

ACCOUNTING TIMES

AI raises risk of accountants providing 'legal advice'

13 April 2023 by Miranda Brownlee

Advancements in automation and generative AI could blur the lines around the provision of legal advice and create dangers for accountants, a law firm warns.

Machine learning and AI are confusing the boundaries of what constitutes legal advice, according to a specialist tax lawyer.

View Legal director Matthew Burgess said that improvements in automation had already seen significant change within the industry and the provision of legal documents which will only accelerate with time.

"Online document providers are looking to make [the provision of these documents] faster, better, quicker, because that's what the market is demanding," said Mr Burgess.

However, recent case law shows that where accountants are involved in the process of obtaining or arranging documents for clients they can still be at risk of providing unqualified legal advice, despite the increased automation in this area.

"From an adviser's perspective, it's getting quicker and easier and they're doing less and less and less but if you look at the terms and conditions of the online provider, they make it clear that all they're doing is providing a template, even if it's fully pre-populated. They're not actually providing legal advice," said Mr Burgess.

"The terms and conditions will say that you need to speak with your insurer as to whether you're giving legal advice."

The rise of generative AI and other forms of automation could therefore potentially raise the risk of accountants engaging in unqualified legal practice.

Professional bodies representing the legal profession have been highlighting concerns around the provision legal advice by non-qualified lawyers for many years, particularly with advancements in technology.

"The reaction from the professional bodies is perhaps best captured by two axioms," said Mr Burgess.

"The first is Junior's Law, that computers make very fast, very accurate mistakes. The second is Bernard Shaw Law, that all professions are conspiracies against the laity."

A range of historical and more recent decisions demonstrate the concerns flagged by the professional bodies regarding non-qualified lawyers providing legal advice.

Historical cases

The leading decision in this area is *Legal Practice Board v Computer Accounting and Tax Pty Ltd* [2007] WASC184, according to Mr Burgess.

"In this particular case, an accountant arranged for a trust deed to be bought for a client over the internet. The base trust instrument had been written by lawyers, however, the accountant then populated the template," he said.

"In doing so, the court held that practically this meant that the accounting firm was breaching the relevant legislation.

“In all likelihood, the accountant would not be covered by their professional indemnity insurance in relation to any issues that arose out of the trust instrument – and also would be likely to have breached the expected standards of their professional body.”

The decision in *Attorney-General (WA) v Quill Wills Ltd* (1990) 3 WAR 500 reached a similar conclusion.

In this case, the system of the (non-lawyer) business operator centred on the provision of wills.

The court held the operators were liable for the provision of legal documents, given the business operator adopted, endorsed and identified themselves with the preparation of the will clauses and the services rendered by the legal practitioners became part of the business of the business operators, who accepted responsibility for the will provided.

The Court also noted that the work done by the legal practitioners was marketed as part of the operator’s business and the overall effect of the system was an attempt to apply the facts to the law of wills, followed by the formation of a conclusion, namely that the will would be valid.

“That was, in essence, the process by which legal advice was given,” said Mr Burgess.

“The provider assured the client of the validity of the will, instructed the client what to do to ensure that validity, and explained the terminology used. The provider was therefore giving legal advice itself.”

If the instrument had been mechanically produced without the application of their own intellect, but by using material created by the intellectual activity of a qualified lawyer, then that may not be legal advice, said Mr Burgess.

“However where the producer of the instrument adopts, endorses and identifies themselves with the material created by the lawyer, and assumes responsibility for it, the producer, is directly or indirectly drawing or preparing a legal document – and is therefore liable for breaching the prohibition on non-lawyers providing legal advice,” he said.

Recent cases

Other jurisdictions have also examined the issue of what amounts to the provision of legal advice, particularly as machine learning and artificial intelligence continue to become increasingly sophisticated and prevalent.

A more recent example is the US case, *In re Peterson*, involving a website, [upsolve.org](https://www.upsolve.org), which enabled clients to complete bankruptcy applications.

The Court found that certain areas of the process amounted to legal advice and that overall the site was close to the unqualified practice of law.

“While the court accepted the website’s promises that it would modify the offending areas of the platform, it was also blunt in its warning that Upsolve should ‘review its website and software en toto for areas where the process could be moved further away from the precipice of legal advice’,” said Mr Burgess.

“Other litigation involving Upsolve has also seen the platform successfully confirm its right ‘to train professionals who are not lawyers to provide free legal advice on whether and how to respond to a debt collection lawsuit’.”

Similarly, an Australian court case, *Galea v Camilleri; The Estate of Patricia Camilleri* [2023] NSWSC 206 provides current context to what is meant by the phrase ‘engaging in legal practice’ – that is, work that any non-qualified lawyer is prohibited from engaging in.

“In this particular case the key issue was whether work and advice in relation to stamp duty by an accountant amounted to the provision of legal advice,” said Mr Burgess.

The Court said that what constitutes engaging in legal practice is a question of fact to be determined objectively in each case.

In his decision, Justice Michael Meek stated that there is no 'bright line' in separating the permissible legal work from the impermissible legal practice.

Justice Meek noted that some activities regularly performed by legal practitioners are also frequently lawfully performed by persons who are not legal practitioners, including, accountants, financial advisors and tax agents.

"When so performed, these activities will only be prohibited if it is reasonable to infer clients or the public would conclude legal advice was being provided," said Mr Burgess.

In the recent Queensland case, *Legal Services Commissioner v Raghoobar* [2023] QSC 41, a person who was a law graduate from the UK, and not admitted in Australia, was held to 'on any view ... (have) engaged in legal practice'.

"This was despite the fact that the individual did not hold himself out as a lawyer and warned clients that he could not provide legal advice," said Mr Burgess.

These subjective factors were held to be irrelevant given the objective conduct such as assisting with the creation of applications and affidavits, drafting other document for use in court, advising parties to litigation in respect of matters of law and procedure and assisting in the preparation of their cases for litigation.

The individual also drafted correspondence to be sent by the parties to their opponents in the litigation and charged clients for the work done.

"Given the ongoing uncertainty in these areas, the conservative and recommended approach is that any adviser engaging in activities that are also performed by lawyers should first have their professional body, firm management, licensee and insurer approve the work types before offering the service," said Mr Burgess.

"As any lawyer would themselves advise, such approvals should be obtained in writing – and the currency confirmed regularly."

"Failure to do so may otherwise expose the adviser (and their firm and licensee) to litigation, professional misconduct sanctions and related consequences – all of which will be unlikely to be covered by insurance."