HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

BIRKETU PTY LTD
ACN 003 831 392
First Appellant

WIN CORPORATION PTY LTD
ACN 000 737 404
Second Appellant

and

JOHN LJUBOMIR ATANASKOVIC
First Respondent

LAWSON ANDREW JEPPS
Second Respondent

MAURICE JOCELYN CASTAGNET
Third Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The issue arising is whether the general indemnity principle that "*costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation*"[1], as it applies under ss 3(1) and 98 of the *Civil Procedure Act 2005* (NSW) (**CPA**), enables the partners of an unincorporated law firm who act for themselves in litigation to recover costs for work done by their employed solicitors in prosecuting or defending the proceedings.

Part III: Section 78B of the Judiciary Act 1903 (Cth)

3. A notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Relevant facts

4. There are no factual issues in contention. The First and Second Respondents do not

[1] *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29 at [33], [60].

contest the factual summary at Appellants' Submissions (**AS**) [5] – [8].

5. As to the observations of Hammerschlag J in the costs judgment referred to at AS [8], Brereton JA rejected the Appellants' argument that those observations precluded the First and Second Respondents from claiming costs for the work undertaken by their employed solicitors: *Birketu v Castagnet* [2022] NSWSC 1435 (**PJ**) at [20] (CAB 16). As Brereton JA recognised, the observations were passing in nature, not informed by argument and unnecessary to Hammerschlag J's decision. The issue was not pressed by the Appellants in the Court of Appeal: see *Atanaskovic v Birketu Pty Ltd* [2023] NSWCA 312 (**CA**) at [6] (CAB 54).

6. As to the circumstances in which the Supreme Court came to consider the issue now raised for determination, the Appellants sought declaratory relief by summons. The parties agreed that the Court should resolve the "*substantive question of principle*" so long as that could be done without resort to controversial facts: PJ at [19] (CAB 15-16). Both Brereton JA and the Court of Appeal proceeded on that basis.

Part V: Argument

A. Summary

7. The Court of Appeal (Kirk JA and Simpson AJA, Ward P dissenting) held that, under NSW law, the partners of an unincorporated law firm who act for themselves in litigation are entitled to recover costs for work done by the employed solicitors of that firm in prosecuting or defending the proceedings.

8. That decision was faithful to the costs regime applicable in NSW. The entitlement of a litigant to recover the costs of employed solicitors is expressly provided for in NSW legislation and is, in any event, a well-recognised incident of the indemnity principle – two propositions that were accepted by this Court in *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29 (***Bell Lawyers***).

9. As to the first issue identified by the Appellants AS [2(a)], the Appellants' submissions prove too much. If the Appellants are right that the costs of a solicitor employed by an unincorporated law firm fall outside the NSW costs regime because the liability for those costs is incurred "*irrespective of the existence of the proceedings*", then the same difficulty arises with respect to the costs of solicitors employed by corporations, government agencies and incorporated law firms. Yet the Court has made clear that such costs are recoverable and the Appellants do not contend that the employed solicitor rule should be abrogated in its entirety.

10. The Appellants' submissions also fail to recognise the inclusion in the statutory definition of "*costs*" in s 3(1) of the CPA of "*remuneration*". That concept captures remuneration for professional services rendered under a contract of service, as well as under a contract for services: *Bell Lawyers* at [44]. In so doing, the CPA makes clear that the "*cost of professional legal services rendered by an employed solicitor is included in the definition of "costs"*": *Bell Lawyers* at [44].[2]

11. As to the second issue identified by the Appellants at AS [2(b)], the Appellants misapprehend the content of the indemnity principle. That principle entitles a litigant to partial indemnity for professional legal costs incurred in the conduct of litigation. Contrary to the Appellants' formulation of the issue, the cost of legal services rendered by an employed solicitor cannot be equated with, or viewed as a subset of, compensation for a litigant's own time and effort.

12. Just as a government agency, corporation or incorporated law firm may recover the costs of its employed solicitors in representing itself in litigation, so too may an unincorporated law firm. No distinction between those types of litigant is drawn by NSW law and none is logically sound.

13. The effect of the majority's decision below is to treat unincorporated law firms in precisely the same way as all other litigants. The conception that all litigants should be treated equally was at the heart of *Bell Lawyers*' rejection of the *Chorley* exception. In contrast, the result contended for by the Appellants places such firms at a unique disadvantage by denying them the ability to claim costs for employed solicitors where all other litigants can do so.

