DISCLOSURE

This is a brief outline only. You should obtain legal advice as to your specific circumstances.

The court's rules[1] provide that *"…each party to a proceeding[2] has a duty…to give full and frank disclosure of all information relevant to the proceeding, in a timely manner*." But what does this mean?

A good starting point is provided by the UK Justice Department[3] which states: "*The purpose of "disclosure" is to make sure that both…parties know of all documents that have a bearing on the case..."document" means any form of recorded information, not just writing on paper. It includes, for example, pictures, emails, mobile phone texts, social networking messages or video-clips."*

What do you need to Disclose?

You must disclose all documents that are relevant to the issues in dispute in the proceedings and being documents which are within your possession or control.[4] This includes documents that the court's rules require you to disclose as well as all documents that allow the issues (or allegations) raised in the proceedings to be known to all and the documents that tend to prove or disprove those allegations.

Again, the UK Justice Department provides this helpful guidance: "*You must disclose all relevant documents…that you now have or…that you have had or…that are held by someone else who would be obliged to give them to you or let you inspect them or have copies of them if asked or…that were held by such a person. You must disclose documents that are harmful to your case just as much as those that are helpful to it…You must actively search for disclosable documents that you may have, though you may limit your search to what is reasonable."*

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[1] Rule 6.01 *Federal Circuit and Family Court of Australia Rules 2021*
[2] The duty of disclosure applies to all parties in all proceedings, (property, parenting, etc) save and except for respondents to contravention or contempt proceedings). A duty of disclosure does apply to applicants in such cases.
[3] See www.justice.gov.uk /courts/procedure-rules/civil/standard-directions/general/disclosure-of-documents
[4] See rule 6.03 *Federal Circuit and Family Court of Australia Rules 2021*. This is also a general common law obligation.

You should disclose but need not produce or allow inspection of documents that are "*privileged*." These are generally documents relating to settlement negotiations,[5] which may lead to self-incrimination,[6] and client legal privilege[7] (communications between people and their lawyers for the purpose of legal advice or litigation).

If you do not disclose a document, then you may not be able to use it in court.[8]

When is a document in your "possession or control"?

A document is in your possession if you physically have a copy of the document.

A document is in your control if you have a legal right to obtain it from someone else. It is not enough to fulfil your duty of disclosure to say that you do not have a copy. If you can obtain it, then you should. For example, tax returns. If you do not have a copy in your possession, you can obtain a copy from the ATO.[9] If you do not obtain it when you could, then a court may make an order for you to obtain it (or give authority to the other party to do so) and may then make a costs order against you.

What is the difference between disclosure and production?

Disclosure identifies and lists the documents that exist or have existed.[10] Production involves making documents available to inspect or providing a copy of the document or documents.[11] Once a list of disclosed documents is provided then a party can request a copy of documents.[12]

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[5] Section 131 Evidence Act 1995 (Cmwth)
[6] Section 128 Evidence Act 1995 (Cmwth)
[7] Section 118-126 Evidence Act 1995 (Cmwth)
[8] For an excellent discussion of this see *Eyles v Sydney Skydivers Pty Ltd [2022] QDC 1.* Rule 6.17 Federal *Circuit and Family Court of Australia Rules 2021* is also relevant, providing potential "consequences" for non-disclosure.
[9] Tax and Social Security (Centrelink) records cannot be subpoenaed. Accordingly, there is an obligation upon the person to whom those documents relate, to obtain copies if they are relevant.
[10] Rule 6.09 *Federal Circuit and Family Court of Australia Rules 2021 and schedule 1 Pre-Action procedures*. The duty of disclosure is ongoing, so that if a document comes into existence or becomes known after earlier disclosure, that newly created or discovered document must also be disclosed as soon as possible after knowledge of its existence. The court's rules also provide for disclosure of information, for example rule 6.06 which specifies the information that must be provided by a party in financial proceedings by filing a financial statement or affidavit.
[11] Provision of copies of documents can be electronic or by hard copy (see rules 6.13 6.20 *Federal Circuit and Family Court of Australia Rules 2021)*. A practice has developed, especially post covid, of providing documents electronically. Notwithstanding that a copy of a document may have been produced, a party may still request to inspect the original document and may do so (rule 6.12 *Federal Circuit and Family Court of Australia Rules 2021).*
[12] Rules 6.10 and 6.13 *Federal Circuit and Family Court of Australia Rules 2021. Whilst the court's rules provide that the party requesting a document is responsible for the cost, the general practice, especially as documents are now generally produced electronically, is that no payment is sought or made.*

How do you know what issues are in dispute?

