BELL GULLY SUBMISSION IN RESPONSE TO RULES COMMITTEE CONSULTATION PAPER *IMPROVING ACCESS TO CIVIL JUSTICE*

2 JULY 2021

BELL GULLY

1. INTRODUCTION

1.1 Bell Gully welcomes the opportunity to make this submission on the Rules Committee's further consultation paper *Improving Access to Civil Justice* dated 14 May 2021 (the **Consultation Paper**).

1.2 We support the Rules Committee's project and the objectives of the Consultation Paper. Access to justice is central to the rule of law and a well-functioning society and economy, and we agree that it is important to regularly assess whether the procedural rules of Court can be improved. Those rules should facilitate speedy and inexpensive determination of civil proceedings. The Rules Committee's work on these matters is timely and important, and we welcome the Committee's review of the rules through the lens of access to justice.

1.3 It is also important that the rules are both fair and just, and perceived to be so by litigants and the broader community. In our view, it is important that the rules continue to provide for a process in which the parties are able to fully put their case and test the opposing party's case. It is essential to a well-functioning system of justice that a losing party can say that, although they lost the case, they felt that they at least had an opportunity to put their case and be fully heard.

1.4 This is particularly the case for commercial parties, who negotiate contracts and other arrangements against the backdrop that, if there is a dispute, they will have a fair opportunity to resolve that dispute through a system in which they have confidence. New Zealand has an enviable reputation for the quality of its civil justice system, which rests in part on well-tested features of the common law system. In our view, any reform should take care to keep those parts of our system that work well.

1.5 We set out below our submissions on the Rules Committee's proposals. In summary, we consider that a number of the proposed reforms may improve access to justice. We support these options. We have reservations, however, that some of the other options raised in the Consultation Paper might not achieve their objectives and may have adverse unintended consequences. Finally, we set out a number of other ways in which we consider that the costs of litigation could be reduced, and access to justice improved.

1.6 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 recognise that the Rules Committee will be concerned to formulate rules that address the needs of all Court users. We nonetheless hope that our submissions may be useful in providing a perspective from one of New Zealand's largest commercial litigation practices.

1.7 We would be very pleased to provide any further feedback that might be useful.

2. HIGH COURT

Discovery

2.1 The Rules Committee proposes to replace the current discovery rules with an adapted version of the initial disclosure rules that operate when pleadings are first filed. In our view, a review of the discovery rules is justified, given the disproportionate costs and delays that occur in some cases. In our view, however, this may be able to be achieved by targeted reforms of the current rules and by ensuring that the current rules are consistently applied (for example, by emphasising the importance of proportionality, which the rules currently provide for). We do not, however, consider that it would be appropriate to fundamentally change the discovery model, and we are concerned that to do so would result in a number of negative consequences.

2.2 As an initial matter, we would observe that the precise scope of the proposed discovery reforms is not clear from the Consultation Paper. The section dealing with the proposed reforms is very short – it consists of a single paragraph – and it is not clear to what extent changes are proposed. For example, the Paper says that discovery should be abrogated in most cases and that the most onerous obligations in the existing rules would only attach where that is proportionate, but does not address which cases fall on either side of the line. The Paper also says that the new obligations should be set out in "fairly broad

terms", by adopting the current rule for initial disclosure and applying a "duty of candour", although the scope of this is not explained further. And the Paper envisages a "wide-ranging residual judicial discretion", but without any commentary as to anticipated scope or parameters.

2.3 Given the potentially significant and far-reaching consequences of the proposed reforms, we consider that a full and detailed analysis of the current discovery regime should first be undertaken before any further action is taken. In our view, this should include an examination of the ways in which the current discovery rules are currently working and not working well, the specific barriers they pose to litigants, and the ways in which any reform will address access to justice issues. The analysis would also need to consider the extent to which any reform would have unintended consequences for litigants.

2.4 We note that the last major change to the discovery rules, in 2011-12, was the product of an extensive and extended consultation and submission process, which involved consultation on the draft rules that were intended to effect the proposed changes. That process, which included the publication of explanatory commentary relating to the proposed draft rules, allowed the legal community to engage in a meaningful way with the proposed changes and their likely impacts on litigation. We are strongly in favour of a similarly detailed analysis being undertaken and consulted on before any significant change is considered further.

2.5 Accordingly, in our view, the limited discussion of discovery in the Consultation Paper does not give a sufficient basis for any "in principle" decision to be made in relation to the reform or replacement of discovery.

