



# Legal professional privilege

Sword or shield?

Legal professional privilege is a venerable principle. With antecedents in 16<sup>th</sup> century Elizabethan England, the concept — that there can be no compelled disclosure of communications between a client and their lawyer — remains a fundamental tenet of common law legal systems the world over. Nor is the principle unique to the Anglosphere: although the exact nature and tenor of the rule varies widely, almost every jurisdiction globally recognises some form of confidentiality in lawyer-client communication.

Truth, like all other good things,  
may be loved unwisely — may be  
pursued too keenly — may cost  
too much.<sup>1</sup>

*Vice-Chancellor Knight Bruce*

...Which makes it somewhat surprising that the principle is under attack.

Despite its august lineage, influential international institutions including the World Bank and United Nations Office on Drugs and Crime (UNODC) have recently suggested that privilege is facilitating corruption and illicit asset flows.

Prosecutors are increasingly asserting that professional secrecy is being misused, while advocacy group Global Witness secretly filmed eminent American lawyers offering advice on how to move suspicious funds for a (fake) prospective client. In the courts, attempts have been made to narrow the application of privilege — with mixed effect.<sup>2</sup>

In a 2005 article, Stephen Argument asked ‘is legal professional privilege

an endangered principle?’<sup>3</sup> It seems his concerns were prescient.

Proponents of privilege watch on with growing concern. Courts in this country and elsewhere have consistently hailed privilege’s significance. The comments of Gummow J are representative: privilege is ‘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’.<sup>4</sup>

Others believe privilege’s importance is overstated. In the same year but in a different case, Gummow’s colleague Toohey J remarked: ‘Important, indeed entrenched as legal professional privilege is, it exists to serve a purpose, that is to promote the public interest by assisting and

enhancing the administration of justice. It is not an end in itself.’<sup>5</sup> Mason J had earlier observed: ‘[I]t is impossible to assess how significantly the privilege advances the policy which it is supposed to serve. The strength of the public interest is open to question.’<sup>6</sup>

All of which makes a case shortly to come before the High Court of Australia, *Glencore International AG v Federal Commissioner of Taxation*,<sup>7</sup> all the more interesting.

In 2014, mining giant Glencore sought advice from Appleby, a law firm now notorious for its offshore restructuring practice. In 2017, documents relating to that advice became publicly available following the Paradise Papers leak. Those documents subsequently came to the attention of the Australian Taxation Office.



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In late 2018, Glencore commenced proceedings in the High Court's original jurisdiction seeking to restrain the use of those documents and have them returned. By demurrer, the Federal Commissioner of Taxation denies that Glencore's asserted facts give rise to any legal basis for remedy. The significance of *Glencore* is that, amidst the various encroachments on legal professional privilege elsewhere, the applicant seeks to radically bolster the principle by supplementing the shield it presently provides with a sharp sword.

The *Glencore* case, then, presents a timely opportunity for a refresher on the law of legal professional privilege, a topic relevant to every lawyer but too often left in the abstract rather

than kept front of mind. This article will begin by outlining the history, rationale and current scope of legal professional privilege. It will then review each party's submissions in *Glencore*, before concluding with some commentary.

It is important to add a brief caveat: this article only considers the common law principle of legal professional privilege. It does not consider the statutory equivalent, often referred to as client legal privilege, located in the *Evidence Act 1995* (Cth) and elsewhere.

## History and rationale

Legal professional privilege, a leading American authority has noted,

is 'the oldest of the privileges for confidential communications'.<sup>8</sup>

The first recorded case to outline the principle occurred in 1577, with the court in *Berd v Lovelace* excusing a lawyer from testifying on matters relating to an ongoing case.<sup>9</sup> It has long been assumed that the principle developed as a fairly prompt response to the first laws which enabled the compulsion of witness testimony, albeit some recent scholarship has queried the directness of that link.<sup>10</sup>

While English courts cited privilege with a degree of regularity, it was 'narrowly defined and tenuously established', such that one commentator notes that until the 1800s recognition of privilege was 'slow and halting'.<sup>11</sup>

