DISCLOSURE

Division 1 – Disclosure of Documents in the Supreme Court

Application of Division 1

8.1 This Division applies only in the Supreme Court.

Duty to disclose documents

8.2 (1) A party must disclose a document if:

[8.2.1] Meaning of "document" See r.20.1 and [20.1.5].

E *CPR* r31.6(a)

(a) the party is relying on the document; or

E *CPR* r31.6(b)

(b) the party is aware of the document, and the document to a material extent adversely affects that party's case or supports another party's case.

[8.2.2] Extent of obligation The mandatory obligation to give disclosure probably extends to any document which may fairly lead to a line of inquiry which might in turn affect a party's case: *Compagnie Financiere v Peruvian Guano* (1882) 11 QBD 55 at 63; *Mulley v Manifold* (1959) 103 CLR 341 at 345; 33 ALJR 168 at 169. Disclosure of material going solely to credit is not required: *George Ballantine v F E R Dixon* [1974] 1 WLR 1125 at 1132; [1974] 2 All ER 503 at 509. The obligation to give disclosure is otherwise to be interpreted widely: *Compagnie Financiere v Peruvian Guano* (1882) 11 QBD 55 at 62; *Seidler v John Fairfax* [1983] 2 NSWLR 390 at 392; *F Hoffman-La Roche v Chiron Corporation* (2000) 171 ALR 295 at 296.

[8.2.3] Obligation not confined by admissibility Disclosure is not limited to admissible documents: *Compagnie Financiere v Peruvian Guano* (1882) 11 QBD 55 at 63; *The Consul Corfitzon* (1917) AC 550 at 553; *O'Rourke v Darbishire* [1920] AC 581 at 630; [1920] All ER 1 at 18; *Merchants & Manufacturers Insurance v Davies* [1938] 1 KB 196 at 210; [1937] 2 All ER 767 at 771.

(2) A party that is not an individual is aware of a document if any of its officers or employees are aware of it.

[8.2.4] Meaning of "officer" The meaning of "officer" is likely, in the context of a company, to be the same as that contained in s.1, *Companies* [Cap 191]: *Microsoft v CX Computer* (2000) 187 ALR 362 at 369; [2002] FCA 3 at [34].

Disclosure limited to documents within party's control

E *CPR* r31.8(1)

8.3 (1) A party is only required to disclose a document that is or has been within the party's control.

(2) A document is or has been in a party's control if:

E *CPR* r31.8(2)(a)

(a) the document is or was in the party's physical possession; or

[8.3.1] Meaning of "control" The word "control" usually signifies something greater than mere physical possession, however this limb of the definition of "control" would seem to include all forms of physical custody over documents of whatever duration or nature, including as agent or servant: *Bovill v Cowan* (1870) LR 5 Ch 495 at 496; *Swanston v*

Lishman (1881) 45 LT 360; *Alfred Crompton Amusement Machines v Customs and Excise Commissioners (No 2)* [1974] AC 405 at 429; [1973] 3 WLR 268 at 280-1; [1973] 2 All ER 1169 at 1180-1; *Rochfort v TPC* (1982) 153 CLR 134 at 140; 43 ALR 659 at 662; 57 ALJR 31 at 32.

E *CPR* r31.8(2)(b)

(b) the party has or has had the right to possess it.

[8.3.2] Duty to make enquiries It is necessary for parties to make enquiries to identify and disclose all documents caught by r.8.2 but which are no longer in the party's control. The obligation extends to making enquiries from the person in whose control the documents now are: *Taylor v Rundell* (1841) 41 ER 429 at 433; *Mertens v Haigh* (1863) 46 ER 741 at 742; *Palmdale Insurance v L Grollo* (1987) VR 113; *Re McGorm* (1989) 86 ALR 275 at 278; 20 FCR 387 at 389. The scope of the enquiries which should be made will depend on the circumstances of the case having regard to the need for disclosure in order to dispose fairly of the issues between the parties, or to save costs in the proceedings. The enquiries must be reasonable, but do not extend to the oppressive: *Re McGorm* (1989) 86 ALR 275 at 278; 20 FCR 387 at 389.

[8.3.3] Meaning of "right" The party must have a past or present legal right to obtain it (*Lonrho v Shell (No 2)* [1980] 1 WLR 627 at 635) and not merely some future right (*Taylor v Santos* (1998) 71 SASR 434 at 439, 442).

[8.3.4] Parent companies As to disclosure from parent companies see: *Douglas-Hill v Parke-Davis* (1990) 54 SASR 346 at 350; *Linfa v Citibank* [1995] VR 643 at 647, 651; *Solartech v Solahart* [1997] WASC 2; *Taylor v Santos* (1998) 71 SASR 434 at 439, 442. As to where a company is the alter-ego of an individual see *B v B* [1978] Fam 181 at 190; [1978] 3 WLR 624 at 632; [1979] 1 All ER 801 at 809.

Copies

8.4 (1) A party need only disclose a copy of a document if the copy has been changed from the original or a previous copy in any way, whether by adding, removing, changing or obliterating anything.

[8.4.1] Changed document is new document Such alteration of a document gives rise, in substance, to a separate and independent document. The widespread use of self-adhesive notes and similar tags would seem to involve an "addition" to documents.

E *CPR* r31.9(1)

(2) A document that has been copied need not be disclosed if the original or another copy has already been disclosed.

