OFFICE OF THE PROTECTIVE COMMISSIONER FEES REVIEW

Final Report

INDEPENDENT PRICING AND REGULATORY TRIBUNAL
OF NEW SOUTH WALES

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May 2003

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EXECUTIVE SUMMARY

On 10 February 2003, the Premier asked the Independent Pricing and Regulatory Tribunal of NSW (the Tribunal) to review the fees the Office of the Protective Commissioner (OPC) charges its clients and recommend a fee structure that is "clear, fair and transparent".

- The Tribunal has completed this review. Based on its findings, it believes OPC's fee structure and funding arrangements should reflect the principles listed in the box below.

Recommended principles for setting OPC's fees

1. OPC's fee structure and funding arrangements should be fair, transparent and clear.
2. Fees should reflect the costs of providing the service as far as practical, to minimise cross subsidisation between activities and client groups in line with the principles of fairness and transparency.
3. Funding to cover the costs of meeting OPC's social obligations—including waiving fees for clients who are unable to pay the full cost of the services they receive, providing services that benefit the wider community and meeting Government policy objectives—should come from consolidated revenue, in line with the principle of fairness.
4. Clients should pay no more for the services provided by OPC than they would if these services were provided by commercial organisations operating in competitive markets.
5. The criteria and process for assessing clients capacity to pay and waiving fees if they have no capacity should strike a balance between simplicity (for example, using an adjustment based on a standard measure such as estate size or income) and flexibility (to reflect individual circumstances through client-specific waivers).

The Tribunal's findings and recommendations in relation to OPC's fee structure, and each of the issues specified in its terms of reference, are summarised below.

Recommended fee structure

The Tribunal assessed the fee structure proposed by OPC, and those of agencies providing similar services,[1] against the principles outlined in the box above. It found that OPC's proposed fee structure is reasonably clear and transparent, and is more cost reflective than its current fees (in aggregate).

The proposed structure is very similar to Perpetual Trustee's fee structure. Perpetual Trustee is a commercial business, but as it does not appear to have effective competitors, its fees are not necessarily cost reflective. However, given that OPC's proposed fees are not higher than Perpetual Trustee's, the proposed fee structure reflects the principle that clients should not pay more for OPC's services than they would if these services were provided by a commercial organisation.

[1] Perpetual Trustee, Public Trustee of NSW, Public Trustee of Queensland, and State Trustees Limited in Victoria.

In relation to the principles of fairness and minimising cross-subsidisation, the Tribunal had three concerns:

- OPC proposed charging new clients an establishment fee of 1 per cent. Although several of the fee structures the Tribunal assessed included similar fees, it is concerned that clients with large estates will pay significantly more in their first year than other clients. In addition, the cumulative effect of this fee and the ongoing management fees they will be charged in that year may be significant for some clients, which may not reflect the costs involved.
- OPC proposed ongoing management fees of 1 per cent for the first $500,000 of a client's estate, and 0.85 per cent for values over this amount. The Tribunal's analysis indicates that in aggregate these fees will not over-recover the costs involved in estate management. However, without an activity base costing system, it is hard to judge whether the structure and level of these fees are appropriate, and the extent of cross-subsidisation between clients.
- OPC proposed investment management fees ranging from 0.5 per cent to 0.9 per cent for its 8 different investment funds. The Tribunal believes these fees are too high. They are higher than fees levied by comparable organisations for comparable services. In addition, the Tribunal's analysis of costs indicates they would result in a cross-subsidy from the funds management activities of the OPC to the estate management activities.

To address these concerns, the Tribunal has recommended a modified fee structure that includes no establishment fee and caps clients' average investment management fees at 0.5 per cent of the total capital they have invested. The adoption of this fee structure will require a contribution from consolidated revenue in the order of $9 million.

The recommended structure gives OPC some room when determining the investment management fee it charges for its individual investment funds. In setting these fees, OPC should ensure that no existing client will be worse off as a result of the change in the fee structure, compared to the current funding structure.

In addition, the Tribunal believes OPC should be able to charge third party litigants a fee to cover its costs where the court action is found to be frivolous, not genuine or malicious. The aim of this power is to deter wasteful litigation: it would need to be considered and incorporated carefully to ensure family members and friends with a genuine concern are not deterred from making a complaint.

The fees charged by Private Managers that OPC supervises remain largely unchanged. This is because, due to the short time frame for this review, the Tribunal has focussed on the larger group of OPC's directly managed clients. Private Manager fees should be reviewed at the next fee review. To facilitate this process, OPC should consider its current systems and whether cost information and service data can be collected consistently in the interim years. It may also be possible to undertake this review at an earlier day, provided appropriate data is available, and OPC, Treasury and other interested stakeholders agree.

The Tribunal recommends the adoption of the fee structure proposed by OPC, with the modifications to the establishment fee and investment management fee shown in the table below.

Recommended fee structure compared to OPC's fee structure

	OPC's Jan 03 proposed structure	Tribunal's recommendation	Tribunal's comments
Establishment fee	1.00% of assets (excluding primary property of residence and vehicle used). Notional minimum fee of $2,200	No establishment fee	The cumulative effect of OPC's proposed fee may be significant for some new clients.
On going management fee	1.00% of first $500,000 0.85% of remaining Notional minimum fee $1,700	1.00% of first $500,000 0.85% of remaining Notional minimum fee $1,700	On aggregate, the structure and level of OPC's proposed fee will not over recover costs, but cross subsidies between clients may still occur.
Investment management fee	Fees vary from 0.5%-0.9% for the 8 different investment funds.	Average should not exceed 0.5% of total capital invested in the funds.	Tribunal analysis indicates that OPC's proposed fees will over recover costs and thus cross subsidise other work areas.

OPC's service delivery costs

The Tribunal found OPC's annual costs for 2002/03 are around $23.1 million, based on 8 months actual accounting data. The chief cost centre is Estate Management, which accounts for 78 per cent of total costs.

Not all these costs directly benefit OPC's clients. Some are related to services that benefit the community as a whole. Others are driven by factors outside OPC's control. These include those related to Government policy initiatives, such as the planned establishment of an external appeals body. The recommended fee structure does not aim to recover these costs from clients.

OPC's costs may also increase if the recommendations in this report are implemented. For example, it may need to incur additional costs related to upgrading its accounting and IT systems and educating staff, clients and stakeholders about the new fees. These additional costs have not been factored into the recommended fee structure.

The Tribunal was not able to assess OPC's efficiency or form a view on the quality of service it provides clients. It approached similar organisations in other jurisdictions, but none were willing to participate in cost benchmarking with OPC. It identified one comparable private sector firm, but could not determine the degree of genuine competition in the market. Although it has tested elements of OPC's proposed fee structure against price benchmarks, it believes a separate study is required to determine OPC's efficient costs.

The Tribunal recommends that NSW Treasury commission an efficiency study to assess the level of efficient costs within OPC prior to the next review of OPC fees.

Extent to which costs are recovered from different client groups

The Tribunal found that OPC's current fees do not recover its costs in any of its service areas. For 2002/03, its total fee revenue will be lower than its operating costs by around $14.9 million.

In the past, section 55 of the *Protected Estates Regulation 1995* has allowed OPC to fund the revenue shortfall by transferring a portion of the interest its clients earn on the funds it manages for them through its Common Fund. This funding system means that one relatively small group of clients (those who are asset-rich and whose assets are invested in the Common Fund) cross-subsidise all other clients. These include those who are asset-poor, or whose assets are invested in other ways.

There were limited data available to this review for analysing the extent of cost recovery and cross-subsidisation between different client groups. Given the magnitude of the current revenue shortfall, this is unlikely to affect the validity of the Tribunal's recommendations. However, to continue to improve the fairness and transparency of OPC's fees, improved data will be needed for the next fee review. To provide this data, OPC will need to establish a management information system. This may involve undertaking a detailed study of various tasks to enable more accurate activity based costing. In establishing this system, OPC should consult with other stakeholders, particularly Treasury, given the above recommendation that it commission an efficiency study.

The Tribunal recommends that OPC develop and institute a management information system prior to the next review of its fees, to gather sufficient data to enable accurate assessment of cost recovery between client groups and between cost pools.

Options for funding the revenue shortfall

The Tribunal identified a range of options for funding the revenue shortfall, including:

1. Maintaining the current system, where the revenue shortfall is funded through a transfer of interest earned by clients whose assets are invested in the Common Fund.
2. Providing an annual contribution of around $5.6 million from consolidated revenue, and funding the remaining shortfall through a transfer from the Common Fund (as proposed by OPC).
3. Providing an annual contribution of around $9 million from consolidated revenue, and funding the remaining shortfall through a transfer from the Common Fund.
4. Establishing OPC as a Government Trading Enterprise and providing a Community Service Obligation to fund the shortfall.
5. Establishing a self-perpetuating fund to fund the shortfall.

The Tribunal assessed each option according to whether it is financially viable, easy to implement, equitable and transparent and whether it will deliver budget certainty for OPC. It found that Option 3 best meets these criteria.

The Tribunal recommends that OPC's revenue shortfall be funded through a budget allocation to OPC and that:

- *The allocation be based on forecasts of the difference between fees charged, actual service costs, efficiency gains and any fee waivers provided.*
- *The allocation be budgeted annually in advance.*
- *The OPC be accountable under normal budget controls for expenditure against these criteria.*
- *Any surplus or deficit balances be rolled forward to the next year within defined limits.*

It also asks that the Government note that external and internal cost drivers may increase the size of the revenue shortfall in the future unless offsetting efficiency gains within OPC can be achieved.

Criteria and process for assessing capacity to pay and waiving fees

The Tribunal assessed OPC's current practice in relation to waiving fees for clients who are unable to pay the cost of the services they receive, and considered options for improving the fairness, transparency and clarity of this process. It found that structuring fees so that clients with small estates are exempt from minimum charges provides a relatively fair and simple way to address capacity to pay concerns for a substantial number of OPC's clients.

However, this approach is not adequate on its own. Estate size is only an approximate guide to capacity to pay, and clients' service and income needs vary greatly. This means that some clients with large estates and incomes that seem reasonable for an 'average' person may not have the capacity to pay substantial fees. For these cases, OPC needs a formal fee waiver mechanism that will allow it to assess an individual client's capacity to pay in a way that is fair, clear and transparent.

The Tribunal recommends that:

- *OPC's proposal for a percentage fee with a notional minimum fee be adopted. That is the gap between the percentage estate management fees and the notional minimum fee should be funded from Government and the clients charged only the percentage fee. This is a relatively simple means of substantially meeting capacity to pay concerns for those with smaller estates and incomes.*
- *OPC develop a waiver mechanism that allows it to consider capacity to pay concerns that are not adequately covered by the above dot point.*
- *OPC develop this mechanism in accordance with the framework outlined below and in consultation with interested stakeholders.*

Recommended framework for developing and implementing a fee waiver mechanism

PROCESS AND SYSTEMS

- Billing clients for services should be automated to remove the need of estate managers to raise/charge a fee themselves. Fees may be calculated daily and charged periodically.
- Clients should be reviewed annually to determine their general capacity to pay. This can be incorporated into the annual client review currently carried out on the anniversary of the client joining OPC. For clients deemed to have a low capacity to pay, or those whose account has insufficient funds, the fees charged will not be withdrawn from their accounts. Instead they will be recorded as a liability of the client.
- Reports on client liabilities should be produced and reviewed periodically to see whether the fees should be waived completely, partly or rolled over to some future date. In conducting this review, set criteria should be applied.
- Staff members should retain the ability to apply for formal waivers of individual fees for any client, where they see the need and follow the correct process.

ASSESSMENT OF CAPACITY TO PAY – PRINCIPLES AND CRITERIA

Principles

- Fairness—criteria should be objective and not discriminate against a client's disability.
- Clarity—the assessment of a client's capacity to pay, based on the criteria, should be easily replicable.
- Transparency—OPC staff should be able to apply the criteria with minimal subjectivity and proper recording of decisions should be kept.

Criteria

The assessment should consider:

- income tests developed by other welfare agencies, eg Centrelink, with possible modifications to account for individual needs arising from the client's disability.
- The appropriateness of the level of service provided and hence the fees charged.
- Whether the service(s) is available from another source, free or at a lower fee.
- Whether the client is entitled to other sources of welfare/subsidies for these services.

Ongoing fee review mechanism

The Tribunal has considered the best mechanism for reviewing OPC's fees on an ongoing basis, including:

- who should undertake these reviews
- how often, and
- within what time frame.

It also considered the requirements on OPC to monitor and report on its implementation of its new fee structure.

The Tribunal recommends that:

- *Following consideration of this report, the Government determine a price path to September 2007 for OPC charges.*
- *OPC's charges be subject to review before the end of that period to assess whether continued regulation is necessary and if so, the reviewer advise on the level and structure of OPC's charges.*
- *The Premier, in consultation with the Attorney General, determine the agency to be tasked with undertaking any future review, and a minimum of 6 months be allowed for the review.*
- *OPC provide, as an adjunct to its annual report to the Attorney General, a report on implementation of the price path and other recommendations including:*
  - *A reconciliation of the funds provided by the government against waivers provided and any cost pool deficits.*
  - *An update on education provided to OPC staff, clients and stakeholders.*
  - *Details of complaints about the fee structure or levels together with information drawn from any surveys.*
  - *Client data (client numbers and financial information by client groups).*
  - *Progress on the implementation of enhanced accounting and management information systems.*

GLOSSARY

ABC	Activity Base Costing
ADT	Administrative Decisions Tribunal
Common Fund	Client funds that are under management by OPC.[2]
EPA	Enduring Power of Attorney
GT	Guardianship Tribunal
MHRT	Mental Health Review Tribunal
OPC	Office of the Protective Commissioner
OPG	Office of the Public Guardian
Perpetual	Perpetual Trustee Company Limited
PTNSW	Public Trustee of New South Wales
PTQLD	Public Trustee of Queensland
SOG	Senior Officers' Group
STL	State Trustees Limited of Victoria
Tribunal	Independent Pricing and Regulatory Tribunal

[2] Previously managed under one fund called the 'Common Fund', and now managed under 8 different funds after the implementation of the prudent person principle.

1 INTRODUCTION

The Office of the Protective Commissioner (OPC) has been reviewed by several bodies in recent years,[3] and is currently being reviewed by the NSW Audit Office. These reviews have raised concerns about the fairness and transparency of the OPC's fees and funding arrangements. Until January 2003,[4] the OPC received no outside funding for its activities, and so has used a subsidy from wealthier clients to fund services for less wealthy clients.

The legislation that regulates the OPC's activities (the *Protected Estates Regulation 1995*) is due for staged repeal on 1 September 2003. To help the Government develop a replacement regulation, the Premier asked the Independent Pricing and Regulatory Tribunal of NSW (the Tribunal) to review the OPC's current fee structure and recommend changes to make it more clear, fair and transparent.

In addition, the terms of reference for this review asked the Tribunal to:

- identify costs of service delivery, including a full expense analysis and benchmarking of efficient costs
- analyse the differences in cost recovery for the different client groups
- consider clients' capacity to pay for the services they receive, and possible criteria for assessing that capacity
- advise on options for meeting any revenue shortfalls that arise where clients do not have the capacity to pay for services
- establish an appropriate ongoing fee review mechanism.

The full terms of reference are set out in Attachment 1. In addition to these terms, the Premier's letter asked for the Tribunal's thoughts on OPC's financial planning function. The Tribunal will respond to this request separately.

