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

WRITTEN SUBMISSIONS OF THE DEFENDANTS

Filed on behalf of the Defendants by:

The Australian Government Solicitor
Level 42 MLC Centre
19 Martin Place
Sydney NSW 2000
DX 444 Sydney

Date of this document: 8 February 2019
Contact: Kristy Alexander
File ref: 18008605
Telephone: 02 9581 7640
Facsimile: 02 9581 7732
E-mail: Kristy.Alexander@ags.gov.au

Part I CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II ISSUES

2. The issues on the hearing of this demurrer are:

   2.1. whether the Plaintiffs' allegation that the Defendants are in possession of documents to which legal professional privilege (**LPP**) attaches of itself founds a cause of action entitling the Plaintiffs to orders restraining the use, and requiring the delivery up, of the documents; and

   2.2. if so, whether the Defendants' right and obligation to retain and use the documents under and for the purposes in s166 of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**) is qualified by that cause of action.

Part III SECTION 78B NOTICES

3. Notices under s78B of the *Judiciary Act 1903* (Cth) have been issued by the Plaintiffs (Demurrer Book (**DB**) 92). No further notices are necessary.

Part IV FACTS

4. The relevant facts for the hearing of this demurrer are those pleaded in the Amended Statement of Claim (**ASoC**) (DB 82–87).

Part V ARGUMENT

Introduction and overview

5. The Plaintiffs (collectively, **Glencore**) seek injunctive relief restraining the use, and orders requiring the delivery up, of certain documents alleged to be in the possession of the Defendants (collectively, **the Commissioner**). That relief is claimed solely on the basis that LPP is alleged to (and therefore for the purposes of the demurrer must be assumed to) attach to the Documents.

6. Glencore makes no claim to recover the documents based on equitable principles concerning breach of confidence, and thereby deliberately eschews the cause of action

that is ordinarily invoked where a party seeks to recover privileged documents from a third party. Glencore has presumably taken that course because it recognizes that any claim against the Commissioner based on confidence would face difficulty, by reason of s 166 of the 1936 Act. However, Glencore's attempt to overcome that obstacle by seeking injunctive relief based on LPP does not warrant the wholesale law reform upon which Glencore invites the Court to embark.

7. The authoritative formulation of LPP by this Court establishes that LPP is, and is only, an immunity from an obligation arising under court processes or by way of statutory compulsion to produce documents, provide information or give evidence. It is not, and has never been, a foundation for a cause of action entitling the privilege holder to injunctive relief restraining the use, and requiring the delivery up, of documents in the possession of another in cases where those documents have not been the subject of any compulsory process. Such relief may be obtained only by reason of equity's protection of confidential information. This state of the law was recognized in England over 100 years ago and, as is developed below, has been consistently applied in Australia and by courts in other major common law jurisdictions.

8. Glencore invites the Court to change the law to what it asserts it "ought" to be. It does not seek incremental development of the common law, but radical law reform. If accepted, its invitation would mean that, for the first time, LPP would become not an immunity from compulsory process, but a positive right capable of founding a cause of action entitling the privilege holder to injunctive relief.

9. Glencore's invitation to change the law in this way should be rejected. Such a development would be unsupported by history, principle and authority. Further, acceptance of Glencore's submissions is not required in order to preserve the public interests protected by LPP, which are adequately protected by equitable principles, and by developments in the law that limit the admissibility of privileged material that is improperly obtained. Finally, acceptance of Glencore's submissions would require the Court to engage in a process of innovation that goes beyond its proper role in developing the common law. For all those reasons, the Commissioner's demurrer should be upheld, and Glencore's claim should be dismissed with costs.

Legal professional privilege is an immunity, not a cause of action

10. In *Daniels Corporation International Pty Ltd v ACCC* (***Daniels***),[1] Gleeson CJ, Gaudron, Gummow and Hayne JJ authoritatively stated the nature and content of LPP according to the common law of Australia. Legal professional privilege, they stated, is a "rule of substantive law which may be availed of to resist the giving of information or the production of documents" which would reveal communications made for the dominant purpose of obtaining legal advice or representation in legal proceedings (at [9]). It applies not only in the context of discovery and inspection and the giving of evidence in judicial proceedings, but also, in the absence of provision to the contrary, to statutory obligations to give evidence or produce documents (at [10]). It is "not merely a rule of substantive law. It is an important common law right, *or perhaps more accurately, an immunity*" (at [11], emphasis added). Consistently with the views of the plurality, McHugh J observed that LPP "describes a person's *immunity from compulsion* to produce documents that evidences confidential communication about legal matters made between lawyer and client or between a lawyer and third party for the benefit of the client" (at [44], emphasis added).

11. Contrary to the Plaintiffs' Submissions (**PS**), the explanation in *Daniels* of the nature of LPP as a basis to resist compulsory production of information or documents was not tentative, qualified or incomplete: cf PS [24]. To the contrary, the Court's language was unequivocal. Further, it was wholly consistent with Gummow J's exposition in *Commissioner, AFP v Propend Finance Ltd*[2] (***Propend***) of the character of LPP as "a bar to compulsory process for the obtaining of evidence" and not "a rule of law conferring individual rights, breach of which gives rise to an action on the case for damages, or an apprehended or continued breach may be restrained by injunction".[3] It was also wholly consistent with *Baker v Campbell*[4] (***Baker***), where all members of the Court identified LPP as a rule governing the obligation to *produce* documents or

---

1 (2002) 213 CLR 543.

2 (1997) 188 CLR 501 at 565-565.

3 (1997) 188 CLR 501 at 565, 570, see further Gaudron J at 537, fn 164.

