

THE PROVISION OF LEGAL ADVICE BY TAX AGENTS

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As is the case generally in the common law world, communications between legal advisers and their clients in Australia are protected from compulsory disclosure under the doctrine of legal professional privilege. Specifically, such communications need to be for the dominant purpose of (a) the provision of legal advice, or (b) in relation to contemplated or current litigation.¹ While it has been settled that legal professional privilege has been accepted as part of the substantive law in Australia,² the content and application of the privilege is still a matter of debate, a state of affairs that at least one Federal Court judge has found surprising.³ Cases in the last decade in Australia have seen the adoption of a dominant purpose test after almost a quarter of a century of applying a sole purpose test,⁴ considered whether the privilege is abrogated by taxation⁵ and trade practices legislation⁶ and addressed the question of whether the two heads of the privilege are in fact unified by a single rationale.⁷ This flurry of curial activity has also sparked a swathe of commentary analysing the role of legal professional privilege in the modern Australian legal setting.⁸

The second head of the privilege, where the communication is made in the context of either contemplated or actual litigation, is usually invoked when a party to proceedings attempts to attach the privilege to communications involving third

¹ *Esso Australian Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; John Dyson Heydon *Cross on Evidence* (7th ed, 2004) [25210].

² *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561, 564 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Note that in that same case, it is also described as being “an important common law immunity” (565), a description the Full Federal Court in *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 207 ALR 217 used as evidence that the privilege goes beyond being “merely a rule of substantive law”; 207 ALR 217, 219 (Finn J).

³ (2004) 207 ALR 217, 219 (Finn J).

⁴ *Esso Australian Resources v Federal Commissioner of Taxation* (1999) 201 CLR 49 (overturning *Grant v Downs* (1976) 135 CLR 674).

⁵ *JMA Accounting Pty Ltd v Carmody* 2004 ATC 4916; *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 207 ALR 217 (*Income Tax Assessment Act 1936* (Cth) s 263); *Federal Commissioner of Taxation v Coombes* 99 ATC 4634 (*Income Tax Assessment Act 1936* (Cth) s 264).

⁶ *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561 (*Trade Practices Act 1974* (Cth) s 155).

⁷ *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 207 ALR 217.

⁸ Suzanne McNicol, ‘Esso Australia Resources Ltd v Federal Commissioner of Taxation’ (1999) 21 *Sydney Law Review* 656; Margaret McLennan, ‘The Statutory Power of the Commissioner of Taxation and the Common Law Doctrine of Legal Professional Privilege’ (1999) 28 *Australian Tax Review* 139; Ken Devos, ‘To what Extent has the Commissioner of Taxation Exploited the Doctrine of Legal Professional Privilege through the Issue of s 264 Notices?’ (2000) 29 *Australian Tax Review* 205; Alex Bruce, ‘The *Trade Practices Act 1974* (Cth) and the Demise of Legal Professional Privilege’ (2002) 30 *Federal Law Review* 373; Rodney Fisher, ‘Whither the Common Law Privileges: Vale Client Privilege in Tax Investigations?’ (2002) 28 *Monash University Law Review* 327; Rodney Fisher, ‘Preserving Professional Privilege: Implications for Tax Investigatory Powers’ (2003) 32 *Australian Tax Review* 7; Vincent Morfuni, ‘Legal Professional Privilege and the Government’s Right to Access Information and Documents’ (2004) 33 *Australian Tax Review* 89.

parties. To qualify for the privilege under this head, the communication needs to have been made for the purpose of intended use in that litigation.⁹ The Full Federal Court decision in *Pratt Holdings* rejected the notion previously held by the profession that third party communications (that is, non-employees or non-agents of the client) need to be directed to the legal adviser, rather than to the client. To insist that the legal adviser acts as the conduit for the privilege to attach, even if the communication was ultimately to be made to the client, was described as an “inevitable and obvious triumph of form over substance”.¹⁰

The facts of *Pratt Holdings* were that the taxpayer was restructuring and refinancing its corporate group. In doing so, an issue arose with respect to some accumulated losses within one of the entities in the group. The taxpayer sought advice from its legal adviser, who advised them to obtain a valuation of assets from a large accounting firm to assist in determining the losses. The taxpayer approached the accounting firm directly and received the valuations before passing them on to the legal advisers. During a later tax audit, the Commissioner sought access to the accounting firm’s documents (including working papers). The taxpayer asserted legal professional privilege over the documents held by the accounting firm. The Full Federal Court overturned the finding at first instance, holding that it is not necessary that the communication be commissioned by nor communicated directly to the legal adviser for privilege to attach. Essentially, the Full Federal Court allowed the taxpayer to claim privilege for the provision of legal advice,¹¹ as no litigation was contemplated at the time the advice from the lawyers was sought.¹²

While this decision may be viewed as expanding the ambit of the privilege in Australia, or at least allowing clients to be somewhat more pragmatic in their affairs, the involvement of a legal adviser is still a necessary requirement. Under the present state of the law, using the facts of *Pratt Holdings*, privilege would not attach to exactly the same communication if the taxpayer had approached the accounting firm for advice on the taxation treatment of the losses without ever involving their legal adviser. While *Pratt Holdings* may be seen as a victory of sorts for a substance over form approach, it is argued here that the chosen profession of the adviser consulted should have no bearing on the outcome of the question of whether privilege will attach to a given communication.

The remainder of this chapter sets out the rationale for having the privilege at all, which provides the justification for restricting the privilege only to communications with legal practitioners. The argument that legal professional privilege should be extended to other professions is not new and is usually justified on the basis that the communications with those other professionals are made in a climate of confidentiality. However, the traditional justification for the privilege existing at all focuses on the operation of the legal system itself rather than any client expectations of confidentiality. This separates the services provided by those other professionals

⁹ Heydon, above n 1, [25235]. This position is usually traced back to the decision in *Wheeler v Le Marchant* (1881) Ch D 675 (CA).

¹⁰ (2004) 207 ALR 217, 219 (Finn J).

¹¹ This was referred to as “advice privilege” in the judgment of the Federal Court (*Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2003) 195 ALR 717, 726).

¹² While this may suggest the existence of a unified rationale, the court explicitly did not address this question directly, despite being put forward in argument by the taxpayer.

(who do not operate within the legal system) from the services provided by legal practitioners. The argument presented here for extending legal professional privilege to tax agents is based on tax agents providing an identical service to legal practitioners, in that tax agents provide legal advice and, therefore, operate within the legal system just as much as those legal practitioners providing legal advice on tax laws. The final section of this chapter establishes that tax agents do, in fact, provide legal advice as part of the service they provide to their clients.

RATIONALE FOR THE PRIVILEGE

The original rationale for the privilege was based on the lawyer's ethical duty to keep client confidences.¹³ This afforded a protection to the lawyer. By the late nineteenth century, the privilege was recognised as protecting the client. The popular formulation of the basis for the privilege is taken from the High Court decision in *Grant v Downs*,¹⁴

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.¹⁵

Similar statements of the purpose of legal professional privilege can be found in most common law jurisdictions.¹⁶

Subsequent statements have emphasised the importance of protecting the individual, particularly from intrusion into their private affairs by the state, and creating a climate in which their legal advisers may be fully abreast of the relevant facts in order to provide appropriate advice. For example, Dawson J in *Baker v Campbell*¹⁷ stated that,

[I]f a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so, then his lack of confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms a part.¹⁸

¹³ *Pratt Holdings Pty Ltd v Federal Commissioner of Taxation* (2004) 207 ALR 217, 235 (Stone J).

¹⁴ (1976) 135 CLR 674.

¹⁵ *Ibid*, 685. See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 and *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 550 (McHugh J).

¹⁶ For example, *Greenough v Gaskell* (1833) 1 My & K 98, 103; 39 ER 618, 621 (United Kingdom); *Fisher v United States* 425 US 391, 403 (1976); *Upjohn Co v United States* 449 US 383, 391 (1983) (USA); *Solosky v Canada* (1979) 105 DLR (3d) 745, 755-757 (Canada); *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191, 219 (New Zealand).

¹⁷ (1983) 153 CLR 52.

¹⁸ *Ibid*, 130.

