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Legal briefing

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Implied undertakings in litigation

In the course of litigation before courts and tribunals, government departments and other agencies, and the lawyers acting for them, may gain access to information recorded in documents made available by the other party or non-parties. If such access is obtained under compulsory court or tribunal process, it will automatically be subject to an implied undertaking prohibiting use or disclosure of the material except for the purposes of the subject proceedings.

The following statement of principle has received repeated judicial endorsement:

> A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit ... nor to use them or copies of them for any collateral object ...[1]

Summary of relevant principles

The implied undertaking:

— applies to information obtained as a result of discovery, answers to interrogatories, subpoenas, notices to produce etc. [2]

— applies to witness statements and affidavits served in accordance with court/tribunal orders, directions or rules [3]

— extends to and binds a stranger who is not a party to the proceeding in which the documents were obtained. [4] The undertaking also extends to material of a secondary character derived from the documents [5]

— prohibits use or disclosure of information even for the purpose of enforcement of the criminal law

— will subsist *at least* until the information is received into evidence or is referred to in 'open court' in such a way as to disclose its contents

— is capable of being waived by the party who produced the information. [6] Waiver may be express or implied, although it has been stated that 'it would be imprudent for a party too readily to infer consent or waiver from some equivocal conduct of the other' [7]

— does not apply to information disclosed voluntarily in support of a case to be argued in open court [8]

— probably does not forestall disclosure of the information in accordance with a legal obligation to which the recipient party is otherwise subject.

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Whether a use or disclosure is collateral, and therefore in breach of the undertaking, may involve difficult questions of judgment and characterisation.[9] If a use or disclosure is not reasonably necessary or conducive to the proper conduct of the proceedings it is likely to be regarded as collateral and in breach of the implied undertaking.

The relevant court or tribunal has power to release a party from the implied undertaking prospectively (which is preferable) or *ex post facto* (if the breach has already occurred).[10]

Breach of the implied undertaking is unlawful and involves non-compliance with the Commonwealth's obligations to act as a model litigant (and should, therefore, be notified to the Office of Legal Services Coordination, Attorney-General's Department). Breach may amount to a contempt of court[11] and will require an application to be made to the relevant court or tribunal to be released from the undertaking (at least in relation to a breach which is continuing).

Particular aspects of implied undertaking

Duration of the undertaking

The duration of the undertaking may be dealt with in rules of court, practice directions or by way of specific court or tribunal order or direction. For example, Order 15 Rule 18 of the Federal Court Rules provides that any implied undertaking shall cease to apply to a document:

> after it has been read to or by the Court or referred to, in open Court, in such terms as to disclose its contents ...

Otherwise, the duration of the undertaking is somewhat unclear. The better view, in terms of principle, is considered to be that the undertaking ceases once the information is received into evidence (without restriction as to publication).[12] However, the Victorian Court of Appeal has held that, in Victoria, a party may continue to be bound by the implied undertaking even after the information is received into evidence without restriction.[13] All Victorian courts will be either bound, or strongly inclined, to follow the Court of Appeal's judgment, unless it is set aside by the High Court.

Jurisdiction and power to grant release

In the case of both courts and tribunals, it has been held that 'the power to release from the implied undertaking of confidentiality is incidental to the power to require the documents to be produced. Production under compulsion gives rise to the undertaking. The power to release is intrinsically associated with that undertaking. It is the other side of the coin'.[14]

There are many cases in which courts have held that the application for release must be heard and determined in the same proceedings in which the implied undertaking was generated.[15]

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What if original proceedings have resolved or been discontinued?

In *Caboolture Park Shopping Centre v White Industries* (1993) 117 ALR 253 the Full Court of the Federal Court considered whether a supplemental costs order could be made against a firm of solicitors in relation to proceedings in which final judgment had already been entered. The court held that there was a power to make supplemental orders where circumstances make it appropriate to do so and where such orders would not in any way vary or alter the initial orders.

