Law Council
OF AUSTRALIA

2021 Inquiry into Legal Practitioners' Scales of Costs

Joint Costs Advisory Committee

6 September 2021

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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 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the following Constituent Bodies and Law Council Sections in the preparation of this submission:

- the Family Law Section;
- the Victorian Bar;
- the Bar Association of New South Wales;
- the Law Institute of Victoria; and
- the Law Society of New South Wales.

Introduction

1. The Law Council is grateful for the opportunity to provide a submission to the Joint Costs Advisory Committee's (**JCAC**) 2021 inquiry into the quantum of costs allowable to legal practitioners pursuant to the scales of costs contained in the rules of the High Court of Australia (**High Court**), Federal Court of Australia (**Federal Court**), and the newly established Federal Circuit and Family Court of Australia (**FCFCOA**) (together, **the Federal Courts**).

2. The JCAC's inquiry provides an opportunity to ensure that parties awarded costs are, as much as possible, not out-of-pocket following resolution of their legal matter in a federal court.

3. The cost of litigation and accessing legal representation in Australia is an issue of ongoing concern to the community and the legal profession. Clients must be able to have confidence that what is charged by lawyers, and what may be recovered, is appropriate and reasonable, while legal practitioners have a right to be fairly remunerated for their skill and labour.

4. An 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. As the Law Council has submitted in previous years, it is concerned that the scales of costs for the Federal Courts have failed to keep pace with actual costs incurred by parties and do not reflect the value of the intellectual work undertaken by practitioners, current charging practices, or changes in the technology used within firms and by practitioners.

5. The Law Council submits that the recommendations of the JCAC each year should be expeditiously enacted by the respective Federal Courts to ensure that any identified discrepancies between the amounts in the scales and actual costs incurred is minimised and therefore that practitioners and their clients are not losing the benefit of the annual increases recommended by the JCAC.

6. The Law Council also notes that the 2021 inquiry is being undertaken in the context of the creation of the FCFCOA on 1 September 2021. The Law Council refers the JCAC to its letter of 4 August 2021 to the Hon Chief Justice Alstergren, in which the Law Council responded to His Honour's invitation to provide feedback on the draft scale of costs to be applied to proceedings in both Divisions of the FCFCOA (see, **Attachment A**). While that consultation reviewed the relevant costs schedule in its entirety, some of the points raised are also relevant to the quantum of costs.

7. In this submission, the Law Council makes the following recommendations:

    (a) In accordance with the Federal Costs Advisory Committee Formula, the JCAC should recommend an increase of at least 2.52 per cent to the federal scales of costs.

    (b) This increase should be applied on top of a further increase to take account of the fact that no increase was applied in 2020. In accordance with the Law Council's submission in 2020, this increase should be between 1.95 per cent and 2.00 percent.

    (c) The JCAC should review itemised costs currently provided for under the fee scales against the types of costs reasonably incurred by practitioners when conducting matters by Audio-Visual Link (**AVL**), to ensure the fee scales represent a fair and accurate estimate of work reasonably required to be undertaken.

(d) The JCAC should recommend that the federal scales of costs be updated regularly each year.

(e) The JCAC should consider the need for a greater level of parity between the pay scales for barristers, as between the respective State and Territory jurisdictions on the one hand, and the Federal Courts on the other.

(f) The JCAC should recommend that the High Court and the Federal Court ensure that continuing changes in market rates and market conditions affecting barristers' fees receive equal recognition to similar changes affecting solicitors' fees and charges.

(g) The JCAC should recommend that the Federal Court update the National Guide to Counsel Fees to recognise changes in market rates and market conditions affecting barristers' fees since 2013.

Federal Costs Advisory Committee formula

8. 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 federal 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)'.

Calculation

9. The FCAC formula is as follows:

$$\begin{aligned} Suggested\ increase &= Ax + By + Cz \\ &= (1.7 \times 0.31) + (3.8 \times 0.39) + (1.7 \times 0.30) \\ &= \mathbf{2.52}\% \text{ (see Table 2 below)} \end{aligned}$$

Where:[1]

A = percentage change in wages and salaries, as indicated by the change in the wage price index (**WPI**) = 1.7% (see Table 1 below);

B = percentage change in other overheads, as indicated by the change in the consumer price index (**CPI**) = 3.8% (see Table 1 below);

C = percentage partners' salaries and profits as indicated by the change in the WPI = 1.7% (see Table 1 below);

x = the weighting given to wages and salaries = 31%;

y = the weighting given to other overheads = 39%; and

z = the weighting given to partners' salaries and profit = 30%.

[1] 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). The Law Council reiterates its concern that these weightings have not been adjusted in more than a decade and are unlikely to reflect current economic conditions or legal practice expenditures.

