

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

BIRKETU PTY LTD & ANOR

APPELLANTS

AND

JOHN LJUBOMIR ATANASKOVIC & ORS

RESPONDENTS

Birketu Pty Ltd v Atanaskovic
[2025] HCA 2
Date of Hearing: 17 October 2024
Date of Judgment: 5 February 2025
S52/2024

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with A R R Vincent for the appellants (instructed by HWL Ebsworth Lawyers)

S J Free SC with D Birch for the first and second respondents (instructed by Atanaskovic Hartnell)

Submitting appearance for the third respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Birketu Pty Ltd v Atanaskovic

Practice and procedure – Costs – Work performed by employed solicitor – Where first and second respondents are remaining partners of unincorporated law firm which obtained costs order against appellants – Where costs were sought for work undertaken by employed solicitors of unincorporated law firm – Whether order for costs in favour of an unincorporated law firm entitles firm to obtain recompense for legal work performed by employed solicitors of firm.

Words and phrases – "assessment of costs", "*Chorley* exception", "employed solicitor", "general common law principle", "general rule", "in-house lawyer rule", "in-house solicitor rule", "indemnity", "lawyer-client relationship", "legal services", "order for costs", "partner", "professional detachment", "professional fees", "quantification", "remuneration", "self-represented litigant", "unincorporated law firm".

Civil Procedure Act 2005 (NSW), ss 3, 98.

Legal Profession Uniform Law Application Act 2014 (NSW), Pt 7, Div 3.

Supreme Court Act 1986 (Vic), s 3.

1 GAGELER CJ, GORDON, EDELMAN, GLEESON AND BEECH-JONES JJ.
A partner in an unincorporated law firm represents the firm in litigation against a former client. The firm is successful in the litigation and procures an order for costs in its favour. The order for costs does not entitle the firm to obtain recompense for legal work performed by the partner: that much is clear from *Bell Lawyers Pty Ltd v Pentelow*.¹ But does the order for costs entitle the firm to obtain recompense for legal work performed by an employed solicitor of the firm?

2 Intermediate courts of appeal have divided on that question since *Bell Lawyers*. For reasons to be explained, the better view is that an order for costs in favour of an unincorporated law firm entitles the firm to obtain recompense for legal work performed by an employed solicitor of the firm.

This appeal

3 Atanaskovic Hartnell is an unincorporated legal practice. The first and second respondents, Mr Atanaskovic and Mr Jepps, are its only remaining partners. The appellants, Birketu Pty Ltd and WIN Corporation Pty Ltd (together, "Birketu"), are its former clients.

4 By proceedings commenced in the Supreme Court of New South Wales in 2018, Atanaskovic Hartnell claimed to recover fees and disbursements for legal services rendered to Birketu. Mr Atanaskovic was the solicitor on the record for Atanaskovic Hartnell throughout those proceedings. In judgments delivered in 2019² and 2020,³ Hammerschlag J upheld most of Atanaskovic Hartnell's claim, ultimately awarding it the sum of \$943,912.15 together with interest. Later in 2020,⁴ Hammerschlag J made orders for costs which included an order that Birketu pay Atanaskovic Hartnell's "costs of the proceedings" up to and including a specified date in 2019 "assessed on the ordinary basis".

5 In 2022, Atanaskovic Hartnell filed an application under Div 3 of Pt 7 of the *Legal Profession Uniform Law Application Act 2014* (NSW) for assessment of the costs so ordered by Hammerschlag J. Atanaskovic Hartnell sought in the

1 (2019) 269 CLR 333.

2 *Atanaskovic v Birketu Pty Ltd* [2019] NSWSC 1006.

3 *Atanaskovic v Birketu Pty Ltd* [2020] NSWSC 573; appeal dismissed in *Atanaskovic Hartnell v Birketu Pty Ltd* (2021) 105 NSWLR 542.

4 *Atanaskovic v Birketu Pty Ltd* [2020] NSWSC 779.

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assessment costs in the sum of \$500,408 including \$305,463 for professional fees. Its claim for professional fees was limited to professional fees for work done by its employed solicitors. It made no claim for work done by Mr Atanaskovic or any other partner.

6 The assessment was referred to the third respondent, Mr Castagnet, a costs assessor. Mr Castagnet refused to accede to a request by Birketu that he determine as a preliminary issue whether Atanaskovic Hartnell was entitled to claim professional fees for work done by its employed solicitors. The refusal led to Birketu commencing further proceedings against the current partners of Atanaskovic Hartnell and Mr Castagnet in the Supreme Court of New South Wales in 2022.

7 The further proceedings were heard at first instance by Brereton JA.⁵ His Honour declared that, under the costs order made by Hammerschlag J, the current partners of Atanaskovic Hartnell "are not entitled to recover costs for work done by the employed solicitors of their own firm".

8 The conclusion of legal principle embodied in the declaration made by Brereton JA was in accord with the earlier holding of the Court of Appeal of the Supreme Court of Victoria (Whelan, McLeish and Niall JJA) in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills*⁶ that a litigant law firm was not entitled to recover costs of work done by its own employed solicitors. Brereton JA considered *United Petroleum* to be indistinguishable and correct in principle.⁷

9 Atanaskovic Hartnell appealed to the Court of Appeal of the Supreme Court of New South Wales, which by majority (Kirk JA and Simpson A-JA, Ward P dissenting)⁸ allowed the appeal and set aside the declaration and other orders made by Brereton JA. In their place, it ordered that the further proceedings be dismissed

5 *Birketu v Castagnet* [2022] NSWSC 1435.

6 [2020] VSCA 15.

7 *Birketu v Castagnet* [2022] NSWSC 1435 at [65]-[66].

8 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305.

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with costs. Kirk JA⁹ and Simpson A-JA¹⁰ each considered that the statutory context applicable to an order for costs made by a New South Wales court rendered an order made in favour of an unincorporated law firm one that, consistently with *Bell Lawyers*, entitled the firm to be compensated for legal work done by an employed solicitor of the firm. Each considered *United Petroleum* to be distinguishable by reference to the different statutory context in Victoria.¹¹ Ward P,¹² like Brereton JA, considered *United Petroleum* to be both indistinguishable and correct in principle.

- 10 The question of legal principle involved in this appeal, by special leave from the majority decision of the New South Wales Court of Appeal, is therefore archetypically¹³ a question in respect of which a decision of this Court, as the final appellate court, is required to resolve differences of opinion both between different intermediate courts of appeal and within the one intermediate court of appeal.

The statutory context

- 11 The general power to make an order for costs in civil proceedings was noted in *Bell Lawyers*¹⁴ to be conferred on New South Wales courts¹⁵ by s 98(1) of the *Civil Procedure Act 2005* (NSW). Section 98(1) relevantly provides that "costs are in the discretion of the court", which "has full power to determine by whom, to whom and to what extent costs are to be paid" and "may order that costs are to be awarded on the ordinary basis or on an indemnity basis".

- 12 The "ordinary basis" on which a court may order costs is defined in s 3(1) of the *Civil Procedure Act* to mean the basis of assessing those costs in accordance

9 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 345 [173], 347 [188].

10 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 375 [330], 377 [343], 378 [346].

11 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 361 [259], 368 [295], 379 [354].

12 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 341 [154]-[155].

13 See s 35A(a)(ii) of the *Judiciary Act 1903* (Cth).

14 (2019) 269 CLR 333 at 342 [13].

15 See s 4(1) of the *Civil Procedure Act 2005* (NSW) read with Sch 1.

with Div 3 of Pt 7 of the *Legal Profession Uniform Law Application Act*. An assessment of costs is to be made in accordance with Div 3 of Pt 7 of the *Legal Profession Uniform Law Application Act* on application by either a person who has paid or is liable to pay those costs or a person who has received or is entitled to receive those costs.¹⁶ In conducting the requisite assessment, the costs assessor "must determine what is a fair and reasonable amount of costs for the work concerned".¹⁷

13 The definition of "costs" in s 3(1) of the *Civil Procedure Act* was noted in *Bell Lawyers*¹⁸ to be that "**costs**, in relation to proceedings, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration".

14 The plurality in *Bell Lawyers* highlighted two features of that definition.¹⁹ The first is that the reference to "costs payable" in the "means" part of the definition embodies the "general principle", stated in *Cachia v Hanes*,²⁰ that costs are only awarded "by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation". The second is that the reference to "remuneration" in the "includes" part of the definition encompasses "remuneration for professional services rendered under a contract of service as well as remuneration for professional services rendered under a contract for services" and so puts beyond doubt that "the cost of professional legal services rendered by an employed lawyer" is to be taken to be within the general principle.

15 Those two features were absent from the definition of "costs" in s 3(1) of the *Supreme Court Act 1986* (Vic), considered by the Victorian Court of Appeal in *United Petroleum*.²¹ The absence of those features, however, is an insufficient basis upon which to treat the holding in *United Petroleum* as inapplicable to the statutory context in New South Wales. In the first place, the Victorian Court of Appeal stated in *United Petroleum* that it was "clear" that the answer to whether a

16 Section 74 of the *Legal Profession Uniform Law Application Act*.

17 Section 76 of the *Legal Profession Uniform Law Application Act*.

18 (2019) 269 CLR 333 at 342 [14].

19 (2019) 269 CLR 333 at 350 [44].

20 (1994) 179 CLR 403 at 410, 412. See (2019) 269 CLR 333 at 344 [22].

21 [2020] VSCA 15 at [74], [94].

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litigant law firm is or is not entitled to recover costs of work done by an employed solicitor "does not lie in any differences between the statutory powers to award costs in Victoria and those of New South Wales considered in *Bell Lawyers*" and that the Victorian definition "does not provide any basis for recovery independently of the [applicable] common law principles".²² In the second place, as Ward P pointed out in dissent in the decision under appeal, the Victorian Court of Appeal approached the question in *United Petroleum* "on the premise that costs referable to employed solicitors were capable of falling within the statutory provision for costs in that State".²³

16 It follows that the critical question that arises is whether the general principle embodied in the reference to "costs payable" in the "means" part of the definition of "costs" in s 3(1) of the *Civil Procedure Act* is engaged where an unincorporated law firm acts for itself in litigation. The general principle embodied in the reference to "costs payable" being "a judicial creation of considerable antiquity",²⁴ that critical question is properly characterised and addressed (as it was addressed in *United Petroleum*) as a question of common law principle calling for contemporary judicial resolution.²⁵

The general common law principle, the "general rule" and its supposed "exceptions"

17 To repeat the formulation in *Cachia v Hanes*²⁶ as endorsed in *Bell Lawyers*,²⁷ the general common law principle embodied in the reference to "costs payable" in the definition of "costs" in s 3(1) of the *Civil Procedure Act* is that costs are awarded only by way of indemnity or partial indemnity "for professional legal costs actually incurred in the conduct of litigation". The general common law principle limits the costs that can be ordered in two respects. First, it confines the costs that can be ordered to the costs of professional legal services rendered to a litigant in the conduct of litigation. Second, it confines the costs of professional

22 [2020] VSCA 15 at [94].

