Tax Research Seminars Online

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‘Under Pressure …’? Section 39 of the Legal Profession Uniform Law and the Federal Commissioner of Taxation

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Via zoom

Schedule for 2022 Tax Research Seminars Online

1. **28 April 2022,** Global Tax Hubs: Theory and Evidence. Presented by Professor Eduardo Baistrocchi (London School of Economics) with Professor Tsilly Dagan (Professor of Tax Law, Oxford University) as discussant. In collaboration with Global Tax Symposium (GTS).

2. **5 May 2022**, A History of Tax reform in Australia. Presented by Mr Paul Tilley (University of Melbourne/ ANU TTPI) with Emeritus Professor Chris Evans as discussant.

3. **6 June 2022,** MNE and State Strategic Responses to Pillar 2 by Mr Heydon Wardell-Burrus (Oxford Law School) and Impact of Pillar 2 on Developing Countries by Dr Suranjali Tandon (NIPFP). In collaboration with the Global Tax Symposium (GTS).

4. **28 July 2022**, 'Under Pressure …'? Section 39 of the Legal Profession Uniform Law and the Federal Commissioner of Taxation. Presented by Mr Eu-Jin Teo (University of Melbourne) with the Hon Tony Pagone as discussant.

REALLY UNDER PRESSURE? THE FEDERAL COMMISSIONER OF TAXATION, LEGAL PROFESSIONAL PRIVILEGE AND THE PROVISIONS OF AUSTRALIAN LEGAL PROFESSION LEGISLATION THAT DARE NOT SPEAK THEIR NAME …

Eu-Jin Teo*

[Taxation and legal professional privilege have a long history. (Indeed, it appears that one of the earliest cases to involve a claim of the privilege, Berd v Lovelace *[1577] Cary 62, arose in a tax context.) In recent times, however, and consistent with what would seem to be an emerging trend amongst regulators internationally, the Australian Taxation Office ('the ATO') has been bellicose in its opposition to claims of legal professional privilege. The ATO has insisted that legal practitioners who, in its view, make unfounded privilege claims, leave themselves open to sanction for breaching their obligation to comply with the Federal Commissioner of Taxation's ('the Commissioner's') coercive information-gathering powers (which, the ATO accepts, are subject to legal professional privilege).*

What seems to have not quite received the same attention, though, are some of the prohibitions that might constrain the ATO itself in the exercise of its powers in this regard. For instance, s 39 of the Legal Profession Uniform Law *provides that: 'A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations.'*

This paper discusses the potential relevance of s 39 (and its equivalents in Australian jurisdictions that have not adopted the Uniform Law*) to the Commissioner and to agents or officers of the Commissioner. Conduct by the executive vis-à-vis s 39, a provision yet*

* Barrister and Solicitor of the High Court of Australia and the Supreme Court of Victoria; Chartered Tax Adviser; Senior Lecturer, The University of Melbourne; Principal Examiner, Law Institute of Victoria, Administrative Law Accredited Specialisation Scheme. This paper extends the author's initial views published in the article '"Under Pressure"? Section 39 of the *Legal Profession Uniform Law* and the Federal Commissioner of Taxation' (2022) 37(2) *Australian Tax Forum: A Journal of Taxation Policy, Law and Reform* 273, by refining a number of arguments and addressing feedback since received, in addition to accounting for the subsequent application of the *Legal Profession Uniform Law* to Western Australia as well as the new *Legal Professional Privilege Protocol* issued by the Australian Taxation Office. The author refers to and repeats the disclosures and acknowledgements set out in that article, and gratefully acknowledges the further input of Phillip Hamilton and Oscar Roos, as well as the research assistance of Emma Grimm, Lucy Leckey and Olivia Watson in ascertaining relevant legislative provisions in non-*Uniform Law* jurisdictions.

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to be judicially considered, likely raises broad rule of law concerns, quite apart from the general issue of Crown immunity (the Legal Profession Uniform Law *does not purport to bind the Crown in any of its capacities). The potential application of the section to the Crown in right of the Commonwealth raises further issues in relation to intergovernmental immunity and s 109.*

While pursuing the hardly objectionable objective that the legally 'correct' amount of tax be paid, it would appear, on balance, that well-meaning but overzealous ATO officers could potentially expose themselves to criminal culpability if they seek to pressure practitioners in relation to claims of legal professional privilege, contrary to s 39 and its equivalents. In this regard, what practical impact, if any, the ATO's most recently adopted Legal Professional Privilege Protocol *will have, remains to be seen.]*

'First remove the beam from your own eye'.[1]

I INTRODUCTION

It is trite to observe that legal professional privilege is a fundamentally important legal right. Sometimes referred to as 'client professional privilege', it serves the public interest in the administration of justice by protecting the confidentiality of certain information communicated between client and lawyer, in order to facilitate the former receiving proper advice and representation from the latter. Nevertheless, determining what information is privileged and what is not may involve some complexity and subtlety and, especially if this is disputed, might take some time. The process has often been contentious. However, the temperature has risen markedly, of late, with the Federal Commissioner of Taxation ('the Commissioner') having been widely reported in the media to be 'cracking down' on legal professional privilege,[2] which is borne out by the experience of lawyers at the coalface[3] and consonant with what would seem to be an emerging

1 Robert Gottliebsen, 'ATO's Fishing Expedition Needs Proper Governance', *The Australian* (Sydney), 22 October 2021, 20, 20 (presumably a reference to Matthew 7:5 and Luke 6:42).

2 See, eg, Ben Butler, 'ATO Set to Crack Down on Lawyers', *Business*, *The Australian* (Sydney), 13 February 2019, 21; Hannah Wootton, 'ATO, PwC Privilege Case could Shake Up Law Firms, Consultancies', *The Australian Financial Review* (Sydney), 22 September 2021, 28 ('Privilege Case'); Amber Agustin, 'Why the ATO is Wrong to Pursue Lawyers', *The Australian Financial Review* (Sydney), 21 June 2019, 33; Michael Roddan, 'Tax Office Targets Lawyers' Privileges', *The Australian* (Sydney), 22 July 2019, 7. Cf Angie Ananda, 'Legal Professional Privilege under Fire?' (2019) 54(1) *Taxation in Australia* 4.

3 As Wootton, 'Privilege Case' (n 2) 28, reports: '"Lawyers have been flagging concerns here"'. See also Michael Pelly, 'Lawyers Accuse ATO of Threats over Privilege', *The Australian Financial Review* (Sydney), 19 November 2021, 36 ('the ATO "frequently pushes taxpayers, and their advisers hard, to waive LPP, or push [sic] for disclosure, in circumstances that breach that privilege, or make it difficult for the lawyers to give frank and fearless advice, on privilege issues"'); John Morgan, *LIV Tells ATO There is a 'Counterbalancing Offence' It could Commit — Even by Finalising Its 'Protocol' for Claiming 'Legal Professional*

international trend amongst regulators; for instance, a similar approach has been noted in Ireland.[4]

In Australia, the Australian Taxation Office ('the ATO') has asserted that legal practitioners who, in its view, make erroneous privilege claims, open themselves up to sanction for breaching their obligation to comply with the Commissioner's coercive information-gathering powers (even though the Commissioner's delegates and authorised officers[5] at the ATO accept that these powers do not override legal professional privilege). What seems not to have received much attention, though, are some of the prohibitions that might constrain the ATO itself in the exercise of its powers.[6] In particular, protocols or actions by the ATO which seek to undermine reliance on legal professional privilege, could amount to a breach by the Commissioner's delegates and authorised officers of s 39 of the *Legal Profession Uniform Law* (and its equivalents in non-*Uniform Law* jurisdictions), to which potential criminal sanctions attach.

For the purposes of discussing the potential relevance of s 39 (and its equivalents) to the Commissioner and to agents or officers of the Commissioner, the remainder of this paper is structured as follows. Part II outlines the ambit of s 39, examining its terms and the conduct that this provision notionally might capture. Part III then considers whether, as a matter of statutory interpretation, the provision, in general, binds the Crown (and in particular, the Crown in right of the Commonwealth). Part IV subsequently investigates whether, as a matter of constitutional competency, s 39 would validly bind a 'person' acting on behalf of the Crown in right of the Commonwealth.

Part VI (following consideration of the ATO's most recent *Legal Professional Privilege Protocol* in Part V) concludes with the observation that ATO officers could potentially expose themselves to criminal culpability if they seek to pressure practitioners in relation to claims of legal professional privilege, contrary to s 39 and its equivalents, as the analysis in the preceding Parts will highlight that the

Privilege' in Terms that 'Overreach' the Actual Law (16 November 2021) Tax Technical <https:// taxtechnical.com.au/liv-submission-to-ato-on-its-draft-protocol-for-claiming-lp-p/> ("*Overreach*"); John Morgan, *Claiming Legal Professional Privilege: ATO Releases Its Draft Protocol for Consultation (No Joint Protocol with LCA)* (26 September 2021) Tax Technical <https://taxtechnical.com.au/claiming-legal-professional-privilege-ato-releases-its-draft-protocol-for-consultation-no-joint-protocol-with-lca/> ('*Draft Protocol*').

4 See, eg, Robin Woellner and Michael Bersten, 'The Developing Doctrine of Legal Professional Privilege: Evolution or Revolution?' (Conference Paper, Australasian Law Academics Association Conference, 8 July 2022) 3.

5 On the difference between delegations and authorisations, see, eg, *Kelly v Watson* (1985) 10 FCR 305; *Federal Commissioner of Taxation v Mochkin* (2003) 127 FCR 185; *R v Ashby* (2010) 25 VR 107.

6 Cf Law Institute of Victoria, Submission to Australian Taxation Office, *Draft Legal Professional Privilege Protocol*, 12 November 2021 ('*Legal Professional Privilege*') (the s 39 aspects of this submission summarise the reasoning and conclusions of this paper, and were drafted by the author of this paper). See also Wootton, 'Privilege Case' (n 2) 28 (interview with this paper's author), which was then followed by Morgan, *Draft Protocol* (n 3); Morgan, *'Overreach'* (n 3); Pelly (n 3); and John Morgan, *LPP Protocol Finalised by ATO: A 'Retrospective'* (3 July 2022) Tax Technical <https://taxtechnical.com.au/lpp-protocol-finalised-by-ato-a-retrospective-to-date/> ("*Retrospective*").

risk that the legislation binds the Crown, including the Crown in right of the Commonwealth (even taking into account the operation of s 109 of the *Constitution*), is one that cannot simply be dismissed.

It will first be necessary to examine, however, how s 39 of the *Uniform Law* protects legal professional privilege.

II SECTION 39 OF THE *LEGAL PROFESSION UNIFORM LAW*

Arising out of the Council of Australian Governments' National Legal Profession Reform Project, the *Legal Profession Uniform Law* came into effect in New South Wales and Victoria on 1 July 2015,[7] and on 1 July 2022 in Western Australia,[8] with the aim of harmonising the regulation of legal services by creating a common regulatory regime to encompass (at present, around three-quarters of) Australia's legal practitioners.[9]

Located in pt 3.2 of ch 3, and carrying the heading 'Undue influence',[10] s 39 of the *Legal Profession Uniform Law* provides as follows:

> A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations.
>
> Penalty: 100 penalty units.