Table 1. Movement in indices

	June 2020	June 2021	Change in indices	% change in indices
WPI[2]	134.4	136.7	2.3	1.7
CPI[3]	114.4	118.8	3.4	3.8

Table 2. Application of the FCAC formula

	Weighting	% change in indices	% increase
Wages and Salaries	0.31	1.7	0.57
Other Overheads	0.39	3.8	1.48
Partners Salaries and Profit Share	0.3	1.7	0.51
Result of application of the FCAC formula			**2.52**

Analysis

10. From 2017-19, the Law Council, following the application of the FCAC formula, recommended that the scales of costs be adjusted by between 1.95 per cent and 2.00 per cent. However, in 2020, the Law Council suggested that the application of the FCAC formula (which would have suggested an increase of just 0.97 per cent) be disregarded due to the impacts of the COVID-19 pandemic and instead recommended that the JCAC propose an increase of between 1.95 per cent and 2.00 per cent in accordance with previous years.[4]

11. The Law Council notes that the JCAC instead decided that 'the FCAC formula should not be applied in the current year … [and that rather it] should be deferred for consideration in 2021 as part of the Fourteenth Report on Legal Practitioners' Costs.'[5]

12. Based on statistics available for the June 2021 quarter, the Law Council submits that the JCAC should recommend an increase of at least 2.52 per cent to the federal scales of costs (see calculation at Table 2).

[2] Australian Bureau of Statistics, *Wage Price Index, Australia, June 2021* (18 August 2021).
[3] Australian Bureau of Statistics, *Consumer Price Index, Australia, June 2021* (28 July 2021). The size of the increase in annual inflation from June 2020 to June 2020 reflects COVID-19 related price changes including the recovery post the height of the pandemic in 2020 (for example, the full unwinding of the Federal Government's free childcare package) and prior to the impact of the Delta variant from June 2021 from this time last year.
[4] See, Law Council of Australia, 'Submission to the Joint Costs Advisory Committee: 2020 Inquiry into Legal Practitioners' Scales of Costs' (4 September 2020) ('LCA 2020 Submission').
[5] See, Joint Costs Advisory Committee, 'Thirteenth Report on Legal Practitioners' Costs' (October 2020) 8.

Other recommendations regarding the federal scale of costs

13. In addition to the recommended 2.52 per cent increase as derived from the above application of the FCAC formula, the Law Council suggests that consideration should also be given as to whether any further increase is required, recognising that no increase was made in 2020. It is the Law Council's view that, at a minimum, the recommended 2.52 per cent increase should be recommended on top of an additional increase which accounts for the lack of increase last year. The Law Council's members report that increases in the scales of costs have failed to keep pace with increases in the costs incurred by parties and essentially 'skipping' any 2020 increase would only serve to further exacerbate this issue.

14. On this subject, the Law Council notes that the COVID-19 pandemic continues to affect the operation of the Federal Courts and the legal profession significantly. This has led to an unprecedented reliance on the use of AVL technology in the Courts in circumstances where in-person hearings and interactions have not been safe or practicable due to public health restrictions.

15. To address these circumstances, the nature of the itemised costs currently provided for under the federal scales of fees should be reviewed against the types of costs reasonably incurred by practitioners when conducting matters by AVL, with a view to ensuring that the scales represent a fair and accurate estimate of work reasonably required to be undertaken. This will avoid further widening the gap between the scales of recoverable costs and the actual costs incurred by parties. More generally, the JCAC's review should give due consideration to the nature of work undertaken by the practitioner, and the skill and expertise brought to bear in undertaking this work.

Scale of costs for the FCFCOA

16. The Law Institute of Victoria (**LIV**) notes that the scale of costs for the Family Court (which is, as of 1 September 2021, part of the FCFCOA) was used only on an *inter partes* basis and only, typically, on occasions where one party's behaviour warrants a costs order being made against them.

17. The LIV further advises that the rates for the Family Court pre-merger were not considered reflective of the costs that parties incur in practice and provided little incentive for a party to seek to recover the applicable fees. For example, the LIV advised that the hourly rate recoverable on the Family Court scale was $251.50, while the market rate for family lawyers in Victoria ranges from $400 to $800 per hour. The LIV suggested that this revealed the need to overhaul the scale as it applies to the family law matters such that it is more reflective of the current costs of engaging family lawyers. The Law Council notes that under the new scale of costs in family and child support matters at the FCFCOA, the maximum hourly rate for lawyers is $259.22.[6]

18. The Law Society of NSW has highlighted that the scales of costs under the pre-merger Family and Federal Circuit Courts as a leading area of concern. The Law Society considers that these scales did not ensure that successful parties obtained a reasonable recovery for party/party costs when they obtained the benefit of a costs order, and recommended that the scales of costs be increased regularly to reflect the increase in costs of professional practice.

[6] See, Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth) sch 3 part 1 item 108.

19. The Law Council notes that the new Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 (**Division 2 Rules**) provide, with respect to family law and child support matters, for the discretionary application of either the applicable costs schedule in those Division 2 Rules, or the applicable costs schedule in the Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (**Division 1 Rules**).[7] This has the effect of there being two possible costs schedules, despite the purpose of the merger to create one court. The Law Council also repeats on this subject concerns with respect to the quantum of costs in what was former Part 1, Schedule 1 of the Federal Circuit Court Rules 2001 (Cth), as raised in its letter dated 4 August (Attachment A).[8]

Frequency of updates to the federal scale of costs

20. The Law Council understands that the federal scales of costs have been updated irregularly. The last time that the Federal Court scale was updated was May 2019, and prior to that date, January 2014. Similarly, before the FCFCOA was established and a new scale of costs included in the new rules, the (former) Federal Court Circuit of Australia scale was last updated on 4 August 2018 and the (former) Family Court of Australia scale, on 1 January 2019. The Law Council suggests that the JCAC recommend that the federal scales of costs be updated regularly each year.

