

**Publication Date: 17 July 2025**

## **YSP Podcast Transcript: 457 - The truth about being 'unfinancial' in strata**

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**Intro:** Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate and bite-sized information from an experienced and authoritative source.

**Amanda:** Hello, and welcome to this week's podcast episode. I'm your host, strata lawyer Amanda Farmer. Imagine turning up to vote at your AGM only to be told that you cannot cast a vote, not one single vote on any one motion, because you are unfinancial. What does that even mean?

And how do you avoid being unfinancial and ending up in this situation where you may be denied a vote? That is what I'm here to unpack for you today. This might seem a pretty simple question on the surface, but I can tell you now, as a lawyer practising in this space for over 20 years, like a lot of things in strata, it ain't as simple as it may appear.

I get plenty of questions about the financial status of owners and whether or not someone should be considered financial or unfinancial. We are often talking about this inside our members Q and A forum and increasingly so. I've noticed as I think we've got more people than ever before struggling to meet the financial demands of living in strata, especially as our buildings age. Special levies and strata loans are fast becoming the norm as we need to complete expensive repair projects on those older buildings.

Owners who can't pay their levies on time, owners who need more time to pay their levies, owners who are trying to fly under the radar with their late levy payments. It's bringing these questions of what it is that makes an owner financial, some technical questions about timing, dates, the impact of being unfinancial, all of those questions to the surface. Today we're going to talk about some definitions, some legal rules, some myths that I hope to bust for you.

I'm going to answer some frequently asked questions in this area and hopefully clear up some common misunderstandings for you. So that's today's agenda. Let's dive in by defining this term unfinancial. I'm going to give you the definition that is in the Strata Schemes Management Act, New South Wales. Yes, I am today, talking about the law specific to New South Wales. Section 4 has our definitions, and the term "unfinancial owner" means an owner of a lot in a strata scheme who has not paid all contributions levied on the owner that are due and payable and any other amounts recoverable from the owner in relation to the lot.

That's the definition in Section 4. You'll notice that it refers to contributions. Those are levies. That's a term that we use in New South Wales interchangeably with levies, an owner of a lot who has not paid all their levies that are due and payable and notice this, any other amounts recoverable from the owner. What does that mean? Well, in my view, that means interest that may be owed on overdue levies and any other expenses that may accrue or may have been charged to the owner.

What kind of expenses? Well, sometimes a building may have a by-law in place that allows an owners corporation to charge an owner certain costs and expenses incurred by an owners corporation. Maybe there was work that was carried out by the owners corporation pursuant to an order or a specific piece of legislation that required the owners corporation to carry out work. It was otherwise the responsibility of the owner to carry out that work.

And the owners corporation has a by-law that allows them in that situation to on charge its costs to the owner. They may have sent an invoice to the owner for that work. It might be outstanding. It is an amount arguably recoverable from the owner in relation to the lot. I think those types of expenses, if unpaid, can make an owner unfinancial. Returning to interest. Bear in mind that interest only accrues when your levy is unpaid for one month after it is due.

That's in Section 85. So be conscious of this. You can slip into unfinancial status the day after your levy is due. You're an unfinancial owner if you haven't paid your levies by the due date. But interest will not start to accrue until your levy is at least one month overdue. So that fact often gives rise to a misconception that you're not unfinancial during that grace period. If you like, where interest doesn't accrue, some owners think I've got that extra month to pay.

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The fact is you've got that extra month to pay without interest being accrued on the outstanding amount. But you are unfinancial pursuant to the definition in Section 4. And if you're unfinancial, you cannot vote at general meetings of the owners corporation. So you might think to yourself, levy is due on the 1st of August. I know that I've got one month before interest is going to start accruing.

I'd rather have that money in my bank account than pay it to the owners corporation. I'm not going to pay it until the 29th of August. You're right that interest does not accrue during that period. But just make sure there isn't a meeting coming up because you may be unfinancial at that meeting. I'm going to speak in a little bit more detail about precisely what it is that makes you unfinancial at a meeting.

