

Report on the Legal Services to Government Panel Contract

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EXECUTIVE SUMMARY

Following a Review in 2000-2001, the government endorsed a panel model for the provision of legal services. The arrangements took effect on 1 July 2002, replacing a system where agencies purchased services in an uncoordinated way. The intent of the new panel was to ensure that government had access to high quality, cost-competitive legal services.

The Legal Services to Government Panel Contract (the Panel) has been a success since its inception in 2002, but the time has come to enter the next phase of legal panel procurement best practice.

The objectives of the current Panel arrangements are:

1. to ensure cost-competitive, high quality and consistent legal services and advice
2. to promote social justice outcomes including increasing pro bono work, briefing more women barristers and improving equal opportunity in law firms.

These objectives have, for the most part, been achieved since the Panel commenced in 2002.

The market for legal services in Australia is fiercely competitive which is restraining legal fees despite a general economic boom increasing demand for legal services. Client agencies report they are able to access cost-competitive and high quality legal advice. The hourly rates of Panel firms are competitive against market averages, indicating successful leverage of the State's buying power.

The social justice requirements are producing benefits for social justice partners and improving equity in the legal profession. Small improvements in the way this area is managed are possible but overall the arrangements have achieved the dual outcomes of promoting social justice without overly burdening Panel firms.

Stakeholders believe Government Legal Services (GLS) has played a major role in the success of the Panel arrangements. Two major limitations hinder GLS from achieving better outcomes:

1. Though GLS plays a role in managing Panel firms, it is clients who actually buy legal services and monitor their delivery. GLS can only ever facilitate procurement; it is clients who must be ultimately accountable for achieving legal outcomes with the Panel.
2. GLS lacks current legal practice expertise, limiting its ability to contribute to the management of firm performance or improve feedback mechanisms.

A range of approaches to legal procurement exists across client agencies within the current VGPB procurement guidelines. This diversity makes it more complex for Panel firms seeking to respond to clients' needs.

While the Panel continues to attract legal suppliers for many reasons, including its value and prestige, its attraction and therefore the State's leverage can be improved.

Feedback from stakeholders suggests that some of the Panel's systems can be adjusted to serve both clients and Panel firms better. These include:

- further development of the exemptions criteria and process to allow regional law firms to be used more frequently and readily

- adjusting the reporting requirements for firms, especially for those who receive little work from the Panel while maintaining meaningful reporting of outcomes.

While the changes described above will be productive, the two most important improvements to the Panel involve aligning and improving client procurement practices and enhancing Panel administration.

The biggest concern for the Panel firms is the diversity of approaches for the procurement of legal services across client agencies. To ensure more effective legal outcomes for the State, a method for harmonising these approaches is required. This Review proposes that this concern be addressed by implementing an 'informed purchaser' model. The Australian National Audit Office argues informed purchasers are required for government legal procurement to ensure legal risks are effectively managed. It recommends each agency appoint informed purchasers who are required to develop on a continuous basis a range of pre-defined competencies that help the agency match its needs to legal suppliers cost-effectively.

Implementing an informed purchaser model in the Victorian Government will harmonise and improve legal procurement across participating agencies. The approach suggested is to charge the Panel administrators with the task of coordinating the development of core informed purchaser competencies with clients, helping to assess gaps in skills and implementing a roll-out of a tailored informed purchaser development program.

On top of developing the necessary skills in client agencies, the Panel administrators themselves should become informed purchasers who can be called upon by clients to provide timely advice on legal procurement. This informed purchaser service may be most useful to client agencies whose legal needs are too small to justify an investment in developing informed purchaser competencies in-house or may be used by larger agencies seeking advice on procuring less familiar legal services.

To achieve the roll-out of informed purchasers, the Panel administration will need to be equipped with legal practice expertise. This leads to the second major recommended improvement to the arrangements, namely allocating responsibility for Panel administration to the Victorian Government Solicitor's Office (VGSO).

The VGSO is the natural home for the Panel administration because it has extensive legal practice expertise, already plays a role in managing whole-of-government legal risk and is in a position to enhance or to develop detailed knowledge about departments' and agencies' business needs and operations.

The present GLS function and personnel would be moved to the VGSO. The new administration would:

- administer the Panel contract
- co-develop the informed purchasers model with clients
- provide an informed purchaser service to ensure the requisite competencies are accessible to all government clients
- create and maintain a matter management system for the State to capture and share legal knowledge
- develop a system of 'invited-audits' to assist clients to review matters for cost competitiveness and quality.

The VGSO's interests are akin to those of an in-house legal department of a large company with multiple divisions with differing needs. As such VGSO is in the optimal position to provide advice to client agencies on how best to access the legal market. Its interests are served by ensuring the value in the Panel increases over time, so that relationships with law firms improve and the supply of cost-competitive, consistent and high quality legal services and advice continues.

There may be a perception in the market that the VGSO is a competitor with the Panel and should not be allowed to recommend the allocation of work. Where they exist, these perceptions of the market will need to be addressed by helping law firms understand that as the VGSO manages whole-of-government legal risk it has an interest in ensuring the Panel is a success.

The Panel contract should be extended until 2009 to allow for time to prepare for a re-tender of Panel arrangements that include an improved component structure and size commensurate with forecast legal spend in each area.

GLOSSARY OF IMPORTANT TERMS

Client agencies

- All government agencies involved in the Panel, including Departments.

Clients

- Government employees who engage legal services, including in-house lawyers.

Contract managers

- Also known as Departmental Legal Services Contract Managers, these are persons appointed within each Department to help coordinate the administration of the Panel arrangements.

Executive Contract Manager (ECM)

- The person appointed to be ultimately responsible for the Panel contract. The current ECM is the Secretary of the Department of Justice.

Government Lawyers Forum (GLF)

- A forum of Contract Managers and the Panel Contract Manager.

Government Legal Services (GLS)

- The unit within the Department of Justice currently responsible for Panel Administration (the current Panel administrators).

Informed purchasers

- Individuals who have prescribed competencies in legal procurement.

Informed purchaser service

- A mechanism whereby the Panel administrators provide a service to client agencies to assist in their procurement of legal services.

Panel administrators

- The body that administers the Panel contract i.e. currently Government Legal Services.

Panel Contract Manager

- The person appointed to take responsibility for the Panel's day-to-day administration. Currently this is the Manager of Government Legal Services.

VGSO

- Victorian Government Solicitor's Office.

VGPB

- Victorian Government Purchasing Board

OVERVIEW OF RECOMMENDATIONS

Chapter 4. Performance of the current Panel arrangements

- Recommendation 1 The social justice reporting requirements should be preserved but reviewed - while maintaining meaningful reporting of outcomes - with the objective of minimizing their impact on firms who receive little or no work.
- Recommendation 2 The Panel administrators, Panel firms and social justice stakeholders should meet at regular intervals to discuss how pro bono services can be adapted to evolving demands.
- Recommendation 3 The Panel administrators should continue to review what information they require and use from the firms' reporting on social justice outcomes and tailor reporting requirements accordingly.
- Recommendation 4 The VGSO should be encouraged to do pro bono work.

Chapter 5. Improving Panel arrangements

- Recommendation 5 Work should be allocated on merit to firms by clients to meet their needs and the expectations of firms should be managed accordingly.
- Recommendation 6 The Panel administrators should review financial reporting requirements with Panel firms.
- Recommendation 7 The Panel should be restricted to about 15 firms overall, or each component should be restricted to a number of firms commensurate with forecast legal spend in that area.
- Recommendation 8 The Panel administration should include current legal practice expertise.
- Recommendation 9 The Panel administrators should consider co-developing a matter management system with client agencies to capture and share legal knowledge provided to the State through the Panel contract.
- Recommendation 10 The criteria for exemptions from the Panel contract should be expanded to include regional exemptions.
- Recommendation 11 The Panel administrators should develop a system of 'invited-audits' where clients invite them to review particular matters for cost-competitiveness and quality.
- Recommendation 12 The Panel's structure and composition should be decided after a demand forecast of client's legal needs.

Recommendation 13 Hourly rates should be retained as the primary basis of the Panel tender, but other fee structures, if proposed by law firms, should be considered.

Chapter 6. The need for informed purchasers

Recommendation 14 To achieve whole-of-government legal objectives, informed purchaser competencies should be developed in client agencies.

Recommendation 15 The Panel administrators should have responsibility for developing and maintaining the informed purchaser system.

Recommendation 16 The Panel administrators should co-develop with clients core competencies for informed purchasers.

Recommendation 17 The Panel administrators should co-develop with clients a plan to implement the core competencies of informed purchasers across government.

Recommendation 18 An informed purchaser service should be developed and available for use by agencies on request.

Chapter 7. Enhancing Panel administration

Recommendation 19 The VGSO should take over Panel administration.

Chapter 8. Extending the Panel contract

Recommendation 20 The Panel contract should be extended to 30 June 2009.

1. REVIEW METHOD

In 2002 as part of Whole of Victorian Government arrangements for legal services the Victorian government established a panel contract (the Panel) for law firm providers, coordinated by the Department of Justice. The contract had an initial three year life-span with two two-year options for extension. The first of these options was exercised in 2005, pushing back the expiry date to 30 June 2007.

With the deadline for deciding whether to exercise its second option to extend the contract approaching, the Department of Justice, which houses the contract administrators, Government Legal Services (GLS), decided to review the contract arrangements to assess their success and search for improvements.

A. Terms of reference

Figure 1.1 Terms of Reference for the Review

“Review of the Panel arrangements: The proposed review will be undertaken by an independent consultant specialising in the legal services area. In principle, the terms of reference will be:

- **Assessed success in achieving objectives:** To what extent have the whole-of-government Panel arrangements achieved the provision of competitive, consistent, high quality legal advice to government and how are the Panel arrangements regarded among legal service providers?
- **Social justice achievements:** To what extent have the Panel arrangements increased the amount of pro bono work undertaken (of the kind approved by the Department) and also increased the briefing of women barristers?
- **Big picture legal services market:** In the next three to five years, what changes are likely to emerge in how legal services are provided and how, for example, might rationalizations of firms be managed within a Panel framework?
- **Extend the Panel or re-tender:** Taking account of the work flows of the first three and a half years of the Panel arrangements and also of likely emerging changes, what are the respective benefits of extending the Panel arrangements for another two years from 1 July 2007 or re-tendering? In particular:
 - What flexibilities need to be incorporated or implemented to adjust for possible significant changes in government’s demand for legal services across the various component areas;
 - How should the component areas of law be divided into Panels and how many firms in each area would suffice for competitive pressure;
 - Should the Panel arrangements aim at providing a broader distribution of advice from the Panel firms than has been the case so far and, if so, how could this be achieved;
 - What experience has there been with other professional services’ Panels in using costing methods other than scheduled hourly rates; and
 - How might the assessment of firms’ performance as undertaken by the monitoring unit, GLS, be improved, particularly if it was to be used as the basis for removing a firm from the Panel and making space for another firm?”

The terms of reference shown in Figure 1.1 were issued on 15 June 2006. The full Project Brief is included in Appendix A. Beaton Consulting was engaged to conduct the Review.

B. Project process

The Review of the Panel contract was approached through an eight stage process that sought to initially define the scope and major issues before undertaking broad consultation to ensure depth and stakeholder engagement.

Figure 1.2 Framework for the approach to the Review

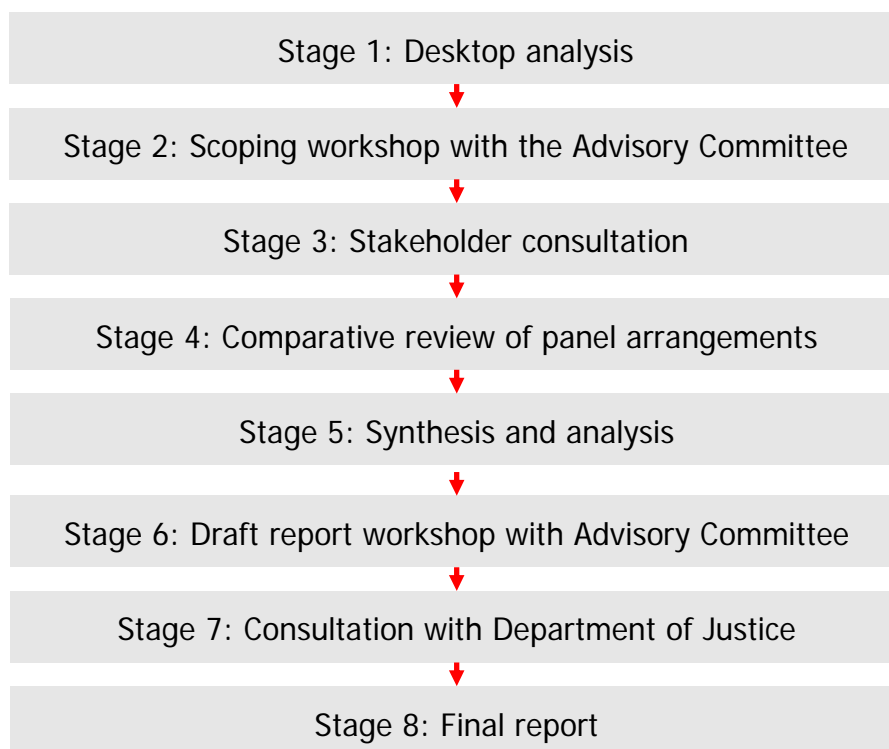


Figure 1.2 shows the eight stage process of the Review. The first four stages of the Review gathered primary information about current performance and potential improvements to the arrangements while the final four distilled these issues.

Stage 1 involved a review of all relevant documentation and the generation of a plan for stakeholder consultation. GLS was heavily involved in producing materials and assisting in bringing about an understanding of the context and history of the Panel.

Stage 2 consisted of a meeting with an Advisory Committee¹ to:

- agree on the nature and format of the project deliverables
- clarify the project process
- identify interviewees / respondents for Stage 3
- address any project management issues.

Stages 3 and 4 consisted of consultations with the Panel's stakeholders and benchmarking of other panel arrangements, respectively.

¹ See Appendix B for members of the Advisory Committee

The purpose of consultations with stakeholders of the Panel was to:

- ensure all relevant issues were uncovered and addressed
- ensure broad buy-in to the Review process.

The classes of stakeholder targeted in Stage 3 of the Review included:

- Panel and non-Panel firms
- client agencies
- social justice partners
- the Executive Contract Manager
- the VGSO
- the Attorney-General.

Table 1.1 Summary of participants to the Review

Stakeholder	People interviewed	Submissions received	Focus group participants
Clients	19	5	
Firms	3	20	37
Social justice partners		4	
TOTALS	22	29	37

The Review was able to examine information arising from 22 in-depth interviews, three focus groups with 37 participants and 29 written submissions. A full list of participants in the consultations is included in Appendix B.

Stage 4 consisted of two segments: domestic and international panel benchmarking. The domestic segment included interviews with 10 organisations from both the private and public sector across Australia to determine best practices in panel management.

The international benchmarking consisted of an interview, written submission and benchmarking information from Richard Stock of Catalyst Consulting, a pre-eminent in-house legal department consultancy based in Canada.

Stage 5 began with an Advisory Committee meeting, as the consultation period was coming to a close. The meeting aimed to assess the comprehensiveness of the information gathered and the veracity of the emerging propositions. An issues paper was presented, debated and agreed.

The issues were then presented to a special meeting of the Government Lawyers' Forum (GLF). No fundamental issues of disagreement emerged from this meeting.

A further Advisory Committee meeting reviewed a draft version of this report and requested specific additional amendments. These were considered and the majority added to the report.

C. Key Recommendation

This Report recommends extending the contract to July 2009. The extension is an underpinning recommendation that will give time to implement two categories of improvements:

- a number of systems changes to the Panel, including the informed purchaser model, that will improve the operation of the current Panel for both clients and Panel firms
- structural changes to the Panel preparatory to the re-tender.

D. Key takeouts

Chapter 1. Review Method

- The Department of Justice commissioned a review of the Panel contract with four topic areas in the terms of reference:
 - assess success in achieving objectives
 - social justice achievements
 - big picture legal services market
 - extend the Panel or re-tender.
- The eight stage approach to the project ensured broad and deep consultations with firms, clients, social justice partners and panel administrators in other organisations.
- Consultations for the Review included:
 - 22 in-depth interviews
 - Three focus groups with 37 participants
 - 29 written submissions
 - interviews with 12 panel administrators in public and private sector organisations.

2. TRENDS IN THE LEGAL MARKET

A panel tries to match legal needs to the legal market. Understanding trends in the market for legal services helps improve the matching process and informs how a panel should be organised.

This chapter will first look at the trends in the legal market that affect the Panel before looking at what factors in panel arrangements attract law firms.

A. Trends in the legal market

General economic pressures

The legal sector is driven by the base economic situation in the Australian economy, so it is useful to start with a macro analysis.

A broad based business investment boom, weighted slightly in favour of mining investment, has driven economic growth² over the 12 months to August 2006.

Table 2.1 Production chain volume measures by industry sector³

Industry sector	Annual % change Jun 05 to Jun 06	Annual % change Jun 05 to Jun 06 (seasonally adjusted)
Construction	6.9	7.2
Finance and insurance	6.9	6.7
Electricity, gas and water supply	6.5	6.4
Communication services	7.4	5.7
Transport and storage	3.9	4.1
Property and business services	4.7	4.1
Ownership of dwellings	3.9	3.9
Health and community services	3.7	3.5
Personal and other services	0.8	2.8
Accommodation, cafes and restaurants	3.2	2.8
Retail trade	2.1	2.1
Government administration and defence	1.9	2
Education	1.7	1.7
Taxes less subsidies on products	1.2	1.1
Wholesale trade	2.4	0.9
Agriculture, forestry and fishing	-0.4	-1.4
Manufacturing	-2.9	-2.4
Mining	-6.7	-8.3
Statistical discrepancy (P)
Gross domestic product	2.3	1.9

² Ibid.

³ Australian Bureau of Statistics, '5206.0 - Australian National Accounts: National Income, Expenditure and Product', Jun 2006.

