

3 August 2022

Dr James Popple
Chief Executive Officer
DX 5719 Canberra
19 Torrens St
Braddon, ACT 2612

Dear Dr Popple

JOINT COSTS ADVISORY COMMITTEE INQUIRY 2022 COMMENTS

I refer to Memorandum dated 14 July 2022 from Margery Nicoll, regarding the above matter.

This correspondence has been reviewed by the Law Society's Costs Committee and I provide the following comments in response.

There appears to be a view that the costs scales, particularly those in respect of proceedings in the Federal Circuit and Family Court of Australia are not consistent with the prevailing market conditions and increases pursuant to the FCAC formula are not likely to ever correct that position.

For example, schedule 3 of the *Federal Circuit and Family Court of Australia Rules 2021 (Cth)* provides that the amount recoverable for "*Times reasonably spent by a lawyer on work requiring the skills of a lawyer (other than work to which any other item in this Part applies)*" is ~\$259.22 per hour. If that work does not require the skill of a lawyer but is nonetheless done by a lawyer, the amount recoverable is \$168.05.

The Law Society is less concerned about the latter, but in respect of the former it is highly unlikely that there would be any, let alone many, lawyers in Western Australia who practice in Family Law who charge an hourly rate of ~\$260 per hour or thereabouts. Indeed, the disconnect between the amount provides for a schedule 3 and the reality is probably best demonstrated by reference to the [Legal Profession \(Family Court of Western Australia\) Determination 2022 \(WA\)](#). That Determination provides a maximum hourly rate for a senior practitioner of \$506.00; a figure which is 195% of the figure contained in schedule 3. In fact, the maximum hourly rate for a clerk/paralegal in our Determination is \$242 a figure which is ~93.3% of what can be claimed by a lawyer performing work requiring the skills of a lawyer.

Whilst the Law Society appreciates that there will always be, and should always be, a difference between what can be recovered on a solicitor and own client basis and on a party and party basis that difference should arise principally because of the work actually performed, rather than by reference to the rate charged. That is, the 'gap' should not arise because the scale hourly rate is set at an arbitrarily lower figure than what is actually charged by practitioners accepting instructions in that area.

Rather, the 'gap' should arise principally because some work can be characterised as being in the nature of party and party work whereas other work can be characterised as being work which is solicitor and own client in nature.

The Law Society does not see any logical or rational basis for the difference between solicitor and client recovery and party and party costs recovery coming largely down to the differences in applicable hourly rates. The one exception to this, however, would be where a person has chosen to instruct a legal practitioner or practitioners who charge in excess of the scale rates and in circumstances where the scale rate is more closely reflective of prevailing market conditions (such as in the Western Australian Determination).

It is trite that where a person engages a solicitor who charges more than scale, they do so knowing that they will not likely be in a position to recover those additional costs. The difficulty with that, is, however, that the principle rests on the common understanding that the scale is actually reflective of what might be loosely referred to as the prevailing market conditions, rather than a rate which is not reflective of market conditions at all.

The issue may also not be limited to the Federal Circuit and Family Court; although it appears to be so. The Law Society notes by way of comparison that:

1. the High Court of Australia has an effective hourly rate of \$545.00 (see item 6(a) of schedule 2 of the *High Court Rules 2004* (Cth)); and
2. the Federal Court of Australia has an effective maximum hourly rate of \$650.00 (item 11), plus a potential to claim an additional allowance for skill, care and responsibility (item 11) (see Schedule 3, *Federal Court Rules 2011* (Cth)).

When regard is had to the amounts chargeable in the High Court, Federal Court and indeed pursuant to our local WA costs determination it is difficult to say that the amounts provided for in the Federal Circuit and Family Court Rules are truly reflective of prevailing conditions. Indeed, it seems they need to be doubled, or close to it.

The Law Society notes that that the rates charged by practitioners in other jurisdictions may be closer to the rates provided for in the scale however we suggest that the majority of rates charges would be similar to those charged in Western Australia I note that the Law Council's prevailing submission suggested the market rate for family lawyers in Victoria was \$400 - \$800 per hour.