1.1 Review process

As part of its review, the Tribunal engaged an accounting firm, RSM Bird Cameron, to help it analyse OPC's costs and the extent to which these costs are recovered. It also consulted a broad range of stakeholders, including:

- most members of OPC's Advisory Council, including client representatives
- the Protective Commissioner
- senior managers of OPC
- central Government agencies with responsibility for OPC policy and potentially for OPC funding
- organisations in other States which perform functions similar to OPC
- organisations which have previously reviewed OPC.

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3 For example, the NSW Audit Office, 1999, the NSW Government Actuary, 2000, the Public Bodies Review Committee of the NSW Legislative Assembly, 2001, and the Council on Cost and Quality of Government, 2002.

4 In January 2003, the government provided public funding amounting to $3.56 million.

Because the terms of reference required it to report by 31 May, the Tribunal did not have time to undertake a full activity-based costing analysis or an efficiency review. However, it believes it has covered the necessary issues and analysed OPC's costs in sufficient detail to make informed recommendations that will enable the Government to establish a fairer, clearer and more transparent fee structure and move towards minimising the cross-subsidisation that currently occurs between OPC's clients.

The Tribunal did not invite public submissions to this review due to the time constraints. It believes public consultation would be better undertaken during the Regulatory Impact Statement (RIS) process, which will accompany the introduction of an instrument to replace the *Protected Estates Regulation 1995*[5].

1.2 Overview of report

The rest of this report explains the Tribunal's findings and recommendations in relation to each of the issues included in the terms of reference:

- Chapter 2 provides an overview of the OPC, its clients, services and decision-making processes
- Chapter 3 identifies and discusses OPC's operating costs
- Chapter 4 looks at the extent to which these costs are recovered through the fees OPC charges clients, and the level of cross-subsidisation that occurs to meet its revenue shortfall
- Chapter 5 assesses the options for funding this revenue shortfall and explains the Tribunal's recommended option
- Chapter 6 considers the options for incorporating concerns about clients' capacity to pay for services into the fee structure, and for developing a fair, transparent and clear fee waiver mechanism
- Chapter 7 explains the Tribunal's recommended fee structure
- Chapter 8 outlines the Tribunal's recommendations for establishing an ongoing mechanism for reviewing the fee structure.

[5] The *Subordinate Legislation Act 1989*, most specifically section 5, sets out the requirements for public consultation when making a statutory rule.

2 OVERVIEW OF THE OFFICE OF THE PROTECTIVE COMMISSIONER

The Protective Commissioner is an independent public official appointed to protect and administer the financial affairs and property of people unable to make financial decisions for themselves and who have no other person suitable or able to assist. The Protective Commissioner is also responsible for supervising private managers (family members, friends or others) who have been appointed to administer an individual's affairs.

The Office of the Protective Commissioner (OPC) is the agency responsible for providing the services required to fulfil the Protective Commissioner's responsibilities. The OPC performs a complex range of services tailored to its clients' needs. For example, it can arrange a client's affairs by buying and selling assets, completing tax returns, and paying bills. In some cases, it acts like a bank, supplying clients with small amounts of cash every few days. Because OPC's clients generally have severe mental or physical disabilities, there is also a large welfare component in much of its work.

2.1 How does OPC's role differ from the Office of the Public Guardian?

The Office of the Public Guardian exists to promote the rights and interests of people with disabilities through the practice of guardianship, advocacy and education.[6] Some of its clients—around 60 per cent—are also clients of OPC. In general, the Office of the Public Guardian makes lifestyle decisions for its clients, whereas OPC makes financial decisions.

2.2 How does OPC get its clients?

OPC currently has 11,137 clients. It does not solicit clients—it is assigned to be a client's legal financial manager by the Supreme Court, the Guardianship Tribunal (GT), the Mental Health Review Tribunal (MHRT) or a magistrate. The Supreme Court and the GT can also appoint a private manager (family, friend or others) as someone's financial manager. In these cases, OPC is required to supervise the private manager.

Most of OPC's clients have been assigned by the GT. Anyone with a genuine concern about another person's ability to make financial decisions can make an application to the GT. The GT must then consider whether that person is able to make financial decisions for him or herself, and if not, who should be responsible for making those decisions. This means OPC cannot control the number of clients it takes on.

GT orders appointing OPC as the financial manager are rarely revoked. However the GT does have the ability to review previous orders. In deciding whom to appoint as financial manager, the GT will consider several issues, including the capability of the person, the willingness and whether there are potential conflicts of interests. In about two-thirds of the cases it considers it appoints OPC as the financial manager.

6 Currently the same individual, Ken Gabb, is both Protective Commissioner and Public Guardian.

2.3 What are the backgrounds of OPC's clients?

OPC's clients have very diverse backgrounds. Its annual report groups them according to the following types of disability:

- Psychiatric.
- Dementia and Age-Related.
- Brain Injury.
- Developmental.
- Physical & others.

The diversity of these disabilities and the various degrees of severity within each group presents OPC with a very wide range of clients. On top of that, OPC often has to consult with friends and family members of clients. This adds another layer of complexity to the task of OPC when making decisions on behalf of the clients. This diversity also means that some clients use more of OPC's resources and services than other clients.

2.4 How does OPC make its decisions on behalf of clients?

As the legal financial manager for its clients, OPC plays the role of a substitute decision maker for each client. When making its decisions the OPC must consider an individual's:

- immediate and long term needs
- available assets
- previous lifestyle and family commitments
- wants and needs of the individual, their family and others important to them.

In addition, OPC also needs to consider the standards determined and set by various disability organisations to ensure that its clients are receiving appropriate levels of service. These external drivers can make what appears to be a simple decision a very complex and time consuming process.

3 OPC'S SERVICE DELIVERY AND OTHER COSTS

To be fair, transparent and clear, OPC's fee structure needs to accurately reflect its service delivery costs and minimise cross-subsidies between its clients, client groups and service areas. The first step in establishing such a structure is to understand the size and nature of OPC's operating costs.

Ideally, the Tribunal would have liked to undertake a full activity based costing (ABC) analysis to understand these costs. It believes this approach would have provided the most accurate view. However, the short time frame for completing this review did not allow it to complete such a complex analysis.

Instead, the Tribunal used an approach that approximates an ABC analysis, and increased the accuracy of its approach by fully distributing all expenses to different program areas of OPC. It engaged an accounting firm, RSM Bird Cameron (RSM), to undertake this analysis.

This chapter discusses its key findings and recommendations, including:

- OPC's total current costs are about $23 million. Its chief cost centre is the Estate Management service area: any further examination of OPC's service delivery costs should focus primarily on this area.
- The Tribunal has reached no conclusion about OPC's efficiency or the quality of its services, or about the competitiveness of the market for services similar to those OPC provides.
- OPC incurs costs for activities that do not directly benefit its clients, such as community education services that benefit the community as a whole.
- OPC's costs are affected by a range of external factors, such as Government policy initiatives like the planned establishment of an external appeals body.

3.1 OPC's current costs

OPC's Annual Report for 2002 contains an operating budget, with both the actual results for 2001/02 and the budgeted results for 2002/03. This budget is reproduced in modified form in Table 3.1. It shows that OPC's total budgeted operating costs for 2002/03 are around $25 million.

OPC is currently self-funding, with its intended primary source of income being fees charged to clients. When fee revenue does not cover its actual costs, the shortfall is made up by appropriations from the investment income on funds held under management for clients (formerly the Common Fund). In 2002, these transfers amounted to $12.8 million, or 122 per cent of the total fees charged to clients ($10.5 million). The transfer mechanism was the most significant source of OPC funding.

Table 3.1 OPC Budget (Operating), 2002 & 2003

	2002/03 Budget $'000	2001/02 Actual $'000
Revenue		
Operating Revenues		
Investment Income	150	197
Registry Fees	114	174
Court Directions and Supervision Fees	491	588
Income and Capital Commission	8,693	8,801
Fees for additional service provided to clients	481	578
Fee for provision of Taxation Service	280	308
Financial Planning Fees	617	73
OPC services to OPG	204	204
Profit on Sale of Assets		16
Transfer under former Section 57 of the *Protected Estates Act*	12,550	11,725
Capital Revenues		
Transfers under former Sections 55 and 57 of the *Protected Estates Act*	0	1,096
Transfers under Section 55 1(C) of the *Protected Estates Act*	1,593	0
Total Revenue	25,173	23,760
Total Expenditure	25,173	24,233
Deficit from Ordinary Activities	**0**	**473**

Source: OPC 2002 Annual Report, p 33.

3.1.1 Costs by service area

OPC groups its services into the following four programs:

- Community Education and Advocacy.
- Financial and Asset Management.
- Funds Management[7].
- Private Management Support.

The level of service and effort within each program is driven by different client attributes and requirements. For example, Funds Management services are driven by the level of funds managed for the different client groups, whereas Financial and Asset Management services are related to the number of deposits and withdrawals, and by the number of client contacts by estate managers.

[7] From 12 March 2002, changes were made to institute the Prudent Person Principle. To reflect these changes, funds under management by OPC have been split into eight separate funds and these eight funds are being progressively outsourced. All will be outsourced by 30 June 2003.

To better assess the costs of service to specific client groups, RSM developed an Activity Based Costing (ABC) model for OPC. It identified 22 responsibility centres within OPC. These centres were then classified according to whether they provided services directly to clients (such as the Estate Management – Transition team) or provided services to other responsibility centres (such as Human Resources or Business Services). It also allocated indirect costs to direct service areas, according to these areas' use of indirect services. The results of this analysis are shown in Table 3.2.

Table 3.2 Costs by Service Area

Service Area	Costs 2003 $	Percentage of Total
Estate Management	17,938,038	78
Private Management Support	2,567,442	11
Banker Only[8]	142,416	1
Funds Management	914,603	4
Financial Planning	743,570	3
Taxation Services	462,402	2
Subtotal	**22,768,471**	**99**
Community Welfare costs*	319,065	1
Total	**23,087,536**	**100**

* The items labelled Community Welfare costs are explained in section 3.2.3 below.

The total cost of OPC services for the eight months to February 2003 (the latest available data) was $15,391,691. Annualising this (by multiplying the figure for eight months by 12/8) suggests an annualised figure of $23.1 million. This is comparable to the budgeted figures above.

It shows that most of OPC's costs relate to the estate management service area, which accounts for 78 per cent of its total costs. (A list of activities undertaken in this area is provided in Attachment 2.) Services to support the private managers of clients' accounts represent 11 per cent of its costs. The other service areas have a less significant impact on costs.

3.1.2 Cost per client

Based on these costs by service area, RSM estimated the average cost incurred in servicing different groups among OPC's clients. For estate management, clients were grouped on the basis of their type of disability, type of management (OPC, private manager, or through the OPC Client Service Centre), and level of service provided (high, average or low). For funds management, financial planning and taxation services, clients were grouped by management type, service level, and the value of client assets.[9]

8 OPC provides arrangements to clients who—although not the subject of a formal financial management order—reside in Department of Ageing, Disability and Home Care residences. The arrangements include receiving income—eg pensions—and making payments for the board and lodging costs and daily living expenses of the client. These clients do not receive any other services from OPC and it would be inappropriate to allocate any costs of funds management or estate management services to these clients.

9 Grouping for the financial planning service area is shown as based on whether clients needed a financial plan or not. However, OPC bases this on the value of client assets.

Tables 3.3 to 3.6 summarise the results of this analysis. However, it is important to note that these classification systems overlap. An OPC client may fit into one estate management client group, and into another funds management client group. For any individual client, the costs incurred by each different service area must be added to achieve the estimated average cost for clients sharing that profile.

Table 3.3 shows the estimated cost per client of estate management services for different client groups. The cost per client in this services area varies widely between client groups. The lowest average cost per client (those with dementia or an age-related disability on the monitoring list – the lowest level of service) is $171 per annum. The highest average cost of service (dementia or age-related clients requiring high-level service) is $8,258, or 48 times the lowest average cost. Furthermore, since these are average costs it is reasonable to assume that there even greater cost disparities between individual clients.

The variation in costs across client groups reflected by disability type, management type and service level, is not driven by client asset values. This suggests that any "one-size-fits-all" funding structure based on income and assets will still contain cross-subsidies.

Table 3.3 Estate management cost per client by client group

Disability Type	OPC Managed			Client Service Centre			Monitoring List
	High $	Ave $	Low $	High $	Ave $	Low $	$
Psychiatric	3,399	1,796	878	5,551	4,147	1,985	569
Dementia and Age Related	8,258	5,442	1,036	-	-	-	171
Brain Injury	7,990	4,650	1,888	9,108	-	2,085	961
Developmental	2,719	2,458	557	-	4,689	-	466
Physical & Other	2,076	1,959	249	-	-	-	-
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Tables 3.4 to 3.6 show the estimated cost per client of funds management, financial planning and taxation services for different client groups. The fact that the cost of service increases with the value of client funds under management suggests that size and complexity of the client's finances are the main drivers of cost for these service areas.

However, complexity of the client's financial affairs was also a factor identified in the analysis, and this has only a partial correlation with the size of the monies involved. An income and asset-based fee structure is likely to reflect actual costs in these service areas more closely than for estate management. But as noted above, these three service areas represent only nine per cent of OPC expenditure.

Table 3.4 Cost per client of funds management services

Value of Funds Under Management	Privately Managed Clients	Privately Managed Costs $	OPC Managed Clients	OPC Managed Costs $
$0	241	0	137	0
$1 to $50,000	278	17	6,399	8
$50,001 to $250,000	269	108	1,485	82
$250,001 to $500,000	67	301	370	262
$500,001 to $1,000,000	28	579	291	519
$1,000,001 +	12	2,297	250	1,575
Total*	**895**	**97,832**	**8,932**	**816,771**

*Total determined by multiplying the average fee for each category by the number of clients in the category.

Table 3.5 Cost per Client for OPC financial planning services

Client Category	Service Level	
	High	Average
Full financial plan required	1,177	1,177
No financial plan required*	114	28

* Done by exception and invested by schedule.

Table 3.6 Cost per Client for OPC taxation services

Value of Funds Under Management	Cost Per Client
Zero to $50,000	$92
$50,001 to $250,000	$147
$250,001 or more	$167

3.2 Efficiency, quality of service and competition

Given the limited time allowed for the review, the Tribunal has not considered the efficiency with which OPC delivers its core services, and has not formed an opinion as to whether the costs described above are the "efficient costs" of service. In addition, it has not formed a view on the quality of service provided by OPC, which would be important in considering the overall efficiency and value to clients of OPC services.

The Tribunal notes that some stakeholders asked that both efficiency and quality of service be addressed as part of a future review. Client representatives have indicated that they would prefer a higher quality of service, which might but need not entail higher costs. For example, higher levels of training for estate managers could lead to lower stress, lower staff turnover, and lower associated costs.

The Tribunal did try to benchmark OPC costs; however, it was not able to do so for several reasons. There are few peer organisations, and the circumstances of each vary. The Tribunal did not find a public sector organisation comparable with OPC willing to provide data for

detailed benchmarking. Published data is in general not comparable, because different organisations have a different scope of activities, and do not break down data into units small enough to be useful for comparison.

In NSW the Tribunal identified only one comparable private sector firm—Perpetual Private Clients. This is a business unit of the Perpetual Group[10], which provides services similar to OPC's. Perpetual targets only commercially viable clients – these equate to the high net worth end of OPC's client spectrum. It may also be that OPC clients, who may be under protection, are intrinsically difficult to administer. Such factors challenge traditional efficiency measures. Furthermore, in the absence of competition from other commercial service providers, the Tribunal is reluctant to assume that Perpetual's fees are necessarily the same as they would be in a fully competitive market.

