

HOT TIP

Beware of refinancing to save your home when you have defaulted on your loan

You should be careful about refinancing your loan to save your home when you are already in default. If you are in financial difficulty you will often be forced to go to a lender of 'last resort'. There are lenders who target desperate borrowers. These lenders often advertise with slogans like: 'Bad credit? No problem!' and 'Sheriff at the door?' You can identify a lender of last resort because:

- The mortgage broker will charge you a (large) fee
- The loan term will usually be 12 months (definitely less than 5 years)
- You will have to borrow a lot more to cover all the fees
- You will be told you have to sign a declaration that loan is for a business/investment purpose, even if it is not.
- They will find a solicitor for you that you have to pay

If you go to a lender of 'last resort' you will probably have difficulty making repayments. This may lead to you losing your home anyway (with a lot less equity left in your home), as happened to Eli and Liz.

ELI AND LIZ'S STORY

Eli and Liz had a home mortgage for \$170,000. When Eli was made redundant from his job they fell behind with their mortgage repayments. Eli eventually found another job, but the lender said that they were too far behind in their repayments and their house would be sold if they did not pay all the arrears on their home loan within 14 days. Liz saw an advertisement for loans for people in financial difficulty. Eli and Liz managed to refinance their loan but it cost them over \$26,000, including enforcement costs on their old loan. Their new loan also has a much higher interest rate, and they are in trouble again, because Liz is pregnant and will soon have to leave work. They have put their house on the market but their loan balance is now \$205,000 and growing every day with default interest. Liz wishes they had sold the house a year ago, and put the extra \$35,000 in their bank account.

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.

Supreme Court of NSW: 9230 8111. The Supreme Court operates a duty registrar service that provides information about Court procedure.

You need to attend the Court in person between 9am-5pm, Mon-Fri, to get help. The Court is located at 184 Phillip Street (Cnr King Street)

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**

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.

**LEGAL
AID NSW**

“They are trying to take my home.”

Things you can do.

This brochure answers common questions about home repossession. It also has information on where you can get legal help.

WHAT IS HOME REPOSSESSION?

If you decide to buy a home you will probably need to borrow money from a lender. The lender will take a mortgage over the house as security for the loan. This means that if you do not pay the home loan in accordance with your contract with the lender or you breach another condition of your contract (that is, you 'default' on your loan) the lender can take possession of your home and sell it.

When can the lender repossess my home?

The lender can only repossess your home if:

- There is a mortgage over your home
- You have defaulted on the loan agreement (for example, failed to make repayments)
- You have been sent a notice under Section 57(2)(b) of the *Real Property Act*. This is called a 'default notice'. It gives you 30 days to fix the default otherwise the lender can start court action to repossess your home. (The lender doesn't need to send you this notice to take possession of your home, but they usually do because they need to send it before they can sell your home).
- If your loan is regulated by the Consumer Credit Code you must also have been sent a default notice under Section 80 of the Consumer Credit Code. This notice states that you are in default of the loan and that you have 30 days from the date of the notice to fix the problem.
- You did not fix the default within the 30 days
- You have received a Statement of Claim

AND

- You do not lodge a defence with the Supreme Court within 28 days after getting the Statement of Claim. This is called 'filing a defence'.

The Section 57(2)(b) and Section 80 notices may be sent separately, together, or may be included in the same document. They can be sent by ordinary post. If you receive a Statement of Claim and you have not received either of these notices, you should get urgent legal advice. Also, you should not conclude that you haven't received the correct notices without first seeking legal advice. You can find out where to get legal help at the end of this brochure.

How do I know if my loan is regulated by the Consumer Credit Code?

The Consumer Credit Code will generally apply if you have borrowed the money to buy a home for yourself or your family rather than as an investment, or if you've 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 you, 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.

Jack & Jenny's story

Jack and Jenny have three young children. They decided to buy a home. They shopped around and got a home loan with BIG BANK. Their house secured the home loan. Jack lost his job and although Jenny worked part-time they could not afford to make their mortgage repayments. A few weeks after Jack and Jenny had missed their second payment they received two letters from BIG BANK. One letter said that they were in default and had to pay \$1200. It said they had 30 days to pay this and the repayment that was due next week otherwise BIG BANK may begin court proceedings. The other letter was a notice under section 57(2)(b) of the Real Property Act. Jack & Jenny were worried but decided that there was no way they could come up with their next repayment and \$1200. They decided to pay \$200 and hope that they could catch up soon. Two months later they received a Statement of Claim from the Supreme Court - BIG BANK was seeking to repossess their home.

