HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

BELL LAWYERS PTY LTD APPELLANT

AND

JANET PENTELOW & ANOR RESPONDENTS

Bell Lawyers Pty Ltd v Pentelow
[2019] HCA 29
4 September 2019
S352/2018

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 to 4 of the Court of Appeal of the Supreme Court of New South Wales made on 13 July 2018 and, in their place, order that:*

   (a) *the summons for judicial review be dismissed; and*

   (b) *the first respondent (Ms Pentelow) pay the costs of the appellant (Bell Lawyers Pty Ltd) in the District Court of New South Wales and the Court of Appeal of the Supreme Court of New South Wales.*

3. *The first respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with M Castle for the appellant (instructed by Bell Lawyers)

G O'L Reynolds SC with D P Hume for the first respondent (instructed by Castagnet Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

Bell Lawyers Pty Ltd v Pentelow

Practice and procedure – Costs – Legal practitioners – Barristers – Where self-represented litigant may not obtain any recompense for value of his or her time spent in litigation – Where exception commonly referred to as "*Chorley* exception" exists for a self-represented litigant who is a solicitor – Where first respondent is a barrister – Where first respondent undertook legal work in litigation in which she was represented – Where first respondent incurred costs on her own behalf and for legal services provided by herself – Whether *Chorley* exception operates to benefit barristers – Whether *Chorley* exception recognised as part of common law of Australia.

Words and phrases – "anomalous", "*Chorley* exception", "common law of Australia", "costs", "costs payable", "creature of statute", "employed solicitors", "equality before the law", "exception to the general rule", "exercise of professional skill", "incorporated legal practice", "indemnity", "judicial abolition", "professional legal services", "prospective overruling", "remuneration", "rule of practice", "rules committees", "self-represented litigants", "statutory power".

Civil Procedure Act 2005 (NSW), ss 3(1), 98(1).

1 KIEFEL CJ, BELL, KEANE AND GORDON JJ. As a general rule, a self-represented litigant may not obtain any recompense for the value of his or her time spent in litigation[1]. Under an exception to the general rule, a self-represented litigant who happens to be a solicitor may recover his or her professional costs of acting in the litigation. This exception is commonly referred to as "the *Chorley* exception", having been authoritatively established as a "rule of practice" by the Court of Appeal of England and Wales in *London Scottish Benefit Society v Chorley*[2].

2 One issue raised by this appeal is whether the *Chorley* exception operates to the benefit of barristers who represent themselves. Another, more fundamental, issue is whether the *Chorley* exception should be recognised as part of the common law of Australia.

3 The *Chorley* exception has rightly been described by this Court as "anomalous"[3]. Because it is anomalous, it should not be extended by judicial decision[4] to the benefit of barristers. This view has previously been taken by some courts in Australia[5]. Dealing with the matter more broadly, however, the *Chorley* exception is not only anomalous, it is an affront to the fundamental value of equality of all persons before the law. It cannot be justified by the considerations of policy said to support it. Accordingly, it should not be recognised as part of the common law of Australia.

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1 *Cachia v Hanes* (1994) 179 CLR 403 at 410-411; [1994] HCA 14. See also *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47 at 51; [1976] HCA 57.

2 (1884) 13 QBD 872 at 877. The rule of practice was acknowledged prior to the decision in *Chorley* by Faucett J in the Supreme Court of New South Wales in *Pennington v Russell [No 2]* (1883) 4 LR (NSW) Eq 41.

3 *Cachia v Hanes* (1994) 179 CLR 403 at 411.

4 *Midgley v Midgley* [1893] 3 Ch 282 at 299, 303, 306-307; *Best v Samuel Fox & Co Ltd* [1952] AC 716 at 728, 733; *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1086; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 18 [35]; [2005] HCA 64.

5 See *Hartford Holdings Pty Ltd v CP (Adelaide) Pty Ltd* [2004] SASC 161 at [125]; *Winn v Garland Hawthorn Brahe (Ruling No 1)* [2007] VSC 360 at [10]-[11]; *Murphy v Legal Services Commissioner [No 2]* [2013] QSC 253 at [16]; *Bechara v Bates* [2018] FCA 460 at [6]. But see to the contrary *Ada Evans Chambers Pty Ltd v Santisi* [2014] NSWSC 538 at [29].

The proceedings

4 The appellant, an incorporated legal practice, retained the first respondent ("the respondent"), a barrister, to appear in proceedings in the Supreme Court of New South Wales in a matter under the *Family Provision Act 1982* (NSW). Following the conclusion of those proceedings, a dispute arose as to the payment of the respondent's fees[6].

5 The appellant paid only a portion of the bill rendered by the respondent for her services, and the respondent sued the appellant for the balance of her fees in the Local Court of New South Wales. She was unsuccessful in that proceeding, but appealed successfully to the Supreme Court of New South Wales. The appellant was ordered to pay the respondent the balance of her unpaid fees. Orders for costs were also made in the respondent's favour in relation to both the Local Court and the Supreme Court proceedings[7].

6 The respondent was represented by a solicitor in the Local Court proceeding, and by solicitors and senior counsel in the Supreme Court proceeding. In each proceeding, the respondent had undertaken preparatory legal work which included, among other things, compiling written submissions, drawing her affidavit evidence, legal research, reviewing submissions in reply, and advising senior counsel on various issues. The respondent also attended court in person on a number of directions hearings and for the purpose of taking judgment[8].

7 The respondent forwarded a memorandum of costs to the appellant pursuant to those costs orders. The total sum claimed was $144,425.45, which included $22,605 for "Costs incurred on her own behalf" in the Local Court proceeding and $22,275 for the "Provision of Legal Services Provided by herself" in the Supreme Court proceeding[9].

8 The appellant refused to pay the costs claimed for the work undertaken by the respondent herself. Pursuant to s 353 of the now-repealed *Legal Profession Act 2004* (NSW), the appellant made an application for assessment of the costs

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6 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [4].

7 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [4].

8 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [5].

9 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [6].

claimed by the respondent. The costs assessor rejected the respondent's claim for the costs of the work she had performed herself on the ground, among others, that in New South Wales the *Chorley* exception does not apply to barristers[10].

9 The costs assessor's decision was affirmed on appeal by the Review Panel[11]. The respondent appealed against the decision of the Review Panel to the District Court of New South Wales, but her appeal was dismissed by the primary judge (Judge Gibson)[12].

The Court of Appeal

10 The respondent sought judicial review of the decision of the District Court in the Court of Appeal of the Supreme Court of New South Wales[13]. The primary issue was whether the respondent could rely upon the *Chorley* exception[14]. A subsidiary issue arose as to whether the respondent was a "self-represented" litigant, but this issue was held not to be amenable to judicial review as it concerned a finding of fact[15]. That subsidiary issue need not be further considered. The Court of Appeal proceeded on the basis that the issue was whether the *Chorley* exception applied to the respondent as a barrister, in circumstances where she had undertaken legal work in litigation in which she was represented[16].

11 The Court of Appeal held by majority (Beazley A-CJ and Macfarlan JA, Meagher JA dissenting) that the respondent was entitled to rely upon the *Chorley*

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10 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [7].

11 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [8].

12 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [9]. See *Pentelow v Bell Lawyers Pty Ltd* (2016) 23 DCLR (NSW) 134.

13 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [10].

14 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [11].

15 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [15].

16 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [112], [116].

exception for the same reason that a solicitor is so entitled, namely, that her costs were quantifiable by the same processes as solicitors' costs[17].

12 Meagher JA, in dissent, expressed reservations as to the continued application of the *Chorley* exception to solicitors, but accepted that he was bound by authority to hold that the exception still exists. Nevertheless, his Honour rejected the "extension" of the *Chorley* exception to barristers[18].

The power to order costs

13 The power to make an order for costs is conferred on the courts of New South Wales by s 98(1) of the *Civil Procedure Act 2005* (NSW), which provides:

> "Subject to rules of court and to this or any other Act:
>
> (a) costs are in the discretion of the court, and
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> (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
>
> (c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis."

14 Section 3(1) of the *Civil Procedure Act* defines "costs" as follows:

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

15 On one view, the reference to "costs payable" in this definition is an indication that an order for costs may be made only in respect of costs payable by the party in whose favour the order is made to another person for services rendered. On this view the *Chorley* exception is inconsistent with the statutory definition of costs and, costs being a creature of statute, the *Chorley* exception has been displaced by the *Civil Procedure Act*.

