

Using Federal Circuit and Family Court of Australia documents in State Domestic Violence proceedings

North Queensland Law Association Conference

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Introduction

1. This paper considers the evidentiary issues arising out the use of documents filed in the Federal Circuit Court and Family Court of Australia in State domestic violence protection order proceedings.
2. It is not uncommon in the context of family law proceedings to see concurrent or subsequent matters in other courts such as civil proceedings, criminal proceedings or relevantly for this paper, domestic violence protection order proceedings. Often the parties in the different jurisdictions are the same. For example, a husband-and-wife have children's matters in the Federal Circuit and Family Court of Australia and a concurrent application for a domestic violence protection order in the State Magistrates Court.
3. There is inevitable temptation to use material filed by the other party during the family law proceedings in the other proceedings, and visa versa. Particularly when there are material inconsistencies in the evidence presented in the different jurisdictions. You may wish to exploit these inconsistencies for the purpose of damaging the other party's credit.
4. Surely you must be able to use this material filed by a party against them, particularly when there is commonality in issues in the two proceedings? The answer is possibly. But only if you go about it the right way. There is no free for all in using this type of material and generally you must first get permission of the court in the jurisdiction from which the material originates. Failure to do so may amount to contempt of court.

The Starting point – An Implied Undertaking

5. At common law there is an *implied undertaking* on a litigant not to use documents or information filed in court for a purpose unrelated to the conduct of the proceedings. This implied undertaking arises out of decision in *Harman v Secretary of State for the Home Office* [1983] 1 AC 280 variously referred to as the “Harman principle”, the “Harman Obligation” or the “Harman Undertaking”.
6. The High Court in *Hearne v Street* (2008) 235 CLR 125 at 154 explained the implied undertaking as follows:

“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. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, witness statements served pursuant to a judicial direction and affidavits.

(emphasis added)

7. Whilst referred to as an implied undertaking it is in fact a substantive legal obligation to the court.¹ The purpose of the undertaking is to preserve privacy and confidentiality so far as reasonably possible while ensuring that justice is done.²
8. The substantive obligation applies not only to parties to the litigation but also to a third party, if that third party knows of the origins of the material.
9. If a person contravenes the implied undertaking, then they are liable for contempt of court.
10. The class of material to which the Harman Principle applies is broad and extends not only to documents obtained via subpoena or the disclosure process, but also to witness statements and affidavits served pursuant to a judicial direction.
11. The implied undertaking ceases operation when documents are received into evidence in the jurisdiction in which documents are obtained, unless the court otherwise orders. At that point they are in the public domain.³ The undertaking remains in force if the documents were neither read in open court nor received into evidence.
12. There is some uncertainty as to the position where documents are read in open court, but not received into evidence (e.g. objected to or ruled inadmissible). In some jurisdictions this issue has been resolved by the rules of court. For example, in the Federal Court the rules provide that the implied undertaking ceases to apply to any document after it has been read or referred to, in open court, in such terms as to disclose its contents, unless the court otherwise orders.⁴
13. No similar provisions have been enacted in the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*. However, given the confidential nature of family law proceedings and the restriction on publication of court proceedings provided for in section 121 of the *Family Law Act*, in my view there the implied undertaking would

¹ *Hearne* at [3].

² *Hearne* at [107]

³ *Esso Australia v Plowman* (Minister for Energy & Minerals) (1995) 183 CLR 10; *Crawford v Timms* [2020] NSWSC 380; *Adair v Adair* (2021) 64 Fam LR 533

⁴ R20.03 *Federal Court Rules 2011*; r14.11 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2001*

still attach to documents which have been read in open court, but not received into evidence.

