

From: [REDACTED]
To: [TPBreview](#)
Cc: [REDACTED]
Subject: Independent Review of the Tax Practitioners Board (TPB) - Submission [interface with State and Territory regulation of 'legal practice'...]
Date: Monday, 8 April 2019 8:12:21 PM

Mr Keith James - Chair
Review of the Tax Practitioner's Board

Mr Nick Westerink
Secretariat - Treasury

Dear Mr James and Mr Westerink,

Independent Review of the Tax Practitioners Board (TPB) - Submission [interface with State and Territory regulation of 'legal practice'...]

1. I commend the Assistant Treasurer, for instigating the Review and, likewise, you gentlemen, to the task of carrying it out.
2. I note, from the Treasury website, that the Review will take submissions up to 23 April 2019 (not the 12 April 2019 date, previously announced by the Assistant Treasurer).

Overview

3. My submission relates to the extent that 'tax agents', registered under the [Tax Agent Services Act 2009](#) (TASA), are committing offences, by breaching the various State and Territory prohibitions on unqualified legal practice.
4. Mr James will know that I've researched this topic, and produced a paper, which can be found at this link:
<https://taxtechnical.com.au/when-does-tax-advice-become-legal-advice-and-thus-unqualified-legal-practice/>
5. I will explain the reasoning, in my paper, below, but the short summary is that, even registered tax agents, are not protected from committing State and Territory offences, if they act beyond their Federally enacted warrant, to provide 'tax agent services', as defined in [s90-5\(1\)](#) of TASA. There are two obvious areas of exposure, where I have at least anecdotal evidence, of widespread 'unprotected' practise, by registered tax agents. They are:
 - (a) providing legal documents (or at least being involved in providing legal documents), other than through a lawyer.
 - (b) practice in State and Territory taxes.
6. I make submissions within your [terms of reference](#), particularly:
 - (a) 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.
 - (b) 'Focussing question' 4, which says:

4. What other legislative measures could be implemented to further protect consumers of tax services?

Submissions

7. My submission starts from the premise that 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 service.

(a) For tax agents, the principal prohibition is set out in [s50-5\(1\)](#) of TASA, and the expression of the 'public interest' is in [s2-5](#) of TASA.

(b) For lawyers (taking Victorian and New South Wales lawyers as the most populous example), the principal prohibition is in s10 of the [Legal Profession Uniform Law](#), and the expression of the 'public interest' is in s9.

8. **My submission is** that the 'public interest' will be compromised, unless the following occur.

(a) The TPB should liaise, regularly, with the various State and Territory authorities, that regulate legal practice, in their respective jurisdictions, about what they can each 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 illegal conduct they ought not engage in, including, particularly: unqualified legal practice. It is unseemly, in my opinion, for a Federal regulator to effectively 'aid and abet' wholesale breach of State and Territory laws, by turning a 'blind eye' to breaches by the professionals it regulates. I have anecdotal evidence that the TPB currently sees breach of these State and Territory laws, as none of its business.

(c) The TPB should apply the portion of the The Code of Conduct, in [s30-10\(4\)](#) of TASA: 'You must act lawfully in the best interests of your client', as breached, by tax agents that engage in unqualified legal practice. This would be because it is 'unlawful' and, also, not in the 'best interests of [their] client' to be acting in a way that is reserved, by statute, for others with different qualifications. Treating the Code as applying, in this way, would open up the range of disciplinary sanctions, in [Subdiv 30-B](#) of TASA that the TPB could apply.

(d) The TPB or another person (competent to do so) 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 extend of the problem.

(e) The TPB should review the types of PI insurance policies, that 'meet its requirements', for registered tax agents (for instance, under the Code of Conduct, at [s30-10\(13\)](#) of TASA). It ought to concern the TPB, if there was systemic risk, that registered tax agents would be left uninsured, by virtue of them carrying on legal practice (because, either: it is outside the area of insured practice, or it is the subject of an exclusion, for illegal conduct). I mention this in para 10(a) of my paper.

(f) 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 the level of agents, being without PI cover, or some other Professional Standards rule was breached, then 'registered tax agents' might not have their liability limited, which could have flow on impacts, with the level of (as well as type of) insurance, which 'meets [the TPB's] requirements. And the absence of this cap on PI liability, might concern the TPB in other ways, too.

(g) The Government should consider amending TASA, or promulgating a further regulation, to make 'unqualified legal practice' another of the considerations for registering tax agents (for instance, by amending [s20-45](#) of TASA, which already lists things, that might 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).