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17 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [90]-[96], [121].

18 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [138].

16 This view, which commended itself to Meagher JA below[19], was advanced by the appellant in argument in this Court. The respondent argued that the legislature did not intend to abrogate the *Chorley* exception by ss 3 and 98(1) of the *Civil Procedure Act* in the absence of clear words to that effect. It is preferable to address the proper effect of ss 3 and 98(1) of the *Civil Procedure Act* in the context of a discussion of the broader question whether the *Chorley* exception should be recognised as part of the common law of Australia. The examination of that question may conveniently proceed by reference to the principal authorities referred to by the parties in the course of argument in this Court.

Chorley

17 One may begin with a consideration of the reasons said to support the *Chorley* exception. In that case, Brett MR stated the general rule, and the exception to it, in the following terms[20]:

> "When an ordinary party to a suit appears for himself, he is not indemnified for loss of time; but when he appears by solicitor, he is entitled to recover for the time expended by the solicitor in the conduct of the suit. When an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him: the remuneration to the solicitor is money paid out of pocket. He has to pay the fees of the court, that is money paid out of pocket; but for loss of time the law will not indemnify him. When, however, we come to the case of a solicitor, the question must be viewed from a different aspect. There are things which a solicitor can do for himself, but also he can employ another solicitor to do them for him; and it would be unadvisable to lay down that he shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor."

18 It may be said immediately that the view 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, is not self-evidently true. A self-representing solicitor, lacking impartial and independent advice that the court expects its officers to provide to the litigants they represent, may also lack objectivity due to

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19 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [126]-[141].

20 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 875.

self-interest. That may, in turn, result in higher legal costs to be passed on to the other party in the event that the self-representing solicitor obtains an order for his or her costs.

19 Importantly, 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. In *McIlraith v Ilkin (Costs)*, Brereton J said[21]:

> "Where a solicitor represents a litigant, the court is entitled to expect the litigant to be impartially and independently advised by an officer of the court. Indeed, where the court concludes that a solicitor is not in a position to give impartial and independent advice to a party, because of the solicitor's own interest in the outcome, the court has restrained the solicitor from continuing to act ... Where a solicitor acts for himself or herself there cannot be independent and impartial advice, and this is in principle a strong reason for holding that a solicitor litigant should not be entitled to costs of acting for him or herself."

20 The view expressed by Brereton J is reflected in rr 17.1 and 27.1 of the *Australian Solicitors' Conduct Rules*, which have been adopted in New South Wales[22], Victoria[23], Queensland[24], South Australia[25] and the Australian Capital Territory[26]. Rules broadly equivalent to rr 17.1 and 27.1 of the *Australian Solicitors' Conduct Rules* also appear in the conduct rules of Western Australia[27] and the Northern Territory[28].

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21 [2007] NSWSC 1052 at [25].

22 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).

23 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic).

24 *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

25 *Australian Solicitors' Conduct Rules 2011* (SA).

26 *Legal Profession (Solicitors) Conduct Rules 2015* (ACT).

27 *Legal Profession Conduct Rules 2010* (WA), rr 6, 12, 42.

28 *Rules of Professional Conduct and Practice 2005* (NT), rr 13, 17.3.

21 In *Chorley*, Bowen LJ explained the rationale for the exception as follows[29]:

> "Professional skill and labour are recognised and can be measured by the law; 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. Professional 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 him to charge for it when it is done by his own clerk."

22 This reasoning is not persuasive. The notion that the "private expenditure of labour and trouble by a layman cannot be measured" is not the basis for the general rule. The general rule that a self-represented litigant may not obtain any recompense for his or her time spent on litigation is not based on a concern about the difficulty of valuing the appropriate amount of recompense, but, as was explained by the majority in *Cachia v Hanes*, because "costs are awarded by way of ... partial indemnity ... for professional legal costs actually incurred in the conduct of litigation"[30]. Accordingly, to say that the value of legal services rendered by a solicitor to himself or herself can be measured is not to justify an exception to the general rule.

23 In addition, in *Cachia*, Mason CJ, Brennan, Deane, Dawson and McHugh JJ, commenting on the rationale for the exception suggested by Bowen LJ, said[31]:

> "Those 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."

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

30 (1994) 179 CLR 403 at 410.

31 (1994) 179 CLR 403 at 412.

24 Further, there is no reason why, in principle, the reasonable value of the time of any litigant cannot be measured[32]. The courts regularly value the provision of labour or services in the context of quantum meruit claims. 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 of justice to an extent that is an affront to equality before the law. To say that practical difficulties may arise in taking evidence to value the time of non-lawyers spent in the course of litigation is merely to identify a reason why, as a matter of policy, the general rule should not be abolished. No doubt such practical difficulties as might be expected to arise in that event could be addressed in legislation for the abolition of the general rule. The need to address practical questions of this kind is one reason why the abolition of the general rule is properly a matter for the legislature rather than the courts. The point to be made here, however, is that to suggest that practical difficulties may attend the abolition of the general rule is not to identify a reason that supports the *Chorley* exception.

25 In *Chorley*, Fry LJ expressed his agreement with Bowen LJ, and went on to say that "[t]his is not a question as to a solicitor's privilege"[33]. Notwithstanding this remark by Fry LJ, there is an air of unreality in the view that the *Chorley* exception does not confer a privilege on solicitors in relation to the conduct of litigation. In Australia, as early as *Pennington v Russell [No 2]*[34], the exception was recognised as the solicitor's privilege that, to modern eyes, it patently is. A privilege of that kind is inconsistent with the equality of all persons before the law[35].

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32 *Sandtara Pty Ltd v Australian European Finance Corporation Ltd* (1990) 20 NSWLR 82 at 93. See also *Reed v Gray* [1952] Ch 337 at 357-358; *Australian Blue Metal Ltd v Hughes* [1970] 2 NSWR 119 at 123-124.

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

34 (1883) 4 LR (NSW) Eq 41 at 42-43, 46.

35 Compare *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at 26 [52]; [2016] HCA 16. See also the discussion of the common law norm of equal justice in *Green v The Queen* (2011) 244 CLR 462 at 472-473 [28]; [2011] HCA 49.

Guss v Veenhuizen [No 2]

26 In *Guss v Veenhuizen [No 2]*[36], a majority of this Court proceeded on the basis that the *Chorley* exception was otherwise applicable on the facts of the case, and decided that the exception was not excluded by the terms of the legislation that applied in that case. Whether the *Chorley* exception should be recognised as part of the common law of Australia was not argued in *Guss*[37]. Instead, the case turned on whether the solicitor litigant was precluded from recovering costs in respect of his own time and services by reason of the circumstance that he was, without fault on his part, not on the Court's Register of Practitioners[38].

27 The question whether the *Chorley* exception should be recognised as part of the common law of Australia is now squarely before the Court, and has been the subject of full argument. Insofar as the *Chorley* exception might be said to be part of the common law of Australia on the authority of *Guss*, the appellant submitted that the Court should reconsider that aspect of the decision in *Guss*. It submitted that the foundation upon which the exception rests is infirm in point of principle.

28 It might be said that, since the question whether the *Chorley* exception is part of the common law of Australia was not in dispute in *Guss*, the decision in that case may be said to "lay[] down no legal rule concerning that issue"[39]. In *CSR Ltd v Eddy*[40], Gleeson CJ, Gummow and Heydon JJ observed that "where a proposition of law is incorporated into the reasoning of a particular court, that proposition, even if it forms part of the ratio decidendi, is not binding on later courts if the particular court merely assumed its correctness without argument"[41].

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36 (1976) 136 CLR 47.

37 See *Cachia v Hanes* (1994) 179 CLR 403 at 412.

38 See *Cachia v Hanes* (1994) 179 CLR 403 at 412.

39 *Coleman v Power* (2004) 220 CLR 1 at 44 [79]; [2004] HCA 39.

40 (2005) 226 CLR 1 at 11 [13].

41 See also *R v Warner* (1661) 1 Keb 66 at 67 [83 ER 814 at 815]; *Felton v Mulligan* (1971) 124 CLR 367 at 413; [1971] HCA 39; *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397 at 405-406; *Baker v The Queen* [1975] AC 774 at 787-789; *Barrs v Bethell* [1982] Ch 294 at 308; *In re Hetherington* [1990] Ch 1

(Footnote continues on next page)

However, given that the present appeal was conducted on the basis that abandoning the *Chorley* exception would require the Court to depart from the authority of *Guss* in that respect, it is necessary to address the considerations relevant to that question.

