim in court arguing you are in financial hardship (get legal advice first).
3. Do nothing (not recommended).



**It is strongly recommended you proceed with option 1 – which is to lodge a complaint with the complaint resolution scheme AFCA, rather than options 2 or 3.**

The complaint resolution scheme, AFCA, is free and the lender cannot get a court judgment against you while AFCA is considering your complaint. You should only consider option 2, lodging a defence and cross claim, if you were not successful at

AFCA or cannot use AFCA (for example, because your lender is not a member or a third party involved in causing you loss is not a member).

## Lodging a complaint with the complaint resolution scheme, AFCA

See **Chapter 7** for details on how to lodge a complaint with AFCA. If you are lodging a complaint with AFCA **after** you have received a statement of claim or summons, you need to:

- Make sure AFCA knows you have received a court document. You can write this on your complaint form.
- The court document will tell you how long you have to respond.
- Lodge a complaint with AFCA as soon as possible after you received the statement of claim, summons or writ. There are only limited circumstances in which you can lodge a complaint with AFCA after the lender has obtained judgement (see page 8) so you need to move fast to make sure you are in AFCA well before the lender can apply for judgment.
- If you are close to the deadline to file a response to the statement of claim, summons or writ, you should also call AFCA to make sure it has received your complaint and has told the lender that it has received your complaint.
- Even if you are negotiating with the lender you need to lodge a complaint with AFCA just to make sure the lender does not get judgment while you work out an arrangement.

## Filing a defence and cross claim in court



**This should only be considered if you cannot go to AFCA or you have been unsuccessful in AFCA. You should get legal advice before filing in the court.**

A defence and cross claim need to be specific to your own case.

Going to court is risky! If you lose you will usually be ordered by the court to pay the legal costs of the lender.

Get legal advice. See **Chapter 14** Useful contacts on how to find a lawyer.

# 10. Getting your superannuation



You may be able to get access to your superannuation early when you are behind on your home loan. **Conditions apply and there is no guarantee you will be successful.**

## Dos and don'ts

### DO

- ✓ Negotiate a financial hardship arrangement with your lender; you may need to go to the complaint resolution scheme, AFCA (see **Chapters 6 and 7**).
- ✓ Get advice on whether accessing your superannuation is a good option in your situation. Talk to a free financial counsellor (see **Chapter 14**).

## DON'T

- ✗ Rely on getting your superannuation to solve all your problems.
- ✗ Access your superannuation when you need to sell your home anyway (see **Chapter 8**).
- ✗ Negotiate a repayment arrangement that depends on getting your superannuation (as it may not happen).
- ✗ Think that the lender will not take legal action while you try to access your superannuation.



**Don't risk losing both your superannuation and your house. Your superannuation is usually protected from bankruptcy – as long as it stays in your super fund. If you owe more in debts than your house is worth, there is a risk you may end up bankrupt so you may lose both the house and any super you withdrew.**

Generally you can withdraw three months worth of mortgage repayments and 12 months worth of interest.

You must pay tax on the amount you withdraw. This reduces the amount you can use to pay the mortgage.

The Australian Taxation Office (ATO) will consider your application to release superannuation early on compassionate grounds. You need a MyGov account – see [my.gov.au](https://my.gov.au)

## Accessing your super

1. Ask your superannuation fund if they will release your superannuation on compassionate grounds if approved by the ATO.
2. You will need a letter from your lender on its letterhead to upload to the ATO. It must be dated and less than 30 days old when you submit it. It should say the following:



- a. There is an overdue amount.
- b. The lender will sell your home if you do not pay it.
- c. The address of the home.
- d. The total amount for 3 months of loan repayments.
- e. The total amount for the next 12 months of loan interest.
- f. The name of the lender.
- g. The account number of the loan.

Submit your application to the ATO with supporting documentation using the [my.gov.au](https://my.gov.au) website. If the ATO approves the release, you will need to send the original ATO letter to your superannuation fund. Your own superannuation fund may have other requirements such as filling out a separate form and identification verification.



**You must pay tax on any amount you withdraw.**

Some problems may occur when trying to access your superannuation.

- The lender will not agree. They can refuse if they are concerned you won't be able to afford the mortgage even after you get your super.
- ATO will not approve the release.
- ATO delays in processing your application.
- Lender delays in giving the required information and confirmation.
- A delay could mean that the amount released is not enough to cover your arrears (overdue payments).