23 (2023) 113 NSWLR 305 at 341 [155].

24 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 354 [60].

25 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 355-356 [63].

26 (1994) 179 CLR 403 at 410.

27 (2019) 269 CLR 333 at 344 [22].

legal services rendered to a litigant in the conduct of litigation to those "actually incurred" by the litigant so as, for example, to exclude professional legal services which have been agreed to be rendered to a litigant for free.²⁸

18 The outworking of the general common law principle has the result described by the plurality in *Bell Lawyers*²⁹ that "[a]s a general rule, a self-represented litigant may not obtain any recompense for the value of his or her time spent in litigation". That "general rule", which results from the outworking of the general common law principle, was commonly acknowledged before *Bell Lawyers* to admit of two "exceptions". One, known as the "*Chorley* exception",³⁰ was that a self-represented solicitor could obtain recompense for legal work performed by the solicitor on his or her own behalf. The other, known as the "in-house solicitor rule" or "in-house lawyer rule", was that a litigant represented by a lawyer employed by the litigant could obtain recompense for legal work performed by the lawyer on behalf of the litigant.

19 The unequivocal holding in *Bell Lawyers* was that "the *Chorley* exception is not part of the common law of Australia".³¹ Underlying that holding was recognition that compensation of a litigant solicitor for legal work performed by the solicitor on his or her own behalf was inconsistent not only with the general common law principle by which professional legal costs are confined to those actually incurred by a litigant for legal services rendered to the litigant in the conduct of litigation,³² but also with the fundamental principle of "the equality of all persons before the law".³³ The arguments that had traditionally been proffered as justifications for treating solicitors differently from other litigants who were subject to the general common law principle were noted and rejected. One such argument was that to recompense a litigant solicitor for legal work done by the solicitor encouraged efficiency in that it saved an unsuccessful litigant the added cost of the solicitor engaging another solicitor. The argument was rejected as "not

28 See *Dyktynski v BHP Titanium Minerals Pty Ltd* (2004) 60 NSWLR 203 at 205 [7].

29 (2019) 269 CLR 333 at 339 [1].

30 After *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872.

31 (2019) 269 CLR 333 at 349 [39].

32 (2019) 269 CLR 333 at 344 [22], 347-348 [33].

33 (2019) 269 CLR 333 at 345 [25]. See also at 349 [38].

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self-evidently true"³⁴ and as "contrary to the modern orthodoxy that it is undesirable, as a matter of professional ethics, for a solicitor to act for himself or herself in litigation".³⁵ Another such argument was that the value of the time of a litigant solicitor was more readily quantifiable than that of another litigant. The argument was rejected because it failed to engage with the general common law principle which was "the basis for the general rule"³⁶ and for the further reason that "there is no reason why, in principle, the reasonable value of the time of any litigant cannot be measured".³⁷

20 Nevertheless emphasised in *Bell Lawyers* was that rejection of the *Chorley* exception did not entail any disturbance of the in-house solicitor rule, which was noted by Gageler J to have been established before the introduction of the *Chorley* exception³⁸ and which was described by the plurality in terms of "the well-established understanding in relation to in-house lawyers employed by governments and others, that where such a solicitor appears in proceedings to represent his or her employer the employer is entitled to recover costs".³⁹ The in-house solicitor rule was referred to as being applied in practice "on the footing that the actual cost to [the employer] of the legal services provided by its employed solicitor would not exceed, in any substantial amount, the sum recoverable by [the employer] for professional legal costs".⁴⁰

21 The explanation given in *Bell Lawyers* for the prior and continuing existence of the in-house solicitor rule, notwithstanding the rejection of the *Chorley* exception, involved no tension between the description by the plurality of the in-house solicitor rule as "outside the general rule" that recompense is unavailable to a litigant for the value of his or her time spent in litigation⁴¹ and the

34 (2019) 269 CLR 333 at 343 [18].

35 (2019) 269 CLR 333 at 343 [19].

36 (2019) 269 CLR 333 at 344 [22].

37 (2019) 269 CLR 333 at 345 [24].

38 (2019) 269 CLR 333 at 357 [68].

39 (2019) 269 CLR 333 at 352 [50].

40 (2019) 269 CLR 333 at 351 [47].

41 (2019) 269 CLR 333 at 351 [47].

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description by Gageler J of the in-house solicitor rule as "an application of ... rather than an exception to" the general common law principle by which professional legal costs are confined to those actually incurred by a litigant for legal services rendered to the litigant in the conduct of litigation and from which that general rule results.⁴² That is because the general rule and the in-house solicitor rule are equally applications of the general common law principle. The general common law principle applies to result in the in-house solicitor rule: first, because the costs of legal work done by an in-house solicitor are costs of professional legal services rendered by the employed solicitor to the litigant employer; and second, because those costs are actually incurred by the litigant employer, albeit that they are "not reflected in a severable liability".⁴³

22 Understanding the in-house solicitor rule as an application of the general common law principle by which professional legal costs are confined to those actually incurred by a litigant for legal services rendered to the litigant in the conduct of litigation accords with the explanation given for the in-house solicitor rule in the seminal decision of the Court of Exchequer Chamber in *Attorney-General v Shillibeer*.⁴⁴ Holding that the Crown was entitled to be recompensed for the professional services of its employed solicitor who received an annual salary, Parke B there said that it was "perfectly clear that the Crown incurred [legal] expenses about [the] suit, and that, unless the Crown [was] compensated by payment of the ordinary costs, there would be no mode of compensation; because it [was] impossible to say what proportion the expense of conducting [the] particular suit would bear to the entire salary for the year, until the end of the year, when all the suits [were] known, and when the expense of each [could] be calculated".⁴⁵ As later summed up by Nicholls CJ in *The "Bengairn"*,⁴⁶ the Crown was "not in any way getting its cases conducted free of cost but ... paid salaries [to] its officers who conduct its cases for it" such that the Crown was "in the position of having paid the costs and [was] entitled to recover them from the unsuccessful party by way of indemnity".

42 (2019) 269 CLR 333 at 357 [68].

43 (2019) 269 CLR 333 at 357 [68].

44 (1849) 4 Ex 606 [154 ER 1356].

45 (1849) 4 Ex 606 at 612-613 [154 ER 1356 at 1359].

46 (1916) 12 Tas LR 26 at 27.

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23 Rejection of the *Chorley* exception in *Bell Lawyers* has therefore left the general common law principle embodied in the reference to "costs payable" in the definition of "costs" in s 3(1) of the *Civil Procedure Act* relevantly unqualified. The costs that can be the subject of a costs order in the application of the common law principle are the professional legal costs actually incurred by the party in whose favour the costs order is made for legal services rendered to that party in or in relation to the proceedings in which the order is made.

Application of the general common law principle

24 For so long as the *Chorley* exception was accepted to have been part of the common law of Australia, it seems not to have been doubted that a litigant solicitor to whom costs were awarded, being entitled to obtain recompense for the solicitor's own legal work, could also obtain recompense for the legal work of the solicitor's employees. The entitlement of the solicitor extended to work "done by his own clerk".⁴⁷

25 The rejection of the *Chorley* exception in *Bell Lawyers* means that the general common law principle that costs are awarded by way of indemnity or partial indemnity for professional legal costs actually incurred in the conduct of litigation now falls to be applied to litigant solicitors or unincorporated law firms in the same way as it applies to other litigants. Like any other litigant, the solicitor or firm cannot obtain recompense for their own legal work. And like any other litigant, the solicitor or firm can obtain recompense for legal work done by their employees, on the basis that the expenses of the salaries and overheads associated with having that legal work done by their employees constitute professional legal costs actually incurred by the solicitor or firm.

26 The proposition that the general common law principle applies to a litigant solicitor or unincorporated law firm in the same way as it applies to any other litigant follows from the general common law principle now being relevantly unqualified and is consistent with the emphasis placed in *Bell Lawyers* on the fundamental principle of equality of all persons before the law. The proposition is not inconsistent with the plurality in *Bell Lawyers* having left open a question as to the position of an incorporated legal practice of which the sole employed

47 See *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 344 [21], quoting *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877. See also *Cachia v Hanes* (1994) 179 CLR 403 at 409-410.

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solicitor is also the sole director and shareholder.⁴⁸ As has since been recognised,⁴⁹ the question left open was focused on the separate legal personality of the incorporated legal practice. The resolution of that question, one way or the other, could have no bearing on the present question of the application of the general common law principle.

27 To adopt the approach preferred by the Victorian Court of Appeal in *United Petroleum* and by Brereton JA and Ward P in the present case, and thereby to deny the entitlement of a litigant solicitor or unincorporated law firm to recover costs of work done by their employed solicitors, would be to depart from the application of the general common law principle. Moreover, it would be to depart from the principle in a manner which would run counter to the fundamental principle of equality which underlay the rejection of the *Chorley* exception in *Bell Lawyers*. It would replace the advantage afforded by the *Chorley* exception to litigant solicitors in comparison to other litigants with a disadvantage imposed on litigant solicitors in comparison to other litigants.

28 The considerations proffered in support of the alternative approach are insufficient to justify its adoption. There is no doubt that a distinction can be drawn between solicitors who act in litigation for themselves and unincorporated law firms who are represented in litigation by one or more partners, on the one hand, and litigants who are represented in litigation by their employed solicitors, on the other hand, insofar as the former can be described as "self-represented" whereas the latter can be described as neither self-represented nor unrepresented.⁵⁰ There is no difficulty accepting that solicitors in the employment of self-represented solicitors or unincorporated law firms can be subject to direct supervision by their employers in doing legal work, including in the exercise of their professional judgment, to an extent to which solicitors employed by other litigants cannot.⁵¹ It can also be accepted that "there is a risk of a lack of objectivity and professional

48 (2019) 269 CLR 333 at 352-353 [51]-[53].

49 See *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [15]-[16], [94], [106]-[109], [162]; *Spencer v Coshott* (2021) 106 NSWLR 84 at 102 [97]-[101].

50 See *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [102]-[103]; *Birketu v Castagnet* [2022] NSWSC 1435 at [50]-[51].