Table 2.1 shows the relative growth of various segments of the national economy over the past 12 months in production measures. Though mining production appears to have fallen, due to falls in gas, oil and gold production, the commodities boom is still ensuring strong investment in that sector⁴. Construction grew the most over the 12 months to June, driven by that same investment.

Table 2.2 Economic growth by state⁵

State	Annual % change Jun 05 to Jun 06	Annual % change Jun 05 to Jun 06 (seasonally adjusted)
Western Australia	11.7	14
Queensland	7.7	7.3
Australian Capital Territory	4.1	5.2
Tasmania	3.2	3.5
New South Wales	1.5	1.1
Victoria	1.4	1.1
South Australia	1.4	0.5
Northern Territory	3.5	-
Australia (DFD)(a)	3.9	3.8

Table 2.2 shows that though Australia's economy grew by 3.9% over the 12 months to June 2006, this growth was uneven across the States and Territories. The relatively weak performance in Victoria should result in a relatively weaker demand for legal services and therefore improved capacity for State procurement. This is, however, partially offset by the demand for Victorian legal providers interstate.

Legal industry pressures

The economic boom Australia has experienced over the past few years has dramatically increased demand for legal services⁶. At the same time, young Australian lawyers from top tier firms have been departing for more lucrative careers internationally⁷, leaving a shortage of lawyers in critical areas of the market.

The implication of the booming legal market for the Panel arrangements is that the price for those legal services in the greatest demand can expect to rise by the most in a re-tender. The fixed prices in the present arrangements mean that instead of raising fees, government work may have to 'queue' in the busiest practice groups, and either timeliness or quality may suffer as a result. Conflict of interest issues are more likely to arise in busy areas of the legal market.

⁴ Base metal prices have increased by over 40% since the start of 2006, Reserve Bank of Australia, 'Statement on Monetary Policy', August 2006.

⁵ Australian Bureau of Statistics, '5206.0 - Australian National Accounts: National Income, Expenditure and Product', Jun 2006.

⁶ L Schmidt, M Priest, 'Mega Litigation and Super Inflow Drive Big Profits', *The Financial Review*, 1 September 2006.

⁷ Australian Business Lawyer, 'London claiming, and keeping Australian lawyers', 17 July 2006.

Chart 2.1 Business expectations by practice area⁸

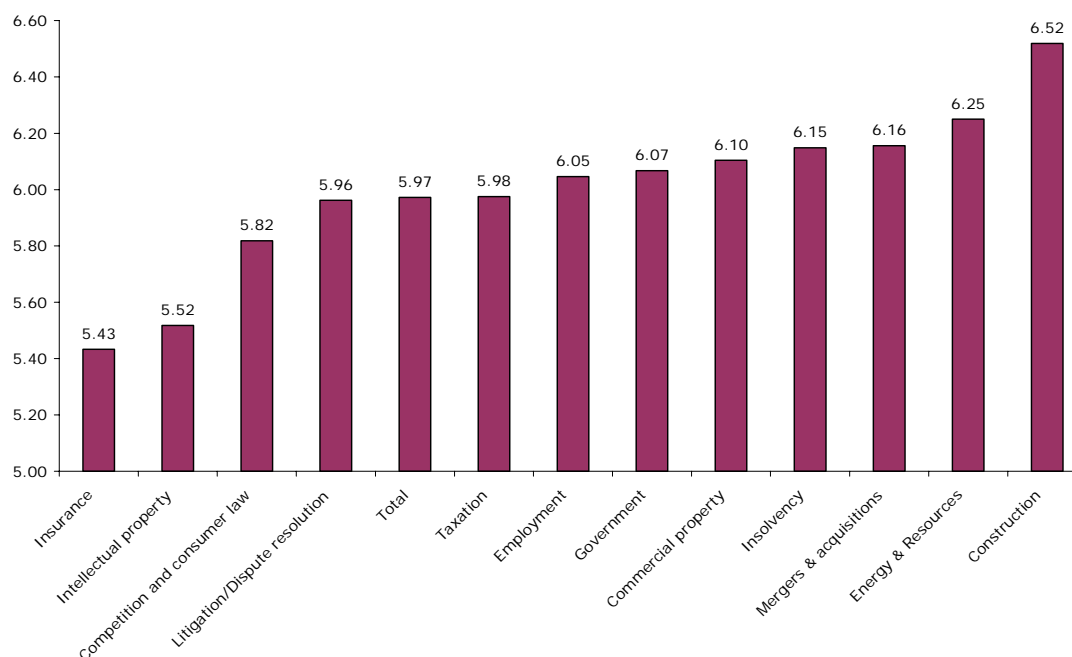


Chart 2.1 shows business expectations of lawyers over the 6 months to June 2006. A rating of '5' means no expected growth, and above 5 meant some expectation of growth. All areas forecast some growth. The expectations for construction in this chart match the economic growth figures in Table 4.1. In addition to construction, mining, energy, resources and mergers & acquisitions predicted strong growth.

Trends in the procurement of legal services

While the legal industry has been buoyed by the economic fortune of Australia, in-house departments have grown increasingly sophisticated in their approach to procurement.

In 2005 Legal Beacon⁹ explored perceived trends amongst buyers of legal services. It found that:

1. Reducing legal expenditure was becoming increasingly important to 69% of respondents.
2. 54% of respondents indicated the percentage of work done in-house was increasing in their organisation; while for 28% it was decreasing.
3. 43% of respondents said their organisations were heading towards more formalised tender processes and 33% away.
4. 80% of respondents indicated they choose the individual, not the firm for legal services¹⁰.

⁸ Business expectations were tested between December 2005 and February 2006. The respondents were asked to rate out of ten their expectations of growth in their practice area over the next six months.

⁹ Legal Beacon is a study conducted by Beaton Consulting every year measuring the attitudes of buyers and users of legal services to the legal market. Sample size for the results presented is between 667 and 1528 respondents.

¹⁰ Beaton Consulting believes that while a proportion buy the individual, this is significantly overstated and the size and position of the firm has a greater influence than individual respondents like to suggest. Further, one of the trigger points found in the Review for why clients hire external firms is to protect the State from political risk, which clients correlate with using top tier law firms.

5. 47% said there was little difference across top Australian law firms while 31% said there was a difference.
6. 56% of respondents were seeking alternatives to hourly rates; while 18% were not.

Number 2 may suggest that growth in government in-house capability is following a broader trend. Number 4 and 5 may suggest that flexibility should exist to follow individuals, should they leave their service providers. Chapter 5 Improving Panel Arrangements explores these themes in greater depth.

B. What firms value in legal panels

The Panel arrangements must be designed to be attractive to law firms if the State wants to leverage its buying power to achieve cost competitive, high quality and consistent legal advice.

This section looks at the factors in the Panel arrangements that drive value from the perspective of law firms (i.e. what attracts firms to the Panel). These factors are:

- economic value
- predictability of work
- interest in the work
- prestige of working for the State
- ease of working with the State
- expectations of all the above.

Table 2.3 Value drivers for law firms

Panel factor	Effect on law firms
Economic value	Law firms look for volume and value of work from their clients to maximise revenue and profitability.
Predictability of work	The more predictable the work is for firms, the less waste they experience and the more attractive the Panel.
Interest in the work	Lawyers consider some government work interesting and this reduces the amount they might need to be paid to do it.
Prestige of working for the State	The prestige of being on the Government Panel has some value for firms, especially smaller players. This allows leverage into other types of government and commercial work because it symbolises skill and experience.
Ease of working with the State	The easier it is for firms to manage the Panel's administration and client agencies, the more they enjoy the work and the more profitable the work, and hence the more attracted they are to the arrangements. Every time an additional requirement is placed on firms, they incur a cost in meeting it, and this reduces the value they receive and hence the attraction of the Panel.
Expectations of the above	All the above factors are limited by expectations of the future. If there is a lot of work now, but firms expect it to reduce over time, then the attraction of the Panel reduces. The other factors are affected in a similar way by expectations.

The two most obvious kinds of expectation for firms are the longevity of the Panel and stability of its membership. If the Panel contract is three rather than five years, then firms will invest less in the relationship. Similarly, if the Panel frequently dismisses firms or adds competitors, then there is less value for individual firms of the Panel arrangements.

Each of the above factors of attraction is a trade-off with value for clients. The higher the value of work for firms, the more it costs the client. Less obviously, factors like the frequency of changing the Panel affect the match of the Panel to client needs and the complacency of Panel firms. Picking the right mix across all levers is important to producing optimal results for the State.

C. Key takeouts

Chapter 2. Trends in the Legal Market

- The current economic boom has tightened the market for lawyers but competition is intense, so fee growth is limited.
- The industry sectors of the economy that grew the fastest in the 12 months to June 2006 were construction, finance and insurance and energy.
- Lawyers expectations at the beginning of 2006 were that construction, energy and resources practices would grow the fastest.
- There is a general trend for increasing reliance on in-house legal departments while reducing external legal expenditure.
- The factors about panels that drive value for law firms are:
 - economic value
 - predictability of work
 - interest in the work
 - prestige of the client
 - ease of working with the client
 - expectations of all the above.

3. CONTEXT OF THE PANEL ARRANGEMENTS

In assessing the success of the Panel and potential improvements the starting point is understanding the context of the arrangements. This includes the Panel's history, the evolution of its structure and the approach of the major government stakeholders – the client agencies and the VGSO.

A. The Panel's origins, systems and structure

Following a review in 2000-1, on 1 September 2001 the Victorian State Cabinet endorsed a panel model for provision of legal services to government. The arrangements took effect on 1 July 2002, replacing a system where agencies purchased services in an uncoordinated way.

“Up until now the provision of legal services has largely been an unsupervised feeding trough for law firms. These reforms will save taxpayers' money by ensuring the Government gets the best advice for the best price”.¹¹

In introducing the Panel, the State outlined 10 expected outcomes from the new arrangements¹² which may be summarised as:

1. to ensure cost-competitive, high quality and consistent legal services and advice for the state
2. to promote social justice objectives, encompassing pro bono work, equal opportunities policies and a women barristers briefing policy.

The Panel contract was initially set up to last for three years with two two-year extensions available to the State. The Panel structure included nine components, each comprising multiple sub-components. 33 firms were appointed to the Panel, including General Panel firms who could work across components and 24 Specialist Panel firms who were restricted to one or two components or sub-components¹³.

Panel firms faced a variety of requirements as part of the contract. These included subscribing to model litigant principles, providing pro bono work in relation to 'access to justice'¹⁴, subscribing to equal opportunity in employment and work allocation practices, subscribing to a women barristers briefing policy and providing reports, periodically, in relation to compliance of all the above.

The VGSO, while not a Panel firm, was “eligible to provide legal services under the nine components”¹⁵. Legal services were defined as 'core' and 'non-core' where the former, restricted, category was exclusively the domain of the VGSO¹⁶. Client departments and agencies could choose which supplier to use for 'non-core' work.

¹¹ R Hulls (Attorney-General), *Hulls Announces Tender for Legal Services*, media release, Legislative Assembly, Melbourne, 19 December 2001.

¹² See Appendix C for the State's Expected Outcomes.

¹³ See Appendix D for more information on the component structure.

¹⁴ Firms were required to nominate at tender what value of *pro bono* work they would do as a percentage of the value of work they received from the State. The lowest amount tendered was 5% and the highest 15%.

¹⁵ GLS, 'Government Legal Services Guide', 28 June 2002.

¹⁶ Appendix E shows that 'core' work made up about \$1M of the \$35M total legal expenditure on the Panel in 2005–6.

The nine Departments that existed in 2002 were required to subscribe to the Panel, while statutory authorities had the option of joining. By 2006, there were 10 Departments as members and 15 client agencies had chosen to join¹⁷.

The responsibility for administering and monitoring the contract was given to the Department of Justice, and GLS was established to fulfil this function. By 2006, this unit had 3.6 EFT staff administering a Panel contract worth over \$34m in legal fees under the Panel arrangements, with 35 Panel firms, 25 client agencies and seven social justice partners.

The Panel's first year, 2002-3, saw \$16m of legal expenditure, a figure artificially suppressed because of grand-fathered arrangements with non-Panel firms. By 2004-5 the expenditure had grown to \$29m¹⁸.

The major developments since 2002 have been:

- The State exercised its option to extend the contract in 2005 until June 2007.
- The Project and Finance Panel component was re-tendered in 2005.
- The key performance indicator requiring that all General Panel firms must do at least 5% of the value of their work in each component was deleted because it proved not to be achievable.
- Requests for exemptions from the Panel arrangements to use non Panel firms have infrequently been sought and rarely granted.

B. The response of client departments

While the scope of this Review is to look at the Panel arrangements and not at client in-house departments, there is an inter-dependence between these two functions that must be considered. The Panel is a mechanism for efficiently making legal services available to the State, but the way that mechanism works depends on the approach clients take to it.

There are two aspects of client agency behaviour that may have affected the operation of the Panel, and in particular the range and value of work sought from Panel firms. The first is the choice of provider of legal services and the second is the growth of in-house lawyer numbers.

Choice of Provider

When a legal need arises, each client can choose a combination of the following approaches to satisfy it:

- use in-house lawyers
- use the VGSO
- engage a Panel firm
- approach the Bar.

In-house lawyers

Clients usually use in-house lawyers when:

- the legal knowledge is readily available in-house
- the knowledge should be developed in-house
- it is the most efficient way to solve the problem e.g. the problem is too small to be briefed out cost-effectively.

¹⁷ See Appendix E for a list of all client agencies of the Panel.

¹⁸ See Appendix E for more information on the use of the Panel.

The VGSO

Clients use the VGSO when:

- the legal problem is part of the 'core-work' of the VGSO
- the VGSO has a particular lawyer or expertise the client desires.

Panel firms

Clients use Panel firms when:

- they need extra capacity in peak periods
- the legal problem requires expertise that is not available in-house, ranging from specialist legal advice through to major projects, undertakings and litigation.

Barristers

Clients do not engage Panel firms or the VGSO when:

- they want to directly brief a barrister for litigation
- it is cost-efficient to ask a barrister on a particular matter of law on which they have specialist knowledge.

In 2005-6 total usage of barristers amounted to around \$9m. One third was by clients directly briefing barristers of which slightly over half was by the Court Advocacy Unit in the Department of Human Services.

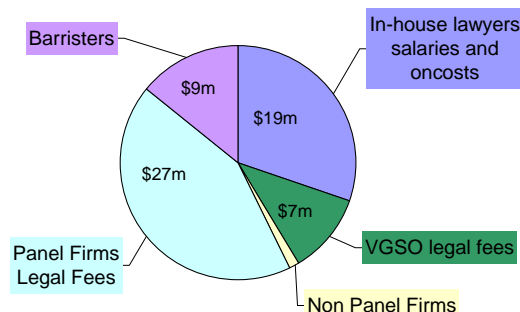
Exemptions

Clients can access non-Panel firms through the Department of Justice exemptions process.

Exemptions have been granted where:

- a legal matter was 'grandfathered' by the Panel process and it is in the interests of cost-effective and quality legal advice that a firm retains the matter
- all firms on the Panel with relevant expertise were conflicted
- no legal expertise existed on the Panel for that particular legal matter. This is rarely the case.

Chart 3.1 Client agencies legal expenditure by type 2005-6¹⁹



¹⁹ The in-house figures were derived from two phone surveys of Departments conducted in January and May 2006, asking for estimates of in-house legal team size.

Chart 3.1 shows what the results of the combined client procurement processes were in 2005-6.

Growth of the usage of in-house lawyers

A second important factor in the context of the Panel arrangements is the growth in the numbers of in-house lawyers. Chart 3.1 shows the recent relative proportions of expenditure on in-house legal advisers and Panel firms. Chart 3.2 shows that in-house expenditure has grown substantially, while expenditure on Panel firms has fallen (all figures expressed in nominal dollars).

Chart 3.2 Growth of in-house lawyers²⁰

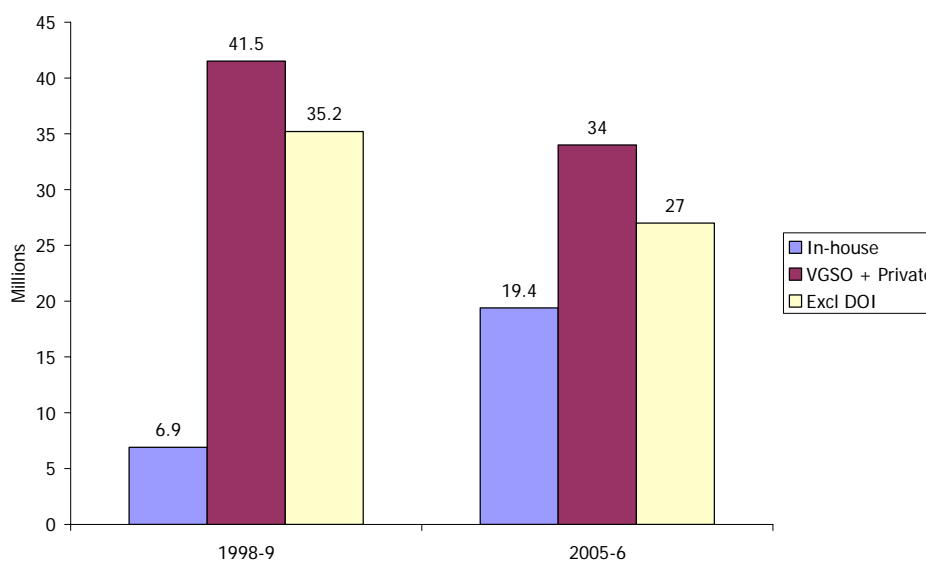


Chart 3.2 shows the growth of in-house departments over the life of the Panel arrangements.

Coordination of the growth of in-house legal resources across government would enable the panel administrators to forecast demand for external providers more accurately²¹ and improve the Panel arrangements accordingly.

C. The role of the VGSO

While there is a widespread perception that the VGSO is a competitor to private sector firms, it displays all the characteristics of a whole-of-government in-house legal function for the State.

