

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

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*Now all be ashes, the conveyancers pass, to be one with Babylon and Tyre.
Great is Diana of the Ephesians, for the solicitors remain.* -- EH Tebbutt¹

I INTRODUCTION²

Queensland is now the only State in Australia to reserve conveyancing work exclusively for solicitors.³ This is, of course, a source of lingering controversy and resentment, especially amongst nonlawyer conveyancers elsewhere in Australia who, despite enjoying a long history, have grown most significantly in numbers and market profile since the 1990s.

The reasons offered for the exclusive reservation of conveyancing work for solicitors in Queensland have shifted over time. In the justification given for it in 2004 to the National Competition Council, the State Government submitted, in short, that Queensland markets for conveyancing services were already competitive and that, in general, the costs of regulating nonlawyer conveyancers and assuring adequate protection for consumers were likely to exceed the minimal benefits that lowering barriers to entry might bring.⁴ The National Competition Council disagreed with this,⁵ and so the Government remains under an obligation to provide a rationale – acceptable to the Council – for what the Council considers is an uncompetitive arrangement.⁶ In this article, and a second that will follow in a later edition of the *University of Queensland Law Journal*, we therefore revisit the Queensland solicitors' conveyancing reservation. The next section is an account of the nature and scope of the reservation. This includes its historical development – a process that, despite the debate of the last two decades, was in the strictest legal terms only properly completed in 2004. The legal ground covered by the reservation is also outlined. It involves an analysis of the scope of the reservation, and the extent to

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¹ 'Exit the "Conveyancer": No Furniture Removed', *Sydney Morning Herald*, 14 June 1930, 14.

² In this article Qld is meant to mean the *Legal Profession Act 2007* (Qld) and Model Laws refers to the Standing Committee of Attorneys-General under *Legal Profession – Model Laws Project: Model Bill (Model Provisions)* (2nd ed, 2006).

³ The Australian Capital Territory also retains the reservation.

⁴ National Competition Council, *National Competition Policy Report* (2005) 13.8 <<http://www.ncc.gov.au/pdf/AST7As-001.pdf>>.

⁵ *Ibid*, 13.9.

⁶ There is to be a 'further review' of the arrangements within 10 years of the first review undertaken in 2004: cl 5 *Competition Policy Reform Act 1995* (Cth) Intergovernmental Agreements.

which the solicitors' branch of the legal profession (when considered as a group) can genuinely be considered to have 'monopolised' the field of conveyancing work.

In the second article, we will consider the competition implications of the reservation, and the arguments for and against maintaining it. We will also conclude 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.

There is nevertheless a preliminary point to make about terminology. This reservation is sometimes loosely called a 'monopoly'.⁷ However, in the usual language of competition law and policy, there is strictly no monopoly in the provision of conveyancing services in Queensland. A monopoly is a market condition in which a single seller of, here, a service deals with a large number of buyers, and the seller has complete control over the price at which the service is sold.⁸ In offering legal services of any kind, including the conduct of a conveyance, solicitors do not act through the profession as a single entity that controls the markets for selling these services. These services are provided by any of more than 1300 solicitors' practices in Queensland, and of even more law practices in other States that, under national legal profession arrangements, are also entitled to practise law in the State.⁹ So, rather than granting a monopoly, the *Legal Profession Act 2007* (Qld) (which contains the reservation) actually provides a barrier to entry into the market.¹⁰ This barrier is structural, in the sense that it is created by the Act as a limitation on the conduct of potential market participants.¹¹ It prohibits nonlawyers from offering the service, and limits the work to those who have certain professional qualifications (which import requirements of education and training). The question of nonlawyer conveyancing in Queensland is therefore not one of breaking a monopoly. It is whether the barrier to entry should be lowered to extend the class of persons lawfully able to provide the service; to retain a barrier, but to ease the qualifications needed to leap over it.

II THE RESERVATION ON LAND TRANSACTIONS

A Development

1 Antecedents

English attorneys' common involvement in land transactions through the seventeenth and eighteenth centuries was largely an aspect of their work as law agents and estate managers for landholders. However, in efforts to secure more of this work their training as officers of the Court of Common Pleas (the court that heard litigation involving land) gradually grew in importance. Still, conveyancing was no exclusive reservation for attorneys. In the provinces, nonlawyer conveyancers competed with attorneys for the work. In the City of London, all lawyers were actually prohibited from undertaking conveyancing work in 1712, when it was exclusively reserved for members of the Scriveners' Company. Lawyers

⁷ See eg, *Law Society of NSW v Ramalca Pty Ltd* (1988) 12 NSWLR 34, 35 (Priestley JA).

⁸ Peter Butt (ed), *Concise Australian Legal Dictionary* (3rd ed, 2004) 286.

⁹ Qld, ss 5(1), 6(1), 24(1).

¹⁰ As to barriers to entry generally refer to Stephen Corones, *Competition Law in Australia* (4th ed, 2007) 110.

¹¹ For a definition of barriers to entry and a discussion of structural barriers refer to *Boral Besser Masonary Limited v ACCC* (2003) 215 CLR 374, 471.

themselves litigated strenuously through the mid-eighteenth century to break the scribes' reservation in the City; a number of barristers acted *pro bono* in this litigation in the general interests of the legal profession. They finally succeeded in gaining access to the London conveyancing market in 1760,¹² and then moved steadily to establish an exclusive reservation for lawyers across the whole of England and Wales. This came with the *Stamp Act 1804* (UK). The taxes stimulated by demand for public finance in the Napoleonic Wars included high stamp duties on articles of clerkship, and attorneys' admission and practising certificates. Conveyancing work was therefore eventually reserved exclusively for lawyers as compensation. Any person who was not an attorney or barrister but who undertook conveyancing work was exposed to a fine of up to £50.¹³ Still, this did not completely secure an exclusive reservation for attorneys. The bar's interest in having access to lucrative land conveyancing was strongly evident in the assault on the scribes' reservation in the eighteenth century. Although this interest waned over the nineteenth century, the Inns of Court did not surrender the right of barristers to conduct land transactions until 1903¹⁴ and, as late as the *Solicitors Act 1941* (UK),¹⁵ barristers were recognised as having a right to undertake conveyancing.

Those reservations were not directly received into the law of any of the Australian colonies but, despite growing differences between the underlying land law of England and the colonies,¹⁶ the English arrangements were eventually mimicked. In New South Wales, land conveyancing remained unregulated until 1847, although, on the whole, the attorneys' profession dominated the market.¹⁷ The *Attorneys' Bills and Conveyancing Act 1847* (NSW)¹⁸ gave the exclusive right to undertake conveyancing work to attorneys and solicitors, to barristers and to 'Certificated Conveyancers' who were specially licensed and examined by the Supreme Court to undertake land transactions, will making and some estate administration.¹⁹ The Act therefore initiated court-regulated, nonlawyer conveyancing. It was a scheme that would be maintained in NSW,²⁰ Victoria²¹ and Queensland into the 1930s, although the number of court-licensed conveyancers in all three colonies was so small that they did not seriously threaten the dominant market position of attorneys and solicitors.²²

¹² Richard Abel, *The Making of the English Legal Profession* (1998) 139-40.

¹³ Section 14 *Stamp Act 1804* (UK) (44 Geo III c 98). See Abel, above n 12, 141; Penelope Cornfield, *Power and the Professions in Britain, 1700-1850* (1995) 81.

¹⁴ Abel, above n 12, 141.

¹⁵ Section 47 *Solicitors Act 1932* (UK); s 23 *Solicitors Act 1941* (UK).

¹⁶ Peter Butt, *Land Law* (5th ed, 2006) 5.

¹⁷ Although barristers also enjoyed regular conveyancing work: John Michael Bennett, *A History of Solicitors in NSW* (1984) 327-8.

¹⁸ 2 Vic No 33 (NSW).

¹⁹ Section 13 *Attorneys' Bills and Conveyancing Act 1847* (NSW). For a history of certificated conveyancers, see Bennett, above n 17, 328-41.

²⁰ In NSW, ss 13-14 *Attorneys' Bills and Conveyancing Act 1847* (NSW) were re-enacted in ss 16-20, 40 *Legal Practitioners Act 1898* (NSW). Section 1 *Conveyancers Enabling Act 1893* (NSW) opened Torrens land conveyancing to certificated conveyancers: see also s 10 *Real Property Act 1900* (NSW).

²¹ Fellows J held in *Re Strong; Ex parte Campbell* (1873) 4 AJR 300, 301-2 that the *Attorneys' Bills and Conveyancing Act 1847* (NSW) was received into the law of Victoria. Victoria also perpetuated 'certified conveyancers' by s 261 *Supreme Court Act 1890* (Vic), although apparently none were admitted after 1885: Bennett, above n 17, 337.

