

THE QUEENSLAND SOLICITORS' CONVEYANCING RESERVATION: PAST AND FUTURE DEVELOPMENT – PART II

MARK BYRNE* and REID MORTENSEN†

I INTRODUCTION¹

In the last volume of the *University of Queensland Law Journal*, we began a reconsideration of the exclusive reservation of land conveyancing work that Queensland legislation provides for solicitors.² The development of this reservation was recounted: a slow process that saw the admission of nonlawyer ‘certificated’ conveyancers prohibited from 1940; the remaining certificated conveyancers, literally, dying out in the 1980s; and the exclusion of barristers from conveyancing practice being formalised as late as 2004.³ We then addressed the legal and practical scope of the reservation – noting how the Queensland Law Society has strongly resisted efforts by nonlawyer conveyancers from other Australian States to gain access to Queensland property markets, while allowing to real estate agents the important role of contract formation and the creation of interests and legal rights in land.⁴ Since the first article was published, a draft *Legal Profession National Law* has been prepared, but if implemented it would not affect the nature or scope of the solicitors’ conveyancing reservation in Queensland.⁵

The implications that the Queensland solicitors’ (qualified) conveyancing reservation have for competition law and policy remain of concern while the National Competition Council disagrees with the Queensland Government’s explanations for prohibiting an access to nonlawyer conveyancers that other States allow.⁶ Having in the first article given the background and scope of the conveyancing reservation, we consider in section II of this article the competition implications of the reservation and the arguments for and against maintaining it. This involves, first, an analysis of conveyancing markets in Queensland and an assessment of the impact that competition

* Senior Lecturer in Law, University of Southern Queensland.

† Professor of Law, University of Southern Queensland. The authors again recognise the support given by the Queensland Legal Practitioners Interest on Trust Accounts Fund for the research and writing of this article. We also wish to thank Ms Kathy Glynn for her research assistance.

¹ In this article Part XIA *Trade Practices Act 1974* (Cth) hereafter Competition Code, *Legal Profession Act 2007* (Qld) hereafter Qld, Standing Committee of Attorneys-General, *Legal Profession – Model Laws Project: Model Bill (Model Provisions)* (2nd ed, 2006) hereafter Model Laws.

² Mark Byrne and Reid Mortensen, ‘The Queensland Solicitors’ Conveyancing Reservation: Past and Future Development – Part I’ (2009) 28(2) *University of Queensland Law Journal* 254.

³ Ibid 258-62.

⁴ Ibid 263-4, 271-4.

⁵ Standing Committee of Attorneys-General, *National Legal Profession Reform Project - Legal Profession National Law, Consultation Draft*, 14 May 2010, s 2.3.1; *National Legal Profession Reform Project - Legal Profession National Rules, Consultation Draft*, 14 May 2010, s 2.3.1(b).

⁶ There are nevertheless weighty arguments that competition law and policy should not be applied to the legal profession. See, JJ Spigelman, ‘Are Lawyers Lemons? Competition Principles and Professional Regulation’ (2003) 77 *Australian Law Journal* 44, 50; R Sackville ‘Welcome Address’ (Speech delivered at the Faculty of Law Prize Ceremony 2004, University of New South Wales, 10 March 2004).

law has on them. As will be seen, it cannot be assumed that the existing barrier to entry must result in a lack of competition,⁷ or that solicitors are currently engaged in anti-competitive conduct that lawful competition by nonlawyer conveyancers might overcome. Secondly, it is ultimately a question of policy whether the current 'legal practice' barrier to entry should be maintained. In accordance with current inter-governmental agreements regarding the implementation of national competition policy, the barrier is only defensible if its benefits exceed its costs. Thirdly, competition-based reforms have already been made to the profession in the *Legal Profession Acts*. The implications these have for nonlawyer access to conveyancing markets are also considered.

In light of the effect of competition law, policy and reforms that have already been made, we conclude in section III with suggestions as to how any lines of debate over the introduction of nonlawyer conveyancing in the State could be refined and whether, given existing reforms, there is any greater need to lower barriers to entry to conveyancing markets in Queensland.

However, given the focus on competition issues in this article, it is worth reiterating a point made in the first article about the use of the term 'monopoly'.⁸ Although this reservation is commonly called the solicitors' conveyancing 'monopoly', in the language of economics, and of competition law and policy, there is no monopoly in the provision of conveyancing services in Queensland. A monopoly needs a single provider of services who controls the price at which the service is sold.⁹ As there are more than 1300 solicitors' practices in Queensland that are lawfully able to provide conveyancing services, the legislation more accurately creates a barrier to entering the market for conveyancing services.¹⁰ The question of nonlawyer conveyancing in Queensland, instead of raising the question of breaking a monopoly, is therefore one of lowering a barrier to entry to extend the class of persons able to provide the service.

II COMPETITION IMPLICATIONS AND ARGUMENTS

A Competition Law and Conveyancing

Throughout Australia, lawyers are currently subject to competition law. In 1995, the federal *Competition Policy Reform Act* incorporated a *Competition Code* as a new part of the *Trade Practices Act 1974* (Cth).¹¹ The *Competition Code* applies the competition provisions of Part IV of the *Trade Practices Act* (which were beforehand limited to corporations) to natural persons, and this is given effect in every State and Territory by enabling legislation. In Queensland, this is the *Competition Policy Reform Act 1996* (Qld), and it clearly covers the conduct of solicitors.¹² The advent of Incorporated Legal Practices (ILPs), by which law can now be practised through any qualifying corporation,¹³ brings Part IV of the *Trade Practices Act* itself to bear on these forms of

⁷ Barriers to entry may have an effect on competition but there are many other factors or elements that can be in play: Corones, below n 10, 99-120.

⁸ Byrne and Mortensen, above n 2, 255; and see Priestley JA in *Law Society of NSW v Ramalca Pty Ltd* (1988) 12 NSWLR 34, 35.

⁹ P Butt (ed), *Concise Australian Legal Dictionary* (3rd ed, 2004) 286.

¹⁰ Stephen G Corones, *Competition Law in Australia* (4th ed, 2007) 110.

¹¹ *Trade Practices Act 1974* (Qld) Part XIA.

¹² The Code applies in relation to persons carrying on business within the jurisdiction: *Competition Policy Reform Act 1996* (Qld).

¹³ Qld, ss 109-61. See discussion at text at below nn 97-122.

law practice.¹⁴ Our analysis begins with the effect that these laws have on solicitors' practices, and on competition in markets for conveyancing.

1 *Market Definition*

Although the two issues are entwined, the question of market definition is generally a necessary preliminary step to considering that of competition.¹⁵ Markets have a number of elements: product or service, geographical limitations, the functional level of the delivery of the good or service; and the potential for change over time.¹⁶

In the *Trade Practices Act*, a 'market' is defined as:¹⁷

... a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and any other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.