The best way to avoid problems with getting your superannuation is to make a hardship arrangement that does not depend on successfully accessing your superannuation.

This chapter has explained the basis for accessing your superannuation in order to prevent your lender commencing action for possession of your property. There are other grounds that may apply, for example:

- you have been on certain Centrelink payments non-stop for over 6 months, or
- you have medical reasons such as illness or to care for someone who is ill.

For a full list and further details, see [www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/withdrawing-and-using-your-super/early-access-to-super/when-you-can-access-your-super-early](http://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/withdrawing-and-using-your-super/early-access-to-super/when-you-can-access-your-super-early)

# 11. Mortgage assistance



The Australian Capital Territory and Queensland governments provide mortgage relief assistance to eligible home owners experiencing short term financial hardship. Assistance is in the form of interest-free loans to cover arrears and some future repayments.

The eligibility requirements, amount of assistance and repayment arrangements varies between each jurisdiction as detailed below.

## Australian Capital Territory

Administered by:

- ACT Revenue Office. To get an application form go to [www.revenue.act.gov.au/home-owner-assistance/mortgage-relief](http://www.revenue.act.gov.au/home-owner-assistance/mortgage-relief) or call **(02) 6207 0028**.

## Amount available

The maximum amount loan amount is \$10,000. This money can only be paid towards arrears on the mortgage or a combination of arrears and future mortgage payments (with arrears capped at \$5,000).

## Key conditions

- You had a recent and unforeseen change in circumstances which has led to short term mortgage stress.
- You own and live in the property.
- You do not own any other property anywhere, including under a trust.
- You must have at least 10% equity in your home.
- The total value of the property must not be higher than the median ACT house price – according to ACT’s sales data from the ACT Treasury Directorate (see [www.treasury.act.gov.au/snapshot](http://www.treasury.act.gov.au/snapshot). The office updates this figure each month).
- You can show you contributed some funding towards current mortgage repayments in the last six months.
- You can provide an insurance certificate to show the home is insured.

## Payment and repayment arrangements

A mortgage relief loan, if approved, is:

- paid directly into your home loan account,
- repaid over five years, with the first repayment starting six months after the funds were paid into your home loan account,
- interest free, and
- secured by a caveat over the mortgaged home.

Immediate repayment is required if you sell, refinance or renegotiate the mortgage.

## Queensland

Administered by:

- Department of Housing, please call **1300 654 322** or visit [www.qld.gov.au/housing/buying-owning-home/financial-help-concessions/mortgage-relief-loan](http://www.qld.gov.au/housing/buying-owning-home/financial-help-concessions/mortgage-relief-loan) to find out more.

### Amount available

Interest free loan of up to \$20,000, paid directly to home lender or local council to clear home loan arrears and/or council rate arrears, and subsidise home loan repayments for a period of up to 6 months.

### Key conditions

- You must owe less than \$500,000 on your mortgage.
- There is enough equity in the home as security for the loan.
- You own and live in the property as your principal place of residence.
- You cannot own or part-own additional property.
- You have exhausted all other avenues of help, including deferring or restructuring loan payments with current lender.
- You must be in financial difficulty, in danger of losing the home and had a change in circumstances which caused your home loan repayments to exceed 30% of your gross household income.
- You have taken all reasonable steps to pay your debts and have been making home loan repayments of more than 30% of gross household income.

- You put in a written application form, which includes information and authorisation from your home loan lender.

## **Payment and repayment arrangements**

A mortgage relief loan, if approved, is:

- paid directly to the your home loan account and/or local council (for council rates),
- secured by a registered mortgage to the Queensland Government – Department of Housing,
- repaid over a maximum 10 year period, with the first payment starting 12 months after the funds were paid into your home loan account and/or local council,
- interest free,
- secured by a caveat over the home, and
- immediate repayment is required if you sell, refinance or renegotiate the mortgage.

