



Law Council
OF AUSTRALIA

2022 Inquiry into Legal Practitioners' Scales of Costs

Joint Costs Advisory Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council acknowledges the assistance of the following Constituent Bodies, Law Council Sections and Committees in the preparation of this submission:

- Family Law Section;
- Federal Court Liaison Committee of the Federal Litigation and Dispute Resolution Section;
- Law Society of the Australian Capital Territory;
- Law Institute of Victoria;
- Law Society of Western Australia;
- New South Wales Bar Association; and
- Victorian Bar.

Executive Summary

1. The Law Council is grateful for the opportunity to provide a submission to the Joint Costs Advisory Committee (**JCAC**) as part of its 2022 inquiry into the quantum of costs (including expenses and fees for witnesses) allowable to legal practitioners pursuant to the scales of costs contained in the Rules of the High Court of Australia (**High Court**), Federal Court of Australia (**Federal Court**), and Federal Circuit and Family Court of Australia (Divisions 1) and (Division 2) (**FCFCOA**) – together, **the Courts**.
2. The JCAC's inquiry again provides an opportunity to ensure that parties awarded costs are, as much as possible, not out of pocket following resolution of their legal matter in one of the Courts.
3. The Law Council maintains its concern that the scales of costs across the Courts have failed to keep pace with actual costs incurred by parties and do not reflect the value of the intellectual work undertaken by lawyers, current charging practices, current market conditions, and changes in the technology used by practitioners.
4. In this submission, the Law Council makes the following recommendations:
 - (a) the JCAC should recommend an increase in the scales of costs that is at least in accordance with the Federal Costs Advisory Committee (**FCAC**) Formula (4.0 per cent based on data for the March 2022 quarter);
 - (b) the JCAC should recommend that each of the Courts consider adopting a process whereby the scales are updated annually based on its recommendations;
 - (c) the JCAC should seek a referral from the Courts to consider the changes in the practices of the Courts and legal practitioners as a result of increased use of technology in order to ensure that the Courts' scales of costs adequately reflect current practices. Alternatively, the Courts should implement a separate process for considering this matter;
 - (d) further to the FCAC formula, the JCAC should recommend an increase to the quantum of the scales in the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*; and
 - (e) the JCAC should recommend that the Federal Court update the National Guide to Counsel Fees to recognise changes in market rates and market conditions affecting barristers' fees since the Guide was issued in 2013.

Federal Costs Advisory Committee formula

5. The Law Council is aware that under the JCAC's Terms of Reference, in reviewing the quantum of costs contained in the rules of the Courts, the JCAC is required to consider the Federal Costs Advisory Committee (**FCAC**) formula 'as an indicative mechanism, to be adjusted according to available data (including but not exclusive to statistics provided by the Australian Bureau of Statistics)'.²

Calculation

6. The FCAC formula is as follows:

$$\begin{aligned} \text{Suggested increase} &= Ax + By + Cz \\ &= (2.6 \times 0.31) + (6.1 \times 0.39) + (2.6 \times 0.30) \\ &= \mathbf{4.0\%} \text{ (see table 2 below)} \end{aligned}$$

Where:

- A = percentage change in wages and salaries, as indicated by the change in the wage price index (**WPI**) = 2.6% (see Table 1 below);
- B = percentage change in other overheads, as indicated by the change in the consumer price index (**CPI**) = 6.1% (see Table 1 below);
- C = percentage change in partners' salaries and profits as indicated by the change in the WPI = 2.6% (see Table 1 below);
- x = the weighting given to wages and salaries = 31%;
- y = the weighting given to other overheads = 39%; and
- z = the weighting given to partners' salaries and profit = 30%.

Table 1. Movement in indices

	June 2021	June 2022	Change in indices	% change in indices
WPI ³	136.7	140.3	3.6	2.6%
CPI ⁴	118.8	126.1	7.3	6.1%

² As extracted in Joint Costs Advisory Committee, *Fourteenth Report on Legal Practitioners' Costs* (September 2021), 1.

³ Australian Bureau of Statistics, *Wage Price Index, Australia, June 2022* (17 August 2021) <<https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/wage-price-index-australia/jun-2022>>.

⁴ Australian Bureau of Statistics, *Consumer Price Index, Australia, June 2022* (27 July 2022) <<https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia/latest-release>>.

