2. Legal Framework for Discovery in Federal Courts

Contents

Introduction

2.1 This chapter considers the obligation on a party to discover documents to another party and the range of documents discoverable in civil proceedings in federal courts. This chapter raises issues about the need for court control over the availability of discovery and limitations on the ambit of discovery in federal courts. Legislative provisions, court rules, practice notes and significant cases dealing with the discovery of documents are discussed here. Chapter 3 discusses the way parties carry out a discovery process and the need for strong case management of the discovery stage in litigation.

Legal framework

2.2 This part of the chapter outlines the current law imposing the obligation to discover documents and the range of documents a party may be required to disclose in the federal civil court system.

High Court of Australia

Obligation to discover documents

2.3 There are no specific provisions in the *High Court Rules 2004* (Cth) about the obligation to make discovery of documents. Should circumstances arise in proceedings

before the High Court that necessitate the discovery of documents, a party may apply to the court for directions.[1]

Scope of discoverable documents

2.4 In the absence of specific provisions or directions to the contrary, the 'train of inquiry' test as propounded in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co*[2] (*Peruvian Guano*) and adopted in Australia[3] remains the test of general application for discovery in the High Court. In the *Peruvian Guano* case Brett LJ stated:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidenced upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.[4]

Federal Court of Australia

Obligation to discover documents

2.5 The availability of discovery in the Federal Court is restricted by provisions in the *Federal Court Rules* (Cth). The rules require that in all cases a party must have the leave of the court to file and serve a notice for discovery.[5] The court must determine an application for leave for discovery in the way that best promotes the overarching purpose of civil practice and procedure, being the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible.[6]

2.6 Where leave for discovery is granted—and a notice for discovery is served—the party required to give discovery must do so within the time specified in the notice, not being less than 14 days after service, or within such time as the court directs.[7] Unless the court otherwise orders, the party must give discovery by serving a list of documents required to be disclosed and an affidavit verifying that list.[8]

2.7 The court may, subject to any question of privilege which may arise, order a party to produce a document which appears from its list of documents to be in the party's possession, custody or power.[9]

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1 *High Court Rules 2004 (Cth)* r 6.01.
2 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.
3 *Commonwealth v Northern Land Council* (1993) 176 CLR 604.; *Mulley v Manifold* (1959) 103 CLR 341, 345.
4 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63.
5 *Federal Court Rules* (Cth) O 15 r 1.
6 *Federal Court of Australia Act 1976* (Cth) s 37M.
7 *Federal Court Rules* (Cth) O 15 r 2(1).
8 Ibid O 15 r 2(2).
9 Ibid O 15 r 11(1).

2.8 However, the rules state that the court shall not make an order for the filing or service of any list of documents or for the production of any document unless it is necessary at the time the order is made.[10] The word 'necessary' in this context has been interpreted as meaning 'reasonably necessary in the interests of a fair trial and of the fair disposition of the case'.[11]

2.9 In determining whether to make orders for the discovery of documents, *Practice Note CM 5* states that the court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.[12]

2.10 Where orders for discovery are made by the court, the party's discovery obligation is ongoing in the sense that the party must continue to discover any documents not previously disclosed which would be necessary to comply with the order.[13]

Scope of discoverable documents

2.11 In the Federal Court, the *Peruvian Guano* test of relevance has been replaced with broad categories of documents 'required to be disclosed' pursuant to O 15 r 2(3) of the *Federal Court Rules*. The documents required to be disclosed in the Federal Court are any of the following documents of which the party giving discovery is, after reasonable search, aware at the time discovery is given:

(a) documents on which the party relies;

(b) documents that adversely affect the party's own case;

(c) documents that adversely affect another party's case; and

(d) documents that support another party's case.[14]

2.12 A number of matters are specified by O 15 r 2(5) as matters which may be taken into account by a party in making a 'reasonable search', namely:

(a) the nature and complexity of the proceedings;

(b) the number of documents involved;

(c) the ease and cost of retrieving a document;

(d) the significance of any document likely to be found; and

(e) any other relevant matter.

2.13 Order 15 r 3 subsequently provides that the court may limit discovery orders to specific documents or classes of documents, or in relation to specific matters in question in the proceeding, to prevent unnecessary discovery.

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10 *Federal Court Rules* (Cth) O 15 r 15.

11 *University of Western Australia v Gray (No 8)* [2007] FCA 89, [18]; *Gray v Associated Book Publishers (Aust) Pty Ltd* [2002] FCA 1045, [9].

12 *Practice Note CM 5: Discovery* (Federal Court of Australia), [2].

13 *Federal Court Rules (Cth)* O 15 r 7A.

14 Ibid O 15 r 2(3).

2.14 Orders for discovery of documents as contemplated in O 15 r 2 are referred to as orders for 'general discovery'.[15] The Rules do not expressly prohibit orders for broader discovery of documents outside these general categories, for example, orders for discovery of all relevant documents within the *Peruvian Guano* test.[16] However, the court has held that, not only should discovery be contained by the general categories in O 15 r 2,[17] in the normal course of events, discovery should be limited to the specific documents or classes of documents contemplated in r 3. In *Racing New South Wales v Betfair Pty Ltd*, Buchanan, Jagot and Foster JJ stated that:

> as apparent from Order 15 r 2(3) of the *Federal Court Rules*, discovery ordinarily should be limited to the documents on which the party relies and the documents that adversely affect or support that party's case or the case of another party. Moreover, Order 15 rr 3(1) and (2) indicate that, if anything, discovery by order should be restricted rather than expanded.[18]

2.15 The practice and procedure for formulating limited categories of documents for the purposes of discovery is considered in Chapter 3.

