



The Harman undertaking – understanding your obligations

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The Harman undertaking, or implied undertaking, prevents a party from disclosing documents obtained in one proceeding through a compulsory process (such as a subpoena) in a separate proceeding. The undertaking is “implied” because it arises automatically upon receipt of the documents. The obligation is owed to the Court by the party receiving the documents.

What is the Harman undertaking?

In the High Court decision of *Hearne v Street* (2008) 235 CLR 125, the Court expressed the content of the Harman Undertaking as follows (at [96]):

“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 than that for which it was given unless it is received into evidence...”

For example, it would be a breach of the undertaking to use the information to gain a competitive advantage or in separate proceedings between the same parties or to [disclose the information to the media](#).

When does the Harman undertaking apply?

The implied undertaking applies to anyone who receives the documents and applies even if the person is not aware of the undertaking.

The undertaking covers:

- documents inspected after discovery;
- answers to interrogatories;
- documents produced on subpoena;
- documents produced for the purposes of taxation of costs;
- documents produced pursuant to a direction from an arbitrator;
- documents seized pursuant to an *Anton Pillar* order;
- witness statements served pursuant to a judicial direction; and

Reference: [*Fotopoulos v Commonwealth Bank \[2017\] VSC 461*](#) [32]-[33]

The undertaking extends to the information derived from documents and copies of those documents.

Consequences of breaching the Harman undertaking

Breaching the implied undertaking can have serious consequences.

For example, a breach of the undertaking can result in a charge of contempt of court, and a claim based on documents obtained through a breach may be struck out. If you are a legal practitioner, a breach of the undertaking could also result in a complaint to the Legal Services Commission.

Exceptions to the implied undertaking

There are several exceptions to the implied undertaking:

- An obvious exception is that information obtained through a compulsory process can be disclosed to a litigant's legal team, as well as to actual and prospective witnesses and to the directors and officers of a corporate litigant. In all cases, those receiving the information are themselves bound by the undertaking.
- The implied undertaking does not apply if the subject document was read in open court.
- A more nuanced exception exists where one proceeding arises out of the second proceeding. For example, in the case of [*Spalla v St George Motor Finance Ltd \[2004\] FCA 1014*](#), Ryan J did not consider documents disclosed in the first criminal proceeding to be used for a collateral purpose in the second civil proceeding because:

'... the civil proceedings are brought against persons who effectively accused Spalla and Still of the crimes with which they were charged. Moreover, one of the causes of action in the civil proceedings is for malicious prosecution which arises directly out of, rather than being collaterally related to, the criminal charges.'

- The implied undertaking will also yield to other disclosure obligations at law. In [Esso Australia Resources Ltd v Plowman \(1995\) 128 ALR 391](#), Brennan J said that

*“the implied obligation must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation”.**
*For example, if a litigant is in possession of documents protected by the undertaking which are required by law to be disclosed to a third party, the undertaking does not prevent the litigant from disclosing the documents.***

References:

* At [12] – [13]; see also *Gordon J in Cadbury Schweppes Pty Ltd v Amcor Ltd [2008] FCA 398*

** *White v Woodward [2018] VSC 335 at [27], [36] and [63]*

Release from the undertaking

If you are in possession of documents protected by the implied undertaking that you would like to make use of in separate proceedings, only the Court can release you from the undertaking. You cannot use the documents even if you have the clear and informed consent of the other party to the proceedings. (see *Hamersley Iron Pty Ltd v Lovell* (1988) 19 WAR 316, 321). You must make the application in the Court to which the obligation is owed.

The Court has discretion to grant or refuse release from the undertaking and is required to consider whether special circumstances exist to justify a release (see [Springfield Nominees v Bridgelands Securities \[1992\] FCA 720](#), Wilcoz J at [26]), including:

1. the nature of a document;
2. the circumstances in which the document came into existence;
3. the attitude of the author of the document and any prejudice of the author;
4. whether the document pre-existed litigation or was created for that purpose and therefore was expected to enter the public domain;
5. the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information);
6. the circumstances in which the document came into the hands of the applicant for leave;
7. the likely contribution of the document to achieving justice in the second proceeding;
8. subsequent proceedings between the same parties (see [Griffith & Beerens Pty Ltd v Duggan \(No 2\) \[2008\] VSC 230](#) at [11]); and
9. the wider public interest (see [Ashby v Slipper \(No 2\) \[2016\] FCA 550](#) [10]).

What are your options if you have breached the implied undertaking?

If you have inadvertently breached the implied undertaking, then you might wish to consider applying to the Court as swiftly as possible to purge the contempt.

The elements that go towards the purging of contempt are:

- an unreserved apology;
- compensation or reparation for damages suffered by a party; and
- the payment of relevant costs on the indemnity basis (see *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 340).

Get help from a criminal lawyer

If you are concerned about a potential breach of the Harman undertaking, you should contact Gilshenan &Luton for legal advice and assistance.

Contacting Gilshenan &Luton

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