

11 APRIL 2018

## Full Federal Court finds the Harman obligation does not constrain statutory power

***Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* [2018] FCAFC 38**

### ***Background***

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The 'Harman obligation' is the common law doctrine established in *Harman v Secretary of State for Home Department* [1983] 1 AC 280, summarised by the High Court in *Hearne v Street* (2008) 235 CLR 125, [96] 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 disclosure cannot, without leave of the court, use it for any other purpose other than that for which it was given unless it is received into evidence.

In this matter, the Commissioner had issued a compulsory notice to the respondent company pursuant to s 353-10 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA) for the production of documents. In response, the company identified a number of documents that fell within the scope of the notice, but which it had obtained through compulsory court processes. The company considered that these were subject to the Harman obligation and could not be produced without a release from the Court.

The Commissioner sought declarations from the Federal Court to clarify that the Harman obligation gives way to s 353-10, such that no release from the obligation was required. The application was made as a test case and, at the direction of the Chief Justice, was heard by the Full Federal Court.

### ***Reasoning of the Federal Court***

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The Full Court (Kenny, Robertson and Thawley JJ) held that the Harman obligation does not require the person owing the obligation to refuse to comply with a valid notice issued under s 353-10 or to make an application to the relevant court for release from the undertaking. That is because the content of the obligation is such that 'it recognises and is shaped by inconsistent legal obligations': see [29]. Accordingly, the obligation itself 'does not extend to requiring the holder of the obligation not to comply with such a notice' and, 'does not require the Commissioner not to use the documents, when received, for the purpose of discharging his statutory duties and functions': see [36].

Further, their Honours went on to find that providing documents to the Commissioner in answer to a notice is not 'use' of documents by the person the subject of the notice. Rather, the true character of providing such documents is compliance with a requirement to give any document to the Commissioner in circumstances where a refusal or failure to give the document was an offence: see [37].

The Full Court explained that, while a breach of the Harman obligation may give rise to a contempt of Court, there can be no breach of the obligation in circumstances where inconsistent statutory provisions mean that it does not apply: see [35]. Accordingly, although in some circumstances it may be possible for s 353-10 to be used in such a way as gave rise to a contempt, ‘the issue does not arise if the only question raised by the facts of the particular case is whether there is a constraint on production or use of the documents by reason of the Harman obligation’: see [56].

In reaching these conclusions the Full Court rejected arguments that the Harman obligation was a fundamental and substantive common law right, akin to legal professional privilege, which engaged the presumption of legality in statutory interpretation. As a result, it was not necessary for the provisions in question to expressly or unmistakably reveal a legislative intention to abrogate a fundamental common law right. Indeed, it was not apt to conceive of the Harman obligation as a ‘right’ at all: see [38]–[40].

For these reasons, the Full Court disagreed with the earlier observations of the Full Family Court in *Commissioner of Taxation v Darling* (2014) 285 FLR 428: see [42]. It also explained the observations of the NSW Court of Appeal in *Blanch v Deputy Commissioner of Taxation* (2004) 58 ATR 113, clarifying that the decision in that case did not mean that a release from the Harman obligation was required when an inconsistent statutory obligation stood against it.

### ***Implications***

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The decision has significant implications for the exercise of statutory powers and functions in relation to information subject to the Harman obligation.

Most directly, the Commissioner will no longer have to take a precautionary approach to the statutory investigative power in s 353-10. It is now clear there is no risk of a potential breach of the Harman obligation in relation to the exercise of that power or using material obtained from it.

Likewise, Commonwealth legislation includes many statutory information gathering powers which are analogous to s 353-10. The decision in this case supports an exercise of such powers (subject to their terms) in relation to Harman information and without the need for any release by a Court from the obligation.

More broadly, there are many statutory powers and functions concerning the use of information by the Commonwealth and agencies. As the Harman obligation ‘recognises and is shaped by inconsistent legal obligations’ there is likely to be wide scope for Harman information to be used when required or authorised by such provisions. The terms of such provisions will be important to considering the application of the Full Court’s decision in such contexts.

Tim Begbie (AGS) and David Thomas (NSW bar) appeared for the Commissioner, instructed by Lee Benjamin and Claire Stokes (AGS).

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