

IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY



No. S256 of 2018

BETWEEN:

Glencore International AG
 First Plaintiff

Glencore Investment Pty Ltd
 Second Plaintiff

Glencore Australia Holdings Pty Ltd
 Third Plaintiff

10 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

PLAINTIFFS' OUTLINE OF ORAL ARGUMENT

20 Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

2. *The question stated:* Does the law of legal professional privilege (**LPP**) operate merely defensively as a means for resisting disclosure, or does it also provide a positive right entitling the holder of the privilege to claim a remedy, specifically an injunction restraining use of privileged material and requiring delivery up of privileged documents and copies thereof?
3. *LPP as a fundamental common law right:* In *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 (JBA 2/17), a majority of the Court held that LPP is a “*rule of substantive law*” (552 [9]) and an “*important common law right*” (553 [11]); PS [13]. While LPP provided, on the facts of *Daniels*, an “*important common law immunity*” (553 [11]), its potential scope, more generally, was not so confined: PS [24]. The right conferred by LPP is so firmly entrenched in the law that it protects communications that

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Filed on behalf of the Plaintiffs

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might establish the innocence of a person charged with a criminal offence: *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 (JBA 1/14) at 128, 133-134, 166-167; PS [14].

4. **Rationale for LPP:** The modern rationale for LPP, as articulated in *Baker v Campbell* (1983) 153 CLR 52 (JBA 1/10) at 89, 95, 115-116 and 128, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 (JBA 1/5) at 487, 490 and *Carter* at 127, 132, 145, 160-161, is the furtherance of the administration of justice and the application of the rule of law through the fostering of trust and candour in the relationship between lawyer and client: PS [27]-[33]. The superseded historical foundations of LPP, related to testimonial compulsion and lawyers' duties of honour, neither justify nor delimit its operation: *Baker* at 85, 93-95, 113-114, 126-128; PSR [2].
5. **Authority of this Court:** There is no decision of this Court establishing that LPP operates *only* as an immunity from an obligation to produce documents or give evidence arising under court processes or by way of statutory compulsion. That specific question did not arise in *Baker, Commissioner of AFP v Propend Finance Pty Ltd* (1997) 188 CLR 501 (JBA 2/15), *Daniels* or any other case before this Court: PSR [6].
6. **Problematic approach of intermediate appellate courts:** In *FCT v Donoghue* (2015) 237 FCR 316 (JBA 3/26), Kenny and Perram JJ held at 329 [52] that LPP operates as an immunity from the exercise of powers requiring compulsory disclosure but is not a rule of law conferring individual rights, the breach of which may be actionable. Their Honours stated at 331 [57] that where privileged documents are disclosed to third parties, the right to restrain their use or to compel their return is grounded in equity (and its principles concerning breaches of confidence) rather than the common law of LPP. This approach to LPP, also observed in decisions of State appellate courts, is overly narrow and logically inconsistent: PS [21]-[22]. It rests on a reliance upon:
 - a. the *Calcraft v Guest* [1898] 1 QB 759 (JBA 1/13) and *Lord Ashburton v Pape* [1913] 2 Ch 469 (JBA 3/38) line of authority, which is conflicting and outdated and reconcilable only at a technical level in a manner recognised as unsatisfactory in *Goddard v Nationwide Building Society* [1987] QB 670 (JBA 3/28) at 683-4: PS [2], [12], [17]-[19], PSR [5], [7]; and
 - b. a misinterpretation of the holdings of this Court in *Baker* and *Daniels*: PS [23]-[24].
7. **A principled approach to LPP:** The description by this Court of LPP as a "right" is

deliberate and significant: PSR [4]. In determining the incidents of the right inherent in LPP, including the resulting remedies, the Court should seek to ensure the coherence of the common law: PSR [4]. Having regard to the rationale for LPP, it is doctrinally unsound for LPP to be recognised as a fundamental and substantive legal right but for confidentiality (though not LPP) to provide the only basis (apart from the case management principles discussed in *Expense Reduction v Armstrong* (2013) 250 CLR 303 (JBA 2/24)) for recovering privileged communications: PS [38]-[40].

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8. To facilitate the recognised public interest in clients being able to communicate freely and frankly with their lawyers, the general law should provide an effective remedy where privileged material is compromised in circumstances not amounting to waiver, *because* it is subject to LPP: PS [15], [21], [35]. Common law courts and jurists, including Heydon (JBA 5/57) and Zuckerman (JBA 5/59), have noted the undesirability of the secure sphere of lawyer/client communications being prejudiced by “*eavesdroppers and thieves*”, “*accident or intentional incursion*”: PS [36].
9. Neither the *Ashburton* principle nor the discretion to exclude evidence obtained by impropriety are responsive to the interests that LPP is intended to protect: PSR [5].
10. Recognising that LPP confers an entitlement to the injunction sought by the plaintiffs does not involve any radical reformation of the common law, rather incremental development of principle, in a manner similar to past decisions of this Court on LPP: PS [26], PSR [8].
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11. ***Section 166 of the Income Tax Assessment Act 1936 does not abrogate LPP:*** Section 166, read in context, is not expressed with the irresistible clarity required to override LPP or to shelter the Commissioner from a claim seeking to restrain his use of privileged documents in raising an assessment: PS [44]-[46]. The result in *Baker* makes plain that the section must be construed in the light of the common law of LPP, as declared by this Court in the present case, and not as it existed at the date the provision was enacted: PSR [9].

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