

Appendix one: Regulatory Impact Statement

Fee for lodging appeals to the Immigration and Protection Tribunal

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Justice (the Ministry).

The Ministry is tasked with the setting of an appropriate fee for the lodging of appeals to the Immigration and Protection Tribunal (IPT).

The Immigration and Protection Tribunal is established by the Immigration Act 2009 (2009 Act) and comes into effect on 29 November 2010. The 2009 Act repeals the current Immigration Act 1987 (1987 Act) and revokes the current regulations relating to the four appeals bodies.

The Ministry recommends a \$550 filing fee (15% GST inclusive). The advice and guidelines of the Office of the Auditor General (OAG) and the Treasury in setting a fee for the IPT were taken into account. In determining an appropriate fee, the following factors were considered:

- Achieving a reasonable level of cost-recovery; including the ability to produce total revenue of approximately \$450,000 per annum as agreed to by Cabinet in 2007;
- Supporting access to justice while deterring frivolous or vexatious appeals;
- The filing fees that applicants currently pay for applications that will be considered by the IPT; and
- How the fee for the IPT sits within the fee structure across other tribunals and courts.

The primary limitation in setting the fee is the funding package agreed to by Cabinet in 2007 [CAB Min (07) 44/2]. The funding was based on the current filing fee of \$700 (GST inclusive) and at that time full implications of the appropriation had not been examined.

The proposed fee will not:

- impose any additional costs to businesses
- impair private property rights, market competition, or the incentives on businesses to innovate and invest, or
- override fundamental common law principles (as referred in Chapter 3 of the Legislation Advisory Committee Guidelines).

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[Signature of person]

9/9/2010
[Date]

Status quo and problem definition

Status Quo

Currently under the Immigration Act 1987 (1987 Act), there are four separate bodies that may consider different aspects of an appeal from decisions on immigration matters. These are:

Administrative support is provided by the Department of Labour:

- Residence Review Board (RRB),
- Removal Review Authority (RRA),
- Refugee Status Appeals Authority (RSAA), and

Administrative support is provided by the Ministry of Justice:

- Deportation Review Tribunal (DRT).

The RRA and RRB are the only two bodies that have a filing fee. That fee is \$700. The 1987 Act prohibits the imposition of fees on refugee status claimants for any matter relating to refugee status (RSAA). The DRT has never charged a filing fee.

The Law Commission in its report *Tribunals in New Zealand, Issues Paper (January 2008)* found that there were few tribunals that have fees of more than \$400. The Report noted no significant concerns about the level at which tribunal fees are set.

The Immigration Act 2009 (2009 Act) establishes the new independent IPT which will replace the four current immigration appeal authorities. The IPT will hear and determine appeals relating to decisions to decline residence visa applications, and liability for deportation and appeals that relate to refugee and protected persons. Applications may also be made to the IPT by Immigration New Zealand for the cessation or cancellation of a person's recognition as a refugee or protected person.

Problem Definition

The Immigration Act 2009 (2009 Act) authorises, but does not oblige the Ministry to prescribe a fee for the new IPT. The Ministry is proposing a fee because the IPT will operate on a partial cost recovery model with expected annual revenue of \$450,000 from filing fees.

The consideration and setting of a fee must:

- Achieve a reasonable level of cost-recovery as imposed by Cabinet in 2007 [CAB Min (07) 44/2] which took into account:
 - The IPT receiving relatively constant fee funding of approximately \$450,000 per annum based on the filing fee for two of the current appeal authorities of \$700;
 - Expenditure appropriated for the current fee-paying bodies under the Immigration Act 1987 (1987 Act); and
- Support access to justice while deterring frivolous or vexatious appeals

Objectives

The objective is to justify and set an appropriate fee for the filing of appeals to the IPT.