(h) When TASA replaced the former [s251L](#) of the [Income Tax Assessment Act 1936 \(ITAA36\)](#), the statutory warrant for practice, given to tax agents, was extended to 'giving advice' about tax liabilities, rights and obligations. The Review might consider how satisfactory this expanded scope is. I express the view, in my paper (under heading 5.2.7) that all tax advice is legal advice, that, but for the Commonwealth warrant to practice, would be prohibited, as unqualified legal practice. The problem is that tax advice typically (if not always) involves understanding the relevant tax law, know what the relevant general law is and provides, ascertaining the facts relevant to both, and the necessary insight, acumen and discipline, to synthesise these reliably - a thing lawyers are trained to do, and non-lawyers, typically, are not

trained to do.

(i) The other problem with the broad way in which 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. I express the view, in my paper (under heading 8.5), that a Court may well read down the TASA right to give tax advice, to a level that preserves the public interest, in getting competent advice. Otherwise, an agent might only breach of the Code of Conduct, but would have not committed any offence. The Review might like to consider these issues, in combination with the other issues I raise, relating to tax agents giving tax advice.

(j) The Review might get 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. My conclusion (under para 8.8 of my Paper) is that tax advice is only protected from being unqualified legal advice, to the extent that TASA is constitutionally valid, when it purports to authorise non-lawyers to give this form of legal advice. I have not researched this myself, but 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 me, that the 'incidental power' extends to interfering with State or Territory laws that regulate lawyers.

General comments

9. I make this submission on my own behalf, as both a relevantly qualified lawyer and also as a registered tax agent.

10. I understand that the Law Council of Australia will be making submissions to your Review. They may endorse these submissions in whole, in part, or with qualifications.

11. I am canvassing the various State and Territory authorities charged with the regulation of lawyers, to see if they will either endorse these submissions or make submissions of their own.

12. I am likewise canvassing all the State and Territory law societies, to see if they will either endorse these submissions or make submissions of their own.

13. In my view, optimising consumer protection, in Tax Practice, is a matter of paramount importance, and this requires the integration of these two important professions, together with a measured review of the relevant laws (in your case: TASA).

Thank you for the opportunity to contribute,

F John Morgan

Barrister at Law - the [Victorian Bar](#)

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SUMMARY OF MY PAPER ON TAX AGENTS AND UNQUALIFIED LEGAL PRACTICE

A. The analysis starts with the proposition that all, or nearly all tax advice, is legal advice, because it involves an adequate knowledge of not only the tax law, but the general law that will be relevant, the facts that will be relevant to both of those, and the insight, acumen and discipline required to integrate all of those reliably. [Heading 5.2.7, p43]

B. So the question becomes: what conduct offends any of the relevant State or Territory laws, that regulate legal practice? There are 7 such statutes, covering 8 jurisdictions (6 States and 2 Territories). There are only 7 statutes, because Victoria and New South Wales have a common statute: the [*Legal Profession Uniform Law*](#).

(1) In every one of these statutes, there is a prohibition, on unqualified legal practice, in common form: prohibiting an unqualified person “engaging in legal practice” (the wording in SA is different but not in substance). [Heading 3.1.2, p.7]

(2) In three of the statutes: ACT, SA & WA, there are ‘specific prohibitions’, that have much in common, but differ in scope and wording. Broadly they involve acting for clients in litigation and preparing various legal documents (and not giving legal advice). [Heading 3.1.4, p.12 - p.16.]

C. We can get at what ‘engaging in legal practice’ means, by looking at the following.

(1) In a Florida case: *Sperry*, legal practice was described as: (a) conducting litigation for a client; (b) drawing legal documents; and (c) providing advice about legal rights and obligations. [Para 133, p.35]

(2) A Victorian case: *Cornall v Nagle*, held that the equivalent (in an earlier statute) to the current prohibition: ‘engage in legal practice’, involved: (a) pretending to be a lawyer (doing things in a way that implied you were qualified); (b) doing something that only a lawyer is allowed to do, by some other statute (eg. by the then Victorian equivalent of the ‘Specific Prohibitions’ still in the ACT, SA and WA statutes, today); and (c) other things, relating to legal rights, that required consumer protection assurance (that they’d be done by suitably qualified people). [Para 126, p.33]

(3) The *Sperry* case then gave guidance as to when consumer protection was required. The test articulated was, any service which required greater than the average citizen. [Para 133, p.35]

(4) A later Victorian case: *Felman* then put a gloss on the *Cornall* formula, saying that the required ‘consumer assurance’ did not have to be provided by a lawyer providing the service, but could be provided by another professional, whose credentials covered the law relevant to that service (for instance, an Architect advising on the building and planning laws, relevant to the building he/she is retained to design). [Para 171, p41]

D. Being registered, under TASA, entitles Tax Agents to provide ‘tax agent services’ as defined in s90-5(1) of TASA, which involves the following three things.