In market definition, the first key issue is 'substitutability',¹⁸ and this is approached from both the supply and the demand sides.¹⁹ It has been argued that services supplied by nonlawyer conveyancers may not be substitutable for those supplied by solicitors because of the different levels of education, skill and experience. From the perspective of consumer demand, however, solicitors and nonlawyer conveyancers might be seen simply as alternatives. For current purposes, the market is probably best described simply as the provision of residential conveyancing services.²⁰

The second and most important element of the market is clearly the question of its geographic boundaries. Again the substitution test is relevant.²¹ How far are consumers in any one area prepared to go to obtain this service from other suppliers? The starting point for conveyancing may be quite a limited geographical area. Presumably consumers would look first to local solicitors. Using the hypothetical monopolist test, if the only local solicitor raised fees by five per cent or 10 per cent, would consumers then look beyond their local area? If so, how far would they go?²² The boundary of their search gives insight into the boundary of the market.

¹⁴ Ie, simply because ILPs qualify as trading corporations.

¹⁵ Corones, above n 10, 48-49. As to the relationship between market definition and market power see *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 187-188.

¹⁶ Corones, above n 10, 55. Given the nature of the business the last two elements will not be considered given that they will add little to the market definition in this case.

¹⁷ *Trade Practices Act 1974* (Cth) s4E.

¹⁸ *Boral Besser Masonary Limited v ACCC* (2003) 215 CLR 374, 454.

¹⁹ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 199, 210.

²⁰ Consideration should be given to the purposive approach to market definition: Norman and Williams, 'The Analysis of Market and Competition under the *Trade Practices Act*: Towards the Resolution of Some Hitherto Unresolved Issues' (1983) 11 *Australian Business Law Review* 396, 400-401; *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1987) 17 FCR 211, 218-219; *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 195. On this basis the market would need to be limited to residential conveyancing as this is the only potential field of competition between the two suppliers in this case.

²¹ *Trade Practices Act 1974* (Cth) s4E.

²² Corones, above n 10, 57-61; *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 199; P Crocioni, 'The Hypothetical Monopolist Test: What it Can and cannot Tell You' (2002) 23 (7) *European Competition Law Review* 354; C Sweeney and DL Hay, 'Quantitative Economic Evidence in Australian and New Zealand Courtrooms' (2003) 10 *Competition and Consumer Law Journal* 284, 289-293.

In-depth analysis is evidently needed to assess the extent of relevant market boundaries throughout Queensland and, indeed, whether they stretch beyond the State border. In the absence of empirical analysis, evidence of the distribution of law practices across the State²³ and the significance of conveyancing revenue to many regional practices²⁴ makes it reasonable to suggest that the market for residential conveyancing services is still quite localised; perhaps more markedly so in Charles Mein's 'interior' – regional Queensland.²⁵ Although there is no reason why a consumer could not instruct any solicitor in Queensland to undertake residential conveyancing for property in any part of the State, any evidence that is available suggests that consumers – clients – tend to identify with local solicitors. There would therefore be many markets operating throughout Queensland, with each conveyancing market centred around a different city, town or business hub of the district where clients can most easily talk to the solicitor or paralegal staff, sign documents and pay accounts.

2 *The Competition Code and Residential Conveyancing Markets*

The efforts of the Australian Institute of Conveyancers (AIC)²⁶ at securing access for nonlawyer conveyancers to Queensland conveyancing markets have mainly raised the question of market power. That is, it is argued that solicitors can take advantage of the 'legal practice' barrier to entry²⁷ in an anti-competitive manner. Under the *Competition Code*, the relevant legal yardstick for measuring claims of this kind is section 46.

A person who has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

- (a) eliminating or substantially damaging a competitor ...;
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.²⁸

In determining whether a person has substantial power in a market, courts must have regard to the extent to which their conduct is constrained by the conduct of competitors, potential competitors, suppliers or acquirers in the market.²⁹

There is little doubt, regardless of how narrowly they are interpreted, that in the large majority of conveyancing markets in Queensland, solicitors are competing strongly with other solicitors when offering residential conveyancing services. In all but the remotest of markets, the number of law practices vying for this work means no one provider could ever operate in a manner unconstrained by lawyer competition. While there are other influential factors, such as quality of service, at least in the larger markets the manner in which professional fees have been struck and are advertised are further evidence of the strength of competition. In the Queensland Government's own commissioned competition impact statement, it was accepted that there was strong

²³ See, K McDougall and R Mortensen, 'New South Wales and Queensland Solicitors: A Spatial Analysis' (Paper delivered at National Rural Regional Law and Justice Conference, Warrnambool, Victoria, 2010).

²⁴ Law Council of Australia, *Report into the Rural, Regional and Remote Areas Lawyers Survey*, July 2009, 9-10.

²⁵ Byrne and Mortensen, above n 2, 258.

²⁶ *Ibid* 262-3.

²⁷ *Ibid* 264-71.

²⁸ Competition Code, s46.

²⁹ Competition Code, s46(3).

competition generally for conveyancing services.³⁰ The National Competition Council agreed.³¹

If markets for these services are defined narrowly, then the only areas where there may be legitimate concerns that there is inadequate competition are very remote districts that are served by only a small number of solicitors.³² Still, whether solicitors in remote areas could have substantial market power seems doubtful. The key test is one of market constraints:³³ the extent to which the solicitors could act in an anti-competitive manner, without having concerns that any rival could enter the market for a reasonable period.³⁴ Together, solicitors' easy mobility and the otherwise competitive nature of law practice mean that the potential threat of new solicitors entering the market is a significant countervailing power. Further, despite the tendency to instruct local solicitors, conveyancing markets have become more porous with the growing ease by which consumers can seek advice and representation beyond their immediate business district. This could also be a significant constraint on the acquisition of substantial market power by solicitors' practices in remote areas.³⁵

There are other anti-competitive provisions under the *Competition Code*. It is unlikely, nevertheless, that vertical restraints such as exclusive dealing³⁶ and resale price maintenance³⁷ would have application to solicitors in conveyancing markets. They generally deal with arrangements between parties on different functional levels, and this is not usually relevant to the provision of residential conveyancing services. However, anti-competitive horizontal arrangements between competitors do potentially apply. If in the smaller markets solicitors did try to reach agreements between themselves that affected competition,³⁸ this might violate section 45.³⁹ Any such arrangement that is an exclusionary provision⁴⁰ or that has the purpose, or has or is likely to have the effect, of substantially reducing competition, could be challenged under present competition laws.⁴¹ In particular, any arrangement to fix prices in respect of the conveyancing services would automatically offend the *Competition Code*,⁴² regardless of its effect on competition in the market.⁴³

As we have noted, extended empirical analysis is needed to give more precise definition to the boundaries of residential conveyancing markets, and the risk that any solicitor could acquire substantial market power, but the available evidence to this point does not suggest serious concerns about the competitiveness of the market. It is true that, in many respects, the AIC considered that the *Sande 1* (on the *Mutual Recognition Act*) and the *Sande 2* (on admission and the legal practice reservation) series of cases in the 1990s were, in effect, competition claims.⁴⁴ However, even if assessed in terms of the more general policies that motivated the AIC's support for it, the *Sande* litigation was

³⁰ National Competition Policy Review, *Queensland's Legal Practice Legislation* (2003) 10.

