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 IN REPLY

1. The Defendants resist the Court's recognition of the cause of action for which the Plaintiffs contend for four principal reasons (DS[9]): a reliance on "history, principle and authority" as well as an opposition to judicial "innovation". None of those reasons, individually or collectively, provide sufficient reason for rejecting the Plaintiffs' claim.

2. ***First,*** the Defendants' invocation (DS[15]) of the history of legal professional privilege (**LPP**) is misplaced. In this regard, in ***Baker*** *v Campbell* (1983) 153 CLR 52, Dawson J explained (at 126-7) that the common law doctrine emerged in the sixteenth century as a natural exception to the then novel right of testimonial compulsion, and in its origins "*was concerned with the duty of the attorney – his oath and his honour – arising out of his professional relationship with his client*". His Honour observed that the "*modern theory that the doctrine is necessary to promote freedom of consultation of legal advisers by clients did not clearly emerge until the nineteenth century*". It followed that (at 128):

> Whilst legal professional privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of

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communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice.

3. Other members of the Court similarly recognised that the modern law of LPP has "*moved decisively away*"[1] from its historical origins, which no longer provide a "*sufficient reason for holding that legal professional confidences are privileged from disclosure*";[2] and that LPP is "*an emanation of a more fundamental and general common law principle*" concerned with the administration of justice.[3] The Defendants accept (DS[34]) that the modern rationale for LPP is to assist and enhance the public interest in the administration of justice by facilitating legal advice and representation. However, this acknowledgment belies their contentions that the compulsion of lawyers' testimony remains the focus of the modern law of privilege (DS[15]-[16]) and that the law as recognised in England over 100 years ago has and should be "*consistently applied in Australia*" (DS[7], [18]).[4]

4. ***Secondly,*** at the level of principle, the description by this Court of LPP as a "right" was not intended as an empty label (cf DS[16]) nor to denote some fixed Hohfeldian classification (cf DS[17]-[20]). Hohfeld's central distinction is between power-conferring and obligation-imposing rules.[5] There is no substantive distinction between a right and a privilege (or immunity) when both operate in a peremptory way: a privilege (or an immunity) is then simply a right not to have one's legal position interfered with by another. The "right" which underpins LPP follows from the importance of ensuring that clients can consult with their lawyers with freedom and candour.[6] In determining the incidents of a right at common law, including the resulting benefits or remedies, the "*central policy consideration ... is the coherence of the law*".[7] There is no logical reason, consistent with the accepted rationale for LPP, why the law should protect a privileged

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[1] *Baker* (1983) 153 CLR 52 at 93, 95 per Wilson J.
[2] *Baker* (1983) 153 CLR 52 at 65 per Gibbs CJ.
[3] *Baker* (1983) 153 CLR 52 at 113-114 per Deane J.
[4] In particular, this Court's resolution of the issues in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 on a basis that did not depend on the history which the Defendants seek to exalt (and which differed from the approach that had been taken by the Court of Appeal in *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group* (2012) 295 ALR 348 at [106]-[131] per Campbell JA: cf DS[12], fn 8) demonstrates that the incremental development of the law of privilege is not and should no longer be tethered to its superseded historical foundations: cf DS[27].
[5] W Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710.
[6] *Baker* at 66 per Gibbs CJ; *Attorney General (NT) v Maurice* (1986) 161 CLR 475 at 480 per Gibbs CJ, at 487 per Mason and Brennan JJ, at 490 per Deane J; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 126-128 per Brennan J, at 132 per Deane J, at 144-147 per Toohey J, at 161 per McHugh J; *Commissioner of Australian Federal Police v* ***Propend*** *Finance Pty Ltd* (1997) 188 CLR 501 at 543 per Gaudron J.
[7] See *Gnych v Polish Club Ltd* (2015) 255 CLR 414 at 434 [72] per Gageler J; *Miller v Miller* (2011) 242 CLR 446 at 454 [15] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

communication from compulsory disclosure but fail to protect it when disclosed without authorisation; or why the scope of the liberty to consult with legal advisers should be determined by when LPP is asserted.[8] Further, privileged documents obtained by the Commissioner – other than via compulsory process – might then be sought by notice pursuant to s 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth). That such a notice may be resisted on grounds of privilege[9] but not confidentiality[10] requires close examination of the doctrinal basis for the Defendants' position: cf DS[26].