As noted above, the *Uniform Law* applies in New South Wales and Victoria (the two most populated states), as well as in Western Australia. With the exception of South Australia, the equivalents to s 39 in non-*Uniform Law* jurisdictions appear to be limited to incorporated legal practices and multi-disciplinary partnerships.[11] Prior to the *Uniform*

7 Governor (NSW), 'Commencement Proclamation under the Legal Profession Uniform Law Application Act 2014 No 16' (17 June 2015); Victoria, *Government Gazette* (No S 151, 16 June 2015) 1.

8 Western Australia, *Government Gazette* (No S 94, 30 June 2022) 3921.

9 For a discussion of the regime, see, eg, David Robertson, 'An Overview of the *Legal Profession Uniform Law*' [2015] *Bar News: The Journal of the New South Wales Bar Association* 36; Michael McGarvie, '*Legal Profession Uniform Law*: Regulation of Lawyers has Changed' (2014) 156 *Victorian Bar News* 50; Chelly Milliken, 'The New *Legal Profession Uniform Law*: What It will Mean for NSW Practitioners' (2015) 9 *Law Society of New South Wales Journal* 70; Joshua Thomson, 'Update on the *Legal Profession Uniform Law* Scheme' (2019) 46(2) *Brief* 3.

10 As to the different treatment of headings in New South Wales, Western Australian and Victorian legislation, compare *Interpretation Act 1987* (NSW) s 35(2), *Interpretation Act 1984* (WA) s 32(2) and *Interpretation of Legislation Act 1984* (Vic) s 36(2A). Cf *Acts Interpretation Act 1954* (Qld) s 14(2); *Legislation Act 2001* (ACT) ss 126(2), 127(3); *Interpretation Act 1978* (NT) s 55(2); *Legislation Interpretation Act 2021* (SA) s 19(1); *Acts Interpretation Act 1931* (Tas) s 6(4). On whether this heading potentially invokes generations of case law on *actual* undue influence (among the most recent of which being *Australia & New Zealand Banking Group Ltd v Karam* (2005) 64 NSWLR 149; *Commercial Base Pty Ltd v Watson* [2013] VSC 334), see Eu-Jin Teo, 'Privilege and the Majesty of the Law' (2022) 96(5) *Law Institute Journal* 17.

11 See *Legal Profession Act 2007* (Qld) ss 143, 159; *Legal Profession Act 2007* (Tas) ss 143, 159; *Legal Profession Act 2006* (ACT) ss 133, 149; *Legal Profession Act 2006* (NT) ss 150, 166 (such that these provisions would, presumably, encompass

Law, this was also the position in Victoria, pursuant to ss 2.7.35 and 2.7.51 of the *Legal Profession Act 2004* (Vic), the Act which expressly recognised incorporated legal practices and multi-disciplinary partnerships. Equivalents to s 39 do not seem to appear in earlier legislation, such as the *Legal Practice Act 1996* (Vic).[12] In South Australia, the equivalent to s 39 is confined, in ss 23G and 30 of the *Legal Practitioners Act 1981* (SA), to incorporated legal practices and community legal centres, as the *Legal Practitioners Act 1981* (SA) does not recognise multi-disciplinary partnerships.

Noting the more limited nature of the non-*Uniform Law* equivalents to s 39, this paper focuses on s 39 of the *Uniform Law*. As mentioned above, the section proscribes conduct that 'causes' or 'induces', or 'attempts' to cause or induce, a legal practitioner to contravene the Uniform Rules or other 'professional obligations'. Prior to considering what conduct of this nature might constitute, the reach of the expression 'professional obligations' will first be examined.

A *Professional Obligations*

'[P]rofessional obligations' is defined inclusively by s 6 of the *Uniform Law*, as follows:

> professional obligations includes —
> (a) duties to the Supreme Courts; and
> (b) obligations in connection with conflicts of interest; and
> (c) duties to clients, including disclosure; and
> (d) ethical standards required to be observed —
> that do not otherwise arise under this Law or the Uniform Rules.

Considering the well-established approach to statutory interpretation, that legislation is to be interpreted in a manner consistent with the general law unless the context requires otherwise,[13] resort to case law would thus appear to be necessary to address the question of whether legal professional privilege relevantly is encompassed by the term 'professional obligations' in this regard.[14]

those associated with, say, KPMG, but not those associated with, say, King & Wood Mallesons). While it might be speculated that the s 39 equivalents in non-*Uniform Law* jurisdictions are targeted toward undue influence from *within* the non-traditional practice structures mentioned, in Queensland, Western Australia and Tasmania, the relevant provisions expressly provide that they apply to a person, 'whether or not an officer or employee of' the relevant structure.

12 'A new offence relating to undue influence is created', as Explanatory Notes, Legal Profession Bill 2004 (NSW) expressly acknowledge, in relation to the position under the *Legal Profession Act 2004* (NSW), although perhaps not one of the 'merely' regulatory kind considered in, for instance, *Proudman v Dayman* (1941) 67 CLR 536, 540 (Dixon J) and *Teh v The Queen* (1985) 157 CLR 523, 594–5 (Dawson J), 567 (Brennan J).

13 See, eg, *A-G (NSW) v Brewery Employes Union (NSW)* (1908) 6 CLR 469, 531 (O'Connor J); *R v Slator* (1881) 8 QBD 267, 272 (Denman J); *Deputy Federal Commissioner of Land Tax v Hindmarsh* (1912) 14 CLR 334, 338 (Barton J); *Davies v Western Australia* (1904) 2 CLR 29, 42 (Griffith CJ).

14 For a discussion of the history of the privilege, see, eg, Hock Lai Ho, 'History and Judicial Theories of Legal Professional Privilege' [1995] (12) *Singapore Journal of Legal Studies* 558.

Perhaps somewhat unsurprisingly, the authorities would appear to suggest that a failure to claim legal professional privilege on a client's behalf may amount to a breach of professional duty and a breach of confidence by a bailee of documents or legal adviser[15] (which may potentially ground an action for damages).[16] As Lord Denning observed in *Parry-Jones v Law Society*:[17] '[T]he law implies a term into the contract whereby a professional man [sic] is to keep his [sic] client's affairs secret'.[18]

To similar effect, the Full Court of the Federal Court noted in *Federal Commissioner of Taxation v Citibank Ltd*[19] that a bailee has:

> a duty to take such care of [the documents] as a reasonable owner would take of his [sic] own property of a similar kind … [and] to make claims in respect of documents where legal professional privilege might reasonably be expected to exist. It must do its best to ensure that a claim for privilege [is] not lost.[20]

In *Baker v Campbell*,[21] Deane J stated that:

> The explanation of legal professional privilege was … seen, when the doctrine was recognized during the reign of Elizabeth I, as being the professional obligation of the barrister or attorney to preserve the secrecy of the client's confidences[,][22]

and further, that:

> the confidentiality which the law accords to communications between solicitor and client [i]s 'the very highest — so high that the solicitor is absolutely privileged and cannot be made to state what passed between him [sic] and his [sic] client. To that extent the solicitor is made, as it were, a part of his [sic] client for the purpose of those communications'.[23]

Accordingly, it could thus be concluded that, to borrow the words of noted legal encyclopaedia *The Laws of Australia*: 'In the absence of instructions by the client to waive, it is the legal adviser's duty to claim the privilege on behalf of the client.'[24] Somewhat tellingly then, s 38(2) of the *Uniform Law*, the section which immediately precedes s 39, provides as follows:

> The law relating to client legal privilege (or other legal professional privilege) is not excluded or otherwise affected because an Australian legal practitioner is acting in the capacity of an officer, director, partner or employee of a law practice or in the capacity of a corporate legal practitioner or government legal practitioner.[25]

15 See, eg, *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461, 479–81 (Scrutton LJ); *Reece v Trye* (1846) 9 Beav 316.
16 *Heywood v Wellers* [1976] QB 446, 461 (James LJ).
17 [1969] 1 Ch 1.
18 Ibid 7.
19 (1989) 20 FCR 403 ('*Citibank*').
20 Ibid 414 (Bowen CJ and Fisher J).
21 (1983) 153 CLR 52.
22 Ibid 113–14 (citations omitted).
23 Ibid 115 (citations omitted).
24 Thomson Reuters, *The Laws of Australia* (at 16 June 2016) 16 Evidence '2 Legal Professional Privilege and Client Legal Privilege' [16.7.330]. Cf *Berd v Lovelace* [1577] Cary 62.
25 Compare *Legal Profession Act 2007* (Qld) s 120(1); *Legal Profession Act 2007* (Tas) s 121(1); *Legal Profession Act 2006* (ACT) s 110(1); *Legal Profession Act 2006* (NT) s 128(1); *Legal Practitioners Act 1981* (SA) sch 1, cl 11(3).

Perhaps noteworthy also is that the High Court has recognised that coercive information-access provisions cast in similar terms to ss 353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth) (the Commissioner's coercive information-access provisions) are subject to legal professional privilege.[26] The ATO itself has accepted that legal professional privilege applies to ss 353-10 and 353-15.[27] That legal

[26] *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, in relation to the Australian Competition and Consumer Commission's powers pursuant to ss 155(1) and 155(2) of the *Trade Practices Act 1974* (Cth), which read as follows:

> [I]f the Commission … has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act … a member of the Commission may … require that person:
> (a) to furnish to the Commission … within the time and in the manner specified in the notice, any such information;
> (b) to produce to the Commission … in accordance with the notice, any such documents; or
> (c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.
> [I]f the Commission … has reason to believe that a person has engaged or is engaging in conduct that constitutes, or may constitute, a contravention of this Act … a member of the Commission may, for the purpose of ascertaining by the examination of documents in the possession or control of the person whether the person has engaged or is engaging in that conduct, authorise … a member of the staff assisting the Commission … to enter any premises, and to inspect any documents in the possession or under the control of the person and make copies of, or take extracts from, those documents.

Cf *Woolworths Ltd v Fels* (2002) 213 CLR 598; Alex Bruce, 'The *Trade Practices Act 1974* (Cth) and the Demise of Legal Professional Privilege' (2002) 30(2) *Federal Law Review* 373; Warren Pengilley, '*Daniels*: Legal Professional Privilege Against the ACCC Unanimously Upheld in the High Court' (2003) 17(1) *Commercial Law Quarterly* 23. In relation to the *Income Tax Assessment Act 1936* (Cth) predecessors to ss 353-10 and 353-15 (discussed in, amongst others, D Castle, 'Legal Professional Privilege Revisited' (1984) 19(3) *Taxation in Australia* 289), see, eg, *Grant v Downs* (1976) 135 CLR 674; *Allen Allen & Hemsley v Deputy Federal Commissioner of Taxation* (1989) 20 FCR 576; *Citibank* (n 19). As to the 're-enactment' presumption as it applies to re-enactments in 'substantially the same language' as that which has been construed previously (here, ss 263 and 264 of the *Income Tax Assessment Act 1936* (Cth)), see, eg, *Platz v Osborne* (1943) 68 CLR 133; *Te v Minister for Immigration and Ethnic Affairs* (1999) 88 FCR 264; *Police v Novak* (2000) 76 SASR 551.

[27] See, eg, *CUB Australia Holding Pty Ltd v Federal Commissioner of Taxation* (2021) 394 ALR 327. The provisions relevantly read as follows:

> Section 353-10
> (1) The Commissioner may by notice in writing require you to do all or any of the following:
> (a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a taxation law;
> (b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;
> (c) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.
> Section 353-15
> (1) For the purposes of a taxation law, the Commissioner, or an individual authorised by the Commissioner for the purposes of this section:
> (a) may at all reasonable times enter and remain on any land, premises or place; and
> (b) is entitled to full and free access at all reasonable times to any documents, goods or other property; and

professional privilege is no less 'a bulwark of liberty' than the privilege against self-incrimination[28] was recognised by Dawson J in *Baker v Campbell*.[29]

As the above analysis is suggestive of legal professional privilege being included within the ambit of 'professional obligations' in s 39 of the *Uniform Law*,[30] attention will now turn to the conduct that the provision proscribes in relation to professional obligations.