Indeed, it almost died a premature death in 1743, when the court in *Annesley v Anglesea* rejected a privilege claim.<sup>12</sup> In a land ownership dispute involving earls, barons and long-lost sons — a case that could have been ‘source material for a Dickens novel’<sup>13</sup> — one party offered testimony by a defence lawyer involved in a related prosecution. Over the other party’s protests, Lord Chief Baron Bowes observed: ‘If I employ an attorney, and entrust secrets to him relative to the suit, that trust is not to be violated; but when I depart from that subject wherein I employed him, he is no more than another man, especially when the cause I did employ him in is over.’<sup>14</sup>

Standing against the application of privilege, then and now, is the immense public interest in full disclosure of information to aid the search for truth. ‘The effect of a successful claim of privilege,’ Dr Sue McNicol has written more recently, ‘is often that information which may be vital and relevant to the proper administration of justice is suppressed.’ The principled basis for privilege is therefore constantly at risk of being undermined by ‘the valid competing claims of the proper administration of justice.’<sup>15</sup>

In 1833, Lord Brougham placed privilege on firmer ground and delivered an articulation of its rationale that remains accepted today. At issue in two cases before his Lordship in that year were a broad range of lawyer-client documents, ranging from legal advice in the anticipation of litigation to broader commercial assistance to pre-existing documents that were provided to a solicitor. Lord Brougham held that all were protected by privilege,<sup>16</sup> in judgments later described as the ‘fons

*et origo*’ of contemporary privilege law.<sup>17</sup> His Lordship opined:

The foundation of this rule is not difficult to discover ... it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counselor half his case.<sup>18</sup>

Legal professional privilege, on this seminal interpretation, is the grease that oils the adversarial machine — ‘it assists and enhances the administration of justice’.<sup>19</sup> Absent privilege, because ‘[h]uman affairs and the legal rules governing them are complex’ and ‘[m]en are unequal in wealth, power, intelligence and capacity to handle their problems’, the ability of the legal profession to level this playing field by realistically appraising the merits of a case (and, in doing so, often encouraging settlement) is significantly reduced.<sup>20</sup> From a utilitarian perspective, such a diminishment would be no good thing.

Privilege is also buttressed by dual rights-based motives. It has been described as ‘an important human right’ in and of itself — a ‘bulwark against tyranny and oppression’.<sup>21</sup> But it has also been labelled a ‘facilitative right’, in light of its contribution to the protection of privacy and individual liberty.<sup>22</sup>

Although these objectives may sound noble, legal professional privilege is not without its critics. Cynics may suggest privilege was invented and is retained to give lawyers a business advantage over other professions: ‘an example of judges looking after their legal brethren.’<sup>23</sup> Indeed, in one early case the stated reason for granting privilege was that ‘no man [would] hereafter employ’ a lawyer forced to testify against their client.<sup>24</sup> Certainly other professions with cognate moral obligations of confidentiality have not enjoyed the benefit of privilege — doctors, accountants and the like. Lord Brougham himself admitted that ‘it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.’<sup>25</sup>

A more fundamental attack was launched by English legal philosopher Jeremy Bentham, who argued that abolishing privilege would result only ‘in a guilty person not being able to derive quite so much assistance from his law advisor, in the way of concerting a false defense’.<sup>26</sup> In other words, ‘it is only the guilty who need protection of the law, not the innocent.’<sup>27</sup> But this view has been forcefully rebutted by many authors and judges, predicated as it is on a simplistic binary between innocent and guilt typically missing in the real world (particularly in civil cases).<sup>28</sup>

And so legal professional privilege has withstood the test of time, an important reminder that the search for truth must have limits. As Knight Bruce V-C mused in 1846, in a passage later cited by the High Court, ‘the mischief of praying into a man’s confidential consultations with his legal advisor, the general evil of infusing reserve and dissimulation ... into those communications which

must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.<sup>29</sup>

## Scope

The common law of legal professional privilege in Australia is relatively settled.<sup>30</sup> A privilege, belonging to the client, protects communications (oral or written) that are:

Confidential in nature; and

Were created for the dominant purpose of:

a) If between the client and their lawyer (including in-house counsel — provided there exists a necessary degree of independence),<sup>31</sup> the obtaining or giving of legal advice or legal services, or for use in litigation (whether actual or in reasonable contemplation); or

b) If between the lawyer and a third party, to enable the client to receive legal advice or in light of litigation.

