IMPLIED UNDERTAKING: EXPRESS REFORM REQUIRED

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I INTRODUCTION

Some say our society is becoming ever more litigious. While this may or may not be the case, one trend that appears to be increasing is the number of proceedings arising out of the same event or series of events. Proceedings brought by the Australian Competition and Consumer Commission can be followed by class actions and other civil prosecutions, such as in the Amcor/Visy imbroglio. Similarly, Royal Commissions, such as those relating to the Australian Wheat Board and the explosion at the Longford gas facility, have led to or preceded class actions. Corporate collapses, such as HIH, seem to have led to a multitude of cases, while there is also the seemingly endless litigation against British American Tobacco. Although the implied undertaking ('the undertaking') in relation to the use of documents in other legal proceedings is one of the most established principles affecting the conduct of related legal proceedings, there are a number of situations, particularly in Victoria, where its application is less certain. Against a background of increasing related litigation, it is worth considering the limits of the undertaking. It may also be time for legislative reform in Victoria to ensure that practitioners know when they are giving the undertaking and when the undertaking comes to an end.

II THE UNDERTAKING

The starting point for the undertaking, as we know it, is the decision of Lord Diplock in *Harman v Secretary of State for the Home Department*.[1] In that case, his Lordship held that a party or a legal practitioner who receives documents from the other side, which were produced under the compulsory process of the court during the course of a legal proceeding, is subject to an implied undertaking not to use the documents for a 'collateral or ulterior purpose'.[2]

It has since been stated that the undertaking applies to any document obtained due to the compulsory processes of the court, whether or not the document is privileged.[3]

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1 [1983] 1 AC 280 ('*Harman*').

2 Ibid 302.

3 *Complete Technology Pty Ltd v Toshiba (Aust) Pty Ltd* (1994) 53 FCR 125, 134.

The purpose of the undertaking is to protect the privacy of the person disclosing the document and thereby encourage full and frank disclosure during litigation.[4]

Injunctions may be sought to restrain a threatened collateral use of documents subject to the undertaking, while an actual breach of the undertaking may amount to contempt.[5] Further, an action based upon information that is subject to the undertaking may be struck out by the court as an abuse of process.[6]

III TO WHICH PROCEEDINGS DOES THE UNDERTAKING APPLY?

It is clear that the undertaking applies to court proceedings, arbitrations and certain tribunals. The position of Royal Commissions is less certain.

A *Arbitrations*

The High Court in *Esso Australia Resources Ltd v Plowman*[7] accepted that the undertaking would apply to material produced by a party on compulsion due to a direction of an arbitrator during a private arbitration. The High Court held that as arbitrations were sufficiently similar to court proceedings the undertaking would apply.[8] *Esso* was recently applied in *Transfield Philippines Inc v Pacific Hydro Ltd*.[9]

B *Tribunal Hearings*

Sundberg J in *Otter Gold Mines Ltd v McDonald*[10] held that the undertaking also applies to documents produced under compulsion in tribunal proceedings. In that case, documents were produced to the Administrative Appeals Tribunal, pursuant to a summons under the *Administrative Appeals Tribunal Act 1975* (Cth). His Honour's decision has since been adopted by the Victorian Civil and Administrative Tribunal.[11] It is therefore likely that the undertaking would apply to any Australian tribunal with powers to compel parties before it to produce documents in relation to the dispute before it.

4 *British and American Tobacco Services Ltd v Cowell (No 2)* (2003) 8 VR 571, [20] (*'Cowell'*).

5 [1983] 1 AC 280; *Biltoft Holdings Pty Ltd v Casselan Pty Ltd* (1991) 4 WAR 14, 18.

6 (1991) 4 WAR 14, 17–8.

7 (1995) 183 CLR 10 (*'Esso'*).

8 See, eg, (1995) 183 CLR 10, [43] (Mason CJ).

9 [2006] VSC 175 (Unreported, Hollingworth J, 4 December 2006) (*'Transfield'*).

10 (1997) 76 FCR 467.

11 *Kelly v Department of Treasury and Finance* [2002] VCAT 1019 (Unreported, Kellam J, Deputy President Galvin, 10 September 2002).

C *Royal Commissions*

Courts are yet to consider the issue as to whether documents produced to a Royal Commission are subject to the undertaking. However, it is likely that documents produced before a Royal Commission would also be subject to the undertaking.

