Law Council
OF AUSTRALIA

APPENDIX B: ENGAGING IN LEGAL PRACTICE

Introduction

When setting the policy framework for the Legal Profession Model Laws (the **Model Bill** Project 2002–2006) Australian governments, through the (then) Standing Committee of Attorneys-General, decided not to attempt an exhaustive statutory definition of *legal practice*, preferring instead that a general legal meaning be developed through common law.

The Model Bill was the basis for the State and Territory Legal Profession Acts enacted by all jurisdictions between 2004 and 2007, apart from South Australia (partial enactment in 2014). The reliance on common law development of the meaning of legal practice was carried into the policy framework of what is now the *Legal Profession Uniform Law* (New South Wales, Victoria and Western Australia).

Statutory definitions

There are five relevant definitions found in legal profession legislation: *client*; *engage in legal practice*; *legal services*; *legal practice* (used only in Queensland) and *practise the profession of law* (used only in South Australia):

- ***Client*** is defined in all jurisdictional legislation as including a person to whom or for whom legal services are provided.
- ***Engage in legal practice*** is defined in the Legal Profession Acts (ACT, Queensland, Northern Territory and Tasmania) to include practise law, while in the Uniform Law jurisdictions (NSW, Victoria and WA) the definition is extended to also include *provide legal services*.
- ***Legal services*** is defined in all jurisdictional legislation to mean work done, or business transacted, in the ordinary course of legal practice.
- The term ***legal practice*** is used only in the Queensland legislation to include the practice of foreign law by a foreign lawyer.[1]
- The term ***practise the profession of law*** is used only in South Australia's *Legal Practitioners Act 1981* (SA), but the definition is to be taken to incorporate *engage in legal practice*.

[1] *Legal Profession Act 2007* (Qld) s 85.

Reservation of legal work

The public policy objectives of regulating the provision of legal services include to:

- protect the administration of justice; and
- protect the public from persons who are either not competent to provide those services (the objective measure of competence is holding a practicing certificate) or who are not otherwise entitled or authorised to engage in legal practice or provide legal services.[2]

This is reflected in criminal offences applying to those who engage in legal practice (or represent such an entitlement) when not authorised to do so:

Uniform Law

The Uniform Law prohibits an entity engaging in legal practice when not a *qualified entity*, where *qualified entity* is defined to mean an Australian legal practitioner (which is in turn defined to mean an Australian lawyer who holds a current practising certificate). There is also a separate prohibition in the Uniform Law on advertising, representing, or doing anything that states or implies an entitlement to engage in a legal practice by an entity that is not a qualified entity.[3]

Legal Profession Acts

These Acts prohibit a person from engaging in legal practice unless the person is an Australian legal practitioner, as well as prohibiting a person representing or advertising an entitlement to engage in legal practice unless the person is an Australian legal practitioner.[4]

South Australia

The *Legal Practitioners Act 1981* (SA) prohibits a natural person from practising the profession of law, or holding himself or herself as entitled to practise the profession of law unless the person is a local or an interstate legal practitioner.[5]

The law that regulates the provision of legal services does not confine the entitlement only to practising certificate holders. There are specific inclusions, exclusions and qualifications to the statutory definitions and prohibitions.

Two authorised areas of legal practice found in all legal profession legislation are:

- incorporated legal practices are specifically entitled to engage in legal practice (when notification and other requirements are satisfied, including having at least one legal practitioner director with an unrestricted practising certificate);[6] and
- the prohibition of engaging in legal practice when not entitled does not apply to a person who engages in legal practice under the authority of a law of the jurisdiction concerned or a law of the Commonwealth.[7]

[2] See, eg, *Legal Profession Uniform Law* (NSW) No 16a of 2014 ('***Uniform Law***') s 9.
[3] *Uniform Law* ss 10-11.
[4] See, eg, *Legal Profession Act 2007* (Qld) ss 24-25.
[5] *Legal Practitioners Act 1981* (SA) s 21(1).
[6] See, eg, *Uniform Law* s 103; *Legal Profession Act 2006* (NT) s 119; *Legal Practitioners Act 1981* (SA) sch 1.
[7] See, eg, *Uniform Law* s 56 (regarding government lawyers); *Legal Profession Act 2007* (Qld) s 23(1)(a); *Legal Profession Act 2007* (Tas) s 13(2)(a).