## 12. Getting a stay of an eviction from the court



This chapter deals with the situation when:

1. there is a court judgment for the possession of your home and the total amount owing, and
2. you do not have a reasonable chance of arguing that the judgement should be set aside, that is, you do not have an arguable defence to the statement of claim (such as circumstances described in **Chapter 4**) and you do not have a reasonable explanation for not responding to the statement of claim earlier. Get legal advice immediately if you think you may have a defence.
3. you need more time to:
  - refinance your loan,
  - sell your home, or
  - move out of your home.



**Once a court judgment exists, there are only limited circumstances in which you can lodge a complaint with AFCA (see page 8).**

## Repayment arrangements after judgment

After the lender has judgment you can still try to negotiate a repayment arrangement with the lender. If the lender agrees to a repayment arrangement, make sure the arrangement is confirmed in writing!



**If you make a repayment arrangement after the court has granted judgment, the lender can apply immediately to get possession of your home if you miss a payment even by a day or you are a few cents short.**

## How to get a stay of an eviction

The court can give you an order to 'stay' an eviction, which means that your eviction date will be placed on hold until a later date, or until the stay is lifted.

You should try to get the lender to agree to a stay. If unsuccessful you should lodge a complaint with AFCA immediately (but also get legal advice as AFCA may not have time to help you if you lodge too close to the eviction date). If AFCA can't help, you will need to apply to court.

Stays are usually only given for a few weeks (or less commonly months) at a time.

### Step 1

Try to get the lender to agree to a stay and to call off the Sheriff so the eviction does not take place. The lender will usually agree to a stay if:



- you have sold your home and you are just waiting for the settlement date to occur, or you can show you are in the process of selling (eg. you can show them a signed real estate agent agreement or advertising and a contract for sale),
- you have approval for a refinance of your home loan and you just need time to complete that process – the lender will ask you to send them a copy of your approval, or
- you need extra time to move out due to a medical condition or you have another good reason why you are delayed in finding somewhere else to live.

## Step 2

If the lender will not agree, you need to lodge a complaint with AFCA immediately. Once a judgment exists, AFCA can make the lender give you more time but only if you are about to refinance or sell the property or you need more time to move out because you are facing personal hardship (such as temporary or serious illness). Warning: if you lodge too close to the eviction date, AFCA may not be able to help you at all. Ring AFCA to check if you are unsure. You may still need to apply for a stay at the court.

## Step 3

If AFCA cannot help, you can apply to the court. This process takes time as there are court forms for you to fill out, have witnessed in front of a JP or solicitor and in some cases, a fee waiver form to be approved as well. You need to act quickly. You should also attach any evidence you have to support your stay. If possible you should seek legal advice about these documents. You can book an appointment with the duty registrar at the Supreme Court of NSW, in person for information about these forms. The duty registrar CANNOT give you legal advice.

The court will consider a stay if you are about to sell or refinance, or need a little bit more time to move out because of personal

hardship. The court will decide what they think is fair. It is important to be ready to move out if you are unsuccessful in applying to the court for a stay.

## Getting a stay of an eviction from the NSW Supreme Court

**This is an example of how you can apply for a stay in NSW. If you are outside NSW, see Chapter 14 for services that can give you advice on getting a stay in your state or territory. Lodging a stay usually will mean more legal and court costs are added onto your mortgage. The lender will be notified of your application and given a chance to respond.**

### Types of stays

In NSW, there are two main types of stays depending on when you apply for the stay:

- **urgent stay** if there are less than four working days until your eviction date, and
- **non-urgent stay** if there are more than four working days until the eviction date.

An **urgent stay** is obtained by direct application of a notice of motion and affidavit in support to the duty registrar at the Supreme Court of NSW. The duty registrar will make a decision based on the information you supply alone. The duty registrar can order a stay for up to 7 days.

The duty registrar will also list the matter within 7 days before the registrar, in court. You must notify the plaintiff (ie the lender and their solicitor) of the date the matter is listed before the registrar.

If you need more time than the 7 days, you will need to file a further notice of motion and a further affidavit in support and appear before the registrar in court on the date the matter is listed.

The plaintiff can also appear on this date and can oppose your application for a further stay. If you have previously applied for an urgent stay, the duty registrar will generally require you to notify the plaintiff and will list the matter before a judicial officer.

A **non-urgent stay** application is set down for a time and date for both you and the plaintiff to argue, in court, whether the stay should be granted or not, after the plaintiff has been notified about your application.