2.6 We make the following high-level comments about the proposal to replace discovery with an adapted form of initial disclosure (with judges having a wide-reaching judicial discretion to order further disclosure on application by a party):

(a) First, discovery allows the parties to get to the heart of the matter, and to the truth of the allegations in the pleadings. It requires a party to actively undertake a reasonable search for potentially adverse documents, and to disclose them. Initial disclosure, by contrast, only requires a party to disclose *known* adverse documents. While the scope of the proposed adapted initial disclosure obligation is not yet clear, if initial disclosure were to be all that is required, then many documents that are adverse to a party's case would never be searched for, discovered and disclosed.

(b) Second, there is a strong culture in the profession about the need to search for and disclose adverse documents. We can generally rely on other lawyers complying with their obligations, without the need for Court assistance. We are very concerned that a much more limited disclosure obligation will end that culture, with far greater need for Court assistance. In our view, that culture is critical to a well-functioning system of civil justice, and we would be very concerned to see it disappear. We note the recent media articles about the difficulties of ensuring the full disclosure of documents in Family Court proceedings. While we cannot comment on that Court, we would be concerned if similar conduct began to arise in High Court proceedings as a result of a change in the culture associated with discovery.

(c) Third, it is difficult to see many cases in which a lawyer would be prepared to rely on the other side's initial disclosure and not seek further disclosure. They will need to seek judicial assistance to get those documents, and we envisage that this will result in interlocutory disputes about the scope of the further disclosure to be provided.

(d) Fourth, the requesting party is often in the dark about the other side's documents, including which custodians to ask about, which sources to ask about, and what types of documents to ask about. Under the current rules, the requesting party can rely on the other party to undertake a reasonable search of the relevant custodians, sources and types of documents. Under the new rules, the requesting party will need to invest significant time in trying to understand (or guess) where the documents are, to support an application for further disclosure. This is likely to be costly and lead to more delays.

(e) Fifth, the reform proposes giving a judge a wide-reaching judicial discretion, but it is not yet clear whether judges will, in exercising that discretion, have prescriptive guidance as to what must be disclosed. Again, we consider that there is the potential for the proposed reliance on a broad judicial discretion to have unintended consequences, including increased arguments and costs, if litigants have no guidance as to how far (or not) they are entitled to seek disclosure.

(f) Sixth, parties (and experts) can, when preparing for trial, perceive documents as significant in ways that were not recognised at the outset of the case (when initial disclosure is provided). The current discovery rules mean that those documents are still likely to be disclosed early in any event. We have a concern that, in the absence of discovery, it is much more likely that there will be late disclosure of relevant documents, potentially at the briefing stage, which may well be prejudicial to the parties and result in an increase in applications to adjourn trials.

(g) Seventh, a decision to replace discovery with more limited disclosure of documents would appear to be inconsistent with the Rules Committee's proposal that greater emphasis be placed on the documentary record, rather than oral evidence, to establish facts at trial.

(h) Eighth, we consider that the discovery affidavit that verifies a party's list serves an important function. It requires a senior representative of the party to personally stand behind the party's disclosure, which in turn leads to robustness in the discovery process. We consider that it is important that parties take ownership of and responsibility for the discovery process, even though they will inevitably need to rely on their legal advisers in fulfilling their obligations.

2.7 That said, we are conscious of cases in which the significant requirements of the current discovery rules, and their associated costs and delays to a resolution of the dispute, have proved to be impediments to parties who would otherwise wish to pursue their case. In these cases, the current rules have worked against a just and fair resolution of the dispute.

2.8 However, we consider that a wholesale replacement of discovery with an adapted form of initial disclosure (plus a right to apply for further disclosure) would have a number of significant negative consequences. We would not support such a change. We therefore respectfully submit that a detailed analysis of the current discovery regime ought to be undertaken and consulted on before any significant change is considered further. We would support targeted changes to improve the rules, in order to ensure that discovery is used proportionately to further justice between the parties, rather than operating as a barrier to justice.

Expanded issues conference

2.9 The Rules Committee is proposing to require an initial issues conference, which is an "expansion" of the current requirement for issues to be addressed at the first and subsequent case management conferences.

2.10 In our experience, issues are typically only addressed at a high-level at early case management conferences. That high-level discussion is adequate for the purposes of timetabling pre-hearing steps, but does not typically advance the substance of the proceeding or result in any potential resolution of the claim.