This principle was discussed in relation to an application for release from an implied undertaking in *Camp Curlewis Resorts Pty Ltd v Hamersley Iron Pty Ltd*, unreported, Federal Court of Australia, 14 December 1994. In that matter Branson J suggested that the appropriate course would be to make the application for release in the original proceedings notwithstanding that those proceedings had been otherwise disposed of. This course was adopted in *Playcorp v Tyco Industries Inc* [2000] VSC 440.[16]

Whether use or disclosure to enforce criminal law is prohibited by implied undertaking

Use or disclosure of information for the purpose of enforcing the criminal law (e.g. to a police force, prosecutorial or regulatory body) may, at first blush, be thought to be outside the implied undertaking. However, this is not the case. In the absence of release from the implied undertaking, subject information cannot be used or disclosed for enforcement of the criminal law or to assist executive agencies to enforce a particular regulatory regime or the law generally.[17] In *Commonwealth v Temwood* (2001) 25 WAR 31 at [41], Pullin J stated as follows (emphasis added):

> My conclusion is that the Commonwealth is bound, like any other third party, not to use information which is gained by one party from the other via the court proceedings under the court's compulsory processes for any purpose other than use in those proceedings. **To seek to use the documents in deciding whether or not to prosecute, or whether or not to take enforcement action, is a "collateral or ulterior" use which requires the leave of the court.**

Accordingly, if the information in question is relevant to some kind of enforcement action, application should be made to be released from the implied undertaking. In an appropriate case, a court or tribunal should be prepared to entertain an application on an ex parte basis (if notice of the application might be contrary to some identifiable public interest).[18]

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Interaction with other curial processes and statutory powers

In *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10 at 33, Mason CJ stated that the implied undertaking 'must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation, e.g. discovery and inspection …'

In *Spalla v St George Motor Finance Ltd* [2004] FCA 1014 at [32], Ryan J held that this principle only applies where 'the litigation in which the requirements of discovery and inspection have arisen has been instituted without recourse to documents or information subject to the implied obligation'.

Whilst doubts about the breadth of Mason CJ's statement have been expressed from time to time, His Honour's approach was followed by the NSW Court of Appeal in *Australian Securities Commission v Ampolex Ltd* (1995) 38 NSWLR 504. In that case the ASC became aware of allegations of possible insider trading as a result of publicity given to observations by a Supreme Court judge, in proceedings before him. The ASC then issued a statutory notice to a solicitor for a party requiring him to produce all records relating to the proceedings. The solicitor objected on the basis that some of the documents in his possession were subject to the implied undertaking and, hence, he had a reasonable excuse for non-production. The Court of Appeal held that it was not necessary to first obtain leave of the court before producing documents to the ASC because the obligations attracted by the undertaking were overridden by the obligation imposed by the statutory notice.[19]

In *Blanch & Ors v Deputy Commissioner of Taxation* [2004] NSWCA 461 the Court of Appeal dealt with a similar situation, this time in connection with a statutory notice under section 264 of the *Income Tax Assessment Act, 1936*. [20] The Court did not consider it necessary to decide the 'important question of the relationship between … [the] undertaking and s 264'. Importantly, Giles JA (with whom Hodgson and Ipp JJA agreed) stated:

> Even if s 264 trumps the undertakings, release of the undertaking [sic] will have to be considered, although the result may be automatic.

Moreover, it must be remembered that the case of *Ampolex* involved the exercise of statutory powers by an agency of the Commonwealth which was not a party to the proceedings and which had not acquired knowledge of the documents as a result of compulsory court process. In *ASIC v Marshall Bell Hawkins Ltd* [2003] FCA 833 Merkel J held that ASIC, as a party to the proceedings, was 'not entitled to have access to the discovered documents for the purpose of exercising its statutory powers in relation to [a related entity's affairs] unless the Court has released it from the implied undertaking.'

