



**Submission by the  
Financial Rights Legal Centre**

NSW Fair Trading

Draft Strata Schemes Management Bill 2015,  
July 2015

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August 2015

## About the Financial Rights Legal Centre

The Financial Rights Legal Centre (*formerly known as the Consumer Credit Legal Centre (NSW)*) is a community legal centre that specialises in helping consumer's understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the Credit & Debt Hotline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. Financial Rights took over 25,000 calls for advice or assistance during the 2014/2015 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

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Credit & Debt Hotline 1800 007 007  
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## Introduction

Thank you for the opportunity to comment on the draft Strata Scheme Management Bill 2015. The Financial Rights Legal Centre (“Financial Rights”) wishes to address the draft sections on payment plans (s. 85), enforcement costs (s. 86) and Internal Dispute Resolution processes (s. 214).

## Payment Plans

Financial Rights is pleased that the draft Strata Scheme Management Bill 2015 has included a provision under s. 85(5)-(7) to enable the establishment of payment plans for payments of overdue contributions. This is an improvement over the current legislation which provides no such ability. However Financial Rights is concerned that as it currently stands the right to establish a payment plan is not mandatory and vaguely defined. Subsections 85(5)-(7) are drafted as follows:

*(5) An owners corporation may, by resolution, agree to enter into payment plans, either generally or in particular cases, for the payment of overdue contributions.*

*(6) The regulations may prescribe requirements for payment plans.*

*(7) The existence of a payment plan does not limit any right of the owners corporation to take action to recover the amount of unpaid contributions.*

Financial Rights is concerned that use of the phrase “generally or in particular cases” under subs. (5) is vague and unclear with respect to what circumstances could lead to the establishment of a payment plan. Financial Rights recommends expanding upon this to clarify those circumstances in which payment plans should be considered, for example, the owner has suffered financial hardship as a consequence of unemployment, illness, a special levy or other reasonable cause.

More importantly though Financial Rights is concerned with the use of the qualifier “may” meaning that the right to agree to enter into a payment plan for the payment of overdue contributions is one held solely by the owners corporation rather than a right for an owner experiencing financial hardship to ask for and obtain an appropriate payment plan. As such, owners corporations will have the right *not* to enter into a payment plan for any reason that the owners corporation should choose, or for that matter, no reason at all. Financial Rights strongly disagrees with this approach and believes that all owners should hold the right to enter into a payment plan under certain circumstances including, as detailed above, financial hardship as a consequence of unemployment, illness, a special levy or other reasonable cause.

The draft legislation as it stands will unfortunately maintain the current situation where there is a perverse incentive for debt collectors and solicitors to be litigious (as they can charge for these services) rather than focus on reasonable repayment arrangements and resolving disputes. The inherent power imbalance remains where the body corporate has no reason or

motivation to be reasonable as they can simply decide to proceed towards making the owner bankrupt. It is this power balance and inherent lack of incentive to resolve disputes that necessitates the establishment of a right for owner's to enter into payment plans, if appropriate, and a right to a review process that the owner can access.

Section 85(6) adds another level of ambiguity, already found under subs. (5). In stating that the "regulations may prescribe requirements for payment plans" it is unclear whether this refers to

- a. the ability for the regulations to require a payment plan and the circumstances in which this should occur, or;
- b. the parameters and rules that payment plans should be regulated by, if they are indeed entered into by an owner's corporation.

Given the use of the word "may" in s 85(5) Financial Rights assumes the Bill refers to the latter meaning of "requirements." This however is far from clear. Financial Rights suggests that the former interpretation is preferable and that new regulations should be established that detail the circumstances and parameters of payment plans. Financial Rights puts forward the following circumstances and parameters, which we believe are reasonable and appropriate:

1. Introduce a right of an owner, who as a consequence of unemployment, illness, a special levy, or other reasonable cause, suffers financial hardship, to apply to the executive committee or agent for a payment plan that could potentially include:
  - a. Deferred payments of whole or part of the levies,
  - b. A reduction of accrued interest charges.
2. Introduce a right of an executive committee or agent to do any of the following:
  - a. Defer the whole or any part of the levies payable by the owner for a reasonable period.
  - b. Approve a flexible payment plan for a reasonable period.
  - c. Write off accrued interest if an owner was unable to pay outstanding levies due to reasons beyond the owner's control, or where the payment of accrued interest would cause the owner hardship.
  - d. Write off accrued interest for an owner who is in receipt of a pension, benefit or other allowance under the *Social Security Act 1991(Cth)*.
3. Introduce a right of an owner to have a decision made by an executive committee or agent to be reviewed by the owners corporation at a general meeting.
4. Prohibit the executive committee or agent accruing legal expenses in responding to a hardship application.

5. Limit disclosure of an owner's financial position to the executive committee or agent and the Tribunal; this information should not be disclosed to all members of an owners corporation.
6. Noting the maintenance of s. 149 of the current Strata Schemes Management Act 1996, introduce an explicit right for an owner in financial hardship to apply to the Tribunal for relief.
7. Introduce a right for an owner to apply to the Tribunal for a stay of enforcement action.
8. Tribunal jurisdiction to be broadened to make orders in relation to financial hardship.
9. Introduce a right for an owner suffering financial hardship to engage in internal dispute resolution process prior to legal action: see further discussion on this below.
10. Introduce a requirement that an owners corporation must, prior to taking legal action, provide a notice giving at least 30 days for the owner to remedy non-payment of levies, otherwise have recourse to rights to seek hardship relief.
11. The notice should include the following:
  - a. Details of the amount outstanding;
  - b. Action necessary to remedy the non-payment;
  - c. The period to remedy the non-payment;
  - d. The date after which legal enforcement proceedings for non-payment may begin if the non-payment has not been remedied;
  - e. Information about the debtor's rights to make an application to the executive committee or agent for hardship relief;
  - f. Information about the type of hardship relief options available;
  - g. Information about the owner's right to internal dispute resolution and the Tribunal, and the contact details for these.

