

The Credit Contracts and Consumer Finance Act

# Buy-back transactions



This fact sheet provides an overview of what a buy-back transaction is and explains the rules and consumer protections that apply to this type of transaction.

A buy-back transaction is where a homeowner transfers their home (or an interest in their home) to someone else who typically pays their debts or gives them money. The homeowner has the right to continue living in the home, usually paying rent, and to buy it back at some time in the future.

Under the Credit Contracts and Consumer Finance Act (CCCF Act), the homeowner is referred to as an occupier, and the person they have transferred their home to is known as a transferee. Sometimes the occupier and the transferee are introduced through a third party or broker, called a buy-back promoter.

A buy-back transaction falls under the CCCF Act if:

- the occupier transfers (or agrees to transfer) an interest in their home to someone else
- the occupier was living in the home at the time of the transfer after the transfer, the occupier (or someone else they have nominated) has the right to continue living in the home or on a part of the property
- there is an agreement between the transferee or buy-back promoter and the occupier that the occupier can buy the home back in the future
- the occupier is a private individual who enters into the transaction primarily for investment or for personal, domestic or household purposes.

The CCCF Act sets out rules for transferees and promoters before and during a buy-back transaction. It also allows the court to deal with any buy-back transaction if it is oppressive, even up to 3 years after the contract has ended.

 You can read more in our fact sheet

*Oppressive contracts: protections for borrowers*

at [www.comcom.govt.nz](http://www.comcom.govt.nz)

## Deal with problems as soon as possible

Occupiers who have concerns about their buy-back transactions, or the behaviour of the transferee should act quickly and seek legal advice to address those concerns. The earlier an occupier takes action, the more options they are likely to have to remedy the situation.

## What rules apply to buy-back transactions?

A transferee must comply with the Responsible Lending Principles in relation to the buy-back transaction. That means that they must exercise the care, diligence and skill of a responsible transferee.

Before an occupier enters into a buy-back transaction, the transferee must:

- give the occupier initial disclosure
- make sure the occupier has had independent legal advice.

If the occupier has been introduced to the transferee by a buy-back promoter, and the transferee is not usually involved in buy-back schemes or lending, it is the promoter who must make sure the occupier gets initial disclosure and independent legal advice.

In addition, a transferee must:

- allow the occupier to lodge a caveat against the home
- continue to provide disclosure if there are agreed changes to the transaction or the occupier asks for it (variation and request disclosure)
- not charge unreasonable fees
- not include oppressive terms in the contract or treat an occupier oppressively.

### What is a caveat?

A caveat is something on the title of a property that flags that someone has an interest in a property and means it cannot be sold, mortgaged or otherwise dealt with unless the caveat is removed.

### Initial disclosure

A transferee or promoter must give the occupier initial disclosure and a copy of all the terms of the buy-back transaction before entering into any arrangement or contract that forms part of the buy-back transaction. This could include, for example, a sale and purchase agreement, tenancy agreement and agreements containing the option to repurchase the home.



The transferee (or promoter) must give the occupier a written disclosure statement that includes all of the information in the table below that applies to the transaction:

|  |  |
|--|--|
| <b>Transferee's full name and address</b>  |  |
| <b>Amounts paid to the occupier or paid for their benefit</b><br>What the transferee will pay to the occupier or to someone else on their behalf | The transferee must set out: <ul style="list-style-type: none"><li>→ the amount, timing and details of what the occupier will be paid</li><li>→ any discharge, payment or consolidation of pre-existing debts the occupier has</li><li>→ the total of all amounts (if known).</li></ul>  |
| <b>Right to occupy</b><br>The occupier's right to occupy the land  | The transferee must set out: <ul style="list-style-type: none"><li>→ when the right to occupy begins</li><li>→ the date of the agreement giving a right to occupy</li><li>→ the transferee's address for service</li><li>→ the amount of any bond</li><li>→ any rent the occupier must pay</li><li>→ how often rental payments are due and how much they are</li><li>→ the place or bank account number where any rent must be paid</li><li>→ any solicitors fees the occupier must pay</li><li>→ any real estate agent fees the occupier must pay</li><li>→ any charges related to the right to occupy the occupier must pay</li><li>→ if the occupier must pay for metered water</li><li>→ a list of any goods provided by the transferee such as household chattels</li><li>→ if the right to occupy is for a fixed term, the date it will end.</li></ul> |
| <b>Right or understanding to repurchase land</b><br>The occupier's right to buy back the land  | The transferee must set out the terms of the occupier's right to repurchase the land, including the purchase price or the method the transferee will use to calculate it.  |

