

Statutory Review of the Local Government Rating System in NSW

Legal Aid NSW Submission
to the
Independent Pricing and
Regulatory Tribunal

May 2016

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to respond to the statutory review of the Local Government Rating System. This submission is largely focussed on financial hardship in the context of how Local Government manages payment of overdue rates.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as tenancy and housing, debt, employment, social security and access to essential social services.

Legal Aid NSW civil law solicitors advise and represent clients living in social and public housing, as well as home owners, with a particular focus on clients experiencing, or at risk of, eviction or homelessness. This submission draws on the casework experience of civil law solicitors in providing these services.

Should you require any further information or would like to discuss any of our recommendations the contact officers are:

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Summary of Submission in Response to Part 4.7: How Councils Manage Overdue Rates

Casework experience of Legal Aid NSW

Legal Aid NSW advises people seeking assistance in relation to local councils' management of overdue rates. Frequently people seeking advice from Legal Aid NSW about overdue rates have been served with a statement of claim or are in a position where court proceedings have concluded and judgement has been entered against them.

We have observed that many of our clients with complex needs, including those with mental health issues and elderly clients experience a great deal of stress when they are unable to pay their council rates and are advised that the local council has no standard, formal hardship policies in place to assist them.

A preliminary review of recent data from our civil law advice clinics indicates that we have advised over one hundred clients in relation to financial hardship and the payment of council rates. Seventy-five percent (75%) of these clients had a number of debts, including council rates, twenty-one percent (21%) had proceedings commenced against them by their local council and were at various stages in the litigation process including enforcement and bankruptcy. For six percent (6%) of clients, their only financial concern related to management of overdue council rates.

Q 9: What changes could be made to the rating system to improve councils' management of overdue rates?

Legal Aid NSW supports the creation and implementation of a consistent, mandatory hardship policy across all local councils.

Embedding consistent and clear financial hardship policies across local councils is an important development for the following reasons:

- Short term financial hardship is a common occurrence and people should be given an opportunity to recover from their financial difficulties and then resume paying their rates.
- Longer term financial hardship is a reality for many rate payers and they should be given an opportunity to pay their council rates by instalments pursuant to an agreed weekly or monthly repayment arrangement. This provision should be available to all rate payers and not exclusively to those receiving a Centrelink pension.

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- It would bring local council regulation in line with best practice in consumer credit,¹ general insurance,² energy,³ and telecommunications,⁴ where consumers are given protections when in financial hardship.
 - It promotes efficiency in the justice system because it keeps low value matters, where there is no actual dispute, out of the court system.
 - It provides for a non-legal process for the early resolution of the problem of management of overdue rates. This is consistent with the direction of the NSW Civil Justice Strategy being developed by the Department of Justice.
 - It would result in cost savings for local councils and rate payers.

For a hardship policy to be effective, a free and independent oversight system needs to exist to enable rate payers to seek a review of any decision in relation to their hardship request, particularly if that request has been refused.

This external review system needs to be able to make decisions that are binding on the local council and could take the form of:

- a specialist External Dispute Resolution scheme, such as the Energy and Water Ombudsman NSW (EWON), or
- a specific Ombudsman for Local Councils.

Non-payment of rates due to financial hardship

Legal Aid NSW is concerned there is currently no standard approach by local councils in dealing with financial hardship in relation to the management of overdue council rates. There are insufficient processes in place to enable the local council to prioritise working with rate payers in financial hardship to resolve arrears, rather than commencing enforcement proceedings in the Local Court.

The nature of financial hardship: the experience of the Mortgage Hardship Service

Legal Aid NSW often assists clients who are experiencing financial hardship and who are unable to meet their day to day financial obligations. Financial hardship may be short term or long term and is usually caused by a sudden or unexpected change in circumstances. For those on low incomes unexpected expenses, such as medical bills, can also give rise to financial hardship.