Although there is no authoritative view, there is a wide range of guidance material on factors to take into account when setting a filing fee. The Ministry's methodology has largely been guided by:

- Government imperatives to fee setting in the public service which include:
 - The agency must have the authority to set fees;
 - Efficiency – public entities must understand and monitor their indirect and direct costs, to ensure they operate efficiently and are achieving value for money; and
 - Accountability – ensuring that the process for identifying costs and the setting of fees is transparent.
- Achieving a reasonable level of cost-recovery; including the ability to produce total revenue of approximately \$450,000 as agreed to by Cabinet in 2007;
- Relevant policy considerations which include:
 - Access to justice;
 - Public and private benefits;
 - Filing fees currently paid for appeals that will be considered by the IPT; and
 - How the fee for the IPT sits within the fee structure across other tribunals and courts within the justice sector.

The fee will apply to appeals that relate to residence class visas and liability for deportation will incur an appeal fee.

Appeals that relate to refugee and protected persons will not incur a fee. The 2009 Act prescribes that fees may not be imposed on refugee or protected person claimants for any matter relating to their status.

Regulatory impact analysis

The revenue funding expectations set by Cabinet in 2007 [CAB Min (07) 44/2] require a reasonable level of cost-recovery (i.e. \$450,000 per annum).

In order to meet the funding expectations, the Ministry looked at four options before recommending a \$550 filing fee.

The Ministry considered fee levels of \$400, \$500, \$550 and \$700. The possibility of not charging a fee was not an option due to revenue funding expectations of \$450,000 per annum.

Fee level	Disadvantages	Advantages
\$400	<ul style="list-style-type: none"> • The funding shortfalls in the first two years of the IPT's implementation were too great for the Ministry to meet • Is at the higher end of the current range of tribunal filing fees (\$22 - \$500) administered by the Ministry, especially in relation to tribunals which have a human rights dimension and do not require a filing fee 	<ul style="list-style-type: none"> • The fee is most closely aligned with other tribunals administered by the Ministry • The fee is not greater than the filing fee for lodging an appeal to the High Court • Allows greatest access to justice compared to the other options
\$500	<ul style="list-style-type: none"> • The funding shortfalls in the first two years of the IPT's implementation were too great for the Ministry to meet. • Is at the highest end of the current range of tribunal filing fees (\$22 - \$500) administered by the Ministry, especially in relation to tribunals which have a human rights dimension and do not require a filing fee 	<ul style="list-style-type: none"> • The fee is more closely aligned with other tribunals • Allows greater access to justice
\$550	<ul style="list-style-type: none"> • Is higher than the filing fee for lodging an appeal to the High Court • Is higher than the current range of tribunal filing fees (\$22 - \$500) administered by the Ministry, especially in relation to tribunals which have a human rights dimension and do not require a filing fee 	<ul style="list-style-type: none"> • Ability to meet expected revenue of approximately \$450,000 by year 3 (with the use of contingency funding from IPT project implementation funds in the first two years of operation) • Allows greater access to justice
\$700	<ul style="list-style-type: none"> • Possibly impedes access to justice although the Law Commission in its 2004 Report did not specify that a fee of \$700 created an undue barrier • It exceeds the current range of tribunal filing fees (\$22 - \$500) administered by the Ministry especially in relation to tribunals which have a human rights dimension and do not require a filing fee 	<ul style="list-style-type: none"> • From the Department of Labour's point of view, appeal fees should align closely to fees for visa applications, to diminish the possible advantage of applicants immediately resorting to lodging an appeal rather than re-applying for a visa • A surplus in terms of the revenue funding appropriation would be generated from the IPT's 2nd year of operation. Generates revenue for the government

The Department of Labour does not have a fixed view on what the level of the fee should be and is primarily concerned that:

- A proposed fee does not result in adverse financial implications and consequently impacts on the IPT's ability to make quality and timely decisions; and
- Appeal fees influence the overall operation of the immigration system of which the IPT is an integral part.

