Articles

Unauthorised practice of law

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Legal profession legislation has long proscribed the unauthorized practice of law, as an adjunct to the core notion of lawyers as professionals. This article probes and then unpacks the rationales for this proscription, before inquiring as to how these inform its justifiable parameters, which both legislators and judges have often found difficult to prescribe with precision.

I Introduction

Legal profession legislation has long disallowed an unauthorised person[1] to 'engage in legal practice', or words to similar effect. For this purpose, what authorises a person to engage in legal practice is that he or she holds a current practising certificate issued by the relevant professional or regulatory body. As its issue rests upon educational, practical and ethical prerequisites, not everyone can hold a practising certificate. Accordingly, there exist barriers to entry, to which the above proscription gives effect, functioning to vest in those who have met the prerequisites a monopoly on engaging in legal practice.

Governments with monopolies with suspicion, fearing that the monopolist will be positioned to exercise undue market power. The rise of competition law is testament to this. But this does not mean that barriers to entering a trade, profession or business, which confer some element of monopoly power, are necessarily contrary to the public interest. On various occasions, society (and government) accepts that certain services, in particular, cannot be supplied purely at the whim of the market (albeit remaining subject to generic consumer protection provisions), but must be confined to a class of appropriately qualified individuals. And this is so even though this places those individuals, vis-a-vis the broader public, in a position of some power or privilege. The assumption, in these instances, is that the public nonetheless secures a net benefit by reason of the relevant restriction.

Yet there remains tension between barriers to entry to the legal profession — with its resultant monopoly on the provision of legal services — and the broader public benefit. A weighty part of this surrounds whether the profession is sufficiently committed to public service to justify its privileged (monopoly) status, attached to concerns pertaining to abuses of privileged position. The modern catchcry of access to justice, where the cost of legal services proves a substantial impediment for many, has refocused attention on the scope of the proscription on unauthorised legal practice. Coupled with the latter having

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1 This article uses the terminology 'unauthorised' in place of 'unqualified' because practising certificates give a person authority to engage in legal practice; a person may be 'qualified' to practise law but not hold a practising certificate.

received relatively little exposure in recent academic commentary,[2] it is apt to probe and unpack the rationale for the proscription, before inquiring as to how this informs its justifiable parameters, which ensue as the primary subject of this article.

II The proscription and its rationales

The statutory proscription on engaging in the practice of law without a current practising certificate is treated with such seriousness by respective parliaments that its breach is declared an offence, in some jurisdictions potentially punishable by imprisonment.[3] Perhaps the most patent breach of the proscription occurs where a person without legal qualification purports to practise law. But it is not so confined. It can operate in any instance where a person engages in legal practice without a current practising certificate. This may include a person who holds a law degree but is not admitted to practice, a person who is admitted to practice but does not hold a practising certificate (uniformly termed by the legal profession statutes as an 'Australian lawyer'), or a person who once held but no longer maintains a current practising certificate (whether by reason of removal or suspension, or simply by not renewing it). Importantly, the proscription, as it is expressed, applies with equal vigour in each case.

While, as discussed later in the article, the parameters of 'legal practice' are not always precise, what drives the unauthorised practice proscription appears clear. As explained by Buddin J in *Law Society of New South Wales v Seymour*,[4] '[i]t is axiomatic that the public at large must be protected from the activities of persons who are not qualified, or not otherwise entitled, to act as solicitors, but who nonetheless seek to conduct themselves as if they are.' The same surfaces in manifold other judicial statements,[5] and finds reiteration in the relevant objectives of the *Legal Profession Uniform Law 2014* (NSW), 'to ensure, in the interests of the administration of justice, that legal work is carried out only by those who are properly qualified to do so' and 'to protect clients of law practices by ensuring that persons carrying out legal work are entitled to do so'.[6] By reference to the monopoly mentioned earlier, it was

2 A notable exception is Jane Knowler and Rachel Spencer, 'Unqualified Persons and the Practice of Law' (2014) 16 *Flinders Law Journal* 203.

3 *Legal Profession Act 2006* (ACT) s 16(1); *Legal Profession Uniform Law 2014* (NSW) s 10(1) (includes potential for imprisonment); *Legal Profession Act 2006* (NT) s 18(1); *Legal Profession Act 2007* (Qld) s 24(1) (includes potential for imprisonment); *Legal Practitioners Act 1981* (SA) s 21(1); *Legal Profession Act 2007* (Tas) s 13(1) (includes potential for imprisonment); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 10(1) (includes potential for imprisonment); *Legal Profession Act 2008* (WA) s 12(2).

4 [2004] NSWSC 493 (3 June 2004) [6].

5 See, eg, *Prothonotary of the Supreme Court of New South Wales v McCaffery* [2004] NSWCA 470 (17 December 2004) [36]–[38] (McColl JA; Sheller and Beazley JJA concurring); *Legal Practice Board v Taylor* [2005] WASC 242 (8 January 2005) [33] (Hasluck J); *Legal Practice Board v Clohessy* [2006] WASC 21 (2 February 2006) [18] (E M Heenan J); *Council of the Law Society of New South Wales v Layton* [2008] NSWSC 606 (18 June 2008) [37] (Hislop J); *Legal Practice Board v Giraudo* [2010] WASC 4 (14 January 2010) [11] (Hall J).

6 *Legal Profession Uniform Law 2014* (NSW) s 9; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 9.

elaborated by the Supreme Court of Western Australia in *Legal Practice Board v Mullally* as follows:

> Whilst sometimes referred to as the monopoly provisions, these ... provisions ... 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.[7]

The latter point has been expressed by reference to it being essential for courts that lawyers 'who provide legal advice in relation to legal proceedings and/or who appear in such proceedings are subject to ethical and other constraints and to the potential sanctions that arise in the event of a breach of professional duty'.[8]

What resonates in these judicial remarks is that the primary function of the unauthorised practice proscription is competence-related, aiming to protect the public from the provision of legal services that are not of the requisite standard. With this the (prospective) consumer has a degree of assurance that the person(s) whom he or she engages to provide legal services will be sufficiently competent. A secondary, but equally pervasive, rationale is that those authorised to practice law are committed to ethical behaviour. These points are encapsulated in the relevant American restatement, which speaks of the 'primary justification' for unauthorised practice limitations as 'to protect consumers of unauthorized practitioner services against the significant risk of harm believed to be threatened by the nonlawyer practitioner's *incompetence* or *lack of ethical constraints*'.[9] It is accordingly appropriate to investigate how the holding of a current practising certificate feeds into these rationales, which forms the subject matter of the ensuing discussion.

III Unpacking the rationales

A Competence

The competence-focused rationale can be readily understood from a consumer protection perspective. It is trite to observe that the bulk of consumers engage a lawyer to provide legal services precisely because they lack the requisite knowledge and skill to perform those services themselves. For this reason, in large part, most clients are not well-positioned to assess a lawyer's competence. This accordingly bespeaks of a need to provide some avenue to certify that competence.