Barristers' fees and parity with the States and Territories

21. The Law Council notes that barristers' work is encompassed within the scale of costs for the FCFCOA.[9] Consequently, the recoverable fees for barristers' work undertaken in matters in those Courts are directly impacted by the implementation of the JCAC's recommendations and any other revisions to the scales of costs.

22. The Law Council has calculated that if applied, the annual increase using the FCAC formula in 2020 would have resulted in a 0.97 per cent increase. However, the Law Council is advised that in Victoria, over the past five years, the maximum daily trial and appeal rate allowed for junior counsel in the Supreme Court of Victoria has increased by an annual average of 3.286 per cent, with the increase in the Victorian scale from 2019 to 2020 being 3.30 per cent, and the most recent annual increase being 4.97 per cent (noting the increase for Senior Counsel was slightly smaller). This reveals a significant disparity between the scale of fees for counsel between the Federal Court system and that of the Victorian State Courts.

23. The Law Council understands that while each State and Territory may have its own approach to legal fees and the application of any annual increase, a similar disparity in the extent of annual increases has been observed in many jurisdictions. The Law Council considers that a greater level of parity between the pay scales for barristers as between the respective State and Territory jurisdictions on the one hand, and the Federal Courts on the other, should be sought.

24. The Law Society of NSW suggests giving consideration to increasing the allowances for counsel in the FCFCOA scales of costs by reference to the amounts set out in the National Guide to Counsel Fees (as discussed at paragraphs 27 to 36 below) for consistency.

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[7] See, Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 r 4.01.
[8] See, 2.
[9] See, for example, ibid; Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 sch 1; Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021.

25. The Law Council also notes that there is some difference between the allowable costs for counsel under the Division 1 and Division 2 Rules. For example, the amount allowed to junior counsel for chamber work is $297.62-$424.49 per hour (including GST) under the Division 1 Rules[10] and is $361 per hour (including GST) under the Division 2 Rules, with the higher possible rate under the Division 1 presumably reflecting the greater complexity of work in Division 1.[11] The Law Council again queries the desirability of having two sets of possible costs for the one Court.

Accredited specialist uplift

26. The LIV also supports a recommendation for an uplift in the federal scales of costs for accredited specialists. The LIV suggests that a premium of 20 per cent on the scale rate ought to apply where the work was considered appropriate for a specialist to be engaged, and should apply not only for appearance work but also other scale work done.

Recommendations:

- **In accordance with the Federal Costs Advisory Committee Formula, the Joint Costs Advisory Committee should recommend an increase of at least 2.52 per cent to the federal scales of costs.**
- **This increase should be applied on top of a further increase to take account of the fact that no increase was applied in 2020. In accordance with the Law Council's submission in 2020, this increase should be between 1.95 per cent and 2.00 percent.**
- **The Joint Costs Advisory Committee should review itemised costs currently provided for under the fee scales against the types of costs reasonably incurred by practitioners when conducting matters by Audio-Visual Link, to ensure the fee scales represent a fair and accurate estimate of work reasonably required to be undertaken.**
- **The Joint Costs Advisory Committee should recommend that the federal scales of costs be updated regularly each year.**
- **The Joint Costs Advisory Committee should consider the need for a greater level of parity between the pay scales for barristers, as between the respective State and Territory jurisdictions on the one hand, and the Federal Courts on the other.**

Federal Court National Guide to Counsel Fees

27. Barristers' fees are not encompassed within either the Federal Court or High Court scales of costs. The Federal Court has a National Guide to Counsel Fees (**Guide**) which may be applied by taxing officers; however, it is a guide only. The Guide was issued on 28 June 2013 and took effect from 1 July 2013. It does not appear to have been updated since. Further, there is no published guideline with respect to barristers' fees in the High Court.

28. The Law Council understands that the Guide is regularly used to determine counsel fees in *inter partes* costs disputes and in large pieces of Federal Court litigation. This

[10] Sch 3 part 2 item 201.
[11] Sch 1 item 15.

includes in class actions, where the Court must approve the lawyer's fees as part of the 'all in' settlement.

29. The Law Council commends the current structure of the Guide, which usefully includes amounts for short interlocutory hearings. The provision of a range of possible rates is also considered helpful. Providing a single figure may risk that figure being used as the floor for counsel's charging rates. Utilising a range also means that the typical rates for barristers who practice in the applicable State or Territory can be taken into account.

30. However, given that the Guide has now not been updated for eight years, the Law Council notes that it is no longer reflective of the actual rates charged by barristers and fails to take into account market and cost-of-living changes over that time, as well as the complexity of matters conducted in the Federal Court. The Law Council understands that market rates for Senior Counsel in New South Wales, for example, are often double and may be triple the rates in the Guide (acknowledging they may be reduced on a party/party taxation or assessment of costs in New South Wales jurisdictions). For this reason, the amounts set out in the Guide should be increased to reflect the rates being charged by counsel appearing in the Federal Court.

31. In its submission to the JCAC's 2019 and 2020 Inquiries, the Law Council recommended that:

> *the JCAC recommend that the Federal Court update the National Guide to Counsel Fees to recognise changes in market rates and market conditions affecting barristers' fees since 2013.*

32. The Law Council repeats this recommendation in relation to the JCAC's 2021 Inquiry, and refers the JCAC to the position and recommendations set out at paragraphs [13]-[27] of its submission to the 2020 Inquiry for more detail.[12] In the Law Council's view, the JCAC should encourage both the High Court and the Federal Court to ensure that continuing changes in market rates and market conditions affecting barristers' fees are properly reflected in the scales of costs and any guidance material. The Law Council submits that the Guide should be updated in the first instance to recognise changes since 2013, and that future reviews and updates of the guidance document be conducted at the same time as reviews and updates of solicitors' fees. Should the Guide not be updated, then the Law Council suggests that it should be removed.