In making this submission, it may be necessary for the Law Council of Australia to conduct a survey of the costs charged by practitioners to compare to the amounts recoverable pursuant to scale. The Law Society would be please to assist in disseminating any such survey to Western Australian practitioners.

Moreover, the submission by the Law Council of Australia should also include that it is necessary to review, say, on a 5 or 7 yearly basis, whether the scale rates continue to be reflective of the prevailing rates charged by private practitioners.

Yours sincerely



Rebecca Lee
President, Law Society of Western Australia

Memorandum



**To: Directors
Executive
Presidents – Constituent Bodies
CEOs – Constituent Bodies
Section Chairs**

From: Margery Nicoll, Acting Chief Executive Officer

Date: 14 July 2022

Joint Costs Advisory Committee Inquiry 2022

Action Request

Input is requested for a possible Law Council submission to the Joint Costs Advisory Committee (JCAC) in relation to its *2022 Inquiry into Legal Practitioners' Scale of Costs by COB Wednesday, 3 August 2022*.

Key Issues

The High Court of Australia, Federal Court of Australia and Federal Circuit and Family Court of Australia (Divisions 1 and 2) have again established the JCAC to inquire into, and make recommendations on, any variations in the quantum of costs (including expenses and fees for witnesses) allowable to legal practitioners which should be contained in the scales of costs in the Rules of each of the respective courts.

The Law Council would particularly appreciate comments from Constituent Bodies, Sections and Committees which identify necessary changes in the scales of costs beyond the ordinary adjustments applied by the JCAC (i.e. by the application the Federal Costs Advisory Committee Formula).

Background

The Law Council's submission to the 2021 JCAC inquiry can be found [here](#).

The Fourteenth Report of the JCAC, released in September 2021, is **attached**.

Contact

Please contact John Farrell, Senior Policy Lawyer on (02) 6246 3714 or at john.farrell@lawcouncil.asn.au if you would like any further information or to provide comment.

A handwritten signature in black ink that reads "Margery Nicoll."

**Margery Nicoll
Acting Chief Executive Officer**

JOINT COSTS ADVISORY COMMITTEE

FOURTEENTH REPORT ON LEGAL PRACTITIONERS' COSTS

**High Court of Australia
Federal Court of Australia
Federal Circuit and Family Court of Australia (Division 1)
Federal Circuit and Family Court of Australia (Division 2)**

September 2021

FOURTEENTH REPORT ON LEGAL PRACTITIONERS' COSTS

Preliminary

This is the Fourteenth Report of the Joint Costs Advisory Committee (the Committee) on legal practitioners' costs in the High Court of Australia, the Federal Court of Australia, the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit and Family Court of Australia (Division 2).

The Committee was established following the Attorney-General's decision to abolish the Federal Costs Advisory Committee (FCAC) in September 2007. The Committee comprises representatives of the four federal courts: the High Court of Australia, the Federal Court of Australia, the Federal Circuit and Family Court of Australia (Division 1), and the Federal Circuit and Family Court of Australia (Division 2). It first met in November 2007.

At the time of writing this report, the membership of the Committee consists of:

The Hon Justice Robert Harper, Federal Circuit and Family Court of Australia (Division 1) (Chair);

Ms P Lynch PSM, Chief Executive and Principal Registrar, High Court of Australia;

Mr S Tredwell, General Counsel, Federal Court of Australia;

Ms V Wilson, Deputy Principal Registrar, Federal Circuit and Family Court of Australia;
and

Ms A Morris, National Judicial Registrar, Federal Circuit and Family Court of Australia.

Terms of Reference

According to its terms of reference, the Committee's functions are:

1. to review and recommend variations to the quantum of costs contained in the rules made by the federal courts; and
2. to advise on such other matters relating to those costs as may be referred to it by a federal court.

In undertaking its functions, the Committee must inform itself by having regard to:

- (a) previous decisions of FCAC;
- (b) the *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);
- (c) written submissions from the Law Council of Australia or any other interested party regarding any circumstances to be taken into account by the Committee in consideration of the application of the *FCAC formula*;
- (d) reasonable expenses incurred by lawyers in the conduct of their practices; and
- (e) any other relevant factors.

