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

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' SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. This proceeding raises for determination a long-standing controversy over whether the law of legal professional privilege operates merely defensively as a means for resisting compulsory production, or whether it also provides a positive right entitling the holder of

Filed on behalf of the Plaintiffs

Date of this document: 11 December 2018

King & Wood Mallesons
Level 61, Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
DX 113 Sydney

Telephone: +61 2 9296 2000
Fax: +61 2 9296 3999
Email: syd@au.kwm.com
Contact: Nicholas Pappas
Ref: 602-0029658

the privilege to claim a remedy, specifically by way of an injunction restraining use of the privileged material. Australian intermediate appellate courts favour the former view, whereas general statements in this Court and fundamental principle favour the latter. The tension between these views has been reflected over the last century in the decisions in ***Calcraft*** *v Guest* [1898] 1 QB 759 and *Lord* ***Ashburton*** *v Pape* [1913] 2 Ch 469, which have been described as being "*fundamentally in conflict*"[1] and "*difficult, if not impossible, to reconcile*".[2]

3. A further issue arising is whether s 166 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) is expressed in sufficiently clear terms so as to entitle the first defendant (**Commissioner**) to resist a general law action to restrain the use of and recover material to which legal professional privilege attaches under the common law of Australia.

4. The Demurrer filed on 2 November 2018 (**DB 88**) gives rise to two questions of law, which the plaintiffs contend should be resolved as follows.

5. **Question 1:** Does the common law of Australia confer upon a privilege holder an actionable right to restrain the use by a third party of documents or evidence of communications to which legal professional privilege attaches? **Yes**

6. **Question 2:** Is the Commissioner entitled and/or obliged to retain and use documents or evidence of communications to which legal professional privilege attaches under the common law of Australia by reason of, and for the purposes of, s 166 of the ITAA 1936? **No.**

Part III: Section 78B Notices

7. Notices under s 78B of the *Judiciary Act 1903* (Cth) were given by the plaintiffs on 6 November 2018 (**DB 92**).

Part IV: Facts

8. By the Demurrer, the defendants deny the legal sufficiency of the facts alleged in the Amended Statement of Claim to entitle the plaintiffs to a legal remedy but, for the purposes of the Demurrer, are taken to have admitted the facts pleaded in the Amended

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[1] J D Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 MLR 601 at 604.
[2] See *Goldberg v Ng* (1994) 33 NSWLR 639 at 673 per Clarke JA; see also ***Baker*** *v Campbell* (1983) 153 CLR 52 at 67 per Gibbs CJ, at 80 per Mason J, at 110 per Brennan J.

Statement of Claim.[3] Those pleaded facts are relevantly as follows.

9. The plaintiffs are companies within the global Glencore plc group (**Glencore group**).[4] In about October 2014 the plaintiffs' Australian legal advisers engaged Appleby, an overseas law firm, to provide legal advice on a corporate restructure.[5] By November 2017, the defendants had obtained documents known as the "Paradise Papers". These included documents or copies of documents held by Appleby that were created for the sole or dominant purpose of Appleby providing legal advice to the plaintiffs (**Glencore Documents**).[6]

10. None of the plaintiffs instructed, consented to or authorised Appleby or any other person, whether directly or indirectly, to release or publish the Glencore Documents.[7] Further, since the plaintiffs became aware that the Glencore Documents were in the possession of the Commissioner, they have asserted that the Glencore Documents are subject to legal professional privilege and have requested that the Commissioner return them and provide an undertaking that they not be referred to or relied upon.[8] The Commissioner, by his officers, has refused to return the Glencore Documents or to provide the requested undertaking.[9]

Part V: Argument

11. The plaintiffs invoke the Court's jurisdiction under s 75(iii) of the *Constitution* to compel the defendants to return the Glencore Documents to them and to restrain the defendants' further use of them. The premise upon which the Demurrer falls to be determined is that the Glencore Documents "*are documents or evidence communications to which legal professional privilege attaches under the common law of Australia*".[10] It is implicit in this premise that legal professional privilege enures in the Glencore Documents and has not been waived by some conduct that is inconsistent with the maintenance of the privilege.[11]

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[3] *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 125-126 per Barwick CJ, at 135 per Gibbs J.
[4] Amended Statement of Claim at [1]-[5] (DB 82-83).
[5] Amended Statement of Claim at [6]-[8] (DB 83).
[6] Amended Statement of Claim at [9] (DB 84).
[7] Amended Statement of Claim at [10] (DB 84).
[8] Amended Statement of Claim at [11] (DB 85).
[9] Amended Statement of Claim at [12] (DB 85-86).
[10] Demurrer, p 2 (emphasis added).
[11] *Mann v Carnell* (1999) 201 CLR 1 at 15 [34] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

Question 1: actionable right to relief claimed

12. Legal professional privilege originally operated only as a negative protection in relation to the giving of testimony and production of documents in legal proceedings.[12] According to the holding in *Calcraft*, once a privileged document passed into the possession of another person, including due to trickery or theft, it could be tendered in evidence.[13] *Ashburton* recognised an entitlement of a privilege holder to protect privileged material from being used by third parties.[14] However, *Ashburton* – so as to be reconcilable with *Calcraft* – has generally been understood as providing only a partial protection for privileged material, being one that restrains uses of privileged documents that involve a breach of confidence owed to the privilege holder, but not otherwise.[15] Each of *Calcraft* and *Ashburton* were decided before, and should be reconsidered in light of, the development of principles relating to the admissibility of illegally obtained evidence as embodied in ***Bunning*** *v Cross* (1978) 141 CLR 54 and s 138 of the *Uniform Evidence Law*.[16] There remains a need for the law to recognise the entitlement of clients to a complete protection of privileged communications, all the more so given the ease with which such communications, particurlarly when stored electronically, might be compromised and publicly exposed. The fact that documents are privileged and that privilege has not been waived should, in principle, be a sufficient basis for an injunction to restrain the use of the documents by a third party.