14. The Harman Principle as approved by *Hearne v Street* have repeatedly been held to apply to parties who wish to use documents obtained in the family law jurisdiction in other proceedings.⁵
15. For example, in *Zarins & Mylne (No 3)* [2013] FamCa 737 Berman J considered that affidavits filed in a parenting orders case are documents to which the Harman Principle applied. He reasoned that the filing of affidavits in anticipation of both interim hearings and final determination was pursuant to orders of the court to ensure the matter was prepared and ready for trial. He went on to say that it is an integral part of the court process in Family Court proceedings that evidence in chief will primarily be given by affidavit and it is a common feature of trial directions that affidavit evidence of all witnesses upon which party intends to rely must be filed in accordance directions of court.⁶

Statutory restrictions on use of documents filed in family law proceedings

16. There are a number of statutory restrictions imposed on the use of documents produced, disclosed or subpoenaed for proceedings in the Family Court or Federal Circuit Court. These restrictions apply not only to a party to family court litigation but also to strangers to that litigation.⁷
17. Broadly those restrictions are:
 - a. Section 121 of the *Family Law Act* – Restriction on publication of court proceedings;
 - b. Rule 6.04 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* - Use of documents

Section 121 FLA

18. Section 121 of the *Family Law Act* relevantly provides:

Restriction on publication of court proceedings

- (1) A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:
 - (a) a party to the proceedings;

⁵ *Zarins & Mylne (No3)* [2013] FamCA 737 at [19] – [22]; *R Pty Ltd v Jones* [2016] FAmCA 928 at [34]-[37]; *Millar & Murphy* [2016] FCCA 974 [43] – [45]; *Adair v Adair* [2021] FedCFamC2F 333

⁶ *Zarins* at [33]

⁷ *R v Pty Ltd v Jones* [2016] FamCA 928 at [30]; *Commissioner of Taxation v Darling* (2014) 50 Fam LR 637

- (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
- (c) a witness in the proceedings;

commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

(4) – (8)...

(9) The preceding provisions of this section do not apply to or in relation to:

- (a) the communication, to persons concerned in proceedings in any court, of any pleading, transcript of evidence or other document for use in connection with those proceedings; or

...

(emphasis added)

19. There are a number of single judge decisions which have considered the operation of section 121 in the context of use of family law documents in other proceedings. They have expressed differing views as to the application of section 121.
20. *Zarins & Mylne* (No 3)⁸ *R Pty Ltd v Jones*,⁹ *Miller and Murphy*¹⁰ each expressing slightly different reasoning have expressed a view that the proposed use and/or reference to documents in another court did not breach section 121(1).
21. However, Judge Betts in *Adiar v Adair*¹¹ took the view that section 121(1) lied but the documents fell within the exception provided for in section 121(9)(a). Judge Betts bought that section 121 not incompatible with the implied undertaking.
22. Given that there is no appellate authority unequivocally stating the position I would recommend arguing that either you documents are not caught by section 121(1) or alternatively they fall within the exception in 121(9)(a).

Rule 6.04 FCFCOA Rules 2021

23. Rule 6.04 provides:

- (1) A person who inspects or copies a document, in relation to a proceeding, under these Rules or an order:
 - (a) must use the document for the purpose of the proceeding only; and
 - (b) must not otherwise disclose the contents of the document, or give a copy of it, to any other person without the court's permission.

⁸ [2013] FamCA 737 at [20] – [22]

⁹ [2016] FAmCA 928 at [36]

¹⁰ *Millar & Murphy* [2016] FCCA 974 [43] – [45]

¹¹ [2021] FedCFamC2F 333

24. This rule limits what a person may do with a document which they inspect or copy in a proceeding by reason of provision of the rules or a court order. Although this rule is found in part 6.1 which relates to the general duty of disclosure, the rule is not, on its face limited to documents produced pursuant to such a duty and extends to a document inspected or copied under the rules generally.
25. Rule 6.04 is, in effect, a restatement of the principles relating to the “implied undertaking” set out in *Hearne v Street*.¹²
26. In *Adair v Adair*¹³ Judge Betts found that affidavits fell within rule 6.04, reasoning that the High Court made it clear in *Hearne v Street* that the ordinary obligation the subject of the implied undertaking can include documents that are not only discoverable, but also affidavits.