Scales of Costs

The current costs scales for each of the federal courts are provided for in the following legislation:

- High Court Rules 2004 - Schedule 2
- Federal Court Rules 2011 - Schedule 3
- Federal Circuit and Family Court of Australia (Family Law) Rules 2021 - Schedule 3
- Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021- Schedule 1
- Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021- Schedule 2

The Committee's Last Report

The Committee's Thirteenth Report was published in October 2020. The Committee deferred making a recommendation for any increase in scales of costs for each Court in 2020. This approach was adopted due to the impacts of the COVID-19 pandemic and noting that the recommendation for 2020 would have been for a very modest proposed increase of 0.97%. The Committee recommended deferral of the proposed increase for 2020 for consideration in 2021 as part of the Fourteenth Report on Legal Practitioners' Costs.

Implementation

High Court of Australia and Federal Court of Australia

Given the Committee's resolution to defer making a recommendation, no increase was implemented for either Court.

Federal Circuit and Family Court of Australia (Division 1)

The Federal Circuit and Family Court of Australia (Division 1) implemented the increase recommended in the Twelfth Report through the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (F2021L01197), which commenced on 1 September 2021. On this occasion, and having regard to substantive Rule amendments occurring shortly prior to the preparation of this Fourteenth Report, it also implemented the 0.97% increase noted by the Committee in its Thirteenth Report.

Federal Circuit and Family Court of Australia (Division 2)

The Federal Circuit and Family Court of Australia (Division 2) implemented the increases recommended in the Eleventh and Twelfth Reports through the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* (F2021L01205) and the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (F2021L01220), which commenced on 1 September 2021. On this occasion, and having regard to substantive Rule amendments occurring shortly prior to the preparation

of this Fourteenth Report, it also implemented the 0.97% increase noted by the Committee in its Thirteenth Report.

The FCAC formula

The *FCAC formula* is defined in the Terms of Reference as the recommended percentage increase to the scales of costs calculated according to the formula $Ax + By + Cz$ where:

- A = wages and salaries – adjust by increase in *appropriate ABS wages statistic* since last determination;
- B = other overheads – adjust by increase in the *consumer price index* since last determination; and
- C = partners’ salaries and profits – adjust by increase in *appropriate ABS wages statistic* since last determination.

Presently, the *appropriate Australian Bureau of Statistics (ABS) wages statistic* for both wages and salaries and partners’ salaries and profits is the wage price index,¹ published by the ABS quarterly as part of the Labour Price Index Series (catalogue no. 6345.0).

The *consumer price index* means the consumer price index published by the ABS quarterly (catalogue no. 6401.0).²

- x = weighting to wages and salaries shown by most recent ABS publication on costs of solicitors’ practices;
- y = weighting to other overheads shown by most recent ABS publication on costs of solicitors’ practices; and
- z = weighting given to partners’ salaries and profits shown by most recent ABS publication on costs of solicitors’ practices.

The most recent ABS publication on costs of solicitors’ practices is the *2007-2008 Legal Services, Australia* (catalogue no. 8667.0) published on 24 June 2009. The relevant weightings from that publication were:

- wages and salaries – 31%;
- other overheads – 39%;
- partners’ salaries and profits – 30%.

Under the *FCAC formula* the increase to the scale of costs for the period June 2020 to June 2021 will be 2.5% calculated as follows:

¹ The wage price index measures changes in the price of wage costs, and is comprised of changes in total hourly rates of pay excluding bonuses (but including overtime earnings). It does not include additional labour costs such as annual leave, superannuation, payroll tax or workers’ compensation, which are measured by the labour price index. See ABS publication *Labour Price Index: Concepts, Sources and Methods*.

