

Mr. Nick Westerink
Individuals and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: TPBreview@treasury.gov.au

Dear Mr. Westerink,

Independent Review of Tax Practitioners Board function in regulating tax agents and its enabling legislation

The Law Institute of Victoria (**LIV**) is grateful for the opportunity to provide comments to the Independent Review of the Tax Practitioners Board (**TPB**) about the function of the TPB in regulating tax agents and its enabling legislation (**Review**), and appreciates the extension provided to provide this submission.

Introduction

The LIV is Victoria's peak body for lawyers and represents more than 19,500 people working and studying in the legal sector in Victoria, interstate and overseas.

The LIV makes submissions within the Review's Terms of Reference, particularly:

- a. Item 4 of the Terms of Reference, which says:
 4. Consider whether the tax agent services legislation supports the Tax Practitioners Board in responding to known and emerging issues.
- b. Item 6 of the Terms of Reference, which says:
 6. Consider any other matters that may enhance the regulatory environment that tax practitioners operate under, including the interaction with the regulation of relevant related professional activities.
- c. 'Focusing question' 4, which says:
 4. What other legislative measures could be implemented to further protect consumers of tax services?

The LIV makes its submission as follows:

1. This submission relates to the extent that 'tax agents', as registered under the *Tax Agent Services Act 2009 (TASA)*, are permitted to provide tax advice, and that tax agents who advise on matters which depend not only on tax laws, but also general law principles, may be in breach of the various State and Territory prohibitions on unqualified legal practice.
2. This submission begins from the premise that the regulation of both tax agents and lawyers, and the prohibitions that support this regulation, are enacted 'in the public interest', to ensure that users of these services have some basic assurance of an adequate standard of services.
 - a. For tax agents the principal prohibition is set out in s 50-5(1) of the TASA, which prohibits the provision of a tax agent service while not a registered tax agent. The relevant expression of the 'public interest' is in s 2-5 of the TASA, which states that the Act's object is to ensure that tax agent services are provided to the public in accordance with appropriate standards of professional and ethical conduct.
 - b. For lawyers (taking Victorian lawyers by way of example), the principal prohibition is in s 10 of the Legal Profession Uniform Law (**LPUL**) which provides that an entity must not engage in legal practice in the jurisdiction unless it is a 'qualified entity', and the expression of the 'public interest' is contained in the s 9 objective of protecting clients of law practices by ensuring that persons carrying out legal work are entitled to do so.
3. Tax agents, even registered tax agents, are not authorised to act beyond their Federally enacted warrant to provide 'tax agent services', as defined in s 90-5(1) of the TASA. Two obvious and significant areas of practice in which registered tax agents engage in 'unprotected' practice, because they are areas not authorised as a 'tax agent service' by the TASA, and risk contravening the prohibition on unqualified legal practice are:
 - a. providing legal documents (or being involved in providing legal documents), other than through a lawyer. This is particularly relevant in the Australian Capital Territory, South Australia and Western Australia, as these jurisdictions have enacted express prohibitions of conduct such as 'preparing documents that create or regulate legal rights' in s 16(1) of the ACT *Legal Profession Act 2006*. It is also possible that the general prohibitions in the Queensland, New South Wales, Victoria, Northern Territory and Tasmania statutes may also include some form of these specific prohibitions; and
 - b. practice in State and Territory taxes. As the Commonwealth only has the power to make laws in relation to (its own) taxes, and matters incidental to those taxes, the ambit of the TASA, and thus its definition of 'tax agent services', is focussed on Federal taxes by constitutional necessity. State and Territory taxes are hence inherently outside the TASA level of skill of registered tax agents. As there is no authorisation of practice in State or Territory taxes by a Commonwealth law, such practice must be tested against the various unauthorised State legal practice prohibitions. Tax advice may constitute 'legal practice', requiring consumer protection assurance. A practitioner may give this assurance if they act in a professional capacity where that profession requires minimum standards of training, skill and experience to advise on the relevant subject matter. However, neither the Tax Agents profession nor any other professional association provides such a minimum level of

training, skill and experience in State and Territory taxes, with the tax agents profession being focussed on Federal taxes.