2.16 If the party does not search for a category or class of document, the rules require that party to include in their list of discoverable documents a statement of the category or class of document not searched for, and the reason why.[19]

2.17 A party is required by the *Federal Court Rules* to discover documents which are or have been in that party's possession, custody or power.[20] It is not necessary to disclose a document if the party giving discovery reasonably believes that the document is already in the possession, custody or control of the party to whom discovery is given.[21]

2.18 The *Federal Court Rules* also exclude from the ambit of discovery additional copies of documents, which are not discoverable purely because the original or any other copy is discoverable.[22]

2.19 While the rules require a party giving discovery to identify in their list of discoverable documents any document which they claim is privileged,[23] the party can rely on a privilege claim to refuse production of the document for inspection.[24]

Family Court of Australia

2.20 In the Family Court, as discussed below, the duty of disclosure is absolute. This may be a reflection of the court's jurisdiction. As noted in *Briese and Briese*, 'the need

15 Ibid O 15 r 5; *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 2)* [2006] FCA 1001, [153].
16 S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), [12.1.21].
17 *The University of Sydney v ResMed Ltd* [2008] FCA 1020; *Australian Competition & Consumer Commission v Advanced Medical Institute Pty Ltd* [2005] FCA 366; *Aveling v UBS Capital Markets Australia Holdings Ltd* [2005] FCA 415.
18 *Racing New South Wales v Betfair Pty Ltd* [2009] FCAFC 119, [19].
19 *Federal Court Rules* (Cth) 15 r 2(6).
20 Ibid O 15 r 6.
21 Ibid O 15 r 2(4).
22 Ibid O 15 r 6A.
23 Ibid O 15 r 6.
24 Ibid O 15 r 11.

for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance'.[25]

Obligation to disclose documents

2.21 The *Family Law Rules* impose a general duty of disclosure on a party to a family law dispute, whether financial or parenting, independently of any action of the Family Court or another party. The duty of disclosure is imposed from the start of pre-action procedures for a case and runs until the case is finalised.[26]

2.22 This means that a party must continue to make disclosures as circumstances change and as documents are created or come into the party's possession or control.[27] The rules require parties to comply with their duty of disclosure in a timely manner.[28]

Scope of disclosure obligations

2.23 The general duty of disclosure under the *Family Law Rules* requires each party to a case to give full and frank disclosure of all information relevant to the case.[29] The duty of disclosure applies to each document that is or has been in the possession, or under the control, of the party disclosing the document and is relevant to an issue in the case.[30]

2.24 The rules also impose a duty on parties to produce particular documents on the first court date for a maintenance application, on the first court date for a child support application or appeal, at a conference in a property case and at trial.[31] In financial cases there are specific rules about full and frank disclosure of the party's total direct and indirect financial circumstances.[32]

Federal Magistrates Court of Australia

2.25 The jurisdiction conferred on the Federal Magistrates Court overlaps with that of the Family Court and the Federal Court. This section of the chapter examines the obligations on parties to disclose information and documents in financial matters under the court's family law jurisdiction. It also considers the rules which apply in all proceedings before the Federal Magistrates Court for the discovery of documents.

Obligation to discover documents

2.26 Section 45 of the *Federal Magistrates Act 1999* (Cth) provides that discovery in relation to proceedings in the Federal Magistrates Court is not allowed unless the Court or a Federal Magistrate declares that it is appropriate, in the interests of the administration of justice, to allow the discovery.

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25 *Briese and Briese* (1986) FLC ¶91.713.
26 *Family Law Rules 2004* (Cth) r 13.01.
27 Family Court of Australia, *Duty of Disclosure* <www.familylawcourts.gov.au/> at 27 October 2010.
28 *Family Law Rules 2004* (Cth) r 13.01.
29 Ibid r 13.01.
30 Ibid r 13.07.
31 Ibid r 4.15, 4.26, pt 12.2 and chs 15 and 16 respectively.
32 Ibid r 13.04.

2.27 Section 45(2) of the Act requires the Court or a Federal Magistrate, in deciding whether to make a declaration for discovery of documents, to have regard to:

(a) whether allowing the discovery would be likely to contribute to the fair and expeditious conduct of the proceedings; and

(b) such other matters (if any) as the Federal Magistrates Court or the Federal Magistrate considers relevant.

Scope of discoverable documents

2.28 If a declaration for discovery of documents is made under s 45 of the *Federal Magistrates Act*, the Court or Federal Magistrate may make an order for discovery:

(a) generally;

(b) in relation to particular classes of documents;

(c) in relation to particular issues; or

(d) by a specified date.[33]

2.29 The *Federal Magistrates Court Rules 2001* (Cth) provide that a party may be required to discover documents which are or have been in that party's possession, custody or control.[34] However, a party may refuse to produce for inspection privileged documents disclosed in their affidavit of discoverable documents.[35]

Obligation to disclose documents

2.30 Part 24 of the *Federal Magistrates Court Rules* imposes a duty of disclosure on parties to financial matters in the court's family law jurisdiction. This includes a requirement for the applicant and respondent to file and serve a financial statement, giving full and frank disclosure of their financial circumstances, together with their application or response.[36]

2.31 The rules also impose an obligation on the respondent, in proceedings for maintenance, to bring certain categories of documents to court on the first court date.[37] In other financial matters, the applicant and respondent must file and serve on each other certain categories of documents within 14 days after the first court date.[38]

Scope of disclosure obligations

2.32 A financial statement filed and served pursuant to part 24 of the *Federal Magistrates Court Rules* must give full and frank disclosure of the party's total direct and indirect financial circumstances, including details of any interest in property, income from all sources and other financial resources.[39]

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33 *Federal Magistrates Court Rules 2001* (Cth) r 14.02.
34 Ibid r 14.04.
35 Ibid r 14.05.
36 Ibid rr 24.02–24.03.
37 Ibid r 24.05.
38 Ibid r 24.04.
39 Ibid r 24.03.

2.33 In proceedings for maintenance, the categories of documents that a respondent must bring to court include a taxation assessment and taxation return for the most recent financial year, bank records for the 12 months before the application was filed and the respondent's most recent pay slip.[40]

2.34 In other financial matters, the categories of documents that the parties must file and serve on each other include the parties' three most recent taxation assessments and taxation returns, copies of the last four business activity statements (if a party has an Australian Business Number) and details of any superannuation plan.[41]

Issues with the laws of discovery

2.35 This part of the chapter discusses the issues that may arise in federal courts with respect to a party's obligation to give discovery and the scope of discoverable documents. Concerns with these aspects of discovery laws have been singled out by academic commentaries, law reform bodies and stakeholders consulted in the early stages of this Inquiry. This part also outlines options for reform to address these issues and the ALRC's preliminary views as to directions for reform of the legal framework for discovery in federal courts. The ALRC welcomes stakeholder suggestions for reforms to the laws concerning when discovery is available and what documents are discoverable in federal courts. In particular, the ALRC seeks feedback on the following questions and proposals.

High Court of Australia

2.36 The range of documents discoverable in the High Court, under the *Peruvian Guano* test of relevance, is quite broad. In his review of the civil justice system in England and Wales, Lord Woolf observed that the result of the *Peruvian Guano* decision

> was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.[42]

2.37 The train of inquiry test has been narrowed in many Australian and overseas jurisdictions, including England and Wales where it was first developed.[43] In the High Court, however, the ALRC was told during initial consultations that the need for discovery arises so rarely that the application of the *Peruvian Guano* case is unlikely to cause any real problems.

