

Episode 43 - Transcript

Navigating the Harman Obligation

Intro

Recent cases have shone a spotlight on the Harman Obligation and the use of documents obtained through court processes. Host Julian Morrow sits down with **Ian Denham**, Partner at Moray and Agnew Lawyers, to explore the risks of misuse of information and how solicitors can protect themselves.

Julian: Welcome to Risk on Air. I'm Julian Morrow and today we're joined by Ian Denham, partner at Moray and Agnew Lawyers, whose practice focuses on the very important process of defending professionals and insured persons in civil actions and disciplinary processes.

Welcome, Ian.

Ian: Thanks very much for having us, Julian.

Julian: Today we're talking about the Harman obligation and in particular because of a case, *Johnston v Allen*, which is a decision of Justice Parker of the NSW Supreme Court in February of 2024. And it goes, I suppose, to the familiar but tricky area of the implied obligation restricting the use of documents obtained through compulsory court processes.

So, Ian, first question what is that obligation?

Ian: Well, you say that it's well-travelled. A lot of people don't actually know about it, and we should. So, it's an obligation. The proper term is an obligation. Lawyers love calling it an undertaking and that comes from historical reasons. The Harman case characterised it as an undertaking, but the High Court of Australia has said don't use that terminology, that's not apt, it's an obligation.

Look, like most things in the law, it sort of derives out of a quid pro quo or a fairness thing. And in this case the courts have powers to require people to produce things, usually documents under compulsion, so under a subpoena if you're not a party, under notices to produce, under discovery if you are a party. You have to produce those documents, whether you like it or not. And the quid pro quo is, sure, you have to produce them, but whoever gets them can only use them for the purposes of those proceedings. So, you get comfort that although you produce it, it can only be used in that case.

Now how does the court enforce that sort of deal that it struck with the third party who's got to produce stuff? It imposes on everybody who gets access to those documents, an obligation, an implied obligation, to use the documents solely for the purposes of the proceedings in which they've been produced. So that's the obligation, as I say, lawyers love calling it an undertaking and we'll often call it the Harman undertaking. That's an English case and the Australian law is the *Hearne v Street* obligation. We'll all call it the undertaking and you'll hear me call it that.

Julian: Absolutely. So, you've said that it's for use only in the proceeding. What exactly is the scope of the obligation?

Ian: Easy to say, hard to put your finger on and the case that we're going to get to talk about gives an example of what isn't part of the proceeding. But the courts actually flip it over. So it's not you can only use it for the proceeding, it's you can't use it for an ulterior or extrinsic purpose beyond the proceeding. So, look, certainly you can use it as evidence in the proceeding, but sometimes cases arise where a similar dispute involves two sets of proceedings - one set of proceedings is where rights are determined and another is where they're enforced - and there has been controversy as to whether those second proceedings, involving the same parties, arising out of the same dispute, is an ulterior or extrinsic purpose, and it can go either way. But, generally speaking you can use it for the dispute in the process of the proceeding in which the document is produced, and not a lot more, and you should be careful if you're starting to move beyond that.

Julian: Yes, yes. Solicitors and their clients.

Ian: Solicitors and their clients, and that's part of the reason that Lawcover want to educate solicitors is for us to know about our own obligations, but also for us to remind our clients of their obligations.

Julian: Obligation for solicitor to tell the client.

Ian: Exactly. Double obligation for us.

Julian: Let's look at some of these issues through the lens of this case of *Johnston v Allen*. Could you tell us the fact scenario and how the Harman issue arose there?

Ian: All right, I'll do my best. I mean, Justice Parker has written a very detailed judgment, as his honour is want to do. With a lot of facts, he's a very careful judge and sometimes the care in his judgments means it's difficult to discern what's the really important stuff. But essentially, Mrs Johnston was the matriarch of a large family. I think she had a daughter and four sons, and she was 98 years of age at the relevant time and had moved from her family home into a nursing home and a decision was made, and I use the passive voice there, I don't know who made the decision, to sell her home, the family home, to one of her grandsons, and a conveyancing solicitor was retained to act on that transaction.

One of Mrs Johnston's sons found out about the deal and didn't like it, thought that the property was being sold under value, to, effectively, his nephew and so wanted to stop it. That son retained a set of lawyers, a solicitor and barrister, and together they moved to the Supreme Court seeking orders effectively to prevent the sale. The proceedings started with an application ex parte before the duty judge and the duty judge made various orders, including orders requiring certain people to produce documents. So, here's the Harman undertaking.