³¹ National Competition Council, *National Competition Policy Report* (2005) 13.8: available at <<http://www.ncc.gov.au/pdf/AST7As-001.pdf>> at 27th November 2010.

³² McDougall and Mortensen, above n 23.

³³ Competition Code, s46(3).

³⁴ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 188.

³⁵ In any case, nonlawyer conveyancers have indicated that it is unlikely that they would seek to move into remote markets: see above n 30, 10.

³⁶ Competition Code, s47.

³⁷ Competition Code, s48.

³⁸ Such agreements could only be expected in smaller markets where the number of competitors could make this conduct feasible.

³⁹ Competition Code, s45.

⁴⁰ Competition Code, s45(2)(a)(i).

⁴¹ Competition Code, s45(2)(a)(ii).

⁴² Competition Code, s45A.

⁴³ Ie, price fixing is a breach that necessarily leads to strict liability.

⁴⁴ See Byrne and Mortensen, above n 2, 263-4.

specifically about securing access to conveyancing markets for nonlawyer conveyancers.⁴⁵ It did not raise any question of market definition or of competition within markets *per se*. Treating the two *Sande* series as irrelevant to this question,⁴⁶ we therefore believe that some significance can be given to the empirical observation that, in the 15 years since the application of the *Competition Code*, there has not been a single action involving Queensland solicitors for anti-competitive conduct relevant to conveyancing.

B Competition Policy

Competition law rests on supporting competition for the benefit of consumers, and not of competitors⁴⁷ – the different angle of the *Sande* litigation that we discussed in the first article.⁴⁸ If the relevant markets are already competitive and the existing participants are effectively controlled (in respect of specific anti-competitive conduct) by the *Competition Code*, it is possible to argue that the *status quo* can be defended. However, all States and Territories did agree that, in implementing the Code, there would be a review of any legislation that imposed restrictions on competition. So the further question to be explored is whether the conveyancing reservation can be defended, as a matter of policy, regardless of any existing evidence of strong competition.

As was noted in the first article,⁴⁹ the National Competition Council and the Queensland Government presently disagree as to whether there is any need to reserve conveyancing work exclusively for solicitors. The significance of this disagreement lies in the Inter-Governmental Competition Principles Agreement made in 1995, which requires the review of any legislation that may have the effect of restricting competition. Specifically, this agreement is that ‘legislation ... should not restrict competition unless it can be demonstrated that: (a) the benefits of the restriction to the community as a whole outweigh the costs; and (b) the objectives of the legislation can only be achieved by restricting competition.’⁵⁰ A transparent and accountable review process was needed to ensure that the interests of the public were of paramount concern, and that the influence of vested interest groups (like, in relation to the conveyancing reservation, the AIC and the Queensland Law Society) be minimised.⁵¹ In the course of this review, it has been accepted that exemptions from competition principles are often appropriate for professionals.⁵² However, the Queensland conveyancing reservation has been more exposed to criticism than any other aspect of the legal practice reservation across Australia because nonlawyer conveyancers are allowed in other States and the Northern Territory.⁵³

⁴⁵ Ibid.

⁴⁶ Likewise similar proceedings in the period involving nonlawyer conveyancing: *Re Wood* [1996] 1 Qd R 688 (mutual recognition) and *Queensland Law Society Inc v Hoy* [1995] QSC 169 (legal practice reservation).

⁴⁷ Corones, above n 10, 34, referring to *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 191, 194, 213; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, 13; *Boral Besser Masonary Limited v ACCC* (2003) 215 CLR 374, 411; *Universal Music Australia v ACCC* (2003) 131 FCR 529, 585; *Baxter Healthcare Pty Ltd v ACCC* [2005] ATPR 42-066.

⁴⁸ Byrne and Mortensen, above n 2, 263-4.

⁴⁹ Ibid 254.

⁵⁰ Cl 5 *Competition Policy Reform Act 1995* (Cth) – *Inter-Governmental Agreements*.

⁵¹ Australian Competition and Consumer Commission, *Promoting Competition and Fair Trading* (2004) 10-11.

⁵² Ibid.

⁵³ Ibid.

1 *The Review of the Queensland Conveyancing Reservation*

Legislation affecting legal practice in Queensland has been the subject of ongoing reviews by the Queensland Government and by the National Competition Council. In its 2005 Annual Review, the Council recognised significant progress by Queensland in removing key restrictions on competition applicable to the legal profession (including the introduction of ILPs),⁵⁴ but concluded that the reform process was not complete.⁵⁵ Its assessment was that the Government had not complied with its obligations under the Competition Principles Agreement by continuing to maintain the conveyancing reservation for solicitors.⁵⁶ Ironically, this assessment was made just after the *Legal Profession Act 2004* (Qld) completed the process of removing barristers as a group entitled to undertake conveyancing.⁵⁷

Earlier, in 2003, the Queensland Government considered the conveyancing reservation in a competition impact statement.⁵⁸ A key conclusion made in the impact statement was that:⁵⁹

...a full law degree is not necessary to the achievement of the objective of the legal practice legislation with respect to conveyancing. If persons are able to meet standards of knowledge and practical training, allowing them to competently perform conveyancing services and have adequate professional indemnity and fidelity insurance, they should be permitted to compete in the market for conveyancing work.

Despite this conclusion, the Government decided to maintain the reservation and advised the Council of its reasons. These were:⁶⁰

- The market for conveyancing services was already competitive and allowing nonlawyers into the market will not necessarily result in lower fees.
- The costs of establishing a scheme to license nonlawyer conveyancers was not justified.
- Nonlawyer conveyancers may not be supported by appropriate insurance and may be vulnerable to market failure.
- Conveyancers in other jurisdictions may only offer limited services or were not legislatively recognised.

It is interesting that the Council accepted that conveyancing markets in Queensland were highly competitive,⁶¹ and that lowering barriers to enter them might therefore be of little or no benefit to consumers. However, the Council was more concerned to apply the State's obligations under the Competition Principles Agreement which, effectively, presume that competition restrictions like a barrier to entry should be removed. They can only be justified if shown to be in the public interest. Here the onus rested on the Queensland Government, and the Council thought it had not shown that the

⁵⁴ Other reforms included removing separate admission requirements for solicitors and barristers and allowing interstate lawyers to practise without a local practising certificate: R Mortensen, 'Becoming a Lawyer: From Admission to Practice under the *Legal Profession Act 2004* (Qld)' (2004) 23 *University of Queensland Law Journal* 319.

⁵⁵ National Competition Council, above n 31, 13.7.

⁵⁶ *Ibid* 13.9.

⁵⁷ Byrne and Mortensen, above n 2, 262.

⁵⁸ National Competition Policy Review, above n 30, 13.7.

⁵⁹ *Ibid* 10.

⁶⁰ National Competition Council, above n 31, 13.8.