²² Bennett, above n 17, 340. The number of licensed conveyancers in NSW under this scheme peaked in 1925 at 72, although only around one-third actually practised: *ibid*, 330, 337; Australian Institute of Conveyancers NSW Division, *A Brief History of the*

In South Australia, the underlying land law did (when compared with England) motivate differences in the structure of conveyancing markets. A more rational system of property holding was contemplated soon after settlement in 1837, but was not achieved. The more intensive landholding in South Australia and, therefore, the greater proportion of land transfers in the colony created conditions for excessive fraud and forgery in the conduct of land transactions. With the small number of lawyers, this meant that it became difficult to develop a workable conveyancing system.²³ Procedures for transfers of land were substantially simplified by Sir Robert Torrens' system of landholding, which also undeniably bore influences from systems of title by registration that German colonists had experienced in their homelands.²⁴ First implemented in the *Real Property Act 1858* (SA), the Torrens system guaranteed title on registration of a transfer with the Land Titles Office, required separate issue by the Titles Office of certificates of title, transformed the mortgage into a charge instead of a conveyance, and used standard forms for different kinds of dealings in the land.²⁵ It revolutionised, and again simplified, the nature of conveyancing work by removing the need for 'retrospection' – establishing whether there was a good 'root of title' by close scrutiny of all documents evidencing the chain of title from the original government grant of an estate. Lawyers vigorously opposed the Torrens reforms – both outside and inside the House of Assembly. It certainly had an adverse effect on their interests; the removal of retrospection significantly streamlined the work required to complete a land transaction. However, for a brief time the Act of 1858 exclusively reserved Torrens system conveyancing for the legal profession.²⁶ That reservation, though, was lost when, by the *Real Property Act 1860*, South Australia introduced land brokers who, alongside lawyers, could undertake conveyancing work.²⁷ Indeed, since 1860 South Australia has had an unbroken history of lawful nonlawyer conveyancing, and from that time has been the only Australian jurisdiction not to have made an exclusive reservation of conveyancing for the legal profession.

Torrens legislation was next introduced in 1861 in Queensland,²⁸ but (unlike South Australia) with the active sponsorship of leading lawyers.²⁹ In 1862, it was adopted in Tasmania, Victoria and NSW, and in 1874 in Western Australia.³⁰ An interesting feature of the introduction of Torrens legislation in NSW, and during debates over amendments in 1877 in Queensland, was the controversy created by proposals to introduce land brokers of the South Australian type.³¹ In the two eastern colonies, court-licensed conveyancers were already actually practising under the *Attorneys' Bills and Conveyancing Act 1847* (NSW) and its progeny in Queensland – the *Supreme Court Act 1867*.

NSW Conveyancing Profession <http://aicnsw.com.au/aicnsw_cms/index.php?page=conveyancing-history> at 6 December 2009.

²³ Robert Stein and Margaret Stone, *Torrens Title* (1991) 18.

²⁴ *Ibid.*, 21-4.

²⁵ *Ibid.*, 21.

²⁶ Section 95 *Real Property Act 1858* (SA).

²⁷ Section 133 *Real Property Act 1860* (SA).

²⁸ *Real Property Act 1861* (Qld).

²⁹ Douglas Whalan, *The Torrens System in Australia* (1982) 8-9.

³⁰ *Real Property Act 1862* (NSW); *Real Property Act 1862* (Tas); *Transfer of Land Statute 1862* (Vic); *Transfer of Land Act 1874* (WA).

³¹ Whalan, above n 29, 9, 11.

2 Queensland – Certificated Conveyancers and Barristers

The objections to land brokers in Queensland in 1877 were led in Parliament by the solicitor Charles Mein, Postmaster-General in the Douglas Government, who claimed that the land broking scheme had been unsuccessful in South Australia,³² and that the suggested amendments to the Torrens legislation did not adequately protect against malpractice by licensed land brokers.³³ It appears that, at this time, a large amount of conveyancing work was actually being done – illegally – by real estate agents and auctioneers, and could not be effectively controlled.³⁴ The first Queensland Law Society had actually been reluctant to suggest prosecutions for illegal conveyancing; it apparently thought the enforcement of the *Supreme Court Act's* reservations would strengthen public support for South Australian-style land brokers. And certainly, supporters of land brokers thought that the prevalence of illegal conveyancing suggested that nonlawyer conveyancing was quite feasible.³⁵ In Parliament, Mein dismissed this; it should just ‘legalize what was done illegally’.³⁶ The suggested amendments to the *Real Property Act* also required that the broker’s oath be taken before the Registrar-General in Brisbane. So, Mein claimed that, if brokers were needed anywhere in Queensland it would be in ‘the interior’ where there was a shortage of lawyers. However, the requirements for the oath meant that brokers would in practice only be licensed in Brisbane.³⁷ This was an argument against land brokers on which lawyers would soon perform a complete professional *volte-face*. Finally, he noted that there was already provision in Queensland for court-licensed conveyancers who had ‘to go through a large amount of training’ and that therefore ‘opportunity was afforded for competent persons ... to become possessed of the necessary knowledge and to show their fitness for transacting real property business’.³⁸

In this last argument, Mein was referring to conveyancers who had been licensed under Queensland’s successor to the *Attorneys’ Bills and Conveyancing Act*, which had been carried into the laws of Queensland at the colony’s separation in 1859. The scheme of the 1847 Act was perpetuated in Queensland until 1987 – when a practising certificate was last recorded as having been issued to a ‘Certificated Conveyancer’.³⁹ In 1866, the Supreme Court had even grouped conveyancers with barristers-at-law and attorneys, solicitors and proctors in its admission rules.⁴⁰ The *Attorneys’ Bills and Conveyancing Act* was repealed in Queensland in 1868,⁴¹ but

³² Queensland, *Parliamentary Debates – Legislative Council*, 31 May 1877, 26 (Charles Mein PMG).

³³ *Ibid*, 18 October 1877, 248 (Charles Mein PMG).

³⁴ See Helen Gregory, *The Queensland Law Society Inc 1928-1988: A History* (1991) 14, 16, 28-9.

³⁵ See Queensland, above n 32, 248 (Charles Mein PMG), 249 (William Thornton), 250 (Henry George Simpson).

³⁶ *Ibid*, 250 (Charles Mein PMG).

³⁷ *Ibid*, 248, 255 (Charles Mein PMG); and see also *ibid*, 251 (Gordon Sandeman).

³⁸ *Ibid*, 249 (Charles Mein PMG).

³⁹ Williams noted in 1982 that there were three names on the Supreme Court’s Roll of Conveyancers: GN Williams, *Harrison’s Law and Conduct of the Legal Profession in Queensland* (2nd ed, 1984) 14. According to *Sande and Registrar Supreme Court of Queensland* [1995] AATA 593, [39] (‘*Sande 1B*’) and *Sande v Registrar Supreme Court of Queensland* (1996) 134 ALR 560, 571 (‘*Sande 1D*’) a Mr Garde, who was admitted as a conveyancer in 1935, took a conveyancer’s certificate in 1987.

⁴⁰ *Rules Relating to the Admission of Barristers, Solicitors, Proctors and Conveyancers 1866* (Qld).

⁴¹ Section 2 and Sch *Repealing Act 1867* (Qld) (31 Vic No 39).

the provisions establishing a conveyancing reservation had already been patriated in the *Supreme Court Act*.⁴² Section 41 stated:

Every person who shall for or in respect of any fee gain or reward directly or indirectly draw or prepare any conveyance or any other deed or instrument in writing relating to any real estate (other than and except barristers or attorneys and solicitors of the Supreme Court or certified conveyancers as hereinafter mentioned ...) shall be guilty of contempt of the Supreme Court and shall and may be punished accordingly.⁴³

The 'conveyancers' mentioned in section 41 had to apply to the Supreme Court for their certificates; indeed, they were 'admitted' by the court as conveyancers under the rules of 1866. An examination was to be held by the Master in Equity on the applicant's 'skill and knowledge in conveyancing as well as to his character for integrity',⁴⁴ before admission was granted and the court could award a certificate.

In the 1880s, the number of prosecutions for illegal conveyancing began to escalate and, at this point, it was becoming clearer that regional solicitors were much more concerned than their Brisbane counterparts to enforce the *Supreme Court Act's* reservations.⁴⁵ However, this period also saw greater opportunities for barristers to conduct land transactions. As seen, the *Supreme Court Act* also provided that a barrister could undertake conveyancing work – as was the case in NSW, Victoria and England. Idiosyncratic arrangements for the fusion of the two branches of the legal profession in the colony would soon reinforce the prospect of barrister conveyancing. Although, in general, the legal profession tried to prevent its passage, the *Legal Practitioners Act 1881* (Qld) aimed to amalgamate the functions of lawyers by providing that barristers could practise as solicitors and solicitors could practise as barristers.⁴⁶ Ostensibly to improve access to the courts outside Brisbane by giving solicitors rights of appearance, the Act also had potential to deal with the problem of an oversupply of barristers in the colony (given the paucity of work for them even in Brisbane) by entitling barristers to a broader range of legal work and enabling them to practise in regional towns.⁴⁷ It is not possible to identify how many barristers took advantage of the *Supreme Court Act* or of the 1881 legislation to conduct land transactions. However, in the 1890s there were barristers practising in regional centres other than Rockhampton and Townsville (where the Supreme Court sat permanently),⁴⁸ and it is almost certain they could only do so by taking on work that traditionally belonged to attorneys and solicitors.