Further, Deane J stated in the same case,

That general principle represents some protection of the citizen – particularly the weak, the unintelligent and the ill-informed citizen – against the leviathan of the modern state. Without it there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.¹⁹

Concerns such as these have long been held in the common law, as evidenced by Jessel MR's statement in *Anderson v Bank of British Columbia*²⁰ over a century before *Baker v Campbell*. Further, Lord Brougham LC identified these issues and the concomitant public interest balancing act in *Greenough v Gaskell*,²¹

It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection ... But it is out of regard to the interests of justice, which cannot be upheld, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

McNicol asserts that the rationale presented applies only to the first head of the privilege.²² This is on the basis that the first head is justified on the basis that it engenders an environment in which the client is free to confide in their legal adviser without fear that such confidences will be compulsorily disclosed to the client's prejudice. This has traditionally not enabled communications involving a third party to be covered by the privilege. For such third party communications to attract the privilege, the communication must have been made with litigation in mind.²³ The communication may be between the legal adviser and the third party without any involvement of the client. Consequently, the state of mind of the client, specifically, whether the client felt comfortable making the relevant disclosure to the legal adviser, does not apply in these circumstances. However, while the Full Federal Court in *Pratt Holdings* did not directly address the question of whether the two heads are based on a unified rationale, the finding that communications between a legal adviser and third party were privileged even in the absence of anticipated litigation goes some way to suggesting that a single rationale underlies both. This rationale would appear to be a public interest in the form of the promotion of the administration of justice through the services of trained professionals, namely lawyers.²⁴ Such promotion necessarily would be based on candour and trust. Such a unified rationale was contemplated by McNicol.²⁵

¹⁹ Ibid, 120.

²⁰ (1876) 2 Ch D 644, 649.

²¹ (1833) 1 My & K 98, 103; 39 ER 618, 621.

²² Suzanne McNicol, *Law of Privilege* (1992) 48.

²³ This head was referred to as "litigation privilege" by the Federal Court in *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2003) 195 ALR 717, 726.

²⁴ Where applicable, this term is used throughout to refer collectively to barristers and solicitors.

²⁵ McNicol, above n 22.

Prior to examining the reasoning for restricting legal professional privilege to communications with qualified lawyers, it is relevant to consider the application of statute. Sections 118 and 119 of the *Evidence Act 1995* (Cth) provide for a “client legal privilege” in federal proceedings²⁶ that is substantially the same as the common law legal professional privilege. The major difference between the statutory privilege and the common law privilege prior to 1999 was that the *Evidence Act 1995* used a dominant purpose test, whereas the common law privilege used a sole purpose test in identifying communications that attracted the privilege. The High Court in *Esso Australia Resources*²⁷ used the statutory dominant purpose test as evidence that legal values had moved on from those that applied when *Grant v Downs* was decided and held that the common law test should be one that adopted the dominant purpose test, making it consistent with the statutory privilege.

However, the High Court stated in *Esso Australia Resources* that the statutory privilege in the *Evidence Act 1995* only applies to the adducing of evidence.²⁸ The common law privilege extends beyond the adducing of evidence during trial, encompassing such matters as discovery and inspection of documents. In taxation matters, specifically s 263 and s 264 investigations, assertions of legal professional privilege are made in the context of access, rather than litigation. Consequently, the privilege given to litigants by the *Evidence Act 1995* is insufficient to prevent the Commissioner accessing sensitive documented communications.²⁹

RATIONALE FOR RESTRICTING THE PRIVILEGE

It should be noted explicitly that support for legal professional privilege is not universal. This stems from the delicate balancing act asked of the courts. Some very eminent jurists prefer the public interest of truth in litigation served by full disclosure in open court to the public interest of full and frank disclosure to trained legal advisers encouraged by the privilege. For example, to justify limiting the scope of legal professional privilege so that the other considerations of the public interest are not unduly affected, Mason J (as he then was) stated,

Notwithstanding strong judicial assertions of the value of the public interest said to be promoted by the privilege [referring to *Greenough v Gaskell* as an example], it is by no means self-evident that the value of this public interest is greater than the public interest in facilitating the availability of all relevant materials for production in litigious disputes.³⁰

Other comments have been directed at specific aspects of the privilege. For example, Pincus J in *Dingle v Commonwealth Development Bank of Australia*³¹ described the law relating to privileged third party communications as a “rather unattractive body of doctrine”.³²

²⁶ Section 120 provides a similar privilege to unrepresented parties.

²⁷ (1999) 201 CLR 49.

²⁸ *Ibid*, 55.

²⁹ It should be further noted that, as the *Income Tax Assessment Act 1936* is a Federal Act, the consideration that the *Evidence Act 1995* is limited in its application to proceedings in Federal and ACT courts is irrelevant.

³⁰ *Baker v Campbell* (1983) 153 CLR 52, 74 (in dissent).

³¹ (1989) 91 ALR 239.

³² *Ibid*, 243.

Despite such reservations, though, it is quite clear from the present state of the case law that third party involvement does not necessarily abrogate any claim to legal professional privilege. However, the one thing that is quite clear is that an appropriately legally qualified professional must have some connection to the communication. Even in *Pratt Holdings*, where the Full Federal Court quite openly adopted a substance over form approach, the communication that was the subject of the dispute was made at the instigation of the lawyer. The accountant's valuation would never have been made if it were not required for the purpose of supporting the lawyer's subsequent advice.

There is currently no provision within the common law for communications between persons and their non-legally qualified professional advisers, such as accountants, surveyors or merchant bankers, to be protected by the privilege. The courts have previously rejected arguments for the extension of the privilege to other professional advisers that were based on client communications made in an environment of confidence.³³

Notwithstanding such judicial restraint, commentators have continued periodically to argue for extending the privilege to other professionals under certain circumstances. For instance, Baxt argues for the privilege to be extended to professional advisers under circumstances where the services they provide their clients is not materially different from the services provided by lawyers. Allowing privilege to attach to such communications that are made with a legal adviser and not if the communication is made with some other form of professional adviser provides a comparative advantage to the legal profession.³⁴ Similar concerns have been raised in New Zealand³⁵ and the United States³⁶ specifically in relation to tax matters.

Italia also argues for the extension of privilege with respect to tax advice to accountants not only on the basis of the similarity of services provided by the two professions, but also through reference to the encouragement of full and frank disclosure in communications.³⁷

It should be noted, though, that the courts are not oblivious to the notion that other professional relationships are based on a high degree of trust and confidence between the professional and their clients. In rejecting the extension of the privilege to other forms of relationship, Jessel MR stated in *Wheeler v Le Marchant*,³⁸

In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which,

³³ *Chantrey Martin & Co v Martin* [1953] QB 286; [1953] 2 All ER 691.

³⁴ Robert Baxt, 'A Matter of Privilege' (1989) 60 *Chartered Accountant* 34.

³⁵ Policy Advice Division, Inland Revenue Department, *Tax and Privilege: A Proposed New Structure* (2002) [2.15].

³⁶ Corby Brooks, 'A Double-Edged Sword Cuts Both Ways: How Clients of Dual Capacity Legal Practitioners Often Lose Their Evidentiary Privileges' (2004) 35 *Texas Tech Law Review* 1069.

³⁷ Maria Italia, 'The History of Legal Professional Privilege and Its Role in Tax Advice by Tax Professionals' (Paper presented at 3rd Accounting History International Conference, Siena, 17-19 September 2003).

³⁸ (1881) Ch D 675 (CA), 681-682.

though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property.