51 See *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 342 [158].

detachment when lawyers appear for themselves in litigation".⁵² And it can further be accepted that the availability of recompense for work done by employed solicitors has the potential to create an incentive for some solicitors and unincorporated law firms to self-represent despite the unavailability of recompense for legal work they do themselves.⁵³ The short point is that none of those considerations impacts on the general common law principle of costs being awarded to a litigant by way of indemnity or partial indemnity for professional legal costs actually incurred.

29 It is not any part of the function of making or withholding an order for costs to encourage or discourage representation of a litigant or to encourage professional detachment or independence from a litigant beyond that which is required by the legal and ethical framework for the provision of legal services. The rejection in *Bell Lawyers* of the notion that lawyers should be encouraged to act for themselves in litigation as a justification for the *Chorley* exception's departure from the general common law principle of costs being awarded by way of indemnity or partial indemnity for professional legal costs actually incurred does not entail acceptance of the notion that lawyers or law practices should be discouraged from having employed solicitors act for them by denying them costs.

30 Nor can it be said, without blurring the distinction between a solicitor or firm and its employees and ignoring the reality of the salaries and overheads attributable to legal work done by employed solicitors, that "to allow a solicitor to recover costs referable to the work done by its employees would recompense that solicitor for its time spent in the litigation"⁵⁴ or that "[t]o 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".⁵⁵ The time spent on the doing of legal work that is capable of recompense is not that of the solicitor or firm but that of employees of the solicitor or firm in respect of which the solicitor or firm incurs

52 See *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [117]; *Birketu v Castagnet* [2022] NSWSC 1435 at [57]-[58].

53 See *Birketu v Castagnet* [2022] NSWSC 1435 at [41]-[42].

54 See *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [100].

55 See *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 343 [161].

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expenses of remuneration and overheads. The recompense is to the solicitor or firm for professional legal costs thereby actually incurred by the solicitor or firm.

Quantification

31 Finally, there is a need to respond to an argument that to allow litigant solicitors and unincorporated law firms to obtain recompense for legal work done by their employees would violate the general common law principle that costs are awarded only by way of indemnity or partial indemnity for professional legal costs actually incurred in the conduct of litigation insofar as they are in the business of litigation and insofar as it would enable them to profit from the conduct of their own litigation. On the approach described above, which is concerned with professional legal costs actually incurred by way of expenses and remuneration, the argument is properly directed not to the availability of such recompense by way of an order for costs but to its quantification by way of assessment.

32 Concern that awards of costs for legal work done by solicitors employed by litigants should not result in profit to litigants is not confined to concern about employed solicitors of litigant solicitors or unincorporated law firms. The concern has repeatedly been raised in relation to other employer-litigants⁵⁶ and has repeatedly been addressed in the broader context of the outworking of the general common law principle in the in-house solicitor rule.

33 The plurality in *Bell Lawyers* noted that "the traditional approach has been to award costs on a basis comparable to the costs which would have been incurred and allowed ... had an independent solicitor been engaged"⁵⁷ on the "assumption", or more accurately the "sensible and reasonable presumption",⁵⁸ that application of the approach will not ordinarily result in an employer-litigant obtaining more than an indemnity for expenses actually incurred.

56 See *Galloway v Corporation of London* (1867) LR 4 Eq 90 at 96; *Irving v Gagliardi; Ex parte Gagliardi [No 2]* (1894) 6 QJL 200 at 201; *Henderson v Merthyr Tydfil Urban District Council* [1900] 1 QB 434 at 437; *In re Eastwood, Deceased* [1975] Ch 112 at 124-125.

57 (2019) 269 CLR 333 at 351 [47], quoting *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 at 337 [11].

58 (2019) 269 CLR 333 at 351 [48], quoting *In re Eastwood, Deceased* [1975] Ch 112 at 132.

34 The presumption on which the traditional approach is founded has never been treated as more than a presumption of fact, it being open to an objecting party to show that application of the approach in a particular case would in fact result in the employer-litigant receiving more than an indemnity for expenses actually incurred.⁵⁹

35 In the application of the traditional approach in the context of an assessment of costs in accordance with Div 3 of Pt 7 of the *Legal Profession Uniform Law Application Act*, it has rightly been said that "[a]lthough there may be cases where it would be open to an assessor to investigate the issue of the costs of [an employer-litigant], so as to ensure that the principle of indemnity is not infringed, this task is not one which should be undertaken without a good and sufficient cause".⁶⁰ However, the mere fact that the costs to be assessed are the costs of legal work done by employees of a litigant solicitor or unincorporated law firm cannot be sufficient to trigger such an investigation.

36 Although this appeal was argued, and should be decided, by reference to the traditional approach concerning professional legal costs actually incurred by way of expenses, there may be an alternative approach for the recovery of costs involving a different conception of "indemnity" which, in other cases, could have a different effect on quantification. In particular, in *Cachia v Hanes*⁶¹ the majority described costs as "reimbursement for work done *or* expenses incurred". The former part of that phrase might be taken to include the reasonable value of non-gratuitous legal work done by another such that, like an award of interest on a judgment sum as an indemnity for being kept out of money even if the judgment sum would not have been used by the recipient to accrue interest,⁶² the award of costs as an indemnity for work done would not be concerned with expenses incurred or remuneration paid and, therefore, would not be rebuttable by proof that expenses or remuneration were less than the reasonable value of the work. The costs would be awarded in the same manner as a quantum meruit, upon which "usually the value of services is assessed by reference to charges commonly made

59 *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 at 339 [24], quoting *Henderson v Merthyr Tydfil Urban District Council* [1900] 1 QB 434 at 437. See also *In re Eastwood, Deceased* [1975] Ch 112 at 132.

60 *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 at 340 [26].

61 (1994) 179 CLR 403 at 410 (emphasis added).

62 *Jefford v Gee* [1970] 2 QB 130 at 146; *Haines v Bendall* (1991) 172 CLR 60 at 66.

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by others for like services".⁶³ In the absence of any argument or any quantification issues in this case, it is unnecessary to consider this point further.

Conclusion

37 The decision of the Victorian Court of Appeal in *United Petroleum* must be overruled.

38 The appeal must be dismissed with costs.

63 See *South Australian Harbors Board v South Australian Gas Co* (1934) 51 CLR 485 at 501; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 602 [92], 645 [203].

39 STEWARD J. In *Bell Lawyers Pty Ltd v Pentelow*,⁶⁴ a majority of this Court abolished an exception to the general rule that a self-represented litigant may not obtain any recompense for the value of his or her time spent in litigation, known as "the *Chorley* exception".⁶⁵ The exception was in favour of lawyers. Thereafter, subject to another exception in favour of government lawyers and certain in-house counsel, a solicitor who represented him or herself, in whose favour a costs order was made, could not recover the value of any time he or she spent in litigating a dispute. The issue now for determination is whether a costs order in favour of such a solicitor entitles him or her to recover recompense for the value of an employee's work on that dispute which is, in substance, referable to the salaries and overheads paid by the solicitor in respect of that work. For the reasons which follow, he or she cannot recover such costs. Any other conclusion would make a mockery of what was decided in *Bell Lawyers*, and would, in substance, resurrect the *Chorley* exception.

40 I gratefully adopt the majority's description of the facts, the proceedings below, and the issues arising in this appeal.

The decision in *Bell Lawyers*

41 The decision in *Bell Lawyers* concerned the *Chorley* exception whereby lawyers, and only lawyers, acting for themselves in litigation could recover the value of the time they had spent on a court proceeding. *Bell Lawyers* established two propositions of law. First, it recognised that the *Chorley* exception in favour of lawyers was "an affront to the fundamental value of equality of all persons before the law" and it was therefore "anomalous".⁶⁶ It thus had to go. Secondly, the abrogation of the *Chorley* exception did not disturb "the well-established understanding in relation to in-house lawyers employed by governments and others, that where such a solicitor appears in proceedings *to represent* his or her employer the employer is entitled to recover costs in circumstances where an ordinary party would be so entitled by way of indemnity".⁶⁷

42 The plurality in *Bell Lawyers* then considered the position of a solicitor employed by an incorporated legal practice of which he or she was the sole shareholder and director. Such a person stood in a different position from that of the in-house lawyer described above. That was because it might be queried whether

64 (2019) 269 CLR 333.

65 The exception was authoritatively established as a rule of practice in *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872.

66 (2019) 269 CLR 333 at 339-340 [3].

67 (2019) 269 CLR 333 at 352 [50] (emphasis added).

the solicitor had "sufficient professional detachment to be characterised as acting in a professional legal capacity when doing work for the incorporated legal practice".⁶⁸ It followed that it might also be queried whether costs claimed by that incorporated legal practice for the work of that solicitor fell "within the expansive view of indemnity that has been adopted in the authorities".⁶⁹ However, the plurality reached no final conclusion about the matter.

43 Nonetheless, two features of the in-house lawyer "understanding" should be noted. First, costs are recovered for the act of representation by the lawyer on behalf of the government or corporation. Secondly, a degree of "professional detachment" is relevant to the ambit or reach of the indemnity now afforded by s 98 of the *Civil Procedure Act 2005* (NSW) ("the Civil Procedure Act").

The decision in *United Petroleum*

44 In *United Petroleum Australia Pty Ltd v Herbert Smith Freehills*,⁷⁰ the firm Herbert Smith Freehills ("Freehills") acted for itself in two separate proceedings. It was the solicitor on the record in each case and was ultimately successful in both matters. It sought to recover costs in respect of work performed by its employee solicitors and other staff, but not with respect to work undertaken by any of the partners of the firm. Freehills was a traditional firm of solicitors; that is, it was an unincorporated partnership.

45 The Court of Appeal of the Supreme Court of Victoria unanimously held that Freehills could not recover these costs. It reached that conclusion by an application of *Bell Lawyers*. For the reasons that follow, the reasoning of the Court of Appeal is entirely correct.

46 The key to the reasoning of the Court was the fact that the partnership of Freehills was the solicitor on the record. The firm was thus truly self-represented. No-one else represented it (save for external counsel). In particular, the employee solicitors did not represent the firm; they were part of the firm which employed them. Their time was the firm's time; and when those employee solicitors worked on the firm's own litigation, the firm lost the value of those hours which might otherwise have been profitably utilised in working on matters for clients. In other words, from the perspective of the self-represented law firm, no material difference existed between the time of a partner and the time of an employee solicitor spent

68 (2019) 269 CLR 333 at 352 [51].

69 (2019) 269 CLR 333 at 352 [51].