Legal professional privilege as a fundamental common law right

13. In *Baker*, the members of this Court variously referred to legal professional privilege as a "*fundamental principle upon which our judicial system is based*",[17] as a "*fundamental civil and legal right to communicate in confidence with one's legal adviser*"[18] and as being a substantive principle of broad scope that is "*of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen*

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[12] *Baker* (1983) 153 CLR 52 at 60 per Gibbs CJ.
[13] *Calcraft* [1898] 1 QB 759; *Baker* (1983) 153 CLR 52 at 67 per Gibbs CJ, at 80 per Mason J.
[14] *Ashburton* [1913] 2 Ch 46.
[15] *Commissioner of Australian Federal Police v* ***Propend*** *Finance Pty Ltd* (1997) 188 CLR 501 at 565 per Gummow J.
[16] See *Baker* (1983) 153 CLR 52 at 110 per Brennan J;
[17] *Baker* (1983) 153 CLR 52 at 64.2 per Gibbs CJ, at 78.3 per Mason J, at 88.5 per Murphy J, at 96.6 per Wilson J, at 105.1 per Brennan J, at 126.2 per Dawson J.
[18] *Baker* (1983) 153 CLR 52 at 106.7 per Brennan J, citing *Bunning* (1978) 141 CLR 54; see also at 85.4 per Murphy J.

under the law".[19] In ***Goldberg*** *v Ng* (1995) 185 CLR 83, Gummow J described legal professional privilege as "*not a mere rule of evidence but a substantive and fundamental common law doctrine, a rule of law, the best explanation of which is that it affords a practical guarantee of fundamental rights*".[20] In ***Daniels*** *Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 a majority of this Court similarly held that legal professional privilege is a "*rule of substantive law*"[21] and an "*important common law right*".[22]

14. In ***Carter*** *v Northmore Hale Davy & Leake* (1995) 183 CLR 121, the Court held that legal professional privilege is so firmly entrenched in the law that it protects from disclosure documents that might otherwise establish the innocence of a person charged with a criminal offence or that may materially assist their defence.[23] Brennan J said that "*if the purpose of the privilege is to facilitate the application of the rule of law in the public interest, it is not possible to allow the interest of an individual accused to destroy the privilege which is conferred to advance that public interest*".[24] Deane J said that the privilege "*reflects the common law's verdict that the considerations favouring the 'perfect security' of communications and documents protected by the privilege must prevail*" over the vindication and establishment of truth in the interests of a fair trial.[25]

15. Yet, despite recognising that legal professional privilege is a fundamental common law right which has paramountcy even over the right to a fair trial, the general law is yet to recognise a complete set of remedies to protect that right. The substantive principle upon which legal professional privilege is predicated should be recognised as entitling a privilege holder to obtain the injunctive relief that has been sought in these proceedings. That is, common law principles of legal professional privilege ought to enable the privilege to be relied upon not only as a shield to resist disclosure of privileged material, but also, as Professor Tapper has stated, "*if not exactly as a sword, at least as a device to disarm one's opponent by preventing him from using evidence in his possession*".[26]

16. Were the position otherwise, persons entitled to claim legal professional privilege – whom the law recognises as having a fundamental common law right – would be unable

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[19] *Baker* (1983) 153 CLR 52 at 118.7 per Deane J.
[20] *Goldberg* (1995) 185 CLR 83 at 121.1 per Gummow J.
[21] *Daniels* (2002) 213 CLR 543 at 552 [9] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[22] *Daniels* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[23] See *Carter* (1995) 183 CLR 121 at 125, 128 per Brennan J, at 133-139 per Deane J, at 166-167 per McHugh J.
[24] *Carter* (1995) 183 CLR 121 at 130 per Brennan J.
[25] *Carter* (1995) 183 CLR 121 at 133-134 per Deane J.
[26] C Tapper, "Privilege and Confidence" (1972) 35 MLR 83 at 84.

to vindicate that right by obtaining any relief in circumstances where their privileged documents, through no fault of their own, fall into the possession of a third party. For the common law to deny relief in such circumstances would indicate that legal professional privilege is not a fundamental right at all. Further, confining the remedies which flow from the rights accorded by legal professional privilege by reference to the historical legacies of *Calcraft* and *Ashburton* is unprincipled and apt to leave the law in a state of confusion.