¹ National Credit Code (Schedule 1 of the *National Consumer Credit Protection Act 2009*)

² *General Insurance Code of Practice 2014* (Cth)

³ All energy retailers must have a hardship policy approved by the Australian Energy Regulator: http://www.aer.gov.au/retail-markets/energy-retailers-customer-hardship-policies#Retailers-_customer_hardship_policies

⁴ *Telecommunications Act 1997* (Cth) Schedule 3 (“Telecommunications Code of Practice 1997”)

The Law and Justice Foundation of NSW (LJF), in its review of the Legal Aid NSW Mortgage Hardship Service,⁵ identified the following reasons for financial hardship for home owners using the service. These situations often exist concurrently:

- 40.6% were unemployment or had reduced employment
- 28.6% were suffering from illness or injury
- 28.6% had experienced business failure or reduced income from self-employment
- 17.7% had experienced family breakdown.

These circumstances are often cited as the main reasons for clients being unable to pay bills such as loan repayments, council rates, strata levies, rent, insurance premiums and other consumer contracts.

Using the hardship rights afforded by the credit law,⁶ the Legal Aid NSW Mortgage Hardship Service solicitors were able to assist home owners in financial hardship to retain their home or, where this was not possible, sell with dignity, and minimum enforcement and other costs. Of the clients assisted by Legal Aid NSW through its Mortgage Hardship services:

- 56.5% were able to retain their home with a hardship variation to get them back on track
- 11.3% sold their house on a timetable agreed between the parties using a hardship variation
- 11.3% surrendered their property to the mortgagee, and
- 17.7% had outcomes that were pending or not unknown at the time of the report.

The use of hardship variations provided under consumer credit regulations offer a way in which credit providers and people in financial hardship may agree on a timeframe to sell, surrender their property to the mortgagee or get back on track with loan repayments.

Importantly, use of hardship variations enabled many borrowers to retain their home, with numerous ongoing benefits to the individual and society.

In the years since the LJF study, hardship processes have become embedded in the business models and practices of all major lenders and Industry Codes of Practice for banks⁷ and non-bank lenders⁸.

⁵ Suzie Forell and Michael Cain, 'Managing Mortgage stress: evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service' (2011) *Law and Justice Foundation of NSW* at 38.

⁶ s.72 National Credit Code (Schedule 1 of the *National Consumer Credit Protection Act 2009*), previously Uniform Consumer Credit Code

⁷ ABA Code of Banking Practice, latest version 2013

⁸ Mortgage and Finance Association of Australia Code of Practice, latest version April 2014

The experience of using hardship variations in relation to the provision of regulated credit provides insight into how hardship arrangements may be used to deal with unpaid council rates. Although there are differences between rates owed to a local council and outstanding loan repayments, the consequence for owners are the same, being the potential loss of their home. It is therefore critical to have appropriate processes that balance the interests of the owner with that of the local council.

Legal Aid NSW submits that a clear mandatory hardship process is the preferred way to ensure that proposals for a payment arrangement are properly considered. This approach is consistent with the direction of the proposed NSW Civil Justice Strategy which promotes early, cost effective and user-friendly responses to resolving legal problems. It also supports the comprehensive hardship provisions available at the Commonwealth level which assist home owners to reach arrangements with their mortgagees.

An alternative way to deal with unpaid rates

Currently there is no standardised approach taken by local councils in dealing with rate payers who are experiencing financial hardship and who fall into arrears in the payment of their rates. The responses vary from council to council. Some councils are prepared to enter into payment arrangements with rate payers but often this is only available to rate payers who are in receipt of a Centrelink pension, excluding those rate payers who receive Newstart Allowance. The policy appears to be arbitrary and distinguishes between two levels of social security recipient where arguably both groups are in long term financial hardship.

Legal Aid NSW submits that any hardship policy should provide those in long term financial hardship with the opportunity to pay their council rates, on an ongoing basis, by instalments, in a weekly or monthly repayment arrangement.

Case Study 1

The client is unable to work full time, due to ill health but works casually when he can. He receives Newstart Allowance. He is in long term financial hardship and frequently experiences difficulties in paying his council rates. Each time he defaults on a payment he is served with a statement of claim, filed in the Local Court.

In the above case study the client would benefit from being able to enter into an ongoing arrangement to pay his council rates by instalments.

