



Law Council
OF AUSTRALIA

2017 Inquiry into Legal Practitioners' Scale of Costs

Joint Costs Advisory Committee

9 August 2017

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Introduction	5
Application of the Federal Costs Advisory Committee Formula	5
Table 1. Movement in indices.....	6
Table 2. Solicitors Costs.....	6
Specific Comments	6
Federal Circuit Court of Australia.....	6
Quantum of costs awarded in family law proceedings.....	7
Inclusion of a range of amounts within items in the event-based scale	8
Inclusion of additional items within the event-based scale	8
Amounts in the event-based scale	9
The Family Court of Australia	9
The Federal Court of Australia.....	10

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 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, 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 Law Society of New South Wales and the Queensland Law Society 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**) 2017 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 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 Law Council submits that JCAC recommend an increase in the scales in accordance with the Federal Costs Advisory Committee (**FCAC**) Formula.
4. The 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'.
5. 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.
6. Adopting the weightings from the 2007-08 Survey and based on the CPI and WPI data for the March 2017 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
7. The Law Council notes the position of the Queensland Law Society (**QLS**) that there should be regular reviews of each scale with increases aligned to the CPI each year in

¹ Australian Bureau of Statistics, *Legal Services Australia*, cat no 8667.0, 2009. <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Explanatory%20Notes12007-08?OpenDocument>>.

² See Australian Bureau of Statistics, *Consumer Price Index, Australia, Mar 2017*, cat no 6401.0, 2017 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6401.0Mar%202017?OpenDocument>>; Australian Bureau of Statistics, *Wage Price Index, Australia, Mar 2017*, cat no 6345.0, 2017 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0>>.

³ At the date of this submission, the most recent available values for WPI were as published for the 2017 March quarter. It is anticipated that figures for the 2017 June quarter will be released on 16 August 2017. For consistency with WPI figures the March quarter figures have been used. June quarter 2017 CPI figures were released on 26 July 2017, see Australian Bureau of Statistics, *Consumer Price Index, Australia, Jun 2017*, cat no 6401.0, 2017 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6401.0>>.

the periods between reviews. The QLS is of the view that the CPI is more appropriate than using the FCAC formula (which is partly based on the WPI) as an indicator, as the WPI may be prone to greater fluctuation.

Table 1. Movement in indices

	Mar 2016	Mar 2017	INDEX	% Increase
WPI	123.2	125.6	2.4	1.95
CPI	108.2	110.5	2.3	2.13

Table 2. Solicitors Costs

	% of Gross Costs (FCAC formula weighting)	% Increase in indices	% Increase
Wages and Salaries	0.31	1.95	0.60
Other Overheads	0.39	2.13	0.83
Partners Salaries and Profit Share	0.30	1.95	0.59
Total			2.02
Recommended Increase			2.00

Specific Comments

The Law Council makes the following particular comments with respect to the *Federal Circuit Court Rules 2001* (Cth) (**FCCR**), the *Family Law Rules 2004* (Cth) (**FLR**) and other matters relating to those costs. The Law Council also provides comments below on the current allowable amounts under the *Federal Court Rules 2011* (Cth) (**FCR**).

Federal Circuit Court of Australia

8. The Federal Circuit Court of Australia (**Federal Circuit Court**) commenced operation in 2000 to provide a simple and accessible alternative to litigation in the Federal Court of Australia (**Federal Court**) and the Family Court of Australia (**Family Court**) and to relieve the workload of those courts.
9. The jurisdiction of the Federal Circuit Court has expanded and the number and complexity of cases coming before it has increased substantially.⁴ Seven years ago the Court dealt with 40 per cent of all family law matters filed in the federal courts (excluding Western Australia family law matters); this has now increased to 86 per cent.⁵
10. In 2015-2016, 91 per cent of the Federal Circuit Court's workload consisted of family law matters and of this workload, 52 per cent of applications filed were 'divorce'

⁴ Explanatory Memorandum, Federal Circuit Court of Australia Legislation Amendment Bill 2012 (Cth), [3].