(c) may inspect, examine, make copies of, or take extracts from, any documents; and

(d) may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.

28 Compare Jeremy Bentham, *Rationale of Judicial Evidence* (Garland Publishers, 1827) vol 9, 339. Cf *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 133–4 (Deane J).

29 (1983) 153 CLR 52, 127 (cf 59 (Gibbs CJ), 74 (Mason J), 95 (Wilson J), 105–6 (Brennan J), 114 (Deane J)) ('*Baker*'). See also *General Accident Assurance Co v Chrusz* (2000) 180 DLR (4th) 241, 271 (Doherty JA); *R v Claus* (2000) 181 DLR (4th) 759, 767 (Kozak J).

30 For further discussion of the nature of legal professional privilege, see, eg, Ronald Desiatnik, 'Legal Professional Privilege; A Tale of Two Judgments' (2021) 50 *Australian Bar Review* 279; Jeffrey Pinsler, 'Legal Professional Privilege: A Consideration of Recent Common Law Developments' (1992) 4(1) *Singapore Academy of Law Journal* 10; Kylie Downes and Susan Forder, 'Back to Basics: Legal Professional Privilege: Why and When Communications are Protected' (2018) 38(4) *Proctor* 32; G T Pagone, 'Legal Professional Privilege and the Commissioner of Taxation's Right to Information' (1981) 16 *Taxation in Australia* 340; W Thompson and D Lamb, 'Is there a Doctrine in the House? Legal Professional Privilege in Taxation Audits' (1992) 26(11) *Taxation in Australia* 600; Keith Lupton, 'Legal Professional Privilege in Administrative Proceedings' (1985) 10(3) *Sydney Law Review* 614; Paul Nicols and Matthew Skinner, 'Attracting and Preserving Legal Professional Privilege' (2007) 21(1) *Commercial Law Quarterly* 3; Isabella Cosenza, 'At What Price the Truth? Revisiting Legal Professional Privilege' (2006) 89 *Reform* 77; Ben Saul, 'Is Removing Legal Professional Privilege a Policy Imperative?' (2001) 39(9) *Law Society Journal* 67; Dorne Boniface, 'Professionalism, Privilege and Public Policy: Legal Professional Privilege' (1989) 27(1) *Law Society Journal* 66; Stephen Argument, 'Is Legal Professional Privilege an Endangered Species?' (2005) 44 *Australian Institute of Administrative Law Forum* 44; Alister Abadee, 'The Forward March of Legal Professional Privilege' [2000] (3) *Bar News* 9; Richard Flitcroft, 'The Shifting Sands of Legal Professional Privilege' (1999) 37(3) *Law Society Journal* 29; Mark Friedgut, 'The Fragility of Legal Professional Privilege' (2008) 46(2) *Law Society Journal* 64; Nigel Ward, 'Legal Professional Privilege: The Dominant Purpose Test Triumphs in the High Court' (2000) 22(4) *Bulletin* 30; Anand Shah, 'Legal Professional Privilege: Dominant Purpose Test Replaces Sole Purpose Test' (2000) 20(4) *Proctor* 19; Nathan Landis, 'Legal Professional Privilege: To Claim or Not to Claim, that is the Question' (2014) 41(3) *Brief* 38; Kevin White, 'Legal Professional Privilege: The Bridling of a Common Law Right' (1982) 29(10) *Law Society Journal* 69; Anthony LoSurdo, 'A Quiet Revolution has Been Happening in Legal Professional Privilege' (2001) 39(6) *Law Society Journal* 50; John Wilson and Kieran Pender, 'Legal Professional Privilege: Sword or Shield?' (2019) 251 *Ethos* 14. See generally Ronald Desiatnik, *Legal Professional Privilege in Australia* (LexisNexis, 3rd ed, 2017); Colin Liew, *Legal Professional Privilege* (Academy Publishing, 2020).

B *Proscribed Conduct in Relation to Professional Obligations*

Section 39, on its terms,[31] proscribes 'causing', 'inducing', 'attempting to cause' or 'attempting to induce' contraventions by legal practitioners of their professional obligations. It sets out a penalty of 100 penalty units for such conduct, which, according to the applicable sentencing legislation, is indicative of the creation of a criminal offence.[32]

Noteworthy in this regard is that relevant 'attempts' are criminalised, despite no penalty of gaol attaching to a breach of s 39. This would seem to be in contrast to what generally would appear to be the case under, for example, the *Crimes Act 1958* (Vic), pursuant to which only attempts to commit *indictable* offences are criminalised.[33]

Although s 39 and its non-*Uniform Law* counterparts appear to await judicial consideration,[34] in relation to the meaning of the term 'cause' as it appeared in s 35(1) of the *Police Offences Act 1953* (SA) ('cause to be offered for sale'), the High Court in *O'Sullivan v Truth & Sportsman Ltd*[35] reviewed authorities such as *Watkins v O'Shaughnessy*,[36] *McLeod v Buchanan*,[37] *Shave v Rosner*[38] and *Lovelace v Director of Public Prosecutions*,[39] and concluded that the word envisaged a situation

> where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his [sic] exerting some capacity which he [sic] possesses in fact or law to control or influence the acts of the other. He [sic] must moreover contemplate or desire that the prohibited act will ensue.[40]

In terms of the expression 'induce or attempt to induce' as it appeared in s 126(1)(b) of the *Securities Industry (Western Australia) Code* ('induce or attempt to induce another person to deal in securities'), Murray J (of the Court of Criminal Appeal of Western Australia, with whom Nicholson and Anderson JJ relevantly agreed) noted in *Bond v The Queen*[41] that

31 'There is no substitute for giving attention to the precise terms in which [the provision] is expressed': *Fleming v The Queen* (1998) 197 CLR 250, 256 (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

32 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 18(1); *Sentencing Act 1991* (Vic) s 111; and *Interpretation Act 1984* (WA) s 72, read together with *Sentencing Act 1995* (WA) s 9. Compare *Legislation Act 2001* (ACT) s 134; *Interpretation Act 1978* (NT) s 38C; *Acts Interpretation Act 1954* (Qld) s 41; *Acts Interpretation Act 1915* (SA) s 30; *Acts Interpretation Act 1931* (Tas) s 37.

33 See s 321M. Cf *Criminal Code* (Qld) ss 535 to 538; *Criminal Code* (Tas) ss 299, 342; *Criminal Code* (WA) ss 552, 555A; *Criminal Law Consolidation Act 1935* (SA) s 270A(3)(a); *Criminal Code 2002* (ACT) s 44; *Criminal Code* (NT) ss 43BF, 277, 278; *Crimes Act 1900* (NSW) s 344A.

34 See also the lack of discussion of this provision in, for instance, Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2017), and the mere passing reference in Simon Libbis and Carly Erwin, 'Ethics: Protecting Client Privilege' (2022) 96(4) *Law Institute Journal* 60.

35 (1957) 96 CLR 220 ('*Truth & Sportsman*').

36 (1939) 1 All ER 385.

37 (1940) 2 All ER 179.

38 (1954) 2 QB 113.

39 (1954) 1 WLR 1468.

40 *Truth & Sportsman* (n 35) 227–8 (Dixon CJ, Williams, Webb and Fullagar JJ).

41 (1992) 62 A Crim R 383.

> to assert that by the act of concealment another was induced to deal in securities, is to make a statement about the causal relationship between the conduct of the accused and that of the victim … I would be rather of the view that the act of concealment need not be the sole cause, provided as a matter of fact it could be seen to have some real or substantial part to play in inducing the dealing …
>
> …
>
> An attempt to induce a dealing in securities would occur where the accused, intending to induce or cause the dealing by a dishonest concealment of material facts, attempted to induce that dealing, or an act which would constitute a dealing in securities by doing something held to be more than merely preparatory to the commission of the completed offence, but did not actually fulfil the intention by inducing or causing a dealing in the securities.[42]

Note, however, the comments of Pearce, that

> if a court is seeking the meaning of a particular piece of legislation, it cannot be bound by the interpretation placed on like words in other legislation by another court. Since the latter court was only saying what the words before it meant, its decision cannot be conclusive as to the meaning of another similar provision. Other decisions may be of assistance, but they cannot remove from a court the obligation to seek the meaning of an Act under consideration for itself.[43]

Similarly, McHugh, Gummow and Heydon JJ observed in *McNamara v Consumer, Trader and Tenancy Tribunal*[44] that

> [i]t would be an error to treat what was said in construing one statute as necessarily controlling the construction of another; the judicial task in statutory construction differs from that in distilling the common law from past decisions.[45]

These are salutary remarks in relation to the interpretive task of settling the precise contours of the conduct that is proscribed by the terms of s 39 and its non-*Uniform Law* equivalents;[46] as noted above, these provisions appear to await judicial consideration.

42 Ibid 406.

43 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) 8–9. See also *Paisner v Goodrich* [1955] 2 QB 353, 358 (Denning LJ); *London Transport Executive v Betts* [1959] AC 213, 246–7 (Lord Denning); *Wright v Walford* [1955] 1 QB 363, 374–5 (Lord Evershed MR); *Goodrich v Paisner* [1957] AC 65, 88 (Lord Reid).

44 (2005) 221 CLR 646.

45 Ibid 661. Compare *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 632–3 (McHugh J).

46 Cf Justice Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (Speech, Clarity and Statute Law Society Joint Conference, 13 July 2002); Chief Justice James Spigelman, 'Statutory Interpretation: Identifying Linguistic Register' (1999) 4(1) *Newcastle Law Review* 1.

C *Problematic Conduct vis-à-vis Section 39?*

Having due regard to the foregoing, the following examples of conduct, where experienced by practitioners,[47] might, it would seem, give rise to circumspection in terms of s 39.

1 *Example of Inducements?*

A regulator issues a statutory notice to produce documents to a client of a firm. The firm makes legal professional privilege claims on the client's instructions, and provides supporting information on the claims to the regulator.

Officers at the regulator tell the responsible lawyer at the firm that things will go better for the client (ie the client will get a better outcome) if the lawyer encourages the client to drop the privilege claim.

The regulator's officers say that they note that the firm acted for the client in the transaction that is the subject of the statutory notice, and that the firm accordingly has a conflict of interest (implying that the regulator is considering pursuing action against the firm).

An officer at the regulator says words to the effect of, 'Persuade your client …', 'Just get your client to drop the claim. It will go better for them and for you.'

2 *Example of Excessive Pressure?*

A regulator issues a statutory notice to produce documents to a client of a firm. The firm makes legal professional privilege claims on the client's instructions, and provides supporting information on the claims ('Particulars') to the regulator.

The regulator makes a blanket complaint to the firm that the Particulars are inadequate.[48] The regulator declines numerous requests

47 Compare the conduct described in *Legal Professional Privilege* (n 6) 4–6 (which was then reported in Pelly (n 3), although maybe not fully accurately in limited respects: see John Morgan, *The 'Counterbalancing Offence' Point Gets some [Further] Oxygen in the* AFR *— In relation to the ATO Exerting 'Undue Influence' on Lawyers from the Point when They Initially Claim Legal Professional Privilege* (19 November 2021) Tax Technical <https://taxtechnical. com.au/the-counterbalancing-offence-point-gets-some-oxygen-in-the-afr-in-rela tion-to-the-ato-exerting-undue-influen-ce-on-lawyers-from-the-point-when-they -initially-claim-legal-professional-privil-eg/>).

