

24 July 2017

Our ref: KB&NDC – LRC&FLC

Ms Fiona McLeod SC  
President  
Law Council of Australia  
19 Torrens Street  
BRADDON ACT 2612

By email: [Arion.moreno@lawcouncil.asn.au](mailto:Arion.moreno@lawcouncil.asn.au) and [john.farrell@lawcouncil.asn.au](mailto:john.farrell@lawcouncil.asn.au)

Dear President

### **Inquiry into Legal Practitioners' Scale of Costs**

Thank you for the opportunity to provide comments on the Joint Costs Advisory Committee in relation to the Inquiry into Legal Practitioners' Scale of Costs. Queensland Law Society appreciates being consulted on this important issue.

We have sought feedback from our Litigation Rules and Family Law Committees about any variations in the quantum of costs (including expenses and fees for witnesses) allowable to legal practitioners pursuant to the scales of costs in the High Court Rules, the Federal Court Rules, the Family Law Rules and the Federal Circuit Court Rules.

In addition, we have received feedback in relation to the costs rules generally and we would be pleased if this information could be included in your submission.

### **General comments**

Firstly, the scales of costs in the Family Court and Federal Circuit Court jurisdictions are not reflective of the costs incurred by the parties. If a party is awarded costs, they are still considerably out-of-pocket as the scales fail to recognise the true costs and time spent on a matter. Market value of the legal work is not, unfortunately, taken into account.

The Society believes that the scales should be reflective of the actual costs incurred by a party. We believe there should be regular reviews of each scale and in the intervening period, submit that the scales should be increased using the Consumer Price Index. We are of the view that the Consumer Price Index is more appropriate than using wage rates as an indicator as these rates may be prone to greater fluctuation. Each of the federal scales should be increased using the Consumer Price Index.

We also believe that some of the items in the scales should be amended. For example, as charging practices and technology within firms have changed, a scale which still refers to items such as, "engrossing" is becoming less relevant to modern practice.

## **Inquiry into Legal Practitioners' Scale of Costs**

We would also like to make some particular comments with respect to the Federal Circuit Court and Family Court.

### **Federal Circuit Court**

Schedule 1 of the *Federal Circuit Court Rules 2001* contains scales of costs applicable to the types of matters dealt with by the Federal Circuit Court (the FCC). The costs allowable within these scales relate to a particular event in the court proceeding. In the Society's view, the lump sum figures contained in these scales are not appropriate in many cases. The fact that these lump sum figures are linked to an event-based system is also not well understood and creates uncertainty. While we note that the court has the option of reverting to a full assessment or an itemised assessment, we query how frequently this discretion is exercised.

Further, the amount allowed for items under this scale is inadequate. A party will receive far less in costs if their matter was heard by the FCC, rather than the Family Court. The FCC has a very wide jurisdiction and its judges do much of the work that was formerly done by Family Court judges including delivering lengthy decisions on a variety of complex legal areas.

When the FCC was commenced, it was designed to deal with simple matters quickly and efficiently. For example, it had a \$750,000 limit on property matters. That limit is now gone and it now deals with very complex matters including lengthy trials in relation to both parenting and property matters. The Scale has not been adjusted to reflect the change in the Court's jurisdiction.

The parties involved in these matters are spending far in excess of the set fees prescribed by the FCC Rules and whilst it is possible for orders to be made for set costs on the Family Court Scale, it is unrealistic to have a scale of costs that is representative of a very small proportion of the case load of the FCC. The experience of our members is that, complex family law matters may be in the FCC system for one to two years and the parties will incur very significant legal fees. Applying the current rules and scale of costs to these matters is simply inequitable.

### **Family Court**

In addition to our comments above, our members consider that the *Family Law Rules 2004* also do not allow for an appropriate assessment of costs. We believe that the Rules need to be amended and we would suggest using the Queensland scales found in the *Uniform Civil Procedure Rules 1999* (the UCPR) as a guide.

In our view, the UCPR scales take a more pragmatic approach to assessing costs. For example, the UCPR allows for "care and consideration".

There is also ambiguity in family law matters when determining whether work should have been performed by a solicitor or clerk. In Queensland, the UCPR scales contain the term, "skill or legal knowledge" is used, which removes the discretion allowed in the Family Court.

The reference to "time reasonably spent" in the *Family Law Rules* is similarly confusing. The scale requires a party to apportion an amount for, for example, part of a letter or a folio which is confusing and cumbersome.

### **Recommendations**

The Society recommends that:

## Inquiry into Legal Practitioners' Scale of Costs

1. The scales of costs in the Federal Circuit Court and Family Court be increased so that they accurately reflect the cost of the work done in progressing matters;
2. The rules and scales in each jurisdiction be regulatory reviewed and revised and, in the intervening periods, be increased based on the Consumer Price Index;
3. The *Family Law Rules* be amended so that costs are more appropriately assessed. We recommend that the Queensland, UCPR scales be used as a guide.
4. The scales in the *Federal Circuit Court Rules 2001* be amended to accurately reflect the type of costs incurred in running these matters.

If you have any queries regarding the contents of this letter, please do not hesitate to contact Policy Solicitors Kate Brodnik at [k.brodnik@qls.com.au](mailto:k.brodnik@qls.com.au) or 07 3842 5851 or Natalie De Campo at [n.decampo@qls.com.au](mailto:n.decampo@qls.com.au) or 07 3842 5889.

Yours faithfully



Christine Smyth  
**President**