70 [2020] VSCA 15.

on working on the two cases. Either way, it was the firm's time. Thus, the Court of Appeal observed:⁷¹

"Freehills was a self-represented litigant in the proceedings. The Freehills partnership was a party, with each of the partners jointly and severally liable, and the partnership was also the solicitor on the record. The employed solicitors did not represent their employer. They worked on the relevant matters as employees of the firm and under the supervision of partners who had overall responsibility for the carriage of the litigation.

Would recovery of costs in respect of work done by employees amount to recompense for time spent by Freehills in the litigation? As a matter of both substance and form, the work of the employee solicitors was done for and on behalf of the partnership. The time of the employed solicitors was time that the firm had available to deploy as it saw fit. The same is true of the work and time of other employees."

47 The exception for in-house lawyers did not apply to the Freehills employees. That is because, subject to specific statutory exceptions,⁷² when a government department or a corporation uses an employed solicitor for litigation, it is the name of that solicitor which goes on the record, not the name of the government department or corporation. That solicitor then *represents* the department or the corporation. Neither the department nor the corporation is, in this sense, a self-represented litigant. As the Court of Appeal said:⁷³

"The applicants rightly point out that a government, government agency or corporate litigant may be represented in litigation by employed solicitors. In those cases the party is separate and distinct from the solicitor on the record. In no meaningful sense would a government or a corporation, represented by an employed solicitor, be described as a self-represented litigant. That is not true of Freehills in the present proceedings. The firm is the solicitor on the record, and the litigation is under the control of one of its partners, albeit no claim for costs is sought in respect of the partners."

48 In that respect, the Court of Appeal further stated⁷⁴ – correctly – that this distinction was recognised by the plurality in *Bell Lawyers* when their Honours

71 [2020] VSCA 15 at [97]-[98] (footnote omitted).

72 For example, the Commissioner of Taxation may appear on the record: *Taxation Administration Act 1953* (Cth), s 15.

73 [2020] VSCA 15 at [102].

74 [2020] VSCA 15 at [104].

observed, referring to lawyers employed by governments and others, that "such a solicitor appears in proceedings to represent his or her employer".⁷⁵

49 The importance in litigation of having a solicitor on the record should not be underestimated. It is an important focal point for the court. As Pring J said in *Ex parte Browne*:⁷⁶

"[T]he solicitor on the record is the only person whom the Court will recognise as the solicitor acting in the case, and the reason, I think, is that he is the only person who is responsible to the Court, responsible to his client, and responsible to the other party to the litigation."

50 The importance of having a solicitor on the record also explains why a corporation generally cannot take any step in a proceeding without a solicitor, unless the leave of the court is first obtained.⁷⁷

51 In contrast, none of the employee solicitors of Freehills, nor any of the employee solicitors of Atanaskovic Hartnell, were the solicitors on the record. Nor should they have been. As Barrett J observed in *Kelly v Jowett*:⁷⁸

"Solicitors in sole practice or in partnership should not allow an employed solicitor to be the solicitor on the record in proceedings, even if the employed solicitor holds an unrestricted practising certificate. As McColl JA has observed, the client does not retain the employed solicitor; the retainer is with the employer. The solicitor retained has clear and direct responsibility to the client for the execution of the retainer. Personal assumption of the role of solicitor on the record and the specific relationship with the court that it entails are part of that responsibility, even though day-to-day work may be delegated to an employee."

52 Bound up with the concept of a lawyer who represents another and is subject to strong ethical duties and constraints is the issue of professional detachment. Plainly, it is now accepted that an in-house lawyer who represents his or her department or corporation does so with sufficient professional detachment, especially once he or she is on the record. That is why the notion of professional

75 (2019) 269 CLR 333 at 352 [50].

76 (1913) 13 SR (NSW) 593 at 597, Gordon and Ferguson JJ agreeing.

77 See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 1.17; *Uniform Civil Procedure Rules 2005* (NSW), r 7.1.

78 (2009) 76 NSWLR 405 at 425 [96].

detachment was referred to in *Bell Lawyers*.⁷⁹ The lack of professional detachment is simply another way of recognising the obverse position; namely that when employee solicitors work at the direction of, or under the supervision of, a firm, then that is the work of the firm. The firm does not cease to be self-represented, when it (or one or more of its partners) is the solicitor on the record, whenever it uses its own employee to undertake legal work in relation to relevant proceedings. There is no relevant difference whether the partnership of the firm, or an individual partner, is named as the solicitor on the record.

53 As the Court of Appeal in *United Petroleum* also observed:⁸⁰

"Although not decisive in *Bell Lawyers*, it emerges clearly enough that there is a risk of a lack of objectivity and professional detachment when lawyers appear for themselves in litigation. Although there may be a degree of separation within the firm, and each lawyer has their own professional obligations, nevertheless the person ultimately responsible for the legal conduct of the litigation is likely to be a partner in the firm with a direct personal interest in the outcome. That was so in this case."

54 The foregoing observation applies equally to this appeal.

A relationship of representation

55 Both the power to award costs contained in s 98 of the Civil Procedure Act (and its definition of "costs" in s 3(1)), and the equivalent power under s 24 of the *Supreme Court Act 1986* (Vic) ("the Supreme Court Act") (and its definition of "costs" in s 3(1)), are very general and broad powers. Whilst the power to award costs in each of New South Wales and Victoria is statutory, it is informed by common law principles relating to the award of costs. It was the common law that created the *Chorley* exception and it was the common law that abolished it.⁸¹

56 Thus, the breadth of the discretion conferred by both ss 98 and 24 is informed by the common law relating to the power to award costs. Because of what was said by this Court in *Bell Lawyers*, as recognised by the Victorian Court of Appeal in *United Petroleum*, it is an implicit but nonetheless fundamental principle that, where recompense is sought for a person's own labour and skill, costs are awarded for the act of representation in litigation. Thus, when s 24 of the Supreme Court Act refers to "costs of and incidental to all matters in the Court", it is

79 (2019) 269 CLR 333 at 352 [51]; see also 343 [18].

80 [2020] VSCA 15 at [117].

81 See *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [94].

referring to the costs of representing another. The same conclusion should be reached about the meaning of the phrase "costs payable in or in relation to the proceedings" in s 3(1) of the Civil Procedure Act. In this way, the law draws a clear distinction between a self-represented litigant and a represented one when it comes to recompense for a person's own labour and skill. As the Court of Appeal noted in *United Petroleum*:⁸²

"It seems to us that all of the members of the Court in *Bell Lawyers* recognised a distinction between the position where solicitors who are parties represent themselves, and the position where a party is represented by an employed solicitor. In the latter case the party is not unrepresented or self-represented. It is represented by the employed solicitor, and an issue which has then arisen at times is what amount of costs should be recoverable given the employment relationship."

57 Here, it should be concluded that the labour and skill of the employee solicitors who worked on each proceeding was relevantly the labour and skill of the firm *Atanaskovic Hartnell*.

Remuneration

58 Unlike the definition of "costs" in the Supreme Court Act, the definition of "costs" in the Civil Procedure Act expressly refers to "remuneration". A majority of the New South Wales Court of Appeal below thought that this was important, reasoning that the term plainly captured the salary paid to all employee solicitors, whether by a firm, a government department or a corporation.⁸³ With great respect, I disagree. As both the primary judge and Ward P recognised below, the reasoning of the Victorian Court of Appeal in *United Petroleum* assumed that the costs referable to employee solicitors were capable of being "costs" within the meaning of s 3(1) of the Supreme Court Act.⁸⁴ The better view is that the word "remuneration" aptly captures the understanding concerning employee solicitors of government departments and corporations, and no more.

Anomalous outcome

59 The substantive effect of the Court of Appeal's decision below is to restore the *Chorley* exception for firms of solicitors. They can avoid its abolition and still

82 [2020] VSCA 15 at [103].

83 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 347 [186]-[188] per Kirk JA, 376-377 [338], 377 [342] per Simpson A-JA.

84 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 341 [155] per Ward P; *Birketu v Castagnet* [2022] NSWSC 1435 at [48] per Brereton JA.

be the solicitors on the record, simply by using their own employees to do the required work. They can thereby recover some or all of the salary paid to a given employee, which they otherwise would have been liable to pay anyway. That is an anomalous outcome.

60 The Victorian Court of Appeal was of the same view in *United Petroleum*. Their Honours concluded:⁸⁵

"Ultimately, we have come to the conclusion that to treat employee solicitors of a legal firm as falling within the 'well-established understanding' would considerably undermine *Bell Lawyers*. It would extend the 'well-established understanding' to cases of self-represented legal firms and perpetuate a significant degree of special treatment not accorded to non-lawyer litigants, referred to in *Chorley* as 'ordinary litigants'.

In substance it would, anomalously, allow firms of solicitors to recover for their own time spent in the litigation. It would also mean that a legal practice with employees could recover fees when a sole practitioner could not."

61 In the New South Wales Court of Appeal below, Ward P, whose reasons I also respectfully agree with, was of the same view. Her Honour said:⁸⁶

"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, in effect reverting to a position where solicitor litigants are in a privileged position compared to other self-represented litigants (inconsistently with the policy of equality extolled in *Bell Lawyers*)."

62 The conclusion reached in *Bell Lawyers* should not now be undermined.

Disposition

63 I would allow this appeal.

85 [2020] VSCA 15 at [119]-[120].

86 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 343 [161].

64 JAGOT J. Can an unincorporated law firm in a proceeding to which the law firm is a party and in which the solicitor on the record⁸⁷ is a partner of the law firm recover as costs of the proceeding the money equivalent to the value of the time that the law firm's employed solicitors spent in the conduct of the proceeding?

65 Before the decision of this Court in *Bell Lawyers Pty Ltd v Pentelow*,⁸⁸ the answer would have been "yes" because it was commonly assumed that Australian law included the so-called "*Chorley* exception"⁸⁹ to the general rule that a person who is not legally represented and instead "represents themselves" or is "self-represented" in a proceeding cannot recover any costs on account of the money equivalent to the value of the time spent by them *or their employees* in conducting the proceeding.⁹⁰ The *Chorley* exception was that a solicitor who "represents themselves" or is "self-represented" in a proceeding could recover costs for the money equivalent to the value of the time spent by them *and their employees* in conducting the proceeding.⁹¹ The justification for this distinction as between a "self-represented" non-solicitor and a "self-represented" solicitor was said to arise from the fact that "[p]rofessional [legal] skill and labour are recognised and can be measured by the law ... Professional [legal] skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs; and it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit [them] to charge for it when it is done by [their] own clerk."⁹² In contrast to the professional legal skill of the solicitor and the solicitor's "clerk", it was said that the "private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual."⁹³

87 See the Dictionary and rr 7.1 and 7.24 of the *Uniform Civil Procedure Rules 2005* (NSW).

88 (2019) 269 CLR 333.