² For detailed information on the consumer price index, see ABS publication *Australian Consumer Price Index: Concepts, Sources and Methods, 2005*

	% of gross costs	% movement in relevant indices	% increase
Wages and salaries	31	1.7 (WPI)	0.53
Other overheads	39	3.8 (CPI)	1.48
Partners' salaries and profits	30	1.7 (WPI)	0.51
% increase per FCAC formula (rounded to one decimal point)			2.5

Submissions

On 9 August 2021, Amanda Morris, on behalf of Justice Harper, wrote to the Attorney-General's Department (AGD), the Law Council of Australia (LCA), the National Association of Community Legal Centres (NACLC) and National Legal Aid (NLA) inviting each of them, and their respective constituent bodies or State/Territory counterparts, to make submissions to the review. A notice of the review was also placed on the website of each Court.

The Committee received submissions from the LCA, dated 6 September 2021, the NLA dated 3 September 2021 and from a citizen, dated 1 September 2021.

The Committee did not receive any correspondence from AGD or NACLC.

Consideration of the submission

The Committee met via Microsoft Teams on 16 September 2021 to consider the submissions.

The key points made in LCA's submission were:

1. In accordance with the FCAC Formula, the Committee should recommend an increase of at least 2.52 per cent to the federal scales of costs.
2. 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 LCA's 2020 submission, this increase should be between 1.95 per cent and 2.00 percent. 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.
3. The 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.
4. The Committee should recommend that the federal scales of costs be updated regularly each year.

5. The Law Institute of Victoria advises that the rates for the Family Court of Australia prior to the commencement of the Federal Circuit and Family Court of Australia 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.
6. The LCA expresses concern at there being two sets of possible costs for the Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit and Family Court of Australia (Division 2). Specifically, it notes the existence of costs schedules in the Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 and the Federal Circuit and Family Court of Australia (Family Law) Rules 2021. The LCA notes some differences between allowable costs between the Courts, and questions “the desirability of having two sets of possible costs for the one Court”.
7. The 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.
8. The Committee 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.
9. The Committee 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.

The NLA expressed the need for appropriately funded legal assistance service delivery, and thanked the Committee for its support in this regard. It highlighted the NLA’s reliance on this appropriate funding, given the function and structure of the organisation, but provided no recommendations for the Committee to consider.

The citizen expressed concern that some legal practitioners charge excessive fees, and submitted that there should be a cap of fees for various matter types. The citizen also raised a number of other broader concerns with the legal system.

Conclusions

At the meeting on 16 September 2021, the Committee agreed that an increase to the scales of costs should be recommended for 2020-21. The Committee additionally agreed that a recommendation should be made to implement an increase for the 2019-2020 year, which was deferred by the Committee in its Thirteenth Report.

The Committee agreed that it should again use the ABS survey *2007-2008 Legal Services, Australia* to determine the new *FCAC formula* weightings. The Committee agreed that a calculation using the *FCAC formula* should be based on the most recent indices (see page 3 above).

The Committee noted the LCA's submission that the 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. The Committee agreed that consideration of this matter is not within the scope of the Committee's terms of reference, and is a matter for each Court to consider when reviewing their respective Rules.

The Committee also addressed LCA's concerns about there being separate costs schedules for the Federal Circuit and Family Court of Australia (Division 1) and (Division 2). The submission of the LCA appeared to be based upon a misconception that these two Courts were one Court. To this point, the Committee notes that a harmonised costs schedule for each Court was considered to lie with the harmonisation of each Court's respective Rules, but was deferred for further consultation and consideration and is appropriately a matter for those Courts.

Committee's recommendation and other resolutions

The Committee recommends

An increase of 2.5% as determined by the *FCAC formula*³ to the current scale of costs specified in the Rules of the High Court, Federal Court, Federal Circuit and Family Court (Division 1) and Federal Circuit and Family Court (Division 2) for the 2020-2021 year.

A further increase of 0.97%, deferred from the Committee's Thirteenth Report, be implemented in the Rules of the High Court and Federal Court, noting this increase has already been incorporated into the Rules of the Federal Circuit and Family Court (Division 1) and Federal Circuit and Family Court (Division 2).

The Committee **resolved** to:

Write to the Chief Justices, Chief Judge and Chief Executive Officers of each of the Federal Courts, the Attorney General's Department, and those who made submissions (being the LCA, NLA and the citizen) and enclose a copy of the Committee's report on its Fourteenth Inquiry.

³ For calculation see page 3 above.