[8.4.2] Documents "copied" in different medium The wide definition of "copy" in Part 20 may give rise to issues in relation to copies in a different medium to the original.

How to disclose documents

E *CPR* r31.10

8.5 (1) A party discloses documents by:

[8.5.1] Purpose of rule The provisions below are designed to enable the court to see whether the rules as to disclosure have been complied with, and the extent of that compliance, without disclosing the actual contents of the documents: *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 265; [1980] 3 All ER 475 at 500; [1980] 3 WLR 668 at 700.

(a) making a sworn statement that:

[8.5.2] Appropriate deponent The appropriate deponent is the party. A sworn statement verifying a list of documents cannot be made by a person holding a power of attorney for the party: *Clauss v Pir* [1988] Ch 267 at 273; [1987] 3 WLR 493 at 498; [1987] 2 All ER 752 at 756. As to corporate parties see subr. (3).

(i) lists the documents; and

[8.5.3] List is conclusive unless deficiency is patent The list is conclusive unless it appears from the sworn statement itself or from admissions in the statements of the case or elsewhere that the list is incomplete: *Jones v Monte Video Gas* (1880) 5 QBD 556 at 558, 559; *British Association of Glass Bottle Manufacturers v Nettlefold* [1912] AC 709 at 714; [1911-13] All ER Rep 622 at 624.

E *CPR* r31.10(6)(b)

(ii) states that the party understands the obligation to disclose documents; and

[8.5.4] Duty of lawyers to advise clients as to obligations Lawyers have an important responsibility to ensure that their clients understand the obligation of disclosure. Many litigants (including businesspeople) do not have a good understanding of this obligation. It is not enough for a lawyer merely to tell the client what is required and then to turn a blind eye. If a lawyer concludes that the list is incomplete but the client does not provide documents to enable the list to be completed, the lawyer ought to withdraw from the case: *Myers v Elman* [1940] AC 282 at 302, 322; [1939] 4 All ER 484 at 497, 511.

E *CPR* r31.10(c)

(iii) states that, to the best of the party's knowledge, he or she has disclosed all documents that he or she must disclose

(iv) for documents claimed as privileged, states that the documents are privileged, giving the reasons for claiming privilege; and

[8.5.5] Mere assertion of privilege insufficient It is not enough merely to state that documents are privileged - the sworn statement must state the ground of privilege and verify the facts upon which any claim of privilege is founded: *Gardner v Irwin* (1879) 4 Ex D 49 at 53.

(b) filing and serving a copy of the statement on each other party.

E *CPR* r31.10(2)

(2) The statement must be in Form 11 and must:

(a) identify the documents; and

[8.5.6] Extent of "identification" required The requirement as to identification is imposed in order that the court can enforce production of discovered documents with certainty: *Taylor v Batten* (1878) 4 QBD 85 at 87-8; *Budden v Wilkinson* [1893] 2 QB 432 at 438; *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 265; [1980] 3 All ER 475 at 500; [1980] 3 WLR 668 at 700. It is not intended that the description should be so detailed that the other party should be able to know the contents of the document from the description, only that the other party should be able to decide which documents they will need to inspect (*Hill v Hart-Davis* (1884) 26 Ch D 470 at 472; *Cooke v Smith* [1891] 1 Ch 509 at 522; *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 265; [1980] 3 All ER 475 at 500; [1980] 3 WLR 668 at 700) and to assess claims of privilege (*J N Taylor v Bond Mitchell & Oates* (1991) 57 SASR 21). There is no rule requiring that the date of the document be specified, or the maker: *Gardner v Irwin* (1879) 4 Ex D 49 at 53.

[8.5.7] Bundles It is permitted to identify the documents according to bundles if the bundles are sufficiently identified otherwise: *Bewicke v Graham* (1881) 7 QBD 400 at 410; *Hill v Hart-Davis* (1884) 26 Ch D 470 at 472; *Taylor v Batten* (1878) 4 QBD 85 at 88; *Cooke v Smith* [1891] 1 Ch 509 at 522; *Budden v Wilkinson* [1893] 2 QB 432 at 438; *Milbank v Milbank* [1900] 1 Ch 376 at 383-4; [1900-3] All ER 175 at 177-8; *Command Energy v Nauru Phosphate* [1998] VSC 162.

E *CPR* r31.10(3)

(b) list them in a convenient order and as concisely as possible; and

[8.5.8] Meaning of "convenience" It is unclear whose convenience is at issue. The dictates of convenience may also differ from case to case. Where disclosure is voluminous, the parties ought to negotiate an acceptable format or obtain appropriate orders ahead of time. There is nothing to suggest that the list must be chronological.

[8.5.9] Costs If the list is "inconvenient" or is not "concise" the party may be ordered to pay costs: See for example *Hill v Hart-Davis* (1884) 26 Ch D 470 at 472 (descriptions too prolix).

(c) include documents that have already been disclosed; and

(d) list separately all documents claimed as privileged; and

[8.5.10] Waiver of privilege The failure to list a privileged document separately will not amount to a waiver but giving inspection of it will: *Re Briarmore Manufacturing* [1986] 3 All ER 132 at 134; [1986] 1 WLR 1429 at 1431; *Meltend v Restoration Clinics* (1997) 75 FCR 511 at 518, 522, 526; (1997) 145 ALR 391 at 398, 402, 406. See further r.8.6.

(e) if the party claims a document should not be disclosed on the ground of public interest, include that document, unless it would damage the public interest to disclose that the document exists.