29 In *John v Federal Commissioner of Taxation*[42], Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ identified considerations relevant to the exercise of this Court's undoubted power to review and depart from its earlier decisions. These included the following circumstances: that the earlier decisions did not "rest upon a principle carefully worked out in a significant succession of cases"; that the earlier decisions had "achieved no useful result but on the contrary had led to considerable inconvenience"; and that the earlier decisions "had not been independently acted on in a manner which militated against reconsideration"[43].

30 It may fairly be said that the decision in *Guss* proceeded upon an uncritical acceptance of the authority of *Chorley*, and so did not establish a principle carefully worked out in a succession of cases in this Court. Importantly, the decision in *Chorley* – on the authority of which *Guss* stands – departed from principle in several respects, as this Court explained in *Cachia*.

Cachia v Hanes

31 As to whether the recognition of the *Chorley* exception in *Guss* is a "useful result", the criticisms of the majority in *Cachia* strongly suggest a negative answer.

32 Although the Court in *Cachia* was not invited to abolish the *Chorley* exception, the majority's criticisms of the *Chorley* exception substantially undermine the authority of the decision in *Chorley*, and consequently the authority of *Guss*. In *Cachia*, the majority, in discussing the decision in *Guss*, described the *Chorley* exception as "somewhat anomalous" and stated that the justification for the exception was "somewhat dubious"[44]. As noted above,

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at 10; *Spence v Queensland* (2019) 93 ALJR 643 at 711 [294]; 367 ALR 587 at 667; [2019] HCA 15.

42 (1989) 166 CLR 417; [1989] HCA 5.

43 (1989) 166 CLR 417 at 438-439.

44 (1994) 179 CLR 403 at 411.

their Honours were of the view that to permit a self-represented solicitor to recover costs – which are the solicitor's reward for the exercise of professional skill – gives rise to the possibility of allowing the solicitor to profit from his or her participation in the conduct of litigation. That possibility is unacceptable in point of principle.

33 In that regard, costs are a creature of statute[45]. It has never been thought that any of the ubiquitous statutory provisions empowering courts to order costs are available to compensate a litigant for his or her time and trouble in participating in litigation. That is because costs are awarded by way of indemnity; they are not awarded as compensation for lost earnings, much less as a reward for a litigant's success. The courts have long regarded the statutory power to make an order for costs as confined by the concern to provide the successful party with a measure of indemnity against the expense of professional legal costs actually incurred in the litigation. Thus, the majority in *Cachia* said[46]:

> "It has not been doubted since 1278, when the *Statute of Gloucester*[47] introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant."

34 In *Cachia*[48], it was argued that *Guss* was wrongly decided and ought not be followed in its affirmation of the general rule that orders for costs are not available to self-represented litigants. The majority did not accept that argument, but in the course of their criticism of the *Chorley* exception they said[49]:

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45 *Latoudis v Casey* (1990) 170 CLR 534 at 557; [1990] HCA 59; *Cachia v Hanes* (1994) 179 CLR 403 at 410; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 85-86 [33]-[34], 120 [134]; [1998] HCA 11; *Northern Territory v Sangare* [2019] HCA 25 at [12].

46 (1994) 179 CLR 403 at 410-411.

47 6 Edw I c 1.

48 (1994) 179 CLR 403 at 405.

49 (1994) 179 CLR 403 at 412.

> "It is ... important to note that no general submission was advanced in [*Guss*] to the effect that a successful solicitor litigant who acts for himself is never entitled to recover 'costs' in respect of his own time and services."

35 The majority went on to say[50]:

> "If the explanations for allowing the costs of a solicitor acting for himself are unconvincing, the logical answer may be to abandon the exception in favour of the general principle rather than the other way round. However, it is not necessary to go so far for the purposes of the present case. It suffices to say that the existence of a limited and questionable exception provides no proper basis for overturning a general principle which has, as we have said, never been doubted and which has been affirmed in recent times."

36 In *Cachia*, Toohey and Gaudron JJ dissented in this regard. Their Honours concluded that the "general principle" should not be applied because of the expansive view they took of the *Supreme Court Rules 1970* (NSW), which authorised the making of orders for costs[51].

37 In the view of the majority in *Cachia*[52], if the anomaly were to be removed by abolishing the general rule, it could appropriately be done only by legislation and not judicial decision. It was noted that this course had been taken in England[53]. It may also be noted that in New Zealand, suggestions that the courts should abrogate the general rule have been rejected on the basis that such a course is a matter for the legislature[54]. In Canada, on the other hand, the courts have not shrunk from abrogating the general rule by judicial decision[55].

38 The majority in *Cachia*, in rejecting the argument that the *Chorley* exception disproves the general rule, noted that "[i]f costs were to be awarded

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50 (1994) 179 CLR 403 at 412-413 (footnote omitted).

51 (1994) 179 CLR 403 at 424-425.

52 (1994) 179 CLR 403 at 416-417.

53 *Litigants in Person (Costs and Expenses) Act 1975* (UK).

54 *McGuire v Secretary for Justice* [2018] NZSC 116 at [56].

55 *Skidmore v Blackmore* (1995) 122 DLR (4th) 330.

otherwise than by way of indemnity, there would be no logical reason for denying compensation to a litigant who was represented" and "[t]hat would in some cases dramatically increase the costs awarded to a successful litigant", especially in corporate litigation of complexity where a litigant "may expend considerable time and effort in preparing its case"[56]. Further, so far as the general rule is concerned, and "[p]utting to one side the question posed by the relatively rare exception of a solicitor acting in person, there is no inequality involved: all litigants are treated in the same manner". On the other hand, "if only litigants in person were recompensed for lost time and trouble, there would be real inequality between litigants in person and litigants who were represented, many of whom would have suffered considerable loss of time and trouble in addition to incurring professional costs"[57]. These considerations weighed with their Honours in declining the invitation to abolish the general rule on the basis that such a course was a matter for the legislature. Importantly for present purposes, their Honours recognised that the *Chorley* exception, though "relatively rare", involved inequality before the law.

39 For these reasons, in the absence of a compelling reason to the contrary, this Court should now accept the "logical answer" and hold that the *Chorley* exception is not part of the common law of Australia, as foreshadowed by the majority in *Cachia*.

Independently acted upon?

40 The respondent advanced several arguments with a view to identifying a compelling reason to maintain the authority of *Guss* and *Chorley*.

41 The respondent emphasised that there had been no rejection of the *Chorley* exception by any Australian legislature. It was said that if *Guss* were to be overruled in relation to its acceptance of the *Chorley* exception, the intention of the various legislatures would be subverted. In particular, the respondent argued that the *Civil Procedure Act* itself embraced the *Chorley* exception. She submitted that the New South Wales legislature demonstrated an intention to maintain the *Chorley* exception by explicitly including within the definition of "costs" the different types of costs, such as "fees, disbursements, expenses and remuneration".

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56 (1994) 179 CLR 403 at 414.

57 (1994) 179 CLR 403 at 414-415.

42 In particular, it was argued on behalf of the respondent that the word "remuneration" in the definition of "costs" is apt to encompass costs within the *Chorley* exception. The respondent submitted that the recovery by a lawyer for work on his or her own case is "remuneration" for the exercise of professional skill by a qualified legal professional. On the other hand, it was said that there is no basis for valuing the work of a non-lawyer because he or she cannot recover "remuneration for the exercise of a professional skill which he has not got"[58].

43 This argument should be rejected. Both the anomalous nature of the *Chorley* exception, and the difference between the position of a lawyer acting for himself or herself and that of a lawyer representing another person, are reflected in the definition of "costs" in s 3(1) of the *Civil Procedure Act*. That definition is a "means and includes" definition. In *BHP Billiton Iron Ore Pty Ltd v National Competition Council*[59], this Court explained that:

> "As a general proposition, the adoption of the definitional structure 'means and includes' indicates an exhaustive explanation of the content of the term which is the subject of the definition, and conveys the idea both of enlargement and exclusion. In doing so, the definition also may make it plain that otherwise doubtful cases do fall within its scope."