It cannot be denied that core to an assurance (to the extent possible) of competence is successful completion of a recognised course of academic study coupled with practical legal training. Yet this certification, at least when it comes to these requirements, is a 'once and for all' exercise. Leaving aside,

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7 [2003] WASC 225 (12 November 2003) [3] (Johnson J).

8 *Council of the New South Wales Bar Association v Davison* [2006] NSWSC 65 (28 February 2006) [43] (Hall J) ('*Davison*').

9 *Restatement (Third) of the Law Governing Lawyers* (2000) § 4 cmt (b) (emphasis supplied).

for the moment, ongoing (now mandatory) continuing legal education requirements (addressed below), questions of 'special skill and learning' represent a threshold for entry into the legal practice domain, and to this end (at least in a sense) presuppose that what is covered as part of these courses of study maintains a lasting influence otherwise lacking in persons who have not completed the *entire* course of study.

The academic content of law study, while a threshold requirement for legal practice, cannot be assured of being maintained as a ready reference by practitioners. Knowledge once gained is not always retained, something acknowledged judicially.[10] Yet lawyers are certified, by virtue of academic and practical legal training, *across a gamut of legal topics* that have, for nearly 3 decades now, been viewed (albeit not always without dissent) as essential to legal practice. The study of this concatenation of legal topics (coupled with meeting the good fame and character threshold) is what differentiates the person *eligible* to hold a practising certificate from one who is not. As indicated above, though, the relevant knowledge, at least in its breadth, is fleeting at best. And the modern push to specialisation with legal practice has arguably exacerbated the point.

If the primary concern underscoring unauthorised practice, at least for those who possess a law degree (and have completed a practical legal training course), is the protection of the public from incompetence, one could legitimately expect something about holding a current practising certificate going to competence. Maintaining competence was, however, traditionally viewed as a practising lawyer's personal commitment rather than anything to be compelled or otherwise regulated. Members of the profession were trusted to *maintain* their competence, at least within their fields of endeavour. An NSW judge, to this end, made the following observation in 1981:

> The minimum standards include ... basic legal knowledge and application to keep abreast of the law in his field of practice ... It would seem to follow that a solicitor fit to remain on the roll must make reasonable efforts to keep up with current developments in his field of practice. In a world of rapid change, he must try to keep up to date.[11]

Curiously, very little in parallel judicial remarks surfaces before the 1980s; the push towards maintaining competence appears to have propelled primarily from this moment forward. The assumption, presumably, was that the law of negligence would function as a backstop and, beyond a commitment to the 'best' professional service for their clients, lawyers' self-interest in avoiding the prospect being sued in tort (and the consequent cost, inconvenience and reputational hit) would motivate efforts to maintain competence.

In July 1994, the Law Council of Australia, in its *Blueprint for the Structure of the Legal Profession*, stated that 'it is incumbent on all lawyers to remain

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10 *Commissioner of Taxation (Cth) v Finn* (1961) 106 CLR 60, 69 (Dixon CJ) (in support of a conclusion that self-education expenses are not to be treated as capital for tax deductibility purposes, remarking that '[y]ou cannot treat an improvement of knowledge in a professional man as the equivalent of an extension of plant in a factory ... [It does] not endure like bricks and mortar.').

11 *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736 (26 November 1981) 751 (Hutley JA).

current with issues of law and legal practice through informal and formal continuing legal education', expressing it 'as desirable that persons practising as barristers and solicitors should complete ten hours of formal continuing legal education each year'.[12]

Of course, as foreshadowed earlier, lawyers are nowadays subjected to mandatory continuing legal education ('MCLE'), uniformly totalling the equivalent of 10 hours each year. As this is one of conditions for maintaining a current practising certificate, this evidently goes to what distinguishes a qualified practising lawyer from one who is not (which is in turn a driver for unauthorised practice proscriptions). Yet this is a relatively recent phenomenon. New South Wales was the first Australian jurisdiction to make CLE mandatory, in 1987, some 12 years after the first such initiative in the United States (in Minnesota), where now almost all states have MCLE. The MCLE take-up in other Australian jurisdictions proved slower, but has since eventuated[13] (accelerated, in part, by the risk management process underscoring liability capping under the professional standards regime).[14]

Most evidently, mere attendance — whether in person, at a distance or otherwise electronically — at an MCLE function hardly assures genuine translation into increased (or renewed) competence pertaining to the subject matter presented. This form over substance ('tick a box') approach to 'competence certification', interestingly, proved a driver for the Solicitors Regulation Authority in the United Kingdom, as part of a wider program moving from processes to outcomes, to recently resile from MCLE, and in its place prescribe a high-level description of competencies required of solicitors to inform their professional development needs, tailored to the individual lawyer or firm practice.[15] There is, in any event, to date little clear empirical

12 Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (1994).

13 Law Society of the ACT, 'CPD Guidelines: A continuing professional development scheme for Canberra's legal practitioners' (Law Council of Australia, 7 February 2017) <https://www.actlawsociety.asn.au/documents/item/1124>; *Legal Profession (Barristers) Rules 2014* (ACT) r 113 (see ACT Bar Association, *Professional Development & CPD Program* (11 May 2016) <https://www.actbar.com.au/barristers/professional-development-cpd>); *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (NSW); *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (NSW); *Legal Profession Regulations 2007* (NT) sch 2; *Queensland Law Society Administration Rule 2005* (Qld) pt 6; Bar Association of Queensland, *CPD Policy* (10 November 2015) <https://www.qldbar.asn.au/baq/v1/viewDocument?documentId=55>; *Rules of the Legal Practitioners Education and Admission Council 2004* (SA) r 3A, app C (effective 1 April 2011); South Australian Bar Association, *Barristers' Conduct Rules*, rr 127–31; Law Society of Tasmania, *Practice Guideline No 4 — Continuing Professional Development Scheme* (16 March 2015); *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (Vic); *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (Vic); *Legal Profession Rules 2009* (WA) pt 2.

14 See *Civil Law (Wrongs) Act 2002* (ACT) sch 4; *Professional Standards Act 1994* (NSW); *Professional Standards Act 2004* (NT); *Professional Standards Act 2004* (Qld); *Professional Standards Act 2004* (SA); *Professional Standards Act 2005* (Tas); *Professional Standards Act 2003* (Vic); *Professional Standards Act 1997* (WA); *Treasury Legislation Amendment (Professional Standards) Act 2004* (Cth).

15 See Solicitors Regulation Authority, 'New approach to CPD starts from April this year' (News Release, 13 February 2015) <https://www.sra.org.uk/sra/news/press/lsb-approves-

evidence that MCLE has indeed improved competence, and thereby offered enhanced public protection underscoring the unqualified practice proscription. Its value proceeds more on assumption, as part of a broader risk management strategy. (And *if* increased exposure to continuing education in reality translates to increased competence, it should be observed that accountants, who compete with lawyers at least for certain types of work, are subject to much more onerous mandatory continuing professional development ('MCPD') requirements;[16] it may be noted, also, that MCPD requirements for Australian accountants predated *any* for Australian lawyers.)