With respect to arguments for extending legal professional privilege to other types of confidential professional advice, the opening words of the quotation taken from *Greenough v Gaskell* reproduced earlier³⁹ set out the common law justification for restricting the privilege to the legal profession. The law does not attempt to elevate the status of the legal profession nor give its members a comparative advantage over other professions by keeping their communications with their clients secret. The privilege is not designed to encourage citizens to seek the services of a lawyer in preference to some other equally capable professional. Nor is it designed to encourage full and frank disclosure per se. It is the administration of justice that is the *raison d'être* for the privilege. Stone and Wells go so far as to describe the privilege as existing not for protecting confidences, but for ensuring that confidences continue.⁴⁰

As the administration of justice is the basis for the privilege, arguments based upon the notion that the delineation between the work of lawyers and that of other professionals is no longer as clear cut as it may once have been fail to address the central issue. While the original basis for the privilege was the maintenance of client confidences, the law now values the indirect role the privilege plays in upholding the integrity of the legal system as a whole.⁴¹ The maintenance of confidences is only a secondary consideration. The privilege is based upon the notion that a legal system, especially an adversarial system such as that operating within common law jurisdictions, is heavily dependent on the practising members of the legal profession. For these members to be able to operate effectively, it is necessary for them to be aware of all aspects of their client's circumstances. The absence of the privilege to ensure that these specific types of communication are kept confidential is considered to be detrimental to the trust relationship at the heart of the lawyer-client relationship. If clients are aware that their confidences may be broken through compulsory disclosure at a later point in time, the concern is that such clients will only provide favourable information to their legal representatives, impeding the effective administration of the legal system. Such considerations led McNicol to regard as dangerous, analogies between the lawyer-client relationship and other professional relationships, where those analogies are based in large part on the maintenance of

³⁹ Above n 21.

⁴⁰ Julius Stone and W A N Wells, *Evidence: Its History and Policies* (1991) 585.

⁴¹ Law Commission (NZ), *Evidence Law: Privilege – A Discussion Paper*, Preliminary Paper No 23 (1994) [46].

confidences as justification for the extension of the privilege.⁴² McNicol submitted⁴³ that Dixon J's reasoning that an inflexible rule had been "established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box"⁴⁴ was to be preferred.

Such reasoning becomes weaker, however, when non-lawyers begin to play a role in the administration of justice (through participation in the legal system). For present purposes, it is acknowledged that a close similarity in the substance of the professional services supplied by lawyers vis-à-vis non-lawyers is not a basis in and of itself for extending privilege to non-lawyer relationships. However, once that "close similarity" is transformed into an identity, the restriction of the privilege becomes much more difficult to justify.

The remainder of this chapter deals with the issue of whether tax agents provide legal advice in the same fashion as legal practitioners. Only if tax agents may legally provide legal advice can an extension of legal professional privilege to these professionals be justified.

REGULATION OF THE PRACTICE OF LAW

The practice of law in Australia is regulated by the States and Territories. As demonstrated below, a number of the statutes use different terminology to achieve essentially the same objective, being to ensure that legal practice is only undertaken by qualified legal practitioners. The justification for the "monopoly provisions" was described by Johnson J in the Supreme Court of Western Australia in the following terms,⁴⁵

Whilst sometimes referred to as the monopoly provisions, these and related provisions of the [*Legal Practitioner Act 1893* (WA)] exist for the protection of the public and not for the protection of legal practitioners. They are designed to ensure that the public receives legal advice and representation only from those who are properly qualified, are fit and proper and in every respect a person of good fame and character ... The public are entitled to be assured that those who undertake the important task of advising and representing them in relation to their legal affairs not only have sufficient knowledge to do so, but are also bound by ethical restraints and standards of responsible conduct.

Section 15 of the *Legal Profession Act 2006* (ACT) provides recent statutory support for this view of the justification for the monopoly provisions, stating,⁴⁶

The purposes of this part are as follows:

- (a) to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by people who are properly qualified to do so;
- (b) to protect consumers by ensuring that people carrying out legal work are entitled to do so.

⁴² McNicol, above n 22, 5.

⁴³ Ibid, 4.

⁴⁴ *McGuinness v Attorney-General (Vic.)* (1940) 63 CLR 73, 102-103.

⁴⁵ *Legal Practice Board v Mullally* [2003] WASC 225, [3].

⁴⁶ See also *Legal Profession Act 2004* (NSW) s 13; *Legal Profession Act 2004* (Vic) s 2.2.1.

As there are some variations in the language used in these provisions between jurisdictions, the relevant sections are reproduced below to facilitate the following discussion.

New South Wales

Section 14 of the *Legal Profession Act 2004* (NSW) provides,

- (1) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.
- (2) Sub-section (1) does not apply to engaging in legal practice of the following kinds:
 - (a) legal practice engaged in under the authority of a law of this jurisdiction or of the Commonwealth;

“Engage in legal practice” is clarified in s 4 to the extent that the phrase includes to practise law, but no further elaboration is provided.

Victoria

Section 2.2.2 of the *Legal Profession Act 2004* (Vic) states,

- (1) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.
- (2) Sub-section (1) does not apply to –
 - (a) a person who engages in legal practice under the authority of a law of this jurisdiction or of the Commonwealth;

Queensland

The prohibition on unqualified practice in Queensland is contained in s 24 of the *Legal Profession Act 2004* (Qld), which states,

- (1) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.

“Engage in legal practice” is indicated in Schedule 5 to include practice of law.

Subsection 23(1)(a) provides an exception to the general prohibition for “a person authorised to engage in legal practice under a law of the Commonwealth”.

Western Australia

Section 123 of the *Legal Practice Act 2003* (WA) states,

- (1) A person must not engage in legal practice unless the person is a certified practitioner.
...
- (2) Nothing in subsection (1) is to be construed as preventing a person from –
...
 - (c) appearing for a person before a court, or providing advice or other services, if that appearance or the provision of that advice or service, is expressly authorised by a written law.

Section 4 defines “engage in legal practice” and includes “performs or carries out or is engaged in any work in connection with the administration of law”.⁴⁷

For the purposes of the analysis conducted below, the phrase “administration of law” should be highlighted. Western Australia is the only jurisdiction to use this phrase, which was retained from the equivalent provision in the predecessor statute, s 77 of the *Legal Practitioners Act 1893* (WA) and has been critical in at least one case, as described below.

South Australia

Subsection 21(1) of the *Legal Practitioners Act 1981* (SA) provides,

- (1) A person must not practise the profession of the law, or hold himself or herself out, or permit another to hold him or her out, as being entitled to practise the profession of the law unless –
 - (a) in the case of a natural person, the person –
 - (i) is a local legal practitioner; or
 - (ii) is an interstate legal practitioner; or
 - (b) in the case of a company, it holds a practising certificate issued and in force under this Act.

Subsection 21(3) proceeds to provide an extensive list of exemptions from the general prohibition, although, interestingly, there is no explicit exemption for unqualified persons from performing functions allowed under a Commonwealth law, as has been included in other jurisdictions. The phrase “practise the profession of the law” is not specifically defined,⁴⁸ although s 21(2) does provide some specific examples (all relating to the preparation of instruments or representation of parties in proceedings).

Tasmania

Section 54 of the *Legal Profession Act 1993* (Tas) states in part,

- (1) A person who is not admitted under Part 5 as a legal practitioner must not –
 - (a) practice as a legal practitioner;

No further elaboration is provided on these concepts within the statute.⁴⁹

Northern Territory

Part XI of the *Legal Practitioners Act* (NT) regulates the conduct of unqualified persons. Unlike the other jurisdictions, there is no general prohibition against practising law or similar. Section 131 does prohibit unqualified persons from holding

⁴⁷ *Legal Practice Act 2003* (WA), s 4(b).

⁴⁸ The dictionary in s 5 cross-references to s 21.

⁴⁹ Section 3 does provide a definition of “practise” and “practise as a legal practitioner”, but only to explicitly include work performed as an employee of a legal firm or corporation.

themselves out to be qualified as legal practitioners⁵⁰ and s 132 prevents such persons from the preparation of specific instruments.

Note that the *Legal Profession Bill 2006* (NT) was introduced into the Northern Territory Legislative Assembly on 19 October 2006, which is based on the uniform legislation model in most other Australian jurisdictions. Section 18 of the Bill includes an explicit prohibition on non-legal practitioners engaging in legal practice, with an exception for legal practice engaged in under the authority of a Commonwealth law.

Australian Capital Territory

Section 16 of the *Legal Profession Act 2006* (ACT) states,

- (1) A person commits an offence if—
 - (a) the person engages in legal practice in the ACT; and
 - (b) the person is not an Australian legal practitioner.
- ...
- (3) Subsection (1) does not apply to engaging in legal practice of the following kinds:
 - (a) legal practice engaged in under a territory law or a law of the Commonwealth;

“Legal practice” is not defined further, other than for some non-exhaustive examples in s 16(1), which deal with the preparation of instruments and acting as an advocate for another party.

