



THE  
VICTORIAN  
BAR



7 August 2009

Mr Peter Hallahan  
Secretary  
Senate Legal & Constitutional Affairs References Committee  
PO Box 6100 Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan,

**Inquiry into Access to Justice: Supplemental Submission**

Thank you for the opportunity to make a Supplemental Submission following my appearance at the Senate Committee Hearing in Melbourne on 15 July 2009.

Specific matters on which the Victorian Bar was asked to make a Supplemental Submission were:

- a) Nett and gross income figures for barristers;
- b) Opinion or view on rationalisation of legal aid/assistance bodies;
- c) Indication of appropriate rates of pay (if possible); and
- d) If the Bar considers there are any emerging issues regarding regional areas having inadequate access to lawyers.

I attach a paper which deals with each of these issues in turn.

The Bar also wishes to take this opportunity to reiterate two important points. First, the Victorian legal profession is heavily engaged in pro bono work and has well established mechanisms in place to facilitate the provision of pro bono services. Pro bono work is however, in no way an adequate substitution for adequate legal aid funding.

Secondly, the current inadequacy of legal aid is a major impediment to access to justice and of major concern to every Australian legal practitioner.

Yours faithfully,  
**JOHN DIGBY QC**  
Chair  
Victorian Bar Council

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## SENATE COMMITTEE RESPONSES

### **Question 1: Request for Information about Barristers Nett and Gross income in the Lowest Category**

Attachment 1 shows the gross fees (including clerk's commission but excluding GST) for barristers doing 90% or more criminal law who earn up to \$50,000.

The Bar does not have figures showing actual nett income for barristers. However, the Pricewaterhouse Coopers Report deducts 35% of gross earnings for operating expenses. (p13) That would leave a nett income of \$32,500.

Attachment 2 shows a projection of Effective Annual Income for Barristers doing VLA criminal cases. That shows at best, a barrister who worked for a year doing VLA funded Magistrates Court Criminal cases would at best nett \$36,363.

Attachment 3 is a comparison of the effective annual earnings of lawyers in various fields of practice. Barristers doing legally aided criminal defence work are in the lowest category in each of the income bands. That level of income is no more than 60% of the average salary of their professional peers at each level.

The most worrying finding in the PricewaterhouseCoopers Report is the sharp decline in the number of barristers doing criminal defence work. Attachment 1 shows the sharpest decline in the lowest category (59% over the three year period) and 26% decline overall. Existing criminal barristers are cutting back and they are not being replaced by barristers entering the field. The low level of fees paid by VLA provides an obvious explanation for this decline. This raises a very serious immediate long-term question for both Federal and State Governments. How will government deliver quality criminal defence counsel for the most needy section of the community?

**Question 2: Opinion or view on rationalisation of legal aid/assistance bodies.**

The Bar is not aware of this having been an issue. The Legal Aid Commissions in each of the States and Territories seem to provide a reasonable co-ordination point for the delivery of legal aid services. Both Commonwealth and State cases are administered through the one Commission in each of the States and Territories. This seems to be a rational approach to the delivery issues.

There is a funding issue at the moment, on account of the Commonwealth's failure to reach agreement with the Victorian Legal Aid Commission, for example. The Victorian Legal Aid Commission has notified the Commonwealth of its intention to terminate the agreement. It would not seem to be efficient for the Commonwealth to set up a separate entity to administer Commonwealth legal aid.

**Question: Indications of Appropriate Rates of Pay**

Attachment 4 shows the extent to which VLA rates of pay have fallen below the CPI over the period 1993 to 2007.

Attachment 3 shows the average salary paid to junior, mid-career and senior lawyers. Fees paid to barristers should annualise to these average salaries levels. The averages correspond, pretty nearly, to the salaries paid to police prosecutors in the Magistrates' Court, crown prosecutors in the County Court, and senior crown prosecutors in the Supreme Court.