Approach to determining the content of common law of legal professional privilege

17. In *Calcraft,* the English Court of Appeal held that the defendant could tender copies of documents, which had been obtained from files of the solicitor of the plaintiff's predecessor in title, notwithstanding that the originals remained privileged.[27] In *Ashburton*, however, an injunction was granted to restrain the publication or use of privileged documents and the information contained therein, which had been obtained improperly from a solicitor's clerk.[28] The combined effect of these cases was explained in ***Goddard*** *v Nationwide Building Society* [1987] QB 670 as follows: a litigant who is in possession of another person's privileged information may use it in litigation; however, if the privileged information has not yet been used in that way, the person in whom the privilege is vested may pre-empt such use by obtaining an order for the delivery up of the privileged documents and restraining the use of any information contained within them.[29] The Court of Appeal in *Goddard* acknowledged, however, the unsatisfactory nature of that conclusion.[30]

18. In *Propend*, Gummow J adopted the interpretation given in *Goddard* to the earlier cases.[31] His Honour considered that the result in *Ashburton,* when compared to that in *Calcraft,* is explicable if it is recognised that the relief granted by the Court in the former case flowed from an equity to protect a breach of confidence rather than from the character of legal professional privilege as a bar to admissibility.[32] None of the other judges who decided *Propend* dealt with that issue. Mr J D Heydon AC QC has observed that whether or not *Calcraft* and *Ashburton* are reconcilable at a technical level, they "*seem to be*

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[27] *Calcraft* [1989] 1 QB 759.
[28] *Ashburton* [1913] 2 Ch 469.
[29] *Goddard* [1987] QB 670 at 683 per May LJ, at 684 per Nourse LJ.
[30] *Goddard* [1987] QB 670 at 683D-E per May LJ, at 684D per Nourse LJ.
[31] *Propend* (1997) 188 CLR 501 at 565 fn 272.
[32] *Propend* (1997) 188 CLR 501 at 565-566.

fundamentally in conflict" and lead to an "*unsatisfactory conclusion*" given that "*the client's success should not depend on the date at which he found out that he was the victim of a wrongdoer*".[33]

19. It is not necessary for the Court to delve into the authorities concerning *Calcraft* and *Ashburton* for the purposes of resolving the Demurrer. As Brennan J said in ***Giannarelli v Wraith*** (1988) 165 CLR 543, "*a court is not ordinarily concerned to apply to the resolution of a current case a proposition of common law plucked from a moment in history*".[34] Each of *Calcraft* and *Ashburton* were decided over a century ago, in a factual setting well removed from the modern potential for privileged material to be compromised by data breaches and computer hacking. This point was recognised as early as 1974.[35] Further, and importantly, those cases were decided prior to the development by this Court in the late 20th century of common law principles restricting the admissibility of illegally and improperly obtained evidence[36] and recognising legal professional privilege as a fundamental common law right.[37] There is, therefore, no basis for this Court to be tethered by the approach to the common law that might be seen to underlie *Calcraft* and *Ashburton*, when determining the scope and content of rights accorded by legal professional privilege in contemporary Australia.

20. Nor should this Court's approach to the common law of legal professional privilege be guided by that taken by the Full Federal Court in *Federal Commissioner of Taxation v* ***Donoghue*** (2015) 237 FCR 316.[38] In *Donoghue*, Kenny and Perram JJ held that the common law of legal professional privilege operates only as an immunity from the exercise of powers requiring compulsory production of documents or disclosure of information and is not a rule conferring individual rights, the breach of which may be actionable.[39] Their Honours stated 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

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[33] J D Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 MLR 601 at 604-605; J D Heydon, *Cross on Evidence* (LexisNexis, 11th ed, 2017), p 909 [25025].
[34] *Giannarelli* (1988) 165 CLR 543 at 584.
[35] J D Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 MLR 601 at 606-607. See also *R v Uljee* [1982] 1 NZLR 561 at 576, where McMullin J said that: "*In principle there seems no reason why a communication which solicitor and client have sought to keep confidential should not still be protected even though a third party has chanced to overhear it or gained knowledge of its contents through a 'bugging device'*".
[36] *R v Ireland* (1970) 126 CLR 321; *Bunning* (1978) 141 CLR 54.
[37] *Baker* (1983) 153 CLR 52.
[38] *Donoghue* (2015) 237 FCR 316 at 329-330 [52]-[53], 331 [57] per Kenny and Perram JJ.
[39] *Donoghue* (2015) 237 FCR 316 at 329 [52].

its principles concerning breaches of confidence rather than the common law of privilege.[40]

21. In contrasting principles of legal professional privilege with equitable principles governing the protection of confidential information, the reasoning of Kenny and Perram JJ leads to the following internal contradiction: [41]

> The distinction between the two sets of principles is not merely technical, it is substantial. One is an immunity which gives rise to no rights which can be breached; the other a right to approach a court of equity for discretionary relief. One is a fundamental common law right; the other an incident of the law of intellectual property.

Thus, legal professional privilege apparently does not give rise to rights which can be breached, but it is also a fundamental common law right. The true position in principle is that anything recognised as a right must be given adequate means of enforcement such that breach of the right is not left without an appropriate remedy.

22. Their Honours' narrow approach to the scope of common law rights accorded by the law of legal professional privilege rested squarely upon:

a. reliance on *Ashburton* (and the particular interpretation given to that decision by a single justice of this Court in *Propend*), which was misplaced for the reasons given in paragraphs [18] and [19] above; [42] and

b. an erroneous reading of the decision of this Court in *Daniels*.

23. In *Daniels,* Gleeson CJ, Gaudron, Gummow and Hayne JJ relevantly said the following at 552 [10] (omitting citations):[43]

> Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings. Rather and in the absence of provision to the contrary, legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures of the kind for which s 155 of the [Trade Practices] Act provides.