A further problem with benchmarking costs is that data needs to be recorded at a sufficiently micro level so that it can be massaged into comparable units for comparison with peers. An example may be to record the time and resources spent by OPC on each client matter, however this would be extremely costly. This further increases the difficulty of comparing OPC with other organisations.

3.3 Costs related to activities that don't directly benefit clients

RSM identified some costs as not directly related to specific clients or client groups, but attributable to the community education and advocacy program of OPC. The total cost is estimated to be $319,065 for 2002/03 (shown in Table 3.2 as "Community Welfare Costs"). These costs were not allocated to any group of clients.

The program is mentioned in the 2002 Annual Report. The key activities listed are:[11]

> …community education, advocacy for services to meet the needs of our clients and protection and promotion of the rights and interests of people with decision making disabilities.

Insofar as the activities undertaken under this program benefit the whole community of NSW rather than the OPC client base only, it is a matter for Government to decide what it wishes OPC to do in this area, and to fund OPC's activities accordingly.

3.4 External cost drivers

The Statement of Financial Performance from the 2002 Annual Report presents a combined financial performance for OPC and the Office of the Protective Guardian. Extracted figures from this statement show that OPC's expenditure grew by 6.13 per cent between FY 2001 and FY 2002. In that time, its client numbers grew by 3.4 per cent and reported inflation was around 3 per cent. This would imply a slight real reduction in costs per client.

However, the Tribunal recognises that certain factors outside OPC's control will affect OPC's costs. While OPC should take all pains to ensure that costs are minimised, OPC should not be penalised for failing to address cost increases where those increases are externally driven.

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10 Perpetual's trustee services are usually referred to in this report as "Perpetual" or "Perpetual Trustees".

11 Source: OPC 2002 Annual Report, p 30.

Many external cost drivers are standards-based, and stem from Government policy initiatives. In future, where extra costs are the result of Government policy requirements upon OPC, extra Government funds may be necessary to offset these costs. A particular example of such an external cost is the forthcoming change to the Administrative Decisions Tribunal (ADT). A new body is being set up within the ADT to hear appeals against OPC decisions. The scope of cases dealt with by this new body has not been finalised (at the time of writing this report), and while many appeals are expected, the effect of the new arrangement on OPC's legal costs is currently unknown and unknowable.

Another example is the Attorney General's Department initiative to increase the use of shared services in which OPC and OPG are participating. At present, transfer of Human Resource services is scheduled for July 2003, and other areas like IT and Corporate Accounts will also be considered. The impact of such consolidation on OPC's costs is not quantifiable at present.

There may be costs involved with the implementation of the Tribunal's recommendations. These costs include:

- any accounting / IT system upgrades necessary to make the recommended changes
- educating staff, clients and stakeholders about the new fee structure and levels
- any necessary organisational changes.

The costs are not avoidable and not directly related to the services currently provided to the OPC's clients. It is not possible to factor these additional costs into the proposed fee structure and they will not be recovered through fees. Any implementation costs will form part of the shortfall.

3.5 Recommendations

The Tribunal recommends that NSW Treasury commission an efficiency study prior to the next review of OPC fees, in order to assist the assessment of efficient costs within OPC.

4 COST RECOVERY

Up until January 2003, OPC received no contribution from government towards its costs[12]. OPC has mainly been funded by the revenue generated by fees for services, and by charges on the income on funds managed for clients. These charges include fees, as well as annual transfers from investment income which the *Protected Estates Regulation 1995* provides for to enable OPC to meet any revenue shortfalls.

The Tribunal analysed the extent to which OPC's costs will be recovered through the revenue generated by the fees it charges its clients in 2002/03, and the level of cross-subsidisation that occurs. Its key findings include:

- In aggregate, fees for 2002/03 will under recover costs by around $14.9 million.
- Under the current funding arrangements, OPC will transfer this amount from the investment income of the Access Fund (the old Common Fund). This represents a high level of cross-subsidisation between clients, which the Tribunal believes is inequitable.
- The recommendations of this review move towards minimising these cross-subsidies, but will not eliminate them entirely. To continue to improve the fairness and transparency of OPC's fee structure, improved data will be needed.

4.1 Aggregate level of cost recovery

RSM forecasts that the total revenue OPC will generate from fees charged under the current fee structure in 2002/03[13] is $8.2 million, while its total costs are expected to be $23.1 million. This means that fees will under recover costs by $14.9 million. This level of under recovery is similar to last financial year's, which was $13.3 million. (See Table 3.1, which shows a deficit of $473,000 plus the transfers from funds under management of $12.8 million.)

The Tribunal's cost analysis indicates that all OPC's service areas currently under recover costs. The largest shortfalls are in the largest cost centres, which include estate management and private management support.

This level of under recovery is due to three factors:

- The difference between the cost of providing OPC's services and the fees it charges for those services.
- Formal and informal waiving of fees for clients who do not have the capacity to pay the full cost of the services they receive.
- OPC's obligations to undertake activities which do not directly benefit its clients and for which no fee can be charged (such as community education).

12 In January 2003, the Government provided public funding amounting to $3.56 million.

13 As in Chapter 3, RSM's data are annualised from data for the most recent 8 months.

4.2 Level of cross-subsidisation

There are several different ways that cross-subsidisation can occur:

- **between clients** – where the fees paid by some clients recover or over-recover the costs incurred in providing the services they receive, while those paid by others under-recover these costs. A certain level of this kind of cross-subsidisation is always likely to occur, even within private service firms with strong cost recording disciplines (eg tax agents who charge a flat fee, despite varying complexity).
- **between client groups** – where, on average, one client group pays in excess of costs and another pays below cost for the services received.
- **between service areas** – where, on average, one service area recovers more than the costs it incurs and another service area pays less.

Under its current funding arrangements, OPC will need to make up its revenue shortfall by transferring a sufficient portion of the interest its clients earn on the funds it manages for them through its Common Fund. The Tribunal believes this mechanism, known as annual section 55 transfer, can be regarded as a fee. However it recognises that it is provided for in the *Protected Estates Regulation 1995* as a general funding source.

As previous reviews have identified, the section 55 transfer reflects a large cross-subsidy between clients. It means that a relatively small group of clients who are asset-rich and whose assets are invested in the Common Fund are cross-subsidising all other clients, including those who are asset-poor, or whose assets are invested in other ways.

These other clients are not intrinsically less costly to administer than those who are asset-rich. Furthermore, many asset-rich clients cannot be regarded as rich *per se*. Some are "rich" only because they have received large compensation or insurance payouts, which were designed to meet their lifetime costs of care. Like previous reviewers, the Tribunal believes continuing to transfer client investment income to cover revenue shortfalls is not equitable.

Table 4.1 compares the costs per client to the current fees in the funds management service area. OPC currently does not charge an explicit fee for these services. The figure in the fees column of this table represents RSM's estimate of the likely fees per client.

Table 4.1 Funds management costs and current fees

Value of Funds Under Management	Clients	Costs per client $	Fees per client* $
$0	137	0	0
$1 to $50,000	6,399	8	6
$50,001 to $250,000	1,485	82	59
$250,001 to $500,000	370	262	188
$500,001 to $1,000,000	291	519	374
$1,000,001 +	250	1,575	5,573
Total**	**8,932**	**816,771**	**588,390**

Source: RSM report, p 42.

*Calculated by assuming a 5 per cent return on funds managed and applying the management fee of 1.26 per cent to the calculated earnings on the average balance within the category.

**Total determined by multiplying the average fee for each category by the number of clients in the category.

In the private management service area, fees appear to over-recover costs. Table 4.2 shows that fees are more than double the costs for clients, regardless of the value of the funds under management. However this table only allocates the costs attributable to the funds management service for private clients. The major costs to OPC in supervising private managers relate to supervision and support services which totalled $2.3 million (annualised for 2002/03).

Table 4.2 Comparison of private management costs and current fees

Value of Funds Under Management	Clients	Costs per client $	Fees per client* $
$0	241	0	0
$1 to $50,000	278	17	39
$50,001 to $250,000	269	108	248
$250,001 to $500,000	67	301	689
$500,001 to 1,000,000	28	579	1,323
$1,000,000 or more	12	2,297	5,254
Total**	**895**	**97,832**	**223,736**

Source: RSM report, p 43.
* Calculated by assuming a 5 per cent return on funds managed and applying the management fee of 4 per cent to the calculated earnings on the average balance within the category.
**Total determined by multiplying the average fee for each category by the number of clients in the category.

In the financial planning service area, neither the high nor low asset wealth client groups appear on average to be significantly disadvantaged by any cross-subsidisation that may be occurring. The most any client can be charged ($1,000) is less than the average cost per client for a full financial plan, and the least any client can be charged ($25) is less than the average cost per client of an average level assessment without a full plan. The fees seem low when compared with commercial providers; if costs are greater than fees, the fee structure leads to a subsidy.

Table 4.3 Summary of OPC's current financial planning fees

Value of Funds Under Management	Initial Plan Fees		Subsequent Annual Review
	New Client	Existing Client	
$0 to $25,000	$50	$25	$25
$25,001 to $50,000	$100	$50	$50
$50,001 to $75,000	$200	$100	$100
$75,001 to $100,000	$300	$150	$150
$100,001 to $250,000	$400	$200	$200
$250,001 to $500,000	$500	$300	$250
$500,001 to $1,000,000	$650	$375	$325
$1,000,001 to $3,000,000	$750	$450	$375
$3,000,000 or more	$1,000	$500	$500

Source: RSM report, p 39.

Table 4.4 Cost per client for OPC financial planning services

Client Category	Service Level	
	High	Average
Full financial plan required	1,177	1,177
No financial plan required*	114	28

Source: RSM report, p 40.
* Done by exception and invested by schedule.

In the taxation service areas, OPC charges $65 to prepare and forward a return where there is no tax payable. It charges $130 for a standard return, and $250 for more complicated returns (with multiple income streams).[14]

Hence the current fee approximates the cost for clients with funds under management in the lower part of the range $50,000 and $250,000. Clients with fewer assets are more likely to require only the non-taxable return, and will thus pay less than cost – however, others in the same group, who pay $130, will be paying more than cost. Similarly for clients in the $250,001+ bracket, if they require a complicated return they may be paying more than cost, but if they do not then they may be benefiting from some cross-subsidisation.

Table 4.5 Cost per client for OPC taxation services

Value of Funds Under Management	Cost Per Client
Zero to $50,000	$92
$50,001 to $250,000	$147
$250,001 or more	$167

RSM concluded that:[15]

> Without performing a more detailed time and cost study for specific clients it is not possible to determine whether these observations indicate a cross subsidisation within the client category for funds in excess of $250,000, or between the three taxation services client categories, or between taxation services and other OPC services.

RSM also pointed out that the only way to determine the impact of cross-subsidisation would be to impose time recording disciplines within OPC's taxation services group, as in commercial tax practices. The Tribunal has not assessed whether the cost of this time recording might be justified.

14 Note that the OPC website publishes the fees for tax to be within the range of $40-$150. OPC has advised that the fees on the website for tax are outdated.

15 RSM report, p 38.

4.3 Issues related to quality of data

There were limitations on the ABC methodology RSM used to estimate cost recovery. Specifically:

- The surveys of time spent on tasks often had small sample sizes.
- Some data has not been recorded by OPC, particularly indirect costs.
- RSM did not reallocate indirect costs within responsibility centres, although this may improve accuracy (for example, OPC allocated rent by staff numbers rather than floor space).
- OPC's indirect costs must be spread over many clients. It is thus difficult to identify avoidable costs.
- There are competitive neutrality issues concerning any return on OPC's capital, and OPC's tax status. The point of assessing costs is to form a view on a suitable level of fees, but private competitors to OPC would need to anticipate extra costs: an expected return on investment, company tax and GST.

Given the magnitude of the current shortfall, these limitations are unlikely to change the conclusion that the current fee structure provides poor cost recovery. However, the ongoing issue of data collection for the use of management and for fee-setting will be important at the next fee review. For each client (or client group), it will be necessary to know the following:

- the cost of providing the services they use
- how much they must pay under a fee structure
- how much they can afford to pay.

The Tribunal notes the value of a more accurate ABC model. If OPC were to conduct a study into patterns of time spent on specific tasks, the current model could be improved. This model could then be used at the next fee review to better gauge cost recovery.

However, the benefit of collecting information (in this case, a fairer and more transparent fee structure) must be weighed against the cost of collection. The Tribunal realises that not all the functions of a management information system (MIS) will be justified in the OPC's case. In particular, the abovementioned study of time spent on tasks is envisaged as a one-off event. However, there may be sections of OPC where cost allocation remains insufficiently accurate for management and funding purposes. OPC should examine where such cases occur, to ensure that the next fee review is furnished with good data.

Treasury and OPC both have an interest in improving information collection for the purpose of the efficiency study (refer to recommendation in section 3) and ongoing management of OPC. Thus it appears to be in the interest of both parties to determine jointly the information needed, the purpose of for which the information is sought and the best way to achieve this.

Consultations suggest that a proportion of OPC's work goes unrecorded, because staff are aware that the client concerned is unable to pay for the services that he or she needs nonetheless. This makes it difficult to accurately assess the fairness of any fee structure proposed, even a pure fee-for-service model, which would be the most administratively burdensome (and expensive) of any option.

4.4 Recommendations

The Tribunal recommends that the OPC, between this and the next review of fees, develop and institute a management information system in order to gather sufficient data to enable accurate assessment of cost recovery between client groups and between cost pools. Part of the development task may be to perform a detailed study of various tasks, to enable more accurate Activity Based Costing. In setting up these management information systems, OPC should consult with other stakeholders, particularly Treasury, which may commission an efficiency study based on the information collected.

5 FUNDING THE REVENUE SHORTFALL

The Tribunal has reviewed a range of options for funding OPC's revenue shortfall, and assessed them according to whether they are financially viable, easily implemented, equitable, transparent and delivery budget certainty for OPC. It believes these criteria reflect the terms of reference of this review, and will help to ensure that OPC has a high level of operational certainty going forward.

Based on this assessment, the Tribunal's preferred option is to fund any revenue shortfall from consolidated revenue. These funds could be:

- budgeted for annually in advance
- disbursed monthly in alignment with OPC's fee billing process, or
- disbursed annually in arrears.

The Tribunal believes they should be budgeted for annually in advance. This approach provides the most budget certainty, and is the usual way of funding Government bodies. Monthly disbursement would allow closer continuous scrutiny of OPC. But the Tribunal does not believe this degree of scrutiny is necessary. Funding in arrears would allow little scrutiny, and would expose the Government to larger uncertainty regarding costs to be covered.

The administrative cost of implementing the Tribunal's preferred funding option is minimal and would not involve major changes to OPC's administrative structures or IT systems.

5.1 Options considered

The Tribunal considered the following options for funding OPC's revenue shortfall:

1. An annual contribution from consolidated revenue in the order of $5.6 million, plus a cross-subsidy from charges for other services or client groups, as proposed by OPC.
2. Modified version of Option 1, which includes an annual contribution from consolidated revenue in the order of $9 million.
3. Establishing the OPC as a Government Trading Enterprise (GTE) and providing a Community Service Obligation (CSO) to fund any revenue shortfall.
4. Disbursement from a self perpetuating fund established with an up-front contribution from consolidated revenue.
5. Transferring management of commercially viable clients to private managers and relying on an annual allocation from consolidated revenue for operational costs and revenue shortfalls.

