

What happens if you do not pay a loan?

Use this fact sheet if:

- You are, or expect to be, in default of payment under a loan contract; AND
- The loan contract is regulated by the Consumer Credit (Victoria) Code.
- You are, or expect to be, receiving demands for payment, or threats to take possession of mortgaged goods.

Enforcing a credit Contract

Normally, if a borrower fails to make a loan repayment on time, a lender can take prompt and immediate action to recover amounts owing, such as:

- demanding the full amount of the loan immediately (not just the late payment), ie **accelerating** the loan,
- taking possession of any secured goods and property,
- issuing legal proceedings to recover the outstanding debt.

Division Two of Part Five of the Code modifies the common law rights of the lender and sets out protocols for enforcement proceedings under a credit contract.

Default notices under s 80 of the Code

If a borrower misses a payment under a loan, the lender has to comply with the requirements of section 80 of the Code. Under section 80, a lender cannot begin enforcement proceedings unless:

- the debtor is in default of the credit contract;
- the debtor (and any guarantor) has been given a default notice in compliance with s 80, which allows at least **30 days** to remedy the default; and
- the default has not been remedied within that period.

A section 80 notice must:

- specify the default - eg. the payments which are in arrears, or a failure to maintain insurance over a secured vehicle;
- specify what is required to remedy the default; and
- state that a subsequent default of the same kind that occurs during the period of the notice will allow the lender to begin enforcement proceedings in reliance on that notice.

When is a section 80 notice not required?

Under s 80(4) a default notice is not required if:

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- a) the credit provider believes that the debtor **fraudulently** entered into the credit contract; or
- b) the credit provider **cannot locate the debtor**; or
- c) **the Court authorises** the commencement of enforcement proceedings; or
- d) the credit provider believes that the debtor has disposed of, or intends to **dispose of, mortgaged goods**, or that urgent action is necessary to protect the mortgaged property.

Taking possession of mortgaged goods

After the 30 day period granted by a section 80 notice has expired, a lender can then commence enforcement proceedings. For secured contracts, this will involve employing a repossession agent to seize and sell any secured goods.

There are a number of restrictions on a lender's right to repossess secured goods:

Remember that these restrictions only apply to mortgaged **goods**. Mortgagee possession of **real property** follows different procedures, normally culminating with a writ in the Supreme Court.

Less than 25% owing on the contract

Under s 83 of the Code, a lender cannot repossess mortgaged goods if the current balance of the loan is less than 25% of the amount of credit provided, or \$10,000 (whichever is the lesser).

However, the lender can nevertheless repossess if:

- **the Court consents** to the repossession, or
- the loan is a **continuing credit contract** (although these are rarely if ever secured over goods), or
- the lender believes that the debtor has disposed of, or intends to **dispose of, mortgaged goods**, or that urgent action is necessary to protect the mortgaged property.

Entry onto residential premises

Under s 91 of the Code, a lender or its agent cannot enter onto residential premises to repossess mortgaged goods unless:

- **the Court has authorised entry**, or

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- the **occupier** of the premises (**not the borrower**) has **consented** in writing, after being informed in writing of the provisions of section 91.

Consent under s 91 can only be obtained from an occupier if the lender complies with r 24 of the Consumer Credit Regulations 1995. Reg 24 states:

24 Consent to enter premises

For the purposes of section 91 of the Code, consent by the occupier of premises to entry to the premises is taken to be given only if the following provisions have been complied with—

- a) a request to the occupier for entry to the premises must be made by the credit provider or agent by application in writing or by calling at the premises concerned;
- b) if the request is made personally, it may only be requested between the hours of 8a.m. to 8p.m. on any day other than a Sunday or public holiday;
- c) the consent in writing must be in form 7 and signed by the occupier;
- d) the written document of consent is not to be presented to the occupier for signature with, or as part of, any other document (unless the other document, or the remainder of the other document, contains only the provisions of section 91 of the Code).

The value of these provisions is not that they absolutely prevent the lender from taking possession of goods in the above circumstances, but that a court order is required to do so. The borrower must be served with such an application and, if they attend the hearing, it may be a valuable time at which to attempt to negotiate some arrangement which allows the loan to remain on foot and the goods to remain with the borrower.

After the repossession

Within 14 days after repossession the lender must give the debtor a written notice under s 94 of the Code stating:

- the estimated value of the goods;
- the enforcement expenses that have and will accrue; and
- a statement of rights and obligations as required under the regulations

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- that the debtor has **21 days from the date of the notice to redeem the goods**, after which they will be sold

A section 94 notice must be in Form 8 of the *Consumer Credit Regulations 1995*.