This is largely determined by the parties and by legal principles. For example, in a property case, a court must ascertain the present legal and equitable interests of parties,[13] their contributions[14] and their "*future needs*".[15] This gives a guide to what must be disclosed – documents that identify and value the assets, liabilities and financial resources to be considered, the parties contributions and future needs. Issues raised that are relevant to the court's consideration of these matters are then the subject of the duty of disclosure – for example, initial contributions, inheritances, compensation claims, premature distributions of property.

It is important to always state the issues or allegations that are relied upon in making a proposal or seeking a particular outcome.[16] If the bases for proposals are known, then the other party can indicate what they agree and disagree with. Parties to the dispute can then focus on what is not agreed. Disclosure then becomes an investment in settlement.

How is disclosure an investment in settlement?

I have always been struck by the words of US General George Marshall, US Chief of Staff in WWII, who opined: "*We are determined that before the sun sets on this terrible struggle, Our Flag will be recognized throughout the World as a symbol of freedom on the one hand and of overwhelming force on the other".*

Having overseen the almost complete destruction of Germany and its allies in WWII, including the killing of nearly 1 million civilians in carpet bombing of German cities, General Marshall was awarded a Nobel Peace Prize in 1953 for his "*Marshall Plan*" for the rebuilding of European infrastructure (to the great profit of many American businesses - a significant conundrum but perhaps speaking to his genius (or the corruption of the concept of a peace prize)).

The relevance of General Marshall's words, for present purposes, is the application of those words in explaining disclosure. Disclosure is an investment in settlement. It aids settlement by making clear what issues are in dispute and what proof exists to establish fact. Hence, disclosure is a tool in achieving "*freedom*," or settlement, by

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[13] See Stanford
[14] See ss.79 and 90SM
[15] See ss.75(2) and 90SF(3). Whilst the Full Court cautions that the factors addressed by these sections should not be thought of or referred to as "future needs" factors, they are what everyone refers to them as.
[16] This is required by pre-action procedures but also simply good practice. It assists each party understand the other's position and the case they must answer.

focusing attention on the facts alleged and relied upon in supporting a party's position and a signal of *"overwhelming force*" by making clear that what is alleged can be proven.

Proof of facts can occur at a primary, secondary, or tertiary level. Primary proof is the most persuasive and authoritative, then secondary and then tertiary levels of proof. These roughly translate to:

Primary	Consensus and agreement (i.e. the parties agree on facts)
Secondary	Source documents that corroborate an allegation
Tertiary	A party's recollection. These are largely issues of credit or plausibility, believability, and consistency with other facts.

Absent agreement as to facts, independent, third-party documents are generally the best available proof.[17]

Conclusion

Disclosure need not be an onerous burden. Disclosure is a necessary part of any case and required by court rules and common law obligations. On those bases alone one might adopt the shoe manufacturer's motto and "*just do it*."

Disclosure should never be approached as a game. As Felix Frankfurter opined "*Litigation is the pursuit of practical ends, not a game of chess*."[18]

One of the most consistent complaints, impeding settlement or even the ability to schedule a mediation or progress negotiation, is "*we haven't had disclosure*." Be focused on making sure all parties to the dispute understand what the dispute is about and that they have a symmetry of information. Make sure everyone has the information they need to make informed decisions.

Disclosure should be embraced as an investment in settlement, to arrive at an outcome with a minimum of delay and expense. Disclosure should be seen as a way of clearly outlining what is agreed and what is not and, when issues are not agreed, to help both parties understand what can and cannot be proven. By doing so, parties should be able to obtain better advice and better focus on settlement.

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[17] As the NSW Law Reform Commission (Report 17 1973) described, such documents, when kept by a person or agency for business purposes, can be generally accepted as more probably correct than not.

[18] *Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69, 1941*