89 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872.

90 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 339 [1], 344 [21]. See also *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877; *Cachia v Hanes* (1994) 179 CLR 403 at 412; *Birketu v Castagnet* [2022] NSWSC 1435 at [43]-[46].

91 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 339 [1], 344 [21], quoting *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877. See also *Cachia v Hanes* (1994) 179 CLR 403 at 409-410.

92 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877.

93 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877.

66 In *Bell Lawyers* this Court held that the common law of Australia did not recognise (or should abolish) the *Chorley* exception to the general rule that a "self-represented" litigant cannot recover as costs of the proceeding the money equivalent to the value of their time or the time of their employees.⁹⁴ Kiefel CJ, Bell, Keane and Gordon JJ considered that none of the purported justifications for the *Chorley* exception were persuasive. Accordingly: (a) it was not "self-evidently true" that "it is somehow a benefit to the other party that a solicitor acts for himself or herself, because the expense to be borne by the losing party can be expected to be less than if an independent solicitor were engaged";⁹⁵ (b) "the view that solicitors should be encouraged to act for themselves is contrary to the modern orthodoxy that it is undesirable, as a matter of professional ethics, for a solicitor to act for himself or herself in litigation";⁹⁶ and (c) it was not the case that the general rule is based on "the notion that the 'private expenditure of labour and trouble by a layman cannot be measured'"⁹⁷ but rather that costs recoverable in a proceeding are "awarded by way of ... partial indemnity ... for professional legal costs actually incurred in the conduct of litigation".⁹⁸

67 Their Honours also referred to the observation of Mason CJ, Brennan, Deane, Dawson and McHugh JJ in *Cachia v Hanes* about the asserted rationale for the *Chorley* exception that "[t]hose assertions that it would be 'unadvisable' or 'absurd' to refuse to allow a solicitor who acts for himself 'to charge' for the work done by himself or his clerk ignore the questionable nature of a situation in which a successful litigant not only receives the amount of the verdict but actually profits from the conduct of the litigation".⁹⁹ Kiefel CJ, Bell, Keane and Gordon JJ said that "[t]hat possibility is unacceptable in point of principle".¹⁰⁰ They also concluded that to "act upon a principle that evidence enabling the quantification of the value of the time of non-solicitor litigants in person should not be received or acted upon by the courts is to exalt the position of solicitors in the administration

94 (2019) 269 CLR 333 at 340 [3], 356 [63], 369 [99].

95 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 343 [18].

96 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 343 [19].

97 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 344 [22].

98 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 344 [22], quoting *Cachia v Hanes* (1994) 179 CLR 403 at 410.

99 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 344-345 [23], quoting *Cachia v Hanes* (1994) 179 CLR 403 at 412.

100 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 347 [32].

of justice to an extent that is an affront to equality before the law".¹⁰¹ That affront to equality led to the conclusion that "the *Chorley* exception is not part of the common law of Australia".¹⁰²

68 In answer to the submission that non-recognition (or abolition) of the *Chorley* exception would lead to "serious inconvenience ... in relation to the use of in-house solicitors by governments and corporations, including incorporated legal practices", Kiefel CJ, Bell, Keane and Gordon JJ said that the submission "fails to appreciate that in relation to the use of in-house solicitors, such arrangements have been treated as being outside the general rule because it is accepted that the recovery of the professional costs of in-house solicitors enures by way of indemnity to the employer".¹⁰³ Leaving the position of an incorporated legal practice "that is a vehicle for a sole practitioner" to the legislature to resolve,¹⁰⁴ their Honours said:¹⁰⁵

"A decision by this Court that the *Chorley* exception is not part of the common law of Australia would not disturb the well-established understanding in relation to in-house lawyers employed by governments and others, that where such a solicitor appears in proceedings to represent his or her employer the employer is entitled to recover costs in circumstances where an ordinary party would be so entitled by way of indemnity."

69 Gageler J reasoned that the common assumption that the *Chorley* exception formed part of the common law of Australia was in fact correct.¹⁰⁶ His Honour considered that the time had come for that part of the common law of Australia to be abandoned for the reasons given by Kiefel CJ, Bell, Keane and Gordon JJ.¹⁰⁷ Gageler J also explained that:¹⁰⁸

101 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 345 [24].

102 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 349 [39].

103 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 351 [46]-[47].

104 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 352-353 [53].

105 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 352 [50].

106 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 355 [63].

107 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 355-356 [63].

108 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 357 [68] (footnotes omitted).

"Recovery of costs by a party using an employed solicitor predated introduction of the *Chorley* exception. The better view, explained in a number of cases ... is that recovery of costs by a party using an employed solicitor is an application of the general principle rather than an exception to it. The general rule is engaged on the basis that the costs of using the employed solicitor are still awarded as indemnity for professional legal costs actually incurred in the conduct of litigation by the employer who is a party to the litigation, albeit that those professional legal costs are incurred in the form of an overhead and are therefore not reflected in a severable liability."

70 Nettle J, having noted that the *Chorley* exception applied only to solicitors and not to barristers,¹⁰⁹ concluded that while the exception was "undesirable"¹¹⁰ there was neither need nor justification for its abolition, the exception reflecting the underlying principles that "only a solicitor may lawfully charge for legal work; the work which the solicitor undertakes on his or her own behalf is the kind of legal work for which only a solicitor may lawfully charge; and the work which the lay litigant undertakes on his or her own behalf is not".¹¹¹ Nettle J identified the "real problem" with the *Chorley* exception as being "that it is productive of a situation in which a successful litigant is permitted not only to recover the amount of the verdict but also to profit from the conduct of the litigation".¹¹² Nettle J also considered that the abolition of the *Chorley* exception would undermine the "in-house solicitor rule" that "firms of solicitors, corporations and government and semi-government agencies that employ solicitors may, under the *Chorley* exception, recover the taxed costs of the work performed by such employee solicitors in representing their employers".¹¹³

71 Edelman J agreed that the *Chorley* exception should be abolished.¹¹⁴ His Honour also observed that:¹¹⁵

"Although an unrepresented solicitor who is party to an action is often described as 'self-represented', the solicitor, like any other unrepresented

109 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 358 [70].

110 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 358 [71].

111 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 358 [71].

112 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 358 [71].

113 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 359 [75].

114 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 367 [93], 369 [99].

115 *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 367 [92].

litigant, does not 'represent herself or himself'. The solicitor's role as an agent for another is absent."

72 The reasoning in *Bell Lawyers* did not directly address the question determinative of the present proceeding. The *Chorley* exception applied to enable a solicitor who was a party to a proceeding in which the solicitor was "self-represented" to recover as costs of the proceeding the money equivalent to the time spent in the proceeding by both the solicitor and the solicitor's employees. In view of that, this Court's conclusions in *Bell Lawyers* that the *Chorley* exception was not part of the common law of Australia (or should be abolished), but that the "in-house solicitor rule" remained, mean that the question in the present case is best conceived of as hinging on whether this kind of case (in which an unincorporated law firm seeks to recover costs in relation to its employed solicitors) is to be assimilated to the *Chorley* exception to the extent the exception applied to employees of a solicitor representing themselves or, alternatively, is to be assimilated to the "in-house solicitor rule". As will become apparent, following the decision in *Bell Lawyers*, lower courts confronted with claims for costs that previously would have been allowed under the *Chorley* exception have generally disallowed such claims on the basis that, in most cases, and consistent with principle, the recovery of costs by a law firm for the time of their employed solicitors was to be assimilated to the now-discarded *Chorley* exception and not to the "in-house solicitor rule".

73 As will be explained, the approach of those courts is correct. The majority in the Court of Appeal of the Supreme Court of New South Wales (Kirk JA and Simpson A-JA, Ward P dissenting) erred in allowing an appeal against the orders of the primary judge (Brereton JA) which declared that the unincorporated law firm in this case was "not entitled to recover costs for work done by the employed solicitors of their own firm".¹¹⁶ The majority was in error because the unincorporated law firm in this case was "self-represented" in the proceeding. The solicitor on the record in this case (meaning "in relation to any party to proceedings ... the solicitor ... named as the party's legal representative in the documentation for the proceedings")¹¹⁷ was a partner of the party unincorporated law firm. The partner represented the law firm as its solicitor on the record as required under the *Uniform Civil Procedure Rules 2005* (NSW) ("the UCPR").¹¹⁸ The party unincorporated law firm therefore being "self-represented", the law firm's employed solicitors are not within the scope of the "in-house solicitor rule" as it must be understood after the decision in *Bell Lawyers*.

116 *Birketu v Castagnet* [2022] NSWSC 1435 at [68].

117 Dictionary to the *Uniform Civil Procedure Rules 2005* (NSW).

118 *Uniform Civil Procedure Rules 2005* (NSW), rr 7.1, 7.24.

74 As a consequence of the non-recognition (or abolition) of the *Chorley* exception in *Bell Lawyers*, and consistent with the motivating principles that led to the outcome in that case, the "in-house solicitor rule" should now be understood to apply to a legal practitioner employed by, contracted to, or otherwise in what may be described as an "in-house" legal relationship with any entity – be that entity a government, government body, or corporation as previously held to be the subject of the rule, or a natural person, partnership, unincorporated law firm, or incorporated legal practice – where, as a matter of substance and not mere form, the legal practitioner (and other legal practitioners working with or under the supervision of that legal practitioner) who is appointed as the party's legal representative for the purposes of the proceeding is *legally representing* the entity as the client. In the present case, as the solicitor on the record in the proceeding was a partner of the party unincorporated law firm, that partner was conducting the proceeding as the client. Therefore, the employed legal practitioners of the unincorporated law firm performing legal work under the supervision of that partner were necessarily conducting the proceeding in the same capacity as that of the partner of the party unincorporated law firm. There was no lawyer-client "relationship" between the partner and the unincorporated law firm.¹¹⁹ Therefore, there could be no such lawyer-client relationship between the employed solicitors of the unincorporated law firm performing legal work under the supervision and direction of the partner as the client. The facts are therefore not within any conception of the "in-house solicitor rule". Rather, they are within the *Chorley* exception, which does not form (or no longer forms) part of the common law of Australia.

75 This proposed contemporary formulation of the "in-house solicitor rule" applies to enable recovery as costs of the money equivalent to the value of the time that a legal practitioner spent in the conduct of the proceeding if the legal practitioner – and other legal practitioners with whom the legal practitioner is working or whom they are supervising – has been appointed by an entity as the legal representative of the entity, the entity being the client of that legal representative, whether that legal practitioner is employed by, contracted to, or otherwise in a legal relationship with the entity. This formulation is necessitated by the outcome of, and the motivating reasoning in, *Bell Lawyers*.