44 In s 3(1) of the *Civil Procedure Act*, the "means" part of the definition, in referring to "costs payable", is a restatement of the general rule that costs are awarded only for professional costs actually incurred. The "includes" part of the definition, in referring to "remuneration", can be seen readily enough to encompass remuneration for professional services rendered under a contract of service as well as remuneration for professional services rendered under a contract for services. In so doing, it "makes plain" that the cost of professional legal services rendered by an employed lawyer is included in the definition of "costs". The definition, being otherwise exhaustive, leaves no room for the *Chorley* exception as a matter of legislative intention. "Remuneration" is 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.

45 By contrast, in *McGuire v Secretary for Justice*[60], the Supreme Court of New Zealand concluded by majority that the applicable rules of court "proceed

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58 *Buckland v Watts* [1970] 1 QB 27 at 38.

59 (2008) 236 CLR 145 at 159 [32]; [2008] HCA 45 (footnotes omitted).

60 [2018] NZSC 116 at [86].

on the basis of the continued operation of both the [general] rule and the [*Chorley*] exception".

Unacceptable inconvenience

46 The respondent argued that serious inconvenience would be occasioned in relation to the use of in-house solicitors by governments and corporations, including incorporated legal practices, if the *Chorley* exception were not recognised by this Court as part of the common law. It was argued that governments and other employers, and incorporated legal practices operating through a sole director, would be prevented from recovering costs for professional legal services rendered by employed solicitors.

47 This 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, as is confirmed by the inclusion of "remuneration" in the definition of "costs" in the *Civil Procedure Act*. Where a government or corporate litigant has been represented by an employed solicitor, the courts have proceeded on the footing that the actual cost to the government or corporation of the legal services provided by its employed solicitor would not exceed, in any substantial amount, the sum recoverable by it for professional legal costs. In *Commonwealth Bank of Australia v Hattersley*[61], Davies A-J explained that:

> "[W]here an employed solicitor is involved, the traditional approach has been to award costs on a basis comparable to the costs which would have been incurred and allowed on taxation had an independent solicitor been engaged. The assumption has been made that, in an ordinary case, the indemnity principle will not be infringed by taking this approach."

48 In *Ly v Jenkins*[62], Kiefel J (as her Honour then was) adopted that explanation and the view expressed by Russell LJ, with whom Stamp and Lawton LJJ agreed, in *In re Eastwood, decd*[63]:

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61 (2001) 51 NSWLR 333 at 337 [11].

62 (2001) 114 FCR 237 at 280 [160].

63 [1975] Ch 112 at 132.

> "It is a sensible and reasonable presumption that the figure arrived at on this basis will not infringe the principle that the taxed costs should not be more than an indemnity to the party against the expense to which he has been put in the litigation."

49 Similarly, in the decision of the Court of Appeal of New Zealand in *Henderson Borough Council v Auckland Regional Authority*[64], Cooke J, with whom Woodhouse P and Richardson J agreed, said:

> "In New Zealand I do not think it can be said to be improper for an employed barrister to represent his employer ... A fortiori an employed solicitor duly enrolled and with a current practising certificate may properly act as solicitor for his employer. Against that background it appears to me that the fact that an employed practitioner has acted for the successful party is not a sufficient reason for denying that party an award of party and party costs: after all, the time of a salaried employee has been occupied."

50 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.

51 Whether the same view should be taken in relation to a solicitor employed by an incorporated legal practice of which he or she is the sole director and shareholder stands in a different position. It might be queried whether such a solicitor has sufficient professional detachment to be characterised as acting in a professional legal capacity when doing work for the incorporated legal practice. And it might be queried whether costs claimed by an incorporated legal practice for work of its sole director and shareholder are within the expansive view of indemnity that has been adopted in the authorities. In this regard, in *McIlraith*[65], Brereton J was disposed to attribute "no significance" to the circumstance that the party seeking an order for costs was an incorporated legal practice whose director was the solicitor who actually performed the work for which costs were sought. It is neither appropriate nor necessary to come to a conclusion as to whether Brereton J was correct in this regard.

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64 [1984] 1 NZLR 16 at 23.

65 [2007] NSWSC 1052 at [11].

52 The resolution of this question may require close consideration of the legislation which provides for incorporation of solicitors' practices and the intersection of that legislation with the provisions of the *Civil Procedure Act* in light of the general rule; and so the resolution of this question may be left for another day, when all the legislation that bears on the question has been the subject of argument.

53 It is sufficient for present purposes to say that whether or not an incorporated legal practice that is a vehicle for a sole practitioner should be able to obtain an order for costs for work performed by its sole director and shareholder is ultimately a matter for the legislature. Whether the *Chorley* exception is part of the common law of Australia is a matter for this Court.

A matter for the legislature

54 The respondent also argued that this Court should refrain from holding that the *Chorley* exception is not part of the common law because that is a task more appropriately dealt with by the relevant legislature or rules committee of a superior court[66]. It was said that the legislature would be better placed than a court to decide whether the court's rules of practice should be altered or abrogated. This argument may be disposed of briefly. The majority in *Cachia* saw great difficulty in resolving the inconsistency between the general rule and the *Chorley* exception by judicial abolition of the general rule. No such difficulty was said to confront the taking of the logical step of holding that the exception is not part of the common law. The *Chorley* exception is the result of judicial decision, and it is for this Court to determine whether it is to be recognised in Australia.

Prospective overruling

55 The respondent submitted that if this Court were to alter or abrogate the *Chorley* exception, such a change should operate only prospectively so that the decision of the Court of Appeal in this case is not disturbed. Once again, this argument should be rejected for reasons that may be explained briefly. To hold that the *Chorley* exception is not part of the common law is to hold that there was no basis in law for the decision of the Court of Appeal. In *Ha v New South Wales*, Brennan CJ, McHugh, Gummow and Kirby JJ said[67]:

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66 *McGuire v Secretary for Justice* [2018] NZSC 116 at [88].

67 (1997) 189 CLR 465 at 503-504; [1997] HCA 34 (footnotes omitted).

> "A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law."

56 Dawson, Toohey and Gaudron JJ expressly agreed with these observations[68].

Conclusion and orders

57 There is no compelling reason for this Court to refrain from taking the "logical step" identified in *Cachia*. The *Chorley* exception is not part of the common law of Australia.

58 The appeal should be allowed. Orders 1 to 4 of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In their place it should be ordered that the summons for judicial review be dismissed and the first respondent pay the appellant's costs in the District Court and the Court of Appeal. The first respondent should pay the appellant's costs of the appeal to this Court.

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68 *Ha v New South Wales* (1997) 189 CLR 465 at 515.

59 GAGELER J. Costs in courts administering the common law are and always have been "entirely and absolutely creatures of statute"[69]. Yet statutes authorising courts to award costs have formed part of the armoury of common law courts for almost as long as the common law system has existed[70]. Throughout much of the history of the common law system, the principles according to which statutory authority to award costs has been exercised have been left to exposition and development by the courts themselves. The courts have articulated those principles at times legislatively through the promulgation of rules of court and at times judicially through reasoned decisions which have the status of precedents.

60 The "general principle" that "costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation" is a judicial creation of considerable antiquity[71]. A comparatively recent judicial creation until now has been the "*Chorley* exception", according to which a legal practitioner has been able to be indemnified at a professional rate for time spent acting on his or her own behalf.

61 The *Chorley* exception was authoritatively introduced into the common law system by a decision of the English Court of Appeal[72] at a time when it had been laid down by the Privy Council to have been "of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same" with the consequence that colonial courts construing and applying colonial statutes were bound to follow decisions of the English Court of Appeal on the construction and application of English statutes in materially identical terms[73]. The last vestiges of

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69 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 182; [1992] HCA 28, quoting *Garnett v Bradley* (1878) 3 App Cas 944 at 962.

70 *Statute of Gloucester 1278* (6 Edw I c 1); *An Act that the Defendant shall recover Costs against the Plaintiff, if the Plaintiff be nonsuited, or if the verdict pass against him 1531* (23 Hen VIII c 15); *An Act to give Costs to the Defendant upon a Nonsuit of the Plaintiff, or upon a Verdict against him 1606* (4 Jac I c 3).

71 *Cachia v Hanes* (1994) 179 CLR 403 at 410-412; [1994] HCA 14, citing Coke, *Second part of the Institutes of the Laws of England* (1797) at 288, *Howes v Barber* (1852) 18 QB 588 at 592 [118 ER 222 at 224] and *Dowdell v Australian Royal Mail Steam Navigation Co* (1854) 3 El & Bl 902 at 906 [118 ER 1379 at 1381]. See also *Harold v Smith* (1860) 5 H & N 381 at 385 [157 ER 1229 at 1231].