Table 2. Application of the FCAC formula

	Weighting	% change in indices	% increase
Wages and Salaries	0.31	2.6 (WPI)	0.81
Other Overheads	0.39	6.1 (CPI)	2.38
Partners Salaries and Profit Share	0.30	2.6 (WPI)	0.78
Result of application of the FCAC formula (to one decimal point)			4.0

Analysis

7. The Law Council notes that in previous years the implementation of the JCAC's recommendations by the Courts has been infrequent and inconsistent. The recommendations of the JCAC each year should be expeditiously acted upon by the Courts to ensure that any discrepancy between the scales of costs and the actual costs incurred by litigants is minimised. Such delays mean practitioners (and their clients) are losing the benefit of the annual increases recommended by the JCAC.
8. Given the current rate of inflation, failure to amend the scales expeditiously will mean that the scales fail to reflect market conditions to an even greater degree than in previous years. It is therefore imperative that the Courts implement any change in the scales as recommended by the JCAC as soon as possible following the release of the JCAC's forthcoming report.
9. The Law Council also urges the JCAC to recommend that each of the Courts consider adopting a process whereby the scales are updated annually based on the recommendations of the JCAC. Additionally, the Law Council considers that the Courts should conduct a broader periodic review, perhaps on a five-yearly basis, to consider whether the scale rates continue to be sufficiently reflective of the prevailing rates charged by private practitioners. The Law Council and its Constituent Bodies would be pleased to work with the Courts to implement these reforms.

Recommendations:

- **The Joint Costs Advisory Committee should recommend an increase in the scales of costs that is at least in accordance with the Federal Costs Advisory Committee Formula (4.0 per cent based on data for the June 2022 quarter).**
- **The Joint Costs Advisory Committee should recommend that each of the Courts consider adopting a process whereby the scales are updated annually based on its recommendations.**

Increased use of technology

10. In its 2021 submission, the Law Council recommended:

*The Joint Costs Advisory Committee should review itemised costs currently provided for under the fee scales against the types of costs reasonably incurred by practitioners when conducting matters by Audio-Visual Link, to ensure the fee scales represent a fair and accurate estimate of work reasonably required to be undertaken.*⁵

11. In response to this recommendation, the JCAC noted:

*consideration of this matter is not within the scope of the Committee's terms of reference, and is a matter for each Court to consider when reviewing their respective Rules.*⁶

12. The Law Council notes that the COVID-19 pandemic led to a significant increase in the use of audio-visual link (**AVL**) technology in the Courts which has permanently changed the way in which the Courts and legal practitioners interact.

13. The scales must be living documents which continue to reflect the actual practices of the Courts and the profession. To address these circumstances, the nature of the itemised costs currently provided for under the federal scales of costs should be reviewed against the types of costs reasonably incurred by practitioners when conducting matters by AVL, with a view to ensuring that the scales represent a fair and accurate estimate of work reasonably required to be undertaken. This will avoid further widening the gap between the scales of recoverable costs and the actual costs incurred by parties.

14. If changes in practice as a result of increased use of technology are considered to be outside the Terms of Reference for the JCAC, the Law Council recommends that the Courts refer this matter to the JCAC for consideration under item 2 in the Terms of Reference.⁷

Recommendation:

- **The Joint Costs Advisory Committee should seek a referral from the Courts to consider the changes in the practices of the Courts and legal practitioners as a result of increased use of technology in order to ensure that the Courts' scales of costs adequately reflect current practices. Alternatively, the Courts should implement a separate process for considering this matter.**

⁵ Law Council of Australia, *Submission to Joint Costs Advisory Committee, 2021 Inquiry into Legal Practitioners' Scales of Costs* (6 September 2021), 10.

⁶ Joint Costs Advisory Committee, *Fourteenth Report on Legal Practitioners' Costs* (September 2021), 5.

⁷ As extracted in Joint Costs Advisory Committee, *Fourteenth Report on Legal Practitioners' Costs* (September 2021), 1.

Scales of costs in the Federal Circuit and Family Court of Australia

Consolidating the scales of costs for Divisions 1 and Division 2

15. The Law Council notes that the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 (Cth) (Division 2 Rules)* provide, with respect to family law and child support matters, for the discretionary application of either the applicable costs schedule in those Division 2 Rules, or the applicable costs schedule in the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth) (Division 1 Rules)*.⁸
16. In its 2021 submission to the JCAC, the Law Council recommended that the FCFCOA should adopt a single fee scale.⁹
17. In response to this recommendation, the JCAC stated:

