

LEGAL AID NSW

Problems paying your mortgage?

Things you can do.

This brochure tells you what you can do if you are having trouble paying your mortgage. It also has information on where you can get legal and financial help.

IF YOU ARE HAVING TROUBLE PAYING YOUR MORTGAGE—DON'T DELAY!

It is very important to act immediately once you realise you are having, or going to have, difficulty paying your home loan. If you delay, the lender can take action to repossess and sell your home. This can happen very quickly and can be difficult to stop.

The first thing to do is work out whether the reason you can't make the loan repayments is a temporary or long-term problem. You should also get legal advice as soon as you can. You can find out where to get legal help at the end of this brochure.

IF THE DIFFICULTY REPAYING YOUR LOAN IS A SHORT-TERM PROBLEM

If the problem is temporary, and the reason you can't pay your loan is because of 'illness, unemployment or other reasonable cause', you can try to change the way you repay your loan on the ground that you are experiencing hardship. This is called asking for a 'hardship variation'.

What you should do will depend on whether or not you are eligible to apply for a hardship variation under the Consumer Credit Code.

How do I know if I am eligible to apply for a hardship variation under the Consumer Credit Code?

To be eligible:

- You must have either borrowed the money to buy a home for yourself or your family rather than as an investment, or used your home as security to raise money for other household, personal or domestic purposes (rather than for a business). If you are unsure about whether the Consumer Credit Code applies to your loan, or if you are told that the Consumer Credit Code doesn't apply because you signed a declaration saying that the loan was for business or investment purposes, you should get legal advice.
- You must be unable to pay because of "illness, unemployment or other reasonable cause".
- You must be able to show that if you get the variation you will be able to repay your loan.

- The maximum amount that is or may be provided under your loan must be less than \$320,100 (as at 16/2/08). This amount is linked to the current cost of new houses in Australia and changes monthly. The current amount is available from the 'What's New' section of the Consumer Credit Code website at www.creditcode.gov.au
- You must have asked the lender for one of the 3 following changes to the loan:
- an extension of the term of your loan contract and a reduction in the amount of each payment for that period;
- a postponement during a specified period the dates on which payments are due under the contract; or
- an extension of the term of your contract and a postponement during a specified period the dates on which payments are due.

At the time you asked for one of these changes you must not have asked for a change to the interest rate on your loan.

HOT TIP

You can apply for a hardship variation at any time up until the lender gets 'Judgment for Possession' (judgment). This means that the Supreme Court has granted the lender the power to repossess and sell your home.

The lender can get judgment if 28 days has passed from the time you received a Statement of Claim from the lender (the document that starts Court action to repossess your home) and you did not lodge a form called a Defence with the Court. If you receive a Statement of Claim you should get legal advice immediately!

I am eligible to apply for a hardship variation under the Consumer Credit Code. What should I do?

- To apply for a hardship variation you should first write to the lender using the Sample Letter at the end of this brochure. Keep a copy of the letter you send. If your loan is a joint loan then all parties to the loan should make the request, if possible. If this is not possible, you should still make the request yourself.

- When writing the letter, consider the following:
The lender will be more likely to accept your request if it is reasonable. Try to suggest an amount you can afford to repay, bearing in mind what your obligations are under the loan contract. The lender will want as much relevant information as possible. This means you will need to give details of:
 - The reason you are experiencing hardship. For example, if you can't pay your loan because of illness, provide a doctor's certificate.
 - Your current income and other major financial expenses, for example, other loans.
 - How you will repay the loan and in what period of time.
- It is very important that in your letter you also ask for a 'stay of enforcement action' (a 'stay') and ask the lender to agree to this in writing within a few days. This means that you are asking the lender not to take any action to repossess your home, or if they have started enforcement action, to suspend the action until your request for a hardship variation has been decided. The Sample Letter includes a request for a stay.
This is important because your options become more limited once Court action is started and you won't be able to apply for a hardship variation under the Consumer Credit Code once the lender gets judgment against you.
If the lender agrees to your request for a hardship variation you should get the agreement in writing and keep a copy of the letter.

What can I do if the lender doesn't agree to my request for a stay?

This will depend on whether an External Dispute Resolution (EDR) scheme is available.

If an EDR scheme is available

If the lender does not agree to a stay in writing within a few days, and it is a member of an EDR scheme, you can make a complaint in writing to the scheme. All the banks, major non-bank lenders, credit

union and permanent building societies are members of an EDR. To find out if your lender is a member of such a scheme call 1300 780 808.

The lender cannot take any enforcement action until the EDR scheme has dealt with the dispute.

If the EDR scheme tells you that you need to wait for the lender to respond to your letter, explain that the lender has not agreed to a stay of enforcement action, and this is why you want to lodge a dispute immediately.