B Ethics

The above assumption operates not unlike that underscoring the American Bar Association's declaration that, as part of their accreditation, US law schools mandate the study of legal ethics in the law degree program. This requirement, introduced in the wake of the Watergate scandal, responded to the fact that many of the principal actors therein were lawyers, including some of the most senior lawyers in the land, who nonetheless opted to outright lie. States thereafter began to mandate ethics portions to bar examinations, and (as now across Australia) also ethics components to MCLE. Yet it seems somewhat obtuse to believe that, had the principal actors in Watergate been schooled in legal ethics as part of their Juris Doctor degree (in the case of Richard Nixon, over 30 years earlier while at Duke University), the consequent untruths would never have ensued.

Australia not uncommonly follows American trends, and in this regard there is no exception. It is now common throughout Australia for legal ethics (or the like) to form part of the core of the law degree program, in addition to its traditional exposure as part of practical legal training courses. Whether or not, in Australia or the United States, this has improved ethical standards and practice (assuming that these are measurable) — and there is, in any case, little in the way of compelling empirical evidence either way — it has translated into a renewed focus on the 'ethical' (as opposed to competence) hurdle to be overcome in the path to practising law without falling foul of the unauthorised practice proscription, namely that an applicant for admission be currently of 'good fame and character'. While the number of Australian cases that have probed an applicant's fame and character has grown, and in some senses the bar has been raised (for instance, regarding questions of academic misconduct, which saw little airplay preceding the turn of the millennium),[17] in the main the 'good fame and character' threshold is not unduly onerous. It usually rests upon inquiry into matters disclosed by an applicant more so than any investigation by the relevant body on its own volition. For practical purposes, 'good fame and character' is *assumed* pursuant to the omission of any (disclosed) matter that could cast a shadow over it.

Until relatively recent times, *ongoing* good fame and character was likewise

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cpd-change.page> (the existing 16 annual hours of mandatory continuing legal education ('MCLE') ended from November 2016, albeit with an opt-out option from November 2015).

16 Both CPA Australia and the Institute of Chartered Accountants require 120 hours of CPD over a 3-year period.

17 See G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th ed, 2017) 48–9.

assumed, pending the relevant professional or regulatory body being apprised of questionable practice (or non-practice) behaviour. The process of professional discipline, and the investigations underscoring it, was the control on a lawyer's ongoing good fame and character. While this remains the primary control in this context, lawyers are now obligated, pursuant to statute, to *self-disclose* to the relevant regulator certain events that may cast doubt over their good fame and character. Again, this is a relatively recent phenomenon, first appearing by way of amendment to the *Legal Profession Act 1987* (NSW), with effect from 27 July 2001,[18] in the wake of another (albeit not so monumental) scandal. The latter was, embarrassingly, reported in the television program *A Current Affair*, and targeted the poor compliance by lawyers (including senior barristers and judges) with their tax obligations. In particular, the journalistic inquiry revealed lawyers who had avoided paying tax for years (even decades) who, when the evasion (finally) came to the attention of the authorities, filed for bankruptcy.

That the consequent statutory obligation had (and maintains) a direct relationship to the issue and retention of a practising certificate presents as one of the few post-admission controls on practising lawyers' good fame and character that do not rest upon a (usually client) complaint. The amendments to the 1987 NSW Act, which have since translated in equivalent form to the both the current NSW Act as well as relevant Acts in all other Australian states and territories,[19] oblige an applicant for a practising certificate, and also the current holder of a practising certificate, who has committed a bankruptcy-related event or been found guilty of a serious or tax offence (collectively a 'show cause event'), to provide a written statement to the relevant body within set time frames showing why he or she nonetheless remains a fit and proper person to hold a practising certificate. Mention of 'bankruptcy-related events' and 'tax offences' (even if not 'serious') speak of the events that propelled these provisions. The relevant body may refuse to issue, or may cancel or suspend, a practising certificate if the applicant or holder has:

- failed to fulfil to notify of a show cause event (assuming, of course, that the body is aware of this);
- provided such a statement that does not show him or her to be a fit and proper person to hold a practising certificate; or
- failed, without reasonable excuse, to properly comply with a requirement made in connection with an investigation for this purpose.

A contravention of the above requirement is, moreover, declared to be professional misconduct or (in New South Wales and Victoria) capable of constituting professional misconduct or unsatisfactory professional conduct.

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18 Pursuant to the *Legal Profession Amendment (Disciplinary Provisions) Act 2001* (NSW), which introduced a new div 1AA to *Legal Profession Act 1987* (NSW) pt 3 (comprising ss 38FA–38FJ).

19 See *Legal Profession Act 2006* (ACT) div 2.4.7; *Legal Profession Uniform Law 2014* (NSW) pt 3.5 div 4; *Legal Profession Act 2006* (NT) pt 2.3 div 6; *Legal Profession Act 2007* (Qld) pt 2.4 div 7; *Legal Practitioners Act 1981* (SA) pt 3 div 2B; *Legal Profession Act 2007* (Tas) pt 2.3 div 7; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 pt 3.5 div 4; *Legal Profession Act 2008* (WA) pt 5 div 7.

There is, as a result, something about the holding of a practising certificate that, independent of a substantiated (client) complaint (and consequent disciplinary sanction), serves to foster public confidence in the ethics of the profession. That this self-disclosure obligation is, however, confined largely to the events that propelled it dictates its irrelevance for the broader span of lawyer (mis)behaviour. Good fame and character (and associated ethical standards), within that span, remains to be addressed through the disciplinary process in the main.

C Upshot

The foregoing reveals that there is relatively little in the issue of a practising certificate that, *of itself*, bespeaks of special skill and learning, and the competence it is designed to inform. At least at an academic level, this is the province of university study of law; at a practical level, admission to practice is a product of either a dedicated legal practice course or supervised work experience. At the admission stage, applicants must also overcome the 'good fame and character' hurdle; the issue of a practising certificate has traditionally involved no further competence or character inquiry. From the perspective of protecting the public from incompetent or unethical lawyers, the issue of a practising certificate has generally performed no substantial function (except to the extent that there are conditions placed on the scope of practice allowed under the certificate, or that must otherwise be fulfilled by the lawyer).[20] The proscription on unauthorised practice nonetheless targets persons who do not hold a current practising certificate, even if they otherwise meet the academic, practical and ethical prerequisites.

Of course, as noted above, the issue and maintenance of a practising certificate is nowadays not entirely devoid of matters going to competence and ethics. But the relevant initiatives set no substantive competence or ethical hurdle; MCLE does not guarantee competence, and show cause events are confined in scope. Beyond its symbolic significance, the principal upshot of the issue of a practising certificate is attendant coverage by professional indemnity insurance,[21] and client access to the fidelity fund for certain law practice defaults.[22] While these perform a consumer protection function, it is chiefly as a backup to the primary liability, which lies in the legal practitioner.

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20 *Council of the New South Wales Bar Association v Kintominas* [2017] NSWCATOD 167 (22 November 2017) [62] (where the tribunal noted that while '[o]rdinarily, a practitioner is permitted to practise unencumbered by special conditions', the imposition of special conditions 'points to concern on the part of the regulator that the public needs additional degrees of protection from possible harm, beyond those conferred by the requirements for admission to practice and the disclosures and commitments that form part of the annual practising certificate cycle').

