



Confidential Information & Family Law Proceedings

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Confidential information & family law proceedings

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Overview

- The Harman obligation and its scope
- Express undertaking for subpoenaed material
- Restrictions on police and child protection material
- Counselling, FDR and expert reports
- Publication of family law proceedings
- Suppression orders
- Using material in other proceedings
- Practical tips



What is the Harman obligation?

- A common law doctrine established by the House of Lords in *Harman v Secretary of State for Home Department* [1983] 1 AC 280
- Applied by the High Court of Australia in *Hearne v Street* (2008) 235 CLR 125
- Hayne, Heydon and Crennan JJ (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 other than that for which it was given unless it is received into evidence.

- An obligation owed to the court

What does the Harman obligation apply to?

- The need to find ‘compulsion’ conditions the types of material to which this principle applies
- The compulsion must arise from the court process in the legal proceedings themselves – ‘an intrusion by the court into the rights of a party not to disclose private documents’ – other legal, ethical or asserted moral obligations not sufficient – eg liquidators...
- Arguably applies to documents produced in the absence of a compulsory process where disclosure could have been obtained by a compulsory process, had they not been voluntarily provided: *Helicopter Aerial Surveys Pty Ltd v Robertson* [2015] NSWSC 2104
- Applies to third parties who receive affected documents, including non-lawyers – eg clients and experts.

Affidavits

- *Hearne v Street*:

... The types of material disclosed to which this principle applies include 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 Piller order, witness statements served pursuant to a judicial direction and affidavits

- Doesn't apply to affidavits filed and served in accordance with normal timetabling directions

- A party who is required by an ordinary timetabling order of the court to provide any affidavits on which they intend to rely at the hearing is not compelled to provide them. The party in those circumstances has a choice whether to provide a particular affidavit and what the contents of that affidavit should be.

- Cf a witness statement - which is merely advance notice of the evidence the witness is expected to give and remains confidential unless and until it is deployed

- *Unicomb v Blais* (2024) 115 NSWLR 155



What does the Harman obligation apply to (cont)?

- Disclosure and pre-action procedures
 - Each party to a proceeding has a duty to the court and to each other party to give full and frank disclosure of all information and documents relevant to the proceeding, in a timely manner: r 6.01, 6.03
 - Parties preparing for a financial, property or parenting proceeding also have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner: Schedule 1, cl 4
 - Documents or information produced by a person to another person in compliance with these disclosure or pre-action obligations will be subject to the Harman undertaking
 - Parties must not use a document disclosed by another party for such a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates, unless the court gives permission or an exception applies under subrule 6.04(2)

What does the Harman obligation apply to (cont)?

- What about Binding Financial Agreements (BFA's)
 - Failure to disclose a material fact can ground an application to set aside a BFA
 - What restrictions apply to material provided in the course of negotiating a BFA?
 - Harman? – No
 - The compulsion must arise from the court process in the legal proceedings themselves – other legal obligations not sufficient
 - Breach of confidence? - potentially

Breach of confidence

- Elements:
 - confidential information
 - imparted in circumstances importing an obligation of confidence (express or implied understanding between the parties that the information is confidential)
 - unauthorised use or disclosure
 - detriment to the confider
- Helpful authorities
 - Krueger Transport Equipment Pty Ltd v Glen Cameron Storage and Distribution Pty Ltd [2008] FCA 803
 - Director of Public Prosecutions (Cth) v Kane (1997) 140 FLR 468



When does the Harman obligation cease?

- Once the document is read in open court or received into evidence
- Documents merely *filed* are not necessarily freed from the obligation.
- If a release from the obligation is granted

Seeking a release

- Typically sought from the court to which the Harman obligation is owed (but can sometimes be sought from a different court)
- Ideally sought before the document or information is used for an ulterior purpose
- 'Special circumstances' are required.



Seeking a release (cont.)

Springfield Nominees Pty Ltd v Bridgelands Securities Ltd (1992) 38 FCR 217, Wilcox J at [26]:

- For 'special circumstances' to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present
- Neither possible nor desirable to propound an exhaustive list of those factors
- Factors include:
 - the nature of the document
 - the circumstances under which it came into existence
 - the attitude of the author of the document
 - any prejudice the author may sustain
 - whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain
 - the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information)
 - the circumstances in which the document came into the hands of the applicant for leave
 - perhaps most important of all - the likely contribution of the document to achieving justice in the second proceeding

Inconsistent statutory provisions

- The Harman obligation yields to inconsistent statutory provisions and to the requirements of compulsory processes in other litigation: *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 33
- *Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 398, Gordon J (at [13]):
the undertaking impliedly given in one proceeding not to use documents compulsorily produced in that proceeding except for the purpose of that proceeding is necessarily subject to other requirements of the law as 'the undertaking is no answer to otherwise compulsive processes of the law'.
- For example, the Harman obligation:
 - yields to discovery obligations in other proceedings: *Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 398 at [13].
 - does not permit a person owing the obligation to refuse to comply with a valid statutory notice to provide documents or information to a regulator: *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* [2018] FCAFC 38 at [36]-[37].
 - does not restrict the (Deputy) Commissioner of Taxation's discharge of powers and duties under the taxation laws because the obligation and duty imposed by the taxation laws on the Commissioner is such that the implication against use cannot be made: *Law Institute of Victoria Ltd v Deputy Commissioner of Taxation* [2009] VSC 55 at [15].