33. Amongst other benefits, applying these recommendations will promote greater parity between the Federal Courts on the one hand and the State and Territory Courts on the other.

34. An example of the disparity between the rates currently set out in the Guide and the rates for counsel in State and Territory Courts is provided by the LIV, which estimates that its rates may represent a median when compared with rates in NSW and Queensland. The scale rate in 2021 for junior counsel at the Supreme Court of Victoria is $6,340 while in the Guide, the range for daily appearance at hearing by junior counsel is currently $900 - $4,200.[13]

35. The LIV suggests that the Guide should be amended to replace the existing rates with those set out at **Table 3** below (exclusive of GST). The LIV also suggests removing altogether what is currently the first row in the Guide (dealing with Fee on Brief),

[12] See, 'LCA 2020 Submission' (n 4).
[13] See, Federal Court of Australia, 'National Guide to Counsel Fees' (28 June 2013).

considering that the use of brief fee and refresher fee is long outdated and has not been applied in Victoria in the Supreme Court for at least the last 20 years.

Table 3. LIV proposed revisions to the Guide

	Junior Counsel	**Senior Counsel**
Appearance at hearing (daily rate including conferences and preparation on that day)	$2,500 - $6,500	$5,000 -$11,000
Interlocutory Applications: Interlocutory hearing • short (up to 2 hours) • long (2 hours plus)	$250 - $650 per hour	$500 - $1,100 per hour
Other: Hourly rate for: • Directions hearing • Preparation time • Conferences (not occurring on day of hearing) • Settling applications, statements of claim, affidavits, defence, other documents • Opinions, advice on evidence • Written submissions (where not allowed above) • Attending to receive judgment (where appropriate) • Not otherwise provided for	$250 - $650 per hour	$500 - $1,100 per hour

36. The Law Society of NSW suggests that the Guide should be amended to replace the existing rates with those set out at **Table 4** below (exclusive of GST). The Law Society of NSW has made no provision for a 'Fee on Brief', because most counsel in NSW do not charge such a fee.

Table 4. Law Society of NSW proposed revisions to the Guide

	Junior Counsel	**Senior Counsel**
Appearance at hearing (daily rate including conferences and preparation on that day)	$6,500	$13,000
Interlocutory Applications: Interlocutory hearing • short (up to 2 hours)	$650 per hour	$1,300 per hour

• long (2 hours plus)		
Other: Hourly rate for: • Directions hearing • Preparation time • Conferences (not occurring on day of hearing) • Settling applications, statements of claim, affidavits, defence, other documents • Opinions, advice on evidence • Written submissions (where not allowed above) • Attending to receive judgment (where appropriate) • Not otherwise provided for	$650 per hour	$1,300 per hour

Recommendations:

- **The JCAC should recommend that the High Court and the Federal Court ensure that continuing changes in market rates and market conditions affecting barristers' fees receive equal recognition to similar changes affecting solicitors' fees and charges.**
- **The JCAC should recommend that the Federal Court update the National Guide to Counsel Fees to recognise changes in market rates and market conditions affecting barristers' fees since 2013.**

Legal Profession Uniform Law cost disclosure requirements

37. While they are not directly related to the scales of costs, the Law Council repeats the following issues, initially raised in its 2020 submission on behalf of the LIV, regarding the operation of the Legal Profession Uniform Law (**LPUL**) in respect of cost disclosure requirements.[14]

New lower threshold of $1,500

38. As considered by the Legal Services Council in 2018[15] and set out on behalf of the LIV in the Law Council's 2020 submission, the LIV and Bar Association of NSW consider it appropriate to adopt the non-Uniform Law lower cost disclosure threshold of $1,500 in Uniform Law jurisdictions, instead of the current threshold of $750, to adequately reflect the increased costs of legal services.

[14] *Legal Profession Uniform Law* (NSW), ss 174, 178.
[15] Legal Services Council, 'Options for Cost Disclosure under the Uniform Law' (July 2018) Attachment A, Option 6. Note, in in January 2019, the Legal Service Council advised the Law Council that it had decided that the (practitioner-client) cost disclosure thresholds should remain unchanged, notwithstanding the views of the Law Council and others that they should be increased.

39. The LIV and Bar Association of NSW acknowledge that this may lead to less consumer protection for low costs matters below $1,500 in Uniform Law states, which would not be subject to the disclosure obligations contained in subsections 174(1) and (3) of Schedule 1 of the LPUL. However, they consider that there remain sufficient protections for consumers who fall within this category, including a statutory right to assess legal costs to ensure that they are fair and reasonable, as well as protections under the Uniform Law costs agreement provisions. Consumers will continue to have contractual rights and can access the Uniform Law complaints provisions for both consumer and disciplinary matters.

