New Discovery Regime For Queensland

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Introduction

In the common law system of party prosecution of litigation, the parties define the issues in dispute and marshal the evidence in support of their contentions. Before the arrival of litigation management schemes, the court left the management and preparation of litigation to the parties. The court merely ruled on the parties' contentions. It did not search for an ultimate truth but it did aim to reach a just result according the evidence and materials the parties put before it. This limitation of the court's ability is inherent in the adversary system.[1] Even with litigation management schemes the parties must still procure the evidence relevant to the issues being submitted for trial. A proper fact determination is critical to the credibility of the court's judgment. Discovery of documents and interrogatories are an important means of procuring evidence. They are most in demand where information cannot be obtained from voluntary sources or where information is within the exclusive knowledge of an opponent. Documents are a source of evidence, subject to proof, and answers to interrogatories are admissible in evidence as admissions. In practice, answers to interrogatories are capable of reducing the scope of a widely pleaded dispute.

Outline of new discovery scheme

Amendments[2] to the Rules of the Supreme Court of Queensland introduce a new procedure for discovery of documents and interrogatories, replacing the old scheme after more than a century of service. The new rules, set out in O 35, deal separately with discovery (or, according to the new terminology, disclosure) of documents and interrogatories.

Documents

The new procedure obliges parties to an 'action'[3] to 'disclose'[4] to each other documents which are subject to their possession or control and are directly relevant to an allegation in issue. The duty of disclosure continues until the case is determined.[5] There is no duty to disclose any document to which privilege applies, which relates only to the credit of a witness, or is an unaltered copy of a document already disclosed.[6]

1 See eg *Hickman* v *Peacy* [1945] AC 304, 318 per Viscount Simon LC. For a description of the adversary system, see N Brooks, 'The Judge and the Adversary System' in A M Linden (ed), *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976), 89.

2 The *Supreme Court Rules Amendment Order (No 1)* 1994 repealed and replaced O 35 of the *Rules of the Supreme Court* 1900. The new Order commenced on 1 May 1994.

3 An 'action' is a 'cause' commenced by a writ of summons, see RSC, O 2 r 1. A 'cause' includes 'any suit action or other original proceeding between a plaintiff and a defendant', see *Judicature Act* 1876 (Qld), s 1.

4 RSC, O 35 r 3.

5 RSC, O 35 r 4(2).

6 RSC, O 35 r 5.

The parties may make disclosure by delivering to each other a copy of the documents concerned.[7] A list describing the nature of, and the person who made, each document must accompany the documents.[8]

Alternatively, if the size or number of documents makes delivery inconvenient, a party may effect disclosure by producing them for inspection at a convenient time and place.[9] The documents must be arranged so that they are readily accessible, can be conveniently inspected and individual documents can be readily retrieved. The documents have to be arranged according to topic, class, category or allegation in issue, or by some other order or sequence. The party producing them has to provide inspection and copying facilities (including mechanical and computing facilities) and a person who can explain the way the documents are arranged and who can assist in locating them.[10]

Times for disclosure by delivery of copies[11] or production for inspection[12] are set in the rules. The first occasion is when the defence is delivered and subsequently if a further or amended pleading is delivered. Delivery must be made within the time specified in an order where the court orders disclosure. A party may call for the inspection of originals of copy documents delivered by way of disclosure.[13] A party who fails to inspect documents after being notified of the time and place that they are available for inspection is not entitled, without an order, to another opportunity to inspect without tendering the additional costs.[14] To avoid this possible liability, a party who is entitled to disclosure may request the deferral of disclosure of specified documents until it is necessary to inspect them.[15] A party may at any time require production of a document mentioned in the opposite party's pleadings, particulars or affidavits.[16] There was a corresponding provision under the old rules.[17]

The disclosure process operates automatically, unless the court intervenes to modify it,[18] or relieves a party of the duty to make disclosure.[19] The new rules permit but, by no means encourage, the court to regulate the discovery process, except in commercial causes. A party still has to apply to the court for an appropriate order. There are commentators who regard party control as inadequate to contain cost and delay in heavy discovery cases. Discovery should be limited, it is argued, to what the court considers necessary.[20] The respective solicitors must certify to the court that the duty of disclosure was explained to the parties.[21]

Interrogatories

Interrogatories can be administered as provided in the rules but not otherwise.[22] They may be administered between parties to a 'cause'[23] but only with the court's leave and must not exceed 30 questions.[24] Interrogatories have to be answered within the time set

7 RSC, O 35 r 7(1).
8 RSC, O 35 r 10(4).
9 RSC, O 35 r 9.
10 RSC, O 35 r 10. This rule appears to be based on a similar rule in South Australia, see SCR r 59.01A.
11 RSC, O 35 r 7(2).
12 RSC, O 35 r 9(2).
13 RSC, O 35 r 8.
14 RSC, O 35 r 11.
15 RSC, O 35 r 12.
16 RSC, O 35 r 13.
17 Repealed RSC, O 35 r 14.
18 RSC, O 35 r 14.
19 RSC, O 35 r 15.
20 See, eg Mr Justice K H Marks, 'Voluminous, Limited and Multiple Action Discovery' in A Zariski (ed), *Evidence and Procedure in a Federation* (Sydney: Law Book Co Ltd, 1993), 132-133.
21 RSC, O 35 r 17.
22 RSC, O 35 r 19.
23 See *supra* note 3 for the meaning of the term 'cause'.