**Question: Are there problems servicing regional Victoria arising due to an increase in lack of solicitors in some regional and rural areas?**

The Bar is well placed to service the *litigation* needs of people living in rural and remote areas of Victoria. Barristers regularly travel to regional courts for circuits. Barristers are more flexible than solicitors in this respect because they do not have the overheads of maintaining offices in those areas. On the other hand, Barristers do not offer the full range of services or the permanence of a local solicitor's office. The flexibility of Barristers' services, however, could

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be utilised by commissioning them to provide circuit advice and referral services as well as court representation. Local court facilities could be utilised at times when the courts were not sitting.

**ATTACHMENT 1**

# Description of service need

## Underlying performance constraints

Barristers who specialise in criminal law will predominantly represent legally aided clients. This is especially true in the Country and Supreme Courts where majority of cases are funded by VLA. There is a small pool of privately funded cases, but these cases will predominantly be dealt with by a small group of highly specialised barristers.

According to the Legal Practitioners Liability Committee, of the 1,600 barristers in Victoria approximately 216 do more than 90% criminal work. This cohort can therefore be assumed to do predominantly legal aid work as this is the source of majority of the work available to them. However, many barristers who undertake legal aid work combine this with family law, or other areas of the law, and therefore would not be included in the 216, which are primarily criminal barristers. Importantly the decision to diversify legal practices is primarily based on the economic reality that in order to support the legal aid system there is a degree of cross subsidisation which is required as the returns are simply not sufficient in criminal law.

As can be seen in Table 1 opposite the number of barristers that do 90% criminal work has been declining steadily over the last three years, and has declined by 26% overall. A small part of this can be attributed to an increase in fees and therefore some barristers have moved up the bracket. However as Section 3 investigates, the fee increase has been minimal over this period and could only account for a negligible portion of the movement. The decline in criminal barrister numbers is particularly evident in the three lower income sectors of the market, who make up 73% of the total and would do predominantly legal aided cases. The average fees collected by these lower sectors of the market have been less than \$80,000 per annum, assuming average expense of 33.5% (per the ABS), this translates to an income of less than \$53,200. Despite being charged with the responsibility of upholding the criminal justice system, these barristers are expected to achieve an economic return equivalent to the average wage.

**Table 1. Change in barristers undertaking 90% or more criminal work 2005-2008**

Annual Fees	2005/06	2006/07	2007/08	Total % change
\$0 - 50,000	95	61	39	-59%
\$50,000 - \$100,000	104	90	81	-22%
\$100,000 - \$150,000	70	65	56	-20%
\$150,000- \$200,000	29	33	30	3%
\$200,000 +	50	47	52	4%
	<b>348</b>	<b>296</b>	<b>258</b>	<b>-26%</b>

Source: Legal Practitioners Liability Committee

As demonstrated in Table 1, the pool from which VLA can employ criminal barristers has been declining markedly over the last three years. This has been confirmed by other research as part of a study of private legal practitioners in the provision of legal aid services in Australia conducted by TNS for the Commonwealth Attorney General's Department. This could be attributed to barristers moving away from wholly criminal practices, or diversifying their practice and therefore undertaking fewer criminal cases. This decline could also indicate that those joining the Bar are not choosing a criminal specialisation. As junior barristers are the future pool of resources for legal aid, a drop in numbers now results in ongoing shortages at all levels of experience well into the future. This is a significant issue for the future of the criminal justice system generally. To the extent that the criminal law declines as an area of specialisation and the financial rewards associated with the criminal process decline, the problem will increase.