⁶¹ *Ibid* 13.8.

conveyancing reservation was in the public interest.⁶² The Council agreed that, given existing competition, the introduction of nonlawyer conveyancing might not result in lower fees, but there was no evidence to indicate that lower fees would not result. Similarly, while the regulation of nonlawyer conveyancers would attract costs, the Government had not shown that those costs would outweigh any benefits to consumers that might result. The Queensland Government had also not proved its concerns about insurance for, and the potential failure of, nonlawyer conveyancers. It had also not shown how these risks could be minimised. Finally, the Council denied that it had singled out Queensland on this issue; it did not consider that limitations on nonlawyer conveyancing in other States were appropriate.⁶³

2 Other Issues for Cost/Benefit Analysis

The central issue for the Queensland conveyancing reservation under the Competition Principles Agreement is not whether (as under the competition law) the reservation leads to individual solicitors' practices exercising a substantial degree of power in conveyancing markets, but whether it positively benefits the public and, if so, how those benefits outweigh the costs of maintaining the reservation. The State Government offered its four reasons for maintaining the reservation but, as we have noted before,⁶⁴ these reasons have shifted over time. A closer analysis of the arguments that have been developed on these issues allows us to revisit some that have been mustered in the past.

(a) *Qualifications Skill and Expertise of the Service Provider*

A concern expressed in an earlier competition review of the reservation is that lowering the barrier to entering conveyancing markets in Queensland will lead to residential conveyancing services being offered by two different types of suppliers, who may be seen as comparable by consumers even though they may have considerably different levels of expertise. Solicitors arguably bring to the service a higher level of skill and training. They are subject to strong professional controls and ethical standards. And although residential conveyances may be generally seen as routine, there is significant potential for the transaction to raise more complicated legal problems.⁶⁵ Nonlawyer conveyancers, on the other hand, are considerably less qualified and do not have the range of expertise needed to deal with all potential problems that a land transaction can involve. Their ability and professional standards could not be easily compared. The argument is not just that the suppliers may be of differing quality, but that consumers may not be able to assess that from information available in the market. The argument is that this creates the problem of information asymmetry:⁶⁶ consumers have a limited capacity to make informed choices about the provider who will serve them best.⁶⁷ It is

⁶² Ibid 13.8.

⁶³ Ibid 13.9.

⁶⁴ Byrne and Mortensen, above n 2, 254.

⁶⁵ For a summary of these arguments refer National Competition Policy Legislation Review, *Legal Profession Act 1993 Regulatory Impact Statement April 2001* (2001) 22.

⁶⁶ For a discussion of the development of the economic principles that support this, see Spigelman, above n 6.

⁶⁷ For a discussion of the consequences of consumers lacking the information to make optimal purchasing decisions, see E Miller, WD Duncan, SA Christensen, SG Coronas, D Round, M Burdon and AP Stickley, 'Is Mandatory Disclosure an Effective Consumer Protection Mechanism in Australian Real Estate Markets? The Perspective of Queensland Industry Experts' (Paper presented at the Proceedings Social Change in the 21st Century Conference, Brisbane, 2006) 4.

said that information asymmetry led to the original need to regulate standards of accreditation and the use of professional titles. Consumers could then rely with some confidence on that professional standing.⁶⁸

(b) *The Duties Owed to Clients*

The question of the standard of care owed by nonlawyer conveyancers to their clients appears to have been first raised in *Benson v MacLachlan*.⁶⁹ Although only in an *obiter dictum*, Meagher JA believed that the *Conveyancers Licensing Act 1995* (NSW) allowed nonlawyer conveyancers 'to do any conveyancing work, not simply easy conveyancing work [and] they are now placed on equal standing with solicitors in that area of legal practice, and they ought to have the same liability'.⁷⁰ In contrast, Handley JA distinguished the roles of solicitors and nonlawyer conveyancers by their qualifications.⁷¹

Licensed conveyancers are not qualified for admission as legal practitioners and are not entitled to hold themselves out as so qualified. They do not have law degrees and the public know or should know these basic facts. They are capable of doing conveyancing work which does not require the fuller legal knowledge which solicitors are expected to possess. They can and do provide a basic service at a basic cost. They should not be expected either by their clients, or by the courts, to provide a champagne service for what amounts to a beer price.

Handley JA's assumption that there are price differences between the conveyancing services offered by solicitors and conveyancers is questionable. However, the possibility that different standards of care could be expected of solicitors and conveyancers is the principal cause for concern about Handley JA's judgment in *Benson*. This naturally means consumers' – clients' – rights are contingent on who provides the service, and who is negligent. Still, it would also be a consideration that is likely to create greater information asymmetries in conveyancing markets, as it is unlikely that consumers would know of different standards of care and even less likely that either solicitors or nonlawyer conveyancers would advertise them.

(c) *Insurance, Risks of Failure, Costs of Licensing*

To have access to the same markets as solicitors, it would be expected that nonlawyer conveyancers should offer the same protections for consumers through appropriate insurance and a fidelity fund. This may possibly have been achieved in other States, though not without considerable anguish along the way.

In 2004, the Queensland Government still maintained disquiet about the ability of nonlawyer conveyancers (as a group) to obtain appropriate insurances, and the potential losses to be incurred from public funds in the case of failures.⁷² While these concerns may be alleviated by appropriate licensing schemes that incorporate requirements for insurance and levies for fidelity funds, the cost of those schemes for a small occupational group is possibly significant when weighed against any likely consumer benefits from the increased competition.

⁶⁸ Organisation for Economic Co-operation and Development Competition Committee, *Policy Roundtables Competition in Professional Services 1999* (1999) 104.

⁶⁹ [2001] NSWCA 263.

⁷⁰ *Ibid* [20].

⁷¹ *Ibid* [24]. For further analysis of this decision, see P Morgan, 'Conveyancing Choice, Regulation diverges with new Conveyancers Act' (2003) 41 *Law Society Journal* 51.

⁷² National Competition Council, above n 31, 13.8.

The particular concerns experienced in other States when regulating nonlawyer conveyancers include minimum educational requirements, and the potential for actions based on incompetence or fraud. The question of educational requirements received considerable attention in 2007, when the New South Wales Office of Fair Trading reviewed the qualifications required for conveyancers under the *Conveyancing Licensing Act 2003*.⁷³ The NSW Government wanted to ensure that licensing meant that nonlawyer conveyancers were accountable and met minimum standards of competence. Attention was drawn to possible points of risk for consumers when dealing with a conveyancer, specifically to identify what should be the prescribed competencies for licensing. In doing so, it highlighted the problem of information asymmetry discussed earlier,⁷⁴ in the public being able to assess the conveyancer's competence on the basis of information available in the market.⁷⁵

For many people, buying or selling property may only occur once or twice in their lifetime and so they may find it difficult to assess whether a conveyancer has the level of competence to efficiently represent their interests.