You can also go straight to the Consumer, Trader and Tenancy Tribunal (CTTT) or Supreme Court rather than going to an EDR scheme. However it is preferable to go to the EDR scheme first if one is available. EDR procedures are cheaper and more consumer-friendly and an unfavourable decision from an EDR scheme will not prevent you from going to the CTTT or the Supreme Court later.

If an EDR scheme is not available

In this case you will need to apply to the CTTT for a stay under the Consumer Credit Code. You can also apply to the Supreme Court for a stay. However it is better to go to the CTTT because the proceedings are less complex than in the Supreme Court, the CTTT will provide interpreters and it sits throughout NSW whereas the Supreme Court only sits in Sydney.

If the lender has started legal action against you in the Supreme Court you will have to apply to the Supreme Court for a stay rather than the CTTT.

Your application for a stay will have to be part of a hardship variation application. You should get legal advice about how to do this.

What can I do if the lender refuses my request for a hardship variation or does not respond to my letter?

If possible you should not stop making repayments! You may not be able to pay the whole amount. However if you are asking to pay a reduced amount you should at least pay that amount to show that you are able to do so.

Your next step will depend on which of the following situations applies to you:

If the lender has NOT started Court action against you, and is a member of an EDR scheme

You have two options:

- You can write to the EDR scheme to see if they can help you sort out your problem with the lender. You must do this before the lender starts court action against you! Once court action has started you will not be able to go to an EDR scheme unless the lender agrees (which is rare). The lender must wait until the dispute has been dealt with by the EDR scheme before it can start Court action against you.

If your lender is in the Banking and Financial Services Ombudsman scheme (BFSO) - one of the EDR schemes - the way the lender dealt with your hardship request will be reviewed by the BFSO. However the BFSO will not decide what is an appropriate repayment arrangement. The lender may be required to reconsider your circumstances, but the lender will have the final say about whether or not it will accept any arrangement. Some other EDR schemes can make a decision to grant a variation on the grounds of hardship that will be binding on the lender.

- You can apply to the CTTT or the Supreme Court for the hardship variation. (If the lender has already started Court action in the Supreme Court you will need to apply for the hardship variation in the Supreme Court).

Although you can go straight to the CTTT or Court rather than going to an EDR scheme, it is preferable to go to the EDR scheme first if one is available. EDR procedures are cheaper and more consumer-friendly. An unfavourable decision from an EDR scheme will not prevent you from going to the CTTT or the Supreme Court later.

The CTTT or Court is only likely to grant the hardship variation you have requested if you can show that it is likely that you will be able to pay back your loan within a reasonable time.

If the lender has NOT started Court proceedings against you and is NOT a member of an EDR scheme

You can apply to the CTTT or Supreme Court for a hardship variation. You will need to show that it is likely that you will be able to pay back your loan within a reasonable time.

If the lender HAS started Court action against you

If the lender has started Court action against you, you will have no choice but to apply to the Supreme Court for a hardship variation. (If the lender is in an EDR scheme you could ask it to let the scheme deal with the matter, but lenders rarely agree to this).

You must apply to the Court for a hardship variation before the lender has obtained a judgment for possession. You do this by lodging a document called a cross-claim. Remember, the lender can get judgment if 28 days has passed from the time you received a Statement of Claim and you did not lodge a Defence with the Court. If you receive a Statement of Claim you should get legal advice immediately!

The Court is only likely to grant the hardship variation if you can show that you will be able to pay back your loan within a reasonable time.

Once Court action has started it is extremely important that you also try to get a stay of enforcement action until the hardship variation is dealt with.

If you haven't yet written to the lender asking for a hardship variation and a stay of enforcement action you need to do so urgently at this stage. You should use the Sample Letter at the end of this brochure. You should get the lender's agreement in writing that it will not ask the Court for judgment until the hardship variation has been dealt with. If the lender will not agree to your request for a stay you will need to ask the Supreme Court for a stay until the request for a hardship variation is dealt with. You should get legal advice about how to do this. You should also read the brochure.

You should read the brochure *'They are trying to take my home.'* Things you can do.

I am NOT eligible to apply for a hardship variation under the Consumer Credit Code. What should I do?

- You can still write to the lender requesting a variation of your loan on the basis of hardship. You can use the

Sample Letter at the end of this brochure as a guide, but delete any reference to the Consumer Credit Code.

You can ask for one of the three options in the Sample Letter, or you can make any other suggestions to vary the loan. You should also ask for a stay of enforcement action until your request has been considered.

- If your lender refuses your request and it is a member of an EDR Scheme, you can write to the scheme to see if they can help you sort out your problem with the lender. All the banks, major non-bank lenders, credit union and permanent building societies are members of an EDR. To find out if your lender is a member of such a scheme call 1300 780 808.