Model Uniform Legislation

There is also lobbying being undertaken primarily by the Law Council of Australia (LCA) to adopt uniform system of regulation across Australia. To this end, a draft Model Bill has been made publicly available by the LCA, the relevant parts of the monopoly provisions of which are reproduced below.

2.2.2 Prohibition on engaging in legal practice when not entitled

- (1) A person must not engage in legal practice in this jurisdiction [for fee or reward] unless the person is an Australian legal practitioner
- (2) Subsection (1) does not apply to engaging in legal practice of the following kinds:
 - (a) legal practice engaged in under the authority of a law of this jurisdiction or of the Commonwealth;

“Engage in legal practice” is defined in s 1.2.1 as including “practise law”, without further detail.

THE SCOPE OF LEGAL PRACTICE AND THE PROVISION OF LEGAL ADVICE

⁵⁰ “Legal practitioner” means a person admitted into the legal profession either in the Northern Territory or another jurisdiction and so recognised under the *Mutual Recognition Act 1992* (Cth); ss 6 and 130A.

With the exceptions of South Australia, Tasmania and the Northern Territory,⁵¹ all jurisdictions utilise the phrase “engage in legal practice”. This is as a result of the efforts to introduce uniform legislation regulating the State legal professions, as exemplified by the LCA’s Model Bill (which also utilises the phrase “engage in legal practice”). This uniformity in language provides some ability for interpretation in one jurisdiction to inform interpretation in others. However, as demonstrated by Kenny JA in *Felman v Law Institute of Victoria*,⁵² even where there is an intent on the part of the legislatures to achieve the same broad goals, any differences may result in a rejection of the extra-judicial authorities. While Kenny JA’s decision was based on the different phraseology used in the statutes (specifically “administration of law” in Western Australia, which as not used in the Victorian statute), *Felman* illustrates that it cannot be taken for granted that uniform legislation will necessarily lead to uniform application.

An unfortunate reality of all the statutes in force across Australia is that there is nothing that unambiguously defines “engage in legal practice”. This lack of legislative guidance has been noted previously with respect to the equivalent phrase used in the former Victorian statute.⁵³ Consequently, what constitutes “engage in legal practice” is a matter to be determined by the case law.

The starting point for this line of inquiry is the decision in *Re Sanderson; Ex Parte The Law Institute of Victoria*,⁵⁴ in which Cussen J considered the meaning of the phrase “act as a solicitor”. His Honour held that,⁵⁵

[I]f a person does a thing usually done by a solicitor, and does it in such a way as to lead to the reasonable inference that he is a solicitor – if he combines professing to be a solicitor with action usually taken by a solicitor – I think he then does act as a solicitor.

The decision of the Court of Appeal of the Supreme Court of Victoria in *Felman* considered the meaning of the phrase “engage in legal practice” and held that it means “engage in legal practice as a legal practitioner”.⁵⁶ While this may not be especially enlightening, prior comments give some illumination to the thinking behind this expression. In *Felman*, the defendant had argued, inter alia, that the monopoly provisions under the Victorian *Legal Practice Act 1996* (the immediate predecessor to the *Legal Profession Act 2004* (Vic) considered earlier) were constitutionally invalid for being allegedly inconsistent with Commonwealth legislation, such as the *Income Tax Assessment Act 1936*, the *Customs Act 1901* and the *Migration Act 1958*, that purport to allow non-qualified parties to undertake activities that may be considered legal practice. Kenny JA considered the meaning of the phrase “engage in legal practice” in dismissing this argument. In so dismissing, her Honour stated,⁵⁷

... a person who gives advice touching legal matters or who prepares documents having legal effect does not act as a solicitor (or legal practitioner) by reason of those acts

⁵¹ Note that the *Legal Profession Bill 2006* (NT) currently before the Northern Territory Legislative Assembly adopts this phrase.

⁵² (1997) 150 ALR 363.

⁵³ *Cornall v Superannuation Systems (Aust) Pty Ltd* [1989] VR 43, 46.

⁵⁴ [1927] VR 394.

⁵⁵ *Ibid*, 397.

⁵⁶ (1997) 150 ALR 363, 390.

⁵⁷ *Ibid*, 389.

alone. Some aspects of litigation too can be conducted by a law clerk (providing it can be said that the clerk acts on behalf of his employing solicitor). In limiting his focus simply to the *activities* of conducting litigation, giving advice and drafting legal instruments, the appellant fails to describe sufficiently full what is signified by the expression ‘engaging in legal practice’. One may need to examine who performs these activities, as well as how, when and where they perform them (original emphasis)

From this passage, it may be seen that engaging in legal practice represents more than the mere activities normally conducted by legal practitioners. At a minimum, it would also include the representation, implicit or explicit, that the services are being provided by a qualified legal practitioner. This is consistent with an explicit prohibition in all jurisdictions regarding non-qualified persons from representing themselves as qualified legal practitioners. Under all jurisdictions, the term “legal practitioner” and its derivatives is restricted to those admitted to the profession by the relevant mechanism (such as registration on the Rolls). This reflects additional requirements over and above educational and experience qualifications, such as the “good fame and character” requirement already mentioned.⁵⁸ This reflects the client protection mischief of the monopoly provisions described earlier⁵⁹ and is consistent with Kenny JA’s assertion that “engaging in legal practice” is more than merely engaging in the types of activities that a legal practitioner would normally undertake.

As noted above, the Western Australian legislation is unique amongst Australian jurisdictions for the utilisation of the phrase “administration of law”. This is especially interesting seeing that this phrase was used as the primary focus as the descriptor of activities that only qualified persons could partake in under the former *Legal Practitioners Act 1893* (WA) and has been retained in the 2003 rewrite, even though the Western Australian legislature adopted the language of “engage in legal practice” consistent with other jurisdictions. The use of this phrase under the former legislation has been interpreted as meaning “the practice of law” or “the practice of the law”.⁶⁰

Notwithstanding Kenny JA’s reservations regarding the use of extra-judicial thinking in the interpretation of the relevant language, the following passage by Phillips J (as he then was) in the Supreme Court of Victoria in *Cornall v Nagle*⁶¹ provides a solid guide in applying the legislation to an unqualified person,⁶² the first point in particular derived largely from his Honour’s interpretation of the *Sanderson* test,⁶³

... a person who is neither admitted to practise nor enrolled as a barrister and solicitor may “act or practise as a solicitor” in any of the following ways:

- (1) by doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor...
- (2) by doing something that is positively proscribed by the Act or by Rules of Court unless done by a duly qualified legal practitioner...

⁵⁸ Above n 45.

⁵⁹ *Ibid.*

⁶⁰ *The Barristers’ Board v Palm Management Pty Ltd* [1984] WAR 101, 107.

⁶¹ [1995] 2 VR 188.

⁶² *Ibid.*, 210.

⁶³ [1927] VR 394, 397.

- (3) by doing something which, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law. For present purposes, it is unnecessary to go beyond the example of the giving of legal advice as part of a course of conduct and for reward.

The final point in Phillips J's passage highlights the provision of legal advice as something coming within the auspices of legal practice and, therefore, the exclusive domain of legal practitioners. Note that reservations expressed by Fitzgerald JA in *Law Society of New South Wales v Seymour*,⁶⁴ to the effect that the third point in Phillips J's formulation is "too widely stated" and potentially captures legitimate activities carried on by legally qualified persons not purporting to act as legal practitioners, such as judges, academics and arbitrators. However, the *Cornall v Nagle* test has been cited with approval in other cases, such as *Felman* and *Queensland Law Society v Sande*⁶⁵ and serves the pragmatic purpose of including the provision of legal advice within legal practice.

While Kenny JA is undoubtedly correct in asserting that legal practice represents more than just the mere activities of a legal practitioner, the provision of legal advice fits squarely within the concept of what represents legal practice. As much is evident from the following passage taken from *Florida Bar v Town*,⁶⁶ quoting from *State ex rel Florida Bar v Sperry*,⁶⁷

It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.

We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitutes the practice of law.

