APPEAL COSTS IN VICTORIA

SUBMISSION ON BEHALF OF THE VICTORIAN CRIMINAL BAR ASSOCIATION

A. Introduction

1. In April 2007, the Department of Justice published a Discussion Paper entitled *Appeal Costs in Victoria* ("the Paper").[1]

2. The stated purpose of the Paper is "to outline the financial performance of Victoria's Appeal Costs scheme and to present options to reduce the costs of the scheme and to bring it into line with the schemes in other States".[2]

3. The Paper was "distributed to promote discussion between the Victorian Government and its stakeholders on apportioning payments under the *Appeal Costs Act* 1998" ("the Act") and comments on it were invited by 18th May 2007.[3] However, since the Victorian Criminal Bar Association ("the CBA") only became aware of the Paper and its proposals by chance during the week ending 18th May 2007, an extension was sought and granted until 1st June 2007 for the CBA to prepare and file a submission in response to the Paper.

B. The three options presented in the Paper

4. The Paper considers three options for change to the scheme concerning both civil and criminal appeals and trials.[4] All three options involve the introduction of caps on total costs payable in each matter (i.e. the total for solicitor, counsel and

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[1] The Paper is based on an associated actuarial report entitled *Appeal Costs Study* by Taylor Fry, 18th April 2007.
[2] Paper at para 1.1
[3] Paper at paras 1.7 & 1.8.
[4] These options are summarized in the Paper at paras 3.8 & 3.9 and Table 1.

other fees), which costs would be reimbursed in criminal matters at the scales currently used by Victoria Legal Aid ("VLA") (with no such scale applicable in civil matters). Further, all three options involve the complete removal of payments in some areas.

5. Option 1: The first option, which is described as being similar to that which prevails in New South Wales, would involve the following caps on or removal of payments:
    - (a) Civil appeals – Cap $10,000;
    - (b) Aborted/discontinued civil trials – Cap $10,000;
    - (c) Criminal appeals against conviction – VLA rates and cap $10,000;
    - (d) Re-trial after successful criminal appeal – VLA rates and cap $10,000;
    - (e) DPP appeals against sentence – No payment;
    - (f) Aborted/discontinued criminal trials – VLA rates and cap $10,000;
    - (g) Adjournments in criminal trials – No payment.

6. Option 2: The second option, which is described as being similar to that which prevails in Queensland, would involve the following caps on or removal of payments:
    - (a) Civil appeals – Cap $15,000;
    - (b) Aborted/discontinued civil trials – Cap $15,000;
    - (c) Criminal appeals against conviction – VLA rates and cap $15,000;
    - (d) Re-trial after successful criminal appeal – VLA rates and cap $15,000;
    - (e) DPP appeals against sentence – No payment;
    - (f) Aborted/discontinued criminal trials – VLA rates and cap $15,000;
    - (g) Adjournments in criminal trials – No payment.

7. Option 3: The third option would involve the following caps on or removal of payments:
    - (a) Civil appeals – Cap $15,000;
    - (b) Aborted/discontinued civil trials – Cap $15,000;
    - (c) Criminal appeals against conviction – VLA rates and cap $15,000;
    - (d) Re-trial after successful criminal appeal – VLA rates and cap $30,000;

- (e) DPP appeals against sentence – VLA rates and cap of $10,000;
- (f) Aborted/discontinued criminal trials – VLA rates and cap $30,000;
- (g) Adjournments in criminal trials – three sub-options: (1) No payment; (2) Payment only if no judge or magistrate available; (3) Caps – $330 Magistrates' Court; $500 County Court; $700 Supreme Court.

C. A summary of the CBA's position

8. The CBA is opposed to each of the options proposed.[5] In summary, the reasons are these:

9. First, the proposals drastically and unfairly undermine the notion that an accused person whose conviction is set aside on appeal, whose trial is aborted, discontinued or adjourned without fault on his or her part, or whose sentence is appealed by the Director of Public Prosecutions ("the DPP"), should be reimbursed by the State for the reasonable costs of the appeal, new trial and/or adjournment, as the case may be.

