

REGULATORY IMPACT STATEMENT

**Supreme Court (Fees) Regulations 2012
County Court (Fees) Regulations 2012**

October 2012

This Regulatory Impact Statement has been prepared in accordance with the requirements of the Subordinate Legislation Act 1994. Its purpose is to inform interested parties regarding a proposal to make new regulations. Comments are invited and should be addressed to the Regulations Officer, Courts Policy, Strategic Policy and Legislation, Department of Justice GPO Box 4356 Melbourne Victoria 3001 or by email to legalpolicysubmissions@justice.vic.gov.au and must be received no later than 5pm on Wednesday 21 November 2012.

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Executive Summary

The proposed regulations will replace existing regulations that will sunset in December 2012. The regulations set the fees payable by litigants in civil matters before the Supreme and County Courts respectively.

The operation of the civil courts gives rise to a mix of public and private benefits. The private benefits arise from the fact that the courts constitute a means of obtaining a definitive resolution of disputes between parties that is widely accepted to be fair and impartial in nature. The key public benefits lie in:

- public confidence in the existence of such a dispute resolution mechanism, and the force the existence of that mechanism gives to legal rights;
- through the doctrine of precedent, the litigation of matters in the courts results in judgments which expound the application of the law in particular circumstances and give predictability as to the likely outcome of disputes, thus reducing the need to litigate similar matters in court; and
- the role of the courts as the third arm of government upholding the rule of law as an essential component of our constitutional democracy.

This mix of public and private benefits arising from the operation of the civil courts implies that the funding of the courts should be funded partly by the public and partly by court users. This has been the practice historically. The current fees were set to recover around 40 - 45% of the relevant costs, however, actual cost recovery has declined significantly since 2001.

A range of options based on the partial recovery of the costs associated with the operations of the civil courts have been identified and assessed in comparison with both a "zero fees" base case and a full cost recovery option. All of the options imply the maintenance of the current fee structure, in which most revenue is obtained via "block" fees payable when a matter is first commenced but additional fees are charged in respect of a range of specific activities, including the conduct of hearings. This modified block fee structure was recommended by the 1984 Victorian Civil Justice Review Committee¹ and is believed to continue to remain an appropriate approach for the time being. Such an approach to fee setting in the civil court context appears to be widespread. Given these factors, it has been determined to retain a modified block fee structure. Within this context, the specific alternatives chosen for formal analysis in this RIS constitute variations of this particular fees model, with both the overall level of cost recovery and the relative size of different fee types being the key variables.

All the options considered imply a significant revision to the existing fee relativities. This reflects the fact that, for the first time, the courts have undertaken activity based costings to estimate the costs

¹ Victorian Law Foundation/Law Department of Victoria (1984). *Report To The Honourable The Attorney-General Concerning The Administration Of Civil Justice In Victoria.*

associated with the specific functions to which the fees relate. This means that all options imply a much better justified set of relativities between the size of individual fees than is currently the case. Moreover, in setting the different types of fees, the following general rules have been followed:

- Fees that involve only administrative inputs are set at full cost recovery levels;
- Fees that involve judicial inputs are set to recover the same proportion of costs as is used for the overall cost recovery target;
- For options 1 to 4:
 - Hearing fees are set to be consistent with those of the Federal Court under most options; and
 - "Block" commencement fees are set at a level required to ensure that the target level of cost recovery is obtained.
- For option 5:
 - "Block" commencement fees are set to be consistent with those of the Federal Court in most instances; and
 - Hearing fees are set at the level required to obtain cost recovery levels,

A further important consideration for the purposes of setting fees in the Supreme Court is the level of Federal Court fees, given their overlapping jurisdictions in the civil area. State governments have agreed to consider the level of Federal Court fees in setting superior court fees. While parity with the Federal Court is desirable in areas of concurrent jurisdiction, in general the fees of the Supreme Court have been set at or below the level of the Federal Court.

Cost recovery levels of 100%, 50% and 40% were considered. The preferred options are:

Supreme Court fees: Recovery of 40% of the costs of running the court's civil jurisdiction. However, specific fees have been adjusted from those implied by the above rules in a substantial number of cases. These adjustments are intended to limit the size of fee changes in many cases and to ensure that appropriate incentives are created in other cases. Probate fees would be maintained at their current levels. This implies that revenue from these fees - paid from the estates of deceased persons - will continue to be around \$4.8 million larger than the \$0.7 million cost of the Probate Office. This additional fee revenue effectively reduces the size of the fee increases that litigants would otherwise bear in order to ensure the target cost recovery level is achieved.

County Court fees: Recovery of 50% of the costs of running the court's civil jurisdiction. Fees are generally set according to the rules established above. However, they have been adjusted as required to ensure that no fee is set at a level equal to more than 80% of the equivalent Supreme Court fee. This largely affects the hearing fees that would otherwise be payable.

The adoption of these fees will substantially increase the current fee revenue collected by the courts. In the Supreme Court, fee revenue will increase from around \$13.4 million to \$16.9 million annually. In the County Court, fee revenue will rise from \$8.2 million to \$11.8 million annually².

² These revenue comparisons are based on 2010-11 data, which is the most recent available. Actual fee revenue is likely to be slightly higher than this, as discussed in the body of the RIS.

Long Summary³

This Regulatory Impact Statement analyses the expected impact of two sets of proposed regulations that would set out the fees to be charged to people commencing *civil* actions in the Victorian Supreme Court and the Victorian County Court. In each case, the proposed regulations would replace existing regulations that will sunset in December 2012, as a result of the operation of the *Subordinate Legislation Act 1994*. A single RIS is being prepared in respect of these two sets of regulations because they deal with very similar matters and, as a result, the issues arising in considering appropriate replacement regulations are very similar.

The operation of the civil courts is widely understood to give rise to a mix of public and private benefits. The private benefits that arise from the operation of the civil courts arise primarily from the fact that the courts constitute a means of obtaining a definitive resolution of disputes between parties that is widely accepted to be fair and impartial in nature. The key public benefits lie in:

- public confidence in the existence of such a dispute resolution mechanism, and the force the existence of that mechanism gives to legal rights;
- through the doctrine of precedent, the litigation of matters in the courts results in judgments which expound the application of the law in particular circumstances and give predictability as to the likely outcome of disputes, thus reducing the need to litigate similar matters in court; and
- the role of the courts as the third arm of government upholding the rule of law as an essential component of our constitutional democracy.

This mix of public and private benefits arising from the operation of the civil courts implies that the funding of the courts should be funded partly by the public and partly by court users. The Department of Treasury and Finance *Cost Recovery Guidelines* indicate that there should be a general presumption in favour of setting fees at full cost recovery levels but that, where parties other than direct users receive significant benefits from a particular activity, a partial cost recovery approach is appropriate on both equity and efficiency grounds. Consistent with this, the fees charged in the civil courts have historically been set at levels that partially recover their operating costs. At the time that the current fees were adopted in 2001 the RIS prepared indicated that expected cost recovery levels across the three civil court jurisdictions would be in the range of 40 - 45% approximately.

A range of options based on the partial recovery of the costs associated with the operations of the civil courts have been identified and assessed. These options vary both according to the degree of cost recovery achieved and in terms of the relative size of various fees. In addition, consistent with the requirements of the Victorian Guide to Regulation (VGR), the option of setting fees at levels that would fully recover costs has been assessed in each case. All of the identified options have been assessed against the base case of no fees regulations being in place, as is required by the VGR for all sunseting regulations.

³ The Long Summary must be included in this form in order to meet the requirements of the Victorian Competition and Efficiency Commission.

A key question in relation to fees regulations is that of the appropriate fee structure. In general terms, there is a trade-off between the achievement of the best possible matching of fees and costs at the level of individual users and individual processes, on the one hand, and the need to minimise the complexity of the fee structure and the associated costs of its administration, on the other. This issue has been considered extensively in the specific context of court fees in a number of previous reviews. The conclusion drawn, historically, has been that a single "block fee", while administratively efficient, implies unacceptable levels of cross-subsidisation between parties: specifically, parties that settle matters early in the process would pay the same fee as parties that proceed to a full hearing and, as a result, use substantially greater amounts of court resources.

Conversely, a fee structure in which separate fees are charged in respect of each identifiable activity undertaken by the court as part of a civil action, while providing a close matching of fees paid and court resources consumed, will lead to an unduly complex set of fees which imply substantial administrative costs. As noted in the 2001 Regulatory Impact Statement (RIS) in respect of the current Supreme Court regulations, the previous Supreme Court fees regulations were based on such a model and resulted in over 80 separate fees being charged.

Consequently, the existing fees regulations are characterised as having a "modified block fee" structure. This means that significant fees ("block fees") are paid when an action is first initiated and when it is set down for trial, with these fees covering a range of court processes likely to be undertaken as the action proceeds. At the same time, a number of smaller, specific purpose fees are also payable at different stages of the process in order to partially recoup the costs of particular activities undertaken by the court.

This modified block fee structure was recommended by the 1984 Victorian Civil Justice Review Committee⁴ and is believed to continue to remain an appropriate approach. It can be noted that a 2001 Ministerial Working Party reviewing civil court fees in New Zealand also reached similar conclusions regarding fee structure. Such an approach to fee setting in the civil court context appears to be widespread. Given these factors, it has been determined to retain a modified block fee structure. Within this context, the specific alternatives chosen for formal analysis in this RIS constitute variations of this particular fees model, with both the overall level of cost recovery and the relative size of different fee types being the key variables.

Probate fees

Of particular importance in terms of the differences between the alternatives identified is the question of fee-setting in relation to the functions of the Probate Office. The civil jurisdictions of the Supreme Courts of each State and Territory contain the Probate Office, which makes orders in relation to the validity of wills and the appointments of executors or administrators, amongst other, related functions. The fee revenue obtained in respect of these functions is, in all jurisdictions, substantially higher than the costs involved. Thus, these fees effectively cross-subsidise other aspects of the court's operations. In Victoria, some \$5.5 million of the total Supreme Court fee revenue of \$13.4 million derives from probate fees. The cross-subsidy (i.e. the amount by which

⁴ Victorian Law Foundation/Law Department of Victoria (1984). *Report To The Honourable The Attorney-General Concerning The Administration Of Civil Justice In Victoria.*

probate fee revenue exceeds costs) amounts to around \$4.8 million. Such cross-subsidies exist in all Australian jurisdictions and is substantially larger in extent in many cases. For example, in New South Wales, this cross-subsidy amounts to around \$20 million per annum.

In practical terms, the existence of these cross-subsidies mean that user fees in the Supreme Court are significantly lower than would otherwise be required in order to achieve any given level of cost recovery. However, this means that the beneficiaries of deceased estates are, in effect, being taxed small amounts (typically a few hundred dollars) in order to subsidise litigants in the Supreme Court, who include significant numbers of corporations, as well as individuals.

Such cross-subsidies are, *a priori*, inconsistent with the DTF Cost Recovery Guidelines. However, the current context is one in which the Victorian Law Reform Commission has recently commenced a review of succession law⁵, which may have significant implications for the operations of the Probate Office and, by implication, the fees charged.

The review follows a nationwide project conducted by the National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General. Among the areas that the Commission has been specifically asked to review are wills, family provision, intestacy, administration of smaller estates, and the operation of the jurisdiction (including costs, rules and principles). The Commission is due to report to the Attorney-General by 1 September 2013. In the circumstances, there is a clear case for adopting a no change approach, pending the outcome of the review. However, the options considered in this RIS include the assessment of different approaches in relation to the future of probate fees.

Setting individual fees

The size of the individual fees charged in the Supreme and County Courts appears historically to have been set without the assistance of detailed activity costing data. This reflects the fact that the administrative systems of the courts have not historically collected this information as a matter of standard practice. The result is that it cannot be shown that there is any close matching between individual fees and the costs of carrying out the functions to which they relate. More specifically, it cannot be shown that individual fees make similar proportionate contributions to cost recovery.

As part of the process of developing the current fee proposals, activity based costings were undertaken for the first time by the courts administrations of both the Supreme and County Courts. These costings were conducted on a "bottom up" basis. This involved the following steps:

- identify the processes undertaken by court officials (including judicial officers) in relation to each of the fees contained in the regulations;
- identify the classifications of the staff involved in carrying out these processes and the average hourly salary cost for each of these classifications⁶;
- estimate the time taken by each staff member to complete each task;

⁵ See: <http://www.lawreform.vic.gov.au/projects/succession-law-terms-reference>

⁶ Based on a midpoint of the relevant salary range for each classification.

- derive the direct cost of completing each task on the basis of the above data and estimates; and
- derive the estimated total wage cost of completing all tasks associated with each identified fee.

This process resulted in the development of a range of estimates of the direct wage costs associated with the functions to which the various fees related. To this base was added proportionate amounts to represent both non-wage labour costs and corporate overheads. In the case of corporate overheads, specific percentages were calculated for each court, based on data from their Annual Reports.

In determining the size of individual fees under the various partial cost recovery options, fees were broadly divided into two categories: those requiring solely administrative inputs and those that require judicial input. This approach reflects a judgement that the public benefits associated with the operation of the civil courts, as described above, are associated with the application of judicial resources to a case, as distinct from the administrative processes undertaken. Consequently, for each partial cost recovery option, the administrative fees have been set at full cost recovery levels, while the "judicial input" fees have been set at the target cost recovery level (40% or 50%)⁷.

In respect of the "block" fees, it was not possible to undertake an activity based costing. This reflects the fact that the block fees relate to a wide range of activities undertaken by the court, while the specific activities undertaken vary widely from case to case. Given this, the approach adopted in respect of each partial cost recovery option is to set these fees on a "residual" basis. That is, the expected revenue from the two classes of specific purpose fees is calculated as explained above and the total is subtracted from the "target revenue" needed to achieve the given cost recovery percentage. The remaining amount becomes the required revenue from block fees and a single, percentage increase is calculated and applied to the existing block fees to obtain the required revenue.

Finally, probate fees are set according to two different rules. Under options 1 and 4, probate fees are set at full cost recovery levels. However, under the remaining three options, probate fees are kept at their current levels. This implies a continuation of the situation in which probate fee revenue recovers 771% of the identified costs of the Probate Office.

Identification and assessment of feasible alternatives: Supreme Court fees

A total of five feasible fees options have been identified in respect of the Supreme Court, as follows:

- Option 1 involves fully recovering the operating costs of the court's civil jurisdiction from users and reducing probate fees to a level that would simply recover the costs of operating the Probate Office;

⁷ For the full cost recovery options all fees are, necessarily, set at 100% cost recovery.

- Option 2 involves recovering 50% of the court's costs, but would maintain probate fees at their current levels;
- Option 3 involves recovering 40% of the court's costs, while also maintaining probate fees at their current levels;
- Option 4 also involves recovering 40% of the court's costs, but would reduce probate fees to cost recovery levels;
- Option 5 is broadly similar to option 4, but modifies a range of individual fees in order to address a range of specific concerns, including ensuring that fees are not unduly high in relation to those charged in the Federal Court, with which the Supreme Court shares jurisdiction⁸.

Table S1, below, summarises the total revenue impacts of each option.

Table S1: Expected revenue under Supreme Court fees options

	Current fees	Option 1	Option 2	Option 3	Option 4	Option 5
Expected revenue	\$13.4m	\$41.2m	\$21.1m	\$16.5m	\$16.5m	\$16.9m
Increase on existing	NA	\$27.8m	\$7.7m	\$3.1m	\$3.1m	\$3.5m

Comparing options in respect of cost recovery percentages for major fee types

The result of the various cost rules adopted in relation to different types of fees, as set out above, is that, rather than each fee being set consistent with the "headline" cost recovery percentage for the given option, there is significant variation in the percentage of costs recovered by individual fees. Table S2, below, summarises the practical impact of the various fee-setting rules adopted under the different options in terms of the percentage cost recovery achieved in respect of each of the major fee types.

Table S2: Cost recovery by major fee types for Supreme Court fees options

Fee type	Option 1	Option 2	Option 3	Option 4	Option 5
Administrative fees	100%	100%	100%	100%	100%
Fees with judicial input	100%	50%	40%	40%	Variable
Commencement Fees (average)	145.8%	50.0%	31.4%	47.5%	32.6%
Hearing days 2-4	6.9%	6.9%	6.9%	6.9%	5.3%
Hearing days 5-9	11.5%	11.5%	11.5%	11.5%	8.9%
Hearing days 10 onwards	23.1%	23.1%	23.1%	23.1%	14.8%
Probate fees	100%	771%	771%	100%	771%

⁸ The specific rationales for setting various fees under Option 5 are several and are explained in the body of the RIS.

Table S2 shows that administrative fees are set at levels that fully recover costs under all five options. Cost recovery in relation to fees for specific activities that are wholly or largely undertaken by judicial officers is equal to the "global" cost recovery level for options 1 to 4. However, cost recovery levels vary across different fees of this type in the case of Option 5, due to the adoption of a number of discrete rules in setting individual fees.

Hearing fees recover very low proportions of the costs involved in all cases. In options 1 - 4, where hearing fees are set at the level charged to individuals by the Federal Court, cost recovery rises from 6.9% in days 2 - 4 to a maximum of 23.1%. In the case of option 5, cost recovery levels are lower still, and range from 5.3% to 14.8%.

Impact of different approaches to probate fees

As discussed above, probate fees recover 100% of costs in the case of options 1 and 4 and 77.1% of costs in the case of the remaining options. The practical impact of the over-recovery of Probate Office costs in Option 2, 3 and 5 is that the commencement fees payable are substantially lower than would be the case were probate fees to be reduced to cost recovery levels. Comparison between Options 3 and 4, which vary only in the treatment of probate fees, makes the size of this effect apparent: in the former case, with probate fees continuing to over-recover costs by \$4.8 million, commencement fees effectively recover only 31.4% of the costs to which they relate, whereas in Option 4, with probate fees reduced to cost recovery levels, commencement fees recover 47.5% of the relevant cost base. These percentages should be measured against the overall level of cost recovery under these options of 40%.

Finally, table S2 shows the calculated average cost recovery level in respect of those activities for which no specific fee is charged but where the commencement fees are, in effect, the means by which a contribution to costs is made. While there are several commencement fees, the table shows the average level of cost recovery across this group of fees. It ranges from a high of 145.8% in Option 1 to a low of 31.4% for Option 3.

Commencement fees over-recover the costs involved in the case of option 1 because of the combination of a 100% cost recovery target and a substantial under-recovery of the costs associated with hearings - itself a result of the adoption of the Federal Court based hearing fees. Similarly, in the case of option 4, commencement fees recover more than the global target (i.e. 47.5% vs 40%). Conversely, in the case of Option 2, the commencement fees recover exactly the same proportion of costs as the global cost recovery target. This reflects the fact that there continues to be significant over-recovery of costs from the probate fees under this option and implies that the extent of this over-recovery effectively balances the under-recovery occurring in respect of hearing fees. In the case of options 3 and 5, commencement fees recover less than the global level of cost recovery. This implies that the average level of cost recovery in respect of other fees is higher than the global target. Again, the cross-subsidy from probate fees represents the major explanation of this result.

Multi-Criteria Analysis of options for Supreme Court fees

The identified options have been assessed via a Multi-Criteria Analysis. Consistent with the discussion contained in the earlier sections of this RIS, the following five criteria have been identified as relevant to the determination as to which option should be preferred:

- Equity between court users and taxpayers;
- Equity between different groups of court users;
- Access to justice;
- Fee relativities with the Federal Court; and
- Proportionality of the increases in major fees.

Because these criteria must be assessed largely qualitatively, a Multi-Criteria Analysis has been developed to enable the assessment of the various options. This involves scoring each of the options on each criterion, measured against the unregulated base case. The preferred option is that which receives the highest overall score. The following discusses the relevance of each of these criteria and the rationale for the score given to each option.

Scoring and weighting

Where an option is judged as being superior to the unregulated base case in respect of a particular criterion, it receives a positive score. Conversely, where it is considered inferior, it receives a negative score. Options are scored on a scale of - 10 to + 10, consistent with the VCEC's guidance note on the use of MCA.

Each criterion has been weighted evenly reflecting the importance of each to the proper functioning of the fee regulations in the court system. Table S3, below, summarises the results of the MCA.

Table 8.2: Multi-Criteria Analysis of Supreme Court fees options

Criterion	Option 1: 100% cost recovery (Probate fees @ full cost recovery)	Option 2: 50% cost recovery (Probate fees at current levels)	Option 3: 40% cost recovery, Probate fees at current levels	Option 4: 40% cost recovery, Probate fees at full cost recovery	Option 5: 40% cost recovery, probate fees at current levels, scaling of various fees
Equity between court users and taxpayers	+1	+ 5	+ 7	+9	+ 7
Efficiency	+8	+4	+2	+3	+ 2
Access to justice	-10	-3	-1	-3	- 1
Proportionality of fee increases	- 8	-4	-3	-5	-2
Fee relativities with the Federal Court	-5	-2	+0	-2	+3
Total	-14	0	+5	+ 2	+ 9

Table 8.2 shows that three of the five options receive positive scores, indicating that they are preferred to the base case in which no fees regulations are made. Option 1, involving cost recovery and the elimination of the probate fee cross-subsidy, receives the only negative score. This reflects its poor performance in the access to justice, parity with Federal Court, and proportionality in major fee increases criteria.

Options 2 and 3 differ only in relation to cost recovery levels. The fact that the public benefit aspect of the operations of the Supreme Court are considered to be relatively large, partly due to its precedent setting role, explains the higher score of Option 3 on equity grounds, while it necessarily scores higher than Option 2 on access to justice grounds, due to the lower fee levels implied. However, the higher cost recovery level of Option 2 also increases its divergence from Federal Court levels, and it consequently scores lower on the parity criterion.

Option 4 has a slightly higher score on the efficiency criterion, reflecting the fact that court users would, in practice, make a significantly greater contribution to cost recovery than under Option 3, due to the elimination of the cross-subsidy from users of the Probate Office. Conversely, the same factor reduces Option 4's score on access to justice, while Option 4 also scores poorly on the proportionality of major fee increases criterion. Thus, Option 3 ultimately receives the higher score due to its superior equity performance.

Option 5 receives a slightly higher score than Option 3. This reflects the fact that both the overall level of cost recovery and the level of contribution from litigants in the Supreme Court (as distinct from users of the Probate Office) are identical, as well as the fact that Option 5 scores highest (or least negatively) in terms of parity with the Federal Court, and the proportionality of major fee increases. The differences between Options 3 and 5 relate to the levels of individual fees: Option 3 demonstrates a generally closer relationship between the level of individual fees and the costs involved than does Option 5. This would, *a priori*, suggest that the former option should be seen as preferable. However, given the SCAG agreement to set superior court fees with regard to those of the Federal Court, combined with the desire not to cause a disproportionate fee impact either in terms of amount of increase or the impact on any particular group, the general relationship of costs and fees is not the sole decisive factor.

Consequently, it is proposed to proceed with Option 5, implying that fees would be set at levels that would achieve 40% cost recovery overall, that Probate Office fees would be set at current levels, commencement fee would be set commensurate with the Federal Court, and that hearing fees would be set as a residual that does not create a disproportionate rise in fees or impact on a particular group.

Summary of major elements of the proposed fees regulations:

- All fees in respect of administrative activities to be set at full cost recovery levels;
- Probate fees to continue at their current levels;
- Fees in respect of activities requiring judicial input to generally be set at 40% of cost recovery, other than:

- Mediation fees, which will remain at current levels to encourage take up of alternative dispute resolution; and
- Fees for interlocutory applications to remain at the same level as the Federal court
- Commencement fees to be set at the same level as the Federal Court;
- A new rising scale of hearing fees to be adopted, with a base fee payable in days 2 - 4 and higher fees payable in days 5 - 9 and a higher fee again payable on day 10 and subsequently;
- New fees to be adopted as follows:

- *A separate fee for interlocutory application within a proceeding that occur within the Court of Appeal*

Interlocutory applications within a Court of Appeal proceeding are a comparatively new type of legal proceeding. The current regulations provide for a fee of 27.3 fee units for an interlocutory application within a proceeding. The inclusion of the words 'including the Court of Appeal' in item 1.8 of the proposed regulations merely clarifies that the standard fee of 27.3 fee units for an interlocutory application also applies to these applications made within a Court of Appeal proceeding.

- *Fees for appeals from an associate judge*

Appeals from associate judges (formerly masters) have been excluded from appeal fees. The jurisdiction of associate judges has increased significantly over time and now includes some trial work. There are rights of appeal to both a judge of the Trial Division and directly to the Court of Appeal in certain instances. The fee for an appeal to a Judge in the Trial division has been set at the same level as an interlocutory application. The fee for an appeal to the Court of Appeal is the same as other appeals.

- *Subpoena fee (Form 42A and Form 42AA);*

The Magistrates' Court and County Court fee regulations prescribe a fee for the issue of subpoenas and the omission of such a fee from the current Supreme Court fee regulations appears to be an oversight. It is appropriate for a fee to be prescribed for issue of subpoenas in the Supreme Court.

- *Fee for filing an application for examination of debtor (67.02);*

Each of the Victorian Court Rules provide for a person entitled to enforce a judgement to apply to a court for an order for the person bound by the judgment to attend the court to be examined on material questions (ie on their financial capacity to pay the debt). Although such applications in the Supreme Court are rare, the regulations do not currently provide a fee and it is appropriate that this omission is rectified.

- *Fee for bringing an application under Section 6 or 8 of Judgement Debt Recovery Act;* Proceedings under section 6 or 8 of the *Judgement Debt Recovery Act 1984* may be taken in any Victorian Court. The current Supreme Court (fees) Regulations 2001 do not prescribe a fee for such applications. While such applications in the Supreme Court are rare, it is appropriate that this omission is rectified, and a commensurate fee has accordingly been prescribed.

- *Search and handling and (where required) retrieval from storage fees.*

These fees are to be charged in respect of requests for photocopying of material that must be obtained from files. The establishment of these fees is intended to facilitate a better alignment between photocopying fees and costs incurred on a

case by case basis. Given this, the revenue from them will be largely offset by substantially lowered per page photocopying fees.

- Two existing fees being abolished, as follows:
 - Fee for a court official taking accounts/assessments;
 - Fee for search and inspection of a file.

Identification and assessment of feasible alternatives: County Court fees

A total of four feasible options have been identified and assessed in respect of the County Court fees. These are:

- Option 1: Full recovery of the costs of operating the civil court functions;
- Option 2: 50% cost recovery;
- Option 3: 40% cost recovery and
- Option 4: 50% cost recovery, with specific fees adjusted to ensure proportionality is maintained vis-a-vis the Supreme Court fees.

Table S4, below, summarises the revenue implications of the four options.

Table S4: Expected revenue under County Court fees options

	Current fees	Option 1	Option 2	Option 3	Option 4
Expected revenue	\$8.2m	\$25.0m	\$12.5m	\$10.0m	\$11.8m
Increase on existing	NA	\$16.8m	\$4.3m	\$1.8m	\$3.6m

Comparing options in respect of cost recovery percentages for major fee types

Table S5., below, summarises the cost recovery implications of each of the four options in respect of County Court fees at the level of the major fee types. As in the case of the Supreme Court fees (see above), the result of the various cost rules adopted in relation to different types of fees is that, rather than each fee being set consistent with the stated cost recovery percentage, there is significant variation in the percentage of costs recovered by individual fees.

Table S5: Cost recovery by major fee types for County Court fees options

Fee type	Option 1 (100% cost recovery)	Option 2 (50% cost recovery)	Option 3 (40% cost recovery)	Option 4 (50% cost recovery with proportionality drivers)
Administrative fees	100%	100%	100%	100%
Fees with judicial input	100%	50%	40%	Various
Commencement Fees	108.9%	50.0%	38.1%	55.6%
Hearing days 2-4	24.4%	24.4%	24.4%	15.1%
Hearing days 5-9	40.6%	40.6%	40.6%	25.2%
Hearing days 10 onwards	81.7%	81.7%	81.7%	42.0%

Table S5 shows that administrative fees recover 100% of costs for all options. For fees relating to specific functions requiring judicial input, cost recovery levels are equal to those of the global cost recovery target for each option except option 4. In the case of option 4, cost recovery rates vary according to the impact of the proportionality rule, which decrees that fees cannot exceed 80% of their Supreme Court equivalent, on individual fee levels.

Hearing fees recover an increasing proportion of hearing-related costs as trials progress, due to the adoption of an escalating scale of fees under all options. These fees are identical to the Federal Court fees for options 1 - 3. Under these options, hearing fees recover 24.4% of costs in days 2 - 4 or a hearing, rising to 81.7% from day 10 onward. The equivalent cost recovery levels are significantly lower, however, for option 4, since hearing fees in this case are set at 80% of the levels set in Supreme Court Option 5. Thus, cost recovery ranges from 15.1% in days 2 - 4 to 42.0% on day 10 and thereafter under option 4.

It must be recalled that the commencement fees are set as a residual: i.e. they are set according the target level of revenue required to attain the global cost recovery goal, once the revenue from the remaining fees has been calculated. Thus, the cost recovery percentages achieved in relation to the costs attributable to these functions vary significantly between the options. Commencement fees slightly over-recover the costs implicitly attributable to the related functions under option 1. This reflects the interaction of the 100% global cost recovery target and the under-recovery of hearing related costs via hearing fees. For Option 2, commencement fees recover exactly 50% of costs, in line with the global cost recovery target. For option 3, commencement fees recovery slightly less than the 40% cost recovery target, as a result of some hearing fees recovering more than the global target percentage. However, for option 4, they recover slightly more than the target (55.6% vs 50%), as a result of the lower level of recovery of hearing related costs under this option.

Multi-Criteria Analysis of County Court Fees Options

These options have also been assessed using a multi-criteria analysis. Three of the criteria adopted are the same as those used in the case of the Supreme Court fees, while the fourth is that of

proportionality between Supreme and County Court fees. Table S6, below, summarises the results of this analysis.

Table S6: Multi-Criteria Analysis of County Court fees options

Criterion	Option 1: 100% cost recovery	Option 2: 50% cost recovery	Option 3: 40% cost recovery	Option 4: 50% cost recovery with individual fees set at maximum of 80% of Supreme Court equivalents
Equity between court users and taxpayers	0	+ 8	+ 6	+ 8
Efficiency	+10	+5	+4	+ 5
Access to justice	- 10	- 5	- 4	- 5
Proportionality between Supreme and County Court fees	+2	+2	+2	+5
Total	+2	+10	+8	+ 13

8.3.2. Conclusion

Table 3 shows that Option 4 scores highest, receiving a score of + 13 points, while Option 2 receives a score of + 10 points and Option 3 receives a slightly lower score of + 8. Option 1, of full cost recovery, scores substantially lower, with +2 points. Thus, it is proposed to proceed with Option 4.

Impact on individual fees

Tables S7 and S8, below, summarise the impact of the proposed fees regulations at the level of individual fees. Each table sets out the existing and proposed fees, expressed in terms of fee units. It also includes the 2012-13 dollar value of the proposed fee.

Table S7: Comparison of Existing and proposed Supreme Court (Fees) Regulations

Current Reg	New reg	Fee description	Existing fee units	Existing fee (\$)	Proposed fee unit	Proposed fee (\$)	% change
1.1	1.1	Commencement of proceeding	62.8	\$786.88	74.9	\$938.00	19%
1.2	1.3	Counter claim	62.8	\$786.88	74.9	\$938.00	19%
1.3 (i)	1.5(a)	Court of Appeal	257.5	\$3,226.48	257.5	\$3,226.34	-
1.3(ii)	1.5(b)	Court of Appeal – to single Judge	62.8	\$786.88	74.9	\$938.00	19%

New fee	1.4(b) note: 1.4(a)=1.5(a)	Appeal from Associate Judge- to single judge	-	-	27.3	\$342.07	-
1.4	1.7	Filing certificate under sec 86 or 112	27.3	\$342.07	27.3	\$342.07	-
1.5	1.8	Interlocutory applicn	27.3	\$342.07	27.3	\$342.07	-
1.6	1.10	Judgment in default	27.3	\$342.07	27.3	\$342.07	-
1.7	1.11	Setting down/Entry into list	61.8	\$774.35	88.5	\$1,108.30	43%
1.8	1.12	Entry -TEC List or Commercial Court	190.6	\$2,388.22	190.6	\$2,216.60	-
1.9	1.15	Hearing Fees Days 2-4	31.9	\$399.71	46.0	\$576.69	44%
New fee	1.15	Hearing Fees days 5-9	31.9	\$399.71	76.8	\$962.56	141%
New fee	1.15	Hearing Fee 10+	31.9	\$399.71	128.3	\$1,607.41	302%
1.1	1.17	Mediation	6.2	\$77.69	6.2	\$77.69	-
1.11	1.18	Pre-trial conf. court official	6.2	\$77.69	9.3	\$116.56	50%
1.12	1.19	Taking accounts	18	\$786.88	29.7 for the first hour then 14.8 for every other hour	\$372.14 \$185.44	65%
1.12.1	-	Deposit for taking of accounts	11.8				-
1.13	1.20	Authentication of order for admission	19.6	\$245.59	19.6	\$245.57	-
1.14	1.21	Sealing of certificate for admission	11.8	\$147.85	11.8	\$147.85	-
1.15	1.22	Appointment of notary	19.6	\$245.59	45.3	\$567.12	131%
1.16	1.23	Sealing any document	11.8	\$147.85	3.8	\$120.23	-19%
2.1AA	2.1	Notice-intention to apply for probate	3.15	\$39.47	3.2	\$39.47	0%
2.1 (a)	2.2	Applicn for probate less than \$1000	8.8	\$110.26	8.8	\$110.26	-
2.1(b)	2.2	Applicn for probate more than \$1000	22.5	\$281.93	22.5	\$281.93	-
2.1(b)	2.2	Motion under	22.5	\$281.93	22.5	\$281.93	-

Rule 7.04							
2.2	2.3	Filing summons under Rules 8,10,11 and 12	62.8	\$786.88	62.8	\$786.88	-
2.3	2.4	Filing applicn	14.9	\$186.70	14.9	\$186.70	-
2.4	2.5	Small estate	8.2	\$102.75	8.2	\$102.75	-
2.5	2.6	Authentication of order	5.7	\$71.42	5.7	\$71.43	-
2.6	2.7	Registrar's certificate	9.8	\$122.79	9.8	\$122.79	-
2.7	2.8	Exemplification	9.8	\$122.79	9.8	\$122.79	-
2.8	2.9	Copy - Will	2.3	\$28.82	2.3	\$28.82	-
3		Inspect court record with number	2.6	\$32.58	-		-
		Without number	4.1	\$51.37	-	-	-
3.2	3.6	Photocopy		\$1.50		60c pp	-60%
3.3	3.1	Production of file	10.3	\$129.06	1.4	\$43.89	-66%
3.4	3.2	Opening of court within half/hr	5.2	\$65.16	3.4	\$107.30	65%
		Opening any other time	51.5	\$645.30	76.8	\$961.78	49%
New fee	3.3	Issuing a subpoena	-		13.0	\$163.51	-
New fee	3.4	Searching a database	-	-	1.7	\$21.36	-
New fee	3.5	Retrieval – additional fee -File offsite	-	-	1	\$12.53	-
New fee	4.1	Examination of debtor	-	-	14.7	\$183.79	-
New fee	4.2	Applicn under sec 6,8 JDRA			1.7	\$21.33	-
SC Rules	4.3	Registration of interstate judgment	-	-	4.9	\$60.14	-15.8
4.1	5.1(a)	Costs Court – re SC	27.3	\$342.07	27.3	\$342.07	-
4.1.b	5.1.(b)	Costs Crt re CC	20	\$250.60	21.8	\$250.60	0%
4.1.c	5.1(c)	Costs Crt re MC	20	\$250.60	21.8	\$250.60	0%
4.1.d	5.1(d)	Costs Crt re VCAT	12.9	\$161.64	12.9	\$161.64	-
	5.2	Rules 63.64 proceedings	NIL		NIL		-

Table S8: Comparison of Existing and Proposed County Court (Fees) Regulations

Existing Reg	New reg no	Fee description	Existing fee units	Existing fee (\$)	Proposed fee unit	Proposed fee (\$)	% change
1	1	Filing originating process	43.3	\$543	59.9	\$745.50	37%

2	2	Issuing adoption summons	18.5	\$232	30.3	\$380	64%
3	-	Filing application under BDM Act 1996	18.5	\$232	-	-	-
4	3	On transfer from Magistrates' Court (less fee paid)	43.3	\$543	59.9	\$745.50	37%
5	4	Filing defence, counter claim or third party notice	43.3	\$543	59.9	\$745.50	37%
6	5	Filing interlocutory application	19.1	\$239	21.8	\$274	14%
7	6	Examination of judgment debtor	12.9	\$162	11.7	\$147	-9%
8	7	Filing ex parte order	10.3	\$129	10.3	\$129	-
9	8	Filing a subpoena	6.2	\$78	10.4	\$131	68%
10	9	Application under sec 6 or 8 JDRA	3.6	\$45	1.4	\$18	-61%
New fee	10	Attachment of debt	-	-	23.2	\$291	-
11	11	Setting down for trial	43.3	\$543	70.8	\$887	45%
12	12.1	Hearing fees – days 2-4	22.7	\$284	36.8	\$461	62%
12	12.2	Days 5-9	22.7	\$284	61.5	\$770	171%
12	12.3	Days 10 or more	22.7	\$284	102.6	\$1,286	352%
13	13	Registrar taking accounts	15.5	\$194	20.9	\$262	35%
14	14	Mediation per hour or part	6.2	\$78	5.0	\$62	-20%
15	15	Pre-trial conference	6.2	\$78	7.4	\$93	20%
16	16	Judgment in default	14.4	\$180	24.6	\$308	114%
17	17	Certificate of registrar	3.1	\$39	1.0	\$13	-68%
18		Search of documents	1.9	\$24			
	18	Photocopying	-	1.50pp	-	60cpp	
19		Copies of judges notes		\$7	-	-	-
New fee	19	Searching database	-	-	1.7	\$21	-
New fee	20	Retrieval offsite file	-	-	1.0	\$13	-
S.C Rules	21	Registration of interstate judgment	-	\$60	4.8	\$60	0.2

Sunseting and review

The process of review of the existing fees within the various court jurisdictions has been under way for some time. However, a number of significant issues of relevance to fees policy have not yet been fully resolved. One concern is that substantial difficulties have been encountered in obtaining reliable activity based costing data to support the setting of individual fees at levels that are appropriately reflective of attributable costs. While progress has been made in this area, further refinement of the data remains desirable. More importantly, the detailed process of consideration of fees policy issues that has been undertaken, involving recognition of important trade-offs and inter-dependencies in relation to different aspects of the fees structure, has highlighted the complexities involved and indicated the need for further work to be undertaken in this area.