New upper threshold of $5,000

40. The NSW Bar Association and LIV also recommend an increase in the upper threshold for legal costs disclosure under section 174(5) of the LPUL by $2,000, bringing it from $3,000[16] to $5,000, for the following reasons (as provided on behalf of the LIV in the Law Council's 2020 submission):

- sole practitioners and smaller law practices generally have a high turnover rate for low-cost matters. Compliance with subsections 174(1) and (3) of the LPUL by sole practitioners and smaller law practices generally requires a higher proportion of non-recoverable administrative time than that required in larger law practices;
- as with the lower threshold disclosure requirements under subsection 174(4) of the LPUL, disclosure will be mandatory under subsection 175(1) of the LPUL if the law practice retains counsel or a 'second law practice' on behalf of the client. Compliance with the higher threshold under subsection 174(5) of the LPUL would still require compliance with the standard disclosure form. This requirement would apply even if professional fees excluding goods and services tax is less than the disclosure thresholds;
- disclosure is still necessary under section 177 of the LPUL for negotiated settlements of litigious matters, regardless of the disclosure thresholds; and
- in addition to the multiple consumer protection avenues discussed above, the consequences of non-disclosure obligations under subsection 174(5) and sections 175 and 177 provide further consumer protections.

[16] See, *Legal Profession Uniform Law* (NSW), sch 4, cl 18(4).

Law Council
OF AUSTRALIA

Office of the President

4 August 2021

The Honourable Justice Alstergren
Chief Justice, Family Court of Australia
Chief Judge, Federal Circuit Court of Australia
Owen Dixon Commonwealth Law Courts
305 William Street
MELBOURNE VICTORIA 3000

By email: rulesharmonisation@familylawcourts.gov.au

Dear Chief Justice

Consultation on the costs schedule to the draft harmonised Family Law Rules

Thank you for your correspondence of 27 July 2021 in which you invited the Law Council to provide feedback on the draft scale of costs to be applied to proceedings in both Divisions of the Federal Circuit and Family Court of Australia (**FCFCOA**).

The Law Council acknowledges the pressures upon the Courts in ensuring readiness for the merger of the Family Court of Australia (**FCA**) and the Federal Circuit Court of Australia (**FCCA**) on 1 September 2021. On the issue of costs, we too have done our best to consult with Constituent Bodies and respond in the short time frame provided. We remain available to engage in further constructive dialogue and more substantial contribution if this would be of assistance as future reviews of the costs schedule occur.

In terms of the current consultation, the Law Council welcomes the opportunity to provide input, and is grateful to its Family Law Section for leading this response, together with contributions from the Law Society of New South Wales and Law Society of South Australia.

Previous submissions about the Family Court Scale of Costs

The Family Law Section of the Law Council has previously communicated to the Rules Advisory Committee of the Family Court with respect to previous reviews of the scale of costs in that court.

In correspondence to the Family Court on 4 May 2017, the Law Council made particular submissions with respect to a review of the scale of costs being undertaken by the Court at that time. For ease of reference, a copy of that letter is enclosed. It is submitted that the issues identified in that 2017 submission remain apposite today.

General observations

The forthcoming FCFCOA creates an opportunity for review of the scale of costs, beyond the regular previous reviews undertaken by the Joint Costs Advisory Committee, which were more focussed upon possible percentage increases to scale items, rather than a review of the schedule in its entirety.

In circumstances where a court may be invited to make a costs order, a range of considerations are set out in the *Family Law Act 1975* (**the Act**).[1] If the court is minded to make a costs order, consideration of the applicable scale will routinely occur. The Family Court is entitled to make such order as it considers just, having regard to the matters set out in subsection 117(2A).

It is noted that the draft scale adopts the structure of the existing Part 1, Schedule 1 of the *Federal Circuit Court Rules 2001* (Cth), and that the amounts proposed against each item represent a modest increase on the amounts currently prescribed for work done in the Federal Circuit Court.

In circumstances where, over time, the scale of costs in the FCA and the FCCA has not been consistent with the fees charged in private practice, the scale has perhaps had less relevance, and may be seen as a 'floor' to costs considerations. It is suggested that a review of the scale of costs should ensure that it is updated such that it provides a contemporary reference point for applicable fees to be claimed and or allowed in disputes between parties as to costs (save for circumstances where indemnity costs orders may be made).

In terms of guiding principles, the scale should:

- assist the court as a contemporary statement of relevant costs in the resolution of certain costs disputes; and
- provide clear guidance to practitioners as to applicable costs in relevant circumstance;
- have sufficient connection with actual costs incurred that an order made by reference to the scale may act as a deterrent to future poor conduct; and
- guide the simple resolution of costs disputes between parties.

The Law Council expands upon some of the difficulties with the proposed scale, below:

- The proposed scale provides for an hourly rate for solicitors and counsel which is well below the fees being charged in private practice, including in regional and remote areas.
- In particular, the proposed hourly rate of $260 for solicitors in item 15 remains low and does not appear to be commensurate with the expertise or cost of services to be performed. By comparison, it is noted that in the Federal Court of Australia, a higher hourly rate of $650 per hour is allowed.[2] In New South Wales, the Supreme Court's Costs Assessment Rules Committee guidelines recommend an hourly rate of $200 to $400 per hour plus GST for an employed solicitor or junior associate of 1 to 4 years' post-admission experience, and up to $750 per hour plus GST for partners.[3]
- It is common for solicitors and junior counsel to perform the same type of work. Despite this, the proposed scale perpetuates the assumption that counsel (including junior counsel) will charge an hourly rate greater than an instructing solicitor, an assumption which has not kept pace with the effects of specialisation and development of expertise within the community of practitioners in this field.
- Similarly, the proposed scale does not allow for gradations or variations of hourly rates within professional groups, reflecting differing expertise (for example a senior solicitor practising exclusively in family law with 20 years of experience, as compared to an