Other areas or activities where statutory authority is given to engage in legal practice when not holding a practising certificate are jurisdictional specific, varied and inconsistent. They may (depending upon the jurisdiction) include:

- trustee companies and persons employed by a trustee company in relation to preparing wills and administering trusts, estates and affairs of persons;
- a licensee or employee of a licensee under the *Property Occupations Act 2014* (Qld) but only to the extent of providing, preparing or completing property transaction documents;
- agents preparing tenancy agreements relating to residential or non-residential premises under the *Land Agents Act* 1994 (SA) subject to maximum prescribed amounts and holding professional indemnity insurance;
- legal practice engaged in by a community legal service (Tasmania) but note that there is no equivalent provision in any Uniform Law jurisdiction.

Consequences of practising law when not entitled

As mentioned above, legal profession laws have created criminal offences for engaging in legal practice when not entitled. The maximum penalty varies from 100 penalty units in the ACT; a $50,000 fine in South Australia; 250 penalty units or 2 years imprisonment or both in Uniform Law jurisdictions; and 300 penalty units or 2 years imprisonment in Queensland.

Additional consequences include:

- the offender is unable to recover any amounts in relation to anything done in contravention of the prohibition;[8]
- any amounts already paid may be recovered as a debt due;[9]
- professional indemnity insurance is not available;[10] and
- the statutory protections in relation to trust money do not apply.

Common law

The courts are called upon to consider the meaning of expressions such as ‘engage in legal practice’, ‘practise law’, ‘legal issues’, ‘legal work’ and ‘legal advice’. The need to do so often arises when action is taken against a person who continues to engage in legal practice after their practising certificate has been suspended, cancelled or not renewed. It also arises in situations where a person who is not a legal practitioner asserts some other basis for lawfully providing legal services, such as through the exercise of a power of attorney, or under a consultancy/agency agreement.

[8] See for example Legal Profession Act 200t (Qld) s. 24(4)
[9] ibid, s.24(5)
[10] The Professional Indemnity Insurance policy issued by LawCover, for example, covers *legal services*, which is defined as work done or business transacted in the ordinary course of legal practice.

Each case is fact and circumstances sensitive, but *some* of the principles and indicia that have emerged are as follows.

- As set out by Kenny JA in *Felman v Law Institute of Victoria*, the ordinary and natural meaning of the expression to 'engage in legal practice' signifies 'to carry on or exercise the profession of law', and the 'carrying on of the profession of law' is 'done by none other than a "legal practitioner"'—accordingly, the 'expression "engage in legal practice" means "engage in legal practice as a *legal practitioner*", the italicised words being implicit in the notion of legal practice.'[11]

- a person who was neither admitted to practice law nor enrolled as a barrister or solicitor may be regarded as acting or practising as a solicitor in one of three ways:

    - 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 is doing it as a solicitor.
    - By doing something that is positively proscribed by legislation or rules of court unless done by a duly qualified legal practitioner.
    - 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.[12]

- The giving of legal advice, at least as part of a course of conduct and for reward, can be said to lie at or near the very centre of the practice of law, and hence the notion of acting or practising as a solicitor.[13]

- Knowledge of relevant aspects of the law and its application is essential to practising other professions or for carrying on other occupations. A person 'who, in lawfully pursuing an occupation other than law, gives advice for reward on matters within his area of occupational expertise involving expressing an opinion about relevant legislation' does not necessarily engage in legal practice.[14] However, the provision of legal advice on matters involving legal interpretation or on legal rights and duties is the preserve of the legal profession, and this distinction must, and does, exist between the professional work of legal practitioners and the professional work of others.[15]

- The issue is one of substance, not form. Hence it is no defence that an unqualified person has not used a title reserved to the legal profession (such as for example, solicitor or legal practitioner) if that person is in fact performing legal work.[16] Also, it is to no avail to adopt labels such as 'planning advice', 'consultative services' and 'strategy' when the context or circumstances of the work requested and performed point to 'legal advice', nor is it sufficient to simply state 'I am unable to give you legal advice' and then in fact go onto provide legal advice on legal matters and questions.[17]

[11] *Felman v Law Institute of Victoria* [1998] 4 VR 324 [352], cited with approval by Daubney J in *Legal Services Commissioner v Walter* [2011] QSC 132.
[12] *Cornall v Nagle* [1995] 2 VR 188, also cited with approval by Daubney J in *Legal Services Commissioner v Walter* [2011] QSC 132 and by Dal Pont, *Lawyers' Professional Responsibility* (7th Ed) [2.150]
[13] *Cornall v Nagle* [1995] 2 VR 188 [208].
[14] Dal Pont, op cit, citations omitted.
[15] See *Council of the NSW Bar Association v Davison* [2006] NSWSC 65, [59].
[16] Dal Pont, *Lawyers' Professional Responsibility* (7th Ed) [2.150] referring to Hall J in *Council of the NSW Bar Association v Davison op. cit.* , [65].
[17] *Council of the NSW Bar Association v Davison, op. cit.* , [69], [82], [104].