⁵ Federal Circuit Court of Australia, *Federal Circuit Court of Australia Annual Report 2015-2016*, 50.

applications, 21 per cent were 'final order' applications, 25 per cent were 'interim' applications and 2 per cent were 'other' applications.⁶ In 2015-2016, a breakdown of the family law workload (excluding divorce) of the Federal Circuit Court was as follows: 53 per cent related specifically to matters concerning children; 12 per cent involved both children and property; and 34 per cent involved discrete property applications.⁷

11. In recognition of the expansion of the jurisdiction of the Federal Circuit Court and the increasing complexity of applications filed, the name of the then Federal Magistrates Court was changed to the Federal Circuit Court and the title of Federal Magistrate was changed to Judge. This change was designed to better reflect the important role of the Federal Circuit Court in the judicial system.

12. It is clear that over the last 16 years, the range and complexity of matters filed in the Federal Circuit Court has increased substantially. This includes:

*an increase in the proportion of families with complex needs involving violence, mental health and/or substance addition or a co-occurrence of these risk factors who are appearing before the Court.*⁸

13. The Law Council is of the view that changes to the quantum of costs provided in the FCCR have not kept pace with the changes to the Federal Circuit Court's family law workload, and do not reflect the costs incurred in family law matters and the cost of running a family law practice.

14. The comments below refer to the party-party costs provisions in the FCCR, namely, Chapter 1, Part 21 – Costs, and the event-based scale in Schedule 1, Part 1 FCCR – Family law proceedings and general federal law proceedings.

Quantum of costs awarded in family law proceedings

15. In the majority of family law proceedings parties will pay their own costs. However, in a small number of matters the Federal Circuit Court will order that one party must pay the legal costs of the other party. Costs may be awarded on the basis of the conduct of the other party or the conduct of the litigation, for example, where a party delays the finalisation of a proceeding because of the rejection of reasonable settlement proposals.

16. The award of costs should provide a just result to the successful party, who should not be substantially out of pocket after an order for costs is made. The quantum of costs awarded by the Federal Circuit Court should reflect a close approximation to the actual costs incurred by the successful party. If the quantum of costs awarded in family law matters provides sufficient indemnity to the successful party, it will also provide that party with a just result. It could also serve to modify the behaviour of litigants and the conduct of litigation if such costs were to be awarded.

17. The Law Council supports the Productivity Commission's view that costs awarded to parties on a standard basis should be set according to fixed amounts contained within court scales.⁹

⁶ Ibid 52, table 3.4.

⁷ Ibid 54.

⁸ Ibid 49.

⁹ Productivity Commission, *Access to Justice Arrangements* (5 September 2014) vol 1, 470.

Inclusion of a range of amounts within items in the event-based scale

18. The Law Council's view is that the event-based scale does not recognise or reflect the diversity and complexity of family law applications filed in the Federal Circuit Court.
19. The Law Council suggests amendment of the event-based scale to include a range of amounts for each item in the scale. Such amendment would allow for an appropriate and reasonable award of costs dependent on the complexity of a particular matter and the costs incurred in the matter. The Law Council supports a range which would allow for an increase by up to 100 per cent in appropriate cases.
20. The judicial officer making an order for costs should be given discretion to award an amount within the range provided, subject to the reasonableness of the costs sought by a party.
21. Although the Court has the option of reverting to a full assessment or an itemised assessment, the Law Council queries how frequently this discretion is exercised and notes that the inclusion of a range of amounts for each item in the scale may encourage greater exercise of discretion, taking into account the various matters of which they will be aware in relation to conduct and complexity in the matter before them.
22. A range of amounts within each item in the scale would also provide a successful party with an award that would more closely reflect the actual costs incurred by that party.

Inclusion of additional items within the event-based scale

23. The current scale does not accurately reflect the number of Federal Circuit Court appearances required in family law matters. The event-based scale requires amendment to include additional Federal Circuit Court events and appearances.
24. Court appearances or events are required at each stage of family law proceedings. Family law matters require a number of mentions or interlocutory applications which are discrete events prior to the final hearing or trial. Such events include Court appearances:
 - (a) following a child dispute conference in parenting matters;
 - (b) before and after the production of family reports and other expert reports (psychologist or psychiatrist reports);
 - (c) before and after a conciliation conference;
 - (d) for the appointment of an independent children's lawyer; and
 - (e) for a call over or for a readiness hearing.
25. The request to inspect documents produced by way of a subpoena and attendance at the exhibit section to inspect such documents would also constitute an additional event.
26. The Law Council suggests that provision for mentions or interlocutory applications should be included in the event-based scale.
27. The Law Council also supports a separate item for counsel's fees. At present, no separate item for counsel's fees appears in the event-based scale. Instead, counsel's

fees are determined by rules 21.15 and 21.16 of the FCCR. These rules read as follows:

21.15 Advocacy certificate

The Court or a Registrar may certify that it was reasonable to employ an advocate, or more than 1 advocate, to appear for a party in a proceeding.