[1] *Family Law Act 1975* (Cth), section 117.
[2] *Federal Court Rules 2011* (Cth), Sch 3 Item 1.1.
[3] Costs Assessment Rules Committee Guidelines (NSW), *Costs Payable between Parties under Court Orders* (2016) 2.

early career lawyer, requiring supervision and guidance). Such a distinction would allow for the proper reflection of current practice, where junior lawyers will be tasked with completion of foundational work, supported and supervised by a senior lawyer (at a higher hourly rate). This allows the distribution of work in the most cost-efficient way for the benefit of the client. It is difficult to understand the rationale by which the hourly rate for junior counsel would exceed that of experienced and specialist solicitors.

- The existing costs schedule in the *Family Law Rules 2004* (**Family Law Rules**) allows for a range of charges with respect to counsel's fees.[4] That refinement is replaced with a 'one size fits all' approach, save for a fixed hourly rate distinction made between senior counsel and junior counsel ($677 to $361, respectively) in relation to drafting and conferences.[5] It is not clear why that distinction is not similarly applied to daily hearing fees.
- The proposed schedule applies what is broadly the current FCCA scale to all matters in the newly combined court, bringing all rates down to the 'lowest common denominator'. This may prove to be a false economy. Not only will those rates fall short of what is charged by experienced and specialist solicitors in the most complex cases, so as to dilute any deterrent effect, it may also lead to more frequent applications for *inter partes* costs to be paid at an indemnity rate to prevent the payee facing a significant shortfall between costs incurred and costs payable on scale. Such applications are time consuming for the judicial officers concerned and will add to resource demands upon the court.
- It is also observed that the proposed schedule does not appear to engage with the reality of modern family law practice (and indeed, as led by the courts through its online court portal, creation of digital files, the management of digital document storage for subpoenaed material and digital and telephone hearings) with a move to digital file creation and storage and the emphasis upon and the enormous volume of email communication. The concept of 'photocopying' material has largely been superseded by the necessity of printing material that has been digitally created, shared and stored. It is suggested that item 17 be re-worded to make clear this inclusion.
- Item 15, relating to drafting and chamber work, does not appear to cover perusing, which can be substantial in large property matters. There may be scope to make this item more clearly the default item for matters not expressly covered elsewhere in the scale in a similar manner to the current item in the FCA scale. Given that the scale will apply to every action, there needs to be a vehicle for recovering reasonable fees in large matters.

While there are benefits in streamlining the relevant schedule of costs, there is a risk the present draft will not permit proper recognition of relevant charges and costs, where:

- the scale does not take into account or provide for the likely costs incurred when a solicitor attends a court event, instructing counsel (and both properly charge the client for that attendance);
- the event based consolidated fees fail to adequately take into account the significant work undertaken to prepare the matter for that court event and the significant work that is usually undertaken prior to that court event (often over months or years, as the case may be, depending upon the particular court event);

[4] *Family Law Rules 2004* (Cth), schedule 3, items 201 to 206 inclusive.
[5] Item 15, drafting, conferences and chamber work, proposed Schedule 3.

- that schedule makes no distinction between the fees that may be claimed in Division 1 or Division 2 of the FCFCOA, despite the intention that those matters proceeding in Division 1 will be more complex;
- counsel fees will be charged as a disbursement (item 16) in addition to the fees stipulated in items 13 and 14 (that is, the advocacy loading may apply to solicitor advocates and the separate disbursement allowance in item 16 will apply for counsel);
- no specific fee is expressed with respect to divorce proceedings (such that this might lead to claims being made under item 1 and related charges); and
- the proposed schedule when applied to costs claims in appellate work (for example, with respect to applications in an appeal) may lead to anomalies where the charges according to scale have little relationship to the actual fees incurred.

It is noted that the existing costs schedule under the Family Law Rules allows greater scope to make costs orders which more appropriately take into account the actual work required in family law proceedings, including the significant document preparation and lawyer assistance in matters as they progress to a court event. In the quest to simplify processes, there is a risk that the ability to properly take into account necessary work for the advancement of matters will be lost, to the ultimate burden of clients, where costs orders prove to be an inadequate response and deterrence to non-compliance by one party.

Review mechanism

Finally, the Law Council suggests that that there should be a mechanism for periodic review of the schedule, to ensure that it reflects contemporary practices and expectations. As noted at the outset, the Law Council remains available to engage in further constructive dialogue and more substantial contribution if this would be of assistance at this stage, or into the future.

Please feel free to contact me directly on [redacted] or at [redacted], should you wish to discuss. Alternatively, I invite you to contact Ms Di Simpson, Chair of the Law Council's Family Law Section, on (02) 6212 7600 or at DS@ddcslawyers.com.au, or Dr Natasha Molt, Director of Policy on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au in the first instance if you require further information or clarification.

Yours sincerely



Dr Jacoba Brasch QC
President

Family Law Section

Law Council OF AUSTRALIA

4 May 2017

The Hon Justice Anne Rees
Chair
Rules Advisory Committee
Family Court of Australia
GPO Box 9991
SYDNEY NSW 2001

Dear Justice Rees

Scale of costs

I refer to our letter dated 14 April 2015 regarding the Court's scale of costs (copy attached). As I understand it, the Rules Advisory Committee of the Court is considering a review of the Scale.

