Would You Like (Some Help) to 'First Remove the Beam from Your Own Eye …'?

The Federal Commissioner of Taxation and Section 39 of the *Legal Profession Uniform Law*

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Background

Australian Taxation Office widely reported to have been 'cracking down' on legal professional privilege, which is borne out by the experience of lawyers at the coalface …

- **'the ATO "frequently pushes taxpayers, and their advisers hard, to waive LPP, or push [sic: pushes] for disclosure, in circumstances that breach that privilege, or make it difficult for the lawyers to give frank and fearless advice, on privilege issues"'**
  - Michael Pelly, 'Lawyers Accuse ATO of Threats over Privilege', *The Australian Financial Review* (Sydney), 19 November 2021, 36, 36
- **See further**
  - 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
  - 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
  - Angie Ananda, 'Legal Professional Privilege under Fire?' (2019) 54(1) *Taxation in Australia* 4

Spoiler Alert … ('A Show-stopper'?)

The *Legal Profession Uniform Law*

- ***Legal Profession Uniform Law 2014*** **(NSW)**
- **… as applied by the**
  - *Legal Profession Uniform Law Application Act 2014* (NSW)
  - *Legal Profession Uniform Law Application Act 2014* (Vic)
  - *Legal Profession Uniform Law Application Act 2022* (WA)

Section 39

Undue influence

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

Section 39 is Yet to be Judicially Considered

Please refer to the paper for

- **how the following might, with respect to the 'contraventions' mentioned, relevantly be defined**
  - 'causing'
  - 'inducing'
  - 'attempting to cause'
  - 'attempting to induce'
    - (pp 9–10)
- **examples of conduct by the Commissioner's delegates, authorised officers or agents that could be problematic in this regard**
  - (pp 11–15)
  - see further the conduct:
    - described in Law Institute of Victoria, Submission to Australian Taxation Office, *Draft Legal Professional Privilege Protocol*, 12 November 2021
    - reported in Michael Pelly, 'Lawyers Accuse ATO of Threats over Privilege', *The Australian Financial Review* (Sydney), 19 November 2021, 36

Section 39 is Yet to be Judicially Considered

Focus of today's presentation

- **The threshold legal issues**
  - Is legal professional privilege included within the ambit of a lawyer's 'professional obligations'?
  - If so, does s 39 bind the Crown (in particular, the Crown in right of the Commonwealth) as a matter of statutory interpretation?
  - If it does, could s 39 validly bind the Crown in right of the Commonwealth?

The wording of s 39 (again)

Undue influence

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.

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‘Professional Obligations’ and Legal Professional Privilege

‘Professional obligations’ defined

- **Section 6 of the *Uniform Law* defines ‘professional obligations’ inclusively, 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.

- **So, does the term ‘professional obligations’ encompass legal professional privilege?**
  - On the approach that legislation is to be interpreted in a manner that is consistent with the general law unless the context requires otherwise, 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)

‘Professional Obligations’ and Legal Professional Privilege

Cases suggest that 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

- ***Parry-Jones v Law Society*** **[1969] 1 Ch 1, 7 (Lord Denning)**
  - ‘[T]he law implies a term into the contract whereby a professional man [sic] is to keep his [sic] client’s affairs secret’
- ***Federal Commissioner of Taxation v Citibank Ltd*** **(1989) 20 FCR 403, 414 (Bowen CJ and Fisher J)**
  - 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’
- ***Baker v Campbell*** **(1983) 153 CLR 52, 113–15 (Deane J)**
  - ‘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 … 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”’

‘Professional Obligations’ and Legal Professional Privilege

Conclusion

- **‘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’**
  - Thomson Reuters, *The Laws of Australia* (at 16 June 2016) 16 Evidence ‘2 Legal Professional Privilege and Client Legal Privilege’ [16.7.330]
- **See further *Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461, 479–81 (Scrutton LJ); *Heywood v Wellers* [1976] QB 446, 461 (James LJ); *Reece v Trye* (1846) 9 Beav 316**

So, Does Section 39 Bind the Crown?

The *Legal Profession Uniform Law* does not purport to bind the Crown

- **Is the presumption, therefore, that s 39 does not bind the Crown, rebutted (as a matter of statutory interpretation) either by**
  - necessary implication?
  - legislative intent?

Bropho v Western Australia (1990) 171 CLR 1

- **The leading case on when legislation binds the Crown as a matter of necessary implication or legislative intent**
  - see Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) 223–6, 329

So, Does Section 39 Bind the Crown?