The following case studies are illustrative of situations where a short term hardship arrangement would benefit both the rate payer and the council and would avoid the need to commence proceedings in the Local Court.

Case Study 2

The client recently lost his job but is actively seeking full time employment. The client's wife works part time and is pregnant with the couple's third child. The client and his wife have a mortgage on their property. They are experiencing difficulties in making their repayments and are on their second hardship variation through their bank. The client is in arrears in respect of the local council rates and attempted to negotiate an instalment payment arrangement with the local council, without success.

Frequently, the local council's response to overdue council rates is to commence debt recovery proceedings in the Local Court and often the amount claimed is low, as evidenced by case studies 3 and 4.

Case Study 3

The client, who lives in far western NSW, has been served with a statement of claim from the local council seeking payment of outstanding council rates. The amount outstanding is \$540. The client receives workers compensation payments but expects to improve and resume full time work. The client negotiated with the local council to immediately commence payments of \$50 per fortnight and to increase the repayments to \$200 per fortnight the following month. The local council accepted the repayment arrangement and agreed to put the Local Court proceedings on hold.

Case Study 4

The client, who lives in far northern NSW, was served with a statement of claim for unpaid council rates in the sum of \$2,800. The client had been on a direct debit payment plan but had missed one payment as there had been insufficient funds in her account the day the payment was to be debited. Almost immediately the local council engaged a private firm of solicitors in Sydney and commenced proceedings in the Local Court.

To address the problems set out above, Legal Aid NSW submits that all local councils should establish a system to provide rate payers with the right to seek a hardship arrangement if they are experiencing financial hardship due to illness, unemployment, family breakdown, or other reasonable cause. Legal Aid NSW submits that this would:

- establish a clear, consistent process for payment arrangements where there are circumstances of both short term and long term financial hardship
- provide rate payers with an opportunity to recover from temporary hardship and resume the payment of their council rates as and when they fall due, and
- bring local council regulation in line with best practice in consumer credit, general insurance, energy and telecommunications, where consumers are given protections when in financial hardship.

To be effective, such a process should go hand in hand with a default notice advising the rate payer of their rights in circumstances of financial hardship. There should also be a requirement for an effective internal dispute resolution process, as a first tier of review of any decisions of the local council makes in relation to the hardship policy. The internal dispute resolution process should be conducted by a designated and appropriately trained hardship unit that would exist within each local council.

In addition, there needs to be an independent and free (for rate payers) oversight system which would enable rate payers to seek an external review of any decision in relation to their hardship request, particularly if that request has been refused. This system of external review needs to be empowered to make a final decision that is binding on the local council and could take the form of a specialist external dispute resolution scheme such as EWON, or a specific Local Council Ombudsman.

This would benefit rate payers and local councils as it would create a non-legal process for the early resolution of the problem of management of overdue council rates. This is consistent with the direction of the NSW Civil Justice Strategy being developed by the NSW Department of Justice. It would avoid the need for enforcement proceedings in the Local Court when the issue in dispute is the non-payment of council rates due to financial hardship. It would also promote efficiency in the justice system as it would keep low value matters, where there is no actual dispute, out of the court system.

Recommendations

1. That all local councils provide a consistent, clearly set out financial hardship policy for circumstances where a rate payer is unable to meet their obligations both temporarily or in the longer term, due to unemployment, illness, family breakdown or other reasonable cause. Options should include one or any combination of:
 - postponing the due date of a payment or payments
 - reducing the amount required to be paid for a period of time
 - a payment plan to catch up on unpaid or postponed council rates
 - waiving or reducing interest, or
 - any other arrangement that will enable the owner to meet their obligations to pay council rates in the future.
2. That each local council establish a designated unit for dealing with hardship applications, and create a consistent internal dispute resolution mechanism.
3. That while a hardship request is pending or approved, interest should not accrue on the unpaid council rates and debt collection activity should remain on hold.
4. That applications under hardship policy provisions if rejected can be referred to a specialist body that has the power to make final decisions that are binding on the

local council, such as a specialist external dispute resolution scheme, for example EWON or a specific Ombudsman for Local Councils.