Those of you who are across this will know that the date the notice of meeting was sent, the date the agenda went out, is relevant to this question of whether you are going to be unfinancial at the meeting. So I will come back to that one. And indeed, if you are a committee member or you've got a committee meeting coming up, you do need to be financial to be able to vote at each committee meeting.

So you want to make sure, even though you might be riding that one-month grace period without interest, you're going to have to make sure that if there's a committee meeting that happens in that period, and there is a levy that is due or overdue, you will need to pay that levy to be able to resume your financial status and vote at the committee meeting. If you're not an owner, but you're on the committee, then you must have been nominated to the committee by an owner.

The owner who nominated you needs to be financial at each committee meeting for you to be able to vote. And just on that point. That's why I get particularly frustrated when I see minutes of annual general meetings where a new committee has been elected and nobody has recorded in the minutes who nominated who for their committee positions. Fairly straightforward where an owner self-nominates, but where a non-owner is nominated by an owner, it's really important that that nomination is recorded, that the name of the owner who nominated you is recorded, because that is the person that owner is the person who needs to be financial.

Every time you, a non-owner, turn up to a committee meeting, if we don't know who they are, if we can't remember who nominated you, then we can't be going back into the records to check that they are financial. And we should be doing that. By we, I mean strata managers who are delegated this task of convening the meeting. Those who are chairing meetings, you have the task of ensuring that proper procedure is followed, that those who are in attendance and voting are actually financial and able to vote.

You need to be checking this ahead of the meeting. Both ahead of general meetings and ahead of committee meetings. Are the owners who are voting at general meetings financial? Are the committee members who are voting at committee meetings financial? And if they are non-owners, is the owner who nominated them financial? Technical, but necessary. I say that with my lawyer hat on. It all runs smoothly while everybody's getting along.

But the minute there is a resolution at a meeting that someone is not happy with, they want to challenge, they want to overturn, they want to invalidate. This is one of the ways that you can challenge the validity of a resolution you investigate. Was everyone who voted in favour of that motion financial? If they weren't, and we discount the votes from unfinancial owners, would the result have been different?

If the result would have been different, there may be grounds there to challenge the resolution. The Tribunal may make an order invalidating that resolution. That's when you start to wish that you paid attention to these technical rules. Good thing that you're listening today. So I said that one of the consequences of being unfinancial is that you lose your right to vote at general meetings. And if you're a committee member or you are nominated by an unfinancial owner to the committee, you lose your right to vote at committee meetings.

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There's also interest, I've said, that accrues one month after the date the levy was due and payable. That interest rate is 10% pretty significant these days. 10% interest on unpaid levies. So that's another consequence of being unfinancial. They may also be recovery costs and legal fees. If you end up being pursued for the debt, owners corporations are generally charging a fee for issuing reminder notices, lawyers charging legal fees if instructed to issue a statement of claim or similar to recover the debt.

And just a note for now, some of our new laws coming into effect later this year in New South Wales do go to how an owners corporation recovers these legal fees. I'm not going to get into that now, but if you want the high-level overview, a bit of a heads up on what to expect from these new laws, check out episode 441, *The Five Strata Law Reforms You Didn't See Coming*.

One of them does relate to the way that owners corporations are going to be required to handle levy arrears and debt recovery. Those are some significant changes, and this won't be the last time you hear me talk about them. Another consequence of being unfinancial, you can't nominate yourself for the committee. So you'll lose that opportunity to serve on the committee if you're not financial at the meeting at which the committee is being elected.

And as I've said, you can't vote at committee meetings. Time for some myth-busting. What do you think? Is it a good idea, or is it okay not to pay your levies? If you are unhappy with what's going on in the building. This is something I hear a lot. Strata managers, I'm sure you've heard this one too. You might be an owner thinking that you'll try this one. Or you might be an owner who's been burned from trying this one.

If your windows are leaking, if your roof is leaking, if there's work that needs to be done on the common property that impacts you, and it is not being done, and you are frustrated, you have asked that it be done, you are being ignored. You have no idea where the money that you've been paying for your levies is, is going to.