[8.5.11] Obligation to list subject to public interest The provisions for identification and listing should be applied to claims for public interest privilege so far as that may be done consistently with the maintenance of the privilege: *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 265; [1980] 3 All ER 475 at 500; [1980] 3 WLR 668 at 700. See further r.8.11.

E *CPR* r31.10(7)

(3) For a list of documents from a person who is not an individual, the sworn statement must also:

(a) be made by a responsible officer or employee; and

[8.5.12] Meaning of "officer" The meaning of "officer" is likely, in the context of a company, to be the same as that contained in s.1 of the *Companies Act* [Cap 191]: *Microsoft v CX Computer* (2000) 187 ALR 362 at 369; [2002] FCA 3 at [34].

(b) give the name and position of the person who identified the individuals who may be aware of documents that should be disclosed; and

(c) give the name and position of the individuals who have been asked whether they are aware of any of those documents.

[8.5.13] Additional requirements for corporate deponents The requirements of paragraphs (b) and (c) are more onerous than equivalent requirements elsewhere: See generally *Stanfield Properties v National Westminster Bank* [1983] 2 All ER 249 at 250-1; [1983] 1 WLR 568 at 571.

(4) If a party claims a document should not be disclosed on the grounds of public interest, the party must make an application under rule 8.11.

(5) A party who believes a list is not accurate, or that documents claimed as privileged are not privileged, may apply for an order to correct the list.

[8.5.14] Inaccuracy must be patent The inaccuracy or deficiency of the list must be apparent from the list itself, from documents in it or from admissions elsewhere: see for example *Kent Coal Concessions v Duguid* [1910] AC 452 at 453 (balance sheets were discovered but not the books from which they were compiled). See further r.8.9.

[8.5.15] When supporting sworn statement required If an inaccuracy/deficiency is not apparent, the application will require a supporting sworn statement deposing to the existence of the missing documents: *Edmiston v British Transport Commission* [1956] 1 QB 191 at 192; [1956] 2 WLR 21 at 22; [1955] 3 All ER 823 at 826. See further r.8.9.

(6) A party need not list the documents if the court orders otherwise at a conference.

Mistaken disclosure of privileged document

8.6 If a privileged document is disclosed to a lawyer, he or she must not use it if, because of the way and circumstances it was disclosed, a lawyer would realise that:

(a) the document is privileged; and

(b) it was disclosed by mistake.

[8.6.1] Waiver of privilege The mistaken production of privileged documents usually amounts to a waiver attaching to them: *Re Briarmore Manufacturing* [1986] 3 All ER 132 at 134 [1986] 1 WLR 1429 at 1431; *Meltend v Restoration Clinics* (1997) 75 FCR 511 at 518, 522, 526; (1997) 145 ALR 391 at 398, 402, 406. Where, however, disclosure is made in circumstances in which the mistake is obvious, the lawyer may not use them: see further *Guinness Peat Properties v Fitzroy Robinson Partnership* [1987] 2 All ER 716 at 730; [1987] 1 WLR 1027 at 1046; *Meltend v Restoration Clinics* (1997) 75 FCR 511 at 518, 522, 526; (1997) 145 ALR 391 at 398, 402, 406.

Inspecting and copying disclosed documents

8.7 (1) A party (the "inspecting party") may inspect and ask for copies of the documents on a list served by another party except:

[8.7.1] Inspection by agent The right to inspect includes the right to inspect by an agent: *Norey v Keep* [1909] 1 Ch 561 at 565. If it is intended that an expert should inspect, an order to this effect should be sought: *Swansea Vale Rwy v Budd* (1866) LR 2 Eq 274 at 275**.**

[8.7.2] Copies in other media It is uncertain whether a copy of an electronic or other non-paper document is to be made in the same medium or, for example, by way of a printout.

[8.7.3] Use of copies The use of such copies must be limited to the conduct of the proceedings and must not be misused such as by dissemination otherwise than for the purpose of the proceedings, which may be a contempt: *Attorney-General v Times Newspapers Ltd* [1974] AC 273. See further r.8.16(1).

(a) documents that are no longer in the other party's control; or

[8.7.4] Documents which may be acquired A party may, however, be required to produce a document not in its control when the party may acquire it by request: *Rafidain Bank v Agom* [1987] 3 All ER 859 at 862, 864; [1987] 1 WLR 1606 at 1611, 1613.

(b) documents that are privileged.

(2) The inspecting party:

(a) must give the other party reasonable notice; and

(b) if he or she wants a copy of a document, must pay the reasonable costs of copying the document.

Duty of disclosure continuous

E *CPR* r31.11(1)

8.8 (1) The duty to disclose documents continues throughout a proceeding.

[8.8.1] Duty of disclosure continuous The effect of this rule is to require a party to give disclosure of documents that may have come into the party's control after disclosure had originally been provided and also of documents that were already in the party's control but were not disclosed through inadvertence or otherwise.

(2) If a party becomes aware of documents that must be disclosed, the party must disclose the documents as required by rule 8.5.

(3) The party must disclose the documents:

(a) within 7 days of becoming aware of the documents, and in any case before the trial starts; or

(b) if the party becomes aware of the documents after the trial has started, as soon as practicable after becoming aware of the documents.

E *CPR* r31.12

Disclosure of specific documents

8.9 (1) A party may apply for an order to disclose the documents described in the application.

