

**Review of the Regulation of Bodies Corporate
Submission by St. Kilda Legal Service to Consumer
Affairs Victoria**

November 2003

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About St. Kilda Legal Service

St. Kilda Legal Service was one of the first community legal centres (CLCs) established in Victoria in 1973. There are approximately 45 CLCs throughout Victoria, which include both generalist and specialist centres. Generalist centres assist clients presenting with a broad range of legal issues, while specialist centres assist clients with legal issues concerning a particular area of law in which the centre has a specialist knowledge. The philosophy of CLCs is not merely to provide legal advice, but to empower people so that they can find ways of resolving their own problems in the future. Centres are dedicated to a preventative approach in solving client's problems and are actively involved in community development, education and law reform activities.

St. Kilda Legal Service is a generalist CLC that provides free legal advice, referral and ongoing casework, as well as being involved in law reform and community legal education activities. The Service is committed to providing free and accessible legal services to members of the community; to increasing the community's knowledge of their legal rights and responsibilities; and to redressing inequalities within the legal system through legal and social reform. The St. Kilda Legal Service is co-located with other services at the St. Kilda Community Centre, including the St. Kilda Financial Counselling Service and an outreach service of the Tenants' Union of Victoria.

Clients are often referred to CLCs for legal advice and assistance with body corporate related disputes. CLCs provide casework services to people within their community who are unable to afford a private solicitor and ineligible for legal aid assistance, as is the case for this type of civil matter. Problems with bodies corporate have been a long-standing, reoccurring problem for many of the clients presenting at the St. Kilda Community Centre for both legal assistance and financial counselling. St. Kilda Legal Service has advised more than 30 new clients in the last financial year, in addition to former clients returning to the Service, with problems with their body corporate. It is not unusual for clients to return to St. Kilda Legal Service several times over a period of years for legal advice and assistance regarding ongoing battles they may have with their body corporate.

The type of casework assistance that St. Kilda Legal Service is able to provide clients to assist them in resolving body corporate disputes includes giving legal advice, assisting clients to take their own action, drafting legal correspondence and negotiating on behalf of clients. Given the nature of legal casework that St. Kilda Legal Service undertakes in assisting members of its community with body corporate disputes, our Service is well placed to contribute to this review.

Information

What suggestions do you have that may improve the current information services available relating to operations of bodies corporate?

Community legal education is recognised by CLCs as an effective means of:

- informing individuals of their legal rights and responsibilities;
- communicating preventative steps that can be taken by individuals to avoid legal conflicts;
- reducing the number of disputes or the escalation of legal disputes.

Information provision to consumers has improved in the last couple of years. In December 1998 St. Kilda Legal Service developed a project proposal to produce a plain English consumer guide about the law relating to bodies corporate, which was sent to the Victoria Law Foundation (VLF) and resulted in the publication 'Common Ground - Your Guide to Body Corporate Law & Living'.

St. Kilda Legal Service also proposed as part of the VLF's ideas incentive scheme that a user-friendly practical guide, including checklists, was needed. Since then the 'Complete Guide to the Law & Managing Bodies Corporate' has been produced and recently launched. St. Kilda Legal Service was also actively involved in the consumer testing of 'Common Ground' by arranging for clients of the Service to participate in focus testing of the booklet.

Although information provision has improved through the publication of written materials, there is still a need for an information and advice telephone service for people who have queries not answered in these materials, and to be able to discuss their individual situation.

What awareness is there of the full implications and consequences of body corporate living for new owners?

The provision of legal information and educational materials at an early stage is an effective means of assisting individuals to avoid potential disputes from arising. The existing publications mentioned above are mainly aimed at current body corporate members. There is a section in the Complete Guide with information for purchasers, but it's unlikely that purchasers would obtain the Guide until after they have purchased their property. There needs to be additional material available, that is less comprehensive than the Guide, that includes information about bodies corporate that prospective owners should be aware of when considering purchasing a property, a checklist of what to be aware of and questions to ask.