21 *Legal Profession Act 2006* (ACT) s 311; *Legal Profession Uniform Law 2014* (NSW) s 211; *Legal Profession Act 2006* (NT) s 376; *Legal Profession Act 2007* (Qld) s 353*; Legal Practitioners Act 1981* (SA) s 19; *Legal Profession Act 2007* (Tas) s 45; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 211; *Legal Profession Act 2008* (WA) s 40.

22 See generally *Legal Profession Act 2006* (ACT) pt 3.4; *Legal Profession Uniform Law 2014* (NSW) pt 4.5; *Legal Profession Act 2006* (NT) pt 3.5; *Legal Profession Act 2007* (Qld) pt 3.6; *Legal Practitioners Act 1981* (SA) s 57, pt 5; *Legal Profession Act 2007* (Tas) pt 3.5; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 pt 4.5; *Legal Profession Act 2008* (WA) pt 12.

That primary liability remains even if the practitioner does not hold a (current) practising certificate. After all, a person who holds himself or herself out as a practising lawyer owes the same duties to the 'client' at general law as a qualified or certificated lawyer would owe.[23]

IV Competence as a parameter-setter

The principal rationale for the unauthorised practice proscription is, as explained earlier, to protect the public by prescribing the fulfilment of competence thresholds. Granted that competence, at least in an assessed form, is chiefly the product of academic and practical qualifications rather than grounded in the issue of a practising certificate, it cannot but inform the interpretation (and thus parameters) of the proscription. The latter aims, it is said, to 'distinguish tasks that can only be performed by trained and licensed lawyers from tasks that lay people, lacking the same training ... can nevertheless provide competently [and] reliably'.[24] And this inquiry cannot be viewed independently of pressures to free up (aspects of) the legal market so as to promote greater (chiefly price) competition. Any changing in perceptions of what is the 'practice of law', to this end, can impact upon the parameters of the unauthorised practice proscription.

Even *within* the legal profession, the market for legal services has become more competitive in time. Swelling in the number of practising lawyers in Australia, per capita well outstripping increases in population[25] (and arguably the amount of legal work), itself speaks to this. Lawyer-client costs disclosure, moreover, represents a statutory measure implemented to, inter alia, foster greater competition within the profession's ranks. But competition also emerges from outside the profession, underscored by the notion that the competence expected of practising lawyers, which drives the unauthorised practice proscription, is not essential to every legal-type task. This view is hardly without supporters, including some influential academics.[26]

A Opening up the legal market

Legal work that, it is argued, should not be exclusive province of practising certificate holders, can comprise chiefly routine or formulaic tasks. This, many maintain, does not require the (supposed) intellect required for entry into a law degree or that underscoring its conferral, or justify what many (aspiring) law students and lawyers envisage as a high income. Document templates, forms or precedents have become the domain of online and other non-lawyer service

23 See, eg, *Braham v Catalano* [2013] VSC 437 (30 August 2013) (where the defendant, who illegitimately held himself out to the plaintiff as a practising solicitor, was found liable in tort and breach of fiduciary duty in representing the plaintiff in a conveyancing transaction).

24 Dana Remus and Frank Levy, 'Can Robots be Lawyers? Computers, Lawyers and the Practice of Law' (2017) 30 *Georgetown Journal of Legal Ethics* 501, 542.

25 See the report prepared for the Law Society of New South Wales by Urbis, 'National Profile of Solicitors 2016 Report' (24 August 2017) 3, which reveals that, in the period 2011–16, the number of solicitors in Australia increased by 24.2 per cent. Within the same time frame, the total population increased by only 8 per cent.

26 See, eg, Deborah L Rhode and Lucy Buford Ricca, 'Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement' (2014) 82 *Fordham Law Review* 2587.

providers,[27] which almost invariably undercut lawyers on price. Routine legal work is also the most amenable to being (at least partly) performed by computer, through artificial intelligence in its various permutations[28] (although predictions that the profession's days are numbered for this reason[29] do appear to understate the 'irreducibly human'[30] nature of much legal work; say, legal writing, advising clients, communications/interactions, court appearances, and negotiation).[31]

The (then) Trade Practices Commission, in a 1994 report, recommended that some areas of legal practice be opened up to appropriately trained non-lawyers, including conveyancing, taxation, wills and probate, simple incorporations, uncontested divorce, simple civil claims and welfare advocacy.[32] These recommendations were reiterated in a 2014 Productivity Commission report.[33] Most Australian jurisdictions now empower non-lawyer conveyancers to perform certain conveyancing services for reward, subject to a licensing regime established by statute.[34] New Zealand, via its *Lawyers and Conveyancers Act 2006* (NZ), created a profession of conveyancing practitioners to perform conveyancing work in competition with lawyers, while applying essentially the same regulatory scheme to both.

There have been similar calls,[35] and a yielding to corresponding pressures, elsewhere. For instance, under the *Legal Services Act 2007* (UK), the Institute of Chartered Accountants of England and Wales can now issue licences to enable its members to undertake probate work,[36] thereby becoming the first non-legal body in the United Kingdom to actually regulate legal services. The Canadian province of Ontario, from 2007, licensed paralegals to assist clients with small claims matters, traffic offences, landlord-tenant disputes,

27 In the United States, eg, LegalZoom (via its website <www.legalzoom.com>) promotes itself as 'the nation's leading provider of personalized, online legal solutions and legal documents for small businesses and families', and provides document templates for, inter alia, company incorporations, trusts, leases, wills, divorces, bankruptcy, powers of attorney, etc.

28 In the Australian context, it has been observed that 'without this technology, and the ability of law firms to use it in an increasingly sophisticated way, no one could undertake meaningful discovery in complex cases in anywhere near a sensible time frame at anything resembling a reasonable price': Tony Joyner, 'The inevitable surprise: How technology will change what we do' (2017) 44(10) *Brief* 14, 16.

29 See, eg, Richard Susskind, *Tomorrow's Lawyers: An Introduction to your Future* (Oxford University Press, 2nd ed, 2017).

30 Remus and Levy, above n 4, 503.

31 See the compelling discussion in ibid.

32 Trade Practices Commission, *Study of the Professions: Legal*, Final Report (1994) 67–71.

33 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview No 72 (2014) 21.

34 *Conveyancers Licensing Act 2003* (NSW); *Agents Licensing Act 1979* (NT) s 5 (applies to, inter alia, conveyancing agents); *Conveyancers Act 1994* (SA); *Conveyancing Act 2004* (Tas); *Conveyancers Act 2006* (Vic); *Settlement Agents Act 1981* (WA) pt III. As to the history of conveyancers in Australia, see *Sande v Registrar, Supreme Court (Qld)* (1996) 64 FCR 123, 135–45 (Lockhart J).