B. *Bell Lawyers*

14. Given the centrality of *Bell Lawyers* to the arguments of the Appellants, it is convenient to identify several key propositions flowing from that decision:

    a. costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation (**the general indemnity principle**): [33], [44] (plurality), [60] (Gageler J);

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[2] A contrast may be drawn here with the costs regime considered by the Victorian Court of Appeal's decision in *United Petroleum v Herbert Smith Freehills* [2020] VSCA 15. The applicable statutory definition of "*costs*" in s 3(1) of the Supreme Court Act 1986 (Vic) was relevantly that it "*includes fees, charges and disbursements*", but it did not expressly include "*remuneration*": CA[258] (CAB 132).

b. one application of the general indemnity principle is that the professional legal costs rendered by a party's employed solicitor are recoverable, on the basis that the costs of using the employed solicitor are an actual cost to the party (**the employed solicitor rule**): [47] (plurality), [68] (Gageler J);

c. a corollary of the general indemnity principle is that a self-represented litigant may not obtain any recompense for the value of his or her own time or labour spent in litigation: [1], [22], [33] (plurality);

d. *Chorley* was a historical exception to the corollary above (and therefore also an exception to the general indemnity principle) because it permitted a solicitor litigant to recover compensation at a professional rate for his or her own time or labour in participating in litigation (i.e. not professional costs which were actually incurred): [1] (plurality), [60] (Gageler J), [91], [93] (Edelman J);

e. the *Chorley* exception should no longer be recognised as part of the common law of Australia: [3], [57] (plurality), [63] (Gageler J), [93] (Edelman J);

f. the definition of "*costs*" in s 3(1) of the CPA:

i. restates or reflects the general indemnity principle: [44] (plurality), [67] (Gageler J), [98] (Edelman J);

ii. does not include a notional payment to a person by himself or herself for work done by himself or herself and, thereby, "*leaves no room*" for the *Chorley* exception: [44] (plurality), [67] (Gageler J);

iii. does include remuneration for professional services rendered by an employed solicitor: [44] (plurality).

15. The plurality also rejected a submission that the abrogation of the *Chorley* exception would cause unacceptable inconvenience by preventing litigants using employed solicitors to recover the professional costs of those employed solicitors: [46]-[47], [50]. The language used by the plurality to explain the ongoing operation of the employed solicitor rule in this part of their judgment was inclusive, not exhaustive: "*in-house lawyers employed by governments and others*": at [50]. Similarly, Gageler J expressed the employed solicitor rule in expansive terms, as applying to "*a party using an employed solicitor*" and "*the employer who is a party to the litigation*": e.g. [68].

16. There is nothing in the reasons of the plurality at [46]-[51] or Gageler J at [65]-[68] to

suggest that the removal of the *Chorley* exception was intended to place the partners of unincorporated law firms in a worse position than other types of litigants with respect to the ability to recover the costs of their employed solicitors.

17. The only member of the Court to expressly consider the issue of whether law firms can claim costs of employed solicitors was Nettle J. His Honour agreed that the appeal should be dismissed but for the reason only that the Chorley exception should not be extended to barristers. At [75], Nettle J did not see any distinction between the position of a corporation and a law firm when it came to the operation of the employed solicitor rule and proceeded on the basis that the rule captured the costs of work performed by employee solicitors of "*firms of solicitors*" as well as employee solicitors of corporations and government and semi-government agencies.

18. The plurality's reasons in *Bell Lawyers* at [46]-[53] also implicitly accepted that incorporated legal practices would continue to be able to recover the costs of employed solicitors (see Kirk JA at CA[198]-[202] CAB 115-117). The respondent's submission to which the plurality's reasons were addressed was that the consequence of removing the *Chorley* exception would be "*that governments and other employers, and incorporated legal practices operating through a sole director, would be prevented from recovering costs for professional legal services rendered by employed solicitors*": at [46], emphasis added.

19. The plurality rejected this submission, but without taking issue with the relevant category being said to include incorporated legal practices. Rather, the plurality raised a question in relation only to a specific subset of incorporated legal practices: where costs are claimed for "*a solicitor employed by an incorporated legal practice of which he or she is the sole director and shareholder*": at [51] (emphasis added). Their Honours queried whether in that specific case, costs claimed for the work of the employed solicitor properly fall within the general indemnity principle, because the incorporated legal practice is then merely "*a vehicle for a sole practitioner*": at [53]. Their Honours considered this was ultimately a matter for the legislature: at [53].

