

## **Victorian Government Legal Services panel arrangements**

### **1. Background**

In 2000, the Victorian Attorney-General Rob Hulls commissioned a review of the provision of legal services to the Victorian government. The review committee report found that in 1998-1999 the Victorian government spent \$35.5m on external legal services and engaged 75 law firms. Not surprisingly, the report found that there was little coordination, monitoring and reporting on the quality of legal service, and no formal system for the exchange of legal advice across government departments.

On 1 July 2002, the Victorian government introduced a tender scheme for the provision of legal services to government. The tender scheme aimed to combine a more transparent system of allocating legal work to law firms, lower costs for the Victorian government and an increased commitment to social policy objectives.

The tender scheme led to the formation of a general panel, consisting of nine law firms, and the allocation of a further 24 firms to nine specialist panels. The panel has since grown to 35 law firms (**Panel Members**), which includes 10 general firms who may provide legal services across all nine legal components<sup>1</sup> and 25 specialist panel firms who are restricted to one or two components or sub-components.<sup>2</sup> The Victorian Government Solicitor's Office (**VGSO**) remains the Victorian government's core legal adviser but competes with the Panel Members.

All Victorian government departments (and participating Victorian statutory bodies) are required to select their legal counsel and services from these two panels or the VGSO except for:

- Certain core government legal services that the VGSO is required to provide on an exclusive basis, and
- Any legal services that have been exempted in advance by the Secretary, Department of Justice from the panel arrangements.

Victorian statutory bodies can choose whether to participate in the panel arrangements. Opting in will provide cheaper rates but not all authorities opt in (e.g Vic Roads has not opted in).

Panel Members are subject to a range of performance tests and audits to guarantee that they adhere to the aims and outcomes of their service level agreements. The tests and audits include a quarterly review of performance, a client satisfaction survey, an audit review and a measure of performance against key performance indicators. If a Panel Member receives an adverse assessment for any of the above performance mechanisms, the Victorian government may, in its absolute discretion, remove or suspend the Panel Member from the panel.

The unique aspect of the tender scheme is that it calls for firms to dedicate themselves to pro bono work and follow model litigant principles and the Victorian Bar Association's Model Briefing Policy. These social justice obligations are an innovative feature of the panel arrangements (which

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<sup>1</sup> The components are: property, commercial law, project and finance, litigation, employment law, administrative law and government, intellectual property and technology law, resources, other legal services.

<sup>2</sup><http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Pr+ofiles/JUSTICE+-+Government+Legal+Services>

are absent from any other contractual relationship) and demonstrate the indirect ways in which government can use its contractual weight to promote better social outcomes.

The Service Level Agreement (**Panel Contract**) was initially set up for three years with two two-year extensions available to the Victorian government. The Victorian government has now exercised the second of these options, extending the panel arrangements to 30 June 2009.

## 2. Key provisions of the scheme

### 2.1 Key documents and mechanisms

The key provisions relating to pro bono services for the tender arrangements are embodied in the:

- *Request for Tender (Tender)*
- *Service Level Agreement (SLA)*
- *Legal Services to Government Panel Contract (Panel Contract)*, and
- *Policy Guidelines for the delivery of Pro Bono services for an approved cause under the Government Legal Services Contract (Guidelines)*.

The minimum level of pro bono services that each Panel Member must provide is set in the Tender and subsequently incorporated in Schedule 1 of the Panel Contract. Law firms are required to commit at least five percent of value of total hours billed under the Panel Contract to pro bono work, with nearly half of firms electing to commit up to 15 percent to pro bono.<sup>3</sup>

The evaluation criteria under the Tender are as follows:

Criterion	Weighting	
Statement of compliance	Mandatory	
Conflict of interest	Mandatory	
Prosecutions and pending investigations	Mandatory	
Financial viability	Mandatory	
Equal opportunity	Mandatory	
Legal expertise, capability and capacity	Weighted	50%
Tenderer capability and capacity	Weighted	20%
Staff resources	Weighted	20%
Referees	Weighted	10%
Service Delivery	Weighted	35%
Risk management, implementation strategy and transition out strategy	Weighted	10%

<sup>3</sup> Request for Tender, section 10

Pro bono services	Weighted	10%
Service Delivery Plan	Weighted	8%
Understanding Developmental Needs	Weighted	7%
<b>Fee</b>	<b>Weighted</b>	<b>15%</b>

Pro bono services account for 10% of all weighted requirements under the Tender and are rated in accordance with the pro bono scorecard set out in *Pro Bono in the Provision of Legal Services to Government*. Under the scorecard, law firms who tender to provide a 15% pro bono commitment get a score of 10/10, which decreases on a sliding scale until firms receive no score for committing 5% but are still eligible for consideration.