72 *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872, affirming *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452.

73 *Trimble v Hill* (1879) 5 App Cas 342 at 344-345.

the policy laid down in that era were removed only with the termination of appeals to the Privy Council from all decisions of Australian courts in 1986[74], immediately following which this Court declared that earlier statements to the effect that decisions of the English Court of Appeal (including those on the construction and application of statutes) ought generally to be followed[75] "should no longer be seen as binding upon Australian courts"[76].

62 The timing of that cessation of institutionalised deference on the part of Australian courts to decisions of the English Court of Appeal does much to explain the contrast between the uncritical acceptance of the *Chorley* exception in *Guss v Veenhuizen [No 2]*[77] and the subsequent acknowledgement in *Cachia v Hanes*[78] of the *Chorley* exception as "somewhat anomalous" accompanied by the suggestion that, if the explanations for the exception were "unconvincing", "the logical answer may be to abandon the exception in favour of the general principle".

63 Using the term "common law" in the broad sense of judge-made law[79], it is therefore not inappropriate to refer to the general principle and the *Chorley* exception as part of the common law, originally of England and then, by application of the rules of reception (in the case of the principle) and by application of the rules of precedent (in the case of the exception), also of Australia. Treating both the principle and the exception as part of the common law of Australia, it is entirely appropriate for this Court in its capacity as ultimate custodian of the contemporary common law of Australia[80] now to take the step foreshadowed in *Cachia* of determining that the exception to the general principle should be abandoned. For the reasons given by Kiefel CJ, Bell, Keane and Gordon JJ, that is the step which should now be taken.

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74 Section 11 of the *Australia Act 1986* (Cth).

75 eg, *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 341, 349; [1975] HCA 28.

76 *Cook v Cook* (1986) 162 CLR 376 at 390; [1986] HCA 73.

77 (1976) 136 CLR 47; [1976] HCA 57.

78 (1994) 179 CLR 403 at 411-412.

79 See *PGA v The Queen* (2012) 245 CLR 355 at 370 [22]; [2012] HCA 21, quoting Simpson, "common law", in Cane and Conaghan (eds), *The New Oxford Companion to Law* (2008) 164 at 165.

80 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563; [1997] HCA 25.

64 In *Guss*, the continued existence of the *Chorley* exception was not in issue. All that was determined was that the appellant, who acted for himself, was not disentitled from claiming professional costs on a taxation under the *High Court Rules 1952* (Cth) because his name failed to appear on the Register of Practitioners kept under s 55C of the *Judiciary Act 1903* (Cth) through no fault of his own. In determining that the *Chorley* exception is to be abandoned, no question of overruling *Guss* in truth arises. It is enough to say that abandonment of the *Chorley* exception means that "the view of the majority in that case would not prevail today"[81].

65 The step now taken to abandon the *Chorley* exception is a step which the Supreme Court of New Zealand chose not to take only last year[82]. That was in part because the rules of court which the Supreme Court was concerned with construing and applying were seen to have been framed on the basis of the continued operation of the exception[83] and in part because the Supreme Court was not satisfied that it had been presented with complete arguments as to the ramifications of abandoning the exception[84]. The Supreme Court mentioned in particular that it had been presented with no principled basis on which it could abandon the exception and yet maintain the ability of a party to recover the costs of using an employed lawyer[85]. The Supreme Court specifically overruled a holding of the Court of Appeal of New Zealand to the effect that costs could only be awarded by way of reimbursement for fees actually invoiced[86]. In so doing, the Supreme Court specifically noted that maintaining that holding would have been fatal to the recovery of costs by a party who used an employed solicitor as much as it would have been fatal to the recovery of costs by a legal practitioner who acted on his or her own behalf[87].

66 In light of that recent decision of the Supreme Court of New Zealand, I think it important to emphasise that the step now taken in abandoning the *Chorley* exception as part of the common law of Australia encounters neither of the obstacles which were of concern to the Supreme Court and involves no

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81 *Annetts v McCann* (1990) 170 CLR 596 at 600; [1990] HCA 57.

82 *McGuire v Secretary for Justice* [2018] NZSC 116.

83 [2018] NZSC 116 at [86], [94].

84 [2018] NZSC 116 at [87(c)].

85 [2018] NZSC 116 at [87(c)].

86 *Joint Action Funding Ltd v Eichelbaum* [2018] 2 NZLR 70 at 83-84 [41]-[43].

87 [2018] NZSC 116 at [85], [88].

adoption of the view specifically rejected by the Supreme Court that costs can only be awarded by way of reimbursement for fees actually invoiced.

67 As to the immediate statutory setting for the present appeal, the reasons given by Kiefel CJ, Bell, Keane and Gordon JJ show that the definition of "costs" in s 3(1) of the *Civil Procedure Act 2005* (NSW) reflects the general principle in a manner which leaves no room for an exception for recovery of costs by a legal practitioner acting on his or her own behalf. The legislative history of the *Civil Procedure Act* contains nothing to suggest legislative endorsement of the *Chorley* exception[88]. As to the statutory setting elsewhere in Australia, it is sufficient to record that, in an argument on behalf of the respondent legal practitioner which left no stone unturned or unflung in defence of the *Chorley* exception, no suggestion was made that the statutory costs regime presently applicable in any other Australian jurisdiction has been framed in a manner which relies on the continuing existence of the *Chorley* exception. Unlike the position in New Zealand, there is in Australia no legislative impediment to its wholesale judicial abolition.

68 Recovery of costs by a party using an employed solicitor predated introduction of the *Chorley* exception[89]. The better view, explained in a number of cases to which the Supreme Court of New Zealand appears not to have been referred, 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[90]. 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.

69 I agree with the orders proposed by Kiefel CJ, Bell, Keane and Gordon JJ.

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88 cf *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107; [1994] HCA 34. See also *Flaherty v Girgis* (1987) 162 CLR 574 at 594; [1987] HCA 17.

89 *Attorney-General v Shillibeer* (1849) 4 Ex 606 [154 ER 1356]; *Raymond v Lakeman* (1865) 34 Beav 584 [55 ER 761].

90 eg, *Registrar of Titles v Watson* [1954] VLR 111 at 112-113; *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 at 337 [11]-[12], 338-340 [17]-[25].

70 NETTLE J. I agree with the plurality that the rule of practice known as the "Chorley exception" does not extend to barristers and should not be extended to barristers. Unlike the plurality and Gageler and Edelman JJ, however, I do not consider that there is need or justification to decide as part of this matter that the Chorley exception should be abolished.

71 If the issue were *tabula rasa*, I would agree that the exception is undesirable; although not because I consider it to be anomalous[91] or an affront to equality of litigants before the law[92]. The exception reflects the fact that, relevantly, 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. The real problem with the Chorley exception, as was observed[93] in *Cachia v Hanes*, is 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.

72 Despite that difficulty, however, the Chorley exception is a rule of practice of long standing which has twice been acknowledged[94] by decisions of this Court – albeit that the correctness of the exception was not there disputed[95] – and which has been widely acted upon by courts, the legal profession, governments and government departments, business and various legislatures and rules committees throughout Australasia. The ramifications of abrogating the exception are potentially very wide, and, without this Court first hearing argument on behalf of the interests likely to be affected, to a large extent unknowable.

73 Moreover, even if the Court had the benefit of argument from representative bodies on behalf of the interests most obviously affected, the potential regulatory and fiscal consequences of abrogating the exception appear

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91 cf *Cachia v Hanes* (1994) 179 CLR 403 at 411 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ; [1994] HCA 14.

92 See and compare *Cachia v Hanes* (1994) 179 CLR 403 at 414-415 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

93 *Cachia v Hanes* (1994) 179 CLR 403 at 412 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

94 *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47; [1976] HCA 57; *Cachia v Hanes* (1994) 179 CLR 403.

95 See and compare *Coleman v Power* (2004) 220 CLR 1 at 44-45 [79] per McHugh J; [2004] HCA 39.

to me to be of a nature and extent that only Parliament is competent to measure and balance[96]. To adopt and adapt the language of Mason CJ, Brennan, Deane, Dawson and McHugh JJ in *Cachia*[97]:

> "there are considerations which must be weighed before any reasoned conclusion can be reached. A court engaged in litigation between parties, even if it were not constrained by the legislation and rules, is plainly an inappropriate body to carry out that exercise or to act upon any conclusion by laying down the precise nature of any change required."