4. The consequences of a tax agent contravening the prohibition on unlawful legal practice could include the following:
 - a. An offence would have occurred, which could result in a conviction if prosecuted. A Court may impose monetary penalties, and in a number of jurisdictions the Court may imprison the offender in particularly serious cases.
 - b. The tax agent is not entitled to any fees or remuneration in connection with the offending conduct. This may be used as a defence to fee recovery action, and there is an obligation on the practitioner to return fees already paid.
 - c. The tax agent's professional indemnity is likely to contain an exclusion for illegal conduct. If a client of the practitioner made a claim, the insurance company could deny liability, leaving the practitioner uninsured and potentially the client without compensation.
 - d. A tax agent may be exposed to disciplinary action for being guilty of an offence, and for breaching the Code of Conduct in s 30-10 of the TASA (for instance, the 'competence' requirement in ss (7) if the Agent was guilty of unqualified legal practice).
5. This submission recognises the paramount importance of the 'public interest', and to this end makes the following specific submissions:
 - a. The TPB should liaise regularly with the various State and Territory authorities which regulate legal practice in their respective jurisdictions about what each body can do to avoid breaches of their respective prohibitions and, more generally, how the 'public interest' can be maximised, by their joint efforts.
 - b. The TPB should provide guidance to the tax agents it regulates about the forms of professional work permitted by the TASA, and those which are not permitted (and may cause a tax agent to breach the LPUL). The TPB, as a Federal regulator, should use its powers as a disciplinary body to ensure that tax agents are only advising within the parameters of the TASA and not outside them (and hence in breach of the LPUL), and providing relevant guidance to tax agents via publications, websites, email updates etc.
 - c. The TPB should take the following actions:
 - i. seek advice and develop a position regarding the scope of activities and services which tax agents are permitted to do, and which activities are outside this scope and thus put tax agents at risk of engaging in unqualified legal practice.
 - ii. publish guidance relevant to TPB's position for tax agents, and actively monitor compliance with its guidelines;
 - iii. where necessary, the TPB should use its investigative powers to investigate matters and determine whether tax agents have acted correctly or outside the limitations for tax agents;

- iv. in appropriate matters, commence formal process and impose disciplinary sanctions on tax agents found to have engaged in unqualified legal practice; and
 - v. report such cases to the various State and Territory authorities which regulate legal practice in their respective jurisdictions.
- d. The TPB should survey the extent to which tax agents are involved in providing legal documents and engaging in practice in State and Territory taxes so as to get some empirical evidence about the extent of the issue.
- e. The TPB should review the types of professional indemnity insurance policies that are required for registered tax agents, for instance under the Code of Conduct, at s 30-10(13) of the TASA. As a regulated profession, public protection for individuals obtaining services from tax agents is a principal concern. The TPB ought be concerned by a systemic risk that registered tax agents would be left uninsured, by virtue of them carrying on legal practice (because it is either outside the area of insured practice, or it is the subject of an exclusion, for illegal conduct). It is relevant to a member of the public if seeking recovery from a tax agent that the practitioner's insurance policy might not cover the claim, leaving the aggrieved member of the public unable to recover. The TPB should liaise with the Professional Standards Board about the impacts of unqualified legal practice on the Scheme to limit the liability of registered tax agents. If there is a significant number of agents without professional indemnity cover, or in breach of another Professional Standards rule, then 'registered tax agents' may not have their liability limited, which could have flow on impacts for the level of (as well as type of) insurance, which meets the TPB's requirements.
- f. The Government should consider amending the TASA, or promulgating a further regulation, to make 'unqualified legal practice' another of the considerations for registering tax agents (for instance, by amending s 20-45 of the TASA, which lists events which may have happened in the last 5 years, including: committing a serious taxation offence, promoting a tax exploitation scheme, becoming bankrupt, or being sentenced to a term of imprisonment).
- g. When TASA replaced the former s251L of the *Income Tax Assessment Act 1936*, the statutory warrant for practice given to tax agents was extended to 'giving advice' about tax liabilities, rights and obligations. Tax advice involves services that require a 'consumer protection' level of training, skill and experience in the persons responsible for giving the advice, thus falling under the 'third limb' of legal practice as set out in *Cornall v Nagle [1995] VicRp 50 (Cornall)*.
 - i. The case of *Cornall* is seminal for the three-part definition of the term 'act or practise as a solicitor' adopted by Phillips J of the Victorian Supreme Court, who held that '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. This is the test in Sanderson.