Bropho v Western Australia (1990) 171 CLR 1

- **In *Bropho*, s 17 of the *Aboriginal Heritage Act 1972* (WA) prohibited destruction of, or damage to, Aboriginal sites except with the responsible minister's consent**
- **The section established a criminal offence and the legislation did not purport to bind the Crown**
  - just like s 39 of the *Legal Profession Uniform Law*(!)
- **The relevant question is whether Parliament intended (nevertheless) for the statute to bind the Crown**
  - Intention in this regard can be ascertained from the content and objectives of the statute
  - 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 held (unanimously) that it (the Crown in right of Western Australia) was bound by s 17

So, Does Section 39 Bind the Crown?

Bropho v Western Australia (1990) 171 CLR 1

- **Justice Brennan, concurring but writing separately, expressly noted (at 26–8) that employees and agents of the Crown should not be exempt from criminal laws:**

> [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* [(1904) 2 CLR 139, 155–6]
>
> > '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.

So, Does Section 39 Bind the Crown?

Conclusion

- **It would be an extraordinary anomaly …**
  - if the 'great unwashed' were bound by s 39
  - but a servant, agent or officer of the Crown (or other 'person' acting on the Crown's behalf) was not so constrained
    - and was thus free to interfere, with impunity, with lawyers' duties
    - relevantly here, a duty as important as legal professional privilege
    - … a privilege held by the High Court to be a fundamental right of a person, in a system that comports with the rule of law (see, eg, *Baker v Campbell* (1983) 153 CLR 52, 59 (Gibbs CJ), 74 (Mason J), 95 (Wilson J), 105–6 (Brennan J), 114 (Deane J), 127, 129 (Dawson J))
- **Surely, this would be inimical to the purpose of the provision?**
  - especially considering the ability of the executive, when 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 may be devoid of legal foundation?
    - see, eg, the circumstances of *Mason v New South Wales* (1959) 102 CLR 108; compare *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

What about the Crown in Right of the Commonwealth?

Intention evinced to bind the Crown in right of the Commonwealth?

- **Cf *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1**
- **Various provisions mention the Commonwealth …**
  - see, eg, ss 6, 56, 263
    - 'government lawyer' includes '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'
    - 'government authority' includes 'a Minister, government department or public authority of the Commonwealth'
  - see also ss 38 and 47 ('government legal practitioner')
- **Commonwealth authorities, unexceptionally and unfortunately, not above acting oppressively …**
  - see, eg, *Hyder v Federal Commissioner of Taxation* [2022] FCA 264; *Hyder v Federal Commissioner of Taxation (No 3)* [2022] FCA 493

Could Section 39 Validly Bind the Crown in Right of the Commonwealth?

The *Legal Profession Uniform Law* is *state* legislation

- **Namely, the *Legal Profession Uniform Law 2014* (NSW)**
  - as applied by the
    - *Legal Profession Uniform Law Application Act 2014* (NSW)
    - *Legal Profession Uniform Law Application Act 2014* (Vic)
    - *Legal Profession Uniform Law Application Act 2022* (WA)

Issue of 'intergovernmental immunity' in federal systems

- **Constraints on the ability of one level of government to legislatively bind another**
  - discussed in 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); 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* 27

Does Section 39 Validly Bind the Crown in Right of the Commonwealth?

Pirrie v McFarlane (1925) 36 CLR 170

- **The issue was whether a member of the Royal Australian Air Force 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)**
  - … namely, was he required to possess a licence to drive in Victoria?
  - the High Court held that he was!

Does Section 39 Validly Bind the Crown in Right of the Commonwealth?

General principle

- **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**
  - see (in addition to *Pirrie*): *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410; *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
- **For instance, it could not seriously be contended that officers of the Commissioner who are 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), would not be 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*, would it not appear therefore that the Commissioner's officers likewise would have to abide by s 39 of the *Legal Profession Uniform Law* when exercising their information-gathering powers under s 353-10 of sch 1 to the *Taxation Administration Act 1953* (Cth)?

What About Section 109 of the *Australian Constitution*?

Australian Constitution s 109

Inconsistency of laws

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.

… returning to *Pirrie v McFarlane* (1925) 36 CLR 170, 184 (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.

What About Section 109 of the *Australian Constitution*?

So, over 50 years after *Pirrie* …

- **The Commonwealth amended the *Defence Act 1903* (Cth) by inserting a new s 123 into the Act:**

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.

What About Section 109 of the *Australian Constitution*?

