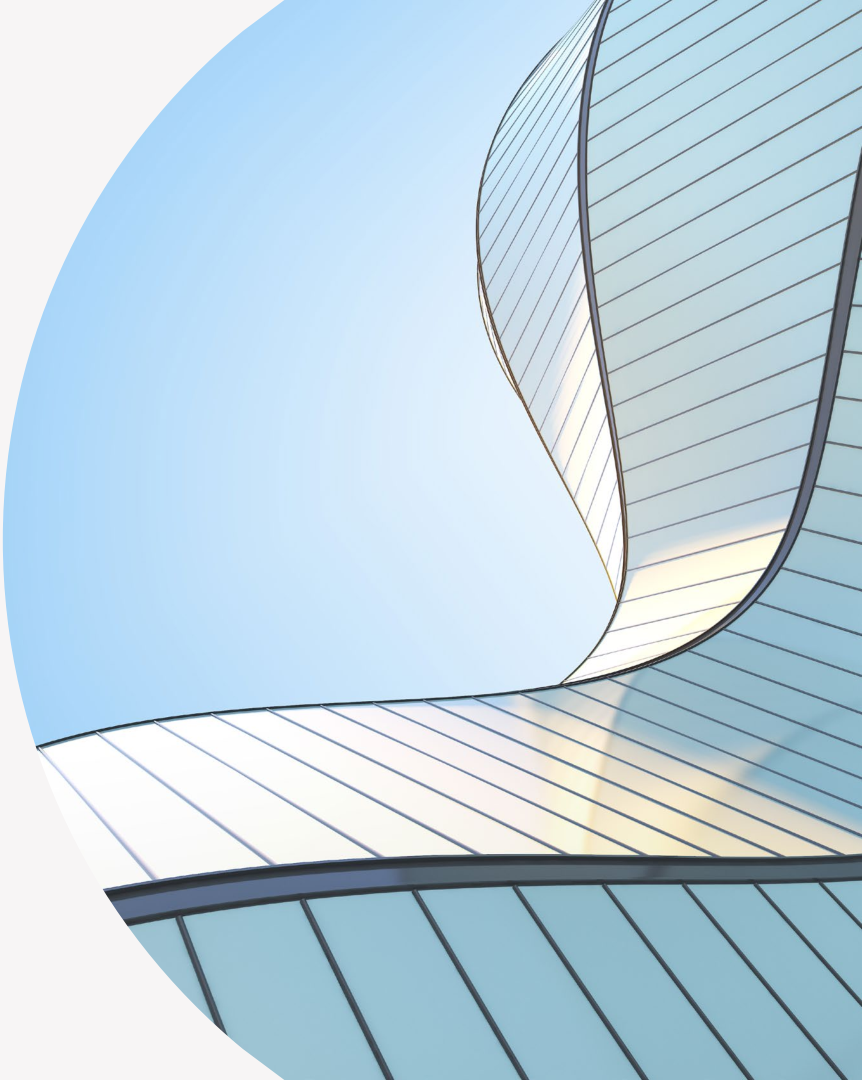
Colin Biggers & Paisley

Insurance Seminar Series.

An update on the Harman obligation and the use of documents obtained in claims and legal proceedings