Given these factors, it has been decided to insert a five year sunseting clause into the proposed regulations, rather than making them for the full ten years allowed under the *Subordinate Legislation Act 1994*.

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1. Background

This Regulatory Impact Statement analyses the expected impact of two sets of proposed regulations that deal with fees charged to users of Victorian courts. It is important to note that the fees regulations considered in this RIS relate to the civil jurisdictions of each court, rather than the criminal jurisdictions.

In each case, the proposed regulations would replace existing regulations that will sunset in December 2012 as a result of the operation of the *Subordinate Legislation Act 1994*⁹. A single RIS is being prepared in respect of these two sets of regulations because they deal with very similar matters and, as a result, the issues arising in considering appropriate replacement regulations are very similar.

In common with other Australian States and Territories, Victoria's court system comprises three levels. These are:

- **The Magistrates' Court**, which hears summary offences and some indictable offences (with the consent of the accused) as well as civil cases up to a jurisdiction limit of \$100,000. The Magistrates' Court also deals with family violence issues and intervention orders, encompasses specialist jurisdictions including the Drug Court and the Koori Court and is responsible for the Infringements Court. Trials are heard by the Magistrate sitting alone;
- **The County Court**, which can hear all indictable offences other than treason, murder and some murder-related offences. It also has a civil jurisdiction, which is no longer limited in terms of the maximum monetary amount involved. The County Court can also hear appeals in some circumstances;
- **The Supreme Court**, which is the highest level of the court hierarchy and also hears both civil and criminal cases. The Supreme Court has both a trial division and an appellate division, with the Court of Appeal hearing appeals against decisions of the trial division of the Supreme Court, the County Court and the President and Vice Presidents of the Victorian Civil and Administrative Tribunal (VCAT).

In addition, the Victorian Civil and Administrative Tribunal (VCAT) hears civil and administrative matters arising under a wide range of legislation that allows or requires matters to be heard at VCAT, rather than in the courts, at first instance. VCAT's fees regulations are also due to sunset in 2012, but replacement regulations will be discussed in a separate RIS. This reflects the fact that a number of different policy considerations arise in respect of VCAT's activities and the associated fees.

⁹ The Supreme Court (Fees) Regulations 2001 were due to sunset on 17 December 2011 but were extended for one year as a result of the Subordinate Legislation (Supreme Court (Fees) Regulations 2001) Extension Regulations 2011. The County Court (court Fees) Order 2001 was also due to sunset on 17 December 2011, but were extended for one year as a result of the Subordinate Legislation (County Court (Court Fees) Order 2001) Extension Regulations 2011.

The proposed regulations establish the fees payable by users of both the Supreme and County Courts.

2. Objectives

The objective of the proposed regulations is to ensure that litigants make an appropriate contribution to the cost of court resources employed in resolving their disputes. An appropriate contribution is one which:

- Recognises that the work of the courts yields a mix of private and public benefits and ensures that user contributions reflect this mix;
- Ensures that user fees do not undermine access to justice for court users; and
- Provides a set of fees that encourages the efficient use of court resources.

3. Nature and extent of the problem

3.1 Overview

The provision of a system of justice, including both a police force for the investigation of crimes and a court system in which both criminal matters and civil disputes can be resolved, is considered to be one of the fundamental responsibilities of government.

However, while government takes overall responsibility for funding these institutions, it is widely considered to be appropriate for persons who make use of the court system for the resolution of civil disputes to make a significant contribution to the costs incurred by the courts in hearing and resolving those disputes. This reflects the fact that the work of the courts in this area yields a mix of public and private benefits.

Fee setting recommendations: The Civil Justice Committee Review

The issue of the need for, and appropriate extent of, a system of user contributions to court costs was considered at length in the Victorian context in the Victorian Civil Justice Committee Report of 1984¹⁰. This report constituted a wide-ranging and exhaustive review of civil justice issues, including issues of information, structure and operational relationships within the court system. The Committee recommended that the government pursue *"a middle course between a heavily subsidised system and a "user-pays" system"*.

The Committee argued that four factors are relevant in determining how to allocate the burden of funding the court system. These are:

- the extent to which access to courts should be affected;
- the extent to which there should be private payment for private benefit;
- the extent to which any scheme should be used as an administrative or management tool; and
- the extent to which court fees should be used as a means of indirect taxation.

The discussion contained in the Committee's report notes that, while it has traditionally been argued that the court system should be publicly funded because it is for the public benefit, in fact the operation of the court system provides both public and private benefits.

¹⁰ Victorian Law Foundation/Law Department of Victoria (1984). *Report To The Honourable The Attorney-General Concerning The Administration Of Civil Justice In Victoria*. See Vol. 1, pp 375 - 379.

Public benefits include, most obviously, the fact that the availability of a fair and impartial mechanism for dispute resolution is fundamental to a well-functioning society. At a more specific level, the rules of precedent mean that trials of private matters lead to the development of generally applicable rules of conduct and an understanding of how they are applied to a range of different circumstances. Private benefits clearly relate to the ability to enforce private claims and obtain restitution for losses incurred due to the fault of others.

The Committee notes that the relative degree of public and private benefit will vary widely from case to case, however, it is not generally possible to separate the private and public benefit elements in any given case.

Given this analysis, the Committee concluded that, in a system in which Government met most or all of the costs of court operations, there would be a significant cost to the taxpayer associated with the achievement of private benefits. Moreover, there would be no disincentive to the pursuit of frivolous or vexatious claims.

Conversely, a system based on full cost recovery entails a number of problems, notably:

- that private individuals would be fully funding a system which provides important public benefits, as discussed above;
- that access to justice is likely to be unreasonably restricted; and
- that there would be inadequate incentives for the courts to achieve and maintain high levels of administrative efficiency over time.

As noted above, having weighed these factors, the Committee concluded that a system which involves the partial recovery of court costs from users of the civil courts constitutes the preferable approach.

Another perspective on the issue of the nature and extent of the public and private benefits arising from the civil justice system is that provided by Dame Hazel Genn in her 2008 Hamlin lecture entitled “*What is Civil Justice for?*” Part of this lecture is reproduced below.

"My starting point is that the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. Bargains between strangers are possible because rights and responsibilities are determined by a settled legal framework and are enforceable by the courts if promises are not kept. Under the rule of law, government is accountable for its actions and will be checked if it exceeds its powers. The courts are not the only vehicle for sending these messages, but they contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly

*society where there are rights and protections, and that these rights and protections can be made good.*¹¹

Access to justice

In the civil context, the notion of access to justice implies that parties in dispute, whether individuals, businesses or other actors are reasonably able to avail themselves of a fair and impartial court system as a forum for settling these disputes. Access is, in effect, limited or denied if the cost of using the court system is prohibitive, or at least so great as to be a major disincentive, for significant numbers of parties in dispute.

It must be acknowledged that the cost of legal representation is typically high and will usually well-exceed the cost of any fees imposed by the court. The Scales of Costs for each of the Supreme and County Courts are included below as appendices and provide an indication of the relative extent of legal representation costs versus court fees. The Scales of Costs represent the amounts recoverable by a successful party against an unsuccessful party under a costs order. Actual costs charged by lawyers may exceed these amounts. While it is not possible to generalise, it is certainly likely that, in many cases, the costs of representation will be several times as high - perhaps an order of magnitude higher - than court fees.

However, this does not render the level of court fees unimportant when considering access to justice issues, for three main reasons. First, the cost of legal representation is not an impediment imposed by government nor, in practical terms, one which can easily be controlled by government. Second, individuals have the option of representing themselves in court, thus allowing for the possibility that court fees will constitute the major cash cost borne in obtaining access to the court system. Third, circumstances increasingly arise where a party will not be required to meet the costs of their legal representation upfront (or at all if unsuccessful) through "no win no pay" agreements, such that court fees may represent the major out of pocket costs to be faced.

The issue of access to justice may be considered to be particularly acute in relation to individuals, as distinct from corporations, given that the latter are likely to have greater ability to pay, in most cases, as well as the ability to claim court costs against their tax liabilities. This raises the issue of the user profile of the Supreme and County Courts. Research undertaken by Supreme Court staff indicates that, in 2010-11, there was an approximately equal split in terms of the number of hearing days occupied by actions initiated by individuals and by corporations: a total of 53% of the 1,700 hearing days recorded related to actions brought by individuals, while 47% related to actions brought by corporations.

The fact that such a substantial part of the work of the civil jurisdiction of the Supreme Court relates to actions brought by individuals indicates that the access to justice issue is clearly significant in this jurisdiction. Data provided by the County Court for 2010-11 indicates that approximately 90% of cases are commenced by individuals while only 10% were commenced by corporations.

¹¹ Dame Hazel Genn, *The Hamlyn Lectures: Judging Civil Justice* (2008)

However, in considering the access to justice issue, it should be noted that the *Supreme Court Act 1986* currently makes provision for fees to be waived at the discretion of the court. Section 129 (3) of the Act provides that a registrar may waive fees if payment of the fee would cause financial hardship. An equivalent provision is also found in Section 28 of the *County Court Act 1958*. Thus, options involving higher levels of cost recovery could remain consistent with acceptable levels of access to justice, given the appropriate use of these fee waiver powers.

Alternative dispute resolution

Concerns over the potential impact of fee increases on access to justice would potentially be ameliorated to the extent that alternative dispute resolution (ADR) mechanisms implying lower costs to users were available and were seen as acceptable substitutes for the civil jurisdiction of the courts. Recent Victorian governments have, indeed, adopted policies favourable to ADR and have made relevant mechanisms available in some areas¹².

However, notwithstanding the above, for a large proportion of users of the civil jurisdiction of the Supreme and County Court's, the available ADR mechanisms do not constitute an effective substitute for the operation of the Court. Moreover, survey data suggest that, while around half of court users are concerned with the cost of court actions, only around one third (37%) considered themselves more likely to use one dispute resolution mechanism over another on the basis of cost differences¹³.

A related survey conducted in the United Kingdom in 2007¹⁴ found that litigants varied in their price sensitivity, with those pursuing monetary claims, especially small claims, being somewhat price sensitive in their choice of dispute resolution mechanism, while other litigants involved in proceedings that sought to define legal rights or status (such as those involved in private family matters) were the least price sensitive.

There will always be matters that require judicial determination- those where a parties cannot reach agreement, where the law is unclear and where the law requires a court order. This means that the impact of court fees on access to justice remains a significant issue to be weighed in fee setting decisions.

Fee setting policy: the New Zealand approach

Fee setting in the New Zealand civil courts is also based on the adoption of a partial cost recovery approach. A 2001 Ministerial Working Party on Civil Fees enunciated the following principles for fee setting¹⁵:

¹² e.g., the mediation services provided, and subsidised, by the Office of the Small Business Commissioner to enable low-cost resolution of a range of disputes involving small businesses.

¹³ Ipsos Australia (2007). *Dispute Resolution in Victoria: Community Survey*. Report prepared for the Victorian Department of Justice.

¹⁴ See: <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/publications/research280607.htm>

¹⁵ *Working Party on Civil Court Fees, (2003)*. Review of Civil Court Fees – Stage 2: Report to the Minister for Courts, p46, Government of New Zealand, Wellington, December 2003.

- *Overall Cost Sharing:* The total cost of civil courts shall be met through a combination of taxpayer and user funding, in ratios to be determined by Government in respect of specific jurisdictions and services
- *Variable Ratios of Taxpayer/User Funding for Specific Services:* The proportion of costs recovered through fees shall vary in accordance with an assessment of the balance of public and private benefits associated with the service concerned. For example, where direct users are the predominant beneficiaries of a service, fees may recover full costs. Where benefits are predominantly public, however, the taxpayer should meet the bulk of the costs and fees should be limited to those necessary to ensure optimal provision of public benefits (e.g. by deterring frivolous use)
- *Protection of Access to Justice:* Fees should not prevent citizens from having access to appropriate court dispute resolution services. This applies particularly to services in respect of which legal aid is not available
- *Average Cost Pricing:* Fees shall be set to recover a proportion of the average cost of service provision. A single fee may cover a number of distinct processes in order to reduce administrative costs associated with setting and collecting fees, but in no case should fees exceed the average cost of the services to which they relate
- *Operational Efficiency:* The fee structure should provide incentives for cost effective use of court services. The number of points at which fees are charged should be limited in order to minimise the transaction costs associated with imposing, reviewing and collecting them. Fees should, as far as possible, be payable in advance
- *Judicial Discretion:* The judiciary shall continue to have discretion to reallocate costs, including court fees, between parties to litigation. This will enable court fees to be charged primarily to the party responsible for the use of court resources, in appropriate cases.

Consistent with these principles, the Working Party recommended varying proportions of cost recovery, depending on the jurisdiction. This approach meant no more than 50 per cent of the costs in any jurisdiction were recovered, while cost recovery levels were differentiated between types of cases according to the level of public and private benefits obtained.

Box 1: The Report on Government Services (RoGS)

The Productivity Commission has, since 1995, published an annual Report on Government Services. The focus of the report is on the equity, efficiency and cost effectiveness of government service provision. Consequently, it includes a range of performance indicators, developed in a way that is intended to be consistent with the Agreement on Federal Financial Relations.

Chapter 7 of the RoGS provides a range of data on court administration. This material provides a substantial data source to enable cross-sectional analysis of court administration issues including, in the current context, the cost per case of the provision of court services and the extent of cost recovery achieved in the various Australian court jurisdictions. Consequently, the majority of the data included in the following analysis has been sourced from RoGS.

All RoGS are available online at: <http://www.pc.gov.au/gsp/reports/rogs>

3.2. Historical fee comparisons

Given the above, the issues to be determined are the appropriate proportionate contribution to be made to court costs by users and the distribution of those contributions. The various RIS published prior to the adoption of the current regulations reported both the proportion of court costs covered by user fees at that time (i.e. under the previous regulations) and the expected contribution to court costs that would be achieved immediately following the adoption of the current regulations. These percentages are reproduced in Table 3.1, below. Table 3.1 also reports the current proportionate contribution to court costs made by user charges. In all cases, the comparisons cited relate to the civil jurisdictions of each court.

Table 3.1: Historical cost recovery in the Victorian Courts (civil division)

Court	2001 (actual)	Post-2001 (estimated)	2010-11
Magistrates'	44.9%	40.8%	30.2%
County	41.2%	48.5%	32.0%
Supreme	38.0%	43.4%	32.6% ¹⁶

Sources: Various RIS, Productivity Commission *Report on Government Services*.

Table 3.1 shows that the percentage of cost recovery attained in the civil jurisdictions immediately prior to the current regulations coming into effect varied from 38.0% to 44.9%. The expected level of cost recovery upon the adoption of the current regulations was slightly higher overall, being between 40.8% and 48.5%. Following the adoption of the current regulations, cost recovery levels were expected to experience a modest increase in the County and Supreme Courts, but a modest decline in the Magistrates' Court.

Review of Table 3.1 also shows that the level of cost recovery achieved in all jurisdictions has declined substantially since the adoption of the current regulations. Given that the fees have been maintained in real terms since being converted to fee units pursuant to the Monetary Units Act 2004, it is clear that the primary reason for this decline is that the real cost per case heard of courts administration has increased.

3.3. Interstate Fee Comparisons

Table 3.2, below, is reproduced from the Report on Government Services. It compares the level of cost recovery currently being achieved in the Victorian courts with that being achieved in other Australian States and Territories.

Table 3.2: Cost recovery in Australian court jurisdictions, 2010-11 (%)¹⁷

¹⁶ This figure includes the operations of the Probate Office. Exclusion of the costs and revenues of the Probate Office has the effect of decreasing cost recovery levels in the Supreme Court substantially, to 19.4%. This reflects the fact that, in common with all other Australian jurisdictions, fee revenue from the Probate Office substantially over-recovers the costs incurred.

¹⁷ Source: Productivity Commission (2012) *Report on Government Services*. See Chapter 7.

Table 7.9 Civil court fees collected as a proportion of civil recurrent expenditure (cost recovery), 2010-11 (per cent)^{a, b}

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>Aust courts</i>	<i>Total</i>
Supreme ^c /Federal ^d	38.3	19.4	34.3	18.6	31.2	11.3	17.6	3.6	11.2	22.3
District/County	37.6	32.0	41.5	20.5	33.2	..	..	..	..	32.3
Magistrates' (total) ^e	30.5	25.8	23.3	26.5	27.0	33.1	2.3	6.5	..	25.9
<i>Magistrates' (only)</i>	35.7	30.2	28.9	28.0	29.2	43.8	2.4	6.9	..	29.9
<i>Children's</i>	–	..	–	–	0.3	..	..	..	..	–
Family courts ^d	..	..	..	13.8	..	..	..	..	2.1	4.3
Federal Magistrates ^d	..	..	..	..	..	..	..	..	31.3	31.3

^a Excludes payroll tax. ^b Some jurisdictions charge corporations twice the amount individuals are charged, therefore average fees can overstate the charge to individuals. ^c Excludes probate costs. ^d During 2010-11 the federal government imposed minimum filing and hearing fees even for parties that are eligible for exemptions and waivers. ^e Victorian Magistrates' Court fees include civil and criminal court fees paid through VCAT. .. Not applicable. – Nil or rounded to zero.

Source: Australian, State and Territory court administration authorities and departments (unpublished); table 7A.15.

Table 3.2 shows that all Australian States recover a significant proportion of the costs of the civil courts from users, although the two territories appear to have a significantly lower level of cost recovery. Victoria's current level of cost recovery is very close to the Australian average in respect of the County and Magistrates' Courts, and slightly below average in respect of the Supreme Court (i.e. 19.4% vs 22.3%).

New South Wales has the highest level of cost recovery in relation to the Supreme Court, Queensland has the highest level of cost recovery in the County Court and Tasmania achieves the highest level of cost recovery in respect of the Magistrates' Court. The highest level of cost recovery achieved is almost double that of Victoria in relation to the Supreme Court, is around 30% higher in relation to the County Court and is almost 50% higher in relation to the Magistrates' Court.

In absolute terms, no jurisdiction achieves more than 50% cost recovery. The highest levels achieved are 38.3% for the Supreme Court (NSW), 41.5% for the County Court (Qld) and 43.8% for the Magistrates' Court (Tas).

Probate Office Fees

The notes to Table 3.2, above, highlight the fact that the cost recovery percentages presented in respect of the Supreme Courts exclude the revenues and costs of the Office of the Registrar of Probates. This approach by the Productivity Commission apparently reflects the fact that the activities of the Probate Office are somewhat distinct from the main work of the Supreme Court. However, the Probate Office function forms a part of the institution of the Supreme Court in all jurisdictions.

The Supreme Court of Victoria has exclusive jurisdiction in Victoria to make Orders in relation to the validity of a will of a deceased person, the appointment of an Executor or an Administrator, and the administration of deceased estates. The Probate Office is part of the Supreme Court Registry and is

the Office that deals with all applications for grants of Probate and Administration of deceased estates in Victoria. Grants of Probate and Administration are collectively referred to as Grants of Representation. The Office maintains a register of all Grants of Representation issued by the Court and of all wills deposited with the Registrar for safekeeping. In addition Registry staff provide advice and assistance to persons seeking to obtain representation in small estate matters.¹⁸

The Probate Office charges a range of fees in connection with the performance of these functions, with revenue from these fees constituting a substantial part of the total fees revenue derived under the current regulations. Consequently, it is appropriate to account for the operations of the Probate Office as part of the overall workings of the civil jurisdiction of the Supreme Court. Table 3.3 provides adjusted cost recovery data for the Supreme Courts, incorporating the revenues and costs derived from the Probate Office and presents these alongside the equivalent County Court figures, for comparative purposes.

Table 3.3: Supreme and County Court cost recovery percentages - including Probate Offices (\$,000)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Fed. Courts	Aust
SC Revenue	28529	7888	5562	5415	3871	559	983	317	13109	66234
Probate revenue	24365	5531	4351	1174	4836	809	516	168	-	41751
Total Revenue	52894	13419	9913	6589	8707	1368	1499	485	13109	107985
SC Costs	71442	40467	15883	27232	10236	4158	5146	5259	95765	272588
Probate Costs	1287	717	255	386	530	130	32	38	-	3375
Total costs	72729	41184	16138	27618	10766	4288	5178	5297	95765	275963
Cost Recovery										
Supreme Courts	72.7%	32.6%	61.4%	23.9%	80.9%	31.9%	28.9%	9.2%	13.7%	39.1%
County Courts	37.6%	32.0%	41.5%	20.5%	33.2%	NA	NA	NA	NA	32.3%

Source: RoGS (2012), Tables 7A.10 & 7A.11.

Table 3.3 shows that, when the operations of the Probate Office are taken into account, cost recovery levels are substantially higher than those indicated above in Table 3.4 for most Supreme Courts. Moreover, Supreme Court cost recovery levels tend to be higher than those of the County Court in each jurisdiction, when the comparison is made on this basis. In the case of Victoria, total cost recovery in the Supreme Court of 32.6% is very similar to the 32.0% cost recovery recorded in the County Court. However, in three states, Supreme Court cost recovery levels are substantially higher than those of the County Court. The New South Wales, Queensland and South Australian Supreme Courts each recovery substantially more than half of the costs of the civil jurisdiction of the Supreme Court, with New South Wales recovering almost three quarters of costs and South Australia recovering more than four fifths.

¹⁸ See: <http://www.supremecourt.vic.gov.au/home/practice+and+procedure/probate+office/>

These results reflect the fact that Probate Office revenue is substantial in all these states, comprising more than half of total Supreme Court fees revenue in South Australia and little less than half of total fee revenue in New South Wales and Queensland. By contrast, the costs incurred in operating the Probate Office function are relatively small and are substantially lower than the revenue received in all cases.

Fees per lodgement

Table 3.3, below, is also reproduced from RoGS and compares the actual average fee collections per matter lodged in each court. This provides some indication of the level of fees paid by litigants in individual cases. That said, the actual quantum of fees paid will vary widely between cases for a range of reasons, one of the most significant being how far through the court process the case proceeds before the matter is finalised.

Table 3.4: Average fee collections per matter lodged¹⁹

Table 7.8 Average civil court fees collected per lodgment, 2010-11 (dollars)^{a, b}

	NSW ^c	Vic	Qld	WA	SA	Tas	ACT	NT	Aust courts	Total
Supreme (excl. probate) ^d /Federal ^e	2 420	1 068	1 003	1 790	2 290	476	1 114	633	2 098	1 721
District/county	1 266	1 177	726	666	833	..	..	..	..	978
Magistrates' (total) ^f	115	85	110	102	129	77	46	60	..	102
<i>Magistrates' (only)</i>	121	88	118	105	135	80	49	63	..	106
<i>Children's</i>	–	..	–	–	2	..	..	..	..	–
Family courts ^e	..	..	..	222	..	..	..	..	129	172
Federal Magistrates ^e	..	..	..	..	..	..	..	..	333	333
Probate — Supreme	1 076	298	541	196	847	370	725	1 092	..	652

^a Some jurisdictions charge corporations twice the amount individuals are charged, therefore average fees can overstate the charge to individuals. ^b Totals are derived for each court level by dividing the total fees for that court level by the lodgments for that court level. ^c Probate lodgments in NSW Supreme Court for 2010-11 subject to error and should be interpreted with caution. ^d During 2009-10, the Supreme Court of Victoria implemented a new Case Management system and associated Courts Data Warehouse. This has required changes to work practices in registries and judges' chambers and introduced new systems and opportunities for improved data analysis. 2010-11 is the first full year of data from the new system. ^e During 2010-11 the federal government imposed minimum filing and hearing fees even for parties that are eligible for exemptions and waivers. ^f Victorian Magistrates Court fees include fees paid through VCAT. .. Not applicable. – Nil or rounded to zero.

Table 3.4 shows that Victoria's average fee level is slightly above the national average in the County Court, but very substantially below the average in Supreme Court. Another notable aspect of Table 3.4 is that Victoria is the only one of the five reporting jurisdictions to have average fees per case lodged that are higher in the County Court than in the Supreme Court. This appears to be an anomalous outcome, particularly given that the 2001 fees were deliberately set such that the County Court fees represented 70% of the Supreme Court fees. It can be speculated that a larger number of

¹⁹ Source: Productivity Commission (2012).

fees are paid, on average, in each County Court case, suggesting that more cases may proceed further through the legal process in the County Court. However, there is no available data to verify this hypothesis.

3.4. Comparisons of average court costs per lodgement

The data presented in the RoGS Report can be used to calculate the average cost per matter lodged in each court jurisdiction. This is achieved by dividing the average fee revenue per lodgement by the percentage cost recovery achieved in each case. Table 3.5, below, provides a comparison of average recurrent expenditure per case lodged in each Victorian court jurisdiction with the national average.

Table 3.5 shows that the average recurrent expenditure per lodgement in the Victorian Supreme Court is substantially below the Australian average (\$5,505, vs, \$7,717). By contrast, average expenditure in the County Court is slightly above the average (\$3,678 vs \$3,028). In sum, Victorian court costs are comparable with those incurred in other Australian jurisdictions, indicating that the cost base against which the partial cost recovery objectives of these fees are measured is an appropriate, or efficient one, measured according to national benchmarks.

Table 3.5: Implicit cost per matter lodged, Victoria and Australia

	Fees per lodgement (average)	Fees as % of civil recurrent expenditure	Recurrent expenditure per lodgement (implicit)
Victoria			
Supreme Court	\$1,068	19.4%	\$5,505
County Court	\$1,177	32.0%	\$3,678
Australia			
Supreme Court	\$1,721	22.3%	\$7,717
County/District Court	\$978	32.3%	\$3,028

Source: RoGS (2012). Data relate to 2010-11

3.5. Total cost recovery

Table 3.6, below, is also reproduced from the 2012 RoGS Report. It shows the comparison between court expenditures and incomes at the aggregate level for each jurisdiction. Table 3.6 shows that total courts administration expenditure in the civil jurisdictions in Victoria was \$122.7 million, while expenditure less income was \$90.4 million. Thus, total fees and other income was \$32.3 million and the aggregate level of cost recovery achieved in the courts was 26.3%. This represents a significant reduction from the 29.6% figure recorded in the previous year²⁰. Taking all Australian civil courts together, the total expenditure was \$566.9 million, of which \$158.2 million is recovered via fees and other income, leaving a net cost of \$408.7 million. Thus, the aggregate level of cost recovery in Australian civil court jurisdictions was 27.9%. Overall levels of cost recovery in the Victorian court system are therefore approximately in line with the Australian average. Queensland (32.1%), New

²⁰ See RoGS (2011)

South Wales (36.9%) and South Australia (39.2%) currently have significantly higher aggregate levels of cost recovery than Victoria.

Table 3.6: Court administration recurrent expenditure less income (excluding fines) 2010-11

Table 7.1 Court administration recurrent expenditure less income (excluding fines), 2010-11 (\$ million)^{a, b}

	NSW ^c	Vic	Qld ^d	WA	SA	Tas	ACT	NT	Aust courts	Total
<i>Court administration recurrent expenditure</i>										
Civil courts ^{e, f, g}	169.2	122.7	52.9	68.6	30.9	6.5	12.5	11.0	92.8	566.9
Criminal courts ^h	205.9	179.0	136.7	110.6	63.5	16.6	13.0	19.2	..	744.5
Family courts ⁱ	..	..	..	24.2	..	..	..	..	106.6	130.8
Federal Magistrates ^j	..	..	..	..	..	..	..	..	96.5	96.5
Coroners' courts ^k	5.7	13.5	10.6	4.1	2.9	0.5	1.5	1.1	..	40.1
Probate — Supreme ^l	1.3	0.7	0.3	0.4	0.5	0.1	—	—	..	3.4
Total	382.0	316.0	200.5	207.9	97.8	23.7	27.0	31.3	295.9	1 582.2
<i>Court administration recurrent expenditure less income (excluding fines)</i>										
Civil courts ^{e, f, g}	106.8	90.4	35.9	51.2	18.8	4.8	10.7	10.3	79.7	408.7
Criminal courts ^h	194.3	179.0	134.4	102.0	57.7	15.4	12.5	19.0	..	714.4
Family courts ⁱ	..	..	..	20.7	..	..	..	..	100.1	120.8
Federal Magistrates ^j	..	..	..	..	..	..	..	..	66.3	66.3
Coroners' courts ^k	5.6	13.5	10.5	4.1	2.9	0.5	1.5	1.1	..	39.7
Probate — Supreme ^l	- 23.1	- 4.8	- 4.1	- 0.8	- 4.3	- 0.7	- 0.5	- 0.1	..	- 38.4
Total	283.6	278.2	176.7	177.2	75.1	20.1	24.3	30.2	246.1	1 311.5

^a Totals may not sum as a result of rounding. ^b Payroll tax is excluded. ^c NSW Courts and Tribunal Services are currently developing a data warehouse to extract and verify crime data in JusticeLink. Completion of the data warehouse is planned for March 2012. As a result, crime data for 2012 for the Magistrates and Children's courts are partially estimated, based on raw data that are subject to final verification. ^d Queensland has amended its methodology to calculate FTE to align with other states and territories. Expenditure data are based on FTE apportionment. ^e Includes data for the supreme, district/county and magistrates' courts (including children's courts) and the Federal Court. Excludes data for probate, family courts, the Federal Magistrates Court and coroners' courts. ^f Data for the Federal Court exclude the cost of resources provided free of charge to the Federal Magistrates Court. ^g Victorian Magistrates' Court civil data include a proportion of expenditure from the Victorian Civil and Administrative Tribunal (VCAT) and County Court civil and criminal data include the Public Private Partnership rental and associated costs for the Victorian County Court building. ^h Includes data for supreme, district/county and magistrates' courts (including children's courts). ⁱ Discounted (estimate) for resources and services (work of court staff and accommodation) provided free of charge to the FMC in accordance with the Federal Magistrates Act 1999 and appropriations transferred to FMC (shown as expenditure in Family Court of Australia annual report) arising as a result of delays in the 'Federal Courts Restructure'. In addition the Family Court of Australia provides further shared services, including IT, accommodation, work of court staff, depreciation and amortisation that cannot be quantified and as such no additional discount could be applied. ^j FMC expenditure data include resources received free of charge from the Federal Court and Family Court. Funds transferred from FCOA and FCA as income are excluded from these data as these amounts are now considered equivalent to government appropriations (noting that the full appropriation amount was returned to the court due to delays in the restructure of the federal courts). Expenditure for the FMC is based on the total net expenditure for that court and does not isolate family law work from general federal law work. Some Bankruptcy and Immigration matters filed with the FMC are delegated to be dealt with by Federal Court registrars. This work is funded by the FMC and is therefore included in its expenditure. ^k Excludes expenditure for autopsy, forensic science, pathology tests and body conveyancing fees as the inclusion of these costs in coroners' court expenditure varies between states and territories. Expenditure data for the Queensland Coroners' Court and the Victorian Coroners' Court include the full costs of government assisted burials/cremations, legal fees incurred in briefing counsel assisting for inquests and costs of preparing matters for inquest, including the costs of obtaining independent expert reports. ^l The true net revenue may not be identified because rent and depreciation attributable to probate matters may be reported with data for supreme courts. .. Not applicable. — Nil or rounded to zero.