The key differences between each of the options are:

- Who determines variations from a cost reflective fee structure and the actual level of funding.
- Who determines the response to any variation (ie who assesses capacity to pay).
- The source of funding (eg tax revenue, cross subsidies etc).

Table 5.1 provides an overview of these options, and then each option is discussed in more detail below.

Table 5.1 Options considered

	Status quo Disbursement from the Common Fund	Option 1 Cross subsidy plus allocation from cons. revenue	Option 2 Modified version of option 1 (preferred)	Option 3 Establish the OPC as a GTE and provide a CSO	Option 4 Disbursement from a self perpetuating fund	Option 5 Transfer management of clients
Who determines total subsidy	Attorney General/OPC	OPC/Treasury	OPC/Treasury	Treasury	OPC/Treasury	Treasury/ OPC/GT
Who sets discounted fee structure	OPC	OPC/Treasury	OPC/Treasury	OPC/Treasury	OPC	OPC
Who determines waivers	OPC	OPC	OPC	OPC	OPC	OPC
Source of funds	Other clients	Other clients & budget	Other clients & budget	Budget	Budget	Budget
Efficiency	Uncertain	Uncertain	Yes	Yes	Yes	Uncertain
Equity	No	Limited	Greater than option 1	Yes	Yes	Uncertain
Transparency	No	Yes	Yes	Yes	No	Yes
Budget certainty	Uncertain	Yes	Yes	Yes	No	Yes
Ease of implementation	No	Yes	Yes	No	No	No

Option 1: Cross-subsidy and an annual contribution from consolidated revenue

This option reflects the fee structure proposed by OPC. This structure involves an estimated contribution from fees of $10.6 million, a transfer from funds management of $7 million,[16] and an annual contribution from consolidated revenue in the order of $5.6 million. Under this option, the subsidy from wealthier clients would be smaller than it is now, but it would still be large.

The Tribunal is not comfortable with this option for a number of reasons:

- Though the extent of the cross-subsidy is smaller due to the partial use of budget, the Tribunal does not think it goes far enough in reducing the level of cross subsidisation.
- Because the cross subsidy is still large, wealthy clients might continue to prefer managers other than OPC, leading to continued litigation and pressure on OPC costs

[16] The Tribunal's estimated revenue from OPC's proposed fee structure yields a total revenue of $18.4m, this compared to RSM's estimate of $17.4m. The difference lies in the assumption of the revenue from other sources. The Tribunals has used the estimates in the Draft Report of the Senior Officers' Group June 2002, while RSM used the actual revenue collected to date for Private client management.

Option 2: Modified version of option 1 with a larger contribution from consolidated revenue

This option is similar to option 1, but involves a larger contribution from consolidated revenue and a smaller subsidy through section 55 transfers. This option is relatively administratively simple to implement, and would allow the Treasury to exercise greater fiscal oversight. It also promotes equity and transparency.

By transferring a large portion of the responsibility for funding the revenue shortfall from OPC's high wealth clients to the Government, the option is more equitable than the current funding arrangements and option 1. It also recognises the welfare component of much of OPC's work.

An important question to consider is how large the contribution from consolidated revenue might be. OPC has proposed a fee structure which would involve a contribution in the order of $5.6 million. The Tribunal considers that this is inadequate. Under the Tribunal's recommended fee structure, it would need to be in the order of $9 million.

In theory, a potential disadvantage of this is that clients are less compelled to scrutinise the efficiency with which OPC operates. However, Treasury and other Government bodies will have a greater incentive to scrutinise all of OPC's operations, and should have a greater capacity to do this.

If OPC receives a larger transfer from consolidated revenue, it will also need to ensure that the funds are used in accordance with well established Government principles of competitive neutrality and general cost efficiency.

On balance, the Tribunal considers that this option best achieves the goals set out in the terms of reference for this review.

Option 3: Establishing the OPC as a GTE and providing a CSO to fund any revenue shortfall

The OPC's Victorian counterpart, State Trustees Ltd has been established as a Government Trading Enterprise (GTE), and is provided with a Community Service Obligation (CSO) to support those clients without the capacity to pay. The CSO paid by the Victorian government was in the order of $5.6 million in 2001 and 2002 which equates to 17 per cent and 16 per cent of State Trustees Ltd total revenue respectively.[17]

A CSO involves providing funds to a GTE to provide a social program with minimal cross subsidies and inefficiencies.[18] The NSW Government provides funds through CSOs for transport, water and electricity services where customers do not have the capacity to pay the full cost of the provision of the service.

Overall, the option of a GTE with a CSO achieves similar results to the first option above. However, the Tribunal believes that this option entails additional administrative complications which do not contribute to policy aims. The GTE structure is generally used for large enterprises (such as utilities) which operate in a generally commercial environment.

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17 State Trustees Ltd 2002 Annual Report.

18 NSW Government, July 1994, *A Social Program Policy for NSW Government Trading Enterprises.*

OPC is a small organisation operating in an environment that has more welfare than commercial characteristics. For this reason, the Tribunal does not recommend this option.

Option 4: Disbursements from a self perpetuating fund

This option involves Treasury allocating a one-off set amount from the budget for each client to go toward establishing a self perpetuating fund which would be used to finance the shortfall in revenue as well as management costs going forward. It has previously been proposed by the OPC, and is equivalent to the Tribunal's preferred option except that it involves an up-front capital contribution rather than an annual funding of expenditure.

If this option were implemented, it would be necessary to ensure that:

- the fund was of adequate size to continually provide sufficient income to cover the OPC's annual revenue shortfall and any fund management fees without eroding the principal balance
- the fund was protected from being accessed for other purposes or from having its real value reduced by drawings by the OPC
- a mechanism was established to review the size of the fund in response to changes in the OPC's client base, cost efficiencies and the investment market.

The cost to consolidated revenue of this option is, in principle, the same as option 1 and 2 on a net present value basis. However, Treasury has indicated that it does not support this option. The Tribunal also has some reservations, in particular:

- a self perpetuating fund would lead to less scrutiny of OPC's efficiency
- the actual size of the fund is difficult to estimate, given uncertainties about future costs and investment returns.

Option 5: To transfer commercially viable clients to private managers and use Government funding for operational costs or revenue shortfalls for other clients

If the commercially viable clients managed by the OPC were transferred to private managers then the OPC would only be responsible for those clients with limited capacity to pay. This would remove the issue of the cross subsidisation of clients and services.

However, the Tribunal considers that this option has a number of disadvantages. First, an organisation like OPC has a high level of fixed costs. If its client number were reduced, each client would bear a greater share of these fixed costs. Second, the Tribunal is not certain that there is an efficient and competitive market for the services provided by OPC. In NSW the Tribunal is aware of only one commercial provider of such services – Perpetual Trustee Ltd. Transferring clients into this market might result in them paying excessive fees. So this option is undesirable on the grounds of both equity and efficiency.

5.2 Recommendations

The Tribunal recommends that:

- *Clients with capacity to pay should pay fees which reflect the full cost of service.*
- *The shortfall between OPC revenues and costs be funded from consolidated revenue.*
- *The allocation be based on forecasts of the difference between fees charged, actual service costs, efficiency gains and any fee waivers provided.*
- *The allocation be budgeted for annually in advance.*
- *The OPC be accountable under normal budget controls for expenditure against these criteria.*
- *The Government note that external and internal cost drivers may in future increase the size of the revenue shortfall unless offsetting efficiency gains within OPC can be achieved.*

6 CAPACITY TO PAY AND FEE WAIVERS

Not all OPC clients are able to pay for the full cost of the service it provides—but these services still need to be provided. To some extent, the current fee structure and funding arrangement embed a level of cross-subsidisation to reduce charges to clients with lower capacity to pay. In addition, the *Protected Estates Act 1983* allows the Protective Commissioner to waive, remit or reduce fees where it appears reasonable to do so. At present, where fees are waived, the shortfall is met by cross subsidisation from wealthier clients.

Arguably, this cost is of a social welfare nature and thus should be appropriated from consolidated revenue. However, if it is to be funded from government appropriations then a closer look at the issue of capacity to pay is needed to ensure that the principles of fairness, clarity and transparency are met.

The Tribunal has considered concerns about clients' capacity to pay. Its key findings include:

- Structuring fees on a percentage base with no minimum charges can take into account capacity to pay concerns for a substantial number of OPC's clients.
- Estate size is only an approximate guide to capacity to pay. For example, some clients with large estates and incomes may still not have the capacity to pay, due to the nature of their health problems and service needs. Therefore OPC needs to be able to assess capacity to pay and waive or reduce fees on an individual basis.
- OPC's current fee waiver mechanism provides incentives for informal fee waivers, which need to be removed to provide more equity and transparency.
- The Tribunal's preferred process for waiving or reducing fees involves a formal fee waiver process and periodic reviews of each client's liabilities and capacity to pay.
- OPC is in the best position to determine the criteria for assessing capacity to pay, but has set out a general framework to guide this process.

6.1 Structuring fees on a percentage basis can address capacity to pay concerns for many clients

A significant proportion of OPC's clients have low estate values. At the start of April 2003, it had 9,167 clients under direct management and 1,970 clients under private management. Of those with trust accounts which OPC manage (7,578), over 60 per cent have an estate value less than $25,000. Together these clients account for only 3 per cent of the value of funds under management.

Table 6.1 OPC client summary

	OPC managed clients	Privately managed clients
Clients with trust accounts opened	7,578	1,643
Clients with no trust account	235	-
Deceased clients	1,354	327
Total clients	**9,167**	**1,970**

Client data as at 4 April 2003.

As Table 6.2 shows, a small number of clients (fewer than 500) hold the vast majority (about two thirds) of the assets OPC manages.

Table 6.2 Estate values of clients under OPC management (2003)

Estate value $'000	Client no.	Total value $m	% client	% value
0	116	0	1.5	0.0
1cent - 25,000	4,594	30,838,022	60.6	3.3
25,001 - 50,000	835	30,069,699	11.0	3.2
50,001 -100,000	683	47,990,179	9.0	5.1
100,001 -150,000	282	34,810,263	3.7	3.7
150,001 -200,000	178	30,586,808	2.3	3.3
200,001 -250,000	117	26,068,187	1.5	2.8
250,001 -500,000	314	110,704,636	4.1	11.9
500,001 -1,000,000	247	172,816,212	3.3	18.5
> 1,000,000	212	450,068,392	2.8	48.2
Total	**7,578**	**933,952,399**	**100.0**	**100.0**

Note that totals may not add up due to rounding.

This suggests that structuring fees on a percentage basis with no minimum charges can take into account capacity to pay concerns for a substantial number of OPC's clients.

6.2 Ability to assess capacity to pay and waive fees on an individual basis still needed

Estate size is at best an approximate guide to capacity to pay. The service and income needs of OPC's clients vary greatly. For example, the health problems of some clients may entail substantial expenditures now or in the future. Hence, some clients with large estates and incomes that may seem reasonable for an 'average' person may not have the capacity to pay substantial fees. Such cases require individual assessment. Some clients may be asset rich, but income poor and vice versa. In addition, client's illness/disability will also affect their capacity to pay.

This means that a simple means test would not be sufficient on its own to determine clients' capacity to pay. OPC also needs clear criteria for assessing capacity to pay on an individual basis, and the ability to waive or reduce fees where it considers a client does not have this capacity. OPC currently has the ability to waive part or all fees (see below)—as do similar organisations such as the Public Trustee of NSW, the Victorian State Trustees Limited (STL) and the QLD Public Trustee—and it is important that it be retained.

However, the application of a fee waiver should be seen as the exception rather than the norm – a last resort option. The Tribunal recognises that there are clients who cannot meet some of the fees charged, but also considers that it is undesirable to provide an incentive to apply the fee waiver more than necessary.

6.3 OPC's current fee waiver mechanism provides incentives for informal fee waivers

Current practice in OPC is that individual fees are waived on a once off basis; no client has a general fee waiver. OPC's rationale for this is as follows:[19]

> Some clients can have nothing in their account one day but then receive a damages award the next and have substantial funds, so we [OPC] avoid general waivers. In the past, any waiver has meant other clients have had to pay more to make up the difference. We have, accordingly, been quite conservative in allowing waivers.

Since August 2000, more than 300 clients have had various individual fees formally waived to the value of $134,964 (Table 6.3). However, many fees are waived informally by simply not registering the transaction.

Table 6.3 Fees waived

	Client numbers	Total value of fees waived
Aug 00 – June 01	39	$32,900
Jul 01 – Jun 02	262	$89,288
Jun 02 – to date	26	$12,776

Only the Protective Commissioner and Director, Finance & Investment in OPC can formally waive a fee. But staff members provide informal fee waivers by not recording the work performed and hence no fees are raised. This bypass of the formal waiver system could be a result of the formal process itself.

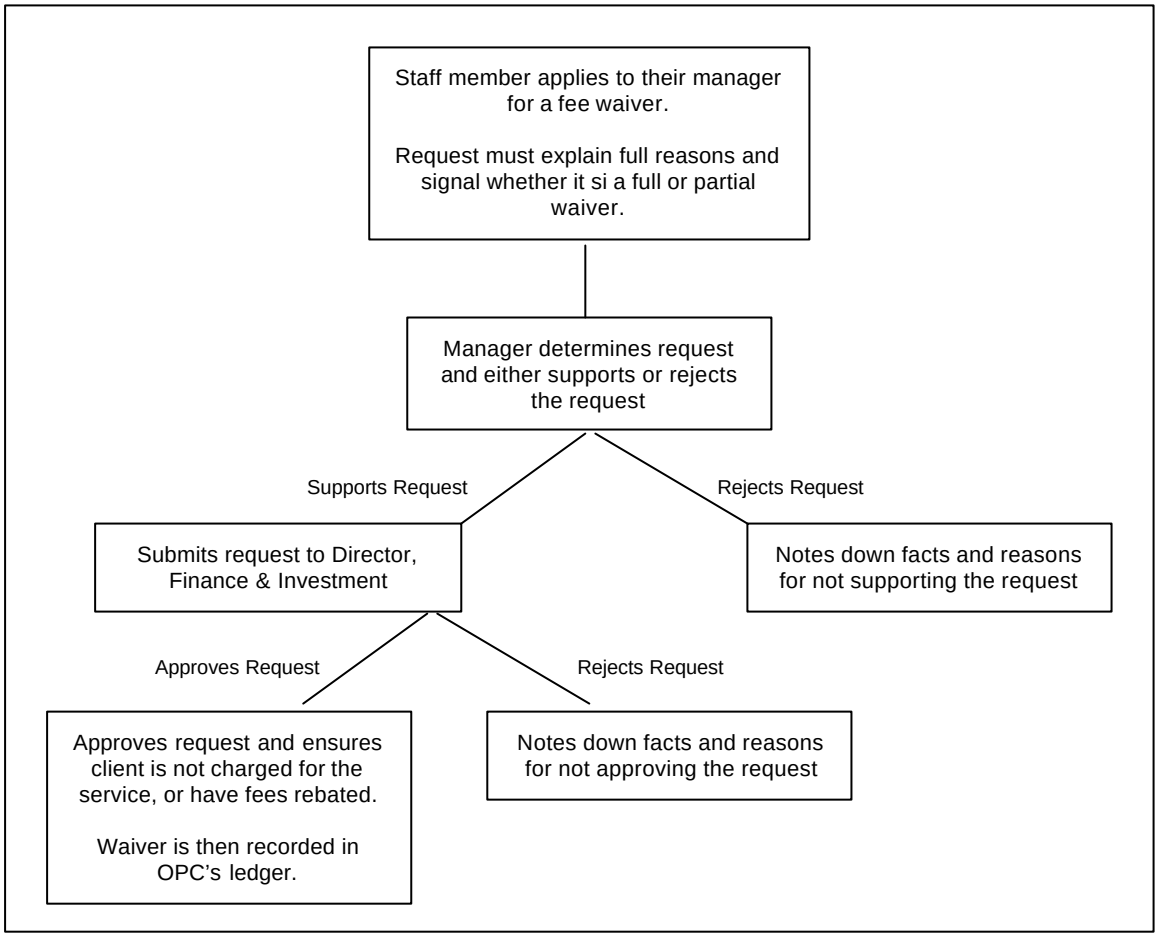
This process is fairly complex, as shown in Diagram 1. Where the fee may be small, employees have an incentive to by-pass the formal request out of convenience. The Tribunal believes these incentives need to be removed to provide more fairness and transparency.

