


Decision Impact Statement

Glencore International AG v Commissioner of Taxation

Court citation(s):	[2019] HCA 26
Venue:	High Court of Australia
Venue reference no:	S256/2018
Judges:	Kiefel CJ Bell J Gageler J Keane J Nettle J Gordon J Edelman JJ
Judgment date:	14 August 2019
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Impacted advice

 This decision has no impact on any related advice or guidance.

Précis

This Decision impact statement outlines the ATO's response to this case which concerns whether the common law of legal professional privilege provided the holder of that privilege with an actionable right to recover the privileged material from another person and to restrain the use of such material by that other person.

Brief summary of facts

The plaintiffs are companies within the global Glencore corporate group. The plaintiffs contended that they sought legal advice from Appleby (Bermuda) Limited (Appleby). Communications between the plaintiffs, their legal advisers and Appleby were stored on Appleby's electronic document management system. That system was accessed in 2016 and a large number of documents and records were downloaded. The downloaded documents have come to be referred to as the 'Paradise papers'. The existence and content of the Paradise papers received widespread media coverage. The plaintiffs contended that some or all of those documents are in the possession of the Commissioner.

The plaintiffs asserted legal professional privilege (LPP) in respect of the documents and requested that the Commissioner return them, destroy any copies, and give an undertaking not to make use of or rely upon knowledge derived from them.

That request was refused. The plaintiffs sought an injunction to restrain the Commissioner from making use of any of the documents or information contained in them, and an order for the return of the documents. The Commissioner demurred. This is a defence which denies that the plaintiff's pleaded facts disclose any cause of action. That is to say, a demurrer asserts that even if the facts pleaded are true, the plaintiff is not entitled to the relief the plaintiff seeks.

Because the case proceeded by way of demurrer it was not necessary for the Court to decide if any of the documents were actually privileged: for the purposes of the case it was simply assumed that the documents were privileged. The Commissioner did not concede that any of the documents were privileged.

Issues decided by the court

The first issue before the High Court was whether LPP provided the holder of privilege at common law with a positive, actionable right to recover privileged documents from another person and to restrain by injunction the use of knowledge derived from such material by that person, or whether it was, as the Commissioner argued, only an immunity.

In a unanimous decision, the High Court found that LPP is only an immunity (that is a defence) to the exercise of a power which would otherwise compel the disclosure of privileged communications.¹ It is not a source of positive rights.

The High Court did not agree that *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited*² stood for any principle that privilege confers a positive right which could justify relief by way of injunction based on the law of privilege. This case only concerned the case management powers of a court in respect of a proceeding before it; it is irrelevant where that is not the context.

The Court also observed that where injunctions have been granted in respect of the use of confidential documents that were also privileged documents; this was because the documents were confidential, not because they were privileged. (It should be noted that confidentiality is not a defence to the exercise of the Commissioner's statutory powers, and confidentiality was not a ground on which the plaintiffs sought an injunction in this matter.)

The second issue before the High Court was an alternative argument put by the Commissioner that section 166 of the *Income Tax Assessment Act 1936* (ITAA 1936) provided a defence against any common law action by a privilege holder to recover privileged communications.

The High Court found that given its decision in respect of the first issue there was no need to consider this alternative ground.³

¹ At [12].

² [2013] HCA 46.

³ At [14].

ATO view of decision

The High Court's decision reflects what the Commissioner has always understood to be the law.

The High Court did not deal with the possible operation of section 166 of the ITAA 1936. However, the Commissioner considers that the Full Federal Court's decision in *Commissioner of Taxation v Donoghue* [2015] FCAFC 183 correctly states the operation of that section.

The High Court made some general observations concerning equitable remedies available to restrain an apprehended breach of confidential information.⁴ Whilst it was not necessary for the Court to decide this point, it did state that there were difficulties in obtaining such relief in the present circumstances: the documents are in the public domain and there were no allegations concerning the Commissioner's conduct or knowledge.⁵ The High Court also observed that the fact that the material was in the public domain created particular problems where the Commissioner is the party that is to be restrained. The granting of such relief would require the Commissioner to assess entities to income tax on a basis which may be known to bear no real relationship to the true facts.⁶

In light of the above observations, even putting aside the operation of section 166 of the ITAA 1936 or other statutory provisions, we consider that equitable remedies for breach of confidentiality would not have been available against the Commissioner.

Since the decision confirmed the existing view of the Commissioner that LPP was irrelevant where documents or information is obtained otherwise than through the exercise of powers of compulsion, the Commissioner's practice in respect of the use of such documents or information is not affected by the decision.

The decision of the High Court also does not affect the right of a taxpayer to refuse to furnish documents that are privileged in response to the exercise of a power of compulsory disclosure.

Consequently, the decision has no implications for the practice of the Commissioner.

Implications for impacted advice or guidance

Nil

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	26 February 2020
Due date:	27 March 2020
Contact officer:	Contact officer details have been removed as the comments period has expired.

⁴ At [6].

⁵ At [7]. There was no indication that the Commissioner's conscience had been relevantly affected.

⁶ At [33].

Case references

Baker v Campbell [1983] HCA 39; 153 CLR 52; 14 ATR 713; 83 ATC 4606

Carter v Managing Partner, Northmore Hale Davy & Leake [1995] HCA 33; 183 CLR 121; 69 ALJR 572

Commissioner of Australian Federal Police v Propend Finance Pty Ltd [1997] HCA 3; 188 CLR 501; 35 ATR 130

Commissioner of Taxation v Donoghue [2015] FCAFC 183; 237 FCR 316

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited [2013] HCA 46; 88 ALJR 76; 303 ALR 199

Grant v Downs [1976] HCA 63; 135 CLR 674; 51 ALJR 198; 11 ALR 577

Lord Ashburton v Pape [1913] 2 Ch 469

The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49; 213 CLR 543; 192 ALR 561

Three Rivers District Council v Governor and Company of the Bank of England [No 6] [2005] 1 AC 610; [2004] WR 1274

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