5. Further, neither equity's protection of confidences[11] nor the judicial discretion to exclude evidence procured improperly[12] warrant a conclusion that the law already provides the "*necessary tools*" to address *any* attempt to use privileged material in court so as to undermine the public interests served by LPP: cf DS[33]-[34]. Recourse under either of those principles requires the establishment of a relevant unconscionability or impropriety in obtaining information, which may be increasingly difficult in an electronic age. The common law discretion means that *Lloyd v Mostyn* and *Calcraft* are now discredited. A different conclusion would be reached under the *Bunning* discretion and the duty created by s 138 of the *Evidence Act*. The cardinal error involved in referring to s 138 as creating a "*discretion*" (DS[31], [33]) was exposed by a majority of this Court in stating that the section calls for "*an evaluative judgment mandating exclusion*".[13] The legislative assumption underlying s 138 is thus that the rejection of evidence obtained by infringing legal rights or other impropriety rests on more than a discretion. That view of the policy of the law has implications for the use of privileged material without a client's consent and for the reaction of a court to it. This justifies expanding, rather than confining, the circumstances in which the general law will act to protect lawyer/client communications: cf DS[21]. Moreover, ss 118- 119 of the *Evidence Act* (which have not been implemented in all Australian jurisdictions) are not a salve to the tension between *Calcraft* and *Lord Ashburton* and do not justify the ossification of the common law of privilege: cf DS[32].[14]

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[8] See *Mykytowych v VIP Hotel* [2016] 4 SLR 829 at [67], referred to at DS[13] fn 14.
[9] See, generally, *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* [2018] FCAFC 38 at [25].
[10] *Smorgon v Australian and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 487, 490, per Stephen J.
[11] Including in the hands of third party recipients: *Johns v ASC* (1993) 178 CLR 408 at 459-460 per Gaudron J.
[12] ***Bunning*** *v Cross* (1978) 141 CLR 54 at 64-65 per Barwick CJ, at 72 per Stephen and Aickin JJ.
[13] *IMM v R* (2016) 257 CLR 300 at 306 [16] fn 15 per French CJ, Kiefel, Bell and Keane JJ; cf *Em v R* (2007) 232 CLR 67 at 101 [95] and *Police v Dunstall* (2015) 256 CLR 403 at 416 [26], where there was apparently no argument on the point.
[14] ***Esso*** *Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49 at 61 [22]-63 [27] per Gleeson, Gummow and Gaudron JJ, at 83 [91] per Kirby J. In any event, if the public availability of a privileged document is no answer to an objection to its admissibility pursuant to *Evidence Acts* (see DS[32], *Re Cannar*

6. ***Thirdly***, as to authority, there has been no authoritative statement by this Court establishing that LPP is *only* an immunity from an obligation to produce documents or give evidence arising under court processes or by way of statutory compulsion: cf DS[7], [10]. That specific question did not arise in *Daniels*, *Propend*, *Baker* or any other High Court case. The holding in *Daniels* that LPP is "*an important common law right, or perhaps, more accurately, an important common law immunity*"[15] can hardly be viewed as placing an "unequivocal" (DS[11]) limitation on the nature of the right identified, particularly given that what was sought by the appellant in *Daniels* was, in fact, immunity from production. Nor were the observations of Gummow J in *Propend*,[16] relied upon at DS[11], part of the *ratio* of that decision or joined by the other members of the Court.[17]