10. Secondly, the proposals for reducing the costs of the scheme proceed from misplaced premises or assumptions, including:
    - (a) that an annual budget of $3.6 million for the scheme is adequate and that annual costs of $7.6 million are high and unsustainable;
    - (b) that expenditure on the scheme should be brought into line with the expenditure on similar schemes in other States;
    - (c) that VLA rates, capped or otherwise, are an adequate level of reimbursement for those who have privately funded trials, appeals and/or other criminal proceedings at reasonable fees.

11. Thirdly, the proposals take no account of or make no allowance for:
    - (a) the financial impact on VLA's already inadequate budget;

[5] The CBA confines its submission to the proposals in respect of criminal law matters. It is understood that the Victorian Bar will address broader submissions on the proposals concerning civil appeals and trials.

- (b) the potential dissuading impact upon the accused's decision to appeal against conviction or persist with a trial or a new trial, despite having good grounds of appeal or a good defence;
- (c) the increase in the frequency of DPP appeals;
- (d) the increasing volume of criminal trials and appeals;
- (e) the changes to the manner in which criminal appeals must be prepared pursuant to the Supreme Court (Criminal Procedure) Rules 1998 and the practice of the Court of Appeal;
- (f) the potential reduction in the success rate of appeals against conviction following the High Court's decision on the proviso in *Weiss v The Queen*;
- (g) the vast variability in the length and complexity of – and therefore the respective costs incurred in – different appeals and trials;
- (h) the desirability of increasing efficiency and reducing costs in other parts of the criminal justice system, such as the listing of matters in circumstances where it is more likely that they will be reached and adjournments are less likely.

12. Fourthly, the proposals take no account of the anomalous savings already present within the scheme, including the exclusion of reimbursement of accused persons or defendants' costs:
    - (a) in all Commonwealth criminal cases at both the trial and appellate levels;
    - (b) in appeals by the DPP on questions of law to the Supreme Court from the dismissal of charges by magistrates;
    - (c) in proceedings brought by the DPP in the nature of judicial review in the Supreme Court of orders made in the course of criminal proceedings on appeal in the County Court.

D. A fundamental matter of principle is undermined by the proposals

13. There are a number of tenets that underpin our criminal justice system, one of which is the requirement that criminal proceedings brought by the State against

its citizens be conducted fairly and without undue oppression or harshness. This includes the reasonable expectation that our criminal justice system will fulfill its role correctly and expeditiously and will not impose additional burdens on its citizens when it falls into error or does not perform its function properly.

14. The *Appeal Costs Act* 1998 recognizes[6] these underlying principles by ensuring that, in some areas of the criminal law and subject to certain conditions, when the system of justice fails, the State should shoulder the financial burden of that failure when it would otherwise fall upon the accused. This recognition is both logically and morally correct.

15. However, as indicated above, the proposals for change in the Paper drastically and unfairly undermine the notion that an accused person whose conviction is set aside on appeal, whose trial is aborted, discontinued or adjourned without fault on his or her part, or whose sentence is appealed by the Director of Public Prosecutions ("the DPP"), should be reimbursed by the State for the reasonable costs of the appeal, new trial and/or adjournment, as the case may be.

16. Consider this example. A person is charged with murder. She claims that she stabbed the deceased in self-defence and instructs her solicitor to brief senior and junior counsel to defend the matter. Because of her financial circumstances, she does not qualify for legal aid funding, so she sells her shares to pay her legal fees. She faces a trial in the Supreme Court but is convicted and imprisoned. The trial costs her $100,000. She appeals to the Court of Appeal, her conviction is set aside because of an error in the judge's directions to the jury and a retrial is ordered. The appeal costs her $60,000. She is acquitted at her retrial. The retrial costs her $100,000. Thus she has spent $260,000 in total. She had to mortgage her home to pay for the appeal and the retrial. All costs are reasonably incurred. Under the current scheme, she would recover the $160,000 for the first trial and the successful appeal. Put another way, her trial will have cost her only the $100,000 that it should have cost in the first place. Under the proposals in the Paper, she will recover no more[7] than $20,000 (Option 1), $30,000 (Option 2)

[6] As did its predecessor the *Appeal Costs Fund Act* 1964.
[7] And, it may be substantially less than these figures, given the limitations in VLA scales.

or $45,000 (Option 3) out of the additional $160,000 she was required to pay for the appeal and retrial.