[8.9.1] When application may be made Such an application may apparently be made at any time. See further r.8.5(5).

(2) The documents may be identified specifically or by class.

[8.9.3] How class to be identified An order made under this rule is not in the nature of an order for general disclosure, but of disclosure of a specified document or class of documents. The document or class of documents should be clearly described in the application and the court must be quite certain that such documents exist before making an order.

(3) The court may order disclosure of the documents if the court is satisfied that disclosure is necessary to:

[8.9.4] Significance of "necessity" The concept of "necessity" probably reflects the policy of active case management: *Commonwealth v Northern Land Council* (1991) 103 ALR 267 at 291; (1991) 30 FCR 1 at 24. Accordingly, whilst this rule may be used to cure omissions in the list of documents, it will not operate automatically in that way as the criteria in paragraphs (a) and (b) make clear.

(a) decide the matter fairly; or

(b) save costs.

[8.9.5] Examples For a discussion of these criteria, especially "fairness" see: *Percy v General Motors-Holden's* [1975] 1 NSWLR 289 at 292; *Technomin v Geometals* (1991) 5 WAR 346 at 352; *Trade Practices Commission v CC (No4)* (1995) 131 ALR 581 at 590-1; (1995) 58 FCR 426 at 437.

(4) The court must consider:

[8.9.6] List not exhaustive of relevant criteria The discretion is wider than the list below: See for example *Murex v Chiron* (1994) 55 FCR 194 at 199-200; 128 ALR 525 at 529-30.

(a) the likely benefit of disclosure; and

(b) the likely disadvantages of disclosure; and

(c) whether the party who would have to disclose the documents has sufficient financial resources to do so.

(5) The court may order that the documents be disclosed in stages.

Application to dispense with or limit disclosure

8.10 (1) A party may apply for an order:

(a) to dispense with disclosure; or

(b) that particular documents not be disclosed.

(2) The court may order that a party need not disclose some or any documents if the court is satisfied that:

(a) the documents are not relevant to the issues between the parties; or

[8.10.1] Relationship to r.8.2 The relationship between this test of "relevance" and the test for disclosure contained in r.8.2 is not clear. Logic suggests that "relevance" ought to be a narrower test so as to limit an otherwise needlessly wide disclosure obligation. By using the term "issues between the parties" (which is defined in r.4.1(2)(c) in connection with statements of the case) this rule seems to refer to the nature of the issues rather than the subject matter of the proceedings.

[8.10.2] Judicial review Disclosure may not be necessary in applications for judicial review because of the nature of the issues raised, particularly where reasons for the decision are available: *R v Inland Revenue Commissioners* [1989] 1 All ER 906 at 915; *Hart v Deputy Commissioner of Taxation* (2002) 49 ATR 656; 2002 ATC 4445; [2002] FCA 606 at [9].

(b) disclosure is not necessary to decide the matter fairly; or

[8.10.3] Significance of "fairness" The "right" to disclosure is subject to overriding considerations of fairness: *Index Group v Nolan* [2002] FCA 608 at [7]. See also *Kent v SS 'Maria Lusia'* [2002] FCA 629.

[8.10.4] Fairness and judicial review Disclosure may not be necessary for the fair disposal of issues in applications for judicial review: *R v Inland Revenue Commissioners* [1989] 1 All ER 906 at 915; *Hart v Deputy Commissioner of Taxation* (2002) 49 ATR 656; 2002 ATC 4445; [2002] FCA 606 at [9].

(c) the costs of disclosure would outweigh the benefits; or

[8.10.5] Disclosure unduly burdensome This provision operates to relieve a party where there may be undue financial hardship in searching for and obtaining documents where the value of those documents is marginal.

(d) for any other reason, the court is satisfied that the documents need not be disclosed.

Public interest

E *CPR* r31.19(1)

8.11 (1) A party may apply for an order dispensing with the disclosure of a document on the ground that disclosure would damage the public interest.

[8.11.1] Public interest in private documents See further r.8.5(2)(e). Public interest privilege is not only available to state documents and may apply to private documents if their disclosure would be injurious to the public interest: *Asiatic Petroleum v Anglo-Persian Oil* [1916] 1 KB 822 at 830; [1916-7] All ER Rep 637 at 640.

(2) The application must:

(a) identify the document, unless to disclose its existence would itself be against the public interest; and

(b) set out the reasons why disclosure would be against the public interest.

[8.11.2] Meaning of "public interest" Disclosure must be "against the public interest". It is not enough that the documents be "confidential" or "official": *Robinson v South Australia (No 2)* [1931] AC 704 at 714; [1931] All ER Rep 333 at 337.

[8.11.3] Sworn statement in support The application, if made on behalf of Government, should usually be supported by a sworn statement by the responsible Minister or other senior public servant sufficiently familiar with the contents.

(3) If the court considers that disclosure of a document could damage the public interest but no-one has raised the matter, the court must:

(a) tell the parties; and

(b) fix a date for a conference or hearing to decide the question.

[8.11.4] No waiver The court owes a duty to the public to ensure that such matters are fully investigated. The privilege can be raised by any party but cannot be waived by any party: *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 264; [1980] 3 All ER 475 at 499; [1980] 3 WLR 668 at 699; *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 at 436; [1983] 1 All ER 910 at 917; [1983] 2 WLR 494 at 526.