²⁰ Prior to the establishment of the current Panel arrangements, the Inter-departmental Committee reported that in 1998-9 the expenditure on in-house legal services was about 14% higher than expenditure on the VGSO (\$6.9m compared to \$6.1m). 'VGSO + Private' refers to expenditure on private firms and the VGSO. In 1998-9 there was no Panel, so the expenditure was broadly based while in 2005-6 the 'VGSO + Private' figure is the expenditure on Panel firms and the VGSO combined. The final bar, 'Excl. DOI', is the same as the second column except that the Department of Infrastructure is removed. This is because in 1998-9 that Department included Vic Roads and Citylink and in 2005-6 it did not, so a fairer comparison is made by excluding it.

The 'in-house' bar for 1998-9 is drawn from a survey completed by departments estimating current in-house legal expenditure (for a report to the Social Development Sub-Committee titled 'Provision of Legal Services to the Victorian Government'). The 2005-6 figures were derived from two phone surveys of Departments conducted in January and May 2006, asking for estimates of in-house legal team size. Note that the 1998-9 figures have not been adjusted by CPI to today's value.

²¹ Chapter 8 Extending the Panel contract explains the concept of demand forecasting in more detail.

Unlike its private sector competitors:

- it has just one client - the State
- it is owned by the State
- its imperative, derived from its ownership, is to serve the State, not to seek a profit.

The view of the VGSO as a competitor is advanced because:

- some clients see it as just another choice of firm
- firms see it as a competitor for work
- its own lawyers have behaved at times as if it were an external firm
- it provides an alternative to private law firms that is competitive in terms of price and service²².

The question for the Panel arrangements is whether to treat the VGSO as a competitor or a whole-of-government in-house function. Chapter 7 Enhancing Panel Administration addresses this question in detail.

D. Key takeouts

Chapter 3. Context of the Panel

- The Panel contract was set up in 2001 in order to:
 - ensure cost-competitive, high quality and consistent legal services and advice for the State
 - promote social justice objectives, encompassing pro bono work, equal opportunities policies and a women barristers briefing policy.
- The State had two options to extend the contract after its initial term of three years. In 2005 the State exercised its first two-year option.
- The 10 Victorian Government departments are compulsory members of the Panel contract but an additional 15 agencies have opted to join. Panel expenditure on legal fees grew to \$34.7m by 2005-6.
- To manage their legal risk, client agencies can:
 - use in-house lawyers
 - use the VGSO
 - engage a Panel firm (through the Panel contract)
 - approach the Bar
 - use a non-Panel firm (exemption process).
- The VGSO's role in the Panel has characteristics of a whole of government in-house function, yet has been perceived to be a competitor to panel firms. Chapter 7 Enhancing Panel Administration addresses this issue in more detail.

²² Competitive service is not the same as being a competitor. In-house legal departments seek to provide a competitive legal service, but not to be competitors with law firms.

4. PERFORMANCE OF THE CURRENT PANEL ARRANGEMENTS

The performance of the Panel arrangements should be measured against the Panel's objectives, which are:

1. to ensure cost-competitive, high quality and consistent legal services and advice for the state
2. to promote social justice objectives, encompassing pro bono work, equal opportunities policies and a women barristers briefing policy.

The efficiency of achieving these outcomes can be measured by examining the role GLS has played in administering the contract since 2002.

A. Provide cost-competitive, high quality and consistent services and advice

Cost-competitive legal advice

Cost-competitive legal advice is achieved through a price that reflects the quality of service provided ('value'). Price, in the legal market, is usually measured in billable hours. This measurement is then based on two factors: the rate per hour and the number of hours spent on a matter.

One of the successes of the Panel is that the rates secured, both in the original tender and subsequent price setting, compare favourably to commercial rates.

Some General Panel firms warn that as a result of the Panel rates, the State may find it hard to attract top lawyers who may have the option of more lucrative private sector contracts. Clients, however, report having access to high quality legal advice.

The number of hours taken in matters is presently evaluated at client level because clients have the most intimate knowledge of the services required. While this is appropriate on an individual matter basis, central coordination would allow improvements to be made in the benchmarking and monitoring of cost-competitiveness. This would provide greater assurance to the State and mitigate the risk of over-servicing.

Once the time and the rate are measured, the final factor in evaluating cost-competitiveness is the value or quality of the service itself. Like evaluating time, there is a specific skill set clients need to have to evaluate value.

Chapter 6 The Need for Informed Purchasers discusses how to ensure all clients across government have access to the legal procurement expertise they need in order to ensure they are receiving cost-competitive advice.

High quality legal services

Clients report that in most instances they are able to access high quality legal advice through the range of choices clients have to solve their legal needs, as described in Chapter 3 Context of the Panel Arrangements.

When clients are unable to find a solution to their legal problem through the Panel mechanism it is usually because of a conflict of interest issue or a lack of relevant expertise on the Panel in particular areas.

Conflict of interest issues

Managing conflicts of interest is important to ensure the interests of the State are protected and to maintain the integrity of the government.

When agencies are involved in large, complicated legal matters where many parties need representation Panel firms may be conflicted out of representing the State because of existing relationships with other clients.

While there are steps the State can take to minimise conflicts of interest, it is not possible to eradicate them completely. Some organisations can pay a premium rate to have exclusive relationships with law firms, but because of the diversity of its requirements, the State is unlikely to be a large enough purchaser in any area for this to be the case (see Chapter 5 Improving Panel arrangements). For this reason, the existence of conflicts of interest is not a reflection on the performance of the Panel.

Firms have expressed concern that at times the treatment of conflict of interest issues appears, in their opinion, to have been inconsistent and overly restrictive.

Chapter 5 Improving Panel Arrangements will look at some of the ways such conflicts may be minimised.

A lack of expertise on the Panel

The Panel is larger than comparable panels, which reduces the likelihood of a lack of available legal expertise; however, on very limited occasions clients have been unable to meet their legal needs through the Panel. This can be expected in any panel arrangement.

To help clients manage situations of conflict of interest or a lack of expertise, the Panel has a mechanism of exemptions. Chapter 5 Improving Arrangements discusses how to make the exemptions process more accessible.

Consistent legal advice

Currently the mechanisms for ensuring consistency of advice across agencies are informal correspondence between peers and discussion at the Government Lawyers Forum. While valuable, such mechanisms do not provide for systematic sharing of or access to legal advice across government.

Chapter 5 Improving Panel Arrangements explores the benefits of adopting a central repository for legal advice to be shared by all clients.

B. Promote social justice objectives

The social justice objectives of the Panel are welcomed by most stakeholders and are achieving tangible social policy outcomes.

Effect of social justice objectives on firms

Most firms support the social justice objectives because:

- many firms have pro bono programs in place
- supporting the objectives helps attract and retain younger lawyers
- the firms receive leverage in the market for supporting these objectives.

Some non-Panel firms argued that imposing social justice requirements had a potential negative impact on the attraction of the Panel. Panel firms who have a better knowledge of the impacts of those requirements did not support this.

Another suggested risk was that the social justice objectives could result in increased legal fees if firms found them to be a burden. This Review has found this has not occurred because of the Panel firms' attitudes towards the objectives and the approach of GLS.

While the social justice reporting requirements are designed to be a flexible once-a-year self-assessment, the cost of reporting is roughly the same for all Panel firms regardless of the work secured under the panel. Smaller firms and those who had received little work under the Panel found them somewhat onerous and costly when compared to the financial returns to those firms under the Panel.

Recommendation 1

The social justice reporting requirements should be preserved but reviewed - while maintaining meaningful reporting of outcomes - with the objective of minimizing their impact on firms who receive little or no work.

Success of social justice objectives

The social justice objectives consist of three elements:

- pro bono
- the women barristers briefing policy
- equal opportunity policy.

Pro bono objectives

Feedback indicates that the pro bono requirement has had a positive social justice impact. The larger firms have adapted their pro bono programs to include the State's emphasis on approved causes and access to justice and the smaller firms are meeting the requirements but any increase in the overall volume of pro bono may be modest. A lack of data on the value or quantity of pro bono services provided by firms prior to the Panel prevents any meaningful "before and after" comparisons.

The pro bono requirement has:

- raised the profile of pro bono work and encouraged 'cultural change' across the legal profession in Victoria
- encouraged an increase in pro bono directed towards 'approved causes' and access to justice
- been an impetus for firms to develop and formalise their pro bono programs
- created a clear model for government support for pro bono services
- provided lawyers with help in making pro bono a priority on their firm's agenda

- encouraged financial support to pro bono clinics through firms' membership fees.

Social justice partners suggested improvements to the pro bono requirement in four areas:

1. Approved causes and access to justice
2. Reporting requirements and how the reported information is used
3. The role of the VGSO
4. Other general improvements.

Approved causes and access to justice

- further emphasis in the definition of 'access to justice' on support for community legal centres
- further emphasis in 'approved causes' on areas of unmet legal need
- articulating 'approved causes' more clearly.

GLS advises that Panel firms are encouraged to explore relationships with Community Legal Centre's. The definition of approved cause includes pro bono and other services to community organisations which are interpreted as meaning community legal centres.

GLS advises that the addressing of unmet legal demand is, and will continue to be, encouraged under 'approved causes' but it is likely that there will continue to be areas of unmet demand as the amount of available pro bono services is finite.

While definition of pro bono provides a degree of certainty, the demand for pro bono and the emphasis on particular causes changes over time and can vary between participants. The definition needs to continue to evolve to meet changing circumstances.

Some Panel firms already ask the panel administrators to review their proposed pro bono programs.

More regular discussion between Panel firms, the social justice stakeholders and the panel administrators about what activities are consistent with the definition of 'approved causes' would assist common understanding and allow for changes in demand.

Recommendation 2

The Panel administrators, Panel firms and social justice stakeholders should meet at regular intervals to discuss how pro bono services can be adapted to evolving demands.

Reporting requirements and how the reported information is used

- reducing the reporting burden on firms
- more detailed reporting back to firms on meeting the requirements
- publicising success of the Panel more.

Firms and social justice partners both suggest that the reporting burden is too high; however it is a once-a-year process that provides needed information necessary for

the annual report and compliance management. GLS is aware that the process needs to be flexible and unobtrusive, and that they should continue to review the information they collect to make sure it is necessary.

Recommendation 3

The Panel administrators should continue to review what information they require and use from the firms' reporting on social justice outcomes and tailor reporting requirements accordingly.

Pro bono achievements are reported to the community through the annual report. In the interests of more detailed reporting one social justice partner suggested that the annual report include how many firms went above, or fell short of, their pro bono requirements in the previous year. As the annual report currently includes information as to the number of firms delivering pro bono in that year and those that have carryover obligations to the next year, the suggestion may provide further positive stories on the Panel's achievements.

The second type of reporting the Panel could do is through the media. This is dealt with below, under the section "Publicising Achievements".

Social justice partners raised the potential for conflict of interest for Panel firms providing pro bono service in actions against the State and securing work under the Panel as a serious issue.

"We commend the Attorney-General for the leadership he demonstrated with his comments regarding conflicts of interest and his encouragement of panel law firms to act against government in public interest matters."²³.

While the above quote is typical of the view of social justice partner submissions, they also report that firms remain concerned about possible impacts on the work they might secure under the Panel if they act for persons in a pro bono capacity in actions against the State. The issue is one of on-going education and continuing reinforcement of the message of support for pro bono with government agencies and client firms.

The role of the VGSO

The final suggestion from social justice partners is that the VGSO be encouraged to undertake pro bono work. The VGSO, unlike Panel firms, is not required to make a pro bono contribution. The suggestion has merit and would set an example of best practice consistent with the State's social justice objectives. Consideration could be given to extending pro bono to all in-house legal functions.

It may also be in the best interests of the VGSO to include pro bono work in its work practices, as many talented young lawyers are attracted to such programs.

Recommendation 4

The VGSO should be encouraged to do pro bono work.

²³ Statement made in relation to pro bono requirements by a social justice partner whose identity is masked due to a policy of non-attribution of stakeholder comments.

Other suggestions

- a mechanism for catering for regional firms as a way to expand local pro bono services (the difficulties associated with expanding the Panel are discussed in Chapter 5 Improving Panel Arrangements)
- awarding work to firms on the basis of their pro bono contribution (this would run counter to the primary legal procurement objective of the State to secure high quality cost competitive legal services)
- conflicts of interest – re-assuring firms from a client agency level that they can act against the State in pro bono cases

The women barristers briefing policy

In 2006 there were 327 women barristers in Victoria, or 20% of the members of the bar.

Over the life of the panel an increasing percentage of work both in numbers and value of fees has been briefed to women barristers. In 2003-04 under the Panel arrangements 42% of government work went to women who invoiced 21% of the fees; in 2004-5 this grew to 53 % of briefs and 26 % of fees to women; in 2005-6, although the number of briefs to women declined marginally to 52%, the share of fees to women increased to 32%. The 2005-06 outcome compares favourably to the fact that women barristers comprised 20% of the members of the Victoria bar in 2006. Reporting briefing choices appears to be influencing the more equitable distribution of work between men and women barristers because there is more accountability.

The figures above suggest the women barristers briefing policy is achieving both tangible outcomes for women barristers, as well as a cultural impact.

Equal opportunity policy

Like the other social justice policies, the equal opportunity policy in firms helps focus firms' attention on issues of equity and encourages cultural change. Larger firms usually have established policies, but along with the smaller firms, have benefited from the process of articulating equal opportunity principles and reporting on policies and achievements.

Recognition by client agencies of firm's social justice achievements

The commitment of firms to social justice objectives was integral to, and rewarded by, their selection as members of the Panel. Under the Panel the selection of a firm to provide legal services is intended to be made on the basis that it will provide high quality cost-competitive legal services. While the achievement of social justice outcomes is not part of the securing of work under the Panel, recognising such achievements at a client agency level would support firms to continue their efforts.

The key to such recognition may lie in making explicit the connection between the legal services delivered and positive social justice outcomes. One suggestion by a social justice partner is to gather qualitative information on what the social justice objectives achieve. Success stories should not only be distributed to clients and

firms, it should also be emphasised that the legal services provided make these successes possible.

Additionally, the opportunity to input into the structure of the social justice requirements could lead to better engagement. If the members of the Government Lawyers Forum more actively support the social justice outcomes in their departments, clients are more likely to recognise and support them.

Publicising achievements

The social policy objectives appear to make little headway in the media²⁴. There is little the panel administrators can do about genuine media disinterest, but the development of a sound communication plan to the media may yield better results.

Overall, the social justice objectives have been successful because they have achieved positive impacts as intended, without detracting from the legal services procurement objectives of the State. The two most important areas for improvement are the better recognition by client agencies of firm's successes in delivering on social justice objectives and in better promoting the success of the social justice requirements to the community.

Role of Government Legal Services

Clients and firms agree that GLS has provided exemplary administrative services for the Panel over the past five years. The view of the industry is that the staff at GLS are effective in administering and monitoring the Panel contract. In particular, GLS is commended for being fair to each stakeholder's interests.

As presently structured, however, the Panel administration has not been able to:

- undertake the benchmarking of quality of services across government
- undertake demand forecasting for future legal needs
- fully utilise information about the performance of law firms gathered through the bi-monthly Customer Satisfaction Survey and the annual Government Lawyers Forum
- assess information about the quality of legal services.

Current legal practice expertise would assist the Panel administrators in achieving the above tasks because of the increased ability to match legal needs to legal services.

Finally, ensuring sufficient capacity in IT infrastructure is critical to allowing GLS to continue and improve the work it does in analysing the flow of legal services to government.

In summary, while GLS has performed well and is lauded by its stakeholders, Panel administration can be improved by the addition of current legal expertise and updated IT infrastructure.

²⁴ There appears to have been just one mention of the social justice outcomes in 2006 and it took an negative view, M Drummond, 'Law firms do bare minimum gratis, report says', *The Financial Review*, 11 August 2006.

C. Key takeouts

Chapter 4. Performance of the current Panel arrangements

- Overall the Panel contract has achieved its objective of providing clients with cost-competitive, high quality and consistent legal services and advice as well as promoting social justice objectives.
- Clients are generally able to access high quality legal services.
- The cost-competitiveness of legal services is not assured because the quality and efficiency of legal advice is not benchmarked effectively.
- Consistency of legal advice across agencies is not assured because no systematic mechanism exists to monitor consistency.
- The Panel arrangements manage to strike the balance between promoting social justice outcomes while minimising the compliance burden to firms.
- The two key challenges for the social justice objectives moving forward are achieving better publicity and better recognition by client agencies.
- Current legal practice expertise would assist the panel administrators in achieving to achieve the Panel's objectives.
- Panel administration would be further enhanced by the improvement of its IT infrastructure.

Recommendation 1. The social justice reporting requirements should be preserved but reviewed - while maintaining meaningful reporting of outcomes - with the objective of minimizing their impact on firms who receive little or no work.

Recommendation 2. The Panel administrators, Panel firms and social justice stakeholders should meet at regular intervals to discuss how pro bono services can be adapted to evolving demands.

Recommendation 3. The Panel administrators should continue to review what information they require and use from the firms' reporting on social justice outcomes and tailor reporting requirements accordingly.

Recommendation 4. The VGSO should be encouraged to do pro bono work.

5. IMPROVING PANEL ARRANGEMENTS

This chapter will first examine how the Panel can be improved in terms of its attraction to firms before looking at how it can be improved to better serve clients and finally how it could be best structured.

A. Improving the attraction to firms

The Panel arrangements are attractive to law firms but improvements would further enhance the leverage power of the State.

Current practices that reduce the attraction of the Panel for firms include:

- unmet expectations around volume of work
- procurement practices
- financial and social justice reporting requirements.

Expectations around volume of work

Firms complain that their expectations about the value and volume of work are unmet by the State. There are three reasons for expectations of firms not being met:

1. Legitimate competition denies work to some firms
2. Previous long associations between clients and firms
3. The perception of Panel firms that work would be more broadly distributed amongst firms.