74 Recently, the Supreme Court of New Zealand cited that observation in support of their decision[98] not to abrogate what is there called "the employed lawyer rule" exception to the "primary rule" that a lay litigant is not entitled to its costs: on the basis that "if there is to be reform to the law [in this area] this should be effected otherwise than by the courts". Significant among the concerns which led the Supreme Court to that conclusion was the "practical inconsistency if the lawyer in person exception were to be abrogated but the employed lawyer rule retained"[99].

75 In this country, there is no employed lawyer rule as such. But the position is similar. It has long been accepted, and costs have long been taxed on the basis, 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[100]. Logically, abolition of the Chorley exception would mean

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96 See *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 627 per Gibbs J, 629 per Stephen J, 633, 636 per Mason J; [1979] HCA 40, citing *Ross v McCarthy* [1970] NZLR 449 at 456 per Turner J and *Bagshaw v Taylor* (1978) 18 SASR 564 at 579 per Bray CJ. See also *McGuire v Secretary for Justice* [2018] NZSC 116 at [87(c) and (d)], [88] per Elias CJ, William Young, Glazebrook and O'Regan JJ, [92] per Ellen France J.

97 (1994) 179 CLR 403 at 416.

98 *McGuire v Secretary for Justice* [2018] NZSC 116 at [68], [88] per Elias CJ, William Young, Glazebrook and O'Regan JJ, see also at [92] per Ellen France J.

99 *McGuire v Secretary for Justice* [2018] NZSC 116 at [85] per Elias CJ, William Young, Glazebrook and O'Regan JJ, see and compare [93] per Ellen France J.

100 See and compare *Attorney-General v Shillibeer* (1849) 4 Ex 606 [154 ER 1356]; *In re Eastwood, decd* [1975] Ch 112; *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333; *Ly v Jenkins* (2001) 114 FCR 237; *Dyktynski v BHP Titanium Minerals Pty Ltd* (2004) 60 NSWLR 203; *Council of the City of Sydney v Galanis* [2012] NSWLEC 263; *Deputy Commissioner of Taxation v Debaugy*

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that the entitlement to do so ceases to exist. It may be open to declare, as the plurality do, that the abolition of the Chorley exception should not be taken to disturb the well-established understanding in relation to in-house solicitors employed by governments and others. But why should there be a distinction? There are potentially many forensic and social considerations relevant to a determination of whether the employed solicitor rule should be permitted to survive the Chorley exception, and, if so, in what form; and none of that analysis has been or can be undertaken in this proceeding.

76 As the matter stands, therefore, I consider that the decision whether to abrogate the Chorley exception in whole or part is something that should properly be left to the Commonwealth and State Parliaments or at least to the Rules Committees or Law Society Committees[101] in the exercise of their representative and regulatory functions.

77 It was contended on behalf of the appellant that Parliament has, in effect, abrogated the Chorley exception by defining "costs" as "costs payable in or in relation to the proceedings" in s 3(1) of the *Civil Procedure Act 2005* (NSW) ("the Act"). In brief substance, the argument tracks suggestions made by Meagher JA in the Court of Appeal, in dissent, as well as by other judges of that Court in other decisions concerning the same or cognate costs powers, that, because s 98(1)(b) of the Act authorises a court to determine by an order for costs "by whom, to whom and to what extent costs are to be paid", and because "costs" are defined in s 3(1) of the Act in terms of "costs payable", the only costs which may be ordered are those which are "payable" in the sense of there being an "underlying liability to *pay* costs incurred in or in relation to proceedings, rather than any prospective liability under a court order to defray those costs"[102]. When a solicitor acts for him or herself, *ex hypothesi*, there are no costs "payable". Hence, the Chorley exception is excluded.

78 The force of the argument is apparent but I do not accept it. The definition of "costs" in s 3(1) was enacted against the background of the long

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(2012) 263 FLR 193; *Maher v Official Trustee in Bankruptcy* (2013) 11 ABC (NS) 590.

101 See, eg, the Law Society of New South Wales Costs Committee and Legal Costs Unit.

102 *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [126] per Meagher JA (emphasis in original). See also *Wang v Farkas* (2014) 85 NSWLR 390 at 397 [28] per Basten JA (Bathurst CJ and Beazley P agreeing at 392 [1], [2]); *Wilkie v Brown* [2016] NSWCA 128 at [34]-[49] per Beazley P (McColl and Gleeson JJA agreeing at [55], [56]); *Bechara trading as Bechara and Company v Bates* [2016] NSWCA 294 at [36]-[66].

history of the Chorley exception. Accordingly, if Parliament had intended to abrogate the exception, it is to be expected that it would have done so expressly, and most improbable that it would choose to do so by the inclusion of a single word of ambiguous import in an Act designed to effect a general consolidation of the law of civil procedure in New South Wales "without radical changes in substance or form"[103]. As it is, although a primary natural and ordinary meaning of "payable" is payable to someone other than the payer, the word also conveys the sense of that which can be paid[104]. Alternatively, it may mean no more than "'payable' pursuant to costs orders made in proceedings"[105]. Either way, however, in the context in which "payable" appears in the definition of "costs", it conveys the sense of that which would be payable if the solicitor had not acted for him or herself. That was the meaning that it was assumed to have in O 71 r 19 of the *High Court Rules 1952* (Cth) in *Guss v Veenhuizen [No 2]*[106]; and, although the point was not expressly considered in that case, Parliament may be presumed to have proceeded on the basis that it was what the Court intended[107]. So much is confirmed by the Second Reading Speech, in which the Attorney-General told[108] the Parliament that the purpose and effect of cl 98 of the Bill was simply to "carry over provisions dealing with the court's power as to costs", which, in practical terms, meant the earlier provisions of s 76 of the *Supreme Court Act 1970* (NSW)[109]. The Attorney-General said[110]:

> "The bill and rules largely reflect existing provisions and continue to use phrases that have a settled legal meaning. Where there is change, much of

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103 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 April 2005 at 15116.

104 Oxford English Dictionary, online, "payable, adj", sense 1b, available at <https://www.oed.com/view/Entry/139176>.

105 *Wilkie v Brown* [2016] NSWCA 128 at [40]; see also at [42].

106 (1976) 136 CLR 47.

107 See *Coshott v Spencer* [2017] NSWCA 118; cf *Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 at [132] per Meagher JA.

108 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 April 2005 at 15118.

109 See and compare *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 at 338 [15].

110 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 April 2005 at 15116.

> it can be attributed to the fact that drafting styles have changed over the past 30 years. Parties should not be arguing that a rule has changed because a modern drafting style has been adopted if the substance of the rule remains the same."

79 In the result, I agree in the orders proposed by the plurality, but for the reason only that the Chorley exception should not be extended to barristers.

EDELMAN J.

The application of general statutory words

80 In 1884, in *London Scottish Benefit Society v Chorley*[111], the Court of Appeal of England and Wales held that the successful, unrepresented solicitors were entitled to their costs although they would not have been so entitled if they were not solicitors. That rule was not new. Prior to that decision, writers who had considered the issue[112], including the commentary in *Archbold's Practice* from 1840[113] to 1879[114], had treated unrepresented solicitor parties as entitled to their costs[115]. Earlier decisions had also recognised that a solicitor could recover costs for attending as a party where it was necessary for the solicitor to attend at court[116]. This rule was also uniform in the Court of Chancery and subsequently the Chancery Division of the High Court[117].

81 It was, however, generally understood that there was a difference between the source of the rules in Chancery and at common law. The authority to order costs in Chancery was inherent[118]. Hence, the development of those rules in

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111 (1884) 13 QBD 872 at 876, 877, 878. See also *Pennington v Russell [No 2]* (1883) 4 LR (NSW) Eq 41.

112 Compare Sayer, *The Law of Costs* (1768) at 5; Hullock, *The Law of Costs*, 2nd ed (1810), vol 1 at 3; Gray, *A Treatise on the Law of Costs in Actions & Other Proceedings in the Courts of Common Law at Westminster* (1853); Morgan and Wurtzburg, *A Treatise on the Law of Costs in the Chancery Division of the High Court of Justice* (1882).

113 Chitty, *Archbold's Practice of the Court of Queen's Bench*, 7th ed (1840), vol 1 at 48.

114 Prentice, *Archbold's Practice of the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court of Justice*, 13th ed (1879), vol 1 at 82. See also *Pennington v Russell [No 2]* (1883) 4 LR (NSW) Eq 41 at 46.