Principles relevant to release from undertaking

In *Springfield Nominees Pty Ltd & Ors v Bridgelands Securities Ltd & Ors* (1992) 38 FCR 217 Wilcox J outlined a range of factors relevant to the court's consideration of release from the implied undertaking. [21] His Honour's approach was endorsed by the Full Federal Court in *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3 as a 'helpful guide' at [31]–[33]. Relevant factors include:

— whether the subject information was prepared for the purposes of becoming evidence in the proceedings and was therefore expected to enter the public domain [22]

— whether the information is sensitive, personal or commercial-in-confidence

— the attitude of the other party and whether the other party could suffer any prejudice as a result of the information being used or disclosed for extraneous purposes

— whether the subject proceedings are still on foot and whether, in particular, there is a real risk that the administration of justice, in respect of those proceedings, could be compromised

— the circumstances in which the information came into the hands of the party seeking release and, in particular, whether those circumstances involved any impropriety

— if the information has already been used or disclosed, whether breach of the implied undertaking was inadvertent and timely application was made to the court or tribunal [23]

— most importantly, whether the proposed use or disclosure is consonant with the 'public interest' purposes served by the administration of justice in courts (e.g. if the information is highly relevant to other legal proceedings). [24]

There are a range of other matters which have been held in various cases to be relevant to the exercise of discretion to release a party from the implied undertaking:

— the mere fact that the document in question may never have been tendered or may, theoretically, have been the subject of a confidentiality order is not a persuasive reason to refuse release [25]

Even if section 264 trumps the undertakings, release of the undertaking [sic] will have to be considered, although the result may be automatic.

— whether the party seeking release does so for their own purposes or to assist other persons. Courts will more readily release a party from their undertaking if the purpose is to assist that party rather than third persons [26]

— the length of time since the implied undertaking was given and/or the subject proceedings were resolved – the longer the period of time the more likely it is that the undertaking will be released [27]

— whether release from the undertaking is sought to enable the document to be used against the other party in the principal proceedings or some other person. It seems that courts are more likely to release a party from an undertaking where the purpose is to enable the document to be used against a person other than the opposing party in the principal proceedings. [28]

Legal advice should be sought whenever it is proposed to use or disclose information which may have been obtained as a result of the compulsory process of a court or tribunal.

Conclusion

It may be difficult in a particular case to know whether the implied undertaking applies or not. Was the information obtained pursuant to compulsory process or otherwise? Was the information received into evidence in open hearing (some paragraphs of affidavits contain statements which are either not read or ruled to be inadmissible)? Is the proposed use or disclosure collateral or not?

Given the seriousness of the consequences which might be involved in breaching an implied undertaking, legal advice should be sought whenever it is proposed to use or disclose information which may have been obtained as a result of the compulsory process of a court or tribunal.

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Notes

1 Bray J, *Bray on Discovery*, 1st Edition (1885) at page 238 endorsed, for example, in *Riddick v Thames Board Mills* [1977] QB 881 per Lord Denning MR at 895 and in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 per Mason CJ at 32.

2 The implied undertaking applies equally to documents produced by parties and non-parties.

3 *Complete Technology Pty Ltd v Toshiba (Australia) Pty Ltd* (1994) 53 FCR 125; *Springfield Nominees Pty Ltd & Ors v Bridgelands Securities Ltd & Ors* (1992) 38 FCR 217; *Australian Trade Commission v McMahon* (1997) 73 FCR 211 per Lehane J at 216; *Commonwealth v Temwood Holdings Pty Ltd* (2001) 25 WAR 31 per Pullin J; *Moage Ltd v Jagelman & Ors* [2002] NSWSC 953; *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3 (8 February, 2005 per Branson, Sundberg and Allsop JJ). It would also appear that the undertaking, or a species of it, applies to documents produced compulsorily in an arbitration pursuant to a direction by the arbitrator: see *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 per Mason CJ at 32–33.

