THE *HARMAN* UNDERTAKING

– THE LITIGATOR'S ROUGH GUIDE –

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The Rule

Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.

> *Hearne v Street* (2008) 235 CLR 125, [2008] HCA 36, Hayne, Heydon & Crennan JJ [96]

What you need to know

- This is often referred to as the *Harman* undertaking, named after *Harman v Secretary of State for the Home Department* [1983] 1 AC 280

- It is now considered a substantive obligation and not strictly speaking an undertaking, even implied: *Hearne*

- The undertaking covers various documents as well as copies of those documents and information derived from these documents, including:

  1) documents inspected after discovery;
  2) answers to interrogatories;
  3) documents produced on subpoena;
  4) documents produced for the purposes of taxation of costs;
  5) documents produced pursuant to a direction from an arbitrator;
  6) documents seized pursuant to an Anton Piller order;
  7) witness statements served pursuant to a judicial direction; and
  8) affidavits.

  Fotopoulos v Commonwealth Bank [2017] VSC 461 [32]-[33]

- The undertaking is to the Court, not to the producing party. Only the court can release a party from their *Harman* undertaking, even if the other party has given clear and informed consent to the use of the document: *Hamersley Iron Pty Ltd v Lovell* (1988) 19 WAR 316, 321.

- Breach of the obligation is punishable as a contempt of court: *Ainsworth v Hanrahan* (1991) 25 NSWLR 155, 168-9; *Hearne* [96]

- Ignorance of the obligation is not a defence, but is relevant to penalty: *Watkins v AJ Wright (Electrical) Ltd* [1996] 3 All ER 31; *Hearne* [109]

What you may not know

- **Consent Orders:** The obligation extends to affidavits and witness statements served pursuant to an order of the court, including ordinary timetable directions even if by consent. The touchstone is that production is done pursuant to a coercive court order: *Ambridge Investments (in liq) v Theodore Baker* [2010] VSC 545, Vickery J at [48].

- **Third Parties:** The obligation extends to any third party such as witnesses, experts & litigation funders, who know the documents originate from legal proceedings: *Hearne* [109] 162.

- **Arbitration and Tribunals:** The obligation extends to arbitrations, where information and documents (statements, disclosure etc.) are produced by a party on compulsion due to a direction from an arbitrator: *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 110. It also extends to tribunal proceedings: *Otter Gold Mines Ltd v McDonald* (1997) 76 FCR 467.

- **Circumstances of Use:** The range of circumstances of breach can be broad, and can even be inadvertent. Any use that would 'promote some private interest…not within the parameters of the action which brought about their disclosure' would breach the obligation. *Bailey v Australian Broadcasting Corporation* [1995] 1Qd R 476.

  1) Any use beyond determining the content to establish any obligation could be caught.

  2) Use in subsequent or separate proceedings, including merely to compare documents or as background information may be a breach.

  3) Simply giving documents to an external third party can breach the obligation: *Evans v Citibank* [2000] NSWSC 1017.

- **Consequences:** More typical consequences for a party to the litigation which is in breach is that the party will not be heard (i.e. cannot

prosecute the action) unless the contempt is purged. Exceptions to this are:

1) Matters of defence
2) Other cases between the same parties on other causes.
3) Defence of an action for contempt.
4) A contention that the proceedings are irregular
5) An application to set aside the order giving rise to the breach
6) To purge the contempt.

Stokes v McCourt [2013] NSWSC 1014, Lindsay J [32].

- The rationale for the rule has since been expressed as:
  1) Encouraging a full and frank disclosure of documents by parties: *British American Tobacco Australia v Cowell* (2003) 8 VR 571, [2003] VSCA 43 [20]
  2) Balancing privacy and the compulsory nature of the court processes: *Taylor v Serious Fraud Office* [1998] UKHL 39; [1999] 2 AC 177, Lord Hoffman at 210; *Hearne* [93], [107], [138]
  3) preventing use of the courts processes for an ulterior purpose: *Hearne* [107], [111]

What you can do for your clients (and your practice)

- Before starting a case:
  1) check the sources of your client's documents – did any come from earlier proceedings?
  2) check the *Harman* status of those documents – was a release obtained? Were they tendered? Were they read? Were they referred to in court? Where is the evidence that any of this happened?
- During a case:
  1) Include a standard '*Harman* warning' in any communication with a client when giving them another party's documents, statements, affidavits, reports or subpoenaed material
  2) Keep a note of what documents have been:

a. Tendered in evidence
b. Read (especially affidavits)
c. Referred to in open court – log the transcript!
d. Referred to in interlocutory and final judgments

- Before ending a case
  1) ask the client what documents they want to use from the case and how they want to use them
  2) advise them of the possible need to make a *Harman* application
- Review your old cases
  1) Check with your clients how they have used documents and information from the case
  2) Offer to review their files to check for *Harman* issues

<u>When you may need further help</u>

Advising *on when the obligation will cease, and whether it has ceased in relation to documents or information*

- Some court rules have eliminated some of the uncertainty.
  1) Federal Court Rule 20.03(1) provides that:

     If a document is read or referred to in open court in a way that discloses its contents, any express order or implied undertaking not to use the document except in relation to a particular proceeding no longer applies.

