

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S256 of 2018

B E T W E E N

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 OLESON, SECOND COMMISSIONER OF TAXATION

Second Defendant

MARK KONZA, DEPUTY COMMISSIONER OF TAXATION

Third Defendant

WRITTEN SUBMISSIONS OF THE ASSOCIATION OF CORPORATE COUNSEL AND
AUSTRALIA CORPORATE LAWYERS ASSOCIATION, SEEKING LEAVE TO
APPEAR AS AMICUS CURIAE

PART I PUBLICATION

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

PART II BASIS FOR INTERVENTION

2. The Association of Corporate Counsel and Australian Corporate Lawyers Association trading as ACC Australia (ABN 97 003 186 767) (together ACC) seeks leave to appear as *amicus curiae* to make submissions in support of the plaintiffs' claims for privilege, and in particular to address the broader international implications that this Court's decision in this matter may have.

PART III: WHY LEAVE SHOULD BE GRANTED

3. ACC submits that it should be granted such leave for the following reasons.

4. **First**, ACC represents more than 40,000 in-house lawyers in over 10,000 organisations in more than 85 countries, who have an interest in maintaining privilege and encouraging client candour globally. ACC has nearly 4,000 members in Australia. It therefore represents persons who may be indirectly affected by the Court's determination in this matter.
5. **Secondly**, the arguments sought to be put below should be considered by the Court and are unlikely to take up a substantial amount of time.

PART IV ARGUMENT

6. ACC supports the position of the plaintiffs in respect of the two questions of law arising from the demurrer:
 - (a) privilege holders have a right to restrain the unauthorised use by third parties of documents or evidence of communications to which privilege attaches (question 1); and
 - (b) that right is not abrogated by s 166 of the *Income Tax Assessment Act 1936* (Cth) (question 2).
7. In so supporting, ACC raises three further matters relevant to the Court's consideration of these questions.
8. **First**, the Court's determination in the present case will have a broad effect, including on privilege claims made by foreign clients over legal advice received from foreign lawyers about foreign law. In *Stewart v Australian Crime Commission* (2012) 206 FCR 347, Besanko J held that questions of legal professional privilege are determined by the *lex fori*, despite legal professional privilege being substantive rather than procedural, such that this Court's decision in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 would suggest that it should be governed by the *lex causae*. Further, Jagot and Bromich JJ held that statutes, such as the *Australian Crime Commission Act 2002* (Cth), are only presumed not to abrogate the Australian law of privilege, absent express words to the contrary, as opposed to foreign privilege. Therefore, in many circumstances, according to their Honours, either Australian law of privilege is applicable, even though the communication may be between a foreign lawyer and foreign client not connected in any way to Australia, or else the communication will not be protected.
9. Presuming that the Full Court's decision is correct, this Court's determination of the right of a privilege holder to protect third-party use of privileged materials will affect the

protection of privileged communications afforded by other jurisdictions. Indeed, the plaintiffs' claims for privilege concern communications with a Bermudan law firm.

10. **Secondly**, unless privilege holders are entitled in Australia to restrain the use by third parties of privileged materials that have been inadvertently disclosed or improperly obtained, whether by right of privilege or confidentiality, ACC is concerned that Australia may become a desirable place for hackers to leak stolen privileged documents. That would be so because:

- (a) if the Defendants succeed in respect of their demurrer, they and other executive agencies will be free to use wrongfully obtained privileged information as they see fit, including to make determinations that may have significant impacts upon the privilege holders, such as issuing amended tax assessments that provide conclusive evidence that the assessment was properly made and the amounts assessed are correct: schedule 1, section 350-10 of the *Taxations Administration Act 1953*;
- (b) persons, such as hackers, who improperly obtain documents which may include privileged communications from organisations operating in Australia, could leak those documents, including to executive agencies, or may threaten to do so, and the risk of privileged information leaks from law firms and other organisations as a result of hacking is increasing: see A Cornoy "Reevaluating Attorney-Client Privilege in the Age of Hackers" (2017) 82(4) *Brooklyn Law Review* 1817; and
- (c) the risk of that happening alone, without appropriate remedy, would undermine client candour to lawyers, including in-house lawyers, which is the very thing privilege is designed to encourage, so as to further the administration of justice.