in the order granting leave to administer them.[25] The rules specify the only permissible grounds of objection, namely, that the question is irrelevant, is vexatious or oppressive, or privilege from answering applies.[26] The court may relieve a party of the obligation to answer, or it may limit the extent of the answer.[27] If there is a default in answering interrogatories, the court may order an oral examination, or order that the cause be stayed or dismissed.[28] Once an answer is given it can be tendered at the trial.[29]

General provisions

Some provisions of the new procedure apply equally to disclosure of documents and to interrogatories. The new procedure does not affect the operation of any law which permits the withholding of information on public interest grounds.[30] Orders relating to disclosure of documents and interrogatories are sufficiently served if they are served on the party's solicitor. That service is sufficient to found contempt proceedings for failure to comply with the order.[31] A solicitor who fails to notify the client of the order is liable for contempt proceedings.[32] An innovation of the new rules is that where the cost of complying with them is oppressive, the court may order another party to contribute to, or give security for, those costs.[33]

The new rules expressly limit discovery to obtaining disclosure, inspection and interrogatories under O 35.[34] This rule refers to disclosure and interrogatories in pending actions. The substantive principles and the procedure for disclosure and interrogatories come from the rules. They should not be construed against the background of the equitable history of discovery.[35] The purport of the provision, it is submitted, is that the new rules are a code for disclosure of documents and interrogatories in pending actions. The rule does not affect the principle enunciated by the House of Lords in *Norwich Pharmacal Co* v *Customs and Excise Commissioners*[36] that a person who is involved in a wrongdoing, even innocently, is liable to disclose the wrongdoer's identity so that the injured party can commence proceedings. The new rules themselves support this construction. Interrogatories may be delivered to:

> A person whom it is necessary to identify for the purpose of a cause it is proposed to start.[37]

A literal reading of this paragraph makes no sense. Its most probable intention is to allow interrogatories to identify a prospective defendant. They are delivered to someone who can identity the wrongdoer. Several jurisdictions allow this form of discovery.[38]

24 RSC, O 35 r 20.
25 RSC, O 35 r 22.
26 RSC, O 35 r 24.
27 RSC, O 35 r 25.
28 RSC, O 35 r 28.
29 RSC, O 35 r 29.
30 RSC, O 35 r 30.
31 RSC, O 35 r 31.
32 RSC, O 35 r 32.
33 RSC, O 35 r 33.
34 RSC, O 35 r 34.
35 In the period immediately following the commencement of the *Judicature Act* in England, the discovery rules were construed not as a code but against the background of equitable principle previously applicable: see *Wilson* v *Church* (1878) 9 Ch D 552, 554-556 per Jessel MR; *Attorney-General* v *Gaskill* (1882) 20 Ch D 519, 526 per Jessel MR, 528 per Cotton LJ and 530 per Lindley LJ.
36 [1974] AC 133.
37 RSC, O 35 r 20(1)(b).
38 FCR, O 4 r 17, O 15A r 3; NSW, Pt 3 r 1; NT, r 32.03; Vic, r 32.03.

Disclosure of documents

Extent of disclosure

A document is subject to disclosure under the new rules if it is 'directly relevant to an allegation in issue'.[39] By the old rules, a document was discoverable if it related to 'matters in question' in the proceeding.[40] Matters in question were usually gleaned from a liberal reading of the pleadings.[41] In *Mulley* v *Manifold*[42] Menzies J, at first instance in the High Court, ruled that a document was discoverable if it 'would, or would lead to a train of enquiry which would, either advance a party's own case or damage that of his adversary'.[43] In *Donaldson* v *Harris*[44] the court explained that a document was discoverable if it threw light on the case and in *Thorpe* v *Chief Constable of Greater Manchester Police*[45] the Court of Appeal considered that matters in question included relevant matters outside the pleadings.

Relevance as a test for discovery has applied for more than a century.[46] It is capable, of course, of compelling discovery of 'enormous proportions'.[47] Generally practitioners accept the need for disclosure of documents.[48] Some argue that the scope of discovery should be limited to documents that advance a party's case or damage the opposite case.[49] The new Queensland rules substitute the test of direct relevance to determine whether a document should be disclosed, thus reducing the scope of disclosure. An example of the scope of discovery under the old rules is afforded by running down and industrial accident cases. The plaintiff was entitled to discovery of documents relating to accidents of a similar nature with the same defendant.[50] They related to a matter in question because they might lead to a line of inquiry.[51] Such disclosure, it is submitted, is not permitted under the new rules. Collateral lines of inquiry are not directly relevant to the allegations in issue. Accordingly, neither the old rules[52] nor the new ones[53] require the discovery or disclosure of a document which relates only to the credit of a witness.