C. Grounds of appeal

20. The Appellants' grounds of appeal deserve close consideration. The first and second grounds (CAB 171-172) set out the gravamen of the Appellants' position. In those grounds, the Appellants contend that "*the general rule of law*" is that "*a self-represented solicitor litigant may not obtain any recompense for the value of his or*

her time and labour spent in litigation including the costs of employed solicitors" [emphasis added].

21. In formulating the grounds of appeal in this way, the Appellants assume that the costs of a person employing a solicitor (e.g. paying that solicitor's salary and paying other overheads like rent for an office, equipment and consumables) are to be equated to the time and labour of the employer himself. The assumption is incorrect on its face. A person seeking an indemnity for the professional legal costs of an employee is, by definition, not seeking to recover costs for that person's own time and effort.

22. The assumption made by the Appellants is also contrary to authority. The employed solicitor rule is an application of the general indemnity principle, not an exception to it: *Bell Lawyers* at [68] (Gageler J). The general rule is engaged because the costs of using the employed solicitor are incurred by the litigant, "*albeit that those professional legal costs are incurred in the form of an overhead and are therefore not reflected in a severable liability*": ibid. Costs incurred in this way cannot sensibly be described as costs for the litigant's own time and effort.

23. The First and Second Respondents were careful to confine their claim for costs accordingly. In the costs assessment, the First and Second Respondents only sought the costs they had incurred in using their employed solicitors and made no claim for the costs of their partner litigants, including the costs of their employed partners: CA[7] (CAB 54-55).

D. Statutory Text

24. Reference has already been made to aspects of the NSW statutory regime and the analysis of the regime in *Bell Lawyers*. In the First and Second Respondents' submission, the starting point and the end point for resolving the issues presently under consideration is the statutory text.

25. The power to make an order for costs is conferred by s 98(1) of the CPA. In s 3(1) of that Act, the term "*costs*" is defined as follows:

> ***costs**, in relation to proceedings, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration.*

26. The definition of "*costs*" is a "*means and includes*" definition and, as a result, provides an exhaustive explanation of the content of the term which is the subject of the definition: *Bell Lawyers* at [43]. In doing so, the definition conveys ideas of both

enlargement and exclusion, and makes plain that otherwise doubtful cases fall within its scope: ibid.

27. The inclusion of "*remuneration*" in the definition makes plain that the cost of professional legal services rendered by an employed solicitor is included in the definition of "*costs*": *Bell Lawyers* at [44]. While remuneration is not a word that is apt to include the notion of payment to a person for work done by himself or herself, it readily captures the cost of remunerating others, including employees, for professional services: *Bell Lawyers* at [44]. At [67], Gageler J adopted the plurality's analysis of the statutory definition of "*costs*" in the CPA. At [98], Edelman J also appeared to endorse this analysis, referring to the Court's decision to abrogate the *Chorley* rule as the determination of the application of ss 3(1) and 98(1) of the CPA.

28. Kirk JA (at CA[172]-[188] CAB 108-112) and Simpson AJA (at CA[330]-[343] CAB 153-156) held that there was no reason, as a matter of statutory construction, why remuneration paid to the solicitor employees of unincorporated law firms should be regarded as falling outside the statutory definition of "*remuneration*" as set out by the plurality of this Court in *Bell Lawyers* at [44]. Their Honours concluded that an order for costs made pursuant to s 98 of the CPA included the costs of the professional legal services rendered by the First and Second Respondents' employed solicitors.

29. Instead of confronting the reasoning above, the Appellants now make an anterior attack. At AS[24], the Appellants contend that the conclusion of the majority below was reached "*without due regard to the qualifying requirement that the cost must be 'payable in or in relation to the proceedings'*."

30. This submission flies in the face of the plurality's reasoning in *Bell Lawyers*, and receives no support from the dissenting judgment of Ward P, nor from the Victorian Court of Appeal's decision in *United Petroleum v Herbert Smith Freehills* [2020] VSCA 15 (***United Petroleum***).

31. Because s 3(1) contains a means and includes definition, the section operates as a restatement of the "*general rule that costs are awarded only for professional costs actually incurred*": *Bell Lawyers* at [44]. That is, the statutory concept that "*costs … means costs payable in or in relation to the proceedings*" simply restates the general concept that costs are awarded by way of (partial) indemnity for professional legal costs actually incurred in the conduct of litigation. As the plurality went on to observe at [44] and [47], the remuneration of an employed solicitor is a specific example of the

actual professional legal costs that a party might incur in the conduct of litigation.