Julian: Compulsion.

Ian: Yeah, because there's no doubt that these documents are, or some documents at least are, to be produced compulsorily. Documents were produced by, I think, the grandson or certain people related, and also by the conveyancing solicitor. He produced to the court an affidavit, and this is where his Honour's facts get a little more complicated, because there was some doubt about whether the affidavit was produced under compulsion or not at the relevant time. But ultimately it was treated as though it was produced compulsorily.

Julian: And it's probably worth observing there that it's not always the case that an affidavit is produced under compulsion.

Ian: I'm going to get back to you on that, because that's I think one of the interesting things is about affidavits.

The case then trundled along and fairly rapidly resolved on terms involving, effectively, the sale to the grandson being called off or wound back, and the property was put on to the open market for sale. By the time that had happened, Mrs Johnston, I think, had passed away, and also her son, who had commenced this action and retained the lawyers, he'd also passed away, and the running of the case on his behalf was taken over by his daughter. I'm going to call her the granddaughter. The granddaughter then approached the lawyers who'd been acting in the case and said I want to make a complaint to the Legal Services Commissioner about the conveyancing solicitor's conduct in letting this deal almost get over the line. It was only because of my dad's actions that stopped this deal going ahead, so I'd like you to prepare a complaint for me. She asked her solicitor to do that. The solicitor then retained the barrister who drafted something, it seems, we haven't seen the something, and then the granddaughter made a complaint to the Legal Services Commissioner using what we understand to be drafts prepared by the solicitor and/or barrister.

Julian: So that's interesting because we've talked previously about the proceeding and the dispute. When there's a complaint being made to the Office of Legal Services, it seems very much bound up with the dispute.

Ian: It does seem related.

Julian: But it's outside the proceeding.

Ian: It is. It is, and his Honour in the judgment talks a little bit about that. Look, by the time the complaint was made, as I said, the two main parties to the proceeding had both died, the proceeding had settled, and the court file had closed several months beforehand. So those were various factors that his honour found meant that the bringing of a complaint in this particular case was exterior, was an ulterior purpose, something outside the scope of the proceeding. Anyway, a complaint's made to the Legal Services Commissioner.

The conveyancing solicitor ultimately finds out about the complaint that's been made against him or about him, and he then contends that whoever's drafted this complaint has used documents produced to the court compulsorily back in the original action and he starts to make a bit of a fuss about it. The solicitor and the barrister then do the prudent thing and approach the court seeking leave effectively to use those documents. And then the granddaughter hops on as well and makes an application. So there's a few applications before the court. The conveyancing solicitor, once those applications have been brought, then brings his own application. So we have a suite of applications seeking effectively forgiveness or leave to use the documents and the conveyancing solicitor's application to effectively seek a declaration that use of them was unlawful, prevent use of the documents and some other relief, and that's the dispute that Justice Parker had to determine.

Julian: And so I suppose that raises the question in what circumstances can the Harman obligation be released? You can go to the court, and you can get the court to say, okay, you can use those documents. What does it take to get that?

Ian: That's the only way you can do it. That's the only way you can be released, and this is one of the, I suppose, differences about this obligation, and it's why we use this sort of generalised obligation, it's not an inter-parties.

Julian: Yeah, so the producing party can't say, well, we're fine with you using that.

Ian: They can't really. They can produce it to you in a different way. And merely because you've produced it in one forum doesn't mean you are prohibited from ever using that document ever again. If you're the creator of the document and you hold it for reasons other than it coming to you, via the court process, but if the only way the document has sort of emerged or is being used by whoever's using it is through compulsion, then the only way to get out of it is to go to the court.

How do you go to the court? Yet again, it's one of those things in the law, easy to say, hard to do. The right thing to do is seek permission of the parties to the litigation in which it was produced, and also the permission of the person who has produced it, if it was a third party. So, we're talking at least one other person, sometimes two, sometimes a myriad of other people. So permission from them isn't enough. You then need to go to court. So usually, you go to court armed with an application and an affidavit that says look, I've asked everybody, they're all fine with it, they're consenting, and here's what I want to do with these documents, please court, would you let me do it? Usually, however, people who have just emerged from litigation aren't very forgiving of whoever's trying to use these documents.