The Family Law Section supports a change to the scale for the following reasons:

1. Whilst the scale is regularly reviewed by the Joint Costs Advisory Committee, the practice of that committee has been to recommend percentage increases to scale items, rather than undertake a comprehensive review of the suitability of the underlying scale rate or the suitability of individual scale items to current legal practice.

2. The quantum of the current scale is now well below the legal fees charged in the majority of family law practices around the country. Whilst the Family Law Section recognises that the scale of costs is not intended to represent indemnity costs, nevertheless, the current level of fees recoverable pursuant to the scale are significantly below contemporary legal fees being charged around the country.

3. The quantum of costs recoverable under the scale can have a significant impact on the behaviour of litigants. Given the now significant disparity between costs recoverable calculated pursuant to the scale and costs charged by most private family law practices, the risk of costs orders under the scale no longer provides a significant deterrent to parties' pursuing unmeritorious or risky litigation.

4. Many of the categories of items chargeable under the scale do not reflect modern legal practice. For example:

   4.1 It is increasingly common for legal work to be undertaken by a team of lawyers, usually a more experienced family lawyer and a more junior family lawyer. This represents the most cost-effective conduct of litigation on the behalf of the client. For that process to be effective there are times a client is charged in private practice for supervising and delegating tasks, including meetings between the senior and junior lawyer on substantive issues.

4.2 Much of modern legal practice now takes place electronically with, for instance, the exchange of discoverable documents electronically, the filing and serving of documents electronically and the collation of briefs to Counsel and the like by printing rather than photocopying.

The Family Law Section is aware of considerable work that was undertaken, with the advice of expert costs lawyers, in the review of the Supreme Court of Victoria's scale of costs. That work was then relied upon substantially in the review of the Federal Court's scale of costs.

The Family Law Section suggests that the scale of costs in the Federal Court Rules (FCR's) would provide a useful basis for review of the Family Court's Scale of Costs. Leaving aside consideration of the quantum of allowable charges in each category, the Family Law Section has reviewed each item of the Federal Court scale and its relevance to family law practice. We **enclose** a copy of our review and comments for your consideration.

The Federal Court scale allows an hourly charge of $580 per hour, including GST. That is an "up to" amount, with the notes to the scale providing that a party cannot recover more than they have actually been charged by their lawyer. Whilst such a rate would be a substantial increase on the current Family Court scale amount, the Family Law Section considers that benchmarking the Family Court's scale rate to the Federal Court scale rate is appropriate given the complexity of the work now carried out in the Family Court.

The Family Law Section would welcome the opportunity to discuss these issues further with the Court.

Your sincerely



Wendy Kayler-Thomson
Chair



14 April 2015

The Hon Justice Robert Benjamin
Family Court of Australia
GPO Box 9991
Hobart TAS 7001

By email: justice.benjamin@familycourt.gov.au

The Hon Justice Jenny Hogan
Family Court of Australia
GPO Box 9991
Brisbane QLD 4001

By email: justice.hogan@familycourt.gov.au

Dear Justices Benjamin and Hogan

***Family Law Rules 2014* - Schedule 3, Scale of Costs**

Wendy Kayler-Thomson, Deputy Chair of the Family Law Section Executive, attended the November 2014 meeting of the Court's Rules Advisory Committee. At that meeting she was advised by Justice Ryan that the Court is conducting a review of Schedule 3.

Coincidently, the Family Law Section Executive was poised to write to the Chief Justice indicating its view that it was timely to review the Family Court's scale of costs.

It is the view of the FLS Executive that the existing scale of costs is out of date as to both quantum, and the categories of work that are performed by solicitors and barristers in the conduct of family law matters. The Executive is also of the view that the Joint Costs Advisory Committee (JCAC) reviews recommending *ad hoc* increases in the scale do not address the fundamental issue of the scale no longer being commensurate with the costs of undertaking proceedings in the Family Court, or the way that such work is performed.

The FLS Executive has reviewed the changes to scales of costs which have been adopted in recent times by the Federal Court of Australia and various Supreme Courts around the country. The Executive has also contacted an expert costs lawyers who was used as consultant by some of those Courts when undertaking a review of their scales.

Justice Ryan invited Ms Kayler-Thomson to contact you both to express FLS interest in this project and to offer the Executive's assistance. FLS would be very pleased to discuss this matter further with you.

Address Section correspondence to
Chair, Family Law Section
Law Council of Australia
GPO Box 1989 Canberra ACT 2601

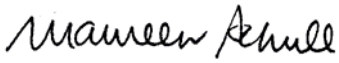
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Law Council
OF AUSTRALIA

The FLS Executive member who will have the primary carriage of this project is Wendy Kayler-Thomson. Ms Kayler-Thomson can be contacted by telephone 03 9248 5800 or email wkaylerthomson@fortefamilylawyers.com.au.