39 RSC, O 35 r 4(1)(b).
40 Repealed RSC, O 35 rr 10 and 11.
41 *Donaldson* v *Harris* (1973) 4 SASR 299.
42 (1959) 103 CLR 341, 345.
43 See also, *Wellcome Foundation Ltd* v *V R Laboratories (Aust) Pty Ltd* (1981) 148 CLR 262; *Australian Dairy Corporation* v *Murray Goulburn Co-operative Co Ltd* [1990] VR 355; *Thorpe* v *Chief Constable of Greater Manchester Police* [1989] 1 WLR 665.
44 (1973) 4 SASR 299, 304-305 per Wells J.
45 [1989] 1 WLR 665, 672 per Neill LJ.
46 *Compagnie Financiere et Commerciale du Pacifique* v *Peruvian Guano Co* (1882) 11 QBD 55, 63 per Brett LJ.
47 Matthews and Malek, *Discovery* (London: Sweet & Maxwell, 1992), 93.
48 Mr Justice K H Marks, 'Voluminous, Limited and Multiple Action Discovery' in A Zariski (ed), *Evidence and Procedure in a Federation* (Sydney: Law Book Co Ltd, 1993), 120-121; B C Cairns, *The Use of Discovery and Interrogatories in Civil Litigation* (Melbourne: Australian Institute of Judicial Administration, 1990), 43.
49 R Cranston et al, *Delays & Efficiency in Civil Litigation* (Melbourne: Australian Institute of Judicial Administration, 1985), 88-89.
50 *Board* v *Thomas Hedley & Co Ltd* [1951] 2 All E R 431 (plaintiff contracted dermatitis after using a cleaning agent — entitled to discovery of documents of similar complaints to the defendant); *Edmiston* v *British Transport Commission* [1955] 3 All E R 823 (plaintiff employed as a locomotive mechanic and fell off the top of an engine — would have been entitled to reports to the defendant of similar accidents if limited as to time, region and type of locomotive); *Moore* v *Woodman* [1970] VR 577 (defendant in motor accident claim joined Melbourne and Metropolitan Tramways Board as third party alleging that it erected a tram post in a dangerous place — reports of other accidents concerning the post discoverable); *Ryan* v *Poulton* (1986) 42 SASR 486 (plaintiff in personal injuries action required to discover medical reports concerning previous injury to same limb).
51 *Thorpe* v *Chief Constable of Greater Manchester Police* [1989] 1 WLR 665.
52 *George Ballantine & Son Ltd* v *FER Dixon & Son Ltd* [1974] 1 WLR 1125.
53 RSC, O 35 r 5(1)(b).

The expression 'directly relevant to an allegation in issue' may be construed to refer to allegations in issue on the pleadings. However, the rules do not so express the test and in *Thorpe* v *Chief Constable of Greater Manchester Police*[54] and *Donaldson* v *Harris*[55] the court did not confine matters in issue to allegations in the pleadings. In any event the word 'directly' as used in the rules is an abstraction. It must be applied to a specific situation according to the subjective notions of the decision maker, initially the relevant party or solicitor, or a judge if there is a dispute. Used as a formulation for the scope of disclosure, the word simply substitutes arguments as to what is directly relevant for arguments about what is a matter in question. At least arguments of the latter type could be examined in the light of a body of established principle. It is submitted that the most that can be said is that the new rules reduce the scope of disclosure. A better means of confining the scope of disclosure would be to adopt a more definite yardstick to determine what documents are subject to disclosure. In Victoria, the rules restrict discovery to documents 'relating to any question raised by the pleadings'.[56] This formula is more definite and ought to yield fewer disputes than a formula based on what is directly relevant.

Another significant feature of the disclosure of documents under the new procedure is that it departs from the obligation imposed under the old rules for a party to list all the documents in the party's possession or power relating to a matter in question.[57] A party who makes disclosure by production for inspection is relieved of this burden. A list is required only where disclosure is by delivery of copies.

Making disclosure by producing documents for inspection at a convenient location accommodates commercial litigation where there is a vast number of unwieldy documents. However, it leaves untouched the problems posed by incomplete discovery.[58]

This was equally a problem under the old rules because the affidavit of documents was conclusive, apart from a narrow range of exceptions, as to a party's discoverable documents.[59] If a party sought to tender at the trial a document that ought to have been mentioned in the affidavit, then to that extent incomplete discovery could be detected. In its decision in *British Association of Glass Bottle Manufacturers Ltd* v *Nettlefold*,[60] the House of Lords identified an additional but still limited means of detecting incomplete discovery. The court could order a party to make a further and better affidavit of documents if from the record or admissions the court thinks further documents ought to have been mentioned, or that incomplete discovery was given because a party misconceived the case.[61] The new discovery rule means that parties will more than ever be in their opponent's hands as to complete discovery. Assertions that a document produced at the trial was not produced for inspection at the disclosure stage could be met with the assertion that it was produced but that the inspecting party missed it. These allegations will be more difficult to resolve in the absence of a list of documents.

Any advantage that might improperly accrue from incomplete disclosure is counterbalanced. The new rules impose clear consequences of an omission to disclose documents. A party who fails to disclose a document in accordance with the new rules cannot

54 [1989] 1 WLR 665.

55 (1973) 4 SASR 299.

56 *General Rules of Procedure in Civil Proceedings* 1986, r 29.02.

57 See repealed RSC, O 35 rr 10 and 11.

58 R Cranston et al, *Delays & Efficiency in Civil Litigation* (Melbourne, Australian Institute of Judicial Administration, 1985), 85; B C Cairns, *The Use of Discovery and Interrogatories in Civil Litigation* (Melbourne, Australian Institute of Judicial Administration, 1990), 44.

59 *Freuhauf Finance Corporation Pty Ltd* v *Zurich Australian Insurance Ltd* (1990) 20 NSWLR 359; *Officine Meccanciche Toschi Sp A* v *Cosco Holdings Pty Ltd* [1992] 2 Qd R 418.