17. Consider another example. A person crashes his car, killing his passenger. The driver is charged with culpable driving causing death. He intends to plea guilty to the charge and instructs his solicitor to brief junior counsel to present a plea in mitigation. Because of his financial circumstances, he does not qualify for legal aid funding, so he uses his cash reserves to pay his legal fees. He is sentenced to a term of imprisonment. The plea hearing costs $15,000. The DPP appeals against the sentence. The respondent instructs his solicitor to brief senior and junior counsel. He sells some shares to fund the appeal. The appeal is dismissed. The appeal costs $30,000. All costs are reasonably incurred. Under the current scheme, he would recover the $30,000 in costs for the DPP's appeal. Under the proposals in the Paper, he will recover either nothing (Options 1 and 2) or no more[8] than $10,000 (Option 3) out of the additional $30,000 he was required to pay for the DPP's appeal.

18. In our submission, each of those results is manifestly unfair. The examples could be multiplied. In the end, it is about what is just.

E. Misplaced premises and assumptions

19. The proposals for reducing the costs of the scheme proceed from several misplaced premises or assumptions.

(a) A budget of $3.6 million is not adequate; and $7.6 million is not too high

20. The first series of misplaced premises is that an annual budget of $3.6 million for the scheme is adequate and that annual costs of $7.6 million are high and unsustainable. As is apparent from the table in Figure 2 of the Paper, the total annual costs have been in the order of $7.1 million in 200/2001, $6.2 million in 2001/2002, $6.9 million in 2002/2003, $5.7 million in 2003/2004, $5.9 million in 2004/2005 and $7.3 million in 2005/2006. But for the apparently unusually high

costs of civil appeals in 2005/2006, which were about $1.3 million more than the previous year, the total costs for 2005/2006 would have been of a similar order to that of the previous three of the previous four years and substantially less than those incurred in 2000/2001 and 2002/2003.

21. A budget of $3.6 million is simply unrealistic in view of those figures and given other factors to be addressed below, such as the increased frequency of DPP appeals against sentence, the changes to the manner in which criminal appeals must be prepared pursuant to the Supreme Court (Criminal Procedure) Rules 1998 and the practice of the Court of Appeal, the vast variability in the length and complexity of – and therefore the respective costs incurred in – different appeals and trials and the increasing volume of criminal trials and appeals generally. Indeed, in some respects, it is surprising that the total costs are not higher than in the order of $7 million per year.

<u>(b) Comparisons with other jurisdictions are neither useful nor appropriate</u>

22. The second misplaced premise is that expenditure on the scheme should be brought into line with the expenditure on similar schemes in other States or jurisdictions. Such comparisons are neither useful nor appropriate. The principles underlying the Victorian scheme are sound. Victoria's commitment to fairness and justice should not be diminished by reference to the failure of other jurisdictions to make such a commitment.[9] Victoria's commitment extends back to 1964 when the *Appeals Cost Fund Act* commenced. Pursuant to that Act a fund was established to indemnify losses incurred by citizens occasioned by a failure of the State's system of justice. Money for the fund was raised in part by an increase in filing fees. With the introduction in 1998 of the *Appeal Costs Act* the fund was abolished and payments (subject to board approval) have been made from consolidated revenue. For more than forty years Victoria has been the yardstick by which fairness and access to justice has been measured. This was reinforced by the Attorney-General in his Justice Statement of 2004. To

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[8] Again, it may be substantially less than this figure, given the limitations in VLA scales.

[9] In this regard, we respectfully adopt the submission made on behalf of the Victorian Bar on 1st August 2003 in relation to contemplated amendments to the *Appeal Costs Act* 1998 – see *Appeal Costs Act* 1998: Contemplated Amendments – Department of Justice: First Submission of the Victorian Bar at pp 20-21.

jettison principle in favour of the economic rationalism and inaction of the other States is unconscionable.

(c) VLA rates are an inadequate level of reimbursement for those who have paid privately

23. The third misplaced assumption is that VLA rates, capped or otherwise, are an adequate level of reimbursement for those who have privately funded trials, appeals and/or other criminal proceedings at reasonable fees.