(4) The court may:

(a) require the person to produce the document to the court so the court is able to decide whether disclosure of the document would damage the public interest; and

[8.11.5] Inspection The court may test the claim to privilege by inspecting the documents but should not do so unless a strong positive case is made out against the privilege: *Burmah Oil v Governor of the Bank of England* [1980] AC 1090 at 1117; [1979] 3 All ER 700 at 711; [1979] 3 WLR 722 at 733.

(b) ask a person who is not a party to make representations about whether or not the document should be disclosed.

Documents referred to in statements of the case

E *CPR* r31.14(1)

8.12 (1) A party may inspect and ask for a copy of a document mentioned in a statement of the case, sworn statement, expert's report or document filed in the court.

[8.12.1] General mention sufficient It is not necessary that such a document be specifically identified – it is enough if it is generally described: *Smith v Harris* (1883) 48 LT 869.

[8.12.2] Meaning of "sworn statement" The reference to sworn statements probably includes documents described in exhibits or annexures to sworn statements: *Re Hinchcliffe* [1895] 1 Ch 117 at 120.

(2) The party must:

(a) give reasonable notice to the party who mentioned the document; and

(b) pay the reasonable costs of copying the document.

E *CPR* r31.16

Disclosure before proceedings start

8.13 (1) A person may apply for an order for disclosure of documents before proceedings have started.

[8.13.1] Fishing This rule may be said to permit "fishing" but not "trawling": *CGU Insurance v Malaysia International Shipping* [2001] 187 ALR 279 at 286; [2001] FCA 1223 at [25]. The rule is designed to enable a party to ascertain whether he has a case against another. It is a beneficial rule which ought to be given a full interpretation: *Paxus v People Bank* (1990) 99 ALR 728 at 733. It is not, however, designed to secure for the applicant all the benefits of disclosure to which he would be entitled during proceedings and the width of the order will be tailored accordingly: *SmithKline Beecham v Alphapharm* [2001] FCA 271 at [19]; *Jovista v FAI* [1999] WASC 44 at [7].

(2) The application must have with it a sworn statement setting out the reasons why the documents should be disclosed.

[8.13.2] Disclosure will inform decisions as to future proceedings The application should make it clear that a decision as to whether, and against whom, to commence proceedings depends upon the disclosure sought. There is no need to establish that a party will take action - only that the party is considering it. The grounds for alleging that the applicant and the party against whom the application is made are likely to be parties ought to be explained: *Dunning v Board of United Liverpool Hospitals* [1973] 2 All ER 454 at 460; [1973] 1 WLR 586 at 593.

(3) The court must consider:

(a) the likely benefits of disclosure; and

(b) the likely disadvantages of disclosure; and

(c) whether the party who would have to disclose the documents has sufficient financial resources to do so.

(4) The court must not order documents to be disclosed unless the court is satisfied that:

(a) the person in possession and control of the document has had an opportunity to be heard; and

(b) the applicant and person in possession and control of the document are likely to be parties to the proceedings; and

[8.13.3] Rule not for identification of third parties The rule does not contemplate that these provisions are to be used to identify parties other than those in possession and control of the documents: *Aitken v Neville Jeffress Pidler* (1991) 33 FCR 418 at 423-4.

(c) the documents are relevant to an issue that is likely to arise in the proceedings; and

[8.13.4] Consideration of defence See further [8.13.1]. This is likely to include consideration of the strength and availability of defences: *CGU v Malaysia International Shipping* [2001] 187 ALR 279 at 285; [2001] FCA 1223 at [21].

[8.13.5] Evidence in support must point to possible case The evidence in support of the application need not disclose a *prima facie* case but must sufficiently point to a case and it is not enough for the applicant merely to assert that there is a case: *Stewart v Miller* [1979] 2 NSWLR 128 at 140; *Quanta Software v Computer Management Services* [2000] FCA 969 at [24]; (2000) 175 ALR 536 at 541-2.

(d) disclosure is necessary to decide the proceedings fairly or to save costs.

(5) The order may state the time and place of disclosure.

E *CPR* r31.17

Disclosure by someone who is not a party

8.14 (1) A party may apply for an order that documents be disclosed by a person who is not a party to the proceedings.

[8.14.1] Discretion exercised cautiously This jurisdiction ought to be exercised with caution: *Richardson Pacific v Fielding* (1990) 26 FCR 188 at 190; *Evans Deakin v Sebel* [2001] FCA 1772 at [11].

(2) The application must have with it a sworn statement setting out the reasons why the documents should be disclosed.

[8.14.2] What sworn statement should contain The application must specify the documents sought with a high degree of precision, since non-parties will be unlikely to comprehend the dispute as fully as the parties.

(3) The court must consider:

(a) the likely benefits of disclosure; and

(b) the likely disadvantages of disclosure; and

(c) whether the party who would have to disclose the documents has sufficient financial resources to do so.

(4) The court must not order documents be disclosed unless the court is satisfied that:

(a) the person in possession and control of the document has had an opportunity to be heard; and

[8.14.3] Pre-application discussion The party and the non-party should usually attempt to resolve the issue before a formal application is made: *Jovista v FAI General Insurance Co Ltd* [1999] WASC 44 at [7].

(b) the documents are relevant to an issue in the proceedings; and

(c) disclosure is necessary to decide the proceedings fairly or to save costs.

(5) The order may state the time and place of disclosure.

Failure to disclose documents

E *CPR* r31.21

8.15 (1) A party who fails to disclose a document may not rely on the document unless the court allows it.