115 Pulling, *A Summary of the Law and Practice Relating to Attorneys*, 3rd ed (1862) at 267; Dixon, *Lush's Practice of the Superior Courts of Law at Westminster*, 3rd ed (1865), vol 2 at 896.

116 *Leaver v Whalley* (1833) 2 Dowl 80 at 80; *Jervis v Dewes* (1836) 4 Dowl 764 at 765.

117 *In re West; Ex parte Chamberlayne* (1850) 4 De G & Sm 17 [64 ER 715]. See *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452 at 457.

118 *Jones v Coxeter* (1742) 2 Atk 400 at 400 [26 ER 642 at 642].

Chancery was purely a matter of judge-made law. By contrast, in a view that has been endorsed in this Court[119], it was thought that at common law the authority was entirely statutory[120]. Nevertheless, from the seventeenth century[121] and through the late nineteenth century repeals and reforms[122], which did not affect "[a]ny jurisdiction or principle or rule of law or equity established or confirmed"[123], the statutory power was expressed in such wide terms as to leave the circumstances for its application as a matter of judicial development. The same broad power exists in statutes in Australia, which replicate this general power to award costs, in provisions such as s 98(1), read with the definition of costs in s 3(1), of the *Civil Procedure Act 2005* (NSW). By such provisions, Parliament "intends to give the Court the widest possible power and discretion in the allocation of costs"[124].

82 The question considered in *Chorley* did not concern the interpretation of the essential meaning of the statutory words that were thought to be the sole source of a power to order costs. In cases of the interpretation of the essential meaning of statutory words, where a statute has been re-enacted or amended on a "settled understanding"[125], it will generally be assumed that Parliament intended the words to have that settled meaning[126]. The question in *Chorley* was different. The essential meaning of the statutory words was established: it was to confer a broad power upon the judiciary to award costs. As Denman J said in the Divisional Court, the "origin of costs is to be traced to some early statutes: but none of the statutes and none of the rules have at all, I think, affected the

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119 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 182; [1992] HCA 28; *Edwards v Santos Ltd* (2011) 242 CLR 421 at 426-427 [11]; [2011] HCA 8.

120 *Garnett v Bradley* (1878) 3 App Cas 944 at 962. But compare Blackstone, *Commentaries on the Laws of England* (1768), bk 3 at 398-399.

121 *An Act to give Costs to the Defendant uppon a Nonsuite of the Plaintiffe, or uppon a Verdict against him 1606* (4 Jac 1 c 3), which extended generally 23 Hen 8 c 15.

122 *Civil Procedure Acts Repeal Act 1879* (UK) (42 & 43 Vict c 59).

123 *Civil Procedure Acts Repeal Act 1879* (UK), s 4(1)(b). See also *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452 at 459; *Supreme Court of Judicature Act 1890* (UK) (53 & 54 Vict c 44), s 5.

124 *McWilliams Wines Pty Ltd v Liaweena (NSW) Pty Ltd* (1993) 32 NSWLR 190 at 192.

125 *Brisbane City Council v Amos* [2019] HCA 27 at [48].

126 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 531; [1908] HCA 94; *Brisbane City Council v Amos* [2019] HCA 27 at [24].

question"[127]. The question in *Chorley* concerned the manner in which the broad statutory power to award costs should be developed and applied by the judiciary.

83 The conferral of a wide, general power as to costs was intended by Parliament to permit an approach by which the judiciary develops and applies the rules on costs in a principled and coherent manner. The same approach can be seen in statutes where Parliament "speaks continuously to the present" by picking up "as a criterion for its operation a body of the general law"[128], or where Parliament is "always speaking" in the sense that the essential original meaning of statutory words is applied to new circumstances and new understandings but consistently with the original statutory purpose[129]. This was the point being made by the repeated references, from the time of *Chorley*[130], to the rule being one of "practice". It is not a "practice" in the sense that the content of the rule will be determined by generally accepted, or expected, conduct of practitioners, which is itself dependent upon economic, social or political conditions. Rather, the "practice" to which reference was made is the authoritative application of a statute based upon legal principle. Even at the time of *Chorley*, the authority of the rule did not derive merely from habit and market expectations but rather from professional opinion and judicial decisions that were thought to be founded upon principle[131].

84 Unlike in New Zealand or England and Wales, in Australia the re-enactment of general provisions as to costs has not incorporated the approach taken by judicial decisions concerning the application of such provisions so that Australia has not "proceed[ed] on the basis of the continued operation" of the

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127 *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452 at 454-455.

128 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23]; [2010] HCA 42.

129 *Aubrey v The Queen* (2017) 260 CLR 305 at 323 [34]; [2017] HCA 18.

130 *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452 at 458; *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877-878; *H Tolputt & Co Ltd v Mole* [1911] 1 KB 87 at 92, affirmed on appeal *H Tolputt & Co Ltd v Mole* [1911] 1 KB 836 at 839; *Guss v Veenhuizen [No 2]* (1976) 136 CLR 47 at 51-52; [1976] HCA 57; *Dobree v Hoffman* (1996) 18 WAR 36 at 41, 43, 45, 51; *Khera v Jones* [2006] NSWCA 85 at [1], [3]; *Soia v Bennett* (2014) 46 WAR 301 at 321 [82].

131 *Burns v Corbett* (2018) 92 ALJR 423 at 468-469 [210]; 353 ALR 386 at 444-445; [2018] HCA 15, quoting Baker, *The Law's Two Bodies* (2001) at 66.

Chorley rule[132]. Rather, in Australia, re-enacted statutory costs powers have left rules, such as the *Chorley* rule, to judicial development by the judicial application of the general costs power.

A coherent principle in the treatment of "costs" of solicitor parties

85 Great care should be taken before abolishing a legal rule that has lasted for, and been followed for, more than a century. Other legal rules, statutory or common law, might have developed around the longstanding doctrine so that the removal or alteration of the longstanding rule could also uproot or damage the developments around it. This will often be so where the rule has been carefully worked out in a succession of cases. Change might also disrupt longstanding foundations upon which people have arranged their affairs and thus disturb existing entitlements[133].

86 None of these concerns prevent the alteration of the costs rule recognised in *Chorley*. No party pointed to any legal doctrine whose development had been affected by the *Chorley* rule. Nor was it suggested that anyone had arranged their affairs on the basis of the rule. Further, throughout its life the rule has been controversial. Two decades after *Chorley*, in 1904, in the Full Court of the Supreme Court of Victoria, Madden CJ still saw the point as "not free from doubt" and one about which it was "not easy even now to find the full explanation of the established principle on this point"[134]. In *Dobree v Hoffman*[135], the Full Court of the Supreme Court of Western Australia refused to follow the *Chorley* rule. In *Cachia v Hanes*[136], a majority of this Court described the rule as "somewhat anomalous" and "limited and questionable". In the Federal Court, "serious doubts" have been expressed about the correctness of the rule[137]. The rule has not been applied to a solicitor without a practising certificate[138] and

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132 *McGuire v Secretary for Justice* [2018] NZSC 116 at [86], [94]. Compare also *EMW Law LLP v Halborg* [2018] 1 WLR 52 at 61 [40].

133 See *Nelson v Nelson* (1995) 184 CLR 538 at 602; [1995] HCA 25.

134 *Ogier v Norton* (1904) 29 VLR 536 at 538.

135 (1996) 18 WAR 36. Overruled in *Soia v Bennett* (2014) 46 WAR 301.

136 (1994) 179 CLR 403 at 411, 413; [1994] HCA 14.

137 *Bechara v Bates* [2018] FCA 460 at [5]-[6]. See also *Hudson v Sigalla [No 2]* [2017] FCA 339 at [51]-[53].

138 *Lloyd v Hill* [2004] NSWSC 652 at [18]; *Worchild v Petersen* [2008] QCA 26 at [9], [14].

a solicitor who gave contested evidence[139]. In some cases it has not been applied to a barrister[140].

87 The *Chorley* rule is unjustifiable as a matter of principle without wholesale reform. In the Divisional Court in *Chorley*, Watkin Williams J considered that the primary application of "costs" was expenditure in "the form of employing skilled persons to do the work necessary to insure success"[141] but he said that the extension should apply where the successful party is "a person of skill, and devotes that skill and valuable time and legal knowledge to the doing of that for which he would otherwise have been obliged to employ and pay some one else".