Obtaining leave – Special circumstances

27. A party (or a third party) can be released by the court from the implied undertaking where there are *special circumstances*. In *Re Springfield Nominees Pty Ltd* Wilcox J explained:¹⁴

“For “special circumstances” to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the court’s discretion, many factors being relevant. It is neither possible nor desirable 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 that 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., the circumstances in which the documents came into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document in achieving justice in the second proceeding.”

(emphasis added)

28. In *Liberty Funding Pty Ltd v Phoenix Capital Limited* the Full Court of the Federal Court said:¹⁵

“... The notion of ‘special circumstances’ does not require that some extraordinary factors must bear on the question before the discretion will be exercised. It is sufficient to say that, in all the circumstances, good reason must be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of

¹² *Adair v Adair* ibid at [21]

¹³ [2021] FedCFamC2F 333

¹⁴ (1992) 38 FCR 217 at 225; (1992) 110 ALR 685 at 693

¹⁵ [2005] FCAFC 3 at [33]

a party in another piece of litigation or for other non-litigious purposes. The discretion is a broad one and all the circumstances of the case must be examined.”

(emphasis added)

29. In *R Pty Ltd v Jones Carew J* considered relevant considerations included:¹⁶
- a. whether the parties were the same and/or there was an interrelationship between them;
 - b. whether the dispute is the same and/or there was a commonality of subject matter;
 - c. whether in the family court proceedings it had been specifically anticipated at the time of finalisation, that disputes external to the family law proceedings would be determined in another jurisdiction;
 - d. whether the usual requirement for specificity of documents sought to be used should be waived in circumstances where the time and cost associated with such task was out of proportion to the case and
 - e. whether a party has a ready caused “personal and confidential information to become available in the public domain”.
30. In *Zarins & Mylne* [2013] Fam Ca 737 leave was given for material from the court file and subpoenaed documentation to be used for the purposes of a criminal proceedings in which the respondent had been charged.
31. Similarly in *Miller & Murphy* [2016] FCCA 974 leave was granted to the husband to use the report of the child and family consultant in domestic violence proceedings in the Magistrates Court.

Material filed in domestic violence proceedings – Going other way

32. What about going the other way? Using material filed in the domestic violence proceedings in the family law proceedings.
33. In my view the same principles apply, but you would still need to obtain leave from the Magistrates Court including in circumstances where the affidavit material has been read and accepted into evidence in a final hearing. That is because of the closed court nature of domestic violence proceedings.

¹⁶ (2016) 56 Fam LR 445 at [59], [64], [68] and [69].

34. Pursuant to section 158(1) of the *Domestic and Family Violence Protection Act 2012* (“DVFVPA”) a court hearing an application under the Act is not to be open to the public.
35. Section 159(1) DVFPA contains a general prohibition against the person publishing information given in evidence in a proceeding or information that identifies or is likely to lead to the identification of the person who is a party, witness or child concerned in the proceeding. However section 159(2)(a) provides that the court may expressly authorise the information to be published.
36. Section 159(1) would seem to fall in a similar category as section 121 of the FLA. It is designed to stop parties publishing posts about the proceedings on social media et cetera and to allow effective communication about the proceedings the purposes of running the court.
37. As such the implied undertaking would apply to documents filed in the domestic violence proceedings and leave need to be sought from the Magistrates Court to use any documents in the family law proceedings.
38. Pursuant to section 144(2) of the DVPA the court may issue directions in relation to a particular proceeding before the court. In my view this is the relevant section under which leave should be sought.

Conclusion

39. Consideration should always be given source of information and documents which come into your possession as a lawyer and how you may, or may not, use this evidence. These issues apply not only to family law and domestic violence proceedings but to civil proceedings and criminal law proceedings.
40. If you have any doubt as to the position, be cautious and seek leave of the court in the jurisdiction in which the evidence originated.