35 See, eg, Leslie C Levin, 'The Monopoly Myth and Other Tales about the Superiority of Lawyers' (2014) 82 *Fordham Law Review* 2611; Laurel A Rigertas, 'The Legal Profession's Monopoly: Failing to Protect Consumers' (2014) 82 *Fordham Law Review* 2683.

36 *Legal Services Act 2007* (UK) sch 4, sch 5 cl 2A.

administrative matters and minor criminal offences.[37] And 5 years hence, in an initiative that has attracted interest by other states in the United States, Washington introduced a regime to qualify and licence non-lawyer 'Legal Technicians' to provide limited legal advice pertaining to domestic relations.[38]

There are common elements to each of the above intrusions into the monopoly lawyers otherwise enjoy(ed) as a result of skill- and learning-based barriers to entry. Conveyancing, beyond assumed to be heavily formulaic, involves tasks confined to a particular endeavour, and it is reasoned that to perform this task conveyancers do not require the breadth of legal knowledge vested in lawyers. What dissolving the conveyancing monopoly has done, in line with its object, is render conveyancing more affordable. Whether in England accountants will be able to perform probate work any more cheaply (or as competently) as lawyers remains to be seen. But together the scenarios that have propelled the changes in Ontario and Washington state, what are involved are areas where the costs of the relevant services may prove disproportionate to the issues or property at stake. Much of probate work, it is reasoned, can be adequately performed by a clerk, at a lower fee, than a lawyer. And the smaller the claim, the greater the prospect that costs incurred to pursue or defend it will become disproportionate.

The upshot of the foregoing is a belief, which has significant carriage, that various aspects of lawyers' work do not require skill and knowledge necessary to confine performance to certified lawyers. If others can perform this work with sufficient competence but at a lower cost, society as a whole gains. Of course, riders must apply. It is no coincidence that the various intrusions into lawyers' monopoly have spawned their own regulatory regimes. This indicates legislators' acknowledgement of the value of the relevant services, and as a consequence the need for some control over their delivery.

To presuppose areas of legal endeavour that are sufficiently self-contained to justify a more constrained competence requirement — not one that requires the full spectrum of legal knowledge assumed to be conveyed (and certified) by a law degree — risks fragmenting the very character of legal work and, in the language of the legislation, what is meant by 'engaging in legal practice'. It opens the door, in addition, to other potential incursions into lawyers' traditional domain. Some other areas of legal practice, it could be argued, do not require knowledge of core areas of law. An example may be the practice of criminal law. Could it be said, for instance, that a person who has successfully completed units on criminal law, criminal procedure and evidence — being what is required under the 'Priestley 11'[39] so far as the study of criminal law is concerned — with some targeted practical legal training attached, should be sufficiently competent to practise criminal law? Does the same person also need to be certified as to knowledge of, say, contract, tort, property, equity, constitutional law, administrative law, etc? Police prosecutors, after all, perform competently in lower courts without this

37 *Law Society Act*, RSO 1990, c L.8 s 1(8).5 (as amended by the *Access to Justice Act*, SO 2006, c 21 sch C).

38 See Benjamin P Cooper, 'Access to Justice without Lawyers' (2014) 47 *Akron Law Review* 205, 217–21.

39 Law Council of Australia, *Historical Documents* <https://www.lawcouncil.asn.au/resources/law-admissions-consultative-committee/historical-documents>.

broader knowledge or training. While this is perhaps a reason (coupled with most criminal defence work being funded under the auspices of legal aid) that to date there has been not significant pressure to 'open up' criminal law work to a broader cohort, absent a compelling justification for the complete span of law study that comprises Australian law degrees (and practical legal training courses) as a foundation for the ability to practise in specific areas of law, the profession is increasingly vulnerable to this reasoning.

B Law as incidental to another endeavour

The above presents scenarios where persons not otherwise trained in, and certified as to, the full gamut of legal study, can in a sense engage in legal practice without a lawyer practising certificate. In other scenarios, despite not always being discrete from the former, a non-legal endeavour may involve a person engaging in what may be seen as the provision of legal advice *incidentally* to the performance of that endeavour. That the law infuses practically every relationship, transaction or dealing makes it difficult, in the performance of many non-legal endeavours, to entirely eschew some legal exposure. Manifold university courses of non-legal study, to this end, prescribe law-focused units. Examples include study that is medical and health-related, or that has a primary focus on social work, surveying, journalism, town planning, management, etc.

There are other endeavours not certified through university study or degrees that nonetheless evince a (limited) legal slant. Real estate (and other commission) agents invariably deal with legal documents, and assist persons in completing those documents, in circumstances that do not always involve an unmodified standard form or content easily understood by the layperson. The same may be said regarding the performance of standard tasks by financial institutions, insurance agents or brokers, and financial planners. Migration agents, like lawyers, clearly represent clients in proceedings before courts and tribunals and, within their scope of work, can be said to provide legal advice and services. (It is perhaps telling that, in each of these instances, parliaments have opted to implement regulatory schemas.) And this is without also probing manifold websites that include legal-type information, and spruik legal-type services, while at the same time decrying any function of engaging in legal practice.[40]

Arguably the most common potential overlap in this context, however, involves business or accounting study. Non-legally trained accountants (that is, most of them) provide advice when it comes to tax law. (Again, it should be noted, so far as tax is concerned, a regulatory scheme has been put into place, where a person must be a registered tax agent in order to provide a 'tax agent service'.)[41] While these persons may, within university study, have successfully passed units in contract, company or commercial law (in addition

40 Eg, multiple industrial advocacy firms clearly provide advice and representation services that could otherwise fall within lawyers' domain. At the same time, they disclaim actually providing legal advice. A website of one such provider contains the following disclaimer, in capitals: 'Absolutely nothing on this site constitutes legal advice. A Whole New Approach Pty Ltd is not a law firm and we are not solicitors' (see A Whole New Approach (9 June 2005) <www.awna.com.au>).

41 *Tax Agent Services Act 2009* (Cth) s 50.5 (a 'tax agent service' being defined in s 90.5).

to a tax unit), the same cannot ordinarily be said regarding any dedicated study of trusts, equity or property law. Few would deny that an understanding of these latter areas is germane to an understanding of tax law, and indeed to other aspects of accounting and business advice. And it cannot be gainsaid that accountants, in dealing with companies, partnerships, trusts and contracts to which their clients are parties, necessarily skirt the boundaries of legal advice or representation. Yet there seems little real societal or regulatory concern that (tax) accountants might lack the structured and certified knowledge in fields apropos their practices. The public, it is assumed, is adequately protected by existing (non-law) regulatory regimes.

