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# The Harman Obligation

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KEY CHAMBERS

# The Harman obligation

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# 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?

- Applies in civil and criminal proceedings and more broadly.
- *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.
- May apply 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.

# When does the obligation cease?

- Once the document is read in open court or received into evidence.
- 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].



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# Inconsistent statutory provisions (cont.)

*La Mancha Africa S.A.R.L. v Commissioner of Taxation* [2021] FCA 1564, Davies J:

- the Harman obligation did not constrain the Commissioner from using the subpoenaed documents in the lawful exercise of his powers and functions.
- section 166 of the *Income Tax Assessment Act 1936* (Cth) not only permits but requires the Commissioner to act upon the information which he has in his possession, regardless of how he came to have it.
- the imposition of the Harman obligation would fetter the Commissioner's obligation and statutory duty under the taxation laws and such inconsistency meant it did not apply: at [8].

# Consequences of non-compliance



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# Consequences of non-compliance (cont.)

- In addition to contempt of court, disciplinary action can be taken against a legal practitioner.
- Case example of non-compliance: *Ndou v Council of Law Society of NSW* [2023] NSWCATOD 111.



# Some practical tips

- What is a document's origin?
- Document management and record keeping can assist.
- Any applicable overriding statutory provision?
- Give third parties (clients, experts etc) advice about the Harman obligation.
- If your client is producing/providing material that will be subject to the Harman obligation, consider whether any reminders to others are needed.
- If a breach occurs, act promptly to remedy this - including seeking a retrospective release if appropriate.



Questions?





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