A borrower may apply for compensation under section 98 of the Code if the goods were sold for less than the best price reasonably obtainable. Note however that, particularly in the case of motor vehicles, lenders will be entitled to sell goods at auctions at wholesale prices, which will be far less than a retail price. So while a client may be outraged at the low price obtained for the vehicle when sold at auction, it will rarely be grounds for claiming compensation.

You can check average prices of motor vehicles on www.redbook.com.au

Unreasonable enforcement expenses

When a borrower falls into default of payment under a loan, enforcement expenses and default interest will usually increase the balance of the loan. Sometimes enforcement expenses – such as the cost of hiring a repossession agent or debt collector to visit the borrower's home, or make phone calls to the borrower, or the cost of hiring a tow truck driver to assist in repossessing a vehicle – can be very considerable.

In certain circumstances, enforcement expenses charged to the borrower may be unreasonable and excessive. For example, if an agent has made a number of fruitless visits to an address which the borrower had disclosed on the contract, each of those visits will be charged to the contract. If it can be proven that the borrower advised the lender of a new residence however, and therefore the lender was incorrect in sending the agent to the old address, all expenses associated with the visits to the old address would be unreasonably incurred.

Conversely, if the fruitless visits were the result of the borrower failing to advise of a new address, the expenses will all be recoverable lawfully.

If unreasonable enforcement expenses have been charged to a borrower, application to the Credit List of the Victorian Civil and Administrative Tribunal can be made by the borrower under **section 99 of the Consumer Credit (Victoria) Code** asking for a determination of the borrower's liability, or a refund of amounts already paid.

Further information and assistance

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Financial and Consumer Rights Council

Ph: (03) 9663 2000, or 1800 134 139 for country callers

To find your local financial counsellor who can give free advice and assistance with credit and debt problems, negotiating with creditors and budgeting.

www.vicnet.net.au/~fcrc

Consumer Affairs Victoria

Ph: 1300 55 81 81 Mon – Fri

Consumer Affairs can help you resolve a dispute with a trader by informing you of your rights or by conciliating with the trader.

www.consumer.vic.gov.au

Victoria Legal Aid:

Ph: (03) 9269 0234, or 1800 677 402 for country callers.

Mon – Fri 9am – 5pm.

VLA publishes a useful series of pamphlets on credit & debt issues that it will send to consumers free of charge.

www.legalaid.vic.gov.au

Federation of Community Legal Centres:

Ph: 9654 2204

To find your local community legal centre.

www.communitylaw.org.au

Insolvency and Trustee Service of Australia

Ph: 1300 364 785

ITSA is not an advice service but it can send information about bankruptcy and forms.

www.itsa.gov.au

Dispute Resolution

Victorian Civil & Administrative Tribunal (VCAT)

General ph: 9628 9700,

country callers: 1800 133 055

Credit List ph: 9628 9790

Civil List ph: 9628 9830

www.vcat.vic.gov.au

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What happens if you do not pay a loan?

Federal Privacy Commissioner

Ph: 1300 363 992 (Privacy Hotline)

To complain about credit reporting or other breaches of privacy.

www.privacy.gov.au

Industry Dispute Resolution Schemes

Banking, Insurance and Investment Assistance

Ph: 1300 78 08 08.

A central telephone number to the appropriate scheme, for disputes with:

- banks
- insurance companies (claims disputes)
- credit unions
- finance brokers
- investment advisors

Water, gas and electricity disputes

Energy & Water Ombudsman (Victoria) EWOV

Tel: 1800 500 509

www.ewov.com.au

Telecommunication disputes

Telecommunications Industry Ombudsman (TIO)

Ph: 1800 062 058

www.tio.com.au

Regulators

They investigate industry conduct & are unlikely to assist with individual complaints.

Australian Securities & Investment Commission (ASIC)

Complaints about conduct of financial services, including debt collection of consumer credit.

Ph: 1300 300 630

www.asic.gov.au

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Australian Competition & Consumer Commission (ACCC)

Complaints about conduct of businesses including debt collection complaints. (Not complaints about credit or financial services).

Ph: 1300 302 502

www.accc.gov.au

Telephone interpreter service:

Free to callers. Available 24 hours, Ph: 13 14 50.

Hearing & Speech Impaired Access:

National Relay Service

All free calls (within Australia)

133 677

Speech to Speech Relay

All local and chargeable calls (within Australia): 1300 555 727

All free calls (within Australia): 1800 555 727

You can obtain more information about the National Relay Service on their website at

www.aceinfo.net.au.

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