

Ms Marian Chapman  
Deputy Secretary, Courts, Civil and Criminal Law  
Department of Justice and Community Safety  
121 Exhibition Street  
MELBOURNE VIC 3000

31 May 2024

Dear Ms Chapman

## **REGULATORY IMPACT STATEMENT FOR THE SUPREME COURT (FEES) AMENDMENT REGULATIONS 2024**

I would like to thank your staff at the Department of Justice and Community Safety (the Department) for working with the team at Better Regulation Victoria to prepare a Regulatory Impact Statement (RIS) for the proposed Supreme Court (Fees) Amendment Regulations 2024 (the proposed Regulations).

As you know, the Commissioner for Better Regulation provides independent advice on the adequacy of the analysis provided in all RISs in Victoria. A RIS is deemed to be adequate when it contains analysis that is logical, draws on relevant evidence, is transparent about any assumptions made, and is proportionate to the proposal's expected effects. The RIS also needs to be written clearly so that it can be a suitable basis for public consultation.

I am pleased to advise that the final version of the RIS received by us on 31 May 2024 meets the adequacy requirements set out in the *Subordinate Legislation Act 1994* (the SLA).

### **Background and Problems**

In the RIS, the Department explains that the Victorian Government has approved a systematic review (the Court Fees Review) of the pricing and structure of fees charged across all Victoria courts and tribunals, with the intention to align Victorian court fees with comparable jurisdictions and improve access to justice and consistency of cost recovery across fees. The Court Fees Review will be implemented in multiple stages, and this RIS focuses on the first stage of considering the fees charged by the Victorian

Probate Office. The second stage will consider all other fees charged by Victoria's courts and tribunals.

The Department outlines the key features of Victoria's court system in the RIS. Victoria's courts interpret the law, adjudicate disputes, and sentence or impose penalties for breaches of the law. The Supreme Court of Victoria (the Supreme Court) is the highest court in the Victorian court hierarchy and hears the most serious and criminal civil matters, as well as appeals of decisions of lower courts. The Supreme Court also has exclusive jurisdiction to make orders in relation to wills and probates through its administration of the Probate Office.

The Department explains that grant of probate or administration (collectively known as a grant of representation) is a legal document certifying that a will is valid and can be acted upon. The process for a probate begins when a person dies and leaves behind property, assets and debts (i.e. their estate) that need to be managed and finalised. Where there is a valid will, the estate will be finalised by the executor named in the will, and where there is no valid will, an administrator of the estate can be appointed, which is usually the deceased's closest next of kin.

The executor or administrator must apply for a grant of representation, which serves as the legal proof that they are entitled to manage the deceased's estate. The Probate Office deals with all applications for grants of representation and maintains a register of all grants issued by the Supreme Court and all wills deposited within the Supreme Court. The Probate Office also provides an optional service to help executors of small estates apply for a grant of representation for a fee. Small estates are defined as estates with assets below a value set by Government, which is currently \$125,080.

The Department explains that while the Supreme Court is partially funded by the Victorian State Budget, taxpayers do not necessarily share in the private benefits that court users obtain from accessing Supreme Court services, and as such, court users are charged fees to cover the costs of the services. However, the Department notes that the Supreme Court is currently recovering less than its total operating costs through fees, and there are opportunities to improve the fiscal sustainability of the Supreme Court through increasing the fee revenue of the Probate Office, which currently over-recovers on the costs of probate services.

The Department also notes that existing regulations do not reflect the principles outlined in the *Pricing for Value* Guide which came out in 2021 (after the current Regulations) and do not currently best promote access to services for people with a lower capacity to pay, especially where a fee may be a barrier to obtaining a grant of representation for an applicant who intends to administer a small estate.

## **Objectives and Options**

In the RIS, the Department outlines the following objectives for the proposed Regulations:

- **Fiscal Sustainability** – Fees should seek to support the overall fiscal sustainability of the Supreme Court.
- **Access to Justice** – Fees should safeguard access to justice by supporting initiatives to improve access to Probate Office services, such as assisting those with small estates through the small estate optional service.
- **Reflective of Costs** – Fees charged should be reflective of the costs involved for the Probate Office in providing the service.
- **Simplicity** – Fees should, as far as practicable, reduce complexity for users of the courts, as well as for the Court in administering the system.

In the RIS, the Department analyses three options to reform the fees charged by the Probate Office. These options amend various Probate Office fees, including the application fee for a grant of representation, the online advertisement and re-advertisement fees, and the fee for the small estate optional service.