What is the committee spending this money on if not fixing the common property? I totally get it. I hear this most days of the week. But the way to handle this is never to stop paying your levies. That is not okay. That is not a smart legal strategy. It's not a smart strategy full stop. In the eyes of the law, your levies are what we call a statutory debt.

The legislation requires you to pay them. You must pay them. There's really no argument for not paying them. As long as they've been validly struck at a meeting, the resolution underlying them is sound, then those levies are going to be due and payable. You're really not going to have an argument against that. The fact that work is not being done around the building, that the owners corporation has been ignoring you, the strata manager doesn't return your calls or respond to your emails, none of that is going to be relevant.

If you end up hauled before a court or the Tribunal having to argue your case in response to a claim for unpaid levies. It's a bad idea because legally you really have no leg to stand on when trying to raise that argument. It's also a bad idea because we've got interest accruing at 10%. We've got potentially legal costs and other expenses being charged, or an owners corporation attempting to charge these other expenses to you while they pursue you for those unpaid levies, damage to relationships.

Your other owners are looking at you and wondering why they have to subsidise you and your share of the burden, if indeed you are suffering, and I know many of you are because of poorly maintained common property. You know that your owners corporation is not meeting its legal obligations to you as an owner. There are other better, more effective avenues available to you to pursue your claim and enforce your rights.

Stopping paying your levies is never a good idea. So I trust I've been clear about that one. I want to cover off now some frequently asked questions, or frequently encountered scenarios and common misunderstandings. I've got five of them here for you. You might have these questions or be labouring under this misunderstanding, or these might sound familiar to you. First up, is it correct that all outstanding levies have to be paid before the meeting at which you want to vote?

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Now, I've told you that you are an unfinancial owner if you haven't paid your levies by the date they are due and payable. I've also told you that if you're an unfinancial owner, you may not be able to vote at a general meeting or vote at a committee meeting. But confusingly, that doesn't necessarily mean that all outstanding levies have to be paid before the meeting. You only have to pay those levies that are due as at the date the meeting notice goes out.

So I know this can be confusing. So let me give you an example. Let's say there is a general meeting on 30 August. The meeting notice, the agenda is dated 1 August, and this is why it's really important to have dates on meeting notices, on agendas. The meeting notice is sent out, sent out by email. It's dated the 1st of August. We've got a very organised strata manager here.

1st of August meeting notice for a 30 of August meeting. And there is a levy, quarterly levy is due on the 15th of August. So that's in the middle of the month. You don't have to pay that the 15 August levy in order to vote at the 30 August meeting. That's because at the date the meeting notice went out, the 1st of August, the levy was not due and payable.

It will be due and payable on the 15th of August. And yes, that is before the 30th of August meeting. But our New South Wales legislation says that though you may technically be an unfinancial owner, you are not prevented from voting at that meeting because the levy wasn't due on the date the meeting notice went out. It wasn't due until two weeks later, the 15th of August. So you can attend that meeting on the 30th, you can vote, you can hold back your payment, avoid paying interest until the 14th of September, that's one month later.

And all of that is above board. Different, of course, if the levy's due on 15 August and the meeting notice goes out on 16 of August, then as of the date of the meeting notice, there was a levy due unpayable. You do need to pay that before the meeting in order to be able to vote. So the short guidance here is that we need to look at what levies are due and payable at the date meeting notices go out.

That's the case for our general meetings. I'm regularly correcting what I'm going to call trigger-happy owners about this. Owners who come to me and say, "Amanda, I looked at the arrears ledger and I saw that three owners who attended the general meeting had not paid their levies. There were outstanding amounts on their levy accounts. They shouldn't have been allowed to vote. They were unfinancial." I always say to those owners, "When were those levies due? What's the due date for those levies? And if they weren't yet due at the date the meeting notice went out, then those owners could still vote at that general meeting."

It's an important one to remember. And if you want to have a closer look at that, you want to check out clause 23 in Schedule 1 to the New South Wales legislation. That's the clause that says a vote by an owner does not count if the owner of the lot was an unfinancial owner at the date the notice of meeting was given and did not pay the amounts owing before the meeting.

