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Problems with your loan



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This guide is the last of a series of three which explain what you need to know if you are borrowing money. These guides give you practical guidance about your rights and what you need to be aware of:

- before signing up to a loan
- during your loan, and
- if you have problems with your loan.

The Credit Contracts and Consumer Finance Act 2003 (CCCF Act) is a law that helps protect you when you are borrowing money for personal or domestic reasons. The CCCF Act sets out rules that your lender must follow when lending you money.

These rules mean that if you have problems with your loan your lender must:

- act carefully and responsibly at all times, and treat you reasonably and with respect
- consider a hardship application if you make one
- follow a particular process if they repossess your property
- not act oppressively.

1. What can you expect from your lender?

Your lender must meet a set of '**lender responsibilities**' throughout your loan.

When you are having problems with your loan, the most important lender responsibilities are that your lender must:

- treat you and your property **reasonably and ethically**
- give you information that is **clear, concise and accurate**
- help you to make **informed decisions** about your loan, including when any changes are made
- ensure the loan agreement is **not oppressive** and that they do not treat you oppressively.

If you are having problems with your loan, you or your budget adviser can remind your lender of the lender's legal responsibilities. More information on these responsibilities can be found in the *Responsible Lending Code*, which is available on the Consumer Protection website at www.consumerprotection.govt.nz.



2. Struggling to make payments?

If you are struggling to make payments on your loan, it is important to get help quickly. You have two main options:

- Talk to your lender as soon as possible to see if they will change your loan terms to help you, for example by extending the length of your loan, or reducing your payments for a short time.
- If you meet certain criteria, you can make an application to your lender for hardship relief – see below.

In many cases it will be helpful to speak to a budget adviser. A budget adviser can help you to understand your options and help you talk to your lender. Your lender does not have to change your loan, but it is often in their best interests to help you get back on your feet.

3. What can happen if you miss payments?

It depends on the terms of your loan. From your lender's point of view, the most important commitment you make is to repay the agreed amounts at the agreed times – so there can be serious consequences if you fail to do so.

The consequences when you miss a payment can include:

- being charged extra (default) fees and/or interest
- repossession of items that you have provided as security (covered later in this guide)
- the guarantor gets asked to repay the loan (if it was guaranteed)
- the lender takes you to court.

The last two of these are not covered here – see our website for more information.

If your lender takes legal action against you, you should consult a lawyer or Community Law Centre without delay.

Default fees and interest

If you miss payments on a loan, it can cost you extra money – on top of repaying the missed payments. What you will have to pay depends on the terms of your loan:

- you could be charged extra (default) fees
- you could be charged a higher (default) interest rate.

A lender can only charge **default fees** to cover the costs they incur when you fail to make your payments.



A **default interest rate** is a higher interest rate that is charged if you miss payments or go over your credit limit. There is a limit to how default interest can be charged. It can only be charged until your account is back in order, and only on the amount of missed or over-limit payments, **not** on the whole amount of the loan.

Example

How default interest can be charged on a loan entered into on or after 6 June 2015

You enter into a loan of \$5,000 on 7 June 2015. You miss the first payment of \$100 due on 21 June 2015. Your lender can charge you default interest on the \$100 missed payment only, and only while you remain in default.

If your lender then 'calls up' the loan, you are required to repay the outstanding balance on the \$5,000 loan in full.

Your lender **cannot** charge default interest on the outstanding balance and must charge you the agreed annual interest rate only.

Make sure you read your loan documents carefully so that you know what extra interest and fees you might have to pay if things go wrong.

If you think you are being asked to pay unreasonable default fees or interest, see your budget adviser, report the lender to us or go to the Disputes Tribunal (see below).



If you are struggling with payments, talk to your lender or a budget adviser at the first opportunity, ideally BEFORE you miss a payment.

4. Hardship relief

When it becomes hard to meet your loan commitments, you can ask your lender to help. It can also be a good idea to speak to a budget adviser for their practical guidance.

Talk to your lender

Lenders will often want to help borrowers who are in difficulties, so that they can get back on their feet and continue paying their loans back.

Your lender is required to act reasonably and ethically when problems arise. If you are struggling to meet your commitments, speak to your lender at an early stage and see if any changes can be agreed that might assist you.

Making a hardship application

You can also make a formal application to your lender to ask them to consider changing your loan to help with your repayment difficulties.

This sort of application is called a **hardship application**.

What changes can be agreed?

Your lender can agree with you to change the loan terms to:

- extend the term of the loan and reduce the amount of each payment, or
- postpone payments for a period of time (a payment holiday), or
- extend the term of the loan and postpone payments for a period of time.