24. In *Donoghue,* Perram and Kenny JJ considered that this passage supported the propositions that "*the true nature of common law privilege [is] as an immunity*" and that "*the common law of privilege is silent when the question which arises does not concern*

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[40] *Donoghue* (2015) 237 FCR 316 at 330-331 [55]-[57].
[41] *Donoghue* (2015) 237 FCR 316 at 332 [62].
[42] *Donoghue* (2015) 237 FCR 316 at 329-330 [52], citing Gummow J in *Propend* (1997) 188 CLR 501 at 565-566.
[43] *Daniels* (2002) 213 CLR 543 at 552 [10] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

compulsory production".[44] However, there is nothing in this or any other passage of *Daniels* which either expressly or impliedly confines the occasions in which legal professional privilege may be availed of to circumstances in which a party is seeking to resist the disclosure of privileged documents. It may be noted that, at 553 [11] of *Daniels*, the joint judgment proceeded to refer to legal professional privilege as not merely a rule of substantive law but "*an important common law right or, perhaps, more accurately, a common law immunity*". Yet, the tentatively expressed inclusion of the underlined words, viewed in context, did not involve the placement by this Court of any fetter on the important right it had identified. Rather, these words were clearly directed to the particular situation in which the application of the privilege arose in *Daniels*, whereby the appellant had claimed an immunity from production, in the sense of an entitlement to refuse to produce privileged documents which were the subject of notices served by the ACCC under s 155 of the *Trade Practices Act 1974* (Cth). It was nowhere suggested in *Daniels*, nor in any subsequent decision of this Court, that the "*rule of substantive law*" and "*important common law right*" identified therein could not, in appropriate circumstances, be vindicated by the grant of (positive) relief.

25. The doctrine of stare decisis therefore does not impede this Court's recognition of the plaintiffs' entitlement to a remedy protecting against use of communications made for the sole or dominant purpose of their being provided with legal advice. Where, as here, the Court is not bound by its earlier decisions, it should undertake its own inquiry into whether common law rules are well-founded and may depart from earlier authority in ascertaining a principle for contemporary application.[45]

26. Indeed, such an approach to the development of the common law has underscored this Court's position with respect to legal professional privilege, which has been marked by a focus on advancing the public policy considerations reflected in the privilege, rather than any slavish adherence to precedent.[46] Resolving the question of whether the common law ought to recognise the actionable right for which the plaintiffs contend thus requires a

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[44] *Donoghue* (2015) 237 FCR 316 at 330 [53].

[45] *Giannarelli* (1988) 165 CLR 543 at 584; see also *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 557 [99], 561 [108] per Gaudron, McHugh and Gummow JJ.

[46] Thus, in *Baker,* the Court held that the power of a police officer executing a search warrant issued under s 10 of the *Crimes Act 1914* (Cth) is restricted by legal professional privilege; declining to follow *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, which had held that legal professional privilege is limited to judicial and quasi-judicial proceedings. In ***Esso*** *Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49 at 71-72 [56] per Gleeson CJ, Gaudron and Gummow JJ, at 105-106 [167] per Callinan JJ, a majority of the Court, in articulating the "dominant purpose" test for legal professional privilege, declined to follow the "sole purpose" approach that had prevailed in *Grant v Downs* (1976) 135 CLR 674 at 685.

close examination of the purpose that underlies the privilege.

Rationale for legal professional privilege

27. In ***Grant*** *v Downs* (1976) 135 CLR 674, Stephen, Mason and Murphy JJ said that the rationale of legal professional privilege, according to traditional doctrine:

> is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.[47]

28. Later, in *Baker*, Mason J noted that the underlying policy of the privilege covering legal advice "*involved the promotion of freedom of consultation generally between lawyer and client*".[48] In the same case, Deane J said that the principle underlying the privilege was that "*a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by the subsequent disclosure of confidential communications*".[49] Dawson J similarly considered that the justification of the privilege is to be found in the fact that the "*proper functioning of our legal system depends upon a freedom of communication between legal advisers and clients*" and that "*professional guidance in the complex processes of the law should be uninhibited by the possibility that what is said to enable advice to be sought or given might later be used against the person seeking the advice*".[50] Murphy J commented that "*[t]he client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy*".[51] Wilson J said that "*[i]n fostering the confidential relationship in which legal advice is given and received the common law is serving the ends of justice because it is facilitating the orderly arrangement of the client's affairs*".[52]

29. In *Attorney-General v* ***Maurice*** (1986) 161 CLR 475, Mason and Brennan JJ described the "*raison d'etre of legal professional privilege*" as "*the furtherance of the*

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[47] *Grant* (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ. Indeed, the Federal Court itself has adopted this approach to the development of the law of privilege in respect of third party communications: see, eg, *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at 366 [34], 367-368 [41]-[42].
[48] *Baker* (1983) 153 CLR 52 at 74 per Mason J.
[49] *Baker* (1983) 153 CLR 52 at 115-116 per Deane J.
[50] *Baker* (1983) 153 CLR 52 at 128 per Dawson J.
[51] *Baker* (1983) 153 CLR 52 at 89 per Murphy J.
[52] *Baker* (1983) 153 CLR 52 at 95 per Wilson J.

administration of justice through the fostering of trust and candour in the relationship between lawyer and client".[53] Deane J said that legal professional privilege is of great importance to the administration of justice and law in that it "*advances and safeguards the availability of full and unreserved communication between the citizen and his or her lawyer and in that it is a precondition of the informed and competent representation of the interests of the ordinary person*".[54]

30. In *Carter*, Brennan J stated that "*the basic justification for allowing the privilege is the public interest in facilitating the application of the rule of law*".

