Law Council
OF AUSTRALIA

14 August 2026

Ms Virginia Wilson
Deputy Principal Registrar
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 Ms Wilson

Joint Costs Advisory Committee—2026 Consultation

1. The Law Council of Australia welcomes the opportunity to respond to the Joint Costs Advisory Committee's (**JCAC**'s) 2026 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.[1]

2. The Law Council thanks its Federal Dispute Resolution Section, Family Law Section, the Queensland Law Society, the New South Wales Law Society, the Victorian Bar and the ACT Law Society for their contributions to this submission.

3. The JCAC's 2026 consultation provides an important opportunity to ensure that parties awarded costs are, as far as possible, not left materially out of pocket following the resolution of proceedings in the federal courts.

4. The Law Council maintains its longstanding concern that the scales of costs across the federal courts have failed to keep pace with the actual costs incurred by parties, and do not adequately reflect the value of the intellectual work undertaken by lawyers, current charging practices, current market conditions, or changes in the technology used by practitioners. Scales of costs that accurately reflect the actual costs of legal work help to ensure access to justice for all litigants.

5. Outdated and irrelevant approaches to costs recovery within the scales create a negative sentiment towards the administration of justice in the federal courts, especially if parties succeed but recover only a fraction of the costs they have incurred in properly vindicating their rights before the courts.

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1 For the purposes of this submission, the term "the federal courts" is used to refer to each of the High Court of Australia, Federal Court of Australia, Federal Circuit and Family Court of Australia (Division 1) and Federal Circuit and Family Court of Australia (Division 2).

Need for a broad review

6. 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 inform itself by having regard to, *inter alia*, the Federal Costs Advisory Committee (**FCAC**) formula "as an indicative mechanism".[2]

7. However, the JCAC should not rely solely on the FCAC formula in its determination. The Law Council considers that, as the widening gap between the scales and actual costs demonstrates, reliance on the FCAC formula alone has tended to understate the adjustments required.

8. The Law Council supports consideration of a broad review of federal costs scales and methodologies beyond routine adjustments on individual scale items. We consider that the scales and fees generally require more regular and objective review to ensure allowable costs and fees keep pace with developments in the market. This has been a key feature of Law Council submissions to JCAC in successive years.[3]

9. The Law Council considers that the annual JCAC process should not be confined to incremental adjustments where the evidence demonstrates that the underlying structure of the scales is no longer fit for purpose. A more comprehensive review is required, along the lines of the recent review undertaken by the Supreme Court of Victoria and the County Court of Victoria, which led to substantial reforms to the approach to litigious costs.[4] That review recognised the need for a contemporary and transparent approach to assessing legal costs, reflecting modern billing practices and the principle of proportionality.

10. The resulting Victorian scale provides a useful point of comparison for the federal courts. Following its introduction, a note to the profession highlighted the benefits of a time-costing approach to costs assessment.[5] While a comparable review may need to occur outside the ordinary JCAC inquiry process, the Law Council submits that the JCAC should make a recommendation to the federal courts to (individually or jointly) undertake a broad review of their costs scales, including whether implementation of a time-costing model would provide a more appropriate and sustainable framework. A clear goal of this review would be to adjust the method of calculating the amount allowable for counsel's fees to more closely reflect the principles of successful party recovery and bring the scales into line with both current billing practices and market conditions.

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2 Joint Costs Advisory Committee, *Eighteenth Report on Legal Practitioners' Costs* (Report, November 2025) 1-2.

3 See for example, Law Council of Australia, 'Joint Costs Advisory Committee—2025 Consultation', Submission to the Joint Costs Advisory Committee, Federal Circuit and Family Court of Australia (Submission, 28 August 2025).

4 Supreme Court of Victoria and County Court of Victoria, *Consultation Paper: Review of Litigious Costs Stage 1 Implementation* (Report, 14 December 2022).

5 Supreme Court of Victoria, 'Notice to the profession—new scale of costs' (Media release, December 2023).

National Guide to Counsel Fees

11. The JCAC will be aware of the Law Council's ongoing concerns about the Federal Court of Australia's National Guide to Counsel Fees (the **Guide**). The Guide has not been updated for 13 years and members of the profession have expressed concern that the amounts in the Guide no longer reflect the intellectual labour involved in, or the market value of, counsel's work at all levels of seniority. The continued use of the unrevised Guide produces uncertain outcomes and undermines the transparency of the method of costs assessment for both lawyers and clients.

12. The Reserve Bank of Australia's inflation calculator indicates cumulative inflation of 34.0 per cent between the 2013–14 and 2025–26 financial years.[6] Accordingly, the Law Council recommends that the Guide be revised to reflect, at a minimum, the inflation that has occurred since 2013.

13. The Law Council would be pleased to both support a review of the scales of costs framework and to work with the Federal Court on a revised version of the Guide.

Federal Circuit and Family Court of Australia

14. The Law Council continues to note that the various Federal Circuit and Family Court of Australia (**FCFCOA**) scales do not ensure that successful parties obtain reasonable recovery for party/party costs when a costs order is made.

