

# HOME LOAN DEFAULT

**Disclaimer:**

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If you are in default on your home loan (behind on 1 or more repayments), it is important to act as soon as possible and not ignore the situation. You are much more likely to get a reasonable outcome if you address the problem.

## Hardship Variations & Other Options

If you are in default on your home loan, consider applying for a hardship variation. Under section 72 of the *National Credit Code*, you are entitled to apply for a variation of the terms of your credit contract on the grounds of financial hardship. You can seek a hardship variation if:

- you are unable reasonably to meet your obligations under a credit contract because of illness, unemployment or other reasonable cause; and
- you reasonably expect to be able to discharge your obligations under the contract if the contract were changed.

Please refer to our Fact Sheet titled 'Hardship Variations' and sample letter titled 'Application for a Hardship Variation' for more detailed information about hardship variations.

Alternatively, you can apply to postpone enforcement proceedings under section 94 of the *National Credit Code*. This may be an option if you believe that you are able to pay the debt but require more time to organise payment.

If your application for a hardship variation or postponement is rejected, you can apply to an external dispute resolution scheme to consider the dispute. Your credit provider should be a member of either the Financial Ombudsman Service or the Credit Ombudsman Service Limited.

You may also consider other options such as accessing your superannuation. This may be a viable option if it is going to resolve the problem. However, unless the superannuation will cover all of the arrears the credit provider is asking you to pay, the credit provider may repossess the property even if you pay only some of the arrears. You may end up with no superannuation and no property. Consider this with care. We recommend seeing a financial counsellor before exercising this option.

In summary, the main options that you have if you are in default on your mortgage are;

1. Apply for a hardship variation
2. Apply for a postponement

3. Apply to an external dispute resolution scheme if applications rejected
4. Refinance
5. Negotiate with the credit provider to allow you to sell the property
6. There may be other financial options such as accessing superannuation (exercise caution and seek advice)

### **Default Notice**

If you are in default under the credit contract, the credit provider must send a default notice complying with section 88 of the *National Credit Code* and section 106 of the *Transfer of Land Act* before it can enforce the home loan and mortgage. A notice given under the *Transfer of Land Act* must be served personally or by registered post. The notice must give you 30 days to pay any outstanding arrears and any payment that falls due within the 30 day notice period. If you pay the outstanding arrears and your normal repayment before the 30 days expires, both notices are satisfied and the contract is reinstated.

If you do not pay the arrears and any repayment that falls due during the 30-day notice period, the lender can take steps to repossess and sell the mortgaged property.

### **Enforcing the Home Loan & Mortgage**

If the lender decides to enforce the credit contract and mortgage, it can simply request that you (or the occupier) vacate the property and give vacant possession to the credit provider. However, more commonly it would start legal proceedings in the Supreme Court. The credit provider will generally ask for possession of the property and/or the payment of all monies due under the contract. Generally speaking, in the absence of any valid defense, the Supreme Court will give judgment to the credit provider.

### **If the credit provider obtains a Judgment against You**

If the credit provider obtains a judgment against you, the credit provider or Sheriff (an officer who enforces court orders) may serve a Notice to Vacate. This usually gives approximately 21 days to vacate the property.

However, even after judgment has been obtained it may be possible to negotiate with the credit provider to delay enforcing the judgment. However, any agreement not to enforce the judgment is at the credit provider's discretion.

### If the Credit Provider Repossesses the Property

If the credit provider takes possession of the property, they will generally sell it by public auction. If there is any money left after discharging the mortgage and paying enforcement and selling costs, it will be returned to the debtor. If the proceeds of the sale do not discharge the mortgage and cover enforcement and selling costs, the debtor will be liable to the credit provider for the shortfall debt.

### Further Assistance

1. Consumer Credit Legal Service WA (CCLS) on 9221 7066.
2. Financial Ombudsman Service at [www.fos.org.au](http://www.fos.org.au) or 1300 78 80 80.
3. Credit Ombudsman Service Limited [www.creditombudsman.com.au](http://www.creditombudsman.com.au) or 1800 138 422.
4. Financial counsellor - Financial Counsellors Resource Project at [www.fcrp.org.au](http://www.fcrp.org.au) or 9221 9411 and follow the link at 'locating a financial counsellor'. Or the Financial Counsellors Association of WA at [www.financialcounselling.org](http://www.financialcounselling.org) or 1800 889 364.

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