The focus of the undertaking is to protect parties who are compelled to disclose documents to other parties. Like a court, a Royal Commission has the power to compel people to disclose documents. Section 2 of the *Royal Commissions Act 1902* (Cth) gives a Commissioner the power to issue summonses for people to attend to give evidence or to produce documents. Section 17 of the *Evidence Act 1958* (Vic) gives a Victorian Commissioner similar powers. It is an offence under both the Commonwealth and Victorian legislation to fail to comply with such a summons.[12] Therefore, as documents may be obtained by compulsion in a proceeding before a Royal Commission it is likely that they would be subject to the undertaking.

However, there are some significant differences between a Royal Commission and a court proceeding, an arbitration and a tribunal hearing. These differences may mean that the undertaking does not apply to documents produced before a Royal Commission, or if it does apply, that it no longer applies once the Royal Commission has concluded and been dissolved. Arguments in support of this view include the following:

(a) In *AWB Ltd v Cole*,[13] Young J, in considering whether the 'litigation limb' of legal professional privilege ('litigation privilege') is applicable to proceedings before a Royal Commission, compared the Royal Commission process to that of a tribunal, in which litigation privilege applies. His Honour stated:

> [I]t is one thing to extend litigation privilege to adversarial proceedings before the Administrative Appeals Tribunal. The Administrative Appeals Tribunal is vested with statutory authority to determine issues with legally binding consequences. A Royal Commission is not in that position. A Commissioner simply carries out investigations, determines the facts and prepares a report and recommendations. A Commission does not finally determine any rights or obligations.[14]

(b) Courts have the power to grant injunctions or make findings of contempt where the undertaking is breached. It does not appear that a Commissioner has these powers. In such a situation the undertaking would be effectively meaningless as any breach of it would go unpunished.

(c) As discussed below, the undertaking is given not to the party who produced the documents, but to the court. After a Royal Commission has

12 See *Royal Commissions Act 1902* (Cth) s 3; of the *Evidence Act 1958* (Vic) s 19.

13 (2006) 152 FCR 382.

14 Ibid 425.

completed its investigation and published its report, the Royal Commission is brought to an end. Therefore, even if an undertaking is given to a Royal Commission, it may be possible to argue that the undertaking no longer exists or no longer has any operation, given that the Royal Commission no longer exists. However, following Hollingworth J's decision in *Transfield*, which is discussed further below, it is unlikely that a court would find such an argument persuasive.

(d) Where a Royal Commission no longer exists, parties who have given the undertaking can no longer apply to that Royal Commission to be released from the undertaking. As such, it may be argued that the undertaking no longer exists or no longer has any operation. Again, such an argument must be viewed in light of Hollingworth J's views in *Transfield*.

(e) Finally, it may be possible to argue that undertakings given to a Royal Commission are unenforceable after the Royal Commission is brought to an end. Even if the Commissioner had the power to grant an injunction or punish a party who breached the undertaking, it is unlikely that a Judge of a court would have the power to punish someone for breaching an undertaking in a proceeding not before that court. It may therefore be the case that breaching an undertaking given to a Royal Commission will not give rise to any consequences once the Royal Commission has been brought to an end. It may, however, be risky practice for a practitioner to proceed on such a basis.

Overall though, as Commissioners can obtain documents by compulsion, it appears that the better view is that the undertaking would apply to documents provided on compulsion during a Royal Commission. Whilst a Commissioner may not have the power to punish someone for breaching the undertaking, neither does an arbitrator, a limitation which did not appear to trouble the High Court in *Esso*. It is therefore most likely that the undertaking would apply to documents produced to a Royal Commission.

IV TO WHOM DOES THE UNDERTAKING APPLY?

The undertaking extends to any person who receives documents or information to which the undertaking attaches.[15] It therefore applies to any parties or lawyers involved in a proceeding. Lord Diplock in *Harman* stated that '[the] implied undertaking is given by the solicitor personally to the court ... any breach of that implied undertaking is a contempt of court by the solicitor'.[16]

Solicitors and their clients are therefore subject to the undertaking in relation to any earlier proceedings in which the client, as a party, received documents.

Ordinarily, the undertaking also applies to third parties, including journalists who acquire documents, since the requirement to seek leave to be released from the

15 *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613, 621.