76 If the facts of the present case are assimilated to the "in-house solicitor rule", then an unincorporated law firm (that is, a partnership) which is "self-represented" in a proceeding (because one of the partners was the solicitor on the record) would be able to recover as costs of the proceeding the money equivalent to the value of the time that solicitors employed by the law firm spent on the proceeding – despite the law firm being "self-represented". In contrast, a government, government body, corporation or other relevant entity that is represented in substance by one of its

119 See, eg, *Giurina v Director of Public Prosecutions* [2020] VSC 1 at [79]. See also *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 367 [92].

employed legal practitioners cannot be said to be "self-represented". The inequality of treatment between a "self-represented" solicitor and a "self-represented" non-solicitor from which the reasoning in *Bell Lawyers* turned its face would thereby be reintroduced in large part. The "self-represented" solicitor alone would be able to recover as costs of the proceeding the money equivalent to the value of the time that solicitors employed by the solicitor spent in the conduct of the proceeding. That anomaly, and the potential for profiteering by lawyers representing themselves, is avoided if it is recognised that the principle underlying the "in-house solicitor rule" is that costs are recoverable by way of partial indemnity where the costs are incurred by a client who has appointed a legal practitioner to represent them. It is that fact, of legal representation separate from the client, which should be determinative of the potential for costs recovery. That fact may be established in respect of any entity appointing a legal practitioner for the purpose of representing the entity in a proceeding if the legal practitioner is acting as a legal representative of the entity as the client (whether the legal practitioner is employed by, contracted to, or otherwise in a legal relationship with the client entity).

77 While this conception of the "in-house solicitor rule" has not been formulated in these precise terms by other courts below, their faithful application of the reasoning in *Bell Lawyers* has led to outcomes which reflect this conception. Based on the reasoning in *Bell Lawyers*, it has been decided that neither an unincorporated firm of solicitors nor an incorporated legal practice that "represented themselves" in a proceeding could recover the money equivalent to the value of the time spent by their partners and employed solicitors (in the case of a firm of solicitors) or their director solicitor and employed solicitors (in the case of an incorporated legal practice) as costs of that proceeding.¹²⁰ As those decisions reflect, a conclusion that an unincorporated law firm may recover the costs of acting for themselves in a proceeding is contrary to the value of equality before the law and contrary to the underlying rationale of the decision in *Bell Lawyers*, in which that value of equality was a core motivating tenet.

78 As Whelan, McLeish and Niall JJA correctly explained in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills*, in respect of the recovery as costs of the money equivalent to the value of the time spent by an employed "in-house" solicitor of a government, government body, or corporation in relation to a proceeding, the "plurality [in *Bell Lawyers*]" held that recovery of such costs is

¹²⁰ eg, *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [119]-[121]; *D A Starke Pty Ltd v Yard [No 2]* [2020] SASFC 81 at [2], [31], [36]-[37]; *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [58]-[62], [66]-[67], [74]; *Hurst-Meyers v Aulich Civil Law Pty Ltd* [2021] ACTSC 16 at [30]-[31]; *Treasury Wine Estates Ltd v Maurice Blackburn Pty Ltd [No 2]* (2021) 388 ALR 540; *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96. Cf *Dennis v Joukhador* [2021] NSWSC 870.

not based on the *Chorley* exception but is independently 'outside the general rule'¹²¹ because it is accepted that the recovery of the professional costs of such in-house solicitors enures by way of indemnity to the employer".¹²² Whelan, McLeish and Niall JJA emphasised a part of the reasoning of Kiefel CJ, Bell, Keane and Gordon JJ in *Bell Lawyers* that "*where such a solicitor appears in proceedings to represent his or her employer* the employer is entitled to recover costs in circumstances where an ordinary party would be so entitled by way of indemnity".¹²³ On this basis Whelan, McLeish and Niall JJA observed that:¹²⁴

"a government, government agency or corporate litigant may be represented in litigation by employed solicitors. In those cases the party is separate and distinct from the solicitor on the record. In no meaningful sense would a government or a corporation, represented by an employed solicitor, be described as a self-represented litigant. That is not true of Freehills in the present proceedings. The firm is the solicitor on the record, and the litigation is under the control of one of its partners, albeit no claim for costs is sought in respect of the partners.

It seems to us that all of the members of the Court in *Bell Lawyers* recognised a distinction between the position where solicitors who are parties represent themselves, and the position where a party is represented by an employed solicitor. In the latter case the party is not unrepresented or self-represented. It is represented by the employed solicitor, and an issue which has then arisen at times is what amount of costs should be recoverable given the employment relationship."

79 Whelan, McLeish and Niall JJA also said, correctly, that "a significant rationale for the *Chorley* exception was to permit a solicitor to recover for the time spent by his or her employees".¹²⁵ Their Honours concluded, accordingly, that to permit a law firm to recover costs on account of the time spent by its employed solicitors in respect of a proceeding in which the law firm was both a party and "self-represented" would, "anomalously[:]" allow firms of solicitors to recover for

121 That a self-represented litigant may not obtain any recompense for the value of their or their employees' time spent in litigation.

122 [2020] VSCA 15 at [83].

123 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [84], quoting *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 352 [50].

124 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [102]-[103].

125 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [109].

their own time spent in the litigation";¹²⁶ "mean that a legal practice with employees could recover fees when a sole practitioner could not";¹²⁷ and "perpetuate a significant degree of special treatment not accorded to non-lawyer litigants" contrary to the reasoning in *Bell Lawyers*.¹²⁸

80 Macaulay J applied the same approach in *Guneser v Aitken Partners Pty Ltd*, a case which concerned a claim by an incorporated legal practice to recover costs in respect of work done by employed solicitors.¹²⁹ Macaulay J reasoned that: (a) insofar as the record of the court disclosed, the respondent incorporated legal practice was "a self-representing legal practice";¹³⁰ (b) when doing work in the proceeding, the respondent's "employees (whether principals [of the practice] or not) did not have any practical independent identity from their litigant-employer" but were "in a substantial sense the arms of the corporate legal practice itself, rather than lawyers standing outside of or apart from it";¹³¹ (c) the respondent's "employees did not so much 'represent' [the respondent incorporated legal practice] in the litigation; in a practical sense, they *were* [the respondent incorporated legal practice] acting for itself in the litigation";¹³² (d) "[f]or the purpose of determining whether the general principle is engaged there is no reason to treat the work of an incorporated legal practice, of necessity performed through its employees, differently to the work of a partner in a firm or the work of a sole practitioner. Since the work of those employees *is* the work of the law practice, to allow the incorporated legal practice to recover costs referable to work done by its employees would be to recompense the legal practice for its own time spent in litigation";¹³³ and (e) "the reasoning of the Court of Appeal in *United Petroleum*, which, in turn, adapts the principles of *Bell Lawyers* to the costs of work done by solicitors employed by law partnerships, applies in substantially ... the same fashion to the costs of a self-representing incorporated legal practice attributable

126 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [120].

127 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [120].

128 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 at [119].

129 [2020] VSC 329 at [4], [73].

130 *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [58].

131 *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [59].

132 *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [60] (emphasis in original).

133 *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [61] (emphasis in original).

to the work of its employed lawyers. Such a practice does not fit comfortably within the 'well-established understanding' referable to the in-house legal services of private corporations or government agencies."¹³⁴

81 Similar reasoning was adopted by the Full Court of the Federal Court of Australia in *Manzo v CSM Lawyers Pty Ltd*.¹³⁵ In that case, Logan, Perry and Meagher JJ rejected the proposition advanced by the respondent incorporated legal practice that "costs should be awarded based on the indemnity principle in relation to a solicitor employed by a party, even if that party is an incorporated legal practice".¹³⁶ In support of that proposition, the respondent incorporated legal practice argued that the reasoning in *Bell Lawyers* implicitly foreclosed only the possibility of recovering costs in the case of a "solicitor employed by an incorporated legal practice of which he or she is the sole director and shareholder", not a larger incorporated legal practice.¹³⁷ The Full Court, in response, observed that this was not "a principled basis on which to distinguish the decision in *Bell Lawyers*",¹³⁸ because "the underlying rationale for the abolition of the 'Chorley exception' in *Bell Lawyers* [was] based on a public policy value judgement of not recognising lawyers acting for themselves as a special class of litigant in person".¹³⁹ Accordingly, in a case where the respondent "was both the client and the solicitor on the record",¹⁴⁰ that public-policy value judgment necessitated a conclusion that the respondent was not entitled to recover costs for "acting as solicitor for itself".¹⁴¹ The Full Court further, and correctly, stated that the "ratio of *Bell Lawyers* [was not] as narrow as was apprehended by the majority ... in *Atanaskovic*".¹⁴² As their Honours also rightly said, "[h]aving been rejected, it is difficult to see why the 'Chorley exception' should be revived ... To do so would

134 *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [73] (footnote omitted).

135 [2024] FCAFC 96. See also *Treasury Wine Estates Ltd v Maurice Blackburn Pty Ltd* [No 2] (2021) 388 ALR 540 at 551 [47].

136 *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96 at [24].

137 *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96 at [12], [23]-[24].

138 *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96 at [24].

139 *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96 at [18].

140 *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96 at [18].

141 *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96 at [26].

142 *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96 at [21], referring to *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305.

revive an inequality before the law in relation to the recovery of costs for a special class of litigant in person."¹⁴³

82 In *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd*¹⁴⁴ Meagher, Leeming and White JJA considered the effect of the non-recognition of the *Chorley* exception in Australia on a case in which one incorporated legal practice, being the party to a proceeding, was represented by another incorporated legal practice, not being a party to the proceeding. The client incorporated legal practice was a wholly owned subsidiary of the incorporated legal practice which represented the client incorporated legal practice and provided professional legal services to it in the proceeding.¹⁴⁵ The incorporated legal practice that represented the client incorporated legal practice in the proceeding was also the corporate successor to the legal work of the client incorporated legal practice,¹⁴⁶ but that corporate succession was unconnected to the claim against the client incorporated legal practice.¹⁴⁷ Given: (a) the two separate incorporated legal practices; (b) that it had to be inferred that the client incorporated legal practice had requested the other incorporated legal practice to represent it in the proceeding, giving rise to a liability on the part of the former to pay the latter;¹⁴⁸ (c) that the corporate succession arrangement was unconnected to the claim against the client incorporated legal practice;¹⁴⁹ and (d) several other factors concerning the "real" distinction between the two practices,¹⁵⁰ their Honours refused to equate the two

143 *Manzo v CSM Lawyers Pty Ltd* [2024] FCAFC 96 at [24].