With both an urgent and non-urgent application for a stay, legal costs for the lender will generally be added to your loan account, in accordance with your mortgage contract.

To get a stay in NSW you need to complete:

1. Form 20 Notice of Motion, and
2. Form 40 Affidavit in support.

Both forms can be found at:

[www.ucprforms.justice.nsw.gov.au](http://www.ucprforms.justice.nsw.gov.au).

**The usual court fee for filing these forms is \$718 (as at October 2023), but you can apply to the court to waive or postpone the fee. You can find the fee waiver form here, along with guidelines for when the court will waive or postpone a fee: [supremecourt.nsw.gov.au](http://supremecourt.nsw.gov.au). The application to waive or postpone the filing fee needs to be submitted to the duty registrar – see below. The application to waive or postpone the filing fee cannot be submitted via the online registry.**

## Sample notice of motion

- 1) For the section “court details” and “title of proceedings” – copy the information from the statement of claim.
- 2) For the section “filing details” and “person seeking orders” – write your name and how you are described in the statement of claim, ie “defendant” or “first defendant” or “second defendant”.
- 3) “Filed in relation to” – write “Plaintiff’s claim”.
- 4) “Legal representative” – leave this blank if you do not have a solicitor.
- 5) “Contact name and telephone” – write your name and your most reliable telephone number.
- 6) “Contact email” – write your email address (you must check this regularly as it will be used by the court and the plaintiff to contact you. Make sure you check any spam or junk folders regularly).
- 7) “Person affected by orders sought” – write “Plaintiff”.
- 8) For the section “Orders sought”:
  - 1) A stay [change to “urgent stay” if you are applying less than four working days from your eviction date)] on the writ of possession due to be executed at [eviction time and date].
  - 2) No order as to costs.
- 9) You need to sign and date the form and add in the registry details for the Supreme Court.

Note: the lender will normally add their legal and court costs for responding to your stay application onto your mortgage even if the court is not making any costs orders.

## Sample affidavit in support of a stay of eviction

Delete the parts that do not apply to your situation.

### Affidavit details

Name	[Your name – the person making the affidavit]
Address	[this can be your work or home address]
Occupation	[Your usual job, whether you are working or not at the time]
Date	[the date the affidavit is signed]

I say on oath or I affirm: [delete one of these] –

1. I am the defendant [or ‘first defendant’, or ‘the second defendant’ – check how you are named on the statement of claim.]
2. I believe that the information contained in this affidavit is true.
3. On [insert date] I received a notice to vacate from the NSW Sheriff in relation to my home.
4. I have never received a notice to vacate before [remove if not correct].

[NEXT SET OUT THE GROUNDS FOR THE STAY – delete any that don't apply to you]:

### **I am unable to find another place to live**

1. I live in the home with [*insert details – my wife/husband/partner and my children [insert ages, and number], anyone else*].
2. I am not able to find alternative rental accommodation [*insert detail of your attempt to do so*].
3. I will not have anywhere to go as I have [*no family that I am able to stay with, etc*].
4. [*insert any special circumstances that preclude you from moving or attempts you have or will make and how long it will take*].

### **I am refinancing**

1. I have received a loan approval from [name of bank, credit union or building society]. [OR I am waiting on a response to my loan finance application with [name of bank] which I submitted on [date]. I expect a decision by [date]. Annexed and marked “A” is [describe what you are attaching – eg. loan approval, or update letter].
2. The amount of credit which has been [approved/applied for] being [amount of credit approved] is enough to pay the mortgage in full.
3. [Any other details you wish to add to explain the situation and why you need more time]

### **Sale of property**

1. I seek time to sell the property known as [address of your property] (“the home”) myself.
2. I have placed the home on the market. I attach a copy of the sales Real Estate Agency Agreement. Annexed and marked “A”.

3. I have sought the advice from the real estate agents about the potential sale price. I believe that the home is valued at approximately \$[insert] to \$[insert].
4. The real estate agent told me that I will realistically be able to obtain \$[insert] for the home. The current balance on the mortgage is approximately \$[insert].
5. I have been to a conveyancing solicitor. Contracts for the sale of the property have been drafted. Annexed and marked "B" is a copy of the contract.
6. I believe that I will exchange contracts for the sale of the home within the next [time you estimate for the exchange to take place]. If I am able to sell the property I can discharge the whole of the debt under the mortgage.