This passage has been cited with approval in several Australian cases considering what constitutes the practice of law.⁶⁸ As such, it may be regarded as being the position in Australia generally that the provision of legal advice, constituting a part of the function of practising as a legal practitioner, is advising on legal rights and obligations where such advice requires a skill and knowledge of the law above that of the average citizen. It is not necessary that such advice be provided with actual or

⁶⁴ [1999] NSWCA 117, [15].

⁶⁵ [1997] QSC 57.

⁶⁶ 174 So (2d) 395, 396-397 (1965).

⁶⁷ 140 So (2d) 587, 591 (1962).

⁶⁸ *The Barristers' Board v Palm Management Pty Ltd* [1984] WAR 101, 107; *Barristers' Board of Western Australia v Central Tax Services Pty Ltd* (1985) 16 ATR 115, 117; *Attorney-General v Quill Wills Ltd* [1990] WAR 500, 507; *Cornall v Nagle* [1995] 2 VR 188, 208-209.

potential litigation in mind (which is also implicit in the recognition of two distinct heads of legal professional privileges).

There are two important qualifications that need to be made to this general statement. Firstly, Kenny JA opined that a non-qualified party who provides advice that touches upon legal matters (a tax agent was a specific example as it had been raised in argument) would not necessarily be providing legal advice, as they could be legitimately relying on their professional experience and skill in their specific area of expertise. What brings the advice within the realm of “legal advice” is that it would be advice normally sought from a solicitor.⁶⁹ This may be contrasted with the comments of Franklyn J in *Central Tax Services*, where his Honour (in interpreting the Western Australian provisions) excluded “mechanical or clerical work not requiring technical or professional skill to attempt it nor the exercise of judgment in the doing of it”.⁷⁰ As discussed further below, it is submitted that, at least since the 2000 rewrite of the relevant provisions in the *Income Tax Assessment Act 1936* (Cth), tax agents have been engaged (legally) in the provision of legal advice. This position may be reconciled with *Felman* as having come after Kenny JA’s comments in that case. However, it is submitted that there are functions that tax agents perform that are indistinguishable from those performed by tax solicitors. These services go beyond the mere mechanical application of legislative rules and require a level of skill and professional judgment that goes beyond the other examples provided by her Honour in support of her position (customs agent, migration agent and architect). These functions include the provision of detailed advice on the expected outcome of proposed structures and advising on the necessary inclusions in documents to give effect to desired results. At this point, it is worthwhile to note that Kenny JA’s comments have been described as a “cautionary qualification” as,⁷¹

[A] person who, in the lawful pursuit of an occupation other than law, gives advice for reward on matters lying within his or her area of occupational expertise does *not necessarily* act as a solicitor or a legal practitioner simply because the advice involves the expression of an opinion about the requirements of relevant legislation, statutory rules or the like (emphasis added).

The second qualification to be made is to note that not all advice coming from a legal practitioner automatically qualifies as legal advice. It has become increasingly common for legal practitioners to provide what may be regarded as “entrepreneurial advice”, that is, the provision of advice that is more accurately described as strategic business advice rather than the traditional advice as to legal rights and obligations normally associated with a legal practitioner. Doubts have been expressed previously regarding the application of legal professional privilege to entrepreneurial advice on the basis of this non-traditional nature of the advice,⁷² although no court in Australia has yet decided in a definitive fashion on this issue.⁷³ In considering the extent of the scope of legal professional privilege, though, and specifically legal advice privilege, it has been indicated that the term “legal advice” may encompass advice not strictly

⁶⁹ (1997) 150 ALR 363, 387-388.

⁷⁰ (1985) 16 ATR 115, 117.

⁷¹ *Kekato v Council of the Law Society of New South Wales* [1999] NSWCA 288, [16] and [18] (Giles JA).

⁷² See *Leary v FCT* (1980) 32 ALR 221, 240 (Brennan J).

⁷³ Michael Bersten and Bronwyn Livermore, “Access and Legal Professional Privilege” (Paper presented at the Taxation Institute of Australia South Australian State Convention, May 2000) 16-17.

relating to the client's legal rights and obligations. In *DSE (Holdings) v InterTAN*,⁷⁴ Allsop J quoted the following passage from Taylor LJ in *Balabel v Air India*,⁷⁵

It may be seen that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser of man of affairs. To speak therefore of matters "within the ordinary business of a solicitor" would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds.

Allsop J then went on to state,⁷⁶

What legal advice is, however, goes beyond formal advice as to the law. This recognition does not see the privilege extend to pure commercial advice. In any given circumstance, however, it may be impossible to disentangle the lawyer's views of the legal framework from other reasons that all go to make up the "advice as to what should prudently and sensibly be done in the relevant legal framework" (Taylor LJ in *Balabel* at 330).

Similar comments have been made in other cases to the effect that the concept of legal advice should not be confined too narrowly. For example, Hall J recently stated in *Council of the New South Wales Bar Association v Davison*,⁷⁷

The expression *legal advice* is a generic term that covers or applies to advice on a wide range of matters. The advice may pertain to strict legal questions but advice provided by a barrister is not necessarily limited to technical issues of law. Inevitably in litigation there are many issues of fact to be proved by evidence in proceedings. Advice on such issues may equally be classed as "*legal advice*" although they are essentially directed to addressing the questions of fact which, in due course, a court will be called upon to determine within the legal framework of the case.

Further support for this wider definition of legal advice is found in the judgment of Young J in *AWB v Cole*,⁷⁸ where it was held that "legal advice is not confined to telling the client the law but includes professional legal advice as to what should prudently and sensibly be done in the relevant legal context".⁷⁹

PROVISION OF LEGAL ADVICE BY TAX AGENTS

The provision of certain tax related services, for a fee, is restricted to registered tax agents under s 251L of the *Income Tax Assessment Act 1936* (Cth). Section 251L relevantly provides,

⁷⁴ (2004) 135 FCR 151, 164.

⁷⁵ [1988] Ch 317, 331-332.

⁷⁶ (2004) 135 FCR 151, 165.

⁷⁷ [2006] NSWSC 65, [113].

⁷⁸ [2006] FCA 571.

⁷⁹ *Ibid*, [100]

- (1) Subject to this section, a person who is not a registered tax agent must not knowingly or recklessly demand or receive any fee for:
 - (a) preparing or lodging on behalf of a taxpayer a return, notice, statement, application or other document about the taxpayer's liabilities under a taxation law; or
 - (b) giving advice about a taxation law on behalf of a taxpayer; or
 - (c) preparing or lodging on behalf of a taxpayer an objection ... against an assessment, determination, notice or decision under a taxation law; or
 - (d) applying for a review of, or instituting an appeal against, a decision on such an objection; or
 - (e) on behalf of a taxpayer, dealing with the Commissioner or a person who is exercising powers or performing functions under a taxation law.
- ...
- (8) Subsection (1) does not apply to the provision of any of these services on behalf of a taxpayer by a barrister or solicitor who is acting in the course of his or her profession:
 - (a) preparing or lodging a notice, application or other document about the taxpayer's liabilities under a taxation law;
 - (b) giving advice about a taxation law;
 - (c) preparing or lodging an objection ... against an assessment, determination, notice or decision under a taxation law;
 - (d) applying for a review of, or instituting an appeal against, a decision on such an objection or undertaking any litigation or proceedings about a taxation law;
 - (e) while acting for a trust or a deceased estate for which the barrister or solicitor is the trustee or legal personal representative, preparing or lodging a return or statement about the trust's or estate's liabilities, obligations or entitlements under a taxation law;
 - (f) dealing with the Commissioner or a person who is exercising powers or performing functions under a taxation law about any of the matters specified in paragraphs (a) to (e).

The intention of s 251L is to limit the provision of these taxation-related services only to registered tax agents.⁸⁰ The present version of s 251L was introduced into the legislation in 2000 to provide clarification as to the types of services tax agents could provide (including expanding the scope from only income tax-related matters) and to clarify the exemptions from the requirement for registration in the case of certain practitioners.⁸¹

The exemption provided for by s 251L(8) relates to legal practitioners. This provision is comprehensive and provides an exhaustive list of those taxation-related services that a legal practitioner may provide. As such, it may be seen that s 251L(8) is intended to preclude the regulation of legal practitioners when dealing with Commonwealth taxation laws.⁸²

Although not specifically addressed in either the Explanatory Memorandum or elsewhere, it may be seen that s 251L serves a similar purpose to the monopoly provisions under the State legal profession statutes, being the protection of the public.