24. Just why it is proposed that criminal matters be limited by VLA rates when civil matters are not so limited is not explained in the Paper. There is no justifiable reason for doing so.

25. On the contrary, the level of funding by VLA for both conviction appeals and DPP appeals is wholly inadequate for the volume and nature of work required. Save in exceptional cases where there is an additional preparation grant, the fees paid to counsel appearing in conviction appeals by VLA[10] are: (a) for drawing of Full Statement of Grounds and Outline of Submissions – $1000; and (b) for the appearance at the hearing – $1375.

26. The work involved in a conviction appeal is as follows. First, the brief must be read. That includes the trial transcript, which will often run for 1,000-2,000 pages. There are shorter trials. There are also longer trials. Other documents must also be read – such as the exhibits, extracts of final addresses, transcript of interviews with police and so on. Although counsel will focus on particular aspects of the transcript – such as the charge to the jury – the Court expects counsel to have read the entirety of the transcript and most of the documentary exhibits. Even in shorter cases (say, a 700-page transcript plus a record of interview and other exhibits), there will be at least two days involved in reading all of the relevant materials. Longer cases may involve many days of reading.

27. Secondly, a Full Statement of Grounds must be drafted and settled. This document must, in accordance with the *Supreme Court (Criminal Procedure)*

Rules 1998 ("the Rules"), identify the specific allegations of error of law or miscarriage of justice. Although counsel is assumed to have a solid working knowledge of the law, the reality is that the criminal law has become increasingly complex. In determining the grounds of appeal, counsel are often required to conduct up to date research on the state of authority not just in Victoria but in other jurisdictions as well.

28. Thirdly, an Outline of Submissions and a List of Authorities must be drafted, settled, filed and served. The submissions must make references to the relevant arguments, transcript and exhibits, principles of law and authorities in support of the grounds of appeal.

29. Whilst the Rules provide that the Full Statement of Grounds and the Outline of Submissions and List of Authorities are filed up to a month apart, most counsel, in order to avoid the need to re-read relevant material and thereby to reduce work and costs, will draft both sets of documents at the one time. Even in a simple case, these tasks will take at least one day and, in larger and more complex cases, can take several days.

30. Fourthly, counsel must prepare for the hearing of the appeal. This will involve, at least, counsel reading and considering the Outline of Submissions, Summary of Proceedings and Summary of Evidence filed by the Respondent and, because of the substantial time lag between filing the Applicant's material and the hearing, reviewing the key sections of transcript and other materials. Again, even in a simple case, there will be at least a day's preparation for hearing.

31. Fifthly, there is the appearance to argue the matter orally before the Court of Appeal. Occasionally, questions will arise in the hearing of an appeal which require (at the Court's request) the preparation of further submissions.

32. Sixthly, counsel may be required to attend for judgment on a separate day from the hearing. This is no formality. The judgment must be read carefully in order

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[10] See VLA Handbook, 12th edition, July 2006, chapter 6, p 139, Table L.

to explain the same to the client and to ensure that all grounds of appeal have been dealt with.

33. Thus, it can be seen that, at a minimum, a standard conviction appeal in the Court of Appeal will involve about three or four days of preparation (that is, reading the brief, drafting grounds and submissions and general preparation for hearing) and a day's appearance (excluding judgment). Often, there are many more days of preparation involved and, on occasions, a hearing will run into a second or more hearing days.

34. It is the experience of our members appearing as counsel in the Court of Appeal that the preparation involved in a conviction appeal from a relatively short and simple trial will often take three days of work. In addition, there is the appearance at the hearing. Pursuant to the VLA scale, junior counsel[11] would be paid $2,375 for such a case ($1,000 for preparation plus $1,375 for the appearance). Such a fee is wholly inadequate and provides no proper basis for reimbursement of those persons who have privately funded their successful appeals at reasonable fees.

35. Reasonable private rates in this jurisdiction, depending upon seniority and/or experience, would be in the order of $2,200 to $3,500 per day for junior counsel and $4,400 to $6,600 for senior counsel. Thus, for a case in which the VLA fee was of the order of $2,375 for junior counsel (no matter how experienced), the reasonable private fee for junior counsel (depending upon seniority and/or experience) would be in the order of $8,800 to $14,000 and for senior counsel would be in the order of $17,600 to $26,400.