Source: RoGS (2012).

3.6. Reasons for the decline in cost recovery since 2001

It has been shown above that the level of cost recovery achieved in the Victorian courts has declined substantially over the past decade. Table 3.1. shows that expected cost recovery levels at the time of the adoption of the current regulations varied between 40.5% and 48.3% in the different courts. A simple average of these expected cost recovery levels yields a figure of 44.2%. This compares with a figure of 26.3% at present. This implies that cost recovery levels have dropped by around two fifths (i.e. 40%) over the past eleven years.

Some of this fall in cost recovery was due to the fact that the 2001 fees were not adjusted to take account of inflation prior to 2005, when they were brought within the ambit of the Monetary Units Act 2004. The remaining part of the fall in cost recovery reflects real increases in the costs of courts administration. Table 3.7, below, compares the real value of the fees initially set in 2001 with those currently in place for a selection of the main fee types contained in the proposed regulations.

Table 3.7: Comparison of fees as made in 2001 and current fees - nominal and real

Fee	2001	2011 ²¹	2011 value of real 2001 fee ²²	Fee reduction (%)
Supreme Court				
Commencement/counterclaims	\$600	\$767.40 (62.8 fee units)	\$797.58	3.8%
Commencement of Court of Appeal cases	\$2,500	\$3,146.70 (257.5 fee units)	\$3,323.25	5.3%
Special list setting down	\$1850	\$2,329.10 (190.6 fee units)	\$2,459.21	5.3%
Daily hearing fee	\$310	\$389.80 (31.9 fee units)	\$412.08	5.4%
County Court				
Commencement/counterclaims	\$420	\$529.10 (43.3 fee units)	\$558.31	5.2%
Daily hearing fee	\$220	\$277.40 (22.7 fee units)	\$292.45	5.1%

Table 3.7 shows that current fees have a value that is between 3.8% and 5.4% below the real value of the fees initially set under the current regulations at the time of their introduction in 2001. This implies that a majority of the reduction in cost recovery levels that has occurred since 2001 has been due to increases in the average recurrent costs incurred in the courts per case lodged, while the erosion in the real value of the fees has played a small, but not insignificant, part.

²¹ The value of a fee unit in 2010-11 was \$12.22.

²² i.e. The 2001 fee inflated by the Melbourne All Groups CPI to obtain the equivalent real value in 2012 dollars.

3.7 Moves toward full cost recovery

While most comparable jurisdictions appear historically to have adopted a similar approach to cost recovery to Victoria's current approach - i.e. affixing an objective of partial cost recovery in recognition of the mix of private and public benefits derived from the operation of the civil courts, there has been movement in recent years toward the embrace of higher levels of cost recovery. Indeed, an objective of full cost recovery has been adopted in some circumstances.

At the international level, the United Kingdom's family and civil court system is predominantly funded by the users of court services. According to the UK Ministry of Justice²³, the annual cost of operating the civil and family courts in England and Wales is £619 million, of which 82% is recovered via court fees, with the remaining 18% funded through the budget of the Ministry of Justice. The approach taken is to set fees on the basis of full cost recovery, while providing a comprehensive fee remission scheme to protect access to justice for lower income groups. New Zealand has also recently moved to increase its court fees with a view to increasing their cost recovery rates significantly in the civil jurisdictions²⁴.

Recent changes at the Federal level also mean that the level of cost recovery via court fees is increasing in that jurisdiction. These changes respond to the recommendations of a 2009 report to the Commonwealth Attorney-General on access to justice in the Federal civil justice system²⁵, which concluded that:

- The Attorney General, through the Standing Committee of Attorneys General (SCAG) process, should initiate a thorough examination of issues and options for funding aspects of the justice system on a cost recovery basis; and
- Given the significant public costs of court hearings and the opportunities parties have to resolve matters without hearing, or minimise the length of hearings by identifying the real issues in dispute, full cost pricing for long hearings is generally appropriate. The Government should propose a model of full cost pricing for long hearings.

The Taskforce Report also recommended that a comprehensive system of fee waivers should be adopted to ensure that access to justice was preserved in the context of a move toward full cost recovery. This approach is consistent with that enunciated in the United Kingdom, as discussed above.

Some of the recommendations of the 2009 report have already been implemented in the Federal Court context, with a sliding scale of hearing fees having been implemented. The current (2012-13) fees are set out in Table 3.8., below, with the pre-reform (2009-10) fee scale included for comparative purposes.

Table 3.8: Federal Court Fees - Civil Jurisdiction

²³ <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/fees/why-we-charge.htm>

²⁴ Department of Justice (2009). *Consultation Paper on Court Fees*, p 3. Victorian Government, Melbourne, 20 October 2009.

²⁵ Access to Justice Taskforce, Attorney General's Department (2009). *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, p 123. Australian Government, Canberra, September 2009.

Fee	Corporation		Other	
	2009-10	2012 -13	2009-10	2012 - 13
Filing fee	\$1,881	\$2,248	\$785	\$938
Setting down/hearing allocation fee	\$3,135	\$3,746	\$1,569	\$1,875
Hearing fee - days 2 -4	\$1,254	\$1,499	\$625	\$747
Hearing fee - days 5 - 9	\$1,254	\$2,696	\$625	\$1,243
Hearing fee - days 10 +	\$1,254	\$5,320	\$625	\$2,502

Table 3.8 shows that the major change to the fee structure implemented has been to increase substantially the daily hearing fees payable after day 4 of a hearing and, in particular, after day 9 of a hearing. Daily hearing fees payable from day 10 onward are now almost four times as large as those payable in days 2 - 4 for civil matters heard in the Federal Court. However, it should be noted that the majority of the revenue derived from court fees derives from the filing fees and setting down fees, which have increased more modestly, rather than the hearing fees, which have seen far more substantial increases. The hearing fees currently applied in the Federal Court on days 2 - 4 of a hearing are somewhat larger than those in place in Victoria's Supreme Court, while those applying to longer hearings are very substantially larger than those currently in place. As noted above, this fee structure has been adopted with the deliberate intent of providing greater incentives to litigants to settle matters early.

This substantial shift in fees has direct implications for Victorian court fees since, in May 2010, the Standing Committee of Attorneys-General (SCAG) agreed in principle to move to parity with fees of the Federal Court where jurisdiction is shared with the State or Territory Courts. This decision effectively applies to all State and Territory Supreme Courts. Thus, an issue in the current context of determining new fees regulations is whether and how to adopt the SCAG agreement in relation to hearing fees. While the "sliding scale", involving rising fee levels in respect of longer hearings, provides incentives to parties for earlier settlement, it can be noted that differing fee structures across the various affected courts mean that the actual levels of cost recovery implied by adoption of the specific Federal Court fees are likely to vary quite widely. This issue is discussed further in the options sections, below.

3.8. Probate Office fees

As noted above, civil jurisdictions of the Supreme Courts of each State and Territory contain the Probate Office, which makes orders in relation to the validity of wills and the appointments of executors or administrators, amongst other, related functions. The fee revenue obtained in respect of these functions is, in all jurisdictions, substantially higher than the costs involved. Thus, these fees effectively cross-subsidise other aspects of the court's operations. In Victoria, this cross-subsidy amounts to around \$4.8 million, while the subsidy is substantially larger in other jurisdictions. For example, in New South Wales, this cross-subsidy amounts to around \$20 million per annum.

Such cross-subsidies are, *a priori*, inconsistent with the DTF Cost Recovery Guidelines. However, the current context is one in which the Victorian Law Reform Commission has recently commenced a review of succession law²⁶, which may have significant implications for the operations of the Probate Office and, by implication, the fees charged.

The review follows a nationwide project conducted by the National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General. Among the areas that the Commission has been specifically asked to review are wills, family provision, intestacy, administration of smaller estates, and the operation of the jurisdiction (including costs, rules and principles). The Commission is due to report to the Attorney-General by 1 September 2013. In the circumstances, there is a clear case for adopting a no change approach, pending the outcome of the review.

3.9 Fee structure

Recommendations of the Civil Justice Committee

In addition to addressing overall cost recovery issues, the Civil Justice Committee Report considered the question of what general fee structure should be preferred in the specific context of court fees²⁷. Its review of this issue focused in particular on a consideration of the relative merits of "block fee" and "multiple fee" systems. A block fee is defined as a single large fee payable on filing of proceedings which is calculated so as to retrieve a substantial proportion of the administrative costs likely to be incurred throughout the process. Conversely, multiple fees systems seek a closer alignment between individual fees paid and the cost of individual administrative actions taken within the Courts.

The Committee noted that, at the time of writing (i.e. 1984), the Supreme Court used multiple fee systems, while the County Court used a "quasi-block" fee system, consisting of one large filing fee and very few additional fees. The Magistrates' Court was found to have moved recently more in the direction of a block fee system, from a starting point of multiple fees.

The Committee argued that block fee systems had the substantial advantages of greater certainty of revenue for the courts and substantially lower administrative costs (i.e. costs of fee calculation and collection). This latter point was judged to be particularly significant, with the Committee noting that in the Supreme Court at that time, in the case of proceedings commenced by writ, up to 80 different fees may be chargeable.

Conversely, the block fee system has the disadvantage that it is more difficult to incorporate a user pays philosophy within it, as the administrative costs incurred will vary widely between different cases²⁸. Some of this variance in administrative costs is due to specific aspects of the cases in

²⁶ See: <http://www.lawreform.vic.gov.au/projects/succession-law-terms-reference>

²⁷ Victorian Law Foundation/Law Department of Victoria (1984), op. cit., p 377-9.

²⁸ The Committee noted that "*This is true because each case requires different services and a different numbers of services.*" See: Victorian Law Foundation/Law Department of Victoria (1984), op. cit., p 378.

question and some to the ways in which the cases are managed. However, a significant part of the difference in administrative costs relates to the question of whether cases proceed through to judgement or are settled or withdrawn at an earlier stage of proceedings.

Having weighed the above factors, the Committee reached the view that a modified block fee system was most appropriate. This would mean that a single block fee would be charged at each major stage of proceedings. The Committee also recommended that there should be uniformity between the courts in the type of fee system used, as well as a clear proportionality between the size of the fees charged in the Supreme and County Courts.

Civil Justice Review Report

The issue of the appropriate structure of court fees has also been considered more recently in the context of the 2008 Civil Justice Review Report completed by the Victorian Law Reform Commission. The Commission noted that:

"Depending on the court and the particular list within the court, such fees encompass fees for the commencement of proceedings, entry into certain lists, the filing of documents, hearing fees, jury fees, late filing fees, mediation fees, notice of trial, production of court files and searching of court files, the filing of motions, pre-trial conference fees, photocopying, setting down and issuing subpoenas. Fees may be waived in cases of hardship.

It is not clear what the costs of administering such a piecemeal system of charges are. At least for certain types of cases, it would appear that it may be more administratively convenient, and involve less "transaction costs" to have one uniform aggregate fee either payable or incurred at the outset, with provision for a reduction or refund in the event of settlement, as an added financial incentive."²⁹

The Commission's comments highlight the administrative costs associated with a multiple fee structure, in common with the 1984 Civil Justice Review Report and suggest that consideration should be given to moving from the current modified block structure to a position much closer to a simple block structure.

DTF Cost Recovery Guidelines and the Committee Recommendations

The Committee's discussion of fees issues acknowledges the importance of user pays principles in fee design, but sets these in the context of a number of competing considerations in the specific context of court fees, many of these considerations being of a pragmatic nature.

The DTF Cost Recovery Guidelines generally favour the adoption of a user pays approach to fee setting, but also recognise the existence of competing policy considerations and practical limitations. In particular it acknowledges the tension between the need to avoid cross-subsidisation and the need to avoid incurring additional costs by introducing unduly complex charging structures:

²⁹Victorian Law Reform Commission (2008). *Civil Justice Review: Report*. Victorian Government Printer. Report No. 98, Session 2006-2008, p 637.

When structuring charges (and, indeed, when designing cost recovery arrangements in general), it is important to ensure that they are simple to understand (and to implement). Complex arrangements, while theoretically pure, may result in unjustified costs, unnecessary confusion, and high levels of evasion.³⁰

Consistent with the recommendations of the Civil Justice Committee and the DTF Guidelines, the current regulations can be characterised as broadly implementing a modified block fee structure. There are currently 24 fees payable in the Supreme Court and 21 fees payable in the County Court. However, revenue analysis indicates that the great majority of revenue collected is derived from a small number of these fees. Table 3.9, below, summarises this point.

Table 3.9: Fee revenue - Supreme Court

Fee type	Revenue
Commencement fees	\$5.7 million (44.2%)
Entry into list	\$0.5 million
Hearing fees	\$0.2 million (1.6%)
Judgements in default	\$0.3 million
Notice on website of application for probate	\$0.7 million
Application for probate	\$3.5 million (27.1%)
Filing a summons (probate matters)	\$0.5 million
<i>Sub-total</i>	<i>\$11.4 million (88.4%)</i>
Other fees	\$1.5 million (11.6%)
Total fees revenue	\$12.9 million

Source: Supreme Court. Data analysed by Deloitte and relates to 2009-10.

Table 3.9 shows that more than 88% of the fee revenue generated in the Supreme Court in 2009-10 was generated by only seven of the 24 fee types. Moreover, commencement fees alone account for 44.2% of total fees, while fees for applications for grants of probate account for a further 27.1% of the total. Thus, over 70% of fee revenue derives from only two fees.

Table 3.10 shows that a similar pattern is evident in relation to County Court fees.

Table 3.10: Fee revenue - County Court

Fee type	Revenue
Filing fees (originating process)	\$3.0 million
Setting down fees	\$1.8 million
Hearing fees	\$0.2 million
Sub-total	\$5.0 million (74.6%)
Other fee revenue	\$1.7 million

³⁰ Department of Treasury and Finance (2010). *Cost Recovery Guidelines.*, p 33.

Total fee revenue	\$6.7 million
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Source: Supreme Court. Data analysed by Deloitte.

Table 3.9 shows that 74.6% of County Court fee revenue comes from only three fees: filing fees originating an action, setting down fees and hearing fees. Moreover, of the remaining \$1.7 million in fee revenue, around three quarters (\$1.3 million) is derived from filing fees payable in relation to counter-claims, defences and other matters subsequent to the initiation of an action.

The above discussion establishes the case for the adoption of a modified block fee structure. This option has been adopted despite the fact that the use of such a structure necessarily means that there is greater potential for divergence between the cost recovery level achieved in respect of any individual case and the average cost recovery level than would be the case under a multiple fee structure. This reflects a judgement regarding the relative importance of the other factors favouring the use of the modified block fee system.

3.10. Conclusions

The above discussion shows that the policy of requiring a significant co-contribution to the costs of the civil court system to be paid by users was adopted following a detailed review of the justice system. Historical levels of cost recovery have been at or above 40%, consistent with this stated policy. However, cost recovery levels have fallen substantially over the past decade, largely due to increases in the cost of courts administration. The level of cost recovery being achieved is now around 30% in the County Court. RoGS reports that cost recovery is below 20% in the Supreme Court, although the adjusted data set out above show that, when the Probate Office is included in the calculation, overall cost recovery in the Supreme Court jurisdiction is above 30% and, indeed, is very similar to that currently being achieved in the County Court.

These levels of cost recovery are broadly in line with the current Australian average, but are well below the highest levels. Significant fee increases would be required in order to restore the co-contribution to court costs made by civil users to their 2001 levels.

Moreover, the SCAG commitment to move fees in the Supreme Court in line with the new, significantly higher, fees payable in the Federal Court necessarily has implications for the future fees in both the Supreme and County Courts, given the historical concern to maintain proportionality between the fees charged in these two jurisdictions.

The government believes that the principles enunciated above remain the appropriate ones to guide fee setting at this time. A key issue canvassed above is that attempts to implement some principles will necessarily tend to work against the achievement of others. Thus, fees policy must reflect attempts to achieve an appropriate balance between these competing principles. In particular, in determining the overall level of cost recovery to be achieved via user fees, a balance must be struck between:

- ensuring civil users of court services make a contribution to court costs, in recognition of the private benefits that they attain due to their access to a government-provided forum for civil dispute resolution; and
- preserving effective access to justice, by avoiding setting fees at a level that will create a perceived or actual barrier to potential litigants making use of court services.

In addition, in determining the appropriate fee structure to be implemented, a balance must be achieved between:

- The need for equity between different court users, ensuring as far as possible that there is proportionality between the quantum of court resources used and the fees paid across different users; and
- The need to ensure that administrative complexity is avoided and the cost of administering the fee structure is, consequently, minimised.

In light of the findings of the 2008 Law Reform Commission report discussed above, the Department of Justice considers that the modified block fees system adopted following the 1984 Civil Justice Committee review continues to reflect a broadly appropriate balance between this latter pair of competing objectives. However, as discussed below, the costing information now available allows for a rebalancing between individual fees in such a way as to improve equity as between court users.

3.11. Fee review process and future fees policy

The process of review of the existing fees within the various court jurisdictions has been under way for some time. However, a number of significant issues of relevance to fees policy have not yet been fully resolved. One concern is that substantial difficulties have been encountered in obtaining reliable activity based costing data to support the setting of individual fees at levels that are appropriately reflective of attributable costs. While progress has been made in this area, further refinement of the data remains desirable. More importantly, the detailed process of consideration of fees policy issues that has been undertaken, involving recognition of important trade-offs and inter-dependencies in relation to different aspects of the fees structure, has highlighted the complexities involved and indicated the need for further work to be undertaken in this area.

Given these factors, it has been decided to insert a five year sunset clause into the proposed regulations.

4. Summary of the current regulations

The following is intended to provide a general overview of the structure of the existing fees regulations. This provides necessary background for the discussion of the options for the proposed regulations which follows. Given the high degree of similarity between the structure of the fees established in each court jurisdiction, these fees are discussed together.

4.1. Court fees

Initiation fees

These fees are payable when a matter is first lodged with the courts. They are referred to as commencement fees in the Supreme Court and as filing fees in the County Court. The need for an initiation fee reflects the fact that a range of administrative requirements are put in train by the initial lodgement of a matter and significant court resources will be deployed before a hearing actually commences.

When a matter is lodged with the court, staff must:

- receive and inspect the documentation;
- identify specific legislative requirements in relation to that type of action and ensure these are complied with;
- allocate a case number and ensure all documents (including copies) are labelled with this number and that the court seal is applied;
- provide a receipt for the fee paid and record this payment in the accounts;
- create a case record.

The fee is also intended to provide partial recovery of the cost of a number of other administrative steps likely to be taken following initiation but prior to the payment of a setting down fee. These include:

- recording of appearance or defence;
- joining of third parties;
- amendment of particulars or of parties; and
- fixing a directions hearing.

The fee also relates to the recording of the details of any of these actions in the case record and the sending of notices to parties advising them when time limits for the completion of various steps in the process are about to expire. These steps are regarded as being essential parts of efficient case management.

Setting down fees

Setting down fees are payable when a matter is set down for hearing - i.e. when a date is fixed for hearing the matter at issue. The basis for setting this fee was revised at the time of the adoption of the current regulations. The setting down fee is intended to recover a proportion of both the administrative costs incurred when a case is set down for hearing and the cost of the first day's hearing.

Hearing fees

These fees are payable at a daily rate in respect of the second and subsequent days of a hearing. The need for a hearing fee arises because the length of a hearing is a major determinant of the amount of court resources expended in finalising a matter. Hence, a daily hearing fee ensures that there is an element of proportionality in the contributions made to court costs by individual litigants. Payment in respect of the first hearing day is regarded as being included with the setting down fee. This change was made at the time of the introduction of the current regulations in 2001.

Judgement or order fees

A fee is payable where an application for a default judgement is made in circumstances where the other party to the proceedings has failed to enter and appearance or file a defence. This involves the registry in checking compliance of the application with the rules, confirming no appearance of defence has been filed and checking the affidavit confirming service, proposed judgment and interest calculations.

Probate related fees

A substantial part of the fee revenue of the Supreme Court derives from Probate Fees. These are fees levied in connection with the determination of the disposition of the estates of deceased persons. The most important fee is that payable on application for a grant of representation, which yields around \$4.5 million in revenue annually.

Other fees

A range of additional fees are charged in respect of specific administrative activities undertaken by the courts. Thus, in the County Court there are five fees payable for "registry activities", including fees for provision of a certificate by the registrar, for document searches and for a copy of a judge's notes, or other proceedings to be provided.

5. Court costs and fee levels

Section 3, above, provides detail on the total of recurrent expenditures in each court jurisdiction. This data provides the basis for comparisons of fees and revenues at an aggregated level and is therefore crucial to determination of the overall level of cost recovery being achieved in each jurisdiction and comparing this with the identified policy goal. This then provides the basis for determining the average percentage change in fees needed to achieve the identified revenue goal.

However, this aggregate data does not provide a basis for determining the costs associated with the activities to which individual fees relate. Thus, it does not provide a basis for determining the appropriate level of individual fees, or setting the relativities between different fees.

Given this, data that would inform the setting of individual fees was sought. However, research into this issue indicated that a "top down" analysis of the resources devoted to individual activities would not be feasible, notably because the staff involved are typically engaged on a wide range of tasks, rather than being specialised in particular areas. Since a "top down" analysis was therefore found to be infeasible, it was decided to develop a "bottom up" approach to estimating the costs incurred in carrying out the tasks related to each individual fee.

5.1. Determining direct wage costs

This involved requesting administrators in each court jurisdiction to undertake the following tasks:

- identify the processes undertaken by court officials (including judicial officers) in relation to each of the fees contained in the regulations;
- identify the classifications of the staff involved in carrying out these processes and the average hourly salary cost for each of these classifications³¹;
- estimate the time taken by each staff member to complete each task;
- derive the direct cost of completing each task on the basis of the above data and estimates; and
- derive the estimated total wage cost of completing all tasks associated with each identified fee.

This process was carried out for all fees other than the modified block fees. As noted above, the modified block fees are the listing or initiation fees paid when a matter is first brought to the court and the fees payable when a matter is set down for trial. A small number of additional fees also fall into this category. Equivalent analyses were not able to be conducted in respect of this group of fees for two, inter-related reasons. First, a large number of processes are, or may be, associated with the payment of these fees, while the complexity of some of these processes - and hence their cost - may vary widely with different cases. Second, depending on the path a case may take through

³¹ Based on a midpoint of the relevant salary range for each classification.

the court process, and the characteristics of the case, there can be wide divergence between cases in terms of what process steps are followed.

5.2. Determining applicable on-costs

As noted, completion of the above steps resulted in a set of estimates of the direct salary costs incurred in completing the tasks to which each fee relates. In order to determine the full costs in each case, it is necessary to inflate these direct wage costs by an appropriate on-cost percentage. On-costs can broadly be divided into two categories:

- Non-wage labour costs. These include the costs of annual and long service leave, payroll tax, superannuation and workcover premiums.
- Corporate overheads. These include the costs of accommodation, services and equipment and indirect labour costs, including corporate management.

Consistent with the requirements of the *Victorian Guide to Regulation*, specific corporate overhead percentages were calculated for each of the courts involved. Non-wage labour costs are effectively identical for all courts, given that employee entitlements and Workcover premiums do not vary between the courts. On-cost percentages were calculated from the RoGS worksheets supplied to the Productivity Commission by the courts administration staff.

Non-wage labour costs

The total non-wage labour cost overhead derived for the three court jurisdictions is 16.9%. This differs only slightly from the 16.5% guideline figure³² recommended for use by the VCEC in circumstances in which organisation-specific data are not available, and so can be considered to be a typical figure. Table 5.1, below, gives a breakdown of this total.

Table 5.1: Non-wage labour cost overheads - all courts, non-judicial officers

Superannuation	9.00%
Workcover	1.34%
Payroll	4.90%
Rec Leave	1.70%
Total	16.9%

The above percentage constitutes a medium-term average figure. Actual on-cost percentages can vary slightly from year to year - notably due to variations in the pattern of redemption of annual and long service leave entitlements by staff. However, the major items (superannuation, Workcover premiums and payroll tax), which account for more than 15% of the 16.9% oncost figure, vary only infrequently. This medium term average figure provides a better picture of the likely average

³² See *Victorian Guide to Regulation* (2011). Appendices, pp 12 - 15.

percentage on-costs over the life of the regulations than would a figure derived from actual expenditures in a given year³³.

The above figures relate only to non-judicial staff. The equivalent figure in respect of judges is 28.5%. This figure has been calculated by the Department of Justice and is typically used in contexts in which supporting data justifying the cost of appointing judges is required to be presented to the Budget and Economic Review Committee of Cabinet. That is, this percentage is adopted where bids for funding to allow additional judges to be appointed are made in the budget process. Virtually all of the major on-cost items will be similar in percentage terms for both judicial officers and administrative staff. The one exception to this which is clearly identifiable is that of judicial allowances. It is believed that this factor essentially explains the difference in labour on-cost percentages between the two groups.

Corporate overheads

The applicable corporate overhead percentages have been calculated from the RoGS worksheets supplied by the courts administration. Key components of corporate overhead costs include usage charges on land and buildings (i.e. rent, depreciation, services costs), court reporting, IT, vehicle expenses, court reporting, sheriff and bailiff services, counselling and mediation costs and cleaning and maintenance. In addition, these costs include the value of various services provided to the courts administration by the Department of Justice. Table 5.2 sets out the overhead costs in each of these major categories for both the Supreme and County Courts.

Table 5.2: Components of courts' corporate overheads , 2010-11 (\$,000)

Item	Supreme Court	County Court
Land and buildings	\$4,014	\$103
Equipment	Nil	Nil
Consumables	\$287	\$167
IT & other support services	\$1,129	\$269
Administrative Support	\$1,791	\$680
Corporate overheads	\$5,624	\$1,350
Other	\$1,476	\$9,898.26
Total	\$14.0 million	\$12.5 million

Source: Department of Justice.

Table 5.2. shows that the calculated overhead percentages for the Supreme Court and the County Court differ significantly, with the former being calculated at 50% and the latter being calculated at 98%. The above overhead costs can be benchmarked against the VCEC's guideline rate of 50%³⁴.

³³ The latter is, in any case, likely to be infeasible in practice, since annual leave and LSL payments may not be identified separately from salary payments in many organisations' summary accounts.

³⁴ See Victorian Guide to Regulation, *ibid*.

The Supreme Court's overhead percentage is identical to the guideline amount, while the County Court figure is approximately twice the guideline level.

Review of the constituent elements of the overheads reported for the County Court shows that the largest proportion (\$9.1 million of a total adjusted³⁵ overhead cost of \$12.5 million) is comprised of "contract payments". This item consists of the annual payments made to the builders of the new County Court building under the Build, Own and Operate (BOO) contract which financed this building. These contract payments are comprised of accommodation services charges which are for the actual usage of courtrooms, and a court services fee, which relates to the provision of security and IT (systems integration) services as part of the building contract.

By contrast, the total building related costs³⁶ listed for the Supreme Court are \$5.6 million. The significantly higher cost involved is likely largely to reflect the fact that the County Court benefits from a new, purpose-designed building, whereas the Supreme Court is housed in "legacy" buildings, which are both government owned and, in effect, are substantially depreciated, being over a century old. Thus, while significant usage charges are levied on the court in respect of these buildings, they are not directly comparable with the open market, commercial arrangements under which the new buildings housing the County Court have been provided. To this extent, the calculated overhead percentage for the Supreme Court arguably represents an under-estimate of true overhead costs.

In order to demonstrate the significance of this item in explaining the substantial observed difference in overhead cost percentages, an additional calculation has been undertaken. The results of this calculation, set out in Table 5.3, show that if the building related and "contract cost" items are excluded from the total overhead figure, the residual overhead cost percentages for the two courts are closely comparable.

Table 5.3: Adjusted overhead cost percentages - Supreme and County Courts (2010-11)

	Supreme Court	County Court
Salary exp. (adjusted)	\$28.2 million	\$12.7 million
Corporate overheads (excluding building & contract expenses)	\$7.0 million	\$3.3 million
Overheads as % of salary exp.	24.8%	25.6%

Source: RoGS (2012). Calculations by Department of Justice

Table 5.3 shows that, excluding building-related costs, the corporate overheads percentages of the two courts differ by only 0.8%. Thus, the observed difference in total overhead cost percentage is almost entirely explained by the different accommodation arrangements to which the two courts are subject.

³⁵ Some re-classification of items between wage and non-wage expenditure was carried out to obtain a truer picture of the nature of the underlying expenditures.

³⁶ Includes usage charges of \$3.6 million and depreciation allowance of \$2.1 million, approximately.

5.3. Estimating total costs

In estimating the total costs incurred in carrying out the tasks associated with each fee, the approach taken was, first, to calculate a cost figure that represents the full cost incurred by the court administration per unit of labour time of each classification that is employed and, second, to multiply these cost figures by the amount of labour time required to complete each of the relevant tasks. Thus, the calculation involves:

- Determining the average annual salary for the relevant staff classification;
- Converting this to a per minute cost, as per 5.1, above;
- Multiplying this figure by the relevant labour on-cost percentage (5.2);
- Multiplying the result by the corporate overhead percentage;
- Applying the resulting cost per unit of time input by the number of minutes taken to complete each task; and
- Summing the results to determine the total cost of completing all tasks associated with the fee being charged.

Table 5.4, below, illustrates the results of this exercise in relation to a sample fee. This is the fee for the issue of a summons for an interlocutory application. This fee has been chosen for illustrative purposes because it demonstrates the large number of specific tasks that are sometimes performed in connection with a single fee being charged. However, the methodology adopted in respect of the remaining fees is consistent with that illustrated below.

Table 5.4: Costing summary - Summons for Interlocutory Application

Activity	Time	Officer	Cost/min	Cost
Fee Processing	5	VPS3	\$1.04	\$5.18
Allocate date	15	VPS3	\$1.04	\$15.55
List	5	VPS3	\$1.04	\$5.18
Initiate case on Courtview	15	VPS3	\$1.04	\$15.55
Follow up work	20	VPS3	\$1.04	\$20.73
Prepare folders	15	VPS3	\$1.04	\$15.55
Prepare summary	120	VPS3	\$1.04	\$124.41
2 judges hearing prepare	90	Judge	\$7.51	\$675.49
Hearing	120	Judge	\$7.51	\$900.66
Hearing	120	VPS2/3	\$0.93	\$111.10
Recording Staff (VGRS)				
Write and hand down decision	120	Judge	\$7.51	\$900.66
Assist and hand down decision	60	VPS2/3	\$0.93	\$55.55
Order Preparation	20	VPS3	\$1.04	\$20.73
Total	725			\$2,866.36

Source: Department of Justice calculations, based on data provided by courts administration.

A key aspect of the process has been to elaborate a disaggregated process analysis as an aid to estimation of the time inputs involved. Table 5.4 shows that the time estimates provided by courts administration have been made at a highly disaggregated level in many cases.

5.3. Comparing costs and existing fees

Comparison of the costs associated with individual fees, calculated as per the above methodology, with existing fee levels reveals widely varying results. That is, while the overall level of cost recovery being achieved is in the vicinity of 32% in the Supreme Court and 30% in the County Court, the level of cost recovery achieved by various individual fees varies widely. In some cases, existing fees have been found to substantially over-recover the costs identified, while in others, cost recovery levels are extremely low: in some cases in the order of 10% or less. Tables 5.5 and 5.6 compares current fees with the calculated costs of the associated activities for the Supreme Court and the County Court respectively and include an estimate of the percentage cost recovery currently being achieved in each case.

It should be noted that data in respect of commencement fees is not included in the table. This reflects the fact that, due to the widely differing nature of the activities that may be undertaken across different matters, and to which these "block fees" relate, it is not possible to produce an average costing or, as a result, a cost recovery percentage. The implications of this are discussed further in the following sections.

Table 5.5: Current fees and costs - Supreme Court

Fee	Cost	Fee	cost rec. %
Fees with judicial input			
Interlocutory application within a proceeding	\$1,149.47	\$333.60	29%
Interlocutory application within a proceeding - CoA	\$2,866.36	\$334.00	12%
Judgement in default	\$1,149.47	\$333.60	29%
Mediation - court official	\$1,018.17	\$76.00	7%
Pre-trial conference - court official	\$277.90	\$75.80	27%
Taking accounts/assessments - Associate Judge or court official	\$1,399.41	\$220.00	16%
Order for appointment as public notary	\$1,352.18	\$239.50	18%
Order for admission as legal practitioner	\$93.23	\$239.50	256%
Certificate of admission	\$111.10	\$144.20	130%
Administrative fees			
Certification of document/certificate	\$114.66	\$144.20	126%
Search and inspection - correct file number or probate file	\$16.30	\$31.80	195%
Search and inspection - incorrect file number	\$24.45	\$50.10	205%
Photocopy	\$0.60	\$1.50	250%
Search and Handling Fee	\$20.37	\$0.00	0%
Retrieval from Storage Fee	\$10.19	\$0.00	0%
Production of file to another Court or Tribunal	\$41.86	\$125.90	301%
Extended opening hours for registry - half an hour before opening or after closing	\$102.33	\$63.50	62%
Extended opening hours for registry - any other time	\$229.32	\$629.30	274%
Subpoena (Form 42A and Form 42AA)	\$389.85	Nil	

Filing an application for examination of debtor (67.02)	\$438.21	Nil	
Application under section 6 or 8 of Judgment Debt Recovery Act	\$50.84	Nil	
Hearing fees			
Hearing (Civil Trial)	\$10,339.98	\$389.80	
Hearing (Court of Appeal)	\$6,811.82	\$389.80	
Block fees			
Commencement	N/A	\$767.40	
Counterclaim, 3rd party proceeding or third/subsequent party claim	N/A	\$767.40	
Commencement of appeal - single judge	N/A	\$767.40	
Commence of appeal - to COA	N/A	\$3,146.70	
Filing a certificate of judgement from Mag or County Court for enforcement	N/A	\$333.60	
Entry to list	N/A	\$755.20	
Entry to list - TEC or Commercial Court	N/A	\$2,329.10	
Commencement in costs court - VCAT	N/A	\$157.60	
Commencement in costs court - Mag Ct	N/A	\$244.40	
Commencement in costs court - County Court	N/A	\$244.40	
Commencement in costs court - Supreme Court	N/A	\$333.60	
Probate Office Fees			
Probate online advertisement - advertising notice to apply for grant of representation	\$10.95	\$38.50	352%
Application for grant of representation	\$40.50	\$275.00	679%
Originating motion under 7.04(1)	\$3,068.10	\$275.00	9%
Summons	\$3,071.17	\$767.40	25%
Filing of notices	\$327.00	\$182.10	56%
Preparation of application for small estate	\$61.43	\$100.20	163%
Authentication of order	\$9.80	\$69.70	711%
Certification of document/certificate	\$37.83	\$119.80	317%
Exemplification	\$44.04	\$119.80	272%
Office copy of parchment and will	\$37.83	\$28.10	74%

Table 5.6: Current fees and costs - County Court

Fee	Cost	Fee	cost rec. %
Specific fees with judicial input			
Filing an interlocutory application	\$1,004.10	\$233.40	23%
Filing an application for examination of debtor (67.02)	\$564.86	\$157.60	28%
Filing material for an ex-parte application	\$220.28	\$125.90	57%
Filing subpoena (Form 42A and Form 42AA)	\$472.72	\$75.80	16%
Specific Fees			
Application under sec 6 or 8 JDRA	\$96.11	\$44.00	46%
Registrar taking evidence, making inquiries or acting as special examiner	\$499.46	\$189.40	38%
Mediation	\$261.54	\$76.00	29%
Pre-trial conference - court official	\$261.54	\$76.00	29%
Judgement in default (may contain judicial input)	\$511.37	\$176.00	34%
Certificate of registrar	\$6.86	\$37.88	552%
Search of docs (per month searched)	\$22.13	\$23.22	105%
Hearing fees			
Daily hearing fee	2918.68	\$277.40	9%
Block fees			
For filing originating process	NA	\$529.10	NA

For issuing an originating adoption summons	NA	\$226.10	NA
Transfer from Magistrates' Court	NA	\$529.10	NA
Filing counterclaim etc	NA	\$529.10	NA
Setting Down for trial	NA	\$529.10	NA

There is some uncertainty as to the reason for the wide variation in cost recovery levels demonstrated in the above tables. On one view, it is possible that changes in court processes and technology have had greater impacts on the costs of carrying out certain functions than others and that such changes have led cost recovery levels to change substantially since the adoption of the current regulations in 2001. However, review of the various RIS completed in 2001 in relation to the existing regulations suggests that, while significant analysis of aggregate cost recovery issues was included, the costs associated with individual fees were not separately identified. This may reflect less well developed management information systems being in place in the courts administration at that time.