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40 Ibid r 24.05.

41 Ibid r 24.04.

42 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), ch 21, [17].

43 *Civil Procedure Rules* (UK) pt 31, 'Disclosure and Inspection of Documents', commenced in January 1999 and provides for standard disclosure which is substantially identical to the documents required to be disclosed under *Federal Court Rules* (Cth) O 15 r 2.

2.38 The nature of the work undertaken in the High Court in its original jurisdiction is largely confined to constitutional work. Often that work proceeds by way of stated case under s 18 of the *Judiciary Act 1903* (Cth) or by demurrer (a plea which, for the purposes of obtaining a ruling on some question of law, admits the truth of the opponent's pleading but asserts that it does not lead to the conclusion for which the opponent contends).[44] In these types of cases, the need for discovery of documents is rarely likely to arise.

2.39 If a proceeding commenced in the original jurisdiction of the High Court did raise any significant factual issue, the ALRC has heard that it is likely the matter would be remitted to another court under s 44 of the *Judiciary Act.*

2.40 The ALRC is not aware of any recent cases in the High Court where the discovery of documents has been problematic but is interested in hearing stakeholder's views about issues or problems in relation to discovery in the High Court, particularly with regards to the *Peruvian Guano* test.

Question 2–1 What issues, if any, arise in the application of the *Peruvian Guano* case to discovery in civil proceedings before the High Court?

Federal Court of Australia

2.41 The Terms of Reference for this Inquiry indicate that a significant prompt for a review of discovery laws is 'the high and often disproportionate costs of discovery'.[45] In initial consultations, the ALRC heard concerns about the overuse of discovery in proceedings before the Federal Court and the excessively voluminous documents being discovered in Federal Court proceedings, both of which may increase the costs of discovery.

2.42 In this section of the chapter, the ALRC discusses its preliminary views on the possibility of a new threshold test that would further restrict the availability of discovery in the Federal Court. Here, the ALRC also puts forward its preliminary views on the need for greater limitations on the test for discoverable documents in proceedings before the Federal Court.

Unnecessary discovery of documents

2.43 In Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System, ALRC Report 89* (2000), the ALRC recognised the need for court supervision and control over the use of discovery in the Federal Court.[46] Subsequently, in 2002, the *Federal Court Rules* were amended to require a party to obtain leave of the court to file and serve a notice for discovery of documents.[47]

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44 S Colbran and others, *Civil Procedure: Commentary and Materials* (4th ed, 2009), 625.

45 See the Terms of Reference at the front of this Consultation Paper.

46 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.73], [7.190].

47 *Federal Court Amendment Rules (No 3) 2002* (Cth).

2.44 However, doubts as to whether the leave requirement is working as an effective control over discovery have emerged. In a conference paper prepared for a joint Federal Court/Law Council of Australia (Law Council) workshop on the court's case management system in March 2008, Finkelstein J observed that:

> Although leave is nominally required and general discovery is frowned upon, the reality is that the leave requirement is a formality rather than a substantive limitation on a party's ability to obtain discovery. That is to say, there is no general practice of requiring a party to justify a request for leave to obtain discovery by showing need or cause.[48]

2.45 Justice Finkelstein took into account comments from practitioners in the Law Council's *Final Report in Relation to Possible Innovations in Case Management* which called for judges to 'more strongly' control discovery.[49] His Honour noted '[t]he concern, particularly with respect to large and complex cases, is that the court has abdicated responsibility, resulting in excessive costs for very little return'.[50]

2.46 The same concerns were raised with the ALRC during initial consultations in this Inquiry. In some cases, parties might seek discovery as a matter of course, or just to 'shake the tree trunk', rather than out of necessity with any real prospects of discovering significantly relevant documents. At the same time, the judge hearing an application for discovery may be uncertain about his or her authority to refuse to make orders for discovery of documents. Whether leave to issue a notice for discovery is given is left to judicial discretion, although the court cannot make an order for the disclosure or production of documents unless it is 'necessary'.[51] The breadth given to the meaning of 'necessity' presents a wide scope for the parties to petition the court for discovery orders.

2.47 The ALRC has heard that a different attitude towards discovery is adopted in the court's Fast Track. The Fast Track List aims to reduce the costs and time of commercial litigation conducted in that list. By limiting discovery, introducing scheduled pre-trial conferences and resolving most interlocutory disputes on the papers, the Fast Track List is attempting to respond to commercial disputes in a more timely and cost effective manner.[52] At a conference on International Commercial Litigation and Dispute Resolution in 2009, Justice Gordon described the Fast Track attitude towards leave for discovery:

> The general presumption is not just that discovery will be limited, but that there will be no discovery unless a party can identify with specificity particular documents or materials (not simply categories) that they require, the reasons that they require those documents, and why no alternative, cheaper means of obtaining the information is available (such as inspection, a summary created pursuant to s 50 of the *Evidence Act*

48 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [4].

49 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (2006).

50 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [6].

51 *Federal Court Rules* (Cth) O 15 r 15.

52 See Ch 3 for discussion of the court procedures applying to matters in the Fast Track List.

> *1995* (Cth), a letter or admission from the other side, or an affidavit from a witness with the relevant knowledge).[53]

Options for reform

2.48 One way to ensure that judges in the Federal Court scrutinise more thoroughly whether leave for discovery is justified in the circumstances of a proceeding, would be to prescribe a specific threshold test for the granting of leave. There is precedent for this approach in s 45 of the *Federal Magistrates Act*, which provides that discovery is not allowed unless the court declares that 'it is appropriate, in the interests of the administration of justice'.

2.49 Another option was raised by Finkelstein J at the court's 2008 case management workshop. His Honour discussed the possibility of imposing restrictions on the availability of discovery and suggested that a cost-benefit analysis should be the bedrock principle and condition precedent to the granting of any leave for discovery.[54] Justice Finkelstein based this proposal on the *Federal Rules of Civil Procedure 2009* (US) r 26(b)(2)(C), which balances the burden or expense of the discovery against its likely benefit. Justice Finkelstein found it

> difficult to avoid the conclusion that the current discovery regime is defective because it does not explicitly force litigants to justify discovery requests (by reference to the costs and benefits) nor does it constrain the trial judge to reject requests not so justified.[55]

2.50 Currently, the court must determine an application for leave for discovery in the way that best promotes the overarching purpose of civil practice and procedure—namely, the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible.[56] In initial consultations, the ALRC sought stakeholder views about imposing specific restrictions on the availability of discovery in the Federal Court. The ALRC discussed with stakeholders the possibility of including a provision similar to s 45 of the *Federal Magistrates Act* in the *Federal Court of Australia Act 1976* (Cth), so that leave for discovery would not be allowed in the Federal Court unless the court made a declaration that it was appropriate in the interests of the administration of justice to allow the discovery.

