The Harman undertaking and tax litigation

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Abstract: The Harman undertaking is an implied undertaking to the court, in litigation, that documents obtained as a result of the compulsory processes of the court will be used only for the purposes for which they were disclosed and will not be used for a collateral or ulterior purpose. It applies in tax litigation as in other litigation, but due regard is had to the fact that tax recovery proceedings and tax appeals, although often conducted in different forums, are nevertheless related proceedings. This article explains the scope and operation of the undertaking, and how it applies in tax litigation in particular. Examples of recent applications in tax cases are provided. Key considerations are discussed, including the "special circumstances" test, what constitutes an "ulterior purpose" and the implications of breach. The authors emphasise that tax practitioners should be aware of the undertaking, as a breach may constitute a contempt of court.

What is the Harman undertaking?

The Harman undertaking is an implied undertaking to the court that documents obtained as a result of the compulsory processes of the court will only be used for the purposes for which they were disclosed and will not be used for a collateral or ulterior purpose.[1] The High Court in *Hearne v Street*[2] expressed it as a substantive obligation: "… 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".

Application to the tax context

The undertaking applies in tax litigation and tax practitioners must be aware of it, as breach of the undertaking is a contempt of court.[3] The operation of the undertaking in the context of tax litigation is affected by the fact that tax litigation is statutorily bifurcated: by virtue of s 350-10 of Sch 1 and ss 14ZZM and 14ZZR of the *Taxation Administration Act 1953* (Cth) (TAA), tax recovery and tax appeals are distinct and separate and often not conducted contemporaneously or even in the same jurisdiction. In *DCT v Karas*,[4] the court recognised that, despite being distinct proceedings, tax recovery and tax appeals are nevertheless somewhat related rather than collateral proceedings.

Before delving into the recent applications of the undertaking, in the tax context, the authors identify the key aspects of the undertaking.

Collateral or ulterior purpose

A collateral or ulterior purpose is one which is different to that which is the reason, under a court procedure designed to achieve justice, a party is privileged to be in possession of another person's documents.[5] This includes use of the document in different proceedings between the same parties,[6] provided the proceedings themselves are sufficiently distinct.

Examples of uses that have been held to constitute a collateral or an ulterior purpose include:

- providing material to the media;[7]
- referring to documents during a media interview;[8]
- commencing proceedings for contempt against the party that disclosed the material;[9]
- investigating or commencing criminal proceedings against the party that provided the material;[10]
- circulating documents obtained by a union during proceedings involving the union to individual members of the union;[8]
- commencing proceedings for defamation against the author of any allegedly defamatory remarks contained in material obtained during legal proceedings;[11] and
- the use of documents to which the implied undertaking applied to commence a cross claim, against either an existing or a new party.[12]

Scope of the obligation

The obligation extends to all Australian courts, its tribunals and arbitration proceedings.[13] It applies to pleadings (other than an originating process), documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for purposes of taxation of costs or pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to judicial direction, affidavits and statements of admissions of facts.[14]

The obligation also extends to information derived from the documents.[15] It applies to any third party who receives documents and is aware that their origin is from legal proceedings, even if they are not aware of the existence of such an undertaking.[16]

Ending of obligation

The undertaking comes to an end once the document is tendered in evidence or formally read in open court, entering the "public domain".[17] In *Ainsworth v Hanrahan*,[18] the NSW Court of Appeal said (at 164) that the undertaking ceases to apply when a document is physically read in open court even if not admitted into evidence.

In *Plate Glass Holdings Pty Ltd v Fraser Gordon Investments Pty Ltd*,[19] Flick J held: "Once a document is adduced in evidence '*…the open court principal [sic] necessarily overrides the right of privacy*'".

This principle has also been codified in *Uniform Civil Procedure Rules 2005* (NSW) reg 21.7 and *Federal Court Rules 2011* (Cth) rule 20.03; although what constitutes "open court" or the "public domain" is still contentious.[20]

Release from obligation

In the event that the obligation is extant, the court may release a party from its obligation.[21] It is necessary to seek a release from the court, even in cases of informed consent.[22]

Special circumstances will be required for the release of a party, on application to the court, from the obligation. Wilcox J in *Springfield Nominees* held that special circumstances will exist where there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present and said:[23]

> "The matter then becomes one of the proper exercise of the court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they 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."

