What is the Harman undertaking?

Named after the judgment of *Harman v Secretary of State for the Home Department*[1], the Harman undertaking is an implied common law obligation that requires parties to litigation not to use any information obtained through court process for a purpose other than that for which it was originally produced (called a "collateral purpose"). The undertaking was affirmed as a substantive obligation required of all Australian legal practitioners and their clients by the High Court in *Hearne v Street* [2].

The rationale behind the obligation is that production of information compelled by order of a court is a "very serious invasion of privacy and confidentiality of a litigant's affairs."[3] The use of that material should be limited to the purposes specified in the proceedings for which it was produced.

Unlike undertakings voluntarily given by legal practitioners, the Harman undertaking is an obligation implied at law that exists when parties engage in litigation.

Who is bound by the Harman undertaking?

The implied undertaking binds all legal practitioners, their clients and any third parties (for example, expert witnesses) who have access to information produced under court process. The implied obligation does not depend on the party knowing of the undertaking or agreeing to it. This places a professional responsibility on legal practitioners to ensure that their clients and third parties involved in litigation are aware of their obligations to the court.

To what material does the undertaking apply?

The undertaking applies to materials produced or created by order of the court in legal proceedings. "Legal proceedings" includes courts, commissions, arbitrations, tribunals and even disciplinary proceedings against legal practitioners.[4]

Any material produced by order of court comes within the scope of the implied undertaking. This includes 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 evidentiary statements/affidavits[5] prepared under order of the court. [6]

When does the undertaking arise?

The undertaking arises with surprising frequency in legal practice. Practitioners need to carefully consider when and to what material the obligation arises.

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[1] *Harman v Secretary of State for Home Department* [1983] 1 AC 280
[2] *Hearne v Street* [2008] HCA 36.
[3] *Harman* at [308].
[4] *Esso Australia Resources Ltd v Plowman* [1995] HCA 19.
[5] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3
[6] *Hearne* at [96].

Documentation produced in one set of proceedings that may benefit the client for other purposes is almost certainly caught. Evidence provided in affidavit and expert reports may also be the subject of the obligation.

Utilising information contained in such materials (for example addresses, incomes) for a collateral purpose (such as reporting to Child Support or affecting service of other process) will constitute a breach of the undertaking.

So too provision of such information to the media may also cause a breach of the undertaking as a "collateral purpose".

What is the duration of the obligation?

The obligation comes to an end once the material is tendered as evidence, formally read in court, is referred to in open court or enters the public domain. Practitioners must take care to ensure that, if only part of a document is tendered, the remainder of material may remain subject to the undertaking.

The undertaking continues even when the initial proceedings that compelled production of material are terminated. It is not enough to obtain the client's or the producing party's consent to use the material for collateral purposes. The obligation is owed to the court, and the court alone can release a party from the obligation.

How can I be released from the undertaking?

Where the Harman Undertaking arises, a party may make application to the court for release from the undertaking. Leave to release a party from the obligation will only be granted in "special circumstances".[7]

Whilst an exhaustive definition of what constitutes "special circumstances" has not been provided by the courts[8], the following factors will be considered by the court: [9]

- the nature of the document, the circumstances under which it came into existence
- the attitude of the author of the document and 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 (particularly whether it contains personal data or commercially sensitive information)
- the circumstances in which the document came into the hands of the applicant for leave
- the likely contribution of the document to achieving justice in the second proceeding.[10]

What could be the consequences of breach?

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[7] See *Crest Homes PLC v Marks* [1987] AC 829

[8] See *Unicomb v Blais* [2024] NSWSC 903 at [254]-[257].

[9] *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217.

[10] *Unicomb v Blais* (2024) 115 NSWLR 155 at [257].

Breaching the undertaking constitutes a breach of a substantive legal obligation owed to the court. This may result in a finding of civil or criminal contempt, striking out of proceedings based on the information [11], an injunction, and may invite professional disciplinary consequences for legal practitioners.[12]

[11] *Danks v McCabe* [2022] FedCFam1F 960; *Pedrana v Pedrana (No 2)* [2012] FamCA 348.

[12] See *Djunaedi v Collins* [2025] FedCFamC2G 135.