24 FEBRUARY 2023

BELL GULLY SUBMISSION TO THE RULES COMMITTEE

IMPROVING ACCESS TO JUSTICE

1. INTRODUCTION

1.1 Bell Gully welcomes the opportunity to make this submission on the Rules Committee's report *Improving Access to Civil Justice* dated 23 November 2022 (**Report**).

1.2 Bell Gully has previously made submissions on the Rules Committee's initial and further consultation papers concerning access to justice, including our view on the broader issues affecting access to civil justice (such as resource constraints).

1.3 We set out below our submissions on the Committee's Report. In making these submissions, we recognise that our experience and perspectives are that of a large commercial law firm, with a particular focus on complex commercial and regulatory disputes. We accept, however, that the Rules Committee will be concerned to formulate rules that address the needs of all Court users.

1.4 Our submissions primarily focus on the recommendations made for reforms to the High Court. In summary, we consider that a number of the proposed reforms would improve access to justice, and we support them. We have reservations regarding some of the proposals, including, in particular, the proposal to exchange written evidence in advance of discovery.

2. RECOMMENDATON 16: INTRODUCE PROPORTIONALITY AS KEY PRINCIPLE

2.1 We support the proposal to amend r 1.2 of the High Court Rules (**Rules**) to introduce proportionality as one of the guiding principles applicable to civil proceedings.

3. RECOMMENDATION 17: WITNESS STATEMENTS

3.1 We have concerns about the proposal to follow the practice note of the New South Wales (**NSW**) Equity Division requiring the exchange of witness statements before discovery (Practice Note SC Eq 11 (**SC Eq 11**)).

3.2 Our concerns are as follows:

(a) The sequencing of witness statements before discovery is likely to lead to higher costs and greater inefficiencies in the management of civil cases.

(b) The application of SC Eq 11 in the NSW Equity Division appears to be more flexible in practice than the terms of the practice note would suggest. We believe that, if this approach is incorporated into the Rules, the same flexibility should be made explicit.

Our concerns about the proposal in principle

3.3 Discovery plays an important role in the development of a civil case. It is common to amend pleadings, refine issues, and focus evidence preparation in the light of discovery. We have concerns about changing the sequence so that discovery comes after the exchange of witness statements. These concerns include:

(a) Witnesses will need to address relevant documents that emerge in discovery in their testimony, either by way of supplementary statements or orally at trial. Witnesses will also need to address any amendments to the pleadings, or shift in focus of the proceeding, that frequently arise after discovery. We therefore question whether the need for supplementary statements will be "*rare*". The process of preparing supplementary statements is likely to be inefficient, increase costs, and disrupt the timeline to trial, while leading evidence orally at trial will also be inefficient, as well as increasing the risk of surprise.

(b) The proposal is likely to significantly elevate the importance of initial disclosure, particularly given the new proposal for the disclosure of adverse documents. Currently, disputes over parties' compliance with the initial disclosure rules are rare because parties expect to receive full disclosure, including adverse documents, before evidence is served. The proposal risks changing the nature of the initial disclosure regime into a quasi-discovery exercise, given that no further discovery will be available until after witness statements are exchanged. Having two stages of discovery is likely to be inefficient and increase the number of disputes over parties' compliance with their initial disclosure obligations.

(c) Similarly, the proposal may also increase the parties' use of alternate means to obtain documents and information, whether it be by non-party disclosure, pre-commencement disclosure, interrogatories or subpoenas. Inevitably this will give rise to disputes, and it may be that these applications will be challenged as inappropriate attempts to obtain discovery before the exchange of witness statements.

(d) While SC Eq 11 has been adopted by the NSW Equity Division, we understand that it has not been adopted in respect of cases heard by the Common Law Division.[1] Further, even in respect of cases heard by the Equity Division, the courts have accepted that the Practice Note may not be applicable to some types of cases.[2] As a result, care should be taken as to whether SC Eq 11 should be adopted in respect of all civil cases heard by the New Zealand High Court.

