

21 August 2024

The Hon Justice Robert Harper  
Chair  
Joint Costs Advisory Committee  
Federal Circuit and Family Court of Australia  
PO Box 9991  
CANBERRA ACT 2601

By email: [customer.service@fcfcoa.gov.au](mailto:customer.service@fcfcoa.gov.au)

Dear Justice Harper

### **Joint Costs Advisory Committee—2024 Consultation**

The Law Council welcomes the opportunity to respond to the Joint Costs Advisory Committee's (**JCAC's**) 2024 consultation on the quantum of costs allowable to legal practitioners pursuant to the scales of costs in the rules of each of the federal courts.

We are grateful for the assistance of the Law Council's Family Law Section and Federal Dispute Resolution Section, the Law Society of New South Wales, the Queensland Law Society, and the Tax Bar Association of the Victorian Bar in preparing this submission.

#### *Federal Costs Advisory Committee formula minimum adjustment*

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)'.<sup>1</sup>

The Law Council submits that the JCAC should recommend an increase in the scales at least in accordance with the FCAC formula. Based on currently available data for the June 2024 quarter, the Law Council suggests that the JCAC should recommend an increase of at least 4.0 per cent.<sup>2</sup>

#### *Ongoing discrepancy between work performed and costs recoverable*

The Law Council continues to be of the view that there is a significant discrepancy between work performed and costs recoverable. The scales of costs across the federal courts must be living documents, which reflect the actual practices of the courts and the profession, to ensure they represent a fair and accurate estimate of work reasonably required to be undertaken.

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<sup>1</sup> As extracted in Joint Costs Advisory Committee, *Sixteenth Report on Legal Practitioners' Costs* (September 2023) 1.

<sup>2</sup> See Australian Bureau of Statistics, [Wage Price Index, Australia, June Quarter 2024](#) (13 August 2024); Australian Bureau of Statistics, [Consumer Price Index, Australia, June Quarter 2024](#) (31 July 2024).

The impacts of this disparity are borne by the party, often in circumstances where they have been successful in the litigation and can be a barrier to outcomes being pursued through the courts. Scales of costs that accurately reflect the actual costs of legal work are needed to ensure access to justice for all litigants.

### Federal Circuit and Family Court of Australia

Practitioners have expressed particular concern that the Federal Circuit and Family Court scales do not ensure that successful parties obtain a reasonable recovery for party/party costs when they obtain the benefit of a costs order. One option to address this issue may be to increase the Federal Circuit and Family Court of Australia scales in line with the Federal Court scales, with those scale charges increased on a regular basis.

### Regular review

The Law Council considers that the scales and fees across the federal courts generally require a broader and more regular review to ensure allowable costs/fees keep pace with developments in the market. We note, for example, that the Federal Court's National Guide to Counsel Fees (**National Guide**) has not been updated for more than 10 years, with the last version issued by the Court in 2013.<sup>3</sup>

### Federal Court's National Guide to Counsel Fees

Barristers' fees are not encompassed within either the Federal Court or High Court's scales of costs. However, pursuant to Items 16.1 and 16.2 of Schedule 3 to the *Federal Court Rules 2011* (Cth), counsel fees may be assessed by reference to the National Guide.

The Tax Bar Association of the Victorian Bar advises that the National Guide is increasingly used by the Commissioner of Taxation to determine funding rates under the Test Case Litigation Funding Program. Accordingly, updating the National Guide is important to both litigants who receive costs orders in their favour and counsel conducting test case matters.

As noted above, the current National Guide remains unchanged since it was issued in 2013. This is 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 scales of costs. There is also a significant difference between the rates currently set out in the National Guide and the rates for counsel in state and territory courts.

As the JCAC would be aware, over a number of years, the Law Council has raised concerns about this situation.<sup>4</sup> Failure to consider market and cost-of-living changes over time, and to revise amounts in the National Guide, has also meant that barristers' fees payable under the National Guide have decreased in real terms.

The Law Council considers that the National Guide should be updated for at least inflation increases over the past 11 years. The Reserve Bank of Australia's simple inflation calculator calculates inflation between 2013 and 2023 as having been 29.9 per cent.<sup>5</sup>

The Law Council and its Constituent Bodies would be pleased to work with the Federal Court on a revised version of the National Guide.

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<sup>3</sup> Federal Court of Australia, [National Guide to Counsel Fees](#) (28 June 2013).

<sup>4</sup> See, eg, the Law Council's submissions to the JCAC in 2019-2022.

<sup>5</sup> Reserve Bank of Australia, [Inflation Calculator](#).

Contact

The Law Council would be pleased to meet with the JCAC to further discuss these ongoing concerns. In the first instance, please contact Mr John Farrell, Executive Policy Lawyer [REDACTED]

Yours sincerely

A handwritten signature in blue ink, appearing to read 'James Popple', with a stylized flourish extending to the right.

**James Popple**  
**Chief Executive Officer**