

Home Repossession

Use this Fact Sheet if:

- You are being pursued for payment of a debt; and
- You are threatened with court action to take possession of your home or other house or land.

What is a Mortgage?

A mortgage is an agreement between someone who borrows money and someone who lends money. Under a mortgage agreement, a borrower will nominate property which may be taken and sold by the lender if the borrower does not repay the money loaned.

Mortgagee's Power of Sale

The lender has the right to seize and sell mortgaged property once:

- The borrower is in default under the mortgage (usually this is a failure to pay an instalment), and
- The borrower has not fixed the default within the time specified in the mortgage (if no time is specified, the period is one month or 30 days), and
- The lender has served the borrower with a notice in writing requesting compliance with the mortgage (asking for payment), and
- The borrower has not fixed the default within the time period specified in the notice

Notice RequirementsLetter of Demand

It is usual practice for a lender to send a letter of demand although there is usually no legal requirement to do so.

Default Notice

If your credit contract or mortgage is regulated by the consumer credit laws, your lender must send you a default notice allowing you at least 30 days to fix the default. It does *not* allow the lender to set a shorter notice period.

Under the consumer credit law a 30-day default notice need not be given if:

- The lender believes on reasonable grounds that it was induced by fraud by the debtor or mortgagor to enter into a credit contract or mortgage;
- The lender has made reasonable attempts to locate the debtor or mortgagor without success;

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- The lender believes on reasonable grounds that urgent action is necessary to protect the mortgaged property; or
- The court relieves the lender of the requirement of giving a default notice.

Under the consumer credit laws the default notice must specify:

- The default
- The action necessary to fix the default
- That if a further default of the same kind occurs during the period of the 30 day notice, the lender may bring enforcement action without further notice, unless that further default is also remedied within the same period.

The consumer credit laws specify that failure to provide the 30-day notice is a criminal offence. It is likely that the courts will view the failure to give the notice as invalidating any enforcement action.

Notice to Pay

In case of mortgage contracts, the *Transfer of Land Act 1958* requires a lender to send a Notice to Pay to the borrower before the lender can take any action to sell the land. The lender can send the Notice to Pay one month (or less, if the mortgage allows it) after the borrower has remained in breach of the mortgage.

The lender does not have to get the court's permission to send a Notice to Pay. The lender can proceed to sell the land, or can proceed to bring court action for possession of the land one month (or whatever the notice period is under the mortgage) after it sends the Notice to Pay. The lender does not have to give any further warning or notice to the borrower.

Notices to Pay and Acceleration Clauses

An acceleration clause is a clause that allows the lender, either on default, or at the lender's choice to "call up" the *entire* loan and so require the consumer to pay the outstanding balance of the loan immediately. The consumer credit laws prevent a lender from accelerating a loan until the 30-day notice period has expired.

Taking Possession of the Land

If the creditor is pursuing you for an unsecured debt (eg personal loans, credit cards) then it is required to obtain judgment debt against you in the court. Before it can take possession of the land, it must also apply for a 'warrant of possession' which gives the Sheriff the power to enter the land and to remove anyone or any possessions remaining on the land.

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For a mortgage contract, if the lender has served notices correctly, it is legally entitled to enter onto the premises and change the locks, and if necessary, to physically remove any occupants. Lenders usually choose not to do this unless the land is vacant because if they or their agents use more force than is reasonably necessary, they may be liable for both civil and criminal damages. Instead lenders will usually take court proceedings so a sheriff, who is a court official, takes the action to enter the premises etc.

Court Proceedings

The lender will file a writ in the Supreme or County Court seeking possession of the land. In Victoria, the borrower has 10 days from being served with this writ in which to file a 'notice of appearance' and then a further 30 days to file a defence.

If the borrower fails to file an 'appearance' or a defence, or if the lender successfully challenges the defence, the Court will make an order giving the lender the right to take possession of the land.

Even if court proceedings have commenced, you may still be able to lodge an application to a relevant external dispute resolution scheme which will stop the legal action. Get advice *immediately* about your options. Currently, there are two ASIC approved EDR schemes: the [Financial Ombudsman Service](#), and the [Credit Ombudsman Service](#).

For an unsecured debt, the lender is required to apply for a 'warrant of possession' after it has obtained a judgement debt.

The Sheriff's Office

The practice of the Sheriff's Office is to write to the borrower advising of a date by which to quit. This is usually a Friday 3 weeks from the date of the letter. The day before possession is to take place the Sheriff's Office will telephone all parties to confirm that possession is to go ahead.

