

Australian High Court Legal Professional Privilege is a Shield, not a Sword *Glencore International AG v Commissioner of Taxation*

Summary

On 14 August 2019, in [*Glencore International AG v Commissioner of Taxation*](#), all seven [7] justices of the High Court of Australia unanimously dismissed Glencore's proceedings to prevent the Commissioner making any use of documents obtained as a result of the "Paradise Papers" scandal.

Glencore had sought orders against the Commissioner, on the basis the documents were subject to Legal Professional Privilege (LPP).

Although the High Court agreed the documents were subject to LPP, their Honours held that LPP was not an actionable legal right and therefore could not form the basis for an injunction preventing the use of the documents by the Commissioner.

In slightly more detail, the doctrine of LPP provides that confidential communications, between a lawyer and client, must not be disclosed to any other person, without the permission of the client.

The documents in question were created by Appleby, a Bermuda law firm, for the sole or dominant purpose of providing Glencore with legal advice about a corporate restructure of the Glencore Group in Australia. They were among the so-called "Paradise Papers", which were stolen from Appleby and provided to the International Consortium of Investigative Journalists.

Glencore argued the documents were subject to LPP and asked the Commissioner to return them and provide an undertaking they would not be referred to or relied upon. The Commissioner refused to return the documents or provide such an undertaking.

Glencore therefore sought an injunction restraining the ATO from making any use of documents, and an order for the delivery up of the documents.

Main Points from High Court's judgement

The main points from the High Court's judgment can be summarized as follows:

1. The doctrine of LPP "enhances the administration of justice by facilitating the representation of clients by legal advisers" because:

[b]y keeping secret their communications, the client is encouraged to retain a lawyer and to make full and frank disclosure of all relevant circumstances to the lawyer.

2. Despite there being "no issue" about the relevant documents being subject to LPP, the documents:

... are in the possession of the [ATO] and may be used in connection with the exercise of their statutory powers unless [Glencore is] able to identify a juridical basis on which the Court can restrain that use.

3. As stated in *Daniels Corporation International Pty Ltd v ACCC*:

... the privilege is only an immunity from the exercise of powers which could otherwise compel the disclosure of privileged communications.

4. Glencore sought, however:

... to transform the nature of privilege from an immunity into an ill-defined cause of action which may be brought against anyone with respect to documents which may be in the public domain.

5. As a result, their Honours refused to compel the ATO to return documents, which were already in the public domain and no longer confidential. The doctrine of LPP did not provide Glencore with the basis for a remedy.

ATO Media Release

On the same day as the High Court delivered judgment, the ATO confirmed it would continue to use the “Paradise Papers” and other similar [data leaks](#), and stated:

This ruling ensures that the ATO will continue to be able to use information in its possession, and can make decisions based on all of the available facts. An offshore law firm is not a cloak of invisibility to hide offshore arrangements.

So what are the implications for taxpayers generally?

- There is no doubt taxpayers may still legitimately claim LPP in respect of confidential communications with their lawyers.
- However, if confidentiality is lost, and documents and other materials come into the possession of the ATO, there is a real risk the ATO may be able to use that information.
- While the High Court left open the possibility of granting an injunction where there has been a breach of confidential information (as “equity will restrain third parties if their conscience is relevantly affected”), taxpayers shouldn’t assume they will be able, of right, to recover documentation from the ATO.
- This raises the difficult issue of striking an appropriate balance between: (1) the interests of clients being able “to make full and frank disclosure of all relevant circumstances to the lawyer”; and (2) the ATO’s ability “to use all information available to ensure [taxpayers] pay the right amount of tax”.
- The *Glencore* decision comes at the same time as the [ATO is making clear](#) it is concerned taxpayers and businesses are claiming privilege unreasonably, and has stated it will seek resolution through the courts.
- The overriding message for taxpayers is that more care than ever needs to be taken to ensure:
 - confidential communications with lawyers are indeed subject to LPP—and it simply cannot be assumed that privilege applies;
 - legally privileged advice is stored securely; and
 - taxpayers do not inadvertently waive their privilege by conduct that is inconsistent with the confidentiality of the documents.

Contact details

If you have any queries regarding this alert, please contact:



Michael Butler Tax Partner
michael.butler@finlaysons.com.au
+61 8 8235 7407



Liyao Wang Lawyer
liyao.wang@finlaysons.com.au
+61 8 8235 7477