31. In ***Three Rivers*** *District Council v Governor and Company of the Bank of England* ***(No 6)*** [2005] 1 AC 610, Lord Scott, after referring to the authorities of common law jurisdictions including the United Kingdom, the United States, Canada, Australia and New Zealand, said:[55]

> ... [T]hese judicial dicta ... recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. ... [T]he dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else (see also paras. 15.8 to 15.10 of Adrian Zuckerman's *Civil Procedure* where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.

32. Viewed from the perspective of this "rule of law rationale", legal advice privilege is to be seen as a fundamental common law right conforming to and underpinning the rule of law,

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[53] *Maurice* (1986) 161 CLR 475 at 487 per Mason and Brennan JJ.
[54] *Maurice* (1986) 161 CLR 475 at 490 per Deane J.
[55] *Three Rivers (No 6)* [2005] 1 AC 610 at 649-50 [34].

the purpose and rationale of which is to enable persons in a civilised complex modern society to conduct their affairs with assistance from legal advisers.[56] This rationale is apt to apply to all clients, individual, corporate and governmental, each of which are "*entitled to the benefit of the ample and protective approach which the common law adopts in respect of legal professional privilege*".[57] The English Court of Appeal has recently observed, in this respect, that large or multinational corporations need, as much as small corporations and individuals, to seek and obtain legal advice without fear of intrusion.[58] As Gummow J stated in *Propend,* in a passage which is applicable to the rule of law in general:[59]

> [T]he privilege alike protects the strong as well as the vulnerable, the shabby and discredited as well as the upright and virtuous, those whose cause is in public disfavour as much as those whose cause is held in popular esteem.

33. The rule of law rationale for legal advice privilege explains why, once legal professional privilege attaches to a communication, it is not lost unless it is waived by the holder of the privilege.[60] This Court has confirmed, in this regard, that "*[n]o balancing of interests is called for, as the balancing has been done in according recognition to the privilege*".[61] That is, legal professional privilege is itself the product of a balancing exercise between competing public interests, whereby the public interest in the administration of justice which underpins the privilege is accorded paramountcy over the public interest in ensuring a fair trial (whether civil or criminal) by the admission of all relevant evidence.[62]

Actionable right to recover and restrain use of privileged material advances rationale underlying the privilege

34. As stated in *Three Rivers (No 6)*, "*[l]egal advice privilege should ... be given a scope that reflects the policy reasons that justify its presence in our law*".[63] There are clear reasons

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[56] See *Kennedy* v *Wallace* (2004) 142 FCR 185 at 221 [201] per Allsop J, referring to the foregoing decisions of this Court.
[57] See ***Osland*** *v Secretary, Department of Justice* (2008) 234 CLR 275 at 307 [82] per Kirby J.
[58] *Serious Fraud Office (SFO) v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006 at [127].
[59] *Propend* (1997) 188 CLR 501 at 565.
[60] *Propend* (1997) 188 CLR 501 at 511 per Brennan CJ, at 554 per McHugh J; *Osland* (2008) 234 CLR 275 at 327 [151] per Hayne J.
[61] *Propend* (1997) 188 CLR 501 at 511 per Brennan CJ and cases there cited.
[62] See *Grant* at 685 per Stephen, Mason and Murphy JJ; *Waterford v The Commonwealth* (1987) 163 CLR 54 at 64 per Mason and Wilson JJ; *Carter* (1995) 183 CLR 121 at 130 per Brennan J, at 133, 138-139 per Deane J, at 167 per McHugh J; *Propend* (1997) 188 CLR 501 at 551 per McHugh J, at 563 per Gummow J, at 583-584 per Kirby J; *Esso* (1999) 201 CLR 49 at 64-65 [35] per Gleeson CJ, Gaudron and Gummow JJ; *Osland* (2008) 234 CLR 275 at 324-325 [141]-[142] per Hayne J.
[63] *Three Rivers (No 6)* [2005] 1 AC 610 at 650 [35]; see also *Esso* (1999) 201 CLR 49 at 64-72 [35]-[58].

of policy why the common law of Australia should recognise not only a right of clients to resist the disclosure of confidential communications with their lawyers for the dominant purpose of being provided with legal advice, but also a right to resist such communications being used to the prejudice of the client.[64]

35. That is because the recognised public interest in clients being able to communicate freely and frankly with their lawyers is harmed as much by demanding that legal advice be disclosed pursuant to compulsory process as it is by rendering the clients powerless when legal advice is leaked or published without their authority.[65] It would not facilitate effective communication with legal advisers, nor effective access to legal advice, if the common law provided no remedy to restrain the use of privileged material which has been disseminated other than by reason of the client's waiver of the privilege.

36. In this respect, jurists have recognised that there is nothing in the rationale of legal professional privilege that demands that it be destroyed by "*eavesdroppers and thieves*".[66] To the contrary, it is undesirable if the security which is the basis of the freedom to consult with one's lawyers is "*to be prejudiced by mischances which are of every day occurrence*".[67] The privilege should therefore protect information that a client imparts to their lawyer in what is thought to be a private and secure sphere from being used against the client where they do nothing that could sensibly be described as amounting to a waiver of privilege.[68] Professor Zuckerman has argued, in this regard:

> To make communications for taking legal advice and for preparing litigation inviolable, it is not enough to protect them by an immunity rule and by equitable protection of confidentiality. The secure space needs to be protected from other incursions besides the process of disclosure. ... [I]t would be unfair to allow the client's communications to be used as evidence against the client, whether or not the information was extracted by legal compulsion [or] the client-lawyer communications have emerged by accident or intentional incursion.[69]