The earliest statutory regulation of lawyers in Queensland was initiated in 1927 by the Queensland Law Association – the solicitors' professional guild – but had to

⁴² Even though it was in exactly the same terms as the NSW and Victorian provisions, they were criticised from outside Queensland as protectionist measures against competition from intercolonial lawyers: see BH McPherson, *The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure* (1989) 81.

⁴³ See also s 13 *Attorneys' Bills and Conveyancing Act 1847* (NSW).

⁴⁴ Section 42 *Supreme Court Act 1867* (Qld); see also s 14 *Attorneys' Bills and Conveyancing Act 1847* (NSW).

⁴⁵ Gregory, above n 34, 40, 61.

⁴⁶ Section 1 *Legal Practitioners Act 1881* (Qld). See generally, Michael White, 'The Development of the Divided Profession in Queensland' (2004) 23 *University of Queensland Law Journal* 296, 313-14.

⁴⁷ In 1881, Arthur Rutledge thought there was enough work in Brisbane for only four barristers: Ross Johnston, *History of the Queensland Bar* (1978) 27-8.

⁴⁸ Section 4 *Supreme Court Act 1895* (Qld). Barristers were known to practise in Gympie, Longreach, Bundaberg, Toowoomba, Charters Towers, Ingham and Cairns: Johnston, above n 478, 30-1.

deal both with the merged roles of barristers and solicitors and with the related practice of court-licensed nonlawyer conveyancers. As a result, the Queensland Law Society, as the Association was renamed, was eventually to gain the power to issue practising certificates and to seek the discipline of any person who, whatever their professional title, practised ‘as a solicitor or conveyancer’.⁴⁹ Although the *Queensland Law Society Act* was first passed in 1927, it was an amending Act of 1930 that referred to any ‘barrister-at-law practising as a solicitor’, ‘solicitor of the Supreme Court’ or ‘conveyancer’ by the clumsy and tautological term ‘practising practitioner’.⁵⁰ The Queensland Law Society was given the power to issue ‘solicitors’ certificates to any solicitor or barrister who wished to practise as a solicitor,⁵¹ and ‘conveyancers’ certificates to any conveyancer who wished to practise as a conveyancer.⁵² Certificates had to be taken out every year. It was illegal for someone to do solicitors’ or conveyancers’ work unless he held a practising certificate issued by the Law Society.⁵³ Similarly, all of these ‘practising practitioners’ were within the jurisdiction of the Statutory Committee – the disciplinary tribunal run by the Law Society, which could hear charges of malpractice, professional misconduct or unprofessional conduct.⁵⁴ Through the 1920s and 1930s, straitened economic conditions compelled a number of barristers to practise as solicitors, and by 1938 there were 30 barristers (or 20 percent of the admitted bar) holding solicitors’ practising certificates.⁵⁵ Sometime in the 1930s, the Law Society even sought discipline against a barrister who was evidently within the Society’s regulatory purview.⁵⁶

However, by any measure the Act of 1881’s attempt to fuse professional functions in Queensland was poorly thought out. From inception, the idea of maintaining different rolls but allowing access to the same work raised questions of the different education and training required for each branch of the profession (and here solicitors had the higher standards).⁵⁷ The Supreme Court judges had even denied that any period of practical training under articles with a barrister could qualify someone for admission as a solicitor.⁵⁸ As a result, it appears that admission to the bar was being used as an easier means of qualifying to do solicitor’s work without the practical training that admission as a solicitor needed. This was a principal reason for returning in the late 1930s to a fully divided legal profession.⁵⁹

Unlike the Act of 1881, the *Legal Practitioners Act Amendment Act 1938* (Qld) was passed without any serious political controversy.⁶⁰ It rationalised the legal

⁴⁹ Cf Gregory, above n 34, 67.

⁵⁰ Section 36 *Queensland Law Society Act 1930* (Qld); s 3 *Queensland Law Society Act 1952* (Qld).

⁵¹ Section 26(1) *Queensland Law Society Act 1930* (Qld); s 38(1) *Queensland Law Society Act 1952* (Qld).

⁵² Section 26(2) *Queensland Law Society Act 1930* (Qld); s 38(2) *Queensland Law Society Act 1952* (Qld).

⁵³ Section 27 *Queensland Law Society Act 1930* (Qld); s 39 *Queensland Law Society Act 1952* (Qld).

⁵⁴ Section 5(1) *Queensland Law Society Act 1927* (Qld); s 6(1) *Queensland Law Society Act 1952* (Qld).

⁵⁵ Johnston, above n 47, 32, 139.

⁵⁶ The barrister’s identity and the charge remain undisclosed: Linda Haller, ‘Solicitors’ Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis’ (2001) 13 *Bond Law Review* 1, 7.

⁵⁷ Johnston, above n 47, 29.

⁵⁸ *Re Walker* (1897) 8 QLJ 61.

⁵⁹ Johnston, above n 47, 29. See the comments of Hoare J in *Ex parte Solicitors’ Board of Queensland* [1979] Qd R 133, 135-6; and White, above n 46, 315-16.

⁶⁰ White, above n 46, 315-16.

profession and laid the ground for the current location of the conveyancing reservation exclusively in the solicitors' branch – although some loose ends were not tied up until 2004. Two significant steps were taken. First, barristers were prohibited from practising as solicitors, and solicitors as barristers.⁶¹ Those barristers who had been 'practising practitioners' were given the option of admission as solicitors (so long as they had three years of actual practice).⁶² Most took that option.⁶³ Secondly, court-licensed conveyancers were marked for extinction. No more conveyancers were to be admitted after 1 January 1940.⁶⁴ Similar moves had been made in Victoria in 1915,⁶⁵ and NSW in 1935.⁶⁶ Although they were given the option of seeking admission as solicitors,⁶⁷ it was possible for Queensland conveyancers admitted before 1940 to continue to practise only as conveyancers and to be issued with conveyancers' certificates by the Law Society.⁶⁸ The last that one of these conveyancers took out a practising certificate was in 1987.⁶⁹ Law Society records have at least two conveyancers facing discipline before the Statutory Committee after the regulatory reforms of 1930.⁷⁰ From that point, the solicitors' reservation for conveyancing was consolidated, although regional solicitors continued to complain about illegal conveyancing by real estate agents and provincial bank managers. They were also concerned about the lawful cut-price conveyancing services offered by the Public Curator. But, at the height of these concerns in the 1950s, the Queensland Law Society was still reluctant to prosecute so as to enforce the reservation.⁷¹

The amending Act of 1938 still did not remove the *Supreme Court Act's* recognition of the right of barristers to undertake conveyancing. There is nevertheless no evidence of barristers attempting to undertake conveyancing work after the re-division of the profession in 1938. The Law Society actually tried to ban barristers from conveyancing in the *Queensland Law Society Rule* by limiting conveyancing practice to solicitors and the remnant of court-licensed conveyancers. Amongst other things, the Rule tried to define the term 'acting as a conveyancer' (which was found in the *Queensland Law Society Act 1930*)⁷² as 'drawing, preparing, filing for registration on behalf of any person of (a) any deed [or] (b) any instrument in writing relating to real estate'.⁷³ It turned out that this was futile. On the first occasion the Rule was tested in litigation on the conveyancing reservation, the Supreme Court made the obvious point that subordinate legislation cannot be used to define the scope of a penal provision in the Act it is made under.⁷⁴ Precisely the same

⁶¹ Section 5 *Legal Practitioners Act Amendment Act 1938* (Qld).

⁶² Section 6 *Legal Practitioners Act Amendment Act 1938* (Qld).

⁶³ Johnston, above n 47, 32.

⁶⁴ Section 2 *Legal Practitioners Act Amendment Act 1938* (Qld).

⁶⁵ Section 24 *Legal Profession Practice Act 1915* (Vic) reserved conveyancing work exclusively for barristers and solicitors.

⁶⁶ Section 8(c) *Legal Practitioners Amendment Act 1935* (NSW); s 20A(1) *Legal Practitioners Act 1898* (NSW). There were 56 conveyancers in NSW at the time, but 'far fewer actually practised': Bennett, above n 17, 339.

⁶⁷ Section 3 *Legal Practitioners Act Amendment Act 1938* (Qld). This was subject to conditions related to experience and meeting examination requirements.

⁶⁸ Section 26(2) *Queensland Law Society Act 1930* (Qld); s 38(2) *Queensland Law Society Act 1952* (Qld); Gregory, above n 34, 78.

⁶⁹ See above n 39.

⁷⁰ Haller, above n 56, 7.

⁷¹ Gregory, above n 34, 114-16.

⁷² Section 27 *Queensland Law Society Act 1930* (Qld); s 39 *Queensland Law Society Act 1952* (Qld).

⁷³ R 102(4) *Queensland Law Society Rule 1987* (Qld); and see Williams, above n 39, 17.