⁸⁰ Explanatory Memorandum, *A New Tax System (Tax Administration) Bill (No 2) 2000*, [2.6].

⁸¹ *Ibid*, 50-52.

⁸² "Taxation law", as used in s 251L, is defined as (a) an Act of which the Commissioner [of Taxation] has the general administration; or (b) regulations under such an Act, subject to certain exclusions; *Income Tax Assessment Act 1936* (Cth) s 251A.

By restricting the ability of non-registered parties from providing taxation-related services, the consumer of such taxation-related services is protected as only those parties with appropriate qualifications and experience may provide such services for a fee.⁸³ It may be inferred that the exceptions provided for legal practitioners are in recognition of the requirements for registration as a legal practitioner under the relevant State authority, as the areas specified in s 251L(8) would normally be expected to form part of a legal practitioner's practice in the area of taxation (note that the introductory wording of s 251L(8) limits the exception to those legal practitioners acting in the course of their profession).

The second exception provided for in s 251L is of interest in the context of justifying restricting the parties who may provide these services. Subsection 251L(6) greatly expands the range of persons who may provide "BAS services".⁸⁴ Essentially, such services represent little more than a bookkeeping function, involving the preparation of certain lodgements (such as business activity statements) and similar matters. Subsection 995-1(1) of the *Income Tax Assessment Act 1997* (Cth) identifies a narrow range of tax-related provisions that constitute the "BAS provisions", relating to which BAS services are provided.⁸⁵ This relaxation of the registration requirements for such services is consistent with the comments of Kenny JA in *Felman*, where her Honour indicated that the reason for restricting the ability to provide (legal) services to appropriately qualified parties is justified on the basis that such services are more than a mere mechanical or technical application of rules and regulations. As these "BAS services" are essentially mechanical or technical in nature, relaxing the registration requirements in this area does not go against established concerns.⁸⁶

Comparing ss 251L(1) and s 251L(8), it is apparent that there are a number of differences in wording, leading to a distinction as to what types of services each type of professional may offer (for a fee). For example, comparing the wording in each subsection's respective paragraph (a), a legal practitioner is not able to lodge a return on behalf of a taxpayer. This is consistent with the observations made earlier as to the rationale regarding the specification of the particular services that a legal practitioner can provide under s 251L(8), since the preparation of returns would not ordinarily be considered part of the course of a legal practitioner's profession.

In the context of the discussion here, paragraph (b) of each subsection is of particular interest. These specify that a tax agent may give "advice about a taxation law on behalf of a taxpayer" and that a legal practitioner may give "advice about a taxation law". At first blush, this would appear to draw a distinction between the type of advice or the target audience to whom a tax agent may provide advice as against that allowable to legal practitioners. However, closer consideration reveals something of a paradox in this wording. The use of the additional words "on behalf of a taxpayer", with respect to tax agents, suggests that the focus is on the audience to whom the tax

⁸³ Requirements to be met for registration as a tax agent are set out in ss 251BC and 251JA of the *Income Tax Assessment Act 1936* (Cth) and reg 156 of the *Income Tax Regulations 1936*.

⁸⁴ "BAS" stands for Business Activity Statement; *Income Tax Assessment Act 1997* (Cth) s 995-1(1).

⁸⁵ *Income Tax Assessment Act 1936* (Cth) s 251L(7).

⁸⁶ The justification put forward by the legislature for this specific exception was to ensure that a sufficient number of parties were legally able to assist taxpayers, particularly small businesses, in meeting their formal compliance obligations under the taxation laws; Explanatory Memorandum, A New Tax System (Tax Administration) Bill (No 2) 2000, [2.3]-[2.4]. Note that this exception was introduced contemporaneously with the Goods and Services Tax (GST) in Australia.

agent may provide advice. The directness of the language used in s 251L(8)(b) is quite clear that a legal practitioner may provide advice directly to the taxpayer. But what do the words “on behalf of a taxpayer” mean in the context of advice being provided by tax agents? And does this differentiate the type of advice that may be provided? If the audience for the advice emanating from the tax agent is not the taxpayer, then who is this audience? If there is an alternative audience other than the taxpayer, then this would suggest that it is the taxpayer providing the advice and the tax agent is merely a mouthpiece.⁸⁷ Such a distinction is feasible if it were intended to cover the administrative dealings with the Commissioner that a taxpayer may be required to undertake. This reasoning, though, cannot explain the difference in wording, otherwise s 251L(1)(e) would not be necessary.

Consequently, the meaning of the language used in s 251L(1)(b) must be at least unclear, if not ambiguous. On the strength of s 15AB of the *Acts Interpretation Act 1901* (Cth), this lack of clarity justifies the use of the Explanatory Memorandum to ascertain Parliament’s intended meaning. Paragraph 2.7 of the Explanatory Memorandum explains the scope of s 251L(1) in the following manner,

A person must be a registered tax agent to be able to charge or receive a fee for the provision of tax agent services. It will be an offence for a person to provide these services for a fee without being registered. Tax agent services include:

- preparing and lodging returns and other documents;
- *giving legal advice about taxation laws*;
- preparing and lodging objections, and applying for reviews on objection decisions; and
- transacting any business with the Commissioner on behalf of a taxpayer (emphasis added)

The second point in the list of examples highlights that Parliament intended for tax agents to have the ability to provide *legal* advice. While the EM is not overly helpful in resolving the ambiguity inherent in the phrase “on behalf of a taxpayer” as used in s 251L(1)(b), it does establish the intended ability for tax agents to provide advice of a nature that, as stated by Phillips J in *Cornall v Nagle*, “can properly be said to lie at or near the very centre of the practice of law, and hence of the notion of acting or practising as a solicitor”.⁸⁸ Of particular relevance is the description of services that legal practitioners may undertake set out in paragraph 2.8, which allows legal practitioners to “give legal advice about taxation laws”. Except for an immaterial grammatical difference, the expressions used relating to tax agents and legal practitioners are identical. At no other point is there a description of the forms of advisory services tax agents or legal practitioners may provide. Therefore, it may be seen that Parliament intended for both types of professionals to be providing what is regarded as legal advice. For the purposes of the discussion here, it is not important

⁸⁷ Note that the taxpayer is formally considered to be the principal in dealings with the Commissioner, for example, the taxpayer signs a formal declaration in their income tax return that they are making a representation as to the return’s accuracy. The courts have also demonstrated a willingness to treat the taxpayer as principal in a number of respects despite an expected high degree of reliance on the tax agent as adviser. For example, the High Court has attributed the adviser’s purpose in formulating a transaction to the taxpayer, even if the taxpayer had no actual knowledge of that purpose through communication with the adviser (*FCT v Consolidated Press Holdings Ltd* (2001) 179 ALR 625; 2001 ATC 4343).

⁸⁸ [1995] 2 VR 188, 208.

as to what constitutes legal advice, nor is it important for the contents of s 251L(1)(b) to be definitively clarified. What is important is that tax agents are legally able to provide the same advisory services that legal practitioners can, specifically legal advice, relating to tax laws.

Notwithstanding the formal relationship between the taxpayer, tax agent and the Commissioner in which the taxpayer is deemed to be the principal, the underlying reality is that the taxpayer tends to rely very heavily on advice provided by the tax agent. Where such advice is sought, such as in the context of a proposed business transaction, it is the provision of the advice that is the service provided. This advice is not some peripheral aspect to an overall service provided by the professional. In this sense, advice provided by a tax agent in the same manner in which a legal practitioner would provide advice may be distinguished from the type of services provided by other professionals, such as architects, whose advice regarding the client's legal rights and obligations would only be ancillary to the primary service. In this sense, Kenny JA's comments in *Felman*, that tax agents do not provide legal advice in the same manner as legal practitioners (and, therefore, do not "engage in legal practice"), may be reconciled with the argument presented here. Kenny JA draws a distinction between the provision of legal advice and services that touch upon legalities within the professional's sphere of expertise. This may be the case with a routine income tax return that may require the tax agent (as preparer) to form an opinion as to the law based on relevant legislation, cases and ATO publications. The preparation of such a return is, essentially, a mechanical exercise and one where any legal opinion would be ancillary to the primary service provided (being the preparation of the return). Based upon the facts in *Felman*, especially the specific qualities of the appellant (such as the market he had been serving and would be likely to serve if registered as a tax agent), Kenny JA's comments may be read as being directed to these activities. More detailed transactional advice, particularly on proposed transactions typical of the style engaged in by the large business sector, is highly distinctive from the legal opinions arrived at in the preparation of a tax return.