37. The public policy balance which legal professional privilege strikes in favour of encouraging lawyer/client communications compels a conclusion that the holder of the privilege should be entitled not only to resist the production or tender of privileged

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[64] A Higgins, *Legal Professional Privilege for Corporations – A Guide to Four Major Common Law Jurisdictions* (Oxford University Press, 2014) pp 224-226 [7.162]-[7.169].
[65] See, eg, *In re Shell Canada Limited* [1975] F.C. 184 at 193-194 per Jackett CJ.
[66] J D Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 MLR 601 at 605-607.
[67] *English & American Insurance Ltd v Herbert Smith* [1988] FSR 232 (Ch) at 239 per Browne-Wilkinson VC.
[68] A Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis Australia, 2018), p 711 [16.115]; see also *R v Uljee* [1982] 1 NZLR 561 at 570 per Cooke J, at 571-572 per Richardson J, at 576 per McMullin J.
[69] See A Zuckerman "Legal Professional Privilege in Equity" in P G Turner (ed), *Equity and Administration* (2016), Chapter 24, p 487-488. See also *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 at 607A-B.

documents, but also to restrain the use of privileged documents that have fallen into the possession of another by some accident, theft or fraud.

No principled basis for injunctive relief to be confined to that arising from equitable principles of confidence

38. In *Donoghue,* the Full Court considered that a person whose privileged documents are stolen or otherwise taken without their authority and which are subsequently provided to the Australian Tax Office may have an entitlement to sue the Commissioner for the return of the material – at least before the information within the documents becomes assimilated via the assessment process – but that such a suit could only be brought in equity to enforce a claim for confidentiality under the principle in *Ashburton.*[70] This narrow approach to the availability of injunctive relief rests on a problematic doctrinal footing and should be rejected.

39. *First* and fundamentally, given the modern recognition of legal professional privilege as a common law right, there is no reason to confine the jurisdiction to grant an injunction restraining the use of privileged documents – howsoever obtained by a defendant – to circumstances where there is confidential information that is protected in equity. Rather, what should support the Court's power to restrain the use of privileged communications is the principle at the foundation of legal professional privilege; that a client must be able to communicate with their lawyers safe in the knowledge that, unless they waive the privilege, their communications will not be used against them.[71] Indeed, the power to restrain the use of material the subject of legal professional privilege is not logically supported by equitable principles of confidence. Mere confidentiality, unlike legal professional privilege, is ineffective to resist compulsory disclosure to a court or public authority.[72] There is thus no principled basis why privilege holders, when they are seeking to recover as opposed to resist production of privileged material, should be required to found their actions upon equitable principles of confidence rather than common law principles of privilege. As one commentator expresses the point:[73]

> If a confidential communication is susceptible to court compulsion whilst still secret, it is bizarre to suggest that it gains a very powerful protection from disclosure *by virtue* of a breach of that confidentiality. Or, to put it another way,

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[70] *Donoghue* (2015) 237 FCR 316 at 331 [59].
[71] A Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis Australia, 2018), p 712 at [16.115].
[72] See, eg, *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 486-490; *Australia & New Zealand Banking Group Ltd v Konza* (2012) 87 ATR 779; cf *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403 at 417 per Bowen CJ and Fisher J, at 437 per French J.
[73] J Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000), p 245.

with respect to curial compulsion of confidential communications, protection exists only if confidentiality is breached.

40. Secondly, this Court has squarely recognised that actions for recovery of privileged material need not be confined to situations where there has been a breach of confidence. In ***Expense Reduction*** *Analysts Group Pty Ltd v Armstrong* (2013) 250 CLR 303, the Court found that the appellant had a broad entitlement to maintain the confidentiality of privileged documents inadvertently disclosed in the course of discovery.[74] Contrary to what had been contended by the respondent, the Court found that it was not necessary, to restrain the use of privileged material that had been disclosed by mistake, to resort to the equitable jurisdiction that underlies Ashburton.[75] Although the decision in *Expense Reduction* related to documents mistakenly provided in the course of litigation, and in circumstances in which the Court's case management powers were engaged, the approach taken in that case ought also apply to privileged material that becomes exposed in other contexts, such as through theft or fraud. It should be legitimate to assert privilege regardless of the circumstances in which the privileged material comes into the possession of the third party (unless those circumstances amount to waiver).

41. *Thirdly*, it is not clear, in any event, that the decision in *Ashburton* confines actions for the recovery of privileged material to situations where there has been a breach of confidence for which equity will provide a remedy.[76] The interpretation of *Ashburton* has been contested, and is obscured by a misreporting of a key passage of the judgment.[77] In *Goddard*, Nourse LJ took the view that the injunction granted in *Ashburton* "*is granted in aid of the privilege which, unless and until it is waived, is absolute*" and that the protection does not "*in any way depend on the conduct of the third party into whose possession the record of the confidential communication has come*".[78] In *Eager v Australian Government Solicitor* [1992] FCA 1060, Wilcox J held that "*[o]n the authority of Lord Ashburton v Pape an injunction will lie to restrain the improper use of privileged*