16 [1983] 1 AC 280, 304.

undertaking also extends to non-parties who wish to use material that is subject to the undertaking.[17]

V TO WHICH MATERIAL DOES THE UNDERTAKING APPLY?

The undertaking applies to documents obtained during legal proceedings, as well as the information derived from those documents.[18] Consequently, the undertaking would apply to reports, opinions and statements based on those documents.

The most obvious type of documents to which the undertaking applies are documents produced on discovery. The undertaking also attaches to a wide range of other documents that are produced pursuant to the compulsory processes of the court during the course of litigation. Other types of documents to which the undertaking applies include:

- documents produced under subpoena, including documents produced by a non-party;[19]
- answers to interrogatories;[20]
- documents produced for the purposes of taxation of costs;[21] and
- documents produced pursuant to an *Anton Piller* order.[22]

It has also been held that the undertaking applies to documents that have been discovered in criminal proceedings.[23]

A *Witness Statements*

The undertaking has also been held to apply to witness statements.[24] The rationale for this is that these documents (a) are brought into existence for one piece of litigation; (b) may contain confidential or personal information; and (c) may not ultimately be read in court.[25] From the decision of Gzell J in *Street v Luna Park Inc*,[26] it appears that the undertaking also applies to expert reports.

17 *Esso* (1995) 183 CLR 10, 37; *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 549; *Complete Technology Pty Ltd v Toshiba (Aust) Pty Ltd* (1994) 53 FCR 125, 132–3.

18 *Sybron Corporation v Barclays Bank plc* [1985] Ch 299.

19 *Telnet Pty Ltd v Takapana Investments Pty Ltd* (1994) 51 FCR 520.

20 *Ainsworth v Hanrahan* (1991) 25 NSWLR 155.

21 *Bourns Inc v Raychem Corp* [1999] 3 All ER 154.

22 *Crest Homes plc v Marks* [1987] AC 829; *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576.

23 *Taylor v Serious Fraud Office* [1999] 2 AC 177; *Spalla v St George Motor Finance Ltd* (2004) 209 ALR 703.

24 *Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509 at 510-511; *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217.

25 *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 223.

26 [2006] NSWSC 624.

In *Cowell*,[27] the Victorian Court of Appeal considered the position of witness statements. The Court took the view that although a party chooses whether or not to call a particular witness and is not, therefore, under compulsion in that sense, compulsion can take many forms, as a court may determine the content of material to be delivered, or the timing of delivery.[28] Applying this reasoning, whilst a party chooses whether or not to call a particular witness, orders mandating the timing of the delivery of witness statements mean that witness statements which are provided to the other parties prior to the hearing are done so by way of compulsion.

B *Affidavits*

It is likely that affidavits are subject to the undertaking. In *Liberty Funding Pty Ltd v Phoenix Capital Ltd*,[29] the Full Court of the Federal Court (Branson, Sundberg and Allsop JJ) proceeded on the basis that an affidavit was subject to the undertaking, but without citing an authority for this proposition.

In *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*,[30] after considering the question of witness statements, Wilcox J went on to say:

> I add that a witness statement fulfils a function very similar to that of an affidavit or an admission of facts. In this court there is a rule (O 46, r 6) limiting the documents on court files which may be inspected without leave of the court or a judge. They include affidavits, interrogatories and answers to interrogatories, lists of documents given on discovery and admissions. All are documents brought into existence for the purpose of the instant litigation which may contain confidential or personal information and which may, or may not, ultimately be read in court. There is every reason for subjecting their use to the same constraints.[31]

Although a Victorian court would likely find these *obiter* comments persuasive, there is no equivalent in the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) ('*Supreme Court Rules*') of O 46, r 6 of the *Federal Court Rules 1979* (Cth) ('*Federal Court Rules*'). Under r 28.05 of the *Supreme Court Rules* any person may inspect any document on the court file, except for documents that the Court has ordered to remain confidential or documents which the Prothonotary considers ought to remain confidential. The Prothonotary's page of the Supreme Court internet site lists the following documents as being unavailable for access by non-parties:

- outlines of submissions, evidence and arguments;
- order 44 statements (witness statements and expert reports);

27 (2003) 8 VR 571.