2.11 It is unclear to what extent the proposals would expand the current requirement in the Rules for issues to be addressed at an early case management conference. It may be that what is envisaged is more of a change in culture, rather than a change in the Rules, as to the extent to which the issues are substantively considered and addressed by the judge and counsel at the case management conference.

2.12 We can see the merits in an early engagement with the issues where the judge engaging in the issue discussion is the same judge who will ultimately hear the substantive case. That is because the view that this judge forms in relation to the issues will be critical to the ultimate determination of the case and the parties will inevitably focus on that.

2.13 However, the judge assigned to initial case management conferences is typically not the judge who will hear the case. Further, it is generally recognised that the cases will develop prior to trial. In those circumstances, there would appear to be more of an incentive for all parties to address the issues at a high level (much as they do now at case management conferences), in case the trial judge forms a different view to the judge assigned to the case management conference, rather than invest significant resources and time in fully embracing the potential for an issues conference. We are therefore sceptical as to whether there is a sufficient incentive to achieve a major change in practice in relation to issue engagement, without also changing to an allocated-judge system.

2.14 Further, there are questions as to how the identification of issues at a conference relates to the issues as indicated by the pleadings, given that the pleadings set the bounds of what can and cannot be addressed at trial. For that reason, counsel typically focus on pleadings, rather than on lists of issues at the case management conference. We note that we consider that the pleadings system serves parties very well. Indeed, we consider that one of the more regrettable aspects of the 2009 reforms of the District Court Rules was the removal of formal pleadings (and we note that, in several cases, we observed parties agreeing to voluntarily exchange pleadings because that was more efficient in distilling the issues than the methods prescribed under those rules).

2.15 We would be concerned if an issues conference were to lead to additional upfront cost for the parties, but without any significant benefit. If so, such a conference would work against the Rules Committee's objective of streamlining the litigation process.

Interlocutory hearings

2.16 We are in favour of the Court being able to exercise greater discretion as to what approach should be taken to interlocutory hearings, particularly if the parties agree that the matter can be determined on the papers. We do not, however, agree that it should be a presumption that interlocutory matters should be dealt with on the papers:

(a) In our experience most interlocutories raise factual and legal issues that benefit from exploration at an oral hearing, and that judges benefit from in-person oral advocacy.

(b) Further, if there is no written right of reply to an applicant, the judge will hear no response to the respondent's argument. And if there is a right of reply to an applicant, we can envisage respondents regularly filing written rejoinders in response to the reply.

2.17 In order to streamline matters, we would propose that judges be given greater discretion to allocate a shorter time for oral argument, and to use that hearing to question the parties on their written submissions, rather than allow full and lengthy submissions. Of course, summary judgments and strikeouts have important consequences for the case, and should continue to be dealt with fully as is currently the case.

2.18 One other way to streamline cases would be to allocate interlocutories much more promptly than is currently the case. It can often take quite some time to wait for an interlocutory hearing date, which causes delays and is a barrier to justice. We acknowledge that this is a resourcing issue, but we submit that addressing this issue would make a real difference to the current barriers.

Common bundle

2.19 We are concerned that the proposal that documents in the common bundle would be admissible as to the truth of their content subject to a challenge being advanced may not achieve the desired savings in time, cost and efficiency. This is because we anticipate there would be a large number of challenges to the documents in advance of the trial in order to "protect" parties' positions, which could cause inefficiencies and delays. We also consider that there are other mechanisms to clear away non-contentious points (eg the pleadings, notices to admit facts, the written evidence, and common chronologies).

Chronology of events

2.20 We support the proposal that witnesses would not be expected to address the chronology of events revealed by the documentation, with the facts to be drawn from the documents instead to be outlined in a separate memorandum of counsel filed with the party's evidence. We caution, however, that we expect that the efficiencies to be somewhat limited. While the documents can sometimes explain much of the background, a witness's account of the facts that sit between and alongside the documentary narrative can also be critical.

Evidence to be given primarily by way of affidavit

2.21 We are supportive of evidence for trial being given primarily by way of affidavit, with cross examination to take place on the affidavit and additional viva voce evidence on areas of factual disagreement. We make the following additional comments:

(a) We agree that witnesses' written affidavits should be allowed to stand as their evidence, obviating the need for the statement to be read at trial. This would save hearing time. However, it will be important to ensure that these are all read in detail ahead of time, as otherwise the cross-examination takes place at trial without the Court first having the benefit of the evidence in chief.