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[74] *Expense Reduction* (2013) 250 CLR 303 at 319 [45] per French CJ, Kiefel, Bell, Gageler and Keane JJ.
[75] *Expense Reduction* (2013) 250 CLR 303 at 323 [58].
[76] See discussion in J Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000), chapter 12, especially at 244-247, 251-253.
[77] See C Tapper, "Privilege and Confidence" (1972) 35 MLR 83 at 85-86.
[78] *Goddard* [1987] QB 670 at 685C per Nourse LJ; *Guinness Peat Ltd v Fitzroy Robinson* [1987] 1 WLR 1027, 1041-1042, 1045-1046 per Slade LJ, Woolf LJ and Sir George Waller agreeing. See also *Derby & Co Ltd v Weldon (No 8)* [1991] 1 WLR 73 at 84C, in which Vinelott J considered that the injunctions granted in *Ashburton* and *Goddard* "*could not ... have been founded solely on the ground that the information contained in them had been imparted in confidence*".

documents and their return to proper custody".[79] In *Richards v Kadian* (2005) 64 NSWLR 204 at 224 [83], Beazley JA (as her Honour then was, and with whom Hodgson JA and Stein A-JA agreed) considered that the principle with which the court in *Ashburton* was dealing "*related to 'protected' information regardless whether the 'protection' was afforded by privilege or confidentiality*".

42. *Fourthly,* courts in other common law jurisdictions have recognised the existence of general law rights which may support an injunction to restrain the use of privileged material that falls into the possession of a third party, solely on the basis of the privilege attaching, and decoupled from the conscience of the third party recipient or traditional concepts of confidentiality.[80] In particular, in ***Lachaux*** *v Independent Print Limited* [2017] EWCA Civ 1327, the English Court of Appeal recently upheld an injunction granted by the primary judge restraining the defendant media outlet from retaining and making use of the plaintiff's privileged documents, which had been provided by his estranged former wife. The Court found that there was no doubt that the documentation was the confidential property of the claimant and also the subject of legal professional privilege[81] – this was despite the wife having given unchallenged evidence that the documents had already been sent to a number of agencies and media organisations.[82] Similarly, in ***Wee*** *Shuo Woon v HT SRL* [2017] 2 SLR 94, the Singapore Court of Appeal dismissed an appeal against an order requiring that references to the respondent's privileged emails, which had been published online by WikiLeaks after a hack by an unknown third party, be expunged from an affidavit relied upon by the appellant (a former employee of the respondent) in an action for breach of his employment contract. The Court in *Wee* considered that the privileged emails concerned had maintained their confidential nature despite publication, due to the volume of material published together, the limited detail in news reporting and relative inaccessibility of any specific email.[83] The outcome of each of *Lachaux* and *Wee* reinforces the Courts' recognition of the

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[79] His Honour found that confidentiality in the material had been retained despite it having been obtained by police officers executing a search warrant; and said that it was not necessary to decide the position if confidentiality in the documents had been lost other than through waiver of the privilege.

[80] For example, the Supreme Court of Canada has observed that "*any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice*": *Lavallee, Rackel & Heintz v Canada (Attorney General)* [2002] 3 SCR 209 at 234 [24] per McLachlin CJ, Arbour, Iacobucci, Major, Bastarache and Binnie JJ; see also *R v Uljee* [1982] 1 NZLR 561 at 570 per Cooke J, at 571-572 per Richardson J, at 576 per McMullin J.

[81] *Lachaux* [2017] EWCA Civ 1327 at [22].

[82] *Lachaux v Independent Print Ltd/ Evening Standard Ltd* [2015] EWHC 3677 (QB) at [28]-[32].

[83] *Wee* at [41] to [43].

importance of the law according protection to privileged communications obtained by stealth, trickery or other impropriety.[84] Yet the strained characterisation by the Court in each case of the leaked material as "confidential" despite having entered the public domain, so as to engage the category of equitable relief identified in *Ashburton,* tends to highlight the "*doctrinally questionable*"[85] nature of that relief. The orders protecting the privileged material in each case would have been more compelling if the reasoning had been based simply on the fact that privilege in the documents had not been waived.

Conclusion on first question

43. In light of the foregoing, a determination by this Court that the common law of legal professional privilege entitles the recipients of legal advice to recover documents prepared for the dominant purpose of their being provided with such advice and to restrain their use by a third party who has obtained the documents without authority would involve no novel extension of principle. Such a holding would instead entail the principled application of a common law right already recognised in the authorities of this Court in a way that is consistent with the rationale underpinning that right.

Question 2: whether s 166 of ITAA 1936 authorises retention and use of privileged documents

44. Section 166 of the ITAA 1936 relevantly provides that "*from the returns, and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of ... the amount of the taxable income ... of any taxpayer*". That provision is not to be construed as abrogating common law rights of legal professional privilege in the absence of clear words or necessary implication.[86]

45. If, as the plaintiffs contend, the common law of legal professional privilege confers a right upon a privilege holder to restrain the use of privileged material by a third party in possession of such material and to compel its return, then the Commissioner could only resist an action based on such a right if s 166 permitted this expressly or by necessary intendment. Yet, as the Full Federal Court recognised in *Donoghue,* "*such clarity of expressed intention [to abrogate privilege] could not be located in the text of s 166*".[87]

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[84] *Wee* [2017] 2 SLR 94 at 110 [50]; *Lachaux* [2017] EWCA Civ 1327 at [14]-[15].
[85] A Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis Australia, 2018) at pp 711-712 [16.116].
[86] *Daniels* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[87] See *Donoghue* (2015) 237 FCR 316 at 335-336 [75].