4 (1983) 153 CLR 52.

information, and not as controlling the use of documents or information in the hands of another.[5]

12. The character of LPP as an immunity from compulsory process – as opposed to a cause of action entitling the privilege holder to restrain the use, and to require the delivery up, of information and documents – has been recognised by Australian intermediate appellate courts including the Full Court of the Supreme Court of South Australia,[6] the Victorian Court of Appeal,[7] and the New South Wales Court of Appeal.[8] Most recently, it was recognized by a Full Court of the Federal Court in *Donoghue v Federal Commissioner of Taxation* (***Donoghue***).[9] Given all the authorities cited above, the character of LPP as an immunity from compulsory production of documents or information, and not a cause of action sounding in damages or injunctive relief, reflects the settled law of Australia.

13. The same position has been reached in other common law jurisdictions. Thus, in *Three Rivers DC v Bank of England (No 6)*,[10] Lord Scott observed that LPP "gives the person entitled to it the right to decline to disclose or allow to be disclosed the confidential communication or document in question".[11] Similarly, the Privy Council in *B v Auckland District Law Society*,[12] on appeal from the New Zealand Court of Appeal,

---

5 *Baker v Campbell* (1983) 153 CLR 52 at 67-68 and 70 (Gibbs CJ), 80 (Mason J), 86 and 90 (Murphy J), 92 (Wilson J), 101 (Brennan J), 111-112 and 115 (Deane J), 127, 129 and 131 (Dawson J). See also *Attorney General (NT) v Maurice* (1986) 161 CLR 475 at 487 (Mason and Brennan JJ) and 490 (Deane J).

6 *Trevorrow v South Australia (No 4)* (2006) 94 SASR 64 at [11]-[16] (Doyle CJ), at [78]-[79] (Debelle J) at [172]-[173] (White J).

7 *Cowell v British American Tobacco Australia Services* [2007] VSCA 301 at [32]-[34] (Warren CJ, Chernov and Nettle JJA) and again in *ASIC v Lindberg* (2009) 25 VR 398 (***ASIC v Lindberg***) at [43]-[48] and [51] (Mandie JA, Warren CJ and Neave JJA agreeing).

8 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Ltd* [2012] NSWCA 430; 295 ALR 348 at [69]-[83] (Campbell JA; Macfarlan JA and Sackville AJA agreeing). An appeal to this Court was allowed on other grounds, but this aspect of the Court of Appeal's reasoning was not disturbed: see *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management Pty Ltd* (2013) 250 CLR 303.

9 (2015) 237 FCR 316 at [57]-[59] (Kenny and Perram JJ; Davies J agreeing at [111]). See also *AWB Ltd v ASIC* (2008) 216 FCR 577 at [34] (***AWB v ASIC***) (Gordon J); *Carey v Korda & Winterbottom (No 2)* [2011] WASC 220 at [59] (Edelman J).

10 [2005] 1 AC at [26].

11 In relation to the United Kingdom, see further: *Butler v Board of Trade* [1971] 1 Ch 680 at 690 (Goff J); *R v Tompkins* (1977) 67 Cr App Reps 181 at 184; *Webster v James Chapman & Co* [1989] 3 All ER 939 at 943–944 (Scott J); *R v Governor of Pentonville Prison; Ex parte* [1990] 1 WLR 277 at 309-310; *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at [67]-[74] (Lawrence Collins J).

12 [2003] 2 AC 736 at [66]-[71].

accepted that "privilege is a right to resist compulsory disclosure of information" (at [67]) and that a claim for the recovery of privileged documents voluntarily supplied to a third party must arise from other common law or equitable foundations. Likewise, in Canada[13] and in Singapore,[14] LPP is characterized as a basis to resist compulsory disclosure, and not as a cause of action affording injunctive or other relief.

Legal professional privilege as a common law "right"

14. At the centre of Glencore's argument is the contention that the recognition by this Court of LPP as a common law "right" – without an attendant recognition of a capacity to obtain injunctive relief to restrain use of, and require the delivery up of, information and documents in the possession of a third party – has left the law in a defective state (PS [15]-[16], [19], [21], [24], [35] and [43]). This contention is flawed, for both historical reasons and for reasons of legal theory.

15. As to history, both Wigmore and Holdsworth traced the development of LPP to the 16th century, as a response to the introduction by the *Statute on Perjury 1592* (5 Eliz. 1 c. 9) of a capacity to compel the testimony of competent witnesses and as connected with the development of the privilege against self-incrimination.[15] This view of the history of LPP has received approval in this Court and in the House of Lords.[16] While more recent scholarship suggests the link between the recognition of LPP and the *Statute on Perjury* may not have been so direct, it remains clear that the historical context for the development of LPP was the attempted compulsion of lawyers' testimony.[17] That remained the focus when LPP was extended in the 19th century to protect from disclosure communications between a lawyer and client in a professional capacity whether by testimonial compulsion or other compulsory process (eg discovery,

---

[13] *Descoteaux v Mierzwinski* [1982] 1 SCR 860 at 875.

[14] *Mykytowych, Pamela Jane v VIP Hotel* [2016] 4 SLR 829 at [57]-[67]; *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [24].

[15] Wigmore, *Evidence in Trials at Common Law* (McNaughton rev. 1961) (**Wigmore**), Vol 8, at 542-543, §2290; Holdsworth, *A History of English Law* (3rd Ed, 1944), Vol 9, 201-202.