4 *Patrick v Capital Finance Pty Ltd (No 4)* [2003] FCA 436 per Tamberlin J; *Distillers Co v Times Newspapers* [1975] QB 613 at 621 and the cases discussed therein by Talbot J at 619–620; *Spalla v St George Motor Finance Ltd* [2004] FCA 1014 at [40]; *Commonwealth v Temwood Holdings Pty Ltd* (2001) 25 WAR 31 at [28]; *Hamersley Iron Pty Ltd & Ors v Lovell & Ors* [1998] WASCA 133. However, the extent to which the undertaking will bind a

stranger may depend very much on the circumstances. In *Capital Television Group Ltd & Anor v Northern Rivers Television Pty Ltd* unreported, NSWSC 4 September, Bainton J stated at [24]: 'I would be surprised if a person who picked up and read a copy of an affidavit, or a witness statement carelessly dropped on the footpath in Phillip Street, and who read it could be restrained from making any use of what he thereby learned. It could not be said, surely, that he is bound by an undertaking ... He simply would not have got the document in the circumstances from which the implication arises'.

5 *Sofilas v Cable Sands (WA) Pty Ltd* (1993) 9 WAR 196; *Hamersley Iron Pty Ltd & Ors v Lovell & Ors* [1998] WASCA 133 per Anderson J; *Sentry Corporation v Peat Marwick Mitchell and Co* (1990) 95 ALR 11 per Sweeney J at p 23 and Lockhart J at p 38.

6 *Hamersley Iron Pty Ltd & Ors v Lovell & Ors* [1998] WASCA 133 per Pidgeon and Anderson JJ (Ipp J dissenting); *Spalla v St George Motor Finance Ltd* [2004] FCA 1014 per Ryan J at [29]; *Sentry Corporation v Peat Marwick Mitchell and Co* (1990) 95 ALR 11.

7 *Dagi v Broken Hill Pty Co Ltd* [1996] 2 VR 567 at 572.

8 *Uniflex (Australia) Pty Ltd v Hanneybel* [2001] WASC 138 per Hasluck J at [142, 148, 151].

9 See *Idoport Pty Limited v National Australia Bank Limited and Ors* [2001] NSWSC 648 per Einstein J at [27]. Much will depend on the closeness of the connection between the subject proceedings and the use or disclosure in question. A 'rule of thumb' is to ask whether the use or disclosure is calculated to vindicate an asserted right in the subject proceedings or some other alleged right. A collateral purpose encompasses 'purposes different from the conduct of the proceedings in or in relation to which the inspection was had' *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 18 ACSR 218 at 221 per Giles J in CommD. Difficult questions arise in relation to amendment of pleadings and counterclaims by reference to documents attracting the undertaking: see *Arnold Mann v Medical Defence Union* [1997] FCA 45; *Spalla v St George Motor Finance Ltd* [2004] FCA 1014; *Allstate Life Insurance Co v ANZ Banking Group* (1995) 57 FCR 360; *Eckert v National Australia Bank* (1997) 191 LSJS 221; *Morgan v Mallard* [2000] SASC 445.

10 See *Commonwealth v Temwood Holdings Pty Ltd* (2001) 25 WAR 31 per Pullin J at [46].

11 Particularly if a breach is deliberate and contumelious: see *Hamersley Iron Pty Ltd & Ors v Lovell & Ors* [1998] WASCA 133.

12 *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10 at 32; *United States Surgical Corp v Hospital Products International Pty Ltd* SC NSW Per McLelland J, unreported, 7 May 1982; *Moage Ltd v Jagelman* [2002] NSWSC 953; *Eltran v Westpac* (1990) 98 ALR 141; *Australian Securities and Investments Commission v Marshall Bell Hawkins Ltd* [2003] FCA 833, at [14] per Merkel J; *K & S Corporation Ltd & Anor v Number 1 Betting Shop Ltd* & Ors [2005] SASC 228 (24 June 2005); *Hamersley Iron Pty Ltd v Lovell* [1998] WASCA 133 per Pidgeon and Ipp JJ (Anderson J dissenting); *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 per Kirby P (with whom Samuels JA agreed); *Registrar of Supreme Court v McPherson* [1980] 1 NSWLR 688; *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 18 ACSR 218; *Chapmans Ltd v Australian Stock Exchange Ltd,* Federal Court, 14 August 1995 per Tamberlin J; *Commonwealth v Temwood Holdings Pty Ltd* (2001) 25 WAR 31 at [29].