2. by doing something that is positively proscribed by the Act or by Rules of Court unless done by a duly qualified legal practitioner. Examples of such prohibitions in a statute are s 93 and s 111 of the LPPA [the Victoria 1958 Act].
 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.'
- ii. The third limb of the test in *Cornall* is the 'consumer protection' test, which provides that a person would relevantly be engaging in legal practice, where it was necessary to protect the public. This will be the case where the service affects important legal rights, and hence it is in the public interest that the service be provided by someone who ought have the necessary training and expertise in the law.
 - iii. Phillips J in *Felman* may have assumed that the 'training and expertise' necessary to provide legal advice must come from the legal profession. However, in *Felman v Law Institute of Victoria [1998] 4 VR 324 (Felman)*, the Victorian Supreme Court, Court of Appeal held that this 'training and expertise' may come from *other* relevantly qualified professions whose area of expertise is such that they may have the necessary training, skill and experience in the legal issues at hand.
 - iv. This is relevant to the profession of 'Registered Tax Agents', whose members are required to have skills and training in relation to lodging tax returns, objections, representing taxpayers in their dealings with the Commissioner, and tax matters generally. In such circumstances, a member of the tax agents' profession does not hold himself (or herself) as a member of the legal profession when they give tax advice, even though it will inherently also be legal advice. The training and experience which Registered Tax Agents typically have means that the consumer protection objective can be achieved when taxpayers receive tax advice from a registered tax agent - up to a point. However, the level of legal skills required to advise on certain tax outcomes or planning is beyond some Registered Tax Agents, and for such matters, the consumer protection objective is not met by getting that legal advice (on tax matters) from a Registered Tax Agent.
 - v. A passage of the *Felman* judgment of Kenny JA suggests that 'tax advice' is not 'legal advice', in reference to an 'assumption' made by the Commonwealth Parliament 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. The substance of this assumption cannot be regarded as correct. Tax practitioners must not only know the tax law, but the general law on which it rests. Giving advice based only on the Commissioner's rulings and guidelines is not sufficient: further legal training, discipline and insight will be involved in applying tax laws to the relevant facts to form the tax advice.
 - vi. Taking the factors above into account, such 'tax advice' is likely to fall within the *Cornall* 'third limb' test of legal practice of services that require a 'consumer protection' level of training, skill and experience in the persons giving the advice.

- h. But for the provisions of the TASA, tax agents providing tax advice would be in breach of the LPUL prohibition against unqualified legal practice. It is uncertain exactly what this TASA authorisation means for tax agents, and how expansive it is - which matters and tax advices require a level of legal skills which exceed Registered Tax Agents. The TASA gives 'registered tax agents' a right to provide 'tax agent services', as defined in s 90-5. The definition of 'tax agent services' thus defines the scope of an agent's Commonwealth warrant for practice.
 - i. 'Tax agent services' is defined in s 90-5 of the TASA as follows:
 - (1) A tax agent service is any service:
 - (a) that relates to:
 - (i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
 - (ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
 - (iii) representing an entity in their dealings with the Commissioner; ...
 - ii. Relevant 'liabilities, obligations or entitlements' which Agents are entitled to 'ascertain' or 'advise on' are those arising under a 'taxation law', relevantly defined in s 995-1(1) of the *Income Tax Assessment Act 1997* as "an Act of which the Commissioner has the general administration...".
 - iii. As the Commissioner of Taxation has the 'administration' of most of the acts relating to federal taxes, tax agents thus have a broad scope of tax matters to ascertain or advise on.