Tuesday 10 March 2026

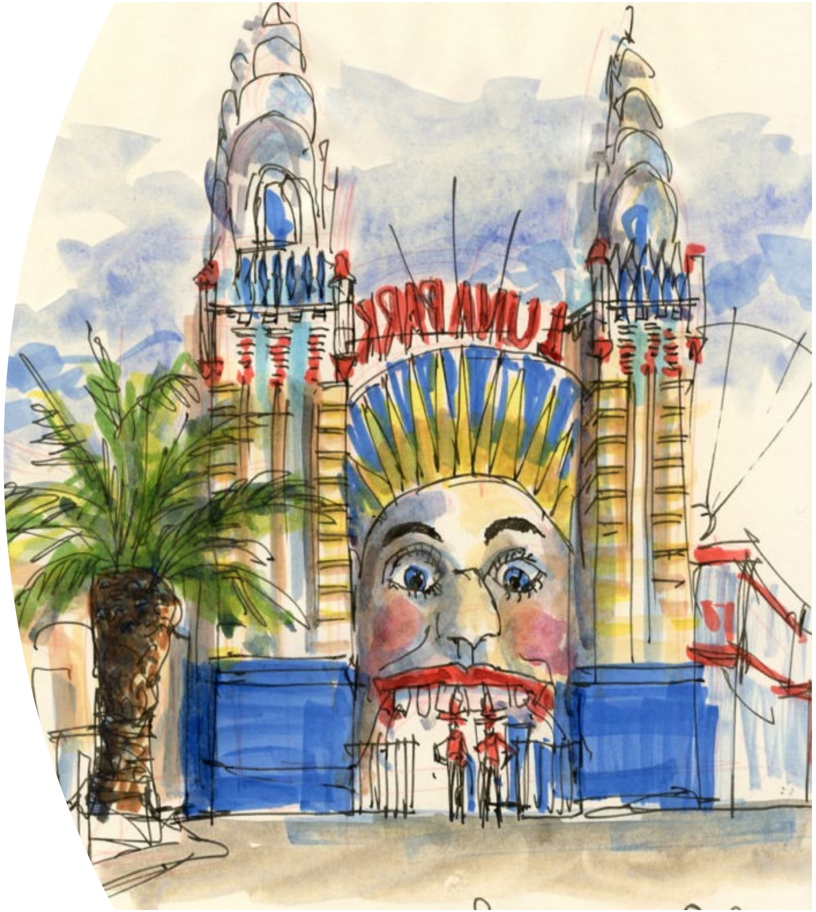


Overview

- Harman obligation in Australia
  - What is the Harman obligation?
  - Rationale.
  - When does it apply -
    - Who is bound?
    - Legal proceedings
    - What is captured ?
    - Compulsion
    - Use
    - Purpose
  - Inconsistent Obligations
  - Duration
  - Release
  - Consequences
- Examples in insurance context

What is the Harman obligation?

- House of Lords judgment in ***Harman v Secretary of State for the Home Department [1983] 1 AC 280***.
- "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." *Hearne v Street [2008] HCA 36*
- Scope of obligation broadened since *Hearne* v *Street*
- Implied obligation is a **substantive legal obligation** implied at common law and owed to party making the disclosure
- Obligation also owed to the Court i.e. only Court can release it
- Breach of the obligation is a **contempt of court**

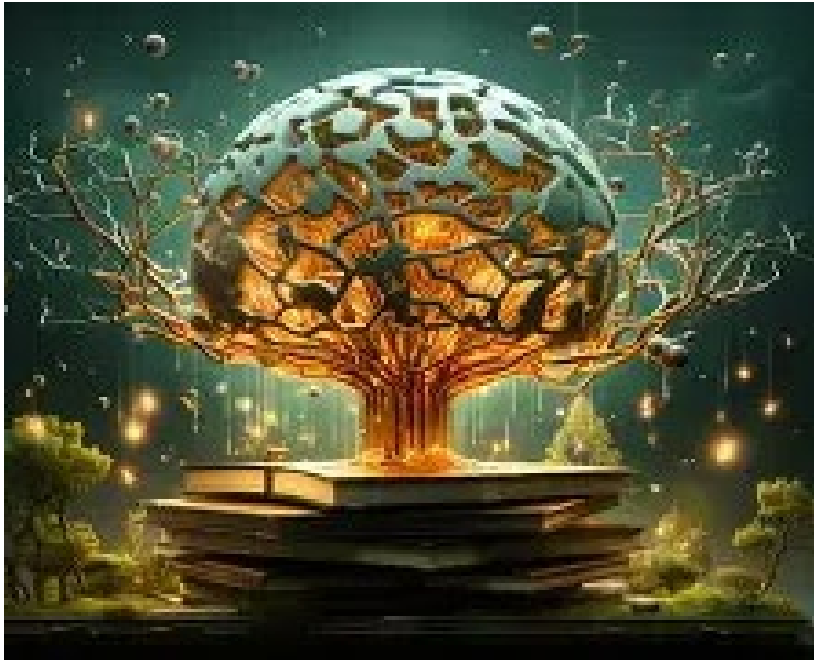


Rationale.