Panel firms claim that there has been little change in purchasing habits since the Panel began and there is a reluctance to test new suppliers. While clients dispute this, and in any case would individually struggle to find meaningful work for more than a few firms, there is some evidence that unsophisticated buyers in government have not managed the expectations of firms well, frustrating suppliers.

While the Panel tender made it explicit that membership did not guarantee work, some firms still sought assurances of a more broad distribution of work. The State responded by asking client agencies, where appropriate, to broaden the range of Panel firms used and so provide opportunities for firms to demonstrate their capabilities.

The efforts to broaden the range of Panel firms used by individual client agencies has had limited impact. While practices in client agencies changed at the margins, the top 10 most used firms on the Panel received about 90% of the value of the work and the remaining 25 received 10% in 2005–6²⁵. Several small firms have received no work at all.

There are a number of reasons why the expectations of Panel firms can be seen as unrealistic:

- work should be allocated on the basis of capabilities and performance in a competitive market
- clients should be allowed to pursue strategic deep relationships with suppliers to build expertise and loyalty in suppliers

²⁵ See Appendix E for more information on the utilisation of the Panel.

- there are too many firms on the Panel. \$34.7m in legal fees were paid in 2005–6 to 35 Panel firms plus VGSO. By comparison, the Department of Defence distributed \$33m in work in 2004–5 to 15 Panel firms
- spreading work broadly has no positive impact on the legal or social objectives of the Panel²⁶.

Recommendation 5

Work should be allocated on merit to firms by clients to meet their needs and the expectations of firms should be managed accordingly.

Procurement practices

Once a firm has joined the Panel it potentially has to deal with 25 client agencies, with legal needs varying from simple advice through to complex projects and litigation.

While GLS provides template forms, and client agencies must comply with VGPB and in-house procurement guidelines and directions in their procurement of legal services, firms find that securing of legal work can sometimes still be a difficult and frustrating process.

Diversity of practices is necessary, due to the variations in the nature, complexity and scale of the legal services required, but further harmonisation would help both the legal firms looking for work, and ultimately the government itself through a further streamlining of the approach to procurement. Better procurement expertise and practices that go towards solving this problem, including making procurement practices more uniform, will be revisited in Chapter 6 The Need for Informed Purchasers.

Financial and social justice reporting requirements

The social justice reporting requirements have been addressed in Chapter 3 Context of the Panel Arrangements.

The financial reporting requirements for firms are an essential element in the management of the Panel and should be undertaken with the least possible impact on firms. Feedback indicates that firms are concerned about the cost of providing this information. The Panel administrators should offer to work with firms to improve the efficiency of the financial reporting systems and explore with the firms an easier transfer of information.

Recommendation 6

The Panel administrators should review financial reporting requirements with Panel firms.

²⁶ Some stakeholders warn that if clients fail to spread work they could become captured by a single supplier who above all competitors has knowledge of the client's business, and threatens to use this against the State (client capture). These circumstances appear to be more theoretical than experienced and in any case can be managed through strategic procurement practices rather than a blanket policy of broad allocation of work.

B. Improving the Panel for clients

Clients are able to procure most of the legal services they require from the existing Panel firms. Changes that would assist in further improving access to cost-competitive, high quality and consistent legal advice include:

- reducing the size of the Panel
- improving feedback systems
- installing a central matter management system
- broadening the exemptions policy
- improving management of conflict of interest.

Reducing the size of the Panel

To determine the attraction to firms and hence the leverage of the State, the value of work on a legal panel is divided by the number of competing firms.

Table 5.1 Australian law firm revenues²⁷

Firm	Revenue \$m	Partners	Victoria BC est. \$m ²⁸
Freehills	465	209	163
Mallesons Stephen Jaques	(460.4)	193.3	161
Minter Ellison	410	268	144
Clayton Utz	390	208	137
Allens Arthur Robinson	(370)	187	130
Blake Dawson Waldron	(280.1)	175	98
Phillips Fox	213	160	75
Corrs Chambers Westgarth	208	116	73
Deacons	195	149	68
Gadens Lawyers	138	121	48
Baker & McKenzie	135	70	47
Sparke Helmore	91	51	32
Gilbert + Tobin	(75.1)	41	26
Henry Davis York	73	45	26
Middletons Lawyers	(71.5)	59	25
Dibbs Abbott Stillman	(70.1)	64	25
Ebsworth & Ebsworth	54.1	54	19
Maddocks	53.5	43	19
McCullough Robertson	52.5	29	18
Arnold Bloch Leibler	41.9	28	15
Holding Redlich	41.8	37	15
Thomson Playford	40	29	14
Piper Alderman	40	51	14

Table 5.1 shows the revenue of law firms nationally, the number of partners and two estimates for what revenue is likely to be from just Victorian operations.

²⁷ From Australian Legal Business 4.7, 2005-6 revenue figures. Where they are estimated, they are in brackets.

²⁸ This figure for Victoria is based on Beaton Consulting's estimate that the share of national legal work in Victoria is greater than its economic share of GDP because most organisations are based out of Sydney or Melbourne and require legal services there, even if they have operations in other States or Territories.

If we take the nine firms on the General Panel in Figure 5.1 (in bold) and add their estimated revenue for the “Victoria BC est.” figures, the figure for their combined revenue comes to \$792m and the State Panel represents 3% of the value of work. Further diminishing this figure is the fact that the Panel’s \$27m in legal fees is also shared with one other General Panel firm and 25 Specialist Panel firms.

The State represents a small fraction of legal income for firms even in Victoria, let alone nationally.

Given that the State spent \$27m on external legal providers in 2005–6, if hypothetically it purchased all its legal services from the largest national firm (Freehills), it would account for some 6% of its revenue nationally (or an estimated 17% of its revenue from Victoria).²⁹

The value in the Department of Defence Legal Panel was about \$33m in 2004–5, while the Crown Solicitor’s Office (NSW) was \$32m and the Department of Health and Aging was \$15m. The State total of legal fees to Panel firms (\$34m) is therefore comparable to larger public institutions. However, does this make the State an important buyer for law firms?

The second calculation is comparing the Panel legal expenditure to the number of member firms. The State has a much larger Panel than many comparable or larger organisations (see table 5.2).

Table 5.2 Number of firms on public and private sector panels

Public sector				Private sector				
Department of Defence	Department of Health and Ageing	Victorian WorkCover Authority	Comcare	BHP ³⁰	NAB	Telstra	Westpac	Best practice ³¹
15	6	8	18	4	15	12	15	4 - 6

Of the Panels represented in Table 5.2, we know the external legal expenditure figures for the Department of Defence (\$33m) and Comcare (\$15m). For both of these, the expenditure per firm on Panel is higher than for the State.

Private sector best practice, from this limited sample, appears to be between 4 and 15 firms on a Panel. Catalyst Consulting’s view of best practice is between 4 and 6 firms on a given Panel³².

All benchmarks for the number of firms on a legal panel collected in the Review, including private and public sector organisations and Catalyst Consulting’s recommended best practice, are significantly lower than the State’s present 35 firm Panel. Given that the State is a relatively minor client to law firms, it should reduce its Panel size to achieve better leverage and hence more cost-competitive advice.

²⁹ See Chart 3.2 and the associated footnote for an explanation of the State’s expenditure on private law firms and the VGSO.

³⁰ BHP does not have a Panel; it has relationships with four firms.

³¹ Best practice refers to Catalyst Consulting’s suggested optimal size of Panel structures.

³² Catalyst Consulting is an in-house department consultancy based in North America. Their benchmarks for Panel size are based on extensive experience consulting to in-house departments across Canada, the United States and Europe.

Recommendation 7

The Panel should be restricted to about 15 firms overall, or each component should be restricted to a number of firms commensurate with forecast legal spend in that area.

Suggestions for how to compose the Panel are offered in Section C of this chapter.

Adding current legal practice expertise in the Panel administration

The problems caused by lack of current legal practice expertise in GLS were addressed to some extent in Chapter 4 Performance of the current Panel arrangements, including the limited ability to:

- monitor the performance of firms (especially the quality of legal advice), a prerequisite to decisions about changing its membership
- contribute to tendering decisions
- communicate with client agencies in relation to their legal needs
- provide qualitative feedback to firms on their performance.

The core function of the Panel administrators is to match legal needs to the market. Adding a current legal practice expertise capability would assist in making this match, as understanding of both areas would be improved.

Recommendation 8

The Panel administration should include current legal practice expertise.

Improving feedback systems

Qualitative feedback is appreciated by Panel firms and also encourages continual improvements in the quality of legal services provided, advancing the legal objectives of the Panel.

The present system of feedback consists of a survey based system and ad hoc feedback from client agencies.

The Client Satisfaction Survey provides a useful form of feedback to firms about their performance, but lacks detail in particular cases. Feedback to clients could be more comprehensive if the survey information incorporated qualitative feedback from clients and combined survey results with other ratings periodically³³. Client satisfaction should also be a standing agenda item at meetings of the Government Lawyers' Forum.

The ad hoc system of feedback to clients is driven by the individual organisational imperatives and culture of client agencies and ranges from excellent feedback to none at all.

³³ Because, even for the large firms, the numbers of survey responses will always be small relative to a statistically robust sample size. Using survey scores as part of the basis for deleting a firm from the Panel will need appropriate protocols.

The next step in improving feedback systems is providing a better level of qualitative feedback (i.e. in-depth interviews) by changing the culture of feedback in client agencies.

One way to attempt to change the culture of feedback in client agencies is by providing whole-of-government guidelines, promoting discussion and articulating the causal link between better feedback and better service to the State. This may best occur as part of the development of core competencies in clients through an informed purchaser framework. This is discussed in greater detail in Chapter 6 The Need for Informed Purchasers.

Installing a matter management system

Effective information sharing can occur in a number of ways, but the most effective is likely to be a computerised matter management system to:

- provide a way of comparing advice across firms and across time
- capture legal knowledge within government and provide appropriate means for sharing it
- provide a tangible value add to in-house lawyers by providing a starting point for solving legal problems.

Where matters involve similar fact situations and legal issues, access to past advice would assist consistent outcomes for the State and full consideration of issues.

Currently legal knowledge is distributed across agencies and among individuals. By pooling legal knowledge in one computerised location, this knowledge becomes more available and valuable to the State. In this way, it is protected from staffing changes over time.

By providing a starting point for any matter, a matter management system may replace the need to seek further advice in some circumstances. In this way the system not only helps the Panel achieve consistent legal advice, but also improves the cost-competitiveness of advice.

The limitations of a centralised matter management system are that it:

- could be costly to create and maintain
- requires active support and participation from clients
- can only ever capture part of the legal advice given to the State.

Assessing the costs of the system are outside the scope of this Review; however matter management systems are common in law firms and currently used by some client agencies. The benefits of a system for the Panel will probably outweigh the costs, but this needs to be more fully tested.

Steps to ensure client buy-in include:

- involving clients in the development of the system from an early stage
- ensuring it is user-friendly
- involving clients in ongoing improvements to the system
- keeping the system up-to-date and well maintained.

The fact that only a portion of legal advice can be captured by a matter management system is unavoidable. Some advice is conveyed verbally or by email and only a portion through documents that can be easily archived.

Nevertheless, significant advice can still be captured, and it is still better to have a system that does all it can to ensure consistency than one in which there is no assurance.

Stakeholders reported that there has been previous consideration of matter management systems aimed at sharing legal opinions but that it did not proceed because of competing priorities.

Recommendation 9

The Panel administrators should consider co-developing a matter management system with client agencies to capture and share legal knowledge provided to the State through the Panel contract.

Broadening the exemptions policy

A panel contract limits access for clients to a legal market in exchange for leverage over provider firms. An exemptions process is a safety valve that allows broader access in cases where a panel fails to meet the needs of clients. Crafting a process that is sufficiently flexible for clients yet retains sufficient value in the arrangements to match panel firm expectations is an important balancing act.

Under the Panel arrangements each exemption is considered on a case-by-case basis against the defined criteria published as guidelines for clients. The Secretary of the Department of Justice must approve exemptions in her capacity as Executive Contract Manager.

The three criteria currently are:

- Panel firms are conflicted out
- Panel firms lack the necessary expertise
- completion of matters when a legal team or key individual moves to a non-Panel firm.

Conflict of Interest exemptions

Exemptions on the grounds of conflicts of interest occur when all eligible firms are conflicted out of legal work. The reason for this exemption ties in with the nature of conflicts of interest for the State; they are relatively rare. Rare problems can be managed through exemptions because they will not threaten the value for Panel firms, and in any case are often a result of the commercial choices made by Panel firms in regards to the matters they take up. More details about managing conflicts are explored below.

Lack of expertise and 'grandfathered'/transitional matters

Clients face situations where it would be more cost-effective or convenient to use a non-Panel firm for a particular matter. This should not be allowed, because it dilutes the value of the Panel, reduces its usefulness to other clients and the State as a whole. However, if the client wants to use a firm that has expertise that does not exist on the Panel or a firm that is half-way through a matter and briefing another firm would be cumbersome, then an exemption should arise.

The ease of access for clients is presently assured through the speed with which GLS can present the Secretary of the Department of Justice with the rationale for an exemption and receive a decision on that matter. The present process is expedient, and this should be maintained. Further clients should be assured that the process will remain expedient into the future.

While some clients have been concerned that the exemption process is too strict, it will always involve some balancing of the integrity of the Panel arrangements against the individual needs of clients in specified circumstances. The Panel administrators may need to restate the exemption policy and process to clients to counter these perceptions.

Regional exemptions

One addition to the criteria suggested by stakeholders is to allow exemptions for regional areas.

The small proportion of legal matters which are local to a particular region and low in value would best be dealt with through a local legal provider. At present, the Panel structure requires the use of mostly Melbourne-based firms for legal matters facing client agencies.

The exemption for regional firms might include the following criteria:

- the matter arose in a regional area
- it can be solved more cost-effectively and to a sufficient quality by a regional firm
- it is worth less than \$20k and in total matters sent to this firm is worth less than \$50k.

Recommendation 10

The criteria for exemptions from the Panel contract should be expanded to include regional exemptions.

Improving management of conflicts of interest

As discussed in Chapter 4 Performance of the current Panel arrangements, conflicts of interest are impossible to completely avoid.

However, the State could improve its management of conflict of interest issues by defining conflict more exactly and by the panel administrators taking a larger role in advising clients on such issues with the informed purchaser model as explored in Chapter 6 The Need for Informed Purchasers.

Improving performance management

Under current arrangements, management of the performance of firms has tended to be largely around individual matters by departments and agencies, while clients in the more serious cases have asked GLS for assistance.

Equipping the Panel administration with current legal practice expertise would allow them to broaden their assistance in gauging the performance of firms in particular matters. Performance could be monitored either on the basis of client agencies inviting a review when they suspect a particular service is deficient ('invited audits'), or through random audits of legal service provision.

A system of invited audits is less intrusive than a random audit approach, as it implicitly involves active client cooperation, and may therefore be a good starting point for the Panel. Such a system would not only have a normative effect on the quality of legal services, it would also assist in knowledge sharing between agencies, in helping clients improve and in providing information to the panel administrators that could be used in the consideration of the membership of the Panel.

Recommendation 11

The Panel administrators should develop a system of 'invited-audits' where clients invite them to review particular matters for cost-competitiveness and quality.

C. Panel structure options

Having examined how aspects of the Panel can be moulded to best attract firms and then how systems can be adapted more efficiently for clients, the overall structure and composition of the Panel can now be explored.

Chapter 8 Extending the Panel Contract argues that a demand forecast should be undertaken ahead of a Panel re-tender. This forecast will identify the likely nature of legal services required and their expected scale and will facilitate mapping the required mix of law firms on the Panel. It will therefore be a key influence on the component structure and composition of the Panel. Before the forecast, the panel structure and composition cannot be finalised.

Recommendation 12

The Panel's structure and composition should be decided after a demand forecast of clients' legal needs.

Current structure

Currently there are nine components, multiple sub-components and the VGSO exclusive component in the Panel arrangements. Firms are allowed to perform work where they are members of the relevant component and sub-component. Specialist Panel firms are typically able to do legal work across one or two components while General Panel firms must work in at least five components.

The General/Specialist distinction acts as a barrier to the efficient allocation of legal work as many legal matters straddle several components or sub-components. In some cases firms must reject work because it does not fit neatly into the relevant category and sometimes clients do not use Specialist Panel firms because they may be unable to solve an entire legal problem.

Removing sub-components

The difference between components and sub-components is one of degree – the latter classification is a subset of the former and defines legal work in a more granular way. The question for the Panel structure is how finely to define legal work types. More precisely, does the advantage of having sub-components outweigh the costs of maintaining that classification?

The advantages of sub-components include:

- legal capabilities of firms can be defined more precisely in the tender – giving clients a more accurate view of available resources and provides certainty for tenderers
- small firms with one or few capabilities can find a defined role in the Panel structure without having to be clumped together with larger firms.

Any tender is a snapshot in time of a law firm's capabilities. The market moves quickly, and the more granular the classification the quicker it becomes outdated. The best method to ensure that the right firms are chosen for legal work is by arming clients with sufficient capacity and capabilities to make informed decisions. Chapter 6 The Need for Informed Purchasers explores how to do this in more detail.

The second advantage above can be retained in a tender that focuses on the capabilities of smaller firms rather than classifications of legal work.

The present sub-component structure complicates the Panel arrangements and the tender process, and creates artificial barriers to legal work. Given these disadvantages and that the advantages of the sub components can be achieved in other ways, it is probably best to avoid the sub-component structure.

Component structure

The number and type of components and sub-components should be reviewed in light of historic and anticipated trends in client legal demand.

The factors to consider in determining the component structure include:

- ensuring each component is viable, i.e. has an attractive amount of legal work available (e.g. over \$1m per annum in expected legal spend)
- keeping the number of components to a minimum. The fewer components, the fewer artificial barriers for law firms and clients in allocating legal work
- grouping like-work together. There is no need to separate out legal work types unless firms vary in that competency. For example, if all firms provide contract law, there is no need for a contract law component separately.

When determining which components are viable, the demand forecast and historic legal spend should be used to predict the value in each component.