Julian: Yeah, funny about that.

Ian: Yeah, so usually there's a fair bit of bad blood. You can expect that whoever's produced the document will often lawyer up, oppose it, seek costs come what may, and they're probably going to be entitled to costs come what may. So merely to use documents can cost you tens of thousands of dollars. To use a document which you've got there sitting on your desk or on your desktop and you're aware of it and you know that it says some things that you really need, but you just can't. The obligation prevents you from doing it unless you seek leave of the court.

Julian: Yeah, and so I suppose the principle is easy, but there are really significant costs and time implications of going through what, on the face of it is a simple procedure.

Ian: Yep, and I think the courts, you know they're not completely unaware of those obligations, but I think they're sometimes understated and that's why the message for lawyers is, just be very aware of your obligations, but also, if there are other ways to get these documents, see if you can pursue those because they're likely to be cheaper. But usually, you're going to have to provide some advice to your client that if we can only use this document this way, it's going to cost us a fair bit of money and much better to seek permission in advance than forgiveness after the event.

Julian: Yes. So what's the principle for getting that permission from the court?

Ian: The court would be inclined to grant permission if you're using it for a legitimate purpose, and so you know, in this case, Justice Parker did provide permission after the event, and that's a different issue that I'll come back to. He did provide permission. He did think that the bringing of a complaint about a solicitor's conduct was a legitimate use for the documents.

- Julian:** If it refers to the public interest in ensuring that the profession conducts itself properly.
- Ian:** Exactly, and there are plenty of other legitimate reasons why documents would be used, so I think the threshold's relatively low. The court would normally do it, but you've got to ask their permission first.
- Julian:** Yeah. So it's described as special circumstances or a good reason, but you're saying, in practice it's not such a high bar that you can kind of put a line through it at the outset, but you've definitely got to go through the process and in the end it's a discretion. What does the court look at in deciding whether or not to grant it?
- Ian:** Good question. Not sure. Things like the public interest that Justice Parker thought was a significant matter in this case. So bringing a complaint against a lawyer or some other good, legitimate public interest use, for sure, when the production of the document under some other means might be impossible. So, someone's produced from overseas or something like that and you've got another dispute that you would like to bring against that person but you're going to really struggle to get production under some other means, then, again, I think the court will be fairly minded to allow an application. *If you seek it in advance.* And that's the point that I wanted to get back to from Justice Parker, who ultimately in the Johnston case gave the orders providing permission after the event, *nunc pro tunc*, but was pretty scathing about the lawyer's conduct in having not thought about their obligation until it was brought to their attention by the conveyancing solicitor.
- Julian:** Yeah. So the court did split up the permissions into the future permission, i.e. the sort of permission that you should get in advance. But then there was that separate question of retrospectivity.
- Ian:** And just coming back to that, Justice Wilcox is, I think, the origin of the word special. You need special circumstances, but special doesn't mean that special, it just means, effectively, circumstances justifying it. And those public interest reasons are very good, very good reasons, and you'll easily get over 'special' in that sort of circumstance.
- Julian:** So ultimately, Justice Parker allowed the use of the documents for that disciplinary proceeding.
- Ian:** He did. He allowed the use of the documents. There were only a handful of them. One of the other factors I think he took into account was that three of the documents, although they did come into the hands of these people through the court process, weren't all that confidential, could easily have been obtained other ways, and I think that was a factor that his honour took into account in saying I'm going to give you permission because ultimately there's not a lot of secrecy in these documents.
- Julian:** And that goes back to the original rationale for the obligation is that the party is compelled and what they're producing notionally is something confidential. But you're telling us that if it's not really that confidential, then that's going to be a factor which the court will take into account.
- Ian:** That's right and the intermediate appellate courts have grappled with, what does it mean if it's in the public domain? And in fact Harman itself was a case about a document produced under discovery and then, after the court case, the solicitor produced that document to the media. But during the court case, his counsel had read the contents of that document onto the record and the effect of the decision in Harman in Australian interpretation at least is well if the solicitor had just shown a transcript of the proceedings to the journalist and not the actual document, he wouldn't have been in breach of his obligation.

Julian: And that, I suppose, goes to another point worth clarifying. We know that one way for the Harman obligation to cease is for the court to say that it's over. How else can the Harman obligation end?