LAW

Consequences of non-compliance



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Consequences of non-compliance (cont.)

- Adverse cost order
- Disciplinary action – eg *Ndou v Council of Law Society of NSW* [2023] NSWCATOD 111.



Subpoenaed Material

- Unless the court gives permission, a person who inspects, copies or receives a copy of a subpoenaed document must:
 - use the document only for the purpose of the proceedings
 - not disclose the contents of the document, or give a copy of it, to any other person: 6.36(2)
- May provide to client, counsel or expert: r 6.36(3)
- May provide to agent for purposes of the proceedings – eg IT support



Subpoenas (cont)

- The specific provisions in relation to subpoenaed material reinforces the Harman obligation but applies whether the material is tendered or read in court
- Subpoena vs call for documents – strategic considerations
- Can object to production, inspection or copying of subpoenaed material: rr 6.38, 6.43

Special material

- A special regime applies where material produced is a child welfare, criminal, medical or police record.
- Such records are not automatically available for inspection
- The Registrar must review the material first; parties cannot inspect, copy or disclose it until the court gives permission
- The court determines:
 - which parts may be released
 - whether conditions (e.g. 'lawyers' eyes only', no copying) should be imposed
 - whether redactions are needed
 - whether some or all material should remain confidential



Special material (cont)

- Parties cannot assume access simply because an agency has produced documents
- Submissions may be required on whether, and on what terms, material is released
- Agencies often object or propose redactions; conditions on access are common
- Helps reconcile:
 - State/Territory child protection secrecy provisions, and
 - sensitivities relating to ongoing criminal investigations (public interest immunity)
- Once material is released, it is still subject to the Harman obligation and the r 6.36 undertaking

Counselling, FDR and Reports – Statutory Protections

- Family counselling:
 - s 10D & E – communications made to a family counsellor are generally not admissible in **any** court, subject to narrow exceptions (e.g. consent, child abuse)
- Family Dispute Resolution:
 - s 10H & J – FDR communications are confidential and not admissible in **any** proceedings, again subject to narrow exceptions
- Family consultants and experts:
 - s 11C deals with admissibility of communications with family consultants and referred professionals



Publication and Communication of Proceedings

Part XIVB restricts communication of accounts and lists of proceedings

Offences include communicating an account of proceedings that identifies parties, witnesses or related persons

‘Communicate’ includes publication in print, broadcast, public exhibition and online (including social media)

Penalty for communicating an identifying account of proceedings: up to 1 year imprisonment

A person is taken to be identified if sufficient material is included (name, image, address, employment, beliefs, relationships, property, etc.)

When communication is not to the public: s 114S

- A communication is not to the public if:
 - the recipient has a significant and legitimate interest in the subject matter, and
 - that interest is substantially greater than that of the public generally
- Examples of non-public communications:
 - private communications between a party and family or friends
 - providing pleadings or transcripts for use in other court/tribunal proceedings
 - communications to child welfare authorities and professional disciplinary bodies
 - communications to legal aid bodies
 - technical/professional legal publications and training materials
 - communications to professionals in connection with practice or study



Suppression and non-publication orders

- Power: s 102PE – court may prohibit or restrict publication or disclosure of:
 - identifying information about parties, witnesses and related persons
 - information about the proceedings, including evidence, discovery, subpoenaed material, and filed documents
- Grounds (s 102PF) include necessity to:
 - prevent prejudice to the proper administration of justice
 - protect national or international security
 - protect the safety of any person
- Orders may be made at any time, for a limited period, and subject to conditions; contravention is an offence (s 102PK) and may also constitute contempt
- Open justice: s 102PD – the court must have regard to the public interest in open justice



Using Material in Other Proceedings: r 15.26

- Rule 15.26 empowers the court to permit collateral use of documents or information
- The court may grant permission to use material obtained in the proceedings for another purpose, including in other courts or tribunals
- The applicant must show ‘special circumstances’ to justify use for another purpose
- ‘Document’ is defined broadly and includes:
 - documents filed under the Rules or an order
 - documents produced under disclosure or subpoena
 - documents admitted into evidence
 - documents provided under ss 67ZBD or 67ZBE
 - family reports and single expert reports
 - reasons for judgment (anonymised or not)

Practical Tips for Practitioners

- Identify the origin of each document (discovery, subpoena, information sharing, expert report, counselling/FDR, etc.)
- ‘Read the (bloody) rules’
- Before using family law material elsewhere, ask whether leave is required and whether any statutory restriction applies
- Warn clients and experts about any limits on sharing documents and discussing proceedings, especially online
- If a potential breach occurs, act promptly to minimise harm and consider seeking retrospective leave
- Maintain good document management and records to track how material was obtained and what obligations attach to it



Questions?