60 [1912] AC 709.

61 See also *Mulley* v *Manifold* (1959) 103 CLR 341; *Beecham Group Ltd* v *Bristol-Meyers Co* [1979] VR 273; *Officine Meccaniche Toshi Sp A* v *Cosco Holdings Pty Ltd* [1992] 2 Qd R 418.

tender it, or adduce evidence of its contents, at the trial unless the court gives leave. In addition, the defaulting party may be liable to proceedings for contempt or sequestration and an order for costs.[62] A similar provision appeared in the old rules.[63]

The initial decision as to whether a document is subject to disclosure as being directly relevant to an allegation in issue rests with the party making the disclosure. However, the court may order a party to state on affidavit whether a specified document or class of documents exists or not, or has never existed. If the specified documents have passed out of the party's possession or have been destroyed, the attendant circumstances must be explained in the affidavit. Should the party have possession or control of the documents, the court may order disclosure but only if the conditions set out in the rules apply. The court cannot order particular disclosure unless there are special circumstances and the interests of justice require it, or there is an 'objective likelihood' that the party did not comply with the duty to disclose documents, or that a document exists and has passed out of the party's possession or control.[64]

Disclosure of specified documents pursuant to an order corresponds to particular discovery under the old rules.[65] The applicant for particular discovery had to state a belief that the opposite party was in possession of the document of which discovery was sought and that it related to a matter in question.[66] Stricter conditions must be satisfied under the new rules than were necessary with the old rules.

Whether the principle, recognised under the old rules, that an affidavit of documents was conclusive and could not be challenged by an argumentative affidavit[67] is abrogated depends on how the court eventually construes the conditions for particular disclosure. The conclusive nature of an affidavit of documents did not come about because of an express stipulation in the old rules. It was the product of the history of discovery as an invention of the Court of Chancery. There was no oral evidence in Chancery proceedings and therefore no means of resolving factual disputes involving the credibility of witnesses. The court normally could not resolve a dispute between competing contentious affidavits. It regarded an affidavit of documents made in discovery proceedings as conclusive. The same attitude was adopted after the *Judicature Act* unified the administration of law and equity.[68]

The new rules authorise the court to make orders as to disclosure if there is an objective likelihood[69] that a party failed in the duty of disclosure. This, it is submitted, abrogates the old rule. If it is objectively likely that a party failed to make disclosure the court may order, refuse, or defer disclosure. Generalised provisions about whether a duty has been complied with are usually difficult to apply to borderline cases. Arguments about whether, for example, a party failed in the duty of disclosure if one document out of a thousand was omitted tend to be precipitated. There is an accommodation of this type of case in that the court has a range of options if there is a complete or partial failure to disclose. It is capable of treating a serious and a nominal or trivial failure to disclose according to its merits.

62 RSC, O 35 r 16.
63 Repealed RSC, O 35 r 14.
64 RSC, O 35 r 14(4).
65 See repealed RSC, O 35 r 18.
66 Jacob (ed), *The Supreme Court Practice* (London: Sweet & Maxwell, 1993), para 24.7.1; Matthews and Malek, *Discovery* (London: Sweet & Maxwell, 1992), 126-129.
67 *Jones* v *Monte Video Gas Co* (1880) 5 QBD 556; *Mulley* v *Manifold* (1959) 103 CLR 341; *Hooker Corporation Ltd* v *Commonwealth* (1985) 61 ACTR 37; *Officine Meccaniche Toschi Sp A* v *Cosco Holdings Pty Ltd* [1992] 2 Qd R 418.
68 See B C Cairns, *Law of Discovery in Australia* (Sydney: Law Book Co Ltd, 1984), 40-41.
69 Despite the obvious plain English approach to the drafting of the rules, it submitted that the term 'reasonable' is preferable. It is not only plain English but is more comprehensible in this context.

Privilege

Disclosure does not apply in relation to a document where there is a claim to privilege from disclosure. The rules expressly provide that a brief or instructions to counsel or advice from counsel are privileged from disclosure. Conversely, they also stipulate that a document consisting of a statement or report from an expert is not privileged from disclosure.[70] A claim for privilege from disclosure is made by an affidavit from a deponent who knows the facts on which the claim to privilege is based. The affidavit has to be filed in the court and served on the opposite party.[71]

Exchanging reports of expert evidence has long been a feature of commercial causes[72] and personal injury cases.[73] The new rules wisely leave the general law to define privilege.

Relief from duty to disclose

The court may fully or partially relieve a party from the duty of disclosure. It has regard to the time, cost and inconvenience in disclosing compared with the amount involved in the action; the importance of the question to which the documents relate; and the effect on the outcome of the action of disclosing or not disclosing the documents.[74] This rule appears to be based on a similar rule in South Australia.[75] It supplements the court's jurisdiction to control oppressive discovery requests.