(e) Overall, we are concerned that the proposal could increase costs, reduce efficiency, and have unintentional consequences for the conduct of civil litigation in New Zealand.

Practices in NSW Equity Division

3.4 We note that there appear to be significant differences between the terms of SC Eq 11 and its application in practice.

[1] Clause 2 of SC Eq 11 also provides that it does not apply to proceedings in the NSW Equity Division's Commercial Arbitration List.
[2] In the NSW case law, probate law and practice has been recognised as an area that does not fit neatly into the conceptual framework of SC Eq 11: see *Re Brooker-Pain* [2019] NSWSC 671 at [42] and [134]; *Re Grundy* [2018] NSWSC 104 at [129]. Similarly, there is an open question regarding the applicability of SC Eq 11 to class actions: *Lam v Rolls Royce plc (No 3)* [2015] NSWSC 83 at [10].

3.5 SC Eq 11 is (unlike the proposed amendment to the Rules) not a rule of court. As a "*compass*", it "*guides, but does not govern*" the disclosure process.[3] The Courts have confirmed that it is not intended to be exhaustive or definitive.[4] Its non-binding, non-exhaustive nature means that it is applied and interpreted by the NSW Equity Division in a very flexible way. This flexible, case-by-case approach has allowed at least three major differences to arise between what SC Eq 11 stipulates and how it appears to operates in practice.

3.6 First, while the Practice Note states that discovery will only be permitted before affidavits if there are "*exceptional circumstances*", the NSW experience is that this does not require circumstances which are unique, unprecedented, or very rare.[5] The exceptional circumstances concept has been interpreted to mean circumstances that are unusual or out of the ordinary, or simply circumstances that necessitate disclosure.[6]

3.7 In a number of situations, we understand that it has become commonplace for disclosure to be routinely ordered. For example, there are many cases where disclosure has been allowed before the exchange of affidavits to facilitate the preparation of expert reports, and to avoid cost and delay, in circumstances where there is nothing particularly exceptional to justify disclosure. The practical utility in providing documents early has been held to justify early disclosure in several other cases.[7]

3.8 Second, the Practice Note directs that discovery will not be ordered "*unless it is necessary for the resolution of the real issues in dispute in the proceedings*". This test of necessity has also been interpreted liberally. Applicants must show that the disclosure sought is reasonably necessary for disposing of the matter fairly or in the interests of a fair trial. In *Pharmacy Guild of Australia v Ramsay Health Care Ltd*, Ward CJ said:[8]

[3] *Oxley v Oxley* [2018] NSWSC 91 at [78] ("*A Practice Note is, deliberately, not designed, expressly, to answer every question which could arise in the course of the preparation of a case for hearing. It is designed to provide a compass to guide the Court, the litigants, and the legal advisers, as to the general course that will be usually be followed. The Practice Note does not have binding effect but enables flexibility. In other words, it does not tie the hands of the court*"); *Graphite Energy Pty Ltd v Lloyd Energy Systems Pty Ltd* [2014] NSWSC 1326 at [14] ("*It is not a statute, nor a rule of the Court. It guides, but does not govern, the disclosure process. It must yield to the requirements of the individual case, although the importance of its purpose means that it will be in a rare case that the Court will depart from its guidance*").
[4] *Leighton International v Hodges* [2012] NSWSC 458 at [15].
[5] *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 89 at [17]; *Owners Strata Plan No 70335 v Walsh Bay Finance* [2013] NSWSC 1623 at [9]–[10].
[6] *Leighton International v Hodges* [2012] NSWSC 458 at [20]; *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2012] NSWSC 913 at [17]; *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 89 at [15]–[17]; *Pharmacy Guild of Australia v Ramsay Health Care Ltd* [2019] NSWSC 1045 at [230].
[7] See, e.g., *Ghalloub v Ghalloub* [2012] NSWSC 906 at [35]–[37].
[8] *Pharmacy Guild of Australia v Ramsay Health Care Ltd* [2019] NSWSC 1045 at [231] (emphasis added). See also *Bulga Coal Management Pty Ltd v Hope Wine Group Pty Ltd* [2020] NSWSC 1783 and [27]; Leighton International v Hodges [2012] NSWSC 458 at [22]; and, with respect to the scope of disclosure, see *Re Felans Fisheries Pty Ltd* [2017] NSWSC 1273 at [4] ("*that observation [of McDougal J's in* Hodges *at [22]] should not be*