… returning to s 39 of the *Legal Profession Uniform Law*

- **The Commissioner's coercive information-access powers are set out in ss 353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth)**
  - these are provisions of *Commonwealth* law
- **Section 39 of the *Legal Profession Uniform Law* is a *state* legislative provision**
- **The question therefore arises as to whether s 39 is, somehow, 'inconsistent' with ss 353-10 and 353-15**
  - … and thus, by dint of s 109 of the *Constitution*, inoperative to the extent of any inconsistency

What About Section 109 of the *Australian Constitution*?

The answer would appear to be: 'no'

- **The Commissioner's coercive information-access powers in ss 353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth) are themselves, quite apart from s 39, *already* subject to legal professional privilege**
  - … a position which the Australian Taxation Office accepts(!)
  - see, eg, *CUB Australia Holding Pty Ltd v Federal Commissioner of Taxation* (2021) 394 ALR 327; *Grant v Downs* (1976) 135 CLR 674; *Allen Allen & Hemsley v Deputy Federal Commissioner of Taxation* (1989) 20 FCR 576; *Federal Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Woolworths Ltd v Fels* (2002) 213 CLR 598
- **The law of legal professional privilege is part of what is now the *Australian common law* and, like the rest of the common law in Australia, is *no longer state-based***
  - *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562–6 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *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)
  - since the 1990s, it has been recognised that, following the passage of the *Australia Acts*, the common law in Australia no longer can be thought of as that of the several Australian states (ie there is no longer a separate system of common law in each individual state): compare Alex Castles, *An Australian Legal History* (Law Book Company, 1982) 511–12

What About Section 109 of the *Australian Constitution*?

So …

- **There thus would appear to be no relevant 'inconsistency', since:**
  - it is possible to comply with 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), as the Australian common law of legal professional privilege, which s 39 protects, is 'read-in' to ss 353-10 and 353-15
    - (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 Tribunal; Ex parte General Motors Acceptance Corp Australia* (1977) 137 CLR 545, 563 (Mason J))
  - because legal professional privilege is 'read-in' to ss 353-10 and 353-15, these provisions do not purport to confer a legal right, privilege or entitlement which s 39 (which, *inter alia*, protects legal professional privilege) purports to take away or diminish
    - unless it can 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, somehow, 'diminishing' the operation of the Commonwealth law *which already is subject to that Australian common law constraint*
    - (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*'))

Conclusion

So, would you like some help to 'first remove the beam from your own eye …'? (a shameless play on the words of Matthew 7:5 and Luke 6:42)

- **The Federal Commissioner of Taxation has been widely reported to be 'cracking down' on legal professional privilege**
  - the Australian Taxation Office asserts 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 information-gathering powers (even though the Commissioner's delegates and authorised officers 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 constrain the ATO itself in the exercise of its powers**
  - this presentation has discussed the potential relevance of s 39 of the *Legal Profession Uniform Law* to the Commissioner and to agents or officers of the Commissioner
- **While pursuing the hardly objectionable objective that the legally 'correct' amount of tax be paid, it would appear 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**

Postscript …

What if there's a bona fide disagreement as to privileged status or otherwise?

- ***Civil* proceedings in the Federal Court (cf *Federal Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278)**
  - … seeking a declaration (pursuant to *Judiciary Act 1903* (Cth) s 39B(1A)(a); *Federal Court of Australia Act 1976* (Cth) s 21) that the information is available under ss 353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth), on the basis that legal professional privilege does not protect it
  - (for 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, see Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2017) 372–3)
- **Criminal prosecution pursuant to s 8C of the *Taxation Administration Act 1953* (Cth) (on the basis of alleged failure to comply with ss 353-10 and 353-15 of sch 1 to this Act) by withholding information, the privileged status of which is contested?**
  - Commissioner needs to have evidence 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
  - NB: 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*

Post-post-scriptum …

What about non-*Uniform Law* jurisdictions?

- ***Legal Profession Uniform Law* operates in New South Wales, Western Australia and Victoria**
- **Equivalents to s 39 in other jurisdictions, but these are more limited in scope**
  - in jurisdictions except South Australia, protection appears to be limited to incorporated legal practices and multi-disciplinary partnerships
    - such that these provisions would, presumably, encompass those associated with, say, KPMG, but not those associated with, say, King & Wood Mallesons(!) (compare s 39: 'law practice')
    - 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) 150, 166
  - the equivalent to s 39 in South Australia is confined, in ss 23G and 30 of the *Legal Practitioners Act 1981* (SA), to incorporated legal practices and community legal centres
    - (the *Legal Practitioners Act 1981* (SA) does not recognise multi-disciplinary partnerships)

Thank you

The Federal Commissioner of Taxation and Section 39 of the *Legal Profession Uniform Law*

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