⁷⁴ *Queensland Law Society Incorporated v Sande (No 2)* [1988] 1 Qd R 273, 290 ('*Sande 2B*').

point could be made about the Rule's incompatibility with the *Supreme Court Act*, and therefore its inability to criminalise conveyancing by barristers.

The right of barristers to undertake conveyancing technically persisted until 2004. Although the Bar Association adopted rules in 1995 that prohibited its members from 'conduct[ing] the conveyance of any property for any other person',⁷⁵ the rule did not apply to barristers who were not members and, being enforceable only as a contractual obligation, could not displace the right of a barrister under the *Supreme Court Act 1867* to undertake conveyancing work.⁷⁶ This right was only removed when section 41 of the *Supreme Court Act* was repealed with the passage of the *Legal Profession Act 2004* (Qld).⁷⁷ The repeal was also reinforced when, under the reforms of 2004, the Bar Association's ban on barristers undertaking conveyancing work was given the status of subordinate legislation applicable to all barristers.⁷⁸ The reforms of 2004 took effect from 1 July, and from that point the reservation of conveyancing work in Queensland was exclusive to solicitors.

3 Modern Conveyancers

In the 1980s and 1990s, competition-based reforms had seen licensed nonlawyer conveyancers re-surface in NSW, the Northern Territory and Western Australia.⁷⁹ South Australia, of course, had had its land brokers since the Torrens legislation of 1860. Tasmania allowed nonlawyer conveyancing in 2004.⁸⁰ In Victoria, a limited form of nonlawyer conveyancing was long thought possible because of an ambiguous understanding of the nature of 'legal practice', but was expressly allowed by statute from 1996 so long as the conveyancer did not prepare documents that created, varied, transferred or extinguished interests in land or gave legal advice.⁸¹ In 2006, the Law Institute of Victoria attempted to enforce this restriction by seeking an injunction against a licensed conveyancer who, the Institute alleged, gave legal advice by providing a statement which gave details of mortgages, charges and other factors affecting the land. However, Osborn J did not think that such a statement necessarily involved the giving of legal advice, and refused the injunction.⁸² This restriction on nonlawyer conveyancers was lifted by statute later in 2006.⁸³ It left only Queensland and the Australian Capital Territory reserving conveyancing work exclusively to solicitors, with most of the lobbying to lower the barriers to enter the conveyancing market focused on Queensland.

Associated with the relaxation of the lawyers' reservation on conveyancing in most Australian jurisdictions has been the industry organisation of nonlawyer conveyancers. Not surprisingly, it was South Australian land brokers who first formed an industry association in 1973.⁸⁴ This was followed by the Western

⁷⁵ R 78(g) *Queensland Barristers Rules 1995*.

⁷⁶ Section 44 *Supreme Court Act 1867* (Qld) was included and perpetuated as section 19 of the consolidating *Legal Practitioners Act 1995* (Qld).

⁷⁷ Section 632 *Legal Profession Act 2004* (Qld).

⁷⁸ Rule 78(g) *Legal Profession (Barristers) Rule 2004* (Qld).

⁷⁹ See now s 14(2)(e) *Legal Profession Act 2004* (NSW); *Conveyancers Licensing Act 2003* (NSW); s 14(2)(e) *Legal Profession Act* (NT); *Agents Licensing Act* (NT); s 12(3)(e) *Legal Profession Act 2008* (WA); *Settlement Agents Act 1981* (WA).

⁸⁰ *Conveyancing Act 2004* (Tas).

⁸¹ Section 326 *Legal Practice Act 1996* (Vic).

⁸² *Law Institute of Victoria v Maric* [2006] VSC 361, [101]-[105].

⁸³ *Conveyancers Act 2006* (Vic).

⁸⁴ Australian Institute of Conveyancers SA Division, *A South Australian Success Story* <www.aicsa.com.au/displaycommon.cfm?an=1&subarticlenbr=34> at 14 May 2009.

Australian Settlement Agents Association in 1979.⁸⁵ The Association of Property Conveyancers was formed in NSW in 1989 to lobby for nonlawyer conveyancing (which came in 1993),⁸⁶ and the Victorian Conveyancers Association was formed in 1991.⁸⁷ Once more, it was the South Australian association that took the initiative to incorporate a national industry association – the Australian Institute of Conveyancers – in 1993. The AIC gradually absorbed the State-based associations as divisions of the national organisation, and added Tasmanian and Northern Territory Divisions when nonlawyer conveyancing emerged in those jurisdictions.

4 *The Sande Litigation*⁸⁸

Since 1996, the AIC's political efforts have concentrated on securing access for nonlawyer conveyancers to the lucrative Queensland property market. It has also given support to attempts by a South Australian land broker, Paul Sande, to open a conveyancing service on the Gold Coast. The *Sande* litigation has been critical to the legal refinement of the conveyancing reservation in Queensland and (as will be made clearer in our second article) to prospects for securing access to the Queensland market by rights to the interstate recognition of occupational status granted by the *Mutual Recognition Act 1992* (Cth). The litigation aimed to secure Sande a conveyancer's or solicitor's certificate, although this was sought by the interplay (as Sande saw it) of applications for admission as a conveyancer or solicitor under the *Supreme Court Act 1867* with the provisions of the *Mutual Recognition Act*. Sande applied to the Queensland Law Society in December 1993 for a conveyancer's practising certificate so that he could conduct land transactions in Queensland. The Law Society refused this certificate, although the refusal was challenged, unsuccessfully, in the Administrative Appeals Tribunal. However, before the AAT decision, Sande opened a conveyancing business on the Gold Coast. Through 1994 he and his company were prosecuted by the Law Society under the *Queensland Law Society Act* for unlawful legal practice, and were convicted. Sande nevertheless had also begun to apply for admission as a solicitor, albeit subject to conditions that would restrict his work to that which can be undertaken by conveyancers in South Australia or NSW.

The first application was made in July 1994 under the *Mutual Recognition Act* for 'admission to the roll of conveyancers' or as a solicitor. In August, the Supreme Court Registrar refused both applications. This was challenged, first, by an application to the Supreme Court in *Re Sande* ('*Sande 1A*').⁸⁹ Fryberg J refused that application in March 1995. However, the Registrar's decision was also challenged by federal proceedings for administrative review. At that point, the Law Society again intervened and sought a declaration in the Supreme Court that the Registrar's decision was correct. In May 1995 in *Re Queensland Law Society Incorporated* ('*Sande 1B*'),⁹⁰ Derrington J refused this declaration simply because, at that stage, to grant it would subvert the application for administrative review. However, in August 1995 in *Sande and Registrar Supreme Court of Queensland* ('*Sande 1C*'),⁹¹ the AAT

⁸⁵ Australian Institute of Conveyancers WA Division, *History* <www.aicwa.info/index.php?option=com_content&task=blogcategory&id=21&I> at 14 May 2009.

⁸⁶ Australian Institute of Conveyancers NSW Division, above n 223.

⁸⁷ Australian Institute of Conveyancers (Victorian Division), *History of the Victorian Conveyancers Association* <www.aicvic.com.au/portal/page.pl?id=57> at 14 May 2009.

⁸⁸ See also PWF Whalley, 'Sande: A Story of Epic Proportions' (1997) 18 *Queensland Lawyer* 30.

⁸⁹ [1996] 1 Qd R 671.

⁹⁰ Unreported, Supreme Court of Queensland, Derrington J, OS 5/1995, 29 May 1995.

⁹¹ [1995] AATA 593.

also affirmed the Registrar's decision to refuse the applications for admission. Sande therefore appealed, but in proceedings decided in February 1996 – *Sande v Registrar, Supreme Court of Queensland* ('Sande 1D')⁹² – the Full Court of the Federal Court dismissed the appeal.

The *Sande 1* series was still underway when, in April 1995, Sande re-applied for admission as a solicitor in identical terms to the application in *Sande 1A*. The Registrar refused this in May 1995, but later that month Sande applied for admission a third time. While these applications were made, Sande was still being paid for conveyancing he was undertaking on the Gold Coast. At that point (before *Sande 1C* was heard), the Law Society sought an injunction to restrain Sande from working as a conveyancer. In this case, *Queensland Law Society Inc v Sande* ('Sande 2A'),⁹³ it became clearer that the reason for these repeated applications for admission was that, although Sande knew they were destined to fail,⁹⁴ he thought he could take advantage of the 'deemed registration' provisions of the *Mutual Recognition Act*. These stated that someone was deemed to be registered in an occupation in the State while their application for registration was pending.⁹⁵ Sande repeatedly applied for admission as a solicitor on the understanding that, while any single application before the Registrar was still undecided, he was deemed to be registered as a conveyancer under the *Mutual Recognition Act*. In June 1995, Thomas J accepted that the second and third applications for admission were being made for an ulterior purpose, and that they were an abuse of the court's process. A declaration was made to that effect. Thomas J also restrained Sande from doing any conveyancing work in Queensland (regardless of Sande's interpretation of the *Mutual Recognition Act*), but gave him the benefit of the doubt on the third application for admission that was still on foot. The injunction was therefore made conditional on the Registrar's refusal of the third application for admission.