(Kenny and Perram JJ treated s 166 as applying to privileged information only because of the position their Honours took on question 1, namely, that the issue of privilege could only arise in the context of a party resisting the exercise of power of compulsory production.[88])

46. Nor can any intention to abrogate legal professional privilege be discerned by necessary implication from the terms of s 166, read in the context of the taxation legislation as a whole. In this respect, while the Commissioner has broad powers under the taxation legislation to require the production of documents and to gain access to premises and take copies of documents,[89] these statutory powers of investigation have been held to be subject to principles of legal professional privilege.[90] As such, the Commissioner must afford taxpayers an adequate, practical and realistic opportunity to claim privilege over documents sought to be inspected.[91]

47. It would be an anomalous result if the statutory scheme operated such that the Commissioner were precluded from exercising his powers to compulsorily obtain documents to which legal professional privilege attaches – which powers are conferred for the purpose of enabling the Commissioner to make assessments under s 166 – but could nonetheless resist a common law action founded on the law of legal professional privilege by reason of his functions under s 166.

48. The incongruity of such an outcome was acknowledged by this Court in granting special leave to appeal against the orders of the Federal Court in ***AWB*** *Limited v Australian Securities and Investments Commission* (2008) 216 FCR 577.[92] In *AWB*, Gordon J had held that although ASIC could not compel the production of legally privileged communications (given that the *Australian Securities and Investments Commission Act 2001* (Cth) did not override or abrogate legal processional privilege),[93] that did not prevent ASIC, in the exercise of its statutory powers, from *receiving* privileged

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[88] *Donoghue* (2015) 237 FCR 316 at 336 [76].
[89] *Taxation Administration Act 1953* (Cth), Schedule 1, ss 353-10, 353-15; see also ITAA 1936 s 264A.
[90] *Federal Commissioner of Taxation v Citibank* (1989) 20 FCR 403 at 417 per Bowen CJ and Fisher J, at 437 per French J; *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187 at 199 per Lockhart J, at 203 per Burchett J, at 208 per Hill J; *Federal Commissioner of Taxation v Coombes (No 2)* (1998) 160 ALR 456 at 461-467 per Heerey J; *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* (2018) 359 ALR 277 at 283 [25] per Kenny, Robertson and Thawley JJ.
[91] *Federal Commissioner of Taxation v Citibank* (1989) 20 FCR 403 at 417 per Bowen CJ and Fisher J, at 437 per French J.
[92] *AWB Limited v Australian Securities and Investments Commission* [2009] HCATrans 331.
[93] *AWB* (2008) 216 FCR 577 at 586 [24].

information from ex-employees of AWB and then proceeding to make use of such information.[94] Her Honour expressly relied, in this regard, on the principle in *Calcraft* and the authorities which had applied it.

49. On the application for special leave, it was submitted on behalf of AWB that this approach left AWB and other persons in its position in a "classic catch-22". Though it was accepted that material in ASIC's possession could well contain privileged communications and that AWB could claim privilege in respect of such communications in a breach of confidence action, AWB could not find out what privileged communications had been obtained so as to allow it a practicable and reasonable opportunity to make a claim over them.[95] It was argued that this "*statutory circle*", whereby an investigative body could obtain privileged information from some person other than the privilege holder (without the authority of the privilege holder) and then use that information without affording the privilege holder an opportunity to be heard, left the law in a "*most unsatisfactory state*".[96] The grant of special leave suggests that the Court saw merit in this characterisation, or at least considered that the issue warranted closer examination. Ultimately, the *AWB* dispute was resolved by agreement such that this Court had no occasion to consider the issues arising on the appeal. This proceeding provides a renewed vehicle for disposition of these important matters (and, indeed, a more fitting vehicle than was presented by the *AWB* case, given that the Demurrer assumes that the Commissioner is in possession of documents to which legal professional privilege attaches).

50. In *Donoghue*, the Full Federal Court expressly left open the potential for a general law claim to be brought against the Commissioner for the return of privileged material, at least before the information in that material became assimilated via the assessment process.[97] The plaintiffs contend that there is no reason why such action should cease to be available following the making of any assessment. If there is nothing in the income tax legislation abrogating the privilege, it should make no difference whether an action to recover privileged material is brought before, or after, an assessment issues.

51. Yet, even if, which the plaintiffs deny, s 166 of the ITAA 1936 entitles the Commissioner to make an assessment of a taxpayer based upon privileged documents in his possession – as was held by the Full Federal Court in *Donoghue* at 355 [74] – that construction of

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[94] *AWB* (2008) 216 FCR 577 at 588 [29], 589 [34].
[95] *AWB Limited v Australian Securities and Investments Commission* [2009] HCATrans 331, p 11.
[96] *AWB Limited v Australian Securities and Investments Commission* [2009] HCATrans 331, p 11.
[97] *Donoghue* (2015) 237 FCR 316 at 331 [59] per Kenny and Perram JJ.

the legislation does not resolve the Commissioner's entitlement to retain or make use of privileged documents *before* making any assessment based upon them in the face of a common law action.

52. It would not be right to interpret s 166 in a way which infringes fundamental common law rights, by immunising the Commissioner from a claim that seeks to restrain his use of privileged documents.

Part VI: Orders

53. The Court should make the following orders:

    a. The Demurrer be overruled.

    b. The proceedings be listed for further directions before a single justice.

Part VII: Estimate for Hearing

54. It is estimated that 2 hours will be required for the presentation of the plaintiffs' oral argument.

Dated: 11 December 2018

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I M Jackman SC
Telephone: (02) 9223 5710
Facsimile: (02) 9232 7740
Email: ijackman@eightselborne.com.au

T L Phillips
Telephone: (02) 8915 2680
Email: tphillips@sixthfloor.com.au