32. There is nothing in the plurality's analysis of the phrase "*costs payable in or in relation to the proceedings*" which supports the distinction which the Appellants now seek to draw. As Kirk JA noted at CA[186] (CAB 111-112), the concept of "*remuneration*" refers to money paid for work or services rendered, and has nothing in particular to do with the identity of the person paying. That logic applies with equal force to the phrase "*costs payable in or in relation to the proceedings*" in s 3(1).

33. The high point of the Appellants' argument appears to be their contention at AS[30] that the remuneration paid to a law firm's employed solicitor is not "*costs payable in or in relation to the proceedings*" because the firm "*is liable to pay the salary of an employed solicitor in a manner entirely unconnected with the existence (or not) of any proceedings or, indeed, any work at all*". However, this argument proves too much. The same is true for an employed solicitor of any other organisation. A government department or a corporation is also liable to pay the salaries and other overheads of its employed solicitors in a manner entirely unconnected with the existence of any given legal proceeding. And, of course, the Court in *Bell Lawyers* was careful to confirm that nothing in that judgment disturbed "*the well-established understanding in relation to in-house lawyers employed by governments and others*": *Bell Lawyers* at [50].

34. Nor is it correct to view the unincorporated law firm as only losing an opportunity for the salaried employee to potentially earn a profit on alternative fee paying matters: cf AS [30]. The partners of a law firm incur an actual cost in paying the salaries and other overheads of their employed solicitors, in exactly the same manner as a government department or a corporation. It is the incurring of these actual costs which engages the indemnity principle: *Bell Lawyers* at [47].

35. In *Bell Lawyers*, the Court comprehensively rejected the argument that a person's opportunity cost is relevant to the question of the application of the general indemnity principle. Accordingly, what an employed solicitor would have been doing had he or she not worked on the litigation is irrelevant to the application of the general indemnity principle. That is so whether that solicitor is employed by a law firm, by a government department, or by a corporation.

36. The Appellants repeat a similar submission at AS[44], contending that "*[t]here is no difference in principle between the situation of the partner and that of his or her employee*", because each loses an opportunity for profit earning, and the employee is

salaried whether or not they perform any work. However, there is a difference in principle: the partner is the litigant. If the partner spends time on the matter, they have not incurred any actual costs to which the general indemnity principle responds – they have simply expended their own time and effort, and the rejection of the *Chorley* exception means that they can no longer recover costs in respect of that time and effort. On the other hand, the use of the employed solicitor is an actual cost to the employer – just as much as it is for an employed solicitor of a government body or a corporation.

37. The Appellants conclude their submission at AS[44] by observing: "*[the employed solicitors] are on staff and in no sense delivering a bill to the partner or firm for what they have done and neither does the partner.*" It is true that the employed solicitors of a law firm do not deliver a bill to the firm, but neither do the employed solicitors of a government body or a corporation. It has never been the law that some form of invoice is required in order to engage the employed solicitor rule: as Gageler J recognised in *Bell Lawyers* at [66], the rejection of the *Chorley* exception "*involves no adoption of the view … that costs can only be awarded by way of reimbursement for fees actually invoiced*."

38. Rather, the assessor awards costs on a basis comparable to the costs that would have been incurred and allowed had an independent solicitor been engaged: *Bell Lawyers* at [47], quoting with approval *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 (***Hattersley***) at [11]. No invoice is required for an employed solicitor because no invoice will exist.

C. Application of the Common Law

39. The Appellants briefly contend that the majority "*erred in failing to address the effect of ss 3(1) and 98(1) of the CPA without reference to the common law*": AS[35]. This criticism is unfair and inaccurate.

40. Costs are wholly a creature of statute but the principles to be applied in exercising the statutory power to award costs are necessarily informed by developments in the common law (in the broad sense of judge-made law): *Bell Lawyers* at [13]-[16], [33] (plurality), [59], [63] (Gageler J), [81]-[83] (Edelman J).

41. The majority below was cognisant of that relationship: e.g. CA[177], [179], [189]ff, [283], [309] (Kirk JA) (CAB 109-110, 112, 139, 146), and [313]-[319] (Simpson AJA) (CAB 146-148). However, as both Kirk JA and Simpson AJA recognised, it would be

wrong to treat the costs jurisdiction as operating independently from its statutory conception. Given the particular way in which the CPA is structured, and its express inclusion of remuneration for employed solicitors, it is difficult to identify any solid footing in the general law for what amounts to a reading down of the statutory text: as to which see also Section D below.

