Memorandum

Law Council
OF AUSTRALIA

To: **CEOs – Constituent Bodies**
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Directors
Section Chairs
Chair - Professional Ethics Committee
Chairs - National Criminal Law Committee

From: Jonathan Smithers, Chief Executive Officer

Date: 15 August 2019

Glencore International Ag and Ors v Commissioner of Taxation of the Commonwealth of Australia and Ors
High Court of Australia, No. S256 Of 2018

Hearing date: 17 April 2019
Judgment date: 14 August 2019

Action request

Constituent bodies are asked to note the following High Court judgment, which is of significance regarding to legal professional privilege.

Recap of facts

1. Glencore International AG (first plaintiff), Glencore Investment Pty Ltd (second plaintiff), Glencore Australia Holdings Pty Ltd (third plaintiff) and Glencore Investment Holdings Australia Pty Ltd (fourth plaintiff) (collectively referred to in this note as the **Glencore Group**) is a group of interrelated companies of which two, being the second and third plaintiffs, are incorporated in Australia.

2. At various times since 1995 each of the plaintiffs had engaged Appleby (Bermuda) Limited (**Appleby**), an incorporated law practice in Bermuda, to provide legal advice. This was done either directly, or through their other legal advisers, King & Wood Mallesons (**KWM**).

3. In October 2014, KWM engaged Appleby on behalf of the plaintiffs to provide legal advice in respect of a corporate restructure of the Australian entities within the Glencore Group. This was known as "**Project Everest**".

4. By November 2017, the defendants had, by virtue of a hacker publishing stolen documents on the internet, obtained various documents in respect of the Glencore Group, which included documents in respect of Project Everest (referred to within the litigation as the "**Glencore Documents**").

5. Since November 2017, the plaintiffs made a number of attempts to recover the Glencore documents and sought an undertaking that the documents would not referred to or relied upon. The defendants, being the Commissioner of Taxation (first

defendant), Neil Oelsen, Second Commissioner of Taxation (second defendant); and Mark Konza, Deputy Commissioner of Taxation (third defendant) (collectively referred to as **the defendants**) refused these requests.

6. The plaintiffs sought an injunction pursuant to ss31 or 32 of the *Judiciary Act 1903* (Cth) restraining the defendants and any other officer of the ATO from relying upon, referring to or making use of the Glencore Documents. They also sought that the documents be returned. Failing this, the plaintiffs sought that the matter be remitted back to the Federal Court to determine whether any of the documents were subject to legal professional privilege.

Summary of arguments

7. Glencore's key arguments were as follows:

    a. **Legal professional privilege is a recognised as a fundamental right in common law. It follows that this right ought to give rise to an enforceable remedy** to protect that right. This is simply bringing our existing law into alignment with the underlying rationale to that law. The case law does not preclude such an extension of the law in this way.

    b. **Legal professional privilege is necessary to preserve the administration of justice** by facilitating the freedom of consultation of legal advisors without the apprehension of compelled disclosure. This facilitation of the rule of law is administered more frequently and directly by legal advisors that it is by judges (*Carter v Northmore Hale* ([1995] HCA 33; 183 CLR 121).

    c. **There is a gap in the law at present.** The law of confidential information, which has established remedies, requires evidence as to the confidential nature of the information. This falls short in the context of confidential information obtained by hackers and then published to a world-wide audience. Rather than straining the law on confidential information, it is preferable in the context of the wider body of Australian law to rather address this gap through the expansion of the law of legal professional privilege. Specifically, through the auxiliary jurisdiction of equity to cure the deficit (i.e the lack of enforceable remedy in the common law of legal professional privilege at present), by way of injunction.

    d. **The balance of public interests always favours legal professional privilege, regardless of the client's individual merits:** (*R v Derby Magistrates' Court* [1996] A.C. 487). While the present case gave rise to suggestions of tax avoidance, Glencore submitted that when considering a balance of public interests (i.e. the public interest in protecting legal professional privilege versus not allowing tax evasion and/or inaccurate tax assessments when certain already known information is excluded) that the balance has already be decided in favour of legal professional privilege: *Carter v Northmore Hale*). In this way, legal professional privilege is an absolute trump card and the balance is always struck in favour of legal professional privilege.