## Defence

1. I think I may have a defence, and I am seeking legal advice. I have an appointment with [legal aid] [a private solicitor] about this matter on [insert date].

You can add to and change the template above to best reflect your situation. It is very important that all the information in your affidavit is true and correct, to the best of your knowledge.

Your signature on the affidavit must be witnessed by a Justice of the Peace, solicitor, barrister, commissioner for affidavits or Notary Public. Remember to take photo identification with you (must be original or certified copy).

## Where do I send the forms?

You need to file these two forms, and the fee waiver application:

1. For urgent stays – file the forms in person with the duty registrar at the Supreme Court of NSW on Level 5 of the Courts Building, Queens Square Sydney. You can attend in person and take a ticket.

- If you are seeking an urgent stay and you are unable to attend the court in person, you can file the forms and the fee waiver application by emailing [sc.emailfiling@justice.nsw.gov.au](mailto:sc.emailfiling@justice.nsw.gov.au). **In the subject line of the email you should write “URGENT – seeking stay of eviction”.**
  - Alternatively, you can book an appointment with the duty registrar by emailing [sc.enquiries@justice.nsw.gov.au](mailto:sc.enquiries@justice.nsw.gov.au) with the subject line “Request for appointment with the duty registrar”, and include your contact number and email. You can find further details about this process here: [www.supremecourt.nsw.gov.au/help-and-support/duty-registrar.html](http://www.supremecourt.nsw.gov.au/help-and-support/duty-registrar.html).
- 2.** For non-urgent stays – if you are lodging a fee waiver application you need to book an appointment with the duty registrar first. You should then attend on that day, see the duty registrar and then file the forms in person on Level 5 of the Courts Building, Supreme Court of NSW, Queens Square Sydney between 9:30 and 4:30pm weekdays.

It is recommended you file the forms in person, especially if your eviction date is close. The online registry is available but **REMEMBER**, you cannot lodge a fee waiver application in the online registry **AND** there is no ability to draw attention to the urgency of the application for a stay.



# 13. Industry codes of practice

Many lenders agree to comply with an industry code of practice. There are three main codes of practice in the mortgage and finance industry. In each code of practice there are sections that cover financial hardship and how the lender should respond to your request for a repayment arrangement.

## Financial hardship provisions

### Banking Code of Practice

The Banking Code of Practice is a set of enforceable standards that customers, small businesses, and their guarantors can expect from Australian banks. A copy of the current Banking Code of Practice can be found at: [www.ausbanking.org.au/code/banking-code-of-practice](http://www.ausbanking.org.au/code/banking-code-of-practice)

The most recent version of the Banking Code of Practice commenced in October 2021.

### Mortgage and Finance Association of Australia (MFAA) Code of Practice

The MFAA Code of Practice aims to promote professional standards between members, their customers and professionals in the mortgage and finance industry.

#### 13. Hardship Applications

- 13.1 If a Member becomes aware, or is advised by a Customer, that the Customer is or may be in financial difficulties, the Member will consider in good faith whether it is reasonably appropriate to vary the payment terms of the credit facility, and if it is appropriate, suggest that the Customer contact the Credit Provider and request the Credit Provider to vary the Customer's repayment terms.

13.2 Where appropriate, the Member must:

- (a) have regard to the Customer's financial circumstances and consider in good faith and within a reasonable time the Customer's request to vary the payment terms; and
- (b) suspend any action to recover any payments due under the Credit facility and, if it has not listed a default already, not list a credit default in respect of the Credit facility against the Customer until:
  - i. the Member informs the Customer in writing whether or not it will vary the payment terms; and
  - ii. if the Member and the Customer agree to vary the payment terms, the Customer fails to meet the varied payment terms; and
- (c) encourage the Customer to make payments the Customer can afford pending the Member informing the Customer of its decision; and
- (d) have a documented policy and procedure in place for receiving and assessing requests to vary credit contracts upon hardship grounds and must provide information about their hardship policy to a Customer on request.

13.3 Members must act reasonably in assessing a Customer's request to vary payment terms. Amongst other things, Members must not require the customer to:

- (a) to apply for the early release of any part of the Customer's superannuation entitlements; or
- (b) the Customer to obtain funds from family members, friends or other third parties;

prior to the Member considering whether to, or agreeing to, vary the payment terms.