Fee structure of the Panel

The fee structure adopted by the Government Panel forms the basis for the tender by law firms. The choices in fee structures include:

- hourly rates
- fixed fees / capped fees
- blended fees.

Currently hourly fees are used in the tender process and it is suggested that that this type of fee structure is kept in the new Panel because:

- hourly rates are still the dominant form of exchange with the legal market. Any move against the norm would be difficult both from the perspective of the Panel firms and the Panel administration
- altering fee structures will not help achieve good value for the government. Good value can best be achieved by assuring access to legal procurement

expertise through the informed purchaser systems and service proposed in the review.

Though hourly rates should be retained as the basic unit of measurement in the tender and in Panel administration, other forms of fee structure, if proposed by firms, should be considered by the Panel administrators as part of the tender. This is especially the case where a firm is bidding for work that the Panel administrators agree is 'transactional' in nature, i.e. low risk, high volume, mostly repetitive legal work.

Recommendation 13

Hourly rates should be retained as the primary basis of the Panel tender, but other fee structures, if proposed by law firms, should be considered.

Removing firms

The final point to consider in the Panel structure is the mechanism for adding or removing firms into the future. This mechanism will be influenced by a number of factors, including:

- which structural model is ultimately chosen for the Panel
- the length of the new Panel contract
- the intended size of the new Panel.

The effect of structure on the mechanism for removal/addition of firms as described above is that the fewer the firms on the Panel the easier it is for them to move across components.

The length of the Panel contract is important because if it is intended to be just three years, the mechanism for changing firms can be more restrictive than a longer period. This is because fewer capability changes between firms are likely in a shorter period.

If the State restricts the size of the Panel, then competition will be fierce in getting onto the Panel, but less so once on the Panel. Conversely, with more firms on the Panel, the tender is less competitive, but subsequent efforts to get work are more competitive.

If the State decides to have more competition at the point of tender than between Panel firms, then the mechanism should reflect that:

- flexible membership of components reduces the attraction of the Panel, and so reduces leverage at the point of tender
- with fewer firms on the Panel, the chances of a lack of particular capability or capacity are more likely.

A minimum criterion for removing or adding a firm to the Panel can be defined around reduced capability or poor performance. If a firm loses its ability to provide services in a component of the Panel structure or if it is underperforming, it should lose its place on that component. If that removal causes a lack of choice or reduced competitive tension in that component, then a replacement firm should be sought.

Both clients and the Panel administrators should be allowed to trigger the process for removing a firm. In the case of poor performance, the firm may need to have its performance audited first, to provide a mechanism for independently verifying the legal outcomes it produces. Once the case is established, a 'show-cause' should be issued to that firm.

D. Key takeouts

Chapter 5. Improving Panel Arrangements

- Current practices that reduce the attraction of the Panel for firms include:
 - unmet expectations around volume of work
 - variable procurement practices
 - financial and social justice reporting requirements.
- Changes that would assist in further improving access to cost-competitive, high quality and consistent legal advice include:
 - reducing the size of the Panel
 - adding current legal practice expertise to the panel administration
 - improving feedback systems
 - installing a central matter management system
 - reducing diverse procurement approaches
 - broadening the exemptions policy
 - improving management of conflict of interest
 - improving performance management.
- **Recommendation 5.** Work should be allocated on merit to firms by clients to meet their needs and the expectations of firms should be managed accordingly.
- **Recommendation 6.** The Panel administrators should review financial reporting requirements with the firms.
- **Recommendation 7.** The Panel should be restricted to about 15 firms overall, or each component should be restricted to a number of firms commensurate with forecast legal spend in that area.
- **Recommendation 8.** The Panel administration should include current legal practice expertise.
- **Recommendation 9.** The Panel administrators should consider co-developing a matter management system with client agencies to capture and share legal knowledge provided to the State through the Panel contract.
- **Recommendation 10.** The criteria for exemptions from the Panel contract should be expanded to include regional exemptions.
- **Recommendation 11.** The Panel administrators should develop a system of 'invited-audits' where clients invite them to review particular matters for cost-competitiveness and quality.
- **Recommendation 12.** The Panel's structure and composition should be decided after a demand forecast of client's legal needs.
- **Recommendation 13.** Hourly rates should be retained as the primary basis of the Panel tender, but other fee structures, if proposed by law firms, should be considered.

6. THE NEED FOR INFORMED PURCHASERS

The previous chapters have shown that client agencies as purchasers of legal services have a major role in achieving the Panel objective of obtaining competitive, high quality consistent legal services and advice.

While there will be natural variation in the purchasing policies of client agencies to cater for differing legal needs, both clients and firms would benefit from more consistency in approaches.

This Review suggests the solution lies in implementing an 'informed purchaser' system.

A. Definition of informed purchaser

'Informed purchaser' is a concept promoted by the Australian National Audit Office (ANAO) as best practice in government legal procurement³⁴. An informed purchaser is an identifiable person within the government agency with the following attributes:

- knowledge of the agency's 'business'
- knowledge of the law and legal practice
- skill in coordinating legal service arrangements
- ability to link strategic decisions to their daily implementation
- skill in ensuring value-for-money for legal services.
- Knowledge of procurement policies, guidelines and processes

The role of the informed purchaser is to provide a 'link between crucial decisions taken at the strategic level and the execution of strategy at a day-to-day business level'³⁵. In practical terms, this covers not just the allocation of legal work, but also monitoring the quality of legal services delivered and managing legal risk. For the purposes of this review, the scope is extended to include assisting in the management of the Panel contract.

Other useful insights provided in the ANAO report include that:

- informed purchasers should be appointed by senior staff
- they should be employees of the agency, to ensure knowledge of its 'business'
- they should inform themselves of best practices for in-house lawyers and develop a network of peers
- experienced purchasers may not be informed purchasers because they may not know how to buy cost-effectively
- in-house legal units are best placed to be informed purchasers.

³⁴ The Australian National Audit Office released 'Legal Services Arrangements in Australian Government Agencies' in August 2006.

³⁵ Ibid.

B. The need for informed purchasers

The informed purchaser concept is a way of improving and harmonising client agency legal procurement processes without coercion. This concept has benefits for all stakeholders:

- the panel administrators benefit from a more uniform approach to procurement by clients, allowing better alignment of the Panel arrangements
- Panel firms will find it easier to do business with government because procurement practices will be more predictable and professional
- client agencies will procure legal services more efficiently, saving money and improving quality of outcomes.

Introducing the concept of informed purchasers is an acknowledgement that clients are central to the success of the Panel arrangements. The role would build on existing strengths and skills of contract managers and create a key coordination position within government agencies. This would then improve coordination of procurement at the whole-of-government level.

Many of the concerns about the operation of the Panel, as outlined in previous chapters, can be addressed through the informed purchaser concept, for example:

- feedback systems; part of the informed purchaser competencies, could include guidelines on frequency and depth of feedback to Panel firms
- informed purchaser development will lead to a more uniform and precise approach to identification and management of conflict of interest issues
- informed purchasers will be better able to judge the value of legal work, improving procurement decisions and relationships with Panel firms.

Recommendation 14

To achieve whole-of-government legal objectives, informed purchaser competencies should be developed in client agencies.

C. Implementing informed purchasers

Developing informed purchasers in government requires central coordination and the active participation of client agencies. Central coordination ensures a consistent approach, reduces duplication and allows for the effective sharing of knowledge.

Responsibility of rolling out an informed purchaser program and maintaining it is best placed with the Panel administrators. There is strong correlation in the skills needed by the Administrators and informed purchasers.

Recommendation 15

The Panel administrators should have responsibility for developing and maintaining the informed purchaser system.

The first step in implementation is defining guidelines for core competencies of informed purchasers for the State. These will probably vary from the ANAO competencies and should be co-developed with clients to ensure they are tailored appropriately and accepted. The informed purchaser competencies in the State could include:

- guidelines on identifying and managing whole-of-government risk (i.e. the criteria for a whole-of-government legal risk and when to involve other stakeholders)
- guidelines on best procurement practices (i.e. when tenders should be used, how decision processes should work etc)
- assessing value for money
- methods for identifying and managing conflicts of interests
- frequency and depth of feedback to firms.

These competencies should be developed to act as a mechanism for harmonising approaches across client agencies. Beyond this, clients could add further competencies specific to their agencies' legal needs and 'business' imperatives.

Recommendation 16

The Panel administrators should co-develop with clients core competencies for informed purchasers.

Once the desired core competencies are identified, a plan for ensuring their application in all areas of government procurement should be developed. This plan could include:

- identification of all public servants who procure legal services for the State
- development of self-testing for competencies
- mechanisms for training and sharing knowledge
- seminars on the dynamics of the legal market by industry experts.

Recommendation 17

The Panel administrators should co-develop with clients a plan to implement the core competencies of informed purchasers across government.

Once the competencies are defined and implemented, the Panel administrators should take a lead role in maintaining the system. This involves continually updating the knowledge available to clients regarding the legal market and best practice procurement practices. Experts from other panels may be invited to share knowledge in this respect.

D. An informed purchaser service

Developing informed purchasers has the greatest value for high spending government agencies and is likely to be done in-house. Many agencies spend small amounts on legal services each year that would not justify the use of in-house expertise. However, when the spending of the small agencies is combined there is a sum worth protecting through providing them with access to an informed purchaser service.

An informed purchaser service involves developing expertise centrally, pooling knowledge of the market and of client agencies in that service and then providing it to client agencies on request.

The benefits of this service include:

- catering to client agencies for which it is not cost effective to develop in-house informed purchaser capabilities
- providing a mechanism for all agencies to access relevant up-to-date information about the legal market to help solve their legal problems
- providing a resource for clients to access if they need assistance in assessing the legal risk of a matter and determining the best procurement option

The natural home for this service is the Panel administrators, who are intimately involved with legal procurement and already have access to all departments and many other government agencies that may desire such a service.

The informed purchaser service would require the Panel administrators to have significant legal and legal market expertise. The Panel administrators would be best placed if they belonged to an organisation that could allocate additional legal resources at short notice in periods of peak demand. Chapter 7 Enhancing Panel Administration looks to how the panel administration can access these skills.

Recommendation 18

An informed purchaser service should be developed and available for use by agencies on request.

E. Key takeouts

Chapter 6. The Need for Informed Purchasers

- The informed purchaser model is the natural next step forward for the management of legal procurement in the Victorian Government.
- The ANAO defines an informed purchaser as an identifiable person within an agency with the following attributes:
 - knowledge of the agency's 'business'
 - knowledge of the law and legal practice
 - skill in coordinating legal service arrangements
 - ability to link strategic decisions to their daily implementation
 - skill in ensuring value-for-money for legal services.
- The informed purchaser role requires not just procurement expertise, it requires competencies in risk management and quality control and an understanding of the agency's core requirements.
- Introducing informed purchasers to the State Panel would help achieve the Panel objectives by solving many problems identified in previous chapters.
- The implementation of informed purchasers must be coordinated centrally but with strong engagement of contract managers and other client stakeholders.
- The steps in implementation include:
 - co-developing a set of core competencies for informed purchasers
 - self-assessment by client agencies of those competencies
 - implementation of strategies to develop competencies where there are deficiencies and monitor the results.
- **Recommendation 14.** To achieve whole-of-government legal objectives, informed purchaser competencies should be developed in client agencies.
- **Recommendation 15.** The Panel administrators should have responsibility for developing and maintaining the informed purchaser system.
- **Recommendation 16.** The Panel administrators should co-develop with clients core competencies for informed purchasers.
- **Recommendation 17.** The Panel administrators should co-develop with clients a plan to implement the core competencies of informed purchasers across government.
- **Recommendation 18.** An informed purchaser service should be developed and available for use by agencies on request.

7. ENHANCING PANEL ADMINISTRATION

While GLS has successfully implemented and managed the panel arrangements to date, as indicated earlier the effectiveness of the Panel can be improved by:

- the inclusion of current legal practice expertise in the Panel administration
- the introduction of a central matter management system
- improved IT capabilities
- the provision of an informed purchaser service.

Although these functions can be developed within GLS the VGSO already has the relevant expertise, resources and systems that can be leveraged.

This chapter will first explore whether a conflict of interest exists in allocating responsibility for Panel administration to the VGSO, the advantages and disadvantages of such an arrangement and finally a proposed new model for the Panel.

A. Conflict of interest

There is a market perception that the VGSO is a competitor to Panel firms in its pursuit of 'non-core' legal work from the Panel. This view is propagated by:

- the actions of the VGSO itself at times in its dealings with clients and private firms
- the Federal Government's positioning of the Australian Government Solicitor (AGS).

If the VGSO was competing with Panel firms, it would be a conflict to allow it to influence decisions on the allocation of legal work under the Panel. However, in terms of structural features the VGSO bears little resemblance to Panel firms, which:

- are privately owned and tender to be on the Panel
- are driven by a profit motive and revenue growth
- have multiple clients in private and public sectors
- have market freedom in employment practices and recruitment.

An in-house legal function for government has the following characteristics:

- the same objectives as the client³⁶
- owned entirely by the client
- the owner is the only client
- in-house lawyers undertake legal work without going through a competitive procurement process
- is governed by government employment policies, procedures and remuneration requirements.

In its organisational structure and the way in which it is engaged, the VGSO has similar characteristics. In this regard the VGSO is similar to the in-house legal areas within government agencies.

³⁶ In this case 'client' refers to whole-of-government rather than particular client agencies.

Recommendations on the allocation of work

As part of an informed purchaser service, on request the VGSO will recommend what legal services to use to satisfy the legal needs of agencies. The choices will include Panel firms, the VGSO, direct briefing to the bar or any combination of those options.

As the VGSO is charged with the task of managing whole-of-government legal risk, it has an interest in maintaining the viability of the Panel. If it were to reduce the amount of work allocated to external firms without cause, it may damage relationships with the market, and reduce the legal outcomes for the State. Its imperative is to maintain these relationships and continue to grow the Panel's efficiency and value.

Most large organisations have a central coordinating in-house legal department, even if they have decentralised legal functions and an external panel. By allocating this coordinating function with the VGSO, the State is merely following practices long established in the public and private sectors.

The AGS provides a model of how government-owned law firms can compete with private sector firms, but this isn't viable for the VGSO at the State level due to the much smaller legal value available³⁷. In many state jurisdictions the government solicitors' offices face little competition and in Western Australia it is the central gate-keeper in relation to the supply of legal services.

B. The advantage of using the VGSO

As described above, there are a number of capacity constraints preventing GLS from taking the next steps in Panel management and introducing an informed purchaser service. The VGSO is well placed to take on this role, for several reasons.

- the VGSO already has the required current legal practice expertise and a long term interest in maintaining this expertise
- the VGSO is well placed to develop informed purchaser competencies because of its knowledge of legal solutions and whole-of-government legal risk management. It can work collaboratively with client agencies to establish appropriate procedures to share their mutual knowledge of the legal market
- the VGSO already has a substantial knowledge of government procurement and the business of client agencies that can be leveraged in the development of an informed purchaser service
- the VGSO has much of the infrastructure that could help enhance the panel administration function. For example, it already has a matter management system it may be able to expand or leverage.

C. Managing perceptions of the market

The major hurdle to using the VGSO as Panel administrator is the perception of conflict of interest.

³⁷ The Australian Government Solicitor supplied \$105M worth of legal services to the Federal Government in 2005–6 while the VGSO supplied \$7M to the Victorian government in the same year (C Merritt, "Obscene' outsourcing blow-out", The Australian, Friday 23 June 2006 and GLS financial data).

Law firms may argue that there is a conflict of interest in making the VGSO responsible for Panel administration arising from fear that the VGSO will retain work that would otherwise go to Panel firms and so reduce their revenues.

Dispelling this fear requires clear expression of the government's intention for operation of the Panel arrangements and consistent follow-through by the VGSO.

Placing GLS within the VGSO will provide for better Panel administration through leverage of their existing systems and technology. It will also benefit Panel firms through the introduction of current legal practice expertise into Panel administration leading to a better understanding of their needs as providers of legal services.

The VGSO can provide an efficient gateway for Panel firms to identify clients and secure work. In short, the function of matching client legal needs to suppliers will be enhanced, improving outcomes for Panel firms.

While the VGSO will offer informed purchaser services it will not control access to legal services as all client agencies will still be able to directly access Panel firms. Larger client agencies with in-house informed purchaser competencies are likely to continue to directly access the Panel firms for legal services. Smaller agencies can choose whether or not to use the informed purchaser service.

Whilst the VGSO has significant expertise in some areas of law, the Panel firms bring needed commercially tested legal expertise in a wide range of areas including project and finance and complex commercial arrangements. Accordingly, client agencies will continue to engage Panel firms to ensure government has access to the best legal services to meet their needs.

In order to reduce the chance of the changes being misconstrued the role of the VGSO must be clearly communicated to Panel firms and the market.

Over time the work sent to Panel firms should increase in line with increasing overall government legal needs. Firms should see an improvement in the transparency and professionalism of procurement practices of government clients as a consequence of the development of informed purchaser competencies and an informed purchaser service. Clients should experience more options in procurement assistance and more resources to improve their purchasing capabilities in-house. Social justice partners should continue to receive the benefits of the social justice policies.

The above outcomes will be further proof to the market that the VGSO is not a competitor and will continue to pursue whole-of-government interests.

Recommendation 19

The VGSO should take over Panel administration.

D. Details of the new model

The new panel administration role, run by the VGSO, will contain three parts:

1. An enhanced version of the current contract management and reporting functions (including monitoring the Service Level Agreement, managing relationships, liaising with stakeholders and facilitating the matching of legal needs to clients).
2. Co-development of informed purchaser competencies in client agencies.
3. An informed purchaser service to client agencies.