- The policy rationale is to:
    - prevent documents produced under coercive court processes from being used for **collateral or ulterior purposes**
    - minimise invasions into the privacy and confidentiality of others
- Where disclosure is compelled, the receiving party is given access only because the invasion of the other party's rights must give way to the need to do justice in the pending litigation: Chesterman JA in *Northbuild Construction v Discovery Beach Project (No 4)*
- Documents do not have to contain confidential or commercially sensitive information - not about inherent character of documents, but how the documents were obtained

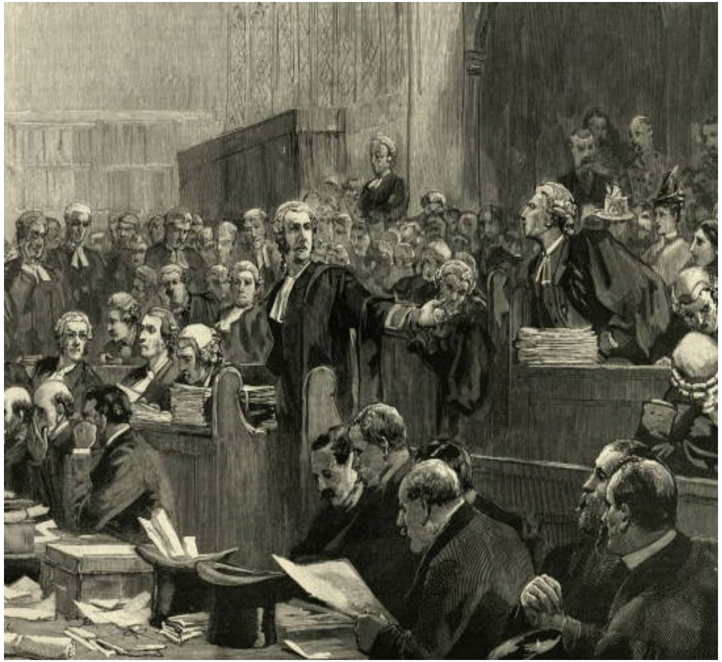
Knowledge

- The obligation applies to "persons who, knowing that material was generated in legal proceedings, use it for purposes other than those of the proceedings are in contempt of court": *Hearne v Street*
- That is, the obligation extends beyond the litigants/recipients - without such a principle any obligation could be easily evaded and be of little value: *Hammersley Iron Pty Ltd v Lovell*
- The implied obligation does **not** depend on the party **knowing of the undertaking or its consequences** or agreeing to it - the relevant knowledge relates to the origin of the materials
- To establish contempt, it must be established beyond reasonable doubt that the person had actual knowledge (or was wilfully blind) that the documents were produced under compulsion at the time of use: *Re Ramsay Health Care Australia Pty Ltd*



Who is bound by the obligation?

- The obligation captures **all legal practitioners**, their **clients** and any **third parties** who have access to information produced under court processes. This includes:
    - Litigants, their agents and advisors.
    - Solicitors and Barristers.
    - Expert and other witnesses.
    - Court staff.
    - Insurers.
    - Litigation funders.
    - Other third parties who know that documents are sourced from legal proceedings e.g. spouses / family members.



Broad ambit of "legal proceedings."

- The obligation applies to materials produced or created by order of the court in legal proceedings.
- The obligation applies to both documents and the information contained within: *Hearne v Street.*
- “**Legal proceedings**” includes courts, commissions of enquiry, arbitrations, tribunals and disciplinary proceedings against legal practitioners: *Esso Australia Resources v Plowman*.
- In *Esso,* High Court held that the implied undertaking as expressed in *Harman* and *Riddick* applied in Australian law to documents produced on discovery in court proceedings and pursuant to directions given in private arbitration.

What is captured by the obligation?

- Any material produced pursuant to court order is subject to the obligation and include:
  - Documents produced on **discovery**.
  - Answers to **interrogatories**.
  - Documents produced in answer to a **subpoena or notice to produce**.
  - Documents produced for **taxation of costs**.
  - Documents produced pursuant to a **direction** from an arbitrator.
  - Documents seized pursuant to an **Anton Piller order**.
- Depending on circumstances, may also include:
  - **Witness statements and affidavits** served pursuant to a court order.
  - **Expert reports** produced pursuant to court order.

Compulsion - When is a document compelled?

- The Harman obligation only applies where the disclosure of the documents or information has been **compelled**: *Hearne v Street.*
- Controversy may arise where documents are produced **without a formal order**, but in circumstances where refusal could realistically have led to one (i.e. an implied or practical compulsion).
- Some authorities treat production in response to an opponent’s request (where a subpoena or notice to produce could have been issued) as **sufficiently compelled** (because of the implicit threat of enforcement): see *Helicopter Aerial.*
- By contrast, documents truly **volunteered for strategic or cooperative reasons** (without any coercive orders) may be less likely to attract the obligation: see *Frigger v Trenfield (No 5); Re T & F.S. Woods Pty Ltd v Woods.*

Compulsion - Case Examples

Helicopter Aerial Surveys v Robertson [2015] NSWSC 2104

Brereton J held that documents voluntarily disclosed in litigation are generally treated as if produced under compulsion and thus subject to the implied obligation (while expressing doubt about affidavits served in the ordinary course of proceedings) but proceeded on the basis that affidavits were covered and granted leave for their use in related proceedings.