2.51 There is a risk that such reform would give rise to disputes between the parties as to whether the relevant threshold had been reached, which may lead to litigation over whether the requirements of the legislation were satisfied in the circumstances of that case. Therefore, there may be concerns that the costs associated with discovery would increase as a result of this satellite litigation.

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53 M Gordon, 'The Fast Track Experience in Victoria: Changing and Evolving the Way in Which We Administer Justice' (Paper presented at International Commercial Litigation and Dispute Resolution Conference, Sydney, 27-28 November 2009).

54 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [20].

55 Ibid, [10].

56 *Federal Court of Australia Act 1976* (Cth) s 37M.

2.52 Reforms that impose greater restrictions on the availability of discovery may also put at risk the benefits of the discovery of documents in litigation. Discovery is an important part of the litigation process as it provides access to information required to resolve or determine the issues in dispute. In some cases, litigants might not be in a position to settle their disputes or present their cases at trial without discovery. The ALRC made this point in *Managing Justice*:

> The process needs supervision and control but, in setting such controls courts should note that discovery is an essential part of the process. The information obtainable through discovery is required to facilitate settlement as well as to present at trial.[57]

2.53 In its report, *Civil Justice Review*, the Victorian Law Reform Commission (VLRC) also formed the view that 'discovery plays a vital role in the administration of justice'.[58] The VLRC concluded that discovery in Victorian courts should continue to be available to the parties as of right.[59] This was despite submissions from some stakeholders that the discovery process should be viewed as a privilege and maintained for appropriate cases by leave of the court.[60] The Victorian Parliament has followed the VLRC's recommendation on this point, in that recent reforms to discovery laws in the *Civil Procedure Act 2010* (Vic) made no changes to limit the availability of discovery.

ALRC's views

2.54 Discovery of documents in proceedings before the Federal Court is important to ensure that cases are decided on their merits and on the basis of all relevant information. In principle, discovery is a legitimate and valuable mechanism that aids the transparency of litigation in the Federal Court and facilitates an informed analysis by the parties of the strengths and weaknesses of their respective cases.

2.55 The ALRC's preliminary view is that the introduction of a new statutory threshold test to limit the availability of discovery in the Federal Court is unwarranted. The existing requirement under s 37M of the *Federal Court of Australia Act*, which in effect requires the court to determine an application for leave for discovery in the way that best promotes the overarching purpose of civil practice and procedure, is an appropriate limit on a party's ability to obtain discovery. The leave requirement, and the requirements of s 37M of the Act, represents a gatekeeper role for the court to regulate the use of discovery and disallow the unnecessary discovery of documents.

2.56 In the ALRC's view, introducing new rules to prohibit the court from granting leave for discovery—unless the party seeking leave meets a particular threshold test—is likely to lead to satellite litigation in relation to the requirements for leave. In this way, the ALRC expects that the costs incurred to resolve such discovery disputes would add to overall litigation expenses.

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57 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.73].

58 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 466.

59 Ibid, 426.

60 Ibid, 458.

2.57 The ALRC considers that the inclusive definition of the overarching purpose in s 37M of the *Federal Court of Australia Act* provides suitable guidance to judges considering applications for leave for discovery in the Federal Court. In particular, the legislative intent for the court to resolve disputes 'at a cost that is proportionate to the importance and complexity of the matters in dispute',[61] should be taken into account when the court decides whether to grant leave for discovery. The Explanatory Memorandum to the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* provides that:

> This provision is intended to be a reminder to litigants that costs should be proportionate to the matter in dispute. It is not only the cost to the parties that is relevant. The efficient use of the Court's resources needs to be taken into account. However, at the same time, due process will be observed so that justice may be done in the individual case. These objectives will support the intention that both the Court's and the litigant's resources are spent efficiently.[62]

2.58 Notwithstanding the ALRC's preliminary view in this regard, the ALRC is interested in receiving stakeholder views on whether existing restrictions on the availability of discovery are operating effectively to eliminate or reduce the burden of documents being discovered unnecessarily in proceedings before the Federal Court.

2.59 A separate issue is how discovery is being used in practice. The terms upon which leave for discovery is granted by the court will determine the range of discoverable documents. The procedures employed to make orders for discovery are considered in Chapter 3.

Question 2–2 Does the requirement for leave of the court effectively regulate the use of discovery in civil proceedings in the Federal Court?

Question 2–3 Is the law sufficiently clear on when the Federal Court should grant leave for discovery of documents in civil proceedings?

Question 2–4 Should the *Federal Court of Australia Act 1976* (Cth) be amended to adopt the provisions of s 45 of the *Federal Magistrates Act 1999* (Cth) in relation to discovery, so that discovery would not be allowed in the Federal Court unless the court made a declaration that it is appropriate, in the interests of the administration of justice, to allow the discovery? If not, should another threshold test be adopted? What should that threshold test be?

Overbroad discovery of documents

2.60 In 2000, when the ALRC delivered its report, *Managing Justice*, the Federal Court had recently amended O 15 to reflect the test of 'direct relevance' for the discovery of documents.[63] That test had been recommended in Lord Woolf's final

61 *Federal Court of Australia Act 1976* (Cth) s 37M(2)(e).

62 Explanatory Memorandum, *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth), [18].

63 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.174]. The amendment to O 15 commenced on 3 December 1999.

report on the civil justice system in England and Wales[64] and had been incorporated into the *Civil Procedure Rules* (UK) a few months earlier.[65] The ALRC's report commented that:

> The move away from the *Peruvian Guano* test to the test of 'direct relevance' and discovery by categories of documents are attempts to streamline the process of discovery so that discovered documents are directly relevant to the issues in a case and the costs of discovery proportionate to the value of the claim.[66]

2.61 Since the publication of the *Managing Justice* report, and with the rise of what Sackville J describes as 'mega-litigation' in the Federal Court, the experiences of some judges may have prompted them to query whether the test of 'direct relevance' has achieved its objectives. In *Seven Network Limited v News Limited* (the C7 case), Sackville J said that:

> The outcome of the processes of discovery and production of documents in this case was an electronic database containing 85,653 documents, comprising 589,392 pages. Ultimately, 12,849 'documents', comprising 115,586 pages, were admitted into evidence.[67]

2.62 Justice Finkelstein has pointed out that in the C7 case only 15% of the millions of pages of documents that were searched and reviewed were put before the court and only about 15% of those documents ultimately went into evidence. In other words, the overall yield of discovery (in terms of the admitted evidence produced) was well below 5% of the documents discovered.[68] Justice Sackville recently reflected on this, saying that:

> far too often, the search for the illusory 'smoking gun' leads to squadrons of solicitors, paralegals and clerks compiling vast libraries of materials, most of which is of no significance to the issues in the proceeding.[69]

2.63 However, the percentage of discovered documents that are not subsequently relied upon at trial may create a misleading perception that discovery rules are only successful when a substantial proportion of documents discovered are tendered in evidence. In the context of certain proceedings, it is possible that a single document may turn out to be crucial to the determination of the issues in dispute.