Enhanced contract management

Figure 7.1 Contract management and reporting

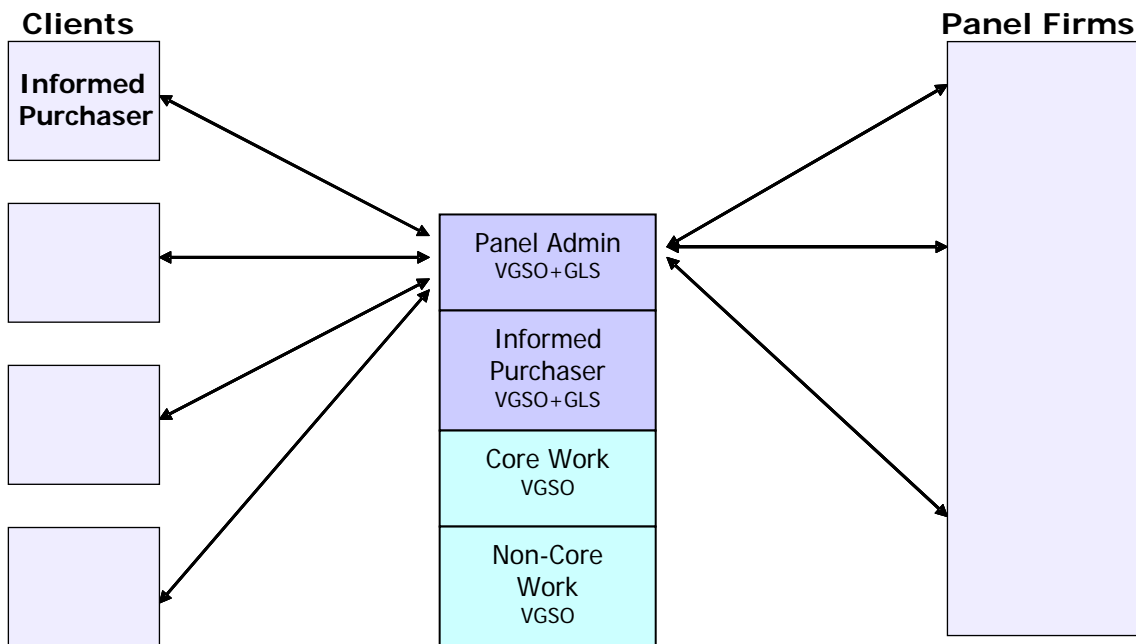


Figure 7.1 shows how contract management and reporting will work in the new arrangements (similar to the status quo). On the left are client agencies while on the right are Panel firms. VGSO and GLS combine to create the new panel administrators in the centre. This combined body provides all three Panel Administrator roles (contract management, an informed purchaser service and informed purchaser development services), but also maintains the legal functions of the VGSO (i.e. the core and non-core legal work).

As part of the contract management and reporting, the new Panel administrators will drive the creation of a new Panel contract, the re-tender and subsequent coordination and management of the Panel arrangements. Expected improvements in contract management and reporting include:

- improved qualitative feedback mechanisms for firms
- a more driven legal practice management agenda for the Government Lawyers Forum
- assistance to clients in performance management of firms
- more active performance management of Panel firms.

Informed purchaser service

Figure 7.2 An informed purchaser service

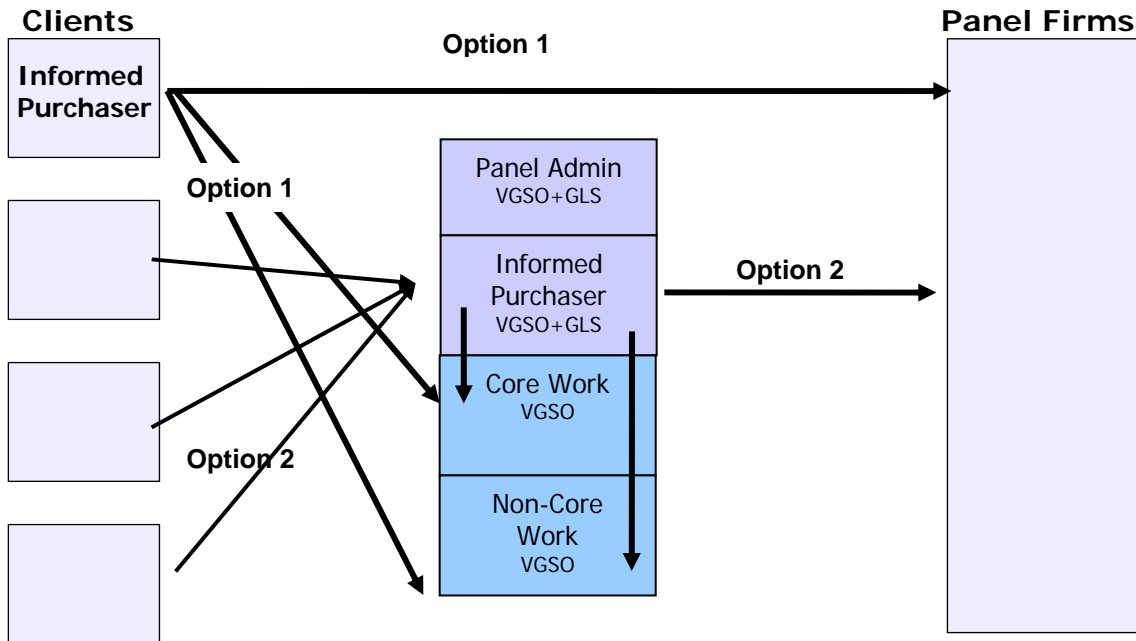


Figure 7.2 shows how the informed purchaser service would operate in government. Clients will have two options. In Option 1 informed purchasers in client agencies can go directly to Panel firms as they do now, or go to the VGSO for core or non-core work. Option 2 is an added choice available to clients. Instead of directly approaching a firm in the market or accessing the VGSO legal function, they can seek an assessment of their needs and receive advice on the best match to these from the Informer Purchaser service of the VGSO. The VGSO can then either make the appropriate match with the market (the arrow pointing to the market) or advise the client to use its own core or non-core legal services (the arrows pointing down).

The informed purchaser service will have informed purchaser competencies including:

- a strong knowledge of the legal market
- an ability to manage legal work from external providers
- an understanding of the agency's imperatives, or an ability to leverage understanding of other government functions to quickly come to speed with agency imperatives
- an ability to assess legal needs and match them to the legal market.

It is envisaged Option 2 will be used by smaller agencies for which it is not cost effective to develop informed purchaser capabilities. However, larger agencies may access Panel firms directly or use the informed purchaser service to supplement their knowledge of the legal market, especially for matters they do not commonly face.

An important point to emphasise with this model is it offers clients more choice in legal service provision, not less. They can choose to directly approach Panel firms if they believe this is the best way of satisfying their agency's legal needs. The VGSO will have to demonstrate value in the informed purchaser service for it to succeed.

The informed purchaser service may recommend the following:

1. The client should use an external Panel firm.
2. The client should use the VGSO core or non-core services.
3. The client should use the bar to get a response to a specific legal problem.
4. The matter is not a (significant) legal issue – no need for legal advice.

Illustrative example of the informed purchaser model

A legal need arises in a client agency. The client is unsure of how to best handle the matter. They ask the VGSO Informed Purchaser service for help.

The Informed Purchaser service assesses the nature of the legal need and examines the business context. It uses its knowledge of the legal market to find the firm that will provide cost-competitive and high quality legal advice. The client is given a list of recommendations and options.

The client can either take the advice of the VGSO or not. It could also choose to ask the VGSO to handle the task of managing the external provider, or help review the firm's performance.

Clients can choose whether to use the VGSO informed purchaser service, however they should consult an informed purchaser either the in-house or the VGSO service before procuring legal services where they are uncertain as to how to approach the market. The VGSO will assist in building informed purchaser competencies in client agencies to make this possible, as shown in Figure 7.3.

Developing informed purchasers

Figure 7.3 Developing informed purchasers

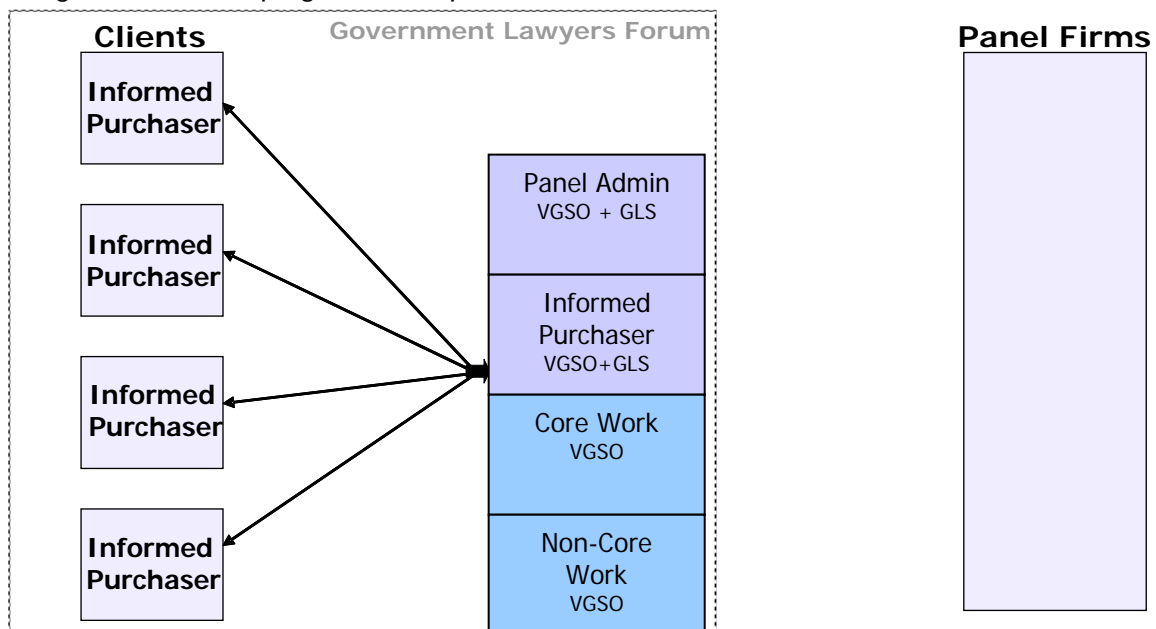


Figure 7.3 shows how the VGSO will interact with each client agency to develop informed purchaser competencies. The legal practice expertise of the VGSO will help it co-define and co-develop legal purchaser competencies with the GLF members and other clients.

The informed purchaser program will be voluntary, but client agencies will probably want to participate because it:

- aims to achieve better and more systematic information on the legal capabilities that could meet their needs
- assists in compiling qualitative feedback to the firms on their services
- will help ensure best practice is followed
- can be coupled with a system for appropriate sharing of legal opinions that would serve whole-of-government interests.

The steps that need to be taken, principally by the client agencies themselves, to implement informed purchasers include:

- identifying who is purchasing legal services across government
- co-defining informed purchaser competencies with this group
- assessing purchasers of legal services against the informed purchaser competencies
- designing strategies to raise the competencies – either through skills development within the agency or through using the informed purchaser service
- developing and implementing a legal risk assessment model
- periodic assessment of the competency model and performance of client agencies against that model.

E. Key takeouts

Chapter 7. Enhancing Panel Administration

- GLS does not possess the legal practice expertise necessary for improved Panel administration and it does not have a system for capturing and sharing legal advice. Rather than developing these functions within GLS the VGSO should take over administration of the Panel.
- The VGSO is best placed to take over because it:
 - has current legal practice expertise and a long term interest in maintaining it
 - is well placed to develop informed purchaser competencies together with client agencies and also to offer an informed purchaser service
 - already has contact with many of the stakeholders involved in government legal procurement
 - has infrastructure that could help enhance the Panel, e.g. a matter management system it might be able to leverage.
- The VGSO should be seen as whole-of-government in-house legal firm rather than a firm competing with Panel members because:
 - it is entirely owned by the State and does not tender to be on the Panel
 - it has no private sector clients
 - its existence is to serve whole-of-government interests.
- It is in the interest of the VGSO to retain and grow the Panel.
- The new Panel Administrator would be an amalgam of the VGSO and GLS and would provide three services:
 - enhanced contract administration
 - an informed purchaser service to client agencies who desire it
 - continual support in the development of informed purchaser competencies in clients.
- In the new arrangements, clients would be able to choose to use the VGSO as an informed purchaser or to go directly to Panel firms for legal matters.
- **Recommendation 19.** The VGSO should take over panel administration.

8. EXTENDING THE PANEL CONTRACT

The objectives of the panel are to achieve cost-competitive, high quality and consistent legal services and advice and to best promote social justice outcomes. By aligning and improving client procurement practices and supporting this through enhanced capacity of the panel administrators and an informed purchaser service the State can boost its performance against the Panel's objectives.

The State has the option of extending the contract from 1 July 2007 for a further two years. Such an extension would allow the above improvements to be made under the current Panel arrangements preparatory for a re-tender by 1 July 2009.

A. Extending the Current Contract

The rationale for extending the Panel arrangements to 1 July 2009 falls under three categories:

1. The current arrangements deliver cost-competitive and high quality legal advice

The present Panel arrangements allow clients to access cost-competitive and high quality legal advice and services.

The Panel rates are cost-competitive, compared to those private sector clients, and do not justify an immediate re-tender.

2. For optimal results, Government procurement should first be improved

There are a number of steps that can be taken now to improve procurement of legal services and the performance of the Panel arrangements.

Establishing a matter management system, improving coordination between client procurement and the Panel, increasing current legal practice expertise in the panel administration, implementation of an informed purchaser model, and the leveraging of VGSO capabilities would further improve the Panel arrangements.

By making the VGSO responsible for panel administration, they would be able to provide an informed purchaser service to client agencies as well as provide enhanced contract administration through its current legal practice expertise and advanced infrastructure.

Client competencies should be developed before they are asked to participate in the selection of a new Panel. In particular, anticipating, quantifying and assessing future legal needs ('demand forecasting') are important to selecting the right mix of firms for the future. The informed purchaser model will allow client agencies to co-develop a demand forecasting competency before a re-tender.

3. Sufficient time must be allowed for the improvements to take effect

For the benefit of all parties the recommended improvements need to be in place and stable prior to any re-tender. Given the nature of the improvements and the necessary training for clients and firms it will take 12 to 18 months before they are fully implemented and stable.

This is not feasible without an extension to the existing contract beyond June 2007. The Panel contract provides the State with an option to extend the Panel for a further two years. Any shorter extension would require a variation to the Panel contract, and the consent of the 35 Panel firms.

An extension of the Panel contract to 30 June 2009 will provide sufficient time for the improvements to the Panel administration to be effective, realign the Panel structure, and properly prepare for what will be a significant re-tender to fully realise the State's legal and social justice objectives while improving the State's buying power.

Recommendation 20

The Panel contract should be extended to 30 June 2009.

B. Reasons for an earlier re-tender

Stakeholders of the Panel suggested the following reasons for why the Panel should be re-tendered as soon as possible:

1. Overhauling the prescriptive Panel structure

Remodelling the General/Specialist categories is one of the options discussed in Chapter 5 Improving Panel arrangements. Such remodelling is important, but not urgent, as:

- the present structure allows clients to access cost-competitive and high quality legal advice
- the apparent under utilisation of Specialist Panel firms does not stem from the component structure alone. The preference of some clients for larger firms, variable procurement practices and the need to develop informed purchasers skills in client agencies are factors which will not be changed by adopting a less prescriptive structure.

2. Moving specific firms onto the Panel

Moving specific firms onto the Panel is an argument propagated by some clients with particular preferences. It is probable that given that a re-tender would still be about limited access to firms in the market in exchange for the benefits of leverage, some clients would still be left wishing particular firms were on the Panel.

3. Realigning the Panel to the market

Given the Panel membership has been reasonably steady for five years an important question is whether the Panel reflects the current market reality

and has enough expertise for clients to effectively satisfy their legal needs. The answer to this question is that clients are able to satisfy most of their legal needs through the present instrument. One reason for this is the Panel's size: contrast the 35 firms that client agencies can choose from with the four firms that BHP employees may use. Where clients are unable to find suitable expertise they have a range of options:

- applying for an exemption through the Panel process
- hiring in-house lawyers
- briefing the bar
- asking to re-tender a particular Panel component.

The first three options do not require a re-tender. The exemption process can be adjusted sooner than a re-tender and provide clients with a viable solution to a lack of expertise on the Panel.

Re-tendering a particular component is not viable given that the Panel contract will end within two years and that the Project and Finance panel was re-tendered in 2005. Firms are attracted to long Panel arrangements (as shown in Chapter 2 Trends in the Legal Market) and such a re-tender would have little leverage and may frustrate firms and diminish the reputation of the Panel.

4. Adding momentum to the Panel concept

A re-tender would help build client interest for the Panel concept by engaging clients in demand forecasting and firm selection, but there are other ways of achieving this engagement. The introduction of the informed purchaser model should engage clients and build the required momentum, without the need for an immediate re-tender.

5. Preventing client capture

Another argument for a re-tender is to prevent 'client capture' and allow non-Panel firms to build expertise that would viably put them in contention for government work in the future. This argument appears to be more theoretical than real. Most client legal work is not easily susceptible to being monopolised by particular firms and many clients sensibly take precautions against over reliance on particular providers.

Client capture does not appear to be a significant threat to the State given the fiercely competitive legal market, but if it were a threat, a re-tender may be suboptimal in addressing it. Even with new firms on the Panel, poor management at the client level could just as easily lead to over-reliance on a particular firm.

Non-Panel firms argue they could be excluded from the Panel because they will be unable to demonstrate relevant Government expertise at time of the re-tender. Experience in State work would be only one selection criterion in any re-tender. The reality is that clients will brief a firm, even if it is inexperienced in government work, provided it is the best in a particular area of law.

It is not feasible to train up all firms in Victoria for potential future government work. The failure of non-Panel firms to succeed in the original tender may mean they will need to work harder to impress selectors when the Panel is refreshed.

6. Reducing the size of the Panel

The final argument for a re-tender is to reduce the size of the Panel. The preceding chapters show that the number of firms on the Panel is too large, and that this creates problems such as frustrating suppliers and reducing leverage. However, the benefits of improved leverage and better relationships with supplier firms can be enhanced if improvements such as using informed purchasers to improve interaction with firms should be implemented before any re-tender.