***R (on the application of Davey) v Silverstein* [2020] VSCA 233**

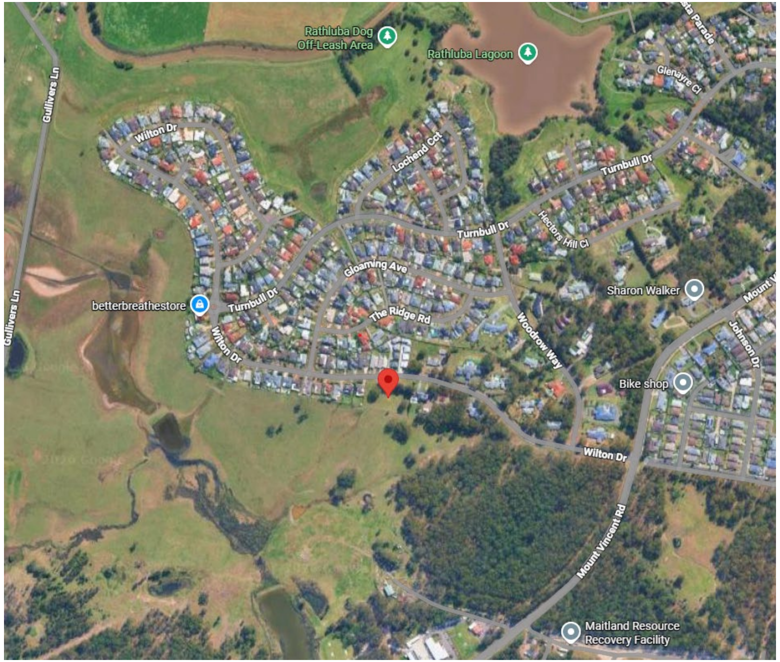
The Court held that the Harman obligation applies only to documents produced under compulsion, not to affidavits filed in the ordinary course of litigation (even if required by court rules), and therefore disclosure of such affidavits to a bankruptcy trustee did not constitute contempt, demonstrating that compulsion is the key threshold.

***Re T & F.S. Woods Pty Ltd v Woods* [2021] FCA 1220**

Derrington J held that, considering the authority of *Silverstein* binding, affidavits filed and served in Federal Court proceedings are not subject to the Harman obligation because they are not produced under real compulsion, clarifying that the obligation applies to documents compelled by specific court orders (such as discovery), but not to affidavits voluntarily filed pursuant to procedural rules or timetabling directions.

Compulsion - *Unicomb v Blais* [2024] NSWSC 903.

- **Facts**: In settled estate proceedings where affidavits were filed under timetabling orders but never read in open court, a developer later commenced separate proceedings and sought a declaration that those affidavits were not subject to the Harman obligation and could be used for another purpose.
- **Key points:**
  1. The Harman obligation only applies where the disclosure of the documents or information has been **compelled.**
  2. In the context of an affidavit made in court proceedings, "compelled" has its **ordinary and natural meaning** of being forced or required to undertake disclosure of the affidavit in a manner which involves an invasion of the privacy and confidentiality of the contents of the affidavit.
  3. The **focus of the inquiry** is on whether the specific documents or information were compelled to be disclosed, not on whether the application to which they relate was compelled, or the mere fact that an affidavit is provided for the purposes of litigation.
- **Outcome**: The Court held that the relevant affidavits were filed voluntarily pursuant to ordinary timetabling orders and so were not produced under compulsion, and not subject to the obligation.



Use - collateral or ulterior purpose

- Utilising information or documents subject to the obligation for a collateral or ulterior purpose constitutes a breach
- "Use" means utilise
- "Ulterior" and "collateral" have been described interchangeably as "*a purpose outside of the proceedings; a purpose other than the proceeding; an extraneous purpose; and an alien purpose."*
- purpose cannot be "unconnected" or "unrelated" to the determination of the dispute in which the documents were produced

Examples of collateral or ulterior purposes:

- use of the documents in unrelated proceedings.
- disclosure to the media and government minister: *Hearne v Street*.
- use of documents to make a complaint to the Office of the Legal Services Commission concerning professional conduct of solicitor acting in the proceedings: *Johnston v Allen* use of documents to gain a business advantage.
- disclosure of documents or information to third parties unconnected to or not related to the dispute.
- reporting information obtained to Government bodies e.g. income to Child Support.