11. **Thirdly**, regardless of whether a privilege holder's right to restrain a third party from using their privileged materials arises from privilege or as a matter of confidence, it should not be abrogated by a statute, such as s 166 of the ITAA, absent clear words: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 [11] (Gleeson CJ, Gaurdon, Gummow and Hayne JJ), 582 [106] (Kirby J); cf *Commissioner of Taxation v Donoghue* (2015) 237 FCR 316 at [70]-[77]. The principle arising from *Daniels* must extend to a right to protect confidentiality over privileged materials, being a small subset of all confidential communications. Such an extension is consistent with the rationale of privilege – to encourage client candour with their lawyers. To do otherwise is to prefer form over substance and allow a statute to do indirectly what it cannot do directly (abrogate privilege in the absence of express words).

12. The defendants rightly acknowledge that the exercise of the equitable jurisdiction to protect confidence applies differently to legal professional privilege (DS at [24]). Further to the matters raised by the defendants, “[i]t is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege”: *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 at [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ). Thus, it is no barrier to privilege being claimed that, through no fault of the client, privileged information becomes widely disseminated: see, *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49; [1999] HCA 67 at [4]-[5] (Gleeson CJ, Gaudron and Gummow JJ); *British American Tobacco Australia Services Ltd v Eubanks* [2004] NSWCA 158 at [146]-[147] and [187] (Spigelman CJ; Handley and Bryson JJA agreeing) (relevant paragraphs not reported in (2004) 60 NSWLR 483).

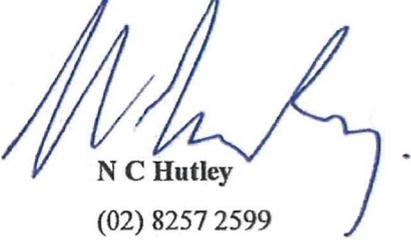
13. In *Federal Commissioner of Taxation v Donoghue* (2015) 237 FCR 316 at [70]-[77] and [85]-[86], Kenny and Perram JJ suggested, in obiter, that the Commissioner is obliged by s 166 of the ITAA to consider privileged documents wrongfully disclosed to him, and that therefore an equitable suit to restrain him from doing so would not succeed. With respect, this Court should not accept that approach because:
 - (a) On their face, the terms of s 166 do not require the Commissioner to use all information in his possession for the purpose of making assessments. Rather, the section relevantly provided that “[f]rom the returns, and from 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 taxable income of a taxpayer and tax payable thereon. As the emphasised words make plain, that section does not *require* the Commissioner to use all information in his possession, so long as the assessment is made from one or more of the return and other information in his possession. To the contrary, the section contemplates that the Commissioner may proceed to make an assessment from a subset of information available to him and disregard other information.

 - (b) It is contrary to *Daniels* to construe s 166 as requiring the Commissioner to consider and use all information available him, including privileged and confidential information that has been improperly obtained in circumstances where he has been notified of the privilege claims, as such a construction would effectively abrogate privilege and the confidentiality associated with it.

PART V ESTIMATE OF TIME

14. If the Court grants ACC leave to appear and considers it would be assisted by oral submissions, ACC seeks leave to present oral argument for no longer than 15 minutes.

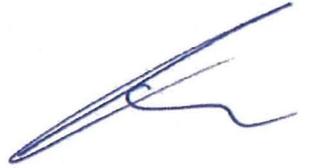
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N C Hutley

(02) 8257 2599

nhutley@stjames.net.au



T E O'Brien

(02) 8228 7114

obrien@elevenwentworth.com