



# Précis Paper

## The Harman Principle

How may documents produced to the court be used for other purposes? This is not well understood by many. The session is infectious. Gregory and Michelle present in a most pleasing way. This session is for all practicing lawyers.

### Discussion Includes

- The Harman Principle.
- Documents protected by the Harman Principle
- Practical application of the Harman Principle v the Theoretical application of the Harman Principle
- Procedure for obtaining a release from the implied undertaking
- Application of the Harman Principle outside of court proceedings
- Consequences of breaching an implied undertaking

# Précis Paper

## The Harman Principle

1. In this edition of BenchTV, Gregory Sirtes SC (Barrister) and Michelle Castle (Barrister) discuss the Harman Principle, a principle of litigation that has existed for 150 years but is not taught in law school and is often misunderstood. Together with Ms Castle, Mr Sirtes SC co-authored the article "The Harman Principle Revisited" published in the *Law Society Journal* in February 2016.
2. The Harman Principle is a substantive rule of law that forbids the use of documents obtained in one proceedings for a purpose collateral to those proceedings i.e. in other proceedings or outside the court forum.

### Origins of the Principle

3. The principle gets its name from the case of *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 but it can be traced to *Williams v Prince of Wales Life & Company* [1857] 53 E.R. 133.
4. In *Williams*, a plaintiff in a shareholder dispute published prejudicial statements against the defendant director of the company in which he was a shareholder. The statements included information learnt as a result of proceedings. The judgment reflected the rule, now elaborated in *Harman* and in *Hearne v Street* [2008] 235 CLR 125, that it is not the right of a litigant to make information or documents attained in the course of litigation available to the public.

### The Implied Undertaking

5. The principle is sometimes referred to as the implied undertaking but according to the presenters, this is not an accurate description. An 'undertaking' is usually considered to be an undertaking given in court to the court, rather than an order being made in an injunction to restrain someone from doing something or in inter partes agreements. This does not capture what the High Court enunciated as the rule in *Hearne v Street*.
6. The proceedings in *Hearne v Street* related to the Luna Park litigation involving issues including the generation of noise, but specifically considered the use of a document that was obtained by one of the experts of the parties. The High Court confirmed that the implied undertaking is in fact a substantive obligation imposed by law and a condition upon which documents are made available to parties in litigation. So the expression "implied undertaking"

can be seen as an historical throwback. There is nothing voluntary about the Harman undertaking so it is difficult to liken it undertakings in their usual sense.

#### The Rationale for the Principle

7. The presenters note that the basis for the principle has shifted since the earlier cases, from a concern to maintain privacy towards an acknowledgement of the parties' compulsion. Early cases established the principle in order to maintain the privacy of the parties. However, privacy as a basis for the principle has been challenged by Gleeson CJ at [131] in *Hearne v Street* because some documents that have been produced in the course of legal proceedings can no longer be considered private. Nevertheless, the presenters note that the principle extends to all documents produced in proceedings notwithstanding the extent to which the documents were private.
8. Later, it was argued that since the documents were produced to the courts under compulsion, the information therein should only be used for the reason of the compulsion.

#### Materials to which the Principle Applies

9. In *Hearne v Street* at [96], Hayne, Heydon and Crennan JJ noted the large array of documents which gain the protection of the implied undertaking:

*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.*

#### Persons Subject to the Implied Undertaking

10. The parties bound by the implied undertaking are quite extensive. Counsel and solicitors are bound, along with the parties, the parties' accessories (legal counsel, employees, servants, agents), anyone who they bring into the proceedings to assist (experts, copiers, process servers, investigators etc.) and litigation funders. In general, the undertaking applies to anyone who receives the documents when they are aware of the origin of the documents in litigation.
11. Significantly, it is not true to say that the parties have the primary obligation whereas barristers, experts etc. have accessorial liability. Rather, the obligation is primary to every person to whom it applies.

12. The presenters note that in this day and age where documents can be globally shared with the click of a button there are particular obligations that should be complied with to ensure that lay people are not subject to the consequences of breach of the Harman principle. The presenters note that lawyers have a primary responsibility in this regard, and they should provide information to everyone who may come into contact with protected materials. Furthermore, precautions should be taken to ensure that protected materials are not readily available to all, so as to decrease the likelihood of breach.

#### Consequences for Breach of the Undertaking

13. The consequences of breaching the principle will differ dependent upon the role of the breaching party. Often, more serious consequences will flow to barristers and solicitors who are expected to more fully appreciate the principle. Additionally, the severity of consequences will also be dependent on the degree to which the breach was committed with contumelious disregard for the principle or whether there has been a show of remorse or contrition.
14. For legal professionals, a gross breach of the principles is likely to lead to a significant sanction from the professional body that regulates their conduct e.g. the Bar Association or the Legal Services Commissioner. In addition to misconduct proceedings, one would also expect fines would be imposed on the breaching party.
15. Furthermore, an intentional and continual breach of an implied undertaking constitutes contempt of court, which introduces the possibility of a criminal sanction and conceivably incarceration. Contempt proceedings and fines are applicable to all those who breach the undertaking and not just legal professionals.