The Review may consider how satisfactory the current scope of the TASA is, and how wide its bounds. Uncertainty over the exact limits of the scope notwithstanding, it is uncontroversial that certain activities must not be covered by the TASA statutory warrant. These include activities which tax agents conduct on a daily basis such as:

- i. providing legal documents other than through a lawyer; and
- ii. practice in State and Territory taxes.

The habitual performance of such unauthorised activities by tax agents, amounting to unqualified legal practice in breach of the LPUL, is a matter that is within the remit and responsibility of the TPB and should be addressed by the TPB.

Another problem with the broad way in which the TASA authorises registered tax agents, to give tax advice, is that theoretically, the least competent tax agent could attempt to give the most difficult tax advice. A tax agent who gives any real 'tax advice' depends on an understanding of the tax law, and of the general law that influences the tax result. Case law establishes that legal advice is central to legal practice and is a prime example of the *Cornall* 'third limb' requirement that consumer protection assurances be met. This means the advice must be given by someone with relevant training, skill and experience in the law. The TASA regime places an emphasis upon tax practitioners having minimum levels of training, skill and experience in matters relating to the main Federal Taxes. Such a qualification could provide sufficient 'consumer protection' to the public. However, a

minimum level of training, skill and experience may be inadequate assurance for the most complex tax advice, which may depend not only on tax law but also significant amounts of general law.

- j. A tax agent giving tax advice which contains a substantial amount of legal advice will be subject to obligations under the TASA Code of Conduct (s 30-10) in relation to complex tax advice, regardless of whether the tax agent is exposed for unqualified legal practice. These obligations include:
 - i. ensuring that the tax advice is provided competently (item 7 of s 30-10)
 - ii. maintaining knowledge and skills relevant to the tax agent services that they provide (item 8)
 - iii. using reasonable care in ascertaining the client's state of affairs, to the extent that this is relevant (item 9)
 - iv. ensuring that taxation laws are applied correctly to the circumstances in relation to which advice is provided to a client (item 10)
 - v. advising clients of their rights and obligations under the taxation laws that are materially related to the tax agent services you provide

It is uncertain whether the TASA provisions, which give tax agents the ostensible right to give any tax advice, would satisfy the s 90-5 definition of 'tax agent services' in circumstances where a tax agent's advice on tax liabilities involved significant amounts of general law. An authority this broad may be inconsistent with a s 90-5 definition of 'tax agent services' which ensures the s 2-5 consumer protection object of the TASA. In some matters, the level of legal skills required to satisfactorily advise on tax outcomes or planning will be beyond some 'registered tax agents'. In a deserving case, a Court may read down the TASA right, limiting the ostensible limits of an agent's rights to give tax advice to a level which preserves the public interest in getting competent advice. Without the TASA giving the agent 'authority' to give high level tax advice, the agent may be faced with giving advice that breaches the prohibitions on unqualified legal advice. The Review may wish to consider these issues, in combination with other issues raised relating to tax agents giving tax advice.

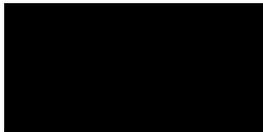
- 6. The Review may receive competent legal advice about the Constitutionality of TASA, so far as it purports to allow non-lawyers to give legal advice that would otherwise be in breach of State and Territory laws prohibiting unqualified legal practice. Tax advice is only protected from being unqualified legal advice (and thus in breach of the LPUL) when it purports to authorise non-lawyers to give this form of legal advice. The Commonwealth has no Constitutional right to regulate lawyers, and its right to pass laws with regard to tax agents comes from its power to pass laws which are 'incidental' to its right to pass laws, with regard to taxes it raises for its own use. It is not clear to the LIV, that the 'incidental power' extends to interfering with State or Territory laws that regulate lawyers and prohibit non-qualified practitioners from legal practice.

Further consultation and contact

The LIV gratefully acknowledges the extensive research and analysis of Mr F John Morgan, Barrister, Victorian Bar in supporting the preparation of this submission.

The LIV would be pleased to discuss this submission with you in greater detail. Please contact Angela Gidley-Curtin, [REDACTED], to arrange a time to meet together with representatives of the Taxation & Revenue Law Committee.

Yours sincerely,



Stuart Webb
President
Law Institute of Victoria