[16] *Baker* at 60 (Gibbs CJ), 93-94 (Wilson J), 113-114 (Deane J), 126-127 (Dawson J); *R v Derby Magistrates Court; Ex parte B* [1996] 1 AC 487 at 504 (Lord Taylor CJ).

[17] Auburn, *Legal Professional Privilege: Law and Theory* (2000) at 2-8; Brereton, "Legal Professional Privilege" in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law*, Vol II (2013) at 128-133 (**Brereton**).

interrogatories and subpoenas), whether directed to the lawyer or the client.[18] Similarly, it remained the focus when, in response to the growth in the 20th century of statutory executive powers to compel the production of documents and the provision of information, LPP was recognized as qualifying those powers. It was that last development that led to the characterization of LPP as a substantive right, by which the courts meant that LPP was not limited to curial procedures. For example, in *Baker*,[19] this Court held that the recognition of the application of LPP to disclosure compelled by statutory powers involved recognition of LPP as a substantive common law principle and not a mere rule of evidence or curial procedure.[20] The course of authority in England followed a similar path.[21]

10 16. Given the above, there is nothing in the history of the development of LPP that would support the proposition that it has ever been anything other than an immunity from compulsory production. That tells against Glencore's contention that LPP should now be recognised as conferring a cause of action sounding in injunctive relief, because the history reveals that the recognition of LPP as a substantive right was directed to extending it to compulsory processes outside of court proceedings, rather than to changing its essential character as an immunity. In substance, Glencore commits the fallacy identified by Holmes J in *Guy v Donald*;[22] namely, of applying a name to a matter or thing (ie calling LPP a "right") and then deducing consequences from the application of the name, without an analysis of the content of the matter or thing or a
20 consideration of why the name was applied in the first place.

17. Glencore's argument is also flawed as a matter of legal theory. As Hohfeld demonstrated, the word "right" is ambiguous and can be used to describe any one of a

---

[18] See in Chancery, *Walker v Wildman* (1821) 6 Madd 47; 56 ER 1007; *Hughes v Biddulph* (1827) 4 Russ 190; 38 ER 777; *Pearce v Pearce* (1846) 1 De G & Sm 12; 63 ER 950; *Minet v Morgan* (1873) LR 8 Ch App 361. See at common law, *Coleman v Trueman* (1858) 3 H&N 871; 157 ER 720; *Chartered Bank of India, Australia and China v Rich* (1863) 4 B&S 73; 122 ER 387. See generally, Brereton at 144-156.

[19] *Baker* at 90 (Murphy J), 96 (Wilson J), 115-116 (Deane J), 129 and 131-132 (Dawson J).

[20] *Baker* at 85 (Murphy J) and 116-117 (Deane J); *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 (***Carter***) at 161 (McHugh J); *Propend* at 540.8 (Gaudron J), 552 (McHugh J), 564 (Gummow J), 582-583 (Kirby J); *Daniels* at [9]-[11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [43]-[44] (McHugh J), [85]-
30 [87] (Kirby J), [134]-[135] (Callinan J).

[21] R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563 at [30]-[31] (Lord Hoffmann).

[22] 203 US 399 at 406 (1906).

number of legal interests and relations and their jural correlatives.[23] At one end of the spectrum Hohfeld identified a "(claim) right", with a correlative duty resting in identified individuals (a right *in personam*) or in persons generally (a right *in rem*) protecting that "(claim) right" from invasion. At another point in the spectrum of legal interests commonly described as "rights", Hohfeld identified a "privilege", being the negation of a duty, and its jural correlative of "no (claim) right". The privilege against self-incrimination, being the negation of a duty to testify, was identified as an example of this species of "right", and both history and authority suggest that LPP should be characterized in the same way.[24] Finally, Hohfeld identified as a further species of "right" an "immunity", being a freedom from a legal power or control, with a jural correlative of "disability" (being the negation of a "power").[25]

18. Hohfeld's analysis is instructive for three reasons. *First*, it enables the more accurate identification of the nature of the legal relations encompassed by LPP, as revealed by authority and history, than is disclosed by mere invocation of the label "right". Indeed, it underpins the statement of the plurality in *Daniels* (at [11]), that LPP is perhaps "more accurately" described as "an important common law immunity", rather than as a "right". As an "immunity", LPP is the negation of a "power", being a power to require the production of documents or provision of information. Alternatively, as a "privilege", LPP is the negation of a "(claim) right", being the right to the provision of information or documents arising under curial processes or statutory powers. Both of these descriptions conform with the history of LPP and its authoritative formulations discussed above.

19. *Second*, Hohfeld's analysis exposes as fallacious Glencore's argument to the effect that the application of the label "right" to LPP necessarily carries with it the imposition of a correlative duty enforceable by injunction on other persons. It likewise exposes the asserted "contradiction" in the reasoning of the Full Court in *Donoghue* as illusory

---

[23] Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale LJ* 16 and (1917) 26 *Yale LJ* 710. See also *Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 664 at [19] (Gummow J).

[24] The historical connection between LPP and the privilege against self-incrimination observed by Wigmore and Holdsworth has been noted above.

[25] For examples of Hohfeldian analysis, see: *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537 at 584 (Windeyer J); *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at [31] (McHugh J).

(cf PS [21]), for there is no contradiction in accepting that LPP is a common law right, yet denying it founds a cause of action sounding in injunctive relief.