When a formal application is made, staff need to consider the following:

- Is the provision of the service compulsory?
- If not, does the client want the service and what would be the consequences if the service were not provided?
- Is the service available from another source, free or at a lower fee?
- Can the client pay for the service over time?
- Can the client make part payment for the service?

[19] Protective Commissioner, email response dated 8 April 2003.

Diagram 1 OPC current fee waiver application process



Staff are encouraged not to apply for a waiver every time a client has difficulty in meeting a fee, but to try to work through alternatives. In addition, the basis for a waiver request can vary widely and thus OPC have not attempted to formalise the process with benchmarks etc.

6.4 Tribunal's preferred process for waiving or reducing fees

The Tribunal considered three options for improving OPC's process for waiving or reducing fees on the basis of inability to pay. For all of these options, the billing of clients should be automated as much as practicable to remove the need of estate managers to raise/charge a fee themselves. Automation should reduce/discourage informal fee waivers by staff, provide more equity in the application of fee waivers and allow better information to be collected over time (which will enhance transparency and assist in any future pricing reviews). OPC already has an IT system that can automate the fees and billing to clients, so none of the three options is expected to impose significant implementation costs. Some minor adjustments may be required subject to the final mechanism developed.

Option 1: Maintain the existing procedure of relying on OPC staff to apply for fee waivers on behalf of the clients

This option places the onus on staff to apply a complex process, which suggests it may not be implemented uniformly. If this policy is maintained, a solution to the informal waivers must be sought so that the process is applied fairly and the full extent of work effort is recorded. This could possibly be in the form of an automated process or a simpler and flat application process combined with a more systematic set of criteria against which to assess a client's capacity to pay.

Such a system is not appropriate under formal ongoing government funding as it is would not satisfy all the principles of being clear, fair and transparent.

Option 2: Define a certain group of clients on the basis of specific criteria, such as income or size of estate, whose financial position automatically dictates that they are given a rebate on fees

This method is simple to apply but does not take into account individual cases. That is, some clients, though not fitting the defined group, may need a fee waiver at some time(s). The nature of OPC's clients implies that a simple means test is not likely to fairly assess their capacity to pay.

Option 3: Regular reviews of liabilities and capacity to pay

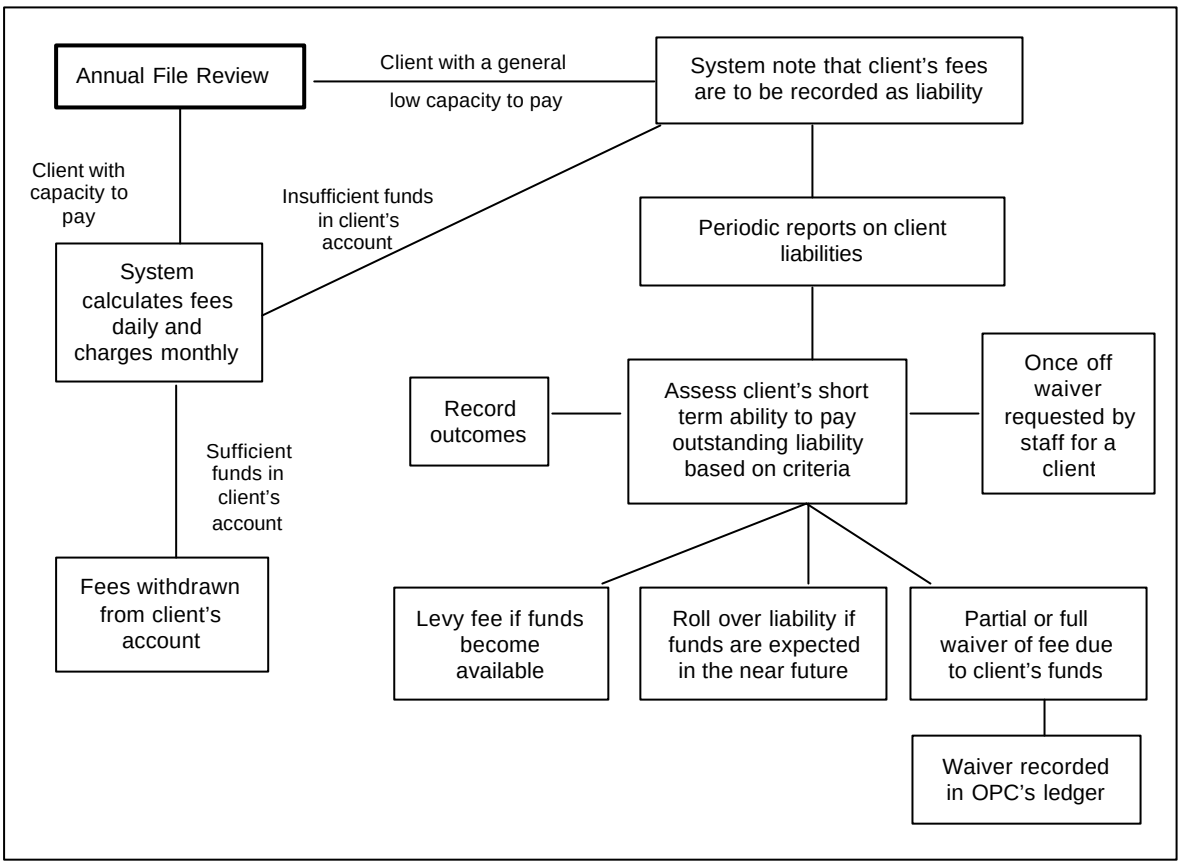
This is the Tribunal's preferred option. Clients would be reviewed annually to determine their general capacity to pay. This review can be incorporated into the annual client review currently carried out on the anniversary of the client joining OPC. For clients deemed to have a low capacity to pay, or those whose account has insufficient funds, the fees charged will not be withdrawn from their accounts. Instead they will be recorded as a liability of the client.

In addition, reports on client liabilities would be reviewed periodically to see whether the fees can be levied, waived completely or partly, or rolled over to some future date. In conducting this review, set criteria should be applied. Finally, staff members would retain the ability to apply for formal waivers of individual fees for any client, where they see the need and follow the correct process.

The benefit of this approach is that the policy is applied more uniformly, while still taking into account individual needs. In addition, it recognises cases where OPC manages a client prior to receipt of settlement when capacity to pay is poor but then the client subsequently receives a settlement.

The Tribunal sees this option as a framework which OPC could use as the basis for a new fee waiver process, and further develop so it can be implemented efficiently and practically. Diagram 2 presents a possible example of a fee waiver process based on this framework.

Diagram 2 Possible framework for the waiver process



Currently, OPC uses its formal fee waiver process very strictly and sparingly because it does not have government funding to subsidise clients who are unable to pay. However, one of the results of this is that staff have used apply informal waivers by performing service without recording. This practice understates the work performed by OPC for its clients, and also conceals the true costs incurred and revenue forgone. If the Government agrees to provide this funding, the Tribunal does not want to produce the opposite effect where OPC provides waivers more leniently due to the availability of government funds.

To avoid this effect, OPC would need to record its use of the fee waiver process and make these records available for annual review/audits. Alternatively, benchmarks and/or productivity measures could be established to assess OPC's improvements over time. Measures of productivity, if not already existing internally within OPC/OPG can be negotiated with the Protective Commissioner and reviewed annually with Treasury. If informal waivers decrease significantly, measured productivity should rise.

6.5 Criteria for assessing capacity to pay of each client

The Tribunal believes OPC, in consultation with other stakeholders, is in the best position to develop criteria for assessing its clients capacity to pay. It has the best knowledge and understanding of its clients. The Tribunal has set out a general framework for the developing these criteria.

The assessment criteria should be a set of clearly defined guidelines for staff to apply to each client when assessing the client's capacity to pay and whether their fees should be waived (partially or completely). Although a level of subjectivity is unavoidable, clearer guidelines will help to ensure a greater degree of fairness, clarity and transparency about how the fee waiver is applied.

6.5.1 Principles underlying assessment criteria

The general principles underlying the criteria include:

- **Fairness**—criteria should be objective and not discriminate against a client's disability.
- **Clarity**—the results of a client's capacity to pay, based on the criteria, should be easily replicable.
- **Transparency**—OPC staff should be able to apply the criteria with minimal subjectivity and proper recording of decisions.

6.5.2 Annual and periodic assessment

Diagram 2 above shows that there are likely to be two assessments of capacity to pay. One is the annual assessment for all clients; the other is a periodic assessment for clients who do incur a liability:

- **Annual assessment**—OPC should conduct an assessment of a client's financial position for the coming year. This assessment should include consideration of the individual's position, future outgoings and other assets which affect capacity to pay. The aim of the annual assessment is first, to impart equity, that is, all clients will have their capacity to pay considered during the course of a year. Second, the Tribunal considers those clients with low or no capacity to pay need to be identified earlier rather than later. Financial assistance should be offered prior to their estate deteriorating to a state of poverty.
- **Periodic assessment**—This assessment will apply to a client when he/she actually does incur a liability. The periodic assessment is likely to be subject to the number of clients accumulating a liability as well as the size of the liabilities.

6.5.3 Assessment criteria

The following criteria are drawn from the principles above and should not be considered exhaustive. As stated before, the fee waiver mechanism, including the assessment criteria, should be further refined and developed to ensure they can be implemented practically, efficiently and consistently with the principles set out above.

The assessment should consider:

- An income test similar to those used by other welfare agencies (eg Centrelink), with possible modifications to account for individual needs arising from the client's disability.
- The appropriateness of the level of service provided and hence the fees charged.
- Whether the service(s) is (are) available from another source, free or at a lower fee.
- Whether there are other sources of welfare/subsidies to which the client is entitled for these services.

6.6 Recommendation

The Tribunal recommends that OPC develop its fee waiver mechanism and assessment criteria in consultation with interested stakeholders, based on the framework outlined in the box below.

Recommended framework on which to develop and implement a fee waiver mechanism

PROCESS AND SYSTEMS – OPTION 3

- Billing clients for services should be automated to remove the need of estate managers to raise/charge a fee themselves. Fees may be calculated daily and charged periodically.
- Clients should be reviewed annually to determine their general capacity to pay. This can be incorporated into the annual client review currently carried out on the anniversary of the client joining OPC. For clients deemed to have a low capacity to pay, or those whose account has insufficient funds, the fees charged will not be withdrawn from their accounts. Instead they will be recorded as a liability of the client.
- Reports on client liabilities should be produced and reviewed periodically to see whether the fees should be waived completely, partly or rolled over to some future date. In conducting this review, set criteria should be applied (refer to section 7.2.2).
- Staff members should retain the ability to apply for formal waivers of individual fees for any client, where they see the need and follow the correct process.

ASSESSMENT OF CAPACITY TO PAY – PRINCIPLES AND CRITERIA

Principles

- Fairness—criteria should be objective and not discriminate against a client's disability.
- Clarity—the results of a client's capacity to pay, based on the criteria, should be easily replicable.
- Transparency—OPC staff should be able to apply the criteria with minimal subjectivity and proper recording of decisions should be kept.

Criteria

The assessment should consider:

- Income test developed by other welfare agencies, eg Centrelink, with possible modifications to account for individual needs arising from the client's disability.
- The appropriateness of the level of service provided and hence the fees charged.
- Whether the service(s) is available from another source, free or at a lower fee.
- Whether there other sources of welfare/subsidies to which the client is entitled for these services.

7 FEE STRUCTURE

The structure and level of fees will directly affect the cost recovery of OPC. In a commercial setting, the user pays principle dominates the design of fees. This principle may not be totally appropriate in the case of OPC, where the services it provides are often essential to the client's well being and where some clients do not have the capacity to pay.

Currently the fee structure has cross subsidies embedded into it. This is not unusual and does occur to some degree in commercial businesses. What is important is whether the level of cross subsidy is at an acceptable level. In recommending a fairer fee structure, the Tribunal cannot entirely eliminate cross-subsidies. It also notes that the move to a new funding structure may produce new cross-subsidies between client groups. However, the most obvious cross-subsidies can be removed now. The Tribunal's intention is that at the next review of OPC's fees, when far better data will be available to assess cross-subsidies overall, it will be able to remove them where possible.

In recommending a fee structure for OPC, the Tribunal assessed each of the issues specified in its terms of reference. It also looked at fees charged by similar institutions, including:

- OPC (proposed fee structure)
- Perpetual Trustee Company Limited (Perpetual Trustee)
- Public Trustee of New South Wales
- Public Trustee of Queensland
- State Trustees Limited in Victoria.

These different fee structures were assessed against the principles of fairness, clarity, transparency and cost reflectivity. The Tribunal's interpretation of fairness, clarity, transparency and cost reflectivity are as follows:

- Fair—the fee structure should incorporate equity considerations and be reasonable. Clients should pay for the services they receive.[20] However the fees should generally not exceed the cost of providing the service. Further where clients cannot afford to pay, this should not disadvantage them in terms of access to the full range of services they need.
- Clear—the fee structure needs to be easily understood by clients and implemented consistently by OPC.
- Transparent—the fee structure and waiver conditions should be known and published. The flow of funds from clients to meet costs, as well as any government appropriations to meet the shortfall between revenue and costs, should be traceable.
- Cost reflective—the fees charged should reflect the total costs of providing the service, as long as clients have the capacity to pay.

An overview of this analysis for each fee structure is presented below.

[20] There are two aspects of fairness. One is that those with the capacity to pay should be charged the same amounts for the same services. Two, those with insufficient capacity to pay should pay less to ensure affordable access to these services.

Figure 7.1 OPC's current fees (excluding GST)

OPC MANAGED CLIENTS

1. Fees on capital - charged on the gross capital realised (once only charge)
4% on the first $100,000
3% on the second $100,000
2% on the third $100,000
1% on the excess above $300,000.

2. Fees on income
2.5% on Centrelink pensions
2.5% on rental income received through a real estate agent
5.25% on all other income (excluding interest earned from the Common Fund).

OPC SUPERVISED CLIENTS

1. Fees on income

4% on the net annual income
(Except where an Australian Government pension represents at least 50% or more than half the person's total net annual income. In those circumstances, the fee is calculated only on other income received.)

2. Annual accounts fee

A fee of up to $100 for the filing, examination and passing of the annual accounts required to be lodged by a private manager. This fee varies according to the complexity of the accounts and assistance required.