C. Best practice in re-tendering

Law panel tenders are often focused on price to the detriment of other important considerations. The State has a long-term relationship with the market and other stakeholders, and the tender should be aimed at maintaining this relationship.

The objectives of the re-tender should also match the objectives of the Panel arrangements, that is, to facilitate the provision of cost-competitive, high quality and consistent legal services and advice and to advance social justice. Within these constraints, the tender must be as attractive as possible to the market.

The starting point is clarifying exactly what legal services the State wants from the Panel. This can be achieved through a demand forecast of legal needs.

Table 8.1 Length of panel contracts

Department of Defence	Department of Health and Ageing	Victorian WorkCover Authority	Department of Treasury Queensland	Comcare	Three large companies	Catalyst best practice
3 years with 3 x 2 year options	3 years no options	2 plus 2 year contracts	3 years with a 2 year option	3 years plus 2 year option	3 years with a 2-3 year option	3 years

Table 8.1 shows that extending the contract would make the State Panel longer than many other Panels in the market, and longer than Catalyst Consulting's recommended best practice of three years. While this would make the State out of step with many practices elsewhere, an extension makes the Panel more valuable in the eyes of the market, because of anticipated longevity of the arrangements.

The demand forecast

A demand forecast of legal needs involves the quantification of expected legal needs by clients into the future. The more accurate this process, the more appropriate the Panel composition is likely to be.

As they have the role of preparing the re-tender, the Panel administrators should have the responsibility for coordinating and driving a demand forecast initiative; however client engagement is critical. The level of that engagement should reflect the size of the legal expenditure by an agency. Those who are likely to spend less

than, say, \$100k a year should merely ensure that the type of legal service they need is represented in the re-tender and shouldn't try to forecast the exact value of their expenditure.

The demand forecast should be quantified against the areas of legal expertise required. Either the present component structure can be used for this process, or another one developed. Either option is acceptable, so long as clients and law firms find it easy to understand. Panel firms indicated that some rationalisation of the structure is desirable; the limit being the need for differential fee structures in some areas of law.

The following may provide useful sources of information to feed into a demand forecast:

- trend information on client agency legal expenditure (supplied by GLS)
- forecast of legal needs based on the business plans of the agency
- the last demand forecast, tracked against actual expenditure (once this process is repeated).

The forecast should document expected legal expenditure for each year for five years. This process of forecasting should be repeated each time the Panel reaches a decision point about re-tendering or extension.

Over time forecasts should be compared to actual spending results, and improvements to the process considered.

Tender method

While the demand forecast is being devised, the Panel administrators should be designing a draft tendering method. The tendering method should seek to compile all the information that the State needs for a decision as efficiently as possible and to limit the costs to firms of tendering.

Three factors affect the cost of a tender to firms:

1. what information is sought
2. the length of the tender (in words)
3. the format of the tender.

Left unrestricted, firms will spend enormous effort in producing lengthy, detailed and glossy proposals that are expensive to produce. They do not want to incur these costs, but will do so to beat their competitors. The cost of tendering is then factored into the rates they charge for legal services.

The panel administrators can significantly limit the costs of tendering to firms by implementing limits on the tender and ensuring only the most pertinent material is requested. Some ideas on how to limit work on tenders include:

- page limits
- on-line applications, to avoid desktop publishing
- limits on the format of the tender, to avoid desktop publishing
- set out standard categories of information to be provided for each assignment or matter cited in the track record
- limiting questions to those that actually make a difference in decision-making, based on experiences of past tender processes. For example,

were the CVs important last time? Did the credentialing really differentiate firms?

Case study 6 – The five page tender

In 2006, one of the major Australian banks put out a tender request for law firms that required responses to be five pages or less. Though they may have spent a long time putting together those five pages, it was shorter than usual tenders, saving firms money. On the other side, the bank was confident it could differentiate firms on the basis of this process. The questions in such tenders must be chosen skillfully; otherwise the brevity of the responses makes it hard to differentiate firms.

Feedback

Feedback to all applicant firms, successful and unsuccessful, should be automatic once the selection of firms has been made. In the Project & Finance tender of 2005 GLS offered in a letter the opportunity for firms to receive feedback; 15 out of 25 took this option.

D. Key takeouts

Chapter 8. Extending the Panel Contract

- The State can let the current Panel contract expire on 30 June 2007, extend to 30 June 2009 or seek Panel firm acceptance of a variation of something in between.
- On the whole, the Panel is working well, and a re-tender is not urgent.
- Many potential improvements to the Panel can be made without a re-tender, for example, by loosening the exemptions process for regional firms.
- The improvements to the Panel administration are:
 - implementing the informed purchaser model and service
 - transferring responsibility for panel administration to the VGSO.
- These improvements, done in stages, will take between 12 and 18 months to implement, and require the full attention of the panel administrators.
- As a variation requires consent from 35 Panel firm parties and would vary the timing only by up to 12 months, the benefits of this are outweighed by the cost (to firms and the State).
- In order to allow for key improvements to be made, the Panel should be extended to 30 June 2009.
- Best practice in re-tendering requires:
 - a demand forecast
 - an efficient request for tender (potentially on-line)
 - feedback to successful and unsuccessful firms.
- **Recommendation 20** The Panel contract should be extended to 30 June 2009.

9. CONCLUSION

The Government Panel Contract has been a success, but a few issues have emerged over the four years of its operation that must be resolved to create even better legal outcomes for the State.

There are a number of changes that will improve the outcomes for the State by making the Panel more attractive to firms and aligning legal needs of clients more closely to the market, but there are two major recommendations in this report.

The first is that the Informed Purchaser concept be applied to legal procurement across all agencies. Competencies for legal procurement should be collectively defined, tested across all public servants who procure these services and capabilities upgraded where needed to ensure best practice is applied.

Tied to this recommendation is the Informed Purchaser Service. Where client agencies have too small a legal spend to justify upgrading their skill sets, or where a client agency is accessing an unusual area of the market, a service should be available to match their legal needs to the appropriate legal supplier. The VGSO has the competencies or can quickly develop the competencies to provide the informed purchaser service and help develop informed purchaser competencies in client agencies.

The second major recommendation is that the VGSO take over Panel administration. This recommendation is made because the State should be coordinating its overall legal risk and needs centrally, while allowing significant autonomy to client agencies.

To implement these two recommended changes, and adopt an improved tender process, including a demand forecast and appropriate restructure of the Panel arrangements, time is needed, and therefore the current Panel contract should be extended to July 2009.

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Appendices

Appendix A	Terms of Reference
Appendix B	Summary of Consultations
Appendix C	Expected Outcomes for the State
Appendix D	Panel Firms and Component Structures
Appendix E	Utilisation of the Panel

APPENDIX A TERMS OF REFERENCE

Project Specification For Review of the Legal Services to Government Panel Contract

1. Scope

The scope of the review is covered by the terms of reference agreed to by the Attorney-General. The terms of reference are:

1. **Assessed success in achieving objectives:** To what extent have the whole of government Panel arrangements achieved the provision of competitive, consistent, high quality legal advice to government and how are the Panel arrangements regarded among legal service providers?
2. **Social justice achievements:** To what extent have the Panel arrangements increased the amount of pro bono work undertaken (of the kind approved by the Department) and also increased the briefing of women barristers?
3. **Big picture legal services market:** In the next three to five years, what changes are likely to emerge in how legal services are provided and how, for example, might rationalizations of firms be managed within a Panel framework?
4. **Extend the Panel or re-tender:** Taking account of the work flows of the first three and a half years of the Panel arrangements and also of likely emerging changes, what are the respective benefits of extending the Panel arrangements for another two years from 1 July 2007 or re-tendering? In particular:
 - a. What flexibilities need to be incorporated or implemented to adjust for possible significant changes in government's demand for legal services across the various component areas;
 - b. How should the component areas of law be divided into Panels and how many firms in each area would suffice for competitive pressure;
 - c. Should the Panel arrangements aim at providing a broader distribution of advice from the Panel firms than has been the case so far and, if so, how could this be achieved;
 - d. What experience has there been with other professional services' Panels in using costing methods other than scheduled hourly rates; and
 - e. How might the assessment of firms' performance as undertaken by the monitoring unit, Government Legal Services, be improved, particularly if it was to be used as the basis for removing a firm from the Panel and making space for another firm?

The review is to include consultation with

- key stakeholders including the advisory committee to clarify the scope and extent of service
- client users of the Panel arrangements
- Panel firms and the VGSO
- Non-Panel firms through the Law Institute of Victoria

Make comparative reference to panels for professional services in the private sector and other government agencies.

2. Background

After an interdepartmental inquiry on the costs, quality and consistency of legal services to government, the current Panel arrangements commenced on 1 July 2002 for three years to 30 June 2005. The State exercised its first option to extend the Panel contract to 30 June 2007. The review is expected to be a substantial input into the decision making process of whether to re-tender or to exercise the second option to extend the contract to 30 June 2009.

Under the Panel arrangements, Departments must use the Panel firms or the VGSO for the provision of legal services except for, certain core government legal services that the VGSO is required to provide on an exclusive basis; or any legal services that have been exempted by the Executive Contract Manager.

Legal services are grouped under 9 broad Component areas of law:

1. Property;
2. Commercial Law;
3. Project and Finance;
4. Litigation;
5. Employment Law;
6. Administrative Law and Government;
7. Intellectual Property and Technology Law;
8. Resources; and
9. Other Legal Services.

Each Component area consists of several Sub-Components for which the Panel firms have been selected to provide legal services on the basis of demonstrated relevant legal expertise.

All Panel firms and the VGSO are committed to the furtherance of equal opportunity in their work practices (including work allocation) and in briefing barristers. They must also comply with model litigant principles when acting on behalf of Departments. Each Panel Member has also committed to provide pro bono services of at least 5% of the value of the legal fees they derive under the Panel arrangements.

At a whole of government level the Manager, Government Legal Services, manages the arrangements. At a departmental level the arrangements will be co-ordinated by a Departmental Legal Services Contract Manager. Generally this person will be the Department's senior lawyer, who will also be responsible for providing input to strategic policy and operational directions for the new arrangements as a member of the Government Lawyers Forum.

The review will evaluate the effectiveness of the Panel arrangements in providing legal services to government and also the effectiveness of the service level agreement and the means of monitoring and reporting on the Panel arrangements.

3. Deliverables

The deliverable is to provide a report on the terms of reference that provides:

- an assessment of the success or otherwise of the Panel arrangements against its stated objectives, including recommendations for improvements to the

Panel arrangement management (referred to in terms 1, 2 and 4 (e) of the TOR)

- guidance into the decision making process as to whether to re-tender or extend the current arrangement for a further two years (referred to in terms 3 and 4 of the TOR)
- a description of the methodology and criteria used for making the assessment as a basis for ongoing benchmarking, performance management and reporting under the Panel arrangement.

The report is to cover but not limited to the following aspects:

- Panel Arrangement structure
 - Is the existing structure of the panel contract and service level agreement effective, in particular:
 - Classification of work types (reference to the components and sub components)
 - Break up between generalist and specialist Panel firms
 - Choice of Panel firms
 - Distribution of work across the Panel firms
 - Rates and project fees
 - Contractual obligations to meet objectives in equal opportunity, pro bono, and model litigant guidelines
 - Cost effective and appropriate governance, performance management and reporting requirements
- Utilisation of the Panel
 - The percentage of the total legal work undertaken in-house and from Panel providers
 - The trigger points to use the Panel providers
 - From the Panel Firm's perspective, how well does the client understand the extent of the legal issues involved
- Managing conflict of interest matters
 - Have the necessary strategies, systems and processes in place to identify and mitigate the risk
 - Proper disclosure to client
- How is the Panel arrangement regarded among the service providers
 - Client satisfaction survey results
 - Use and costs of the Panel over the period 1 July 2002 to 31 March 2006 by the clients
 - Level of understanding of the Panel arrangements, contract, guide and service standards
 - Exemptions applied for and number approved
 - Value for money
- Social Justice objectives
 - To what extent have the Panel arrangements influenced the supply of pro bono legal services by Panel firms - has there been an increase in the level of pro bono legal services in the types of areas characterised as Approved Causes or are firms attributing work that would have been done regardless to satisfy their contractual obligations

- Is there a genuine mix of old and new pro bono, the latter being the types of relationships/partnerships which are encouraged by the Guidelines
 - Does the pro bono commitment distort the cost of legal services
 - Approved causes are prescriptive but shaped as a result of each firms' culture and interests etc – has this worked in getting firms to deliver pro bono programs that address areas of disadvantage
 - Do all Panel firms understand and apply the Guidelines to meeting their contractual obligations in a manner which gives them flexibility in determining the areas of their involvement
 - What indicators could be used to measure achievement in the areas of pro bono and equal opportunity in the workplace
 - Equal opportunity in the workplace is self-assessed and Panel firm reports are narrative in style responding to a wide range of indicators of equal opportunity– rather than based on quantitative data - how useful is this in raising awareness and encouraging equal opportunity initiatives in the workplace.
- Costs and managing costs
 - From the client's perspective when does the cost matter i.e. when are costs a significant constraint and when are they not.
 - How well do clients understand what they are seeking from the Panel firm and what services they require – how are these reflected in the costs
- Access
 - Availability
 - Expertise within the firm
 - Communication with client
 - Thinness of the market, particularly matters involving major infrastructure projects
 - How effective is the method of granting exceptions to the use of the Panel arrangement in dealing with the thinness of the market
- Capability and capacity
 - Turnover of key personnel i.e. how does the movement of key personnel impact on the effectiveness of the Panel arrangement
 - How important is the government work to the Panel firms. What is the motivation of the Panel firms to be part of the Panel arrangements.
- Understanding of Business needs, risks and drivers of the client and meeting these needs
 - Demonstrated knowledge and understanding of the client's legal risks, business and corporate intent
 - Seen as adding value – looks beyond the legal issue before them – able to conceptualise, put in context
 - Understanding of the additional accountabilities of government
 - What has been the impact of the model litigant guidelines on the Panel firms

APPENDIX B SUMMARY OF CONSULTATIONS

Beaton Consulting would like to thank the law firms, social justice partners, clients and other stakeholders who generously donated their time to help make this Review a success.

Table B.1 Summary of all consultations

Stakeholder	People interviewed	Submissions received	Focus group participants
Clients	19	5	
Firms	3	20	37
Social Justice Partners		4	
Benchmarked Panels	10		
TOTALS	32	29	37

Table B.1 shows that the consultations for the Review comprised of 32 interviews, 29 written submissions and 37 participants in 3 focus group sessions.

Table B.2 RSVPs to focus groups at the Law Institute of Victoria

Person	Organisation	Panel involvement
Mr Martin Bruckard	Australian Government Solicitor	Non-Panel
Ms Sheri Pickering	Baker & McKenzie	Non-Panel
Mr Bradley Vann	Clayton Utz	General
Ms Julie Van Dort	Coadys Barristers & Solicitors	Non-Panel
Mr Michael McDonald	Corrs Chambers Westgarth	General
Ms Emily Merrett	D.E. Jones & Associates / KCI Lawyers	Non-Panel
Mr Robert Bradford	Deacons	General
Mr Peter Francis	Francis Abourizk Lightowlers	Specialist
Mr Andrew Plaskett	Freehills	General
Mr Bart Leslie	Freehills	General
Mr Cameron Roberts	Frenkel Partners	Specialist
Mr David Brahe	Garland Hawthorn Brahe	Non-Panel
Mr Karl Rozenbergs	Hall & Wilcox	Specialist
Mr William Fazio	Herbert Geer & Rundle	Non-Panel
Mr John Bushby	Herbert Geer & Rundle	Non-Panel
Mr Howard Rapke	Holding Redlich	General
Mr Chris Lovell	Holding Redlich	General
Ms Ashley Pelman	Hunt & Hunt	Non-Panel
Ms Sarah Rey	Justitia	Non-Panel
Mr Michael Hazell	Kelly Hazell Lawyers	Non-Panel
Mr Brendan C Kelly	Kenna Teasdale Lawyers	Specialist
Mr Michael Brett Young	Law Institute of Victoria	Non-Panel
Mr James Smart	Maddocks	General
Mr Brendan Reidy	Mahonys	Non-Panel
Mr Rui de Lemos	Mahonys	Non-Panel
Mr Andrew Fairbank	McMahons National Lawyers	Non-Panel
Mr Robert Turnbull	McMahons National Lawyers	Non-Panel
Mr Laurence Dalton	Mercer Legal Pty Ltd	Non-Panel
Mr Michael Tehan	Minter Ellison	General
Ms Lee Newnham	Moores Legal	Non-Panel

Person	Organisation	Panel involvement
Mr Chris Edquist	Phillips Fox	General
Mr Victor Harcourt	Russell Kennedy Solicitors	General
Mr Paul Mentor	Sparke Helmore	Specialist
Ms Anne Dalton	Sparke Helmore	Specialist
Ms Jenny Willcocks	TurksLegal	Non-Panel
Mr Christopher Galagher	White Cleland Pty	Specialist
Mr Steve White	White SW Computer Law	Non-Panel
Mr Euan Luff	Wilmoth Field Warne	Non-Panel
Ms Vicki Carter	Wisewoulds	Specialist

Table B.2 shows people who submitted RSVPs to attend focus group sessions run by Beaton Consulting at the Law Institute of Victoria on 18 August. Nearly all people who sent RSVPs attended.

Table B.3 Written submissions received

Organisation	Panel involvement
Blake Dawson Waldron	General
Clayton Utz	General
Corrs Chambers Westgarth	General
Deacons	General
Ebsworth & Ebsworth	Specialist
FOI Solutions	Specialist
Francis Abourizk Lightowlers	Specialist
Freehills	General
Frenkel Partners	Specialist
Hall & Wilcox	Specialist
Holding Redlich	General
Ligeti Partners	Specialist
Maddocks	General
Mallesons Stephen Jaques	Specialist
Minter Ellison	General
Nevett Ford (NF Legal Pty Ltd)	Specialist
Norton Gledhill	Specialist
Phillips Fox	General
Rigby Cooke Lawyers	Specialist
Sparke Helmore	Specialist
Wisewoulds	Specialist

Table B.3 shows the firms that submitted written submissions on the Panel arrangements.