28 *Cowell* (2003) 8 VR 571, [42].

29 (2005) 218 ALR 283.

30 (1992) 38 FCR 217 ('*Springfield Nominees*').

31 Ibid 223.

- synopsis of evidence;
- exhibits to affidavits;
- subpoenaed documents;
- submissions and chronologies; and
- documents ordered to be confidential by the Court.[32]

Importantly, affidavits are not included in this list. Therefore as the general public may be able to obtain a copy of any affidavit from the court, it is possible that in Victoria, affidavits are not subject to the undertaking. Such a conclusion appears to be contrary to what logic would dictate and is contrary to the position in the Federal Court. As was pointed out by Wilcox J, affidavits serve a similar purpose to witness statements and like witness statements, they are filed under 'compulsion'.

C *Lists of Documents*

Other than the *obiter* comments of Wilcox J in *Springfield Nominees*, the courts have not discussed whether the undertaking applies to lists of documents produced as part of the discovery process. It would appear, however, that the undertaking applies. This is because discovery lists are often provided by way of affidavit, and the discussion above suggests that the undertaking probably applies to affidavits. It would be illogical for an affidavit of documents to be treated differently from documents included in an unsworn list. Furthermore, the existence of the documents recorded in the list is only known by the other party because of the existence of the legal proceeding and the orders of the court in relation to discovery. It is therefore likely that lists of documents are also subject to the undertaking.

D *Other Court Documents*

Following Wilcox J's views in *Springfield Nominees* and the position of the Prothonotary's Office set out above, it is likely that almost all documents produced by a party during the course of a proceeding are subject to the undertaking. Certainly in Victoria, it appears that the documents listed above are subject to the undertaking.

VI WHAT USE DOES THE UNDERTAKING PROHIBIT?

As set out above, the undertaking prohibits the use of material for a 'collateral or ulterior purpose'. A collateral or ulterior purpose has been held to be one that is

32 Supreme Court of Victoria, Practice and Procedure: File Searches Note <www.supremecourt.vic.gov.au/CA256CC60028922C/page/Practice+and+Procedure-Prothonotarys+Office-File+Searches?OpenDocument&1=20-Practice+and+Procedure~&2=30-Prothonotarys+Office~&3=80-File+Searches> at 12 August 2007.

not reasonably necessary for the conduct of the litigation in which the documents were provided.[33] In *Mann v Medical Defence Union Ltd*,[34] Ryan J stated:

> Usually, if not invariably, the use of documents disclosed in one action for the purpose of another action will be a collateral or ulterior purpose, even where the parties to both actions are identical and the causes of action are identical.[35]

In *Bailey v Australian Broadcasting Corporation*,[36] Lee J held that using documents the subject of the undertaking to 'promote some private interest of the applicant not within the parameters of the action which brought about their disclosure' would breach the undertaking.[37] The use of documents produced in one proceeding in a later proceeding would therefore breach the undertaking.

Notwithstanding the fact that documents subject to the undertaking cannot be used outside the proceeding in which they were produced, it appears as though they can be inspected by a person to determine whether they wish to use them and whether they wish to apply to be released from the undertaking. In *Cowell*, David Beach SC for the appellant submitted that only the person applying for leave to be released from the undertaking knows the use to which it intends that the document be put. The Court of Appeal accepted this submission.[38] It follows that since such person can only know the use to which they intend to put a document once they have read and considered it, they should be able to read the document subject to the undertaking in order to determine whether or not they wish to seek leave to be released from the undertaking.

However, there is little judicial consideration of what constitutes 'use' of a document. In cases such as *Harman* and *Cowell*, the use made, or intended to be made, of the documents was clear. In most cases the use sought to be made of a document is as evidence in a later proceeding. The question therefore arises as to whether other uses of the documents, such as simply reading them, would breach the undertaking.

It is likely that the only 'use' that can be made of a document subject to the undertaking is to review it to determine whether leave to be released from the undertaking should be sought. Any other use, including reading the document for background information or to compare it with documents produced in or prepared for another proceeding would be in breach of the undertaking.

33 *Mann v Medical Defence Union Ltd* [1997] 45 FCA (unreported, Ryan J, 7 February 1997).

34 [1997] 45 FCA (unreported, Ryan J, 7 February 1997).

35 Ibid [7].

36 [1995] 1 Qd R 476.