OTHER FEES

OPC can charge a fee for other services it provides. These include:

- Regular direct payment of an allowance into a bank account ($25 p.a.).
- Preparation and lodgement of an uncomplicated taxation return ($65 to $250)*.
- A visit to a client, and a subsequent report, by an external specialist in disabilities, known as a "Court Visitor" (from $210).
- Property inspections, arranging repairs, preparing inventories and arranging the storage of possessions, etc. ($50 to $80 per hour).
- Legal advice and representation (from $140 per hour).
- Financial planning fees

Estate Value Range	Initial Plan Fee	Subsequent Annual Review Fee
$0-$25K	$50	$25
$25k-$50k	$100	$50
$50k-$75k	$200	$100
$75k-$100k	$300	$150
$100k-$250k	$400	$200
$250k-$500k	$500	$250
$500k-$1,000k	$650	$325
$1m-$3m	$750	$375
$3m+	$1000	$500

* The OPC website sets out the fees for taxation services as ranging from $40-$150. OPC has confirmed that the new current fees are $65-$250 and that the website is outdated.

7.1 OPC's proposed fee structure

As a result of the Council on the Cost and Quality of Government's report in March 2000, a Senior Officers' Group (SOG) was established in relation to the OPC. This group included representatives from the OPC, the OPG, the Attorney General's Department, Treasury and other central agency representatives. The SOG conducted a fee review in 2002.

For the purposes of that review, OPC presented a discussion paper looking at 4 different options for a fee structure, these were:

1. OPC's current fee structure (see Figure 7.1).
2. Fee for service model.
3. Perpetual's fee structure.
4. State Trustees of Victoria fee structure.

It proposed a fee structure based on Perpetual's fee structure, consisting of an establishment fee, ongoing management fee and an investment fee applicable to all clients that OPC manages directly. At that time, it did not propose to change the fees for supervising Private Managers, even though it recognised that these fees did not fully recover costs. This was because it wanted to tackle the larger issue of the fees for clients it directly managed, and then progressively look at a change to the fee structure for privately managed clients.

SOG engaged Hawkless Consulting to assess the fee structure proposals in OPC's discussion paper, and delivered a report in June 2002 containing recommendations for a proposed revised fee structure. Further developments led to the understanding that the proposed fees would be implemented as an interim fee structure from January 2003. As a result, OPC set up IT systems ready for implementation in January. However that did not occur and OPC is still charging based on the old fee structure.

Figure 7.2 OPC proposed fees for managed clients (June 2002)

1. Establishment fee

Clients will be charged a fee equal to 1% of their assets (excluding the primary property of residence) in the first year they become a client of OPC. This goes towards the costs of setting up the client's account, securing the assets and so forth.

To assist with determining the amount that government should contribute, a notional amount of $2,200 was set as the minimum establishment fee. Note that the clients are not charged a minimum fee of $2,200.[21]

2. Ongoing management fee

An annual management fee will be charged based on the value of the estate as follows.

1.5% for the first $250,000
1.0% for the next $750,000
0.5% for amounts above $1,000,000

Again, a notional minimum fee of $1,700 was set to help determine the government contribution for low estate value clients.

3. Investment fee

	fee charged
Access Fund	0.9%
Cash	0.5%
Cash Plus	0.6%
Australian Bonds	0.7%
International Bonds	0.9%
Listed Property	0.7%
Australian Shares	0.7%
International Shares	0.8%

Note that the Access fund is effectively a working account where the first $25,000* of each estate will be kept to meet daily transactions. The investment fee reflects the higher level of transactions on this account, given the lack of a transaction fee.

* This is not a firm rule and variations do and will occur. At present, many estates have the first $50,000 kept in the Access Fund.

The level of the fees proposed was amended in January 2003 on the assumption that OPC would receive a maximum of $5 million each year from consolidated revenue. The change only affected the ongoing management fees and the investment fee for the Access Fund. This resulted in the fees as follows.

[21] Under the proposed fees, OPC clients would be charged a fee based on a percentage of their estate value. So a client with a small estate would be paying a smaller fee in dollar terms compared to a client with a larger estate. The notional minimum fee is used to reflect the costs to service the client and hence any difference between the fees charged and the notional minimum fee reflects a shortfall in cost recovery.

Figure 7.3 OPC amended fee structure proposed January 2003

1. Establishment fee

1% of their assets (excluding the primary property of residence) in the first year they become a client of OPC.

Notional minimum amount of $2,200.

2. Ongoing management fee

1.0% for the first $500,000
0.85% for amounts above $500,000

Notional minimum fee of $1,700.

3. Investment fee

	Fee (%)		Fee (%)
Access Fund	0.7	International Bonds	0.9
Cash	0.5	Listed Property	0.7
Cash Plus	0.6	Australian Shares	0.7
Australian Bonds	0.7	International Shares	0.8

7.1.1 Tribunal's assessment of OPC's proposed fee structure

Fair

Under the proposed fees, OPC clients would be charged a fee based on a percentage of their estate value. So a client with a small estate would be paying a smaller fee in dollar terms compared to a client with a larger estate. But all clients will be paying the same percentage in fees.

It is possible to argue that the services used by a client depend on their disability rather than the value of their estate. This argument suggests that clients with high estate values and requiring few personal services are still being charged more than their fair share. There is some validity in this argument. Ideally the prices charged would be just equal to costs. However, individual costing and pricing would have too high an implementation cost. An alternative which addresses this inequity is a fee-for-service structure, which has its own inequities (discussed below with reference to the Public Trustee of Queensland).

Cost reflective

OPC's proposed fee structure aims to improve the level of cost recovery in aggregate.

Clear

The proposed fee has 3 elements, similar to the current fees. The major difference is that current fees are based on income, whereas the new fees are based on estate value. This is easily explained to clients, and easily implemented by OPC. Currently there is an emerging issue regarding what constitutes 'income'.[22] This could potentially affect all clients. Adopting a fee structure based on estate value removes this contentious issue.

Transparent

The determination of a notional minimum amount will definitely assist in the calculation of a funding shortfall. Where this notional minimum amount reflects the actual cost for the provision of basic services to a client, the difference between this minimum and the actual received from the client is indicative of the foregone revenue due to a lower financial capacity to pay.

The $2,200 notional minimum fee appears high at first glance, but is in fact less than the minimum fee charged by Perpetual, a private sector organisation. OPC and similar organisations have high fixed costs for each client, which need to be reflected in a minimum fee.

7.2 Perpetual Trustee Company Limited's Fee Structure

Perpetual Trustee is a financial services institution providing a broad range of services to individuals and corporations. Under its range of portfolio management services, the Discretionary Service, combined with its Full Personal Care Service, is comparable to the financial management service provided by OPC.

Perpetual's Discretionary Service provides full administration of a client's portfolio, comprehensive strategic financial and investment advice, administrative convenience, ongoing monitoring of investments and day-to-day management of investment decisions.

The Full Personal Care option is a service designed for clients who:

- are too busy to manage their portfolio effectively; or
- are no longer willing to continue managing their affairs; or
- suffer from illness or incapacitation; or
- are absent from home for extended periods; or
- prefer to have Perpetual manage their affairs.

In addition to managing and acting as custodian of a client's investments, Perpetual's Full Personal Care option can attend to such details as paying household and medical bills, collecting refunds—for example from Medicare or a private health fund—through to arranging, supervising and organising payment for home help or a home carer.

[22] The present case that OPC has informed us about involves an insurance bond. OPC argues that the increase in the value of the insurance bond is income for the purposes of the regulation. This is based on the general definition of income used by the Australian Tax Office. The private manager is arguing that the increase is the result of diversified investment and includes capital gain as well as income.

The fee charged for this total package of service is a combination of a percentage fee on capital and a fee for service.

Figure 7.4 Perpetual's fee structure
(Discretionary Service + Full Personal Care service)

DISCRETIONARY SERVICE FEES
(Fees in bold exclude GST)

1. Portfolio establishment fee

1.1% (***1.0%***) of initial assets in the portfolio as well as any asset added from time to time.

Minimum fee of $3,300 (***$3,000***)

2. Perpetual's ongoing management fee (per annum)

1.925% (***1.75%***) for the first $300,000
1.375% (***1.25%***) for the next $700,000
0.825% (***0.75%***) for amounts above $1,000,000

Minimum fee of $3,850pa (***$3,500pa***).

3. Investment fee

Average transaction cost for managed investments - 0.55% (***0.50%***) of amount invested.

Average annual management fee & expenses – 0.88% (***0.80%***) of amount invested.

Brokerage fee for listed share investments – 0.385% (***0.35%***) of amount invested.

4. Other fees

Transaction fees
First 50 transactions per year are fee, thereafter $27.50 (***$25***) per transaction. Transactions are defined as actions initiated by the client for the sale, redemption or purchase of investments, but exclude collection of dividends, interest and disbursements from investments.

Provision of information
Where additional reports are requested more frequently than quarterly, a fee of $30 (***$27.27***) per requested is charged plus an additional amount if the communication takes more than 15 minutes to address. This excess is charged at a rate of $80 (***$72.72***) per hour.

Fees for asset held in client's name
An additional amount of 0.25% (***0.227%***) will be charged on the amount of the assets a client wishes to be held in their name.

Early termination fee
For terminations prior to 12 months with Perpetual, clients will have to pay the full ongoing management fee, calculated on the highest value of the portfolio up to the date of termination.

FULL PERSONAL CARE FEES

1. Medical refunds
Where Perpetual arranges refunds from Medicare/private health fund
$20 (***$18.18***) per receipt

2. Bill Payments
where Perpetual pays a third party account or remits funds to a third party
$5 (***$4.55***) per payment

Others
Fees for other services negotiated will be charged on an hourly basis. The rate can vary up to $300 (***$272.72***) per hour.

Source: Perpetual's Portfolio Management Service Brochure.

7.2.1 Tribunal's assessment of Perpetual's fee structure

Fair

The Full Personal Care option charges on a fee for service basis. Some clients, as a result of their disability, will naturally call on OPC more often than others. For example a client with brain injury may calls several times because they can't remember what OPC told them, or simply can't remember that they have called.

The Tribunal acknowledges that these clients impose a real cost on their financial manager. However, full fee for service would effectively discriminate against them based on their disability. At the same time, these clients should not be subsidised by other clients. These are two equally valid principles of fairness. To satisfy both principles, in OPC's case, the Tribunal considers that some part of their fees should be subsidised from consolidated funds.

Cost reflective

Perpetual's structure is arguably more cost reflective than OPC's proposed structure, as includes a component of fee for service. However, the lack of effective competition in this market means that an outside observer cannot be certain that the overall level of fees simply recovers costs. It is possible that Perpetual is over-recovering.

Clear

The proposed structure consists of percentage of asset payments and fee for service. This is similar to OPC's current fees where there are percentage amounts calculated as well as separate fees for unique actions taken on behalf of the clients.

Transparent

Perpetual's structure is more transparent than OPC's proposed structure given the fee for service component which allows funds to be traced to a more detailed level. If OPC were to adopt some fee for service charging, it would have to ascertain the true costs of providing that service in order to be able to set a price that is transparent. This would impose more costs on OPC as it would need to upgrade its accounting systems to allow for a more

detailed identification of costs. A future review of OPC's fees may wish to consider the possibility of a fee for service structure if OPC's accounting and recording systems have been further upgraded.

7.3 Public Trustee of NSW's fee structure

The Public Trustee of NSW (PTNSW) also has a small group of clients to whom it provides services comparable to those provided by OPC. PTNSW may acquire a client for which it becomes financial manager as a result of an enduring power of attorney (EPA).[23] The responsibilities of PTNSW to its clients under an enduring power of attorney are equivalent to OPC's responsibilities under a financial management order of the Supreme Court, Guardianship Tribunal, MHRT or a magistrate.

In addition, PTNSW has a service called Active Assist where it can manage the day-to-day financial task of clients, including collection of income, bill payments, maintenance and management of property, processing of health fund accounts and investment of surplus savings.

Figure 7.5 Fees charged for the service of Active Assist

(Fees in bold italics exclude GST)

1. Establishment fee

$330 (***$300***)

2. Ongoing fees

1.1% (***1.0%***) if the value of income producing assets (excluding primary place of residence.

Minimum fee charged is $660 (***$600***)

3. Account keeping fee

$8.80 (***$8***) per month

4. Additional services

For an additional charge PTNSW can also assist in the buying and selling of real estate, portfolio reviews and tax returns.

5. Investment management

Section 13 of the *Public Trustee Regulation 2001* allows the Public Trustee of NSW to receive from or out of the income received by the common fund a fee for establishment, keeping and conduct of the common fund. This fee is to be calculated at a rate not exceeding 0.5% per year on capital sums invested in the common fund during the period in which the income is received or allocated.

[23] An EPA is a legal document where a person (donor) appoints another person (attorney) to make financial and legal decisions on their behalf when they become incapacitated. An EPA can only be made while the donor has capacity and is aware of their decision.

7.3.1 Tribunal's assessment of PTNSW's fee structure

Fair

The costs relating to establishing an account may vary depending on the size of the estate. A fixed dollar establishment fee does not recognise this.

Cost reflective

PTNSW's fee structure has elements of postage pricing which reduce cost reflectivity.

Clear

PTNSW's structure is the simplest of all the structures assessed and would be fairly easy to implement if adopted by OPC. However, it was purposely designed by PTNSW for ease of explanation to clients and to assist with the marketing of its other Private Client Services.

Transparent

The postage pricing element in the fees is very transparent. A disadvantage is that it contributes to cross subsidies, making it harder to identify where government contributions are needed.

7.4 Public Trustee of Queensland's fee structure

The Public Trustee of Queensland (PTQLD) is equivalent to PTNSW combined with OPC and OPG. It provides trustee, guardianship and financial manager services. In 2001, PTQLD introduced a new fee-for-service pricing model. To come up with a fee-for-service schedule, it had to install and implement systems to collect quality data for the past 4 years. The implementation of these systems and the analysis of the data involves a significant cost.

The result is a very detailed and complex schedule of fees for the services the PTQLD provides. This can be found in the *Public Trustee Act 1978*, Section 17. Table 7.1 below lists out the categories of services for which fees have been defined. Actual fees charged for service categories similar to OPC are presented.

Table 7.1 PTQLD fee for service charges

Service category	Service	Fees charged	
		With GST	Ex GST
Disability services	Personal financial administration (depending on level of service)	$726 - $5,082 pa	$660 - $4,620 pa
	Asset management fee (based on the value of assets under management, but excludes real property, vehicles, furniture, effects, chattels and personal jewellery)	$110 - $7,480 pa	$100 - $6,800 pa
	Real property	$544.50/property	$495/property
Taxation services	Prepare and lodge tax returns	$145.20 / hr	$132 / hr
	Reconstruct, set up and/or maintain asset register	$145.20 / hr	$132 / hr
Property Services (fees may be negotiated or reduced if PTQLD acts in conjunction with another agent)	Property management fee		
	- Storage of vehicles/estate goods	$23/week	$20.90/week
	- Property inspection	$92/hour	$83.64/hr
	- Arranging tenancy	max of 1 week's rent or $79	max 1 week's rent or $71.82
	- Management of rental/trust properties	8.25% of gross rent + monthly administration fee of $5	7.50% of gross rent + monthly administration fee of $4.55
	Valuation		
	- Residential property	$175 - $330	$159.09-$300
	- Commercial/rural properties	negotiated	negotiated
	- Furniture, plant, implements, chattles	$145.20/hr (min $81)	$132 (min $73.64)
	- Motor vehicles, caravans/boats	$58	$52.73
Investment services	Public Trustee investment funds		
	- Entry fee (% of value invested)	Up to 4%	Up to 3.64%
	- Management fee (% of value invested)	Up to 2.15%	Up to 1.95%
Special fees	For other services which there is no specified fee	$145.20 / hr	$132 / hr
Others			
Deceased Estates			
Agencies			
Trusts			
Prisoners			
Special function of a public nature			
Unclaimed moneys & property			
Miscellaneous services			

Note that PTQLDs fees include GST while OPC's fees do not. Hence for ease of comparison, PTQLD's fees, excluding GST, are also presented. The fees above have been summarised for ease of presentation. For the full details of the fees charged, please refer to the Queensland *Public Trustee Act 1978*, section 17.

