



Mortgage repossession of a rental property

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Mortgagee repossession of a rental property



When a mortgagor (borrower) defaults on their home loan the mortgagee (lender) is given the right to take possession to sell their secured property and recover their loss. These rights are contained within the terms and conditions that are given to a mortgagor when the mortgage is arranged.

There are several steps that a mortgagee must go through before they are given the right to take possession of the secured property. If the mortgagor fails to attend to the arrears or fails to make any arrangements as to the payment of the arrears, the mortgagee can issue the required notices. The mortgagee will first send a notice pursuant to section 57(2)(b) of the Real Property Act 1900 (NSW). This notice will give the mortgagor 30 days to remedy the arrears figure otherwise the mortgagee will be entitled to issue Court proceedings with the view of taking possession.

Court proceedings are commenced with a Statement of Claim in the possession list of the Supreme Court. A Statement of Claim cannot be served without first issuing the notice described above and waiting the 30 days. If a mortgagor receives a Statement of Claim it is important that they seek legal advice. Unlike the first notice issued, the

Statement of Claim will be personally served on the mortgagor. The Statement of Claim will set out the mortgagee's case against the mortgagor. If there are tenants in the secured property a Notice to Occupier will accompany the Statement of Claim. The Landlord/Agent should forward this 'Notice to Occupier' to the tenant – however there is no legislative requirement for this to occur. It is the mortgagor's responsibility to pass the Notice to Occupier to the Agent, in order for the Agent to forward through to the tenant. If the landlord (mortgagor) does not share this document with the agent, the tenant will most likely get their first notification of any issue to vacate from the Sherrif and will usually contact the agent for clarification.

Any Defence by the mortgagor must be filed within 28 days of service of the Statement of Claim. If a mortgagor ignores the Statement of Claim and does not file a Defence within 28 days the mortgagee can obtain judgment for possession.

The mortgagee needs to obtain an order from the Supreme Court, in order to take back possession of their property. If the court makes an order for possession, the tenant must be notified. The court can make an order even if the tenant

does not know about the proceedings. The mortgagee may send the tenant a written notice asking the tenant to pay the rent to them instead of the landlord or agent. In this instance, tenants should follow the instructions of the mortgagee.

During this time, the mortgagee may show prospective purchasers through the property, however, only if they have provided the tenant with reasonable notice and the time and date of the inspections that have been agreed on.

Tenants' rights and notice to vacate

Tenants residing in the property at the time of mortgagee repossession must be given a Supreme Court Order, not forcibly evicted, and receive at least 30 days' notice to vacate. The tenant can leave before the date in the 30-day notice period and is not required to pay a break lease fee under these circumstances.

The court order will end the tenancy, even if a tenant is on a fixed term agreement and there is still time remaining on the agreement.

The NSW Sheriff's Office enforces the Supreme Court Orders for possession. A Sheriff's Officer will serve the tenant with the 30 days' notice, during which time they are not required to pay rent. Any rent which the tenant has paid in advance for this time should be refunded. Tenants can apply to the NSW Civil and Administrative Tribunal <https://ncat.nsw.gov.au> if the landlord or agent does not pay back the rent money which they have paid in advance.

If the tenant does not move out, the Sheriff can also remove them from the property.

If the landlord or agent knew about the mortgagee's court action for possession prior to the tenant signing the tenancy agreement and failed to inform the tenant, the tenant is entitled to issue a 14-

day termination notice to conclude the tenancy. Additionally, the tenant has the option to submit an application to the NSW Civil and Administrative Tribunal for an order to terminate the tenancy. The Tribunal may also direct the landlord to reimburse the tenant for any expenses incurred as a result of terminating the tenancy. Furthermore, a tenant may seek to negotiate an extension to allow for additional time to vacate the property (at least until the property is sold).

If there remains a shortfall after the sale, the mortgagor remains liable and the mortgagee can issue further proceedings to recover the shortfall.

If a tenant can prove that they need to remain in the property, they can either apply to:

- the Supreme Court if the proceedings have not been finalised, or
- the NSW Civil and Administrative Tribunal if the possession order has already been made

Once a tenant has moved out, the mortgagee can sign a rental bond claim form to authorise NSW Fair Trading to release the bond to the tenant once they take possession of the property. The tenant can also claim the bond without waiting for anyone else's signature.

Further information regarding mortgagee repossession can be found on the NSW Fair Trading Website: <https://www.nsw.gov.au/housing-and-construction/rules/mortgagee-repossession-of-a-rental-property> and The Tenants Advice and Advocacy Services Website: <https://files.tenants.org.au/resources/mortgagee-repossession.pdf>

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