Also, with an aging population and an increasing number of retirement villages, many of which are managed by a body corporate, there needs to be information that is specifically targeted to older persons. Older persons who have owned their home and are down sizing may not be fully aware of the restrictions and consequences of owning a property managed by a body corporate.

Would an information service provided by a person with specialist body corporate knowledge be more effective in providing consumer information?

A service should be established to provide information, support and advice for consumers, just as Consumer Affairs Victoria provides for consumers with complaints under the Fair Trading Act (Vic.) or the Australian Consumer Competition Commission (ACCC) provides for consumers with complaints under the Trade Practices Act (C'wealth). This role of specialist information provision could be performed by an existing government department such as Consumer Affairs Victoria or by establishing an office specifically for this purpose, such as the Office of the Commissioner for Body Corporate and Community Management in Queensland.

The provision of information by a body with specialist knowledge about the law relating to the operation of bodies corporate would be more effective in assisting consumers and avoid consumer frustration and confusion about who can assist them. A body with specialist knowledge in this area may also be able to monitor complaints against particular professional body corporate management companies and warn consumers, in the same way that Consumer Affairs is able to monitor complaints against unscrupulous traders.

Dispute Resolution

Have you any suggestions about the current resolution service offered by the Dispute Settlement Centre in relation to body corporate matters?

Where possible the St. Kilda Legal Service encourages clients to engage in mediation to resolve their disputes. However, given that mediation is a voluntary process that requires both parties to agree to participate it is usually not an option. Even if mediation is pursued, agreements reached during mediation are not legally binding or enforceable. Although mediation may be successful in some cases, it is not usually a realistic alternative to court action for most clients seeking assistance from the St. Kilda Legal Service.

Would a dispute resolution service provided by a person with specialist body corporate knowledge be likely to be more effective in resolving body corporate disputes?

A dispute resolution service, such as a conciliator, with specialist knowledge of the law relating to the operation and regulation of bodies corporate would be more effective, as often parties may not have sought independent legal advice and may be misinformed as to what are their rights and responsibilities as members of a body corporate. However, the third party's role would have to be neutral, unable to give legal advice to either individual party, but rather to assist the process of reaching agreement on the issues in dispute, within the law as it relates to bodies corporate.

Have you any suggestions about the current dispute resolution services provided by the Magistrates' Court in relation to body corporate matters?

The procedure for enforcement of body corporate rules or resolving other disputes arising that affects a body corporate is to seek a Magistrates' Court declaration or an Order pursuant to section 38 of the Subdivision Act 1988. However, the expense of court proceedings is usually a deterrent for complainants to take these matters to court, particularly where the dispute does not concern a substantial amount of money.

Community legal centres, including St. Kilda Legal Service, are limited to what extent they can assist clients and do not have adequate resources to initiate court proceedings or represent clients at court. It is the legal expenses associated with litigation that are the biggest financial deterrent for complainants, including legal costs for drafting a Magistrates' Court Complaint, institution of proceedings, service of documents, preparing supporting affidavits, preparation and attendance at a pre-hearing conference if required and legal representation at court, in addition to the court fees charged. The Magistrates' Court Scale of Costs sets out the costs and fees, which may be claimed by Counsel and Solicitors, with the scale of fees increasing the higher the amount being sought. In some cases a complainant's litigation fees could exceed the amount being sought in their claim. Matters involving witnesses or expert witnesses are more costly, likewise where a barrister is briefed to appear.

Unrepresented litigants are at a distinct disadvantage where the other party is represented, and those litigants where English is not their first language struggle to prepare the required documents, let alone represent themselves at a hearing. Where one party to proceedings is a professional body corporate management company taking action against an individual owner there is clearly a disparity in power and resources between the parties. Many of the clients seeking legal advice and assistance from St. Kilda Legal Service on body corporate matters are aged pensioners and often from non-English speaking backgrounds.

A more accessible and inexpensive dispute resolution option needs to be available for parties to body corporate disputes, where legal representation is not required, such as in the Residential Tenancies List at the Victorian Civil and Administrative Tribunal (VCAT), where parties are not legally represented.