21.16 Counsel as advocate

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 Part 1 and 2 of Schedule 1.

28. Certification for counsel at interim and final hearings is unnecessary and should only be retained for senior counsel. The Law Council supports the introduction of a range of amounts in an item for counsel's fees. It is noted that the scale of costs in Schedule 3 of the FLR currently includes a separate part and items for counsel's fees and a range of hourly fees are included in each item. As set out above, the Law Society supports a range which would allow for an increase by up to 100 per cent in appropriate cases.

Amounts in the event-based scale

29. The Law Council is of the view that the amounts currently provided in each item of the scale are inadequate. The amounts do not accurately reflect the reality of the cost of legal practice and the time taken to complete tasks in family law matters. The scale should be updated to take into consideration the increased complexity of the family law workload of the Federal Circuit Court and accurately reflect the cost of family law practice.
30. The complexity of the Federal Circuit Court's family law workload is well recognised and the Law Council suggests that the differences between the family and general law items in the event-based scale be removed. The Law Council does not see the need for a distinction between family and general law items in the scale. It is not apparent why such a distinction exists in the scale, nor is it apparent why the amounts for family law events are significantly less than general law events.

The Family Court of Australia

31. The comments below refer to the party-party costs provisions in the FLR activity-based scale in Schedule 3 - *Itemised scale of costs*.
32. The Law Council observes that the FCCR include an event-based scale and the FLR include an activity-based scale. The rationale for the different methods in assessing and awarding costs in the family law jurisdiction is not apparent.
33. The Law Council is of the view that the amounts provided in the FLR scale are inadequate and do not accurately reflect the cost of family law practice. We note that the scale includes a range for counsel's work done and services performed and the Law Society supports the inclusion of a range of amounts for other activities listed in the scale. Further, items 101-106 do not accurately reflect the manner in which work is costed in legal practice and an adoption of an hourly rate for the activities in items 101-106 is supported.
34. The Law Council acknowledges the suggestion of the QLS that the Queensland scales found in the *Uniform Civil Procedure Rules 1999 (Qld) (the UCPR)* provide an

appropriate guide for the amendment of the FLR. In the QLS's view, the UCPR scales take a more pragmatic approach to assessing costs. For example, the UCPR allows for 'care and conduct'.¹⁰ As another example, the QLS suggests that use of the term 'skill or legal knowledge',¹¹ as contained in the UCPR scales, could address ambiguity in family law matters when determining whether work should have been performed by a solicitor or clerk.

The Federal Court of Australia

35. As set out above, the Law Council is of the view that the award of costs should provide a just result to the successful party, who should not be substantially out of pocket after an order for costs is made. Accordingly, the quantum of costs awarded by the Federal Court should reflect a close approximation to the actual costs incurred by the successful party.
36. The costs set out in Schedule 3 of the FCR have not risen since the increases made by the *Federal Court Amendment (Costs and Other Measures) Rules 2013* (Cth). This means that the amounts set out in the Schedule more and more do not reflect the actual costs incurred by the successful party. This is despite the recommendation made by JCAC in September 2015 that there should be a 3 per cent increase to the scale of costs.
37. The Law Council recommends that consideration be given to increasing the amounts provided for in Schedule 3, at least in accordance with the FCAC Formula.
38. Further, the Law Council notes concern within the legal profession that Schedule 3 of the FCR does not represent the most appropriate way to calculate costs allowable for work done and services performed in Federal Court matters. Practitioners have advised that the current method of calculating allowable costs does not accurately capture the costs incurred by a party and adds to the expense of assessors preparing bills.
39. The Law Society of New South Wales proposes that items 1-11 of Schedule 3 of the FCR should be removed and item 12 amended so that it refers to recoverable costs generally, providing that a fair and reasonable amount will be allowed for recoverable costs as determined by judicial officers with regard to items (a)-(l).

¹⁰ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) sch 1, item 1.

¹¹ See, eg, *Uniform Civil Procedure Rules 1999* (Qld) sch 1, items 12, 17.