There is an inherent jurisdiction for the court to disallow oppressive requests for discovery or disclosure. In *Attorney-General* v *North Metropolitan Tramways Co*[76] the court refused a request for a company to disclose virtually all of its financial records. In a different statutory context the House of Lords ruled in *Science Research Council* v *Nasse*[77] that the court would order discovery of documents only if it was necessary for the proper disposal of the action. Relevance of itself is insufficient to justify discovery. This is especially so where cost and inconvenience outweighs the possible benefit of giving discovery. Excessive requests for information and admissions by interrogatories are also oppressive and the court will grant relief.[78] The new rules put this jurisdiction on a firm statutory footing. It should be useful in restraining unreasonable requests for disclosure. With the advent of mega-firms of solicitors, it is important to have a means of stopping disclosure being used oppressively against a party with meagre, or relatively meagre, financial resources acting through a small firm of solicitors. The new rules offer a means of dealing with that kind of abuse.

70 RSC, O 35 r 5. I am indebted to Dr J R Forbes for a reference to the Full Court decision in Cleland v *Boynes* (1978) 19 SASR 464 where the court upheld the validity of a rule requiring similar disclosure. However, in *Taylor* v *Guttilla* (1992) 59 SASR 361 the Full Court ruled invalid r 126A of the *Local Court Rules* which required the parties to personal injuries actions to exchange all medical reports in their possession relating to the plaintiff's injuries irrespective of whether they intended to tender the report or call its author to give evidence. The rule encroached too far into the common law principles of legal professional privilege to stand as a rule relating to practice and procedure. The rule was therefore beyond the rule making power conferred by s 28 of the *Local and District Criminal Courts Act* 1926 (SA). See also, *Circosta* v *Lilly* (1967) 61 DLR (2d) 12.

71 RSC, O 35 r 6.

72 Practice Direction No 4 of 1987, Commercial Causes Jurisdiction 'A' List, reproduced in Ryan, Weld and Lee, *Supreme Court Practice Queensland* (Sydney: Butterworths Looseleaf Service), para [7075].

73 RSC, O 39 rr 29C and 29D.

74 RSC, O 35 r 15.

75 SCR, r 58.04(b).

76 [1892] 3 Ch 70.

77 [1980] AC 1028. See also *Dolling-Baker* v *Merret* [1990] 1 WLR 1205.

78 *Alexander* v *Fitzpatrick* [1981] Qd R 359; *Derham* v *Amev Life Insurance Co Ltd* (1978) 20 ACTR 23; *Kennedy* v *Dodson* [1895] 1 Ch 334.

Possession or control of documents

A party must disclose the documents of which the party has the 'possession' or 'control'.[79] This formulation extends the range of documents subject to disclosure.

Under the old rules discovery applied to relevant documents in the party's possession or power.[80] Possession referred to the ownership of a document and power meant a right to obtain possession from another person.[81] In an appropriate case, the term 'power' extended to a document held by a proprietary company where a party to litigation dominated the company to the extent that there was no practical difference between the party and the company.[82] There was no requirement for a party to mention in the affidavit of documents a document which the party merely possessed but did not own. In most other jurisdictions the rules overcame this deficiency by extending discovery to documents in a party's custody as well as those in the party's possession or power.[83] The formula in the old Queensland rules sometimes had startling consequences. There was no need to give discovery of a document that a party held jointly with another person[84] or documents held on behalf of another person. In *Evans* v *Staunton*[85] the defendant held relevant documents on behalf of his employer. The court upheld the defendant's right not to produce them for inspection because he did not own them.[86] The question now arises whether the formula 'in the possession or under the control' of a party equates to 'possession, custody or power' as used in the rules in the other jurisdictions. One may venture the opinion that they are equivalent. Arguments would have been saved had the new rules adopted the established formula.

Continuing obligation to disclose

Failure to disclose is linked to another innovation of the new rules. They impose a continuing obligation of disclosure until the cause is determined.[87] This differs from the previous rules.[88] They stipulated discovery of the documents in a party's possession or power at the time of making the affidavit of documents. Where a document was omitted from an affidavit of documents the court distinguished a document which came into a party's possession after the affidavit was sworn from a document which a party possessed but erroneously omitted from the affidavit.[89] Supplementary discovery had to be given where a party possessed a document which ought to have been included in an affidavit of documents. Further discovery was not required as to a document that came into a party's possession after the affidavit was made.[90]

The new rules do not distinguish between a document which comes into a party's possession after disclosure is made from one that was merely omitted. While an allegation is

79 RSC, O 35 r 4.

80 Repealed RSC, O 35 rr 10 and 11.

81 *Turner* v *Davies* [1981] 2 NSWLR 324; *Roux* v *Australian Broadcasting Commission* [1992] 2 VR 577, 589-591 per Byrne J; *Douglas-Hill* v *Parke-Davis Pty Ltd* (1990) 54 SASR 346.

82 *B* v *B* [1978] Fam 26.

83 FCR, O 15 r 6; NSW, Pt 23 r 6; NT, r 29.01; SA, r 58.01; Tas, O 33 r 12; Vic, r 9.01; WA, O 26 r 1.

84 *Kearsley* v *Phillips* (1883) 10 QBD 465.

85 [1958] Qd R 96.

86 *Hogan* v *Dorries* [1977] Qd R 314 is a decision to the same effect.

87 Discovery is continuous in commercial causes: see Practice Direction No 4 of 1987, Commercial Causes Jurisdiction 'A' List, reproduced in Ryan, Weld and Lee, *Supreme Court Practice Queensland* (Sydney: Butterworths Looseleaf Service), para [7075].