Advantages of applying

If you qualify to make a hardship application, there are some advantages when compared with informally talking to your lender:

- Your lender is required to consider the application within certain timeframes, and is not allowed to simply ignore it (see below for timeframes your lender must follow).
- Your lender does not have to agree to make changes, but if they decline your application they must give you written reasons why your hardship application has been declined and they must tell you that you can ask a court to review the decision.
- If your lender does not agree to make changes, or ignores your application, you have the right to apply to the Disputes Tribunal or a court to change the loan terms. Ignoring your application would also be likely to breach your lender's responsibilities to you.

If changes are made, these can provide temporary relief that helps you get your loan back in order. But note that temporary relief is likely to increase the overall amount owing on a loan (by expanding the loan's length or the number of payments).

Criteria for making an application

You will qualify to make a hardship application if you meet all the following three criteria:

- you have suffered a hardship you could not reasonably have seen coming, for example:
 - illness
 - injury
 - loss of employment
 - end of a relationship (including death of a spouse or partner)

and

- as a result of the hardship, you cannot reasonably meet your loan payments

and

- you reasonably expect that you could meet your commitments if the loan was changed by:
 - extending the loan and reducing each payment, or
 - postponing the payment dates for a time, or
 - extending the loan and postponing payments for a time.

The timing of your application is very important, as you only have a short time to make a hardship application once you fall behind in your payments.

You cannot make a hardship application if you:

- are 2 months or more behind in your payments, or
- have failed to make four or more consecutive payments on the due dates, or
- have been in default for 2 weeks or more after receiving a repossession warning notice or Property Law Act notice.

However, if one of these situations applies to you and you catch up on your payments, you can make a hardship application at that time.

You can only make one hardship application for the same reason within any 4 month period, unless your lender agrees otherwise.

How to apply

A hardship application must:

- be in writing
- be given to the lender
- explain the reason for the unforeseen hardship and the difficulty you are having making payments
- describe the changes you would like made to your loan to help you deal with your situation.

Your loan terms do not change unless your lender agrees, so you must keep making payments that are due while the lender considers the application.

Your lender cannot take steps to repossess any of your property if you have made an application for hardship and your application has not yet been decided. The only exception to this is where your lender thinks that the property is 'at risk' (see box on page 10 to see what 'at risk' means). In this situation, your lender can repossess property which is identified as security (see box on page 9 to see what 'security' or 'security interest' means) in your loan contract but they cannot take any further steps, such as selling the property until your application is decided.

You can only seek changes that:

- are no more than you reasonably anticipate are needed to get your loan back in order,
- are fair and reasonable to both you and your lender.

Can you claim on payment protection insurance?

Some lenders require or ask you to take out 'payment protection insurance', so that your loan payments are covered if you find yourself in difficulties. Check whether you have such a policy. If you do, it can be a good idea to apply for hardship relief at the same time as making an insurance claim, in case your insurance claim is denied.



If something unexpected happens and you cannot make loan payments, you may be eligible to make a hardship application. Contact your lender quickly.

Fee may apply to changes

A lender must not charge a fee for processing your hardship application. But if the application is successful and the loan is changed, your lender may charge a fee for their costs in making the changes to your loan, provided that the fee:

- is described in the loan contract
- is reasonable – it should not exceed the lender’s costs of doing the paperwork to make changes to your loan contract.

Your lender is not allowed to change the interest rate when you make a hardship application.

You should also remember that changes can help in the short term but they are likely to increase the total amount you owe under the loan.

Lenders obligations and timeframes when considering hardship applications

A lender must do the following things if they receive a hardship application:

Send a written receipt or acknowledgement to you within **5** working days of receiving the application.

Send a written request to you for any further information necessary to decide the application within **10** working days of receiving the application.

If the lender does not request further information, they must decide whether or not to agree to the changes and inform you (in writing) of the decision, within **20** working days of receiving the application.

If the lender has not agreed to the changes, the lender must advise you of the reasons for the decision, together with a clear summary of your rights to apply to the courts to change the terms of the loan.

If the lender agrees to change the loan, the lender must give you specific information about the change before the change takes effect.



If the lender has requested further information from you, the lender must decide whether or not to agree to the changes requested by the later of:

20 working days after making the request for further information,

or

10 working days after receiving the information requested.



Hardship applications and interest rates

Lenders are not permitted to increase the interest rate when a loan is being changed due to hardship.

If your hardship application is declined

If your lender does not agree to change your loan, they need to give you written reasons for the decision. Remember, your lender does not have to agree to make changes, but they must consider your application within the timeframes above.

