



Law Council
OF AUSTRALIA

2018 Inquiry into Legal Practitioners' Scale 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 the 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 60,000 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 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the New South Wales Bar Association, Queensland Law Society (**QLS**), Law Society of South Australia, the Family Law Section and the Federal Court Liaison and Federal Circuit Court Liaison Committees of the Federal Litigation and Dispute Resolution Section, in the preparation of this submission.

Introduction

1. The Law Council is pleased to provide a submission to the Joint Costs Advisory Committee's (**JCAC**) 2018 inquiry into the quantum of costs allowable to legal practitioners pursuant to the scales of costs contained in the rules of the participating federal courts.
2. The Law Council commends the JCAC's work in conducting an annual inquiry into the need for changes to the scales of costs. These inquiries provide an opportunity to ensure that parties awarded costs are, as much as possible, not out-of-pocket following resolution of their legal matter. However, there nevertheless remains a generally held view within the legal profession that the scales of recoverable costs are no longer reflective of the actual costs incurred by parties. Additionally, the scales may no longer reflect charging practices and technology within firms.

Application of the Federal Costs Advisory Committee Formula

3. The Federal Costs Advisory Committee (**FCAC**) Formula relates the movement in indices (the wage price index (**WPI**) and consumer price index (**CPI**)) to three expenditure components weighted to reflect the allocation of expenditure incurred in the provision of legal services. The expenditure components are: 'wages and salaries'; 'other overheads'; and 'partner salaries and profit'.
4. The relative weight of each component is determined by reference to the Australian Bureau of Statistics' *Legal Services Australia* survey, most recently undertaken in 2007-08 (published June 2009).¹ Accordingly, the Law Council again notes concern that the weightings have not adjusted to present economic conditions and may not reflect present legal practice expenditures.
5. Adopting the weightings from the 2007-08 Survey and based on the CPI and WPI data for the March 2018 quarter,² the Law Council submits that JCAC recommend an adjustment of at least 2.0 per cent to the federal scales of costs (see calculation at Table 2). Consistent with JCAC's practice, the Law Council encourages JCAC to have regard to all statistics available to it in arriving at the final level of the recommended increases.³

¹ Australian Bureau of Statistics, *8667.0 - Legal Services Australia* (2009)
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Explanatory%20Notes12007-08?OpenDocument>>.

² See Australian Bureau of Statistics, *6401.0 - Consumer Price Index, Australia* (2018)
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6401.0Mar%202018?OpenDocument>>;
Australian Bureau of Statistics, *6345.0 - Wage Price Index, Australia* (2018)
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/productsbyCatalogue/07C8525D230737D4CA2581D700791749?OpenDocument>>.

³ At the date of this submission, the most recent available values for the CPI and WPI were as published for the 2018 March quarter. It is anticipated that figures for the 2018 June quarter will be released on 25 July 2018 (CPI) and 15 August 2018 (WPI).

Table 1. Movement in indices

	Mar 2017	Mar 2018	Change in indices	% change in indices
WPI	125.6	128.2	2.6	2.07
CPI	110.5	112.6	2.1	1.90

Table 2. Solicitors' Costs

	% of Gross Costs (FCAC formula weighting)	% Increase in indices	% Increase
Wages and Salaries	0.31	2.07	0.64
Other Overheads	0.39	1.90	0.74
Partners Salaries and Profit Share	0.30	2.07	0.62
Recommended Increase			2.00

Recommendation 1:

- **The JCAC recommend an increase in the scales at least in accordance with the Federal Costs Advisory Committee Formula (currently 2.00 per cent).**

General Comments

Scale of Costs in Family Law Matters before the Federal Circuit Court and the Family Court of Australia

6. In 2017 the Australian Government requested that the Australian Law Reform Commission (**ALRC**) inquire and report into the state of Australia's family law system by March 2019. The ALRC Inquiry is currently underway and represents the first comprehensive review of the *Family Law Act 1975* (Cth) since the legislation commenced in 1976.
7. On 30 May 2018 the Commonwealth Attorney-General announced that, independent of any recommendations of the ALRC's ongoing inquiry into family law, the Government would introduce legislation in Spring 2018 to restructure the federal courts. This significant structural reform includes the establishment of a new 'Federal Circuit and Family Court of Australia' and a new Family Law Appeal