Finally it is Financial Rights' view that not limiting the right of the owners corporation to take action to recover the amount of unpaid contributions (as proposed under s. 85(7)) is too broad and should be limited. Financial Rights believes that the owners corporation should not be able to take legal action while a payment plan is being adhered to.

### **Recommendations**

**Financial Rights recommends expanding upon the phrase "generally or in particular cases" under section 85(5) to clarify that circumstances – such as financial hardship as a consequence of unemployment, illness, a special levy or other reasonable cause – should**

be considered in in establishing payment plans.

Financial Rights recommends amending section 85(5) to ensure that owners hold the right to enter into a payment plan under circumstances of financial hardship.

Financial Rights recommends clarifying section 85(6) and introduce regulations that:

1. ensure a right of an owner to apply for a payment plan including deferred payments of whole of part of the levies, and a reduction of accrued interest charges;
2. enable an executive committee or agent to do any of the following:
  - a. defer the whole or any part of the levies payable by the owner for a reasonable period.
  - b. write off accrued interest if an owner was unable to pay outstanding levies due to reasons beyond the owner's control, or where the payment of accrued interest would cause the owner hardship.
  - c. write off accrued interest for an owner who is in receipt of a pension, benefit or other allowance under the *Social Security Act 1991(Cth)*;
3. create the right for an owner to have a decision made by an executive committee or agent to be reviewed by the owners corporation at a general meeting;
4. prohibit the executive committee or agent accruing legal expenses in responding to a hardship application;
5. limit disclosure of an owner's financial position to the executive committee or agent and the Tribunal; this information should not be disclosed to all members of an owners corporation;
6. create the right for an owner in financial hardship to apply to the Tribunal for relief.
7. create the right for an owner in financial hardship to apply to the Tribunal for a stay of enforcement action;
8. broadens the Tribunal's jurisdiction to make orders in relation to financial hardship;
9. creates a right for an owner suffering financial hardship to engage in internal dispute resolution process prior to legal action: see further discussion on this below;
10. require that an owners corporation, prior to taking legal action, provide a notice giving at least 30 days for the owner to remedy non-payment of levies, otherwise have recourse to rights to seek hardship relief.
11. and that notice include the following:
  - a. Details of the amount outstanding;
  - b. Action necessary to remedy the non-payment;
  - c. The period to remedy the non-payment;
  - d. The date after which legal enforcement proceedings for non-payment may begin if the non-payment has not been remedied;
  - e. Information about the debtor's rights to make an application to the executive committee or agent for hardship relief;
  - f. Information about the type of hardship relief options available;
  - g. Information about the owner's right to internal dispute resolution and the Tribunal, and the contact details for these.

Financial Rights recommends that s. 85(7) should be amended to ensure that owners corporations not be able to take legal action while a payment plan is being adhered to.

## Enforcement costs

Sections 86(1)(c) and (2)(c) empower the Tribunal and a court to order an owner to pay the expenses of the owners corporation incurred in recovering any contributions not paid or interest payable. Financial Rights strongly believes that this should be limited to the recovery of expenses that are reasonable in the circumstances and/or clarify in the section what owners corporations can reasonably charge for enforcement. Owners should have a right to challenge excessive overcharging.

Owners should also be given access to internal dispute resolution processes, before any recovery action is taken.

### Recommendation

**Financial Rights recommends amending section 86(1)(c) and (2)(c) to limit the recovery of *reasonable* expenses and/or clarify what owners corporations can reasonably charge for enforcement**

## Internal Dispute Resolution

The draft Bill states that an owners corporation for a strata scheme “may establish, by any means it thinks fit, a voluntary process for resolving disputes”: s. 214. While Financial Rights supports the introduction of an internal dispute resolution process it is concerned that its establishment is not a mandatory one.

Financial Rights strongly believes that all owners corporations must establish an internal dispute resolution process for resolving disputes. The establishment of an IDR process must be compulsory, on the grounds that, as discussed above, there is an inherent power imbalance between the owners corporation and an individual owner in financial hardship. There remains no motivation for an owners corporation to be reasonable and a perverse incentive to pursue debt collection, litigation and bankruptcy. A right to a review process that the owner can access would provide some balance.

Internal dispute resolution processes should also comply with certain legal standards and requirements (such as procedural fairness) to improve dispute resolution standards across the industry and encourage negotiation. Financial Rights opposes the inclusion of the phrase “by any means it thinks fit” on the simple basis that the process could be easily abused, include unfair procedures and be stacked in favour of the owners corporation. Disputes about payment arrangements must explicitly be allowed access to internal dispute resolution processes.

## Recommendation

**Financial Rights recommends amending s. 214 to ensure owners corporations must establish an internal dispute resolution process for resolving disputes, that complies with certain legal standards and requirements to improve dispute resolution standards across the industry and encourage negotiation**

## Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,



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