From the proceedings that followed, the Registrar apparently did refuse Sande's third application for admission. Sande nevertheless continued to offer conveyancing services in Queensland, and so the Law Society moved to have him cited for contempt. These proceedings – *Queensland Law Society Inc v Sande (No 2)* ('Sande 2B')⁹⁶ – again came before Thomas J. He accepted that the Society had proved 14 instances of conveyancing by Sande in breach of the injunction issued in *Sande 2A*, and that there were continuing breaches of the *Supreme Court Act 1867*⁹⁷ and the *Queensland Law Society Act*. Sande was in contempt of court, and given a suspended sentence of three months imprisonment and a \$5,000 fine.⁹⁸ The *Sande 2* series, in particular, has been important for articulating the legal scope of the conveyancing reservation.

B 'Legal Practice': Nature, Scope and Reservation

The core of legal work is allowed to lawyers qualified as such under legal profession legislation, and no one else. In almost all Australian jurisdictions, the qualification for someone to be able to do any work that is within this reservation is that she is, in the words of the *Model Laws* on national legal practice, an 'Australian legal practitioner'. This means a person who is both 'an Australian lawyer' –

⁹² (1996) 134 ALR 560.

⁹³ [1996] 1 Qd R 622.

⁹⁴ *Ibid*, 628.

⁹⁵ Section 25(1) *Mutual Recognition (Queensland) Act 1992* (Qld).

⁹⁶ [1998] 1 Qd R 273.

⁹⁷ By the time of *Sande 2B*, s 41 *Supreme Court Act 1867* (Qld) had been re-enacted as s 19 *Legal Practitioners Act 1995* (Qld).

⁹⁸ [1998] 1 Qd R 273, 302.

someone who has been admitted in any State or Territory as a lawyer⁹⁹ – and who 'holds a current practising certificate or a current interstate practising certificate'.¹⁰⁰ Only a certified lawyer is able to undertake legal work.

The term used in the *Model Laws* to describe the legal nature and scope of this exclusive reservation is 'legal practice'.¹⁰¹ So, section 24(1) of the Queensland *Legal Profession Act* states:

A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.

Violation of this reservation is a criminal offence throughout Australia and, in some States, can attract a custodial sentence.¹⁰²

Since the nineteenth century, the ban on unqualified people undertaking 'legal practice' has given rise to adjudication and judicial interpretation of the meaning of 'legal practice', or of equivalent terms that have been used in legislation relating to the legal profession. However, Australian exegesis of 'legal practice' has been especially indebted to Florida cases that made some effort to distil the essence of the practice of law. In *State ex rel Florida Bar v Sperry*,¹⁰³ the Supreme Court of Florida held that a patent attorney, who held himself out as such, was illegally engaged in legal practice in Florida even though he had been admitted as a patent attorney by the US Patent Office.¹⁰⁴ O'Connell J said:¹⁰⁵

... representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.

This was followed in *Florida Bar v Town*,¹⁰⁶ once more by a court led by O'Connell J. The Florida cases therefore recognise a broad range of activities, beyond the giving of legal advice, as being within the reservation of legal practice to attorneys. However, it is the giving of legal advice that Australian courts have concentrated on when using the Florida jurisprudence to draw the boundaries of legal practice.¹⁰⁷

⁹⁹ *Model Laws*, s 1.2.2(a).

¹⁰⁰ *Model Laws*, s 1.2.3(a).

¹⁰¹ *Model Laws*, s 2.2.1(1).

¹⁰² Section 16(1) *Legal Profession Act 2006* (ACT) (100 penalty units); s 14(1) *Legal Profession Act 2004* (NSW) (200 penalty units); s 18(1) *Legal Profession Act* (NT) (500 penalty units); Qld, s 24(1) (300 penalty units or two years imprisonment); s 21(1) *Legal Practitioners Act 1981* (SA) (\$10,000 fine); s 13(1) *Legal Profession Act 2007* (Tas) (200 penalty units or two years' imprisonment); s 2.2.2(1) *Legal Profession Act 2004* (Vic) (two years imprisonment); s 12(2) *Legal Profession Act 2008* (WA) (\$20,000 fine).

¹⁰³ 140 So (2d) 587 (1962).

¹⁰⁴ *Ibid*, 596.

¹⁰⁵ *Ibid*, 591.

¹⁰⁶ 174 So (2d) 395, 396-7 (1965).

¹⁰⁷ *Barristers' Board v Palm Management Pty Ltd* [1984] WAR 101, 107; *Barristers' Board v Central Tax Services Pty Ltd* (1985) 16 ATR 115, 117; *Attorney-General v Quill Wills Ltd* (1990) 3 WAR 500, 507; *Cornall v Nagle* [1995] VR 188, 208; *Sande 2B* [1998] 1 Qd R 273, 298. Not all situations in which legal advice is given will be captured by the reservation. If the legal advice is genuinely only incidental to the conduct of another lawful occupation, it will not amount to 'legal practice': *Felman v Law Institute of Victoria* [1998] 4 VR 324, 350; *Law Institute of Victoria v Maric*

The central, though not exclusive, role of the giving of legal advice in identifying the nature of ‘legal practice’ was confirmed in the leading Australian case on the point, *Cornall v Nagle*.¹⁰⁸ This, too, somewhat akin to *Sperry*, dealt with a defendant who had been describing himself as an ‘attorney and agent’, but who also drafted, prepared and filed court documents and unsuccessfully applied to a Magistrates Court to appear for a client in a rehearing. Phillips J held that this infringed the reservation of legal practice for solicitors, and following *Sperry* agreed that, where the giving of legal advice was concerned, the public are to be protected from the untrained and the unqualified with the result that the task will ordinarily be regarded as the exclusive province of professionals who were trained and duly qualified.¹⁰⁹ That said, Phillips J thought that the ‘untrained’ or ‘unqualified’ would be in breach of the prohibition on ‘acting or practising as a solicitor’ (as the Victorian legislation then described ‘legal practice’):¹¹⁰

- (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 [legislation] 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.

In *Law Society of NSW v Seymour*,¹¹¹ the NSW Court of Appeal expressed concern about two aspects of *Cornall* and, to that extent, a narrower approach to the reservation seems to be settled in that State.¹¹² In relation to the first meaning of legal practice in *Cornall*, it was noted that there are activities regularly performed by lawyers that are also commonly – and lawfully – done by accountants, merchant bankers and financial advisers.¹¹³ It has also been recognised that migration and customs agents, like tax agents, give legal advice that touches on areas of the expertise and in which they can lawfully give advice.¹¹⁴ The *Seymour* court also thought that the third meaning of legal practice in *Cornall* was too widely expressed, and would improperly bring work undertaken by other legally qualified persons such as judges, legal academics and arbitrators within the sphere of prohibited work.¹¹⁵ This approach narrows the lawyers’ reservation considerably. In *Seymour*, a ‘business consultant and migration agent’ (who had been removed as a solicitor) gave legal advice on patent transactions, advised on a leasing matter and had some involvement in a family law dispute. However, he was held not to have engaged in legal practice, especially as solicitors who had dealt with him were aware that he was not a solicitor.¹¹⁶

[2006] VSC 361, [42].

¹⁰⁸ [1995] VR 188.

¹⁰⁹ *Ibid*, 210.

¹¹⁰ *Ibid*.

¹¹¹ *Law Society of NSW v Seymour* [1999] NSWCA 117.

¹¹² *Kekatos v Law Society of NSW* [1999] NSWCA 117, [17].

¹¹³ *Law Society of NSW v Seymour* [1999] NSWCA 117, [18]. See also *Felman v Law Institute of Victoria* [1998] 4 VR 324.

¹¹⁴ *Felman v Law Institute of Victoria* [1998] 4 VR 324, 350. For Australian tax agents, see also *Income Tax Assessment Act 1936* (Cth), s 251L(1).

¹¹⁵ *Law Society of NSW v Seymour* [1999] NSWCA 117, [15].

¹¹⁶ *Ibid*, [23]-[24].

It is difficult to reconcile *Seymour* with both the concerns and decision in *Sperry*. In any case, Australian courts outside NSW have generally accepted the three ways that Phillips J defined legal practice in *Cornall* as authoritative.¹¹⁷ For instance, unqualified people have been held to have illegally engaged in legal practice for giving legal advice on terms of a contract;¹¹⁸ preparing and filing court documents;¹¹⁹ giving assistance to people preparing wills (even when a do-it-yourself will kit is used);¹²⁰ witnessing a guarantee and giving a related certificate; presenting an office as a solicitor's office; sitting in, giving legal advice during and intervening during police interviews of 'clients'; and conducting negotiations as a 'solicitor'.¹²¹ An unqualified person who represents that she is a lawyer of some kind will provide good evidence of unlawful legal practice.¹²² The conduct of a conveyance of land is squarely within the definition of legal practice.