[8.15.1] See generally *Roberts v Oppenheim* (1884) 26 Ch D 724 at 735.

(2) If a party fails to disclose a document as required by this Part:

(a) another party may apply for an order that the person disclose the document; and

[8.15.2] See further rr.8.5(5), 8.9.

(b) if the party fails to disclose the document within 7 days of the date of service of the order, the court may strike out the non-disclosing party's claim or defence.

[8.15.3] Discretion exercised cautiously The court has a discretion whether to make an order under this rule which will be exercised cautiously: *Samuels v Linzi Dresses Ltd* [1981] QB 115 at 126; [1980] 1 All ER 803 at 812; [1980] 2 WLR 836 at 845. It may not be appropriate to strike out the claim or defence unless the court is satisfied that the party is attempting to avoid disclosure (*Mosser v PGH* (1964) 82 WN (Pt 1) (NSW) 147) or the omission or neglect is culpable (*James Nelson v Nelson Line* [1906] 2 KB 217 at 227).

[8.15.4] Claim/defence struck out may not be re-filed Where a claim or defence is struck out under this rule, it is not permitted to file another without leave of the court: *KGK v East Coast Earthmoving* [1984] 2 Qd R 40 at 43.

E *CPR* r31.22

Use of disclosed documents

8.16 (1) A party to whom a document is disclosed may only use the document for the purposes of the proceeding unless the document has been:

[8.16.1] Implied undertaking not to misuse documents There is said to be an implied undertaking to this effect: See generally *Riddick v Thames Board Mills* [1977] 3 All ER 677 at 688; [1977] QB 881 at 896; [1977] 3 WLR 63 at 75; *Church of Scientology of California v Department of Health* [1979] 3 All ER 97 at 113, 116; [1979] 1 WLR 723 at 743, 746; *Rank Film Distributors v Video Information Centre* [1982] AC 380 at 442; [1981] 2 All ER 76 at 81; *Crest Homes v Marks* [1987] 1 AC 829 at 853-4; [1987] 3 WLR 293 at 297-8; [1987] 2 All ER 1074 at 1078.

(a) read to or by the court; or

(b) referred to in open court.

[8.16.2] General observations This is consistent with the general principle that proceedings ought to be conducted in the public domain.

(2) A party, or person in possession or control of a document, may apply for an order restricting or prohibiting use of the document even if it has been:

(a) read to or by the court; or

(b) referred to in open court.

(3) The court may make an order restricting or prohibiting use of the document if it is satisfied that the benefits of restricting or prohibiting the use of the document outweigh the benefits of allowing the document to be used.

Agreed bundle of documents

8.17 (1) The originals of all documents to be used at the trial must be brought to the trial.

[8.17.1] Secondary evidence of documents If the original is not brought to trial, secondary evidence of its contents may be adduced.

(2) The documents to which the parties have agreed must be gathered together, indexed and numbered.

(3) If the parties do not agree about the disclosure of some documents or their use at the trial, the party in possession of the documents must bring the documents to the trial.

Division 2 – Disclosure of Information in the Supreme Court

Application of Division 2

8.18 This Division applies only in the Supreme Court.

Written questions

8.19 With the court's permission, a party may ask another party a set of written questions.

[8.19.1] Function of written questions The original purpose of such questions (formerly known as "interrogatories") was to prove some material fact necessary to a cause of action or defence by tendering the question and the answer, so diminishing the burden of proof: *A-G v Gaskill* (1882) 20 Ch D 519 at 528; [1881-5] All ER 1702 at 1706; *Kennedy v Dodson* (1895) 1 Ch 334 at 341; [1895-9] All ER 2140 at 2144. The modern function of written questions is much wider and includes (1) obtaining admissions to support the case of the questioning party (2) obtaining admissions which damage the case of the party to be questioned (3) requesting further and better particulars of a claim or defence; and (4) seeking accounts from a fiduciary: See for example *WA Pines v Bannerman* (1979) 41 FLR 175 at 190; (1979) 30 ALR 559 at 574.

[8.19.2] General observations Written questions may be asked only with the permission of the court and serious thought should be given to whether it is necessary to resort to this often controversial process. The application may be made at any time (see for example *Disney v Longbourne* (1876) 2 Ch D 704 at 705) but it would be exceptional for questions to be asked before the issues between the parties are defined by the statements of the case. The most convenient time to ask written questions is after disclosure and inspection. For a general description of permissible written questions see *Daybreak Pacific Limited v Donaldson* [2006] NZHC 957 at [25].

[8.19.3] Only one set of questions The general rule is that only one set of questions may be asked, however there are exceptions: See for example *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 at 30; [1881-5] All ER 814 at 826 (clarification of answers); *Boake v Stevenson* [1895] 1 Ch 358 at 360 (discovery of additional facts).

[8.19.4] Judicial review Written questions are not necessarily appropriate in all cases; their role in judicial review is likely to be very limited as factual issues will be narrow: *Cyclamen v Port Vila* [2006] VUCA 20; CAC 20 of 2006.

Permission to ask written questions

8.20 (1) A party may make an oral application for permission at a conference, telling the judge the matters the question will cover.

[8.20.1] Function of permission The requirement to seek permission to ask written questions recognises the need for judicial control of the process having regard to experience in other jurisdictions in which unsupervised use of the process is prone to abuse and overuse: *Cyclamen v Port Vila* [2006] VUCA 20; CAC 20 of 2006.