Division in the Federal Court of Australia to commence operation from 1 January 2019.⁴

8. This proposed restructure and transitional periods will significantly impact upon the administration of Australia's family law system and potentially marks a period of significant disruption and change in the family law courts. The proposed structural change and transitional provisions may create new pressures and challenges for the courts in seeking to implement these changes. Scales of costs is one issue that should be taken into consideration and addressed in the course of this restructure, should it proceed.
9. The QLS has advised the Law Council that many of its members have queried the justification for the different fees under the *Federal Circuit Court Rules 2001* (Cth) (**FCCR**) for family law and general federal law matters. The QLS considers the amount for a general federal law proceeding far more accurately represents the costs in family law proceedings than the lower amount currently prescribed.
10. Although the scale of costs within the *Family Court Rules 2004* (Cth) have increased, the ambiguous language used within these rules such as 'time reasonably spent' and the determination of work to be performed by a solicitor or a law clerk remain.
11. The Law Council suggests that the above concerns be considered and addressed when further information is available in relation to the Attorney-General's proposed restructure and the possible cost implications.

Recommendation 2:

- **The JCAC revisit the issue of scales of costs in family law matters in Australia's family law courts once legislation for the proposed reform of the federal courts and family law system has been introduced. In the intervening period, the scales of costs in the Federal Circuit Court and Family Court should be adjusted at least in accordance with the FCAC formula.**

Solicitors' Costs

Federal Court of Australia

12. The Federal Court Scale contained in Schedule 3 of the *Federal Court Rules 2011* (Cth) has not increased since 2014.
13. The hearing fees payable to the court (generally \$1,100 - \$2,700 per day for corporations, excluding filing and setting down fees) and the rates being charged for a transcript (readily \$1,500 to \$2,000+ per day) are, in many instances (particularly those involving corporations), proportionately very close to, or even greater, than the allowance for a lawyer at scale item 1.1. This indicates a significant devaluing of the intellectual work undertaken by lawyers.
14. Items 2 and 3 of the Scale, which require consideration of the number of words in particular documents, rather than the complexity and time spent in drafting/reading

⁴ Attorney-General (Cth), 'Court Reforms to help families save time and costs in family law disputes' (Media Release, 30 May 2018) <<https://www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx>>.

documents, should be reconsidered. Again, this approach devalues the intellectual work that may be involved. Further, the actual charging of clients based on the number of words in a document, as distinct from time spent, is not the way many firms charge their clients. Accordingly, being required to go back to each document and calculate the costs of drafting/reading on this basis (when it will often have been charged by time) only adds to delay and costs for all parties in calculating.

15. The QLS has noted to the Law Council that when considering the scale for lawyers, the rates being charged and allowed for counsel should be taken into account. In this regard, the rates in the National Guide to Counsel Fees for experienced counsel are significantly higher than allowed for experienced solicitors. The QLS questions whether there is any legitimate basis to give preference to counsel for their fees, particularly when they often contain significantly less detail than lawyers' costs.

Recommendation 3:

- **The JCAC, when considering rates for solicitors, should take account of:**
 - **the hearing fees payable to the court; and**
 - **the rates being charged for transcripts of proceedings.**

Recommendation 4:

- **The JCAC should review Items 2 and 3 of the Scale, and consider replacing the method of calculation based on the number of words in particular documents with an alternative method that accounts for the complexity and time spent in drafting/reading documents.**

Barrister's Costs⁵

High Court of Australia

16. The *High Court Amendment (Fees) Rules 2017* provides in Schedule 2 (Fees for work done and services performed), the fee which may be charged for various matters.
17. Schedule 2 does not specifically identify scale fees for work performed by barristers. Barristers' fees fall within the category Item 20 (Disbursements) which states that '[a]ll disbursements reasonably incurred and paid are to be allowed'.
18. This view is sustained by the Explanatory Statement to the amendments to the *High Court Rules 2004* on 6 November 2017, issued by the authority of the Justices of the High Court of Australia. That document states that following the 2017 annual review by JCAC:

The Court has agreed to the recommendation of the Committee for an increase of 1.9% to the solicitors' costs as set out in Schedule 2 of the High Court Rules 2004, which is to come into operation on 1 January 2018 and will apply in respect of all work done and services performed by solicitors after 31 December 2017.