The test of "necessity" requires that the disclosure sought be shown to be reasonably necessary for disposing of the matter fairly or in the interests of a fair trial. In *Re Metal Storm Ltd (subject to a deed of company arrangement)* [2016] NSWSC 306, Brereton J, as his Honour then was, said (at [17]):

> "In that context, it is necessary to remember the purposes of discovery. While it is a common use of discovery to obtain evidence of Party B's knowledge or conduct, **that is far from its sole use or purpose. The purposes of discovery include not only obtaining relevant evidence, but also reducing surprise and promoting fairness by putting parties in an equal position at trial, so that the parties are 'playing with all the cards face up on the table'.** Discovery has the consequence that Party B cannot adduce documentary evidence at trial which takes Party A by surprise. Thus, simply ascertaining what documents relevant to a fact in issue are in the possession of Party B and may be deployed at trial by that party, or may aid Party A's case or harm Party B's case, is a relevant and proper purpose of discovery. It is a means of a party ascertaining what the other party has in its hand, and thereby avoiding surprise."

3.9 For example, in *Re Micron Manufacturing Pty Ltd*, a shareholder brought a claim against a company alleging that it had engaged in oppressive conduct. The shareholder made an application seeking disclosure of documents from the company that were necessary for his expert to value his shareholding. This application was made before the court had found the company liable for oppressive conduct. The documents could not be said to be necessary, as there had not yet been a judgment on liability. Nonetheless, the application for disclosure was justified on the basis that the production of expert reports was more likely, rather than less likely, to assist the parties in settling the disputes between them, and that disclosure sooner rather than later was consistent with the overriding objective.[9]

3.10 Third, SC Eq 11 is silent about the interrelationship between the Practice Note and the other rules of court concerning the disclosure of documents. We understand that parties in NSW often seek documents by issuing subpoenas and interrogatories. The NSW Equity Division has dealt with this by, in effect, applying a gloss to the rules of court, so that applications for interrogatories and subpoenas must comply with SC Eq 11.[10]

Our submissions on the formulation of the rules, if this approach is adopted

understood, as Felan's sought to read it, as expanding the scope of disclosure in response to evidentiary dispute, without any real limitation, because one aspect of a fair trial is that costs of the trial and time spent in disclosure is managed in a proportionate way").

[9] *Re Micron Manufacturing Pty Ltd* [2017] NSWSC 289 at [18]–[24].

[10] See, e.g., *Anderson v Patersons Securities Ltd (No 2)* [2019] NSWSC 853 at [6] (subpoenas); *Karpin v Gough (No 2)* [2022] NSWSC 682 at [25] (timing of subpoeanas after affidavits); *IC Pipes Pty Ltd v DGS Trading Pty Ltd* [2022] NSWSC 951 at [8] and *Aversa v Roads & Maritime Services* [2021] NSWSC 1047 at [124], cf *International Management Group of America Pty Ltd v Media Niugini Ltd (t/as EMTV) (No 2)* [2021] NSWSC 919 at [20] (notices to produce); *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2014] NSWSC 372 at [87] (interrogatories).

3.11 In the event that the Rules Committee decides to import the SC Eq 11 process into New Zealand, we submit that the rules should reflect the learnings from the NSW Equity Division's experience with SC Eq 11. Unless these points are considered and addressed, there is likely to be a significant amount of litigation in the High Court concerning the scope of the rule. This will inevitably increase the cost and risk of litigating disputes in the High Court while the change is bedding in. In addition, if the change is implemented by amending the Rules, rather than by a practice note, as in NSW, the High Court might be unable to take as many leniencies with the language of the rule as the Equity Division has done with its practice note. As any fix may necessitate further amendment, it is important that careful consideration is given to the formulation of the rules.