The identified risks arose from the fiduciary relationship with clients, the potential for poor quality service and, again, information asymmetry.⁷⁶ They included risks of fraud and incompetence. The need to avoid these demanded that the necessary protections be thoroughly mapped against the qualifications to be required of nonlawyer conveyancers, and inevitably a raising of educational standards. Presumably the cost of implementing such measures in Queensland, with its own jurisdictional peculiarities, would be considerable. However, the issue should have already been considered when dealing with the qualifications of real estate agents who, as we discussed in the first article, are allowed to perform significant aspects of what the law regards as conveyancing work.⁷⁷

In Victoria the need for comprehensive licensing requirements was highlighted by the collapse of Grove Conveyancing Services in 2004.⁷⁸ This identified for the Victorian Government the need for closer regulation of nonlawyer conveyancers to protect consumers. A report delivered to the Government in 2005 raised again questions of consumer protection that relate to information asymmetries as well as identifying the potential for the transactions to cause significant harm to third parties.⁷⁹

In particular consumers may find themselves at an information disadvantage when purchasing conveyancing services because such services may be:

- hard to inspect before they are purchased;

⁷³ NSW Office of Fair Trading, *Conveyancers Licensing Act 2003 – Qualification Requirements for the Conveyancer Industry*, Consultation Paper, January 2007.

⁷⁴ See text at above nn 66-68.

⁷⁵ NSW Office of Fair Trading, above n 73, Heading 6(a).

⁷⁶ Ibid.

⁷⁷ Byrne and Mortensen, above n 2, 271-4.

⁷⁸ Groves Conveyancing Services was one of Geelong's busiest conveyancers. It collapsed in October 2004 with several million dollars of client funds missing. Some clients who had sold their homes had reinvested money through Grove. Others had left titles with Grove, and it was alleged these had been used by the firm as collateral for its own financial arrangements: P Henrichs, 'Widow Takes on \$9m Fight', *The Age*, 14 November 2004; 'Former Grove Principal Bob Day Surrenders to Police', *Geelong Advertiser*, 2 May 2008; available at <www.geelongadvertiser.com.au/article/2008/05/0213550_news_pf.html> at 27th November 2010.

⁷⁹ Allen Consulting Group, *The Regulation of Conveyancing Services in Victoria*, Final Report, June 2005.

- hard to assess even after purchase due to their complexity and the requirement for a judgement on the quality of those services;
- hard to check because services tend to be bought infrequently and therefore they are not easily compared with quality of previous purchases; and/or
- relate to a high value purchase so mistakes may cause serious and potentially irreversible harm.⁸⁰

... the failure of a conveyancer may create a series of ripple effects as innocent third parties are affected because of the loss of money, delays in transfer settlement, and so on. The magnitude of the funds involved in conveyancing means that costs for third parties can be large even with only a few problem conveyances.⁸¹

After the introduction of the *Conveyancers Act 2006* (Vic) to license and better regulate conveyancers, a Regulatory Impact Statement was also prepared.⁸² It was still concerned about the need to protect consumers against the risks highlighted in the earlier report. It suggested that unforeseen costs of adequate protection for consumers of conveyancing services could potentially increase. Problems associated with conveyancing have a long lead time, and the fear was that there has been insufficient time for some problems to surface. There were also ongoing questions whether the legislation appropriately dealt with the qualifications of conveyancers, and the adequacy and process of obtaining professional indemnity insurance.⁸³ Indeed, the AIC predicted that efforts to improve the qualifications of nonlawyer conveyancers in Victoria and 'clean up' relationships with real estate agents would see some leave the industry,⁸⁴ suggesting that barriers to entry were initially lowered too far. The complexity of the licensing regime and ongoing concerns about potential risks for consumers add weight to the argument in Queensland about the costs associated with establishing the scheme.

(d) *Bush Lawyers*

Although in the 1870s the Douglas Government was suggesting that, if nonlawyer conveyancers were needed anywhere in Queensland, it was in 'the interior',⁸⁵ since that time there have been persistent concerns about the impact increased competition may have on the viability of regional solicitors' practices. The argument relies on the assumption that revenue from conveyancing practice in the regions cross-subsidises other aspects of legal practice; in particular, family law and litigation. If, of course, nonlawyer conveyancing made regional practice less viable, then in a given conveyancing market consumers could be deprived of other legal services. In the first article, we outlined the representations that regional solicitors have regularly made to prosecute for illegal conveyancing.⁸⁶ More recently, two Queensland Law Society Presidents continued this argument. In 2002, Joe Tooma said 'diluting the conveyancing market with private practitioners would impact on the viability of some law firms, especially in the bush. We do not want to see rural areas lose their legal services.'⁸⁷ In 2003, Glenn Ferguson, made

⁸⁰ Ibid 18-20.

⁸¹ Ibid.

⁸² Allen Consulting Group, *Conveyancing Regulations 2007*, Regulatory Impact Statement, December 2007.

⁸³ Ibid 6-11.

⁸⁴ Chris Merritt, 'Conveyancers Target Sunshine State', *Australian*, 27 January 2006.

⁸⁵ Byrne and Mortensen, above n 2, 258.

⁸⁶ Ibid 259.

⁸⁷ C Griffith, 'Lawyers May Keep Property Monopoly', *Courier Mail*, 5 June 2006, 12.

the claim that 'conveyancing was the backbone of the practice of many regional solicitors' and that most 'of the solicitors in regional centres are generally the only solicitor in that town'.⁸⁸

It has been argued in Queensland's own competition policy review that it is more likely regional solicitors would have little to worry about. It claimed nonlawyer conveyancers would not operate in such areas simply because they would need a larger base of clientele to support a business that just provided conveyancing services. This has certainly been the claim of the conveyancers themselves.⁸⁹ Related to this, solicitors' practices have greater service differentiation and more diverse revenue sources and, as a result, any loss of work in one area should not impact as significantly on the availability of legal services generally. This naturally undermines arguments about *the extent* to which conveyancing revenue cross-subsidises other legal services. Finally, existing solicitors are well placed to compete with nonlawyer conveyancers and to market their existing goodwill and higher qualifications.⁹⁰

This is one consideration that we believe should now be disregarded, or weighed as insignificant. The Law Society has raised no empirical evidence to support the Tooma and Ferguson claims and, if anything, the evidence that is now available suggests that the advent of nonlawyer conveyancing has not led to poorer legal service provision in the regions than is currently available in Queensland. In research related to this article, McDougall and Mortensen have analysed the distribution of solicitors' practices across NSW (where nonlawyer conveyancing is lawful) and Queensland (where it is not). The evidence clearly establishes that access to legal services – both solicitors' practices and solicitors – is better in NSW than it is in Queensland, and that the higher density of practices in NSW holds consistently for metropolitan, regional and remote areas.⁹¹ Here, it is naturally impossible to establish the specific effect that the conveyancing reservation has on this distribution, but it can be said that the legalising of nonlawyer conveyancing in NSW in 1993 has not led to a poorer distribution of solicitors' practices in that State. In general, it seems best that the Law Society abandon this argument.⁹²

(e) *Professional Fees*

It has previously been claimed that 'conveyancing fees in Queensland are already as low, or lower, than anywhere else in Australia because of existing competition'.⁹³ However, it is difficult also to maintain the 'fees' argument when evidence from other jurisdictions is mustered. For example, it has been claimed that when nonlawyer conveyancing was revived in NSW in 1993, the average price of a conveyance fell by 17 per cent over two years.⁹⁴ Perhaps the more interesting question would be whether this is a shorter term phenomenon. Studies on the deregulation of conveyancing in England and Wales between 1985 and 1992 would suggest it could be.⁹⁵ In the year before the first nonlawyer conveyancers (re)joined the English and Welsh conveyancing markets, solicitors were reportedly reducing fees in anticipation of the new competition. Three years later, solicitors' fees in areas where there were nonlawyer conveyancers were lower than those of solicitors in other areas. However, six years later, both the fees of solicitors

⁸⁸ Chris Merritt, 'Conveyancing Market Too Tough', *Australian Financial Review*, 12 September 2003.