If your application is declined, you can complain to your lender's Dispute Resolution Service. The contact details of the Dispute Resolution Service must be provided in the information provided to you when you signed up to the loan. You can also ask a court or the Disputes Tribunal to change the loan. It is a good idea to speak to a budget adviser or contact a Community Law Centre if you are thinking of taking these options.



Your lender may not take repossession action against you if you have made an application for hardship and your application has not yet been decided. The only exception to this is where your property is 'at risk'. (see box on page 10 for what this means). If your property is considered to be 'at risk', your lender can take repossession action against you.

5. Repossession action

What is repossession?

When you first entered into your loan you might have agreed that if you do not make payments on your loan, your lender could take and sell some of your property and put the money they get from the sale towards the loan. The right for the lender to do this is called having a **security interest** in your property (for more information see the box below). The process of taking your property away to sell it to repay your loan is called **repossession**.

Your lender should have talked to you about what property was covered by the security interest and explained that it could be repossessed before you entered into the contract. If they did not and they want to repossess your property, you should talk to your budget adviser or Community Law Centre as soon as possible.



What is a security interest?

Sometimes your lender may ask you to give them what is called a '**security interest**' over something you own or that you are paying off. This means that they can take the item from you and sell it if you miss payments or otherwise break the terms of your loan contract. For example, your lender may take security over the car that you are paying off. If you miss payments on your car loan, your lender could seize your car and sell it (unless you quickly catch up on your payments and pay any default fees and default interest owing).

However, lenders may **not** take security over – or repossess – some types of household items and important documents. These items include:

- beds and bedding
- cooking equipment including stoves
- medical equipment
- portable heaters
- washing machines
- refrigerators.

Documents that a lender cannot take a security interest over are:

- travel documents
- identification documents
- bank cards.

The only exception to this rule is where you took the loan out specifically to purchase one of these household items. For example, if you took out a loan to purchase a bed, then the lender can use the bed as security for the loan. Therefore the bed could be repossessed if you fall behind with payments on the loan for the bed.

Your lender may have the right under your loan contract to enter your house or flat to repossess your property, but they must follow a number of clear rules. These rules are summarised below.

As well as following these rules, your lender must treat you and your property reasonably and ethically throughout the repossession process.

For more complete guidance on repossession, read our *Repossession Guidelines* www.comcom.govt.nz.

When can a lender repossess your property?

Your lender can only begin to repossess your property if:

- your lender has a '**security interest**' (see box on page 9) in the property they want to repossess, **and**
- those items are specifically described in the loan contract **and**
- you are behind on your loan payments or the secured property is '**at risk**' (see below).

When can your items be considered 'at risk'?

Your property is 'at risk' when your lender has reasonable grounds to believe that the property has been or will be destroyed, harmed, sold, hidden or otherwise disposed of.

Example: Your lender has a security interest in your car – which you have not yet paid off – and they have a right under the loan contract to repossess it. You have decided to sell the car without telling your lender, and have listed it for sale online. Your lender may consider your car is 'at risk'. This means they can take immediate action to repossess your car without giving you the usual 15 days' notice.

What items can be repossessed?

The only property that can be repossessed is property that is **specifically listed** in the loan contract as being subject to a 'security interest'.

Specifically listed means that there must be an adequate description of the secured property, item by item, that enables it (or them) to be identified – it is not enough to simply describe the items by kind. For example, a loan contract that describes a television being used to secure a loan as a "TV" or even "40 inch TV" is not enough. A good description would include detailed information, such as "40 inch Sony Bravia HD TV model W800B with remote control". Good descriptions avoid any dispute about exactly which items of your property are secured and can be taken, and which cannot.

If you are worried that your lender may repossess your property, check your loan contract to see whether that is allowed and what specific items can be taken. Remember, if you are facing repossession action, you only need to allow those specific items to be seized.



Some household property and important documents cannot be used as security or repossessed.

Know your rights

When you are facing repossession, you still have important rights.

Lender's behaviour

Your lender, or their agent (such as a tow-truck driver who might repossess your car), must treat you and your property reasonably and ethically during the repossession process, including taking all reasonable steps to ensure that:

- your property is not damaged during the process
- any property that is repossessed is adequately stored and protected
- the right to enter your house or flat is not exercised unreasonably.

Warning about repossession

Your lender must give you at least 15 days written warning that they intend to repossess your property. This notice is called a **repossession warning notice**.

The repossession warning notice must include key information that you need to know about the repossession, including what is to be repossessed, why, and what you can do to stop the repossession from going ahead (for example, paying what you owe or insuring items of property where insurance is a requirement under the loan).

