

DUTY OF DISCLOSURE – A FAMILY LAW PERSPECTIVE

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In family law proceedings, the **duty of disclosure** is the obligation that each party be transparent about their circumstances and disclose to the other party and the court all relevant information and documents related to the issues in dispute. This duty applies to both parenting and financial matters and is an ongoing obligation that starts with the pre-action procedures and continues until the matter is finalised.³ This article will serve as an overview of the duty of disclosure, applicable documents, compliance with the duty, and the consequences of non-disclosure. It is discussed in the context of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) ('the Rules'), recently introduced under the new Federal Circuit and Family Court of Australia.

What is meant by 'duty of disclosure'?

Disclosure is covered by Chapter 6 of the Rules, with the general duty of disclosure for all family law matters set out in Rule 6.01 – “each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the proceeding, in a timely manner”.⁴ There are different disclosure requirements for parenting and property matters but the continuous nature of the duty of disclosure is a common thread. Each party in a family matter is compelled to provide new information as circumstances change or more documents come into their possession, until the conclusion of the matter.

What documents are required to be disclosed?

It is important to note Part 6 of the Rules that deals with disclosure and sets out the mandatory documents which need to be disclosed at various stages of the proceedings.

¹ Director, Blanchfield Nicholls Family & Private Advisory, 2021.

² Paralegal, Blanchfield Nicholls Family & Private Advisory, 2021.

³ *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* ('the Rules') r 6.01(2).

⁴ *Ibid* r 6.01(1).

Legislation

Rule 6.06 provides, in summary, that a party to a financial case must make full and frank disclosure of the party's financial circumstances, including at (3):

- a) the party's earnings
- b) any vested or contingent interest in property;
- c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;
- d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity (eg income of a company which is fully or partially owned or controlled by a party)
- e) the party's other financial resources;
- f) In relation to a trust of which the party is the appointor or trustee, or eligible beneficiary as to capital or income, over which the party has any direct or indirect power or **control** or of which the party has the direct or indirect power to remove or appoint a trustee;
- g) any disposal of property (whether by sale, transfer, assignment or gift) made by the party or an entity they control that may affect, defeat or deplete a claim
 - (i) in the 12 months immediately before the separation of the parties; or
 - (ii) since the final separation of the parties; and
- a) liabilities and contingent liabilities.

Application

In practice, family lawyers generally request the following documents at first instance:

1. Particulars of any real estate owned by the party or in which a party has an interest.
2. Three most recent tax returns and notices of assessment.
3. Pay slips or records of earning for the last three months.
4. All bank account statements for all accounts (including but not limited to savings accounts, every day/ transaction accounts, credit cards, personal loans, mortgages, loans) in the party's name (whether held solely or jointly with another person), or in which a party has an interest (be it legal or equitable) for the past twelve months.
5. Copies of any financial statements including Balance Sheet and Profit and Loss Statements of any company of which the party is a Director or Shareholder for the last 3 financial years.

6. Particulars of any trusts of which the party is the Appointor, Trustee or beneficiary, including copy of trust deed.
7. Particulars of any property disposed of by Sale, Transfer, Assignment or Gift for the past twelve months.
8. The statements of any Superannuation Interest held by the party for the three most recent financial years.
9. Any share statements.
10. Registration certificates of any motor vehicles owned either individually or jointly.
11. An estimate of the value of any contents and any other items of Property, Tools, Machinery or any other asset or liability held.

Orders for Disclosure

If a party does not comply with the duty of disclosure, Rule 6.18 empowers a party to apply for an order for disclosure. The court can then make an order to require further information from the non-compliant party, such as orders for compliance with a request for a list of documents, a requirement to inspect documents, or general orders for disclosure.⁵ Notably, Rule 6.18(f) empowers the court to make orders that the first party be partly or fully relieved of the duty of disclosure however, pursuant to Rule 6.18(2), “a party making an application under subrule (1) must satisfy the court that the order is appropriate in the interests of the administration of justice”.

Compliance with the duty of disclosure

There are several ways in which a party can comply with the ongoing duty of disclosure.

For matters at the **negotiations stage**:

- 1) Production of documents prescribed in the pre-action procedures and any other documents relevant to the issues in dispute i.e., documents to support your case.
- 2) Providing authorities to the accountant, medical doctor, and/or bank to provide documents to you or the other party directly.

For matters **resolved by consent**, where the parties enter into Consent Orders:

⁵ Ibid r 6.18(1)(a) (c), (d),

- 3) Preparation of the **Application for Consent Orders** – this document requests all relevant information from the parties about length of relationship, contributions, future needs, the parties’ income, property, liabilities, and financial resources.
- 4) The parties must also sign a **Statement of Truth** – a written statement signed by a party to confirm that their Application for Consent Orders and its contents are truthful, before filing with the Court.⁶

For financial matters which **proceed to court**:

- 5) The parties must swear or affirm, and thereafter file a Financial Statement setting out their income, expenses, assets (including superannuation), liabilities and financial resources.

Undertakings

Rule 6.02 requires all parties in applicable family law proceedings (except for Independent Children’s Lawyers) to file an undertaking of disclosure with the court. This undertaking is a written notice and is just as binding as an order of the court – a formal promise to the court that the parties understand their duty to the court and to the other party to give full and frank disclosure. It also requires parties to promise that they have complied and will continue to comply with their duty of disclosure and acknowledges that breaching the undertaking will be treated the same as a breach of an order and may even constitute contempt of court.

Consequences of non-disclosure

If a party fails to comply with the duty of disclosure, the court may take action against them as set out in Rule 6.17. This includes: refusing to allow the party to use that information or document as evidence in their case; finding the party guilty of contempt for non-disclosure; ordering costs against the party; or staying or dismissing all or part of their case.⁷

If property settlement Orders have already been made and non-disclosure is subsequently discovered, Section 79A of the *Family Law Act 1975* sets out the grounds on which an Application may be made to set aside the Orders. Non-disclosure is also a ground to set aside a Financial Agreement under Section 90K of the *Family Law Act 1975*. Accordingly, even in matters which are ultimately resolved and agreement is formalised by way of a

⁶ Application for Consent Orders (Consent Orders Kit) Parts J & L.

⁷ The Rules r 6.17(a)(i)–(iii), (b).

Financial Agreement, both parties have to provide full and frank financial disclosure and both parties must obtain independent legal advice.⁸

Disclosure Requirements – Mediation

Disclosure obligations apply for mediation as well as litigation. Mediation is an opportunity to resolve the matter on a final basis and save significant litigation costs. Disclosure of all documents which support your case and arguments should be provided to the other side, and efforts should be made to gather material which assists you.

Summary

As the duty of disclosure is integral to the proper functioning of the Federal Circuit and Family Court of Australia, it is vital that parties ensure that they fully understand their duties to the court and the other side when making full and frank disclosure in family law proceedings. If you require legal advice or representation in a family law matter, please complete a Blanchfield Nicholls enquiry form, available [here](#).

⁸ *Family Law Act 1975* s 90G(1)(b).