Carve out: A connected purpose

- Development of scope of obligation post - *Hearne* v *Street.*
- "The scope of the undertaking may be better expressed by saying that documents produced on discovery or other compulsive process may only be used for a purpose connected with or related to the determination of the dispute in which the parties are engaged and to assist in the resolution of which the documents were required": Chesterman JA in *Northbuild.*
- When is a document used for a connected purpose?
  - Documents may be used in the very proceedings in which discovery is granted (for example, to add new causes of action or parties), but they may also have uses that can legitimately be regarded as **flowing** from the purpose of the original proceedings: *Gavan v FSS Trustee Corp.*
  - Documents may be used for purposes "**connected with**" or "**related to**" the resolution of a dispute between the parties, not just for the specific proceeding in which they were disclosed: *Marsh Limited v Greensill Bank AG.*
  - Where insurer has not assumed conduct of the claim, documents provided by an insured to an insurer to enable the insurer to consider a claim for cover for the proceedings against the insured.
  - Providing documents to a litigation funder considering funding for the proceedings in which the documents produced: *Cadence Asset Management* v *Concept Sports.*

Inconsistent obligations

- Careful consideration must be given to how the obligation interacts with inconsistent statutory powers or obligations
- *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10 per mason CJ at [33]: "*No doubt the implied obligation must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation."*
- The Harman obligation does not operate to prevent production of documents in a second set of proceedings pursuant to discovery orders because it does not trespass on an inconsistent legal obligation - see *Cadbury Schweppes Pty Ltd (ACN 004 551 473) v Amcor Ltd (ACN 000 017 372)* [2008] FCA 398 per Gordon at [13]:

  "*The party's undertaking in the first proceeding restricts the uses to which that party may choose to put the documents. But the undertaking is no answer to otherwise valid compulsive processes of law."*
- See *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (In Liq)*
  - Liquidators of Rennie obtained documents pursuant to s 596B summonses requiring production of documents.
  - The Commissioner of Taxation issued a Notice to Rennie requiring production of documents in its custody or control re a tax self-assessment.
  - Documents held by the Liquidators were responsive to the Notice.
  - Held: The Harman obligation does not prevent or excuse a person owing that obligation from complying with a valid notice issued by the Commissioner of Taxation or prevent the Commissioner from using those documents. Providing the documents in answer to a Notice **is not use** of the documents by the person subject to the Notice in circumstances where a refusal to comply is an offence of absolute liability. It is not correct to equate the Harman obligation to the common law right to legal professional privilege.

Duration

- The obligation **ends** once the material is tendered as evidence, read in court, referred to in open court, or otherwise enters the public domain: *Hearne v Street.*
- If only part of a document is tendered, the **remaining portions** may still be subject to the obligation.
- The obligation continues after the original proceedings that required production have concluded.
- The obligation is **owed to the Court** (not the client or producing party), and only the Court can release a party from it.

Release

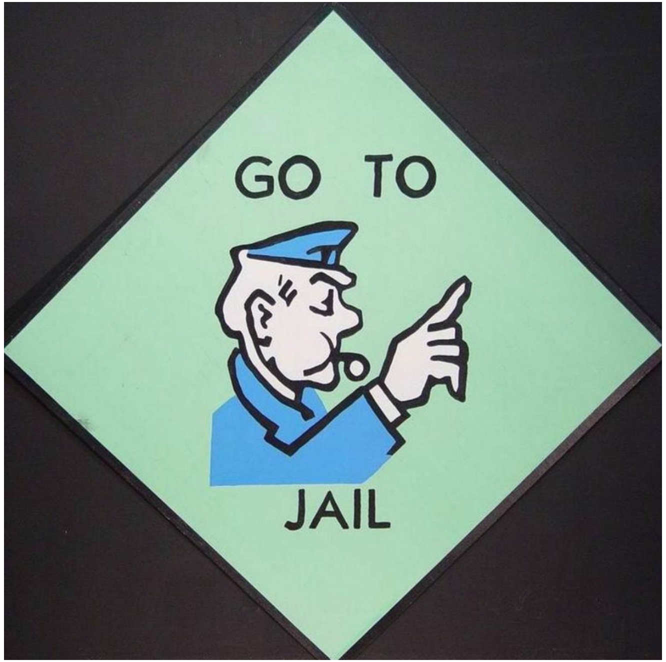
- Where the Harman obligation arises, a party may apply **to the court for an order for release** from the obligation.
- The owner of the documents cannot consent to use in breach of the obligation.
- A party seeking release from the implied undertaking must show "**special circumstances**", but this does not require extraordinary factors; rather, a good reason must be shown to justify departure from the usual rule: *Liberty Funding Pty Ltd v Phoenix Capital Ltd.*
- The court's discretion to grant release is broad, requiring consideration of **all the circumstances**, including factors identified in *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* - nature of the document, how and why it was created, attitude and prejudice to the author, sensitivity of the information, how it was obtained, the likely contribution of the document/information to achieving justice.
- The **most important consideration** is the document's likely contribution to achieving justice in the other proceeding.
- These principles apply in varied contexts, including:
    - application to use material such as expert reports arising from mediation in discontinued proceedings (*Glencore Coal v Franks*), with the court weighing fairness, prejudice, and the interests of justice.
    - Where discovery of documents in one proceeding requires discovery of documents obtained in a related proceeding.

