

# LITIGATION ALERT:

## Legal professional privilege – a shield, not a sword

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The recent decision of the High Court of Australia in *Glencore International AG and ors v Commissioner of Taxation and ors* [2019] HCA 26 has important implications for individuals and companies whose confidential documents enter the public domain – even where the cause of that disclosure is theft.

19 November 2019

### HOW DOES THE DECISION AFFECT YOU?

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**Glencore emphasises the importance of maintaining confidentiality over your communications and documents, and ensuring that robust document security (particularly cyber security) arrangements are in place.**

**Stolen documents that have been made public cannot be recovered through legal action based on a claim of “legal professional privilege”. Rather, any action must be brought on the grounds of a breach of confidentiality.**

**Individuals and companies face serious risks of being exposed to legal and regulatory actions founded on communications passing between them and their lawyers, which would have been otherwise unknown or lacking in evidence if those communications were protected by legal professional privilege.**

**If you suspect that a data breach may have occurred, seek legal advice immediately.**

### BACKGROUND

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The High Court’s decision in *Glencore* involved 4 key players:

- the plaintiffs, a group of inter-related companies (collectively, “**Glencore**”);
- Glencore’s Bermuda-based legal advisers, Appleby (Bermuda) Limited (“**Appleby**”);
- Glencore’s Australian-based legal advisers, King & Wood Malletsons (“**Malletsons**”); and
- the defendants, being the Commissioner of Taxation the Second Commissioner of Taxation and the Deputy Commissioner of Taxation (collectively, “**the ATO**”).

At various times since 1995, Glencore had engaged Appleby to provide legal services, either directly by Glencore or through other legal advisers such as Mallesons.

In 2014, Mallesons engaged Appleby on behalf of Glencore to provide legal advice in respect of the Australian Glencore entities. The retainer was known as “*Project Everest*”.

In 2017, a cyber-attack on Appleby resulted in 13.4 million files being leaked by an unknown source to the International Consortium of Investigative Journalists. The documents subject of the leak became known as the “*Paradise Papers*”, and included files which exposed the details of Appleby’s clients utilising offshore tax havens. Glencore was one such client.

The ATO obtained the Paradise Papers, and used them to investigate Australian entities utilising possible tax avoidance schemes.

Glencore became aware that the ATO was in possession of the leaked files. Glencore immediately demanded return of the documents, and asked the ATO to provide undertakings that it would not refer to or rely on any of the documents. Glencore’s sole basis for doing so was that the documents were protected by legal professional privilege.

The ATO declined to provide the undertakings sought by Glencore. Glencore applied to the High Court for an injunction restraining the use of those documents by the ATO.

## WHAT IS LEGAL PROFESSIONAL PRIVILEGE?

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Legal professional privilege is a fundamental common law right which protects the confidentiality of statements and communications passing between a lawyer and their client.<sup>1</sup>

In order to attract legal professional privilege, statements and communications must be confidential and have been made for:

- the dominant purpose of the client obtaining, or the legal practitioner giving, legal advice; or
- use in existing or contemplated legal proceedings.<sup>2</sup>

Legal professional privilege precludes both the compelling of the production of a privileged communication, and the admissibility into evidence of that communication, without the client’s consent and in breach of the client’s confidentiality.<sup>3</sup>

In *Baker v Campbell* (1983) 153 CLR 52, Gibbs CJ observed that privilege exists:

to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist “a man would not venture to consult any skilful person, or would only dare to tell ... half his case”.<sup>4</sup>

In *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121, McHugh J observed:

By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce

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<sup>1</sup> Legal professional privilege is also enshrined in the Commonwealth and State *Evidence Acts*, where it is known as “*client legal privilege*”. The terms “*legal professional privilege*” and “*client legal privilege*” are used interchangeably.

<sup>2</sup> *Esso Australia Resources v FCT* (1999) 201 CLR 49.

<sup>3</sup> *Baker v Campbell* (1983) 153 CLR 52, 98 (Brennan J), cf. 112–113 (Deane J) (CLR); *Commissioner of Police (Cth) v Propend Finance Pty Ltd* (1997) 188 CLR 501, 550 (McHugh J).

<sup>4</sup> *Baker v Campbell* (1983) 153 CLR 52, 66 (Gibbs CJ).

those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that equal protection under the law is a reality.

## **THE ARGUMENTS IN GLENCORE**

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Given the documents were already in the public domain (and no longer confidential), the primary issue for the High Court was whether there was a basis on which the Court could prevent their use.

The following matters were not in dispute:

- the Glencore documents had entered into the public domain following a data breach involving theft from Appleby;
- there was no evidence of the ATO's conduct in the thefts, or knowledge of the origin of the Glencore documents,
- Glencore had no intention of waiving legal professional privilege;
- Glencore had taken no action to lose its privilege claims; and
- but for the data breach, the documents would have been confidential and subject to legal professional privilege.

Glencore argued that the documents which had been stolen from Appleby were subject to legal professional privilege, and that it was therefore entitled to an injunction requiring the ATO to return the documents, and not to rely on the documents. Glencore said that the injunctions were necessary to prevent the improper use of the documents by the ATO.

## **THE HIGH COURT'S DECISION – LEGAL PROFESSIONAL PRIVILEGE IS A SHIELD, NOT A SWORD**

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Glencore's arguments were unanimously rejected by the High Court.

The High Court recognised that legal professional privilege is a fundamental legal right – but only to the extent that it functions as an immunity from production. The High Court held that:

[Glencore's argument] 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...<sup>5</sup>

The High Court emphasised that previous cases concerning legal professional privilege all considered the issue in the context of immunity from production. The earlier 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.

The High Court found that Glencore had not identified a basis on which the Court could restrain the use of the privilege documents. Further, to the extent that there was a "gap" in the law, then legal professional privilege is not the area to be further developed to remedy that gap.

Rather, the appropriate avenue for relief might be through equity on the basis of confidential information – which Glencore did not argue, and which the High Court did not therefore need to consider.

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<sup>5</sup> *Glencore International AG and ors v Commissioner of Taxation and ors* [2019] HCA 26, [12] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

## IMPLICATIONS

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The High Court's decision in *Glencore* has important implications for clients whose confidential communications fall into the wrong hands – including where documents are stolen.

*Glencore* does not mean that stolen documents can never be recovered, or their use restrained. Rather, any action must be brought on the grounds of a breach of confidentiality (rather than legal professional privilege) and will be judged on its own facts.

*Glencore* emphasises the importance of maintaining confidentiality over your communications and documents, and ensuring that robust document security (particularly cyber security) arrangements are in place. If you suspect that a data breach may have occurred, it is important to seek legal advice immediately.

## FURTHER INFORMATION

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