*The Committee also addressed LCA's concerns about there being separate costs schedules for the Federal Circuit and Family Court of Australia (Division 1) and (Division 2). The submission of the LCA appeared to be based upon a misconception that these two Courts were one Court. To this point, the Committee notes that a harmonised costs schedule for each Court was considered to lie with the harmonisation of each Court's respective Rules, but was deferred for further consultation and consideration and is appropriately a matter for those Courts.*¹⁰
18. The Law Council maintains its position that it is no longer appropriate or practicable to maintain two separate scales of costs for Division 1 and Division 2 of the FCFCOA, notwithstanding that these Divisions are not a single court.
19. Since September 2021, there has been a single point of entry for all proceedings issued in the FCFCOA. Cases are managed by Judicial Registrars at first instance, then often proceed to an interim hearing before a Senior Judicial Registrar, then some form of alternative dispute resolution. If the case does not resolve by that stage, it is then listed for a Compliance and Readiness Hearing and then at that point set down for a final hearing if all interlocutory issues have been exhausted.
20. There are certainly some cases that are transferred at an earlier stage to:
 - (a) a specialised list in Division 1 (e.g. matters involving complex property disputes, allegations of child sexual abuse, international child abduction and some, but not all, international relocation matters); or
 - (b) a Division 2 Judge rather than a Senior Judicial Registrar at an interlocutory stage, where orders are sought that are beyond the power of the latter.
21. In the Law Council's view, the quality of work performed by solicitors and counsel in the FCFCOA is consistent across both Divisions and it is artificial to distinguish between the two. The Law Council submits that it would be easier for all

⁸ See *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 (Cth)* r 4.01.

⁹ Law Council of Australia, *Submission to Joint Costs Advisory Committee, 2021 Inquiry into Legal Practitioners' Scales of Costs* (6 September 2021), 8-9.

¹⁰ Joint Costs Advisory Committee, *Fourteenth Report on Legal Practitioners' Costs* (September 2021), 5.

practitioners and judicial officers to have only one scale of costs to which to refer when seeking costs orders in the FCFCOA.

22. The Division 2 scale provides costings that are event-based, whereas the Division 1 scale is 'older fashioned', referring to time and folio-based costing. The Law Council suggests that of these two scales, Division 2 is easier to understand and follow, not only for practitioners but also the significant number of self-represented litigants who appear in the FCFCOA. There is also a growing number of practitioners who have fixed fee arrangements with their clients, and who would find it very difficult to provide accurate summaries of units charged based on time or folios, but would be able to identify the amount claimed by court event.
23. Appeal costs are currently provided for in the Division 1 scale. These would need to be redrafted and included in the proposed consolidated Scale of Costs. They could, be consistent with the costs allowable for preparation and appearance at final hearings.
24. Where there is a difference between a cost allowable in the current Division 1 and Division 2 scales, the Law Council submits that the higher amount should be preferred. Realistically, as discussed further below, that amount will still fall short of the actual costs charged to family law litigants by most private firms and counsel, and there is no reason why they should not all be able to claim the maximum amount allowed across the two scales.

Short mentions

25. Additionally, Item 13 on the Division 2 scale, which allows for a 'short mention' in the sum of \$321 should be discontinued entirely for the following reasons:
 - (a) Whether or not a matter is a short mention of 10 minutes, or a half-day event punctuated by stand downs, this item does not reflect the work done to prepare the case for that mention. This is particularly so following the COVID-19 pandemic, where a great deal more front-end preparation is required prior to participating in an AVL with a court. This work used to be done easily face-to-face between practitioners at court on the day. This has now changed because the emphasis is on paperwork prepared ahead of time, such as case outlines, consolidated minutes of orders, written submissions, and also having conferences with clients and instructors in advance of the hearing date (as opposed to on the day at court).
 - (b) There is no way of knowing whether a matter will be called first or last in these lists anymore, and that often determines whether a matter falls into the 'short mention' event category. For example:
 - (i) being middle or last on a 12-noon listing can easily see a matter not dealt with until 3:30pm; but
 - (ii) being first on a 10:00am listing can see it finished by 10:15am; and
 - (iii) Judicial Registrars and Senior Judicial Registrars do not seem to prioritise matters with counsel over those with self-represented litigants.
 - (c) Finally, the 'short mention' event fee is so low that it does not offer any disincentive to litigants to settle matters before the Court date and therefore avoid the briefing fee.