Debate surrounding the extent to which accountants traverse into the legal arena, chiefly in tax work but not so confined, has been longstanding, without ever genuinely reaching a climax, even as accountants have moved from mere compliance work to consulting/advice spheres. In 1951, at a time when compliance work was the predominant function of accountants vis-à-vis tax law, a Minnesota judge made the following observations:

> the distinction between law practice and that which is not may be determined only from a consideration of the nature of the acts of service performed in each case. No difficulty arises where such service is the primary business of the actor. We then have law practice. Difficulty comes, however, when the service furnished is incidental to the performance of other service of a nonlegal character in the pursuit of another calling such as that of accounting. In the field of income taxation ... we have an overlapping of both law and accounting. An accountant must adapt his accounting skill to the requirements of tax law, and therefore he must have a workable knowledge of law as applied to his field. By the same token, a lawyer must have some understanding of accounting. In the income tax area, they occupy much common ground where the skills of both professions may be required and where it is difficult to draw a precise line to separate their respective functions. The public interest does not permit an obliteration of all lines of demarcation. We cannot escape reality by hiding behind a facade of nomenclature and assume that 'taxation', though composed of both law and accounting, is something *sui generis* and apart from the law ... If taxation is a hybrid of law and accounting, it does not follow that it is so wholly without the law that its legal activities may be pursued without proper qualifications and without court supervision.[42]

That accountants' primary historical function in the tax sphere was, as noted above, largely confined to what could be described as tax compliance work, which lawyers did not ordinarily perform, may explain why, at least at the outset, questions over the unauthorised practice of law generated few blips on the radar. It also explains why they have proven very difficult, if not practically impossible, to sustain even once accountants began to inhabit the consulting domain, which clearly involves giving advice as to the meaning and effect of tax (and some related) laws.

IV Boundaries of legal practice

To the extent that the legal services market is opened up to persons other than legal practitioners, it stands to reason that the scope of the unauthorised practice proscription is correspondingly reduced. Those who provide what

42 *Gardner v Conway*, 48 NW 2d 788, 796 (Matson J) (Minn, 1951).

would otherwise have been legal services but under a different regulatory regime do not accordingly fall foul of the relevant proscription, at least provided that they stay within the parameters of that regime. Rather, non-lawyer's traversal into the legal arena as incidental to another endeavour is the scenario that more acutely places the unauthorised practice proscription in the sights. It is apt, accordingly, to target the wording of the proscription, and what it reveals about the parameters of legal practice.

A Under statute

As noted at the outset, the legal profession legislation in each jurisdiction proscribes the unauthorised practice of law. It does so by prohibiting a person, other than the holder of a current practising certificate, from 'engaging in legal practice'. But nowhere does the statute attempt to define or otherwise set clear parameters for what is 'legal practice', which of course goes to the core of what is 'unauthorised legal practice'. Most, not very helpfully, merely state that 'engage in legal practice' includes practise law or, in New South Wales and Victoria under the *Legal Profession Uniform Law* ('*Uniform Law*'), provide legal services.[43] That the *Uniform Law* defines 'legal services' to mean work done, or business transacted, in the ordinary course of legal practice[44] hardly represents any quantum step in defining the concept or parameters of 'legal practice'.

Some utility in this endeavour appears in the Australian Capital Territory Act, if only by way of example. The relevant provision supplies five examples of engaging in legal practice:

- preparing a will or other testamentary instrument;
- preparing an instrument creating or regulating rights between people;
- preparing an instrument relating to property or a legal proceeding;
- acting as advocate for someone in a proceeding before a court or tribunal; [and]
- preparing papers to be used in support of, or opposition to, an application for the grant of probate or letters of administration.[45]

The South Australian Act contains a provision directed to a similar end, albeit phrased in greater detail. Like its territory counterpart, it focuses on the preparation of various legal instruments, which by definition impact upon or effect the rights or obligations of a client, and the representation of a party to proceedings in a court or tribunal.[46] Consistent with the chief rationale for proscribing the unauthorised practice of law, the relevant assumption is that legal (and practical) training, in tandem with the issue of a practising certificate (with its attendant safeguards and controls), is vital to the

43 *Legal Profession Uniform Law 2014* (NSW) s 6; *Legal Profession Act 2006* (NT) s 4; *Legal Profession Act 2007* (Qld) sch 2; *Legal Practitioners Act 1981* (SA) s 5(1); *Legal Profession Act 2007* (Tas) s 4(1); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 6; *Legal Profession Act 2008* (WA) s 3.

44 *Legal Profession Uniform Law 2014* (NSW) s 6; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 6.

45 *Legal Profession Act 2006* (ACT) s 16.

46 *Legal Practitioners Act 1981* (SA) s 21(2) (expressed 'without limiting the generality' of the unauthorised practice proscription found in s 21(1)).

competent performance of these tasks. Even so, and aside from being purely illustrative, these provisions are phrased in terms broad enough to allow not a little leeway.

Western Australia is the only jurisdiction that purports to define 'legal work'. It does so in the context of what falls *outside* unauthorised practice, namely (inter alia) 'a person doing legal work under the supervision of an Australian legal practitioner, as a paid employee of a law practice or in the course of approved legal training'.[47] 'Legal work' is here defined to mean:

> (a) any work in connection with the administration of law; or
> (b) drawing or preparing any deed, instrument or writing relating to or in any manner dealing with or affecting —
> (i) real or personal estate or any interest in real or personal estate; or
> (ii) any proceedings at law, civil or criminal, or in equity;[48]

Those expecting some additional insight into 'legal work' (or 'legal practice') would accordingly be left somewhat disappointed.

Australian law is not unique in this regard. No common law jurisdiction has purported to exhaustively set or define the parameters of legal practice. Indeed, a commentator has suggested that the 'practice of law' is 'indefinable', opining that no definition will distil the practice of law to its essence.[49] McGowan fears that a definitional approach, framed according to the core object of the unauthorised practice prohibition, could actually harm consumers: if the practice of law is defined too narrowly, consumers are exposed to incompetent (or not-yet-competent) sellers; if defined too broadly, 'consumers are denied the benefits of competition from competent, but unlicensed, sellers'.[50] (There is also the flipside, namely the perception that authorised practice guarantees competence; this may provide insight into why matters of competence have now traversed into the disciplinary sphere, via 'misconduct' definitions[51] and compensation orders.)[52]

B Pursuant to judicial interpretation

In areas of definitional fluidity, legislatures are prone to vest in courts the responsibility of drawing a line, according to the facts of each case. Questions over the unauthorised practice of law fall into this milieu. As the dividing line rests heavily upon the facts, reciting one case illustration after another has limited value in probing what distinguishes 'legal practice' from other

47 *Legal Profession Act 2008* (WA) s 12(3)(g).
48 Ibid s 12(1).
49 David McGowan, 'Two Ironies of UPL Laws' (2017) 20 *Chapman Law Review* 225, 226.
50 Ibid.
51 See the definition of 'unsatisfactory professional conduct' in: *Legal Profession Act 2006* (ACT) s 386; *Legal Profession Uniform Law 2014* (NSW) s 296; *Legal Profession Act 2006* (NT) s 464; *Legal Profession Act 2007* (Qld) s 418; *Legal Practitioners Act 1981* (SA) s 68; *Legal Profession Act 2007* (Tas) s 420; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 296; *Legal Profession Act 2008* (WA) s 402.
52 See *Legal Profession Act 2006* (ACT) pt 4.8; *Legal Profession Uniform Law 2014* (NSW) pt 5.5; *Legal Profession Act 2006* (NT) pt 4.12; *Legal Profession Act 2007* (Qld) pt 4.10; *Legal Profession Act 2007* (Tas) pt 4.9; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 pt 5.5; *Legal Profession Act 2008* (WA) pt 13 div 11.

endeavours. At the same time, courts have faced the same difficulties, when it comes to propounding statements of principle, as have confronted legislatures. In an ostensibly leading case, *Cornall v Nagle*,[53] J D Phillips J couched the meaning of 'acting or practising as a solicitor' (or by analogy 'engaging in legal practice'), albeit not exhaustively, by reference to the following forms of behaviour:

> (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 ...
> (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.