*Barristers who undertake 90% or more criminal work have been declining in number over the last three years*

**ATTACHMENT 2**

# Effective annual income of VLA funded barristers 2007

Magistrates Court			
Procedure	No. of procedures p.a.	Fee per procedure	Total
Mention	4	\$116	\$464
Adjournment	20	\$200	\$4,000
Contest mention	10	\$208	\$2,080
Contest mention-resolved as a plea	15	\$408	\$6,120
Consolidated contest mention	15	\$436	\$6,540
Plea	90	\$301	\$7,090
Consolidated plea	15	\$360	\$5,400
Bail application	25	\$301	\$7,525
Sentence	3	\$200	\$600
Contest	10	\$420	\$4,200
Contest - resolved as pleas	10	\$368	\$3,680
Committal mention	3	\$286	\$858
Committal - day 1	10	\$665	\$6,650
Committal - subsequent day(s)	7	\$600	\$4,200
<b>Total procedures</b>	<b>237</b>		<b>\$79,407</b>
Total days in court	220		
Less 20% contingency			\$15,881
Less GST			\$5,775
<b>Gross income</b>			<b>\$57,751</b>
Less 37% operating expenses			\$21,368
<b>Nett income</b>			<b>\$36,383</b>

County Court			
Procedure	No. of procedures p.a.	Fee per procedure	Total
Trial - day 1	30	\$1,240	\$37,200
Trial-subsequent day(s)	80	\$845	\$67,600
Plea - day 1	30	\$676	\$20,280
Plea-subsequent day(s)	20	\$396	\$7,920
Bail application	2	\$615	\$1,230
Appeal	12	\$615	\$7,380
Breach	5	\$615	\$3,075
Directions/mentions/callovers	40	\$203	\$8,120
Case conference	25	\$354	\$8,850
Sentence	40	\$248	\$9,920
Conference - 5 hours	30	\$720	\$21,600
Conference - 3 hours	15	\$432	\$6,480
<b>Total procedures</b>	<b>329</b>		<b>\$199,655</b>
Total days in court	220		
Less 20% contingency			\$39,931
Less GST			\$14,520
<b>Gross income</b>			<b>\$145,204</b>
Less 37% operating expenses			\$53,725
<b>Nett income</b>			<b>\$91,479</b>

Supreme Court			
Procedure	No. of procedures p.a.	Fee per procedure	Total
Trial - day 1	12	\$1,690	\$20,280
Trial-subsequent day(s)	126	\$1,352	\$170,352
Plea - day 1	12	\$958	\$11,496
Plea-subsequent day(s)	1	\$620	\$620
Bail application	5	\$620	\$3,100
Section 5 hearing	9	\$502	\$4,518
Directions/mentions	24	\$271	\$6,504
Sentence	12	\$338	\$4,056
Conferences- 5 hours	12	\$1,435	\$17,220
Conference - 3 hours	4	\$615	\$2,460
<b>Total procedures</b>	<b>217</b>		<b>\$240,606</b>
Total days in court	175		
Less 20% contingency			\$48,121
Less GST			\$17,499
<b>Gross income</b>			<b>\$174,986</b>
Less 37% operating expenses			\$64,745
<b>Nett income</b>			<b>\$110,241</b>