20. *Third*, Hohfeld's analysis brings into stark relief the radical nature of the reformation of the common law that Glencore seeks from this Court. Glencore asks this Court to amend the fundamental legal conceptions underlying LPP so that LPP is no longer a "privilege" or "immunity" (with the correlatives "no (claim) right" or "disability") but is henceforth a "(claim) right", giving rise to a correlative duty on any person in possession of privileged documents to not make use of, and to deliver up, privileged information and documents. Moreover, the duty which Glencore asserts this Court should create is one which arises, not by reference to any pre-existing relationship, but in persons generally. In other words, Glencore asks that this Court declare LPP a "(claim) right" *in rem* and thus treat LPP as, or as akin to, a species of property.[26]

Equity's protection of confidential information

21. While the juridical basis of LPP is an "immunity" or "privilege", a privilege holder faced with threatened use of their confidential information by another is not without remedy. That is obviously so with respect to a lawyer's threatened or continuing misuse of privileged information, which can be restrained by injunction.[27] However, as Gaudron J pointed out in *Johns v Australian Securities Commission*[28] (***Johns***), equity's protection of confidential information extends to third parties to the confidential relationship if the third party's conscience is relevantly affected so as to come under a duty with respect to the information involved. As Gaudron J went on to observe, the conscience of an innocent recipient of confidential information can be relevantly affected once he or she learns the information was obtained in circumstances involving a breach of confidence.[29] This was the jurisdiction exercised by the Court of Appeal in

---

[26] Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 *Yale Law Journal* 710 at 718, 740-745.

[27] *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 at 835 (Cozens-Hardy MR), 839 (Fletcher Moulton LJ), 842 (Buckley LJ); *Bolikah v KPMG* [1999] 2 AC 222 at 235 (Lord Millett); *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 646 at [129]-[140] (***AG v Burton***).

[28] (1993) 178 CLR 408 at 459-460.

[29] Gaudron J's observations in *Johns* were referred to in the context of privileged documents in the hands of third parties by her Honour in *Propend* at 537 (fn 164) and by Gummow J at 657.

Lord Ashburton v Pape[30] (***Pape***) to restrain the use of documents derived from Lord Ashburton's solicitor which, by a trick, had fallen into Pape's hands. The Court of Appeal treated Lord Ashburton's letters to his solicitors as analogous to a trade secret the misuse of which equity would restrain.[31]

22. Since *Pape*, the equitable jurisdiction to protect confidential information has consistently been recognised as the basis of the power to enjoin misuse of information by third parties which is both privileged and confidential (even if the information was initially obtained innocently), including misuse in extant or proposed proceedings.[32] In this respect, confidential information to which LPP attaches stands in the same position as other confidential information.[33]

10

23. In addition to breach of confidence, if privileged documents are obtained by an excessive exercise of compulsory powers, equity will enjoin their use and require their delivery up so as to ensure the observation of the limits of the repository's power.[34] However, that area of law has no relevance to this demurrer, as the documents in question are not alleged to have been the subject of any exercise of coercive powers.

24. While the juridical basis of equity's jurisdiction to restrain the misuse by third parties of information to which LPP attaches is confidence and not privilege, the policies which inform the law's recognition of LPP are not irrelevant to the manner in which equity will exercise that jurisdiction.[35] Thus, equity will not, in exercising its jurisdiction to

20

restrain the use of confidential and privileged information in proceedings, weigh the

---

30 [1913] 2 Ch 469.

31 *Pape* at 472.6 (Cozens Hardy MR) at 475-476 (Swifen Eady LJ); *Propend* at 565 (Gummow J); Matthews, "Breach of Confidence and Legal Privilege" (1981) 1 *Legal Studies* 77 at 88; Newbold, "Inadvertent Disclosure in Civil Proceedings (1991) 107 *LQR* 99 at 108-111.

32 See, eg, *Butler v Board of Trade* [1971] 1 Ch 680 at 690 (Goff J); *ITC Film Distributors v Video Exchange* [1981] 1 Ch 431 at 440-441 (Warner J); *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 680A–C, 683D–H, (May LJ), 685C–E (Nourse LJ); *English & American Insurance Co Ltd v Herbert Smith* [1988] FSR 232 at 237-230 (Browne Wilkinson VC); *Webster v James Chapman & Co* [1989] 3 All ER 939 at 943–944 and 946*h-j* (Scott J); *DPP (Cth) v Kane* (1997) 140 FLR 468 at 472-476 (Hunt CJ at CL); *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at [74]-[75] (Lawrence Collins J); *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 230 at [15]-[33] (Brereton J).

33 See, eg, *Sullivan v Sclanders* (2000) 77 SASR 419 (business confidences); *AG v Burton* (employment confidences); *Richards v Kadian* (2005) 64 NSWLR 204 (doctor-patient confidentiality).

30 34 As Gummow J observed in *Propend* (at 566-568), and as the proceedings in *Baker* exemplify. The decision in *Eager v Australian Government Solicitor* [1992] FCA 1060 (Wilcox J), which is referred to at PS [41], provides another example of that jurisdiction.

35 *B v Auckland District Law Society* [2003] 2 AC 736 at [71] (Lord Millet).

importance or significance of the information in the proceedings.[36] Equally, injunctive relief to restrain the use of confidential and privileged information will not be refused for want of clean hands or iniquity, other than on grounds which would serve to deny the communications their privileged character (eg the "crime / fraud" exception).[37]

25. The limits on the equitable jurisdiction identified above do not provide any support for the suggestion that the authoritative and orthodox position that LPP is an immunity is an unprincipled historical artefact: cf PS [16]. Nor do they support Glencore's assertion that reliance upon equity's protection of confidence (outside of any excessive exercise of compulsory powers) as the source of any rights to enjoin the use and require the delivery up of information and documents to which confidence and LPP attaches involves a "slavish adherence to precedent" (cf PS [26]), or that it rests on any "problematic doctrinal footing" (cf PS [38]). Glencore's submissions to this effect are fundamentally in error, for four reasons.