7.4.1 Tribunal's assessment of PTQLD's fee structure

Fair

The structure is fair in that clients pay for what they use. However, the principle of fairness also means that all clients should have access to the services provided regardless of their capacity to pay. Thus for a fee for service model to be fair, the fee waiver mechanism would have to ensure that clients without the financial capacity to pay are still provided with an acceptable level of service.

In the case of the PTQLD, Section 19A of the Queensland *Public Trustee Act 1978* allows it to apply interest from invested amounts to meet interest payments to clients and then towards the payment of operating and capital expenses of the office. This is similar to the OPC's draw down of funds from the investment income of the common fund, which has been criticised for not being fair and transparent.

Cost reflective

A fee for service structure is highly cost reflective.

Clear

PTQLD's structure is very detailed and complex. Clients need to be assessed and classed into one of six service level categories. Other services are charged based on 'standard units of effort' or on an hourly rate of $145.20 ($132 ex GST). This would necessitate the need to record working time by staff members.

To implement such a system at OPC would require some time. First, the accounting systems and data collection systems would need to be upgraded to provided a more detailed level of data. This would have to be tested over a few years to ensure that the quality of the data was acceptable before analysis and design of a fee for each service can begin. Ongoing the fee structure would need to be evaluated to incorporate inflation and other changes to the cost base since many fees are stated in fixed dollar terms.

The cost of coming up with a fee for service model is not insignificant and the benefits would need to really outweigh the costs to warrant such an investment. Otherwise the money would be better spent on provision of better services to clients.

Transparent

Under a fee for service model coupled with an appropriate fee waiver mechanism, the cost of any shortfall would be clearly identified.

It would be of interest to monitor the performance of the PTQLD's model over time. This would assist in the cost benefit analysis of whether OPC should follow a similar direction in the long term.

7.5 State Trustees Limited of Victoria's fee structure

State Trustees Limited (STL) provides an extensive range of financial and legal management services for people with disabilities. STL can become the administrator for a client either under an EPA or an Administration Order by The Victorian Civil and Administrative Tribunal.

When appointed as an administrator, STL provides a comprehensive range of financial, legal and administrative services on behalf of clients including:

- Collection of income.
- Payment of bills and accounts.
- Property management.
- Investment advice.
- Preparation of tax documentation.
- Provision of legal advice.
- Referrals and submissions to government agencies.

Figure 7.6 Fees charged by STL for appointed administrations

1. Capital Commission – charged on the gross value of assets in the estate. (once only charge)

Not to exceed 4.4% (***4.0%***)

2. Common funds investment Management fee – charged on the capital sum invested in STL's common fund

1.1% (***1.0%***) per annum

Minimum fee charged is $660 (***$600***)

3. Income collection

max of 6.6% (***6.0%***) per annum on gross income received
3.3% (***3.0%***) of Centrelink or Department of Veteran Affairs pension

4. Other services

STL is allowed to charge fair and reasonable commissions and fees for other estate related services provided including but not limited to:

Taxation
$127.60 (***$116***) per hour for manual reviews
$63.80 (***$58***) per hour for computer assisted reviews

Temporary administration orders
$132 (***$120***) per hour

Financial Planning

Value of portfolio	Plan Fee ($)		Review Fee ($)	
		Ex GST		Ex GST
$0-$100K	440	400	275	250
$100k-$300k	825	750	550	500
$300k-$400k	1,100	1,000	770	700
$400k-$500k	1,650	1,500	880	800
$500K-$750K	2,200	2,000	1,320	1200
$750K-$1m	3,300	3,000	1,980	1,800
$over $1m	max 5,500	max 5,000	max 3,300	max 3,000

7.5.1 Tribunal's assessment of STL's fee structure

Fair

STL's fee structure is similar to OPC's current structure. However, it does not suffer from OPC's current problem of heavy cross subsidies. Under the *State Trustees (State Owned Company) Act 1994*, Part 4 the Responsible Minister pays STL a community service obligation (CSO) to provide services to those the Minster deems not to have the resources to attain the services themselves.

Cost reflective

The capital commission and income collection fee is similar to what OPC charges at present, except that STL charges a higher percentage.

Clear

To implement a system like STL's would be relatively simple due to the similarity with OPC's current structure. However extra work is required to assess potential services for which fees are currently not charged, for example, investment management fees.

Transparent

In Victoria, the Minister is responsible for providing protective services to the low capacity clients. This is done via an agreement with STL, other trustees, persons or body. This agreement would provide the transparency needed in relation to the source of funds and the usage.

7.6 Tribunal's overall findings

Table 7.2 provides an overview of the different fee structures the Tribunal assessed.

Table 7.2 Summary of fee structures (all values exclude GST)

	Establishment fee	Management fee	Investment fee	Others
OPC Current fee structure	4% x $0-$100K 3%x $100-$200K 2%x $200-$300K 1% x $300K+	2.5% income pensions 2.5% rental income [1] 5.25% other income [2]	1.26% [3]	$65-250 – tax $50-80 property $140/hr – legal $25-1000 Financial planning [4]
OPC proposed structure 2002	1% of assets	1.5% x $0 – $250K 1.0% x $250K-$1,000K 0.5% x $1,000K+	0.5%-0.9% of capital	$40-150 – tax $50-80 property $140/hr – legal $25-1000 Financial planning [10]
OPC proposed structure 2003	1% of assets	1.0% x $0 - $500K 0.85% x $500K+	0.5%-0.9% of capital [5]	$40-150 – tax $50-80 property $140/hr – legal $25-1000 Financial planning [10]
Perpetual Trustee	1% assets Min fee $3,000	1.75% x $0-$300K 1.25% x $300-1,000K 0.75% x $1,000K+ Min fee $3,500	0.5% for transaction fee [6] 0.8% for mgt +exp [6] 0.35% for brokerage [7]	$25 per transaction [8] $27-73 - information 0.23% - assets in client's name 1 yr mgt fee - early termination $18/medical refunds $5/bill payment $272/hr negotiated services
Public Trustee NSW	$300	1% of income producing assets	0.5% of common fund income [9]	Additional charge for buying/selling property, portfolio review and tax returns
Public Trustee QLD	Nil	$100 - $6,800 [10] $660 - $4,620 [11]	Up to 3.64% entry fee Up to 1.95% mgt fee	$132/hr – tax property services [12] others [13]
State Trustees Limited (VIC)	4% of gross assets	6% of gross income 3% on pensions	1% of capital in common fund	$116/hr manual tax $58/hr computer tax $120/hr temporary administration orders $250-5,000 financial planning

1. For property managed by real estate agent.
2. Excludes income from Common Fund investments.
3. Indicative based on the amount allowed in the 2002/03 budget to be transferred from Income of the Common Fund.
4. There are also other miscellaneous fees for court registry, court visit, direct payments etc..
5. Percentage charged were the same for all funds in the 2002 proposal, except that the Access fund charge was reduced from 0.9 per cent to 0.7 per cent.
6. These are average fees presented in Perpetual Trustee's client example calculation. These fees are not explicitly presented elsewhere.
7. Brokerage fees apply to investments in listed shares.
8. Clients are allowed 50 transactions per year and any excess is charged at this rate.
9. Section 13 of the *Public Trustee Regulation 2001* allows the Public Trustee of NSW to receive from or out of the income received by the common fund a fee for establishment, keeping and conduct of the common fund. This fee is to be calculated at a rate not exceeding 0.5% per year on capital sums invested in the common fund during the period in which the income is received or allocated.
10. This is the range of fees for asset management.
11. This is the range of fees for personal financial administration.
12. Property services vary, refer to Table 7.1.
13. Other services not listed are charged $132 per hour.

This table shows that OPC's proposed fee structure almost mirrors that of Perpetual Trustee. Perpetual Trustee is a commercial market business, but in the absence of effective competitors it can not be assumed that the fee structure is necessarily cost reflective. However it can be said that if OPC's were no higher than Perpetual's, the clients would not be worse off than if they sought a private commercial manager.

Not withstanding the above, the Tribunal does have concerns about the suitability of the fees for OPC's clients. OPC's clients are there not by choice, yet it is deemed that they need the services of OPC for their own benefit. One could say that OPC's services are largely of a social welfare nature. Accordingly, when designing a fee structure for OPC, the impact on the clients is paramount.

The Tribunal's concerns regarding OPC proposed fee structure include:

1. The basis for charging an establishment fee for new clients. Though an establishment fee is common in most of the fee structures presented, the Tribunal is uncomfortable with the idea of charging new clients an extra charge to set up their account. For some clients the setup may be straight forward and simple. For others a bit more work might need to be done. However the main concern is with the fact that there is no cap on the establishment fee. This means that clients with large estates will be paying significantly more in their first year of being with OPC. That is, the cumulative effect of an establishment fee and on going management fee in year 1 may be significant for some clients. This may or may not be cost reflective.
2. The level of the management fees. The Tribunal notes that estate management is a significant operation area for OPC. Without an Activity Based Costing System, it is hard to judge whether the structure of the ongoing management fees and the level of the charge is appropriate. RSM's study indicates that the fees in aggregate will not over recover the cost of this activity. The Tribunal, in working from the principle that no client should pay for more than their costs, would like to see that the management fees minimise the cross subsidy between clients.
3. High investment fee. The Tribunal feels strongly that OPC's proposed investment fees are too high. In looking at public sector comparators, the Tribunal notes that State Super SAS Trustee Corporation's (State Super) costs, as a percentage of its funds under investment, are 0.27 per cent for the last financial year and First State Super's management costs were 0.22 per cent of total capital.[24] Public Trustee of NSW is allowed to charge a rate at no more than 0.50 per cent. After taking into account the smaller size of OPC's fund, the Tribunal considers that on average, the fee charged for investment fund management should not exceed 0.50 per cent of the total capital invested. The RSM report shows that under OPC's proposed investment management fees, an over recovery will exist and this will subsidise other operation areas. This will effectively continue the cross subsidisation from asset rich clients to asset poor clients, which is the problem that sparked this review in the first place.

To address these concerns, the Tribunal has recommended a modified fee structure, that includes no establishment fee and caps clients' average investment management fees at 0.5 per cent of the total capital they have invested. Table 7.3 compares the likely impact on clients with small, medium and large estate values of OPC's proposed fee structure with

[24] First State Super, *Annual report highlights 2001-2002*, p 9.
State Super, *Pooled Fund 2000-2002 annual report highlights*, p 11.

those of the Tribunal's recommended fee structure. Attachment 3 presents further details for other customer groups and the assumptions used in the calculations.

Table 7.3 Indicative customer impacts ($)

	Proposed Fee (as per January 2003)		Tribunal's recommended fee structure
	First Year	Ongoing	Ongoing
Ave OPC client in 1cent-$25K - estate of $6,713	181	114	107
Ave OPC client in $100-$150K - estate of $123,441	3,223	1,988	1,791
Ave OPC client in $250-$500K - estate of $352,563	9,519	5,994	4,870
Ave OPC client in >$1 million - estate of $2,122,964	54,886	33,656	26,889

Under the Tribunal's recommended fee structure, the average client in each group should experience a decrease in fees charged, compared to OPC's proposed fees, assuming all other conditions remain unchanged. However a critical factor to achieving this result is the assumption for the investment management fees. The Tribunal's amendment assumed that the investment management fees were 0.6 per cent for the Access fund and 0.35 per cent for the remaining 7 funds. This combination meets the criteria that the average fee charged for investment management does not exceed 0.5 per cent.

In its assessment of the fee structure and in discussions with various stakeholders, the Tribunal has also come up with the following findings.

1. Fee structures adopted by the various agencies vary widely. Due to the different scope of their operations, it is hard to argue which is better.
2. Given the nature of OPC's clients, OPC's scope of operations, and OPC's information systems, a strict fee for service model, as adopted in Queensland, is not appropriate at this point in time.
3. Given the nature of the services OPC provides, it is essential that all clients have equal access to these services, regardless of their ability to pay. Thus the fee structure needs to incorporate simplicity and clarity so as not to alarm/confuse the clients.
4. There are some services which are not recovering fees. These include deceased estates and complaints from third parties.
    - Deceased estates – management of a client ends upon death of the client. In such cases OPC will finalise the estate to be handed to the executor and possibly pay for the funeral. OPC also has the power to complete transactions begun prior to death of the client. Currently OPC only charges $100 for the release of an asset and liability statement for deceased estates.
    - Complaints from third parties – actions taken out by third parties, such as family members of a disabled client, are currently paid through the client's estates. One suggestion is that where the complaint is found to be malicious or frivolous, the

third party bringing action should be charged for the court costs and other related costs. The Tribunal finds much to recommend this suggestion. Legal fees are normally a natural deterrent to unjustified litigation, but a situation where both parties have their costs paid by a third party (the OPC client's estate) affords potential for a client's interests to be damaged by parties who may or may not have the client's best interests in mind.

7.7 Recommendation

The Tribunal's recommendation for a fee structure is presented below.

Table 7.4 Recommended fee structure compared to OPC's fee structure

	OPC's Jan 03 proposed structure	Tribunal's recommendation	Tribunal's comments
Establishment fee	1.00% of assets (excluding primary property of residence and vehicle used). Notional minimum fee of $2,200	No establishment fee	The Tribunal is concerned with the cumulative effect this fee would have on new clients.
On going management fee	1.00% of first $500,000 0.85% of remaining Notional minimum fee $1,700	1.00% of first $500,000 0.85% of remaining Notional minimum fee $1,700	The Tribunal notes that this fee structure and the level of fee do not in aggregate over recover costs, though cross subsidies between clients may still occur.
Investment management fee	Fees vary from 0.5%-0.9% for the 8 different investment funds.	Average should not exceed 0.5% of total capital invested in the funds.	The Tribunal notes that RSM's report indicate that OPC's proposed fees will generate an over recovery that will cross subsidise other work areas.

The Tribunal's recommendation regarding the investment management fee allows OPC some room when determining the actual fee charged for the individual investment funds. However, in setting the investment management fee for each fund, OPC should ensure that no existing client will be worse off as a result of the change in the fee structure, compared to the current funding structure.

In addition, the Tribunal considers that OPC should be given the ability to charge third parties a fee to cover the costs imposed by that third party where the action is found to be frivolous or malicious. The aim of this power is not to increase revenue recovery, but rather to deter wasteful court action taken by third parties. Such a provision needs to be considered and incorporated carefully to ensure that family members and friends with a genuine concern are not deterred from making a complaint.

For the Private Managers that OPC supervises, the fees remain largely unchanged for the current review. Due to the short time allowed for the Tribunal to conduct its review, the focus has been on the larger group of OPC's directly managed clients.

A review of the fees for OPC's supervision role relating to Private Managers should be incorporated into the next review (see Chapter 8). To assist with that review, OPC should consider its current systems and whether cost information and service data can be collected consistently in the interim years. Subject to the availability of appropriate data, and agreement between OPC, Treasury and possible other interested stakeholders, it may be possible for a review of Private Client's fees to be carried out earlier than the review date proposed in Chapter 8.