37 Ibid 485.

38 (2003) 8 VR 571, [37].

VII WHEN DOES THE UNDERTAKING CEASE TO HAVE EFFECT?

The Law Lords in *Harman*, Mason CJ in *Esso*, some state jurisdictions (including New South Wales[39]) and the *Federal Court Rules* all envisage that the undertaking ceases to have effect upon the documents being adduced into evidence. However, following the decision of the Court of Appeal in *Cowell*, the position in Victoria appears to be different, such that the receiving of most documents into evidence may not terminate the undertaking.

In *Harman*, the Law Lords were unanimous in their finding that the undertaking ceases to operate when the documents are received into evidence, but remains in force if the documents are neither read in open court nor received into evidence. There was, however some division as to what would happen if the documents were read in open court, and therefore brought into the 'public domain', but not received into evidence. The majority held that in this situation, the undertaking would continue to apply.[40]

According to Mason CJ in *Esso*, the undertaking is:

> [S]ubject to the qualification that once material is adduced in court proceedings it becomes part of the public domain, unless the court restrains publication of it.[41]

Mason CJ's comments in *Esso* appear to have been accepted in New South Wales,[42] while in a Western Australian case, the majority held that the undertaking ceased once the documents were tendered and were held to be properly admissible into evidence.[43]

In the Federal Court, the undertaking ceases to apply to any document:

> [A]fter it has been read to or by the Court or referred to, in open Court, in such terms as to disclose its contents unless the Court otherwise orders.[44]

Similarly, in England, O 24, r 14A of the *Rules of the Supreme Court* states that the undertaking ceases to apply to any document:

> [A]fter it has been read to or by the Court, or referred to, in open court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs.

This rule was introduced in 1987 as a result of the decision in *Harman*. Following the House of Lords' decision, Ms Harman brought proceedings against the United Kingdom in the European Commission of Human Rights. This proceeding was

39 See, eg, *Moage Ltd v Jagelman* [2002] NSWSC 953 (Unreported, Gzell J, 15 November 2002) [12].

40 [1983] 1 AC 280.

41 (1995) 183 CLR 10, 32–3.

42 [2002] NSWSC 953 (Unreported, Gzell J, 15 November 2002), [12].

43 *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316, 342.

44 *Federal Court Rules 1979* (Cth) O 15, r 18.

ultimately settled by the Government of the United Kingdom undertaking to amend the law so that it would not be contempt to make use of a document after it had been read out in open court, unless the judge made an order restricting its disclosure to the parties to the proceeding.[45]

However, in Victoria there are no rules of court in relation to this question. The leading decision in Victoria on this issue is that of the Court of Appeal in *Cowell*. In reaching its decision, the Court of Appeal drew a distinction between 'original' documents that exist independently from, and generally prior to, the litigation, such as those obtained via discovery, and documents produced solely for the purposes of litigation, such as witness statements. The position in relation to documents such as witness statements is discussed further below. In relation to documents obtained by discovery, the Court held that the undertaking remained in force even if those documents had been tendered in evidence in open court. The Court stated that:

> [I]f it once attaches, the implied undertaking should ... endure despite the tender of the document in evidence against the party seeking protection. The fact that, despite the tender, it has passed into 'the public domain' may be a consideration when leave is sought to use the document otherwise than for the purposes of the litigation in which it was produced, but it does not per se gainsay the continuance of the undertaking.[46]

The Court of Appeal held that there was no logical or practical reason for the undertaking to cease merely because a document had gone into evidence. Instead, if a party or its legal advisors wished to be released from the undertaking, then they could apply to the court for release. In its reasons, the Court considered the passage from Mason CJ's decision in *Esso* quoted above. Their Honours considered that that this passage was only *obiter* and as such, was not a decision that they were bound to follow.[47]

The Court of Appeal was also critical of the concept of 'the public domain'.[48] The Court gave the example of a document that is exhibited to an affidavit that goes into evidence. Often that document is not referred to in court and is not disclosed to the public. How then can it be said that it has entered into 'the public domain'? The Court therefore held that 'original' documents remain subject to the undertaking, even where they have been admitted into evidence.