26. *First*, to point out that confidence (unlike LPP) does not generally provide a foundation to resist compulsory disclosure (PS [39]) says nothing about the doctrinal soundness of drawing on equity's protection of confidential information in cases where relief is sought to restrain the use of privileged and confidential information in the hands of third parties. Nor is it in any sense "bizarre" that a confidential, non-privileged communication may attract equitable protection outside the context of compulsory disclosure, but be subject to compulsory disclosure under court processes and/or by the lawful exercise of statutory powers.[38] The reasons that Parliament has conferred compulsory powers of investigation in a particular context may well justify that distinction (for the protection of the confidence may be fully justified save in the specific circumstances Parliament has identified).[39] Furthermore, it is simply incorrect to

---

[36] This is how the remarks of Norse LJ in *Goddard v Nationwide Building Society* [1987] QB 670 at 685C (***Goddard***) (referred to at PS [41]) to the effect that "[t]he injunction is granted in aid of the privilege which, unless or until it is waived, is absolute" have been understood: see *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at [88]-[94] (Lawrence Collins J).

[37] *Cowell v British American Tobacco Australia Services* [2007] VSCA 301 at [34]-[35] (Warren CJ, Chernov and Nettle JJA).

[38] Being the assertion of J Auburn, *Legal Professional Privilege: Law and Theory* (2000) at 245 quoted with approval at PS [39].

[39] See *AG v Burton* at [218]-[223].

assert that equity only protects confidentiality after it has been breached,[40] as equity will enjoin apprehended breaches of confidentiality.[41]

27. *Second*, contrary to PS [40], nothing in this Court's decision in *Expense Reduction Analysts Group v Armstrong Management Services*[42] (***Expense Reduction***) provides any invitation to alter the juridical foundation of LPP. That decision expressly rested on the Court's procedural powers, under the relevant rules, to permit the correction of an error made in the process of discovery so as to promote the efficient and just resolution of the proceedings (see [49], [51]-[63]). That is very distant from the present context.

28. *Third*, Glencore's assertion that doubt attends whether equity's protection of confidence formed the basis on which the Court of Appeal restrained the use of Lord Ashburton's letters in *Pape* is to be rejected: cf PS [41]. That the decision rested on equity's protection of confidence was recognised by Goff J in *Butler v Board of Trade*[43] and has been consistently accepted ever since.[44] In those circumstances, it is respectfully submitted that Beazley JA's statement in *Richards v Kadian*[45] that the Court in *Pape* was indifferent as to whether the source of the jurisdiction to restrain the use of the letters was privilege or confidentiality was in error.

29. *Fourth*, Glencore's assertion that courts in other common law jurisdictions have issued injunctions to restrain the use and require the delivery up of privileged information, uncoupled from equity's protection of confidence is contradicted by the very authorities upon which it relies: cf PS [42]. In *Lachaux v Independent Print Limited*, both the primary judge[46] and the Court of Appeal[47] applied the principles as formulated by Lawrence Collins J (as his Lordship then was) in *ISTIL Group Inc v Zahoor*[48] to the effect that the jurisdiction to restrain privileged information in the hands of a third party rested in confidence, although the exercise of that jurisdiction was informed by the

---

40 Being a further assertion of Auburn quoted with approval at PS [39].

41 See *Propend* at 565.

42 (2013) 205 CLR 303.

43 [1971] 1 Ch 680 at 690E.

44 See the cases cited at fn 20 above.

45 (2005) 64 NSWLR 204 at [83].

46 [2015] EWHC 3677 at [17]-[18].

47 [2017] EWCA Civ 1327at [26].

48 [2003] 2 All ER 252 at [88]-[94].

public policies relevant to LPP (ie the point made in paragraph 23 above). Relief was available because the primary judge in *Lachoux* (at [31]-[32]) rejected the submission that the relevant information had lost the necessary quality of confidence,[49] and that holding was not challenged in the Court of Appeal. To like effect, in *Wee Shuo Woon v HT SRL*[50] the Singapore Court of Appeal expressly applied the equitable jurisdiction to restrain breaches of confidence as the governing body of law to determine a claim for relief preventing the use in litigation of emails disclosing privileged communications. Relief was available because the Court of Appeal rejected a submission that the emails had relevantly passed into the public domain simply by being uploaded onto the internet together with a very large number of other documents. In doing so, it relied on English authority[51] to the effect that mere theoretical accessibility by the public did not equate to the entry of the information into the public domain so as to preclude relief for breach of confidence.[52] Accordingly, neither the English nor the Singaporean authorities assist Glencore. Contrary to PS [42], those decisions do not rest on any "strained characterisation" of confidentiality.[53] Nor do they support the assertion that the exercise of equitable jurisdiction to restrain breaches of confidence in relation to documents and information which also attract LPP is "doctrinally questionable".[54] To the contrary, they reflect an orthodox exercise of that jurisdiction.

The admissibility of privileged documents

30. The traditional view of the common law was that the manner in which a party procured evidence was not a ground to reject its admission.[55] This, together with LPP's character

---

[49] By reason of what the Court regarded as the vague and inadequate evidence of disclosure relied on by the defendant.

[50] [2017] 2 SLR 94 at [24].

[51] See *Attorney General v Greater Manchester Newspapers Ltd* [2001] EWHC 530 at [32]-[33] (Butler Sloss P).

[52] [2017] 2 SLR 94 at [27]-[43].