D. General Rule – Indemnity Principle

D.1 Relevance of "representation" to the general indemnity principle

42. The Court should decline the Appellants' invitation to devise a new gloss on the indemnity principle by reference to what the Appellants submit is a policy that costs incurred must arise "*from the representation of another or conducting litigation for another*": AS [36].

43. There is no reason in principle why the general indemnity principle is limited to costs arising from "*representation*". As Kirk JA noted at CA[197] and [261] (CAB 114-115, 133-134), the operation of the general indemnity principle, and its corollary that costs do not extend to the value of the litigant's own time, do not depend on whether the litigant is "*represented*" or "*self-represented*".

44. Rather, the general indemnity principle operates to provide the party with (partial) indemnity for the legal costs which it has been required to incur in vindicating its rights in court. As Bramwell B put it in *Harold v Smith* (1860) 5 H&N 381 at 385, 157 ER 1229 at 1231, "*... find out the damnification, and then you find out the costs which should be allowed*."

45. Numerous examples can be provided where a party would be entitled to recover for legal costs which do not "*arise from the representation of another or conducting litigation for another*":

    a. where an unrepresented litigant engages a solicitor to provide legal advice in relation to the proceeding, or assistance in preparing documents, but does not engage the solicitor to represent them in the proceeding: e.g. *Hoe v Lennox* [2020] VSC 262 at [31]; *Sandilands v New Zealand Law Society* [2017] NZHC 2640; *Harrison v Keogh* [2015] NZHC 3320;

    b. where a party incurs legal costs prior to the proceedings being formally instituted, but where those costs are relevant to the proceedings as ultimately prosecuted: e.g. *Re Gibson's Settlement Trusts* [1981] Ch 179 at 187-188;

Chow v Chow (No 2) (2015) 18 BPR 35,385; [2015] NSWSC 1348 at [19]-[24];

c. where a party engages a second law firm to provide advice on a discrete issue arising in the proceedings, such as where a party engages foreign lawyers to give advice about an issue of foreign law arising in the proceedings: e.g. *Societa Finanziaria Industrie Turistiche SpA v Manfredi Lefebvre D'Ovidio De Clunieres Di Balsorano* [2006] EWHC 90068 (Costs).

46. In short, the concept of "*representation*" is not a necessary criterion for the operation of the general indemnity principle.

47. Equally importantly, the concept of "*representation*" finds no anchor in the text of the CPA. In particular, representation is not a touchstone for the conception of "*costs*" in s 3(1) of that Act.

D.2 Relevance of "self-representation"

48. Similar difficulties confront the Appellants' related attempt to draw a "*real and meaningful distinction*" between the position where solicitors in partnership represent themselves (which is said to constitute "*self-representation*"), and the position where an organisation such as a bank or government agency is represented by an employed solicitor (which is said not to constitute "*self-representation*").

49. No such distinction is found in the CPA. Nor is it to be found in *Bell Lawyers*. Indeed, Ms Pentelow was not self-represented: she was represented by external solicitors and counsel: *Bell Lawyers* at [6]; as was Herbert Smith Freehills in *United Petroleum* for at least part of the time claimed: *United Petroleum* at [56]. Similarly, in the proceedings which resulted in the costs order the subject of the costs assessment, the First and Second Respondents were represented at the hearing by counsel: CA[4] (CAB 54).

50. The Appellants' proposed distinction is irreconcilable with the plurality's acceptance that an incorporated law firm is entitled to recover the costs of its employed solicitors (as set out in paragraphs 18-**Error! Reference source not found.** above). It is difficult to see how there could be a relevant distinction between incorporated and unincorporated law firms as to whether they are "*represented*" by their employed solicitors.

51. The basis for any relevant distinction was rebutted comprehensively at CA[260]-[267]

(CAB 133-135) and CA[297]-[306] (CAB 143-145) (Kirk JA), and at CA[355]-[358] (CAB 159-160) (Simpson AJA). As Kirk JA recognised, neither the CPA nor *Bell Lawyers* turned on whether the solicitor on the record was the litigant themselves or an employed solicitor: CA[261] (CAB 133-134). "*Regardless of whether or not the costs-claimant was self-represented, insofar as they used employed solicitors then they have incurred an actual cost that the law regards as falling within the general indemnity principle*": CA[261] (CAB 133-134). And, as Simpson AJA recognised, the distinction breaks down in practice given it is "*commonplace for legal professional costs to be incurred by work done by solicitors other than the solicitor on the record*": CA[357] (CAB 159-160).