1 *The Law on Conveyancing*

Nineteenth century English adjudication on the meaning of conveyancing deferred almost entirely to the opinion of conveyancers.¹²³ Apart from being a dangerous approach to a penal provision, any subjective assessment of the scope of the reservation would, now, necessarily be incompatible with the more basic definition of 'legal practice' in *Cornall v Nagle*. At least if the third aspect of *Cornall* is taken to govern the scope of the reservation, the definition of conveyancing within a Torrens system is now anchored in the judgment of the NSW Supreme Court in *In the Will of Kerrigan*.¹²⁴ Under her will, the testatrix in *Kerrigan* had appointed a certificated conveyancer as her executor, but also provided that he could only draw on the estate to pay his 'ordinary legal costs'. These costs could be assessed by the Supreme Court Registrar, who understood the will as limiting the executor's entitlement to costs that he could charge for as a conveyancer. A reference to the Full Court therefore required the court to determine what work was captured by the practice of conveyancing. *Pulling on Attorneys* had defined conveyancing as 'the drawing of legal documents, and investigating and advising on legal titles'. Jordan CJ (with whom Stephen and Street JJ agreed) – in both developing and qualifying the definition in *Pulling* – believed that conveyancing included:

... preparing any document or doing any act for the purpose of creating, transferring or extinguishing any interest in any form of property, and anything incidental or ancillary to any such act, where the document or act is of a kind calling for something more than ordinary business knowledge, skill or ability.¹²⁵

It was taken to include two tasks that the executor in *Kerrigan* had charged to the estate: dealings with the revenue authorities (and particularly stamps offices) that

¹¹⁷ Cf *ibid*, [15].

¹¹⁸ *Legal Practice Board v Said*, Unreported, Supreme Court of Western Australia, Scott J, 31 October 1994.

¹¹⁹ *Cornall v Nagle* [1995] VR 188; *Legal Practice Board v Said*, Unreported, Supreme Court of Western Australia, Scott J, 31 October 1994.

¹²⁰ *Attorney-General v Quill Wills Ltd* (1990) 3 WAR 500; *Australian Competition and Consumer Commission v Murray* (2002) 121 FCR 428.

¹²¹ *Kekatos v Law Society of NSW* [1999] NSWCA 117, [50], [76]-[108].

¹²² *Ibid*, [90]-[108].

¹²³ *Isherwood v Oldknow* (1815) 3 M&S 382, 396-7; 105 ER 654, 660; *Howard v Ducane* (1823) T&R 81, 87; 37 ER 1025, 1027.

¹²⁴ (1935) SR (NSW) 242.

¹²⁵ *Ibid*, 250.

are associated with the terms of transferring property; and the preparation of a return for federal estate duty.¹²⁶ The second of these must now be disputed. However, Jordan CJ also believed that, given the traditional work of conveyancers in NSW, the definition from *Pulling* was too broad, and he would not accept that conveyancers could ‘prepare papers for the purpose of proceedings in Court’.¹²⁷ Thomas J accepted the *Kerrigan* court’s definition of conveyancing, almost without qualification, in *Sande 2B*.¹²⁸ He also accepted the *Kerrigan* example of attending at, and communicating with, the stamps office as an instance of conveyancing,¹²⁹ but did not mention *Kerrigan*’s second example of preparing a return for estate duty. As noted, this is not easily captured by *Kerrigan*’s general definition of conveyancing work as being ‘for the purpose of creating, transferring or extinguishing any interest in any form of property’,¹³⁰ and Thomas J’s ignoring this second example in *Sande 2B* could be understood as implicitly excluding it from the scope of conveyancing.

Accordingly, courts have accepted a range of tasks from the point of entering a land sale contract to the registration of transfer documents after settlement of the contract as being within the definition of ‘conveyancing’ and, it follows, within the definition of ‘legal practice’. There is judicial authority for the following as potentially being aspects of conveyancing:

- Explaining the terms of the contract to the client, and especially its salient points and any unusual provisions.¹³¹ It has been confirmed that this explanation is *required* in conveyancing practice even when, as is usual in Queensland,¹³² the contract was signed before the solicitor was retained.¹³³
- Explaining to the client what usual protections are not found in the contract the client has signed.¹³⁴
- Investigating the title to the land.¹³⁵
- Undertaking searches relevant to the land.¹³⁶
- Preparing requisitions on title, or answers to them.¹³⁷
- Preparing transfer documents. These are, of course, the actual conveyances of title and, although in a much simplified standard form in Torrens systems, the documents that are central to conveyancing practice.¹³⁸ Accordingly, even simple exercises of filling in the blanks, or arranging a signature, on a

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ [1998] 1 Qd R 273, 289.

¹²⁹ *Ibid.*

¹³⁰ *In the Will of Kerrigan* (1935) SR (NSW) 242, 250.

¹³¹ *Attard v Samson* (1966) 110 Sol Jnl 249; *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113; *Fox v Everingham & Howard* (1983) 50 ALR 337, 341.

¹³² See below nn 164-185.

¹³³ *Littler v Price* [2004] QCA 383, [7], [38].

¹³⁴ *Fox v Everingham & Howard* (1983) 50 ALR 337, 341; *Littler v Price* [2004] QCA 383, [43].

¹³⁵ *Beeston and Stapleford Urban District Council v Smith* [1949] 1 KB 656, 663.

¹³⁶ *Queensland Law Society Inc v Hoy* [1995] QSC 169; *Sande 2B* [1998] 1 Qd R 273, 296.

¹³⁷ In conveyancing practice, questions often called requisitions on title do not actually go to anything concerning the title to the land. However, in *Sande 2B* (at 301) Thomas J included requisitions concerning ‘flaws or defects in title or inconsistencies between contract description and property’. See also *Queensland Law Society Inc v Hoy* [1995] QSC 169; *Sande 2B* [1998] 1 Qd R 273, 296, 301, 302.

¹³⁸ *Re Strong; Ex parte Campbell* (1873) 4 AJR 300, 301; *In re King; Ex parte the Incorporated Law Institute of NSW* (1887) 8 NSW 395, 396; eg, *R v Police Magistrate at Brisbane and Blocksidge & Ferguson Ltd; Ex parte Knott* [1924] St R Qd 223; cf *R v Silvesters Ltd; Ex parte Queensland Law Society Inc* [1936] QWN 11.

standard form transfer document amounts to 'conveyancing' and 'legal practice'.¹³⁹

- Attending to the stamping of land contracts and transfer documents.¹⁴⁰
- Arranging for the satisfaction of mortgages.¹⁴¹
- Preparing mortgage documents.¹⁴²
- Drawing a discharge of a mortgage.¹⁴³
- Preparing notices to a body corporate under group title legislation.¹⁴⁴
- Calculating settlement figures.¹⁴⁵
- Preparing settlement statements.¹⁴⁶
- Organising settlement.¹⁴⁷
- Advising the client when difficulties arise.¹⁴⁸
- Undertaking negotiations for the client when difficulties arise.¹⁴⁹
- Lodging land transfer documents for registration.¹⁵⁰
- Arranging the payment of registration fees.¹⁵¹

In *Sande 2B*, it was emphasised that the coordination of these activities also amounts to conveyancing practice.¹⁵² Indeed, it is coordinating these activities in the correct sequence, and in accordance with the terms of the contract, its time limits and other conditions of performance, that the skill and expertise of the lawyer would be most needed.

Australian adjudication has also insisted that the business that receives payment for the service of arranging the conveyance is itself involved in conveyancing practice, even if it outsources the legal aspects of the transaction to legally qualified people. For instance, in *Law Society of NSW v Ramalca Pty Ltd*¹⁵³ – a case decided before nonlawyer conveyancing was legalised in NSW – a company offered flat-fee conveyancing services, but outsourced any work that was properly reserved to lawyers to a non-practising barrister. However, the outsourcing was incomplete as the barrister effectively worked within the company's business organisation. He was paid a daily rate, did all of the work on the company's premises, and used its secretarial staff. The client made one payment for the service to the company itself. The NSW Court of Appeal held, for two reasons, that the company was engaged in illegal conveyancing. According to Priestley JA, when the company paid the barrister to complete conveyancing tasks, it was 'in a legal metaphorical sense'

¹³⁹ *Beeston and Stapleford Urban District Council v Smith* [1949] 1 KB 656, 661. Eg, *In re Cooper; Ex parte Hall* (1890) 16 VLR 802; cf *In re Simpson & Fricke; Ex parte Robinson* [1910] VLR 177.

¹⁴⁰ *In the Will of Kerrigan* (1935) SR (NSW) 242, 250; *Sande 2B* [1998] 1 Qd R 273, 296. See also *In re King; Ex parte the Incorporated Law Institute of NSW* (1887) 8 NSW 395, 396-7.

¹⁴¹ *Sande 2B* [1998] 1 Qd R 273, 296.

¹⁴² *Beeston and Stapleford Urban District Council v Smith* [1949] 1 KB 656, 663.

¹⁴³ *Re Crowley* (1899) 20 LR (NSW) 150, 151, 152, although there was no breach of the legislation as the discharge had not been drawn for the personal reward of the respondent. See also *Sande 2B* [1998] 1 Qd R 273, 299.

¹⁴⁴ *Sande 2B* [1998] 1 Qd R 273, 300-1, 302.

¹⁴⁵ *Queensland Law Society Inc v Hoy* [1995] QSC 169.