The structure of s 251L(1) may also be used as justification for this narrow interpretation of *Felman*. If taxpayers did not engage tax agents specifically for advice as to their rights and obligations under the tax law, s 251L(1)(b) would be unnecessary. The provision of advice merely as a necessary ancillary service to the preparation of a tax return would be covered by the statutory power to prepare the tax return under s 251L(1)(a) as a necessary means by which to carry out that power.⁸⁹ Further, the provision of any advice as to how the tax agent may deal with the Commissioner on the taxpayer's behalf is covered by s 251L(1)(e). This encompasses Kenny JA's comments regarding advice based on the tax agent's familiarity with the Commissioner's practice.⁹⁰ Consequently, under the structure of s 251L, it may be seen that the separate specification of providing legal advice is a service that a tax agent may provide quite separately from either the preparation of a tax return or in dealing with the Commissioner on behalf of the taxpayer.

Notwithstanding that this is the case since s 251L was amended in 2000, it is argued that this was also the case prior to 2000. The 2000 amendments represent a

⁸⁹ *Re Sterling; Ex parte Esanda Ltd* (1980) 30 ALR 77, 83 (Lockhart J); D C Pearce and R S Geddes *Statutory Interpretation in Australia* (2001) 5th ed., Butterworths, Sydney, [2.37].

⁹⁰ (1997) 150 ALR 363, 383.

clarification of the present application of the legislation, rather than a departure from previous law. Section 251L read at the time of the facts in *Felman* as follows,⁹¹

(1) A person, other than a person exempted under this section, shall not demand or receive any fee for or in relation to the preparation of any income tax return or objection, or for or in relation to the transaction of any business on behalf of a taxpayer in income tax matters, unless he is a registered tax agent.

...

(4) Subsection (1) shall not apply to any solicitor or counsel acting in the course of his profession in the preparation of any objection or in any litigation or proceedings before a board, the Tribunal or a court, or so acting in any advisory capacity either in connexion with the preparation of any income tax return or with any income tax matter.

Kenny JA interpreted the original s 251L(4) as evidence that the Parliament intended s 251L to operate in the context of the State monopoly provisions. In respect of services provided by tax agents, her Honour went on to state that,⁹²

The Commonwealth Parliament would appear to have acted upon the assumption that a tax agent who gives advice as to income tax matters in his or her capacity as a tax agent does not give what is ordinarily understood as legal advice, ie, advice of the kind properly given by a legal practitioner in his or her capacity as a legal practitioner.

With great respect to Kenny JA, this may be representative of the role of tax agents in 1943 when s 251L was introduced, but is not reflective of the role tax agents (especially tax accountants) play at present. At some point in the past, most likely around the 1970s with the advent of highly complex transactions being structured in a commercial context with the explicit purpose of minimising tax liabilities, tax accountants took on a role much more akin to the traditional role of a legal practitioner. A clear illustration of this development is the advice the subject of the litigation in *FCT v Consolidated Press Holdings Ltd*,⁹³ which involved a complex arrangement of cross-border transactions requiring knowledge of both financial and taxation implications, was provided by a large chartered accounting firm. This advice was provided in the late 1980s. The Institute of Chartered Accountants in Australia has also recently argued that the majority of tax advice comes from accountants, rather than legal practitioners.⁹⁴ In her Honour's comments, it is evident that great weight is placed upon the explicit reference to advisory services on the exemption provided for legal practitioners in s 251L(4) and the absence of any such reference in s 251L(1). The conclusion drawn from these observations is that Parliament intended advice to come only from legal practitioners who are, in turn, regulated by the relevant State legislation. If the 2000 amendments to s 251L are seen as a clarification of its present operation, then an alternative interpretation of the original s 251L is that the explicit reference to advisory capacities in s 251L(4) is more of a restriction on the capabilities of legal practitioners rather than an expansion. Registered tax agents, under the original s 251L(1), were permitted to receive

⁹¹ This wording is the original language used in the 1943 amending Act that introduced s 251L into the *Income Tax Assessment Act 1936* (Cth).

⁹² (1997) 150 ALR 363, 383.

⁹³ (2001) 179 ALR 625; 2001 ATC 4343.

⁹⁴ Elizabeth Kazi, 'Accountants want professional immunity', *Australian Financial Review* (Sydney), 6 October 2006, 25.

payment “for or in relation to *any business* on behalf of a taxpayer in income tax matters”. The words “any business” are more general than the language used in s 251L(4) and, therefore, can encompass the provision of advice. Based upon this interpretation, the most appropriate means of interpreting the former s 251L would be to do so in line with the expectations of taxpayers. This is entirely consistent with the remainder of Kenny JA’s judgment in *Felman*. Returning to Kenny JA’s analogy with architects, clients seek architectural advice from architects and, while some comment may be passed regarding the legalities of the design, it is the architectural service that is the primary service acquired. If a significant legal question arises in the course of such service, the prudent client would seek advice from an appropriately qualified solicitor and not rely on the architect’s understanding of the law. In the tax arena, once taxpayers began to rely on advice from tax agents (perhaps most likely from tax accountants, but there is nothing in either the original or current s 251L to justify limiting this interpretation to accountants) in the same way as they would rely on advice obtained from a legal practitioner that specialises in taxation law, then tax agents do provide legal advice in the sense contemplated by the monopoly provisions.

Finally, and related to the previous point, it may be suggested that tax advice itself does not constitute legal advice, regardless of the source. Due to the commercial and financial considerations involved with the provision of such advice, tax advice may be more of the kind of “entrepreneurial advice” referred to earlier, which may not be privileged. However, such considerations are clearly unfounded on the present state of the law, as demonstrated by the tension described at the beginning of this chapter regarding ss 263 and 264 of the ITAA 1936 and legal professional privilege. The mere fact that this tension has arisen at all is sufficient to establish that tax advice, provided by a legal practitioner, is capable of constituting legal advice for the purpose of legal professional privilege, since a number of those cases mentioned earlier did not involve actual or contemplated litigation at the time of the communication (and, therefore, would only be protected under advice privilege). As the tension has been resolved in favour of the privilege not being abrogated by the legislation is further proof that tax advice is capable of constituting legal advice.

INTERACTION BETWEEN REGULATIONS

Based on the above analysis, it would appear that there is an inconsistency between the State legislation regulating who may engage in legal practice (including providing legal advice) and the services that tax agents may provide, which includes legal advice. The inconsistency arises as it is not a prerequisite to be admitted in a jurisdiction as a legal practitioner to be registered as a tax agent. Therefore it would appear that s 251L(1), at least since the 2000 amendments, purports to allow some non-legal practitioners to provide legal advice. While Kenny JA has indicated that the services provided by tax agents do not represent a function that is intended to be the exclusive domain of legal practitioners, this holding needs to be placed in context. At a minimum, it should be noted that the decision in *Felman* predates the introduction of the present version of s 251L(1). The EM to these amendments represents the first time that the legislature has explicitly addressed the issue of tax agents providing legal advice. Therefore, one means of reconciling the position outlined above with that in *Felman* is that the legislature introduced the ability for tax agents to provide legal advice, in the *Cornall v Nagle* sense, for the first time in 2000.

In addition to a change in wording in s 251L, the Victorian and Western Australian monopoly provisions have also been rewritten since the decision in *Felman*. In particular, both statutes now use the phrase “engage in legal practice” rather than divergent language (“acting or practising as a solicitor” in Victoria, “administration of law” in Western Australia). While the current Western Australian provisions retain the phrase “administration of law”, this is as an elaboration on the concept of “engaging in legal practice”, rather than being the central focus as it was under the *Legal Practitioners Act 1893* (WA). The change to a more consistent phrasing of the monopoly provisions ought to be sufficient to depart from Kenny JA’s holding in *Felman* that the use of different phrases in the Victorian and Western Australian statutes rendered the Western Australian provisions of “little, if any assistance” in interpreting the Victorian legislation.⁹⁵

On this basis, the decision in *Felman*, to the extent that it was held that tax agents do not provide legal advice, can be distinguished at least since the 2000 amendments to s 251L. However, it is argued that tax agents could provide legal advice prior to 2000 on the basis described in the previous section.