88 Repealed RSC, O 35 rr 10 and 11.

89 *TNT Management Pty Ltd* v *Trade Practices Commission* (1983) 47 ALR 693. See *contra*, *Donaldson* v *Harris* (1974) 4 SASR 299.

90 *Lanzon* v *State Transport Authority* (1985) 38 SASR 321; *Cooke* v *Australian National Railways Commission* (1985) 39 SASR 146. It is apparently otherwise in England where subsequently acquired documents should be discovered: see Matthews and Malek, *Discovery* (London: Sweet & Maxwell, 1992), 103.

in issue there is a duty to disclose. An allegation is in issue until it is admitted or taken to be admitted, or is withdrawn, struck out or disposed of in some other way.[91] Obviously the expression 'taken to be admitted' is likely to be difficult to apply. It is presumably relevant where informal admissions, for example answers to interrogatories, admit matters which are in issue on the pleadings. Clearly a document which comes into a party's possession or is located after disclosure has been made must be separately disclosed to the opposite party.[92]

Disclosure by stages

Deferral of disclosure permitted by the new rules[93] is capable, it is submitted, of allowing disclosure by stages. A party may give a notice to the opposite party that the documents specified in the notice should not be disclosed until they are requested. This device could be developed to obtain disclosure as it becomes necessary to examine the documents. Disclosure by stages is likely to be useful only in commercial litigation involving masses of documents. There are, however, cases where the issues are discrete and, if the dispute will be resolved according to the decision on one or a few issues, disclosure might initially be confined to them. If this is managed effectively, then in appropriate cases costs and delay stand to be reduced.[94]

Definition of document

It is worth noting that the new rules incorporate the definition of a document contained in the *Evidence Act* 1977 (Qld).[95] Documents are defined there to include tapes, discs, films and negatives as well as written documents.[96] This puts to rest any lingering doubts about whether electronically or mechanically stored information is a document.

To make the requirement to produce computer discs operable, the rules stipulate that the party producing them must provide computing facilities.[97] This stipulation stops short of expressly requiring access procedures to be given. Perhaps this could be implied into the rule. It may also be necessary to imply into the rule a requirement for any party disclosing computer discs to list the files and identify their contents. In the absence of such a requirement the documents would not be arranged in a logical sequence in the way the rules contemplate.[98] Moreover, the court may have to limit inspection where information which is subject to disclosure is contained in a database. The database will almost certainly contain information which is not directly relevant.[99] The party making disclosure will have to give a description of the information contained in the database.

91 RSC, O 35 r 4.

92 A party has seven days to disclose a document after the party finds it or after it comes into the party's possession, see: RSC, O 35 r 7.

93 RSC, O 35 r 12.

94 For a discussion of disclosure by stages, see *Manual for Complex Litigation*, in *Moore's Federal Practice* (New York: Matthew Bender & Co Inc, looseleaf service), 1-Pt 2; Mr Justice A Rogers, *The Conduct of Lengthy and Complex Matters in the Commercial List* (1982) 56 *Australian Law Journal* 570, 572; B C Cairns, *The Use of Discovery and Interrogatories in Civil Litigation* (Melbourne: Australian Institute of Judicial Administration, 1990), 28.

95 RSC, O 35 r 1.

96 Section 5.

97 RSC, O 35 r 10.

98 For a discussion of this see Argy, *The Evidentiary and Discovery Problems Posed by Information Technology* in *Dispute Resolution in a High Technology Environment* (Sydney: Centre for the Study of Law and Technology, The University of New South Wales, 1986), 37-53.

99 *Derby & Co Ltd* v *Weldon* (No 9) [1991] 1 WLR 652.

Interrogatories

Delivery of interrogatories

A party to a cause may, with leave of the court but not otherwise,[100] deliver interrogatories to another party.[101] Practice will probably clarify what the expression of the new rule leaves in doubt. Interrogatories are used to obtain admissions of facts. They are relevant to proceedings commenced by writ. Yet the rule is expressed to allow a party to a 'cause' to obtain leave to interrogate. A proceeding in the nature of a cause encompasses disputes of law as well as disputes of fact. Causes, other than the sub-class of causes defined as actions,[102] are taken by originating summons and the evidence is given by affidavits. Interrogatories are useful only in actions and the court will probably construe the term 'cause' to mean an action.[103] There is a similar misuse of the terms 'cause' and 'action' in relation to disclosure of documents. A party to an 'action' has a duty to disclose documents which relate to an issue in the 'cause'.[104] This is an inconsistent use of the terms. They should be used in the sense in which they are defined in the rules.

While the new rules limit the number of questions to 30, the court always did have an inherent jurisdiction to limit excessive interrogation.[105] Interrogatories are not allowed if the matter inquired about could be proved at the trial by some other reasonably simple and inexpensive way. A draft of the proposed interrogatories must be lodged with the application for leave.[106] Confining interrogatories to matters which can be proved only with the aid of the answer is an innovation. It will be interesting to see how the additional cost of obtaining proof compares with the cost of obtaining an admission through interrogatories.

An order giving leave to a party to deliver interrogatories does not imply that they are valid. The interrogated party may still object to answering.[107] The right to object to answering an interrogatory is a safeguard because the application for leave to interrogate need not be served unless the court directs otherwise.[108] In *Konings* v *Naylor*[109] the Full Court considered that it was improper for the court to amend interrogatories and then order the opposite party to answer them without having the opportunity to object to the question. A means of objecting to interrogatories will be useful where leave to deliver them was granted without notice to the opposite party.