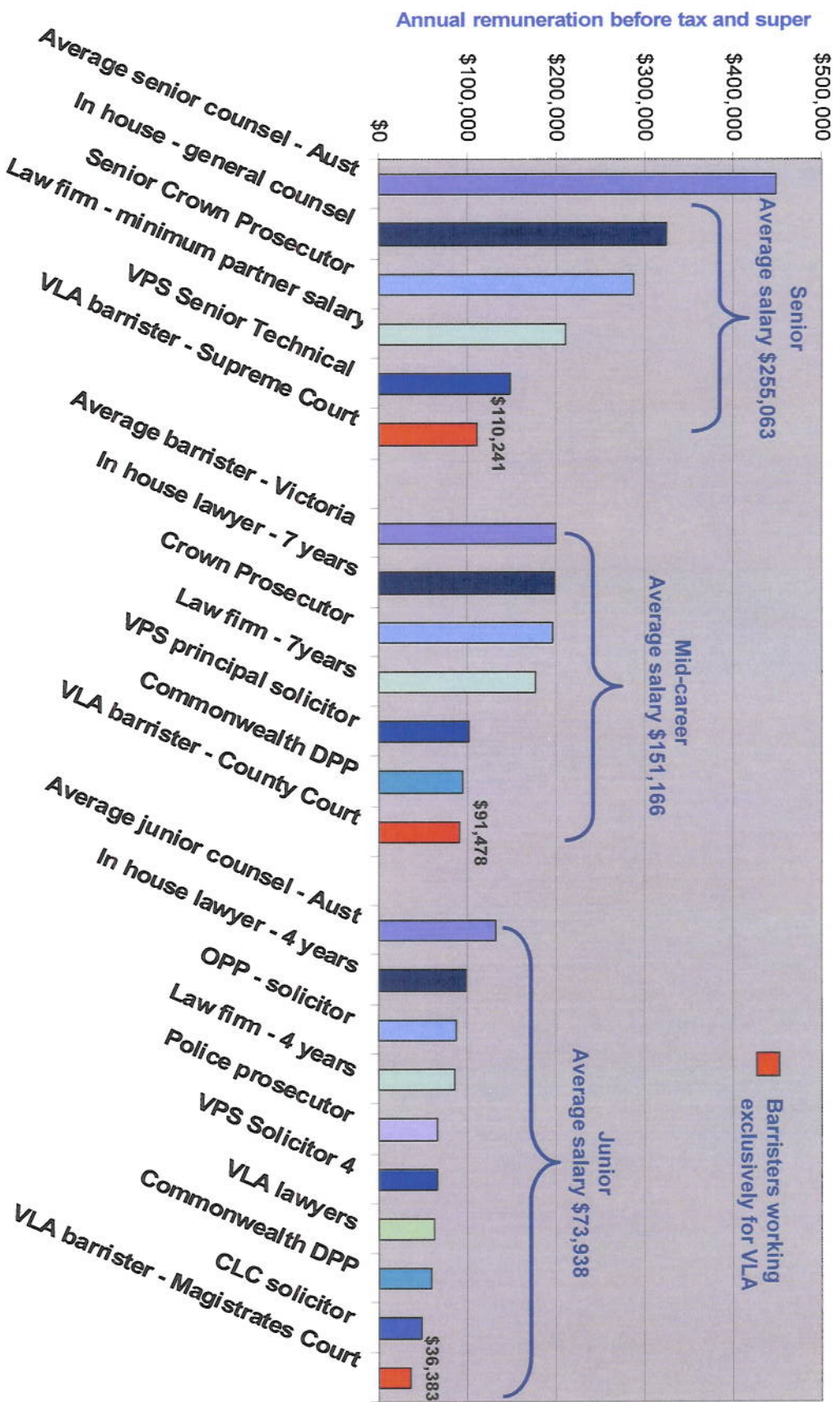


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**ATTACHMENT 3**

# Pay comparisons

Figure 4. Comparison of effective annual earnings (total value of packages) between legal professionals



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**ATTACHMENT 4**

# VLA criminal barristers' fees

VLA funded barristers' fees have declined in real terms over the past 15 years in all court jurisdictions

## Current fees

Currently VLA criminal barristers are paid fees for the various services they perform in court, conferences and some preparation time (albeit via the various solicitors engaging them). The fees vary for each court jurisdiction and reflect the time allocated for a procedure by VLA and its significance in the legal process.

## Change of fees over time compared to inflation

Over recent years the fees paid by VLA to barristers have increased sporadically. Set out below and opposite are comparisons of how these fees have changed over time in relation to inflation during this period as measured by the CPI and the costs incurred by barristers (see end note below). The change in the fees has been weighted according to the size of the fee and how many of each procedures a barrister would normally undertake in a year, according a report compiled by Vic Bar.

The VLA fees paid to barristers in the County Court saw a significant increase in some fees in 2000. However, when tracked back to 1993 and compared to inflation this can be seen to be a correction in the fee levels that had fallen well below inflation in the previous years. Moreover, decreases in fees for long trials have offset the fee increases for more serious cases. In recent years the fees have stagnated again falling below CPI.