13.4 Members who decide to vary the payment terms must promptly and in any case within twenty one calendar days give the Customer written notice setting out particulars of the varied payment terms.

13.5 Members who decide not to vary the payment terms must promptly and in any case within twenty one calendar days give the Customer written notice of:

- (a) its decision and the reasons for its decision; and
- (b) the Customer's right to make a complaint to the Member's IDR and EDR schemes (providing contact details for those schemes) if the Credit falls within the jurisdiction of those schemes.

## **Customer Owned Banking Code of Practice**

The Customer Owned Banking Code of Practice is the code of practice for Australia's mutual banks, credit unions and building societies.

### **24. If you are in financial difficulties**

24.1 We will work with you in a constructive way if you experience genuine difficulties meeting your financial commitments to us. With your agreement and commitment, we will try to assist you to overcome those difficulties. We will do this whether or not you have a right to seek a hardship variation or change under consumer credit laws.

24.2 Without limiting (24.1), we will have procedures in place to ensure we:

- adhere to hardship variation or change provisions of consumer credit laws

- respond promptly to any request or application made to us (we may also initiate contact to discuss your financial situation)
- genuinely consider your application or request, taking account of your situation. However, we will only be able to do this if you provide us with the financial information and documents we may reasonably need to assess your situation for ourselves
- encourage you to keep making whatever payments you can while we are considering your request
- consider longer term as well as short-term financial issues when they are relevant. If you are experiencing longer term difficulties, we will try to develop an appropriate solution with you to allow you to meet your obligations
- not list your default on your credit reference file while we are considering your application or request, unless legally required to do so
- when you have made an application or request in respect of a debt, not sell that debt to a debt buy-out business while we are still considering the application or request
- suggest other options or avenues that may be available to you, if we are unable to agree to your application or request
- if we are unable to assist you, advise you promptly in writing, and refer you to a financial counselling or similar service in appropriate cases (subject to availability).

# 14. Useful contacts

## Australian Financial Complaints Authority (AFCA)

**1800 931 678**

[www.afca.org.au](http://www.afca.org.au)

## MoneySmart

MoneySmart is the Australian Securities and Investments Commission's website on money matters. It has helpful, practical information for people who are struggling to pay their mortgage.

[www.moneysmart.gov.au](http://www.moneysmart.gov.au)

## National Debt Helpline

**1800 007 007**

[www.ndh.org.au](http://www.ndh.org.au)

## Specialist credit law advice

### ACT

#### Consumer Law Centre ACT

**(02) 6257 1788** or **(02) 6143 0044**

[www.carefcs.org](http://www.carefcs.org)

### New South Wales

#### Financial Rights Legal Centre (NSW)

**1800 844 949**

[www.financialrights.org.au](http://www.financialrights.org.au)

### South Australia

#### Consumer Credit Law Centre (Uniting Communities)

**(08) 8202 5960** or **1300 886 220**

[www.unitingcommunities.org/service/legal-services/consumer-credit](http://www.unitingcommunities.org/service/legal-services/consumer-credit)

### Victoria

#### Consumer Action Law Centre

**1800 466 477** or **(03) 9629 6300**

[www.consumeraction.org.au](http://www.consumeraction.org.au)

## **Western Australia**

**Consumer Credit Legal Service (WA)**

**(08) 9221 7066**

[www.cclswa.org.au](http://www.cclswa.org.au)

## **Other community legal centres**

**Community Legal Centres Australia**

[www.clcs.org.au](http://www.clcs.org.au)

## **Legal Aid offices**

### **NSW**

**1300 888 529**

[www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

### **Queensland**

**1300 651 188**

[www.legalaid.qld.gov.au](http://www.legalaid.qld.gov.au)

### **Victoria**

**1300 792 387**

[www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)

### **Northern Territory**

**1800 019 343**

[www.legalaid.nt.gov.au](http://www.legalaid.nt.gov.au)

### **ACT**

**1300 654 314**

[www.legalaidact.org.au](http://www.legalaidact.org.au)

### **Tasmania**

**1300 366 611**

[www.legalaid.tas.gov.au](http://www.legalaid.tas.gov.au)

