

LEVEL

TWENTY
SEVEN

C H A M B E R S

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Trouble in Paradise

Protecting privilege after Glencore

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>> *Glencore v The Commissioner of Taxation* [2019] HCA 26

- LPP is not a right
- LPP is a “shield”, rather than a “sword”
- Equity *will* restrain an apprehended breach of confidential information and will do so with respect to documents which are the subject of LPP and which are confidential
- Glencore did not run an action for breach of confidence.
The Court observed it may have had difficulties in doing so because:
 - > Glencore documents were in the public domain
 - > no allegation made about the Commissioner's conduct or knowledge

>> Risk

Internal threats

- Disgruntled employees
- Careless employees
- Inadequate data management systems

External threats

- Hackers
- Journalists / investigators

>> Regulatory activity

- Regulators cannot compel the production of privileged communications: *Daniels Corporation v ACCC* (2002) 213 CLR 543
- Sometimes advantageous to disclose privileged documents, for example as a condition of cooperative arrangements or deferred prosecution agreements
- Whether limited disclosure of LPP documents to a regulator will amount to a waiver will turn on the facts and circumstances of a case: *Cantour v Audi* [2016] FCA 3191
- Processes used by regulators to obtain data
 - > Anton Pillar orders
 - > Warrants



Pre-data breach / disclosure

IT tips

- Australian Cyber-Security Centre- Australian Signals Directorate
- Password v encryption
- Strict protocols regarding storage of privileged and confidential information

Practice tips

- Watermark all documents
- Limit reproduction of sensitive documents - consider circulating hard copies
- Disclosure of privileged documents to third parties such as regulators should be subject to a limited waiver agreement

>> Post-data breach / disclosure

- Notify forensic IT specialist
 - > Difficult to force removal of documents from websites hosted outside of the jurisdiction
 - > Difficult to identify who has accessed and how many times

>> Claim for return / restraint

- Will not be based on claim for LPP
- Will be based on breach of confidence
 - > Person to be restrained must have obligation of conscience arising out of the way in which the information was obtained
 - > Communications must have retained their confidential character
 - Publication on the internet may not be fatal to claim based on confidentiality
 - Not possible for IT specialist to ascertain how many times relevant information has been accessed on the internet
 - Limited disclosure does not waive privilege

>> Limited disclosure does not waive confidentiality

- Confidentiality not an ‘absolute concept’
- Limited disclosure may be consistent with maintaining an action for breach of confidence:
 - > *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94
 - > *Brand v Monks* [2009] NSWSC 1454

>> Admissibility of hacked documents in Court proceedings different question

- *Commonwealth Evidence Act*
 - > Sections 118, 119, 138
- *Bunning v Cross* (1978) 141 CLR 54; [1978] HCA 22
 - > Discretion to exclude evidence improperly obtained can rightly be exercised where unfairness to defendant outweighs public interest in enforcement of the law and obtaining evidence to aid that enforcement
- Voir dire
- Statutory provisions affecting privilege

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