52. Further, even if there were some relevant distinction between the position of an unincorporated law firm litigant and an agency or corporation, when viewed through the lens of 'self-representation', the Appellants do not explain why this distinction leads to the conclusion that the latter is entitled to claim for the professional costs of a solicitor which it employs, but the former is not.

53. Ultimately, as set out at AS[37], the Appellants' contended distinction appears to be premised on two propositions.

D.2.1 Potential for profit

54. The first matter called in aid by the Appellants is that it is undesirable to permit solicitor litigants to claim for the professional costs of their employed solicitors, because this will permit the solicitor litigants to profit from their participation in the conduct of the litigation: AS [37](a)-(c), [39]. The Victorian Court of Appeal deprecated this argument in *United Petroleum* at [118]. However, even if the submission were accepted, it is unclear how it supports the Appellants' contended "*self-representation*" distinction between solicitor and non-solicitor litigants.

55. The starting point for the Appellants' submission is the observation of the plurality in *Bell Lawyers* in the final sentence of [32] that the possibility of a solicitor profiting from his or her participation in the conduct of litigation is "*unacceptable in point of principle*". However, the preceding sentence in [32] makes clear that what their Honours were specifically addressing was the possibility that a self-represented solicitor might recover costs reflecting "*the solicitor's reward for the exercise of professional skill*" – i.e. costs reflecting the solicitor's own time and labour, being the costs previously claimable under the *Chorley* exception. Their Honours were not there

addressing the situation of a party profiting by recovering costs for its employed solicitor.

56. Instead, the plurality addressed the issue of how costs of employed solicitors are to be recovered at [47]. Their Honours endorsed the approach of Davies AJ in *Hattersley* at 337 [11] that employed solicitors are entitled to have their costs assessed on the same basis as that of independent solicitors exercising comparable skills in the performance of comparable work, approving the observation that: "*[t]he assumption has been made that, in an ordinary case, the indemnity principle will not be infringed by taking this approach*".

57. Courts have long recognised that it would be overly complex to try to identify that proportion of a yearly salary paid to the employed solicitor that is referable to the litigation at hand: *Hattersley* at 338 [17], citing *Attorney-General v Shillibeer* (1849) 4 Ex 606; 154 ER 1356. In *Hattersley* at 340 [27], Davies AJ further observed that, as the general indemnity principle responds to the party's actual costs of using an employed solicitor, it would be necessary to allocate and apportion all the other direct and indirect costs to the party in respect of the employed solictor which are referable to the litigation at hand, including not only the employed solicitor's "*remuneration*", but also other overheads like rent for office space, equipment, and consumables: *Hattersley* at 340 [27]. The fact that such a task would be long, expensive and disproportionate to the underlying dispute justifies the assumption embraced by the plurality in *Bell Lawyers* at [47].

58. Similarly, the approach of permitting the taxation of a bill of an employed solicitor's costs as if it were the bill of an independent solicitor received the express approval of the Court of Appeal of England and Wales (Russell LJ, Stamp and Lawton LJJ agreeing) in *In re Eastwood (deceased)* [1975] Ch 112 at 132. His Lordship observed that it was "*a fair and reasonable presumption*" that this method would not infringe the indemnity principle. In *Ly v Jenkins* (2001) 114 FCR 237 at 280 [160], Kiefel J (as her Honour then was) adopted that explanation. The plurality in *Bell Lawyers* referred to this with approval at [48].

59. This is consistent with the historical approach to the employed solicitor rule. As Kirk JA observed at CA[269] (CAB 135-136), the rule: "*has been consistently applied even though it has long been recognised that there was a possibility of profit*", citing *Galloway v Corporation of London* (1867) LR 4 Eq 90 at 96; *Irving v Gagliardi; Ex*

parte Gagliardi (No 2) (1895) 6 QLJ 200 at 201 and *Henderson v Merthyr Tydfil Urban District Council* [1900] 1 QB 434 at 437.

60. Accordingly, the prospect of a litigant profiting from using an employed solicitor and claiming for the employed solicitor's time on the basis of taxable rates is also present where the litigant is a government body or corporation, and courts have repeatedly confirmed the continuing operation of the employed solicitor rule despite these concerns.

