

REMAINING ALERT TO AVOID CONTEMPT

Before using documents in a case, check whether they have been used in other proceedings and whether a release of the Harman obligation has been obtained.

The rule in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 (*Harman*) precludes a litigant from making collateral use of documents obtained through the court's compulsory processes. Importantly for practitioners, parties' solicitors and barristers are subject to the obligation and as an obligation to the court, its breach is a contempt.

The rule as it applies in Australia is as follows:

"[w]here 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).

The rule recognises that compulsory production of documents involves "an inroad . . . upon the right of an individual to keep his own documents to himself".¹ The inroad, though tolerated in the interests of achieving justice, requires safeguards against abuse.

Although usually referred to as an implied undertaking given by litigants, the High Court has explained in *Hearne v Street* that there is "nothing voluntary about the 'undertaking'"; it is a substantive obligation imposed by law as a condition of discovery. It is an obligation to the court and cannot be released by the other party.

The obligation is easy to breach

The law surrounding the *Harman* obligation is technical and as such it is very easy for practitioners to unwittingly breach the obligation.

Cases have arisen when practitioners have not clearly warned their client of the *Harman* obligation and the client, without knowing they are in contempt, has then used the discovered or subpoenaed documents for a collateral purpose.

In *Treasury Wine Estates Limited v Maurice Blackburn Pty Limited* [2020] FCAFC 226 (*Treasury Wine*), solicitors and a barrister faced allegations that they had breached their *Harman* obligations in preparing a statement of claim in a class action using pleadings they had drafted in an earlier class action against the same defendant. The pleadings in the earlier proceeding were based on discovered documents and were publicly available on the Federal Court's website (in connection with the settlement of that proceeding).

The defendant contended that the *Harman* obligation applied to information derived from documents discovered in the earlier proceeding and, as that information had been incorporated into the pleadings, the implied undertaking subsisted in the pleadings. Because the practitioners had access to the discovery in the earlier class action, they were in a position of "special advantage" in relation to the pleadings based on the discovery.

The practitioners sought and obtained a declaration that the pleadings in the earlier class action were not subject to the *Harman* obligation. The Court also said that, if the *Harman* obligation had applied, it would have released the parties from that obligation. The Full Court accepted that:

"[t]here is no reason in principle why the obligation might not attach to a pleading to the extent that the pleading has been prepared using information from documents otherwise the subject of the obligation (such as discovered documents not tendered into evidence) [at 88]".

However, in this case no direct use had been made of any discovered document; rather, use was made of pleadings, derived in part from discovered documents, which had been made public on the Court's website [at 84].

Avoiding a breach

Although in *Treasury Wine* the lawyers were found not to have breached their obligations, they were required to respond to serious allegations of wrongdoing with potentially serious consequences for them and their clients. Apart from facing possible contempt findings, the defendant had applied to have the subsequent class action permanently stayed as an abuse of process, exposing the practitioners to the possibility of claims by their clients. The practitioners also incurred costs in obtaining the declarations. The barrister thought it prudent to return his brief.

When seeking to rely on documents in a proceeding that are neither personal nor business records of your client, it is important to check where they came from and whether they have been used in earlier proceedings. If they have been used, check whether a release from the *Harman* Obligation has been obtained. If not, check whether the documents have been referred to, read or tendered in court.

It is possible for parties who think they might be subject to the obligation to obtain a release from the Court in advance of using material to which the obligation attaches. Parties can obtain an order releasing the obligation without a finding that the obligation applies.² To obtain a release, it is necessary to demonstrate special circumstances, although according to Brereton J in *Helicopter Aerial Surveys Pty Ltd v Garry Robertson* [2015] NSWSC 2104 the bar to obtaining a release is not high:

"[g]enerally, all that is required by special circumstances is some good reason – or, as I would be inclined to put it, some circumstance – that warrants relief from the undertaking".

If, however, the breach has already occurred, the correct course is to promptly apply to purge the contempt. This is done by proffering an apology to the court and offering to pay any affected parties' indemnity costs. ■

Baron Alder is a partner at Moray & Agnew.

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1. *Harman* at 300 per Lord Diplock.
2. *Polyaire Pty Ltd v K-Aire Pty Ltd* (2011) 111 SASR 19.

TIPS

- Consider obtaining a release in advance. It is possible to be released from the obligation if there are special circumstances. Only the court can grant a release.
- Consider the rules of court which might affect the obligation: for example, Federal Court Rule 20.03 (1); Vic Civil Procedure Act Rule 27; NSW Uniform Civil Procedure Rule 21.7.
- Always give *Harman* warnings to clients when providing them with copies of another party's documents, statements, affidavits or subpoenaed material.