Answering interrogatories

A party who is served with interrogatories must serve answers, verified by affidavit,[110] on the other party within the time set in the order granting leave to deliver them.[111] Answers to interrogatories must deal with each interrogatory individually. An answer must respond to the substance of the question, it must be direct and be given without evasion or resort to technicality. An objection to answering has to state the grounds of objection and briefly give the supporting facts.[112]

100 RSC, O 35 r 19.
101 RSC, O 35 r 20.
102 See *supra* note 3 for the definition of the terms 'action' and 'cause'.
103 See eg *Cannan and Petersen* v *Commissioner of Pay-roll Tax* [1975] Qd R 177.
104 RSC, O 35 r 4.
105 *Alexander* v *Fitzpatrick* [1981] Qd R 359; *Kennedy* v *Dodson* [1895] 1 Ch 334.
106 RSC, O 35 r 21(2).
107 RSC, O 35 r 23.
108 RSC, O 35 r 21.
109 [1964] Qd R 235.
110 The party must swear the affidavit but if the party is under a legal disability the guardian or committee swears it. The rules provide for an appropriate person where a body corporate is a party, see RSC, O 35 r 26.
111 RSC, O 35 r 22.
112 RSC, O 35 r 23.

By the old rules a party could take any of the general law objections to answering interrogatories.[113] The rules were not decisive as to the grounds of objection. Some grounds were nominated as objections, namely, interrogatories that were scandalous or irrelevant, not bona fide, or that the matters inquired after were not material The rules merely stated that those or any other objections could be taken in the affidavit in answer to the interrogatories.[114] This open-ended scope to take objections to interrogatories rendered the process much more expensive and much less useful than if parties answered the substance of the question. The wide range of technical objections meant that interrogatories had to be drawn with ever greater precision. Even then technical objections to answering were common.[115] Some courts asserted that useless answers based on over subtle semantic distinctions and inconsistencies in the question would not be tolerated.[116]

Over subtle objections to answering interrogatories are proscribed in the new rules. The only grounds of objection are that the interrogatory does not relate to a matter in question,[117] it is vexatious or oppressive, or that privilege applies.[118] An interrogated party may also apply to the court for an order that an interrogatory need not be answered or that it be answered only to a limited extent.[119] Beyond these grounds of exemption a party who is served with interrogatories must answer them.

The first ground of objection to answering interrogatories is that they do not relate to a matter in question or likely to be in question. The old rules applied the same formula but only as to matters in question not as to matters likely to be in question. At different times the courts have applied varying constructions to the notion of matters in question. A broad view was that anything material could be asked.[120] A narrower stance was that interrogatories were limited to seeking the admission of the facts the interrogating party had the onus of proving.[121] In South Australia the Full Court in *Tiver* v *Tiver*[122] and *Barbarian Motor Cycle Club* v *Koithan*[123] resolved this apparent conflict. It held that interrogatories must be relevant to what is in issue on the pleadings. Either view might prevail under the new Queensland rules, since they extend the scope of interrogatories to matters likely to be in question. Unfortunately, the extension contained in the new rules is capable of reviving the debate settled in *Tiver* v *Tiver*. Extending interrogatories to what is likely to be in question is an invitation to disregard the pleadings as defining the dispute. This is incongruous in the light of the High Court decision in *Banque Commerciale SA (en liq)* v *Akhil Holdings Ltd*[124] reasserting the binding effect of pleadings as defining the issues.

The new rules also provide that an objection lies to interrogatories which are oppressive or vexatious. The definition of vexation and oppression is a matter for the general

113 For an explanation of the grounds for objecting to answer interrogatories, see N J Williams, *Civil Procedure — Victoria*, (Sydney: Butterworths Looseleaf service), paras [I 30.07.0]-[I 30.07.160].

114 Repealed RSC, O 35 r 7.

115 R Cranston et al, Delays & Efficiency in Civil Litigation (Melbourne: Australian Institute of Judicial Administration, 1985), 85; B C Cairns, *The Use of Discovery and Interrogatories in Civil Litigation* (Melbourne: Australian Institute of Judicial Administration, 1990), 26, 37.

116 *Aspar Autobarn Co-operative Society* v *Dolala Pty Ltd* (1987) 16 FCR 284, 285-286; *Thiess* v *T C N Channel Nine Pty Ltd (No 3)* [1992] 1 Qd R 587, 588 per Dowsett J.

117 An expression wisely retained from the old rules, see repealed RSC, O 35 r 1.

118 RSC, O 35 r 24(1).

119 RSC, O 35 r 25.

120 *Potter's Sulphide Ore Treatment Ltd* v *Sulphide Corp Ltd* (1911) 13 CLR 101; *Australian Blue Metal Ltd* v *Hughes* [1960] NSWR 673; *Cumming* v *Matheson* (1970) 92 WN (NSW) 339; *Fisher* v *City Hotels Pty Ltd* (1970) 92 WN (NSW) 322; *Sharpe* v *Smail* (1975) 49 ALJR 130.

121 *Osborne* v *Sparke* (1907) 7 SR (NSW) 460; *Green* v *Green* (1913) 13 SR (NSW) 126; *Kennedy* v *Dodson* [1895] 1 Ch 334.