Table B.4 Individuals interviewed outside of the focus group sessions

Person	Organisation
Mr Brian Ward	Brian Ward & Partners
Mr Emilios Kyrrou	Mallesons Stephen Jaques
Mr Philip Gleed	Rigby Cooke Lawyers

The individuals from law firms indicated in Figure B.4 were interviewed outside of the focus group sessions.

Four organisations which work with the Panel's social justice arrangements provided written submissions:

1. Federation of Community Legal Centres (Vic) Inc
2. National Pro Bono Resource Centre
3. Women Barristers Association.
4. Public Interest Law Clearing House.

Table B.5 In-depth interviews with government stakeholders

Person	Organisation
The Hon. Robert Hulls MLA	Attorney-General
Mr Andrew Lyons	Department for Victorian Communities
Mr Kevin O'Brien	Department of Education & Training
Ms Louise Johnson	Department of Human Services
Ms Shelley Marcus	Department of Infrastructure
Mr Bob McDonald	Department of Infrastructure
Mr Brian Corney	Department of Innovation, Industry & Regional Development
Mr Adrian Shavitsky	Department of Innovation, Industry & Regional Development
Ms Penny Armytage	Department of Justice
Ms Liz Eldridge	Department of Justice
Mr Rupert Burns	Department of Premier & Cabinet
Ms Marisa Patitucci	Department of Premier & Cabinet
Ms Giovanna Tirifiny	Department of Primary Industries
Mr Stuart Atkins	Department of Primary Industries
Ms Kirsty Douglas	Department of Sustainability & Environment
Mr Ian Gibson	Department of Treasury & Finance
Mr Steve Gleason	Victoria Police
Mr Findlay McRae	Victoria Police
Mr John Cain	Victorian Government Solicitor's Office
Ms Marlo Baragwanath	Victorian WorkCover Authority

An in-depth interview, about one hour long, was conducted with each of the people listed in Table B.5. In addition to these interviews, the following client agencies made written submissions in relation to the Panel arrangements:

- VENCORP
- GSO
- Park's Victoria
- State Trustees
- Building Commission.

Table B.6 Organisations benchmarked on panel arrangements

Organisation	Sector
Department of Defence	Public
Department of Health and Ageing	Public
State Solicitor's office Western Australia	Public
Victorian Workcover Authority	Public
Queensland Crown Solicitor	Public
Department of Treasury Queensland	Public
New South Wales Attorney-General's Office	Public
Comcare	Public
BHP	Private
NAB	Private
Telstra	Private
Westpac	Private

Table B.6 shows the organisations which contributed to the Review for benchmarking purposes. Either GLS or Beaton Consulting interviewed most over the phone.

Table B.7 Government Legal Services

Person	Organisation
Mr Peter Galeotti	Department of Justice
Ms Margaret Fried	Department of Justice
Mr Robert Reid Smith	Department of Justice
Ms Heather Cook (by email)	Department of Justice

Table B.7 shows the members of GLS. GLS contributed to the Review by providing primary material, advice and other support for the process. Interviews were conducted with each member at the beginning of the Review process.

Table B.8 Members of the Advisory Committee

Person	Organisation
Mr Ian Gibson	Department of Treasury & Finance
Ms Louise Johnson	Department of Human Services
Ms Shelley Marcus	Department of Infrastructure
Ms Liz Eldridge	Department of Justice

Table B.8 shows members of the Advisory Committee. The Committee met on 31 July and again on 30 August. A final meeting is scheduled on 18 October.

APPENDIX C EXPECTED OUTCOMES FOR THE STATE

The State has identified the Outcomes that it requires of the Panel. A commentary in relation to the intended role of Panel firms in achieving each Outcome is provided below.

Outcome	Commentary
High quality Services provided in a timely manner, cognisant of the Public Sector environment.	The State operates in a dynamic environment requiring high standards of public accountability and probity. Services must be of the highest quality in order to withstand public scrutiny. Many matters require urgent attention to meet externally imposed deadlines. The State requires its Panel Members to be cognisant of its environment and able to deliver high quality Services, often at short notice.
Knowledge is shared between Departments to ensure consistency in advice received and minimal duplication of effort.	The State is seeking consistent legal advice from Panel Members across Departments. The State intends to implement procedures for sharing of knowledge between Departments. Panel Members will be expected to facilitate this process.
The State is able to maximise economies of scale and purchasing leverage in the procurement of legal services.	<p>The level of expenditure by Departments on legal services provided by private sector legal firms is significant, and totalled in excess of \$35m for the 1998-99 financial year. Approximately 75 legal firms provided services at that time.</p> <p>By reducing the number of providers of legal services to Departments, the State anticipates increased opportunities for Panel Members to provide high quality Services at competitive rates.</p> <p>The State will endeavour to provide Panel Members with access to opportunities to provide Services over the term of its membership of the Panel Contract.</p>
A sufficient number and range of firms are represented on Panels to provide real choice for Departments, but Panels are not so large as to be unworkable.	<p>Whilst limiting the number of Panel Members servicing each Component, the State is seeking a balance between General and Specialist Panel Members to ensure that Departments have quick and flexible access to Services.</p> <p>It is expected that the successful Tenderers will have nominated a suitably qualified and dedicated team to provide the Services to the State for the term of the Panel Contract.</p>
There is a commitment to pro bono services supported by a coherent policy framework.	Under the terms and conditions of the Panel Contract, Panel Members will be required to undertake or support pro bono services. Tenderers must nominate in their Tender the value of work, calculated as the percentage of fees billed under the Panel Contract they intend to commit to pro bono services.
Panel Members demonstrate their planning and commitment to equal opportunity in their employment practices.	The State is strongly committed to equal opportunity. The State expects Panel Members to have equal opportunity policies and procedures in place commensurate with the size of the firm, and for these to be subject to regular review. The State further expects that Panel Members will demonstrate progress in relation to their equal opportunity plan over the life of the Panel Contract.

Outcome	Commentary
<p>Panel Members adopt and adhere to Victorian Government Policies in the delivery of Services.</p>	<p>The State expects Panel Members to adhere to Government Policies generally in the delivery of Services and in particular:</p> <ul style="list-style-type: none"> • To adopt briefing practices that ensure equality of opportunity; and • To conform with the Government's obligation to act as a model litigant.
<p>Corporate knowledge is retained by Panel Members through retention of key staff over the life of the Panel Contract.</p>	<p>The State expects that Panel Members will ensure continuity in Service provision and retention of corporate knowledge acquired over the life of the Panel Contract. The State expects that Panel Members will endeavour to retain key staff at the partner and senior associate level responsible for the provision of Services to Departments.</p>
<p>An exceptional quality of performance is maintained by Panel Members throughout the life of the Panel Contract.</p>	<p>The State expects that the performance of Panel Members will be exceptional for the full term of the Panel Contract. The State intends to institute robust contract management and audit arrangements to regularly monitor Panel Member performance, with a formal review conducted on an annual basis. Ongoing mechanisms will be employed to remove non-performing members of the Panels as part of the annual review process.</p>
<p>Protocols and procedures are adopted to maintain confidentiality and avoid conflict of interest.</p>	<p>The State expects high standards of professional conduct from Panel Members and will enforce strict compliance with requirements for dealing with conflict of interest. Failure to comply with these requirements may result in the removal of a Panel Member.</p>

APPENDIX D PANEL FIRMS AND COMPONENTS

There are 35 law firms on the Panel, 10 General Panel firms and 25 Specialist Panel firms. General Panel firms must deliver services across at least five components while Specialist Panel firms typically deliver services across no more than two.

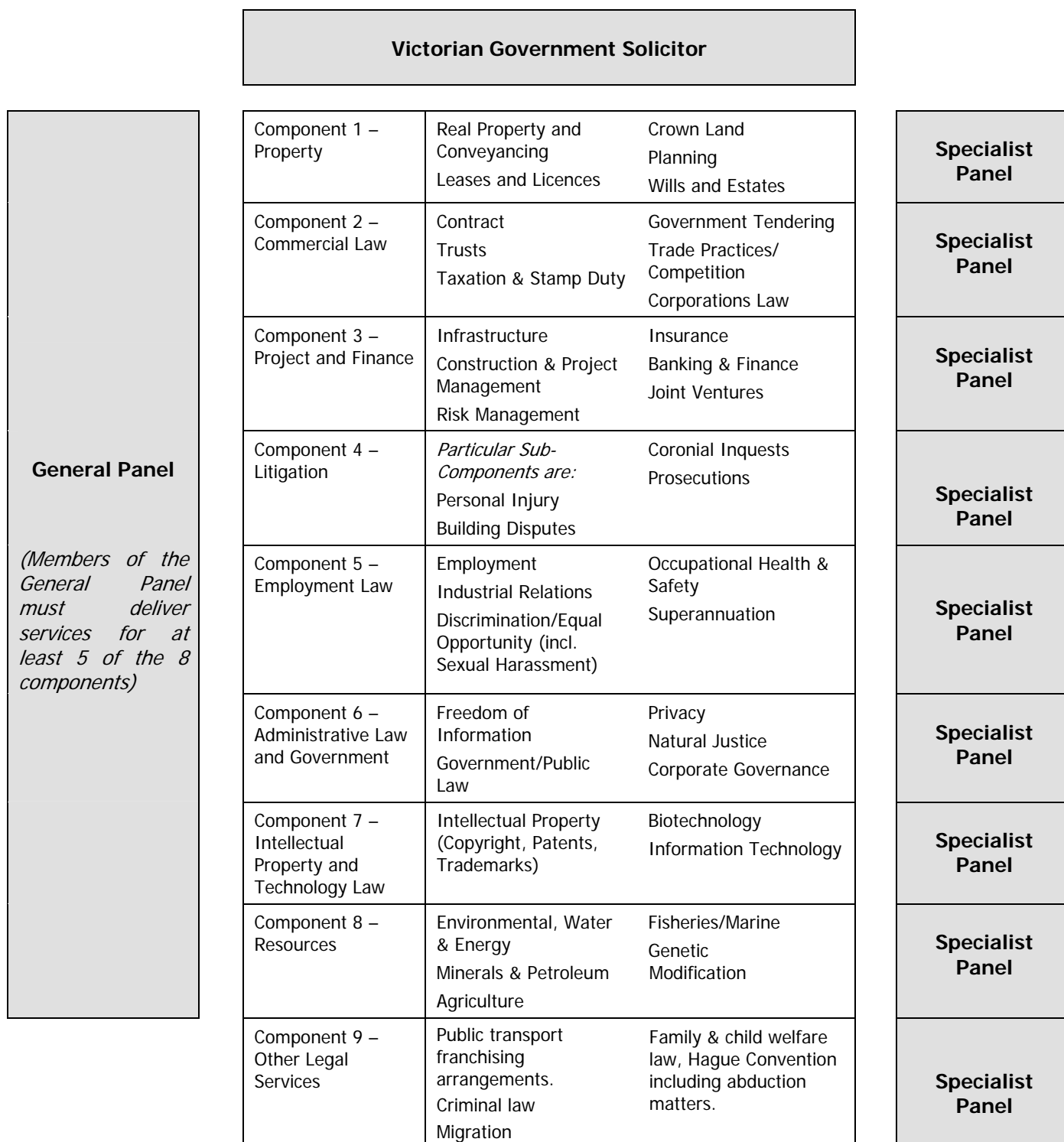
General Panel firms

- Blake Dawson Waldron
- Clayton Utz
- Corrs Chambers Westgarth
- Deacons
- Freehills
- Holding Redlich
- Maddocks
- Minter Ellison
- Phillips Fox
- Russell Kennedy.

Specialist Panel firms

- Allens Arthur Robinson
- Berry and Associates
- Brian Ward and Partners
- Dawes and Vary
- Ebsworth and Ebsworth
- Francis Abourizk Lightowlers
- Frenkel Partners
- FOI Solutions
- Hall and Wilcox
- Kenna Teasdale
- Kennedy Wisewoulds
- Ligeti Partners
- Logie-Smith Lanyon
- Mallesons Stephen Jaques
- Maurice Blackburn Cashman
- Middletons
- Nevett Ford
- Norton Gledhill
- Rigby Cooke
- Ryan Carlisle Thomas
- Sparke Helmore
- TressCox
- Tait Leishman Taylor
- White Cleland
- Wisewoulds.

Figure D.1 Component / sub-component structure of the Panel³⁸



³⁸ This diagram was supplied by Government Legal Services.

APPENDIX E UTILISATION OF THE PANEL

Table E.1 Client agencies of the panel arrangements

Organisation	Abbreviation
Department of Infrastructure	DOI
Department of Justice	DOJ
Department of Human Services	DHS
Department of Education and Training	DET
Department of Sustainability and the Environment	DSE
Victoria Police	VP
Department of Treasury and Finance	DTF
Department of Primary Industries	DPI
Victorian WorkCover Authority	VWCA
Department of Innovation, Industry and Regional Development	DIIRD
State Trustees	ST
Parks Victoria	PV
Department for Victorian Communities	DVC
Building Commission	BC
Department of Premier and Cabinet	DPC
Victorian Energy Networks Corporation	VENC
Emergency Services Super	ESS
Victorian Institute of Forensic Medicine	VIFM
Adult Multicultural Education Services	AMES
Business Licensing Authority	BLA
Victoria Legal Aid	VLA
Melbourne & Olympic Parks Trust	MOPT
Motor Car Traders Guarantee Fund Claims Committee	MCTGFCC
Anti-Cancer Council of Victoria	ACCV
Victorian Law Reform Commission	VLRC

Chart E.1 Panel expenditure over 4 years (Legal fees only – Panel firms and VGSO)

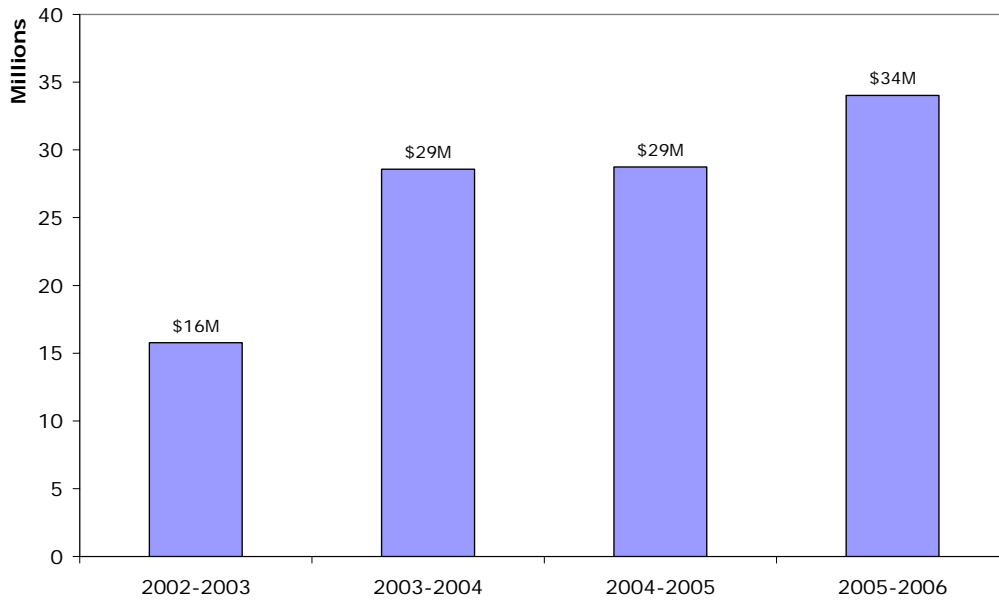


Chart E.2 Expenditure by client agency on panel firms and the VGSO: 2005/06

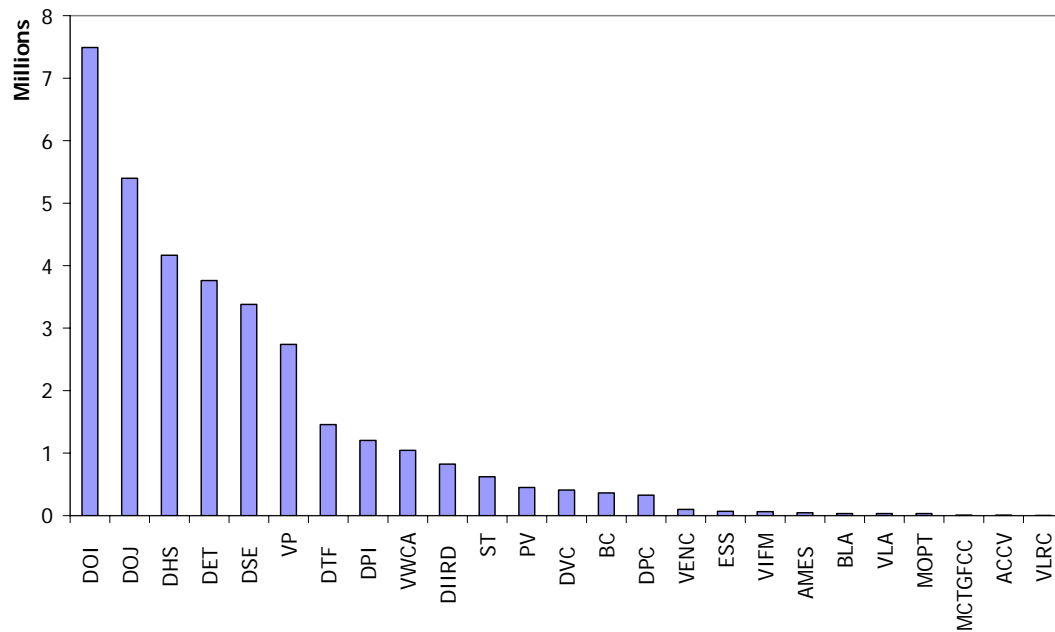


Chart E.3 Expenditure by component area: 2005/06