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|---|---|
| <b>Right or understanding to repurchase land</b><br>The occupier's right to buy back the land                               | The transferee must set out the terms of the occupier's right to repurchase the land, including the purchase price or the method the transferee will use to calculate it.   |
| <b>Fees and charges</b><br>Any charges the occupier must or may have to pay under the transaction                           | The transferee must set out: <ul style="list-style-type: none"> <li>→ any fees or charges that apply or may apply to the transaction</li> <li>→ when the occupier must pay the fee or charge (if known)</li> <li>→ either the amount of the fee or charge or how the transferee will calculate it.</li> </ul>   |
| <b>Payments required</b><br>What payments the occupier must make under the transaction                                      | Where there is more than one payment, the transferee must set out: <ul style="list-style-type: none"> <li>→ the amount of each payment or how the transferee will calculate each payment</li> <li>→ when the first payment is due</li> <li>→ how often the occupier must make payments</li> <li>→ how many payments the occupier must make (if known)</li> <li>→ the total amount of all payments over the course of the transaction (if known).</li> </ul> |
| <b>Buy-back default fees</b><br>Any fees an occupier must pay if they breach the terms of the transaction                   | The transferee must describe any default fee that an occupier may have to pay, and in what circumstances they may apply.  |
| <b>Consent to electronic communications</b><br>Confirmation that an occupier can contact a transferee by email, fax or text | This only needs to be included if the transferee is happy to be contacted by the occupier in this way.  |

## Independent legal advice

Before an occupier enters into any part of a buy-back transaction, the transferee or promoter must make sure the occupier has had independent legal advice. Independent legal advice can only be given by a lawyer who has no interest in, or relationship with, the transferee or anyone else promoting the buy-back scheme.

The lawyer must also witness the occupier's signature on every contract or document that forms part of the buy-back transaction and certify that they have explained the effect and implications of the contract or document before the occupier signed.

## Right to caveat

An occupier has the right to protect their home by lodging a caveat on the property with the Registrar of Land Information New Zealand. A caveat means the property cannot be sold, mortgaged or otherwise dealt with unless the caveat is removed, which has to be done with the occupier's consent or by court order.

If a transferee includes anything in the contract saying that the occupier cannot lodge a caveat, it will have no effect, and is likely to breach the Fair Trading Act.

Occupiers should be cautious if their contract has a power of attorney clause, as it could be used to remove the caveat. This would mean the property could be sold or mortgaged without the occupier's knowledge.

## Variation disclosure

If both the transferee and occupier agree to change the terms of the transaction, the transferee must give the occupier full details of the change before it happens.

A transferee may have other legal obligations to advise the occupier of any changes to the arrangements, or any power they are planning to exercise, such as increasing any rent payments under a related tenancy agreement, requiring occupiers to pay for maintenance, or renovations. The CCCF Act does not affect these obligations.



## Request disclosure

An occupier may ask the transferee in writing for information about:

- the amount, timing and number of payments the occupier must make under the transaction
- details of any changes made to the transaction since its start
- a copy of any disclosure statement that the transferee has already provided or should have provided before the request was made.

A transferee must provide request disclosure within 15 working days of either:

- being asked for it
- or
- the occupier paying a fee for it – the fee has to be disclosed in the contract.

A transferee does not have to provide request disclosure if either:

- the transferee has already given the information to the occupier in the previous 3 months
- or
- the occupier asks for the information more than a year after the transaction has ended.

If there is little or no opportunity for an occupier to negotiate the terms of the buy-back with the transferee, it is likely to be a standard form consumer contract. A transferee needs to make standard form buy-back terms publicly available, prominently and clearly on their internet site if they have one or in their business premises if they have them. Any person can request a copy of standard form contract terms used by a transferee and they must be provided immediately.

🔗 You can read more in our fact sheet *Disclosure overview* at [www.comcom.govt.nz](http://www.comcom.govt.nz)

## Fees

A transferee must disclose any fees under a buy-back transaction and these fees must be reasonable. This includes any default fees the transferee might charge if the occupier breaches the terms of the transaction.

The court can reduce or cancel an unreasonable charge or fee.

If a third party charges a fee to a transferee and the contract gives the transferee the right to pass it on to the occupier, it must be passed on at cost. The transferee must not charge any premium, commission or mark-up on the fee. They must also pass on any discounts or allowances.

## Protection from oppressive buy-back transactions

A transferee cannot include oppressive terms in a buy-back transaction and they cannot treat an occupier oppressively – either when they are signing an occupier up to a buy-back scheme, or during it.

The CCCF Act gives the court “reopening” powers to deal with any buy-back transaction it believes is oppressive. This can include cancelling or amending the contract or ordering a transferee to transfer ownership of the home back to the occupier. However, if the transferee no longer owns the home, it may not be possible to return it to occupier.

The court can reopen a buy-back transaction at any time during the course of the transaction and up to 3 years after the transaction ended.

🔗 You can read more in our fact sheet *Oppressive contracts: protections for borrowers* at [www.comcom.govt.nz](http://www.comcom.govt.nz)

### Need to know more about buy-backs?

You can read more about buy-back transactions in our other fact sheets available at [www.comcom.govt.nz](http://www.comcom.govt.nz) including:

- Disclosure
- What happens if a lender breaches the CCCF Act?
- Oppressive contracts: protections for borrowers

This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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