(b) We note the risk of affidavits being improperly used as advocacy. We would support the Court being more clearly empowered to refuse to read affidavits that are inappropriately or needlessly argumentative. In our experience, the Courts generally take an appropriately robust approach and there is a procedure to challenge inadmissible passages.

(c) Presumptive page limits for such affidavits are not practicable, as it will be particularly important for evidence to be given in a fairly full way by affidavit if the witness will not be giving evidence in chief orally. Page limits on evidence would be inconsistent with each party believing it has had the opportunity to say what it wants to say. This is a key element of delivery of civil justice. We agree with the Rules Committee that it may be too difficult to devise a practicable means of calculating appropriate limits for each case. The introduction of page limits if evidence at trial is to be given by way of affidavit could have a detrimental effect if parties are incentivised to have more witnesses in order to ensure all of the evidence they believe is necessary before the Court. It could also lead to increased cross examination on the affidavit evidence (where insufficient evidence has been given), which may cause greater inefficiencies and, contrary to the Rules Committee's intention, may attach greater weight to oral/viva voce evidence.

Expert evidence

2.22 We agree with the Rules Committee's proposal of a presumptive limit of one expert witness per topic for each party. However, we note that this presumption may not be appropriate for all cases. For example, in a straightforward breach of contract case, one expert might be sufficient to address the loss caused to the plaintiff by the breach. By contrast, in a complex securities class action, whether the issue is what loss was caused by misstatement or non-disclosure of a matter in an offer document, it may be necessary to call several experts to properly understand the full scope of the loss (for example, an expert in trading of securities, a quantitative loss expert, and an accountant). Those experts are from different disciplines but it is unclear if the presumption would be against having them all broadly address the same topic. In short, our concern is that any presumption should not result in a "one-size-fits all" approach for all cases.

2.23 We agree with the Rules Committee's proposal providing that expert evidence is not to be received unless there has been a joint expert conference, except by leave. However, it is important to note that this should be between experts of the same discipline only.

2.24 We are concerned that the proposal to make greater use of single Court-appointed experts, paid for by both parties, may not be workable in practice and may increase costs and delays. In our experience, the

use of Court-appointed experts in the Canterbury Earthquake Tribunal has not reduced costs, but introduced a third opinion often different from the parties' experts' opinions. It is inconsistent with the Rules Committee's proposal to limit experts. There are also difficult questions as to how a Court-appointed expert would be chosen. We therefore do not support this proposal.

Other proposals for achieving better access to justice

2.25 We have a number of other suggestions for the Rules Committee's consideration as to how to reduce costs and delays, and improve access to justice:

(a) We are strongly of the view that having an assigned judge throughout the life of a proceeding provides a significant incentive against unnecessary or strategic use of the Court process, which can prevent parties from fully accessing justice. It will also help with, for example, issues conferences and discovery, as the assigned judge will be across the details of the case through the life of the case, and will have a much better appreciation as to the issues in the case, and whether the discovery sought by a particular party goes too far. However, we are conscious that this involves resourcing constraints that may be beyond the scope of the Rules Committee's remit.

(b) In our view, a comprehensive electronic filing system would allow for better access to justice by allowing the parties and Court to more easily upload and access relevant documents. It would be important that any electronic filing system includes a way to verify that documents have been successfully uploaded to the case file. At present, the combined electronic and hardcopy system results in duplication which can be time-consuming and therefore costly.

(c) We also consider that the delays in allocating prompt trial dates are a key reason why litigation can be lengthy and costly. Again, we acknowledge that this is a resourcing issue that is beyond the remit of the Rules Committee, but it is very difficult to explain to a client why it may take a considerable period of time for a trial to be allocated, given the current waiting list. What we are seeing in response to this is judges allocating trial dates, not when the matter is ready to be set down, but at a very early stage in the case, so that the case "gets in the queue", even though the allocation of a trial date is premature (for example, with discovery yet to be undertaken or still underway, and with no indication as to likely witnesses). This approach can cause a number of difficulties.

(d) Ultimately, many of the issues identified by the Rules Committee could be addressed by closer judicial supervision of the existing rules. That would be best achieved by allocated judges, but in the absence of that, we consider that there would be real benefit in greater judicial supervision of the conduct of proceedings. We also consider that there is scope to amend the rules, but that should be done in a targeted way, as we have proposed.