Subpoenas

Limitations imposed by the undertaking naturally clash with compulsory procedures in subsequent proceedings.

In *Esso Australian Resources*, Mason CJ held that the principle "must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation, eg discovery and inspection".[24] In *Patrick v Capital Finance Pty Ltd (No. 4)*,[25] Tamberlin J held that the obligation "does not prevent or diminish the enforcement of discovery or the compulsion to discover documents".

Gordon J affirmed the above in *Cadbury Schweppes Pty Ltd v Amcor Ltd*,[26] saying "the undertaking is no answer to otherwise valid compulsive processes of law", and that no release is required in such a circumstance.[27]

This does not mean that the implied undertaking is extinguished for all purposes, rather it merely "yields" to the other curial processes.[28]

Recent application in the context of tax cases

Some examples of how the implied undertaking has arisen in the context of tax litigation are now outlined below.

DCT v Karas

In *Karas*,[29] the Deputy Commissioner applied to the Victorian Supreme Court for the use of affidavits filed on behalf of the taxpayer in relation to freezing orders obtained by the Deputy Commissioner against the taxpayer in separate proceedings for the enforcement of a judgment debt obtained in that court and in relation to any appeal or review of the taxpayers' objections to assessments.

Forrest J held (at [44]) that the implied undertaking did not apply to the purposes proposed by the Deputy Commissioner and allowed him to use the affidavits in enforcement of the recovery proceeding or in the Administrative Appeals Tribunal (AAT) review or any Federal Court appeal. His Honour explained:[4]

> "In this case, the freezing order is intimately bound up with the enforcement of the recovery proceeding in this court. It is not for a purpose unrelated to the obtaining of the freezing order which seeks to preserve the assets which may be the subject of legal proceedings undertaken by the Deputy Commissioner (cf *Cowell* and *Hearne*). It is ancillary to the wider dispute between the Deputy Commissioner and Mr Karas in relation to his tax liabilities between June 2003 and June 2010. Proceedings in the federal jurisdiction (be it in the AAT or any appeal to the Federal Court) relate directly to the income tax assessments which are also the foundation for the obtaining of the freezing order and the judgment in the recovery proceeding."

His Honour further held (at [59]) that even if he was wrong and the implied undertaking did apply, special circumstances existed enabling the Commissioner to be relieved of the implied undertaking if that were necessary. The special circumstances outlined were the following:

(1) the Commissioner is fulfilling a public function in seeking recovery of moneys. That function is important and is in the public interest (and it would be frustrated if the affidavit material was not able to be used in those proceedings);

(2) the Commissioner identified the material which he proposed to rely on and the proceedings in which he sought to use the affidavits;

(3) the recovery proceeding was intimately bound up with the orders made in the subject proceeding. The enforcement of the judgment in the recovery proceeding took place pursuant to the court's processes and the assets the subject of the freezing orders may form part of the assets over which that enforcement takes place. The AAT proceedings (and any Federal Court proceeding), although not as intimately connected with the subject proceeding, nevertheless have a common thread;

(4) apart from the general principle of coercive invasion of his confidential material, it was not argued by Mr Karas that some specific deleterious result or prejudice would flow from the release of the material; and

(5) there is no suggestion that the material contained in the affidavits was commercially sensitive.

Oswal v FCT (No. 4)

In *Oswal*,[30] the applicants served a notice to produce on the Commissioner seeking the production of evidence filed but not read in previous proceedings between a Mr Rambal and the Commissioner. This evidence included affidavits of Mr Rambal and of Mr Halligan, an expert witness. The applicants sought leave to issue a subpoena on Mr Rambal to give evidence in the current proceedings and the Commissioner sought the setting aside of the notices to produce.

The Commissioner contended that it would be a breach of his implied undertaking in the Rambal proceedings if he were compelled to produce the affidavits in the current proceedings.