2.64 From 1 January 2011, the Federal Court's formulation of the 'direct relevance' test for discovery will apply in the Victorian Supreme Court on commencement of 2010 amendments to the *Supreme Court (General Civil Procedure) Rules 2005* (Vic),[70] replacing the *Peruvian Guano* test of relevance. In recommending this amendment, the VLRC acknowledged that 'there is little evidence to support the contention that a

64 Lord Woolf, *Access to Justice: Final Report* (1996), ch 12, [38].

65 *Civil Procedure Rules* (UK) r 31.6 commenced in April 1999.

66 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.179].

67 *Seven Network Limited v News Limited* [2007] FCA 1062, [4].

68 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [7].

69 R Sackville, 'Mega-Lit: Tangible Consequences Flow from Complex Case Management' (2010) 48(5) *Law Society Journal* 47.

70 *Supreme Court (Chapter I Amendment No. 18) Rules 2010* (Vic) inserted r 29.01.1 into the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

narrower test will necessarily confine the scope of discovery, thereby saving costs and time'.[71] Nevertheless, the VLRC supported the intention behind a narrower test for discovery:

> Although narrowing the discovery test will not necessarily reduce the time and expense incurred in the review of potentially discoverable documents, it does reflect an important shift in the approach to discovery and litigation generally ... We believe that a narrower discovery test, combined with our other discovery recommendations, will encourage important cultural change and assist parties to focus their attention on the main purpose of discovery in the litigation process.[72]

2.65 In a 2008 workshop on the Federal Court's case management system, Finkelstein J made two observations about the 'direct relevance' test for discovery:

> One obvious point highlighted by the foregoing is that the scope of discovery being allowed under the current system is overbroad. If the system is to remain, the trial judge must actively manage the process, rejecting or restricting discovery requests in order to improve the yield of admissible evidence. A second, though perhaps less obvious, point is that while the cost to the party *taking* discovery might be staggering, the costs and burdens involved in making the discovery is that much more staggering. Order 15 rule 2 explicitly recognises that a discovery order effectively places a duty to search for the materials described in the order. The duty can be burdensome. If the current rule is retained the court must in all cases consider the cost and burdens associated with the performance of that duty.[73]

2.66 The general scope of discovery permitted by the test of 'direct relevance' under O 15 r 2 of the *Federal Court Rules* may be limited by orders pursuant to r 3.[74] In the normal course of proceedings, the Court should not make orders for 'general discovery' under r 2,[75] instead discovery—if necessary at all—should be limited to particular documents or issues, by orders under r 3.[76] However, the ALRC has been told that most discovery orders in Federal Court proceedings are for general discovery in accordance with O 15 r 2—with close to 70% of discovery orders being made by consent of the parties. This suggests that in most cases neither the court nor the parties are making serious attempts at limiting the ambit of general discovery.

2.67 In initial consultations, the ALRC heard widespread concerns about the burden of discovering vast categories of documents and large volumes of materials in proceedings before the Federal Court, as illustrated in the C7 case. This problem was generally raised by reference to the increasing quantity of electronic documents and information generated in contemporary trade and commerce and the growing capacity of electronic document storage and management systems with advancing computer technologies.

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71 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 466.

72 Ibid, 466.

73 R Finkelstein, *Discovery Reform: Options and Implementation* (2008), prepared for the Federal Court of Australia, [8].

74 *Federal Court Rules* (Cth) O 15 r 3(1).

75 *Practice Note CM 5: Discovery* (Federal Court of Australia); *Kyocera Mita Australia Pty Ltd v Mitronics Corp Pty Ltd* [2005] FCA 242; *Pasini v Vanstone* [1999] FCA 1271.

76 *Racing New South Wales v Betfair Pty Ltd* [2009] FCAFC 119.

2.68 The same problem was noted in the United Kingdom in Lord Jackson's *Review of Civil Litigation Costs*, where the example was given of retrieving information from back-up tapes under orders for discovery as a 'vast expense and sometimes with no discernable benefit at the end'.[77] While this was his final report to the government, it is unclear at this stage which—if any—of Lord Jackson's recommendations will be implemented in the United Kingdom.

Options for reform

2.69 One way to eliminate masses of irrelevant documents from discovery would be to impose greater restrictions on the range of documents discoverable in the Federal Court. This approach was adopted in the rules applicable to Fast Track proceedings, which limit discovery to the following documents of which the party is aware or discovers after a good faith proportionate search:

(a) documents on which the party intends to rely, and

(b) documents that have significant probative value adverse to a party's case.[78]

2.70 *Practice Note CM 8* defines a 'good-faith proportionate search' as a search undertaken by a party in which the party makes a good-faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive, having regard to the nature and complexity of issues raised by the case, including the type of relief sought and the quantum of the claim.[79]

2.71 The ambit of discovery has also been narrowed in the court's Tax List where the documents required to be disclosed must have a 'material' adverse affect on the party's own case or another party's case, or 'materially' support another party's case.[80] However, this scope of discovery may be expanded or limited by the Tax List Coordinating Judge or the judge to whose docket the case is allocated.[81]

2.72 The concept of 'materially' relevant documents is defined in *Practice Note Tax 1* as 'documents that would enable a judge to reach a sound, complete and just decision in the case'.[82] The ALRC has heard that this concept is not necessarily an easy one for legal practitioners to interpret, since there is sparse judicial guidance in judgments, which leaves uncertain the issue of how it should be applied. The same comment might be made about the test of 'significant probative value' in relation to the Fast Track List.