However, the Court of Appeal went on to say that once documents were incorporated into the transcript or the judgment of a court, the parties could make unrestricted use of the information from those documents to the extent that it was actually contained in the transcript or the judgment.[49] In such a situation, the information would be obtained from a source other than the documents the subject of the undertaking.

45 See, eg, *Bibby Bulk Carriers Ltd v Cansulex Ltd* [1989] QB 155, 158–9.

46 (2003) 8 VR 571, [35].

47 Ibid [31].

48 Ibid [36].

49 Ibid [28], [38].

It is important to note that the Court of Appeal also drew a distinction between the parties to the proceeding (and their lawyers) and the public at large. The Court held that the public is able to make what use it can of what is contained in the transcript or in the reasons for judgment, and additionally, what is said in court. This is because, unlike the parties, the public has not had the opportunity to read and properly digest the entire contents of the documents.[50]

The application of *Cowell* has been considered in decisions of the Supreme Court of Victoria[51] and the Supreme Court of South Australia.[52] In *Citicorp Life Insurance Ltd v Lubransky*,[53] Hargrave J considered an application for a declaration that documents which had been read in court and recorded in the transcript of an earlier proceeding, but which had not been admitted into evidence, were not subject to the undertaking. His Honour found that *Cowell* stands only for the limited proposition that the passing of a document into evidence does not relieve a person bound by the undertaking from their obligations in relation to that document. Hargrave J stated that the comments of the Court of Appeal in relation to the use that can be made of information about documents contained in a transcript or reasons for judgment were only *obiter*. His Honour therefore followed the decisions in *Harman*, *Sybron Corporation v Barclays Bank plc*[54] and *Hamersley Iron Pty Ltd v Lovell*[55] and held that as the documents were not admitted into evidence, they remained subject to the undertaking. *Lubransky* therefore appears to be a more restrictive decision even than *Cowell*, in that it suggests that no use may be made of a document, even where it appears in the transcript.

However, it may be that *Lubransky* does not further advance the law. The declarations sought in that proceeding were in relation to the documents themselves. No declaration was sought in relation to the use that could be made of the information about the documents that could be obtained from the transcript. Furthermore, the party seeking the declaration was a party to the earlier proceeding. In such circumstances, it may be argued that all *Lubransky* reiterates is the limited proposition that where a document is read in court, but is not admitted into evidence, then that document remains subject to the undertaking. Given such a reading, the comments of the Court of Appeal in *Cowell* in relation to the use that can be made of information contained in transcripts or judgments would likely remain very persuasive to any Victorian court confronted with that issue.

In *K and S Corporation Ltd v Number 1 Betting Shop Ltd*,[56] Debelle J considered whether documents that had been admitted into evidence in an earlier proceeding could be used when drafting a statement of claim in a later proceeding. Unlike

50 Ibid [36], [48].

51 *Citicorp Life Insurance Ltd v Lubransky* [2005] VSC 101 (Unreported, Hargrave J, 15 April 2005) ('*Lubransky*').

52 *K and S Corporation Ltd v Number 1 Betting Shop Ltd* [2005] SASC 228 (Unreported, Debelle J, 24 June 2005).

53 [2005] VSC 101 (Unreported, Hargrave J, 15 April 2005).

54 [1985] Ch 299.

55 (1998) 19 WAR 316.

56 [2005] SASC 228 (Unreported, Debelle J, 24 June 2005).

the Court of Appeal in *Cowell*, his Honour found the comments of Mason CJ in *Esso* to be 'very persuasive'.[57] Furthermore, Debelle J was critical of the Court of Appeal's approach to documents entering into 'the public domain' stating that such a phrase is not a term of art, but is one of a number of well understood expressions in relation to confidential information. His Honour declined to follow *Cowell* and instead followed *Esso*. At least in South Australia, *Cowell* is not the law.

It seems that in relation to documents tendered in evidence, *Cowell* is inconsistent with the course adopted in most other jurisdictions. It is therefore difficult to see how the view taken by the Court in relation to documents tendered can be sustained. However, unless *Cowell* is overruled or further cases clarify the situation, *Cowell* represents the Victorian position on the issue.

Overall, it appears that in Victoria, in respect of persons who were party to the original litigation, the undertaking will continue to apply to pre-existing documents even after they have been tendered in evidence until and unless those documents are contained in any transcript or judgment, such that leave would be needed in order to use those documents for another purpose.