Pagone J did not doubt that the Commissioner was bound by the undertaking. However, his Honour, citing *Esso Australia Resources* and *Cadbury Schweppes,* stated that the undertaking must yield to "inconsistent statutory provisions and to the requirements of curial process in other litigation" and that the Commissioner's reliance on the undertaking was not the answer to that question of whether the notices to produce should be set aside. His Honour held

that the answer to the question lay in the "exercise of judicial discretion in which the achievement of justice must be the guiding principle". His Honour, in considering the dictates of justice, took into consideration the principles applied in cases concerning the release of the undertaking, in particular, what Wilcox J in *Springfield Nominees* found to be the most important factor in determining whether special circumstances existed to justify a release from the undertaking, being "the likely contribution of the document to achieving justice in the second proceeding".[23] His Honour considered the notice to produce and whether it should be set aside, inter alia, on the grounds that it lacked a legitimate forensic purpose.

His Honour concluded that:[31]

> "It is not in the interest of justice that subpoenas and notices to produce to the Commissioner should be used to elicit evidence from a third party which could have been given by Mr Oswal in circumstances where the reason he did not give evidence on those matters was a decision not to call him to give evidence."

His Honour set aside the notices to produce in respect of Mr Rambal's evidence and refused to grant leave for the issue of a subpoena to give evidence to Mr Rambal on the grounds that they lacked a legitimate forensic purpose. With the notice set aside (save to the extent discussed below) and no subpoena issued, the Commissioner's undertaking in this regard had nothing to yield to.

His Honour did not set aside that part of the notice to produce in respect of the affidavit of Mr Halligan, as he was called as an expert on behalf of the Commissioner in the Rambal proceedings and in the subject proceedings. His Honour said that "it would not be in the interests of justice for the Commissioner to withhold potentially relevant expert evidence previously given by the same witness in respect of the same issues and subject matter". The effect of his Honour's determination was that the undertaking yielded to the notice to produce, in respect of the Halligan affidavit, thus enabling the Commissioner to produce the document, notwithstanding the undertaking. His Honour concluded that Mr Halligan's "independent expert evidence in the Rambal proceedings should be disclosed to the Oswals for the assistance of the Court to the extent that his expert evidence was on the same issue and transaction as that in the Oswal proceeding".

BCI Finances Pty Ltd (in Liq) v FCT (No. 3)

In *BCI Finances*,[32] the Commissioner sought leave to use certain documents, including affidavits filed but not read and documents discovered and produced on subpoena, in order to determine whether he would apply to the court in separate proceedings to set aside the decision of the Full Court in *Rawson Finances Pty Ltd v FCT*[33] (*Rawson Finances*) on the basis that that judgment had been procured by fraud.

Edmonds J held that special circumstances existed that justified the Commissioner being released from any implied undertaking arising in the *BCI Finances* proceedings and leave should be granted for the Commissioner to use the documents in the manner sought.

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Edmonds J (at [60]) set out the relevant special circumstances:

(1) the release is sought in order to assist in determining whether proceedings should be brought to set aside decisions which may have been procured by fraud;

(2) the documents are likely to have a material contribution to achieving justice between the parties. If the Commissioner were not able to use the documents for the purposes of the *Rawson Finances* proceeding, he could not make his determination based on highly probative material and, further, would not have sufficient material on which to commence proceedings alleging fraud;

(3) there is no relevant injustice in this course to BCI or Rawson or others and none has been suggested; and

(4) none of the deponents of the affidavits or the authors of the document could complain of prejudice.

Areffco and FCT

In *Areffco*,[20] the Commissioner sought an order releasing him from his implied undertaking in relation to collateral use of evidence filed and read in those proceedings. Crucially, the material was adduced into evidence in "private" proceedings in accordance with s 14ZZE TAA. The taxpayer opposed the proposed use on the basis of the implied undertaking and, in the alternative, sought a non-disclosure order under s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth).

Senior Member PW Taylor held (at [17]-[18]) that, on those particular facts, the taxpayer's disclosures in question were voluntary and therefore not subject to the undertaking. The affidavits and exhibits were created by the party that submitted them into evidence and not obtained as a result of a compulsory pre-hearing disclosure. Even if the material had been obtained as a result of compulsory pre-hearing disclosure, once it had been tendered in evidence in AAT proceedings, the evidence was free to be used regardless of the privacy of the hearing.