(1) ‘Ascertaining’ all Federal tax liabilities, rights and obligations (ie. compliance based activities, such as lodging returns).

(2) ‘Advising’ about the above (viz: Tax Advice).

(3) ‘Representing’ taxpayers with the Commissioner of Taxation. [Heading 7.3, p47]

E. ‘Tax agent services’ expressly cover giving ‘advice’ about liabilities (etc.) under Commonwealth taxation laws - so the question becomes, whether a tax agent would be breaching State or Territory prohibitions on unqualified legal practice (by giving this type of legal advice)? Subject to TASA being Constitutionally valid, in purporting to authorise

non-lawyers to give legal advice, a 'registered tax agent' will not breach State or Territory laws, for two reasons.

(1) The first is that TASA, being a Commonwealth law, prevails over State laws, under s109 of the *Commonwealth of Australia*, to the extent of any inconsistency. A State law, attempting to prohibit, a right given to a 'registered tax agent', under TASA (eg. to give tax advice) would be relevantly 'inconsistent' and invalid to that extent. [Heading 6, p44]

(2) The second is that in 6 of the 7 statutes regulating legal practice, there is a 'carve-out', from the prohibition on unqualified legal practice, for any conduct authorised by a Commonwealth law. This is local recognition of the inevitable Constitutional invalidity, of that Act, had the 'carve-out' not been included. The only exception is the SA Act, where Constitutional invalidity would have to do the work. [Heading 3.1.7]

F. Obviously enough, 'tax agent services' do not extend to:

(1) Providing legal documents - whether to implement tax advice or not.

(2) Practising in State or Territory law. This is because the TASA rights: are only to 'ascertain' or 'advise' on Federal 'taxation laws'. It could not be otherwise, as the Commonwealth can only legislate on matters incidental to its own taxing powers.

G. Registered tax agents providing legal documents (or even being involved in it) is likely to be a breach of the three Statutes that still have specific prohibitions - which all focus on creating documents that affect legal rights. [Heading 8.1, p54]

H. It may be that registered tax agents, providing legal documents, also breach the prohibitions in the States and Territory statutes, with only a general prohibition. Providing legal documents is still likely to constitute 'engaging in legal practice' and thus, be a breach. [Heading 8.3, p55]

I. Absent any absolute prohibition, on providing legal documents, the service would fall into the 3rd limb of the *Cornall* test of 'legal practice' - namely services that require legally enshrined consumer protection (unless that protection can be provided by the controls on another professional). [Para 184, p42]

J. Practice in State and Territory taxes, will fall into the same category (typically) - services that ought be provided with the requisite consumer protection (unless that protection can be supplied by another profession). [Heading 7.3.1, p48]

K. I have formed the view that the profession of 'registered tax agents' cannot be an alternate form of 'consumer protection', for the type of conduct that falls outside the definition of 'tax agent services'. My paper alludes to, but did not fully develop, this proposition. [Para 215(f), p.48] However, my rationale, for this conclusion, is as follows.

(1) In *Felman*, the Court said that the consumer protection could be given by a member of another profession, whom the public could expect to have the expertise, relevant to their particular need.

(2) The reason why she referred to a member of another profession is because, they typically have standards, which they enforce, thus giving the public this level of assurance of the skill types and levels, in that profession. It cannot be a question of what individual practitioners hold themselves out to be competent in.

(3) In the case of the profession of tax agents, the assurance that registration with the TPB, under TASA, gives, is defined by the extent of the prohibitions on conduct that is NOT permitted, if not registered. In this case, s50-5(1) only imposes a civil penalty, on any person who provides 'tax agent services' and is not registered.

(4) Therefore, conduct outside the definition of 'tax agent service' cannot be the

subject of the requisite publicly assured competence, of the 'tax agent' profession.

L. This leaves even 'registered tax agents' exposed to breaches of unqualified legal practice prohibitions (including committing offences) for conduct outside the definition of 'tax agent services', such as providing legal documents and practice in State and Territory taxes.