Figure 2. Comparison of change in VLA County Court fees with CPI and costs

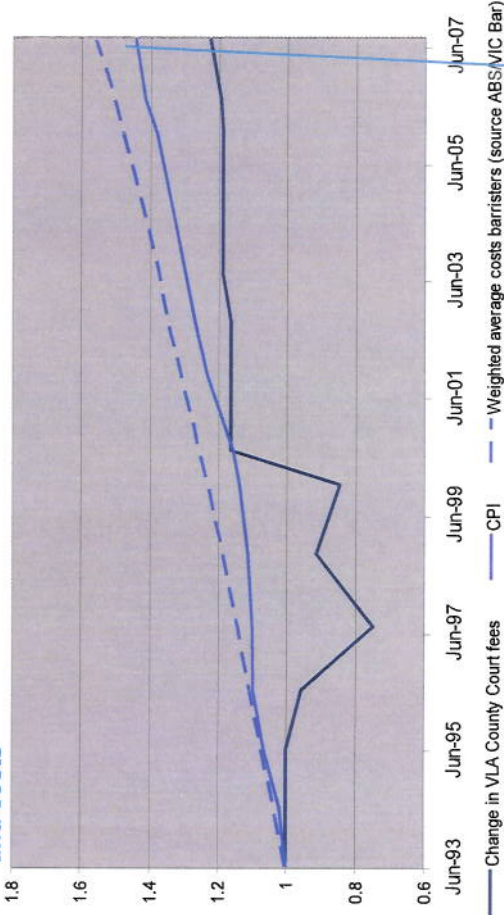
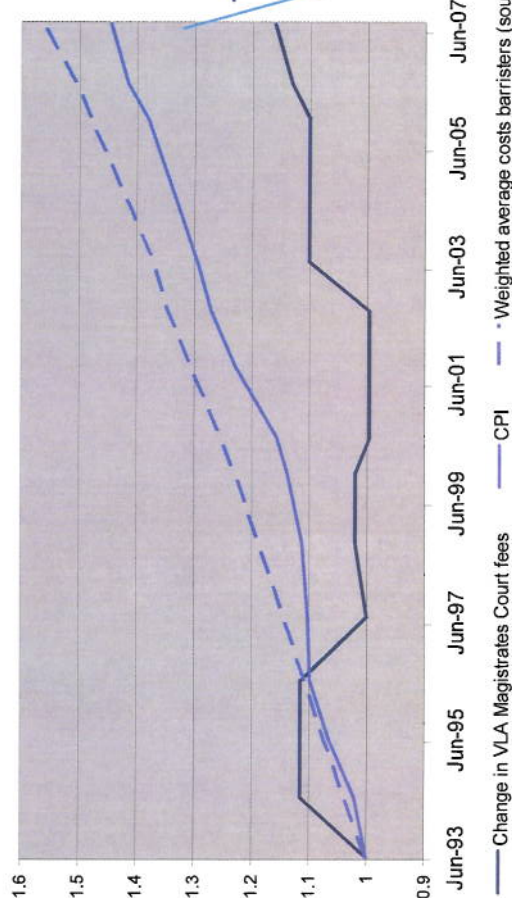