Given that the costs associated with individual fees were apparently not identified in 2001, it is probable that the existing fees were not set with reference to these micro-level costings. Rather, the fees may have been set on a subjective basis, applying adjustments to the pre-existing fees on the basis of perceived reasonableness.

The Department of Treasury and Finance *Cost Recovery Guidelines* require that individual fees within a larger fee structure should, as far as is feasible, be set on a consistent basis; that is, that the level of cost recovery to be achieved should be equalised across the individual fees within the structure. Given the above it is apparent that, regardless of the level of cost recovery to be achieved via the proposed regulations, the relativities between the existing fees must be adjusted substantially from current levels.

5.4. Efficient costs

The DTF Cost Recovery Guidelines state that cost recovery through regulatory fees or user charges should be based only on "efficient costs" - i.e. the costs that would be incurred by a normally efficient enterprise in carrying out the relevant tasks. The RoGS publishes a number of "key performance indicators" for the courts, among which are the two efficiency indicators of clearance rate and cost per finalisation. The results of both of these indicators suggest that the Victorian Supreme and County Courts compare well in efficiency terms with equivalent courts across Australia. This suggests that the cost base identified in this RIS can be accepted as representing one based on "efficient costs".

Clearance rates

The clearance rate indicator is based on calculation of the ratio of the number of cases finalised in the relevant years to the number of new cases lodged. Thus, this indicator effectively measures whether the court is managing its workload adequately. If the indicator value is above 100%, the

court backlog will have been reduced over the course of the year, while if it is below 100% the backlog will have increased. Table 5.7 reports the results of this indicator from the 2012 RoGS.

Table 5.7: Clearance indicator - Supreme Court

Year	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust	Ave.
Supreme court										
2010-11	88.9	88.0	128.5	93.3	95.3	100.7	127.4	100.7	94.1	97.4
2009-10	121.7	113.3	94.9	97.4	106.8	118.3	115.9	107.6	96.6	108.9
2008-09	104.9	116.9	87.7	87.7	97.7	98.7	93.2	106.2	106.8	101.9
2007-08	105.4	119.9	100.3	107.3	102.1	102.4	86.1	112.5	107.3	106.9
2006-07	106.8	115.9	97.2	130.3	93.3	107.9	117.8	108.5	105.4	108.0
County Court										
2010-11	95.7	86.4	93.6	93.9	104.7	NA	NA	NA	NA	93.7
2009-10	100.6	91.3	94.3	112.8	93.6	NA	NA	NA	NA	98.4
2008-09	93.5	91.1	105.0	107.2	94.0	NA	NA	NA	NA	97.1
2007-08	99.1	99.0	96.9	115.6	111.1	NA	NA	NA	NA	102.1
2006-07	110.3	98.2	122.7	126.4	112.2	NA	NA	NA	NA	112.5

Source: RoGS (2012), Table 7A.22

Supreme Court

Table 5.7 shows that Victoria's Supreme Court clearance rate substantially exceeded the national average in four of the last five years and was significantly higher than 100% in each of those years. The only exception to this trend is 2010-11, where the clearance rate fell to 88.0%. It appears likely that this outcome may have been due to a switch of focus to the criminal jurisdiction at this time: the introduction of the Ashley-Venne reforms coincided with the achievement of a record 150.2% clearance rate in the criminal jurisdiction in 2010-11. These reforms have only been applied in the criminal jurisdiction to date, however, the Supreme Court has indicated that it is currently considering adopting them in the civil jurisdiction, suggesting that significant further progress may be made in the near term³⁷.

County Court

County court data is available from only five jurisdictions. This reflects the fact that neither Tasmania, the territories nor the Federal Government operate County or District courts. The data for this jurisdiction shows a very different picture, with Victorian clearance rates being below the national average in all of the past five years and continuing to decline.

³⁷ These reforms are intended to reduce court delays and more closely manage criminal appeals. They include a range of procedural changes, for example, a requirement for leave to appeal to be obtained in all cases. The substance of the reforms is discussed in more detail in the 2010-11 Annual Report of the Supreme Court. See: Supreme Court (2012) *Annual Report 2010-11*, p 49, p 79.

This decline in clearance rates essentially reflects two factors. First, the number of lodgements in the County Court increased by 34 per cent between 2006-07 and 2010-11. This increase in lodgements occurred mainly in the Commercial List and can be attributed to the removal of the County Court's monetary jurisdictional limit as from 1 January 2007: prior to January 2007, if a civil case involved a monetary amount above \$100,000, the case had to go to the Supreme Court. After January 2007, this monetary limit for the County Court was removed, resulting in many cases now being lodged with the County Court that had previously gone to the Supreme Court. Moreover, over the same period personal injury lodgements have also increased by 7%.

Second, during this period, there has been a reallocation of priorities - and hence resources - within the County Court. Specifically, sexual assault cases took on a legislative priority, requiring a redistribution of judicial staff to the criminal jurisdiction. Criminal judicial staff increased by 26% over the period in question, while civil judicial staff decreased by 6%. Notwithstanding this reduction in staff numbers, the County Court has managed to increase its finalisation numbers by 18 per cent in the five years 2006-07 to 2010-11. However, the larger increase in lodgements (i.e. of 34 per cent) occurring over the same period resulted in a declining trend in clearance rates over time.

In sum, the available data for the County Court are indicative of an efficiently functioning jurisdiction.

The RoGS states that this is the only efficiency indicator they have been able to develop that is directly comparable between jurisdictions. However, it also reports an average cost per finalisation indicator, which it regards as broadly comparable, subject to a number of caveats. Table 5.8, below, reports the results of this indicator.

Table 5.8: Average cost per finalisation (\$)

Year	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust	Average
Supreme Court										
2010-11	\$4,267	\$5,040	\$1,481	\$8,267	\$4,797	\$3,624	\$4,015	\$16,310	\$17,138	\$5,992
2009-10	\$3,545	\$3,559	\$1,635	\$7,410	\$6,801	\$3,379	\$2,254	\$19,986	\$24,443	\$5,554
2008-09	\$2,566	\$2,591	\$1,974	\$7,550	\$4,320	\$3,161	\$3,256	\$14,411	\$20,931	\$4,869
2007-08	\$2,721	\$2,787	\$2,398	\$10,627	\$5,211	\$2,888	\$3,236	\$17,644	\$19,738	\$5,539
2006-07	\$2,961	\$2,587	\$2,698	\$7,493	\$6,946	\$2,548	\$3,249	\$17,664	\$17,881	\$5,428
County Court										
2010-11	\$2,054	\$2,900	\$1,078	\$2,712	\$1,463	NA	NA	NA	NA	\$2,125
2009-10	\$2,172	\$3,433	\$1,155	\$3,395	\$2,159	NA	NA	NA	NA	\$2,463
2008-09	\$1,884	\$3,302	\$1,376	\$4,191	\$2,519	NA	NA	NA	NA	\$2,519
2007-08	\$2,107	\$3,590	\$1,400	\$4,389	\$2,357	NA	NA	NA	NA	\$2,659
2006-07	\$2,117	\$4,073	\$1,086	\$3,762	\$2,470	NA	NA	NA	NA	\$2,516

Source: RoGS (2012), Table 7A.24

Table 5.8 shows that, for the Supreme Court, Victoria's average cost per finalisation has been substantially below the national average in each of the last five years. That said, the RoGS speculates that geographical factors may be important in determining average costs. Thus, it would be expected that a geographically compact and relatively densely populated state such as Victoria would achieve relatively low costs. This issue highlights the importance of the RoGS caveats about comparability.

In contrast, to the Supreme Court, the County Court has reported an average cost per finalisation that has been well above the national average in each of the last five years. It is likely that the costs associated with the new premises in which the County Court operators have had a significant impact on this outcome. However, it is notable there has been a clear downward trend in the cost per finalisation over this time, with the 2010-11 figure of \$2,900 being the lowest recorded over this period. Moreover, the cost per finalisation in the County Court remains over 42% lower than in the Supreme Court.

5.5. Assessing fees options

The preceding discussion has highlighted the fact that there are two important differences between the Supreme and County Courts in terms of the context for fee-setting. The first is that the Supreme Court's civil jurisdiction includes the Probate Office, which has historically constituted a substantial source of revenue for all State and Territory Supreme Courts, with fees typically being set at levels above those required to recover the costs of the associated activities. By contrast, the County Court has no equivalent source of revenue.

Second, it was noted above that one of the sources of public benefit that potentially justify the adoption of fees set at partial cost recovery levels is that of clarifying the law through the power of some judicial decisions to set precedents. The Supreme Court of Victoria is a superior court and therefore its decisions are binding on lower courts. Decisions of the Supreme Court of Victoria at the trial and appellate level create precedent. Given the workings of the doctrine of precedent, there are additional public benefits associated with the work of the Supreme Court. This may justify adopting a different preferred option in terms of the percentage of costs that should be covered by fees for Supreme Court proceedings.

Given these two distinguishing factors in respect of the operating environment of the two courts, the following sections identify and analyse fees options for the two courts separately.

6. Identification and assessment of options - Supreme Court fees

6.1. Overview

While the current RIS is an omnibus type covering two, related sets of regulations, it is necessary to consider the various options for achieving the identified regulatory objectives in each case separately. This reflects the fact that, while the key alternatives in each case differ according to the level of cost recovery to be attained, the considerations involved differ somewhat between the regulations. The following section considers options in relation to the fees to be charged in the Supreme Court, while Section 7, below, considers options in relation to the fees to be payable in the County Court.

6.1.1. General consideration of possible fees options

Fees options can be considered in terms of two broad dimensions: the structure of the fees and the extent to which the costs of court operations are to be recovered from users via the fees charged. Section 2, above, setting out the nature and extent of the problem being addressed by the proposed regulations, includes a detailed discussion of the issues involved in relation to the former issue. In general terms, the issue to be addressed is that of whether a single "block" fee should be payable by all litigants on commencement of an action, whether a large number of individual fees should be established, with each being related to the costs incurred in completing specific tasks in relation to the progress of a dispute through the court system, or whether some hybrid of these two options is to be preferred.

In weighing the options, the key issue is to achieve an appropriate balance between equity and efficiency. That is, a detailed fee structure, in which a separate fee is charged in respect of each significant activity undertaken in respect of a case, achieves a high level of equity as between different court users, in that the fee paid by any individual litigant will be related to the costs incurred in relation to their individual case. Conversely, implementation of such a fee structure is likely to incur administrative costs in respect of the calculation of which fees are to be applied to which litigants and in issuing accounts and collecting the requisite amounts. Conversely, a block fee structure has major advantages in terms of administrative simplicity and, accordingly, low cost, but performs relatively poorly in terms of equity between individual litigants.

The detailed discussion of these issues contained in Section 2 concludes that a hybrid system, in which a substantial block fee is supplemented by a limited number of specific fees in relation to major individual activities that may be undertaken in moving a case through the court system, is preferable to the other two alternatives. This outcome derives substantially from the conclusions of two major reviews previously undertaken in Victoria, which are believed to remain relevant to the current context. Given the detailed discussion contained in Section 2, this aspect of the alternative fee options available is not considered further here.

However, it can be noted that, while the specific purpose fees to be charged in the proposed regulations (which largely reflect those currently in place) are relatively numerous, the amount of

revenue currently being obtained via many of these fees is quite small. Consequently, there is a potential argument in favour of further simplification of the fee structure via elimination of these, relatively rarely charged, fees. In this case, the maintenance of a given level of cost recovery would require a small upward adjustment in the size of the block fees to compensate for the small amounts of revenue that would be foregone from the abolition of these fees. It is also possible that the abolition of these fees might have some impact on the incentives faced by litigants and could mean that there is some increase in demand for these actions to be taken.

Question: Stakeholders' views are particularly sought on the question of whether there is significant merit in further simplifying the proposed fees to eliminate those that are rarely charged and which, consequently, generate little revenue.

Given the above, the following discussion of alternatives considers only options in terms of the extent of cost recovery to be achieved.

6.1.2. Probate fees

Section 3.8 discusses the current level of fees charged in the Probate Office. These fees are currently set at levels that are substantially higher than the costs incurred in funding the operations of the Probate Office within the Supreme Court. Indeed, these cost amount to only around \$0.7 million per annum, whereas attributable fee revenue is around \$5.5 million, implying that revenue exceeds costs by \$4.8 million. As noted in Section 3.8, this substantial over-recovery of costs is found in the Probate Office functions within all States' and Territories' Supreme Courts. Table 6.1 provides data on Probate Office costs and revenues for all States and Territories, as well as the Australia-wide total.

Table 6.1: Probate Offices Costs and Fee Revenues (2010-11) (\$,000)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Probate Fee Revenue	\$ 24,365	\$ 5,531	\$ 4,351	\$ 1,174	\$ 4,836	\$ 809	\$ 516	\$ 168	\$ 41,750
Probate Office Costs	\$ 1,287	\$ 717	\$ 255	\$ 386	\$ 530	\$ 130	\$ 32	\$ 38	\$ 3,375
Net Revenue	\$ 23,078	\$ 4,814	\$ 4,096	\$ 788	\$ 4,306	\$ 679	\$ 484	\$ 130	\$ 38,375
Cost Recovery (%)	1893%	771%	1706%	304%	912%	622%	1613%	442%	1237%

Source: RoGS (2012)

Table 6.1 shows that the fee revenue in Probate Offices recovers more than 300% of costs in all Australian jurisdictions. The national average is 1,237% cost recovery, while the highest levels of cost recovery are found in Queensland (1,706%) and New South Wales (1,893%). In dollar terms, the highest level of over-recovery is found in New South Wales, where fee revenue exceeds Probate Office costs by over \$23 million. By contrast, Victoria generates net revenue of \$4.8 million, while its

cost recovery percentage of 771% is very substantially below the national average and the fourth lowest of the eight States and Territories.

A number of points can be made in this regard. First, Probate is a high volume jurisdiction within the Supreme Court dealt with by specialist staff. Innovations have been introduced by the Court in recent years that have substantially reduced costs to parties in other way. The Probate Online Advertising System was introduced in 2009 with a fee under \$40. Prior to this parties were required to place advertisements in newspapers costing approximately \$260 (\$100 in regional papers). Any fear that over-recovery may have impeded efficiency is not borne out on the evidence.

Second, the Supreme Court on 1 July 2011 established a Probate List with a dedicated Judge heading the list and hearing applications and trials. Costs associated with the Probate List are not included in the costing exercise for the previous financial year. Family Provisions proceedings under Part IV of the *Administration and Probate Act 1958* for organisational reasons do not fall within the Probate Office administratively but affect a subset of parties within the probate jurisdiction. The Court provides special case management in these matters. In a number of cases this involves a mediation before an Associate Judge for which no fee is charged. It is estimated that approximately 40% of the 184 mediations before Associates Judges in 2011/2012 were Part IV matters. When the above matters are considered there is considerably less cross-subsidisation than would appear from the older figures.

Finally, probate Fees in Victoria are low in comparison to other States. The \$282 Victorian fee is considerably less than New South Wales (\$730 for estates over \$50,000) and Queensland (\$555). Only Western Australia has a lower flat fee.

Nonetheless, it is necessary to clarify the effects of this over-recovery of costs. Probate fees are levied on the estates of deceased persons. Thus, the costs incurred are levied on deceased persons or, more pragmatically, on the inheritors of their estates. In terms of fee-setting policy, as set out in the DTF Cost Recovery Guidelines, the systematic over-recovery of the costs of carrying out regulatory functions is contrary to equity and efficiency principles: it is inequitable to charge the recipients of regulatory services substantially more than they cost to provide, while such charging practices potentially undermine incentives for efficiency by ensuring that regulatory costs will be able to be more than recovered, even if they are not kept down to efficient levels.

However, in conceptual terms, the systematic collection of fees that substantially over-recover costs over a period of years can be considered to amount to a form of taxation. Considered from this perspective, the collection of revenue in this way is highly efficient. That is, a tax on deceased estates does not alter behaviour and so, in economic terms, does not give rise to welfare losses due to economic distortions.

The practical rationale for the widespread over-recovery of costs in the context of probate fees across Australia does not appear to have been widely discussed: for example, the policy issues involved are not discussed by the Productivity Commission in its *Report on Government Services*. However, it is most probable that the various States and Territories have taken the view that this

over-collection enables the fees charged to users of the civil jurisdiction of the Supreme Court to be kept at lower levels than would otherwise be needed to achieve any given level of cost recovery.

The size of this impact can be demonstrated in the Victorian context via the following calculations: if a notional target of 40% cost recovery in the Supreme Court is adopted, which is broadly consistent with the levels expected to be achieved at the time of the adoption of the current fees regulations in Victoria in 2001, the required change in current Supreme Court fee levels under two scenarios is set out in table 6.2. The two scenarios are:

- Maintenance of probate fees at their current levels; and
- Reduction of probate fees to levels that would simply recover the costs incurred by the Probate Office.

Table 6.2: Impact on Supreme Court Fee Revenue of Different Probate Fee Options

	Current fee revenue	40% Cost Recovery (Probate fees at cost recovery)	40% cost recovery (Probate fees at existing levels)
Probate fees	\$5.5 million	\$0.7 million	\$5.5 million
Other fees	\$7.9 million	\$15.8 million	\$11.0 million
Total	\$13.4 million	\$16.5 million	\$16.5 million
Costs (civil jurisdiction)	\$41.2 million	\$41.2 million	\$41.2 million

Table 6.2 shows that, if probate fees were kept at current levels, revenue from fees charged to users of the Supreme Court's civil jurisdiction would need to rise from \$7.9 million to \$11.0 million in order for an overall 40% cost recovery target to be achieved. This increase, of \$3.1 million, is equal to an average fee increase of 39.2%. However, were probate fees to be reduced to levels that would just recover the costs of the Probate Office, revenue from fees charged to Supreme Court litigants would need to rise from \$7.9 million to \$15.8 million. This represents a 100% increase in existing fee revenue.

Thus, in the context of a move to restore cost recovery levels in the Supreme Court to 40%, the implication of retaining probate fees at their existing levels, rather than reducing them to cost recovery levels, is to reduce the required average fee increase for litigants from 100% to 39.2%.

Arguably, retention of probate fees at their current high levels would help to maintain access to justice for users of the civil jurisdiction of the Supreme Court, given broader government policy on cost recovery in the courts. However, it must be recognised that such a policy position involves the continuation of a historic practice in which, in effect, the beneficiaries of deceased estates subsidise the costs of litigants in the Supreme Court. As noted above, around half of these litigants are corporations, rather than individuals. Moreover, the extent of this cross-subsidy currently amounts to around \$4.8 million per year in Victoria.

There is clearly room for questions to be raised as to whether such cross-subsidisation is appropriate, given that the only linkage between the two activities is an administrative one (i.e. both functions are carried out under the auspices of the Supreme Court). One consideration in this regard is that of the relative economic position of the estate beneficiaries, who provide the subsidy, and Supreme Court litigants, who benefit from it. However, little concrete information is available in relation to this issue. It can be noted that the Probate Office deals with all grants of probate, so that anyone who inherits the assets of a deceased person contributes to this cross-subsidy. Put alternatively, those who contribute constitute a very broad cross-section of society. It is arguable that the economic position of Supreme Court litigants may be better, on average, than that of this broad cross-section of inheritors, given the substantial costs involved in such litigation. Moreover, as noted elsewhere, around 47% of the beneficiaries of these cross-subsidies are corporations, rather than individuals. Thus, there may be some, albeit limited, basis for concluding that the redistribution of income implied by this cross-subsidy is one that is, on the whole, regressive in nature.

However, in the current Victorian context, the continuation of this cross-subsidy is preferable to the alternative of raising other fees to the level that would otherwise be required to achieve the target level of cost recovery while reducing probate fees to full cost recovery levels. This judgement reflects, in part, the fact that the restoration of historical cost recovery levels in the Supreme Court will require approximately a 40% increase in Supreme Court fees, even given the maintenance of the cross-subsidy. A substantially larger fee increase - estimated above to amount to a doubling of fees on average - as would be required to eliminate the cross-subsidy is likely to have a low level of acceptability to many stakeholders.

The options considered below adopt different approaches to the setting of the probate fees. Option 1 is based on full cost recovery and would involve resetting the probate fees at full cost recovery levels, thus ending the current cross-subsidy. Option 2 is based on 50% cost recovery and would retain probate fees at their existing levels. Options 3 - 5 are all based on an overall cost recovery level of 40%. However, they differ in terms of their treatment of probate fees: option 3 would see these fees reduced to cost recovery levels, while options 4 and 5 would see them retained at their existing level.

Finally, it should be noted that there is currently a broad review of succession law underway in Victoria. The review follows a nationwide project conducted by the National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General. Among the areas that the Commission has been specifically asked to review are wills, family provision, intestacy, administration of smaller estates, and the operation of the jurisdiction (including costs, rules and principles). The Commission is due to report to the Attorney-General by 1 September 2013. In the circumstances, there is a clear case for adopting a zero or minimal change approach, pending the outcome of the review, particularly given the intention that the proposed regulations would have a sunset date five years after coming into effect, rather than the usual ten years.

Stakeholder question: *Stakeholder views are particularly sought on the question of the appropriate future level of probate fees. Are there any other factors that you consider should be weighed in determining the level of these fees? If so, why are these relevant? Are there any other specific*

options in terms of the future level and structure of probate fees that should be considered? If so, why?

6.2 Option 1: Set fees at full cost recovery levels

6.2.1. Description of option 1

Option 1 would involve setting all Supreme Court fees at full cost recovery levels. Given that direct costings have not been possible in relation to the activities to which the block fees relate, in practice, these fees would be set on a "residual" basis, whereby the required amount of revenue to achieve full cost recovery would be calculated after estimation of the full cost-recovery based expected revenue to be derived from the remaining fees is completed and this figure is used to calculate the necessary percentage increase on the current fee level. This option would involve reducing the various fees charged in the Probate Office from their current levels to amounts that would only recover the costs incurred by the Office.

Fee waivers

It should be noted that the *Supreme Court Act 1986* currently makes provision for fees to be waived at the discretion of the court. Section 129 (3) of the Act provides that a registrar may waive fees if payment of the fee would cause financial hardship. An equivalent provision is also found in Section 28 of the *County Court Act 1958*.

The current fee waiver provisions will continue to operate under the full cost recovery option.

Table 6.3: Required average fee increase, by court jurisdiction

Court	Current Cost recovery level	Required % increase (average)
Supreme Court	32.6% ³⁸	215.7%

Note: Based on 2010-11 data, derived from RoGS (2012).

Table 6.3 shows that, to achieve full cost recovery, fees in the Supreme Court would need to increase approximately threefold: that is, full cost recovery based fees would, on average, be around three times their existing levels. As noted in Section 5, however, there would be very substantial variations around these averages for individual fees. This reflects the current, widely varying levels of cost recovery being achieved in relation to these individual fees.

The cost recovery level of 32.6% reported above in respect of the Supreme Court includes the costs and revenues of the Probate Office. This reflects the fact that it has been assumed that, under a full

³⁸ This figure includes the costs and revenues of the Probate Office and so differs from that reported in RoGS. The rationale for providing this "global" figure is discussed in the text.

cost recovery option, the current substantial over-recovery of costs in the Probate Office³⁹ would need to be addressed, with these fees also being reduced to a 100% cost recovery level. The implications of this change are discussed below.

Impact on individual fees

The above discussion of existing cost recovery levels in the courts has highlighted the wide differences in cost recovery between individual fees. Were a full cost recovery based option to be adopted it would necessarily imply that individual fees would be set at levels that corresponded to full cost recovery in relation to the activities to which they specifically relate. This means that, while the average rate of increase in fees would be 215.7%, the increases in individual fees would vary widely around this rate. Table 6.2 clarifies the size of the increase in individual fees that would be required under this option.

Hearing fees

While individual fees would generally be set at levels that fully recovered the costs of the associated activities under this option, one exception, as shown in the following table, is that of hearing fees. As a result of the recent agreement of the Standing Committee of Attorneys-General to harmonise certain court fees⁴⁰ this option would, in common with the others considered below, adopt the fee structure used on the Federal Court for both the Supreme and County Courts⁴¹. These fees are \$712.00 per day on days 2 - 4, \$1,184 per day on days 5 - 9 and \$2,384 per day thereafter. As indicated in Table 6.2, these fees fall substantially below full cost recovery levels. By implication, the result of this approach to hearing fees being taken is that the shortfall in cost recovery in this area would be retrieved through the commencement fees being set at a higher level than would otherwise be the case⁴².

Revenue from hearing fees

The estimates of the revenue that would be derived from hearing fees under each of the five options discussed below are substantially higher than a simple comparison of the current and proposed hearing fees in each case would imply. This reflects the fact that the Supreme Court has recently identified a substantial level of under-recovery of hearing fees from litigants. The Court believes that this substantial under-recovery derives from the fact that the collection of hearing fees is not tied to the filing of documents and relies on solicitors making daily payments during the trial. It appears that substantial numbers of litigants have not made these payments. The Court identified this issue and is in the process of taking steps to try to improve compliance.

³⁹ RoGS (2012) shows that Probate Office costs are currently \$0.7 million, while fee revenues are \$5.5 million. This substantial over-recovery of costs occurs in all jurisdictions and has been in place for a very long period.

⁴⁰ This agreement is discussed further in the following sections.

⁴¹ One variation from the Federal Court structure arises because Victoria does not differentiate for fee-setting purposes between individuals and corporations. Thus, both individuals and corporations would have the hearing fees charged at the Federal Court's rates for individuals.

⁴² i.e. Because these fees have been set on a "residual" basis, as explained above.

In light of these findings, the Court intends to introduce a hearing fees payment process that will require fees to be paid by the date specified in the notice. It is expected that this mechanism will be effective in addressing the current non-payment issue. Consequently, all of the following five options include estimates of hearing fee revenue that are based on fees being collected in respect of a total of 1,700 hearing days per year⁴³, rather than the 571 days in respect of which hearing fees were actually collected in 2010-11. The effect of this change in the regulations with respect to each of the options discussed is, therefore, to reduce the size of the block fees required in order to meet the target level of cost recovery in each case. This change is, therefore, clearly one which reflects an improvement in the equity performance of the regulations, since it reduces the size of the fees paid by all litigants as a result of ensuring that litigants who proceed to hearing consistently meet their fees obligations.

Box 2: Calculating the fee impact of the alternatives

The cost estimates used as the basis for the following calculations, for all options, relate to 2010-11, as this is the most recent data available. This means that the target revenue figures derived, in relation to each option (i.e. 100%, 50% or 25% cost recovery) relate to the 2010-11 expenditure figures. Thus, the dollar values of the individual fees required to achieve these cost recovery outcomes are also, necessarily, specified in terms of 2010-11 values. In drafting the proposed regulations, these values must be converted to fee units, as required by the *Monetary Units Act 2004*. Because all of the cost and target revenue calculations have been undertaken using 2010-11 values, the conversion of the target fee levels into fee units must, for the sake of consistency, also be undertaken using the 2010-11 value of a fee unit.

This means that the dollar value of the fees thus derived will be higher, at the time of their introduction in 2012-13, than the 2010-11 values contained in the tables used throughout Section 7. The difference, which reflects the difference between the 2010-11 value of a fee unit (\$11.95) and the 2012-13 value of a fee unit (\$12.53), is approximately 4.8%. Appendix 3 provides detail on these calculations and shows the dollar value of each proposed fee in 2012-13.

Table 6.4: Proposed Fees in the Supreme Court - Option 1

Fee	Estimated Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11) ⁴⁴	Expected revenue	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)
Interlocutory application within a proceeding	\$1,149.47	\$333.60	\$1,149.47	96.2	2968	\$3,411,626.96	\$1,205.26	\$3,577,212.20
Interlocutory	\$2,866.36	\$334.00	\$2,866.36		96	\$275,170.56	\$3,005.48	\$288,526.12

⁴³ This is the court's estimate of the actual number of days of hearings conducted during 2010-11, as distinct from the number of days in respect of which hearing fees were actually collected.

⁴⁴ Where an item is marked "NA", this is due to the fact that the court was unable to provide data on the number of times this fee was charged. The courts advise that, where such information is unavailable, it is reflective of a fee that is relatively little-used. Where a proposed fee is a newly proposed fee, with no equivalent in the existing fees regulations, this is noted in the column.

application within a proceeding - CoA				239.9				
Judgement in default	\$1,149.47	\$333.60	\$1,149.47	96.2	1021.26	\$1,173,907.73	\$1,205.26	\$1,230,884.01
Mediation - court official	\$1,018.17	\$76.00	\$1,018.17	85.2		\$0.00	\$1,067.59	\$0.00
Pre-trial conference - court official	\$277.90	\$75.80	\$277.90	23.3	113	\$31,402.70	\$291.39	\$32,926.85
Taking accounts/assessments - Associate Judge or court official	\$1,399.41	\$220.00	\$1,399.41	117.1	NA	N/A	\$1,467.33	N/A
Order for admission as legal practitioner	\$93.23	\$239.50	\$93.23	7.8	1151	\$107,307.73	\$97.75	\$112,515.97
Certificate of admission	\$111.10	\$144.20	\$111.10	9.3	176	\$19,553.60	\$116.49	\$20,502.65
Order for appointment as public notary	\$1,352.18	\$239.50	\$1,352.18	113.2	8	\$10,817.44	\$1,417.81	\$11,342.47
Certification of document/certificate	\$114.66	\$144.20	\$114.66	9.6	NA	\$0.00	\$120.23	N/A
Production of file to another Court or Tribunal	\$41.86	\$125.90	\$41.86	3.5	NA	\$0.00	\$43.89	N/A
Extended opening hours for registry - half an hour before opening or after closing	\$102.33	\$63.50	\$102.33	8.6	50	\$5,116.50	\$107.30	\$5,364.83
Extended opening hours for registry - any other time	\$229.32	\$629.30	\$229.32	19.2	4	\$917.28	\$240.45	\$961.80
Subpoena (Form 42A and Form 42AA) (new)	\$389.85	N/A	\$389.85	32.6	New fee	\$1,720,035.00	\$408.77	N/A
Filing an application for examination of debtor (67.02) (new)	\$438.21	N/A	\$438.21	36.7	New fee	N/A	\$459.48	N/A
Application under section 6 or 8 of Judgment Debt Recovery Act (new)	\$50.84	N/A	\$50.84	4.3	New fee	N/A	\$53.31	N/A
Photocopy	\$0.60	1.5	\$0.60	NA	150069	\$90,041.00	\$0.60	\$90,041.40
Search and Handling Fee (new)	\$20.37	\$0.00	\$20.37	1.7	New fee	\$201,118.56	\$21.36	NA
Retrieval from Storage Fee (new)	\$10.19	\$0.00	\$10.19	1.0	New fee	\$12,004.90	\$12.53	NA
Hearing (Civil Trial) - Days 2 - 4	\$10,339.98	\$389.80	\$712.00	59.6	298	\$212,062.00	\$746.56	\$222,474.08
- days 5 - 9	N/A	N/A	\$1,184.00	99.1	N/A		\$1,241.47	
- day 10 onward	N/A	N/A	\$2,384.00	199.5	N/A		\$2,499.71	
Hearing (Court of Appeal) - days 2 -4	\$6,811.82	\$389.80	\$712.00	59.6	N/A		\$746.56	
- days 5 - 9	N/A	N/A	\$1,184.00	99.1	N/A		\$1,241.47	
- day 10 onward	N/A	N/A	\$2,384.00	199.5	N/A		\$2,499.71	
Commencement	N/A	\$767.40	\$4,193.59	350.9	5227	\$21,919,894.93	\$4,397.13	\$22,983,789.41
Counterclaim, 3rd party proceeding or third/subsequent party claim	N/A	\$767.40	\$4,193.59	350.9	299	\$1,253,883.41	\$4,397.13	\$1,314,741.35
Commencement of appeal - single judge	N/A	\$767.40	\$4,193.59	350.9	33	\$138,388.47	\$4,397.13	\$145,105.23
Commence of appeal - to COA	N/A	\$3,146.70	\$17,195.07	1,438.9	111	\$1,908,652.77	\$18,029.64	\$2,001,290.31

Filing a certificate of judgement from Mag or County Court for enforcement	N/A	\$333.60	\$1,827.45	152.9	221	\$403,866.45	\$1,916.15	\$423,468.34
Entry to list	N/A	\$755.20	\$4,126.82	345.3	487	\$2,009,761.34	\$4,338.00	\$2,112,606.00
Entry to list - TEC or Commercial Court	N/A	\$2,329.10	\$12,727.69	1,065.1	155	\$1,972,791.95	\$13,345.44	\$2,068,542.52
Commencement in costs court - Supreme Court	N/A	\$333.60	\$1,823.01	152.6	238	\$433,876.38	\$1,911.49	\$454,934.82
Commencement in costs court - Mag Ct	N/A	\$244.40	\$1,335.54	111.8	425	\$567,604.50	\$1,400.36	\$595,153.51
Commencement in costs court - County Court	N/A	\$244.40	\$1,335.54	111.8	62	\$82,803.48	\$1,400.36	\$86,822.39
Commencement in costs court - VCAT	N/A	\$157.60	\$861.42	72.1	63 ⁴⁵	\$54,269.46	\$903.23	\$56,903.46
Probate online advertisement - advertising notice to apply for grant of representation	\$10.95	\$38.50	\$10.95	1.0	20,827	\$228,055.65	\$12.53	\$260,962.31
Application for grant of representation (<\$1,000)	N/A	\$105.16	\$40.93	3.4	18387	\$752,579.91	\$42.92	\$789,106.80
Application for grant of representation (>\$1,000)		\$268.88						
Originating motion under 7.04(1)	\$3,068.10	\$275.00	\$3,068.10	256.7	NA	\$0.00	\$3,217.01	NA
Summons	\$3,071.17	\$767.40	\$3,071.17	257.0	64	\$196,554.88	\$3,220.23	\$206,094.78
Filing of notices	\$327.00	\$182.10	\$327.00	27.4	272	\$88,944.00	\$342.87	\$93,260.95
Preparation of application for small estate	\$61.43	\$100.20	\$61.43	5.1	34	\$2,088.62	\$64.41	\$2,189.99
Authentication of order	\$9.80	\$69.70	\$9.80	1	11	\$107.80	12.53	\$113.03
Certification of document/certificate	\$37.83	\$119.80	\$37.83	3.2	NA	\$0.00	\$39.67	\$ -
Exemplification	\$44.04	\$119.80	\$44.04	3.7	135.00	5,945.4	\$46.18	\$6,233.96
Office copy of parchment and will	\$37.83	\$28.10	\$37.83	3.2	56.00	2,118.5	\$39.67	\$2,221.30

Commencement fees

As noted above, the commencement fees (i.e. the modified block fees) are set as a "residual" under all fees options, given the fact that it is not possible to calculate directly the costs of the numerous activities to which they effectively relate. Thus, they are set at a level that would yield sufficient revenue to bridge the difference between the revenue generated by the specific purpose fees and the total target revenue.