2.73 Another model may be found in the *Rules on the Taking of Evidence in International Arbitration*, which limit discovery to documents that are 'relevant to the case and material to its outcome'.[83] The requirement in international arbitration for discoverable documents to be 'material to the outcome of the case' imposes the same

77 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), ch 41, [4.2].
78 *Practice Note CM 8 Fast Track (Federal Court of Australia)*, [7].
79 Ibid, [7.2].
80 *Practice Note Tax 1 Tax List* (Federal Court of Australia), [6.1].
81 Ibid, [6.1].
82 Ibid, [6.2].
83 *Rules on the Taking of Evidence in International Arbitration 2010*, art 3.

limitation as that in the court's Tax List and employs a similar concept to that of 'significant probative value' in Fast Track discoveries.

2.74 While limiting the range of discoverable documents might alleviate some of the complication, expense and inefficiency of the current process, it may also come with its own set of costs. Parties—particularly those unfamiliar with rules for more limited discovery—may litigate over compliance with narrower discovery obligations. For example, a party in search of the 'smoking gun' may assume it was not disclosed because their opponent did not search in 'good faith' and so apply to court for additional discovery. There may also be concerns that narrower discovery obligations provide parties with an excuse not to disclose relevant material. For example, a party might assume their opponent unfairly withheld documents on the unsound basis that they lacked the requisite 'probative value'.

2.75 In some cases, non-disclosure may occur even where the discovering party acts genuinely and in good faith. The parties might differ as to how 'material' or 'probative' a document is to one side's case, and parties are not always *ad idem* about the significance of a particular point. At times, parties might agree that their case turns on a particular issue only to be told by the court in judgment that the 'real issue' is entirely different—and that one party's case failed for lack of evidence going to a point neither party anticipated.

2.76 These kinds of arguments and satellite litigation ensued when the current rule was introduced. In *Managing Justice*, the ALRC reported with respect to current O 15 that practitioners felt 'the real temptation when documents adverse to the case are found, to seek to rationalise that the documents are outside the discoverable categories and therefore not required to be disclosed to the other side'.[84]

2.77 However, the 2008 decision in *The University of Sydney v ResMed Ltd* suggests that legal practitioners are not necessarily interpreting or applying O 15 r 2 on a restrictive basis. In this case, where the Court directed that each party serve on the other a list of categories of documents of which it would seek discovery, the parties' requested categories of documents which were, in the Court's view, broader than the four classes of documents referred to in O 15 r 2(3).[85]

2.78 There is a risk that confining discovery to documents of 'significant probative value' would result in the parties incurring higher legal fees. A more stringent assessment of the extent of a document's relevance may require the involvement of more senior lawyers and, if so, costs would increase.

2.79 Such concerns are borne out by findings in Lord Jackson's *Review of Civil Litigation Costs*, which found that parties in the United Kingdom who strictly comply with the test of 'direct relevance' would disclose fewer documents, but incur higher costs, as it requires lawyers to evaluate the relevance of discoverable documents.[86] Lord Jackson pointed out that 'because of the continuing obligation [of discovery], the

84 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [7.179].

85 *The University of Sydney v ResMed Ltd* [2008] FCA 1020, [40].

86 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), ch 41, [3.1].

exercise may have to be repeated if the pleadings are amended'[87] and additional costs would be incurred. However Lord Jackson reported that, in practice, solicitors simply continue to disclose everything that might be relevant:

> In other words, they continue to follow the old rules, thus saving costs (on their own side) but disclosing a greater quantity of documents than should be disclosed.[88]

2.80 There may also be concerns that narrowing the rules that define the ambit of discovery would have no practical impact unless the court, the parties and their lawyers give effect to the limits on discoverable documents. During initial consultations, the ALRC heard that nationally the Fast Track List and Tax List have had mixed results in narrowing the scope of discovery. The ALRC was told that parties to proceedings in these lists will continue to discover larger volumes of documents than permitted by the rules when the court lacks the capacity or willingness to enforce the limits.

2.81 Such discovery—broader than the rules would suggest—might also be a consequence of the nature of the proceeding. For example, some tax matters may require broad discovery where a question arises as to the nature and extent of a taxpayer's business or income-producing activity over a period of years. In such cases, the ALRC has been told, the parties might need to look at the totality of relevant documents—rather than assess a particular document in isolation—to determine whether each document materially supports or is materially adverse to one side's case.

ALRC's views

2.82 At this stage in the Inquiry, the ALRC's preliminary view is that reforms to limit the categories of documents discoverable in proceedings before the Federal Court are not necessary. The ALRC's view is that confining the ambit of discovery in the Federal Court (to those documents discoverable in Fast Track proceedings, for example) would be likely to increase the costs of discovery. There is a risk that such reform would create disputes between the parties about compliance with discovery obligations and parties would incur the cost of litigation to resolve those disputes. This would not be consistent with the Terms of Reference for this Inquiry, which set the objective of identifying 'means to limit the extent to which discovery gives rise to satellite litigation'.[89]

2.83 The VLRC's *Civil Justice Review* recommended narrowing the test for discovery in Victorian courts, while acknowledging that it would not necessarily reduce the time and expense incurred in litigation. The VLRC's reasoning was that 'a narrower discovery test will encourage important cultural change and assist parties to focus their attention on the main purpose of discovery in the litigation process'.[90]

2.84 The ALRC agrees that cultural change is required for the effective reform of discovery in the Federal Court. However, a better direction for cultural reform may be through changes to discovery practice and procedure. The ALRC is initially inclined to the view that the best way to focus the scope of discovery in the Federal Court is

87 Ibid, ch 41, [3.1].
88 Ibid, ch 41, [3.2].
89 The Terms of Reference at the front of this Consultation Paper.
90 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 466.

through effective judicial case management, rather than the laws governing what documents are discoverable. For example, where the range of issues in dispute is broad and complex, discovery often generates large numbers of documents. Narrowing and clarifying the issues in dispute may be one way of containing the volume of discoverable material. These issues are explored further in Chapter 3.

2.85 Nevertheless, the ALRC welcomes stakeholder views on the appropriate test for whether a document is discoverable in proceedings before the Federal Court.

Question 2–5 Are the categories of documents required to be disclosed under the *Federal Court Rules* (Cth) too broad? If so, where should the parameters be set?

Question 2–6 Should O 15 r 2 of the *Federal Court Rules* (Cth) be amended to adopt the categories of documents discoverable in Fast Track proceedings, so that discovery in the Federal Court is limited to the following documents of which the party giving discovery is aware at the time orders for discovery are made or discovers after a good faith proportionate search:

(a) documents on which the party intends to rely; and

(b) documents that have significant probative value adverse to a party's case?