VIII WHEN DOES THE UNDERTAKING CEASE TO HAVE EFFECT IN RELATION TO WITNESS STATEMENTS AND EXPERT REPORTS?

In Victoria, the Court of Appeal in *Cowell* drew a distinction between documents produced on discovery or pursuant to a subpoena, and documents prepared specifically for the purpose of the litigation, such as witness statements. The Court stated that the undertaking applies to witness statements, but indicated that the undertaking likely only subsists until the statements are adopted by a witness during the hearing and pass into evidence. This is because a witness statement is created for the sole purpose of going into evidence. Before this occurs, the statement needs to be protected from possible misuse. However, once the witness statement has passed into evidence, there is no misuse from which it needs to be protected, and therefore no need for the undertaking to continue to exist.[58]

The Court of Appeal in *Cowell* was not required to specifically deal with this issue as the witness statements there were used only as part of an interlocutory application and had not yet be relied upon at trial. It is unlikely though that a Victorian court would act in a manner inconsistent with these very persuasive comments.

As is discussed above, it is likely that expert reports are subject to the undertaking. Given the similarities between expert reports and witness statements – they are both produced for the purpose of giving evidence at the substantive trial of a proceeding – it is likely that the Court would treat them in a similar way. It is

57 Ibid [67].

58 (2003) 8 VR 571, [43].

therefore likely that once expert reports have been adopted and have passed into evidence they would also no longer be subject to the undertaking.

In the Federal Court, the effect of O 15, r 18 of the *Federal Court Rules* is that once a document has been read to or by the Court, or referred to, in open Court, in such terms as to disclose its contents, the undertaking ceases to have effect.

IX WHEN DOES THE UNDERTAKING CEASE TO HAVE EFFECT IN RELATION TO OTHER COURT DOCUMENTS?

It does not appear that Victorian courts have considered the issue as to when the undertaking ceases in relation to other court documents, such as lists of documents. From the authorities it is clear that the purpose of the undertaking is not to protect the confidentiality of documents, but rather to protect the court's processes, including allowing full and frank disclosure by the parties. In relation to documents created for the purpose of the proceeding, the purpose is to prevent the improper use of those documents before they have served the purpose for which they were created.

The purpose of a list of documents is to inform the other parties to the proceeding of the documents in that party's possession that are relevant to the proceeding. It is arguable that once the list of documents is provided to the other side it has served its purpose. Applying the reasoning of the Court of Appeal in *Cowell* in relation to witness statements, once this has occurred, there would be no misuse from which to protect the list of documents and therefore no need for the undertaking to continue.

If such reasoning is applicable, lists of documents from earlier proceedings would no longer be subject to the undertaking and therefore could be used in a later proceeding to assess the adequacy of the other party's discovery. However, as there are no decisions on this issue, it may be prudent to adopt a more conservative approach. The courts, and those in Victoria in particular, appear to be very protective of the undertaking and of documents produced during a proceeding under compulsion by the court.

X RELEASE FROM THE UNDERTAKING BY SEEKING LEAVE OF THE COURT

Parties may be released from the undertaking by applying for leave to the court which had the conduct of the proceeding in which the material that is the subject of the undertaking was provided.[59] This is a direct result of the undertaking being owed to that court, rather than to the parties themselves. Where such an

59 Matthew Groves, 'The implied undertaking restricting the use of material obtained during legal proceedings' (2003) 23 *Australian Bar Review* 314, 327-328.

application is made, a court will release the party from the undertaking where there are 'special circumstances' for doing so.[60]

Lord Oliver in *Crest Homes plc v Marks* did not explain what a court should consider when deciding whether or not 'special circumstances' exist. In *Springfield Nominees*, Wilcox J in relation to 'special circumstances':

> 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 to 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 the 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 contain personal data or commercially sensitive information), 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.[61]

These factors would need to be considered by a party if it wishes to make an application to be released from the undertaking in relation to some or all of the documents it received in an earlier proceeding. The significance of each of these factors would obviously depend on the specific documents to which access is being sought.