36. A similar comparison can be made in relation to DPP appeals against sentence. The VLA fees[12] to junior counsel for such an appeal are: (a) for drawing the Outline of Submissions – $1,200; and (b) for the appearance at the hearing –

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[11] Senior counsel are rarely briefed in VLA conviction appeals.
[12] See VLA Handbook, 12th edition, July 2006, chapter 6, p 140, Table L (i).

$1,500;[13] and fees to senior counsel are (a) $1,624 for drawing the Outline of Submissions and (b) $3,500 for the appearance.

37. The work involved in appearing for a Respondent in a DPP appeal is as follows: First, counsel must read the transcript of the plea and sentence; any exhibits tendered on the plea (such as the Crown summary, victim impact statements, psychiatric reports, character references, etc); and the Crown's Notice of Appeal, Outline of Submissions, Summary of Proceedings and Summary of Evidence. Depending upon the volume of the materials, there will usually be at least a day's reading to be done.

38. Secondly, a written Outline of Submissions must be drafted and settled on behalf of the Respondent. The majority of the justices of the Court of Appeal as presently constituted look for considerable assistance from counsel as to the applicable range of sentences for particular offences, including reference to sentencing statistics. The time taken for this task can vary from half a day to up to two days, depending upon the complexity of the matter.

39. Thirdly, there is preparation for the hearing. As with conviction appeals, because of the substantial time lag between filing the Respondent's material and the hearing, the key sections of transcript and other material must be reviewed. Thus, there is usually at least half a day involved in this step.

40. Fourthly, there is counsel's appearance at the hearing itself.

41. Fifthly, there is counsel's appearance at judgment, if that is on a separate day from the hearing. When a DPP appeal is allowed (which occurs in about 70 per cent of cases), this appearance will involve explaining to the respondent what has happened. In some cases a person who had his or her liberty following sentencing in the County Court will now be sent to prison. Again, the reasons for judgment must be examined closely to ensure that the facts have been accurately recorded and submissions fairly dealt with.

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[13] It is not understood why the VLA fees to junior counsel on a conviction appeal are less than those on a DPP appeal, particularly when there is usually substantially more work involved in a

42. Thus, it can be seen that, at a minimum, a standard DPP appeal in the Court of Appeal will involve at least two days of preparation (that is, reading the brief, drafting grounds submissions and general preparation for hearing) and a day's appearance (excluding judgment). Pursuant to the VLA scale, junior counsel would be paid $2,700 for such a case and senior counsel would be paid $5,124 whereas, on a private brief, the reasonable fees to a junior (depending upon seniority and/or experience) would be somewhere between $6,600 and $10,500 and senior counsel somewhere between $13,200 and $19,800. Again, the VLA fees are wholly inadequate and provide no proper basis for reimbursement of those persons who have privately funded their successful appeals at reasonable fees.

F. Matters not allowed for in proposals

43. In addition, the proposals in the Paper fail to take any account of several matters of importance.

(a) The financial impact on VLA's already inadequate budget

44. The proposals will impact upon VLA's ability to recover from the Appeal Costs Board costs thrown away as a result of adjournments, aborted trials, appeals and so on. That will require VLA to turn to the State to prop up its already inadequate budget. Yet no account appears to have been taken of this factor.

(b) The dissuading impact upon decisions to appeal

45. In the absence of an adequate appeal costs scheme, an accused faced with the crippling costs of an appeal or a retrial or the like may well be dissuaded from appealing against conviction or persisting with a trial or a new trial, despite having good grounds of appeal or a good defence. That would be a sorry state of affairs.

(c) The increased frequency of DPP appeals

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conviction appeal.

46. The table in Figure 2 of the Paper shows that, 2000/2001 apart (where there was a very high upwards spike in costs), there has been a trend upwards in the total costs attributable to DPP appeals. Whilst the costs of DPP appeals are but a relatively small part of the total costs, the trend upwards in total costs reflects the increasing frequency of DPP appeals in recent years.[14] That fact is not reflected in any of the proposals in the Paper.

(d) The increasing volume of criminal appeals and trials

47. Similarly, the proposals in the Paper take no account of the increasing volume and complexity of work that is going through the criminal courts generally, which in turn is likely to result in more matters subject to reimbursement under the Act, whether they be appeals, aborted trials or adjournments.

