28 August 2025

Law Council
OF AUSTRALIA

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

Dear Justice Harper

Joint Costs Advisory Committee—2025 Consultation

1. The Law Council welcomes the opportunity to respond to the Joint Costs Advisory Committee's (**JCAC's**) 2025 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.

2. We are grateful for the assistance of the Law Society of New South Wales, the Queensland Law Society, the New South Wales Bar Association, the Law Institute of Victoria in preparing this submission. The Law Council also gratefully acknowledges the assistance of its Family Law Section and Federal Dispute Resolution Section.

Federal Costs Advisory Committee formula minimum adjustment

3. 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, inter alia, 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)' (**ABS**).[1] However, the JCAC is not limited to the FCAC formula in its determination.

4. The Law Council submits that the JCAC should recommend an increase in the scales of costs *at least* in accordance with the FCAC formula. Based on currently available data for the June 2025 quarter, the Law Council suggests that the JCAC should recommend an increase of at least 2.9 per cent.[2] That recommendation is qualified by comments below.

[1] As extracted in Joint Costs Advisory Committee, *Seventeenth Report on Legal Practitioners' Costs* (September 2024) 1.
[2] See Australian Bureau of Statistics, Wage Price Index, Australia, June Quarter 2025 (13 August 2025); Australian Bureau of Statistics, Consumer Price Index, Australia, June Quarter 2025 (30 June 2025).

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Ongoing discrepancy between work performed and costs recoverable

5. As in previous years, 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. 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.

Reported Cost Pressures

6. The scales of costs across the Courts have not kept up with the actual costs incurred by parties, do not reflect the complexity of intellectual work and expertise required of members of the profession, and have not matched increases in the ambient costs of practice in real terms linked to the costs of business rental and access to professional technologies and databases essential for practice.

7. Members of the legal profession have reported that the application of the existing costs scale often result in significant shortfalls between recoverable costs and actual legal expenses, particularly in complex litigation. This is of particular importance in the federal jurisdiction where matters (notably corporate, insolvency and constitutional cases) are complex and resource-intensive.

8. Actual costs are not accurately reflected in the FCAC formula which relies on changes in the consumer price index and wage price index as published by the ABS. These are economy-wide estimates, which do not specifically reflect changes in the costs of providing legal services. As demonstrated by the growing gap over recent years between the scales of costs and actual costs incurred by parties, reliance on the FCAC formula has tended to underestimate the required changes to the scales of costs. The JCAC should not solely rely on the FCAC formula in making its recommendations to the Courts.

Federal Circuit and Family Court of Australia

9. The legal profession welcomes recent changes to the Federal Circuit and Family Court of Australia fee scales in family law matters.[3]

10. However, legal practitioners have expressed particular concern that the Federal Circuit and Family Court of Australia (**FCFCOA**) 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 FCFCOA scales in line with the Federal Court scales, with those scale charges increased on a regular basis.

11. Legal practitioners working in family law also report that particular complexity is created as a result of different cost models in Division 1 (set out in Schedule 3 to the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth)) as compared to Division 2 (set out in Schedule 1 to the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* (Cth)).

[3] See, eg, *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) sch 3; *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* (Cth) sch 1.

12. Proceedings under Division 1 require a costly and time-consuming accounting exercise because of a requirement to count the number of words on any given document. This is to be contrasted with a simple model linked to Division 2 proceedings. The Law Council recommends that a review be undertaken of the process of preparing cost scaling for Division 1 matters, noting the complexity of matters arising under Division 1. Consideration might be given to including as event-based model for Division 1 in addition to the current scale, to be adopted in the Court's discretion.

Federal Court of Australia

National Guide to Counsel Fees

13. Barristers' fees are not encompassed within either the Federal Court or High Court's scales of costs.

14. 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 Federal Court's *National Guide to Counsel Fees* (**National Guide**).[4] The National Guide, when used in cost assessment, creates substantial downward pressure on cost claims.

15. The JCAC will be aware that the Law Council has regularly raised concern about the National Guide which has not been updated since 2013.[5] This is despite significant increases to senior and junior counsels' 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.

16. The National Guide is not only problematic because the scale of costs does not reflect the actual costs or market value of legal costs incurred: the continuity of the National Guide continues to impact on costs assessments within federal jurisdictions, particularly where costs are being fixed in the Federal Court in accordance with the *Costs Practice Note (GPN-Costs)*.[6] It is common practice for costs assessment to be referred to registrars whose only reference point is the 2013 National Guide. 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, with the result that litigants with a favourable costs order often carry significant portion of costs incurred. The practical effect is to create uncertainty both in costs disclosures and cost estimates, but also in the recovery of costs.