## South Australia

**1300 366 424**

[www.lsc.sa.gov.au](http://www.lsc.sa.gov.au)

## Western Australia

**1300 650 579**

[www.legalaid.wa.gov.au](http://www.legalaid.wa.gov.au)

## Australian Taxation Office (ATO)

### Early release of superannuation

**13 28 65**

[www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/withdrawing-and-using-your-super/early-access-to-super](http://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/withdrawing-and-using-your-super/early-access-to-super)

## Mortgage assistance schemes

### Queensland

**(07) 3224 7202**

**Toll Free: 1300 654 322**

[www.qld.gov.au/housing/buying-owning-home/financial-help-concessions/mortgage-relief-loan](http://www.qld.gov.au/housing/buying-owning-home/financial-help-concessions/mortgage-relief-loan)

### ACT

**(02) 6207 0084**

[www.revenue.act.gov.au/home-owner-assistance/mortgage-relief](http://www.revenue.act.gov.au/home-owner-assistance/mortgage-relief)

## Supreme Court contacts

### NSW

**Sydney – 1300 679 272**

[www.supremecourt.justice.nsw.gov.au](http://www.supremecourt.justice.nsw.gov.au)

### Northern Territory

**Darwin – (08) 8999 7024**

**Alice Springs – (08) 8951 5711**

[www.supremecourt.nt.gov.au](http://www.supremecourt.nt.gov.au)

## Tasmania

**Hobart – 1300 664 608**

**Launceston – (03) 6777 2873**

**Burnie – (03) 6477 7120**

[www.supremecourt.tas.gov.au](http://www.supremecourt.tas.gov.au)

## ACT

**(02) 6205 0000**

[www.courts.act.gov.au/supreme](http://www.courts.act.gov.au/supreme)

## Victoria

**(03) 9603 9300**

[www.supremecourt.vic.gov.au](http://www.supremecourt.vic.gov.au)

## Western Australia

**(08) 9421 5333**

[www.supremecourt.wa.gov.au](http://www.supremecourt.wa.gov.au)

## Queensland

**Brisbane – (07) 3247 4313**

[www.courts.qld.gov.au](http://www.courts.qld.gov.au)

Email: [courtinfo@justice.qld.gov.au](mailto:courtinfo@justice.qld.gov.au)

**Bundaberg – (07) 4131 5667**

Email: [Courthouse.bundaberg@justice.qld.gov.au](mailto:Courthouse.bundaberg@justice.qld.gov.au)

**Cairns – (07) 4039 8885**

Email: [cairnshcregistry@justice.qld.gov.au](mailto:cairnshcregistry@justice.qld.gov.au)

**Longreach – (07) 4650 1983**

Email: [courthouse.longreach@justice.qld.gov.au](mailto:courthouse.longreach@justice.qld.gov.au)

**Mt Isa – (07) 4747 2011**

Email: [courthouse.mountisa@justice.qld.gov.au](mailto:courthouse.mountisa@justice.qld.gov.au)

**Roma – (07) 4624 3033**

Email: [Courthouse.roma@justice.qld.gov.au](mailto:Courthouse.roma@justice.qld.gov.au)

**Townsville – (07) 4799 7261**

Email: [townsvillehcregistry@justice.qld.gov.au](mailto:townsvillehcregistry@justice.qld.gov.au)

## South Australia

**(08) 8204 0289**

Email: [Supreme.registry@courts.sa.gov.au](mailto:Supreme.registry@courts.sa.gov.au)

[www.courts.sa.gov.au/OurCourts/SupremeCourt](http://www.courts.sa.gov.au/OurCourts/SupremeCourt)



## Emergency Accommodation

### NSW

**Housing NSW Service Link2home**

**1800 422 322**

### Queensland

**Homeless Hotline**

**1800 474 753**

### South Australia

**Homelessness Gateway**

**1800 003 308**

### Northern Territory

[www.shelterme.org.au](http://www.shelterme.org.au)

### Tasmania

**Housing Connect**

**1800 800 588**

### ACT

**Homeless Services**

**OneLink 1800 176 468**

### Victoria

**Crisis & Emergency Accommodation**

**1800 825 955**

### Western Australia

**Specialist Homelessness Services**

**Entrypoint Perth 1800 124 684**

## Notes

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