48 Cf *Hodgson v Amcor Ltd (No 2)* [2011] VSC 204, [37] (Vickery J) (a claiming party 'cannot be compelled to provide such particularity as would compromise the very privilege that is claimed'). See also *Boase v Seven Network (Operations) Ltd* [2005] WASC 174, [24] (Master Newnes, as he then was) (emphasis added):

> Where a claim for privilege is made it is necessary that any documents for which privilege is claimed be properly described. Unless such documents are sufficiently described, it will be impossible for the other party to discern whether the claim of privilege is properly made. It is not sufficient merely to assert that the documents are privileged, which is a statement of law, but the facts relied upon as giving rise to the privilege must be set out so the claim of privilege can be tested, *although the facts should not be set out in such detail*

from the firm to offer both an explanation for the complaints and to have a legally trained officer of the regulator involved.

The regulator's officers tell the firm that if its client persists with the privilege claims, the regulator will assume that the claims are invalid. The regulator's officers tell the firm that the regulator is concerned that the client has 'something to hide', and that legal professional privilege should be waived unless the client has 'something to hide'.

The responsible lawyer at the firm feels under great pressure to either provide significant further Particulars (with the attendant risk of waiving legal professional privilege)[49] or to advise the client to abandon the privilege claims.

3 *Example of Specific Pressure on a Firm?*

A regulator tells a firm that it is not satisfied that the firm is making only properly available claims of legal professional privilege in response to statutory notices to produce that have been issued to clients. The regulator expresses its views on the interpretation and availability of privilege claims in certain, particular categories. In some cases, these views are not supported by case law (because the law is uncertain), and in others, these views are materially at odds with case law. The regulator tells the firm that the firm's privilege claims will be given more scrutiny than those of other firms. The regulator informs the firm that the regulator will be taking test cases against the firm (with likely media attention the result) if the firm allows its clients to make any privilege claims with which the regulator disagrees. The regulator also tells the firm that it is at risk of criminal prosecution if it makes privilege claims with which the regulator disagrees.

> *as would enable the contents of the documents to be ascertained directly …* That is, an adequate description is required of each document for which privilege is claimed, *but not one which indirectly reveals its contents*.

[49] Compare Australian Taxation Office, *Legal Professional Privilege (LPP) Protocol* (September 2021) Addendum 2, which asserts that: (1) the ATO will not contend that information provided about legal professional privilege claims in accordance with the (proposed) Protocol amounts, by itself, to a waiver of privilege; and that (2) the ATO does not seek to create waiver of privilege through the (proposed) Protocol (despite waiver ultimately being imputed by operation of law and courts thus judging waiver objectively, that is, by ignoring the subjective intentions of parties: see, eg, *Benecke v National Australia Bank* (1993) 35 NSWLR 110; *Mann v Carnell* (1999) 201 CLR 1, 13 (Gleeson CJ, Gaudron, Gummow and Callinan JJ); *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd* (2013) 250 CLR 303, 315–6 (French CJ, Kiefel, Bell, Gageler and Keane JJ); *Vic Hotel Pty Ltd v DC Payments (A'asia) Pty Ltd* (2015) 321 ALR 191; compare *White Industries Aust Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 298 ('*White Industries*')). The guidelines previously agreed to between the ATO and the Law Council of Australia (regarding access procedures by ATO officers on lawyers' premises where legal professional privilege is claimed) seemed to have fallen into disuse: cf Thomson Reuters, *The Laws of Australia* (at 16 June 2016) 16 Evidence '2 Legal Professional Privilege and Client Legal Privilege' [16.7.350] ('*Laws of Australia*'). (On the Australian Federal Police counterpart to these guidelines, see Suzanne McNicol, 'Unresolved Issues Arising from the General Guidelines Between the AFP and the Law Council of Australia' (1998) 72 *Australian Law Journal* 137; Dal Pont (n 34) 406.)

The regulator then issues a statutory notice to the firm for all documents relating to clients that fall within various specified categories. The firm informs each of those clients. A client informs the firm that it intends to make a claim of legal professional privilege in relation to certain documents. The claim is ethically available to the client, although it is known that the regulator's view is that such documents are not subject to legal professional privilege. (The law is unsettled, and a test case is required for judicial guidance.)

A senior partner at the firm tells the senior lawyer handling the regulator's notice that the firm is under 'too much pressure from [the regulator]' and that the firm will not respect or make the claim of privilege, and that they will hand the documents over to the regulator. The firm gives the documents to the regulator in a sealed envelope, over the client's claim of legal professional privilege and insistence that the documents should be withheld for privilege.

4 *The ATO*

It has previously been noted that the ATO accepts that legal professional privilege qualifies the Commissioner's coercive information-access powers in ss 353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth), as similarly worded provisions have been held to be subject to legal professional privilege. Accordingly, it would seem that threats of prosecution, for instance, under s 8C of the *Taxation Administration Act 1953* (Cth), in relation to alleged failures to comply with ss 353-10 and 353-15 of sch 1 to that Act, run a risk of falling foul of s 39 of the *Legal Profession Uniform Law*, unless the Commissioner has evidence[50] that is capable of establishing beyond reasonable doubt (ie there is a proper basis for the claim, as distinct from, say, suspicion or conjecture) that the information that is being withheld is *not*, in fact, privileged. This is because, in a s 8C prosecution,[51] for instance:

- the onus is on the Crown to prove *all* the elements of the offence (in relation to non-compliance with ss 353-10 and 353-15, one of which is that the information is not privileged);[52] and

- a practitioner may not legally be compelled to disclose the information in question for the purpose of its status relevantly being ascertained, due to the (separate) privilege against self-incrimination.[53]

50 For instance, by way of 'whistle-blowers' or unauthorised disclosures (compare *Glencore International AG v Federal Commissioner of Taxation* (2019) 265 CLR 646 ('*Glencore*')).

51 Or s 8K.

52 *Woolmington v DPP* [1935] AC 462. Cf James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2008).

53 Compare *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 393 (Gibbs CJ, Mason and Dawson JJ); *Korp v Egg & Egg Pulp Marketing Board (Vic)* [1964] VR 563, 564 (Herring CJ), 570–1 (Gowans J); and s 128 of the *Uniform Evidence Acts* (bearing in mind the 'balancing' discussed in *Deputy Federal Commissioner of Taxation v Shi* (2021) 392 ALR 1).

This second point does call for some explanation. It is well established that the privilege against self-incrimination would seem to have no application in relation to ss 353-10 and 353-15, from cases such as *Federal Commissioner of Taxation v De Vonk*[54] and *Binetter v Deputy Federal Commissioner of Taxation*.[55] It is also well established that:

- a court will not generally issue a notice to produce, or permit discovery or interrogatory, against a defendant to an action to recover a penalty or to impose a forfeiture,[56] and criminal prosecutions under s 8C (over an alleged breach of ss 353-10 or 353-15, in relation to a supposed failure to disclose non-privileged information) potentially would answer the description of proceedings of this kind[57] (noting the consequences that the *Taxation Administration Act 1953* (Cth) provides for a breach of s 8C);[58] and

- the disclosure which otherwise might be *court*-ordered pursuant to these coercive procedures, which are associated with the trial process, is separate from the statutory powers available for the *Commissioner* to compel disclosure, whether or not in aid of litigation, under ss 353-10 or 353-15.[59]

In this regard, it would appear to be further noteworthy that, in neither *De Vonk* (where criminal proceedings were also on foot) nor *Binetter*, were claims of legal professional privilege salient: there is no suggestion, on the facts of either case, that the information sought to be withheld was (also) potentially privileged.[60]

54 (1995) 61 FCR 564.

55 (2012) 206 FCR 37. For a critique of this position, see, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) [11.73]–[11.78].

56 See, eg, *Redfern v Redfern* [1891] P 139 (CA), 147 (Bowen LJ); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335 (Mason ACJ, Wilson and Dawson JJ); *Sorby v Commonwealth* (1983) 152 CLR 281, 288 (Gibbs CJ); *R v Deputy Federal Commissioner of Taxation; Ex parte Briggs* (1987) 13 FCR 389, 392 (Beaumont J); *Hamilton v Oades* (1989) 166 CLR 486, 499 (Mason CJ); *Smith v Papamihail* (1998) 88 FCR 80.

57 For an examination of the privilege, see, eg, John Cotton, 'The Judicial Use of History in Decisions About the Privilege Against Self-Incrimination' (2009) 13(2) *Legal History* 175; Michael Hor, 'The Privilege Against Self-Incrimination and Fairness to the Accused' [1993] (7) *Singapore Journal of Legal Studies* 35; and generally Andrew Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart, 2013).

58 See s 8E.

59 For a recent discussion of these provisions, see, eg, Stewart Grieve, Kathryn Bertram and Alison Haines, 'Commissioner of Taxation's Access Powers' (2022) 56(7) *Taxation in Australia* 431. Cf John Fleming, 'Privilege: The Limits of the Privilege Against Self-Incrimination' (2019) 61 *Law Society of New South Wales Journal* 78; Ben Saul and Michelle McCabe, 'The Privilege Against Self-Incrimination in Federal Regulation' (2001) 78 *Reform* 54.

60 Whilst the latter decision does not appear to have attracted academic commentary, for a discussion of the former case, see, eg, Duncan Bentley, 'Formulating a Taxpayer's Charter of Rights: Setting the Ground Rules' (1996) 25 *Australian Tax Review* 97; John McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24 *Federal Law Review* 347; Suzanne McNicol, 'Before the High Court: *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd and Another*' (2002) 24(2) *Sydney Law Review* 281; Margaret Allars, 'Reputation, Power and Fairness: A Review of Impact of Judicial Review' (1996) 24 *Federal Law Review* 235.

If the Commissioner disputes the legal professional privilege status of withheld information, without having the requisite evidence that is necessary in order to sustain a criminal prosecution,[61] the safer course, for s 39 purposes, therefore, would appear to be for the Commissioner to bring *civil* proceedings, seeking a declaration that ss 353-10 or 353-15 apply to the information in question.[62]

III Does Section 39 of the *Legal Profession Uniform Law* Bind the Crown (and in Particular, the Crown in Right of the Commonwealth) as a Matter of Statutory Interpretation?

The preceding discussion begs the statutory interpretation question of whether s 39 binds the Crown, as the *Legal Profession Uniform Law* does not expressly purport to bind the Crown in any of its capacities.[63]

In *State Government Insurance Corporation v Government Insurance Office of New South Wales*,[64] French J (as his Honour then was) noted that:

> The common law presumption that statutes are intended not to bind the Crown remains in force, but as a more flexible guide to construction which may be displaced without the stringent requirements that previously existed.[65]

Accordingly, on the present state of the law, the issue is whether (subject to intergovernmental immunity constraints, discussed below) the presumption that s 39 of the *Uniform Law* does not bind the Crown[66] is, as a matter of interpretation, rebutted either by necessary

61 Cf *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303 (Kitto J) (citation omitted):

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence'.

62 Pursuant to *Judiciary Act 1903* (Cth) s 39B(1A)(a); *Federal Court of Australia Act 1976* (Cth) s 21. Compare *Colgate Palmolive Pty Ltd v Federal Commissioner of Taxation* (1998) 39 ATR 235; *Federal Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278. A detailed discussion of the various steps that would be involved in such a proceeding, together with the approach to the relevant onus of proof, may be found in Dal Pont (n 34) 372–3.