¹⁴⁶ *Sande 2B* [1998] 1 Qd R 273, 296.

¹⁴⁷ *Queensland Law Society Inc v Hoy* [1995] QSC 169; *Sande 2B* [1998] 1 Qd R 273, 296.

¹⁴⁸ *Sande 2B* [1998] 1 Qd R 273, 296.

¹⁴⁹ *Ibid*, 296.

¹⁵⁰ *Ibid*, 296.

¹⁵¹ See *In re King; Ex parte the Incorporated Law Institute of NSW* (1887) 8 NSW 395, 396-7.

¹⁵² *Sande 2B* [1998] 1 Qd R 273, 296.

¹⁵³ (1988) 12 NSWLR 35.

directly involved in conveyancing work.¹⁵⁴ Secondly, it was irrelevant that the barrister might have been exercising an independent professional judgment when, say, drawing transfer documents for the conveyance. Everything the barrister did was within the company's business organisation and so, in that respect, the company was indirectly engaged in conveyancing work for payment.¹⁵⁵ The principles for attributing the conduct of a land transaction to the nonlawyer conveyancing company in *Ramalca* were then thinned and rationalised by Thomas J in *Sande 2B*¹⁵⁶ - a case where the outsourcing was more completely realised. After *Sande 2A*,¹⁵⁷ when an injunction was issued to restrain Sande and his company from conducting land transactions in Queensland, the standard retainer for the company provided that it would 'arrange for Duncan, Sande and Associates' [DSA] to prepare, stamp and register transfer documents and act as DSA's agent. DSA was a conveyancing practice in South Australia and, despite its name, was no longer owned by Sande or his company. The idea was therefore to have the transfer documents drawn by a different entity that was outside Queensland and not targeted by the *Sande 2A* injunction. Sande's company paid a small fixed fee to DSA for each transaction. However, Thomas J described this as 'a failed attempt to obtain the benefits of legal practice by means of artificial subdivisions, agencies and franchises'.¹⁵⁸ He focused on one aspect only of *Ramalca*: the offering of a service (that included legal tasks) for payment. Irrespective of what arrangements Sande's company might make for legal tasks to be outsourced out-of-State, the company earned its profits by providing in the State an 'overall service' that involved conveyancing work.¹⁵⁹ Thomas J did not consider the *Ramalca* limb that attributed legal work to the company because documents were drawn by a barrister working within the business organisation.

The *Ramalca* analysis left open the question whether outsourcing arrangements could be lawful when the conveyancing business is not incorporated.¹⁶⁰ Although the incorporation of a nonlawyer conveyancing business does not appear to be necessary in *Sande 2B* for attributing the conduct of legal practice to the business, a company was also involved in *Sande 2B* and, therefore, it does not provide a clear distinction from *Ramalca* on the point. Ironically - as we will see in our second article - it is now the corporate form of a business that will allow lawful *Ramalca*-like arrangements for conveyancing in Queensland.

The other side of this principle is that, as long as the 'business' that receives payment for conveyancing services is a law practice - as defined now in the *Legal Profession Act 2007* (Qld) - the services are provided lawfully even if the work is done by legally unqualified people or outsourced to unqualified people.¹⁶¹ Indeed, it is common, particularly in practices that specialise in conveyancing, for paralegal or administrative staff to do most of the work.

¹⁵⁴ Ibid, 40.

¹⁵⁵ Ibid, 41.

¹⁵⁶ [1998] 1 Qd R 273.

¹⁵⁷ [1996] 1 Qd R 622.

¹⁵⁸ *Sande 2B* [1998] 1 Qd R 273, 293.

¹⁵⁹ Ibid, 293. This narrowing of *Ramalca*'s means of attributing legal practice to a business was initially taken by Ipp J in *Attorney-General (WA) v Quill Wills Ltd* (1990) 3 WAR 500, 515, although in the case of unlawful willmaking.

¹⁶⁰ In this respect, Priestley JA in *Ramalca* (1988) 12 NSWLR 34, 41-2 distinguished *Reynolds v Hoyle* [1976] 1 WLR 207 and *Green v Hoyle* [1976] 1 WLR 575 where arrangements for nonlawyer conveyancing were held lawful, in part, because they were conducted for no charge within a voluntary unincorporated association.

¹⁶¹ Cf *Legal Services Commissioner v McClelland* [2006] LPT 013, where the objection was not that the solicitor outsourced work to a nonlawyer conveyancer, but that he shared receipts with her.

The case law also recognises particular tasks in the penumbra of conveyancing practice that, in themselves, do not necessarily amount to 'legal practice'. Thus, preparing a vendor disclosure statement required under land sales legislation does not necessarily amount to 'legal practice'.¹⁶² It has also been recognised that some aspects of conveyancing work are of a clerical or secretarial quality, do not demand the attention of legally skilled professionals to complete properly and, for that reason, are outside the reservation. The Queensland courts have affirmed the prospect of law-related but 'mechanical or clerical' work in relation to land transactions,¹⁶³ but have only once allowed it as an escape for those accused of unlawful meddling in legal work. In *Sande 2B* the correction of spelling mistakes on transfer documents was regarded as a clerical exercise. It was therefore not treated as the equivalent of preparing an instrument relating to real estate, and so was not regarded as illegal.¹⁶⁴

2 *The Agents' Exception*

Although the Law Society still maintains that the conduct of land transactions must be entrusted exclusively to solicitors, it has long allowed a significant aspect of conveyancing to be done by real estate agents – the preparation and formation of the land sale contract. An idiosyncratic feature of Queensland conveyancing practice (when compared with the practice elsewhere in Australia) has been that, almost universally in residential conveyancing, the contract of sale is not even sent to a solicitor until a real estate agent has concluded the negotiations between buyer and seller; discussed with (in the main) the buyer important terms like price, preconditions as to finance and other sales, inspections and settlement date; completed any details in the contract that are needed to give effect to those terms; and sometimes inserted special clauses that deal with unusual arrangements.

The Queensland Law Society has allowed real estate agents to have the principal role in the formation of land sale contracts, and of all aspects of conveyancing before that, for decades.¹⁶⁵ Furthermore, it has openly endorsed this practice by collaborating with the Real Estate Institute of Queensland in developing and approving the standard residential property sale contract.¹⁶⁶ The Law Society has arguably, therefore, acquiesced in allowing aspects of 'legal practice' to real estate agents and, until 2004, without any statutory authorisation for agents to intrude into the exclusive reservation of conveyancing for solicitors (and barristers).

It may be that, under the *Seymour* approach to the scope of 'legal practice', the long term practice of allowing real estate agents to deal with all arrangements up to the formation of the contract could take this outside the reservation. *Seymour* effectively recognised that activities regularly done by other professions and

¹⁶² *Law Institute of Victoria v Maric* [2006] VSC 361.

¹⁶³ *Queensland Law Society Inc v Hoy* [1995] QSC 169, following *Barristers Board v KWA*, Unreported, Supreme Court of Western Australia (Anderson J), 23 April 1992.

¹⁶⁴ *Sande 2B* [1998] 1 Qd R 273, 300.

¹⁶⁵ The Real Estate Institute of Queensland originally recommended a general form contract of sale which was approved for general use by the Queensland Law Society in 1972. Since then, revisions of the standard contract have been either prepared or approved by the REIQ and the Law Society with the expectation that the real estate agent must provide the details not only to complete the contract, but to give it certainty and effect: WD Duncan, *Real Estate Agency Law in Queensland* (4th ed, 2006) 64-5.

¹⁶⁶ See now Real Estate Institute of Queensland and Queensland Law Society, *Contract for Houses and Residential Land* (6th ed, 2005). It appears that the REIQ's involvement in the development of the standard land sale contract was initially motivated by the need to simplify the language of Queensland Law Society standard form contracts.

occupational groups might not be reserved exclusively for lawyers.¹⁶⁷ However, this is unlikely to be the law in Queensland. In *Sande 2B*, Thomas J accepted the *Sperry-Cornall* approach to the meaning of ‘legal practice’ and, further, the *Kerrigan* formulation of the work of a conveyancer.¹⁶⁸ When the issue is viewed through this lens, the stronger argument is that the conventional role of real estate agents involves aspects of conveyancing work – specifically ‘preparing any document or doing any act for the purpose of creating ... any interest in any form of property’.¹⁶⁹ Although with Torrens land the legal estate does not pass until transfer documents have been registered after settlement, the signing of an unconditional contract immediately creates an equitable interest in the land. Even if the contract is subject to a condition precedent (like the approval of finance), it is likely that the agent has been involved in preparing a document that sees equitable rights created.¹⁷⁰

Although Australian adjudication on the point is scarce,¹⁷¹ in *Florida Bar v Irizarry*¹⁷² the Supreme Court of Florida held that:¹⁷³

... the practice of law includes... the preparation of... contracts, by which legal rights are either obtained, secured or given away...