The Ministry has taken the Department's concerns into account and is satisfied that its recommendation of the new fee level appropriately takes into account various imperatives and broader policies to fee setting across the public sector.

The proposed \$550 does present the Ministry with a shortfall in revenue funding in the first two years of implementation, and results in an inconsequential impact by the third year and on-going years.

Projected revenue figures for the IPT show a deficit against expected revenue in the Revenue Other appropriation levels. The reduction in Revenue Other collected are set out below:

- 2010/2011 - \$240,000 (note this financial year reflects the period 29 November 2010 – 30 June 2011)
- 2011/2012 - \$45,000
- 2012/2013 - \$5,500

The shortfall in Revenue Other appropriation will be managed within the funding from the baseline transfer from the Department of Labour to the Ministry of Justice for the IPT.

The proposed fee represents approximately 12% in the first 3 years of operation. This compares to an approximate cost recovery level in other specialist civil jurisdictions of 13 percent¹. However, it is important to note that the IPT is a newly established body. These specialist civil jurisdictions are well established bodies with static case volumes and workloads. It is possible that after two to three years of the IPT's establishment, cost efficiencies may be realised as the service evolves and assumptions are justly tested.

Consultation

The Departments of Internal Affairs and Labour, the Ministries of Foreign Affairs and Pacific Island Affairs, The New Zealand Association for Migration and Investment, the United High Commissioner for Refugees, the Office of the Ombudsman, the Human Rights Commission, the New Zealand Law Society, the Office of Ethnic Affairs, the New Zealand Security and Intelligence, the New Zealand Customs Service, Crown Law, the Privacy Commissioner, Legal Services Agency, and Treasury were consulted.

The Department of Labour does not support the proposal to enable appellants to pay one fee where their facts and humanitarian appeals have been lodged together. The policy rationale for the proposal should be justified. It is the Department's view that it is not fair to reduce the cost of appeals for some appellants who are able to lodge both appeals together due to their particular place in the immigration life cycle, but to charge other appellants two fees where their circumstances mean that they cannot lodge their appeals at the same time. The Department does not support the Ministry's statement that a filing fee of \$700 would generate a surplus in the IPT's second year of implementation. It may generate more fee revenue than the Ministry is appropriated but the IPT will still be largely funded by the Crown.

The chairs of the Refugee Status Appeals Authority, the Removal Review Authority, the Residence Review Board, and the Deportation Review Tribunal were also consulted.

The Department of Prime Minister and Cabinet has been informed.

¹ These included the Motor Vehicle Disputes Tribunals, Tenancy Tribunal, Customs Appeal Authorities, Deportation Review Tribunal, Human Rights Review Tribunal, Land Valuation Tribunal and the Taxation Review Authority

Conclusion and recommendations

The Ministry recommends a new fee level of \$550. The Ministry has extensive experience in managing various tribunals and must consider as a matter of policy access to justice alongside cost recovery.

The Ministry's view is that the purpose of specialist jurisdictions, such as the new IPT, is to provide an alternative to the court process by making available access to an affordable and efficient method of dispute resolution. Therefore accessibility is crucial to the effectiveness of the tribunal system. Access to tribunals and courts is a key matter across the justice sector and fees are often only a small part of the total costs that an applicant may incur.

The Ministry has considered the financial and resourcing implications at length and is able to manage any such implications that (may) result in setting the fee at \$550.

Implementation

The recommended filing fees will form part of the proposed regulations and are intended to give effect to the new legislation.

It is intended that the regulations come into effect on 28 October 2010, and all appeals filed under the 2009 Act on or after that date will attract the new filing fee.

Monitoring, evaluation and review

It is the role of the Special Jurisdictions Service Design and Operational Policy team to review, on request, practices and procedures to ensure effectiveness, efficiency and consistency of processes across all tribunals.

The appropriateness of the fee level will be revisited as part of a wider review of Civil Court and Tribunal fees that the Ministry plans to undertake in 2012.