[53] The difficulties which attend determining whether, and to what extent, the passage of information into the "public domain" is sufficient to deny obligations of confidentiality otherwise arising were discussed in *Johns* by Brennan J at 432, by Gaudron J at 460-463 and by McHugh J at 475.

[54] In fact, Professor Zuckerman (from whom Glencore draws the quote at PS[42]) does not doubt the doctrinal soundness of the exercise of equitable jurisdiction to restrain breaches of confidence in relation to documents and information which also attract LPP, but says it should additionally be a rule of admissibility: see A Zuckerman, "Equitable protection of legal professional privilege" in PG Turner (ed) *Equity and Administration* (2016), 472 at 495.

[55] *R v Leatham* (1861) 8 Cox CC 498 at 501 ("it matters not how you get it; if you steal it even, it would be admissible in evidence": Compton J).

as an immunity and not a rule of admissibility,[56] underlay the observations of Parke B in *Lloyd v Mosytn*[57] to the effect that even if a privileged document was stolen by the other party, that would provide no grounds for rejecting its admission into evidence. Parke B's observations in *Lloyd v Mostyn* were applied by the Court of Appeal in *Calcraft v Guest*[58] to reject an objection to the tender secondary evidence of a privileged document which had come into the hands of the other party.

31. The correctness of both Parke B's observations in *Lloyd v Mostyn*, and *Calcraft v Guest*, was subsequently accepted by each of the Full Court of the NSW Supreme Court, the Privy Council and the House of Lords.[59] However, the significance of that ruling has been eroded by the development of a judicial discretion to reject evidence procured by impropriety,[60] that discretion being analogous to that now found in s 138 of the *Evidence Act 1995* (Cth). As a result of that development, an attempt by a party to tender a privileged document which he or she had stolen, or obtained by a trick, would likely attract the discretion to exclude the evidence, either at common law or under the *Evidence Act*.[61]

32. These developments in the law of evidence have done much to ameliorate the perceived tension between the rule in *Calcraft v Guest* and the equitable jurisdiction associated with *Lord Ashburton v Pape*.[62] The perceived tension is further ameliorated if, as some authorities indicate, the fact that a document to which LPP attaches is in the possession of the other party or is publically available is no answer to an objection to its admission under ss 118 or 119 of the *Evidence Act*.[63] If that is correct, the same facts as arose in

---

[56] *Meath v Winchester* (1836) 4 Cl & Fin 449 at 7 ER 171 at 536-537; 205 (Tindal CJ). See also, *Baker* at 67 (Gibbs CJ), 80 (Mason J), 101 (Brennan J), 112 (Deane J) and 129 (Dawson J).

[57] (1842) 10 M&W 478; 152 ER 558 at 481-482, 560.

[58] [1898] 1 QB 759 at 762-763.

[59] See *Bell v David Jones* (1948) 49 SR(NSW) 223 at 227-228 (Jordan CJ; Street and Maxwell JJ agreeing); *Kuruma v The Queen* [1955] AC 197 (PC) at 203-204 (Lord Goddard). See also *Waugh v British Railways Board* [1980] AC 521 at 536G (Lord Simon of Glaisdale).

[60] *R v Ireland* (1970) 126 CLR 321 at 334-335 (Barwick CJ); *Bunning v Cross* (1978) 141 CLR 55 at 71-81 (Stephen and Aickin JJ); *R v Swaffield* (1998) 192 CLR 159 at [21]-[25] (Brennan CJ), at [57]-[61] (Toohey, Gaudron and Gummow JJ).

[61] *ITC Film Distributors v Video Exchange* [1981] 1 Ch 431 at 440A – 441B, Warner J exercised a common law discretion to exclude evidence obtained in similar circumstances.

[62] See JD Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 *MLR* 601 at 603-604.

[63] See *Re Cannar* [2003] NSWSC 802 at [72]-[82] (Bell J). A similar view was taken in *MM v Australian Crime Commission* [2007] FCA 2026; 244 ALR 452 at [38] (Emmett J) and *AWB v ASIC* at [40] (Gordon J).

Calcraft v Guest may yield a different result if heard under the *Evidence Act*.

33. As this proceeding does not involve any attempt to tender privileged documents, it is not necessary in determining this demurrer to resolve the correct construction of ss 118 and 119 of the *Evidence Act*, or to explore the discretion to exclude improperly obtained evidence under either the common law or s 138 of the *Evidence Act*. It is sufficient to observe that, contrary to Glencore's assertions in PS [12], those developments do not suggest, let alone compel, a conclusion that the fundamental juridical conceptions underlying LPP has been, or should be, transformed from a privilege or immunity to become a cause of action sounding in injunctive relief to restrain the use, and require the delivery up, of information and documents to which LPP attaches. If anything, they point against any such development, for they indicate that the law already provides the necessary tools to address any attempt to use privileged material in court proceedings in a way that would undermine the public interests served by LPP.

Recognizing a cause of action for LPP is not required by the public interest underling LPP and is not consistent with the role of the Court

34. The established rationale for LPP is that it assists and enhances the public interest in the administration of justice by facilitating the provision of legal advice and representation. It does this by protecting the confidentiality of communications by clients and legal advisers from disclosure by compulsory process, absent a sufficient statutory indication to the contrary.[64] Contrary to PS [34]-[37], that rationale does not compel, or even suggest, the reformation of LPP so that it confers a cause of action sounding in injunctive relief to restrain the use, and require the delivery up, of privileged documents obtained otherwise than by compulsory process. It is simply incorrect to assert (cf PS [35]) that a client whose legal advice is leaked or published without their authority is

---

A contrary view was expressed (without reference to *Re Cannar*) in *Nasr v New South Wales* [2007] NSWCA 101; 170 A Crim R 78 at [127] (Campbell JA; Beazley and Hodgson JJA agreeing) and in *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Ltd* [2012] NSWCA 430; 295 ALR 348 (Campbell JA; Macfarlan JA and Sackville AJA agreeing) at [181]-[184]. The conflict of authority in this connection turns on the construction of the phrase "disclosure of" in ss 118 and 119 of the *Evidence Act*.