Privilege can be waived, whether explicitly or by conduct.<sup>32</sup> Provided privilege has not been waived, this principle acts as a bar to the compelled disclosure of privileged documents or testimony. This remains the case no matter the public interest in disclosure of the privileged evidence. As the High Court has observed, privilege ‘is itself the product of a balancing exercise between competing public interests’, such that ‘no further balancing exercise is required.’<sup>33</sup>

Of particular relevance to the *Glencore* litigation, though, is the law concerning the ability of third parties

to circumvent this principle — known as the third party exception. This holds that ‘a third party may give evidence of a privileged document’, regardless of its provenance — even if the third party ‘steals it or sees it [or overhears it] or is given it by the legal adviser’.<sup>34</sup> Given a third party could in turn provide the documents to a party to the proceedings, the corollary is that ‘if a party has in his possession a copy of a privileged document belonging to the other party, the holder of the copy may use it in evidence despite the fact that the original is privileged’.<sup>35</sup>

The rule arose in 1898 in *Calcraft v Guest*.<sup>36</sup> A century prior to that litigation, a substantially similar action had been taken. Documents from that action fell into the hands of the defendant, who took copies before returning them. In *Calcraft*, the English Court of Appeal held that while privilege had **not** been lost, the defendant/appellant could nevertheless produce them in evidence. Ever since, this judgment has stood for the proposition that ‘once a privileged document passed into the possession of another person, including due to trickery or theft, it could be tendered in evidence.’<sup>37</sup>

However, 15 years later, in *Ashburton v Pape*,<sup>38</sup> privileged documents belonging to the plaintiff in a bankruptcy action were obtained by the defendant, via collusion with the plaintiff’s solicitor’s clerk. The defendant copied the documents and returned the originals. The plaintiff sought — and was granted — an injunction to prevent use of the documents. Given the contradiction with *Calcraft*, *Ashburton* has subsequently been explained as providing limited injunctive

protection for privilege, where, and only where, the privilege holder is asserting a breach of confidence.

On this interpretation, the *Ashburton* action ‘is taken under the equitable doctrine and is entirely independent of the privilege rule.’<sup>39</sup> That these two rules apply to, in effect, the same documents is merely coincidental; ‘[r]elief sought under the equitable doctrine just happens to have an effect which greatly serves the purpose of the privilege rule by effectively filling a gap in the application of the privilege.’<sup>40</sup> While this may sound beneficial, the technical reconciliation of *Calcraft* and *Ashburton* has been criticised: conceptually, the two ‘seem to be fundamentally in conflict.’<sup>41</sup>

## Glencore

In *Glencore*, the High Court must decide whether to affirm a limited approach to legal professional privilege, whereby it is a defensive shield only, or expand the doctrine to include a sword, too. If the Court is liberally minded and prefers the latter option, it would empower *Glencore* to seek an injunction to prevent the Federal Commissioner of Taxation using its privileged material. In doing so, the Court must resolve — or cast aside — the *Calcraft* and *Ashburton* divergence. While *Ashburton* supports *Glencore* at a principled level, it provides no practical help because s 166 of the *Income Tax Assessment Act 1936* (Cth) (‘IATA’) precludes a confidence-based claim against the Commissioner.

The crux of the plaintiff’s claim is that: a) legal professional privilege is a fundamental common law right; b)

the common law's failure to provide positive protection for this right is an aberration, and; c) it is incumbent upon the Court to empower a party to protect this fundamental right. The common law, *Glencore* submits, 'ought' to enable privilege to be used 'if not exactly as a shield, at least as a device to disarm one's opponent by preventing him from using evidence in his possession'.<sup>42</sup> Doing so, the mining conglomerate continues, 'would involve no novel extension of principle' but would 'instead entail the principled application of a common law right ... in a way that is consistent with the rationale underpinning that right.'<sup>43</sup>

The Commissioner disagrees. Privilege, Solicitor-General Stephen Donaghue argues in written submissions, 'is, and only is, an immunity ... [i]t is not, and has never been, a foundation [for a positive cause of action]'.<sup>44</sup> He charges *Glencore* with 'not seeking incremental development of the common law, but radical law reform ... unsupported by history, principle and authority'.<sup>45</sup> The Commissioner's submissions suggest that *Glencore's* position is infected by a logical fallacy; 'of applying a name to a matter or thing (ie calling LPP a "right") and then deducing consequences from the application of the name [demanding a positive remedy], without an analysis of the content of the matter or thing or a consideration of why the name was applied in the first place'.<sup>46</sup>

## Consideration

There is little middle ground in *Glencore*. Unless the High Court locates a statutory exit route, possibly by holding that s 166 of the *LATA*

inhibits the grant of an injunction regardless and therefore the privilege question need not be decided, it must either radically reshape the law in Australia or remain steadfastly attached to a position that is not without pitfalls.