63 For a discussion of why s 64 of the *Judiciary Act 1903* (Cth) (which provides that: 'In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject') has no application in relation to criminal proceedings, see, eg, Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 321 ('*Constitution*'); Peter Hanks, *Constitutional Law in Australia* (Butterworths, 2nd ed, 1996) 206.

64 (1991) 28 FCR 511.

65 Ibid 557. Cf Anthony Gray, 'Options for the Doctrine of Crown Immunity in 21st-Century Australia' (2009) 16 *Australian Journal of Administrative Law* 200; Gonzalo Villalta Puig, 'Dents Appear in the Shield of the Crown' (2002) 40(7) *Law Society Journal* 70; Anthony Gray, 'Immunity of the Crown from Statute and Suit' (2010) 9 *Canberra Law Review* 1.

66 See, eg, *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58, 61, 63 ('*Bombay*').

implication or legislative intent.[67] To note the observation of the United Kingdom Supreme Court (albeit in quite a different setting) in *R (Black) v Secretary of State for Justice*,[68] the question 'is whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the Crown [in an Australian context, not necessarily that in right of the enacting polity] to be bound.'[69]

The leading Australian case on the general issue of whether legislation binds the Crown as a matter of necessary implication or legislative intent is said to be that of *Bropho v Western Australia*.[70] In this case, s 17 of the *Aboriginal Heritage Act 1972* (WA) prohibited destruction of, or damage to, Aboriginal sites without the responsible minister's consent. The section established a criminal offence, and the legislation did not purport to bind the Crown in any of its capacities (just like s 39 of the *Uniform Law*). Pre-*Bropho*, the presumption that legislation did not bind the Crown was rebuttable only by express words or 'necessarily implication', the latter being where the purpose of the statute would be 'wholly frustrated' if it did not bind the Crown.[71]

In *Bropho*, a statutory corporation of the Western Australian government undertook works to redevelop a site owned by the State of Western Australia. The High Court (unanimously) held that it (the Crown in right of Western Australia) was bound by s 17. The judgment overturned the *Bombay*[72] requirement that the presumption against being bound could be rebutted only by express words or necessary implication. According to the plurality, the relevant question is whether Parliament intended for the statute to bind the Crown, an intention that can be ascertained from the content and objectives of the statute.[73]

Justice Brennan, concurring but writing separately, expressly noted that employees and agents of the Crown should not be exempt from criminal laws.[74] His Honour observed:

> [I]t is beyond the power of the Crown to authorize a servant or agent to commit an offence and any attempt to confer authority to do so in fact is void in law. As Griffith CJ said in *Clough v Leahy*

67 As in *Bropho v Western Australia* (1990) 171 CLR 1, critiqued in Steven Churches, 'The Trouble with Humphrey in Western Australia: Icons of the Crown or Impediments to the Public?' (1990) 20 *University of Western Australia Law Review* 688; Steven Churches, 'Aboriginal Heritage in the Wild West: Robert Bropho and the Swan Brewery Site' (1992) 56(2) *Aboriginal Law Bulletin* 9; David Kinley, 'Crown Immunity: A Lesson from Australia' (1990) 53 *Modern Law Review* 819; Susan Kneebone, 'The Crown's Presumptive Immunity from Statute: New Light in Australia' [1991] *Public Law* 361.

68 [2018] 2 LRC 674.

69 Ibid 688 (Lady Hale P, for the Court).

70 (1990) 171 CLR 1 ('*Bropho*').

71 *Bombay* (n 66); *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

72 [1947] AC 58.

73 *Bropho* (n 70) 22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), discussed in Duncan Berry, 'Crown Immunity from Statute: *Bropho v Western Australia*' (1993) 14 *Statute Law Review* 204; John McCorquodale, 'Immunity of Commonwealth Government Business Enterprises from State Laws' (1992) 66 *Australian Law Journal* 406.

74 *Bropho* (n 70) 26–8. Cf Malcolm Barrett, 'Prosecuting the Crown' (2002) 4 *University of Notre Dame Australia Law Review* 39.

> '*If an act is unlawful — forbidden by law — a person who does it can claim no protection by saying that he [sic] acted under the authority of the Crown*.'
>
> ...
>
> As the Court must determine whether the legislature intended (or would have intended had the question been addressed) that the statute should affect the activities of the Executive Government, the circumstances which properly relate to that question must be considered. Those circumstances include the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if the Crown is bound.[75]

In particular, cases along the lines of *Ganter v Whalland*,[76] *ACQ Pty Ltd v Cook*[77] and *Turner v George Weston Foods Ltd*[78] (authorities endorsed by Pearce,[79] the 'Bible' on statutory interpretation, at least in Australia)[80] indicate that the consequences of the adoption of a particular interpretation are a relevant consideration in the construction of legislation.

Relevantly, would it not seem to be an extraordinary anomaly if the 'great unwashed' were bound by s 39 of the *Uniform Law* ... but a servant, agent or officer of the Crown (or other 'person' acting on the Crown's behalf)[81] was not so constrained, and was thus free to interfere with lawyers' duties generally, and, in this case, a duty as important as protecting legal professional privilege (which has been held by the High Court to be a fundamental right of a person, in a system that comports with the rule of law)?[82] This outcome might be inimical to a stated purpose of s 39 ('to ensure that clients of law practices are adequately protected ...'),[83] especially, considering the ability of the executive, when

75 *Bropho* (n 70) 26–8 (emphasis added, citations omitted). As to attaching criminal culpability to the Crown itself, see, eg, *Cain v Doyle* (1946) 72 CLR 409, 424 (Dixon J); *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 270 (Brennan CJ, Dawson, Toohey and Gaudron JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 380–1 (Gummow and Hayne JJ). See also Pearce (n 43) 329, 463–4.

76 (2001) 54 NSWLR 122, 131 (Campbell J).

77 (2008) 72 NSWLR 318, 343 (Campbell JA, with whom Beazley and Giles JJA agreed).

78 [2007] NSWCA 67 [59] (Campbell JA, with whom Beazley and Hodgson JJA agreed).

79 Pearce (n 43) 223–6, 329.

80 Formerly, Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014). Compare Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (LexisNexis, 8th ed, 2020).

81 Cf *Coomber v Justices of Berks* (1883) 9 App Cas 61. Compare *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, where the issue was whether the reference in ss 6(3) and 75B(1) of the *Trade Practices Act 1974* (Cth) to a 'person' included members, servants and agents of the executive government. See generally Nick Seddon, 'The Crown' (2000) 28 *Federal Law Review* 245; Cheryl Saunders, 'The Concept of the Crown' (2015) 38(3) *Melbourne University Law Review* 873.

82 See, eg, *Baker* (n 29) 59 (Gibbs CJ), 74 (Mason J), 95 (Wilson J), 105–6 (Brennan J), 114 (Deane J), 127, 129 (Dawson J).

83 See *Legal Profession Uniform Law* s 30(c). Compare *Legal Profession Act 2007* (Qld) ss 143, 159; *Legal Profession Act 2007* (Tas) ss 143, 159; *Legal Profession Act 2006* (ACT) ss 133, 149; *Legal Profession Act 2006* (NT) ss 150, 166. On the importance of purpose in statutory interpretation, see, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Neindorf v Junkovic* (2005) 222 ALR 631; *Weiss v The Queen* (2005) 224 CLR 300; *Combet v*

acting under 'colour of office', to marshal the resources of the state to potentially apply a form of duress in threatening prosecution or other legal sanction that essentially is devoid of legal foundation.[84] On a cautionary note, lest it be thought that such behaviour be beyond loyal and faithful servants of the Crown (who, naturally, would conduct themselves according to the dictates of the rule of law),[85] a notable example might be found in the facts of *Mason v New South Wales*.[86]

In *Jacobsen v Rogers*,[87] McHugh J in dissent alluded to 'the presumption that the legislature of a member of a federation does not intend its legislation to apply to another member of the federation',[88] citing Dixon J's dictum in *Uther v Federal Commissioner of Taxation*[89] that: 'In a dual political system you do not expect to find either government legislating for the other'[90] (a reference which McHugh J repeated in *Re Wakim; Ex parte McNally*).[91] In finding that Commonwealth land could not be the subject of an application for mining exploration licences under the *Mining Act 1978* (WA), Hayne J (with whom McHugh and Callinan JJ relevantly agreed) in *Commonwealth v Western Australia*[92] made reference to 'the presumption that one polity does not intend, by its legislation, to affect the other polities in the federation'.[93]

Does the *Legal Profession Uniform Law*, therefore, evince an intention to bind not just the Crown in right of its enacting polities, but also the Crown in right of the Commonwealth? The purposive analysis undertaken above in relation to s 39 would, it is submitted, appear also

Commonwealth (2005) 224 CLR 494; *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235; *Trust Co of Australia Ltd v Commissioner of State Revenue (Qld)* (2003) 197 ALR 297. See generally Michael Kirby, 'The Never-Ending Challenge of Drafting and Interpreting Statutes: A Meditation on the Career of John Finemore QC' (2012) 36 *Melbourne University Law Review* 140, 168–72.

84 Cf *Sargood Brothers v Commonwealth* (1910) 11 CLR 258; *Bell Brothers Pty Ltd v Serpentine-Jarrahdale Shire* (1969) 121 CLR 137; *The Melbourne Tramway & Omnibus Co Ltd v Mayor of Melbourne* [1903] 28 VLR 647; *Payne v The Queen* [1901] 26 VLR 705.

85 On the nature of the rule of law in Australia, see *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. Compare Richard Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97(1) *Columbia Law Review* 1; Lon Fuller, *The Morality of Law* (Yale University Press, 1964); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) (It might even be claimed that, without the rule of law, taxation effectively amounts to little more than state-sanctioned theft writ large: compare Mark Leibler, 'Tax and the Rule of Law' (Annual Tax Lecture, The University of Melbourne, 23 March 2022); *Prohibitions del Roy* (1607) 12 Co Rep 63 ('*Case of Prohibitions*').)

86 (1959) 102 CLR 108. A discussion of the cases may be found in Margaret Brock, 'Restitution of Invalid Taxes: Principles and Policies' (2000) 5(1) *Deakin Law Review* 127. Compare the conduct described in Part IIC above and reported in *Legal Professional Privilege* (n 6) 4–6; Pelly (n 3).

87 (1995) 182 CLR 572 ('*Mining Act Case*').

88 Ibid 590.

89 (1947) 74 CLR 508.

90 Ibid 529.

91 (1999) 198 CLR 511, 557.

92 (1999) 196 CLR 392.