64 *Grant v Downs* (1976) 135 CLR 674 at 685 (Stephen, Mason and Murphy JJ); *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487 (Mason and Brennan JJ); *Carter* at 126-127 (Brennan J), 132-133 (Deane J) and 160-161 (McHugh J); *Propend* at 508 (Brennan CJ), 551-552 (McHugh J) and 582-583 (Kirby J); *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49 at [35]-[36] (Gleeson CJ, Gaudron and Gummow JJ).

"powerless" or without remedy. As discussed above, equitable and contractual obligations protect the confidentiality of privileged communications and provide remedies for a breach of confidentiality *qua* client and legal adviser. Subject to other statutory duties and obligations, equity's protection of confidential information operates to protect the confidentiality of confidential and privileged communications which have fallen into the hands of third parties otherwise than by compulsory process. There is no lacuna demanding the radical reformation of the law of LPP sought by Glencore.

35. There is a further difficulty with Glencore's appeal to "policy" in support of its claim that LPP should be declared by this Court to found a cause of action sounding in injunctive relief: cf PS [34]-[37]. The identification of a legal policy can play a role in the proper development of legal principle according to traditional common law methods.[65] However, just as statutory construction does not commence with the identification of a statutory policy and then proceed to adopt the construction which is thought most to advance that policy,[66] so the development of the common law does not commence with the identification of a legal policy and then proceed to declare the law to be whatever is perceived to advance that policy.[67] Even if the transformation of LPP into a cause of action was thought to advance a legal policy favouring the confidentiality of lawyer-client communications, that does little to advance Glencore's contention that this Court should declare LPP to be a cause of action.

36. In *PGA v The Queen*,[68] five Justices referred to the circumstances described by Sir Owen Dixon in which a court, particularly a final court of appeal, can legitimately develop the common law: first, the application of accepted principles to new circumstances; second, reasoning from the more fundamental of settled principles to new conclusions; and, third, deciding that a category is not closed to new instances.[69] To these, the plurality in *PGA* (at [30]) added a fourth – declining to maintain a legal rule whose foundation has been eroded by statutory intervention or a shift in the case

---

[65] *Caltex Oil (Australia) Ltd v The Dredge (Willemstad)* (1976) 136 CLR 567 (Stephen J); *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [28] (Gleeson CJ), [47] (Gummow and Hayne JJ).

[66] See, eg, *Carr v Western Australia* (2007) 232 CLR 138 at [6] (Gleeson CJ); *Miller v Miller* (2011) 242 CLR 446 at [29] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[67] *Breen v Williams* (1996) 186 CLR 71 at 99 (Dawson and Toohey JJ), 115 (Gaudron and McHugh JJ).

[68] (2012) 245 CLR 355 at [29] (***PGA***).

[69] Dixon, "Concerning Judicial Method" in (1956) 29 *Australian Law Journal* 468 (**Dixon**) at 472.

law. The reformation of the common law of LPP sought by Glencore in this proceeding does not involve any of those four circumstances. In truth, what Glencore seeks from this Court is a fundamental change in the conception of LPP from a "privilege" (being the negation of a "(claim) right") or an "immunity" (being the negation of a power) to a "(claim) right" with a correlative duty resting on persons generally to not make use of, and to deliver up, privileged information and documents. No settled legal principle can be extended to achieve this result. No reasoning from the more fundamental principles can yield this conclusion. The result can only be achieved by "abrupt and almost arbitrary change". However, as Sir Owen Dixon observed, abrupt changes in fundamental legal conceptions according to personal standards, theories of justice or of convenience is not a method of development of the common law which this Court has adopted.[70] As such, Glencore's invitation to take that step should be rejected.

Commissioner's power and obligation under s166 of the 1936 Act not qualified by the renovated law of LPP

37. Section 166 of the 1936 Act imposes a duty and confers a power on the Commissioner to use "the returns and ... any other information in [his] possession" to make an assessment of the taxable income of any taxpayer. This power and obligation is not qualified by any obligations of confidentiality which might otherwise attach to the information.[71] As the Full Court pointed out in *Donoghue* (at [76]), s 166 not being a power to require the production of documents or information, LPP says nothing about the scope of the Commissioner's power and duty under it. However, if Glencore's argument is accepted, the result would be that even after information has become known to the Commissioner, with the result that the Commissioner is obliged by s 166 to use that information to issue a "correct" assessment, the Commissioner might be required to return documents to which LPP applies and then to issue assessments disregarding any facts known to the Commissioner only by reason of those documents. That might require assessments to be issued on a basis known to be contrary to the true facts. That outcome cannot be reconciled with the Commissioner's obligations under s 166. Glencore's common law LPP claim must therefore give way to s 166.

---

[70] Dixon at 472, 476.

[71] *Denlay v Federal Commissioner of Taxation* (2011) 193 FCR 412 at [81]-[82] (Keane CJ, Dowsett and Reeves JJ); *Donoghue* at [70]-[77], [85]-[86] (Kenny and Perram JJ).