The only time your lender does not need to give you a repossession warning notice is if your lender has reason to believe your property is 'at risk'. The lender can take urgent action in this situation (see box above).

Your lender cannot take repossession action unless you have failed to meet your loan obligations by the time specified in the notice, or the 15 days written notice has expired.

Each repossession warning notice expires within 60 days of you receiving it, and after that time, if the repossession has not gone ahead, your lender will have to issue you with a new repossession warning notice if they still want to repossess your property. Extra time must be added to the 60 days if you have made a hardship application after the repossession notice was issued.

Licensing requirement

Lenders and their agents or employees must be licenced or certified. If they are not, they are not permitted to enter your house or flat to inspect or repossess your property. Ask to see the license or certificate of anyone who wants to repossess your property or to enter your house or flat for that purpose.

No repossession while hardship is being considered

If you have made a hardship application, your lender may not take repossession action until the hardship application is decided. The one exception to this is where your lender thinks that property is 'at risk' (see box on page 10).

Timing of entry to property

Your lender can only enter your house or flat (including garages or driveways associated with your place) between 6am and 9pm Monday to Saturday, and they must leave by 9pm.

They cannot enter on Sunday or a public holiday. These are the **permitted times** for entry.

You can agree to entry outside these permitted times, but there are rules your lender must follow when getting your agreement:

- If your lender wishes to seek your agreement to enter your home **outside** the permitted times, your lender must approach you **within** the permitted times – ie, between 6am and 9pm Monday to Saturday.
- Your lender can only ask you to agree to entry outside the permitted times if you have already missed a payment.

Forced entry to your property

Your lender should try to carry out the repossession when you are home. However if you are not home, your lender can enter your house or flat anyway, if they have the right to do so under your loan contract. They should find a way to enter that causes the least amount of damage and take steps to ensure the house is not left obviously open. If you are not home, the lender must also leave a notice explaining that they have entered your house or flat, the date of entry and provide you with a list of any items of property they have removed.

Information you must be given

Your lender must show you certain key documents when they first enter your house or flat:

- A copy of the repossession warning notice (you will not get this if your property is being repossessed because it is 'at risk' – see page 10).
- A copy of your loan contract.
- A copy of the lender's licence or certificate.
- If an agent is carrying out the repossession on behalf of your lender, proof that they have your lender's authority to repossess the property.
- A statement with the address of the house or flat being entered, the date of entry, and a list of items to be taken.
- A statement of your rights following repossession of the property, and your rights to make a complaint about the lender's conduct.
- A copy of your consent if you have agreed to the repossession happening after-hours.

If you were not home when the lender repossessed, these documents must be left for you in a prominent place.

Voluntary surrender of property

Once you have received a repossession warning notice, you can prevent the need for the lender to enter your house or flat and repossess your property, by voluntarily giving it to the lender – this is called **voluntary surrender**.

The rules differ depending on when you entered into your loan:

- For loan contracts signed before 6 June 2015, your lender will need to consent to accept delivery of the property if your loan contract does not allow for it.
- For loan contracts signed after 6 June 2015, you can choose to deliver the property to your lender at the place stated in your repossession warning notice.

What happens after repossession?

Your lender must give you written notice within 14 days of the repossession which gives you information about the repossession and how you can get your property back. This is called the **post-repossession notice**.

It must include key information like:

- the date of the repossession
- a list of things that were taken and an estimate of their value
- what you need to do if you want to get your property back
- what will happen if you do nothing – your property will be sold and you will be liable for the difference between what you owe and what the property is sold for (after expenses are deducted). Alternatively, if there is money left after your loan is paid off from the proceeds of the sale, you will get a refund.

There are two ways that you can get your property back:

- You can **reinstate** your loan by paying any overdue amounts (only the amounts that are in default, not the entire loan) and meeting any other obligations (including paying the lender's reasonable costs of repossession action) so that the loan is no longer in default. Once the loan is reinstated, your lender must return the repossessed property to you. Then the loan will continue as if the default and repossession never occurred.
- You can **settle** your loan by paying back the balance of the loan, doing anything else that you need to do under the loan contract (for example insuring the property) and paying your lender's reasonable costs of repossession action. Once the loan is settled, your lender must immediately return the repossessed property to you and the loan is ended.

To be sure of getting the repossessed property back, you need to reinstate or settle the loan before the lender is legally entitled to sell your property (15 days after you received the post-repossession notice).

Selling the property

If you do not reinstate or settle the loan within 15 days of receiving the post-repossession notice, the lender can put your property up for sale or dispose of it.