61. In any event, the concern about profit goes to the question of quantifying the extent of the indemnity, not to whether the entitlement to indemnity arises at all. As the Victorian Court of Appeal correctly observed in *United Petroleum* at [118], where there is a concern about infringement of the indemnity principle, the avoidance of profit should be achieved through the taxation process (e.g. by imposing a limit on the amount recoverable by a party's employed solicitors), rather than by entirely precluding recovery for employed solicitors altogether. That is consistent with the Russell LJ's acceptance in *In re Eastwood* at 132, cited by Davies AJ in *Hattersley* at [25]-[26], that there might be "*special cases*" which might require a different approach, where it is plain that the indemnity principle would be infringed by the orthodox approach to taxation.

62. To simply prevent any recovery for employed solicitors for a particular class of litigant is disproportionate to the concern that the method of assessment may lead to some infringement of the general indemnity principle.

D.2.2 Lack of independence

63. The second basis upon which the Appellants support their contended distinction between solicitor litigants and non-solicitor litigants as to "*self-representation*" is that the employed solicitors of a legal partnership lack sufficient professional detachment, when compared to the employed solicitors of government bodies or corporations: AS[37](d), (g).

64. This is a sweeping generalisation. The Appellants have not pointed to any basis in fact to support it. As Kirk JA observed at CA[266] (CAB 135), solicitors employed by a legal partnership owe no lesser duties as legal practitioners than solicitors employed elsewhere. And there is no reason to think that such solicitors are any less capable of complying with, or likely to comply with, those duties than solicitors employed by

governments, companies or incorporated law firms.

65. Indeed, in other contexts courts are acutely conscious that it is employed solicitors of companies who may lack sufficient professional detachment. In the context of legal professional privilege, some attention has been given in the case law to the status of in-house counsel and the importance of establishing that the in-house counsel was, in making the communications over which privilege is invoked, acting in a legal professional capacity, entailing an element of independence and detachment from the commercial activities of the business at large: see e.g. *Banksia Securities Limited v The Trust Company* [2017] VSC 583 at [47]ff, citing e.g. *Archer Capital 4A Pty Ltd & Ors v Sage Group PLC (No 2)* [2013] FCA 1098; (2013) 306 ALR 384 at [59]-[73]. Yet these concerns did not prevent this Court in *Bell Lawyers* from confirming the ability of corporations to claim the legal professional costs of their in-house counsel.

66. Ultimately, questions of professional independence provide a far too fluid yardstick by which to apply the statutory costs regime in NSW. While, from one perspective, it may be preferable for solicitors to not represent themselves in some circumstances, it is surely significant that no blanket prohibition exists in the professional conduct rules. Instead, rules exist around, eg, the requirements for independence and impartiality that may preclude self-representation in an individual case: see eg *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW), rules 17.1, 27.1. No conduct rule was alleged by the Appellants to have been offended in the present case.

67. Nor is it evident that self-representation by solicitor litigants is always problematic. The case at issue in these proceedings is a good example: in seeking the recovery of fees under outstanding invoices issued to a client, the litigant partners may reasonably have concluded that the most timely and cost-efficient course was for them to represent themselves and brief counsel directly, rather than expend additional costs in instructing a different law firm (for example, because the different law firm would need to become informed separately and additionally regarding numerous matters (such as relevant facts and circumstances) with which the litigant law firm was already familiar, and the different law firm would obviously take additional time and expense in becoming so informed, which would increase the costs incurred). That efficiency in cost is also to the benefit of the Appellants, as the parties against which the relevant costs order was made, because their exposure to adverse costs is lower than it would otherwise be.

68. The short point is that the *costs* regime is not the vehicle by which the conduct of

solicitors in acting for themselves in litigation is to be regulated, at least until legislative amendments are made to the relevant provisions of the CPA.

D.2.3 'Effectively work of the firm'

69. A further variation of the Appellants' self-representation submissions is to treat the work done by employed solicitors of the 'firm' as "*effectively work of the firm*", adopting the dissenting reasons of Ward P at CA[157] (CAB 104): see AS [46].

70. Such an approach finds no support in the statutory language. Further, an approach that centres on whether work is "*effectively*" work of "*the firm*" collapses the distinction between litigant employers and their employees. It treats the time and labour of "*the firm*" as a unitary construct. But "*the firm*" is not a legal entity: it is a partnership of natural persons, who employ other natural persons.