The various specific purpose fees listed above would, if set at full cost recovery levels, yield revenue of \$8.5 million, based on existing volumes. Given that a full cost recovery outcome requires revenue of \$41.2 million to be generated, this implies that a further \$32.7 million would need to be

⁴⁵ There is no appreciable difference in the costs associated with processing a grant for an estate under \$1000- only a handful of such applications are made in any given year. This figure does not include any allowance for the costs associated with those matters that are referred to a judge. These matters are now referred to the Probate List Judge.

generated via the (block) commencement fees. This is equivalent to an increase of approximately 495% in current commencement fee revenues. It is assumed that the current relativities among the commencement fees payable in respect of disputes involving different monetary amounts would be maintained. Given this assumption, the required commencement fees are also set out in Table 6.2, above.

6.2.2. Expected benefits of option 1

Option 1 is advanced because it is consistent with the general presumption in favour of full cost recovery contained in the DTF Cost Recovery Guidelines. There is also some precedent for the adoption of such a model, both internationally and in the Australian context. In relation to the Supreme Court, while no Australian jurisdiction currently achieves full cost recovery, three states currently achieve substantially more than 50% cost recovery. As demonstrated in Table 6.5, below, Queensland recovers 61.4% of the costs of the civil jurisdiction of the Supreme Court, while New South Wales recovers 72.7% and South Australia recovers 80.9%.

Table 6.5: Revenues, costs and cost recovery levels in Supreme Courts, 2010-11 (\$,000/%)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Fed. Courts	Aust
SC Revenue	\$28,529	\$7,888	\$5,562	\$5,415	\$3,871	\$559	\$983	\$317	\$13,109	\$66,234
Probate revenue	\$24,365	\$5,531	\$4,351	\$1,174	\$4,836	\$809	\$516	\$168	-	\$41,751
Total Revenue	\$52,894	\$13,419	\$9,913	\$6,589	\$8,707	\$1,368	\$1,499	\$485	\$13,109	\$107,985
SC Costs	\$71,442	\$40,467	\$15,883	\$27,232	\$10,236	\$4,158	\$5,146	\$5,259	\$95,765	\$272,588
Probate Costs	\$1,287	\$717	\$255	\$386	\$530	\$130	\$32	\$38	-	\$3,375
Total costs	\$72,729	\$41,184	\$16,138	\$27,618	\$10,766	\$4,288	\$5,178	\$5,297	\$95,765	\$275,963
Cost Recovery										
Supreme Courts	72.7%	32.6%	61.4%	23.9%	80.9%	31.9%	28.9%	9.2%	13.7%	39.1%
County Courts	37.6%	32.0%	41.5%	20.5%	33.2%	NA	NA	NA	NA	32.3%

Source: RoGS (2012), Tables 7A.10 & 7A.11.

However, Table 6.3 shows that those states that achieve very high levels of cost recovery in the Supreme Court do so through a combination of relatively high fees for court actions and very high Probate Office fees. In both Queensland and New South Wales, Probate Office fees represent a large minority of total revenue, while in South Australia, the state with the highest level of cost recovery, Probate Office revenue actually accounts for the majority of revenue collected in the Supreme Court's civil jurisdiction. By comparison, in the County Court, cost recovery levels are substantially lower. Thus, where high levels of cost recovery in the Supreme Court have been

achieved, it has only been in the context of very high levels of cross-subsidisation from Probate Office fees to court activities per se⁴⁶.

Option 1 has not been specified in a way consistent with current practice in these jurisdictions because such an approach is inconsistent with the principles set out in the DTF Cost Recovery Guidelines, which emphasise the need to ensure horizontal equity in fee setting - i.e. that the fees paid by individual parties reflect, as far as possible, their individual contributions to the costs of the court's operations. Thus, Option 1 instead sets all fees at 100% cost recovery.

The implication of adopting this option is that the taxpayer would not subsidise the day to day operations of the court system, since all recurrent costs would be met via fee revenue received from court users. Adoption of Option 1 would necessarily result in a substantial increase in revenue to government, given the relatively low levels of cost recovery currently being achieved in the court system, as set out in Section 3. At the same time, it would necessarily result in a major increase in the fees charged to users of the civil courts. Table 6.6, below, sets out the implications of the adoption of Option 1 in respect of the two court jurisdictions.

Table 6.6: Total recurrent expenditures on civil matters by court jurisdiction and expected fee revenue

Court	Expenditure	Revenue	% cost recovery	Increase in revenue to achieve full cost recovery (2010-11 data)	% increase in revenue
Supreme Court	\$41.18m	\$13.42m	32.6%	\$28.95m	215.7%
County Court	\$25.49m	\$8.01m	32.0%	\$17.48m	218.2%
Total	\$67.86m	\$21.43m	31.6%	\$46.43m	216.7%

Source: Productivity Commission (RoGS, 2012). Data for 2010-11.

Note: Supreme Court data includes Probate Office

Table 6.6 shows that the adoption of Option 1 would result in a substantial increase in revenue to government. Revenues from the Supreme Court would increase by \$28.95 million. However, the major implied reduction in probate fee levels under this option - in order to remove the current over-recovery of costs in that office - would mean that users of Supreme Court services other than the Probate Office would, in fact, face the greatest average fee increases: if probate related costs and revenues are excluded, current Supreme Court fees revenue is reduced to \$7.9 million, while costs fall only marginally to \$40.5 million. The required fee increase is therefore $(\$40.5 - \$7.9) = \$32.6\text{m}$. This implies an average increase in the commencement (block) fees of almost 500% from current levels.

⁴⁶ As Table 6.2 demonstrates, this cross subsidy exceeds \$23 million in New South Wales, with Probate Office fee revenue being approximately 20 times the costs incurred.

A number of benefits would be likely to flow from the move to full cost recovery. The substantial increase in fees charged, when combined with the fact that fees are levied at different stages of the court process (i.e. on initial filing, at the time a matter is set down for trial, at the hearing stage), would provide additional financial incentives for litigants to seek to settle matters earlier through compromise and negotiation. To the extent that this incentive changed behaviour, it would result in savings to the parties in terms of other legal expenses. Moreover, there is arguably a direct benefit to the parties in having reached a settlement to which both parties have consented, rather than one that is imposed by the courts. Finally, there would inevitably be savings in court costs as a result of this expected increase in the rate of early settlements.

If the rate of early settlements were to increase, as suggested above, one corollary is that the total increase in fee revenue would be somewhat lower than that estimated above, as these estimates effectively assume the maintenance of existing case loads. However, the costs incurred by the courts may also be consequentially reduced. A reduction in court caseloads would also be expected to allow for some reduction in court backlogs and allow more timely delivery of judgements in those cases that did continue to proceed to this final stage in the court process. Thus, access to justice would be improved in this respect.

6.3. Expected costs of Option 1

As noted above, the adoption of full cost recovery based fees would substantially increase the size of the fees payable by litigants in the courts. Table 6.7, below, sets out the average amount of court fees paid per case lodged in each jurisdiction at present and compares it with the implicit average cost per case lodged under Option 1.

Table 6.7: Expected change in average court fees per lodgement

	Australia	Victoria (2010-11)	Victoria (option 1)
Supreme Court	\$1,721	\$1,068	\$5,628
County Court	\$978	\$1,177	\$3,678

Note: Assumes no change in current settlement rates.

Source: RoGS (2012), p 7.26.

Table 6.7 shows that the average fee paid per case lodged in the Supreme and County Courts would be very large under Option 1, totalling \$5,628 and \$3,678 respectively. These fee levels would be significantly higher than both the current average levels in Victoria and the national average. Moreover, as indicated in Section 3, these average fees would substantially exceed those currently being charged in any other Australian jurisdiction: the highest average fee level currently being charged in the Supreme Court is \$2,420, while in the County Court it is \$1,266⁴⁷.

The average fees calculated in Table 6.7 reflect a calculation based on dividing the total fee revenue by the number of cases lodged with the courts. The actual fees paid in any individual case will vary

⁴⁷ In all cases, the highest average fee paid is in the New South Wales court system.

significantly from this average depending on whether the case is settled at an early stage or proceeds to hearing and judgement. Thus, litigants who settle cases early will generally pay much less than the above averages, while those that proceed to hearing and judgement will generally pay much more. This fact is important to underline in considering the issue of the likely impact of fees set at this level on access to the court system.

While litigants will, in the majority of cases, also need to pay substantial fees to legal practitioners to prepare their cases and represent them in court, increases in court fees of some thousands of dollars must be considered likely to raise additional affordability concerns for many litigants considering commencing an action in the civil courts. Thus, fees set at full cost recovery levels could have an effect of reducing the effective level of access to the courts to resolve civil disputes.

Importantly, the full cost recovery option would also be inconsistent with the logic advanced by the Civil Justice Committee, which argued that the operation of the courts led to both public and private benefits being obtained and should therefore be funded through a combination of government subsidies and user charges. This issue may be regarded as being particularly important in relation to the Supreme Court, given the important role played by the court in establishing legal precedents which have the effect of clarifying both the common and statute law and thus making the likely outcomes of litigation more predictable. By improving parties' ability to assess the likely outcome of litigation this factor, in turn, will tend to favour the direct settlement of matters between parties and thus reduce the call on court resources.

In this view, a full cost recovery based option would mean that court users effectively subsidise the achievement of these public benefits by meeting all of the recurrent costs of the court system. Such an outcome is not consistent with both the equity and efficiency principles. In respect of equity, the issue is that public benefits are being obtained, in part, at private cost. In respect of efficiency, the issue is that the likely reduction in the use of the court system due to government not meeting the costs of achieving the public benefit outcomes will mean that an inefficiently low level of use of this resource is obtained.

Finally, it should be noted that the UK experience (cited above) of combining fees set at full cost recovery levels and detailed waiver provisions appears to have yielded a cost recovery level of only around 80% in practice.

6.3. Option 2: set fees to recover 50% of recurrent cost

6.3.1. Description of the option

Option 2 would involve adjusting the current fee levels in such a way as to ensure that total revenue from fees charged in the Supreme Court, including the Probate Office, recovered 50% of the recurrent costs of the civil jurisdiction. Moreover, all individual fees would be set by reference to the costs associated with performing the specific functions to which they relate. Within this overall

50% cost recovery objective, however, differential approaches would be taken to different groups of fees. These different approaches are identified and explained below.

- **Administrative fees.** Fees which relate to activities that are wholly administrative in nature - that is, they are completed by administrative, rather than judicial officers - would be set at full cost recovery levels. This approach reflects the view that, while the public benefits associated with court operations justify a partial cost recovery option, these benefits essentially accrue to the judicial inputs to the court, rather than the administration of matters.
- **Fees with judicial input.** These are the fees that relate to predominantly judicial activities, but which do not constitute part of the modified "block fee" structure. They would be set at levels that would recover 50% of the costs attributable to these functions.
- **Probate Office fees.** These fees would be retained at their current levels. This approach is justified on the basis that major changes to the fee structure of the Probate Office should be avoided in the short term, pending the completion of a review of its activities which is currently underway. However, a small reduction in fees is proposed, in recognition of the current significant level of over-recovery of costs in this area.
- **Block fees.** Block fees would be set on a "residual" basis. That is, having calculated the expected revenue from the fees discussed above, the block fees would be set at a level that would ensure that, in the aggregate, 50% cost recovery is achieved in the Supreme Court.
- **Hearing fees.** As with Option 1, above, the hearing fees to be adopted would be those set in the Federal Court, pursuant to the SCAG agreement. This means that hearing fees will achieve less than 50% cost recovery.

Table 6.8, below, sets out the implications for individual fees of adopting this fee structure.

Table 6.8: Proposed Fees in the Supreme Court - Option 2

Fee	Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11)	Expected revenue	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)
Interlocutory application within a proceeding	\$1,149.47	\$333.60	\$574.74	48.1	2968	\$1,705,828.32	\$602.64	\$1,788,621.66
Interlocutory application within a proceeding - CoA	\$2,866.36	\$334.00	\$1,433.18	119.9	96	\$137,585.28	\$1,502.74	\$144,263.06
Judgement in default	\$1,149.47	\$333.60	\$574.74	48.1	1021.26	\$586,958.97	\$602.64	\$615,447.36
Mediation - court official	\$1,018.17	\$76.00	\$509.08	42.6	NA	NA	\$533.79	NA -
Pre-trial conference - court official	\$277.90	\$75.80	\$138.95	11.6	113	\$15,701.35	\$145.69	\$16,463.42
Taking accounts/assessments	\$1,399.41	\$220.00	\$699.71	58.6	NA	NA	\$733.67	NA

- Associate Judge or court official								
Order for admission as legal practitioner	\$93.23	\$239.50	\$93.23	7.8	1151	\$107,307.73	\$97.75	\$112,515.97
Certificate of admission	\$111.10	\$144.20	\$111.10	9.3	176	\$19,553.60	\$116.49	\$20,502.65
Order for appointment as public notary	\$1,352.18	\$239.50	\$676.09	56.6	8	\$5,408.72	\$708.90	\$5,671.24
Certification of document/certificate	\$114.66	\$144.20	\$114.66	9.6	NA	NA	\$120.23	NA
Production of file to another Court or Tribunal	\$41.86	\$125.90	\$20.93	1.8	NA	NA	\$21.95	NA
Extended opening hours for registry - half an hour before opening or after closing	\$102.33	\$63.50	\$51.17	4.3	50	\$2,558.50	\$53.65	\$2,682.68
Extended opening hours for registry - any other time	\$229.32	\$629.30	\$917.26	76.8	4	\$3,669.04	\$961.78	\$3,847.12
Subpoena (Form 42A and Form 42AA)	\$389.85	Nil	\$194.93	16.3	NA	\$860,017.00	\$204.39	NA
Filing an application for examination of debtor (67.02)	\$438.21	Nil	\$219.10	18.3	NA	NA	\$229.73	NA
Application under section 6 or 8 of Judgment Debt Recovery Act	\$50.84	Nil	\$25.42	2.1	NA	NA	\$26.65	NA
Photocopy	\$0.60	1.5	\$0.60	0.6	150069	\$90,041.40	\$0.60	\$90,041.40
Search and Handling Fee	\$20.37	\$0.00	\$20.37	1.7	NA	\$201,118.00	\$21.36	NA
Retrieval from Storage Fee	\$10.19	\$0.00	\$10.19	1.0	NA	\$12,004.00	\$12.53	NA
Hearing (Civil Trial) - Days 2 - 4	\$10,339.98	\$389.80	\$712.00	59.6	298	\$212,062.00	\$746.56	\$222,747.00
- days 5 - 9			\$1,184.00	99.1	NA	NA	\$1,241.47	NA
- day 10 onward			\$2,384.00	199.5	NA	NA	\$2,499.71	NA
Commencement	N/A	\$767.40	\$1,436.71	120.2	5227	\$7,509,683.17	\$1,506.44	\$7,874,169.88
Counterclaim, 3rd party proceeding or third/subsequent party claim	N/A	\$767.40	\$1,436.71	120.2	299	\$429,576.29	\$1,506.44	\$450,426.02
Commencement of appeal - single judge	N/A	\$767.40	\$1,436.71	120.2	33	\$47,411.43	\$1,506.44	\$49,712.57
Commence of appeal - to COA	N/A	\$3,146.70	\$5,890.98	493.0	111	\$653,898.78	\$6,176.90	\$685,636.13
Filing a certificate of judgement from Mag or County Court for enforcement	N/A	\$333.60	\$629.16	52.6	221	\$139,044.36	\$659.70	\$145,792.96
Entry to list	N/A	\$755.20	\$1,413.84	118.3	487	\$688,540.08	\$1,482.46	\$721,958.76
Entry to list - TEC or Commercial Court	N/A	\$2,329.10	\$4,360.47	364.9	155	\$675,872.85	\$4,572.11	\$708,676.72
Commencement in costs court - Supreme Court	N/A	\$333.60	\$624.56	52.3	238	\$148,645.28	\$654.87	\$155,859.86
Commencement in costs court - Mag Ct	N/A	\$244.40	\$457.55	38.3	425	\$194,458.75	\$479.76	\$203,896.92
Commencement in costs court - County Court	N/A	\$244.40	\$457.55	38.3	62	\$28,368.10	\$479.76	\$29,744.96
Commencement in costs court - VCAT	N/A	\$157.60	\$295.12	24.7	63	\$18,592.56	\$309.44	\$19,494.96
Probate online advertisement - advertising notice to	10.95	\$38.50	\$37.64	3.1	20827	\$783,928.28	\$39.47	\$821,976.68

apply for grant of representation								
Application for grant of representation (<\$1,000)	\$40.50	\$110.00	\$105.16	22.5	1387	\$4,943,896.56	\$281.93	\$5,183,851.37
Application for grant of representation (>\$1,000)	\$40.50	\$275.00	\$268.88	22.5			\$281.93	
Originating motion under 7.04(1)	\$3,068.10	\$275.00	\$268.88	22.5	NA	NA	\$281.93	NA
Summons	\$3,071.17	\$767.40	\$750.46	62.8	64	\$48,029.44	\$786.88	\$50,360.58
Filing of notices	\$327.00	\$182.10	\$178.06	14.9	272	\$48,432.32	\$186.70	\$50,783.01
Preparation of application for small estate	\$61.43	\$100.20	\$97.99	8.2	34	\$3,331.66	\$102.75	\$3,493.36
Authentication of order	\$9.80	\$69.70	\$68.12	5.7	11	\$749.32	\$71.43	\$785.69
Certification of document/certificate	\$37.83	\$119.80	\$117.11	9.8	NA	\$0.00	\$122.79	NA
Exemplification	\$44.04	\$119.80	\$117.11	9.8	135	\$15,809.85	\$122.79	\$16,577.19
Office copy of parchment and will	\$37.83	\$28.10	\$27.49	2.3	56	\$1,539.44	\$28.82	\$1,614.16

6.3.2. Expected benefits of option 2

As discussed in Section 3, court fees have, since the 1980s, been set on the basis of the recommendations of a substantial review of the operation of the civil justice system, which argued for a fee regime which resulted in users of the civil courts making a significant contribution to their running costs. The general rationale provided was that the operation of the civil court system resulted in a mix of public and private benefits and that the funding of the court system should, accordingly, be via a mix of public and private contributions.

If this analysis of the issues involved, and the resulting conclusion, are accepted, the issue of what specific percentage of cost recovery it is appropriate to achieve is necessarily a matter of judgement, given the impossibility of measuring precisely the relative size of the public and private benefits arising as a result of the operation of the court system. However, as noted in section 3, cost recovery levels of around 40% to 50% have historically been achieved under both the current regulations and the previous regulations.

Specifically, cost recovery levels of between 38.0% and 44.9% were being achieved in early 2001, the last year of operation of the previous regulations, while the level of cost recovery estimated to be achieved immediately following the introduction of the current regulations varied from 40.8% to 48.5%.

As per Section 3, the current level of cost recovery is significantly lower than this amount, at 32%, in part because of the erosion of the real value of the current fees in the early years following their introduction and, more importantly, because of increases in the average recurrent cost per lodgement of the court system.

While detailed information is not available as to the reasons for the increase in the average cost of the court system, it is generally considered appropriate that these cost increases should be shared between users and taxpayers, given that both obtain benefits from the courts' operations. Conversely, the fact that the real value of the current fees is below their 2001 levels means that all of the cost increases incurred have, to date, been met by taxpayer.

It can therefore be considered appropriate to revise the existing fees. While the specific size of the appropriate increase is necessarily a matter of judgement, it is appropriate to restore the levels of cost recovery obtained via the fees to at least the levels being achieved under the former regulations and in the early days of the operation of the current regulations.

A 50% cost recovery level would imply a slightly higher level of user contribution than was achieved at the time of the introduction of the current regulations. Given that it is generally accepted that the provision of court services gives rise to significant public and private benefits, an equal sharing of the recurrent costs of use of court services can be considered to be an equitable outcome.

6.3.3. Expected costs of Option 2

As shown in Table 6.6, the fee increases implied by Option 2, while necessarily substantially smaller than under the full cost recovery option, remain considerable. Given that specific purposes fees would be set at 100% cost recovery levels and hearing fees at current Federal Court levels under both options, the major differences between the two options relate to commencement fees and Probate Office fees.

The Probate Office fees have been set at their current levels under this option, for the reasons discussed above, and the current cross-subsidisation of other Supreme Court activities from the proceeds of deceased estates would therefore continue largely unchanged. This means that revenue from this source would be substantially larger than under Option 1. Conversely, this contributes to a much lower required increase in commencement fees: under Option 2, the commencement fees would approximately double, whereas they increase sixfold under Option 1.

Total revenue under this option is approximately \$20.6 million, which represents an increase of \$7.2 million on current revenue, but is \$20.6 million lower than the revenue attained under the full cost recovery option. This means that taxpayers would continue to contribute approximately \$20.6 million per annum to funding the recurrent costs of the civil jurisdiction of the Supreme Court.

6.4. Option 3: 40% cost recovery, with probate fees set at current levels

6.4.1. Description of the option

This option differs from Option 2 only in that it adopts a lower cost recovery target of 40%. The methodology used for determining individual fees is, therefore, essentially the same as that adopted for Option 2. Thus, hearing fees are set at the levels charged to individuals in the Federal Court, Probate Office fees are set at their current levels, administrative fees are set at full cost recovery levels and fees in respect of specific functions largely carried out by the judiciary are set at 40% cost recovery levels. The various commencement (block) fees are then set at the level required to achieve the overall 40% cost recovery target. In practice, this approach means that a large proportion of the fees that would be charged under this option. Table 6.9, below, sets out the fees that would be payable under this option.

Table 6.9: Proposed Fees in the Supreme Court - Option 3

Fee	Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11)	Expected revenue	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)
Interlocutory application within a proceeding	\$1,149.47	\$333.60	\$459.79	38.5	2968	\$1,364,656.72	\$482.11	\$1,430,891.10
Interlocutory application within a proceeding - CoA	\$2,866.36	\$334.00	\$1,146.54	95.9	96	\$110,067.84	\$1,202.19	\$115,410.04
Judgement in default	\$1,149.47	\$333.60	\$459.79	38.5	1021.26	\$469,565.14	\$482.11	\$492,355.74
Mediation - court official	\$1,018.17	\$76.00	\$407.27	34.1	NA	\$0.00	\$427.04	\$
Pre-trial conference - court official	\$277.90	\$75.80	\$111.16	9.3	113	\$12,561.08	\$116.56	\$13,170.74
Taking accounts/assessments - Associate Judge or court official	\$1,399.41	\$220.00	\$559.77	46.8	NA	NA	\$586.94	NA
Order for admission as legal practitioner	\$93.23	\$239.50	\$93.23	7.8	1151	\$107,307.73	\$97.75	\$112,515.97
Certificate of admission	\$111.10	\$144.20	\$111.10	9.3	176	\$19,553.60	\$116.49	\$
Order for appointment as public notary	\$1,352.18	\$239.50	\$540.87	45.3	8	\$4,326.96	\$567.12	\$4,536.97
Certification of document/certificate	\$114.66	\$144.20	\$114.66	9.6	NA	NA	\$120.23	NA
Production of file to another Court or Tribunal	\$41.86	\$125.90	\$41.86	3.5	NA	NA	\$43.89	NA
Extended opening hours for registry - half an hour before opening or after closing	\$102.33	\$63.50	\$102.33	8.6	50	\$5,116.50	\$107.30	\$5,364.83
Extended opening hours for registry - any other time	\$229.32	\$629.30	\$917.26	76.8	4	\$3,669.04	\$961.78	\$3,847.12

Subpoena (Form 42A and Form 42AA)	\$389.85	Nil	\$155.94	13.0	NA	\$688,014.00	\$163.51	NA
Filing an application for examination of debtor (67.02)	\$438.21	Nil	\$175.28	14.7	NA	NA	\$183.79	NA
Application under section 6 or 8 of Judgment Debt Recovery Act	\$50.84	Nil	\$20.34	1.7	NA	NA	\$21.33	NA
Photocopy	\$0.60	1.5	\$0.60	NA	150069	\$90,041.40	\$0.60	\$90,041.40
Search and Handling Fee	\$20.37	\$0.00	\$20.37	1.7	NA	\$201,118.00	\$21.36	NA
Retrieval from Storage Fee	\$10.19	\$0.00	\$10.19	1.0	NA	\$12,004.00	\$12.53	NA
Hearing								
- Days 2 - 4	\$10,339.98	\$389.80	\$712.00	59.6	1,300	\$925,600.00	\$746.56	\$970,524.52
- days 5 - 9			\$1,184.00	99.1	300	\$355,200.00	\$1,241.47	\$372,439.83
- day 10 onward			\$2,384.00	199.5	100	\$238,400.00	\$2,499.71	\$249,970.88
Commencement	N/A	\$767.40	\$901.63	75.5	5227	\$4,712,820.01	\$945.39	\$4,941,559.39
Counterclaim, 3rd party proceeding or third/subsequent party claim	N/A	\$767.40	\$901.63	75.5	299	\$269,587.37	\$945.39	\$282,671.95
Commencement of appeal - single judge	N/A	\$767.40	\$901.63	75.5	33	\$29,753.79	\$945.39	\$31,197.91
Commence of appeal - to COA	N/A	\$3,146.70	\$3,696.96	309.4	111	\$410,362.56	\$3,876.39	\$430,279.74
Filing a certificate of judgement from Mag or County Court for enforcement	N/A	\$333.60	\$396.39	33.2	221	\$87,602.19	\$415.63	\$91,854.01
Entry to list	N/A	\$755.20	\$887.27	74.2	487	\$432,100.49	\$930.33	\$453,072.73
Entry to list - TEC or Commercial Court	N/A	\$2,329.10	\$2,736.47	229.0	155	\$424,152.85	\$2,869.29	\$444,739.35
Commencement in costs court - Supreme Court	N/A	\$333.60	\$391.95	32.8	238	\$93,284.10	\$410.97	\$97,811.70
Commencement in costs court - Mag Ct	N/A	\$244.40	\$287.14	24.0	425	\$122,034.50	\$301.08	\$127,957.51
Commencement in costs court - County Court	N/A	\$244.40	\$287.14	24.0	62	\$17,802.68	\$301.08	\$18,666.74
Commencement in costs court - VCAT	N/A	\$157.60	\$185.21	15.5	63	\$11,668.23	\$194.20	\$12,234.55
Probate online advertisement - advertising notice to apply for grant of representation	\$10.95	\$38.50	\$37.64	3.1	20827	\$783,928.28	\$39.47	\$821,976.68
Application for grant of representation (<\$1,000)	\$40.50	\$110.00	\$105.16	8.8	-		\$110.26	
Application for grant of representation (>\$1,000)	\$40.50	\$275.00	\$268.88	22.5	18,387	\$4,943,896.56	\$281.93	\$5,183,851.37
Originating motion under 7.04(1)	\$3,068.10	\$275.00	\$268.88	22.5			\$281.93	
Summons	\$3,071.17	\$767.40	\$750.46	62.8	64	\$48,064.00	\$786.88	\$50,360.58

Filing of notices	\$327.00	\$182.10	\$178.06	14.9	272	\$48,416.00	\$186.70	\$50,783.01
Preparation of application for small estate	\$61.43	\$100.20	\$97.99	8.2	34	\$3,332.00	\$102.75	\$3,493.36
Authentication of order	\$9.80	\$69.70	\$68.12	5.7	11	\$748.00	\$71.43	\$785.69
Certification of document/certificate	\$37.83	\$119.80	\$117.11	9.8		\$0.00	\$122.79	\$0.00
Exemplification	\$44.04	\$119.80	\$117.11	9.8	135	\$15,795.00	\$122.79	\$16,577.19
Office copy of parchment and will	\$37.83	\$28.10	\$27.49	2.3	56	\$1,540.00	\$28.82	\$1,614.16

6.4.2. Expected benefits of Option 3

As noted above, a large proportion of the individual fees set in option 3 are identical to those contained in option 2. The major difference arises in respect of the commencement fees. Whereas these fees would more than double under option 2, they would rise by a comparatively modest 44% under option 3. Given that these fees account for the majority of Supreme Court civil fees revenue (excluding Probate Office fees), this represents a substantially smaller impact on litigants.

In total revenue terms, this option is estimated to recover ($\$41.2 \text{ million} \times 40\%$) = \$16.8 million per annum in fees revenue, compared with \$13.4 million at present. Thus, it would increase overall revenue by \$3.4 million, or slightly less than 25%.

6.4.3. Expected costs of option 3

The required taxpayer subsidy under this option is approximately \$24.7 million. While this represents a reduction of \$3.4 million when compared with the current fees, it constitutes an additional call on the budget of \$4.1 million, when compared with option 2. This option continues to see the bulk of the costs of the civil jurisdiction of the Supreme Court being met by the taxpayer, rather than by litigants.

6.5 Option 4: 40% cost recovery, with probate fees set at cost recovery

6.5.1 Description of the option

This option would generate the same total revenue as option 3 and, as a result, would require the same level of taxpayer subsidy of court operations. It differs from option 3 in that it significantly changes the fee relativities. Specifically, rather than probate fees continuing to cross-subsidise other aspects of the operations of the court, they would be reduced to 100% cost recovery levels. The consequence of this change, given the fact that target revenue is maintained at 40%, is that the

commencement fees paid would rise by a much larger amount than under option 3. Table 6.10, below, sets out the required fees under option 4.

Table 6.10: Proposed Fees in the Supreme Court - Option 4

Fee	Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11)	Expected revenue	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)
Interlocutory application within a proceeding	\$1,149.47	\$333.60	\$459.79	38.5	2968	\$1,364,656.72	\$482.11	\$1,430,891.10
Interlocutory application within a proceeding - CoA	\$2,866.36	\$334.00	\$1,146.54	95.9	96	\$110,067.84	\$1,202.19	\$115,410.04
Judgement in default	\$1,149.47	\$333.60	\$459.79	38.5	1021.26	\$469,565.14	\$482.11	\$492,355.74
Mediation - court official	\$1,018.17	\$76.00	\$407.27	34.1	NA	\$0.00	\$427.04	\$ -
Pre-trial conference - court official	\$277.90	\$75.80	\$111.16	9.3	113	\$12,561.08	\$116.56	\$13,170.74
Taking accounts/assessments - Associate Judge or court official	\$1,399.41	\$220.00	\$559.77	46.8	NA	NA	\$586.94	NA
Order for admission as legal practitioner	\$93.23	\$239.50	\$93.23	7.8	1151	\$107,307.73	\$97.75	\$112,515.97
Certificate of admission	\$111.10	\$144.20	\$111.10	9.3	176	\$19,553.60	\$116.49	\$ -
Order for appointment as public notary	\$1,352.18	\$239.50	\$540.87	45.3	8	\$4,326.96	\$567.12	\$4,536.97
Certification of document/certificate	\$114.66	\$144.20	\$114.66	9.6	NA	NA	\$120.23	NA
Production of file to another Court or Tribunal	\$41.86	\$125.90	\$41.86	3.5	NA	NA	\$43.89	NA
Extended opening hours for registry - half an hour before opening or after closing	\$102.33	\$63.50	\$102.33	8.6	50	\$5,116.50	\$107.30	\$5,364.83
Extended opening hours for registry - any other time	\$229.32	\$629.30	\$917.26	76.8	4	\$3,669.04	\$961.78	\$3,847.12
Subpoena (Form 42A and Form 42AA)	\$389.85	Nil	\$155.94	13.0	NA	\$688,014.00	\$163.51	NA
Filing an application for examination of debtor (67.02)	\$438.21	Nil	\$175.28	14.7	NA	NA	\$183.79	NA
Application under section 6 or 8 of Judgment Debt Recovery Act	\$50.84	Nil	\$20.34	1.7	NA	NA	\$21.33	NA
Photocopy	\$0.60	1.5	\$0.60	NA	150069	\$90,041.40	\$0.60	\$90,041.40
Search and Handling Fee	\$20.37	\$0.00	\$20.37	1.7	NA	\$201,118.00	\$21.36	NA
Retrieval from Storage Fee	\$10.19	\$0.00	\$10.19	1.0	NA	\$12,004.00	\$12.53	NA
Hearing								
- Days 2 - 4	\$10,339.98	\$389.80	\$712.00	59.6	1,300	\$925,600.00	\$746.56	\$970,524.52
- days 5 - 9			\$1,184.00	99.1	300	\$355,200.00	\$1,241.47	\$372,439.83

- day 10 onward			\$2,384.00	199.5	100	\$238,400.00	\$2,499.71	\$249,970.88
Commencement	N/A	\$767.40	\$901.63	75.5	5227	\$4,712,820.01	\$945.39	\$4,941,559.39
Counterclaim, 3rd party proceeding or third/subsequent party claim	N/A	\$767.40	\$901.63	75.5	299	\$269,587.37	\$945.39	\$282,671.95
Commencement of appeal - single judge	N/A	\$767.40	\$901.63	75.5	33	\$29,753.79	\$945.39	\$31,197.91
Commence of appeal - to COA	N/A	\$3,146.70	\$3,696.96	309.4	111	\$410,362.56	\$3,876.39	\$430,279.74
Filing a certificate of judgement from Mag or County Court for enforcement	N/A	\$333.60	\$396.39	33.2	221	\$87,602.19	\$415.63	\$91,854.01
Entry to list	N/A	\$755.20	\$887.27	74.2	487	\$432,100.49	\$930.33	\$453,072.73
Entry to list - TEC or Commercial Court	N/A	\$2,329.10	\$2,736.47	229.0	155	\$424,152.85	\$2,869.29	\$444,739.35
Commencement in costs court - Supreme Court	N/A	\$333.60	\$391.95	32.8	238	\$93,284.10	\$410.97	\$97,811.70
Commencement in costs court - Mag Ct	N/A	\$244.40	\$287.14	24.0	425	\$122,034.50	\$301.08	\$127,957.51
Commencement in costs court - County Court	N/A	\$244.40	\$287.14	24.0	62	\$17,802.68	\$301.08	\$18,666.74
Commencement in costs court - VCAT	N/A	\$157.60	\$185.21	15.5	63	\$11,668.23	\$194.20	\$12,234.55
Probate online advertisement - advertising notice to apply for grant of representation	\$10.95	\$10.95	1.0	20827	\$228,055.65	\$12.53	\$260,962.31	\$10.95
Application for grant of representation (<\$1,000)	\$40.50	\$40.50	3.4	-		\$42.47		\$40.50
Application for grant of representation (>\$1,000)	\$40.50	\$40.50	3.4	18,387	\$744,673.50	\$42.47	\$780,816.65	\$40.50
Originating motion under 7.04(1)	\$3,068.10	\$3,068.10	256.7			\$3,217.01	\$	\$3,068.10
Summons	\$3,071.17	\$3,071.17	257.0	64	\$196,554.88	\$3,220.23	\$206,094.78	\$3,071.17
Filing of notices	\$327.00	\$327.00	27.4	272	\$88,944.00	\$342.87	\$93,260.95	\$327.00
Preparation of application for small estate	\$61.43	\$61.43	5.1	34	\$2,088.62	\$64.41	\$2,189.99	\$61.43
Authentication of order	\$9.80	\$9.80	1.0	11	\$107.80	\$12.53	\$137.83	\$9.80
Certification of document/certificate	\$37.83	\$37.83	9.0			\$112.77	\$	\$37.83
Exemplification	\$44.04	\$44.04	3.7	135	\$5,945.40	\$46.18	\$6,233.96	\$44.04
Office copy of parchment and will	\$37.83	\$37.83	3.2	56	\$2,118.48	\$39.67	\$2,221.30	\$37.83

6.5.2. Expected benefits of the option

The expected aggregate revenue under this option is identical to that of option 3, at \$16.8 million per annum. As noted above, this represents an increase of \$3.4 million, or slightly less than 25%, over current revenue. The key benefit of this option, *vis-à-vis* option 3, is that it would remove the cross-subsidy currently paid by users of the Probate Office's services, whereas this cross-subsidy would be largely retained under option 3. This constitutes a superior equity outcome, given the principles underlying the DTF Cost Recovery Guidelines.