144 [2021] NSWCA 148.

145 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [2].

146 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [128].

147 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [129].

148 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [17].

149 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [129].

150 See, eg, *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [127]. See also at [123]-[130], [145]-[146].

incorporated legal practices.¹⁵¹ They therefore concluded that the client incorporated legal practice was not "self-represented" in the proceeding.¹⁵² Consequently, the client incorporated legal practice was able to recover costs on account of its liability to pay the other incorporated legal practice for representing it in the proceeding. As Meagher JA put it, what was decisive for the question of the capacity to recover the costs of the proceeding was that the client incorporated legal practice "was not *acting for itself*" in the proceeding.¹⁵³ Leeming JA (with whom Meagher and White JJA generally agreed¹⁵⁴) considered that on the facts there was "no reason to doubt that the distinction [between the two practices] was real"¹⁵⁵ so that the submission that one was to be equated to the other had to be rejected, and *Bell Lawyers* confirmed that costs were recoverable in such a case.¹⁵⁶

83 In the present case, the primary judge in the Supreme Court of New South Wales (Brereton JA) was confronted with facts materially indistinguishable from those in *United Petroleum Australia*. As his Honour put it, "in *Burrows*, the incorporated legal practice that acted in the relevant proceedings as the solicitors for the solicitor litigant was a separate and distinct legal entity, which was retained by the solicitor litigant (another incorporated legal practice). In this case, as in the Victorian case of *United Petroleum Australia* ... the lawyers in respect of whose work costs are claimed were the employed solicitors of the law firm which was the litigant."¹⁵⁷ Brereton JA concluded that the law firm, which was represented by one of its partners¹⁵⁸ (and "self-represented"), could not recover as costs the money equivalent to the value of the time that the law firm's employed solicitors had spent

151 See, eg, *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [133].

152 See, eg, *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [1], [137], [140].

153 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [16] (emphasis added).

154 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [1], [140].

155 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [127].

156 *Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd* [2021] NSWCA 148 at [133].

157 *Birketu v Castagnet* [2022] NSWSC 1435 at [1].

158 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 308-309 [4].

in the proceeding.¹⁵⁹ After considering cases in which it was established that a party to a proceeding such as a government, a government body, or a corporation which was represented in a proceeding by its own employed solicitor was entitled to recover costs in relation to the proceeding (the "in-house solicitor rule", referred to by Brereton JA as the "employed solicitor exception"),¹⁶⁰ Brereton JA said that:¹⁶¹

"These cases show that the rationale for the 'employed solicitor exception' [to the general rule that a 'self-represented' party cannot recover as costs the money equivalent to the value of the party's time in the conduct of the proceeding] is that *a party entitled to the costs of litigation who is represented by a solicitor is entitled to recover the costs of engaging a solicitor*; that entitlement is unaffected by the circumstance that the solicitor is a salaried employee of the party as distinct from a conventionally retained independent solicitor; and (arguably subject to the indemnity rule), as between party and party those costs are assessed objectively, and do not depend on the private arrangements between the litigant and its (employed) solicitor."

84 Brereton JA then observed (correctly) that "the judgment of the High Court in [*Bell Lawyers*] does not explicitly resolve the present question".¹⁶² His Honour proceeded on the basis that it was therefore "necessary to explore the policy and intent that underlies that judgment to ascertain how that policy and intent informs the answer to the question".¹⁶³ In so doing his Honour said: (a) he did not consider that Kiefel CJ, Bell, Keane and Gordon JJ in *Bell Lawyers* had in mind "a litigant solicitor's own employed solicitors when [their Honours] made clear that [they were] not intending to displace the 'employed solicitor exception'";¹⁶⁴ (b) similarly, the reasoning of Gageler J in *Bell Lawyers* addresses "the position where a party

159 *Birketu v Castagnet* [2022] NSWSC 1435 at [67].

160 eg, *Attorney-General v Shillibeer* (1849) 4 Exch 606 [154 ER 1356]; *Raymond v Lakeman* (1865) 34 Beav 584 [55 ER 761]; *Galloway v Corporation of London* (1867) LR 4 Eq 90; *Irving v Gagliardi; Ex parte Gagliardi [No 2]* (1894) 6 Q LJ 200; *Henderson v Merthyr Tydfil Urban District Council* [1900] 1 QB 434; *McCullum v Ifield* [1969] 2 NSW 329; *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333.

161 *Birketu v Castagnet* [2022] NSWSC 1435 at [34] (emphasis added).

162 *Birketu v Castagnet* [2022] NSWSC 1435 at [35].

163 *Birketu v Castagnet* [2022] NSWSC 1435 at [35].

164 *Birketu v Castagnet* [2022] NSWSC 1435 at [36], referring to *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 351-352 [46]-[51].

is represented in the proceeding by a solicitor who is an employee of the party";¹⁶⁵ and (c) the three primary reasons the High Court gave in *Bell Lawyers* for not recognising the *Chorley* exception (being that (i) "the modern orthodoxy [is] that it is undesirable, as a matter of professional ethics, for a solicitor to act for himself or herself in litigation"; (ii) "to exalt the position of solicitors in the administration of justice [over 'non-solicitor litigants in person'] ... is an affront to equality before the law"; and (iii) "the exception was recognised as [a] solicitor's privilege [which] to modern eyes ... is inconsistent with the equality of all persons before the law")¹⁶⁶ "unambiguously favour the position that a solicitor litigant should not be able to recover costs in respect of work done by his or her own employees, any more than for work done by him or herself".¹⁶⁷ As a result, Brereton JA declared that the unincorporated law firm was "not entitled to recover costs for work done by the employed solicitors of their own firm".¹⁶⁸

85 As noted, the majority in the Court of Appeal (Kirk JA and Simpson A-JA) allowed the appeal against the orders of Brereton JA. Kirk JA considered that the definition of "costs" in s 3(1) of the *Civil Procedure Act 2005* (NSW), which includes "remuneration", meant that the *Chorley* exception had been abrogated by statute in New South Wales before the decision in *Bell Lawyers*.¹⁶⁹ His Honour also considered that the "reasoning in the joint judgment and that of Gageler J [in *Bell Lawyers*] relating to the employed lawyer rule directly supports the [law firm's] claim" as the partners of the law firm were not claiming costs on account of their own time and the reasoning in *Bell Lawyers* did not suggest that "the employed lawyer rule should be understood in a way so as to exclude claims by unincorporated law firms".¹⁷⁰ Simpson A-JA agreed in substance with the latter part of this reasoning.¹⁷¹ Ward P would have dismissed the appeal on the basis that the primary judge "was correct in concluding that there is a real and meaningful distinction (as recognised in *Bell Lawyers*) between a corporation or government

165 *Birketu v Castagnet* [2022] NSWSC 1435 at [39], referring to *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 357 [68].

166 *Birketu v Castagnet* [2022] NSWSC 1435 at [41], referring to *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333 at 343-345 [18]-[20], [24], [25].

167 *Birketu v Castagnet* [2022] NSWSC 1435 at [42].

168 *Birketu v Castagnet* [2022] NSWSC 1435 at [68].

169 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 347 [187].

170 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 353 [213].

171 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 371-378 [312]-[346].

department represented by its (employed) in-house lawyers and the partners of an unincorporated law firm litigant represented by their own employed solicitors".¹⁷²

86 In the reasoning in the various cases below, other than that of the majority in the Court of Appeal in the present case, the focus has been the fact (or otherwise) of the legal *representation* of the solicitor, unincorporated law firm, or incorporated legal practice that is a party to a proceeding by a legal practitioner separate from the solicitor, unincorporated law firm, or incorporated legal practice. This focus on separate representation accords with key planks of the common law as adapted into the statutory regimes by which proceedings are conducted before a court in Australia. The role of the solicitor or legal practitioner "on the record" of the court in a proceeding is important. It has been said that the "solicitor on the record is the only person whom the Court will recognise as the solicitor acting in the case, and the reason ... is that [they are] the only person who is responsible to the Court, responsible to [their] client, and responsible to the other party to the litigation".¹⁷³

87 Although different terminology is used across different jurisdictions and rules of procedure, all jurisdictions in Australia provide to the effect that a party to a proceeding may be represented by a legal practitioner or, in some cases, a firm of practitioners, generally with an explicit or implicit requirement that a representing practitioner hold a current practising certificate.¹⁷⁴ Accordingly, the UCPR, applicable in the present case, define a "solicitor" as "a legal practitioner

172 *Atanaskovic v Birketu Pty Ltd* (2023) 113 NSWLR 305 at 344 [165].

173 *Ex parte Browne* (1913) 13 SR (NSW) 593 at 597.

174 *Federal Court Rules 2011* (Cth), r 4.01; *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth), r 3.08(1); *Uniform Civil Procedure Rules 2005* (NSW), rr 1.3(1)(b), 7.1; *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 1.18; *County Court Civil Procedure Rules 2018* (Vic), r 1.18; *Magistrates' Court General Civil Procedure Rules 2020* (Vic), r 1.18; *Uniform Civil Procedure Rules 1999* (Qld), r 17(1)(b); *Uniform Civil Rules 2020* (SA), rr 25.1, 25.3; *Supreme Court Rules 2000* (Tas), r 12; *Magistrates Court (Civil Division) Rules 1998* (Tas), r 19; *Supreme Court (Court of Appeal) Rules 2005* (WA), r 23; *Rules of the Supreme Court 1971* (WA), O 4 r 3; *District Court Rules 2005* (WA); *Magistrates Court (General) Rules 2005* (WA); *Court Procedures Rules 2006* (ACT), r 2801; *Supreme Court Rules 1987* (NT), rr 1.09(1), 1.14; *Local Court (Civil Jurisdiction) Rules 1998* (NT), rr 1.09, 1.14. See also *Legal Profession Uniform Law* (NSW), s 6(1); *Legal Profession Act 2007* (Qld), s 6; *Legal Profession Act 2007* (Tas), s 6; *Legal Profession Uniform Law* (WA), s 6(1); *Legal Profession Act 2006* (ACT), dictionary; *Legal Profession Act 2006* (NT), s 6.

who practises as a solicitor".¹⁷⁵ The UCPR also define a "solicitor on the record" to mean "in relation to any party to proceedings ... the solicitor who is for the time being named as the party's legal representative in the documentation for the proceedings".¹⁷⁶ Rule 7.1(1) of the UCPR provides that a "natural person may commence and carry on proceedings in any court, either by a solicitor acting on his or her behalf or in person", whereas r 7.1(2)-(4) relevantly provides that a company may commence and carry on proceedings in any court by a solicitor or by such other persons as nominated depending on the court within which the proceedings are being carried on. By r 7.1(6) a "solicitor who is a person's solicitor on the record must hold an unrestricted practising certificate".