Another hurdle for complainants initiating court proceedings can be where they find themselves in a minority. Those body corporate members holding the majority of voting entitlements can effectively exercise control over decisions made and actions taken by the body corporate. Those members in the minority often feel helpless and powerless to take action. For instance, where a resident is breaking the body corporate rules, court action may be required to enforce compliance with the rules. However, this can be problematic where the majority of body corporate members are not in favour of taking court action.

Do you believe a dispute resolution process by written application would be more efficient and effective than a hearing in a tribunal or court?

Any dispute resolution process adopted should demonstrate procedural fairness. The process should provide both parties to a dispute with an opportunity to state their case at a hearing and feel they have participated in the dispute resolution process. For the public to have confidence in the process it should be an open, accountable and legitimate process, where the final decision is based upon what the parties have said. Litigants usually want to feel listened to, that arguments made were considered and expect an explanation as to whether those arguments have been accepted or rejected and why. It would be difficult to achieve this through a process only considering written applications. The requirement to provide written submissions is not an accessible process for those people who are not literate in English, whether it is due to illiteracy or English being a second language.

Do you believe the dispute resolution system for bodies corporate should include mandatory mediation or conciliation?

Mandatory conciliation, that could result in legally binding and enforceable agreements, would overcome some of the problems associated with mediation (as mentioned above). Mandatory conciliation would also give parties the opportunity to attempt to resolve the issues in dispute between themselves prior to coming before a more formal forum, such as a tribunal or court. The process of mediation or conciliation to reach agreements is

also recognised as a preferable method of dispute resolution to maintain ongoing relationships between parties, such as neighbours living in close proximity and/ or body corporate members that will need to make decisions together in the future. This would be a more efficient and cost-effective means of resolving disputes, which could provide parties with the skills to be able to negotiate future agreements regarding their property and maintain good relations.

Do you believe that special provision needs to be made (such as a separate body corporate list) for the courts or a tribunal to deal effectively with body corporate matters?

If you are a tenant there are accessible avenues of redress through the Residential Tenancy List of the Victorian Civil and Administrative Tribunal (VCAT), which resolves disputes between landlords and tenants and is able to make legally enforceable decisions. A body corporate can even take a civil dispute over services provided by a body corporate manager to VCAT for resolution, under the Fair Trading Act 1999. However, if you are an individual owner it is a very different story, as there is no regulatory body to oversee the running of bodies corporate and investigate complaints, or tribunal to resolve disputes with other body corporate members.

VCAT also has a number of lists that hear other property related matters and some commercial matters such as the Real Property List, the Land Valuation List, Retail Tenancies List, Domestic Building List and the Planning List. Given the nature of the types of matters currently being heard by VCAT through these lists it would seem appropriate that the jurisdiction of the tribunal be expanded to also hear residential body corporate matters. Many of the VCAT lists hear disputes affecting consumers under legislation that Consumer Affairs Victoria is responsible for administering, and since Consumer Affairs Victoria has become responsible for administering the Subdivision Act as it relates to body corporate regulation, this would appear consistent for VCAT to also hear these disputes. This is the case in NSW with the Consumer Trader and Tenancy Tribunal hearing body corporate disputes.

Victoria needs an easily accessible and inexpensive complaints and dispute resolution process in place to resolve disputes for those living in properties managed by residential bodies corporate. One way to achieve this would be to create a special list within the Civil Division of VCAT or to expand the jurisdiction of an existing list such as the Civil Claims List or the Residential Tenancy List (which would need to be renamed eg. 'Residential Disputes List') to determine and remedy disputes involving bodies corporate. Expansion of VCAT's jurisdiction would require broader legislative reform beyond the Subdivision Act, such as amendments to the Victorian Civil and Administrative Tribunal Act.

What do you believe is a fair and reasonable application fee for a binding decision to resolve a body corporate dispute?

Application fees in accordance with current VCAT fees, with an ability to request a waiver where the fee will cause financial hardship, would be fair and reasonable. The VCAT fee for Residential Tenancy applications is \$31.

Alternative models to improve access to dispute resolution

St. Kilda Legal Service supports the model outlined in Option 2 of Section 6 of the Issues Paper, which would provide for a three-tiered approach of information provision, mandatory conciliation and a tribunal hearing.