Remedying a previous breach

- Release should be sought **in advance** of using the documents or information
- If a party has already breached, the focus should be on remedying the breach i.e. application to the Court, ceasing to use the documents
- A sincere apology to the Court should be proffered and a comprehensive explanation for the breach
- May include an application for an order "nunc pro tunc" i.e. to be released from the obligation retrospectively
- Do not assume such an order will be made - discretionary, an indulgence not a right
- Retrospective order more likely where:
    - breach was reasonably unanticipated.
    - reasonable view that the implied obligation did not apply to the documents in question.
    - no forensic advantage sought or obtained from the breach.

Potential consequences of breach

- Consequences of breach include:
  - Contempt proceedings.
  - Adverse costs orders.
  - Having the claims based on the documents struck out or dismissed.
  - Regulatory complaints e.g. professional misconduct or unsatisfactory conduct.



Some examples in insurance context

***Gavan v FSS Trustee Corporation* [2019] NSWSC 667**

- **Facts**: MetLife sought to obtain and use documents sought under a notice to produce in coverage proceedings (Ms Gavan's Facebook records) to assess Ms Gavan's parallel TPD claim (subject of an administrative process). MetLife argued that the material obtained could be used for the dual purpose of the conduct of the proceedings and the assessment of the insured's TPD claim.
- **Key Point**: The Harman obligation is not infringed where the insurer uses documents obtained in the course of proceedings also for the purpose of determining the insured's claim to the benefit and the documents would inform and be relevant to the same primary issue and so not used for an unconnected purpose.

***Price v Clearview Life Nominees* [2024] NSWSC 706**

- **Facts**: Mr Price sued ClearView for a TPD benefit while receiving undisputed income protection (IP) benefits, and ClearView, having obtained documents under compulsion in the TPD proceedings, sought to use them to assess his income protection entitlement, with the parties agreeing the material was subject to a Harman obligation.
- **Key Point**: ClearView's proposed use of the material for assessing the income protection claim would breach the implied obligation because it constituted a collateral use unrelated to the TPD proceedings. As there was no dispute on foot regarding the IP benefits, ClearView had not demonstrated a sufficient basis to be released from the implied obligation and gain access to more information than it was permitted under the IP policy.

Insurance Example.

***Marsh Limited v Greensill Bank AG* [2025] FCAFC 186**

- **Facts**: In the Greensill Federal Court proceedings, Marsh Limited received extensive discovery from Greensill Bank AG and, with Marsh Pty Ltd, sought an ex parte anti-suit injunction against Greensill Bank in the English High Court relying on an English exclusive jurisdiction clause in Marsh Limited's letter of engagement with Greensill Bank . To comply with their duty of full and frank disclosure, the Marsh entities relied on documents discovered in the Australian proceedings without seeking leave from the Federal Court (being the Court in which the documents were produced), and the primary judge held that this use breached the Harman obligation, refusing retrospective relief.

- **Key points**:
    1. FCAFC allowed the appeal and set aside the declaration of breach; using the discovered documents in the English anti-suit application did not breach the Harman obligation because the use was sufficiently connected with the determination of the same underlying dispute.
    2. Because the application involved asking a Court to not exercise its jurisdiction, this was a purpose directed at the "conduct of" a proceeding in a court.
    3. The Court stressed that the "connected purpose" test is a fact specific endeavour.

MARSH

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Thank you.

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