93 Ibid 473–5. See also McHugh J at 421 and Callinan J at 479. Cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 536–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) ('the predominant concern of State and Territory legislatures is with acts, matters and things in their respective law areas').

to be applicable to the Crown in right of the Commonwealth.[94] That Commonwealth authorities (for instance, like the ATO) are, unexceptionally, not above acting oppressively, unfortunately is borne out by the circumstances of cases such as *Hyder v Federal Commissioner of Taxation*.[95]

In addition (and in so far as it has been suggested by Gummow J in *Commonwealth v Western Australia* that a *Bombay*-like 'necessary intendment' test is applicable in the context of the Crown in right of the Commonwealth potentially being bound by a state statute),[96] the terms of the *Uniform Law* contemplate their ambit of operation as encompassing the Commonwealth, even without a direct statement to the effect that the Crown, in any capacity, is bound by the legislation in general.[97] For instance, a number of provisions are applicable to 'government lawyers',[98] a term which is defined as including 'a person who engages in legal practice only … as an officer or employee of a government authority; or … as the holder of a statutory office of the *Commonwealth*',[99] with the term 'government authority' itself defined as encompassing 'a Minister, government department or public authority of the *Commonwealth*'.[100]

Finally, the 'objects clause' of the *Uniform Law* provides that one of the *Law*'s objectives is 'to promote the administration of justice and an efficient and effective Australian legal profession … within which an appropriate level of independence of the legal profession from the

94 Compare *Jacobsen v Rogers* (1995) 182 CLR 572, 591 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) ('*Jacobsen*'). On the application of *Bropho* in inter-polity contexts, see, eg, *Re Commissioner of Water Resources* [1991] 1 Qd R 549; *Deputy Federal Commissioner of Taxation v Zarzycki* (1990) 96 ALR 146; *Commissioner of Railways (Qld) v Peters* (1991) 24 NSWLR 407; *State Government Insurance Corporation (WA) v Government Insurance Office of NSW* (1991) 28 FCR 511; *Hawthorn Pty Ltd v State Bank of SA* (1993) 40 FCR 137; *Kinross v GIO Australia Holdings* (1994) 55 FCR 210; *Wenpac Pty Ltd v Allied Westralian Finance Ltd* (1994) 123 FLR 1; *Ling v Commonwealth* (1994) 51 FCR 88; *Jellyn v State Bank of SA* [1996] 1 Qd R 271; *McMullin v ICI Australia Operations Pty Ltd* (1996) 69 FCR 473; *Ventana Pty Ltd v Federal Airports Corporation* (1997) 75 FCR 400; *Margarula v Minister for Resources and Energy* (1998) 86 FCR 195.

95 [2022] FCA 264. See also *Hyder v Federal Commissioner of Taxation (No 3)* [2022] FCA 493, and the circumstances canvassed by Mason CJ and Brennan, Deane, Dawson and Gaudron JJ in *Deputy Federal Commissioner of Taxation v Moorebank* (1988) 165 CLR 55, 67.

96 (n 87) 432 (cf Kirby J at 447), an approach implicitly disapproved of in Pearce (n 43) 224–5. For a critique of this case, see, eg, Greg Taylor, '*Commonwealth v Western Australia* and the Operation in Federal Systems of the Presumption that Statutes Do Not Apply to the Crown' (2000) 24(1) *Melbourne University Law Review* 77, 119, who points out that, on one view, *Bropho* (n 70) 22, 28 'simply removed the word "necessary" from the test for whether a statute binds the Crown.'

97 Compare the discussion of the relevant effect, in inter-polity cases, of statements of this kind in, for instance, *AGU v Commonwealth (No 2)* (2013) 86 NSWLR 348, 356 (Basten JA, with whom Bathurst CJ and Beazley P agreed); *Warner v First Mildura Irrigation Trust* (1993) 46 FCR 294.

98 See, eg, ss 56 and 263. See also ss 38 and 47 ('government legal practitioner').

99 Section 6 (emphasis added).

100 Ibid (emphasis added). Compare the court's approach to the relevant legislation in the *Mining Act Case* (n 87), *Jacobsen* (n 94) and *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253.

executive arm of government is maintained.'[101] In this regard, to exclude the executive arm of the Commonwealth likely would be anomalous. For example, few would forget the Commonwealth's (now discontinued) intervention in the regulation of Australian lawyers who make immigration representations to the Commonwealth on behalf of, or who provide Australian immigration advice to, clients, by effectively requiring such lawyers to have been licensed by the Commonwealth to do so … a measure which was challenged (with the support of the Law Council of Australia) in *Cunliffe v Commonwealth*.[102]

IV WOULD SECTION 39 VALIDLY BIND THE CROWN IN RIGHT OF THE COMMONWEALTH?

Whilst it could be open to argument from the preceding analysis that s 39 might evince an intention to bind the Crown[103] (including the Crown in right of the Commonwealth), as has been canvassed at length by Taylor[104] and others,[105] the issue of 'intergovernmental immunity' in federal systems gives rise to constraints on the ability of one level of government to legislatively bind another. Noting that the *Legal Profession Uniform Law* is state-based legislation,[106] the question

101 See s 3. Compare *Legal Profession Act 2007* (Qld) s 3; *Legal Profession Act 2007* (Tas) s 3; *Legal Profession Act 2006* (ACT) s 6; *Legal Profession Act 2006* (NT) s 6. On the proper role of objects clauses, see, eg, *Russo v Aiello* (2003) 215 CLR 643, 645 (Gleeson CJ); *Lynn v New South Wales* (2016) 91 NSWLR 636, 647 (Beazley P). See generally Jeffrey Barnes, 'Statutory Objects Provisions: How Cogent is the Research and Commentary?' (2013) 34(1) *Statute Law Review* 12; Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23(1) *Melbourne University Law Review* 184; Kent Roach, 'The Uses and Audiences of Preambles in Legislation' (2001) 47(1) *McGill Law Journal* 129.

102 (1994) 182 CLR 272. See, eg, Michael Chaaya, 'Proposed Changes to the Review of Migration Decisions' (1997) 19 *Sydney Law Review* 547; Mary Crock, 'Judicial Review and Part 8 of the *Migration Act*: Necessary Reform or Overkill?' (1996) 18 *Sydney Law Review* 267; Jane McGrath, 'Regulation for Migration Agents' (1997) 19(10) *Law Society Bulletin* 16; Jonathan Faulkner, 'Controlling the National Interest Through Migration' (2002) 27(5) *Alternative Law Journal* 233. See generally Belinda Wells, 'Aliens: The Outsiders in the Constitution' (1996) 19 *University of Queensland Law Journal* 45; Kristen Walker, 'Who's the Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights' (1995) 25(2) *University of Western Australia Law Review* 238; Steven Rares, 'The Independent Bar and Human Rights' (2005) 26 *Australian Bar Review* 11; Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1; Russell Blackford, 'Judicial Power, Political Liberty and the Post-Industrial State' (1997) 71 *Australian Law Journal* 267.

103 On the relevant status of the Commissioner in this regard, see, eg, Stephen Barkoczy and Vince Morabito, 'Are the Commissioner of Taxation's Recovery Powers Fettered by State Moratorium and Limitation of Actions Legislation?' (1997) 25 *Australian Business Law Review* 236.

104 (n 96).

105 See generally P Hogg, P Monahan and W Wright, *Liability of the Crown* (Carswell, 4th ed, 2011); Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 6th ed, 2018) ch 4; Ann Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006).

106 *Legal Profession Uniform Law 2014* (NSW), as applied by the *Legal Profession Uniform Law Application Act 2014* (NSW), *Legal Profession Uniform Law*

therefore arises as to whether the *Uniform Law*, even if it might evince an intention to bind the Crown (as explored in the preceding discussion),[107] could *in fact* bind the Crown in right of the *Commonwealth*.[108]

By way of example, in the 'enigmatic case'[109] of *Pirrie v McFarlane*,[110] the issue was whether Thomas McFarlane, a member of the Royal Australian Air Force ('a leading aircraftsman') who was driving a Commonwealth-owned car on Victorian roads *in the course of his duty*, was subject to s 6 of the *Motor Car Act 1915* (Vic), which required him to possess a licence to drive in Victoria. It was held by the High Court that he was.[111]

The majority explained that if the prohibition against driving a motor car without being licensed under Victorian law was reasonably capable of interfering with the defence of the Commonwealth or that of the states, the Commonwealth Parliament possessed ample power by legislation to confer upon Defence Force personnel the right to drive a motor car in the performance of their duty without being licensed under state law.[112] In the words of Knox CJ:

> If Parliament choose, it can exempt them from the obligation to obey this provision of the State law; but in my opinion, it has not yet done so. No repugnant or inconsistent Commonwealth legislation stands in the way of the State law on this subject, and such law remains valid and binding in Victoria by virtue of sec 107 of the Constitution.[113]

Justice Higgins concluded that:

> The result of this case, if the view which my learned colleagues the Chief Justice and Starke J, and myself, have expressed be adopted, will be to make it clear that a soldier is also a citizen and must obey the laws of the State in which he [sic] is, as well as the Federal laws. … The Crown is one and indivisible; but the Crown acting with the advice and consent of the Australian Federal

Application Act 2022 (WA) and *Legal Profession Uniform Law Application Act 2014* (Vic).

107 Compare *Roberts v Ahern* (1904) 1 CLR 406; *Lord Advocate v Dumbarton District Council* [1989] 3 WLR 1346; James Wolffe, 'Crown Immunity from Regulatory Statutes' [1988] *Public Law* 339; James Wolffe, 'Crown Immunity from Legislative Obligations' [1990] *Public Law* 14.

108 Cf Ricky Lee, 'Applicability of State Laws to Commonwealth Land and Activities' (2002) 6 *University of Western Sydney Law Review* 39; James Thomson, 'Beyond Superficialities: Crown Immunity and Constitutional Law' (1990) 20 *University of Western Australia Law Review* 710; Igor Mescher, 'Wither Commonwealth Immunity?' (1998) 17 *Australian Bar Review* 23.

109 H P Lee, 'Commonwealth Liability to State Law: The Enigmatic Case of *Pirrie v McFarlane*' (1987) 17(2) *Federal Law Review* 132.

110 (1925) 36 CLR 170 ('*Pirrie*').

111 'A soldier or a member of the Air Force does not cease to be a citizen: if he [sic] commits an offence against the ordinary criminal law, he [sic] can be tried and punished as if he [sic] were a civilian' (Starke J, ibid 227). Compare *D'Emden v Pedder* (1904) 1 CLR 91.

112 For a discussion of *Pirrie* (n 110), see, eg, Nicolee Dixon, 'Limiting the Doctrine of Intergovernmental Immunity' (1993) 9 *Queensland University of Technology Law Journal* 1; Lee (n 109).

113 *Pirrie* (n 110) 184. This is despite Isaacs J intimating at 200 that the *Air Force Act 1923* (Cth)

> either expressly or impliedly, empowers the Commonwealth military authorities at their discretion and upon their own professional judgment as to qualifications to choose their own motor-car drivers or motor-cycle drivers for the purpose of public defence[.]

> Parliament is distinct in aspect and function from the Crown acting with the advice and consent of the State legislature … Perhaps, if we must bring the position within recognized legal categories, we may say that the … State Parliaments are distinct agencies of the Crown; and when the State agency legislates, it had better say expressly — as the law stands — that it means to bind itself, if such be the intention.[114]

Pirrie (along with *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*,[115] and others)[116] supports the proposition that, by laws of general application, a government may legislate to bind the Crown in right of another in a way that does not inhibit or impair the latter's continued existence or capacity to function. For instance, could it, seriously, be contended that ATO officers driving on Victorian roads (even in Commonwealth cars), to compulsorily access physical premises pursuant to their powers under s 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth), are not subject to the requirements of the *Road Safety Act 1986* (Vic) and the *Road Safety Road Rules 2017* (Vic)? By parity of reasoning, *mutatis mutandis*, it would seem, therefore, that ATO officers, similarly, could have to abide by s 39 of the *Uniform Law* when exercising their information-gathering powers under s 353-10.

