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Release from the 'implied undertaking' for the purpose of a criminal investigation

The Federal Court has released the Commonwealth from the 'implied undertaking' attaching to information obtained in the course of a previous legal proceeding pursuant to a court order thereby enabling it to provide the information to the Commissioner of the AFP for use in a current criminal investigation into the alleged unlawful disclosure of the official diary of the former Speaker of the House of Representatives.

Ashby v Slipper (No 2) [2016] FCA 550

Federal Court of Australia (Flick J), 19 May 2016

In 2012 James Ashby commenced proceedings in the Federal Court of Australia against the Commonwealth of Australia and the former Speaker of the House of Representatives, Peter Slipper. In the course of that proceeding, Mr Ashby served, pursuant to a direction of the Court, 2 compact discs containing a forensic download of Mr Ashby's mobile phone (the **CDs**). That included a number of text messages. The CDs were never filed, tendered or read into evidence. Accordingly, the 'implied undertaking' attached to the CDs such that they could not be used or disclosed except for the purposes of that Federal Court proceeding.

By October 2012 the Commonwealth ceased to be a party to this proceeding and by mid-2014 the Federal Court proceeding had relevantly concluded.

In 2014 an allegation was referred to the AFP that Mr Slipper's official diary was disclosed without lawful authority. The AFP is investigating that alleged conduct and whether it may constitute one or more Commonwealth offences. Information available to the AFP caused it to believe the CDs may contain evidence relevant to its investigation.

In April 2016 the Commonwealth filed an interlocutory application seeking to be released from the implied undertaking attaching to the CDs permitting the provision of the CDs to the Commissioner of the AFP for use in the investigation and any prosecution for an offence against a law of the Commonwealth (and related advice).

On 19 May 2016 the Federal Court of Australia granted the orders sought by the Commonwealth.

Jurisdiction and considerations for release from the implied undertaking

The Commonwealth made the application for release in the original proceeding in which the implied undertaking attached. The Court accepted the Commonwealth's argument that this was the proper approach, even where the proceeding was 'finalised' and the Commonwealth was not a party to the proceeding when it finalised (at [9]).

In determining whether to exercise the discretion to release the Commonwealth, the Court was required to balance 2 competing public interests at play: (i) the public interest in

imposing the constraint on the use of materials that have been provided pursuant to the Court's compulsory process, and (ii) the public interest in the enforcement or administration of the criminal law which would require a release from the implied undertaking (at [10]). The Courts have consistently held that 'special circumstances' must exist to order a release from the implied undertaking. This requires a 'good reason' to be shown in all the circumstances why, contrary to the usual position, documents produced in one piece of litigation should be used in another piece of litigation or for a non-litigious purpose. Whilst not exhaustive, some of the relevant considerations to the exercise of this discretion include:

- the nature of the document
- the circumstances under which the document came into existence
- the attitude of the author of the documents 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 in to the hands of the applicant [for release]
- most importantly of all, the likely contribution of the document to achieving justice in the other proceeding.

(see *Springfield Nominees Pty Ltd v Bridgelands Securities* (1992) 38 FCR 217 and *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283).

Flick J concluded that the release sought should be made because of the legitimate public interest in permitting the AFP access to materials that may assist its investigation into the alleged unlawful disclosure of the official diary of a former Speaker of the House of Representatives, the apparent relevance of the CDs to the investigation and the inability to obtain that information elsewhere. His Honour also noted that the parties (including the 'author of the document', Mr Ashby) consented to the orders (at [13]).

His Honour also referred to the 'irony' if it were a court of justice which stood in the way of the enforcement of the criminal law by precluding the provision to police of material (quoting at [12] Jessup J in *Websyte Corporation Pty Ltd v Alexander* [2012] FCA 69).

Implications

Regardless of whether the original proceeding (in which the undertaking attached) is finalised, for how long it has been finalised, or whether the Commonwealth was a party to that original proceeding, the appropriate manner of making an application for release is to make that application in that original proceeding.

Where release from an implied undertaking is sought for purposes relating to the enforcement or administration of the criminal law there should generally be reasonably good prospects of obtaining such a release.

Text of the decision is available at: <http://www.austlii.edu.au/au/cases/cth/FCA/2016/550.html>

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