Ian: It's uncontroversial now that the obligation doesn't apply to documents which have been tendered and admitted into evidence, and that's the safest way. So, if a document or an affidavit has been read, or a document has been tendered and admitted, it is absolutely there for everyone to see, it's on the public record and therefore if you're relying on that document or its contents, it's not because they've been produced compulsorily, it's because they've been disclosed in open court, and so the obligation, so far as it subsisted until it was tendered, has now gone.

Julian: So, from what you've told us, in some ways, Ian, the process is the punishment of trying to get a release from the Harman obligation. But, as a matter of principle, what are the consequences of breaching the Harman obligation?

Ian: It's just a matter of contempt, as in, it's a very serious obligation. It's a very serious consequence because it's an obligation to the court and if you have acted inconsistently with it, consciously or not, you have committed a contempt and so you're up for all of the very broad range of sanctions that's available to the court for contempt. So very large number of sanctions, right up to the most serious, but usually you're looking at being prevented from using the documents is the most obvious, being required to hand back any copies that you have. It can have significant sort of flow-on consequences as well. So, another case at my firm one of my colleagues was involved a barrister using some documents to draft a proceeding, and the respondent in those proceedings said you can't maintain this action because you've used some confidential documents to even commence it.

Now the respondents in that case were ultimately unsuccessful. The barrister was found to have used public documents. But if they've been successful then perhaps this cause of action that would otherwise have existed against them might have not been able to be pursued, and the barrister's clients, and it was a class action so there were a large many of them, may have lost a valuable cause of action. So there's sort of flow-on consequences quite beyond the personal consequences of committing a contempt. It might affect your client or a third party as well and you might be up for damages for that.

Julian: It was clear in the case of *Johnston v Allen* that the proceeding had ended, the matter had been settled, and so the disciplinary proceedings were after and separate from the original dispute. What if the litigation is still going?

Ian: Justice Parker still thought that they would probably be a different purpose. So, it would be prudent still to seek permission of the court. And I'm not even sure that the court would necessarily grant the permission in those circumstances. It may well say, if you want to bring a complaint, that's fine, but wait until we finish these proceedings. And they may well say don't do it until, because they'd be concerned that the complaint process might be used for an ulterior purpose.

Julian: And the last thing you want is to commence a complaint against another solicitor only to get a complaint against yourself for breach of the Harman obligation.

Ian: Which inevitably would happen.

Julian: Yes. There are some interesting comments as well by Justice Parker about retention of documents.

Ian: I think with respect to his honour, it's a little bit of a thought bubble. He's really saying well, hang on, are solicitors even entitled to keep these documents? Barristers he says, in the olden days we used to return our briefs, but maybe we don't so much anymore. But I don't think storing the document is using the document. So I don't think storing the document is a problem. And, as his honour noted, solicitors keep documents for very good reasons. He noted, you know, for risk management reasons, just in case someone comes back and says I don't like what you did in that case, you can say well, here's the documents that indicate why I did what I did. But also, clients often want us to keep the documents. They often lose them, and they often come back to us and say hey, you remember those things that I produced? Have you still got them? And we go yeah, we've got a copy.

But I think merely keeping the documents isn't going to put you in breach of the undertaking. It's the use of the document which is potentially going to be in breach. But I should say, whilst ever you've got those documents, that's a higher risk of you using them for an ulterior purpose. So if you can't see them, maybe you won't use them and then you'll say, well, I need to get these somehow. But that opens up another tricky thing, which is you can't even use the information in the document or your knowledge of the existence of the document to go and get it again. So one of the very first cases when I first acted for a barrister was he had been acting in migration proceedings, so against the Commonwealth, and he knew, because of a subpoena issued in one set of proceedings, that the department had certain documents. And so, he issued a subpoena in other proceedings seeking that very document and the department raised a complaint rightly against him to say, well, you only know about us having that document through something you've found out in these other proceedings.

Julian: Was the nature of the request really specific and sort of clearly relied on the knowledge there?

Ian: The second one was so specific that it could only have come from the knowledge of what had been produced in proceeding A.

Julian: Right, but presumably there'd be other circumstances where the nature of the dispute means you ask for a category of documents and you might have a fairly good idea that some of those documents exist, but you wouldn't want to specifically ask for that document.

Ian: That was the mistake that the barrister made in that case here.