So your levies might be overdue. They might be due and payable when that notice of meeting comes out. Just make sure that you pay them before the meeting. What does that mean? It means before the meeting starts. Yes, you can pay them two minutes before the meeting starts. You might have trouble proving that payment. And I'd suggest if you're going to do that, you'll want to do it by EFT, some electronic transfer and be able to show the strata manager or chairperson who is conducting the meeting and making sure that all procedural rules are followed.

Taking attendances, you want to show that person that you've made the payment and have a receipt there for them to rely on. But you can do that before the meeting. Pay all amounts that were owing as at the date of the notice of meeting, pay those amounts before the meeting starts, and then you will be able to vote. Clause 23, Schedule 1, check that one out. But the key thing to remember here is that if you didn't owe any levies on the date that meeting notice was sent, you don't have to pay anything before the meeting if you don't want to in order to be able to vote.

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Another common misunderstanding or misconception. Even though our AGM hasn't yet been held, we're running a bit late this year, and we haven't had a meeting to strike levies. The quarterly levies are still due, and you should just keep paying them each quarter. Otherwise, you're going to be unfinancial. I've heard that one a few times. The short answer is you can't be unfinancial. If levies have not been made, they can't be due and payable.

So, if your AGM last year only raised levies for the next four quarters and the last quarter's levy has already been issued and paid, it is not the case that the next quarter's levy is automatically due at the same rate. Even if you don't get a notice, levies do need to be struck. And by that I mean we have to resolve at a meeting what the levies are going to be, what the amounts are going to be that we raise to the administrative fund and the capital works fund.

If we don't have that resolution, then there's not going to be any levies due. The only caveat on that is that in some communities. Quite forward-thinking, I want to say, and I think this is a good idea. Some communities do pass a rolling levy motion, what I call a rolling levy motion. So, at each AGM, they strike levies for the next four quarters and then have a motion that says something along the lines of quarterly levies will continue at the same rate for each subsequent quarter until redetermined by the owners corporation.

And that just covers you. If you do struggle to have an AGM on time for whatever reason, your AGM is a little bit delayed. You don't want to end up in a position where there's no money coming in because levies haven't been struck. If you've got one of those rolling levy motions, I think that's okay. You guys will let me know if you disagree. If one of those rolling levy motions is in place, then yes, quarterly levies should continue to be paid, and you may be unfinancial if you don't pay them on time.

And just bear in mind here that regular quarterly levies are due and payable even if you don't get the levy notice. That's in Section 83 of the New South Wales legislation. Regular periodic contributions, that is quarterly levies or whatever you've decided are going to be your regular periodic contributions are taken to have been duly levied on the owner of a lot even though notice was not given to the owner.

So that's designed to deal with the excuse, I never got my levy notice. It went to the wrong place, I'd moved. You didn't have my correct address. The legislation assumes that you are aware of what your levies are. Why? Because they've been determined at a meeting of which you had notice, at which you could have voted. The levies have been determined, the dates have been set. You should know what your regular quarterly levies are, and you do need to pay them, even if you haven't got that notice.

But that doesn't mean that you need to continue paying levies where there's been no resolution striking levies. Now, that is not the case for special levies. Remember, I just said regular periodic contributions or quarterly levies. If there is a special levy, a levy that is out of the ordinary, we've got a specific project we're funding. That is a case where you do need to receive your levy notice to be on the hook for paying levies.

So strata managers, committees, lawyers even who are chasing unpaid levies do make sure that if it is an unpaid special levy notice has been sent to the owner. But otherwise, you can rely on Section 83 as your answer to a defence or an excuse. I never got my levy notice. Another frequently asked question in this space. What if I'm an owner who owns more than one lot?

Maybe I own two lots. Maybe I own six lots in a building, and I'm all paid up for one of my lots, but not the other? Does that mean I am an unfinancial owner full stop, and can't vote at all, even though I've paid all the levies for one lot, and it's only my other lot or lots where I'm behind? Well, to answer this question, we return to the definition of unfinancial owner.