You will not be able to go to an EDR scheme if the lender has already started court action against you, unless the lender agrees—which is rare.

Can I get any financial assistance if I'm having short-term difficulties paying my loan?

There are some possible sources of financial assistance that may be able to help you overcome temporary financial hardship:

- The Mortgage Assistance Scheme can provide a short-term interest free loan (currently up to \$15,000) if a homeowner is experiencing temporary difficulties with home loan repayments through unemployment, having suffered an accident, illness, some other crisis or unavoidable event. You can find out more about the scheme at www.housing.nsw.gov.au or by calling 1800 806 653 or emailing mas@housing.nsw.gov.au
- You may be able to make a claim under an insurance policy. For example, many superannuation funds take out policies to provide benefits to their members in the event of injury or disability.
- You can investigate the early release of any superannuation you have by contacting your superannuation fund and the Australian Prudential Regulation Authority (www.apra.gov.au). **Do not do this unless your problems are temporary.** If you use up what is available from your superannuation and are still not able to meet your

repayments you may find you will lose your home anyway and you will have less superannuation when you retire. It's a good idea to get advice from a financial counsellor first.

IF YOU WILL NEVER BE ABLE TO REPAY YOUR LOAN

Be as realistic as you can about your situation. If you don't think it's likely that you will ever be able to meet your repayments, even if you had a longer time to repay the loan and were able to pay a smaller regular amount, it is unlikely that you will be able to get your loan varied.

EXAMPLE

You are permanently injured due to a work injury. You have received some compensation for that injury. The compensation made a small dent in your mortgage. However you now cannot afford the repayments on your loan even if the term of the loan has been extended and the payments reduced. You do not have enough superannuation to help and there is no money you can expect from sources such as inheritances in the foreseeable future.

If you will never be able to afford to make the repayments you will need to consider selling your home, unless:

- the loan contract was unfair to you at the time it was made, or
- the lender failed to give you the information it was required to give you.

You should get legal advice to work out if either of these situations applies to you.

The longer you do nothing the more likely it will be that the lender will sell your home. You will probably not get as good a price as you might get if you sold it yourself. Also your loan balance will grow in the meantime due to interest on the loan and default charges payable to the lender.

If you decide to sell, but the lender won't give you time to do this, you may be able to apply to the CTTT to get time to sell your home. Your loan will have to be one that is covered by the Consumer Credit Code and must be below \$320,100 (as at 16/2/08). You will need to get legal advice about whether you are able to apply to the CTTT.

WHERE CAN I GET MORE HELP?

LawAccess NSW: 1300 888 529. Free telephone legal information, referrals and legal advice.

Credit and Debt Hotline: 1800 808 488. Free financial counselling and legal advice for people who are experiencing difficulty with consumer loans.

Translating and Interpreting Service (TIS): 13 14 50. The Department of Immigration and Citizenship provides the TIS national interpreting service for people who do not speak English. They can put you through to LawAccess NSW.

Legal Aid NSW wishes to acknowledge the assistance provided by the Consumer Credit Legal Centre NSW in the preparation of this factsheet especially for allowing the use of relevant sections from their publications.

[Address of borrower]
[Date]

[Name of Lender]
[Address of Lender]

SAMPLE
LETTER

Dear Manager,
Request for change on the grounds of hardship

Account name:

Account no:

I/We wish to apply to you for a variation of the above loan contract pursuant to section 66 of the Consumer Credit Code 1996. I/We request the following change:

(CHOOSE ONE OPTION ONLY)

- A reduction of the amount of each repayment to \$ per week/fortnight/month. This change is requested from / / until / / .
- Postponing the repayment due on / / so that it is now due on / / .
With the next [Number of repayments] being due on the following dates / / , / / , [etc.]
- Postponing the repayments due between / / and / / .

I understand that where I am requesting the payments to be reduced or postponed there will be no change in the annual percentage rate and the term of the loan will be extended accordingly. In support of my application I give the following details:

DETAILS OF REASONABLE CAUSE FOR APPLICATION:

(Give details of illness, unemployment or other "reasonable cause" and expected date for recovery/employment.)

DETAILS OF INCOME AND EXPENDITURE:

My current income is: \$[] per week/fortnight/month

My current expenses are:

Rent/mortgage: \$[] per week/fortnight/month

Other loan repayments: \$[] per week/fortnight/month

Other major expenses: \$[] per week/fortnight/month

As can be seen from the above information, I/we will be able to discharge our obligations under the above contract if you agree to the proposed change. I/we ask that you consider this application as a matter of urgency. I/We request you stay all enforcement action while you consider this application. Please confirm immediately in writing that you will do so.

[Full name]