1. **Option 1 – Balanced (preferred option):** Fees are increased to support the overall fiscal sustainability of the Supreme Court while also improving access to justice and better reflecting the costs incurred by the Probate Office. This option removes the application fee for a grant of representation for small estates while proportionately increasing the fee for higher value estates, creates two fee tiers for advertisement and re-advertisement, and marginally increases the fee for the small estate optional service. All other fees remain unchanged.
2. **Option 2 – Uplift:** As with Option 1, fees are amended to prioritise fiscal sustainability and improve access to justice and better reflect costs of the Probate Office's service delivery. This option removes the application fee for a grant of representation for small estates while increasing fees to 0.17 per cent of gross estate value for estates up to \$20 million, and increases fees for advertisement and the small estate optional service. All other fees are increased by 10 per cent.
3. **Option 3 – Flat Increase:** The current fee structure is maintained with increases to all fees by 250 per cent to improve the fiscal sustainability of the Supreme Court.

## Impact Analysis

In the RIS, the Department uses multi-criteria analysis (MCA) to analyse the options against the base case (i.e. the current fees under the Supreme Court (Fees) Regulations 2018).

The Department uses four criteria in the MCA to analyse the options, which align with the objectives of the proposed Regulations:

1. Fiscal Sustainability (40 per cent)
2. Access to Justice (25 per cent)
3. Reflective of Costs (25 per cent)
4. Simplicity (10 per cent).

Option 1 scores highest overall in the MCA and is the Department's preferred option (and the proposed Regulations).

The Department explains that although all options would increase revenue for the Probate Office, Option 2 would increase fee revenue the most and support **fiscal sustainability** more than Options 1 and 3, and hence achieves a score of +10. Options 1 and 3 both increase revenue by about 90 per cent as much as Option 2, and are hence assigned a proportional score of +9. Option 1 is estimated to raise \$46.7 million in revenue per year compared to \$13.1 million in the base case.

For the access to justice criterion, the Department defines applicants for grants of representation with a limited capacity to pay as:

- those applying for estates below the small estate threshold; and
- those applying for estates above the small estate threshold, but below the median gross estate value.

Option 2 increases fees the most for applicants who may have limited capacity to pay (294 per cent) and achieves a score of -10. Option 1 increases fees by 164 per cent while Option 3 increases fees by 250 per cent, and are hence assigned proportional scores of -6 and -9 respectively compared to Option 2.

The Department explains that the fee changes under all options directly affect how closely the fees **reflect the costs** of the services provided by the Probate Office. As noted above, the Probate Office is currently recovering 310 per cent of its costs. Each option further increases cost recovery and makes fees less reflective of costs. To score each option, the Department calculates percentage fee increases for five different fees and weights these increases based on the prevalence of the activity that the fees are charged for. Option 2 is assigned a score of -10 as it is the least reflective of costs. Option 2 significantly increases the difference between fees charged and the estimated underlying costs of providing services (a weighted increase of 490 per cent compared to the base case). Option 1 and Option 3 increase the difference between fees charged and estimated underlying costs to a lesser extent (270 per cent and 453 per cent respectively) when compared to the base case, and are hence assigned proportional scores of -6 and -9 respectively.

The Department explains that Option 3 performs best against the simplicity criterion being assessed as equivalent to the base case with a score of 0 given it replicates the existing fee structure. Option 1 is assigned a score of -3 because it would increase complexity slightly by introducing one new fee for the replication or amendment of an online advertisement and two new fee tiers for a grant of representation. Despite reducing the number of fee tiers for a grant of representation, the Department explains that Option 2 is scored at -5 because it would increase overall complexity more than Option 1 by necessitating software updates to implement percentage fee calculation for applications.

## **Implementation and Evaluation**

In the RIS, the Department explains that the proposed Regulations (and fee changes) will commence on 29 December 2024 and that the Supreme Court will inform law firms and the public of these changes via the Supreme Court website. This includes updating published information about fees to enable parties to determine the correct fees. The Department notes that current arrangements for charging and collecting fees will continue.

The Department commits to undertaking a mid-term evaluation of the proposed Regulations in 2027, as part of the sunset review of the Supreme Court (Fees) Regulations 2018. The evaluation will assess the proposed fees against their objectives, including assessing whether the fee changes have improved access to services provided by the Probate Office for those with lower ability to pay and have supported the overall fiscal sustainability of the Supreme Court. The evaluation will rely on data obtained from existing Probate Office information systems, including data on the number of applications for grants of administration and related estate values.

Should you wish to discuss any issues raised in this letter, please do not hesitate to contact my office on (03) 7005 9772.

Yours sincerely



**Cressida Wall**

Commissioner for Better Regulation