

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY



NO S 256 OF 2018

**BETWEEN:**

**GLENCORE INTERNATIONAL AG**

First Plaintiff

**GLENCORE INVESTMENT PTY LTD**

Second Plaintiff

**GLENCORE AUSTRALIA HOLDINGS PTY LTD**

Third Plaintiff

**GLENCORE INVESTMENT HOLDINGS AUSTRALIA LTD**

Fourth Plaintiff

**AND:**

**COMMISSIONER OF TAXATION OF THE**

**COMMONWEALTH OF AUSTRALIA**

First Defendant

**NEIL OLESEN**

**SECOND COMMISSIONER OF TAXATION**

Second Defendant

**MARK KONZA**

**DEPUTY COMMISSIONER OF TAXATION**

Third Defendant

## OUTLINE OF ORAL SUBMISSIONS OF THE DEFENDANTS

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## PART I INTERNET PUBLICATION

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1. This outline of oral submissions is in a form suitable for publication on the Internet.

## PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

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### I. NO CAUSE OF ACTION FOUNDED IN LEGAL PROFESSIONAL PRIVILEGE

2. The boundaries of legal professional privilege (**LPP**) have been carefully drawn over a long period, and reflect a balance between competing public interests. The plaintiffs' invitation to this Court to give LPP an expanded and hitherto unrecognised operation as a cause of action is premised on the incorrect assumption that any development that would advance the public interest served by LPP should occur: cf *Grant v Downs* (1976) 135 CLR 674 at 685 (Stephen, Mason and Murphy JJ) (**JBA V3:T30**).

3. It is settled law that LPP confers immunity from the compulsory production of privileged documents, and nothing more. In particular, LPP does not, and has never, conferred upon a privilege-holder an entitlement to injunctive relief to restrain the use of privileged documents. LPP was recognised as a “substantive right” to distinguish it from a rule of evidence, rather than to reflect any change in its character as an immunity:

- 3.1. *Commissioner of the AFP v Propend Finance Ltd* (1997) 188 CLR 501 at 565-566 (Gummow J) (**JBA V2:T15**)

- 3.2. *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 552 at [9]-[11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [44] (McHugh J) (**JBA V2:T17**)

- 3.3. *ACC v Stoddart* (2011) 244 CLR 554 at [180]-[182], [186], [232] (Crennan, Kiefel and Bell JJ) (**JBA V1:T6**).

4. Intermediate courts in Australia have consistently recognised that LPP does not found a cause of action to restrain the use or disclosure of privileged documents:

- 4.1. *Cowell v British American Tobacco* [2007] VSCA 301 at [15]-[17], [32]-[33] (Carren CJ, Chernov and Nettle JJA) (**JBA V2:T16**)

4.2. *AWB Ltd v ASIC* (2008) 216 FCR 57 at [17], [29], [34] (Gordon J) (**JBA V1:T8**)

4.3. *FCT v Donoghue* (2015) 237 FCR 316 at [52]-[53], [57]-[58], [62], [68], [93] (Kenny and Perram JJ) (**JBA V3:T26**).

5. The plaintiffs have not established that there is any deficiency in the existing law that requires LPP to be expanded to create a new cause of action.

5.1. In many circumstances a person who wishes to recover privileged documents can bring a claim in equity for breach of confidence. The fact that the plaintiffs have not, or for specific reasons could not have, brought such a claim should not distort the development of common law principles.

5.2. A court may use its supervisory powers to compel the return of privileged documents disclosed inadvertently: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at [7], [58] (French CJ, Kiefel, Bell, Gageler and Keane JJ) (**JBA V2:T24**).

5.3. The laws of evidence may operate to prevent the admission of privileged documents either generally, or where obtained by improper means: e.g. *Evidence Act 1995* (Cth), s 118, s 119, s 138; cf *Calcraft v Guest* [1898] 1 QB 759 (**JBA V1:T13**).

6. In comparable overseas jurisdictions, LPP is similarly recognised only as an immunity from compulsory production, with any right to recover privileged documents being grounded in equity:

6.1. *B v Auckland District Law Society* [2003] 2 AC 736 at [66]-[70] (**JBA V1:T9**)

6.2. *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at [67]-[74], [89] (**JBA V3:T33**)

6.3. *Lachaux v Independent Print Ltd & Evening Standard* [2015] EWHC 3677 at [17]-[18], [24], [28]-[32] (**JBA V3:T35**)

6.4. *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [22], [24] (**JBA V5:T52**).

## II. EFFECT OF SECTION 166 OF THE *INCOME TAX ASSESSMENT ACT 1936*

7. Alternatively if (contrary to the defendants' submissions) LPP confers an actionable right to restrain the use of privileged materials, any such right is subject to s 166 of the *Income Tax Assessment Act 1936* (Cth). The duty imposed on the Commissioner by s 166 cannot be read conformably with any claim to the return of the documents.

7.1. Section 166 embodies the interest of the Australian community in the making of assessments of the correct amount of tax imposed by the revenue law, based on the most accurate information available. The interest in taxpayers paying, and the Commissioner assessing taxpayers for, the correct amount of tax would be jeopardised if the Commissioner was required to base an assessment on less than all the relevant information that he or she possessed: *Denlay v Commissioner of Taxation* (2011) 193 FCR 412 at [81]-[82] (Keane CJ, Dowsett and Reeves JJ) (**JBA V2:T18**).

7.2. Section 166 imposes a statutory duty on the Commissioner to make an assessment by reference to all information in his or her possession. The duty arises even in respect of material the Commissioner knows to be privileged or subject to a claim for breach of confidence: *FCT v Donoghue* (2015) 237 FCR 316 at [73]-[76], [77], [86] (**JBA V3:T26**).

8. The principle of legality does not alter this operation of s 166. That principle is directed at rights which are fundamental in character and which are clearly recognised as such: *ACC v Stoddart* (2011) 244 CLR 554 at 622 [182] (Crennan, Kiefel and Bell JJ) (**JBA V1:T6**). The plaintiffs seek to recast LPP so radically that the principle cannot, in its asserted expanded operation, be said to have formed any part of a 'working hypothesis' between Parliament and the courts:

8.1. *Bropho v Western Australia* (1990) 171 CLR 1 at 22-23

8.2. *Baker v Campbell* (1983) 153 CLR 52 at 68-69, 106-107; cf 96 (**JBA V1:T10**).

Date: 17 April 2019

**STEPHEN DONAGHUE**

**MICHAEL O'MEARA**