In this regard, however, whilst it has been suggested that the Commonwealth may be protected from state legislation which directly affects its property, prerogatives or finances,[117] it could also be submitted that cases such as *Pirrie* and *Henderson* are distinguishable, since they involved activities by the Crown that could have been carried out by natural persons in the ordinary course of things (eg leasing property, in *Henderson*, and driving, in *Pirrie*),[118] whereas coercively accessing premises or information for tax-related purposes clearly is not an endeavour of this kind, with the legal ability to do so arising specifically under statute, namely various provisions of the *Taxation Administration Act 1953* (Cth).[119] Hence, attention should be focused on s 109 of the *Constitution*, in so far as the interaction between s 39 of the *Legal Profession Uniform Law* and ss 353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth) is concerned.

114 Ibid 219. See also Starke J at 227.

115 (1997) 190 CLR 410 ('*Henderson*').

116 See, eg, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*'); *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372; *Austin v Commonwealth* (2003) 215 CLR 185.

117 See, eg, *Trade Practices Commission v Manfal Pty Ltd (No 2)* (1990) 27 FCR 22, 23 (Northrop J), 29 (Wilcox J) ('*Manfal*'). Compare *Re Commissioner of Water Resources* [1991] 1 Qd R 549, 556 (Byrne J).

118 For a discussion of these cases, see, eg, Tom Thawley and Allan Anforth, 'Good Conscience and Technicalities Clauses: The *Residential Tenancies Act 1987*' (1998) 72 *Australian Law Journal* 551; Mark Leeming, 'The Liability of the Government under the *Constitution*' (1998) 17 *Australian Bar Review* 214; Amber Cerny, 'To What Extent is the Commonwealth Immune from State Laws?' (1997) 12 *Australian Property Law Bulletin* 14.

119 Cf *Henderson* (n 115) 445–7 (Dawson, Toohey and Gaudron JJ); *Manfal* (n 117) 23 (Northrop J), 29, 31 (Wilcox J); Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16(4) *Public Law Review* 279.

A *Section 109 of the* Constitution

Section 109 of the *Constitution*, which was alluded to in the judgments in *Pirrie* considered above,[120] provides as follows:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Heeding the suggestion of Knox CJ in *Pirrie*,[121] albeit more than half a century later, the Commonwealth amended the *Defence Act 1903* (Cth) by inserting a new s 123 into the Act,[122] to the following effect:

> A member of the Defence Force is not bound by any law of a State or Territory:
> (a) that would require the member to have permission (whether in the form of a licence or otherwise) to use or to have in his or her possession, or would require the member to register, a vehicle, vessel, animal, firearm or other thing belonging to the Commonwealth; or
> (b) that would require the member to have permission (whether in the form of a licence or otherwise) to do anything in the course of his or her duties as a member of the Defence Force.

As ss 353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth) are Commonwealth laws and s 39 of the *Legal Profession Uniform Law* is state law, the question arises as to whether s 39 is, therefore, inconsistent with the former provisions and thus, by dint of s 109 of the *Constitution*, inoperative to the extent of any inconsistency. In this regard, the High Court has held, unanimously, that a state law is inconsistent with a Commonwealth law if the state law would 'impair or detract from the operation of a law of the Commonwealth Parliament'.[123]

The answer to this query might seem to be that no relevant inconsistency arises,[124] since, as noted previously, s 39 safeguards against (amongst other things) certain incursions into legal professional privilege, and ss 353-10 and 353-15 are, in their operation, themselves already subject to legal professional privilege, a common law right. Prior to the 1990s, it might have been thought that there was a separate system of common law in each individual state, to wit, that the common law was that of the several states.[125] However, the High Court has indicated clearly that (following the passage of the *Australia Acts*)[126] there is now but one *Australian* common law,[127] which would seem to

120 *Pirrie* (n 110) 184 (Knox CJ), 200 (Isaacs J).
121 Ibid 184.
122 By way of s 27 of the *Defence Legislation Amendment Act 1987* (Cth) (compare the facts which led to *A v Hayden (No 2)* (1984) 156 CLR 532 ('*ASIS Case*')).
123 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ), citing Dixon J in *Victoria v Commonwealth* (1937) 58 CLR 618, 630 ('*The Kakariki Case*').
124 Compare *New South Wales v Commonwealth* (1983) 151 CLR 302 ('*Health Fund Levy Case*'); *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 ('*Airlines of NSW Case*'); *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47.
125 See, eg, Alex Castles, *An Australian Legal History* (Law Book Company, 1982) 511–12.
126 Namely, the *Australia (Request and Consent) Act 1985* (Cth), the *Australia Acts (Request) Act 1985* (that was passed by each state), the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK).
127 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562–6 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ);

carry with it the consequence that the legal professional privilege, to which ss 353-10 and 353-15 are subject,[128] and which is protected by the *Uniform Law*, is no longer *state*-based.[129] It would, thus, seem that the *Uniform Law*, in this regard, does not relevantly 'impair or detract from the operation of'[130] these provisions of the *Taxation Administration Act 1953* (Cth). This would appear to be different to the position, for instance, in relation to the state debt moratorium and limitation of actions legislation vis-à-vis the Commissioner's income tax recovery powers contained in pt VI of the *Income Tax Assessment Act 1936* (Cth), considered by the courts in cases such as *Deputy Federal Commissioner of Taxation v Moorebank*,[131] *Deputy Federal Commissioner of Taxation v DTR Securities Pty Ltd*,[132] *Deputy Federal Commissioner of Taxation v Zarzycki*,[133] *Deputy Federal Commissioner of Taxation v Homewood*,[134] *Re Mazuran; Ex parte Deputy Federal Commissioner of Taxation*[135] and *Re Pollack; Ex parte Deputy Federal Commissioner of Taxation*.[136]

To put it another way, it would seem that it could be difficult to contend that it is impossible to obey both s 39 of the *Legal Profession Uniform Law* and ss 353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth)[137] (since, as has been noted, the

Lipohar v The Queen (1999) 200 CLR 485, 505–6 (Gaudron, Gummow and Hayne JJ); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 556 (McHugh J). See generally Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337, 344–5; Kathleen Foley, 'The *Australian Constitution*'s Influence on the Common Law' (2003) 31 *Federal Law Review* 131, 132–3; Sonali Walpola, 'After the *Australia Acts*: The High Court's Attitude to Changing the Common Law (1987–2016)' (2021) 21(1) *Oxford University Commonwealth Law Journal* 1, 10. Cf Justice L J Priestley, 'A Federal Common Law in Australia?' (1995) 6 *Public Law Review* 221.

128 For a particular contextual critique of the principle of legality, a principle which would seem to underlie this approach, see Jason Varuhas, 'The Principle of Legality' (2020) 79(3) *Cambridge Law Journal* 578. Compare *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ); Dan Meagher, 'The "Modern Approach" to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?' (2018) 46(3) *Federal Law Review* 397.

129 Cf *Kable v DPP (NSW)* (1996) 189 CLR 51, 112 (McHugh J):

> Perhaps the validity of th[is] proposition is not as readily apparent to a State judge bound by the authority of his or her own Full Court or Court of Appeal as it is to a judge of a federal court who must apply the common law.

130 Cf *Dickson v The Queen* (2010) 241 CLR 491, 502 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 524 (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ); *Loo v DPP (Vic)* (2005) 12 VR 665, 688 (Winneke P, with whom Charles JA agreed); *Local Government Association of Queensland (Inc) v Queensland* [2003] 2 Qd R 354, 373 (Davies JA).

131 (1988) 165 CLR 55.

132 (1988) 165 CLR 56.

133 (1990) 96 ALR 146.

134 (1991) 21 ATR 1426.

135 (1990) 97 ALR 391.

136 (1991) 32 FCR 40. For a critique of a number of these decisions, see, eg, Peter Searle, 'State Judgment Debt Recovery Acts: Do They Apply to Commonwealth Income Tax Debts?' (1991) 20(1) *Australian Tax Review* 14 (itself critiqued in Barkoczy and Morabito (n 103)).

137 Compare *University of Wollongong v Metwally* (1984) 158 CLR 447, 455–6 (Gibbs CJ); *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23, 29 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ); *Re Credit*

Australian common law of legal professional privilege, which s 39 protects, is 'read-in' to ss 353-10 and 353-15), or that ss 353-10 and 353-15 purport to confer a legal right, privilege or entitlement which s 39 purports to take away or diminish[138] … unless it might be argued that attaching a state-based sanction to a failure to observe an Australian common law constraint on the operation of a Commonwealth law is, in effect, 'diminishing' the operation of the Commonwealth law (which, nevertheless, *already* is subject to that Australian common law constraint).[139]

The attractive force of this last argument would seem to be blunted by the outcome of the spate of relatively recent authorities in which the use by the Commissioner of illegally obtained (including legally privileged) taxpayer information has been considered. In cases such as *Denlay v Federal Commissioner of Taxation*[140] and *Donoghue v Federal Commissioner of Taxation*,[141] the general assessment power in s 166 of the *Income Tax Assessment Act 1936* (Cth) was deployed successfully to resist challenges to the Commissioner's use of information obtained in breach of the law. These cases would seem to underscore an especially broad and entrenched judicial approach to claims against tax officials, which gives an extremely broad interpretation to the Commissioner's powers and shies away from any possibility that those powers could be fettered or impaired by an adverse judicial outcome … a reasoning which is prominent especially in instances where (on the limited circumstances in which, despite the privative clause protections in s 175 of the *Income Tax Assessment Act 1936* (Cth) and div 350 of sch 1 to the *Taxation Administration Act 1953* (Cth)), an imputation of dishonest or malicious intent on the part of tax officials is, as elaborated in *Federal Commissioner of Taxation v Futuris Corporation Ltd*,[142] notionally possible.[143]

Tribunal; Ex parte General Motors Acceptance Corp Australia (1977) 137 CLR 545, 563 (Mason J).

138 Compare *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Gavan Duffy J); *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151, 160 (Latham CJ), 161–2 (Starke J); *Wallis v Downard-Pickford (North Qld) Pty Ltd* (1994) 179 CLR 388, 396–7 (Toohey and Gaudron JJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 438, 451–2 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*').

139 Compare Andrea Beatty and Gabor Papdi, 'Constitutional Issues Raised by South Australia's Proposed Major Bank Levy' (2017) 16(7) *Financial Services Newsletter* 125; George Williams, 'Return of State Awards: Section 109 of the *Constitution*' (1997) 10 *Australian Journal of Labour Law* 170; Allan Murray-Jones, 'The Tests for Inconsistency Under Section 109 of the *Constitution*' (1979) 10(1) *Federal Law Review* 25, 52 ('the existence of different penalties for the same conduct provided for in different laws will not always lead to the conclusion that the laws are directly inconsistent', discussing cases such as *Hume v Palmer* (1926) 38 CLR 441 and *Kelly v Shanahan* [1975] Qd R 215). Cf the underlying facts of *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16.

140 (2011) 193 FCR 412 ('*Denlay*').

141 (2015) 237 FCR 316 ('*Donoghue*'). Cf *Glencore* (n 50).

142 (2008) 237 CLR 146.