While on its face promising, this categorisation in effect does little more than fiddle with the statutory formulae or reflect, in the broadest of terms, the rationale for the unauthorised practice proscription. The second resorts to what statute or court rules already address by way of proscription, and so adds nothing to the definition. The first, in being couched by reference to 'what is usually done by a solicitor', does not actually define what that is. And the third category does little more than advert to the chief rationale underscoring the proscription, namely consumer protection. It does not, in its terms, attempt any further step. In somewhat circular (but not unexpected or illogical) reasoning, what qualifies a person to practice law itself is treated as defining what it is to engage in the practice of law.

Beyond this, what is clear is that the relevant inquiry is not informed by subjective considerations. Whether or not the person who has (allegedly) breached the unauthorised practice proscription actually intended to do so, or appreciated that this would be the outcome, is irrelevant. The inquiry is an *objective* one. It follows that the mere fact that a person who acts on behalf of another in a legal matter describes himself or herself by some not expressly legal title is no defence to a charge of unauthorised legal practice if he or she performs work that is in breach of the law.[54]

There may well be more compelling grounds to so find where the person in issue has legal qualifications but no current practising certificate. The point is

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53 [1995] 2 VR 188, 210, applied by Thomas J in *Queensland Law Society Inc v Sande* (1997) Q Conv R 54-486, 59,871–2. There are multiple other instances where courts have addressed the point, but without anything substantially more specific than expressed in *Cornall v Nagle* [1995] 2 VR 188: see, eg, *Felman v Law Institute of Victoria* [1998] 4 VR 324, 352 (Kenny JA; Winneke P and Brooking JA concurring); *Law Society of New South Wales v Seymour* [1999] NSWCA 117 (3 May 1999) [18]–[21] (Fitzgerald JA); *Kekatos v Council of the Law Society of New South Wales* [1999] NSWCA 288 (26 August 1999) [16] (Giles JA); *Council of the New South Wales Bar Association v Davison* [2006] NSWSC 65 (28 February 2006) [141] (Hall J); *Legal Services Commissioner v Walter* [2011] QSC 132 (27 May 2011) [23]–[29] (Daubney J).

54 *Cornall v Nagle* [1995] 2 VR 188, 220–2 (J D Phillips J).

illustrated in *Council of the New South Wales Bar Association v Davison*,[55] where the defendant, following the cancellation of his practising certificate as a barrister in 2001, established and conducted a business providing town planning advice. In his practice at the Bar, the defendant had specialised in local government, environmental and planning law. Hall J accepted that town planners and lawyers may in some contexts perform 'overlapping or similar functions',[56] and that town planners must have an awareness and knowledge of relevant law (including planning instruments) and update their knowledge of relevant court decisions. His Honour agreed, more generally, that the application of laws, legal instruments and the observance of legal principles occurs in many fields of professional endeavour (citing hospital management, policing, nursing and financial advising by way of example).

The relevant inquiry, though, was whether 'a particular aspect of work involves or requires the application of legal expertise by a legal practitioner (in particular that of a barrister), or whether it falls within the province of a town planner or of both'.[57] When it involves '[t]he provision of legal advice on matters involving legal interpretation or on legal rights or duties', explained Hall J, this is 'the preserve of the legal profession'.[58] On the facts, Hall J made the following observations:

> Even allowing for the fact that town planners have a knowledge of relevant law which they bring into account as necessary, the knowledge and skill held and exercised by the defendant in the many instances detailed in this judgment was plainly not that of a town planner. It was acquired by him during his years in practice, firstly, as a solicitor, and later as a member of the Bar. Whilst no doubt, aspects of his knowledge may have overlapped the discipline of town planning in some respects that is not determinative of the nature of his activities. The very nature of the advice provided by him as identified in this judgment was in the nature of legal advice which barristers are called upon to provide.
>
> On a significant number of occasions ... the knowledge and skill applied by him was that of a specialist barrister in the fields of local government, planning and environmental law. The advice given on those occasions included advice as to the legal rights or powers of local government authorities and of others. On many occasions, the advice related to the preparation and conduct of proceedings instituted in the Land and Environment Court. In some instances, the defendant provided advice direct to clients. In other cases, the advice was tendered by him to solicitors on matters involving legal issues in performance of the contract or retainer made with [a company associated with the defenfant]. The advice required the defendant to employ his legal and other specialist knowledge and to exercise a measure of the skill and judgment of the specialist barrister.[59]

In so concluding, his Honour was influenced by the absence of evidence that the defendant had undertaken a course of study in town planning or related disciplines, or had obtained any accreditation or affiliation with a group or association comprised of practitioners in the planning or any related field. That the defendant's only qualification was that of legal practitioner, and only a

55 [2006] NSWSC 65 (28 February 2006).
56 Ibid [41].
57 Ibid.
58 Ibid [59].
59 Ibid [145]–[146].

very short interval elapsed between the cancellation of his practising certificate and the commencement his new business,[60] ostensibly made the case against him all the stronger.

The decision in *Davison* should not be read as suggesting that a person who, in lawful pursuit of an occupation other than law, gives advice on matters lying within his or her occupational expertise involving the expression of an opinion concerning requirements of relevant legislation, statutory rules and the like, necessarily acts as a lawyer or engages in legal practice.[61] Nor does drafting an agreement by itself carry a reasonable inference that the drafter is acting as a lawyer.[62] In these circumstances, that the person in question makes clear that he or she is acting in other than a legal capacity may carry some sway;[63] it is not necessarily decisive, though, as otherwise it would impinge upon the objective, substance over form, approach noted earlier.

VI Where does this leave us?

It seems, therefore, that what constitutes 'legal practice' will, at the borders (which themselves evince a degree of fluidity), remain difficult to prescribe with certainty. Of course, as with any continuum, there will be cases that clearly fall on one (or the other) side of the line. Unless authorised (and regulated) by statute, court or tribunal, representation is the domain of legal practitioners. As is the formulation of statements of claim or defences in civil proceedings,[64] as well as otherwise purporting to correspond on a client's behalf in the course of a legal dispute.[65] While (assistance in) drafting legal

60 Ibid [137].

61 *Felman v Law Institute of Victoria* [1998] 4 VR 324, 350 (Kenny JA; Winneke P and Brooking JA concurring) (referring, by way of example, to a person 'in his or her capacity as a tax agent, customs agent or migration agent'). See, eg, *Law Institute of Victoria Ltd v Maric* (2008) 21 VR 1 (where Neave JA, with whom Warren CJ and Kellam JA concurred, held that 'it does not follow that because legal advice will sometimes be required in order to satisfy the requirements of [*Sale of Land Act 1962* (Vic)] s 32, the preparation of a vendor's statement inevitably requires the giving of legal advice': at 16 [51], and ruled that the respondent conveyancer had not been 'engaging in legal practice' contrary to *Legal Practice Act 1996* (Vic) s 314 in preparing statements under s 32); *Defteros v Scott* [2014] VSC 205 (14 May 2014) (where Kaye J held that a non-lawyer legal cost consultant was not engaging in legal practice contrary to the statutory proscription, but emphasised that the decision was one on the facts in issue, and not to be taken as determining the more general question whether a cost consultant is, or is not, engaging in legal practice: at [85]) affd *Defteros v Scott* [2014] VSCA 154 (24 July 2014).