7. Further, and importantly, in *Baker,* a majority of the Court expressly did not decide whether LPP controls the use of information in the hands of another: cf DS[11]. Mason J said (at 80) that while, according to authority, it seemed that the availability of the claim for privilege is lost once the document or a copy passes into the possession of another, "*[t]hose rules have been criticized and the decisions on which they are based may perhaps require some qualification, particularly in relation to documents obtained by illegal means or by deception*"; and that it was not necessary for the Court to resolve such difficulties. Brennan J was of the opinion (at 110) that *Calcraft* should not be followed insofar as it requires the admission of a document or a copy which is privileged because it has come into existence merely as the "*materials for the brief*". Deane J said (at 112) that privilege may be lost "*arguably*" by the content of the communication ceasing to be confidential; and Dawson J similarly indicated (at 129) the existence of competing authority on this point. The question of whether LPP is an immunity only, or also confers a cause of action, thus remains an open one on the authority of this Court.

8. ***Fourthly,*** the Defendants greatly exaggerate the step advocated by the Plaintiffs, which does not entail any "radical reformation" of the law of LPP in a manner that is inconsistent with this Court's function: cf DS[6]-[9], [34]-[36]. A core aspect of this Court's function is the resolution of conflicting lines of authority and the filling of anomalous gaps. In *PGA v The Queen*, the plurality described how this Court undertakes the "*creative element*

[2003] NSWSC 802 at [80]-[82]), the same result ought obtain under the common law given its "*symbiotic relationship*" with legislation: *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 532 [31] per Gleeson CJ.

[15] (2002) 213 CLR 543 at 553 [11], per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

[16] (1997) 188 CLR 501 at 565, 570.

[17] Gaudron J at 537, fn 164 did not endorse the reasoning of Gummow J on this aspect: cf DS[11], fn 3.

of both inductive and deductive reasoning", including by "*reasoning 'from the more fundamental of settled legal principles to new conclusions'*".[18] If the Defendants' characterisation of the current state of the law be correct, then this case falls squarely within (at least) the fourth category referred to in *PGA*:[19] declining to maintain a rule (here, the characterisation of LPP as an immunity) by reason of a shift in the case law and in the assumptions of the legislature which reveals that such rule has been superseded and need not be maintained (here, due to recognition of the modern rationale for LPP).

9. ***Finally,*** the Defendants' narrow approach to the application of the principle of legality in construing s 166 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**) echoes the dissentients in *Baker*[20] and does not withstand scrutiny. The presumption approved by O'Connor J, that it is highly improbable that Parliament would act to depart from "*fundamental principles*" or "*rights*" without expressing itself with "*irresistible clearness*", is a "*working hypothesis*", known to Parliament and the courts, upon which statutes will be interpreted.[21] However, this formulation "*can only be treated as a comprehensive explanation of the operation of the principle [of legality]as applied in practice if the working hypothesis is extended to include the way in which rights recognised by the common law can be developed by courts through time after the enactment of a statute*":[22] cf DS[40]. Thus, in *Baker*, the newly recognised law of LPP was applied in 1983 in construing a statute enacted in 1914. The ITAA36 similarly must be construed in accordance with common law principles of interpretation "*as those principles exist, not simply at the time of enactment, but also at the time of application*".[23] O'Connor J's presumption clearly encompasses the fundamental principles and rights reflected in legal professional privilege as it has come to be developed in recent decades.[24]

Dated: 22 February 2019

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[18] (2012) 245 CLR 355 at 372-373 [28]-[29] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
[19] (2012) 245 CLR 355 at 373 [30].
[20] *Baker* (1983) 153 CLR 52 per Gibbs CJ at 68-69; per Brennan CJ at 106-107.
[21] *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ.
[22] Gageler, Stephen, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37(2) *Monash University Law Review* 1, p 13.
[23] Ibid, p 14; *Daniels* (2002) 213 CLR 543 at 556-557 [19]-[21], at 558 [27], 560 [35] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; cf *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.
[24] A recent demonstration of the extension of the principles underlying LPP beyond objecting to the tender of evidence appears in the Court's criticism of the conduct of the lawyers and authorities in *AB v CD* (2018) 93 ALJR 59 at 62 [10].