A similar approach has been adopted in the area of equal opportunity and anti-discrimination law. The Equal Opportunity Commission Victoria (EOCV) provides a public telephone information and advice line, and provides assistance and support with the lodging of complaints. The EOCV has the capacity to investigate and conciliate complaints where necessary. If matters fail to resolve through conciliation parties can proceed to the Anti-Discrimination List within VCAT for a determination. The EOCV records statistics on the number of enquires and complaints of discrimination, harassment and vilification lodged, and it is also proactive in providing written information, education and training.

Protection of body corporate funds

Requiring long-term financial planning by bodies corporate

Unexpected and unplanned expenses for maintenance of residential common property, particularly large lump sum special levies imposed in addition to annual contributions, are a cause of complaint by many clients seeking legal advice and assistance from St. Kilda Legal Service.

The following are some examples of the types of problems faced by clients:

- body corporate members who are living on pensions being forced to pay for alterations, renovations and refurbishment to the property which are sometimes purely cosmetic and unnecessary. In a number of cases seen at St. Kilda Legal Service each owner has been required to pay \$3,000 – \$4,000, including our clients who have been aged pensioners unable to afford this;
- body corporate members, particularly those on low incomes, often find themselves in debt having to pay not only the body corporate annual fees but also additional levies for maintenance such as repairs, painting, gardening etc. that can be large amounts as much as up to \$3,000. Legal action may be threatened or instituted by body corporate managers to recover fees from individual members;
- body corporate members, who are in arrears for maintenance contributions, not being permitted to vote at body corporate meetings;
- disputes between body corporate members and professional body corporate management companies as to responsibility to carry out repairs to and maintenance of property, such as window frames, plumbing, a leaking roof, fences, removal of trees and steam cleaning of carpet in a stairwell;
- financial mismanagement by body corporate managers;
- responsibility for repairs or replacement of external boundary fences, particularly where the fence may be in a state of disrepair in only one section affecting only a minority or one body corporate member (eg. individual units);
- body corporate members unable to reach agreement on installation of an aerial or satellite dish on the rooftop of an apartment block;
- individual body corporate members denying access to their private property to allow maintenance work to be undertaken that has been agreed to by the majority of body corporate members. Alternatively, body corporate members trespassing on private property to undertake maintenance work without the authority of the owner.

Would a requirement to establish a sinking fund and prepare a maintenance plan be reasonable for some or all categories of body corporate?

The notion of developing a management or maintenance plan for a residential body corporate would avoid the situation where members are called on to contribute additional special levies for major expenditure when the maintenance work or repairs are required. This would give members on fixed limited incomes, such as pensions, the chance to budget for such additional expenses. A maintenance plan would also give prospective purchasers an indication as to future expenses that would be incurred. The development of a maintenance plan could avoid disputes at a later stage in some cases.

However, many body corporate disputes that clients seek legal advice from the St. Kilda Legal Service about (such as those outlined above) involve disagreement over whether major maintenance is required, or who should bear the financial responsibility for the capital expenditure – the body corporate or individual members. Therefore, it is likely that disputes will arise when body corporate members are developing such plans if they can't reach agreement at this stage.

A dispute resolution mechanism that assists body corporate members to reach agreement in developing such maintenance plans and to protect individual body corporate members, who may be in a minority, would also be needed.

Should the requirement of sinking funds be introduced, there should be provision for body corporate members to contribute by instalments throughout the year, rather than lump sum payments, which members are often not in a financial position to meet.

What would be a fair and reasonable amount for a purchaser of a lot affected by a body corporate to pay as a fee to support an information and dispute resolution service?

Given that all body corporate members will be seeking to access information and the dispute resolution service it does not appear fair that only purchasers of new lots should be expected to bear the cost of funding such a service. If a user-pays scheme was introduced then it would be fairer if all bodies corporate were required to contribute an administration fee, which should take into account whether the body corporate manages residential or commercial premises. Also to be fair and reasonable any fees should take into account whether the premises are a primary place of residence for a lot owner or an investment property.