Julian: Okay. So Ian, we said we'd come back to affidavits. Is it the case that all affidavits are subject to the Harman obligation?

Ian: That's a very good question. I think the answer is going to be no. Remember that *Hearne v Street* is a case all about affidavits. So in that case the parties were in massive dispute about Luna Park and one of the parties produced affidavits and another party or at least part of the action group, which was a party, shared those affidavits with members of the media and the High Court says you can't do that.

Julian: So certainly, some affidavits are subject to the obligation.

Ian: Certainly, some affidavits. It's what happened in *Hearne v Street*. But I'm aware that there are decisions where courts have said affidavits produced under a court timetable aren't produced compulsorily. Effectively, if you choose not to put on an affidavit, there's no sanction other than you're not putting your best foot forward.

Julian: Yeah, because a timetabling order doesn't say the party must produce affidavits.

Ian: That's right.

Julian: Any affidavits must be produced by this date.

Ian: That's right. And to test it, you're not in contempt for failing to produce an affidavit. You can just choose not to, that's fine. So, the question then arises, because remember, the foundation for the obligation is that the documents were produced compulsorily in the first place. So if they're not produced compulsorily, does the obligation apply? I suspect, and I'll need to trace through the judgment a little more closely, I suspect what happened in *Hearne v Street* was, attached to the affidavit were some confidential things provided purely for the purposes of those proceedings, and it was those matters which caused the affidavit and its contents to attract the obligation.

I don't think it's going to happen in every case. Now the message for solicitors is, do you want to take a chance on that? I wouldn't be one taking a chance. So I would treat affidavits cautiously. I would treat them as having been produced compulsorily. But if there's a slip or if you really, really need to use the affidavit, you might have a look closely and you might find a way in which you can use it and not breach the obligation that you would ordinarily have.

Julian: But your life will probably be simpler if you don't have to be the test case.

Ian: Just find another way to do it. That's right.

Julian: Okay, so it's clear that this is something that solicitors should be very aware about and should speak to their clients about. Ian, could you give us some practical tips for solicitors who no doubt, after getting this far into the Risk on Air Podcast are now very focused on exactly how they should conduct themselves going forward.

Ian: The main thing to remember and we all forget it that we're part of this justice system and we have a special role and we get to see a whole lot of stuff that people normally don't see, and we naturally become blasé about documents we have and information that we've obtained. And particularly for those like me who act for institutional clients, who themselves have a real familiarity with the court process and they want us to use the documents that we've been given in proceeding A for some other purpose, it's really easy to forget it. So that you know, the main message is for lawyers, where did you get this information? Did you get it because of our special position that we hold? If so, start to take care. That's the main thing. So that's the trap is to forget where we get information.

Julian: Yeah, and it's interesting there. It's a reminder that it's the information, not just the document.

Ian: Absolutely. Courts have been very clear about it is the information, but it does create some real problems, and lawyers again because we're special are sort of the only people who can unknow things and compartmentalise and say I don't even know that, I'm going to issue a subpoena in this case just to find out what documents might be produced. And, as you've said, you might have a fairly good idea of what's going to be produced, but you cannot use that information. You can only legitimately issue a subpoena in the usual legitimate ways. I think that's the main pointer to give to solicitors and, as we've said before, we've got an important role to play, but so do our clients, and so another obligation is on us to remind our clients.

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Often our clients will say what was produced under subpoena and we'll say here are all the documents. When we do that, we should also say, here are all the documents, but don't use them. You can only use them for this case. Don't you start using them for other purposes. And remember, a lot of litigation involves people who hate each other, who are rivals in business, and the temptation on clients to use those documents is high. Our obligation to prevent that is similarly high.

Julian: And when we do that, I'm sure taking a file note or putting it in writing is going to be very helpful.

Ian: Got to love emails. So yeah, if you're sending documents to somebody, then a little covering email to say, don't forget, you can only use it in these proceedings and for no other purpose. It's only a handful of words. It'll be a lovely little insurance policy if anything ever goes wrong.

Julian: Ian Denham, thanks very much for joining us on Risk on Air.

Ian: My pleasure, thanks.

Outro

Thanks for listening to Risk on Air by Lawcover. Join us for the next episode on current risks in legal practice to stay up to date.

Resources:

Johnston v Allen [2024] NSWSC 187

Hearne v Street [2008] HCA 36