⁸⁹ *Ibid.*

⁹⁰ National Competition Policy Review, above n 30, 10.

⁹¹ See above n 23.

⁹² *Ibid.*

⁹³ Merritt, above n 88.

⁹⁴ Allen Consulting Group, above n 82, 33.

⁹⁵ FH Stephen and JH Love, 'Regulation of the Legal Profession' in B Bouckaert and G De Geest (eds), *Encyclopedia of Law and Economics* (1999) III, 987, 995-6.

and nonlawyer conveyancers had risen by more than those in markets with no licensed conveyancers. Also, the fees of conveyancers were closer to those of solicitors than had been the case before. Accordingly, the *threat* of lowering barriers to entry into conveyancing markets probably had a greater effect on fees than the *actual entry* of nonlawyer conveyancers to these markets. There is therefore some suggestion that conveyancers provide a more limited service than solicitors but, unsurprisingly, still have the same interest as solicitors in maximising fees. 'These results should caution against the assumption that multiple professional bodies will necessarily be to the benefit of consumers'.⁹⁶

C *Ramalca Revived: Incorporated Legal Practices*

The arguments of competition law and policy that have been made in relation to the Queensland solicitors' conveyancing reservation may need some repositioning in light of competition-based reforms that have already been made to the profession. Specifically, the introduction of ILPs with the *Legal Profession Act 2007* (Qld) brought significant changes to the lawful management, practice and capital financing arrangements of solicitors' business structures that, perhaps, have had unforeseen effects on the possible access of nonlawyers to conveyancing markets. In the first article, we discussed how some corporate structures that blended lawyer and nonlawyer practices were held to be unlawful in *Law Society of NSW v Ramalca Pty Ltd*.⁹⁷ ILPs now legalise some *Ramalca*-style arrangements.

The *Legal Profession Act*, adopting the *Model Laws*, allows a solicitor to incorporate a practice, whether conducted alone or with other solicitors. In addition, it also allows *any* corporation to undertake legal practice so long as it meets two requirements of solicitor involvement in its management and the supervision of legal work. First, the corporation needs at least one legal practitioner director,⁹⁸ who must be an 'Australian legal practitioner' holding a principal's practising certificate.⁹⁹ In Queensland, this means the director must be entitled to practise as a principal solicitor.¹⁰⁰ Secondly, the solicitor-director must ensure that the corporation has 'appropriate management systems' that enable it to provide legal services in accordance with solicitors' usual professional obligations.¹⁰¹ This duty also requires the solicitor-director to take reasonable action to make sure breaches of professional obligations do not happen or, if they do happen, to take 'appropriate remedial action'.¹⁰² No other special requirements exist for an ILP, except that, in addition to the usual regulation of corporations conducted by the Australian Securities and Investments Commission, they remain under the regulation of the Queensland Law Society and the Legal Services Commissioner. Indeed, the Law Society and the Commissioner have powers to audit ILPs that they do not have for unincorporated practices.¹⁰³

The result is that the ILP is a business structure for lawyers that is radically different from the traditional partnership. An ILP is not restricted to undertaking only legal practice – it can also conduct businesses that do not amount to providing legal

⁹⁶ Ibid.

⁹⁷ (1988) 12 NSWLR 35, as discussed in Byrne and Mortensen, above n 2, 269-70.

⁹⁸ Qld, s117(1).

⁹⁹ Qld, s110.

¹⁰⁰ A barrister cannot be a legal practitioner director: r 85(d) *Legal Profession (Barristers) Rule 2007* (Qld).

¹⁰¹ Qld, s117(3).

¹⁰² Qld, s117(4). See also s118.

¹⁰³ Qld, s130.

services.¹⁰⁴ Where in a partnership the owners have fiduciary duties that restrict the extent to which they can abdicate managerial responsibilities for the practice, there is no requirement for an ILP that a shareholder be a director or that a solicitor-director be a shareholder. The other directors need not be lawyers, let alone have a principal's practising certificate. It is quite possible that all of the directors of an ILP (but one) might not have any legal qualifications.¹⁰⁵ And, there is no requirement whatsoever that the ILP be owned, even in part, by a lawyer. All of the owners of any unincorporated law practice – whether it is sole trading or a partnership – must hold principals' certificates, and they are still banned from 'sharing receipts' with anyone who does not hold a principal's certificate.¹⁰⁶ In fact, a number of solicitors in Queensland have been disciplined for sharing conveyancing profits with nonlawyer conveyancers. In *Adamson v Queensland Law Society*,¹⁰⁷ a solicitor suffered a year's suspension from practice for sharing a fixed 75 per cent of professional fees with his conveyancing clerk (who actually worked out of separate premises). The arrangements were a little more elaborate in *Legal Services Commissioner v McClelland*,¹⁰⁸ where the solicitor was suspended from practice for four months. He had arranged with a nonlawyer conveyancer (and her company) that she would organise buyers to sign contracts and assist them in securing finance, and would then refer them to the solicitor for the conveyancing.¹⁰⁹ For each transaction, the solicitor charged \$2,500 but remitted a fixed \$1,000 to the conveyancer.¹¹⁰ The idea of the ban on sharing receipts is that all profits of the practice should belong, at least in the first instance, to solicitors with principals' certificates. For an ILP, all profits of the practice might belong to no one who is a lawyer. As an entity, it also falls outside the ban on sharing receipts that applies to unincorporated practices.¹¹¹ Therefore, if a solicitor were to incorporate his practice, it is possible that the resulting ILP could properly share profits with a clerk or nonlawyer conveyancer under referral or outsourcing arrangements similar to those disciplined in *Adamson* or *McClelland*.¹¹²

So, in traditional unincorporated legal practice, reserved 'legal practice' is supposed only to be managed by and make profits for principal solicitors, and to be exclusive of other kinds of business. For ILPs, legal practice is more porous, and may be largely managed by and run for the benefit of people who are not lawyers. So far as accessing Queensland conveyancing markets is concerned, it took about a year for interstate nonlawyer conveyancers to use the ILP. At least one interstate conveyancer opened business in Brisbane through an ILP (with a solicitor as a director) in 2008.¹¹³ There may now be more, especially on the Gold Coast.¹¹⁴ The AIC saw the ILP as an opportunity for nonlawyer conveyancers to gain access to Queensland markets, but as a 'transitory

¹⁰⁴ Qld, ss111(1), 112(1). It cannot conduct managed investment schemes [s 112(2)], and there are restrictions on what a practice can do when it has also acted as a real estate agent: r 24 *Legal Profession Regulation 2007* (Qld).

