

### ***'The Bank' is trying to take my home... What is the process and what can I do?***

When you buy a home, it is common to borrow most of the money from another party, usually a bank. This party is called the **lender**.

You may have an agreement with the lender to pay the money back through regular payments over a certain period of time. This arrangement is called a **mortgage**. If you fail to make one of the agreed payments you are in breach of the mortgage agreement. This is called a **default**.

If you default on your mortgage, the lender may try to get a court order to take possession of your property so that the lender can sell your property. This is called an **Order of Possession**.

The following flowchart outlines the process generally in South Australia:

### Stage 1: Notice of Default

#### Notice of Default

- If your lender wants to repossess your home, they first have to serve you with a **Notice of Default**.
- A Notice of Default must be in writing and 'served' to you in one of the following ways:
  - in person
  - left at your last known residence or place of business
  - affixed or left for you at the mortgage property, or
  - sent by registered post to your last known address.

#### 1-month period

- The law requires that your lender give you **1 month** after being served with a Notice of Default to remedy the default. Unless you make other arrangements with your lender, this means you will have to pay the outstanding arrears as set out in the notice of default.
- If you do nothing, the lender can file for a Possession Order in the Supreme Court, allowing them to have you evicted and take possession of your home. Filing for a Possession Order is expensive and the cost will likely to be passed on to you. You need to **act immediately** to avoid additional costs.

#### What can you do?

- You have a number of options you can pursue during this 1-month period, which may allow you to keep possession of your home:
  - You can ask the lender to postpone filing any court action in order for you to negotiate for one or more of the following:
    - time to get legal advice/financial counselling
    - a hardship variation to your home loan
    - time to pay the amount in arrears
    - time to refinance
    - time to correct any errors in your mortgage account, or
    - time to sell the property yourself.
  - If you agree that the lender should sell your property, you can ask the lender to either not apply to the court for a Possession Order or ask the court to remit the filing fee on the grounds you cannot pay.

First and foremost, you should use this time to make an honest and comprehensive assessment of your finances.

**Ask a Financial  
Counsellor for free  
assistance!**  
**(08) 8342 1800**

### Lender's response

- If the lender agrees to postpone legal action, and you can meet the proposed conditions, you should get the agreement in writing.
- If the lender doesn't agree to postpone legal action and/or negotiate an acceptable resolution before the date given to you on the Notice of Default, you should immediately file a dispute with the relevant Ombudsman. Contact the Consumer Credit Law Centre SA on (08) 8342 1800 if you need assistance.

## Stage 2: Summons for an Order for Possession

### Lender commences court action

**BE WARNED:**  
Generally, once court action begins, all associated costs, including court fees and solicitor's fees will be payable by YOU!

- Starting court action:
  - Generally a lender will **serve** you with a '**Summons under Part XXVII of the Real Property Act**'. This is a court document requiring you to attend a court hearing because the lender is seeking a court order to take possession of your property.
  - Service of a Summons for an Order for Possession is generally required to be made personally. However, the Supreme Court can make other orders for service.
  - Notices are also required to be served to other occupiers of the property, such as tenants.
  - If you are considering one of the following:
    - a hardship variation
    - access to superannuation to pay the arrears
    - time to sell your property, or
    - time to refinanceand you have not negotiated a resolution with the lender, you should seek legal advice **before** the court hearing.

16 days

- A court hearing to make an Order for Possession must be held at least 16 clear days since you were served with the Summons.
- At the hearing, the court will determine if the lender is entitled to an Order for Possession.

## Stage 3: Court hearing

### Court hearing

If you don't have a defence, you may still be able to ask for an adjournment to seek:

1. financial counselling and/or
2. legal advice and/or
3. time for other relevant action.

Keep in mind that adjournments are generally granted for only short periods of time, eg 2-6 weeks.

- The hearing is known as a '**summary**' hearing. Summary hearings are **in front of a judge** and are usually **very quick**. A summary Order for Possession can readily be granted if the judge is satisfied that the lender is entitled to an Order for Possession and that you have no reasonable defence. (Generally a lender will be entitled to a Possession Order if (a) your mortgage is in default, **and** (b) you have been served with the Notice of Default, **and** (c) have not paid, **and** you have been served with a Summons).
- **HOWEVER**, you may still be able to have the matter adjourned for a specific, relevant purpose, for example, to get legal advice, to see a financial counsellor, to seek funds to pay your arrears, to sign an employment contract, etc. Adjournments are limited in time—**take action BEFORE the hearing**. Make appointments, send in forms, etc.

Attending  
the hearing

Outcome of  
hearing

- If you do not attend your hearing, you will have no opportunity to give the court reasons why your home shouldn't be repossessed and **it is likely that the judge will order against you** and grant the lender permission to take possession of your home.

The court may:

- **grant the Order for Possession:**
  - If you do not attend your hearing and the court is satisfied the lender is entitled to an Order for Possession, the court may grant the order.
  - NOTE: A dispute over the amount owing in arrears is not a reason for the court not to order possession. The court can still order possession if the lender can show you are in arrears—the exact amount can be finalised later.
- **adjourn the hearing:**
  - if you have requested additional time to obtain legal advice or financial counselling
  - if you have lodged a dispute with the relevant Ombudsman, the court will likely adjourn the hearing for a time to allow the Ombudsman to resolve the dispute
  - if you are trying to resolve the matter such as:
    - arranging payments to pay outstanding amounts owing (eg refinance, accessing your superannuation)
    - entering into a variation agreement dealing with how you will pay the arrears and future payments, or
    - asking for time to sell the property on your ownthe court *may* adjourn the hearing to allow time for you to make acceptable arrangements with the lender.
  - if the court decides the matter should go to a full trial.
- **dismiss the case:**
  - for example, if you have paid the arrears.