62 *Orrong Strategies Pty Ltd v Village Roadshow Ltd* (2007) 207 FLR 245, 448 [874] (Habersberger J).

63 Such as where, eg, in sending a letter of demand, the sender states that he or she is acting as an agent under power: *Law Institute of Victoria Ltd v Nagle* [2005] VSC 35 (24 February 2005) (see [72]–[73] (Gillard J)).

64 See, eg, *Legal Practice Board v Adams* [2001] WASC 78 (30 March 2001) (where the non-lawyer respondent, who prepared two writs to commence actions in the Supreme Court, was held to have engaged in the unauthorised practice of law).

65 See, eg, *Legal Practice Board v Giraudo* [2010] WASC 4 (14 January 2010) (where the non-lawyer respondent, who assisted his employer in legal proceedings by, inter alia, preparing court documents and letters for the employer, and attended conferences with him, was held to have engaged in the unauthorised practice of law).

instruments, and advice as to the nature and effect, are likewise the province of legal practitioners, being unduly categorical in this regard may prove inaccurate.

As foreshadowed in the first part of this article, prohibiting persons without current practising certificates from engaging in legal practice, at the pain of criminal sanction, serves a consumer protection agenda, protection being needed primarily from incompetence; hence the heavily competence-focused barriers to entering the legal profession. It should stand as no surprise, as a result, that what is legal practice should chart the competence established by the threshold qualifications for legal practice. Purely clerical work, to this end, hardly requires this level of competence, and so falls outside of what the profession can claim as exclusively within its domain. The same may be said of multiple formulaic or routine tasks performed within a law office, albeit not uncommonly by a non-lawyer under effective supervision. (Indeed, a failure in effective supervision may amount to the lawyer being a party to the non-lawyer's unauthorised practice of law.)[66]

The American Bar Association's former Model Code of Professional Responsibility described the practice of law as 'the rendition of services for others that call for the professional judgment of a lawyer ... [consisting of lawyer's] ability to relate the general body and philosophy of law to a specific legal problem of a client'.[67] The exercise of professional judgment no doubt dovetails into the qualifications needed to practice law, and speaks against purely routine, formulaic or mechanistic functions, at least to the extent that they are not concurrently also punctuated by the need for that judgment. By way of example, an American court has remarked that 'an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law'.[68]

Another related approach to making this distinction involves inquiring into whether the reasonable protection of the rights and property of the clients '[require] that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen'.[69] If the answer is in the affirmative, there are good grounds to conclude that it reflects legal work, although it cannot blithely be assumed that it is necessarily exclusively within the lawyer's monopoly. Others, as noted earlier, may directly or incidentally be expected to exercise legally-related skill and knowledge exceeding the layperson. But it at least provides what constitutes a compelling starting point, or litmus test, to set the parameters of (un)authorised legal practice. In the words of a Western Australian judge, by way of illustration:

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66 See, eg, *Re Hrones*, 933 NE 2d 622 (Mass, 2010) (where the Supreme Judicial Court of Massachusetts suspended the respondent lawyer (H) who had entered into a business arrangement with a law graduate yet to pass the Bar examination (L), allowing the latter to de facto practise law without effective supervision, finding that H actually assisted a non-lawyer in the unauthorised practice of law, rather than merely inadequately supervising L).

67 American Bar Association, *Model Code of Professional Responsibility*, EC 3-5 (1969).

68 *Lola v Skadden, Arps, Slate, Meagher & Flom LLP*, 620 Fed Appx 37, 45 (2nd Cir, 2015).

69 *State ex rel Florida Bar v Sperry*, 140 So 2d 587, 591 (Fla, 1962).

> Work of a merely clerical kind such as filling out blanks in a printed form or drawing instruments of a generally recognised type that does not involve the determination of the legal effect of special facts and conditions should not be regarded as legal work. However, that is to be distinguished from the situation where an instrument is shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to ensure a specific result and to guard against others. In such a case more than the knowledge of the layman is required and a charge for such services brings it within the practice of the law.[70]

Beyond comparisons with laypersons, and instead drawing a line between work by practising lawyers and that of non-lawyers whose domain incidentally and/or in one or more specific contexts traverses into the legal arena, there is wisdom in the observation that:

> The interest of the public is not protected by the narrow specialization of an individual who lacks the perspective and the orientation which comes only from a thorough knowledge and understanding of basic legal concepts, of legal processes, and of the interrelation of the law in all its branches.[71]

Perspective and orientation cannot be devalued in this (or other) contexts. Assuming the requisite competence, it clearly feeds into the quality of the advice supplied. There is accordingly value in legal advice supplied by certified lawyers, *even if alternatives may exist*. Yet this value is not measured only in competence, deriving prima facie from stringent academic and practical requirements, and commitment to ongoing education. It is, in the final analysis, also substantiated by enduring commitments to honesty and loyalty (under the banner of fiduciary law), the latter without parallel in the professional sphere.

The upshot, in conclusion, is that when speaking of the boundaries to 'protective laws', such as the prohibition on the unauthorised practice of law, the following sentiments expressed by an American commentator arguably sustain as much carriage today as when they were uttered nearly 40 years ago:

> Lawyers have much to offer the public. Those qualities represented by the title 'lawyer' and attested by the lawyer's [practising certificate] — character, legal learning, proficiency, commitment to a high code of ethical standards and to a tradition of honesty and fidelity — are resources of great value to the public ... *It is this set of qualities, and the titles and certificates that represent them, that should be the subject of protective laws*. No one but lawyers, trained in the law and committed to the profession's ideals, should be permitted to use the titles 'lawyer' or 'attorney at law' or to in any way hold themselves out as lawyers ... But beyond that, no restrictions whatever should inhibit the public in its exercise of freedom of choice in obtaining needed services.[72]

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70 *Legal Practice Board v Giraudo* [2010] WASC 4 (14 January 2010) [13] (Hall J) citing *Barristers' Board v Palm Management Pty Ltd* [1984] WAR 101 (21 June 1983) [108] (Brinsden J).

71 *Gardner v Conway*, 48 NW 2d 788, 796 (Matson J) (Minn, 1951).

72 Barlow F Christensen, 'The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbours — Or Even Good Sense?' [1980] *American Bar Foundation Research Journal* 159, 214 (emphasis added).