## Mining arbitration

In a Western Australian case involving a mining magnate's family, the confidentiality obligation over arbitration documents obtained in discovery was conditionally released.

# Harman obligation released for documents from mining arbitration

Written by **RICHARD PIDGEON**

**The implied undertaking of confidentiality in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 not to use documents discovered in a proceeding for collateral purposes was released in *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd* [No 21] [2023] WASC 169, with some conditions.**

## Background

Court proceedings were on foot in the Western Australian Supreme Court before, during and following an arbitration. The proceedings involved the family of mining magnate Gina Rinehart and the family mining business. It is a long-running court saga. Co-defendants Bianca Hope Rinehart (**Bianca**) and John Langley Hancock (**John**), two of Gina Rinehart's children, sought to use documents obtained during the arbitration *for any purpose* connected with the conduct of their defences in the court proceedings, despite the parties to the court proceeding including some who had not taken part in the arbitration. *Wright Prospecting Pty Ltd (Wright) v Hancock Prospecting Pty Ltd* (Hancock) [No 21] was the application which dealt with this issue.[1]

By way of explanatory detail, in the case of *Harman v Secretary of State for the Home Department*, a solicitor employed by the English Council of Civil Liberties was also engaged by a prisoner to sue the

1 *Wright Prospecting Pty Ltd v Hancock Prospecting Pty* Ltd [No 21] [2023] WASC 169.

Home Department.[2] The solicitor was deemed to be in contempt of court for using a confidential document outside the proceedings. This particular document had been obtained during discovery, read in open court, but then released to a journalist. The journalist wrote a scathing article. This action by the solicitor was found to be a civil contempt of court as a breach of the solicitor's implied undertaking to only use a discovered document in the court proceeding itself. This notion is termed the *Harman* obligation and covers arbitrations as well.

In the course of the discovery process in the *Wright v Hancock* court proceedings, John and Bianca sought to discover two categories of documents which arose directly from the arbitration. In pre-hearing directions conferences Justice Smith first made interim discovery orders permitting only the parties to the arbitration (who were also parties to the court proceedings) to inspect the arbitral documents Bianca and John wished to rely on. The non-party to the arbitration (who was part of the court proceeding) was initially prevented from inspecting the documents. There was some overlap between the arbitration and the court proceeding, but not completely so.

Hancock opposed the application to use the documents in the court proceedings, primarily stating the arbitral tribunal needed to give its permission, not the Court. Hancock alternatively submitted that in any event the Court should not exercise any power to permit use of the documents without clear evidence that Bianca and John had been unable to get a release from the arbitral tribunal.

Hancock also submitted that to make a ruling on the application was to intervene in an arbitration in breach of section 5 of the Commercial Arbitration Act 2012 (WA) (Act), which holds:

> **5. Extent of court intervention (cf. Model Law Art 5)**
> In matters governed by this Act, no court must

2 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

> intervene except where so provided by this Act.

## Decision

Justice Smith rejected the objections to the release of the *Harman* obligation. For the proper administration of justice, the *Harman* obligation must yield to production orders made by the court.[3] A court other than the one to which the *Harman* obligation was owed can make the order permitting use of the subject documents. Justice Smith held:[4]

> However, where a curial order is made in another proceeding which has the effect to bring those confidential documents into the other proceeding, the order also has the effect of yielding or overriding the Harman obligation owed to the first court or tribunal in respect of those documents. At the same time the order creates a new Harman obligation on the parties to other proceeding, which obligation binds all of the parties who receive the documents, and others who receive or inspect the documents such as counsel, solicitors and experts.

The Court ruled that it was entitled to make directions in the court proceedings in respect of the documents without being deemed to be intervening. There could be no:[5]

> jurisdictional void, in which the court is prohibited from determining disputes between persons who are not subject to an arbitration agreement because of the potential that its determination may overlap with issues in a dispute between parties that are so subject.

The fact some parties to the court proceedings were not party to the arbitration was a key element to the ruling. From the earlier interim orders, it was clear similar issues emerged in both the court case and the arbitration, and use of the documents was needed where there was *likely contribution of the document to achieving justice in the second proceeding*.[6]

Leave was granted to Bianca and John to use the documents obtained in the arbitration in the court proceedings. However, Justice Smith did not quite grant the application as sought. The application was not granted *for any purpose connected with* the conduct of their defences, but rather for trial preparation only. From there, any documents sought to be tendered in evidence would be subject to the usual rules of admissibility, relevance and privilege. As a protective measure, no party, especially the interested non-party (Gina Rinehart) was prohibited from seeking confidentiality orders in relation to the documents.

## Conclusion

The confidentiality of documents disclosed in private arbitration is not absolute. The *Harman* obligation can yield to compulsive court orders in recognition of the *public interest in the promotion of the ascertainment of truth in litigation*.[7] From there, documents which are commercially sensitive can be protected by *an appropriate confidentiality regime*.[8]

## About the author

Richard Pidgeon works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with NZDRC and NZIAC. He is a Doctor of Law, and previously practiced as a general civil litigation barrister in Auckland.

3 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 33.

4 *Hearne v Street* (2009) 235 CLR 125 at [109]–[111] (Hayne, Haydon & Crennan JJ); applied in *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union (Ruling on Discovery)* [2015] VSC 352 at [21].

5 *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* [2020] WASCA 77, (2020) 55 WAR 435 [309]–[311], cited at *Wright Prospecting,* above n 1, at [111].

6 *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at 225, cited at *Wright Prospecting*, above n 1, at [172].

7 *Wright Prospecting,* above n 1, at [192].

8 *Wright Prospecting,* above n 1, at [191].