13 *British American Tobacco Australia Services Ltd v Cowell* [2003] VSCA 43 (28 April 2003).

14 *Otter Gold Mines Ltd v McDonald & Ors* (1997) 147 ALR 322 per Sundberg J at 328.

15 See, for example, *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576 per Burchett J; *Morgan v Mallard* [2000] SASC 445 per Lander J at [115] and *Springfield Nominees Pty Ltd & Ors v Bridgelands Securities Ltd & Ors* (1992) 38 FCR 217.

16 A similar situation appears to have pertained in *Springfield Nominees Pty Ltd & Ors v Bridgelands Securities Ltd & Ors* (1992) 38 FCR 217. In that case the original proceedings had been disposed of more than 12 months before the application was brought for release from the implied undertaking. Wilcox J apparently had no difficulty with hearing the application in those circumstances.

17 See *Dart Industries Inc & Anor v David Bryar & Associates Pty Ltd & Ors* [1997] 481 FCA (10 April 1997) per Goldberg J; *Bailey v Australian Broadcasting Corporation* (1995) 1 Qd R 476; *Australian Trade Commission v McMahon* (1997) 73 FCR 211 per Lehane J ; and *Moage Ltd v Jagelman & Ors* [2002] NSWSC 953.

18 See *Australian Trade Commission v McMahon* (1997) 73 FCR 211.

[19] Accordingly, documents subject to the undertaking are nonetheless discoverable in other legal proceedings, although the court concerned would retain a discretion as to whether to permit inspection: *Patrick v Capital Finance Pty Ltd (No 4)* [2003] FCA 436 at [21]–[22].

[20] In *Commercial Bureau (Aust) Pty Ltd v Allen; Ex parte Federal Commissioner of Taxation* (1984) 1 FCR 202 at [15]–[16], Northrop J had previously held that section 263 of the *Income Tax Assessment Act 1936* displaced the undertaking (where the Commissioner was a non-party).

[21] These factors have been endorsed and applied in a range of subsequent decisions: see, for example, *Complete Technology Pty Ltd v Toshiba (Australia) Pty Ltd* (1994) 53 FCR 125 at 133 and *Otter Goldmines Ltd v McDonald & Ors* (1997) 147 ALR 322 at 328–9.

[22] See also the observations of Kirby P in *Ainsworth v Hanrahan* (1991) 25 NSWLR 155 at 167.

[23] See Wheeler J in *Commonwealth v Temwood Holdings Pty Ltd* [2002] WASC 107 at [12].

[24] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3 at [33]. In *Australian Trade Commission v McMahon* 73 FCR 211 Lehane J held (at 217) that 'special circumstances' will 'fairly readily be found where it is established that the use of [the] documents … is reasonably required for the purpose of doing justice between the parties in other proceedings'.

[25] *Australian Competition and Consumer Commission v Telstra* [2000] FCA 28 per Lindgren J at [34]–[35].

[26] *British American Tobacco Australia Services Ltd v Cowell* [2003] VSCA 43 (28 April 2003) at [53]; *Spalla v St George Motor Finance Ltd* [2004] FCA 1014 per Ryan J at [43].

[27] *Morgan v Mallard* [2000] SASC 445 per Lander J at [116].

[28] *Playcorp Ltd v Tyco Industries Inc* [2000] VSC 440; *Australian Trade Commission v McMahon* 73 FCR 211; *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576 per Burchett J.

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