8 ONGOING FEE REVIEW MECHANISM

The terms of reference for this review state that "the Tribunal should … establish an appropriate ongoing fee review mechanism". Currently there is no mechanism that allows a periodic review of the appropriateness of the fee structure or level. In considering a fee review mechanism there are two groups of issues:

1. Process and structure of the review
    - the agency tasked to undertake the review
    - the regularity of future reviews
    - the timing of future reviews
    - the time allowed for future reviews, and
    - a monitoring and reporting regime.
2. Content and depth of the review
    - the fee structure
    - the fee levels
    - depth of cost analysis, and
    - the method of charging clients (process and timing).

8.1 Process and structure of the review mechanism

8.1.1 Agency tasked to conduct future reviews

A number of agencies have reviewed the OPC in the past five years. They include:

- IPART (current review)
- Hawkless Consulting (2002)
- NSW Government Actuary (2001)
- The Public Bodies Review Committee (2001)
- Senior Officers' Group (2001-2003)
- Council on the Cost and Quality of Government (2001)
- The Audit Office of NSW (1999 and 2003).

The Tribunal does not feel qualified to determine which agency is best suited to undertake future reviews of the OPC's fee structure and costs. The Tribunal would like to suggest that the different agencies have the characteristics set out in Table 8.1.

Table 8.1 Potential agencies to conduct the next review

Agency	Comments
IPART	The skills required in the review of OPC prices parallel those required for IPART's regulation of other prices. However, such reviews also entail strong judgements on matters of policy and welfare policy.
Hawkless Consulting	Private sector firm. The nature of these reviews suggest that they should be undertaken by a public sector agency. However, Hawkless could be one candidate (among many) for subcontracting to the public sector agency which has responsibility for any review.
NSW Government Actuary	The Government Actuary's core expertise is useful for assessing specific areas of OPC, but may not cover some important aspects such as the assessment of welfare policy objectives.
Audit Office of NSW	The Audit Office is probably the best qualified to assess efficiency. As long as the Audit Office is comfortable in dealing with issues of equity and social welfare, the Audit Office could have a good range of expertise for future reviews.
Senior Officers' Group	This is a less formally constituted group, which may or may not have access to the support and expertise required for such reviews.
Public Bodies Review Committee	The Public Bodies Review Committee is able to call on a broad range of expertise. The Work of the PBRC is more public than that of other agencies.
Council on the Cost and Quality of Government	Generally undertakes higher level policy analysis. If COCQG is comfortable dealing with more detailed issues, COCQG could have a good range of expertise for future reviews.

The Government should also consider whether ongoing independent reviews are necessary. Once an effective fee structure is established it may be adequate to have a monitoring regime. This issue is discussed in section 8.1.2.

The Tribunal considers that the Premier, in consultation with the Attorney General, should determine the agency to be tasked with undertaking any future reviews.

8.1.2 Regularity of future reviews

Two options have been identified with respect to deciding the regularity of future reviews:

1. that reviews be scheduled periodically from this review, or
2 that one future review be scheduled, with the need for subsequent reviews to be assessed as part of its terms of reference.

The request in the Terms of Reference to establish an 'ongoing' fee review mechanism would tend to indicate that reviews be scheduled periodically from this review (option one). This would provide a measure of certainty for the OPC and its stakeholders and would allow it to implement changes within defined planning periods.

However, it may be more appropriate to select option two. A review in the future to assess the success of the implementation of the recommendations in this report is needed. But over time, as OPC's operations change and improvements are made, the nature of each review may be very different. Hence it would be more appropriate to determine the ongoing

appropriateness of the fee review mechanism at that time. Also, once the fee structure is established and determined to be operating successfully it may not be necessary to undertake any further reviews. A simple monitoring process may be sufficient going forward.

The Tribunal considers that one future review should be scheduled, with a decision about subsequent reviews being made at that time.

8.1.3 Timing of future reviews

The timing of when the next and ongoing reviews take place should:

- take into account when the new fee structure is implemented
- allow sufficient time for the OPC to consolidate and implement the recommendations of this review
- take into account whether the fee structure adequately achieves all the requirements of the terms of reference
- consider the burden of frequent reviews on OPC and stakeholders.

The new fee structure may not be implemented until September 2003 and may or may not involve a transitional period. This uncertain timing will in itself affect the timing of the next review.

The Public Bodies Review Committee recommended in 2001 that there be a three year moratorium on reviewing the OPC. It is highly desirable that there be sufficient time to implement and consolidate the recommendations of this review with minimal (if any) outside intrusions.

It is recommended that a review take place in 2007, with a final report due by September 2007.

8.1.4 Time allowed for future reviews

The limited time and tight deadline allowed for this review has affected the quality of data and analysis available. Ideally, any future review should be conducted over a longer period.

The Tribunal considers that 6 months is an adequate period to conduct the next review. This assumes that OPC will in the meantime have established information systems that allow the reviewer to start with better quality data. If in fact OPC does not establish better information systems, a longer review period may be necessary to collect data and undertake analysis. Specifically, the Tribunal considers that benchmarking information, activity based costing, and automated fee waiver mechanisms will assist any future review.

8.1.5 Monitoring and reporting on implementation

In making its recommendations, the Tribunal considers that OPC should report to the Attorney General on the implementation of those recommendations.

Focus of reporting

Issues of importance in the period leading up to the next review in 2007 are:

- Are the capacity to pay criteria suitable?
- Are the clients / stakeholders satisfied with the new fees structure and level?
- Have the recommendations reduced or eliminated cross subsidisation and promoted a clear fair and transparent fee structure that recognises capacity to pay?
- Have the clients, OPC staff and stakeholders been adequately educated about the import of the changes?
- Are fees and government appropriations recovering the costs of service in a transparent manner?
- Is it possible to reconcile government appropriations against the usage of those funds?

Reporting process

The reporting process should not result in an onerous administrative burden for the OPC. The report can be presented as a section in the OPC's annual report.

Recommendations

The OPC should provide an annual report to the Attorney General that is also included in its Annual Report.

The report could cover the following issues:

- A reconciliation of the funds provided by the government against waivers provided and any cost pool deficits.
- An update on education provided to OPC staff, clients and stakeholders.
- Details of complaints about the fee structure or levels together with information drawn from any surveys done.
- Client data (client numbers and financial information by client groups).
- Progress on the implementation of enhanced accounting and management information systems.

8.2 Recommendations

The Tribunal recommends that

- Following consideration of this report, the Government should determine a price path to September 2007 for OPC charges.
- OPC's charges be subject to review before the end of that period to assess whether continued regulation is necessary and if so, advise on the level and structure of OPC's charges.
- The Premier, in consultation with the Attorney General, determine the agency to be tasked with undertaking any future review, and a minimum of 6 months be allowed for the review.
- OPC provide as an adjunct to its annual report to the Attorney General, a report on implementation of the price path and other recommendations including:

- a reconciliation of the funds provided by the government against waivers provided and any cost pool deficits
- an update on education provided to OPC staff, clients and stakeholders
- details of complaints about the fee structure or levels together with information drawn from any surveys
- client data (client numbers and financial information by client groups)
- progress on the implementation of enhanced accounting and management information systems.

ATTACHMENT 1 TERMS OF REFERENCE

Office of the Protective Commissioner Fees Review

Terms of Reference

I, Bob Carr, Premier of New South Wales, pursuant to Section 9(1)(b) of the *Independent Pricing and Regulatory Tribunal Act 1992,* request the Tribunal to review the fees charged by the Office of the Protective Commissioner for services provided to its clients, in order to recommended a fee structure that is clear, fair and transparent.

In conducting the review, the tribunal should:

- Identify costs of service delivery (including a full expense analysis)
- Analyse the extent to which there are differences in cost recovery between client groups
- Establish an appropriate ongoing fee review mechanism.

The tribunal should also;

- Consider the capacity or otherwise of clients of the Office of the Protective Commissioner to pay for services provided, and possible criteria for assessing that capacity; and
- Advise on options for meeting any shortfall that may arise in view of that.

The Tribunal is to conduct the review and provide a report to me by 31 May 2003.

ATTACHMENT 2 ACTIVITIES OF ESTATE MANAGERS

Sourced from OPC Fees Review Discussion Paper, September 2001

Financial and Asset Management
Services provided under this program include:
Establishment of new clients

1. Provision of information on services and service standards to client/carers
2. Establishment of liaison database of available client information, eg contact details, family/carer details
3. Identification and securement of client's assets and entitlements
4. Identification of client's liabilities
5. Payment of client's immediate and short term liabilities and needs
6. Creation of schedule for payment of client's "routine" bills and management of client's longer term liabilities
7. Provision/arrangement of initial advice from disabilities specialist on aspects of client's circumstances
8. Provision/arrangement of initial legal advice
9. Development of a client plan in consultation with the client and appropriate others, incorporating:
    - the client's short, medium and long term personal and financial objectives
    - the client's short, medium and long term needs, eg personal care
    - the client's and appropriate others' preferred means of contact
    - any cultural, ethnic, religious etc views/issues that need to be respected
    - annual budget to meet ongoing financial needs and objectives
    - strategy to address any outstanding issues relating to the client's disability/ies, eg need for special accommodation and/or equipment
    - financial plan for investment of the client's funds
    - strategy to address any outstanding legal issue

Ongoing management of client's financial affairs

10. Management of issues identified but not resolved during establishment of relationship, eg *Family Provision Act* claim
11. Collection of regular income due to the client, eg Centrelink payments, rent
12. Collection of money due to the client, eg damages award
13. Evaluation of claims for payment for past care etc
14. Payment of routine bills, eg rates, rent, utilities
15. Arrangement of and payment for insurance policies
16. Provision of advice on and negotiation of client-carer agreements
17. Payment of carer fees/wages
18. Payments in support of the client's dependents
19. Provision of security for the client's personal assets, eg jewellery, title deeds

20. Acquisition/arrangement of acquisition of major asset, eg residence, motor vehicle
21. Sale/arrangement of sale of major asset
22. Management of dwelling construction
23. Management of dwelling modification, refurbishment etc
24. Management of dwelling repairs
25. Management of leased/rented property
26. Inspection of and provision of report on real property
27. Securement of dwelling contents upon vacation by the client
28. Exercise of shareholder rights etc in relation to the client's business
29. Provision/arrangement of advice on the client's circumstances and needs from disabilities specialist
30. Provision/arrangement of legal advice and representation to protect client's assets/rights
31. Preparation of income tax and land tax returns
32. Seeking of Australian Tax Office rulings
33. Arrangement of and payment for interpreter and translation services for client contact
34. Provision of reports to client/others on the client's assets, liabilities, income, expenditure as needed or at least six monthly (income/expenditure) or twelve monthly (assets/liabilities)
35. Review of annual budget, financial plan and client plan as needed or at least annually
36. Provision of Reports and Proposals to the Supreme Court for determination of:
    - major issues eg concerning management of the client's business interests
    - a disputed claim for past care of the client
37. Provision of reports on the client's circumstances to the Supreme Court, Guardianship Tribunal or Mental Health Review Tribunal to assist review of financial management orders

Finalisation of Management

38. Payment upon revocation/discontinuance of the client's funds
39. Payment upon the client's death of funeral expenses and some liabilities
40. Provision upon the client's death of a statement of assets and liabilities, payment of the client's funds, and release of security documents to the client's legal personal representative

ATTACHMENT 3 INDICATIVE CUSTOMER IMPACT CALCULATIONS

Table A3.1 Summary of indicative customer fees under the current fee structure and OPC's (2003) proposed fee structure

			OPC Proposed (Jan03)		Tribunal's Recommendation
			Total fees ($)		Total fees ($)
Estate value ($)	Client no.	Ave estate	1st yr	Ongoing	ongoing
0	116	0	0	0	0
1cents - 25,000	4594	6,713	181	114	107
25,001 - 50,000	835	36,012	972	612	576
50,001 -100,000	683	70,264	1,827	1,124	1,036
100,001 -150,000	282	123,441	3,223	1,988	1,791
150,001 -200,000	178	171,836	4,457	2,738	2,445
200,001 -250,000	117	222,805	5,757	3,528	3,133
250,001 -500,000	314	352,563	9,519	5,994	4,870
500,001 -1m	247	699,661	18,591	11,595	9,365
Over 1,000,000	212	2,122,964	54,886	33,656	26,889

Below explains how we have calculated the indicative fees under OPC's proposed fee structure and the Tribunal's recommendation.

OPC PROPOSED STRUCTURE AS AT JANUARY 2003

Establishment fee

1% of estate value

Ongoing management fee

1.0% for $0 - $500,000
0.85% for >$500,000

Investment fee

	Fee (%)		Fee (%)
Access Fund	0.7	International Bonds	0.9
Cash	0.5	Listed Property	0.7
Cash Plus	0.6	Australian Shares	0.7
Australian Bonds	0.7	International Shares	0.8

Investment fees depend on where the investments are made. This calculation was done using the guidelines from OPC's Financial planning unit which states that estates:

Estate value	Guideline
less than $50,000 -	goes into the Access Fund
$50,000 - $100,000	50% in Access Fund and 50% in Cash Fund
$100,000 - $250,000	$50,000 in Access Fund, remainder is equally split into Cash and Cash Plus funds
Over $250,000	full financial plan. For these clients we multiplied their estate value by the average of the fees on all the funds

EXAMPLE CALCULATION
Client with estate value of $222,805

Establishment fee = (1% x $222,805) = $2,228
On going management fee = (1% x $222,805) = $2,228
Investment management fee=($50,000x0.7%)+($86,403x0.5%)+($86,403x0.6%) = $1,300

Total fee for first year = $2,228 + $2,228 + $1,300 = $5,757[25]
Total fee for ongoing year = $2,228 + $1,300 = $3,528

TRIBUNAL'S RECOMMENDED FEE STRUCTURE

Ongoing management fee
1.0% for $0 - $500,000
0.85% for >$500,000

Investment management fee
The Tribunal assumed investment fees charged for the individual funds were:

	Fee (%)		Fee (%)
Access Fund	0.60	International Bonds	0.35
Cash	0.35	Listed Property	0.35
Cash Plus	0.35	Australian Shares	0.35
Australian Bonds	0.35	International Shares	0.35

Investment fees depend on where the investments are made. This calculation was done using the guidelines from OPC's Financial planning unit which states that estates:

Estate value	Guideline
less than $50,000 -	goes into the Access Fund
$50,000 - $100,000	50% in Access Fund and 50% in Cash Fund
$100,000 - $250,000	$50,000 in Access Fund, remainder is equally split into Cash and Cash Plus funds
Over $250,000	full financial plan. For these clients we multiplied their estate value by the average of the fees on all the funds

[25] Note that totals don't add up due to rounding.

OPC can and may assign a different set of fees to that which the Tribunal has assumed, as long as it maintains the average at 0.5 per cent, thus the allocation of assets into the different funds will have an impact on fees for individual clients.

EXAMPLE CALCULATION

Client with estate value of $222,805

On going management fee = (1% x $222,805) = $2,228
Investment management fee=($50,000x0.6%)+($86,403x0.35%)+($86,403x0.35%) = $905

Total fee for first year = $1,000 + $2,228 + $905 = $4,133
Total fee for ongoing year = $2,228 + $905 = $3,133

ATTACHMENT 4 RSM BIRD CAMERON REPORT