Taking Possession of Tenanted Land

If a tenant occupies the property the lender must also serve a 28-day notice to vacate on the tenant under section 268 of the Residential Tenancies Act 1997. If the tenant does not vacate after notice is given, the lender can apply to the Residential Tenancies Tribunal for an order that the tenant vacate. The order to vacate can then be enforced by the police.

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Remedies or Defences available if the court proceedings have commenced

There may be some options open to the borrower to prevent the lender going as far as getting a court order to take possession of the land. These are:

- Fixing the default (usually paying the money due) within the period fixed by the notice
- Applying for a hardship variation with the relevant external dispute resolution scheme
- Defending the writ on the grounds that the notice was incorrect or not properly served
- Defending the writ on other grounds
- If the loan contract is unjust the borrower may lodge an application with the relevant external dispute resolution scheme.

Fixing the Default

The borrower can fix the default by paying the money due within the time period fixed by the mortgage. The borrower can also fix the default by paying the total amount due under the mortgage at any time before the land is sold.

Where the borrower has fixed the default, and the lender continues to go ahead with the sale, the borrower may be able to apply to the court for an injunction to stop the sale.

Apply for a financial hardship variation

You can apply to your lender for a hardship variation to your mortgage contract. If your application to the lender is unsuccessful then you may be able to take your application to an external dispute resolution ('EDR') scheme even if court proceedings for repossession have commenced.

If the consumer credit law regulates your mortgage you can lodge your application for a financial hardship variation with the relevant EDR scheme. If you entered into the contract with your lender after 1 July 2010, then you can seek a hardship variation if you borrowed \$500,000 or less. For contracts taken out before 1 July 2010, a floating hardship threshold applies (\$388,080 for the period 8 September 2010 - 11 October 2010, see ASIC's [MoneySmart website](#) for the current figures).

The effect of your complaint to an EDR scheme will be to prevent the creditor from enforcing any court proceedings while the dispute is being resolved.

Incorrect Notice or Improper Service of the Notice

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It is difficult to challenge a notice to pay or a default notice under the consumer credit law on the basis that it is incorrectly drafted. Essentially all the notice need do is sufficiently identify the debt for which payment is demanded. The fact that it overstates that debt or incorrectly states the time period for its payment have not been viewed as sufficient errors in the notice to invalidate it.

Under the Transfer of Land Act, if the Notice to Pay is not served correctly, it will not be enforceable. The notice must be served or posted to all parties concerned at their address for service or, if there is no such address, at the last known address. The parties concerned will be the borrower and all parties who appear on the mortgage or on the certificate of title to the land.

Stay of Possession if the creditor has obtained a court order

If the creditor has obtained a court order to take possession of land, you may be able to apply to the Supreme Court or the County Court for a stay on possession. The discretion of the court to stay execution of judgement is a wide one. The court is required to take into account all the circumstances of the case. Grounds to seek a stay include:

- sale of the secured property is imminent
- refinance is imminent
- the debtor is to apply to set aside judgement and file a defence

Method of Sale

The lender may sell either by auction or by private sale. Three rules apply:

- The lender is bound to exercise the power of sale in good faith having regard to its own interest but not disregarding the interests of the borrower.
- As part of the duty exercise the power of sale in good faith, the lender is bound to obtain the best price obtainable consistent with the right of the lender to realize the security.
- The lender is entitled to realise its security by selling the mortgaged property as and when it chooses.

For a lender to sell in bad faith the lender must effectively act recklessly. For example, there is no general duty to make repairs or improvements. However, there may be a small number of cases where it would be reckless to sell the property without making improvements.

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It is clear that vacant possession of the mortgaged property should be obtained if the fact that the property is vacant would lead to a higher price on sale.

If a lender does sell by private sale, it runs the risk of being proven to have sold the property at a gross undervalue to such an extent as to constitute bad faith. It is also clear that if an auction of the mortgaged property is properly advertised, then the lender can safely accept the highest bid without any risk of being viewed as selling in bad faith.

Enforcement Expenses

Often mortgages reserve the right for the lender to charge whatever enforcement expenses are incurred.

For mortgages that are regulated by the consumer credit law, the lender can only recover enforcement expenses that have been *reasonably* incurred. Therefore, if a lender takes enforcement action that was plainly unnecessary, such enforcement expenses cannot be recovered. What is less clear is whether there is a limit on the amount of enforcement expenses. It is arguable that where an excessive amount is charged for enforcement expenses, then those expenses have not been reasonably incurred, and so should be reduced to a reasonable amount.

Further Information and Assistance

Consumer Action Law Centre
Email: advice@consumeraction.org.au,
Ph: 03 9629 6300 or 1300 881 020

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