143 Cf Kalmen Datt, 'Taxpayer Rights in Australia? Hope Springs Eternal' (2019) 34(3) *Australian Tax Forum: A Journal of Taxation Policy, Law and Reform* 445; Prue Vines, 'Private Rights and Public Wrongs: The Tort of Misfeasance in Public Office' (2012) 111 *Precedent* 4; Sue Milne, 'The Bottom Line for Review of an Assessment' (2012) 36(2) *Monash University Law Review* 181; Nicholas Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34(3) *Melbourne University Law Review* 870; John Azzi, 'Preserving the Constitutional Function of Courts and Increasing Confidence in the Tax System: Time to Reconsider *Futuris*' (2019) 43(1) *Melbourne University Law Review* 44; Justice Michael Kirby, 'Of "Sham"

If nothing else, this line of authority is relevant to note in terms of the consequences (or lack thereof) for the Commissioner in the event that s 39 of the *Legal Profession Uniform Law* is found to have been contravened in the exercise of the Commissioner's powers pursuant to ss 353-10 or 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth), thus supporting the conclusion that s 39 does not 'diminish' the operation of ss 353-10 or 353-15 in a manner that renders the former inconsistent with the latter provisions, for the purposes of s 109 of the *Constitution*. Namely, consistent with the reasoning in *Donoghue* and *Denlay*, a finding of a breach of s 39 would not necessarily impugn the validity or integrity of any attendant assessment made by the Commissioner, such being the breadth of the Commissioner's assessment powers.[144]

In the words of Kenny and Perram JJ in *Donoghue* (their Honours themselves quoting Keane CJ, Dowsett and Reeves JJ in *Denlay*):[145]

> 'Section 166 imposes a duty upon the Commissioner [*viz*, to make assessments]. … It would be a remarkable state of affairs if the Commissioner were entitled, and indeed obliged, to refrain from doing what is expressed to be his duty by the terms of s 166 of the [Income Tax Assessment Act] 1936 by reason of a suspicion on his part, even a reasonable suspicion, that some illegality on the part of his officers may have occurred in the course of gathering the information. A clear expression of legislative intention so to qualify the duty imposed on the Commissioner would be required to relieve him of his duty under s 166. We are unable to see that such a limitation is consistent with the unqualified language in which the duty is cast upon the Commissioner and the high importance of making an assessment based on the information available to the Commissioner.'[146]

In the alternative, a brave submission might be put. Based on simple facts and simple arguments, it is as follows. As has been discussed above, powers in provisions similarly worded to ss 353-10 and 353-15 have been held to be qualified by legal professional privilege, and the ATO accepts that its powers as set out in ss 353-10 and 353-15 must be exercised consistent with this qualification, which serves as a limitation on the power which otherwise would be available to officers under these sections. Accordingly, coercive actions *purportedly* undertaken in accordance with these provisions, but not *in fact* consistent with the observance of legal professional privilege (and thus potentially in breach of s 39) are therefore not authorised … either by ss 353-10, 353-15 or 166 (the broad and general assessment power available from the latter might not, it could be said, from first principles,[147] and in contrast to the

and Other Lessons for Australian Revenue Law' (2008) 32(3) *Melbourne University Law Review* 861.

144 Cf Robert Wyld, Angus Hannam and Macsen Nunn, 'Paradise, Privilege and the High Court of Australia: The ATO and Accessing Corporate Confidential Information' (2020) 16(9) *Privacy Law Bulletin* 162; Charles Noonan, 'Section 75(v), No-Invalidity Clauses and the Rule of Law' (2013) 36(2) *University of New South Wales Law Journal* 437; Jeffrey Pinsler, 'Status of Privileged Communications Inadvertently Disclosed in Civil or Criminal Proceedings' (2021) 33(3) *Singapore Academy of Law Journal* 959.

145 (n 140) 433–4.

146 (n 141) 334–5 (with whom Davies J relevantly agreed: at 344).

147 Namely, '*expressum facit cessare tacitum*' and '*generalia specialibus non derogant*'. As Pearce (n 43) 182 puts it:

> If the general power is conferred without limitations or qualifications but the special power is expressed to be subject to some limitations or qualifications,

circumstances of *Donoghue* and *Denlay*, validly sanction a *prospective* breach of the law). Since such actions, inconsistent with privilege (unlike, for instance, in *CUB Australia Holding Pty Ltd v Federal Commissioner of Taxation*)[148] would, as a result, be beyond the power of statutory officers purportedly conducting themselves in accordance with ss 353-10, 353-15 or 166, would the shield of the Crown relevantly still be available?[149] Further or alternatively, s 109 might fade into irrelevance, since the actions at issue would not, in fact, be authorised under ss 353-10, 353-15 or 166.[150]

V CODETTA: THE 'REFRESHED' *LEGAL PROFESSIONAL PRIVILEGE PROTOCOL*

In light of the preceding, the ATO's latest *Legal Professional Privilege Protocol* (issued on 22 June 2022,[151] ostensibly pursuant to the Commissioner's general administration powers)[152] could be seen as an attempt to 'reset', on paper at least, the terms of its approach to legal professional privilege vis-à-vis legal practitioners and their clients.[153] What practical impact, if any, the *Protocol* will have in this regard, however, very much remains to be seen.[154] For instance, the *Protocol* states that compliance with its provisions is 'voluntary' on the part of lawyers and their clients,[155] but the consequences (or lack thereof) for the ATO itself of non-adherence to the terms of the *Protocol* are not entirely clear.[156]

> the general power cannot be exercised to do that which is the subject of the special power.

See, eg, *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672; *Saraswati v The Queen* (1991) 172 CLR 1; *Grofam Pty Ltd v ANZ Banking Group Ltd* (1993) 45 FCR 445.

148 (n 27).

149 Cf *Bropho* (n 70) 26–8 (Brennan J); *Clough v Leahy* (1904) 2 CLR 139, 155–6 (Griffith CJ); Zines, *Constitution* (n 63) 267.

150 Cf *Henderson* (n 115) 445–7 (Dawson, Toohey and Gaudron JJ), and compare the court's approach in *Wotton v Queensland* (2012) 246 CLR 1, *Comcare v Banerji* (2019) 267 CLR 373 and *Palmer v Western Australia* (2021) 388 ALR 180 to actions purportedly taken pursuant to powers.

151 Australian Taxation Office, *Compliance with Formal Notices: Claiming Legal Professional Privilege in Response to Formal Notices — Legal Professional Privilege (LPP) Protocol* (June 2022) ('*LPP Protocol*').

152 See, eg, *Taxation Administration Act 1953* (Cth) sch 1, s 356-5; *Income Tax Assessment Act 1936* (Cth) s 8; *Income Tax Assessment Act 1997* (Cth) s 7-1.

153 See, eg, Hannah Wootton, 'ATO "At Risk of Breach" in Data Order', *The Australian Financial Review* (Sydney), 13 July 2022, 35.

154 A collection of material on the *Protocol* may be found in Morgan, '*Retrospective*' (n 6).

155 See, eg, *LPP Protocol* (n 151) [2], [11], although can the *Protocol* truly be characterised as 'voluntary' if additional scrutiny should likely be expected if those to whom it is directed 'choose' not to explain why they have not complied with it? (For a discussion of the concept of voluntariness, albeit in the context of voluntary assumption of risk in relation to the tort of negligence, see, eg, *Insurance Commissioner v Joyce* (1948) 77 CLR 39; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656.)

156 Cf *Bellinz Pty Ltd v Federal Commissioner of Taxation* (1998) 84 FCR 154; *White Industries* (n 49). See generally Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42(1) *Federal Law Review* 181. Compare *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR

Whilst the *Protocol* does acknowledge lawyers' 'professional obligations'[157] (perhaps intending to reflect the meaning of this phrase as it appears in the *Uniform Law*?),[158] the *Protocol* does not purport to be comprehensive, being, on its own terms, expressly limited to privilege claims made with respect to information sought pursuant to the Commissioner's coercive information-gathering powers.[159] Curiously, it appears also to overlook the Australian Law Reform Commission's comprehensive report into legal professional privilege,[160] and makes no mention of the guidelines previously agreed to between the ATO and the Law Council of Australia in relation to access procedures by ATO officers on lawyers' premises, where legal professional privilege is claimed[161] (even though the *Protocol* apparently supersedes these guidelines). Unlike the former guidelines, the *Protocol* is unilateral in nature, and it is, accordingly, noteworthy that the Law Council has expressed some misgivings regarding the latter.[162] Perhaps this is unsurprising, if not to be expected.[163]

As has relevantly been noted:

> The Commissioner's suggestion that a lawyer is completely protected (from ATO 'undue influence'), because they are 'acting on instructions',[164] is not true. The undue influence could be exerted before the lawyer can get instructions (for instance, when the staff first arrive in a raid). The undue influence could be exerted over the advice the lawyer subsequently gives (for instance — to give advice that the privileged advice was not privileged, or the privilege had already been waived, when it had not). It could be exerted by threatening meritless consequences, for their client, if the client doesn't waive the privilege. It could be exerted by threatening meritless investigation, of the lawyer's tax affairs, and/or meritless adverse consequences, for the lawyer, in relation to their own tax affairs. And, it could be exerted, when there is no particular client involved, or involved yet.[165]

'The proof of the pudding is in the eating', as the expression goes, so only time will tell whether these concerns will be borne out despite the *Protocol*, or whether they are now more theoretical than real. In this regard, though, there may not be much cause for optimism. As Woellner and Bersten conclude:

577, 589–91 (Bowen CJ and Deane J); *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105, 117 (Kitto J); *Conder Tower Pty Ltd v Commissioner of State Revenue* (2012) 88 ATR 123, 141–2 (Pagone J); *VL Investments Pty Ltd v Commissioner of State Revenue* (2006) 63 ATR 319, 327 (Hollingworth J).

157 See, eg, *LPP Protocol* (n 151) [34].

158 See, eg, ss 6, 39.

159 *LPP Protocol* (n 151) [1].

160 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, February 2008).

161 Discussed in *Laws of Australia* (n 49) [16.7.350].

162 Law Council of Australia, 'ATO Legal Professional Privilege Protocol' (Media Release, 22 June 2022).

163 'The level of detail that the ATO sets out for every communication would appear to make the task of cleaning the Augean stables look like child's play': Woellner and Bersten (n 4) 22.

164 Australian Taxation Office, *Compendium: Compliance with Formal Notices — Claiming Legal Professional Privilege in Response to Formal Notices (Legal Professional Privilege (LPP) Protocol)* (June 2022) item 34.

165 John Morgan, *LIV's 'Counterbalancing Offence' Submission Mentioned in ATO's Consultation Compendium (Item 34): Released with Its Finalised LPP Protocol* (3 July 2022) Tax Technical <https://taxtechnical.com.au/livs-counterbalancing-offence-submission-mentioned-in-atos-consultation-compendium-released-with-its-finalised-lpp-protocol-item-34/>.

> The experience with the ATO Protocol may suggest that the old problems are still rattling their chains — indeed, with the dramatic growth and ongoing sophistication of information technology and document digitation, the old problems may now be larger and even harder to deal with.[166]

VI CONCLUSION

Widely reported has been the ATO's 'crackdown', in recent times, on claims of legal professional privilege. Much less widely so have been some of the prohibitions that might constrain the ATO itself in this regard.

This paper has suggested that, due to the existence of s 39 of the *Legal Profession Uniform Law* (and its equivalents in non-*Uniform Law* jurisdictions), well-meaning but overzealous ATO officers, in pursuit of their laudable objective that the legally 'correct' amount of tax be paid, may expose themselves to criminal culpability if they seek to pressure practitioners in relation to claims of legal professional privilege. This is because legal professional privilege would appear to come within the ambit of professional obligations protected against 'undue influence' by the legislation, legislation which binds the Crown, including the Crown in right of the Commonwealth, even taking into account the operation of s 109 of the *Constitution*.

166 Woellner and Bersten (n 4) 26.