  2) UCPR 2005 (NSW) r 21.7 deals with discovered documents:

     No copy of a document, or information from a document, obtained by party A as a result of discovery by party B is to be disclosed or used otherwise than for the purposes of the conduct of the proceedings, except by leave of the court, unless the document has been received into evidence in open court.

- The point at which the obligation ceases is unclear if not expressly covered by the rules. The obligation generally ends when the document is tendered in evidence or formally read or referred to in open court. However, this is unresolved, with at least one appellate court in

Australia stating that it may still continue even if a document is tendered: *British American Tobacco v Cowell* (2003) 8 VR 571, 572 [2003] VSCA 43 [35]; *Connective Services Pty Ltd & Anor v Slea Pty Ltd & Ors* [2017] VSC 182 (Almond J).

- Various strategies can be pursued to help ensure the obligation ceases, and to minimise the exposure to complaint or the consequences of any contempt.

Applying *to the court for a release before the use of the documents*

- FCR 20.03(2) specifically authorises this in the Federal Court, but any Court, statutory tribunal or arbitral tribunal can give a release.

- This should be done in the Court or tribunal (arbitral or public) to whom the obligation is owed and in the proceedings. *Holpitt Pty Ltd v Varimu Pty Ltd* [1991] FCA 269; (1991) 29 FCR 576 Burchett J at 577.

- However, it can be done in later proceedings in the same court, and may even be done in a different Court in its inherent jurisdiction, at least if the documents are to be used for the purposes of those proceedings. *Bondelmonte and Ors & Bondelmonte* [2017] FamCA 924, Watts J at [78]-[94] and cases cited therein.

- Potentially affected parties should be joined.

- You should seek a court order in the proceedings to release the obligation if related or consequential proceedings are on foot or likely e.g. winding up proceedings and liquidators' actions.

- You must specify the particular documents that you want to use, and identify the purpose of its use: *ASIC v Marshall Bell Hawkins Ltd* [2003] FCA 833 [12]-[13]; *Ambridge Investments (in liq) v Theodore Baker* [2010] VSC 545, Vickery J [52].

- 'Special circumstances' must be shown in respect to the documents you have identified to justify the release of the obligation: *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283, 289-290. Although there are no exhaustive list of relevant factors, they can include the

following: *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217, [1992] FCA 472, Wilcox J [26] 225.

1) Nature of the document
2) Circumstances under which the document came into existence
3) Whether the document pre-existed litigation
4) Nature of the information in the document
5) Circumstances in which document came into the applicant's hands
6) Likely contribution of the document to achieving justice in the second proceeding
7) Subsequent proceedings between identical parties: *Griffith & Beerens Pty Ltd v Duggan (No 2)* [2008] VSC 230 [11]
8) Broader public interest: *Ashby v Slipper (No 2)* [2016] FCA 550 [10]

- Whether special circumstances exist is a matter of judicial discretion, and the relevance of each factor will depend on the facts of each case.

Applying *to the court to purge contempt*

- If you or the client has breached the obligation, you should make an application to the court to purge the contempt as soon as possible: *Evans v Citibank* [2000] NSWSC 1017, Hamilton J [5]

- The elements that go towards the purging of contempt are:

  1) unreserved apology
  2) compensation or reparation for damages suffered by a party
  3) the payment of relevant costs on the indemnity basis

  United Telecasters Sydney Limited v Hardy (1991) 23 NSWLR 323, Samuels AP at 340.

About the Author

Justin Hogan-Doran is a senior barrister with 14 years' experience at the Australian Bar. He is recognised in *Doyle's Guide* as a leading counsel in four separate practice areas – *Litigation* (2018), *Transport* (2017, 2018), *Construction* (2017, 2018) and *Arbitration* (2017, 2018). He has been recognised since 2009 in *Best Lawyers® in Australia* in *Alternative Dispute Resolution* and *Shipping & Maritime*, and was named *'Lawyer of the Year' in Shipping and Maritime 2019*.

Justin also regularly appears in arbitrations in Australia and sits as an arbitrator in transport and construction disputes. He is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and of the Australian Centre for International Commercial Arbitration (ACICA).

Justin was a Councillor and the Treasurer of the NSW Bar Association in 2015. He is a Captain in the Australian Army Legal Corps. He commenced his military career as a Commando with the 1st Commando Regiment, and is a former UN Legal Officer at the International Criminal Tribunal for the former Yugoslavia (ICTY) at The Hague.

Prior to the Bar, Justin worked as a Banking & Finance Solicitor at Mallesons Stephen Jaques (now King+Wood Mallesons) and as a Management Consultant with The Boston Consulting Group.

Justin is a long-time lecturer at the University of Sydney Law School in *Litigation*, *Equity*, *Private International Law* and *Transnational Commercial Litigation* (at Humboldt University, Berlin). He was the 1998-2000 Menzies Scholar to Oxford University (BCL/MPhil), where he won the John Morris Prize for the Conflict of Laws.