19. Thus, the calculation of costs awards in regard to barristers' services is likely to include considerations of whether such costs were 'reasonably incurred'.

⁵ The following content is based on the input of the New South Wales Bar Association and may not represent the position of each of the Law Council's Constituent Bodies.

Necessarily this introduces a degree of an objective assessment by the taxing officers as to the level of fees charged and thereby allowable.

Federal Court of Australia

20. The *Federal Court Rules 2011* (Cth) provide in Part 40 (Costs), the rules relating to costs and taxation of costs. Rule 40.29(6) states that a taxing officer is to allow costs for the work done on or after 1 August 2011 in accordance with Schedule 3 to the Rules. Rule 40.30 states that costs are not to be allowed on taxation by a taxing officer for barrister's fees on a hearing if the barrister did not give substantial assistance in the conduct of the proceedings.
21. The current Schedule 3 applies to work done and services performed on or after 1 January 2014. Clause 16 of Schedule 3 states:

16.1 an amount may be allowed for counsel's fees according to the circumstances of the case. The amount may be assessed by reference to the National Guide to Counsel Fees. The fees are to be claimed as a disbursement.
22. An Explanatory Note to the National Guide to Counsel Fees issued on 28 June 2013, and effective from 1 July 2013, states that updates to the guides to the amounts which may be applied by taxing officers of the court 'have been adjusted for market and cost-of-living changes'.
23. By 1 July 2018 no update to the amounts listed in the current National Guide to Counsel Fees will have been made for five years. By failing to take into account market and cost-of-living changes for that period, by the issue of revised amounts to this guide, counsel's fees payable pursuant to the guide have decreased in real dollar terms.

Recommendation 5:

- **The amounts in Schedule 3 of the *Federal Court Rules 2011* be adjusted on at least a CPI basis from 1 July 2013 to date to bring the various fees in the National Guide to Counsel Fees identified up to date as at 1 July 2018.**

Recommendation 6:

- **That consistent with the principles explained in the National Guide to Counsel Fees, there be a presumption of an annual adjustment to the amounts contained within National Guide to Counsel Fees by reference to the annual determination of the JCAC, taking into account annual CPI movements.**

Federal Circuit Court of Australia

24. The FCCR provide in Rule 21.10 that, unless the court otherwise orders, a party entitled to costs in a proceeding is entitled to costs in accordance with Parts 1 and 2 of Schedule 1 to the Rules. This Rule does not apply to a proceeding to which the *Bankruptcy Act 1966* (Cth) applies.
25. Rule 21.16 of the FCCR (Counsel as advocate) states:

If the employment of an advocate is certified as reasonable, the amount payable for counsel to appear is the daily hearing fee and advocacy loading in accordance with Parts 1 and 2 of Schedule 1.
26. The *Federal Circuit Court (Costs and Other Measures) Rules 2001* provides that Schedule 1, as amended by the *Federal Circuit Court Amendment (Costs and Other Measures) Rules 2017*, applies to work done and services performed after the commencement of this Schedule. Reference is made to Rules 21.10, 21.16 and 44.15 of the FCCR.
27. Schedule 1 of Part 1 (Family Law proceedings and general law proceedings) includes, in Item 12, '[a]dvocacy loading' being 50 per cent of the daily hearing fee mentioned in Item 13 that applies to the hearing. Similar provisions are found in Part 2.
28. By operation of Rule 21.16 of the FCCR and Schedule 1 Part 1 Item 14 (Disbursements – court fees and other fees and payments to the extent that they have been reasonably incurred) the prescribed rate per the Schedule will be presumed to apply to counsel's fees by a taxing officer, absent an order otherwise.
29. It may be noted that no separate advocacy fee or distinction for junior or senior counsel is found in Schedule 1.

Recommendation 7:

- **The amounts in *Federal Circuit Court Rules 2001* Schedule 1 should be adjusted on at least a CPI basis from 1 July 2017 to date to bring the various fees identified up to date as at 1 July 2018.**

Recommendation 8:

- **That there be a presumption of the annual adjustment to the amounts contained within *Federal Circuit Court Rules 2001* Schedule 1 by reference to the determination of the JCAC, taking into account annual CPI movements.**

Scale of Costs in Family Law Matters before the Federal Circuit Court and the Family Court of Australia

30. Please see the 'General Comments' section on page 6 above.