A *Court to which the Application for Leave is Made*

As set out above, the application for leave is made to the court to which the undertaking was given. In *Transfield*, Hollingworth J considered whether the Court has the power to release a party from an undertaking given to an arbitral tribunal that had since been disbanded. Her Honour noted that in *Holpitt Pty Ltd v Varimu Pty Ltd*,[62] Burchett J stated that the application ought to be made in the proceeding in which the undertaking was given,[63] however, in that proceeding his Honour heard the application as the parties gave their consent, and the earlier proceeding was also before the Federal Court.

60 *Crest Homes plc v Marks* [1987] AC 829. See also *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878, 895; *Ainsworth v Hanrahan* (1991) 25 NSWLR 155, 168; *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576, 578; (1992) 38 FCR 217, 225.

61 (1992) 38 FCR 217, 225.

62 (1991) 29 FCR 576.

63 See also *Playcorp Ltd v Tyco Industries Inc* [2000] VSC 440 (Unreported, Mandie J, 20 October 2000), [14]; *McCabe v British American Tobacco Australia Services Ltd (No 3)* [2002] VSC 150 (Unreported, Byrne J, 7 May 2002). Byrne J's decision on this issue was not the subject of the subsequent decision in *Cowell*.

In *Transfield*, it was argued that the Court, as part of its inherent jurisdiction, has the power to release a party from an implied undertaking given to a different court, tribunal or arbitrator. No authorities were cited in support of this proposition. Hollingworth J made the following comments in relation to that argument:

> In so far as I do have the power to release some or all of the disputed documents from the implied undertaking, I would regard it as a power to be exercised sparingly. That is because the very essence of the implied undertaking is that the undertaking is given to that court or tribunal which orders compulsory production of the documents. That body is fully acquainted with the circumstances in which the documents were produced, the use that has or may be made of them, and whether any harm may flow as a result of the use of the documents for other purposes. As a matter of policy, it strikes me as highly undesirable that one court should interfere with an undertaking given to another court or, in this case, tribunal.[64]

Her Honour declined to release Transfield from the undertaking due to the specific circumstances of that proceeding, including that at the time Transfield considered seeking a release from the undertaking, the arbitral tribunal was still in existence and so could have heard and determined that application.

XI RELEASE FROM THE UNDERTAKING BY CONSENT

The undertaking is viewed as an obligation that is owed to the court for the benefit of the parties, not one which is owed simply to the parties. Hence, it is the court which has the right to control the undertaking and can modify it or release a party from it.[65] Consequently, it can be inferred that the undertaking can only be modified or released by the court, and cannot be waived by the party that produced the documents or be modified or released by agreement between the parties.[66]

There have been some suggestions to the contrary, for example, Byrne J in *Dagi v Broken Hill Pty Co Ltd*.[67] However, the better view is likely to be that the undertaking cannot be waived or released by agreement between the parties, but that a court is unlikely to be requested to enforce the undertaking in those circumstances.

Rather than relying on an agreement between the parties to modify or release the undertaking, the party that produced the material could consider voluntarily providing a further copy of the material to the other party.[68] Such copies would then not be subject to the undertaking and could be used by the other party as it sees fit.

64 [2006] VSC 175 (Unreported, Hollingworth J, 4 December 2006), [125].

65 [1991] 3 All ER 878, 895.

66 (1998) 19 WAR 316, 321.

67 [1996] 2 VR 567, 572.

68 Groves, above n 59, 328.

XII CONCLUSION

In both the Victorian and Commonwealth courts, the starting point appears to be that all documents, including witness statements, expert reports and lists of documents, produced under compulsion in an earlier proceeding, including an arbitration, a tribunal hearing or a Royal Commission, are subject to the undertaking. Unless the undertaking has ceased to apply, it appears that the only use that parties can make of those documents is to review them to determine whether they wish to seek leave to use them in a later proceeding. Any other use of the documents, outside the proceeding in which they were produced, would be prima facie in breach of the undertaking.

Due to O 15, r 18 of the *Federal Court Rules*, when the undertaking ceases to have effect is clear in any proceeding before that Court. In Victoria, where there is no such rule, the effect on the undertaking of reading, tendering or relying upon a document depends on a range of factors, including the type of the document subject to the undertaking and the person to whose attention the information in the document is brought. This situation is obviously not ideal.

It may therefore be that legislative reform, such as the introduction of an order such as O 15, r 18, is required in Victoria to bring it into line with the Commonwealth, and more importantly, to clear up the very murky waters surrounding the question of when the undertaking ceases to apply.