3. DISTRICT COURT

Principal Civil Judge and civil registry expertise

3.1 In our experience, the District Court is used less than it could be for the resolution of civil disputes within its jurisdiction. We agree with the Rules Committee that this is not because of any particular issue within the Rules, but more for institutional reasons. We therefore support the Committee's proposal to appoint a Principal Civil Judge. This would be a welcome step in strengthening confidence in the District Court's civil jurisdiction. We also support the proposal to improve civil registry expertise, which is critical.

3.2 We submit that these changes should be accompanied by:

(a) Internal Court protocols (and associated resourcing) to facilitate case management and swift hearing dates, including:

(i) a list judge system to allow case management outside of scheduled list calls, and to avoid burdening judges who already have a full case load;

(ii) registry staff sufficiently skilled and confident to know when to refer matters raised by the parties to a judge, when to leave them in the list, and when to deal with them in the Registry (much like registry staff do in the High Court); and

(iii) prompt hearing dates and telephone conferences, including sufficient judicial resources to enable cases to be progressed and judgments delivered swiftly.

(b) The ability to contact court staff responsible for the proceeding reasonably promptly. For example, we often need to obtain updates on the status of the proceeding, check documents have been referred to a judge, and check whether a call or conference has been scheduled. In our experience, it can be difficult to obtain timely information from the District Court. In some cases, there is little option but to rely on the limited and sometimes inaccurate information available to Ministry of Justice call centre staff, and to hope that forwarded voicemails and emails sent to generic addresses reach their intended destination.

Use of part time Deputy Judges

3.3 We support an increase in the number of judges to increase the District Court's civil capacity.

3.4 We do not support the proposal to use practitioners as part-time judges. In our view, it is unfair to put counsel in the position of appearing before a judge that they may oppose in another capacity (eg in adversarial proceedings or negotiations). In such a situation, there is a risk that counsel will change how they interact with the part-time judge when the judge is acting in their capacity as a private advocate – which is unfair to counsel's client. We believe the separation between being an advocate and being a judge is constitutionally and professionally appropriate. Consistent with that, we support the practice that when a judicial appointment is made, the appointee steps away from all existing private work.

Pre-action protocols for debt collection matters

3.5 We have serious concerns about the proposal for pre-action protocols. We agree with the comments referred to by the Rules Committee that the introduction of such protocols can in fact serve to impede access to civil justice. We do not consider that such a trial protocol for debt recovery matters should be introduced without details as to what the protocol would require, and a sufficient analysis of both the potential benefits and the likely additional costs that would be associated with such a protocol.

3.6 The Consultation Paper says that the debt protocol could range between a warning that proceedings are to be issued, through to an onerous requirement that creditors seek to attempt to agree a payment plan. However, these appear to be raised as indicating the possible scope of a protocol. In our view, it is important that the requirements of any protocol are clearly set out to allow for proper consultation on the proposals.

3.7 We also consider that the introduction of a debt protocol would create delay and additional costs to creditors in enforcing debts. In many cases, these costs can be passed on to debtors. The introduction of additional delays and costs therefore benefits neither creditors nor debtors.

3.8 Further, it is not clear that a protocol would address the problem raised by the Rules Committee. The Committee says that many people do not seek advice until after judgment is issued. It is difficult to see how adding another step before judgment will change this position. It may be that debtors should be given additional information about the consequences of waiting until after judgment. If so, that could be done in the notice of proceeding, rather than by adding another stage to the process.

3.9 In addition, questions as to disclosure by creditors are primarily dealt with by the Credit Contracts and Consumer Finance Act, including in the latest reforms. In our view, additional obligations on creditors

should be dealt with holistically in the context of that legislation, rather than through the rules of civil procedure.

3.10 Ultimately, the addition of additional protocols in the District Court goes against the Rules Committee's theme of streamlining the litigation process, and will simply add unnecessary delays and costs.

Introducing a more flexible process for determining substantive claims

3.11 We would support in principle greater flexibility in the process for determining substantive claims in the District Court, though we note that the principal hurdle to access to justice in the District Court is the availability of civil hearing time.