The adequacy of the current scales

26. The Law Council is of the view that the scales of costs in respect of proceedings in the FCFCOA are not consistent with the prevailing market conditions. Increases pursuant to the FCAC formula are not likely to correct this position.
27. Schedule 3 of the Division 1 Rules provides that the amount recoverable in family and child support matters in Division 1 of the FCFCOA for '[t]ime reasonably spent by a lawyer on work requiring the skills of a lawyer (other than work to which any other item in this Part applies)' is \$259.22 per hour.¹¹ In its submission to the 2021 Inquiry, the Law Council noted, by way of example, that the market rate for family lawyers in Victoria ranges from \$400 to \$800 per hour, significantly higher than the amount recoverable under the FCFCOA's scale of costs for family matters. Similar market rates for family lawyers exist in the other States and the Territories.
28. The Law Council understands that there would be very few, if any, lawyers in Australia practising in family law who charge an hourly rate of approximately \$260.
29. Indeed, the disconnect between the amount provided for in schedule 3 and the reality is demonstrated by reference to the *Legal Profession (Family Court of Western Australia) Determination 2022 (WA) (WA Costs Determination)*. That Determination provides a maximum hourly rate for a senior practitioner of \$506.00 – a figure which is 95 per cent larger than the figure contained in schedule 3. The maximum hourly rate for a clerk/paralegal under that Determination is \$242 – a figure which is approximately 93 per cent of what can be claimed by a lawyer performing work requiring the skills of a lawyer under the FCFCOA's scale of costs for family matters.
30. While the Law Council appreciates that there will always be, and should always be, a difference between what can be recovered on a solicitor-and-own-client basis and what can be recovered on a party/party basis, that difference should arise principally because of the work actually performed, rather than by reference to the rate charged. That is, the 'gap' should not arise because the scale hourly rate is set at an arbitrarily lower figure than what is actually charged by practitioners accepting instructions in that area.
31. The Law Council does not see any basis for the difference between solicitor-and-client recovery and party/party costs recovery largely coming down to the differences in applicable hourly rates. The one exception to this, however, would be where a person has chosen to instruct a legal practitioner or practitioners who charge in excess of the scale rates and in circumstances where the scale rate is more closely reflective of prevailing market conditions (such as in the Western Australian Determination).
32. Where a person engages a solicitor who charges more than scale, they do so knowing that they will not likely be in a position to recover those additional costs. However, the principle underlying such circumstances rests on the common understanding that the scale is actually reflective of what might be loosely referred to as the prevailing market conditions. The current scale is not reflective of market conditions at all.

¹¹ If that work does not require the skill of a lawyer but is nonetheless done by a lawyer, the amount recoverable is \$168.05.

33. The Law Council notes that this issue is not limited to the FCFCOA and that the High Court and Federal Courts scales similarly fail to reflect current market conditions. However, by way of comparison, the rates in the High Court and Federal Court Scales are significantly above similar rates in the FCFCOA:
- (a) the High Court scale includes an effective hourly rate of \$545.00;¹² and
 - (b) the Federal Court scale includes an effective maximum hourly rate of \$650.00 plus a potential to claim an additional allowance for skill, care and responsibility.¹³
34. When regard is had to the amounts chargeable in the High Court, Federal Court and indeed pursuant to the WA Costs Determination, it is difficult to say that the amounts provided for in the FCFCOA Rules are truly reflective of prevailing conditions, nor would they seem to reflect the relative complexity of matters heard in these two courts.

Recommendation:

- **Further to the FCAC formula, the JCAC should recommend an increase to the quantum of the scales in the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*.**

Federal Court National Guide to Counsel Fees

35. As the JCAC would be aware, barristers' fees are not covered by either the Federal Court or High Court's scales of costs. However, the Federal Court issued its National Guide to Counsel Fees (**Guide**) which may be applied by taxing officers (noting that it is a guide only).
36. In its recent submissions to the JCAC (2019-2021), the Law Council identified that the Guide has not been updated for a considerable period of time, and recommended that it be updated to adequately reflect the actual rates charged by barristers. Failure to consider market and cost-of-living changes over time and to revise amounts in the Guide has also meant that barristers' fees payable under the Guide have decreased in real terms.
37. The current Guide itself acknowledges the need to adjust 'for market and cost-of-living changes'.¹⁴ However, despite significant increases to senior and junior counsel's fees, the general rise in the costs of living since 2013 and updates to the Federal Court's scale of costs in January 2014 and again in May 2019, the current Guide remains unchanged since it was issued in 2013.
38. There is also currently a significant difference between the rates currently set out in the Guide and the rates for counsel in state and territory courts.
39. The Law Council submits that the Guide should be increased having regard to the current market rates for senior and junior counsel in each state and territory. The Law Council and its Constituent Bodies would be pleased to work with the Federal Court on a revised version of the Guide.

¹² See *High Court Rules 2004* (Cth) sch 2, item 6(a).

¹³ *Federal Court Rules 2011* (Cth) sch 3, item 11.

¹⁴ Federal Court of Australia, 'National Guide to Counsel Fees' (28 June 2013) <<https://www.fedcourt.gov.au/forms-and-fees/legal-costs/national-guide-counsel-fees>>.

40. In the Law Council's view, the JCAC should encourage both the High Court and the Federal Court to ensure that continuing changes in market rates and market conditions affecting barristers' fees are properly reflected in the scales of costs and any guidance material. In updating this material, the levels allowed for solicitors should also be updated to ensure that scales for counsel and solicitors remain broadly in step.

Recommendation:

- **The JCAC should recommend that the Federal Court update the National Guide to Counsel Fees to recognise changes in market rates and market conditions affecting barristers' fees since the Guide was issued in 2013.**