Figure 1. Comparison of change in VLA Magistrates Court fees with CPI and costs



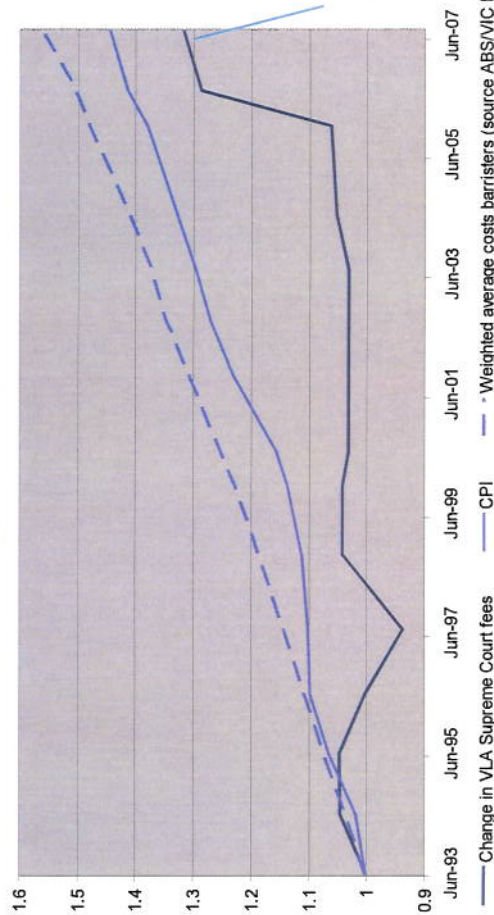
# VLA criminal barristers' fees (continued)

The annual income shown for the County Court assumes a barrister who does 30 trials per annum (of which 10 resolve as a guilty plea on the first day), plus a variety of other matters (pleas, appeals, sentences, applications etc.) This represents a particularly high number of first day fees and as such potentially over estimates the average revenue associated with each trial as it suggests a high number of first days which are higher in value than all other days. Some members of the barristers' reference group regarded this number of trials as unrealistically high. If so, the figures shown are very much at the upper limit of income.

It was also suggested that the average trial takes 9 days rather than the 5 days assumed in Figure 9. But assuming a 9-day average would reduce the amount of annual income because a barrister would not be able to do as many trials per year. Reducing the number of trials from 30 to say 20 would reduce the number of first day fees which the barrister could earn. Hence, if anything, the annual income shown overstates rather than understates the position.

From 2006, VLA fees in all courts were increased by reference to CPI. Additionally, in 2006, VLA removed the penalty fee for fifth and subsequent days of trials (the fee dropped from \$825 for days 2 – 4, to \$512 for days 5 and subsequent) in County and Supreme Court trials. The trend line reflects these increases.

Figure 3. Comparison of change in VLA Supreme Court fees with CPI



NOTE: To establish the differential between the movements in the costs of providing criminal legal services over the past 10 or 15 years versus the actual movement in the amount paid to criminal barristers by VLA and the CPI over this same period, the weighted average cost index for barristers was developed. The index was built up using the movements in the various expenses that barristers incur with each expense given the weight relating relative to its contribution to total expenses. Barristers' remuneration is represented by ABS data for professionals' salaries over this period. All other cost data is from the ABS except for barristers' chambers rent that was provided by the V/c Bar.

It can be observed that over a 15 year period the increase in VLA funded barristers' fees, in all courts, has fallen short of inflation. Therefore the fees have declined in real value during these periods. It should be noted that inflation is a conservative comparison for the change in barristers' fees, as real wages in the professional services sector have grown over this period at a higher rate than inflation. In addition this measurement does not include the change in barristers' costs over this period.

Figures, 1 through 3 highlight the differences between the movement in the weighted average cost index and the fees paid to barristers by VLA. These figures illustrates that barristers' fees have not kept pace with the expenses that they face in running their practice. Therefore during the past 15 years VLA funded barristers' net income (after expenses have been deducted) has declined. If barristers' fees and costs both continue on their current trajectories the gap will continue to widen and barristers' real earnings will continue to decline.

Across the court jurisdiction barristers' real take home pay has declined:

- 40% over the past 15 years in the Magistrates Court
- 34% over the past 15 years in the County Court
- 25% over the past 15 years in the Supreme Court

When this is compared to other professionals, whose average real take has increased by around 15% (per ABS) over the least 10 years, the disparity is significant.

*VLA funded barristers' real take home pay has fallen by 25% to 40% over the past 15 years while other professions real take home pay has increased by around 15% over the same period*

Supreme Court 1997-2007  
 VLA fee increase – 31%  
 CPI increase – 44%  
 Cost increase – 56%