(e) Changes to the preparation of criminal appeals

48. The table in Figure 2 of the Paper shows that there has been a trend upwards in the costs of criminal appeals, although the costs in 2002/2003, 2004/2005 and 2005/2006 remained quite similar. That in part is likely to be a reflection of the changes during that period made to the *Supreme Court (Criminal Procedure) Rules* 1998. Those changes have meant that more preparation goes into criminal appeals at an earlier stage. In the past, appeals were often prepared very much at the last minute, with grounds being amended and submissions being filed only just prior to or at the hearing. The changes compel the drafting of grounds and submissions many months prior to the hearing. Those changes were designed to create – and no doubt have created – efficiencies for the Court of Appeal in preparing for and disposing of appeals. However, they have also created more work for solicitors and counsel for the Applicants, which is likely to be reflected in the costs of appeals. None of this has been taken into account in the proposals in the Paper.

(f) *Weiss v The Queen*

49. In 2005, the High Court handed down its judgment in *Weiss v The Queen* (2005) 224 CLR 300. It is thought by many that this decision is likely in some cases to

[14] See, for example, the remarks of, and references cited by, Neave JA in *DPP v Coley* [2007] VSCA 91 at [30].

result in the dismissing of appeals against conviction that otherwise would have succeeded in the past.[15] No account has been taken of this possibility in the Paper.

(g) The variability in the length and complexity of cases

50. The introduction of caps takes no account of the vast variability in the length and complexity of – and therefore the respective costs incurred in – different appeals and trials. As indicated above, some trials run into thousands of pages of transcript such that the preparation involved in appeals from such trials is vastly greater than the more ordinary case. Similarly, retrials ordered in such cases involve vast additional preparation because not only do counsel at the retrial have to read the original depositions but they must also familiarize themselves with the transcript of the previous trial. The introduction of caps means that only a miniscule amount of the actual costs of these trials and appeals would be reimbursed. That is grossly unfair.

(h) Efficiencies must be achieved in other parts of the criminal justice system

51. Putting aside the costs of civil appeals (which were about $2.4 million in 2005/2006), by far and away the largest cost item of the scheme is the costs of adjournments ($1.9 million in 2005/2006). However, that there are so many adjournments attracting the operation of the scheme is plainly a failing of the listing procedures of criminal justice system. Clearly, if there were greater efficiency and certainty in the listing of cases, there would be fewer adjournments and in turn a reduced call on the appeal costs scheme. Concentration on achieving such efficiencies would also reduce wasted time and resources of other (State-funded) arms of the system, including the courts and the prosecuting authorities.

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[15] On the potential impact of this decision, see, e.g., The Honourable Justice Alex Chernov, "*Weiss v The Queen*", a paper delivered to the Victorian Bar on 23rd May 2007; The Honourable Mr Justice Frank Horton Callaway on the occasion of his retirement from the Court of Appeal, 140

G. Anomalous savings already present in scheme

52. There are several anomalous savings already present within the scheme, including the exclusion of reimbursement of accused persons or defendants' costs (a) in all Commonwealth criminal cases at both the trial and appellate levels; (b) in appeals by the DPP on questions of law to the Supreme Court from the dismissal of charges by magistrates; (c) in proceedings brought by the DPP in the nature of judicial review in the Supreme Court of orders made in the course of criminal proceedings on appeal in the County Court.[16]

53. Rather than cutting the scheme back even further, these anomalies should be addressed so that litigants in the foregoing categories are adequately reimbursed when the system fails them.

H. Conclusion

54. The proposals for change are neither sound nor fair. The CBA opposes them.

55. The CBA would be happy to discuss any aspect of this submission.

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Stephen Shirrefs SC
Chairman, Criminal Bar Association
1st June 2007

Victorian Bar News Autumn 2007 at 24-27; and P.G. Priest QC, "The Problematic Proviso: The Vice of *Weiss*", 140 Victorian Bar News Autumn 2007 at 32-40.

[16] See O.P. Holdenson QC et al, *Submission in Respect of Amendments to the Appeal Costs Act 1998*, a submission made to the Department of Justice dated 4th December 2000.