You have some rights regarding what happens to your property after repossession. The lender can generally choose any way of selling your property (for example, by auction, private sale or tender), but they must ensure that the sale is commercially reasonable and that they obtain the best price reasonably obtainable at the time.

If the lender does not sell the property within 30 days of the repossession, you can force the lender to sell your property by auction. You may also request a valuation of the property (at your expense) or introduce a buyer to your lender. If you introduce a buyer, your lender must sell the property to them for at least its estimated value, as set out in the post-repossession notice (see above). Introducing a buyer may make it easier for your lender to sell your property.

After selling your property, your lender must apply the money from the sale to reduce your loan.

Within 7 days of the sale the lender must send you a statement of your loan account, including key information like:

- the price your property was sold for
- the lender's costs for selling your property
- the amount left to pay on your loan at the time your property was sold
- the amount left to pay if there is a shortfall between what your property was sold for (minus the sale costs) and what you owed
- if your property sold for more than you owed on the loan, the amount the lender owes you (minus the sale costs).



If you still have a debt after your property is sold, the lender must not add any further interest or fees to the amount of your loan.

More detailed information on all aspects of repossession can be found in our *Repossession Guidelines* www.comcom.govt.nz

6. Oppression by lenders

The CCCF Act also protects borrowers and guarantors from 'oppressive' loan terms and conduct by lenders. 'Oppression' is defined in the CCCF Act as conduct that is oppressive, harsh, unjustly burdensome, unconscionable or in breach of reasonable standards of commercial practice. In effect, oppressive conduct means conduct or terms that are extremely unfair, harsh or unreasonable.

If you think your loan is oppressive, or that your lender has behaved oppressively towards you, you have a number of options as to what to do. One of these is to go to the court for help.

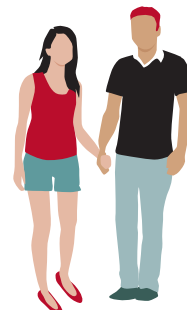
If the court finds that your lender has acted oppressively, it can reopen the terms of the loan and order your lender to give you a refund, credit, or compensation, or to stop behaving in a certain way.

You may also wish to refer to our *Oppression* fact sheet at www.comcom.govt.nz.

7. What are your options if you are having problems with your loan?

If you are having the sorts of problems discussed in this guide, you have a number of options you can take. Problems may include:

- falling behind with your payments
- suffering hardship because something has happened that you could not have reasonably seen coming
- facing repossession action from your lender
- your lender is acting in an oppressive way towards you, or you believe the terms of your loan may be oppressive.



Options if you are having problems

- In the first instance, we recommend that you talk to your lender. Responsible lenders should take any complaints seriously and may agree to adjust the loan terms or change their conduct. More information on the lender responsibilities can be found in the *Responsible Lending Code*, which is available on the Consumer Protection website at www.consumerprotection.govt.nz.
- Go and see the Citizens Advice Bureau (www.cab.org.nz or 0800 367 222), Community Law Centres (www.communitylaw.org.nz), Budget Advice Services 0508 283 438 or a lawyer.
- You may have grounds to complain to your lender's dispute resolution scheme. See the box below about this free scheme.
- You can complain to the Commerce Commission. We are not able to take action on every complaint we receive but we can investigate and take enforcement action in appropriate cases. You can make a complaint through our complaint form at www.comcom.govt.nz or by calling us on 0800 943 600.
- You can lodge a claim at the local Disputes Tribunal. The Disputes Tribunal is a relatively quick, inexpensive and informal way to resolve commercial disputes. Lawyers are rarely allowed to participate. Go to www.justice.govt.nz for further information.

Dispute resolution

Your lender is required to be a member of an independent dispute resolution scheme. Dispute resolution is a free way to deal with problems with your lender.

If you have a problem with your lender, you must first contact your lender to discuss the problem with them. If you are unable to resolve the matter with your lender, you can then report the problem to their dispute resolution scheme.

In the information you received when you signed up, your lender is required to give you information about what to do if you have a problem with your loan or your lender, and how to contact your lender's dispute resolution scheme.

You can also find out which scheme a lender belongs to at: www.fsp-register.companiesoffice.govt.nz

If your loan has been switched to a new lender at any stage during the loan term, your original lender must provide you the details of the dispute resolution scheme of your new lender.

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This is a guideline only and reflects the Commission's view. 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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Contact us with information about possible breaches of the laws we enforce:

Phone: 0800 943 600

Write: Enquiries Team, PO Box 2351, Wellington 6140

Email: contact@comcom.govt.nz

www.comcom.govt.nz