3.12 We consider that, in the case of straightforward disputes, it should be possible for a trial date to be allocated and for a full pre-trial timetable to be set at the first case management conference. In our experience, the precise differences between short, simplified, and full trial procedures are less significant than achieving a fixture date and pre-trial timetable to which the parties can work. We believe that it should be the objective of the Rules to ensure that civil disputes in the District Court are tried within one year of commencement.

3.13 To that end, we would support the District Court taking the same approach to judicial settlement conferences as the High Court.

3.14 We have reservations as to whether the iterative determination of a case issue-by-issue would achieve efficiencies. In most cases, the splitting off of issues is likely to cause more inefficiencies, as the Courts have observed in a number of cases regarding the determination of separate questions prior to trial. Indeed, that has been our experience in the Canterbury Earthquake Tribunal, where a trial was divided into four separate "chunks" over a 3-4 month period, which caused much more expense to our client than if it had been all heard together.

4. DISPUTES TRIBUNAL

4.1 We have experience in advising our clients who appear before the Disputes Tribunal. We therefore set out below our comments on a number of the reforms proposed by the Rules Committee.

Increase in Tribunal jurisdiction to $50,000

4.2 We support the Dispute Tribunal's jurisdiction being increased from $30,000 to $50,000.

4.3 The Disputes Tribunal provides a low cost forum for parties to resolve lower value disputes. We consider the proposed increase to $50,000 to be a sensible and proportionate response to the concerns raised by the Rules Committee regarding the difficulty of economically litigating disputes in the District Court.

Increase in Tribunal jurisdiction beyond $50,000

4.4 We do not support the Disputes Tribunal's jurisdiction being increased beyond $50,000.

4.5 The function of the Disputes Tribunal is to resolve low value disputes in a pragmatic, user-friendly, efficient and cost-effective manner. Further, Referees are required to have regard to the law (as opposed to applying the law). In our view, disputes above $50,000 should be determined in accordance with the law. This ensures certainty in commercial dealings, and avoids disputes where a considerable value is at stake being determined on the basis of individual Referees' perception of justice without any obligation to apply the law.

4.6 As a matter of policy, a line must be drawn to mark a point where disputes are deemed to be of a sufficient value that they ought to be determined in accordance with the law, rather than by reference to the law and in accordance with broader notions of justice. Knowing that disputes will be resolved

according to the law supports certainty in commercial dealings. $50,000 represents a significant sum of money to almost all New Zealanders. In our view, disputes of amounts greater than $50,000 should be resolved according to law.

4.7 We are conscious that it can be uneconomic to litigate claims between $50,000 and $100,000 in the District Court. In our view, this concern can be addressed in three ways:

(c) First, we support the proposal for parties to disputes between $50,000 - $100,000 to be able to agree to have their dispute referred to the Disputes Tribunal instead of the District Court.

(d) Second, District Court Judges should be encouraged to pro-actively use their case management powers (including at an early stage in proceedings) to ensure that disputes, particularly those valued under $100,000, are pro-actively case managed to ensure a proportionate progression and determination of the dispute. This might include a greater judicial willingness to direct that lower value disputes should be dealt with by way of the short trials procedure.

(e) Third, there are a range of alternative dispute resolution mechanisms outside of the judicial system, including arbitration, expert determination, and various industry-specific forums for dispute resolution (for example, adjudication or engineer's determinations in the construction industry). Private forums for dispute resolution represent an opt-in alternative to the formal Court process.

Appeal rights

4.8 As matters currently stand, there is no general right of appeal from the Disputes Tribunal. The sole right of appeal is essentially limited to procedural unfairness. These limited appeal rights are consistent with the current role of the Disputes Tribunal, as it increases the likelihood of lower value disputes being quickly and inexpensively resolved in the Disputes Tribunal and reduces the likelihood that they will clog up the District Court. However, we note that there is also a limited right to apply for a rehearing and the Disputes Tribunal is amenable to judicial review for errors of law within its jurisdiction.

4.9 If the jurisdiction of the Disputes Tribunal stays at $30,000 (or is increased to $50,000) we do not consider that there is a need to expand appeal rights. Expanded rights of appeal would inevitably result in fewer cases being finally determined in the Disputes Tribunal and a number of uneconomic appeals clogging up the District Court.