Yours sincerely



Maureen Schull
Director

Federal Court Rules (FCR's)	**FLS Position** OK to adopt?
1. Attendances	✓
2. Preparing documents	✓
[Note: Query whether it is necessary to include a note that this work would include "drafting a document". It is submitted that it should.]	
3. Reading	✓
4. Delegation and supervision	✓
[Note: It is submitted that this category be expanded to provide as follows (consistent with item 12 in the Supreme Court of Victoria Scale of Costs. A copy of Appendix A is Annexure D):- "*Such allowances may include time spent by both principal legal practitioner and delegates in ensuring tasks are properly delegated and supervised – in accordance with item 1(a) and item 1(b).*"]	
5. Research	✓
6. Electronic document management	✓
[Note: paragraph 6.2 makes reference to the Federal Court Practice Note. It is suggested that the Family Court should consider issuing a similar Practice Note or Direction.]	
7. Masking	
[Note: the term 'redacting is also commonly used in some states.]	✓
8. Collation, pagination and indexing	✓
9. Copying	**x**
[Note: The FLRs presently provide a photocopy note of $0.80 per page. It is submitted that it would be preferable for the Rules to fix a rate. It is also submitted that some photocopying tasks have now been replaced, in modern practice, by printing. For instance, as many Court documents are now served and filed electronically, preparation of briefs to counsel and appeal books are now commonly prepared by printing multiple copies of documents stored electronically, rather than by photocopying paper copies. Preparation of annexures/exhibits and instruction to expert witnesses (e.g. business valuers) are also often prepared by	

printing electronically stored documents. It is submitted that item 9 be amended to read:-

> "*Copying or printing documents: $0.80 per page or such other rate as the discretion of the taxing officer.*"]

10. Personal service **x**

[Note: It is submitted that this rule not be adopted. There is nothing in the FLRs on the cost of service. The allowable charge in the FCRs is $106 "inclusive of all attempts". In a jurisdiction where respondents are known to attempt to evade service, and there is often a higher cost of service for regional, remote, interstate or overseas respondents, there should be the discretion to allow for reimbursement of the actual costs of service. It is submitted that item 10 be amended to read:-

> "*Such amount as is incurred as a disbursement for service, unless a taxing officer provides otherwise.*"]

11. Skill care and responsibility ✓

[Note: There is no fixed fee under this category.]

12. Where client not charged on a time costing basis ✓

[Note: This is a provision which allows for "a fair and reasonable amount" where items 1 to 11 do not apply.]

13. Not applicable

14. Not applicable

15. Not applicable

16. Counsel fees ✓

[Note: This refers to an amount allowed "according to the circumstances of the case" and with "reference to the National Guide to Counsel Fees". It should be noted that this Guide was published in 2013 and, accordingly, the market rate of counsel fees across the country has generally increased. The rates in the Guide are, however, higher than in the FLRs.

The FLRs provide (in Part 2 to Schedule 3) a range of allowable charges for senior and junior counsel both on an hourly and a daily basis.

In a jurisdiction in which referral of costs orders for taxation is relatively uncommon, it is contended that it would be preferable for the Rules to fix a range of allowable fees for the assistance of practitioners (and judges) who are often required to make

submissions (and decisions) on the quantum of costs during a hearing. Accordingly, it is submitted that it would be preferable for the Rules to adopt the National Guide to Counsel fees in the FCRs.]

17. Witnesses' expenses ✓

[Note: There are similar provisions in the FLRs. The FLRs provide (in Schedule 4) that witness fees are "$75 per day, or part of a day …" or, for expert witnesses, "such further amount as the Court allows".

The figure of $75 per day is clearly outdated and inadequate.

The FCRs are considered preferable.]

18. Disbursements ✓

19. Fees not here provided for ✓

20. Notes ✓

[Note: 20.4 provides that "there is no scale item for printing documents. Accordingly, litigants should not expect to recover the cost of this task". Any such cost is included in Item 2 (preparing documents). This is considered appropriate, save for the identified at Item 9. It is suggested that the "first" print of a document drafted in Item 2 should not be recoverable, but subsequent printing (akin to photocopying) should be recoverable.]

21. Conduct money/costs of compliance with subpoena

21.1 Conduct money

There is no category in the FCRs as to conduct money or the costs of compliance with a subpoena.

The current provision in the FLRs is continued in Schedule 4. "Conduct money" is defined in the FLRs. It is defined as money paid by a party to a witness (or the recipient of a subpoena) to enable the witness to travel to Court and/or for accommodation. Schedule 4 currently refers to the minimum amount being $25. It is submitted that this is now an inadequate allowance, and it should be increased to $75 (or even $100) if the subpoena requires delivery of documents to the Court. If the subpoena requires delivery of documents to the Court <u>AND</u> for the recipient of the subpoena to attend Court, the applicable rate should be that for witness fees (item 17).

21.2 Costs of compliance

It is not uncommon for the recipient of a subpoena to seek orders for the costs of compliance. Such an application can be made in the Family Court under rule 15.23(3).

There is no item in the FCRs which deals with the costs of compliance with a subpoena.

Accordingly, it is suggested that the FLRs include a category for the payment of costs of compliance with a subpoena. It is submitted that the amount should be as determined by a taxing officer, as the range of proper charges for compliance are likely to be significant.

22. Other matters

22.1 It is submitted that Parts 3 and 4 of Schedule 3 to the FLRs are unnecessary and can be removed. With respect to Part 3, it provides a "composite fee for undefended divorce". All divorce applications are now heard in the Federal Circuit Court. With respect to Part 4, enforcement warrants and third party debt notices are relatively uncommon and can readily be dealt with in the scale generally.

22.2 The Supreme Court of Victoria Scale of Costs makes a provision for interpreters allowances (Appendix B). There is no similar provision in the FLRs. It is submitted that the inclusion of the Victorian Supreme Court item might be appropriate for inclusion.