88 When it comes to the statutory power of a court to order "by whom, to whom and to what extent costs are to be paid",¹⁷⁷ whether "costs" is defined to mean "in relation to proceedings ... costs payable in or in relation to the proceedings, [including] fees, disbursements, expenses and remuneration"¹⁷⁸ as in New South Wales or otherwise, the inquiry after *Bell Lawyers* in cases of this kind (other than by the majority in the Court of Appeal in this case) has correctly been directed to identifying the costs that *a party legally represented by a legal practitioner, or legal practitioners*, has actually incurred – the partial indemnity that an order for costs provides being a partial indemnity for those actual legal costs. This reasoning reflects that the *Chorley* exception applied to a solicitor representing themselves *and their employed solicitors*¹⁷⁹ and that this Court in *Bell Lawyers* therefore held that the *Chorley* exception in its entirety was not or should no longer be part of the common law of Australia.

89 This concept of costs, as functioning by way of compensation as a partial indemnity for the costs that a party *represented by a legal practitioner* has actually incurred, comfortably and cogently applies to any entity that is *legally represented* by a legal practitioner (be it an employed, contracted or otherwise appointed legal

175 *Uniform Civil Procedure Rules 2005* (NSW), r 1.3(1)(b). See also the meaning of "solicitor" in the *Legal Profession Uniform Law* (NSW), s 6(1).

176 *Dictionary to the Uniform Civil Procedure Rules 2005* (NSW).

177 *Civil Procedure Act 2005* (NSW), s 98(1)(b).

178 *Civil Procedure Act 2005* (NSW), s 3(1).

179 See, eg, *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15; *D A Starke Pty Ltd v Yard [No 2]* [2020] SASC 81; *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329; *Hurst-Meyers v Aulich Civil Law Pty Ltd* [2021] ACTSC 16; *Birketu v Castagnet* [2022] NSWSC 1435. See also at [65] of these reasons.

practitioner) who is "on the record of" the court¹⁸⁰ and responsible to the court for the conduct of the proceeding. This concept, however, does not comfortably and cogently apply to a solicitor, unincorporated law firm, or incorporated legal practice which, in substance, is representing themselves in a proceeding and has merely used their employed solicitors to perform legal work in the proceeding.

90 Against this background, it can be said that the divergence of opinion between other courts below and the majority in the Court of Appeal in this case is not explicable on the basis that the definition of "costs" differs between the jurisdictions. The definition that was relevant in *Bell Lawyers* was also that which applied in New South Wales.¹⁸¹ While the reasoning of Kiefel CJ, Bell, Keane and Gordon JJ in *Bell Lawyers* noted (in response to an argument that the word "remuneration" was "apt to encompass costs within the *Chorley* exception"¹⁸²) that the definition of "costs" in New South Wales "leaves no room for the *Chorley* exception as a matter of legislative intention", "remuneration" being "simply not a word which is apt to include the notion of payment to a person by himself or herself for work done by himself or herself",¹⁸³ the focus of the reasoning in that case was whether the common law of Australia recognised (or should continue to recognise) the *Chorley* exception. The decision was that the common law did not (or should not continue to do so). That is, it was common ground in *Bell Lawyers*, and properly so, that the statutory power of courts to order costs is to be construed and applied in the context of common law principles, which include, for example: the compensatory purpose of such an order;¹⁸⁴ the general rule excluding self-represented parties from recovering costs for their time or their employees' time in the conduct of a proceeding; the "in-house solicitor rule"; and, now, the recognition in *Bell Lawyers* that the *Chorley* exception to the general rule is not a part of the common law of Australia.

91 The contemporary conceptualisation of the "in-house solicitor rule" as formulated above reflects the reality that any entity which is a party to a proceeding and seeks to recover as costs of the proceeding the money equivalent to the value of their legal representatives' time spent in the conduct of the proceeding is, prima

180 In the sense of being the legal practitioner whom the court will regard as responsible for the conduct of the proceeding, whether the terminology of being the "solicitor on the record" is used or not.

181 (2019) 269 CLR 333 at 342 [14].

182 (2019) 269 CLR 333 at 350 [42].

183 (2019) 269 CLR 333 at 350 [44]. See also at 357 [67].

184 eg, *Latoudis v Casey* (1990) 170 CLR 534 at 543, 562-563, 566-567; *Cachia v Hanes* (1994) 179 CLR 403 at 410.

facie, able to do so if the entity has in fact been legally represented (and is therefore not "self-represented") in the proceeding. In a case of legal representation by a legal practitioner (even if an employed legal practitioner), the entity should be in no different position from any other client of a legal practitioner. In the traditional case of a government, government body, or corporation, the entity will have appointed one of its employed legal practitioners as its legal representative who will then appear on the record of the court as the legal practitioner for or legal representative of the entity. A lawyer-client relationship will exist between the entity and the legal practitioner for or legal representative of the entity no different from the position of any other legal practitioner representing a client in a proceeding. There is no reason in principle for the same approach not to apply to any other form of entity, including a solicitor, unincorporated law firm or incorporated legal practice appointing as their legal representative to legally represent them in proceedings a legal practitioner (be the legal practitioner employed by, contracted to, or otherwise in a legal relationship with the entity). In such a case, the money equivalent to the value of the time that the legal practitioner, and the legal practitioners working with or under the supervision and direction of that legal practitioner, spent in conducting the proceeding will be costs *in relation to* the proceeding.

92 In contrast, if a solicitor, unincorporated law firm or incorporated legal practice acts for themselves in a proceeding, the reality of such "self-representation" is that the solicitor, a partner of the law firm, or a director or principal solicitor of the incorporated legal practice respectively will be both the client and the legal representative appearing on the record of the court. The lawyer-client relationship is either non-existent (in the case of a solicitor where the client and legal practitioner on the record would be one and the same) or taken by law to be non-existent (in the case of a partner of a law firm party being the client and legal practitioner on the record). In such a case the money equivalent to the value of the time that the solicitor, partner, or director spent in conducting the proceeding will not be costs in relation to the proceeding and the time spent by any legal practitioner acting under the direction or supervision of that solicitor, partner, or director has the same character.

93 In the case of an incorporated legal practice there is scope for greater factual complexity (as the reasoning in *Burrows*¹⁸⁵ discloses), but the question remains whether the client and legal practitioner on the record are or are to be taken to be one and the same. In some cases, as appears to be permitted under some jurisdictions' rules of procedure,¹⁸⁶ the litigant law firm or incorporated legal

185 [2021] NSWCA 148.

186 See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 5.02 and the forms referred to therein; *County Court Civil Procedure Rules 2018* (Vic), r 5.02

practice itself, rather than an individual lawyer, may be the legal practitioner on the record of the court. In these cases, the elision of the client and legal practitioner as one and the same entity may be even more stark, as, for instance, the Court of Appeal in *United Petroleum Australia* acknowledged when it observed that the litigant law firm in that case, which was "also the solicitor on the record", "was *both* the party and the legal representative for that party".¹⁸⁷ Further, even in cases where the legal representative on the record of the court is an individual employed solicitor who is neither a partner (in the case of an unincorporated law firm) nor a director or principal solicitor (in the case of an incorporated legal practice),¹⁸⁸ and therefore may not directly be part of the "controlling mind" of the firm or practice, Macaulay J has rightly observed (at least in the context of incorporated legal practices) that such employee solicitors (at least in the usual course) do not "have any practical independent identity from their litigant-employer" as they will be "[a]cting under the supervision and control of ... a member of the controlling mind".¹⁸⁹ Such employee solicitors are, as Macaulay J further stated, "in a substantial sense the arms of the ... legal practice itself, rather than lawyers standing outside of or apart from it" with a real degree of "functional separation",¹⁹⁰ the result being that the "work of those employees *is* the work of the law practice".¹⁹¹ Whatever the precise factual circumstances, if the client and the legal practitioner on the record are or are taken to be substantively one and the same, there is no lawyer-client relationship. Accordingly, such "self-representation" is outside the functional and conceptual scope of the "in-house solicitor rule" – in which there is always a client separate from the legal practitioner who is legally representing the client, and the lawyer-client relationship is indistinguishable from any other lawyer-client relationship.

94 If, by means of the decision in this appeal, the *Chorley* exception is now to be in part reinstated to enable a solicitor, an unincorporated law firm, or an incorporated legal practice to recover as costs the money equivalent to the value

and the forms referred to therein; *Magistrates' Court General Civil Procedure Rules 2020* (Vic), rr 1.13.1, 1.18; *Supreme Court (Court of Appeal) Rules 2005* (WA), r 23(1) and the "Form 5" referred to therein; *Court Procedures Rules 2006* (ACT), dictionary; *Local Court (Civil Jurisdiction) Rules 1998* (NT), r 1.14(b).

187 [2020] VSCA 15 at [85], [97] (emphasis added).

188 Although this does not appear to be prohibited by any of the rules of procedure referred to in [87] fn 174, it has been cautioned against as poor practice: *Kelly v Jowett* (2009) 76 NSWLR 405 at 425-426 [96]-[97].

189 *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [59].

190 *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [59].

191 *Guneser v Aitken Partners Pty Ltd* [2020] VSC 329 at [61] (emphasis in original).

41.

of their employed solicitors' time in conducting a proceeding in which the solicitor, unincorporated law firm, or incorporated legal practice was representing themselves, it is not only that the affront to equality identified in *Bell Lawyers* would itself be largely reinstated. It is that a decision to so reinstate part of the *Chorley* exception in Australia would have more wide-ranging consequences than the facts of the present case expose. In the present case, the costs claimed to be recoverable are the money equivalent to the value of the time of the unincorporated law firm's employed solicitors. If, however, the *Chorley* exception is partly reinstated in Australia, the costs recoverable by a solicitor, unincorporated law firm, or incorporated legal practice representing themselves, subject to any other limitations on recovery, could extend to the money equivalent to the value of the time that other employees of the solicitor, unincorporated law firm, or incorporated legal practice (such as paralegals, law clerks, and others) spent in the conduct of the proceeding. A partial reinstatement of the *Chorley* exception in Australia would therefore restore the very affront to the equality of all persons before the law which motivated the decision in *Bell Lawyers*. It would also make a solicitor, unincorporated law firm, or incorporated legal practice representing themselves a profit-making venture in a way not involved in the continued recognition of the "in-house solicitor rule".

95 For these reasons, the majority in the Court of Appeal erred, and the appeal should be allowed.