On one hand, this case is indicative of wider technological challenges to legal rules crafted many centuries before the internet age. *Glencore* observes: '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, particularly when stored electronically, might be compromised and publicly exposed'.<sup>47</sup> Certainly, hacks and data leaks were not issues that troubled the likes of Lord Chief Baron Bowes and Lord Brougham when the metes and bounds of privilege first began to be delineated.

Yet on a different view, *Glencore* is not novel at all. Instead, it merely reflects the latest opportunity for a court to address a lack of certainty on the difficult question of privileged documents inadvertently coming into the hands of another party or a third party, problems which have existed long before even *Calcraft* and *Ashburton*. In this regard, the High Court justices may find guidance from their former colleague, Dyson Heydon. In a 1974 article for the *Modern Law Review* — cited by both parties in *Glencore* — Heydon articulated several compelling policy concerns with the present position.

Heydon argued persuasively that the law's failure to prevent *Calcraft* use of privileged materials was 'at odds with [the principle's] underlying justification'.<sup>48</sup> It was unjust for one

party to benefit from their own — or a third party's — wrongdoing. Heydon observed: 'Ordered legal procedure seeks to overcome the ill-effects of self-help; to permit one litigant to win his case by stealing documents is regressive'.<sup>49</sup> Even before the rise of the internet, Heydon identified that the law needed to move with technological change; '[t]he exception arose in an age when eavesdropping and the purloining and intercepting of communications was difficult, rare and unfavoured' — in 1974, and certainly today, this basis for the exception is 'suspect'.<sup>50</sup>

The Federal Commissioner of Taxation might respond that Heydon was not advocating for the creation of a sword but merely observing chinks in the shield. But a necessary corollary of Heydon's observations of the law's deficiencies is that privilege in these circumstances deserves protection. It does not seem satisfactory that the Commissioner can make use of materials received as a consequence of a (legally-questionable) act of a third party, when they could not otherwise gain those materials through orthodox channels. If the policy objectives of privilege are to be upheld, the principle must be protected *in toto* — not in some circumstances, but not others.

## Conclusion

Despite the principle's nearly 500-year-old history, the exact breadth and depth of legal professional privilege continues to trouble lawyers, courts and regulators. As the Administrative Review Council once noted, privilege remains an 'evolving and often contentious area of the law'.<sup>51</sup> While recent developments internationally

suggested that the tide was turning against legal professional privilege, *Glencore* provides the High Court with an opportunity to reassert the principle's importance.

In the 1970s, Yale's Professor Geoffrey Hazard conducted an extensive analysis of the early British common law development of privilege for the *California Law Review*. His concluding words ring loudly today, reminding us that the current skirmishes between those who seek to attack and defend the principle are hardly novel — and that, as a result, history provides regrettably little guidance for the ultimate arbiter.

The rule of confidentiality is critical to the modern lawyer's role, as advisor to clients probably even more than as advocate. It has always been recognized that the rule must have some limits, for at minimum it is inadmissible that legal consultation be a cover for thuggery and theft. The difficult problem is where to draw the boundaries ... This inquiry into the rule's origins provides little guidance in that task, for it shows that the problem has been difficult from the beginning. Better no light from history, however, than false light.<sup>52</sup>

### John Wilson

MANAGING LEGAL DIRECTOR,  
BRADLEY ALLEN LOVE,  
CANBERRA

### Kieran Pender

LEGAL ADVISOR,  
INTERNATIONAL BAR  
ASSOCIATION, LONDON

The views of the authors are their own and do not represent the views of their organisations.