Family Court of Australia

Non-compliance with disclosure obligations

2.86 Based on initial consultations, the ALRC understands that disclosure obligations on the parties to proceedings in the Family Court are generally working well. If there are ever any issues with disclosure in Family Court proceedings, it is typically a matter of too little disclosure rather than too much. However, the ALRC was informed that parties will usually comply with the duty of full and frank disclosure and provide the documents required under the *Family Law Rules*. Instances of relevant information and documents being withheld in proceedings before the Family Court are, on the whole, isolated.

2.87 Where there is non-compliance with disclosure obligations in the Family Court, the court may deal with this issue in its judgment. In property matters, for example, the court may draw adverse inferences from non-disclosure and distribute assets accordingly. In *Marriage of Weir* the Full Court commented that:

> It seems to us that once it has been established that there has been a deliberate non-disclosure ... then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature.[91]

91 *In the Marriage of Weir* (1992) 110 FLR 403.

2.88 The court's ability to deal with non-disclosure was more recently expressed by the Full Court in *Marriage of Kannis*:

> Whether the non-disclosure is wilful or accidental, is a result of misfeasance, or malfeasance or nonfeasance, is beside the point. The duty to disclose is absolute. Where the Court is satisfied the whole truth has not come out it might readily conclude the asset pool is greater than demonstrated. In those circumstances it may be appropriate to err on the side of generosity to the party who might be otherwise be seen to be disadvantaged by the lack of complete candour.[92]

2.89 In such extraordinary cases where serious breaches of disclosure obligations occur, the court's authority to alter proprietary interests—to ensure a just and equitable order for property distribution—is illustrated in the following case study.

CASE STUDY

LGM & CAM & Ors [2009] FamCA 251

The applicant commenced proceedings for property settlement in the Family Court on 4 March 1997. The first respondent was the former wife of the applicant. Other respondents to the proceedings were relatives of the first respondent and private companies.[93] The final hearing before O'Ryan J occurred on 6 November 2007 and for a subsequent non-consecutive period of 68 days, eventually concluding on 5 September 2008. His Honour commented that 'this was an extraordinary case which I describe as an aberration'.[94]

The history of the marriage and the parties' shareholdings and relations with various companies were complex and claims of forgery, deception and fraud contributed towards a lengthy and costly case.[95] Costs incurred by the applicant in relation to his dispute with the first respondent in the Family Court exceeded $1.5m, and the public cost, according to O'Ryan J, was 'incalculable'.[96]

In his judgment, O'Ryan J commented on a number of factors that contributed to the complexity of the case. These included the 'complete and utter failure' of the first respondent to comply with disclosure obligations, discovery requirements and to produce documents to the Court.[97]

92 *In the Marriage of Kannis* (2003) 30 Fam LR 83.

93 *LGM & CAM & Ors* [2009] FamCA 251, [1]–[3]. The second respondent was the sister of the first respondent. The third and fourth respondents were, respectively, the father (deceased) and mother of the first and second respondents. The fifth and sixth respondents were private companies in which the first respondent had significant shareholdings.

94 Ibid, [38].

95 Ibid, [27].

96 Ibid, [23]. The estimated cost borne by the applicant in relation to all proceedings against the first respondent, including proceedings outside the Family Court, amounted to $5.1m.

97 Ibid, [28].

In this case, disclosure of documents was essential so as to determine the value of assets in the matrimonial pool.[98] However, precise determination of asset value was hampered by the first respondent's failure, amplified by the similar failure of other respondent family members, to disclose the existence and/or nature of her financial circumstances.[99] The applicant contended that such non-disclosure, and additional failure to provide discovery, were deliberate.[100] The applicant further contended that some documents produced were unauthentic and untruthful.[101]

For example, on 12 November 2007, several days after the commencement date of the hearing, the second respondent produced documents on behalf of the third and fourth respondents.[102] The applicant sought an order for an affidavit explaining the late production of relevant documents.[103] O'Ryan J found that the explanations were inconsistent with the second respondent's earlier accounts,[104] and later during cross-examination of the second respondent, his Honour found that she could not give an adequate explanation.[105]

O'Ryan J held that only 31 out of the 84 documents produced on 12 November 2007 had been previously produced,[106] and none of the produced bank cheques had been previously produced in the proceedings.[107] The applicant submitted that the documents had internal inconsistencies and that monetary and calculation figures on documents were fabricated.[108] His Honour agreed with the applicant and held that invoices were fabricated,[109] copies of bank cheques had forged signatures,110 cash books had falsified entries,[111] and stated that the behaviour of the first to fourth respondents were 'contumacious'.[112] His Honour further recounted instances where he had given express orders for discovery in favour of the applicant, but the first respondent had repeatedly failed to comply.[113]

In considering the value of available assets for the purposes of making orders, his Honour had to determine whether the applicant should be granted a distribution of assets from the matrimonial pool which

98 Ibid, [88].
99 Ibid, [91].
100 Ibid, [92] and [186]–[187].
101 Ibid, [191] and [462].
102 Ibid, [464].
103 Ibid, [464].
104 Ibid, [464].
105 Ibid, [468].
106 Ibid, [473].
107 Ibid, [485].
108 Ibid, [480].
109 Ibid, [483].
110 Ibid, [486]-[487].
111 Ibid, [504].
112 Ibid, [490] and [722].
113 Ibid, [1388], [1402], [1409] and [1487].

> amounted to more than the identified value of the pool itself.[114] The first respondent's deliberate non-disclosure and failure to provide discovery obscured the true value of her assets and financial resources,[115] and it was compounded by the fact that first respondent, in anticipation of marriage break-up, had diverted monies from the matrimonial business to a private company incorporated in Taiwan with the first to fourth respondents being the shareholders.[116]
>
> The applicant therefore submitted that instead of the usual 50% of monies being used in the calculation of an order for property distribution, 100% of the diverted monies should be added back to the matrimonial pool as a notional asset in order to arrive at a just and equitable order for property distribution.[117] The Family Court has the discretionary power to alter property interests pursuant to s 79 of the Family Law Act 1975 (Cth).[118]
>
> O'Ryan J agreed that an alteration of property interests in favour of the applicant should be made, given that the first respondent failed to discharge disclosure and discovery obligations, and that this alternation was the only manner through which a just and equitable outcome could be reached.[119]
>
> Among other things, orders were made to transfer a property to the applicant,[120] to transfer the entirety of liquidated monies from the matrimonial business to the applicant,[121] and to transfer shareholdings of the first respondent to the applicant.[122]

Overbroad disclosure of documents

2.90 Currently, the ALRC is not aware of any cause for concern regarding the amount of information or volume of documents required to be disclosed in proceedings before the Family Court. This may be due to the nature of family law matters, where the parties are generally familiar with each other's case including their respective financial circumstances. Non-court based family dispute resolution procedures prior to the commencement of proceedings in the Family Court may also help to draw out the main facts in issue and focus the objectives of disclosure obligations.