Law firms must satisfy all mandatory criteria as well as the mandatory minimum for pro bono services in order for their tender to be considered.

Panel Members must discharge their pro bono commitments by undertaking legitimate pro bono services in areas consistent with the Guidelines. In the event that a Panel Member does not derive any fees under the panel arrangements, the Panel Member is not required to provide the nominated amount of pro bono services.

## 2.2 Definition of ‘approved cause’

Panel Members must provide ‘pro bono’ services within the ‘approved causes’ outlined in the Guidelines. The Guidelines define ‘approved cause’ as:

The provision of any services by lawyers or other staff based in Victoria which will enhance access to justice for disadvantaged persons or organisations and/or promote the public interest including circumstances where a Panel firm:

1. without fee or expectation of a fee or at a reduced fee, advises and/or represents a client in cases where:
  - a. a client has no other access to the courts and the legal system; and/or
  - b. the client’s case raises a wider issue of public interest;
2. is involved in free community legal education and/or law reform;
3. is involved in the giving of free legal advice and/or representation to charitable and community organisations;
4. provides staff (legal or other) on secondment to a community organisation; or
5. provides financial or in-kind assistance (e.g. equipment, sponsorship etc) to a community organisation.

## 2.3 Calculating the pro bono services required

A Panel Member’s nominated pro bono contribution is calculated as a percentage of fees earned under the panel arrangements every six months. The pro bono services that must be delivered by a Panel Member accrue over a six month period as fees are earned, starting on the commencement date. The Panel Member must provide the nominated services by the expiry of the following six month period. The pro bono commitment is calculated as a percentage of legal fees only and is exclusive of GST and disbursements such as barrister’s fees. The value of the pro

bono services is calculated in accordance with the billable rates at the time that the services are performed.

#### *2.4 Discharging the pro bono commitment*

Panel Members have the option of discharging their pro bono obligations by providing staff to the Department of Justice or a payment for the delivery of pro bono services in 'approved areas as directed by the Attorney-General'.<sup>4</sup>

The Guidelines provide that pro bono services can include, but are not limited to:

- Legal or paralegal advice, representation or assistance
- Legal research, education or law reform work, and
- Provision of staff, financial assistance, equipment, sponsorship or other in kind assistance.

A Panel Member may, with the approval of the Executive Contract Manager, make payments in lieu of pro bono services in respect of all or part of the nominated pro bono amount.

The Guidelines stipulate that for the purposes of the panel arrangements, the Victorian government does not recognise as pro bono, work performed without expectation of fee or at a reduced fee, for persons or organisations that would otherwise be able to afford those services. Furthermore, the government does not recognise as pro bono, work performed for persons or organisations who are involved in a 'no win no fee' commercial business arrangement.

#### *2.5 Failure to satisfy the pro bono condition*

If a Panel Member fails to achieve any of the minimum performance standards, such as failing to provide the agreed pro bono services, the Victorian government may, in its absolute discretion, remove or suspend the Panel Member.

In 2005-2006, three Panel Members reported low pro bono commitments which they elected to carry over to the following year. Two Panel Members did not meet their contractual obligation because some of their reported pro bono activity was for pro bono activities outside the scope of the Guidelines and within a more general corporate social responsibility program. In each case, the firm proposed a plan to acquit its pro bono obligations within an extended timeframe.

To date, the Victorian government has not required any non-performing Panel Member to make a payment in lieu of its obligation to provide pro bono services, or terminated or suspended a Panel Member for failing to provide the agreed pro bono services within the specified timeframe. Despite this, we are advised that two Panel Members who did not meet their Pro Bono Commitments made payments to a community organisation to discharge their contractual obligations.

#### *2.6 Maintaining records*

Panel Members are required to keep records of the pro bono services performed by their lawyers, including but not limited to the dates on which, and the 'approved causes' for which, pro bono services were performed; the name and level of each of the lawyers performing the pro bono services; and the number of hours of pro bono services performed.

### **3. Key statistics**

Between 2002 and 2007, the Victorian government is estimated that Panel Members provided approximately \$11m in free legal services aimed at providing access to justice for the

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<sup>4</sup> Request for Tender, section 10

disadvantaged or assistance in matters in matters in the public interest.<sup>5</sup> To date, the three largest recipients of pro bono services were the Homeless Persons' Legal Clinic (**HPLC**), Public Interest Law Clearing House (**PILCH**) and Community and Specialist Legal Centres.

Preliminary figures for the 2006-2007 financial year show that the panel firms in Victoria delivered pro bono services worth \$7.7m – an increase of \$2.5m on the year before.<sup>6</sup>

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<sup>5</sup> See *Government Legal Services Annual Report*, Department of Justice (April 2007), p1

<sup>6</sup> <http://www.theaustralian.news.com.au/story/0,25197,23369637-5013946,00.html>