6.5.3. Expected costs of the option

As a corollary of the removal of the cross-subsidy from Probate Office fees, this option would entail substantially larger increases in commencement fees than option 3, despite the overall revenue outcome being identical. Commencement fees would more than double - increasing by 125% - under this option, compared with a substantially more modest increase of 44% under option 3.

6.6. Option 5: 40% Cost recovery with Probate Fees set at current levels, individual fees set according to a range of proportionality criteria

6.6.1. Description of the Option

This option is a variant of Option 4, as discussed above. However, the majority of individual fees are set at different levels from those found in Option 4. This option is based on the same high level policy rationales as Option 4 – i.e. a 40% cost recovery target, retention of Probate Office fees at their current levels, at least pending the outcome of the current review of succession law, and setting of individual fees based on a rule of full cost recovery in respect of administrative fees and 40% cost recovery for fees relating to tasks involving judicial input. However, a substantial number of individual fees have been set at different levels from those that the above approach would imply. This broadly reflects the strong view of the Supreme Court regarding the need to maintain proportionality in respect of certain individual fees, particularly in light of the substantial concurrent jurisdiction of the Supreme Court and the Federal Court.

Parity with the Federal Court

In May 2010, the Standing Committee of Attorneys-General (SCAG) agreed in principle to move to parity with fees of the Federal Court where jurisdiction is shared with their State or Territory Courts. Following further discussion and consultation regarding Federal Court fee policy, in October 2012 SCAG's successor organisation, the Standing Committee on Law and Justice (SCLJ), agreed that relevant State Ministers would consider Federal Court fee arrangements in the setting of superior court fees. Thus, a consideration in determining the new fees regulations is whether and how to treat parity with the Federal Court as a criterion in setting Supreme Court fees.

Option 5 implements partial parity with Federal Court fees by setting the commencement fees at the same level as the Federal Court, and also introduces a sliding scale of hearing day fees, although the exact fee levels are different to those of the Federal Court for reasons discussed below.

The Supreme Court believes that there is a risk that setting fees above Federal Court levels, as implied in respect of some fees under Option 4, could encourage litigants to choose to have matters heard in the Federal Court. They believe that fee differentials should not create incentives for what would amount to "jurisdiction shopping", even though court fees constitute only a small proportion of the total costs of undertaking litigation. Option 5 sets commencement fees at the same level as the Federal Court and sets hearing fees at a lower level than in the Federal Court in order to reduce this risk of jurisdiction shopping⁴⁸.

Commencement fees

Commencement fees (including fees for commencements of appeals), together with fees for interlocutory applications, have been set at the same level as those currently charged to individuals in the Federal Court. This reflects the concurrent jurisdiction between the Federal and Supreme Courts and a consequent desire to ensure that litigants do not face fee-based incentives to use the Federal Court in preference to the Supreme Court. From the viewpoint of corporations, the fact that the proposed fees do not differentiate between individuals and corporations implies that commencement fees will be only around half as large in the Victorian Supreme Court as those they would face in the Federal Court. However, the fee setting head of power contained in the Supreme Court Act does not currently allow for fees to be differentiated as between individuals and corporations.

Fees for admission to practice as a legal practitioner

The fees charged to legal practitioners being admitted to practice are to be retained at their current levels. This reflects several factors. First, the court has advised that it is not able to provide robust costings in relation to all of the activities to which these fees relate.

Second, under the National Legal Profession Reform (NLPR), Victoria is committed to implementing uniform admissions standards across participating jurisdictions. The NLPR was initiated in April 2009. Draft uniform legislation was delivered to the Council of Australian Governments (CoAG) in December 2010 and jurisdictions have been negotiating the content of the reforms and their respective participation since that time. The reforms may impact on the cost of admissions-related regulatory functions in Victoria when they commence.

⁴⁸ See further discussion of the parity with Federal Court criterion in Chapter 8.

Hearing fees

Hearing fees are to be set on a sliding scale, with substantially higher fees to be charged during the later stages of a hearing, in order to provide significant incentives for early settlement. This is consistent with Federal Court practice. However, the actual size of the fees proposed under this option is lower than those imposed in the Federal Court. This reflects a view that the size of the fee increases that would be implied were the Federal Court fees to be adopted is unduly large. Hence, fees have been proposed that represent substantial increases on current fee levels, but increases that are, nonetheless, smaller than those that would be implied were the Federal Court fees to be adopted. It is noted that this involves some comparison of effects on court users paying current fees, and those under the new regulatory regime. However, litigants in the Supreme Court do include repeat litigants with large volumes of matters, and litigants who are advised by legal representatives who experience litigation across regulatory periods and are influenced by fee changes across time. Bearing in mind all these factors, the hearing fees under this option have been set at 74% of the Federal Court level for days 2-9, and 64% of the Federal Court fee levels for 10+ days. Based on consultation with the Supreme Court, these levels are considered a reasonable increase without disproportionately affecting court users whose matters proceed to (a lengthy) hearing.

Mediation fees

Mediation fees are retained at their existing levels under this option. This reflects a view that the use of mediation yields substantial savings in court resources, given that significant numbers of matters are settled during the mediation process, rather than proceeding to trial. In this context, the court considers that any increase in mediation fees beyond their current low levels will tend to create disincentives for litigants to use the court's mediation services. Such disincentives are considered undesirable given the fact that any reduction in the use of mediation would lead to increased calls on court resources.

Interlocutory applications

These fees would be retained at their current level under this option. This reflects the fact that the current fee is set at the same level as that charged to individuals by the Federal Court and the Supreme Court believes that this equivalence should generally be maintained.

Table 6.11: Proposed Fees in the Supreme Court - Option 5

Fee	Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11)	Expected revenue (\$2010-11)	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)	% cost recovery
Interlocutory application within a proceeding	\$1,149.47	\$333.60	\$326.24	27.3	2968	\$968,280.32	\$342.07	\$1,015,276.35	28.4%
Interlocutory application within a	\$2,866.36	\$334.00	\$326.24	27.3	96	\$31,319.04	\$342.07	\$32,839.13	11.4%

proceeding - CoA									
Judgement in default	\$1,149.47	\$333.60	\$326.24	27.3	1021	\$333,091.04	\$342.07	\$349,257.80	28.4%
Mediation - court official	\$1,018.17	\$76.00	\$74.09	6.2	NA	NA	\$77.69	NA	7.3%
Pre-trial conference - court official	\$277.90	\$75.80	\$111.16	9.3	113	\$12,561.08	\$116.56	\$13,170.74	40.0%
Taking accounts/assessments - Associate Judge or court official - First Hour	\$887.25	\$220.00	\$354.90	29.7	NA	NA	\$372.13	NA	40.0%
Taking accounts/assessments every other hour	\$442.25		\$176.90	14.8	NA	NA	\$185.49	NA	40.0%
Order for admission as legal practitioner	\$93.23	\$239.50	\$234.20	19.6	1151	\$269,564.20	\$245.57	\$282,647.65	251.2%
Certificate of admission	\$111.10	\$144.20	\$141.01	11.8	176	\$24,817.76	\$147.85	\$26,022.30	126.9%
Order for appointment as public notary	\$1,352.18	\$239.50	\$540.87	45.3	8	\$4,326.96	\$567.12	\$4,536.97	40.0%
Certification of document/certificate	\$114.66	\$144.20	\$114.66	3.8	NA	NA	\$120.23	NA	100.0%
Production of file to another Court or Tribunal	\$41.86	\$125.90	\$41.86	1.4	NA	NA	\$43.89	NA	100.0%
Extended opening hours for registry - half an hour before opening or after closing	\$102.33	\$63.50	\$102.33	8.6	50	\$5,116.50	\$107.30	\$5,364.83	100.0%
Extended opening hours for registry - any other time	\$229.32	\$629.30	\$917.26	76.8	4	\$3,669.04	\$961.78	\$3,847.12	400.0%
Subpoena (Form 42A and Form 42AA)	\$389.85	Nil	\$155.94	13.0	NA	NA	\$163.51	NA	40.0%
Filing an application for examination of debtor (67.02)	\$438.21	Nil	\$175.28	14.7	NA	NA	\$183.79	NA	40.0%
Application under section 6 or 8 of Judgment Debt Recovery Act	\$50.84	Nil	\$20.34	1.7	NA	NA	\$21.33	NA	40.0%
Photocopy	\$0.60	\$1.50	\$0.60	N/A	150,069	\$90,041.40	\$0.60	\$90,041.40	100.0%
Search and Handling Fee	\$20.37	\$0.00	\$20.37	1.7	NA	NA	\$21.36	NA	100.0%
Retrieval from Storage Fee	\$10.19	\$0.00	\$11.95	1.0	NA	NA	\$12.53	NA	117.3%
Hearing - Days 2 – 4:	\$10,339.98	\$389.80	\$550.00	46.0	1,300	\$715,000.00	\$576.69	\$749,702.93	5.3%
Hearing - Days 5 – 9:	\$10,339.98	\$389.80	\$918.00	76.8	300	\$275,400.00	\$962.56	\$288,766.69	8.9%
Hearing - Days 10 onward	\$10,339.98	\$389.80	\$1,533.00	128.3	100	\$153,300.00	\$1,607.41	\$160,740.50	14.8%
Commencement	N/A	\$767.40	\$938.00	74.9	5227	\$4,902,904.05	\$938.00	\$4,902,904.05	NA
Counterclaim, 3rd party proceeding or third/subsequent party claim	N/A	\$767.40	\$938.00	74.9	299	\$280,462.00	\$938.00	\$280,460.74	NA
Commencement of appeal - single judge	N/A	\$767.40	\$938.00	74.9	33	\$30,954.00	\$938.00	\$30,953.86	NA
Commence of appeal - to COA	N/A	\$3,146.70	\$3,077.00	257.5	111	\$341,547.00	\$3,226.34	\$358,124.18	NA
Filing a certificate of judgement from Mag or County Court for	N/A	\$333.60	\$326.24	27.3	221	\$72,099.04	\$342.07	\$75,598.41	NA

enforcement									
Entry to list - TEC or Commercial Court	N/A	\$2,329.10	\$2,114.00	190.6	155	\$327,670.00	\$2,216.60	\$343,573.65	NA
Entry to list	N/A	\$755.20	\$1,057.00	88.5	487	\$514,759.00	\$1,108.30	\$539,743.12	NA
Commencement in costs court - Supreme Court	N/A	\$333.60	\$326.24	27.3	238	\$77,645.12	\$342.07	\$81,413.67	NA
Commencement in costs court - County Court	N/A	\$244.40	\$239.00	21.6	62	\$14,818.00	\$250.60	\$15,537.20	NA
Commencement in costs court - Mag Ct	N/A	\$244.40	\$239.00	21.6	425	\$101,575.00	\$250.60	\$106,505.00	NA
Commencement in costs court - VCAT	N/A	\$157.60	\$154.16	12.9	63	\$9,712.08	\$161.64	\$10,183.46	NA
Probate online advertisement - advertising notice to apply for grant of representation	\$10.95	\$38.50	\$37.64	3.2	20827	\$783,928.28	\$39.47	\$821,976.68	343.7%
Application for grant of representation (<\$1,000)	\$40.50	\$107.50	\$105.16	8.8	N/A ⁴⁹	NA	\$110.26	NA	259.7%
Application for grant of representation (>\$1,000)	\$40.50	\$275.00	\$268.88	22.5	18,387	\$4,943,896.56	\$281.93	\$5,183,851.37	663.9%
Originating motion under 7.04(1)	\$3,068.10	\$275.00	\$268.88	22.5		\$0.00	\$281.93	\$0.00	8.8%
Summons	\$3,071.17	\$767.40	\$750.46	62.8	64	\$48,029.44	\$786.88	\$50,360.58	24.4%
Filing of notices	\$327.00	\$182.10	\$178.06	14.9	272	\$48,432.32	\$186.70	\$50,783.01	54.5%
Preparation of application for small estate	\$61.43	\$100.20	\$97.99	8.2	34	\$3,331.66	\$102.75	\$3,493.36	159.5%
Authentication of order	\$9.80	\$69.70	\$68.12	5.7	11	\$749.32	\$71.43	\$785.69	695.1%
Certification of document/certificate – Probate	\$37.83	\$119.80	\$117.11	9.8		\$0.00	\$122.79	\$0.00	309.6%
Exemplification	\$44.04	\$119.80	\$117.11	9.8	135	\$15,809.85	\$122.79	\$16,577.19	265.9%
Office copy of parchment and will	\$37.83	\$28.10	\$27.49	2.3	56	\$1,539.44	\$28.82	\$1,614.16	72.7%

⁴⁹ No of times fee charged for application for grant of representation less than \$1000 included below in Applications for grant of representation greater than \$1000 (18,387).

6.6.2. Expected benefits of Option 5

This option would achieve broadly the same overall level of cost recovery as options 3 and 4, but implies some significant differences in fee structure.

6.7. Overall comparison of cost recovery percentages for major fee types

The global target cost recovery percentage for each option has been determined on the basis of different views of the proportionate contribution that that users of court services should collectively contribute to funding the costs of the Court. However, the result of the various cost rules adopted in relation to different types of fees is that, rather than each fee being set consistent with the stated cost recovery percentage, there is significant variation in the percentage of costs recovered by individual fees. Table 6.12, below, summarises the practical impact of the various fee-setting rules adopted under the different options in terms of the percentage cost recovery achieved in respect of each of the major fee types.

Table 6.12: Cost recovery by major fee types for Supreme Court fees options

Fee type	Option 1	Option 2	Option 3	Option 4	Option 5
Administrative fees	100%	100%	100%	100%	100%
Fees with judicial input	100%	50%	40%	40%	Variable
Commencement Fees (average)	145.8%	50.0%	31.4%	47.5%	32.6%
Hearing days 2-4	6.9%	6.9%	6.9%	6.9%	5.3%
Hearing days 5-9	11.5%	11.5%	11.5%	11.5%	8.9%
Hearing days 10 onwards	23.1%	23.1%	23.1%	23.1%	14.8%
Probate fees	100%	771%	771%	100%	771%

Table 6.12 shows that administrative fees are set at levels that fully recover costs under all five options. Cost recovery in relation to fees for specific activities that are wholly or largely undertaken by judicial officers is equal to the "global" cost recovery level for options 1 to 4. However, cost recovery levels vary across different fees of this type in the case of Option 5, due to the adoption of a number of discrete rules in setting individual fees.

Hearing fees recover very low proportions of the costs involved in all cases. In options 1 - 4, where hearing fees are set at the level charged to individuals by the Federal Court, cost recovery rises from 6.9% in days 2 - 4 to a maximum of 23.1%. In the case of option 5, cost recovery levels are lower still, and range from 5.3% to 14.8%.

As discussed above, probate fees recover 100% of costs in the case of options 1 and 4 and 77.1% of costs in the case of the remaining options.

Finally, table 6.12 shows the calculated average cost recovery level in respect of those activities for which no specific fee is charged but where the commencement fees are, in effect, the means by which a contribution to costs is made. While there are several commencement fees, the table shows the average level of cost recovery across this group of fees. It ranges from a high of 145.8% in Option 1 to a low of 31.4% for Option 3.

Commencement fees over-recover the costs involved in the case of option 1 because of the combination of a 100% cost recovery target and a substantial under-recovery of the costs associated with hearings - itself a result of the adoption of the Federal Court based hearing fees. Similarly, in the case of option 4, commencement fees recover more than the global target (i.e. 47.5% vs 40%).

Conversely, in the case of Option 2, the commencement fees recover exactly the same proportion of costs as the global cost recovery target. This reflects the fact that there continues to be significant over-recovery of costs from the probate fees under this option and implies that the extent of this over-recovery effectively balances the under-recovery occurring in respect of hearing fees. In the case of options 3 and 5, commencement fees recover less than the global level of cost recovery. This implies that the average level of cost recovery in respect of other fees is higher than the global target. Again, the cross-subsidy from probate fees represents the major explanation of this result.

7. Options for County Court Fees

Four options have been identified in respect of cost recovery percentages for the County Court. The first three of these are full cost recovery, 50% cost recovery and 40% cost recovery. As with the Supreme Court fees, the view has been taken that, to the extent that public benefit considerations justify a partial cost recovery approach, the resulting reductions in fees should be targeted in those areas where the fees relate largely to judicial inputs. Thus, as in the previous section, the options are based on administrative fees being charged at full cost recovery, with the remaining fees charged at the relevant percentage. It should be noted that a majority of the revenue derived from County Court fees comes from the block fees charged (i.e. the fees for filing originating process and setting down for trial).

The fourth alternative identified is a variant of the 50% cost recovery option. It differs from the other three options in that it adjusts the level of individual fees to ensure that none exceeds 80% of the level of the equivalent Supreme Court fee, where one exists. The overall impact of this change, given the maintenance of a 50% cost recovery target, is that the reduction in the size of some specific purpose fees is offset by the adoption of larger block fees. Option 4 was adopted following consultation with the County Court and reflects a view that the historic relativities between equivalent fees charged in the Supreme and County Courts should, broadly, be maintained.

7.1. Implications for fee levels

Tables 7.1 - 7.4, below, compare the four identified options in detail. They provide equivalent data for each option to that set out in the previous section in relation to the Supreme Court fees. Table 7.5 summarises the implications of each option for total revenue.

County Court Fees Option 1: 100% cost recovery

Fee	Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11)	Expected revenue	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)
Filing an interlocutory application	\$1,004.10	\$233.40	\$1,004.10	84.03	768	\$771,149	\$1,052.83	\$808,576.94
Filing an application for examination of debtor (67.02)	\$564.86	\$157.60	\$564.86	47.27	26	\$14,686	\$592.28	\$15,399.17
Filing material for an ex-parte application	\$220.28	\$125.90	\$220.28	18.43	211	\$46,479	\$230.97	\$48,734.97
Filing subpoena (Form 42A and Form 42AA)	\$472.72	\$75.80	\$472.72	39.56	12538	\$5,926,963	\$495.66	\$6,214,631.87
Application under sec 6 or 8 JDRA	\$96.11	\$44.00	\$96.11	8.04	9	\$865	\$100.77	\$906.97
Attachment of debt	\$1,057.00		\$277.2	23.2	0	\$0.00	\$290.70	
Registrar taking	\$499.46	\$189.40	\$499.46	41.80			\$523.70	\$ -

evidence, making inquiries or acting as special examiner								
Mediation	\$261.54	\$76.00	\$261.54	21.89			\$274.23	\$ -
Pre-trial conference - court official	\$261.54	\$76.00	\$261.54	21.89			\$274.23	\$ -
Judgement in default	\$511.37	\$176.00	\$511.37	42.79	2956	\$1,511,610	\$536.19	\$1,584,976.55
Certificate of registrar	\$6.86	\$37.88	\$6.86	1.00	63	\$432	\$12.53	\$789.39
Photocopy per page ⁵⁰	\$0.60	\$1.50	\$0.60	NA	819526	\$491,716	\$0.60	\$491,715.60
Search and Handling Fee	\$26.98		\$26.98	2.26	12538.6212	\$338,292	\$28.29	\$354,711.19
Retrieval from Storage Fee	\$13.49		\$13.49	1.13	2507.709414	\$33,829	\$14.14	\$35,470.91
Hearing Fees (Civil) days 2 - 4 ⁵¹	\$712	\$277.40	\$712	59.58	571	\$406,552	\$746.56	\$426,284.23
- days 5 - 9	\$1,184	\$277.40	\$1,184	99.08			\$1,241.47	
- day 10 onward	\$2,384	\$277.40	\$2,384	199.50			\$2,499.71	
For filing originating process	\$1,582.09	\$529.10	\$1,527.18	127.80	6590	\$10,064,116	\$1,601.30	\$10,552,583.76
For issuing an originating adoption summons	\$676.07 (199%)	\$226.10	\$652.49	54.60	81	\$52,852	\$684.16	\$55,416.88
Transfer from Magistrates' Court	\$1,582.09 (199%)	\$529.10	\$1,527.18	127.80			\$1,601.30	
Filing counterclaim etc	\$1,582.09 (199%)	\$529.10	\$1,527.18	127.80	334	\$510,078	\$1,601.30	\$534,835.05
Setting Down for trial	\$1,582.09 (199%)	\$529.10	\$1,527.18	127.80	3188	\$4,868,650	\$1,601.30	\$5,104,952.51

County Court Fees Option 2: 50% cost recovery

Fee	Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11)	Expected revenue	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)
Filing an interlocutory application	\$1,004.10	\$233.40	\$502.05	42.01	768	\$385,574	\$526.42	\$404,288.47
Filing an application for examination of debtor (67.02)	\$564.86	\$157.60	\$282.43	23.63	26	\$7,343	\$296.14	\$7,699.59
Filing material for an ex-parte	\$220.28	\$125.90	\$110.14	9.22	211	\$23,240	\$115.49	\$24,367.48

50 No % change can be provided, since the means of charging for photocopying will change under all options, from a simple page fee to a combination of search and retrieval fee, plus per page charge. The net impact of the change is that the photocopying charges will more closely mirror actual costs.

51 Daily hearing fees in each case.

application								
Filing subpoena (Form 42A and Form 42AA)	\$472.72	\$75.80	\$236.36	19.78	12538	\$2,963,482	\$247.83	\$3,107,315.94
Application under sec 6 or 8 JDRA	\$96.11	\$44.00	\$48.05	4.02	9	\$432	\$50.38	\$453.44
Attachment of debt	\$1,057.00		\$277.2	23.2	0	\$0.00	\$290.70	
Registrar taking evidence, making inquiries or acting as special examiner	\$499.46	\$189.40	\$249.73	20.90			\$261.85	\$ -
Mediation	\$261.54	\$76.00	\$130.77	10.94			\$137.12	\$ -
Pre-trial conference - court official	\$261.54	\$76.00	\$130.77	10.94			\$137.12	\$ -
Judgement in default	\$511.37	\$176.00	\$255.69	21.40	2956	\$755,820	\$268.10	\$792,503.77
Certificate of registrar	\$6.86	\$37.88	\$3.43	1.00	63	\$216	\$12.53	\$789.39
Photocopy per page ⁵²	\$0.60	\$1.50	\$0.60	NA	819526	\$491,716	\$0.60	\$491,715.60
Search and Handling Fee	\$26.98		\$26.98	2.26	12538.621	\$338,292	\$28.29	\$354,711.19
Retrieval from Storage Fee	\$13.49		\$13.49	1.13	2507.7094	\$33,829	\$14.14	\$35,470.91
Hearing Fees (Civil) days 2 - 4 ⁵³	\$712	\$277.40	\$712	59.58	571	\$406,552	\$746.56	\$426,284.23
- days 5 - 9	\$1,184	\$277.40	\$1,184	99.08			\$1,241.47	
- day 10 onward	\$2,384	\$277.40	\$2,384	199.50			\$2,499.71	
For filing originating process	\$1,582.09	\$529.10	\$700.98	58.66	6590	\$4,619,458	\$735.00	\$4,843,666.21
For issuing an originating adoption summons	\$676.07 (199%)	\$226.10	\$299.50	25.06	81	\$24,260	\$314.04	\$25,436.95
Transfer from Magistrates' Court	\$1,582.09 (199%)	\$529.10	\$700.98	58.66			\$735.00	
Filing counterclaim etc	\$1,582.09 (199%)	\$529.10	\$700.98	58.66	334	\$234,127	\$735.00	\$245,490.82
Setting Down for trial	\$1,582.09 (199%)	\$529.10	\$700.98	58.66	3188	\$2,234,724	\$735.00	\$2,343,187.84

52 No % change can be provided, since the means of charging for photocopying will change under all options, from a simple page fee to a combination of search and retrieval fee, plus per page charge. The net impact of the change is that the photocopying charges will more closely mirror actual costs.

53 Daily hearing fees in each case.

County Court Fees Option 3: 40% cost recovery

Fee	Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11)	Expected revenue	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)
Filing an interlocutory application	\$1,004.10	\$233.40	\$401.64	33.6	768	\$308,459.52	\$421.13	\$323,430.78
Filing an application for examination of debtor (67.02)	\$564.86	\$157.60	\$225.94	18.9	26	\$5,874.44	\$236.91	\$6,159.56
Filing material for an ex-parte application	\$220.28	\$125.90	\$88.11	7.4	211	\$18,591.21	\$92.39	\$19,493.54
Filing subpoena (Form 42A and Form 42AA)	\$472.72	\$75.80	\$189.09	15.8	12538	\$2,370,810.42	\$198.27	\$2,485,879.04
Application under sec 6 or 8 JDRA	\$96.11	\$44.00	\$38.44	3.2	9	\$345.96	\$40.31	\$362.75
Attachment of debt	\$1,057.00		\$277.2	23.2	0	\$0.00	\$290.70	
Registrar taking evidence, making inquiries or acting as special examiner	\$499.46	\$189.40	\$199.78	16.7			\$209.48	\$ -
Mediation	\$261.54	\$76.00	\$104.62	8.8			\$109.70	\$ -
Pre-trial conference - court official	\$261.54	\$76.00	\$104.62	8.8			\$109.70	\$ -
Judgement in default	\$511.37	\$176.00	\$204.55	17.1	2956	\$604,649.80	\$214.48	\$633,996.82
Certificate of registrar	\$6.86	\$37.88	\$6.86	1.0	63	\$432.18	\$12.53	\$789.39
Photocopy per page ⁵⁴	\$0.60	\$1.50	\$0.60	NA	819526	\$491,715.60	\$0.60	\$491,715.60
Search and Handling Fee	\$26.98		\$26.98	2.3	12538.621	\$338,292.00	\$28.29	\$354,711.19
Retrieval from Storage Fee	\$13.49		\$13.49	1.1	2507.7094	\$33,829.00	\$14.14	\$35,470.91
Hearing Fees (Civil) days 2 - 4 ⁵⁵	\$712	\$277.40	\$712.00	59.6	571	\$406,552.00	\$746.56	\$426,284.23
- days 5 - 9	\$1,184	\$277.40	\$1,184.00	99.1			\$1,241.47	
- day 10 onward	\$2,384	\$277.40	\$2,384.00	199.5			\$2,499.71	
For filing originating process	\$1,582.09	\$529.10	\$535.72	44.8	6590	\$3,530,394.80	\$561.72	\$3,701,744.51

⁵⁴ No % change can be provided, since the means of charging for photocopying will change under all options, from a simple page fee to a combination of search and retrieval fee, plus per page charge. The net impact of the change is that the photocopying charges will more closely mirror actual costs.

⁵⁵ Daily hearing fees in each case.

For issuing an originating adoption summons	\$676.07 (199%)	\$226.10	\$228.89	19.2	81	\$18,540.09	\$240.00	\$19,439.94
Transfer from Magistrates' Court	\$1,582.09 (199%)	\$529.10	535.72	44.8			\$561.72	
Filing counterclaim etc	\$1,582.09 (199%)	\$529.10	\$535.72	44.8	334	\$178,930.48	\$561.72	\$187,614.97
Setting Down for trial	\$1,582.09 (199%)	\$529.10	\$535.72	44.8	3188	\$1,707,875.36	\$561.72	\$1,790,768.06

County Court Fees Option 4: 50% cost recovery, all fees limited to a maximum of 80% of equivalent Supreme Court fees

Fee	Cost	Current Fee	Proposed fee (\$2010-11)	Proposed fee units	No. of times fee charged (2010-11)	Expected revenue	Proposed fee (\$2012-13)	Expected revenue (\$2012-13)	% cost recovery
Filing an interlocutory application	\$1,004.10	\$233.40	\$260.99	21.8	768	\$200,440.32	\$273.66	\$210,168.80	26.0%
Filing an application for examination of debtor (67.02)	\$564.86	\$157.60	\$140.23	11.7	26	\$3,645.98	\$147.04	\$3,822.94	24.8%
Filing material for an ex-parte application	\$220.28	\$125.90	\$123.09	10.3	211	\$25,971.99	\$129.06	\$27,232.56	55.9%
Filing subpoena (Form 42A and Form 42AA)	\$472.72	\$75.80	\$124.75	10.4	12538	\$1,564,115.50	\$130.80	\$1,640,030.73	26.4%
Application under sec 6 or 8 JDRA	\$96.11	\$44.00	\$48.05	1.4	9	\$432.45	\$17.54	\$157.88	50.0%
Attachment of debt	\$1,057.00		\$277.24	23.2	0	\$0.00	\$290.70	\$0.00	26.2%
Registrar taking evidence, making inquiries or acting as special examiner	\$499.46	\$189.40	\$249.73	20.9			\$261.85	\$ -	50.0%
Mediation	\$261.54	\$76.00	\$59.27	5.0			\$62.15	\$ -	22.7%
Pre-trial conference - court official	\$261.54	\$76.00	\$88.93	7.4			\$93.25	\$ -	34.0%
Judgement in default	\$511.37	\$176.00	\$367.83	24.6	2956	\$1,087,305.48	\$308	\$1,140,078.47	71.9%
Certificate of registrar	\$6.86	\$37.88	\$3.43	1.0	63	\$216.09	\$12.53	\$789.39	50.0%

Photocopy per page ⁵⁶	\$0.60	\$1.50	\$0.60		819526	\$491,715.60	\$0.60	\$491,715.60	100.0%
Search and Handling Fee	\$26.98		\$20.37	1.7	16607	\$338,292.00	\$21.36	\$354,711.19	75.5%
Retrieval from Storage Fee	\$13.49		\$11.95	1.0	2507	\$29,965.00	\$12.53	\$31,419.37	88.6%
Hearing Fees (Civil) days 2 - 4 ⁵⁷	\$712	\$277.40	\$440.00	36.8	571	\$251,240.00	\$461.36	\$263,434.08	61.8%
- days 5 – 9	\$1,184	\$277.40	\$734.40	61.5			\$770.04		62.0%
- day 10 onward	\$2,384	\$277.40	\$1,226.40	102.6			\$1,285.92		51.4%
For filing originating process	\$1,582.09	\$529.10	\$750.40	59.9	6590	\$4,945,136.00	\$786.82	\$5,185,150.97	47.4%
For issuing an originating adoption summons	\$676.07	\$226.10	\$362.49	30.3	81	\$29,361.69	\$380.08	\$30,786.78	53.6%
Transfer from Magistrates' Court	\$1,582.09	\$529.10	848.45	59.9			\$889.63		53.6%
Filing counterclaim etc	\$1,582.09	\$529.10	\$848.43	59.9	334	\$283,375.62	\$787	\$297,129.42	53.6%
Setting Down for trial	\$1,582.09	\$529.10	\$750.40	70.8	3188	\$2,392,275.20	\$887	\$2,508,385.63	47.4%

Table 7.5: Total Revenue Comparison for County Court Fees Options

Fee	Current Fee	Option 1: Full cost recovery (% increase)	Option 2: 50% cost recovery (% increase)	Option 3: 40% cost recovery (% increase)	Option 4: 50% cost recovery, fees set at max. 80% of Supreme Court
Total Expected Revenue (\$2010-11)	\$8.0m	\$25.0m (212%)	\$12.5m (56%)	\$10.0m (25%)	\$12.5m (56%)
Increase over actual revenue (2010-11)	NA	\$17.0m	\$4.5m	\$2.0m	\$4.5m
Total expected revenue (\$2012-13)	\$8.4m	\$26.2m	\$13.1m	\$10.5m	\$13.1m

⁵⁶ No % change can be provided, since the means of charging for photocopying will change under all options, from a simple page fee to a combination of search and retrieval fee, plus per page charge. The net impact of the change is that the photocopying charges will more closely mirror actual costs.

⁵⁷ Daily hearing fees in each case.

7.2. Expected benefits and costs

7.2.1. Impact on total revenue

Table 7.1 shows that all four options would yield increased revenue when compared with the current regulations. This increase⁵⁸ would be a relatively modest \$1.8 million, or 22%, in the case of the 40% cost recovery option, but would more than double to a \$4.3 million increase (giving total revenue of \$12.5 million) were either of the 50% cost recovery options adopted. Moving to full cost recovery would more than triple total revenue, from \$8.2 million to \$25.0 million.