71. The difficulties in this approach are also evident in Ward P's observation at CA[161] (CAB 106): "*To enable an unincorporated law firm to recoup the cost of employed solicitors amounts to recovery of the partnership's own time and effort (albeit through the partnership's employed solicitors) as professional legal costs*" [emphasis added]. In doing so, her Honour elides the distinction between the notional cost of a litigant's own time (which is not recoverable), and the actual costs incurred in utilising the services of an employed solicitor. As noted above, that distinction was fundamental to the reasoning of the plurality ([33], [44], [47], [50]) and Gageler J (see [65]-[68]) in *Bell Lawyers*.

72. The Victorian Court of Appeal made a similar error in *United Petroleum* at [120], where their Honours commented that permitting recovery "*would, anomalously, allow firms of solicitors to recover for their own time spent in the litigation*" [emphasis added]. As Kirk JA observed at CA[276] (CAB 137), this also elides the difference between being able to claim for the costs of the partners as litigants, which is not permitted, and claiming for the costs of their employed solicitors performing the role of solicitors.

73. The analysis of Ward P and the Victorian Court of Appeal necessarily involves the creation of a legal fiction in order to confine the ordinary scope of the general indemnity principle so as not to apply to unincorporated law firms. The fiction operates as follows:

a. the partners of the firm are ultimately responsible for the work done by their

employed solicitors;

b. therefore, the employees' work is in fact the partners' work;

c. therefore, a claim for the costs of employed solicitors is a claim for the partners' own time and effort.

However, (b) does not follow from (a). There is no justification to resort to a fiction that the partners' responsibility for their employees' work means that the work becomes the product of the partners' own time and effort.

74. Once that fiction is dispelled, it is clear that there is no "*reversion*" to a position where solicitor litigants are in a privileged position (*cf* CA[161] (CAB 106) per Ward P).

75. Further, neither Ward P nor the appellants offer any basis for resorting to this fiction only in the case of unincorporated law firms, while maintaining the distinction for other litigant employers and their employed solicitors.

76. The analysis of Ward P also fails to recognise that the statutory regime which regulates "*law practices*" in NSW is inconsistent with a supposed implied restriction which prevents only one specific type of legal practice from recovering the costs of its employed solicitors: *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [94]. For example, the *Legal Profession Uniform Law* (NSW) provides in s 6 that a "*law practice*" may be (inter alia) a sole practitioner (i.e. a natural person), a law firm (i.e. a partnership of natural persons), or an incorporated legal practice. Section 32 provides that legal services may be provided under any business structure (subject to the provisions of the Uniform Law and Uniform Rules), and s 33 provides that compliance with professional obligations is not affected by the nature of the relevant business structure. The evident statutory intention is that the same substantive legal principles should apply irrespective of the particular business structure which is used to conduct the "*law practice*". The statutory scheme for recovery of costs is equally inconsistent with an implied restriction which permits an incorporated legal practice from recovering costs but prohibits a partnership of natural persons from doing so.

77. Accordingly, the Appellants' position leads to an outcome that is both perverse and contrary to the statutory framework in NSW. Natural person solicitors conducting business either in partnership as a law firm, or as a sole principal, but employing other solicitors, would be in the unique position of being the only legal persons unable to

claim an indemnity for professional legal costs incurred in the conduct of litigation by solicitors whom they employ. They would thereby be placed at a singular disadvantage vis-à-vis all other self-represented litigants who choose to use employed solicitors to take carriage of litigation – be they government departments, corporations, unincorporated professional firms or individuals. Far from exalting solicitors above other litigants, that consequence imposes a material adverse burden on one class of litigants alone. This exclusion of the partners of unincorporated law firms from the employed solicitor rule is also "an affront to the fundamental value of equality of all persons before the law" (*Bell Lawyers* at [3], and see also at [24]-[25]), which was the primary rationale offered by the High Court in abolishing the *Chorley* exception.

Part VI: Argument on notice of contention or notice of cross-appeal

78. Not applicable.

Part VII: Estimate of time required for respondents' oral argument

79. The First and Second Respondents estimate that no more than 1.5 hours will be required for their oral argument.

Dated 21 June 2024

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ANNEXURE TO THE FIRST AND SECOND RESPONDENTS' SUBMISSIONS

List of statutes referred to in the First and Second Respondents' Submissions:

1. *Civil Procedure Act 2005* (NSW) – ss 3 and 98, current version.
2. *Legal Profession Uniform Law* (NSW) – ss 6, 32-33, current version.
3. *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) – rr 17.1, 27.1, current version.