8. The ATO's key arguments were as follows:

a. **Legal professional privilege is a common law right, but only to the extent that it is an immunity from compulsory production:** (*Lord Ashburton v Pape* (1913) 2 Ch 469); Being called a "right" did not convert it into anything else and, in fact, the word "right" can be accurately used to refer to in substance what is an immunity. It is erroneous to say that a public interest such as legal professional privilege has to be developed to the fullest extent possible in order to protect that interest. It was also argued that legal professional privilege could nevertheless be considered as a right giving rise a remedy: but only to the remedy of resistance from compulsory production of documents.

b. **Regardless, this is an occasion when the clear words of statute have limited the scope of legal professional privilege.** Once the Glencore documents were in the hands of the Commissioner, the Commissioner was not only allowed, but was *required* to use them under s 166 of the *Income Tax Assessment Act 1936* (Cth). There are examples where Acts have limited the operation of legal professional privilege, for example the *Royal Commissions Act* (Cth), which allows for privilege to be overridden in certain circumstances (section 6AA). However a limitation can only be interpreted when the legislative intent to do so manifests in statute "either by express words or by necessary implication" (*Bropho v Western Australia* (1990) 171 CLR 1). Section 166 was a clear as it could possibly be in the circumstances, given that it could not refer to a principle (legal professional privilege as an actionable right) that did not exist at the time.

c. **There is no clear deficiency in the law.** ATO further argued that Equity already restrains the use of confidential information by third parties when it was known that the information was improperly obtained (*Johns v Australian Securities Commission* (1993) 178 CLR 408). Furthermore, the case law to date has supported the use of improperly obtained material by innocent third parties (*AWB v ASIC*[1], *Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501*). Accordingly, there is no clear deficiency in the law to be remedied by an expansion of Legal Professional Privilege.

d. However, if it is found that such a deficiency does exist, it ought to be remedied by the legislature, not the Courts. The hacking phenomenon is a modern issue. If we accept that any such "rebalancing" of the law ought to take place, then it ought to be done by the legislature not the Courts.

Judgment

9. In a unanimous decision, the High Court upheld the ATO's demurrer and dismissed Glencore's proceeding with costs.

10. While the High Court noted that there was no issue about the Glencore documents being the subject of legal professional privilege, the ATO's demurrer was upheld on the first ground: that Glencore's claim was based on the incorrect premise that legal professional privilege is a right capable of being enforced. It was accordingly not

[1] As cited in the transcript.

necessary for the Court to consider s166 of the *Income Tax Assessment Act 1936* (Cth).

11. The High Court recognised that legal professional privilege is a fundamental right within our legal system, however only to the extent that it functions as an immunity:

> [Glencore's] argument cannot be accepted. Fundamentally it rests upon an incorrect premise, namely that legal professional privilege is a legal right which is capable of being enforced, which is to say that it may found a cause of action. The privilege is only an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications, as *Daniels Corporation* holds.[2]

12. The High Court emphasised that the key cases concerning legal professional privilege all considered this issue in the context of immunity from production: *Grant v Downs* considered the conditions for objection to production,[3] which were modified but considered in the same context in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.[4] *Attorney-General (NT) v Maurice* considered privilege from the production of documents,[5] and *Carter v Northmore Hale Davy & Leake* also addressed privilege in this context- even to the extent that it prevented an accused from obtaining documents relevant to his defence.[6] *Baker v Campbell* [7] and *Commissioner of Australian Federal Police v Propend Finance Pty Ltd (Propend)*[8] extended privilege to apply to search warrants authorised by statute, and *Daniels Corporation*[9] extended privilege to apply to documents compelled under the then *Trade Practices Act 1974* (Cth).[10]

    The High Court found that these cases did not suggest any further relief beyond immunity from production, nor that the intended effect was to render legal professional privilege an enforceable legal right. This, it was stated, was made clear in cases such as *Propend*, where Gummow J stated that legal professional privilege was:

> …a bar to compulsory process for the obtaining of evidence… not to be characterised as a rule of law conferring individual rights, breach of which gives rise to an action the case for damages, or an apprehended or continued breach of which may be restrained by injunction.[11]

13. The High Court similarly did not agree with Glencore's argument that the 'balance of public interests' in respect to the administration of justice favoured legal professional privilege. Rather, it was found that there are other public interests, discussed at length in cases such as *Grant v Downs,*[12] such as the 'fair conduct of litigation' which require that all relevant documentary evidence be available. It is for reasons such as