15. Although the general rule in family law proceedings remains that each party bears their own costs, our constituent bodies have observed that costs orders are being made in family law proceedings with increasing frequency, making the adequacy of the FCFCOA scales a matter of practical importance.

16. Additionally, the Law Council notes that item 9 (Daily hearing fee) in Schedule 2 to the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2025* (Cth) does not reflect the time, skill and intellectual labour involved in counsel's work, and does not reflect the actual costs or market value of legal services. This provision should be substantially increased. An increase limited to the ordinary FCAC formula adjustment would be insufficient to address the existing gap. Additionally, consideration should be given to amending item 10 (Advocacy loading) to reflect the graduation in counsel's skills and experience.

17. The Law Council also notes that low recoverable costs may create inappropriate incentives for parties to pursue marginal, speculative or unmeritorious issues where the potential costs exposure is commercially acceptable. Costs orders should operate as an effective remedy for prejudice caused by claims with limited prospects of success and should have a meaningful deterrent effect where appropriate.

18. In reviewing the FCFCOA scales, consideration should also be given to current legal aid rates and to the practical complexity associated with different costing models across Divisions 1 and 2. The Law Council reiterates that consideration should be given to a simpler and more transparent event-based model for Division 1 matters, to be available in addition to the current scale and adopted in the Court's discretion.

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6 Reserve Bank of Australia, 'Inflation calculator' (Web Page, 2026).

Impacts of technology on costs landscape

19. Artificial intelligence (**AI**) and other legal technologies are changing the way legal services are delivered and the manner in which litigation is being conducted. This in turn impacts the costs of providing legal services.

20. The Law Council considers that the federal courts' costs scales should be responsive to technological developments and should reflect the work reasonably required in contemporary legal practice. In this regard, the Law Council makes the following comments in relation to the impacts of AI on legal costs.

21. Additionally, the Legal Technology Committee of the Law Council's Federal Dispute Resolution Section is developing a paper about technology costs in eDiscovery and the litigation process. The Law Council will provide a copy of this paper to the JCAC in due course, along with any other material of relevance.

Artificial Intelligence

22. Any use of AI tools by practitioners must only occur in a responsible way, consistent with their obligations to the court, their client and other parties. Practitioners remain responsible for the accuracy, reliability and appropriateness of work undertaken with the assistance of AI.

23. Where the use of AI reduces the time required for a particular task, or otherwise improves efficiency, the amount charged should ordinarily reflect the actual reduced time spent. However, it may not always be practical for practitioners to quantify or substantiate the precise time saved through the use of AI.

24. AI and automation have not necessarily reduced legal costs in all areas. In some public law matters, practitioners are increasingly required to respond to lengthy AI-generated material advanced by self-represented litigants, including submissions containing misconceived arguments, inaccurate authorities or fictitious citations. The time required to review and address such material may increase, rather than reduce, litigation costs.

25. The Law Council considers that AI-related expenses should not be treated automatically as recoverable disbursements. Costs such as software licensing fees will often be more appropriately characterised as office overheads. Whether a software-related expense is recoverable should be assessed on a case-by-case basis. More broadly, litigation increasingly relies on specialist technology, including eDiscovery, digital forensics and document management platforms. The recoverability of technology-related expenses should continue to be assessed according to their nature and the circumstances in which they are incurred.

26. Any future adjustment to allowable costs to reflect AI-driven efficiencies should be evidence-based and not applied as a blanket reduction. Adoption of AI is not uniform across the profession or across practice areas, and clients may restrict or prohibit its use. While AI may improve efficiency in some circumstances, it does not eliminate the need for legal expertise, professional judgment, supervision, verification or compliance with professional obligations. The use of AI may also necessitate additional review, validation and quality assurance processes to ensure accuracy and

compliance with professional duties. Costs scales should therefore continue to reflect the real costs of legal practice and compliance.

27. At this time, in our view, it would be premature for the JCAC to introduce discrete AI-related scale items, or adjust practitioners' costs to account for AI, without further evidence and guidance. The Law Council instead supports ongoing monitoring of the impact of AI and other technological change on litigation costs. It would be appropriate for the JCAC, or the federal courts through a separate referral or review process, to examine how technology-enabled legal work should be reflected in the costs framework, including whether and how disclosure of AI use should be required where costs are claimed for AI-assisted work.

Conclusion

28. For the reasons set out above, the Law Council urges the JCAC to recommend more than a mechanical annual uplift to the federal courts' costs scales. At a minimum, the scales should be increased in accordance with the FCAC formula. However, evidence provided by the profession demonstrates that broader reform is required to ensure the scales reflect the actual costs of contemporary legal practice, the value of legal work, and the principle that successful parties should obtain meaningful recovery under costs orders.

Contact

29. The Law Council would greatly appreciate the opportunity to meet with the JCAC to discuss the concerns raised in this submission.

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

Yours sincerely



Tania Wolff
President