If an Order for  
Possession is made

14 days to vacate.

- The Order for Possession is generally served on you personally. However, the lender can ask the Court to be allowed to serve the Order on you in a different manner.
- An Order for Possession is a notice to **vacate the property by a certain date**.
- Generally, you will have 14 days from the date of service of the Order for Possession to vacate the property. However, in some circumstances, for example, if you have executed a Contract of Sale and settlement is pending, the Court *may* order that you be given more time.

## Stage 4: Taking possession

If you vacate  
within 14 days

- The lender will **take vacant possession of your home** and sell it—often at auction.

### If you do not vacate

- If you do not vacate, the lender can apply to the court for a Warrant for Possession. The Warrant will allow the Sheriff to evict you from the property, **by force if necessary**. The Warrant is valid for 12 months.
- If more than 6 months have passed since the Order for Possession was granted, the lender must serve you a notice of intention that they are applying for a Warrant for Possession. In these circumstances you will have 10 days from the date of the notice to object and request a court hearing. You should seek legal advice to determine whether you might have grounds for an objection.
- Once you are evicted, if you re-enter your home you may be held in **contempt of court**. This means that you could be arrested and fined or imprisoned for up to 40 days.

## Stage 5: Sale

### Sale of your home

- The lender will generally engage a **real estate agent to sell** the property. The costs of hiring the agent as well as costs associated with the sale such as tidying up and preparing the property for sale may be recovered from you.
- The lender may agree to allow you to sell your home on your own. The earlier in the repossession process you make this request, the more likely the lender is to agree. Selling your home on your own, and selling it **sooner rather than later**, may result in a better financial outcome for you—you may obtain a higher sale price and the costs payable by you to the lender may be reduced.

## Stage 6: Payment

### What you pay

- The lender can ask you to pay the amount you owe them under the terms of the mortgage, including the amount in arrears as well as legal enforcement costs and costs associated with the sale of the property.

### How you pay

- Generally, the amount owing will be **taken from the sale of the home** and any **remainder returned to you**.

### Shortfall

- **If you owe more** than what can be repaid by the sale of the property, you remain financially liable to the lender for the shortfall. If you do not pay the shortfall, the lender may take further legal action against you to recover that amount.

### Frequently asked questions

#### ***I can't make payments on my mortgage, what should I do?***

- If there is a **short-term** reason why you **cannot** make repayments, you may be able to vary your mortgage. Contact your lender and request **financial hardship**. There are a number of hardship options available depending on your lender and your circumstances. The lender is required by law to consider your request, however, **they are not required to agree**. Contact the Consumer Credit Law Centre SA on **(08) 8342 1800** and make an appointment to speak to a Financial Counsellor for more information and assistance.
- If your financial circumstances are unlikely to improve, you may need to consider selling your home. By taking charge of the sale process you have a better chance of:
  - minimising lender late fees
  - avoiding enforcement charges and legal fees
  - ensuring that you obtain the best possible sale price for your property, and
  - maximising your post-sale 'cash-in-hand'.

#### ***Does the lender have to go to court to get possession of my home?***

- A lender can take possession of a property without a court order, however, they will generally only do so when they know the property is vacant. This is because evicting mortgagors without a court order exposes a mortgagee to potential liability if their actions are found to be wrongful.

#### ***What happens if I have a guarantor(s) on my mortgage?***

- If a guarantor is included on the mortgage, the guarantor will be notified of the default and the amount owing. If, after a reasonable period of time, you or the guarantor(s) have not repaid the amount, a notice of default will be issued to both you and the guarantor(s).
- If the arrears are not paid, and the home must be sold, the guarantor is financially liable for any shortfall up to the amount they agreed to in the mortgage/guarantee contract.
- If the guarantor is unable to pay the shortfall, they could lose their own home.

#### ***If the lender takes possession of my property, can I get it back?***

- Even if the lender has taken possession of your property, in certain circumstances you may still be able to reclaim it.
- This option can remain open until the property has been sold.
- To regain possession of your home you will need to be able pay all outstanding arrears and show that you can maintain payments into the future or, alternatively, pay out the mortgage and associated fees/charges, for example, by refinancing.
- Contact the lender or (the lender's solicitors) to discuss. You can also contact the Consumer Credit Law Centre for information and advice on how to proceed.

### Know the signs of mortgage stress!

You are in mortgage stress if you have defaulted on or are about to default on your mortgage and one or more of the following is true:

- you cannot pay your mortgage arrears unless you don't pay your council rates or utility bills or car registration or insurance or the kids' school fees, or any other ongoing financial obligation
- you are in financial difficulty that is likely to last longer than 6 months
- you cannot meet your current financial obligations without accessing your superannuation
- your only income is from Centrelink
- you find yourself further in debt each month.

If you are experiencing mortgage stress, contact the **Consumer Credit Law Centre SA** for free legal advice and/or financial counselling (see our complete contact details below).

**The earlier you seek assistance, the more options you may have available to you.**

### FREE information, assistance and advice

The **Consumer Credit Law Centre SA** is a community legal centre, which offers free legal advice and financial counselling services, and can be contacted at any step of the process, even after court proceedings and sometimes after judgment.

**Contact us** to discuss your situation and find out what your options may be.

Consumer Credit Law Centre SA  
Ph: (08) 8342 1800  
consumercredit@unitingcommunities.org  
[www.consumercreditsa.org](http://www.consumercreditsa.org)

**This fact sheet is a joint project of the Consumer Credit Law Centre SA and law students from the Clinical Legal Education program at the University of Adelaide.**

This fact sheet is for information only and is not a substitute for legal advice. It is recommended that you get legal advice about your situation. For information and help, see our webpage at: [www.consumercreditsa.org](http://www.consumercreditsa.org)