38. In these proceedings, having sought reformation of LPP so that it creates a right and correlative duty, enforceable by injunction, to prevent the use of privileged information in the hands of another, Glencore then appeals (PS [44]-[47] and [52]) to the rule of construction that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities (including LPP) in the absence of clear words or a necessary implication to that effect.[72] That rule of construction is now viewed as a manifestation of a "principle of legality",[73] being a principle that expresses a set of shared legal values governing the relationship of parliament, the executive and the courts, the content of which is supplied by the rights, privileges and immunities recognised by the common law as fundamental in a liberal democracy founded on the rule of law.

39. Essential to the application of the principle of legality as a "working hypothesis" of the parliament and the courts is the correct identification of the rights, privilege and immunities that engage it.[74] In this Court, the criterion by which the rights, privileges and immunities which engage the principle of legality have been identified has been supplied by their "fundamental" character.[75] That character is derived not only from the inherent importance of the right, privilege or immunity, but also from its clear and consistent recognition as a fundamental right.[76]

40. The rights and duties which Glencore asks this Court to create bear a fundamentally different juridical character from the privileges and immunities conferred by LPP. Even if the label of LPP is (inaccurately) attached to them, they are in substance new rights and duties. Those rights and duties cannot plausibly be said to form any part of a "working hypothesis" shared by Parliament and the courts against which s 166 of the

---

[72] eg *Daniels* at [11]. See also *Saaed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [307]-[313] (Keane and Gageler JJ).

[73] *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at [40] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

[74] *Malika Holdings Pty Limited v Stretton* (2001) 204 CLR 290 at [27]-[30] (McHugh J); *Gifford v Strang Patrick Stevedores Pty Limited* (2003) 214 CLR 269 at [36] (McHugh J).

[75] *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Bropho v Western Australia* (1990) 171 CLR 1 at 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[76] *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at [182] (Crennan, Kiefel and Bell JJ); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at [67] (Gageler J).

1936 Act was enacted and falls to be construed. Nor can they be said to express any enduring fundamental legal value which has enjoyed recognition by the principles and traditions of the common law. Invocation of the "principle of legality" outside of common law rights which are recognised as fundamental risks weakening its normative force, decreasing the predictability of its application and, ultimately, calling into question its democratic legitimacy.[77] For that reason, even if Glencore's invitation to extend LPP were to be accepted, there would be no proper basis to confine the ordinary operation of s 166 of the 1936 Act by reference to the principle of legality.

41. ***AWB proceedings (PS[48]-[49])***: Statements made in determining special leave applications create no precedent and are binding on no one.[78] *A fortiori*, little is to be gained from an examination of the *arguments* advanced in special leave applications. However, two points should be made concerning the special leave application discussed at PS[48]-[49]. First, the application was for special leave to appeal from the decision of the Victorian Court of Appeal in *ASIC v Lindberg*, and *not* the decision of Gordon J in *AWB v ASIC* (cf PS [48]).[79] Second, and more substantively, the context of *ASIC v Lindberg* and *AWB v ASIC* concerned an exercise by ASIC of compulsory powers requiring the attendance at interview of persons who AWB apprehended were aware of communications over which it asserted LPP. The principal point sought to be ventilated by AWB (and on which it succeeded at first instance in *ASIC v Lindberg*[80]) was whether the principle in *FC of T v Citibank Ltd*[81] – to the effect that a privilege holder is entitled to a practical and realistic opportunity to assert and test claims for LPP – applies to privilege claims of persons other than the object of the exercise of compulsory powers and applies both at the time of the exercise of compulsory power and subsequently (that is, when ASIC proposed to disclose the records of interview to other persons, being the AFP in *AWB v ASIC* and on discovery in *ASIC v Lindberg*).[82] That context is distant from the present, which has never involved any exercise of compulsory powers by the

---

77 Independent Commission Against Corruption v Cunneen (2015) 256 CLR 1 at [88] (Gageler J).

78 *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (2015) 256 CLR 104 at [52] (French CJ, Nettle and Gordon JJ), [112] (Kiefel and Keane JJ) and [119] (Bell and Gageler JJ).

79 [2009] HCATrans 311 at 2.15-20.

80 *Re AWB Ltd (No 6)* [2009] VSC 330 at [25]-[28] (Robson J).

81 (1989) 20 FCR 403.

82 [2009] HCATrans 311 at 4.95-115, 9.345-350, 19.790 -795.

Commissioner and no point concerning the reach of the principle in *Citibank* arises in this proceeding.

42. Finally, the possibility referred to in *Donoghue* (at [59], [88] and [89]) that a breach of confidence action may lie against the Commissioner in relation to documents received at a point prior to the information in those documents being read rested on the proposition that, at that point, the Commissioner was not in possession of the "information" and, thus, s 166 of the 1936 Act did not apply. That possibility did not arise in *Donoghue* and does not arise in this proceeding. Contrary to PS [50]-[51], it is not a possibility which assists Glencore. Glencore does not advance a claim based on confidentiality and, whatever information is in the Glencore Documents, it has long since been in the possession of the Commissioner.

Part VI ORDERS

43. The Commissioner's demurrer should be upheld, and the Amended Writ of Summons should be dismissed. Glencore should pay the Commissioner's costs.

Part VII ESTIMATE FOR HEARING

44. The Commissioner will require 2 hours for the presentation of his oral argument.

Dated: 8 February 2019

.....	.....	.....
Stephen Donaghue	**Neil Williams**	**Michael O'Meara**

Solicitor-General of the Commonwealth
T: 02 6141 4145
F: 02 6141 4149
stephen.donaghue@ag.gov.au

Counsel for the Defendants