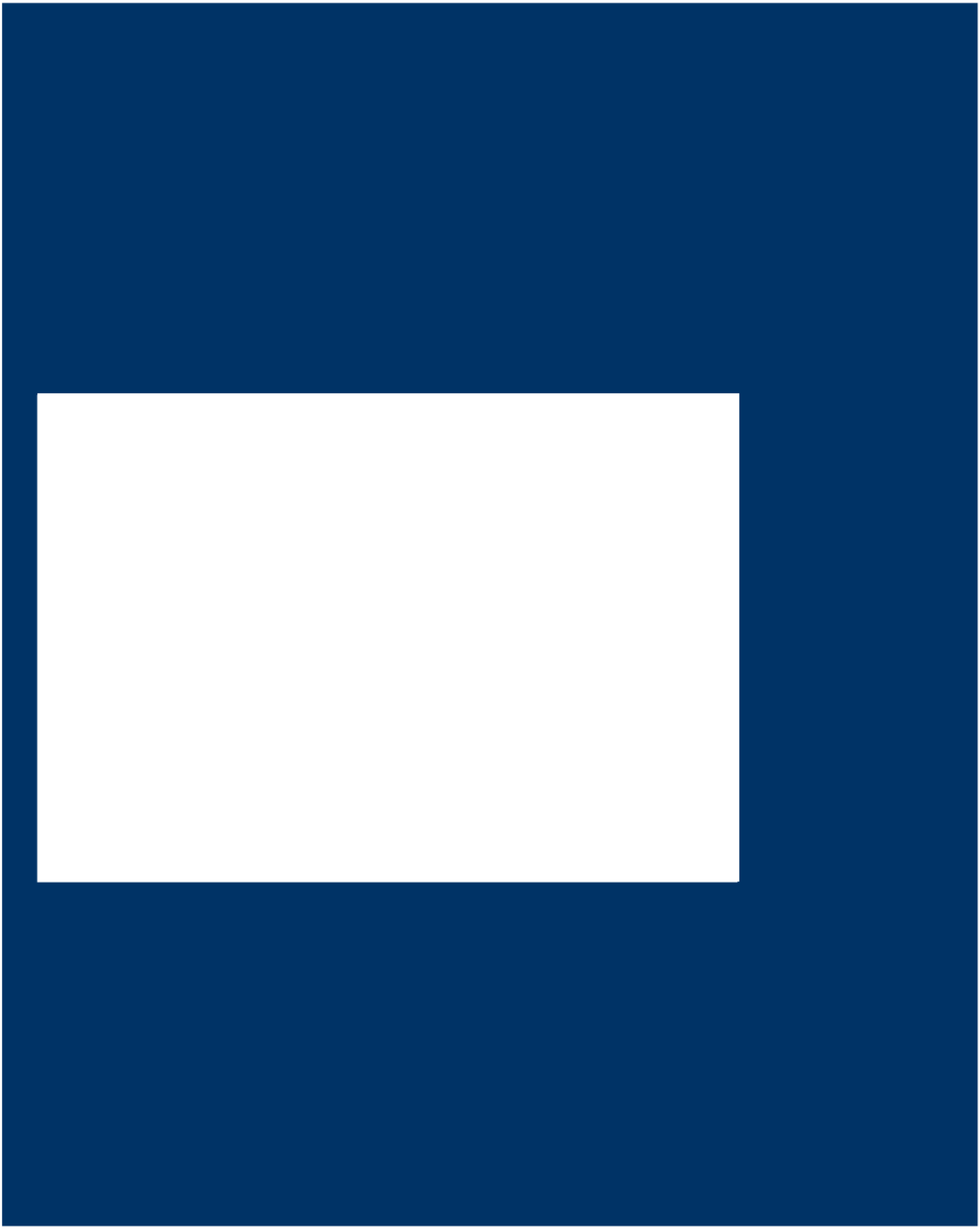
4.10 As set out above, we do not support the Disputes Tribunal's jurisdiction being increased beyond $50,000. However, if the jurisdiction were increased, close attention will need to be given to whether further appeal rights are needed, and if so, whether that means that the underlying substantive standard to be applied in the Disputes Tribunal needs to be changed.

4.11 One suggestion by the Rules Committee is a dual or graduated appeals system. We have concerns that this would be administratively burdensome for the Disputes Tribunal and also potentially confusing for litigants. This also would risk undermining the access to justice objectives. In our view, the complex issues presented in relation to appeal rights provides a further reason why the jurisdiction of the Disputes Tribunal should not be expanded beyond $50,000.

5. CONCLUSION

5.1 We thank the Rules Committee for the opportunity to make submissions on the Consultation Paper. 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



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