3.12 We therefore make the following submissions, drawing on the learnings of the NSW Equity Division's experience with SC Eq 11:

(a) The requirement for "*exceptional circumstances necessitating disclosure*" before the exchange of affidavits should not be adopted. The NSW case law suggests that disclosure is ordered in situations which are not truly exceptional. We support a test that provides that disclosure will not be ordered until the parties have served their evidence, unless it is in the interests of justice to do so.

(b) The directive that no order for disclosure will be made "*unless it is necessary for the resolution of the real issues in dispute*" should also not be adopted. We support a test that provides that no order for disclosure will be made unless it is "*reasonably necessary for disposing of the matter fairly or in the interests of a fair trial*".

(c) Careful consideration should be given to the interplay between disclosure and the rules relating to interrogatories, subpoenas, and other means for obtaining disclosure outside the discovery process.[11]

3.13 We also make the following more specific submissions, in the event that SC Eq 11 is adopted in whole or part:

(a) The rules should provide for a non-exhaustive list of the reasons which may mean it is in the interests of justice to permit early disclosure of documents.[12]

(b) Consistent with the practice in respect to affidavits, parties should be required to disclose with their witness statements all documents that are

[11] For instance, arguments were made in *Re Awesome Rubber Pty Ltd* [2019] NSWSC 1428 about the interaction between the director's right to inspect records under s 198F(2) of the Corporations Act 2001 (Cth) and SC Eq 11. On the facts of the case, it was not necessary for the Court to make a determination on the issue: at [3].

[12] Drawing on the NSW case law, the list could suggest disclosure may be permissible if: all the relevant documents are in the possession or control of the respondent; there is no or little risk that the disclosure sought would impermissibly shape the witness evidence; the issues for disclosure are clear and the parties' witness evidence is unlikely to narrow the scope of disclosure further; it may reduce cost and delay, and increase the chance of settlement; it may assist in identifying potential witnesses to provide evidence (cf *Millinium Capital Managers Ltd v Soma Group Ltd (No 3)* [2020] NSWSC 966 at [11]); it is in the public interest; and it is in the interests of justice.

specifically referred to in their statements that were not already provided as part of initial disclosure.

(c) The Rules Committee could consider whether special rules should apply for specific proceedings to allow for disclosure before the exchange of witness statements.[13]

(d) Early disclosure of documents that are necessary for the preparation of expert reports should be permitted as a matter of course. In our experience, a significant amount of time is required to brief experts, identify documents for disclosure, and prepare reports. Cost and time considerations favour disclosure, particularly as the documents necessary for the preparation of expert briefs are usually in the hands of one or the other of the parties.[14] Moreover, as Brereton J observed in *Re Metal Storm*:[15]

> [B]ecause the evidence will chiefly be expert option, and does not involve the state of mind or conduct of EQT, the risks of "shaping" evidence to the documents which otherwise make it desirable to obtain the testimonial evidence first, are not present. Thus, the rationale that informs the Practice Note is no longer relevant at this stage of these proceedings. To the contrary, the expert evidence to be served will necessarily be informed by the documents.

(e) SC Eq 11 requires that the party applying for disclosure address the likely costs of disclosure. While this requirement has been justified as a guard against applications for discovery of excessive width, it has also been pointed out it can be difficult for the applicant to estimate the cost of disclosure.[16] In our view, the applicant and respondent are best positioned to assess what evidence is practical and appropriate to put before the court. We therefore do not see much benefit in specifically requiring the applicant to put in a cost estimate.

Other recommendations regarding witness statements

3.14 We support the Committee's proposal that witness statements should not be argumentative, or engage in a recitation of the chronology of events to be established at trial.

3.15 The Report states that, in light of these changes to the content of witness statements, it may be necessary to reconsider the extent of the duty to cross-examine in s 92 of the Evidence Act 2006. As it stands, it is not clear to us why a change may be necessary, and we are concerned that any change could result in injustice if key propositions were not required to be put to a witness in cross-examination.