I'll remind you what it is. It's the owner of a lot who has not paid all contributions levied on the owner that are due and payable, and any other amounts recoverable from the owner in relation to the lot. Now, in my view, and I have had to give some advice on this before, in my view, that means the owner is unfinancial in relation to that one lot where they haven't paid their levies.

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And assuming those levies were due and payable at the date the meeting notice went out, they cannot vote on behalf of that lot at the meeting, but they can vote on behalf of their other lots where they are paid up. And my view comes from the use of that language there in the definition in relation to the lot, not in relation to any lot or in relation to lots generally that that owner may own.

It is specifically in the definition referring to the lot in respect of which the owner has not paid all of their contributions. So I did have to think about this one. In a case I was involved in last year, where we were acting for an owner in a building where more than half of the other lots were owned by a single owner investor owner and there was a big bill to pay big special levy.

That investor owner was all paid up on just a couple of their lots and had not yet paid the levies for their other lots. They were then attending meetings, they were voting on certain motions, and the question was could this owner attend and vote at all? My answer after looking into this was yes, they can. They can vote on behalf of those lots for which they are paid up, but not on behalf of those lots where they are unfinancial.

If that owner is a committee member, however, in my view, they cannot vote at all at a committee meeting. Let's say they self-nominated for the committee. So the question is, are they a financial owner at the date the notice of meeting is given? And if they're not, have they paid up all of the amounts that are due before the committee meeting in order to be able to vote? In the committee context, I say it doesn't matter how many lots you own which are financial, which are not.

If you have outstanding amounts that are due to the owners corporation, you cannot vote at a committee meeting. I come to that conclusion because the language used in Schedule 2, Clause 9, which deals with our committee meetings and unpaid contributions, the language is a little bit different. It says this. A member of the strata committee is not entitled to vote on any motion put to the strata committee if the member was an unfinancial owner of a lot in the strata scheme at the date the notice of meeting was given and the amounts owed were not paid before the meeting.

Now let me just highlight that I've said was an unfinancial owner of a lot in the strata scheme, not the lot. So, an unfinancial owner of any lot in the strata scheme. If any of your lots are unfinancial and you're a committee member, owner, then you can be denied your vote at a committee meeting. Different for general meeting. This is what I mean, guys. I said it was technical.

I said it seems simple on the surface, but you dig into it. There's a few twists and turns here, isn't there? Different rules for committee meetings, different rules for general meetings, but these things come up. You've asked me these questions, and sometimes you don't learn the answer until you have a lawyer writing you a letter telling you that a particular owner should not have been permitted to vote at a general meeting or at a committee meeting.

It's always nice if you can be on the front foot and work these ones out before you get the letter from the lawyer. Now, fourth on the list of my five frequently asked questions or frequently encountered scenarios, payment plans. More and more owners utilising the option of a payment plan. Are you unfinancial if you're on a payment plan? Short answer is - check the terms of the plan. But in my view, I don't think you have to be unfinancial.

due and payable in accordance with the payment plan and the dates set out in the payment plan in the instalments set out in the payment plan. What payment plans do is change that due date. So, if we go back to the definition of unfinancial owner, it's all about an owner who has not paid their levies that are due and payable.

An owner on a payment plan, as long as they stick to that payment plan, should be paying their levies when they are due and payable under that payment plan. So they shouldn't be unfinancial. But I suggest when you're drafting your payment plans, you do make that clear. My template that is available for free to our members certainly makes that clear, that the mere existence of the payment plan does not make an owner unfinancial.

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Of course, if an owner does not comply with the payment plan, if they default, then they should be unfinancial and unable to vote at meetings. But you'll want to make that clear in your payment plan. And finally, coming back to our consequences for committee members. Owners who are unfinancial are not eligible for election. And committee members who haven't paid levies that were due as at the date of the committee meeting, if they haven't paid those levies before the meeting, they're not able to vote at that committee meeting.