¹⁰⁵ Qld, s117(1).

¹⁰⁶ *Legal Profession (Solicitors) Rule 2007* (Qld) r33.

¹⁰⁷ [1990] 1 Qd R 498.

¹⁰⁸ [2006] LPT 013.

¹⁰⁹ *Ibid* [4].

¹¹⁰ *Ibid* [5].

¹¹¹ *Legal Profession (Solicitors) Rule 2007* (Qld) r33.

¹¹² Paul Sande has lodged a complaint with the Legal Services Commissioner about solicitors sharing receipts with nonlawyer conveyancers: Chris Merritt, 'Land Law Practice Inquiry for Qld', *Australian*, 5 September 2008.

¹¹³ Chris Merritt, 'Conveyancers Find Way To Break the Land Law Monopoly', *Australian*, 29 August 2008 ('Land Law Monopoly').

¹¹⁴ Chris Merritt, 'Title Fight: Conveyancer Sees Her Chance – One Non-lawyer Found that Solicitors Cast a Long Shadow Over Conveyancing in the Sunshine State', *Australian*, 29 August 2008 ('Title Fight').

phase' in its efforts to establish a licensing system that did not involve lawyers.¹¹⁵ The regulators also recognised that the ILP gave new opportunities for nonlawyer conveyancers to be involved in conveyancing work in Queensland, but naturally under a principal solicitor's supervision. Legal Services Commissioner John Briton said that 'an incorporated legal practice that does conveyancing is no different to a partnership that employs conveyancers who are not legally trained.' 'That is quite proper so long as they are supervised or the lawyer is doing the component of conveyancing that counts as legal work.'¹¹⁶

The ILP therefore demands some rethinking of the lawful arrangements for conveyancing in Queensland. The arrangements that were punished in *Ramalca* – a lawyer doing the conveyancing, working within the company's business structure, using its secretarial resources and paid a salary – are now allowed. The only continuing restrictions are that the lawyer is a properly certified solicitor (and not, as in *Ramalca* itself, a barrister), is made a director of the corporation, and takes any supervision of legally unqualified staff seriously.¹¹⁷ As we have noted, the traditional barriers to gaining access to the profits of legal practice have now disappeared, and this suggests some rethinking of the competition issues canvassed by the National Competition Council in 2005. Strangely, ILPs may have made the AIC's particular case for access to Queensland conveyancing markets even harder to argue.

III CONCLUSION

The purpose of competition law is for courts to determine whether a given market is competitive, and whether the conduct of market participants has a detrimental effect on competition. It is not necessarily to change the prevailing market structure. Existing monopolies, oligopolies or barriers to entry are not to be unthinkingly dismantled. Quite simply, the law sensibly just restricts the behaviour of those who do business in those conditions. Solicitors in Queensland already operate in a competitive market. They are subject to the *Competition Code* (which applies all the anti-competitive restrictions to their business) and, to date, there have been no prosecutions against solicitors for violating that Code. From the legal perspective, therefore, maintaining the existing (and significantly qualified) 'legal practice' barriers to entering conveyancing markets may be defensible.

From the perspective of competition policy, however, the position is more difficult. There is little, if nothing, to suggest that lowering the barrier to entry will improve the quality and efficiency of conveyancing services for consumers. The question largely seems to be one of whether to benefit a group of potential suppliers: nonlawyer conveyancers. In other words, the purpose of the AIC's efforts to change legal barriers to entering Queensland conveyancing markets is precisely the same as the limited focus of the *Sande* litigation. Regardless of any improvement for consumers, should nonlawyer conveyancers be allowed to profit by different terms of access to Queensland conveyancing markets?

¹¹⁵ Land Law Monopoly, above n 113.

¹¹⁶ Chris Merritt, 'Conveyancers Seeking Solicitors', *Australian*, 29 August 2008.

¹¹⁷ The *Sande 2B* arrangements – outsourcing to an interstate conveyancer – remain unlawful if the corporation offering conveyancing services in Queensland is not itself an ILP: see Byrne and Mortensen, above n 2, 264, 270.

A Mutual Recognition

The AIC's efforts at securing access to Queensland markets have tended to concentrate on arguments based on the principle of the mutual recognition of occupations across Australia. However, the *Mutual Recognition Act* itself has been of no assistance. In the mid-1990s, the *Supreme Court Act 1867* and its references to certificated conveyancers were still on the Queensland statute book, but so was the *Legal Practitioners Act Amendment Act 1938*'s ban on admitting conveyancers after 1 January 1940.¹¹⁸ As a result, in the *Sande IA* case¹¹⁹ Fryberg J held that the provisions of the Act of 1938 'severely restrict the operation of the 1867 Act', and that they ended the occupation of conveyancer in Queensland.¹²⁰ Therefore, although Sande was a land broker in South Australia, there was no occupation of conveyancer in Queensland that could be regarded as equivalent to land broking.¹²¹ And even if court-licensed conveyancers still existed in Queensland, it was a profession that lawfully conducted more kinds of legal work than the South Australian land brokers' profession did. They could not be regarded as equivalents.¹²² Likewise in *Sande IB*¹²³ in the Administrative Appeals Tribunal, Mathews J held that the occupation of conveyancer had ceased to exist by the time the *Mutual Recognition Act* was passed.¹²⁴ In the appeal to the Full Court of the Federal Court – *Sande ID*¹²⁵ – Lockhart J agreed with Sande that the office of conveyancer had not been abolished in Queensland, but that the effect of the Act of 1938 was that it was 'practically unreal' to regard anyone as now qualifying for admission to that profession in Queensland.¹²⁶ This put an end to any genuine attempt by individual conveyancers to gain access to Queensland markets under the *Mutual Recognition Act*, although *Sande 2A*¹²⁷ shows that Sande himself continued to resort to the Act. It also shows that he was too prepared to overwork its language, and was punished for doing so.¹²⁸

The AIC has nevertheless continued to press the mutual recognition principle for lowering the barrier to entry, and in some respects still denies the effect of the *Sande I* litigation. In 2008, it argued in a submission to the Productivity Commission on mutual recognition schemes that it was 'erroneous' to claim that the occupation of conveyancer did not exist in Queensland. There were nonlawyer conveyancers working in Queensland solicitors' practices; they just could not work outside them.¹²⁹ Perhaps reflecting the AIC's origins, it appealed especially to the experience of nonlawyer conveyancing in South Australia and suggested that, if interstate conveyancers were recognised in Queensland, they would give conveyancing markets 'much needed competition', and result in 'very significant benefits to the consumer'. It claimed that the current arrangements in Queensland led to a 'denial of public benefit' and 'reduced

¹¹⁸ Byrne and Mortensen, above n 2, 258-62.

¹¹⁹ [1996] 1 Qd R 671; see also Byrne and Mortensen, above n 2, 264.