17. By way of example, the Registrar in *Australian Competition and Consumer Commission v Pacific National*[7] (**copy attached**) applied the same cost references as the Guide to a complex case involving eight respondents and five senior counsel, allowing a daily rate of $9000 for senior counsel based on the National Guide. Conversely, in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal*, Muir J stated:

> *There is nothing controversial about the contention that a daily fee rate of between $5,000 to $20,000 was charged by senior counsel depending on their seniority, expertise and the complexity of the case. That range ought*

[4] Federal Court of Australia, National Guide to Counsel Fees (28 June 2013).
[5] See, eg, the Law Council's submissions to the JCAC from 2019-2022 and 2024.
[6] Federal Court of Australia, *Costs Practice Note (GPN-Costs)*, 25 October 2016.
[7] *Australian Competition and Consumer Commission v Pacific National Pty Ltd & Ors* (Unreported, Federal Court of Australia, Registrar Stone, 1 April 2021).

to have been accepted as a matter of common knowledge by an experienced costs assessor…[8]

18. In another example of the practical impact, the Law Institute of Victoria has reported that the discrepancies between ordered and assessed costs usually result in protracted negotiations and/or contested costs hearings to determine what constitutes a reasonable fee. In federal matters involving counsel, the lack of clarity around daily or hourly rates has led to disputes that could otherwise be avoided by an updated benchmark. In costs disputes it is not uncommon for parties to spend hours in mediation solely to resolve disagreements over counsel's fees, which then inflates the costs that would otherwise apply. In addition, there is anecdotal evidence that Junior Counsel, in particular, are subject to a reduction in cost claims assessed on the basis of the Guide despite charges reflecting the prevailing market.

19. The Law Council considers that the National Guide should be updated to reflect at least inflation increases over the past 12 years. The Reserve Bank of Australia's simple inflation calculator calculates inflation between 2013 and 2024 as having been 34.0 per cent.[9]

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

Short Form Amounts

21. The Law Council also recommends expanding short form amounts available under Item 14 of Schedule 3 of the *Federal Court Rules 2011*. Item 14 allows a party to claim a short form amount upon the making of a sequestration order or the dismissal of a petition under the *Bankruptcy Act 1966* (Cth). Where additional steps are taken, which are often routine, a practitioner is required to prepare a partly itemised bill. Examples of these steps include applications for substituted service, obtaining an extension of time, or amending a petition. These steps are routine but fall outside the scope of Item 14.

22. Expanding the short form schedule to include common additional steps as individual items would streamline costs recovery, reduce administrative inefficiencies and better reflect the realities of insolvency practice. It would also assist consumers and practitioners by avoiding the need to prepare partly itemised bills for matters that are only marginally more complex than those contemplated by the existing short form amounts. For the avoidance of doubt, the scale should retain the option to prepare a partly or fully itemised bill where appropriate.

Increased use of technology

23. Legal practitioners report increased use and reliance on court-approved technologies, as well as other forms of technology, in the ordinary course of their work. The JCAC is encouraged to review itemised costs provided under the fee scale for costs reasonably incurred when conducting matters using technologies; particularly court-approved technologies. This aligns with the practice of maintaining currency with the realities of practise. We note that the Law Council has previously raised this issue with JCAC in 2022.[10]

[8] [2024] QSC 28, [106].
[9] Reserve Bank of Australia, Inflation Calculator (Web Page).
[10] Law Council of Australia, Submission to the Joint Costs Advisory Committee, 2022 Inquiry into Legal Practitioners' Scales of Costs (22 August 2022) [25].

24. The JCAC may benefit from a referral from the Courts to examine the impact of technology on practise and the extent to which associated costs fall outside the scope of fee scales. As it stands, the current framework appears to penalise innovation and efficiency gains where practitioners and firms invest in expensive technology used to streamline work that would otherwise be time intensive. The effect is that productivity gains enabled by technology are substantially offset by the investment costs.

25. Modern legal practice increasingly relies on digital tools, such as automated document review, to reduce time and cost. However, the Federal Court and FCFCOAs' cost recovery framework remains largely tethered to traditional, time-based metrics. This could create a disincentive for practitioners to adopt efficient, technology-driven workflows. In turn, this could discourage innovation to facilitate swift and cost-effective resolution of disputes.

26. It may therefore be useful for JCAC to examine the uses of technology as a rapidly evolving aspect of legal practice and how that can be reflected in costs. The Law Council would be pleased to assist in facilitating that inquiry.

Contact

27. The Law Council would greatly appreciate the opportunity to meet with the JCAC to discuss the concerns raised in this submission—many of which have been raised over a number of years but remain unaddressed.

28. In the first instance, please contact Mr John Farrell, Executive Policy Lawyer [redacted]

Yours sincerely



Tania Wolff,
President-elect