The application under s 35 proved ineffective. A substantial amount of the information was publicly available or carried into the published reasons for decision. The Commissioner's proposed use was for related proceedings, and other related proceedings had commenced on appeal in the Federal Court, where no similar non-disclosure order had been sought.

The AAT's General Practice Direction (30 June 2015) at [5.2] to [5.6] now expressly identifies that the implied undertaking applies to documents compulsorily acquired through the AAT's processes and that a document may not be used for a collateral purpose, unless it is received in evidence and not protected by a confidentiality order made under s 35.

Conclusion on relevance of undertaking to tax cases

As can be seen, the Harman undertaking applies no differently in the context of tax-related litigation than it does in the commercial arena. *Oswal* highlights the principle that the undertaking yields to other curial processes; but there is

always a need for an applicant seeking access via court processes to documents otherwise protected by the undertaking to demonstrate that the interests of justice are served and a legitimate forensic purpose exists. *BCI Finances* serves as an example of when "special circumstances" might exist in a tax context, to enable the Commissioner to be released from his undertaking to use documents in subsequent proceedings. *Areffco* demonstrates that even where the hearing is conducted in private, the principle that the undertaking is released or extinguished once the material is tendered or read prevails. However, at least one difference between tax cases and other types of commercial litigation must be acknowledged: tax litigation may be bifurcated and conducted in courts and tribunals simultaneously and the undertaking must operate with this in mind. An example of this may be found in *Karas,* which raises the spectre of the Commissioner's ability to use material obtained in freezing order proceedings in subsequent tax debt recovery and Pt IVC TAA proceedings.

Contempt of court

Breach of the obligation constitutes contempt of court.[34]

The Federal Court has adopted Lord Denning's progressive discretionary approach to contempt from *Hadkinson v Hadkinson.*[35] This means that the court, in its discretion, may permit the contemnor to proceed. However, the position in New South Wales remains unclear. The starting point appears to be that a contemnor cannot be heard or take proceedings in the same case until purged of the contempt.[36] While in *Young v Jackman*,[37] Young J interpreted the reasons for the decision in *Permewan Wright*[36] as supporting the absence of a discretion, in *Woollahra Municipal Council v Shahani*,[38] Bignold J interpreted *Permewan Wright* as not denying the existence of a discretion.

Defences

Ignorance of the existence of the obligation is not a defence, but is relevant to penalty.[39] Intention is also relevant to penalty.[40]

It is generally not a defence to argue that the use of protected documents was in the public interest.[41] However, if the reason for the breach is grounded in public interest considerations, such as where the documents evidence a crime, a court may be more inclined to grant release from the obligation.[42]

Conclusion

The Harman undertaking is a vital extension of the principles of confidentiality and privacy in litigation. The undertaking applies in tax litigation, and so it is imperative that tax practitioners understand its scope, noting that courts have recognised the relatedness of tax recovery proceedings and tax appeals.

The interests of justice underline the approach taken by the courts when dealing with the implied undertaking, in particular whether special circumstances exist to justify a party being released from it. A party bound by the undertaking in one proceeding and a conflicting obligation to discover or produce the documents to which the undertaking relates in another proceeding should recognise that the undertaking yields to curial process, and ensure that the particular curial process has been properly invoked before being satisfied that the undertaking has yielded to that process. Similarly, a party wishing to use documents subject to the undertaking obtained in one proceeding for the purposes of another proceeding should seek a release before doing so. It is important that practitioners be aware of the scope of the undertaking, when it may yield or be released or extinguished, and the consequences of its breach. When in doubt, a release should be sought.

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4 [2012] VSC 143 per Forrest J at [43].
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6 *Riddick v Thames Board Mills Ltd* [1977] QB 881; *Re Marshall Bell Hawkins Ltd* [2003] FCA 833 per Merkel J at [7].
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8 *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316 (*Hamersley Iron*).
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