It should be noted, however, that these estimates are made on a "steady state" basis, which assumes both that the volume of cases passing through the County Court and the conduct of those cases would remain unchanged. In practice, substantial fee increases could have some impact in both reducing the number of cases lodged with the court and in favouring early resolution of matters once lodged. To the extent that this occurred, the above estimates of revenue impacts could tend to over-estimate actual revenue outcomes.

7.2.2. Impact on fee relativities

Review of the impacts of Option 3 shows that, while overall revenue would increase by around 22%, the commencement (block) fees paid when matters are initially listed with the court and when matters are set down for trial⁵⁹ would rise by only 8%. This reflects two factors: the move to set the various specific purpose fees at levels that reflect underlying costs (including a move to full cost recovery for administrative-type fees) and the adoption of the Federal Court's approach to hearing fees in the County Court. While the impact of the move to set specific fees based on cost varies widely between individual fees, it is clear that the overall impact of this change is to increase substantially the revenue that would be attained from these fees. This effect is further strengthened by the proposed increase in hearing fees.

A similar pattern is evident in relation to Option 2: while the move to 50% cost recovery would increase overall revenue by 52%, revenue from block fees would increase by only 35%. Option 4, which varies from option 2 in capping some specific purpose fees and increasing block fees to maintain the same revenue target, implies an increase in block fees of 55% - slightly more than the overall increase in revenue.

Conversely, in relation to the full cost recovery option, the size of the block fee increases differs little from the overall revenue increase (195% vs 205%).

⁵⁸ All references to fee increases in this paragraph refer to 2010-11 dollar values, since this provides comparability with historical revenue figures.

⁵⁹ And in some other circumstances - as per table 7.1.

Table 7.6, below, shows the impact on the revenue derived from each of the main fee categories as a result of the adoption of each of the options.

Table 7.6: Revenue Implications of County Court Fees Options (2010 - 11 data)

Fee type	Existing Regs.	Option 1	Option 2	Option 3	Option 4
Specific purpose	\$2.9 million	\$8.9 million	\$4.9 million	\$4.1 million	\$4.3 million
Hearing fees	\$0.2 million	\$0.4 million	\$0.4 million	\$0.4 million	\$0.3 million
Block fees	\$5.1 million	\$15.7 million	\$7.2 million	\$5.5 million	\$7.9 million
Total	\$8.2 million	\$25.0 million	\$12.5 million	\$10.0 million	\$12.5 million

Source: Courts Administration. Calculations by Department of Justice.

Table 7.6 shows that the relative contribution of the block fees to revenue rises with overall cost recovery levels. This reflects the fact that all options adopt a full cost recovery approach to administrative fees (a subset of specific purpose fees). The table also shows that expected hearing fee revenue is the same under each option, since all options include adoption of the Federal Court hearing fee structure, in line with the approach to be taken in the Supreme Court as a consequence of the national agreement on this issue by the Standing Committee of Attorneys-General. Despite the significant increases in hearing fees which this move entails, total revenue from these fees rises by only \$0.25 million. This reflects the fact that the higher fees, payable after day 4 and, in particular, after day 9 of a hearing would rarely be levied in the County Court.

Option 4 differs from the other three options in that it adjusts the level of individual fees to ensure that none exceeds 80% of the level of the equivalent Supreme Court fee, where one exists. The overall impact of this change, given the maintenance of a 50% cost recovery target, is that the reduction in the size of some specific purpose fees is offset by the adoption of larger block fees.

As noted above, Option 4 was adopted following consultation with the County Court and reflects a view that the historic relativities between equivalent fees charged in the Supreme and County Courts should, broadly, be maintained. In fact, the RIS prepared in relation to the *County Court Fees Order 2001* shows that the existing fees were set consistent with an objective of ensuring that County Court fees would not exceed 70% of the equivalent Supreme Court fees. Thus, the relativity proposed in Option 4 therefore implies a somewhat lesser degree of differentiation between the Supreme and County Court fees than has been the case to date. The Department of Justice considers this to be an appropriate change given that the jurisdiction of the County Court has been extended significantly since the adoption of the current Fees Order, so that the Court now deals with many larger and more complex matters than was previously the case.

The rationale for acting to maintain this fee relativity, notwithstanding that it results in lower County Court fees than the cost rules generally adopted would imply in some cases, is that it is necessary to recognise the hierarchical nature of the court structure. Thus, a litigant in the Supreme Court

benefits from the highest level of judicial input in having their matter resolved and can reasonably be expected to make a larger contribution to the costs involved.

This issue is significant, in part, because of the fact that the Supreme and County Courts have concurrent jurisdiction over civil matters: as noted above, whereas the County Court was previously subject to a monetary limit on its jurisdiction, this limit has been removed since the current Fees Order was made. This means that litigants are, in some cases, effectively able to choose the jurisdiction in which their matter is heard. In such cases, it is appropriate to ensure that price signals favour the use of the lower cost jurisdiction of the County Court, where appropriate. In this context, it can be noted that, while the cost data obtained from the courts administration suggests that the County Court incurs higher costs in respect of some specific activities to which particular fees relate, there remain concerns as to the robustness of many of these micro-level costings. Thus, given the generally higher cost structure of the Supreme Court, the Department of Justice considers that some adjustment in specific County Court fees to remove these apparent anomalies is appropriate.

7.2.3. Efficiency and equity impacts

Options 2, 3 and 4 all imply substantial contributions to the cost of the civil jurisdiction of the County Court continuing to be made by both users and taxpayers. Such an outcome is consistent with the historical approach to cost recovery in this court and with a view that there are substantial public, as well as private, benefits derived from the operation of the courts. Moreover these options are broadly in line with the recent move to adopt new fees in the Magistrates' Court that aim to recover 50% of the relevant cost base.

By contrast, Option 1 would imply that the whole of the recurrent costs of the civil jurisdiction would be met by users, except to the extent that the application of hardship based fee waivers led to fees not being collected in individual cases. Such an outcome can be regarded as inefficient and inequitable to the extent that it is believed that there are public benefits arising as a result of the operations of the civil courts.

Finally, it can be noted that all four fees options achieve improvements in the current level of horizontal equity (i.e. equity between different users of court services) by achieving a better alignment between the level of individual fees and the cost of the activities to which they relate. However, the capping of individual fees at 80% of the value of the equivalent Supreme Court fees necessarily undermines this attempt to equalise cost recovery levels across fees to some degree. Hence, Option 4 can be seen as performing less well in terms of horizontal equity, while providing improved vertical equity, in the sense of ensuring proportionality between County Court fees and their Supreme Court equivalents.

7.3. Overall comparison of cost recovery percentages for major fee types

Table 7.7., below, summarises the cost recovery implications of each of the four options in respect of County Court fees at the level of the major fee types. As in the case of the Supreme Court fees (See

Section 6.7, above), the result of the various cost rules adopted in relation to different types of fees is that, rather than each fee being set consistent with the stated cost recovery percentage, there is significant variation in the percentage of costs recovered by individual fees.

Table 7.7: Cost recovery by major fee types for County Court fees options

Fee type	Option 1 (100% cost recovery)	Option 2 (50% cost recovery)	Option 3 (40% cost recovery)	Option 4 (50% cost recovery with proportionality drivers)
Administrative fees	100%	100%	100%	100%
Fees with judicial input	100%	50%	40%	Various
Commencement Fees	108.9%	50.0%	38.1%	55.6%
Hearing days 2-4	24.4%	24.4%	24.4%	15.1%
Hearing days 5-9	40.6%	40.6%	40.6%	25.2%
Hearing days 10 onwards	81.7%	81.7%	81.7%	42.0%

Table 7.7 shows that administrative fees recover 100% of costs for all options. For fees relating to specific functions requiring judicial input, cost recovery levels are equal to those of the global cost recovery target for each option except option 4. In the case of option 4, cost recovery rates vary according to the impact of the proportionality rule, which decrees that fees cannot exceed 80% of their Supreme Court equivalent, on individual fee levels.

Hearing fees recover an increasing proportion of hearing-related costs as trials progress, due to the adoption of an escalating scale of fees under all options. These fees are identical to the Federal Court fees for options 1 - 3. Under these options, hearing fees recover 24.4% of costs in days 2 - 4 or a hearing, rising to 81.7% from day 10 onward. The equivalent cost recovery levels are significantly lower, however, for option 4, since hearing fees in this case are set at 80% of the levels set in Supreme Court Option 5. Thus, cost recovery ranges from 15.1% in days 2 - 4 to 42.0% on day 10 and thereafter under option 4.

It must be recalled that the commencement fees are set as a residual: i.e. they are set according to the target level of revenue required to attain the global cost recovery goal, once the revenue from the remaining fees has been calculated. Thus, the cost recovery percentages achieved in relation to the costs attributable to these functions vary significantly between the options. Commencement fees slightly over-recover the costs implicitly attributable to the related functions under option 1. This reflects the interaction of the 100% global cost recovery target and the under-recovery of hearing related costs via hearing fees. For Option 2, commencement fees recover exactly 50% of costs, in line with the global cost recovery target. For option 3, commencement fees recovery slightly less than the 40% cost recovery target, as a result of some hearing fees recovering more than the global target percentage. However, for option 4, they recover slightly more than the target (55.6% vs 50%), as a result of the lower level of recovery of hearing related costs under this option.

8. Conclusion

The following assesses the options considered above in respect of each set of regulations in comparative terms and comes to a judgement as to the preferred option in each case with the aid of a Multi-Criteria Analysis. A separate assessment is made in respect of each set of regulations, given that the relevant considerations differ somewhat between the two cases.

The conduct of a process analysis in respect of each of the activities associated with the current fees regulations has provided the basis for a resetting of the relativities between the individual fees contained in the regulations. This will allow a substantially better alignment between the costs incurred and the fees charged in individual cases than is achieved under the current regulations. As such, it will yield a significant improvement in equity as between court users. It should also yield some, albeit small, efficiency gains due to more appropriate price signals being set. Consequently, each of the three options considered above uses the results of this process analysis as the basis for the development of the proposed fees.

8.1. Assessment against the unregulated base case

Because the context for the adoption of the proposed regulations is one in which existing regulations are sunsetting, the various options must be assessed against an unregulated base case. In this base case, no fees would be charged to users of the civil jurisdiction of either court. This means that taxpayers would bear all of the relevant costs.

Consistent with the discussion contained in the earlier sections of this RIS, the following four criteria have been identified as relevant to the determination as to which option should be preferred.

- Equity between court users and taxpayers
- Equity between different groups of court users
- Access to justice
- Proportionality of increases in major fees

In the case of the Supreme Court, an additional criteria of fee relativities with the Federal Court has been identified as relevant.

Because these criteria must be assessed largely qualitatively, a Multi-Criteria Analysis has been developed to enable the assessment of the various options. This involves scoring each of the options on each criterion, measured against the unregulated base case. The preferred option is that which receives the highest overall score.

The following discusses the relevance of each of these criteria and the rationale for the score given to each option.

Scoring and weighting

Where an option is judged as being superior to the unregulated base case in respect of a particular criterion, it receives a positive score. Conversely, where it is considered inferior, it receives a negative score. Options are scored on a scale of - 10 to + 10, consistent with the VCEC's guidance note on the use of MCA.

Each criterion has been weighted evenly reflecting the importance of each to the proper functioning of the fee regulations in the court system.

8.2. Supreme Court (Fees) Regulations

8.2.1. Assessment of options against relevant criteria

Criterion 1: Equity between court users and taxpayers

As discussed above, it is widely accepted that the operation of the courts gives rise to both public and private benefits. The major source of public benefits in relation to the activities of the courts arise from the provision of an authoritative and credible forum for the resolution of private disputes. The availability of a credible and trusted system of justice has long been considered to be indispensable to a well-functioning society and as a necessary underpinning to the protection of private property rights and the rights of individuals and organisations more generally.

However, in the case of the Supreme Court, the ability of decisions to act as precedents, binding on lower courts, would suggest that the size of these public benefits is somewhat larger than is the case in respect of the lower courts.

This mix of public and private benefits implies that the cost of funding those operations should be shared between taxpayers and users of court services. This, in turn, means that the partial cost recovery options considered must be scored as being superior to the unregulated base case, since the taxpayer would meet all the costs of the court system in the latter case.

Options 2 and 3 differ relatively little in terms of the balance between public and private contributions to court costs. This implies that judgements about which level of cost recovery is preferred in terms of the equity and efficiency criterion are necessarily subjective. However, given historical levels of cost recovery below 50% in all courts, together with the above view that the public benefit component is relatively larger in relation to the Supreme Court, Option 3, entailing 40% cost recovery, is preferred on this criterion. Thus, Option 3 scores + 7 on this criterion, while Option 2 scores + 5. Option 5 is very similar to Option 3, with both involving a 40% overall level of cost recovery and maintenance of the current cross-subsidy from probate fees to litigants. Thus, Option 5 also scores +7. Option 4 also involves a 40% cost recovery level. However, it differs substantively from Options 3 and 5 in that it would reduce probate fees to full cost recovery levels, thus ending the current cross-subsidy between beneficiaries of estates and litigants. The removal of this effective tax on estate beneficiaries means that Option 4 must score more highly than Options 3 and 5 on the equity criterion. Thus, this option scores + 9 on this criterion.

Option 1, involving full cost recovery, would be expected to receive a negative score, relative to a zero fees base case, given the mathematical fact that, if public benefits are judged to account for more than half of the total benefit of the operation of the courts, a full cost recovery option is necessarily less preferred to a zero cost recovery base case. However, such a score would fail to take account of the fact that Option 1 would also give rise to an important equity gain, in that it would remove the current \$4.8 million per annum cross-subsidy from estate beneficiaries to litigants. As a result of this fact, Option 1 scores + 1 against this criterion.

Criterion 2: Efficiency

Fee options should also be assessed in terms of their impact on economic efficiency. Two different dimensions of efficiency are identified in economics - allocative and productive efficiency. The former requires that court resources are "optimally allocated" - that is, that the most significant cases are heard. The underlying concept is that the "value added" by the court system resolving more substantial disputes will generally be higher. In general, it can be expected that higher court fees will act as a greater disincentive to potential litigants to take smaller matters to court, whereas litigants with larger amounts at stake will be less affected. Thus, higher fees can be said to favour allocative efficiency.

The second dimension of efficiency is productive efficiency. This implies that outputs are produced efficiently. In the current context, this means that the costs which the fees seek to recover are "efficient costs". It is arguable that higher fees also favour productive efficiency, all things being equal, since the higher fee levels will tend to lead to a greater level of scrutiny being applied to the court. For example, if fees are unusually high by national standards, users may be more likely to make comparisons of court costs across jurisdictions and to advocate for greater efficiency.

Given the above, the full cost recovery option scores highest on this criterion. The 40% option with probate fees set at full cost recovery scores next highest. This reflects the fact that, like Option 1, the current level of cross-subsidy from the Probate Office to the general operations of the court would be eliminated and, as a result, the fees paid in respect of court actions *per se* would be higher than in the other two options and closer to full cost recovery levels. The 50% cost recovery option scores slightly higher than the 40% cost recovery option with probate fees retained at current levels (i.e. Option 3). Option 5 scores equal to Option 3: while there are some differences in the level of individual fees, the total fee revenue raised from litigants is identical.

Criterion 3: Access to Justice

All of the options considered would imply some reduction in effective access to justice, vis-a-vis the base case of having no fees. This is because all would involve higher litigation costs than in the base case. While the existing fee waiver powers would potentially limit any negative impact in this regard, it must be noted that only relatively limited use of these powers is currently made by the court. It is difficult to predict, *a priori*, what change could occur under the different options.

However, a more significant point is that court fees constitute a very small proportion of the total costs of undertaking litigation, which also include the costs of hiring legal counsel, the implicit costs of the litigants' time and the costs that may be associated with obtaining evidence to support one's

position. Even full cost recovery based fees would be small in relation to the total of these other costs.

Given these factors, all options score negatively when assessed in relation to the base case. However, the size of these negative scores is small, while there is little differentiation between the options. Options 3 and 5 receive the highest scores of - 1, since they are both predicated on the maintenance of the existing cross-subsidy from probate fee revenue. Option 2 receives the next highest score of -3: its score is slightly lower than those of options 3 and 5 because, while it retains the cross-subsidy from probate fees, the total level of cost recovery is somewhat higher (i.e. 50% vs 40%). While Option 4 involves the removal of the cross-subsidy from probate fees, it also involves a lower level of cost recovery than Option 2. The net result of these two differences is that the fees paid by court users (excluding probate office users) would be very similar. Thus, Option 4 has been scored identically to Option 2, at - 3 points. Conversely, Option 1 combines a move to full cost recovery based fees with the abolition of the cross-subsidy from probate fees. Thus, the fees paid by court users would be substantially higher than under any other option. Thus, Option 1 scores - 10 points on this criterion.

Criterion 4: Fee relativities with the Federal Court

As can be seen from Table 3.4 in Chapter 3 above, the various States and Territories currently have differing approaches to fee parity between their superior courts and the Federal Court. According to the average civil fees collected per lodgement in Table 3.4, the Supreme Courts of NSW and SA have an average fee collection greater than the Commonwealth courts. Along with Victoria - Queensland, WA, Tasmania and the territories all collect considerably lower average fees per civil lodgement than the Commonwealth courts. It should also be noted that currently, despite a considerably larger average fee collection, the principal fees in the NSW Supreme Court are set only slightly above the equivalent Federal Court level (eg standard commencement fees for individuals of \$951 (NSW SC) vs \$938 (FC) and hearing fee for days 2-4 of \$757 (NSW SC) vs \$747 (FC)⁶⁰).

Neither the Department of Justice nor the Supreme Court have any direct quantitative evidence regarding the impact of differential fees between the Supreme Court and the Federal Court on litigants' choice as to the court in which they will file proceedings, in situations where both courts have jurisdiction to hear a matter. Moreover, it is not clear that even large differences in fees would significantly affect litigants' choices as to jurisdiction, given the fact that court fees constitute only one, relatively small element of the total costs of litigation.

However, as noted above, SCAG agreed in principle in 2010 that both commencement and hearing fees in the State superior and Federal Courts should be the same where jurisdiction is shared. Commonwealth court fee policy continues to be developed. In October 2012, SCLJ agreed to consider Federal Court fees in the setting of State superior court fees. As a result, the 5 options for Supreme Court fees are also measured against a criterion of fee parity with the current fees of the Federal Court. For the purposes of the criterion, parity with the Federal Court is assessed in terms of the dollar amounts of the principal fee types – commencement and hearing fees – to reflect the

⁶⁰ Comparison fees for NSW and Federal Court obtained from the following websites on 16 October 2012:
http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_courtfees#3
http://www.fedcourt.gov.au/fff/fff_feesandcosts_fees.html

immediate impact on litigants who may alter behaviour based on the fee differential. All options compare the Victorian fees to the Federal Court fees for individuals.

Options 1 to 4 all adopt Federal Court hearing fee levels. As a result, the differences in assessment on this criterion (for these options) are concerned with the extent of divergence of the block commencement fees from Federal Court levels. Option 1 involves very high commencement fees, well above Federal Court levels, and thus scores -5 points. Options 2 and 4 require commencement fees to be set at levels well above the Federal Court fee levels, to achieve their respective cost recovery targets, and thus both score -2 points⁶¹. Option 3 involves commencement fees only marginally below the Federal Court equivalent and so scores 0 points. Option 5 sets commencement fees at Federal Court levels and hearing fees considerably below the Federal Court levels. As a result, option 5 is the only one that provides for the major fees payable to be, in the aggregate, lower in level than those of the Federal Court. Consequently, this option scores +3 points.

Criterion 5: Proportionality of increases in major fees

For the purposes of this criterion, proportionality refers to two related concepts: the relationship between current and proposed fees, and the impact of increases in particular fees on a particular group of litigants. Thus, measuring against this criterion aims to ensure that no particular fees are increased by a disproportionately large amount, and that no particular class of litigants is disproportionately affected by any fee increase.

While all court users will inevitably pay a number of different fees, there may be significant differences in terms of what fees are payable in respect of different matters, as they progress through the court system in different ways. Thus, major increases in certain fees may disproportionately affect some users. Connected with this point, there may be a higher level of user concern should certain fees rise by particularly large amounts, particularly where these are "major" fees, representing a large proportion of the total fee amount payable. Thus, options that avoid very large proportionate increases in major fees are preferred under this criterion.

Option 1 clearly involves very substantial increases in the block fees, given the 100% cost recovery outcome and the substantial reductions in probate fees implied under this option. Conversely, the hearing fees would be limited to the Federal Court fees. Given the size of the block fee increases in particular, option 1 scores - 8 points. Option 4 involves the next highest increase in block fees, given that it also involves reducing probate fees to cost recovery levels. Thus, this option scores - 5 points. Option 2 involves achieving 50% cost recovery and so has the next highest level of block fee increases. It therefore scores - 4 points.

Options 1 - 4 all adopt the Federal Court hearing fees. Applying Federal Court hearing fees would mean a very large increase in the dollar amounts for hearing fees (and a significant percentage increase in the current hearing fee) that would disproportionately affect those litigants whose matters run to hearing, or who contest lengthy cases - but may raise limited additional revenue. The government considers this disproportionate because it would result in a smaller number of litigants having to meet a very significant price increase, in comparison to an approach that shares the

⁶¹ The differences between the required commencement fees are relatively minor, so these two options are scored identically.

burden of increased fees across all commencements, and hence reduces a disproportionate impact on a particular group.

In this respect, option 5 takes a different approach to the calculation of fees. Where options 1-4 set hearing fees consistent with the Federal Court and set the commencement fee as a residual to achieve cost recovery (depending on the treatment of probate fees), option 5 sets the commencement fee consistent with the Federal Court and then sets hearing fees as a residual. As a result, option 5 sets hearing fees that are significantly below those of the Federal Court, while offsetting the revenue loss involved by setting commencement fees and fees for interlocutory applications that are slightly higher than under Option 3. This has the effect noted under the previous criterion of parity or lesser fee amounts than the Federal Court. It also means that the maximum percentage increase for any major fee is substantially lower for option 5 than for option 3. Given this, Option 5 scores higher on this criterion.

Given that all options imply significant fee increases from current levels, all must score negatively. However, Option 3 is scored at -3 points, while option 5 is scored at -2 points.

Table 8.2: Multi-Criteria Analysis of Supreme Court fees options

Criterion	Option 1: 100% cost recovery (Probate fees @ full cost recovery)	Option 2: 50% cost recovery (Probate fees at current levels)	Option 3: 40% cost recovery, Probate fees at current levels	Option 4: 40% cost recovery, Probate fees at full cost recovery	Option 5: 40% cost recovery, probate fees at current levels, scaling of various fees
Equity between court users and taxpayers	+1	+ 5	+ 7	+9	+ 7
Efficiency	+8	+4	+2	+3	+ 2
Access to justice	-10	-3	-1	-3	- 1
Proportionality of fee increases	- 8	-4	-3	-5	-2
Fee relativities with the Federal Court	-5	-2	+0	-2	+3
Total	-14	0	+5	+ 2	+ 9

8.1.2. Conclusion

Table 8.2 shows that three of the five options receive positive scores, indicating that they are preferred to the base case in which no fees regulations are made. Option 1, involving cost recovery and the elimination of the probate fee cross-subsidy, receives the only negative score. This reflects its poor performance in the access to justice, parity with Federal Court fees, and proportionality in major fee increases criteria.

Options 2 and 3 differ only in relation to cost recovery levels. The fact that the public benefit aspect of the operations of the Supreme Court are considered to be relatively large, partly due to its precedent setting role, explains the higher score of Option 3 on equity grounds, while it necessarily scores higher than Option 2 on access to justice grounds, due to the lower fee levels implied. However, the higher cost recovery level of Option 2 also increases its divergence from Federal Court levels, and it consequently scores lower on the parity criterion.

Option 4 has a slightly higher score on the efficiency criterion, reflecting the fact that court users would, in practice, make a significantly greater contribution to cost recovery than under Option 3, due to the elimination of the cross-subsidy from users of the Probate Office. Conversely, the same factor reduces Option 4's score on access to justice, while Option 4 also scores poorly on the proportionality of major fee increases criterion. Thus, Option 3 ultimately receives the higher score due to its superior equity performance.

Option 5 receives a slightly higher score than Option 3. This reflects the fact that both the overall level of cost recovery and the level of contribution from litigants in the Supreme Court (as distinct from users of the Probate Office) are identical, as well as the fact that Option 5 scores highest (or least negatively) in terms of parity with the Federal Court, and the proportionality of major fee increases. The differences between Options 3 and 5 relate to the levels of individual fees: Option 3 demonstrates a generally closer relationship between the level of individual fees and the costs involved than does Option 5.

It is proposed to proceed with Option 5, implying that fees would be set at levels that would achieve 40% cost recovery overall, that Probate Office fees would be set at current levels, commencement fee would be set commensurate with the Federal Court, and that hearing fees would be set as a residual that does not create a disproportionate rise in fees or impact on a particular group.

8.3. County Court (Fees) Regulations

8.3.1. Assessment of options against relevant criteria

The four options considered in relation to the proposed County Court fees regulations included one option setting fees at 100% cost recovery, one option setting fees at 40% cost recovery and two options that are based on an overall 50% cost recovery level, albeit with different specific fee levels. In each case, the broad approach to setting specific fees would be the same. That is:

- fees that relate essentially to administrative activities would be set at 100% cost recovery levels;
- fees that relate to judicial activities would generally be set at the target cost recovery level;
- hearing fees would be set relative to Supreme Court hearing fees, in recognition of the nature of the court hierarchy
- the block (i.e. commencement) fees would be set on a "residual" basis, to ensure that the overall target cost recovery level was met.

However, Option 4 involves adding a further constraint on specific fee levels, which is that **none** will be higher than 80% of the equivalent Supreme Court fee. This has the practical effect of increasing the size of the block fees under this option.

The following assesses each of the options against four assessment criteria. The first three of these criteria are identical to those adopted above in relation to the proposed Supreme Court fees regulations. The use of essentially the same assessment criteria reflects the very similar purpose of, and context for, the relevant fees. However, the fourth criterion differs from that used in respect of the Supreme Court fees regulations. Where the fourth criterion used in respect of those regulations is that of proportionality in relation to the size of increases to the main fees, the equivalent criterion used in respect of the County Court fees regulations is that of proportionality in the fees charged across court jurisdictions - i.e. between the Supreme and County Courts. As with the Supreme Court fees, all criteria have been accorded equal weightings.

Criterion 1: Equity between court users and taxpayers

As discussed above, it is widely accepted that the operation of the courts gives rise to both public and private benefits. The major source of public benefits in relation to the activities of the courts arises from the provision of an authoritative and credible forum for the resolution of private disputes. The availability of a credible and trusted system of justice has long been considered to be indispensable to a well-functioning society and as a necessary underpinning to the protection of private property rights and the rights of individuals and organisations more generally.

This mix of public and private benefits implies that the cost of funding those operations should be shared between taxpayers and users of court services. This, in turn, means that both of the partial cost recovery options considered must be scored as being superior to the unregulated base case, since the taxpayer would meet all the costs of the court system in that case.

The relative size of the public and private benefits associated with the operations of the courts cannot be determined as a matter of objective, quantitative analysis. Rather, subjective judgement must be applied. The fact that both public and private benefits are clearly substantial implies a need for a broadly equal allocation of costs between users and taxpayers. Moreover, as discussed in Section 2, above, fees have historically been set at levels that implied cost recovery levels in the 40 - 50% range.

The government believes that a 50% cost recovery option is preferable on equity grounds, given the above considerations. It can also be noted that this level of cost recovery would be consistent with that recently adopted in relation to the Magistrates' Court (Fees) Regulations 2012. There are clear equity benefits in achieving consistency between the courts in cost recovery levels, as far as practicable.

Thus, Options 2 and 4 receive higher scores than Options 1 and 3. Options 2 and 4 each score 8 points, given that they would both recover 50% of costs. Option 3, which differs from Option 2 only in recovering 40% of costs, rather than 50%, receives 6 points. Option 1, involving full cost recovery, receives zero points, reflecting the fact that it is approximately equally preferable on equity grounds to the "no fees" base case.

Criterion 2: Efficiency

Fee options should also be assessed in terms of their impact on economic efficiency. Two different dimensions of efficiency are identified in economics - allocative and productive efficiency. The former requires that court resources are "optimally allocated" - that is, that the most significant cases are heard. The underlying concept is that the "value added" by the court system resolving more substantial disputes will generally be higher. In general, it can be expected that higher court fees will act as a greater disincentive to potential litigants to take smaller matters to court, whereas litigants with larger amounts at stake will be less affected. Thus, higher fees can be said to favour allocative efficiency.

The second dimension of efficiency is productive efficiency. This implies that outputs are produced efficiently. In the current context, this means that the costs which the fees seek to recover are

"efficient costs". It is arguable that higher fees also favour productive efficiency, all things being equal, since the higher fee levels will tend to lead to a greater level of scrutiny being applied to the court. For example, if fees are unusually high by national standards, users may be more likely to make comparisons of court costs across jurisdictions and to advocate for greater efficiency.

All options receive positive scores on this criterion, given that they are compared with a base case in which there are no fees regulations made. Option 1 clearly scores highest on this criterion. Options 2 and 3 receive similar scores, with the slightly higher score received by Option 2 (+5 vs +4) being a reflection of the higher level of cost recovery achieved under Option 2. Option 4 receives the same score as Option 2. This reflects the fact that the overall level of cost recovery being achieved under the two options is identical, while there is limited difference in the size of the individual fees charged.

Criterion 3: Access to Justice

All of the options considered would imply some reduction in effective access to justice, vis-a-vis the base case of having no fees. This is because all would involve higher litigation costs than in the base case.

Importantly, however, court fees constitute a very small proportion of the total costs of undertaking litigation, which also include the costs of hiring legal counsel, the implicit costs of the litigants' time and the costs that may be associated with obtaining evidence to support one's position. Even full cost recovery based fees would be small in relation to the total of these other costs.

Given these factors, all options score negatively when assessed in relation to the base case. However, the size of these negative scores is small, while there is little differentiation between the options. Option 1 receives the largest negative score, of -10, while option 2 scores -5 and Option 3 scores -4. Option 4, which involves the same level of cost recovery as Option 2, scores identically to Option 2 with -5 points.

Criterion 4: Proportionality of fees across court jurisdictions

At least two considerations suggest that fee setting in the County Court should have regard to the size of the equivalent Supreme Court fees. First, the courts have, for some years, had concurrent jurisdiction in respect of civil matters, as the monetary jurisdiction limit formerly applied to the County Court was abolished during the life of the current fees regulations. This means that litigants can, in many cases, choose in which jurisdiction they wish to have their matter heard. In this context, it is appropriate that fees charged are appropriately reflective of the overall differences in the cost of operating each jurisdiction, so that appropriate incentives are present when the choice of jurisdiction is being made. Second, it is appropriate that the fee structure reflect the higher level of judicial resources being brought to bear in the Supreme Court. These two factors imply that there should be a clear differentiation between the levels of the major fees payable in the two courts, with the County Court fees being lower than their Supreme Court equivalents.

Option 4 scores highest on this criterion, since it adopts a specific decision rule that no County Court fee can be set at a level higher than 80% of the Supreme Court equivalent. By contrast, all three of the remaining options imply that hearing fees would be set at the same level as in the Supreme

Court. These three options score + 2 points, reflecting the fact that all fees other than the hearing fees are lower than the equivalent Supreme Court fees, where these exist, while the hearing fees do not exceed the Supreme Court level. However, Option 4 scores + 5 points in reflection of the fact that it ensures that all fees are lower than their Supreme Court equivalents.

Table 8.3, below, summarises these scores.

Table 8.3: Multi-Criteria Analysis of County Court fees options

Criterion	Option 1: 100% cost recovery	Option 2: 50% cost recovery	Option 3: 40% cost recovery	Option 4: 50% cost recovery with individual fees set at maximum of 80% of Supreme Court equivalents
Equity between court users and taxpayers	0	+ 8	+ 6	+ 8
Efficiency	+10	+5	+4	+ 5
Access to justice	- 10	- 5	- 4	- 5
Proportionality between Supreme and County Court fees	+2	+2	+2	+5
Total	+2	+10	+8	+ 13

8.3.2. Conclusion

Table 3 shows that Option 4 scores highest, receiving a score of + 13 points, while Option 2 receives a score of + 10 points and Option 3 receives a slightly lower score of + 8. Option 1, of full cost recovery, scores substantially lower, with +2 points. Thus, it is proposed to proceed with Option 4.

9. Consultation

The proposed regulations have been developed following consultation with both the Supreme and County Court. In each case, court and tribunal representatives indicated the view that they believed that the current fee structure remains broadly appropriate and should be retained in the remade regulations. In a limited number of cases, new or amended fees have been adopted in response to proposals advanced by court/tribunal representatives.

Public consultation has not been conducted prior to the development of the draft regulations. Hence, the release of this RIS constitutes the main opportunity for consultation with court users in relation to the proposed fees. Public comment in response to the RIS and the draft regulations will be received for 28 days following the release of the RIS, as required by the Subordinate Legislation Act 1994. While the Victorian Guide to Regulation indicates that a 60 day consultation period is

preferred and should be adopted where possible, this is not regarded as feasible in the current circumstances. This reflects the fact that the two sets of regulations discussed in this RIS have an imminent sunset date and that it is essential that the proposed regulations are in place prior to these sunset dates.

10. Evaluation and enforcement

As discussed in section 3.11, above, a five year sunset clause has been included in the proposed regulations.

The Federal Government has recently announced an increase in Federal Court fees, to take effect from 1 January 2013. There has not yet been an announcement as to the new fees, however, an increase in cost recovery level to 27% has been foreshadowed. In addition, the Federal Government has indicated that it plans to increase expenditure on the courts. Thus, the size of the expected fee increase is, presumably, larger than a simple comparison of the current and proposed cost recovery levels would suggest. These significant fee increases will necessarily have implications for fee setting in the Supreme Court as a result of both the general context of the concurrent jurisdiction of the two courts and the specific context of the SCAG agreement discussed above. Moreover, the fee increases may also indirectly affect future County Court fees. The implications of these expected changes in Federal Court fees will necessarily be considered in any further review of court fees policy.

The issue of enforcement is essentially non-existent in relation to court fees regulations as it is a general requirement that fees be paid to the court before the processes to which they relate can proceed. Thus, there is a high level of certainty that fee liabilities are actually met. The one historical exception to this point is that of hearing fees in the Supreme Court. As discussed in Section 6.1, these fees have historically been collected on an *ex post* basis, with the result that substantial non-compliance by litigants with their obligation to pay hearing fees has developed over time. The proposed regulations will address this issue through the adoption of a requirement for these fees to be paid (on an estimated liability basis) by a specified date.

In the medium term, it can be noted that responsibility for implementation and enforcement of the proposed regulations is likely to be largely a matter for the Courts Executive Service, currently being established by the Government.