Irizarry involved real estate agents preparing land sale contracts (and more).¹⁷⁴ It was a direct application of the court’s earlier decisions in *Sperry* and *Town*,¹⁷⁵ which through *Cornall* have shaped the predominant Australian approach to the meaning of ‘legal practice’. The American adjudication also regards incidental advice about the effect of land sale documents as legal practice.¹⁷⁶ However, significant differences in opinion have arisen as to whether someone who merely ‘filled in blanks’ of a standard form land sale contract is involved in legal practice.

¹⁶⁷ *Law Society of NSW v Seymour* [1999] NSWCA 117, [18].

¹⁶⁸ [1998] 1 Qd R 273, 289, 291.

¹⁶⁹ *In the Will of Kerrigan* (1935) 35 SR (NSW) 242, 250; *Sande 2B* [1998] 1 Qd R 273, 289, 291.

¹⁷⁰ Ie, under the principle of *Lysaght v Edwards* (1876) 2 ChD 499, 506-10 that, once a contract becomes specifically performable, the buyer is considered in equity to be the owner of the property. The may be rights in equity even if specific performance is not available.

¹⁷¹ However, see *Re Simpson & Fricke; Ex parte Robinson* [1910] VLR 177, where a father and son entered an agreement to transfer land to the son after the father’s death, and was held not to violate the Victorian reservation of preparing land title documents to solicitors and conveyancers. However, this does not support the suggestion that the preparation of an agreement is not legal practice. The document in *Simpson & Fricke* was an agreement prepared by the parties themselves, and the question was whether the document was of a kind captured by the ban on ‘drawing a conveyance’ in s 261 *Supreme Court Act 1890* (Vic) (the successor to the *Attorneys’ Bills and Conveyancing Act*). It was not whether (had the document been prepared by someone else for a fee) the preparation of a contract was within the scope of ‘legal practice’. Cf the Texas decision in *Hexter Title and Abstract Co Inc v Grievance Committee, Fifth Congressional District, State Bar of Texas*, 179 SW (2d) 946 (1944).

¹⁷² 268 So (2d) 377 (1972).

¹⁷³ *Ibid*, 379.

¹⁷⁴ For other decisions recognising the preparation of land sale contracts as legal practice, see *Clark v Rearden*, 231 Mo App 666, 670; 104 SW 2d 407, 410 (1937); *People ex rel Illinois Bar Association v Schafer*, 404 Ill 45, 50; 87 NE (2d) 773, 776 (1949); *Chicago Bar Association v Quinlan and Tyson Inc*, 53 Ill App 2d 388, 396; 203 NE (2d) 131, 136 (1964).

¹⁷⁵ See text at above nn 103-106.

¹⁷⁶ *Rattikin Title Company v Grievance Committee of the State Bar of Texas*, 272 SW (2d) 948, 951 (1954); *People v Sipper*, 64 Cal App Supp 2d 844; 142 P (2d) 960 (1943).

There have been American State courts that treat this as merely a clerical exercise, requiring nothing more than ordinary business judgment.¹⁷⁷ As recently as 1996, the Attorney-General for New York advised that real estate agents could lawfully complete fill-in-the-blank form contracts so long as the contracts had been prepared by attorneys or approved by a 'recognised bar association in conjunction with a recognised realtor's association'.¹⁷⁸ On the other hand, the use of a standard form has been held still to demand the exercise of a legally skilled judgment that the contract is adapted to the transaction and, so, has been regarded as work reserved exclusively for attorneys.¹⁷⁹ However, reviewing the competing authorities in *People ex rel Illinois State Bar Association v Schafer*,¹⁸⁰ the Supreme Court of Illinois pointed out the tension between, on the one hand, the risks of mechanical form filling and, on the other, the inevitability of intruding into legal work if more care were taken. Simpson J said:¹⁸¹

One who merely fills in certain blanks when other pertinent information should be elicited and considered is rendering little service but is acting in a manner calculated to produce trouble. When filling in blanks as directed he may not by that simple act be practicing law, but if he elicits the proper information and considers it and advises and acts thereon he would in all probability be practicing law. In other words, if his service does not amount to the practice of law it is without material value; but if it is of material value it would likely amount to the practice of law.

The Queensland practice – with the standard REIQ-QLS land sale contract – meets the conditions of the New York Attorney-General's Opinion, but the law in Queensland is not likely to be as relaxed as it is in New York. In *Sande 2B*,¹⁸² the Supreme Court of Queensland would recognise only the correcting of spelling errors in documents as a clerical or secretarial exercise, and filling in the blanks on transfer forms was regarded as legal practice.

As a result, while interstate nonlawyer conveyancers have met Law Society resistance to their attempts through litigation and political lobbying to lower barriers to offering conveyancing services, real estate agents have been allowed to undertake an important aspect of conveyancing. This was originally allowed simply by 'prosecutorial nullification'¹⁸³ – the Law Society's tacit refusal to prosecute agents for violating the reservation. It was more recently allowed and regularised by express statutory exception to the 'legal practice' reservation in the *Legal Profession Act 2004* (Qld).¹⁸⁴ The current expression of the agents' exception in the Act of 2007 is for:¹⁸⁵

... work performed by a [*Property Agents and Motor Dealers' Act 2000* (Qld)] licensee, or by an employee of a PAMDA licensee, if the licensee or employee only

¹⁷⁷ *Gustafson v Taylor*, 138 Ohio St 392, 398; 35 NE (2d) 435, 439 (1941).

¹⁷⁸ See Joyce Palomar, 'The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says "Cease Fire!"' (1991) 31 *Connecticut Law Review* 423, 433.

¹⁷⁹ *Washington State Bar Association v Washington Association of Realtors*, 41 Wash 2d 697; 251 P 2d 619 (1952); *People v Sipper*, 61 Cal App Supp 2d 844; 142 P 2d 960 (1943).

¹⁸⁰ 404 Ill 45; 87 NE 2d 773 (1949).

¹⁸¹ 404 Ill 45, 54; 87 NE 2d 773, 777-8 (1949).

¹⁸² [1998] 1 Qd R 273, 300.

¹⁸³ Ie, the effect of the law is nullified by an official refusal to enforce it – especially where the law 'seems out of tune with contemporary sentiment': W Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998) 84.

¹⁸⁴ S 24(2)(e) *Legal Profession Act 2004* (Qld).

¹⁸⁵ Qld, s 24(2)(e).

fills in details in a preprinted contract or other document as part of performing the work of a PAMDA licensee and does not give advice about the contract or other document or the details that are filled in.

The agents' exception, carefully limited to 'filling in blanks', requires some comment. First, it reinforces the central place that giving legal advice is regarded as having under the *Sperry-Cornall* approach to legal practice, and so tries to exclude agents from advising on the effect of the contract. Efforts have also been made at placing external constraints on agents' slipping into the giving of legal advice. An agent must give a written statement to a buyer of land that the buyer should seek independent legal advice about the contract.¹⁸⁶ Secondly, it is most likely a genuine exception to the exclusive reservation of legal practice to lawyers. As we have seen, some American courts consider filling in blanks in a standard form contract – especially one endorsed by a lawyers' professional association – as a clerical activity. But *Sande 2B* did not go this far. To the extent that it can be determined in Queensland, correcting spelling mistakes on documents is the only activity relating to land transactions that is plainly treated as clerical. Thirdly, the line between 'filling in blanks' and giving advice is almost impossible to police, despite the warnings given to buyers,¹⁸⁷ and may therefore itself be subject to a pragmatic prosecutorial nullification. For the agent, it will sometimes be dangerous actually *not* to cross the line. With the Illinois Supreme Court in *Schafer*, we may wonder how, when 'filling in' the blanks of the standard contract, the agent could do so merely on the buyer's directions without exercising the judgment needed to select the right contract and, having been advised of the buyer's circumstances, selecting which clauses to trigger or add to the contract.¹⁸⁸ The standard REIQ-QLS contract requires agents to complete the document in ways that differently shape the terms of the contract around the peculiarities of the given transaction – to fill in or leave blank sections that render finance, inspection, electrical safety and smoke alarm terms operative or inoperative; to add other preconditions and terms for the payment of the agent's commission. It is almost inconceivable that a diligent agent could perform this role without explaining the effect of the contract, or why at least information is needed from the parties if the standard contract details are to be completed safely.

III CONCLUSION

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 access to nonlawyer conveyancers that other States allow.¹⁸⁹ In the next Part – to be published in a subsequent edition of the *University of Queensland Law Journal* – we will consider these implications. This will involve an analysis of conveyancing markets in Queensland and the impact that competition law has on them. Secondly, we consider that, as a matter of competition *policy* – not law – whether the current 'legal practice' barrier to entry should be maintained. And

¹⁸⁶ Section 366D *Property Agents and Motor Dealers' Act 2000* (Qld); Form 30c.

¹⁸⁷ *Ibid.*

¹⁸⁸ 404 Ill 45, 54; 87 NE 2d 773, 777-8 (1949).

¹⁸⁹ 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).

thirdly, as 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 will also be discussed. We believe that serious consideration must be given to the possibility that, even if more by accident than design, reforms that have already been made to the legal profession in Queensland may have brought conveyancing markets to the point where the State is now complying with national competition policy.