What can I do if I think the lender will repossess my home?

Your options will depend on what action the lender has taken:

If you are having trouble paying your loan but you have not yet received a default notice from the lender

If you are having trouble paying your loan but you have not yet received a default notice, your options are discussed in the brochure *Problems paying your mortgage? Things you can do*.

If you have received a default notice from the lender

If you receive a default notice from the lender under Section 57(2)(b) of the *Real Property Act* and/or a notice under Section 80 of the Consumer Credit Code you need to take immediate action.

If you do not pay the amount asked for in the default notice and also the payment that is due during the 30-day notice period the lender can take steps to repossess your home.

If at all possible you should pay the amount asked for in the default notice and the payment that is due during the 30-day notice period. If you do that you are no longer in default.

You can also 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'. You should read the brochure *Problems paying your mortgage? Things you can do* for more information about applying for a hardship variation and for information about possible sources of financial assistance.

If you have received a Statement of Claim for possession

If you receive a Statement of Claim for possession this means the lender has started Court action against you to take and sell your home. If you receive a Statement of Claim you need to get legal advice IMMEDIATELY.

You have 28 days from the date you receive the Statement of Claim to lodge a form called a Defence and another called a Notice of Appearance with the Supreme Court. If you don't lodge a Defence and a Notice of Appearance in the 28 days then the lender can get 'Judgment for Possession' (judgment) and a 'Writ of Possession'. This means that the Supreme Court has granted the lender the power to repossess and sell your home.

The lender can also get judgment for the amount of money claimed by the lender in the Statement of Claim. This means that if the lender sells your house and the amount received from the sale does not cover the whole of your loan, you will still owe the lender the difference between the amount outstanding on your loan and the money from the sale (less the lender's costs for arranging the sale). Interest and fees will continue to be charged on any amount outstanding.

It is important to get legal advice immediately if you receive a Statement of Claim because a lawyer can help you work out whether you have a defence (that is, a reason to argue that the lender cannot repossess your home). A defence can be technical. For example

it may be that the lender has not met the legal requirements to start Court action to repossess your home because they failed to give you the required notices. Or you may have a defence that the loan contract was unfair in some way at the time it was made.

It is also important to get legal advice before filing a defence because if you don't have a proper defence the lender can claim more costs against you and this will further reduce your equity in your home.

Once you have received a Statement of Claim, you won't be able to apply to an External Dispute Resolution scheme for a hardship variation unless the lender agrees (which is rare). However, if the Consumer Credit Code applies to your loan you can still apply to the Supreme Court for a hardship variation. You should read the brochure *Problems paying your mortgage? Things you can do* to find out more about hardship variations.

If the lender has obtained judgment against you

The lender can 'enforce' the Judgment for Possession by getting a Sheriff's officer to give you a Notice to Vacate your home. If you don't leave by the date stated in the notice, the Sheriff's officer will force you to leave.

If you think you have a defence, and you have a good reason why you did not lodge a defence with the Supreme Court within 28 days after you received the Statement of Claim, you need to seek legal advice urgently.

You may be able to get a 'stay', that is, a postponement of all action against you, to give you time to move out of your home, sell it, refinance it, or to file a defence. You can apply for a stay by seeing a Duty Registrar at the Supreme Court. You can call the Supreme Court and ask what you need to do to see the Duty Registrar. You will need to complete a Notice of Motion and an Affidavit in Support setting out your reasons for requesting a stay. These forms are available from the Supreme Court.

You will not be given a stay for an indefinite period. The Duty Registrar will grant a stay of 14 days at the most. Your case will be listed in the Court at the end of that period to decide whether you will be granted a further stay and, if so, for how long. You should get legal advice as soon as you can about what to take to Court.

The Statement of Claim usually comes with a Notice to Occupier. The Notice to Occupier is for tenants, so if you are the owner of the home you can ignore it.