

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 (or mortgagee) 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 Requirements**Letter 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.

Notice to Pay

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.

If the mortgage is regulated by the *Consumer Credit Code* the notice period must be 30 days. It does *not* allow a mortgagee to set a shorter notice period.

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Under the Code 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;
- 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 Code 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 Code specifies 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.

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 Code prevents a lender from accelerating a loan until the 30-day notice period has expired.

Taking Possession of the Land

Once 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.

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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.

The lender can then 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.

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 1987. 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.

Remedies or Defences

There are some options open to the borrower to prevent the lender going as far as getting a warrant of possession. These are:

- Fixing the default (usually paying the money due) within the period fixed by the notice
- Negotiating with the lender to postpone enforcement proceedings
- 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 VCAT pursuant to s 70 and then apply for a stay of proceedings in the court in which the writ was issued (County or Supreme Court).

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.

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Negotiating with the lender to postpone enforcement proceedings

Act quickly - you may only be able to apply to an external dispute resolution scheme such as the Banking Ombudsman *before* the lender takes court proceedings.

If the Consumer Credit Code regulates your mortgage and the maximum amount of credit that can be provided under the credit contract does not exceed the current threshold amount (at time of writing, approximately \$317,240), you can apply to VCAT for a postponement of enforcement proceedings.

Before making a court application under the Code to stay enforcement proceedings you must first approach the lender and try to negotiate a postponement of that enforcement action. If this is unsuccessful, you can then apply to a court for a postponement order.

The Code provides no guidance as to *when* a court will order postponement of enforcement action. However, it seems likely that the consumer making such an application will need to be able to show that if the proceedings were postponed for a relatively short period, i.e. a few months, there would be good reason to believe that the default would be rectified.

Incorrect Notice or Improper Service of the Notice

It is difficult to challenge a notice to pay or a default notice under the Code 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.

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.

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- 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.

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 Code, 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

For consumer and credit-related enquiries, members of the public, community and public sector caseworkers and lawyers can obtain advice from our web-based advice service at www.consumeraction.org.au, or they can telephone us Monday to Friday, on 03 9629 6300 or 1300 881 020

Members of the public can also obtain advice and assistance regarding consumer disputes from Consumer Affairs Victoria by calling 1300 55 81 81.

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