[8.20.2] When right to object preserved Where the judge is told only the nature of the matters the question will cover, the grant of permission does not foreclose the making of an objection later: *Cyclamen v Port Vila* [2006] VUCA 20; CAC 20 of 2006.

(2) A party may make a written application only if it is not practicable to make an oral application at a conference.

(3) The questions must be attached to the written application

[8.20.3] When right to object foreclosed It is suggested that the principle in *Cyclamen v Port Vila* [2006] VUCA 20; CAC 20 of 2006 (that permission does not foreclose the right of later objection) ought to be confined to oral applications. Where a written application with draft questions is the subject of a grant of leave, it would be unusual to permit a party to argue the same points twice.

(4) The written application must be filed and served on the other party at least 3 days before the hearing date.

Service of questions

8.21 The set of written questions must be served on the party to whom they are directed and on all other parties.

Time for answering

8.22 (1) A person who is asked written questions must answer them.

[8.22.1] How questions to be answered Questions must be answered to the best of one's knowledge and belief, even where complete precision is impossible. This obligation includes an obligation to make reasonable enquiries of servants or agents or such other sources of knowledge as may be reasonably available for the purpose of answering: *Lyell v Kennedy (No 2*) (1884) 9 AC 81 at 85-6; [1881-5] All ER 807 at 809-10; *Bank of Russian Trade v British Screen* [1930] 2 KB 90 at 96; *Daybreak Pacific Limited v Donaldson* [2006] NZHC 957 at [25].

(2) The written questions must be answered:

(a) within 14 days of the questions being served on the party; or

(b) within the period fixed by the court.

Form of answer

8.23 (1) The questions must be answered in writing.

(2) The answers must:

(a) set out each question followed by the answer; and

(b) be verified by a sworn statement made by the party answering the questions.

[8.23.1] Answers as exhibit This is so that the question and answer is capable of forming a discrete exhibit which can be tendered.

[8.23.2] What sworn statement should contain The sworn statement should make it clear that the deponent has made all proper enquiries without going into the precise details: *Stanfield Properties v National Westminster Bank* [1983] 2 All ER 249 at 250-1; [1983] 1 WLR 568 at 571.

(3) The answer must:

(a) answer the substance of each question, without evasion or resorting to technicalities; or

[8.23.3] Meaning of "evasion" Answers ought to be "specific and substantial": *Parker v Wells* (1881) 18 Ch D 477 at 485. The more specific a question, the more specific the answer should be: *Gordon & Co v Bank of England* (1884) 8 Jur 1132; *Earp v Lloyd* (1858) 70 ER 24. Answers should be precise and rigorously drafted: *Kupresak v Clifton Bricks (Canberra) Pty Ltd* (1984) 57 ACTR 32 at 34. Answers should be given in an "open and helpful way, not in a clever and grudging way": *Aspar Autobarn Cooperative Society v Dovala Pty Ltd* (1987) 16 FCR 284 at 286; 74 ALR 550 at 552.

[8.23.4] Partly objectionable question Where a question is partly objectionable and partly unobjectionable, a full answer ought to be given to the unobjectionable part and

an objection raised against the objectionable part: *Aspar Autobarn v Dovala* (1987) 16 FCR 284 at 286; (1987) 74 ALR 550 at 552.

(b) object to answering the question.

[8.23.5] How objection to be made The objection is part of the answer and must be raised separately in answer to each question. The failure to object at the time of answering is usually a bar to raising a subsequent objection.

Objections

8.24 (1) An objection must:

(a) set out the grounds for the objection; and

(b) briefly state the facts on which the objection is based.

(2) A person may object to answering a written question only on the following grounds:

(a) the question does not relate to a matter at issue, or likely to be at issue, between the parties; or

[8.24.1] Meaning of "matter at issue" The meaning of "matter at issue" may be narrow and directed only toward matters directly at issue and not the surrounding questions: *Sharpe v Smail* (1975) 49 ALJR 130 at 133; (1975) 5 ALR 377 at 381; cf *Marriott v Chamberlain* (1886) 17 QBD 154 at 163; [1886-90] All ER 1716 at 1720. This requirement is to prevent "fishing" for some other cause of action or a cause of action against a third person. See generally *Aspar Autobarn v Dovala* (1987) 16 FCR 284 at 287; (1987) 74 ALR 550 at 554.

[8.24.2] Significance of "issue between the parties" The requirement that there be an issue "between the parties" may mean that questioning of a co-defendant is not permitted (in the absence of a counterclaim): *Buxton & Lysaught v Buxton* [1977] 1 NSWLR 285 at 288. A third party may be permitted to question a claimant: *Barclays Bank v Tom* [1923] 1 KB 221 at 224; [1922] All ER 279 at 280.

[8.24.3] Questions confined to factual matters Questions are usually confined to matters of fact and not to the evidence by which the facts will be proved: *Re Strachan* [1895] 1 Ch 439 at 445 but see also *Rofe v Kevorkian* [1936] 2 All ER 1334 at 1337, 1138. Questions about documents are permitted and are often useful to ascertain facts regarding authorship, receipt, location, the meaning of annotations and codes, etc. Questions as to states of mind are permitted where that is a material fact: *Plymouth Mutual v Traders' Publishing* [1906] 1 KB 403 at 413.