122 [1969] SASR 40.

123 (1984) 35 SASR 481.

124 (1990) 169 CLR 279.

law. Interrogatories are oppressive if the work and expense involved in answering them is out of proportion to the value of the information likely to be obtained.[125]

Failing to answer interrogatories

If a party fails to answer interrogatories, or gives an insufficient answer, the court may order a further answer or direct an oral examination.[126] Where a party fails to comply with an order to give a further answer, the court may stay or dismiss the cause as to all or part of the relief claimed, give judgment or make an order against the party in default, or make a further order for the answering of the interrogatories.[127]

These default provisions give the court greater options than it had under the old rules. Besides, the old rules contained an inconsistency which the new rules avoid. If the plaintiff failed to answer interrogatories, the court could dismiss the claim for want of prosecution. Where the defendant failed to answer, the defence was struck out and the defendant was placed in the same position is if there was a failure to enter an appearance or deliver a defence. Often the court would make a self-executing order to this effect.[128] Consequently, once the defence was struck out, the plaintiff could enter a judgment by default, thus concluding the defendant's rights, or at least forcing the defendant to show why the judgment should be set aside. However, the plaintiff, not being confronted with a judgment but merely with dismissal for want of prosecution, could commence another action.[129]

Conclusion

Documents

Disclosure of documents is rendered more manageable through the procedures introduced in the new rules. Disclosure takes place between the parties without court intervention except where difficulties arise and a party applies to the court. There is the possibility for disagreement about the extent of disclosure the new rules contemplate. Under the old rules the extent of discovery was measured by the test of matters in question. The issue with the new rules is whether the notion of documents directly relevant to an allegation in issue is merely a rephrasing of the old test, or whether the extent of disclosure is different. If the scope of disclosure is the same as under the old rules, the notion of disclosure of documents relating to a matter in question is the preferable formulation of the test. As it rests, the new rules simply pose the question about the extent of disclosure without giving guidelines for answering it. Arguments about what is directly relevant will simply be substituted for arguments about what was in question. At least the content of the expression matters in question was defined by established principle. More positively, the new rules are capable of reducing the scope of disclosure. While the old rules tended to expand the number and type of documents subject to discovery, the new rules tend to reduce the scope of disclosure. The cost and delay associated with disclosure will be contained if the court administers the new disclosure procedure with this objective in view.

A reduction in cost will flow from abandoning the affidavit or list of documents in heavy discovery cases. Of course, the party giving disclosure may opt to supply copies of documents accompanied by a list. Obviously this option is less likely to be taken up where the documentation is extensive. The cost of preparing a list is saved. Simply producing the documents for inspection gives an incentive to the parties to arrange disclosure efficiently. Disclosure can be arranged as a continuous process rather than as the

125 See *supra* notes 77 and 78 for references.
126 RSC, O 35 r 27(2).
127 RSC, O 35 r 28.
128 See eg *Bellenger* v *Watson* (1980) 3 NTR 28.
129 Repealed RSC, O 35 r 22.

once and for all process that the old rules imposed. The parties need only give a notice for the deferral of disclosure to initiate this procedure. A probably unavoidable disadvantage of abandoning the affidavit of documents is that incomplete disclosure will be more difficult to detect. This is offset in that the court may make an appropriate order if there is an objective likelihood that a party failed to make proper disclosure. Also, a party's decision as to the extent of disclosure is subject to challenge. The new rules abrogate the old principle that an affidavit of documents was conclusive.

A further important innovation is that the court may fully or partially relieve a party from the obligation to disclose documents if the time, cost and inconvenience is not justified in the circumstances of the action. In another aspect the new rules extend the obligation of disclosure. They stipulate continuous disclosure. Where a relevant document first comes under a party's control after inspection or delivery of copies, the document has to be disclosed to the opposite party. This adds a reality to disclosure that was absent from the old discovery rules. The unsatisfactory distinction the old practice drew between documents that a party possessed but omitted from the affidavit of documents, and documents that came into a party's possession after the affidavit was delivered, no longer applies. Disclosure gains in credibility if the parties are confident that there is an obligation to make disclosure irrespective of when the documents come under a party's control.

Credibility of the new disclosure procedure is further enhanced in that data held electronically is subject to disclosure. The extended definition of a document produces this result. Merely defining a document in this extended sense may not be enough to make disclosure of data stored on a computer disc operable in practice. The rule does not stipulate that access codes and procedures are to be supplied with the disc. Notwithstanding this possible defect, any adequate system of disclosure must extend to electronically stored information.

Interrogatories

It is submitted that the worst abuses of the old practices with interrogatories were oppressive interrogation and useless answers. The new rules correct these abuses. A party may interrogate only with the court's leave. The number of questions is limited to 30, treating each question as a distinct interrogatory. Interrogatories have to be answered directly and without evasion or resort to technicality.

The advantage of having the court give leave to deliver interrogatories will be eroded if leave is given as a formality. It would simply become another item of cost. Applications for leave might become formal matters because the application is made *ex parte* and the interrogated party still has the opportunity to object to the question. A grant of leave does not imply that the interrogatories are valid. There would almost certainly be an increase in costs if the application for leave to interrogate had to be served. The usefulness of this provision will need to be evaluated after a period of operation. In the meanwhile, however, the new rules are to be commended for attending to the abuses that have drawn interrogatories into disrepute.