## Endnotes

1. *Pearse v Pearse* (1846) 1 De G & Sm 12, 28–9.
2. See, eg, *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) (8 May 2017); albeit overturned on appeal: *Director of the Serious Fraud Office v Eurasian Natural Resources Ltd* [2018] EWCA Civ 2006 (5 September 2018).
3. Stephen Argument, 'Is Legal Professional Privilege an Endangered Species?' (2005) 44 *AIAL Forum* 44.
4. *Goldberg v Ng* (1995) 185 CLR 83, 121.
5. *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 147.
6. *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, 26.
7. No S256 of 2018 ('*Glencore*').
8. John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940) [2290].
9. (1577) 21 Eng Rep 33 (Ch).
10. See generally Richard Pike, 'The English Law of Legal Professional Privilege: A Guide for American Attorneys' (2006) 4 *Loyola University Chicago International Law Review* 51, 52–3; Jonathon Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 2–8.
11. Geoffrey Hazard, 'An Historical Perspective on the Lawyer-Client Privilege' (1978) 66 *California Law Review* 1061, 1070, 1073.
12. (1743) 17 How St Trials 1139.
13. Hazard, above n 11, 1073.
14. (1743) 17 How St Trials 1139, 1239–40.
15. Sue McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege – The Demise of Implied Statutory Abrogation?' in Peter Mirfield and Roger Smith (eds), *Essays for Colin Tapper* (Oxford University Press, 2003) 48.
16. *Bolton v Corporation of Liverpool* (1833) 39 ER 614; *Greenough v Gaskell* (1833) 39 ER 618 ('*Greenough*').
17. *Three Rivers District Council v Governor of the Bank of England (No 6)* [2005] 1 AC 610, 669 (Rodger LJ).
18. *Greenough* (1833) 39 ER 618, 621.
19. *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason and Murphy JJ).
20. J D Heydon, 'Legal Professional Privilege and Third Parties' (1974) 37 *Modern Law Review* 601, 605.
21. *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 576 (Kirby J); *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490 (Deane J).
22. Justice John Gilmour, 'Legal Professional Privilege: Current Issues and Latest Developments' (Speech delivered at the Law Society of Western Australia, March 2012) 4.
23. Pike, above n 10, 53.
24. *Harvey v Clayton* (1674) 2 Swan 221, 36 ER Rep. 599.
25. *Greenough* (1833) 39 ER 618, 621.
26. Jeremy Bentham, *Rationale of Judicial Evidence* (1827, vol VII) 474.
27. Justice Gilmour, above n 22, 5.
28. See, eg, Heydon, above n 20, 605–6.
29. *Pearse v Pearse* (1846) 1 De G & Sm 12, 28–9.
30. For a helpful overview see Geoff Healy and Andrew Eastwood, 'Legal Privilege and Confidentiality in Australia' in David Greenwald and Marc Russenberger, *Privilege and Confidentiality: An International Handbook* (Bloomsbury, 2nd ed, 2012) 1.
31. See, eg, *Waterford v Commonwealth* (1987) 163 CLR 54; but see *Dye v Commonwealth Securities Ltd (No 5)* [2010] FCA 950 (1 September 2010).
32. Healy and Eastwood, above n 30, 13–17. See generally *Mann v Carnell* (1999) 201 CLR 1.
33. *Esso Australia Resources v Federal Commissioner of Taxation* (1987) 163 CLR 54, 164–5.
34. Heydon, above n 20, 601.
35. Auburn, above n 10, 223.
36. [1898] 1 QB 759 ('*Calcraft*').
37. *Glencore International AG*, 'Plaintiffs' Submissions', Submissions in *Glencore International AG v Federal Commissioner of Taxation*, No S256 of 2018, 11 December 2018, 4.
38. [1913] 2 Ch 46 ('*Ashburton*').
39. Auburn, above n 10, 233.
40. *Ibid.*
41. Heydon, above n 20, 604.
42. *Glencore*, above n 37, 5.
43. *Ibid.* 17.
44. Federal Commissioner of Taxation, 'Written Submissions of the Defendants', Submissions in *Glencore International AG v Federal Commissioner of Taxation*, No S256 of 2018, 8 February 2019, 3.
45. *Ibid.*
46. *Ibid.* 7.
47. *Glencore*, above n 37, 4.
48. Heydon, above n 20, 608.
49. *Ibid.* 607.
50. *Ibid.* 606–7.
51. Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* (Report No 48, May 2008) 51.
52. Hazard, above n 11, 1091.