88 As a matter of principle, there may have been good arguments in support of a rule that applied "costs" to "any real expenditure, whether of time or money"[142]. Time is money. Expenditure of time, as a measure of true loss, might be valued by the opportunity cost[143], although if it is measured as a provision of something of independent value the award would more naturally be in the form of a fair remuneration for work of that nature as the common law and equity have done for centuries, including for claims based on contract and on unjust enrichment.

89 A costs rule that is based upon all real expenditure in this sense has been adopted in England, since 1998, in the *Civil Procedure Rules*, which allow all litigants in person, including barristers and solicitors[144], to recover, subject to a cap, those costs "which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf"[145]. The amount of costs is either the proved financial loss or "an

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139 *Adamson v Williams* [2001] QCA 38 at [26].

140 *Winn v Garland Hawthorn Brahe (Ruling No 1)* [2007] VSC 360 at [10]; *Murphy v Legal Services Commissioner [No 2]* [2013] QSC 253 at [16]. See also the discussion in *Lake v Municipal Association of Victoria [No 2]* (2018) 57 VR 154 at 155 [6].

141 (1884) 12 QBD 452 at 460.

142 *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452 at 460. See also Dixon, *Lush's Practice of the Superior Courts of Law at Westminster*, 3rd ed (1865), vol 2 at 896.

143 *Atlas Corporation Pty Ltd v Kalyk* [2001] NSWCA 10 at [9].

144 *Civil Procedure Rules 1998* (UK), r 46.5(6)(b)(i)-(ii).

145 *Civil Procedure Rules 1998* (UK), r 46.5(3).

amount for the time reasonably spent on doing the work" at a prescribed rate of £19 per hour for non-solicitor litigants in person[146].

90 As a matter of principle, it might be arguable that if the law had been judicially developed in the manner of the 1998 civil procedure reforms in England then such an approach should also extend to the time reasonably spent by represented parties. But on this appeal no party submitted that such a wholesale reform, which might substantially increase the costs of litigation, could be made judicially to the general rule against recovery of the value of time so that "the exception [for solicitor litigants in person] becomes the rule"[147].

91 If the general rule is not to change then, as a matter of principle, it is impossible to justify an exception that recognises costs for expenditure of time in litigation by an unrepresented solicitor litigant who performs work on the case but not by any other unrepresented litigant. If a distinction were said to lie in the skill often possessed by unrepresented solicitors but not by other unrepresented litigants then costs should be permitted for the time of an unrepresented builder, plumber, engineer, architect, or accountant who relies on their expertise to perform work on their own case including preparing submissions on matters within their expertise. In the Court of Appeal in *Chorley*, Bowen LJ thought it "absurd" to "permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk"[148]. Whether or not that is correct, it would be equally absurd to permit the builder, plumber, and engineer to recover costs for the same skilled work when it is done by another for the litigation, but not to permit them to recover when it is done by themselves.

92 Nor is there any reason to treat solicitors differently from other professions due to the particular duties that they owe in the course of representing others. Although an unrepresented solicitor who is party to an action is often described as "self-represented", the solicitor, like any other unrepresented litigant, does not "represent herself or himself". The solicitor's role as an agent for another is absent. Further, although it might be said that evidence given by a builder, plumber, or engineer would better be given by an independent person, modern orthodoxy, as the joint judgment explains, is also that it is undesirable for solicitors to act for themselves.

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146 *Civil Procedure Rules 1998* (UK), r 46.5(4) and para 3.4 of Practice Direction 46 – Costs Special Cases.

147 *Cachia v Hanes* (1994) 179 CLR 403 at 414.

148 (1884) 13 QBD 872 at 877.

93 In summary, since the *Chorley* rule was a judicially developed rule which did not form an underlying assumption of any later statutory enactment, and since it is inconsistent with the underlying foundation of principle upon which costs rules have developed, those decisions that have adopted the *Chorley* rule in Australia should be overruled.

Prospective overruling

94 Echoing Pope Innocent III, Lord Rodger said that "in the New Testament even God himself made some changes to what he had laid down in the Old"[149]. If a broad view is taken of "prospective", of "overruling", and of the subject matter that is prospectively overruled, it might be arguable that almost every common law jurisdiction recognises some form of prospective judicial overruling. However, the primary point of concern raised by the opponents of "prospective overruling" is not the terminology. Their valid point is that judges must not cross the Rubicon, however elusive its precise location might be, between adjudication and legislation.

95 In *Ha v New South Wales*[150], in the context of the interpretation of the essential meaning of s 90 of the *Constitution*, this Court refused to overrule previous decisions with prospective effect only. Brennan CJ, McHugh, Gummow and Kirby JJ said that the "adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power"[151]. This passage should not be understood as endorsing the theory of law, described by Lord Reid as a "fairy tale"[152], that courts cannot create new law or that adjudication does not involve creating new rights and obligations. Plainly courts do create new rights and obligations as a matter of legal effect by recognising rights or obligations that are different from a previously settled understanding or a previously settled recognition. Less obvious, but nonetheless still involving a creation of new rights and obligations by a court order, is when a party is exposed to a liability, such as to make discovery or to account, and a judicial order creates the duty to do so.

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149 Rodger, "A Time for Everything under the Law: Some Reflections on Retrospectivity" (2005) 121 *Law Quarterly Review* 57 at 79.

150 (1997) 189 CLR 465; [1997] HCA 34.

151 (1997) 189 CLR 465 at 504; see also at 515.

152 Reid, "The Judge as Law Maker" (1972) 12 *Journal of the Society of Public Teachers of Law* 22 at 22.

96 The point instead being made in the quoted passage from *Ha v New South Wales* is that when the legal effect of a judicial decision is to create a substantive right or obligation, a court achieves this by reasoning of legal principle that is "fundamentally different from the enactment of new statutory provisions" because it is explicitly or implicitly based upon an assumption that the right or obligation was "at all relevant times legally correct and an authentic legal rule"[153]. In that sense, an obligation to which the order gives effect will be based on a legal duty or liability that is held to have been "existing" at the time of the relevant event as a matter of legal principle[154].

97 The concern of this Court in *Ha v New South Wales* was that prospective overruling could not alter these foundational precepts by requiring courts to "maintain in force that which is acknowledged not to be the law"[155]. The Court was not concerned with whether there could ever be any circumstances in which courts might create rules with other than retroactive effect to the time of the relevant events[156]. For instance, practice directions of a court, which regulate or govern the court's authority, are usually concerned only with future practices because they are not concerned with duties or liabilities at the time of any relevant event. Sometimes, perhaps on the same theory by describing the rule as one of "practice", orders have been made *inter partes* without giving the rule upon which they were based full retroactive effect[157]. But it does not appear that such orders have ever been made after full argument about the scope of judicial power. And it was not submitted on this appeal that a power to overrule prospectively could be contained within judicial power by limiting it only to rules that regulate or govern the court's authority. The scope of such a power was thus not directly raised on this appeal.

98 Although the *Chorley* rule has often been described as a "rule of practice", it was not submitted that it is merely a rule that regulates or governs the court's

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153 Finnis, "The Fairy Tale's Moral" (1999) 115 *Law Quarterly Review* 170 at 174-175.

154 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189-190; [1991] HCA 58.

155 (1997) 189 CLR 465 at 504.

156 Campbell, "The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts" (2003) 29 *Monash University Law Review* 49 at 53-56, 71.

157 *McKinney v The Queen* (1991) 171 CLR 468 at 476; [1991] HCA 6. See also *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1296, 1360-1361, 1368. Compare *Royal Bank of Scotland Plc v Etridge [No 2]* [2002] 2 AC 773 at 804 [50], 814 [89].

authority rather than being a rule that creates substantive rights or liabilities or creates or alters the court's powers to enforce or sanction those rights or liabilities. If that submission had been made and accepted, it would have been necessary to determine (i) whether, and if so when, it is possible to give, with prospective effect only, an authoritative legal application to a general statutory power to create a "rule of practice", and (ii) whether that prospective effect could be made to post-date the resolution of the dispute itself. It is enough in this case to apply the usual principle that in the exercise of judicial power a court cannot determine that a statute be applied in one way to the parties before the court but in another way to other parties in the future. The legal rule which this Court determines to apply by ss 3(1) and 98(1) of the *Civil Procedure Act* is one that should have applied, and does now apply, at all relevant times.

Conclusion

99 For these reasons, I agree with Kiefel CJ, Bell, Keane and Gordon JJ that the rule in *Chorley* is not part of Australian law and with the orders proposed.