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[2] *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [12].
[3] *Grants v Downs* (1976) 135 CLR 674 at 687-688 per Stephen, Mason and Murphy JJ; *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [17].
[4] (1999) 201 CLR 49 at 71-73.
[5] (1986) 161 CLR 475.
[6] (1995) 183 CLR 121.
[7] (1983) 153 CLR 52.
[8] (1997) 188 CLR 501.
[9] (2002) 213 CLR 543.
[10] *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [18].
[11] (1997) 188 CLR 501 at 565, 566.
[12] (1976) 135 CLR 674.

this that the law has already struck a balance between these public interests: one that confined legal professional privilege to only an immunity from production and/or disclosure.[13]

14. The High Court further found that in the circumstances, Glencore did not identify a juridical basis on which the Court could restrain use of the privileged documents, and to the extent that there is a gap in the law, then legal professional privilege is not the area to be further developed to remedy that gap. The High Court found that there was no basis in common law to support the extension of legal professional privilege in this way, noting that the development of the common law can only proceed from settled principles and be conformable with them.

15. Rather, the appropriate avenue for relief is through equity on the basis of confidential information, which, contrary to the Glencore's arguments, was supported by *Lord Ashburton v Pape*[14] which considered and applied the law of confidential information.[15] Also contrary to Glencore's position, the case of *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*[16] was found to have no broader application in respect of the granting of injunctions pursuant to the Court's case management powers (and without recourse to equity).[17]

16. In addition, the High Court found Glencore's assertion that common law courts have elsewhere granted injunctions (on a basis other than confidential information) was incorrect. Overseas cases did not impact the status of the law of this point in Australia.

Implications

17. Overall, it appears that (if available) Glencore should have sought remedy through equity and the law of confidential information. As this was not raised, the Court did not need to consider this area in any great detail, however, the Court made it clear that it was the only potential appropriate avenue in this circumstance.

18. Consequently, the Court did not need to address the limitations of recourse though confidential information: that is, that such an action generally requires evidence as to the confidential nature of the documents. In the present case that course of action was undermined by the fact that the documents were stolen and published by an unidentified hacker (i.e. their confidentiality was lost by being placed into the public domain). There are also interesting issues surrounding the balance between confidentiality and the obligations upon regulators and administrators to use all available information to discharge their statutory obligations.

19. While it is disappointing that this issue was not further addressed, it appears that there is a gap in the law by virtue of the nature and impact of the modern phenomenon of hacking and cyber security. The decision of the High Court does not address, for example, the admissibility of hacked documents in subsequent court

[13] *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [29].
[14] [1913] 2 Ch 469.
[15] *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [37].
[16] (2013) 250 CLR 303.
[17] *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [36].

cases and the court's discretion to exclude improperly obtained evidence (as Glencore's case did not depend on questions of admissibility).

20. These gaps could have serious implications. Legal professional privilege facilitates the administration of justice by encouraging clients to make full and frank disclosures to their lawyers. This in turn furthers access to justice, insofar as it allows clients to receive accurate legal advice. Failure to protect this information thereby undermines the operation and effectiveness of our legal system.

21. As this decision is now the authority on the issue, there are also serious concerns with regard to privileged documents mistakenly disclosed to government agencies. If privileged documents are inadvertently disclosed in court proceedings, the rules of the court are a sufficient remedy to compel their return and non-use per *Expense Reduction*[18]. The various state and territory professional conduct rules reinforce this. However, if such documents come into the possession of a government agency, there is no clear recourse for affected parties. The High Court refrained from considering this issue in the context of the ATO's assertion that s166 of the *Income Tax Assessment Act 1936* (Cth) prevented them from returning and disregarding the Glencore documents.

22. Furthermore, the decision seems to leave unanswered a potential back door or loophole through which otherwise privileged documents might become admissible.

23. Further potential implications include greater exposure by legal practitioners and law firms to professional negligence proceedings in the event that confidential information stored online is inadequately protected from hackers.

The Law Council of Australia is grateful for the assistance of Ian Bloemendal (Chair, Privileges and Immunities Committee, Federal Litigation and Dispute Resolution Section) and Clint Harding (Chair, Taxation Committee, Business Law Section) in the preparation of this memorandum.

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[18] (2013) 250 CLR 303.

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