2.91 Despite the breadth of disclosure obligations in the Family Court, the transparency of cases in its jurisdiction may help to contain disclosure—as explained in the Explanatory Statement for the *Family Law Rules*:

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114 Ibid, [2217].
115 Ibid, [2217].
116 Ibid, [2230]–[2231].
117 Ibid, [2231].
118 Ibid, [2268].
119 Ibid, [2274].
120 Ibid, [2364].
121 Ibid, [2366]–[2367]. There was a surplus arrangement of monies payable to the first respondent, if the surplus exceeded $2m. However, there was likely to be little, if any, surplus.
122 Ibid, [2373].

> The 'litigation tool' of complete disclosure is an expensive process and is therefore still timed to commence only after the final resolution event. The purpose of this is that, at that stage, the parties should be in a position to know what issues need to be proven and they can therefore concentrate on obtaining disclosure relevant to those issues ... The court's expectation will be that parties will not go on a 'fishing expedition' or apply for a general order but will direct their mind to the higher standard and consider what is directly relevant to the disputed issues.[123]

2.92 The ALRC welcomes feedback from stakeholders as to whether disclosure obligations are working well in the Family Court, particularly with regards to the court's ability to deal with non-disclosure.

Question 2–7 Are the disclosure obligations on parties to proceedings before the Family Court working well and is the Court adequately equipped to deal with instances of non-compliance with disclosure obligations?

Federal Magistrates Court of Australia

2.93 The Terms of Reference for this Inquiry suggest that reforms are needed to 'reduce the expense of discovery and ensure that key documents relevant to the real issues in dispute are identified as early as possible'.[124]

2.94 This section of the chapter considers the interaction between restrictions on discovery under s 45 of the *Federal Magistrates Act* and disclosure obligations under part 24 of the *Federal Magistrates Court Rules*. This section also outlines the ALRC's proposal for clarification of disclosure obligations in financial matters under the Federal Magistrates Court's family law jurisdiction.

Non-disclosure in family law matters

2.95 During initial consultations, the ALRC heard about a particular issue with the operation of s 45 the *Federal Magistrates Act* in financial matters under the Federal Magistrates Court's family law jurisdiction. In some cases, parties may take the view that the obligation to disclose documents under part 24 of the *Federal Magistrates Court Rules* does not apply unless the court or a magistrate makes a declaration to allow discovery of documents pursuant to s 45 of the Act. This means the party does not disclose their financial documents voluntarily in the absence of court orders. This practice requires the party seeking documents to apply to the court for a declaration compelling disclosure.

2.96 While views may differ between the Court's registries, the ALRC has heard that some magistrates apply s 45 of the Act narrowly and are generally inclined to the view that discovery is not in the interests of the administration of justice. When the court dismisses an application for discovery under s 45 of the Act in a family law matter where a party refuses to disclose their financial circumstances voluntarily, it may be difficult for other parties to obtain relevant information and documents—more difficult

123 Explanatory Statement, *Family Law Rules 2004* (Cth) ch 13.
124 The Terms of Reference at the front of this Consultation Paper.

than it perhaps would have been had the proceeding been commenced in the Family Court.

2.97 On the one hand, it may be argued that the information needs of a case in the Federal Magistrates Court's family law jurisdiction are the same as proceedings in the Family Court. Disclosure of a party's financial circumstances should be as accessible in the Federal Magistrates Court as it is in the Family Court. This would mean that parties to proceedings in the Federal Magistrates Court are required to disclose relevant information and documents to each other without the need for court intervention to require the disclosure.

2.98 On the other hand, s 45 of the Act may be considered an important provision that helps the Federal Magistrates Court to achieve the purposes of being a simple and accessible forum for dispute resolution through informal and streamlined procedures. Section 45 of the Act sends a clear message that the court will not allow litigants to abuse discovery for tactical reasons, and so in most cases the parties to proceedings before the Federal Magistrates Court will make appropriate arrangements for informal discovery.

ALRC's views

2.99 The ALRC's preliminary view is that s 45 of the *Federal Magistrates Act*, which bars discovery unless the court declares that it is allowed, should be amended to clarify that disclosure obligations in financial matters under part 24 of the *Federal Magistrates Court Rules* apply independently of any declaration to allow discovery. This could be achieved by inserting a note to s 45 of the Act that refers to part 24 of the Rules.

2.100 The ALRC seeks to address concerns about instances of non-compliance with disclosure obligations by parties to financial matters under the Federal Magistrates Court's family law jurisdiction. Specifically, the proposed reform seeks to eliminate non-disclosure on the basis that disclosure obligations under part 24 of the *Federal Magistrates Court Rules* are contingent upon a court declaration to allow discovery pursuant to s 45 of the *Federal Magistrates Act*.

2.101 Part 24 of the *Federal Magistrates Court Rules* imposes a general duty of disclosure (including a duty to produce documents)[125] independently of any action of the court or any other party. A general duty of this nature should not be contingent on compliance with s 45 of the Act. Otherwise, s 45 would undermine the objective of disclosure in family law matters (to help parties focus on genuine issues, reduce cost and encourage settlement)[126] by requiring a party to incur the cost of applying to court for a declaration to allow discovery and potentially restricting access to relevant information.

125 *Federal Magistrates Court Rules 2001* (Cth) rr 24.04, 24.05.
126 *Family Law Rules 2004* (Cth) ch 13.

2.102 The ALRC notes that the *Access to Justice (Family Court Restructure and Other Measures) Bill 2010* (Cth) proposed to remove the Federal Magistrates Court's family law jurisdiction and make the Family Court the single court dealing with all family law matters.[127]

2.103 Subject to any restructure of the family court system, the ALRC is interested in stakeholder views on reforms to clarify that disclosure obligations under part 24 of the *Federal Magistrates Court Rules* apply independently of any declaration to allow discovery pursuant to s 45 of the *Federal Magistrates Act*.

Proposal 2–1 Section 45 of the *Federal Magistrates Act 1999* (Cth), which provides that discovery is not allowed unless the court declares that it is appropriate in the interests of the administration of justice, should note that disclosure obligations under part 24 of the *Federal Magistrates Court Rules 2001* (Cth) (including the obligations to produce documents under rr 24.04 and 24.05) are not contingent upon compliance with s 45 of the Act.

127 Explanatory Memorandum, Access to Justice (Family Court Restructure and Other Measures) Bill 2010 (Cth).