(b) the question is not reasonably necessary to enable the court to decide the matters at issue between the parties; or

[8.24.4] Meaning of "reasonably necessary" It is impossible to define what questions might be "reasonably necessary" and this will depend on the circumstances of each case. Questions which exceed the legitimate requirements of the case will not be permitted: *White v Credit Reform Association* [1905] 1 KB 653 at 659.

[8.24.5] Questions as to credit Questions which are merely cross-examination as to credit are usually disallowed: *Allhusen v Labouchere* (1878) 3 QBD 654 at 661.

(c) there is likely to be a simpler and cheaper way available at the trial to prove the matters asked about; or

[8.24.6] Discretion The allowance of questions is discretionary. Leave may be refused generally or in respect of specific questions in these circumstances.

(d) the question is vexatious or oppressive; or

[8.24.7] Meaning of "vexatious" The meaning of "vexatious" is that which is contained in the dictionary and refers to the purpose of causing trouble or annoyance: *Aspar Autobarn v Dovala* (1987) 16 FCR 284 at 287; (1987) 74 ALR 550 at 554.

[8.24.8] Meaning of "oppressive" The word "oppressive" refers to situations in which far too much is expected of the party questioned: *Aspar Autobarn v Dovala* (1987) 16 FCR 284 at 287-8; (1987) 74 ALR 550 at 555.

(e) privilege.

[8.23.9] Particularisation of claim to privilege Claims to privilege must be made with sufficient particularity to show that the matter is clearly privileged: *Lyell v Kennedy (No 1)* (1883) 8 AC 217 at 227; [1881-5] All ER 798 at 803; *Triplex v Lancegaye (1934) Ltd* [1939] 2 KB 395 at 403; [1939] 2 All ER 613 at 617.

[8.24.10] Self-incrimination This may include the privilege against self-incrimination where the proceedings may expose a party to a penalty or criminal prosecution: *Fisher v Owen* (1878) 8 Ch D 645 at 651, 654; *R v Deputy Commissioner of Taxation* (1987) 13 FCR 389 at 394-5; 71 ALR 86 at 91.

(3) The objection is to be dealt with at a conference.

(4) If the judge agrees with the objection, the question need not be answered.

[8.24.10] Amendment to cure objectionable question It may be that the case management considerations would permit the court to allow a party to amend a question where it might be permissible in a different form rather than disallow it altogether: *Nast v Nast & Walker* [1972] 2 WLR 901 at 907; [1972] 1 All ER 1171 at 1175; [1972] Fam 142 at 151.

Failure to answer written questions

8.25 (1) If a person does not answer, or does not give a sufficient answer, to a written question, the court may order the person to:

[8.25.1] Meaning of "sufficient" The meaning of sufficient ought to be approached by comparison with r.8.23(3). An answer is not insufficient only because the party seeking an answer did not get the answer expected. Neither is an answer insufficient because it is or may be untrue: *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 at 19, 21. An answer will be insufficient if it does not deal with the point raised in the question or deals only with part of the question or evades the question. An answer which includes irrelevant matters is also insufficient: *Peyton v Harting* (1874) LR 9 CP 9 at 10, 11, 12; *Taylor v New Zealand Newspapers* [1938] NZLR 198 at 203. Applications under this rule should make clear why an answer is said to be insufficient: *Anstey v North & South Woolwich Subway* (1879) 11 Ch D 439 at 440.

(a) answer the question; or

(b) attend court to answer the question on oath.

[8.25.2] Oral examination exceptional The power to compel oral examination is very seldom used and special circumstances must usually be evident: *Lawson & Harrison v Odhams* [1949] 1 KB 129 at 137; [1948] 2 All ER 717 at 721.

[8.25.3] Scope of oral examination The scope of oral examination ought to be confined to obtaining a proper answer to those questions which were not answered: *Litchfield v Jones* (1884) 54 LJ Ch 207.

(2) If the person does not comply with the order, the court may:

(a) order that all or part of the proceedings be stayed or dismissed; or

(b) give judgment against the person; or

(c) make any other order the court thinks fit.

[8.25.4] Discretion exercised cautiously The court has a wide discretion which will be exercised cautiously: *Samuels v Linzi Dresses* [1981] QB 115 at 126; [1980] 1 All ER 803 at 812; [1980] 2 WLR 836 at 845. The power to dismiss or strike out will usually be used only where the defaulting party has acted wilfully and with full knowledge (*Haigh v Haigh* (1885) 31 Ch D 478 at 484) or where trying to avoid its obligations (*Kennedy v Lyell* [1892] WN 137; *Danvillier v Myers* [1883] WN 58).

(3) Subrule (2) does not affect the power of the court to punish for contempt of court.

Division 3 – Disclosure of Documents in the Magistrates' Courts

Application of Division 3

8.26 This Division applies only in the Magistrates Court.

Disclosure of documents

8.27 (1) A party to a proceeding must disclose the documents the party intends to rely on at the trial.

(2) A party discloses a document by giving a copy of the document to each other party at least 14 days before the trial.

Disclosure of particular documents

8.28 (1) A party may apply for an order that another party disclose particular documents.

(2) The magistrate may order that the documents be disclosed if the magistrate is satisfied that:

(a) the documents are relevant to the issues between the parties; or

(a) disclosure is necessary to decide the matter fairly; or

(a) for any other reason the magistrate is satisfied that the documents should be disclosed.

(3) If the magistrate orders that documents are to be disclosed. He or she may also order that Division 1 applies to the extent ordered.

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