Since the provision of legal advice by tax agents is permitted under s 251L and legal advice is at the centre of legal practice as per *Cornall v Nagle*, s 251L would appear to be inconsistent with the State statute monopoly provisions that seek to restrict legal practice only to legal practitioners. With the exceptions of South Australia and Tasmania, there is a specific allowance in the State monopoly provisions for non-legal practitioners to perform functions provided for by another Commonwealth law.⁹⁶ In these jurisdictions, this proviso should negate those arguments put forward by the appellant in *Felman* that concluded the State provisions were void for inconsistency.

This position does not apply to South Australia and Tasmania, being the only jurisdictions with an explicit prohibition on non-qualified legal practice to not have such an exception.⁹⁷ In these cases, such inconsistencies between State and Commonwealth statutes are resolved by reference to s 109 of the Commonwealth Constitution, which states,

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.

As noted by Kenny JA in *Felman*, s 109 only invalidates a State statute to the extent of any inconsistency.⁹⁸ In this case, rather than the State monopoly provisions being wholly invalid due to the identified inconsistency (as was argued by the appellant in *Felman*), they could only be invalid in areas where s 251L seeks to operate. To this end, it appears that Parliament intended s 251L to regulate completely the provision of

⁹⁵ (1997) 150 ALR 363, 389.

⁹⁶ This carve-out is more general in Western Australia, although this difference is immaterial for this discussion as the apparently inconsistent law is a Commonwealth statute.

⁹⁷ With the exception of the Northern Territory (which does not have an explicit prohibition on non-qualified legal practice), these jurisdictions are also the only jurisdictions not to have adopted legislation based on the uniform model. Section 122 of the Commonwealth Constitution would resolve any inconsistency with Northern Territory law and Commonwealth law in favour of the Commonwealth law, but, as noted, the Northern Territory Legislative Assembly is currently considering a Bill to introduce the uniform legal profession provisions.

⁹⁸ (1997) 150 ALR 363, 382.

tax agent services, which includes the provision of legal advice in relation to taxation laws. This may be seen since s 251L(1) is expressed so that only registered tax agents may provide the types of services described. In support of this position is the presentation of the exception to this general rule for legal practitioners contained in s 251L(8). The areas of practice identified in s 251L(8) are exhaustive rather than illustrations of the types of tax services that a legal practitioner may provide. Further, there is no general exception for tax services that a legal practitioner might be expected to provide in the course of practising in the legal profession. While those services identified in s 251L(8) may be regarded as comprehensively identifying these areas, the fact that they are specifically identified in preference to the provision of a general exception supports the contention presented here that s 251L is intended to be the sole source of the regulation of provision of tax agent services.

On the strength of this position, it may be seen that the State monopoly provisions do not apply to the provision of legal advice regarding taxation laws. Section 251L, as a Commonwealth provision, excludes these State provisions under s 109 of the Commonwealth Constitution and prohibits the provision of legal advice in relation to taxation laws from any party other than a tax agent or a legal practitioner.

CONCLUDING REMARKS

While the provision of legal advice has traditionally been a professional function reserved exclusively for legal practitioners, certain areas of professional practice impinge on what might ordinarily be regarded as within this domain. Taxation law represents one such area. Prior to the amendments to s 251L made in 2000, there may have been some doubt as to whether tax agents, when advising as to legal rights and obligations under the taxation laws as part of their ordinary course of practice, were providing legal advice as described in the case law relating to the State monopoly provisions. However, the amendments made indicate quite clearly that Parliament's intention is to allow tax agents, as well as legal practitioners, to provide legal advice in relation to taxation laws.

It is important to note, though, that the allowance made by s 251L is not a comprehensive permission for tax agents to perform a generalist legal advisory function. Section 251L only overrides the monopoly provisions to the extent that the legal advice in question relates to taxation laws. This has two implications for tax agents.

Firstly, tax agents cannot provide legal advice on an area of law outside of taxation, even though it may be relevant in some way to the advice they are giving. For example, it would not be permissible for a tax agent to advise on the implications of including particular terms in a trust deed except to the extent that the advice relates to how such terms impact the client's taxation affairs. This is because s 251L only overrides the monopoly provisions to the extent that the monopoly provisions could be construed as attempting to regulate the provision of legal advice in relation to taxation laws. Section 251L does not affect the operation of the monopoly provisions beyond the realm of taxation.

Secondly, there are a number of ancillary services that tax agents may be inclined to provide, particularly as it would be predictable that clients would request such

services. While a detailed discussion of the extent of tax agent powers is beyond the scope of the discussion here, it is worthy to note that, in particular, the preparation of legal documentation, such as trust deeds and loan agreements, is outside of the powers bestowed upon tax agents by s 251L. This may be seen from three bases. Firstly, the EM to the current s 251L explicitly qualifies the legal advice it covers to “legal advice about taxation laws”. There is nothing that would necessarily imply or otherwise extend the scope of s 251L to cover the provision of other advice, even where the requirement for such documents emanates from the tax agent’s advice, for example, a loan agreement arising from advice regarding Division 7A of Part III of the *Income Tax Assessment Act 1936* (Cth). Secondly, the provision of legal advice is only one aspect of legal practice, as is evident from the judgment in *Cornall v Nagle* as well as the description of legal practice in the oft-cited passage taken from the *Florida Bar* case.⁹⁹ Consequently, the preparation of documents cannot be justified on the basis that they represent legal advice, as such services are a separate aspect of legal practice. Thirdly, s 251L specifically identifies the services that both tax agents and legal practitioners may provide. The types of documents that a tax agent is permitted to prepare under s 251L all relate to a taxpayer’s tax liabilities, such as an income tax return. Documents such as trust deeds and loan agreements do not relate to a taxpayer’s tax liabilities in such a direct fashion. Consequently, as they do not fall within the specified tax agent powers under s 251L, they are beyond the scope of services that a tax agent may legally provide for a fee.

As a result of s 251L, it is not necessary to be a member of the legal profession to provide legal advice on a taxation law.¹⁰⁰ While many tax agents will be members of either the legal or accounting professions, this is not a requirement either. Qualification for registration as a tax agent in Australia is determined primarily by the amount of experience obtained in applying tax laws (principally in the form of the preparation of income tax returns) and level of relevant education obtained (which determines the amount of work experience required before being qualified to apply for registration).¹⁰¹

As it is not a prerequisite to be a member of the legal profession to provide advice to clients on matters involving the interpretation of tax legislation, as it is in most other areas of legal practice, extending legal professional privilege only to members of the legal profession and not other persons qualified to advise on taxation law, even where the advice would be identical, is anomalous. In being able to provide tax advice, tax agents that are not members of the legal profession play just as much of a role in the administration of justice as do lawyers. Any arguments in favour of legal professional privilege protecting communications with legal practitioners on tax related matters, therefore, apply equally strongly to tax agents generally.

Based on the preceding analysis, the following two-stage test is proposed to determine whether advice obtained from a tax agent should be considered, for legal professional

⁹⁹ Above n 66.

¹⁰⁰ The term “taxation law” is defined in s 995-1(1) of the *Income Tax Assessment Act 1997* as any “Act [or related regulations] of which the Commissioner has the general administration”. As well as the two Income Tax Acts, this includes fringe benefits tax legislation and the goods and services tax legislation.

¹⁰¹ Reg 156 *Income Tax Regulations 1936*.

privilege purposes, as legal advice in the same fashion as if it were obtained from a legal practitioner.

1. Could the advice reasonably be expected to have been obtained from a legal practitioner operating in the ordinary course of their practice?
2. Did the taxpayer rely on the advice in the same way as if the advice were obtained from a legal practitioner?

If the answer to both questions is yes, then the advice provided by the tax agent is identical to the type of advice normally provided by legal practitioner. In such circumstances, it is difficult to justify distinguishing between such advisory services based purely on the professional membership held by the adviser.