¹²⁰ [1996] 1 Qd R 671, 679.

¹²¹ Ibid 680.

¹²² Ibid 685.

¹²³ [1995] AATA 593.

¹²⁴ Ibid [43].

¹²⁵ (1996) 134 ALR 560.

¹²⁶ Ibid 2. The decisions in *Sande IA* [1996] 1 Qd R 671, 685 and *Re Wood* [1996] 1 Qd R 688, 691 that the Supreme Court was not a registering authority under the *Mutual Recognition Act* also proceed on this assumption.

¹²⁷ [1998] 1 Qd R 273.

¹²⁸ See Byrne and Mortensen, above n 2, 264.

¹²⁹ Australian Institute of Conveyancers, *Submission to the Australian Productivity Commission Review of Mutual Recognition Schemes*, 18 July 2008, 1.

productivity'.¹³⁰ However, these submissions lacked any empirical support for the AIC's claims of competition and benefit and, indeed, did not even suggest what those benefits might be. Significantly, in relation to the Queensland reservation it made no suggestion as to how the *Mutual Recognition Act* should be changed so as to enable nonlawyer conveyancers to offer their services in Queensland. This is understandable, as it is difficult to see how continuing to pursue mutual recognition solutions without, in the *Legal Profession Act*, making a second exception to the Queensland conveyancing reservation can assist the AIC.¹³¹ As Lockhart J noted in *Sande ID*, the *Mutual Recognition Act* 'preserves the right of the State ... to regulate the manner of carrying on an occupation in that State'.¹³² Spender J added that it would be 'farical' to try to solve the AIC's problem of access by any means other than a change to Queensland's own laws; otherwise the only nonlawyers allowed to conduct conveyancing in Queensland would be 'non-Queenslanders'.¹³³

B Costs and Benefits

The principal interest that both the Queensland Law Society and the AIC have in the debate over the (qualified) reservation in Queensland of conveyancing for lawyers is the profit of their members. That is how it should be. But any assessment of the value of the reservation for the public is to be made from a different perspective, and with the interests of a professional or industry association appropriately discounted. However, the account given earlier of the development of the conveyancing reservation, and its analysis in light of competition law, policy and reforms already made, suggest more concentrated lines of debate for any future reconsideration of the reservation.

To begin with, there are arguments that the Law Society is best to abandon, or that it should be reluctant to make. At present, the 'bush lawyers' argument cannot be sustained. There is no evidence to support it, and what evidence that is available suggests, to the contrary, that nonlawyer conveyancing has not necessarily led to poorer access to regional solicitors' services than Queensland has at present.¹³⁴ Further, although the qualifications of nonlawyer conveyancers are certainly an important consideration, the Law Society itself cannot credibly argue that lawyers alone meet the necessary standards of education and training when, for so long, it effectively nullified important aspects of the conveyancing reservation by endorsing real estate agents' dominant role in the very creation of residential land sale contracts. The Government, likewise, has tacitly recognised this by regularising the agents' exception to the reservation in the *Legal Profession Acts*.¹³⁵ Equally, although in 2008 the AIC was at pains to reinforce that there be 'no lowering of educational requirements and other standards for Conveyancers to operate',¹³⁶ it has still not developed national standards of education and training for nonlawyer conveyancers and, before 2005, had by all accounts been prepared to allow the barrier to entering Victorian conveyancing markets to be lowered below the point where the public was adequately protected.¹³⁷

Any reconsideration of the conveyancing reservation therefore, we suggest, should concentrate on three issues. First, the expertise required to conduct a conveyance should not be exaggerated. Arguments about the necessity of a lawyer's qualifications and

¹³⁰ Ibid 580.

¹³¹ The first exception is that given for real estate agents: see Byrne and Mortensen, above n 2, 271-4.

¹³² (1996) 134 ALR 560, 580.

¹³³ Ibid 581.

¹³⁴ See above text at nn 85-92.

¹³⁵ See Byrne and Mortensen, above n 2, 271-4.

¹³⁶ Australian Institute of Conveyancers, above n 129, 2.

¹³⁷ See above nn 78-83.

expertise have little credit when nonlawyer conveyancing is allowed in all other States and the Northern Territory and, for the most part, without serious industry-wide problems of expertise. However, the likelihood of different qualifications must also overcome the effect that information asymmetries can have on consumers. It would be unacceptable if the presumably lower educational and training standards of nonlawyer conveyancers were to allow a lower standard of care,¹³⁸ poorer insurance or fidelity coverage, or weaker regulatory or disciplinary supervision.¹³⁹ This leads to the second, and most important, consideration: the costs of a regulated, nonlawyer conveyancing scheme, as compared with the benefits. It seems doubtful, given the National Competition Council's agreement in 2005 that Queensland conveyancing markets were already competitive,¹⁴⁰ that any benefits of nonlawyer access will be significant. Accordingly, the costs of any regulatory scheme for nonlawyer conveyancers must be minimal if lowering the barrier to entry is to be worthwhile. The experience in other States has shown that it is difficult (and presumably costly) to provide the necessary regulation for nonlawyer conveyancers. The AIC is therefore best to concentrate its efforts on securing protections and assurances equivalent to those that solicitors now give, but with minimal additional cost. And thirdly, the effect that ILPs have on this debate must be seriously weighed. The question now before the National Competition Council is not what benefits consumers; it is what secures benefits to nonlawyer conveyancers. However, ILPs already give them the right to draw profits from conveyancing services in relation to land in Queensland. The marginal cost, which imports all of the protections that are available for solicitors' conveyancing under the *Legal Profession Act*, is engaging a properly certified solicitor as a director.¹⁴¹ Furthermore, it is possible that the cost of a solicitor-director in a nonlawyer-controlled ILP is the minimum that is required to secure the most effective regulation of nonlawyer conveyancing services. It is even possible that this may be a more efficient and protective arrangement than the schemes currently in place for nonlawyer conveyancers in other States and the Northern Territory. It is a solution that is untidy, and one that many in the conveyancing industry do not want.¹⁴² To this point, the contest between solicitors and conveyancers in Queensland has been one of mutual exclusion. Solicitors have maintained that nonlawyer conveyancers should be excluded from the State, and conveyancers want a scheme for doing business exclusively of solicitors. It may just be that the most protective cost-efficient arrangement requires them, through an ILP, to work together. When there were plans in 1930 to abandon certificated conveyancers in NSW,¹⁴³ the *Sydney Morning Herald* complained that just 'the solicitors remain'.¹⁴⁴ The conclusion can only be tentative, but it might be that for Queensland in the 2000s this is still the best outcome.

¹³⁸ See above nn 69-71.

¹³⁹ See above nn 72-83.

¹⁴⁰ See above nn 30-31.

¹⁴¹ See above nn 97-117.

¹⁴² Title Fight, above n 114.

¹⁴³ Byrne and Mortensen, above n 2, 256.

¹⁴⁴ EH Tebutt, 'Exit the "Conveyancer": No Furniture Removed', *Sydney Morning Herald*, 14 June 1930, 14.