11. Statement of Compliance with National Competition Policy

The National Competition Policy Agreements (“NCPA”) set out specific requirements with regard to all new legislation adopted by jurisdictions that are party to the agreements. Clause 5(1) of the Competition Principles Agreement sets out the basic principle that must be applied to both existing legislation, under the legislative review process, and to proposed legislation:

The guiding principle is that legislation (including Acts, enactments, Ordinances or Regulations) should not restrict competition unless it can be demonstrated that:

- (a) The benefits of the restriction to the community as a whole outweigh the costs; and*
- (b) The objectives of the regulation can only be achieved by restricting competition.*

Clause 5(5) provides a specific obligation on parties to the agreement with regard to newly proposed legislation:

Each party will require proposals for new legislation that restricts competition to be accompanied by evidence that the restriction is consistent with the principle set out in sub-clause (1).⁶²

Accordingly, every regulatory impact statement must include a section providing evidence that the proposed regulatory instrument is consistent with these NCP obligations. The recently released OECD Competition Assessment Toolkit⁶³ provides a checklist for identifying potentially significant negative impact on competition in the RIA context. This is based on the following three questions:

- Does the proposed regulation limit the number or range of suppliers?
- Does the proposed regulation limit the ability of suppliers to compete?
- Does the proposed regulation limit the incentives for suppliers to compete vigorously?

According to the OECD, if all three of these questions can be answered in the negative, it is unlikely that the proposed regulations will have any significant negative impact on competition. The proposed regulations do not act directly in any of the above ways. Therefore, it can be concluded that they are unlikely to have any significant negative impact on competition. In sum, it has been concluded that the proposed regulations are fully compliant with the requirements of the National Competition Policy.

⁶² Clause 5, Competition Principles Agreement, 11 April 1995 accessed at www.ncc.gov.au/pdf/PIAg-001.pdf

⁶³ See *Integrating Competition Assessment into Regulatory Impact Analysis*. OECD, Paris, 2007. (DAF/COMP(2007)8).

Appendix 1: Proposed Supreme Court Fees Order 2011

Refer to attached document

Appendix 2: Proposed County Court (Fees) Order 2011

Refer to attached document

Appendix 3: Supreme Court Scale of Costs

The Supreme Court scale of costs is published as Appendix A of the *Supreme Court (General Civil Procedure) Rules 2005*. They are reproduced below.

	<i>Instructions</i>	
1.	To institute or defend any proceeding or appeal	\$303.00
2.	To make or oppose any interlocutory application	\$72.00
3.	For statement of claim whether indorsed on writ or third party notice or served separately, or counterclaim	\$149.00
4.	For any other pleading, particulars in lieu of pleading or amended pleading	\$72.00
5.	For counsel to advise or give an opinion	\$72.00
6.	For counsel to make an interlocutory application where no other brief	\$72.00
7.	For witness statements, summaries of evidence or like documents, interrogatories, answers to interrogatories, oral examination for discovery, affidavit or other document for filing on an interlocutory application other than a short, formal affidavit or other document	\$149.00
8.	For a necessary document not otherwise provided for, such fee as may be reasonable in the circumstances No allowance for instructions shall be made under the above items where an allowance for the work is claimed in detail and allowed on that basis Instead of the fees for instructions above, such larger sum may be allowed as the Costs Court thinks reasonable in the circumstances	
9.	Instructions for brief on trial of proceedings, including an assessment of damages or value or a trial before special referee, or an appeal, such allowances as the Costs Court thinks reasonable in the circumstances	
	<i>Originating Process</i>	
10.	Writ or originating motion or summons (where filed as originating process)	\$175.00
11.	If any of the above exceed three folios (when not drawn by counsel) for each extra folio	\$32.00
	The above allowances include all indorsements of claim, copy for filing and one copy for service and attendance to file, but not Court fees	
	<i>Corporations Short Form Bill</i>	

11A.	Costs of obtaining a winding-up order up to and including authentication, filing and service of the order under section 470 of the Corporations Act and the obtaining from the Costs Court of an order as to costs	\$3488.00
	Additional costs are allowable for any adjournment in accordance with item 34 or 35 in respect of which costs have been reserved by the Court	
	<i>Interlocutory Process</i>	
12.	Summons before Judge of the Court or Associate Judge	\$149.00
13.	Subpoena	\$88.00
	If a subpoena exceeds three folios, for each extra folio	\$12.00
	These allowances include preparation of document, copy for filing and one copy for service and attendance to file	
	<i>Execution Process</i>	
14.	Warrant of execution	\$175.00
	This allowance includes preparation of the warrant, copy for filing and one copy for service and attendance to file	
	<i>Notices and Memoranda</i>	
15.	Notice to produce or any other necessary or proper notice or memorandum not otherwise provided for, or any demand	\$60.00
	This allowance does not apply to a short notice or memorandum indorsed on another document, but an allowance may be made therefore as part of the allowance for the document	
16.	If the notice is special, or necessarily exceeds three folios, for each folio The above allowances include preparation of the notice and one copy for filing or service	\$32.00
	<i>Appearance</i>	
17.	Preparing and attending filing notice of appearance (including one copy for service)	\$105.00

	<i>Drawing Pleadings and Other Documents</i>	
18.	(a) Pleadings, including petitions, indorsement constituting statement of claim on writ or third party notice, including particulars (b) If exceeding three folios, for each extra folio	\$149.00 \$32.00
19.	Any other necessary document, per folio	\$32.00

	No allowance is to be made to a solicitor for drawing a document drawn by counsel, but a fee may be allowed for drawing matter necessary to instruct counsel	
	In allowing for drawing, the Costs Court may disallow anything which is a repetition or adaptation of matter for the drawing of which allowance has otherwise been made in the proceeding. The Costs Court may increase these allowances if in the circumstances the Costs Court thinks it reasonable to do so	
20.	For preparing each exhibit	\$6.20
	<i>Engrossment and Copies</i>	
21.	Engrossment of documents, per folio	\$6.20
22.	(a) Copy or photocopy of document, per page	\$2.20
	(b) Reproduction of document from microfiche, microfilm or like process, per page, the actual cost or	\$2.20
23.	Where under the Rules or any order of the Court or for other sufficient cause any document is printed out and it would not have been reasonable to send the original to the printer, a copy for the printer shall be allowed, per page	\$2.20
24.	Where more than ten copies of the same document are required, the amount actually and properly paid to a printer (in addition to all necessary attendances on the printer), or, if reproduced by the solicitor, the equivalent amount or such lesser amount as the Costs Court considers fair and reasonable having regard to commercial rates for similar services, shall be allowed	
	Where it is necessary to print any part of a document in a foreign language, or as a facsimile, or in any unusual or special manner, or where any alteration in the document printed becomes necessary after the first proof, such further allowance shall be made as the Costs Court thinks reasonable	

	<i>Perusals</i>	
25.	Of all pleadings, amendments of pleadings (which exceed three folios), applications by summons, notice or otherwise, third party notices, interrogatories, answers thereto, transcripts of discovery by oral examination, notices, affidavits, draft orders submitted for approval by another party, drafts of documents to be settled by an officer of the Court, orders (unless an allowance has been made previously for perusal of a draft), opinions or advices of counsel where requested, bills of costs necessarily perused by the solicitor for the party on whom it was served	\$46.00
	Or per folio	\$6.40

26.	Of all other documents, including deeds, correspondence (including incoming correspondence), exhibits, per folio	\$5.30
	If the solicitor is or ought to be familiar with the contents of the document or if it is not necessary to read all of it carefully, the Costs Court shall allow such smaller amount as it thinks reasonable. No allowance shall be made for the solicitor perusing letters which he or she receives unless the Costs Court considers there are special circumstances for doing so	
27.	Alternatively, for examining a document or checking a proof or print or examining an appeal book	
	Solicitor, per quarter hour	\$72.00
	Clerk, per quarter hour	\$42.00
	<i>Service</i>	
28.	Service of any document where necessary, and not able to be served by post	\$71.00
	Or such charge as is reasonable having regard to the number of necessary attendances, the time taken, the distance travelled and any expense incurred	
29.	Where by reason of the location of the person to be served it is proper to effect service through an agent, instead of an allowance for service—	
	(a) for correspondence with the agent	\$46.00
	(b) the amount actually and reasonably charged by the agent	
	Where more than one attendance is necessary to effect service, or to ground an application for substituted service, the Costs Court may make such further allowance under items 28 and 29 as the Costs Court considers reasonable	
	For service out of Victoria, the Costs Court shall make such allowance as the Costs Court considers reasonable	
30.	Service of document on a party by filing or leaving at the office of the party's solicitor or other address for service, where that mode of service is necessary	\$42.00
31.	Service of document on a party by post or leaving at document exchange	\$25.00
	Only one fee for service shall be allowed where two or more documents are or could have been served together	
	<i>Attendances</i>	
32.	(a) On counsel with brief on trial of proceeding, including an assessment of damages or value or a trial before a special referee or an appeal	\$89.00

	(b) On counsel with any other brief or papers or to appoint consultation or conference (including all attendances to settle counsel's fees)	\$60.00
33.	(a) On consultation or conference with counsel	\$149.00
	(b) Where a consultation or conference occupies more than one half hour, if the Costs Court considers it reasonable, for each subsequent half hour	\$149.00
	(c) If the solicitor does not attend personally, the allowance shall be as the Costs Court considers reasonable, but not exceeding, for— the first half hour each half hour thereafter	\$72.00 \$72.00
34.	On any application or attendance before a Judge of the Court, an Associate Judge, the Costs Court or Prothonotary, examination of a witness, discovery by oral examination, assessment of damages or value, trial or inquiry, trial of a proceeding or hearing of an appeal, where in list or likely to be heard	\$149.00

35.	(a) At trial or hearing, for each hour	\$303.00
	But, according to circumstances, not to exceed per day of six hours (including luncheon and dinner adjournments)	\$1453.00
	or,	
	If attended by clerk	\$722.00
	(b) To hear reserved judgment, for each half hour	\$149.00
	(c) By appointment or on short or formal application to a Judge of the Court or an Associate Judge, the Costs Court or Prothonotary	\$149.00
36.	Where in the opinion of the Costs Court the attendance of two principals or of a solicitor and clerk at trial is necessary, an additional allowance may be made not exceeding per day of six hours (including luncheon and dinner adjournments)	\$1453.00
37.	To settle judgment or order, per half hour	\$149.00
38.	In addition to reasonable expenses for travel and sustenance, allowance may be made for a solicitor travelling to a place more than 50 kilometres distant from his or her place of residence or business where—	
	(a) the journey was necessary and proper for the purpose of the proceeding and what was done by the solicitor could not have been done satisfactorily by an agent; and	

	(b) the solicitor was necessarily absent from his or her office, and for that time no charge could otherwise be made, and having regard to what other allowances may be made to the solicitor in the proceeding	
	Not exceeding per day	\$1453.00
	If the journey is not undertaken solely for the purpose of the proceeding, the Costs Court may allow a proportion of the fee as the Costs Court considers reasonable	
39.	To file or lodge any document, to obtain an appointment from an officer of the Court, or to insert an advertisement or other attendance of a similar nature capable of performance by a junior clerk	\$42.00

40.	If the exercise of skill or legal knowledge is involved so as to require the personal attendance of the solicitor, per quarter hour	\$72.00
	Or, if attendance by solicitor's clerk, per quarter hour	\$42.00
	Or such larger amount as the Costs Court thinks reasonable having regard to the importance or difficulty of the subject matter of attendance	
41.	Making an appointment or similar attendance by telephone, at the discretion of the Costs Court	\$13.00
42.	Arranging attendance of a witness or any attendance for which no other provision is made, per quarter hour	\$42.00
43.	Sending or receiving telex, telegram or facsimile documents	\$42.00
	Or such larger amount as is reasonable in the circumstances having regard to the length	
	Correspondence	
44.	Letter making an appointment or forwarding document without explanation or the like	\$22.00
45.	Letter, ordinary	\$38.00
46.	Letter, special	\$50.00
	Or such amount as the Costs Court thinks reasonable	
47.	Circular letter, after the first	\$12.00
	For each additional page after the first page, the photocopying charge shall apply	
	The above allowances include the standard surface rate of postage, but, if any communication is necessarily made by telex, telegram or transmission of a facsimile, the appropriate statutory charges may be allowed as a disbursement	

48.	Where any agent is employed, for correspondence with the agent which the Costs Court thinks reasonable, per quarter of the year	\$72.00 to \$303.00
	Or, if special or extensive, in the discretion of the Costs Court.	

Appendix 4: County Court Scale of Costs

The County Court scale of costs is published as Appendix A of the County Court (Civil Procedure Rules) 2008. It is reproduced below.

	Institution of Proceedings	
	Instructions to sue including letter before action, drawing and engrossing of brief to and attendance on counsel, preparation of originating process, statement of claim, request to enter the list and copies, filing, attending to service, and affidavit of service	\$768.00
	If Brief to Counsel or Statement of Claim each exceeds 10 folios, for each additional folio such additional fees pursuant to items 27 and 28 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Consent of litigation guardian including preparation of memorandum, copies and obtaining signature of litigation guardian	\$208.00
	Instructions to defend, including perusal of statement of claim, up to 10 folios, and preparation and filing of appearance including copies	\$357.00
	If Statement of Claim exceeds 10 folios, for each additional folio such additional fees pursuant to item 33 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Instructions to institute or oppose any interlocutory proceeding, or instructions for special affidavit where not elsewhere provided for	\$98.00

	Administrative Mention	
	Preparation of consent directions order, attendances (not including attendances at Court), copies, filing and serving and perusal of directions order	\$378.00
	Issues and Particulars	
	(a) Counterclaim or third party notice including drawing and engrossing of brief to and attendance on counsel, copies, filing and service	\$410.00

	(b) Perusal of counterclaim or third party notice and making copies for file and brief	\$65.00
	If Brief to Counsel, counterclaim or third party notice exceeds 10 folios, for each additional folio such additional fees pursuant to item 33 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Defence	
	(a) Any necessary further pleading, notice claiming contribution or indemnity, including drawing and engrossing of brief to and attendance on counsel, copies for file and for service, filing and service	\$260.00
	(b) Perusal of Defence, any necessary further pleading, notice claiming contribution or indemnity and making copies for file and brief	\$65.00
	If Brief to Counsel, defence, any necessary further pleading or any notice claiming contribution or indemnity exceeds 10 folios, for each additional folio such additional fees pursuant to items 27, 28 and 33 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Request for further particulars including special damages or preparation of further particulars or special damages including drawing and engrossing of brief to and attendance on counsel, copies, filing, service, perusal of further particulars, or special damages, or request, and making copies thereof	\$306.00

	If Brief to Counsel, defence, any necessary further pleading or any notice claiming contribution or indemnity exceeds 10 folios, for each additional folio such additional fees pursuant to items 27, 28 and 33 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Discovery	
	(a) Notice for discovery including copies, filing, service, perusal of affidavit of documents, and making copies thereof	\$208.00

	(b) Affidavit of documents including instructions for affidavit, copies, swearing, filing and service	\$513.00
	If affidavit exceeds 10 folios, for each additional folio such additional fees pursuant to item 33 as appropriate provided that the Judge, Registrar or Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Interrogatories	
	(a) Interrogatories for examination of one party including instructions for interrogatories, drawing and engrossing of brief to and attendance on counsel, copies, filing, service, perusal of answers to interrogatories and making copies thereof	\$513.00
	(b) Answers to interrogatories of one party including perusal of interrogatories, instructions for answers, drawing and engrossing of brief to and attendance on counsel, swearing, copies, filing and service	
	If interrogatories, answers or brief to counsel exceed 10 folios, for each additional folio such additional fees pursuant to items 27, 28 and 33 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	\$1020.00
	Notices	
	(a) Notice to Admit including drawing and engrossing of brief to and attendance on counsel, copies, filing, service, perusal of admissions and making copies thereof	\$208.00

	(b) Admissions (including perusal of Notice to Admit and making copies thereof), drawing and engrossing of brief to and attendance on counsel, copies, filing and service	\$357.00
	If Notice to Admit, admissions or brief to counsel exceed 10 folios, for each additional folio such additional fees pursuant to items 27, 28 and 33 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Offer of compromise, or notice of acceptance including copies, and service	\$144.00
	(a) Any necessary notice (including notices before proceeding, notice to Transport Accident Commission and any other statutory notice when required) memorandum or undertaking, including copies, filing and service, where not	

	elsewhere provided for	\$144.00
	(b) Any short notice, memorandum or undertaking (including expert witness statement front sheet where report of expert attached, Statement of Issues and statement of Calculation of Loss of Earnings) not exceeding three folios in length, including copies, filing and service, where not elsewhere provided for	\$89.00
	If short notice, memorandum or undertaking exceeds three folios, for each additional folio such additional fees pursuant to items 27 and 28 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Preparation and Trial	
	Callover—	
	(a) Solicitor's attendance	\$144.00
	(b) Clerk's attendance	\$98.00
	Subpoena	
	(a) Including filing, copy for service and attending to arrange service	\$98.00
	(b) Each additional copy for service	\$3.90
	Expert Witness	
	(a) Arranging examination or inspection by an expert witness and notifying party	\$98.00
	(b) Notifying party of examination or inspection arranged by opposite party	\$45.00
	Advice of Counsel	
	Including drawing and engrossing a memorandum to counsel of not more than 3 folios, attendance on counsel and perusal of advice	\$260.00
	If memorandum exceeds 3 folios, for each additional folio such additional fees pursuant to items 27 and 28 as appropriate provided that the Costs Court is satisfied in	

	all the circumstances that it is fair and reasonable to do so	
	If advice exceeds 10 folios, for each additional folio such additional fees pursuant to item 33 as appropriate provided that the Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Conference with Counsel	
	Appointing conference and attending—	
	(a) Solicitor's attendance—per hour	\$260.00
	(b) Clerk's attendance—per hour	\$144.00
	Brief to View	
	Including arranging view, attendance on counsel and attendance at view	\$260.00
	If attendance on view exceeds half an hour, for each quarter hour thereafter	\$45.00
	Mediation and Case Conference	
	Counsel or solicitor appearing at mediation or case conference—	
	(a) Half day (3 hours or part thereof)	\$1272.00
	(b) Hourly rate beyond half day	\$306.00
	(c) Daily maximum or if case settles within the day Solicitor appearing to instruct at mediation or case conference—	\$2250.00
	(d) Half day (3 hours or part thereof)	\$513.00
	(e) Hourly rate beyond half day	\$251.00
	(f) Daily maximum	\$1243.00
	Note	
	1 Paragraphs (a), (b) and (c) are all inclusive and include preparation and appearance.	
	2 Despite anything to the contrary in item 42, a Judge or Costs Court may allow a higher fee for counsel or solicitor appearing at mediation or case conference.	
	3 In circuit cases, a circuit fee may be allowed by a Judge or Costs Court in accordance with Schedule 1 if in his or her opinion,	

	having regard to all the circumstances, the fees in this item are insufficient.	
	Directions Hearing	
	Counsel or solicitor appearing at directions hearing, for each hour appearing, but not to exceed \$1422.00 for the day	\$251.00
	Instructions for Brief	
	For work necessarily and properly done in preparing for trial or hearing and not otherwise provided for, including—	
	(a) taking instructions for examination of any party or witness;	
	(b) considering the facts and the law;	
	(c) attending on and corresponding with client;	
	(d) interviewing and corresponding with witnesses and taking proofs of their evidence;	
	(e) arranging to obtain reports or advice from experts and maps, plans, photographs and models;	
	(f) making search in any public office and elsewhere for relevant documents;	
	(g) inspecting any property or place material to the proceeding;	
	(h) perusing relevant documents;	
	(i) the general care and conduct of the proceeding.	
	Such sum as may be appropriate, to be fixed by the Judge or the Costs Court having regard to all the circumstances of the case and in particular to—	
	(a) the complexity of the matter;	
	(b) the difficulty or novelty of the questions involved in the matter;	
	(c) the skill, specialised knowledge and responsibility involved and the time and labour expended by the legal practitioner;	
	(d) the liability assumed by the legal practitioner in the matter;	
	(e) the amount or value of money or property involved;	
	(f) the time within which the work was required to be done;	
	(g) any other relevant matter.	
	Notes	
	1 This item should begin with a short statement of— (a) the main issues; (b) any particular difficulties of fact or law; (c) any special skill, knowledge or responsibility required.	

2	This should be followed not by a chronological narrative, but by an analysis of the work done separated on the main headings appropriate to the subject matter, a statement of the number of attendances on the client, the total time occupied and the number of letters sent, but not the details of every attendance or of every letter.	
	However, where objection is lodged to the stated number of letters, attendances, documents drawn, perused or scanned and copied documents, the practitioner lodging the bill for taxation must remove from his or her file that material claimed, and be in a position to produce same in chronological order at the taxation	

	Brief to Counsel to Appear	
	Including drawing and engrossing a memorandum to counsel of not more than 3 folios and attendance on counsel	\$144.00
	If memorandum exceeds 3 folios, for each additional folio such additional fees pursuant to items 27 and 28 as appropriate provided that the Judge, Registrar or Costs Court is satisfied in all the circumstances that it is fair and reasonable to do so	
	Attending Court	
	(a) Solicitor or managing clerk with counsel—per half day	\$513.00
	(b) Clerk with counsel—per half day	\$378.00
	(c) Solicitor without counsel—per day	\$1520.00
	(d) If proceeding in list for hearing but not reached, for each hour spent waiting	\$251.00
	(e) Additional Solicitor or managing clerk (if certified by trial Judge)—discretionary fee	
	(f) Pre-Trial Conference—	
	(i) solicitor or managing clerk with counsel	\$513.00
	(ii) solicitor without counsel	\$766.00
	Solicitor or managing clerk attending trial at a Court more than 50 kilometres from his or her place of business for each day of absence from office—discretionary additional fee	

	Brief to hear Judgment	
	(a) Including receiving advice of date fixed, and attendance to hear judgment for up to one hour; Brief to counsel to appear to be allowed as at item 22 in addition	\$260.00
	(b) Drawing and engrossing brief to Counsel to appear (or brief notes for solicitor) for any unopposed application or adjournment (where not otherwise provided for) including attendance to apply, for up to one hour	\$260.00

	Time over one hour to be allowed at the rate for counsel as set out in item 42	
	Costs of the Day	
	Including—	
	(a) Practitioner for attending Court where no counsel employed	\$616.00
	(b) Attending with counsel—	
	(i) Clerk	\$306.00
	(ii) Practitioner or managing clerk	\$455.00
	(c) Counsel's fees	\$1340.00
	Note These allowances shall be in addition to other items thrown away.	
	Court Documents	
	Applications, including copies, issuing and filing	\$144.00
	Affidavit of service, including swearing, copies and filing	\$45.00
	Necessary affidavit (not otherwise provided for), including preparation, copies, swearing, filing and service	\$513.00
	Short affidavit or affidavit exhibiting reports (where not otherwise provided for), including preparation, copies, swearing, filing and service	\$251.00

	Drawing Documents—for each folio	\$27.00
	Or at such higher rate as the Costs Court considers appropriate given the nature of the document	
	Engrossing or Approval of Documents	
	Otherwise properly drawn and engrossed by others and signed by the Solicitor	
	For each folio	\$9.40
	Reproduction by Photocopy	
	Or other machine made copy including hard copies of electronic documents—for each printed side of a page	\$0.22
	If printed out of the office, allow the amount charged by the service provider as a disbursement	
	Letters (including electronic communications)	
	(a) Message (20 words or less) or letter forwarding documents without explanation, or circular letter	\$12.30
	(b) Short (1 folio or less)	\$25.00
	(c) Any other letter—for each folio or at such higher rate as the Costs Court considers appropriate given the nature of the document and having regard to items 27 and 28 of the scale	\$37.00
	(d) For each additional page after the first page of a circular letter, the photocopying charge shall apply	
	The charge for a letter includes transmission by standard surface post, facsimile, e-mail or other form of electronic transmission	
	Service	
	(a) Personal service where necessary and required and not able to be served by other means	\$71.00
	(b) Attempted service where more than one attendance is necessary to effect service, or to ground an application for substituted service, for each necessary attendance	\$42.00
	(c) Service by leaving. Service of a document on party by filing or leaving at the office of the party's solicitor or other address for service, where that mode of	

	service is necessary	\$32.00
	(d) By letter in accordance with item 30(b)	\$25.00
	Receiving and Filing	
	Any incoming document including correspondence whether by electronic means or otherwise including first page for file	\$12.00
	Copies of additional pages received electronically are to be charged pursuant to item 29	
	Perusals	
	Of all documents including incoming correspondence—	
	For each folio	\$5.60
	Scanning	
	If it is not reasonable to peruse but it is reasonable to scan a document including incoming correspondence— for each page	\$3.90
	Examination	
	If it is not reasonable to peruse or scan a document but an examination is reasonable—for each page	\$2.70
	Review and Consideration	
	Where the Costs Court considers it reasonable for the legal practitioner or lay associate to review or consider the file or particular parts of the file in preparing to draw or redact documents and letters, for conferences, hearings, taxations of costs and the like—in accordance with item 41(a) and (b)	
	In considering a claim made pursuant to this item the Costs Court must have regard to any allowances claimed pursuant to items 33, 34, 35, 37 and 38	
	Delegation and Supervision	
	In matters where the Costs Court considers it reasonable for more than one legal practitioner to be involved in the conduct of the matter, the Costs Court shall make such additional allowances as are considered reasonable in all	

	the circumstances in accordance with this scale. Such allowances may include time spent by both principal practitioner and delegates in ensuring tasks are properly delegated and supervised—in accordance with item 41(a) and (b)	
	Research	
	Researching the law and evidence—in accordance with item 41(a) and (b)	
	Collation, Pagination and Indexing	
	Of documents or files including for discovery or inspection purposes, briefs to Counsel, Court Books, Appeal Books, exhibits or annexures to Court documents, hearings, instructions to expert witnesses, correspondence, and the like—in accordance with item 41(c)	

	Redaction	
	Of documents or files including for discovery or inspection purposes, briefs to Counsel, Court Books, Appeal Books, exhibits or annexures to Court documents, hearings, instructions to expert witnesses, correspondence, and the like—in accordance with item 41(c)	
	Attendances	
	Any necessary attendance not otherwise provided	
	(a) Requiring legal skill or knowledge by a legal practitioner—per quarter hour or part thereof (100%)	\$55.00
	(b) Where any attendance, requiring legal skill or knowledge, referred to in item 41(a) is by a lay associate as defined by section 1.2.4(2)(b) of the Legal Profession Act 2004 , a trainee (formerly called articled clerk) or a clerk (meaning an employee of a legal practice who is not an Australian legal practitioner within the meaning of the Legal Profession Act 2004 and who by training or experience is able to conduct work exercising legal skill or knowledge—at the rate of 75% of the legal practitioners rate (75%)	\$41.00

	(c) Any other attendance, not requiring legal skill or knowledge, capable of performance by a clerk—per quarter hour or part thereof (50%)	\$27.00
	(d) Attendances to file or issue any document or similar attendance—per quarter hour or part thereof (50%)	\$27.00
	Travelling to Court or counsel's chambers for a conference may be allowed on taxation or assessment if the Law Practice is more than 10 kilometres from the Court or counsel's chambers and it is reasonable to make a charge, at the rate allowed in item 41(c)	
	Where the attendance is by telephone the charge for an attendance includes the standard local landline telephone charge	

	Fees to Counsel		
		<i>Junior Counsel</i>	<i>Senior Counsel</i>
	(a) Appearances		
	(i) On trial or appeal including up to 4 hours preparation (daily fee)	\$1566– \$4385	\$3706– \$6890
	(ii) Any other appearance (1/2 day rate)	\$783–\$2192	\$1853– \$3445
	(b) Preparation (for each hour exceeding first 4 hours)	\$157–\$438	\$376– \$689
	(c) Conferences (not occurring on day of hearing) (for each hour)	\$157–\$438	\$376– \$689
	(d) Views (for each hour)	\$157–\$438	\$376– \$689
	(e) Drawing or settling documents (for each hour)	\$157–\$438	\$376– \$689
	(f) Opinions, advices (for each hour)	\$157–\$438	\$376– \$689
	(g) Not otherwise provided for (for each hour)	\$157–\$438	\$376– \$689
	(h) Circuit Fees—Based on Schedule 1		
	(i) In allowing a fee to counsel, the Costs Court will have regard to the following—		

	(i) the complexity of the matter;	
	(ii) the difficulty or novelty of the questions involved in the matter;	
	(iii) the skill, specialised knowledge and responsibility involved and the time and labour extended by the law practitioner;	
	(iv) the other fees and allowances to the law practitioner;	
	(v) the number and importance of the documents prepared and perused, however brief;	
	(vi) the places and circumstances in which the business involved in the matter are transacted;	

	(vii) the commercial importance of the case;	
	(viii) the importance of the matter to the client;	
	(ix) the amount or value of money or property involved;	
	(x) research and consideration of questions of law and fact;	
	(xi) payments made for interlocutory work where that work has reduced the work which would otherwise have been necessary in relation to the brief;	
	(xii) the quality of the work done;	
	(xiii) the place where, and circumstances in which, the legal services were provided;	
	(xiv) the time within which the work was required to be done;	
	(xv) the extent to which the case prevented the law practitioner taking on other work;	
	(xvi) the undesirability of being associated with the case;	
	(xvii) the nature and length of the professional relationship with the client;	
	(xviii) the standing of counsel;	
	(xix) the fees charged by counsel of similar standing in cases or matters of a similar kind;	
	(xx) the possibility that counsel may be called on to argue on behalf of a party not represented at the hearing;	
	(xxi) the jurisdiction in which the service is provided;	
	(xxii) the number of persons represented by the practitioner at the same time;	
	(xxiii) any other relevant matter;	
	(j) Where costs are taxed pursuant to an order of the Court, Counsel's fees in excess of the scale range are not to be allowed in the absence of an order by the Judicial Officer making the costs order	

	(k) In any other case, the Costs Court has discretion to allow fees in excess of scale	
	Note	

	No fee to counsel is to be allowed unless vouched by the signature of counsel or his or her clerk.	
	(l) In circuit cases, a circuit fee may be allowed and the amount thereof fixed by order of the Judge, in accordance with Schedule 1, if, in his or her opinion (having regard to all the circumstances, including travelling expenses, living expenses and absence from chambers) the scale fee is insufficient, but the total amount of the scale fee and the circuit fee shall not exceed the fee marked on the brief	
	(m) Where the Judge certifies or the Costs Court allows for two counsel, all reasonable and necessary attendances and copies of documents for the brief as allowed for in items 41 and 29 additional to those which would have been necessary had only one counsel been employed shall be allowed	
	Order for Substituted Service	
	Application for order for substituted service including application, affidavit in support, draft order, filing and perusal of order (not including fees of advertising)	\$556.00
	Interpleader	
	(a) Bailiff—solicitor or counsel appearing	\$1155.00
	(b) Claimant—solicitor with or without counsel appearing	\$940.00
	(c) Creditor—solicitor with or without counsel appearing	\$940.00
	Other Applications in Proceedings	
	(a) Applicant's costs—solicitor with or without counsel appearing	\$1155.00
	(b) Respondent's costs—solicitor with or without counsel appearing	\$1032.00
	(c) The costs include the fee for drawing and engrossing the application, one affidavit in support, brief to counsel, all necessary attendances on counsel	
	(d) Additional work to be allowed pursuant to the scale	
	Summons to Debtor	
	(a) Judgment Creditor on hearing—solicitor with or without counsel appearing	\$1155.00
	(b) costs of adjournment—solicitor with or without counsel appearing	\$940.00
	The costs in items 44, 45 and 46 do not include fees for service or filing fees for an application. These costs are subject to increase or reduction at the discretion of the Costs Court. Such costs include the summons, affidavit in support, one affidavit	

	of service, preparation, signing, service and filing of the order where appropriate	
	Miscellaneous	
	Registration of interstate Judgment	\$144.00
	Warrant of execution	\$144.00
	Upon entering default judgment, including instructions to sue, letter before action, preparation of originating process and statement of claim, including copies, issuing, arranging for service, affidavit of service and entry of judgment	\$803.00

Witnesses' Expenses

Witnesses giving evidence in an expert or professional capacity, \$169.00–\$340.00 per hour or part thereof, not exceeding \$2117.00 per day.

Persons not referred to in the preceding paragraph who are engaged in business as principals on their own behalf—\$353.00 per half day or part thereof but not in any event to exceed \$634.00 in any one day.

Other witnesses—\$105.00 per hour, provided that a witness who receives wages, salary, remuneration or fees may be allowed the amount actually lost by reason of attendance not exceeding \$634.00 per day.

Travelling expenses, if witnesses' residence or place of business is more than seven kilometres from place of hearing, the sum reasonably and actually paid.

Witnesses attending in more than one case will be entitled to a proportionate part only in each case.

Professional, scientific or expert witnesses, for time necessarily occupied in qualifying to give evidence, to be allowed such reasonable sum as was necessarily and properly incurred.

Meals and Accommodation of Witnesses

A reasonable sum to be fixed by the Costs Court.

In cases in which it is considered reasonable to bring heavy or bulky articles to court or the precincts of the court as exhibits or for inspection by Judge or Jury, a reasonable sum may be allowed for costs of conveyance or transport.

Interpreter Allowances

Attending professional, scientific or expert witnesses qualifying to give evidence, attending conference with solicitor or counsel \$71.00, or for each hour \$50.00 but not in any event to exceed \$306.00 in any one day.

Attending court where the period of absence from the place of business or residence is four hours or less, \$176.00, and for each hour or part thereof in excess of four hours, \$50.00, but not in any event to exceed \$306.00 in any one day.

Travelling Accommodation and Meals

A reasonable sum to be fixed by the Costs Court.

PART 2—ELECTRONIC DOCUMENT MANAGEMENT

If a proceeding is conducted electronically, the Costs Court shall allow such costs as have been reasonably incurred and are of a reasonable amount including, but not limited to, the costs of engaging an external service provider or an IT consultant in the employ of the law firm.

	Document preparation including delineation and identification of host/attachment relationship—for each document	\$2.10 per document
	Database creation, database administration and project management including establishing design and agreement of protocols, database design and implementation, importing data, normalisation of data/cleanup, user management and access, duplicate culling, team management, resourcing, reports, production of draft discovery lists, electronic exchange and security issues	\$5.30 per document
	Database entry including numbering and objective coding—for each database item—for each field	\$0.30 per field
	Bar coding—for each page	\$0.02 per page

	Scanning and electronic processing	
	(a) Establishing design and agreement of protocols, scanning and quality assurance of images and conversion of e-files	\$0.26 per page
	(b) Extracting files, automated indexing, automated records attachment relationship, automated numbering and automated re-duplication of data	\$0.30 per file
	Publishing	
	(a) To CD including set up and burning—for each CD	\$159.00
	(b) To hard copy—for each page	\$0.30