And if they are not an owner, but were nominated by an owner, it is the owner who nominated you who needs to be paid up ahead of that meeting. So, a few practical tips to help you stay financial and stay away from these twists and turns of our strata legislation. Stay on top of the due dates for your levies. Pop them in the calendar. Remember that you do have a 30-day grace period.

That is only a grace period for interest not to accrue. It is not a grace period that will leave you financial. If there is a meeting that is coming up and there were levies due and owing as at the date of the notice of meeting, make sure you get those paid before the meeting. If you do want the opportunity to vote, and if you are going to run that gauntlet of paying 30 days after the due date.

One month, I think, is the actual wording in the legislation. I'm correcting myself on that. You get a one-month grace period before interest accrues. If you're going to run that gauntlet, make sure that you do pay within that time to avoid that 10% interest being charged. Make sure you're reading your levy notices. Make sure that the amounts are correct. You're aware of any special levies. If there are interest charges on there that you disagree with, or charges for cost recoveries or expenses that you disagree with that you don't think you should be being charged, please ask those questions.

Raise this with your strata manager, if you have one with your strata committee. Don't just leave it thinking, I'll deal with that in a few months time. Interest will accrue, there will be more expenses, those charges will increase over time. This is something that does need your attention. You also want to make sure that those levy notices are going to the right place. If you've moved, if you've got a property manager, if you've got a new email address, be sure to update your strata manager to make sure that you are receiving levy notices.

If you are having trouble paying your levies, paying them on time, paying them at all. If you're having trouble paying a special levy, make sure you speak to the owners corporation, speak to the strata manager, the strata committee, about the difficulties that you're facing. Do that early. Propose a payment plan again, don't let things mount up before tackling these difficult issues. And if you're a strata manager or you're a chairperson, running a general meeting, running a committee meeting, you may have picked up from what's come before, that you really need to be on top of who owes what ahead of the meeting and as close as possible to the beginning of the meeting.

So I've said that an owner can pay any amounts that were due and owing as at the date of the meeting. They can pay those anytime before the meeting to make themselves financial. If you're heading out to attend a meeting in person, that means you want to print off your arrears list as one of the very last things you do before you leave the office. And hopefully, your accounts team, if you're lucky enough to have one, has been diligent in recording any payments that have been received that day.

I know strata managers who do a ring around or an email around to committee members ahead of a committee meeting and say, "Hey, you know, there's only three of you and two of you haven't paid a levy that was due last week. So the levy was due as at the date of the notice of meeting. It needs to be paid for you to be able to vote. Can you please make sure you do that this afternoon and send me that receipt before we have our meeting at 6 pm tonight."

I think strata managers who do that are doing an excellent service for their committee members and the communities, making sure that we don't have to adjourn meetings or we're not able to reach quorum because committee members can't vote, or even just having surprised or unhappy committee members turning up to a meeting, not realising that they hadn't paid their levy. And owners, if you do turn up to a general meeting and you're told that there was a levy that was due when the meeting notice went out and you haven't paid it, so you can't vote, be prepared to pay on the spot.

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That doesn't mean handing over thousands of dollars in cash to your strata manager, but paying by BPAY, by DEFT, as most strata managers facilitate these days. Being able to do that on your phone and showing that receipt to the strata manager as confirmation from a legal perspective, I say that's enough. That's enough for you to be able to get your vote at the meeting. So that's my crash course in unfinancial owners.

What is it that makes an owner unfinancial? What are those relevant legal definitions in the New South Wales legislation? If you thought that was a straightforward one, you might be having second thoughts about it now. Have a listen. Have a re-listen. Check out the transcript for this episode. Share that one with your fellow committee members, strata managers. Share it with your clients. Share it with your strata manager if they have perhaps got a few of these points wrong in the past, and that might have caused a little bit of conflict in the community.

I know that happens because these are technical requirements. There are a few twists and turns in there, but the more we talk about them, get our heads around them, the more confident we can be in applying and relaying these requirements to others. Thanks for tuning in this week. I look forward to catching up with you next time. Bye for now.

**Outro:** Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at [yourstrataproperty.com.au](https://yourstrataproperty.com.au).