[13] See fn 9 above.
[14] See, e.g., *JK Williams Staff Pty Ltd v Sydney Water Corporation* [2018] NSWSC 981; *RSA (Moorvale Station) Pty Ltd v VDM CCE Pty Ltd* [2013] NSWSC 534 at [35]–[37].
[15] *Re Metal Storm Ltd* [2016] NSWSC 306 at [34].
[16] *Re Felans Fisheries Pty Ltd* [2017] NSWSC 1273 at [6].

4. RECOMMENDATION 18: DISCOVERY AND DISCLOSURE

4.1 The Report proposes an enhanced level of initial disclosure to include adverse documents known to a party as well as a draft chronology. For companies and other organisations, this standard would effectively require a quasi-discovery exercise at the outset of the proceeding in order for the organisation to be comfortable confirming that all known adverse documents have been included in the initial disclosure and that the chronology of events is correct. The full discovery process would then follow later in the proceeding.

4.2 As we submitted at paragraph 3.3(b) above, having two stages of discovery is likely to be costly and inefficient, and may increase the number of disputes about initial disclosure. It may also be practically difficult for companies filing defences to conduct a quasi-discovery exercise in the 25 working day period between the receipt of the statement of claim and the filing of the defence.

5. RECOMMENDATION 19: JUDICIAL ISSUES CONFERENCE

5.1 We support the proposal that the Judicial Issues Conference and any subsequent interlocutory applications be conducted by the trial judge if at all possible.

6. RECOMMENDATION 20: INTERLOCUTORIES

6.1 We agree that, in many cases, it may be efficient for interlocutory applications to be consolidated. However, consolidation will not always be practical or desirable. In our experience consolidation occurs when there are time and cost efficiencies in doing so. We therefore question the utility of any amendment to the rules requiring the consolidation of all interlocutory applications that are filed after the Judicial Issues Conference.

6.2 We do not support the proposal that there be a presumption for remote hearings of interlocutory applications. In our experience, remote hearings for contentious applications are less efficient than in-person hearings. We therefore question whether there are material cost and time savings, particularly for contentious applications, and there may be unintended effects.

6.3 We also have concerns about the introduction of presumptive time limits for interlocutory applications. In our view, presumptive limits would be too rigid.

7. RECOMMENDATION 21: EXPERT EVIDENCE

7.1 We support the introduction of presumptions limiting parties to one expert witness per topic and that there be a requirement for expert conferral before expert evidence is led at trial.

7.2 In paragraph 3.13(d) above, we submitted that an order for disclosure of documents that are necessary for the preparation of expert evidence should be made at an early stage of the proceeding and before the exchange of witness statements. This appears to be consistent with NSW practice and is likely to result in significant cost and time savings.

7.3 We question the value of using moderators for expert conferences. The use of moderators will add cost and complexity, and will likely make scheduling time for conferral between the experts more difficult. In our experience, experts usually interact cordially and constructively at expert conferences, and no change is required. Their involvement may also introduce a quasi-trial atmosphere that is less conducive to constructive engagement between the experts.

8. RECOMMENDATION 23: REMOTE HEARINGS

8.1 We agree with the report that the hearing practices developed during the COVID-19 pandemic worked well in the circumstances and there are valuable learnings from this experience that can be made part of the standard practice and procedure of the High Court. However, as set out in paragraph 6.2 above, we consider there is value in in-person hearings for many contested applications. We do not consider there should be a presumption for interlocutory applications to be heard remotely.

9. DISTRICT COURT RECOMMENDATIONS

9.1 In relation to the District Court, we welcome the proposed creation of a separate civil division, the appointment of a Principal Civil Judge, and measures to strengthen the expertise and capabilities of the civil registries in the District Court.

10. CONCLUDING REMARKS

10.1 We thank the Rules Committee for the opportunity to make submissions on the Report. We would be pleased to answer any questions arising or provide any further information that might be useful for the Committee's work.

Bell Gully