Commonwealth programs

Because legal profession legislation is State and Territory legislation, and the concepts of engage in legal practice, legal services, etc., are common law concepts, careful consideration needs to be given to the design of federal legislation which establishes and provides for the administration of federal programs established under that legislation.

As a general (and over-simplified) proposition, the power to make laws that is conferred on the Australian Parliament is the power to make laws 'with respect to' the particular 'matters' (or subject areas/topics) listed in section 51(1)-(xxxviii) of the *Constitution*, together with the 'matters incidental' power in section 51(xxxix).[18] However, it is observed that the *Constitution* does not explicitly refer to making laws (in the sense of conferring a plenary power) in relation to specified professions or occupations. Rather, a federal law that applies so as to regulate a particular 'matter' (taxation, for example, can extend to regulation of persons or entities that provide services or transact taxation-related business on behalf of taxpayers). This 'regulate the service/regulate the service provider' model raises challenges for federal schemes, deriving from the fact that some service providers may already be regulated elsewhere or may not.

State and Territory regulated service providers

For activities or services regulated under federal legislation that are also legal services regulated under State and Territory legislation the general approach (which avoids the dual regulation problem) is to exclude the legal profession from direct federal regulation on the basis that the State and Territory legal profession regulatory schemes are comprehensive and sufficient for achieving the Commonwealth's objectives. Examples include:

- The first federal parliament, when debating what became the *Judiciary Act 1903* (Cth), recognised the constitutional possibility,[19] but decided not to establish a separate legal profession regulatory scheme covering federal legal practice in the High Court, other federal courts, or State courts exercising federal jurisdiction.

- The federal scheme for registration of tax agents, introduced by the *Income Tax Assessment Act 1943* (Cth) provided that the prohibition on a person demanding fees for taxation services unless registered as a tax agent did apply to solicitors or counsel acting in the course of their profession in preparing objections, in litigation or proceedings, or when acting in an advisory capacity in connection with the preparation of income tax returns or any income tax matter.

- The *Migration Act 1958*, which was-eventually-amended to exclude from the migration agents registration scheme legal practitioners who provide immigration assistance as a legal service.

- Regulations made under the *Water Act 2007* (Cth) exclude legal practitioners from regulation as water market intermediaries under that Act in relation to water market intermediary services that are also legal services.

[18] The federal income tax system is an example – it uses an Income Tax Act to impose the tax, an Assessment Act to determine the extent of an individual or entity's liability to income tax, and an Administration Act to create and empower a Commissioner of Taxation to administer the income tax system.
[19] Including under the incidental power in s 51(xxxix) of the *Constitution*.

The same approach can be taken for other professions or occupations that are separately regulated under State and Territory schemes. By way of example, the *Marriage Act 1961* (Cth) excludes persons authorised to solemnise marriages by State and Territory laws from registration and regulation as marriage celebrants under that Act.[20]

Commonwealth programs that deploy the 'regulate the service/regulate the service provider' model should not present unsurmountable regulatory difficulties where the service providers and services they provide are already effectively regulated under state or territory schemes. Experience suggests that effective regulation utilising existing State and Territory professional and occupational regulatory schemes is essentially a matter of political will and cooperation with the States and Territories during the design and delivery of Commonwealth schemes. A recent example is amendments to federal taxation legislation to enable the Commissioner of Taxation to refer disciplinary complaints about legal practitioners, arising during the administration of the taxation laws, to the State and Territory legal profession regulatory authorities.

Unregulated service providers

Unregulated service providers present a different set of challenges, as recently illustrated by the emergence of 'claim farmers' purporting to offer assistance and referrals to potential applicants under the National Redress Scheme for victims of institutional child sexual abuse.

When a particular service/service provider is not already subject to an existing regulatory scheme, not only may those providers not be able to be easily identified, but the users of those services are exposed to misinformation, exploitation and legal risk, and the integrity of the Commonwealth program is undermined. These risks are usually dealt with through either:

Registration schemes

Registration schemes, such as the tax agent services regime, the migration agents scheme and the water markets intermediaries scheme. These schemes essentially create a statutory occupational group and 'service' and then regulate both the provider and the services provided.

Licensing and permit schemes

Licensing and permit schemes, such as the Australian financial services licence scheme under the *Corporations Act 2001* (Cth) and export licences under *the Export Control Act 2020* (Cth), which authorise the licence holder to undertake particular kinds of business activity in specified circumstances. These schemes essentially authorise an existing business entity to provide a specified service or services, but do not create a statutory occupational group, or regulate the provider or the manner in which the services are provided to the same extent as registration regimes.

[20] *Marriage Act 1961* (Cth) ss 39 and 39(1)(e).