#### Derivative Use

16. In *Hearne v Street*, Hayne, Heydon and Crennan JJ note at [96] that:

*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.*

17. The presenters note that although this principle seems theoretically clear, applying the above statement in practice can become complex and the courts have provided limited assistance to how the principle will apply in more derivative breaches. For example, will the principle apply when a party uses information from a protected document to subpoena other

documents where the party's awareness of those other documents was only gained by virtue of the protected document? One approach to derivative use may be to refer to the underlying bases of privacy and compulsion and consider the degree to which the use is offensive.

#### Practical v Theoretical Application of the Principle

18. The presenters note that Harman issues often require practitioners to engage in cost benefit analysis with the client. The cost might be the need to approach the court and the producer of the document for a release and that can be an expensive endeavor. This needs to be weighed against the potential benefits that can flow from collateral use of the document.
19. The presenters suggest a two-stage process to dealing with materials that may be protected. First, approach the party that produced the document for the purpose of seeking consent. Where the party is not cooperative or does not respond to your approach, one would then make an application to a court by way of either an initiating process or a notice of motion with an affidavit in support (depending on the court's process).
20. When the matter is heard before a court, the primary factor considered is the likelihood of the document serving the interests of justice outside the first proceedings. This does not mean whether the document will be useful to a party or give them a forensic advantage. Rather, a release will likely be given in circumstances where the information will be used to report someone to the police for criminal conduct.
21. The presenters note this is a broad discretion which is not rule bound, although that is not to say it is easy to obtain a release from the implied undertaking and applications often fail. The court balances the principle of the undertaking against a concern that the principle does not become one which itself creates injustice.
22. In *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217, Wilcox J said at [26] that factors relevant to determining whether special circumstances exist:

*.... include 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 (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 and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding.*

### Application of the Harman Principle Outside of Court Proceedings

23. The presenters note that there has been a proliferation of alternative dispute resolution processes that can be used in substitution of court process e.g. specialist tribunals, ICAC, Royal Commissions and arbitrations. Accordingly, the case law has recognized that the implied undertaking applies to those processes as well. The basis for the extension of the principle's application is that those processes similarly involve documents being produced for a specific purpose and they should therefore not be used for a collateral purpose.
24. The presenters note that in some cases, materials produced to administrative bodies such as bodies that regulate professions, can attract the protection of the undertaking where the document has been produced for the purpose of that particular process.

### Release from the Implied Undertaking

25. The High Court said in *Hearne v Street* that if documents come into evidence in proceedings in 'open court' the possessors of the document are released from the implied undertaking. This is distinct from when affidavits for example are exchanged between parties prior to being read into evidence. The presenters note that litigators need to make enquiries as to whether information they possess following a matter proceeding to judgment or settling was indeed entered into evidence before using the information for a collateral purpose.
26. If the material has not come into evidence in open court, the possessors of the materials may need to seek a waiver or release from the producing party, as has been mentioned above.

### Implications

27. As breach of the Harman undertaking is capable of placing the breaching party in contempt of court, as well as being capable of initiating misconduct proceedings, it is important for practitioners to have a thorough understanding of the rule.
28. Furthermore, it is not sufficient that practitioners are aware of the rule but they must also ensure that those who are assisting them or their client are aware of their obligations and the consequences for breach.

## **BIOGRAPHY**

### Gregory Sirtes SC

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Mr Sirtes joined the Bar in 1992 and was appointed Senior Counsel in 2008. He is also a Lieutenant Commander and Legal Officer in the Royal Australian Navy Reserve. His practice is primarily in property, probate, professional negligence, contracts and building and construction. Together with Ms Castle, Mr Sirtes SC co-authored the article *The Harman Principle Revisited* published in the Law Society Journal, February 2016.

### Michelle Castle

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Ms Castle was a solicitor for 16 years before being called to the Bar in 2007. Prior to that Michelle owned DG Thompson Legal Costs Assessors and was recognised as a leading expert in legal costs. At the Bar, Michelle practises principally in administrative and commercial law, professional and medical negligence, and costs and disciplinary matters. Together with Mr Sirtes SC, Ms Castle co-authored the article *The Harman Principle Revisited* published in the Law Society Journal, February 2016. Michelle is also the Director of the NSW State Legal Conference.

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### Cases

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*Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217

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