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FOREWORD

It is my great pleasure to welcome readers to the 2014 issue of the *Journal of the Australasian Law Teachers Association* (JALTA).

JALTA is a double-blind refereed journal that publishes scholarly works on all aspects of law. JALTA was established by the Australasian Law Teachers Association (ALTA) in 2008 and represents an important initiative which supports the research endeavours of its members, in addition to ALTA’s highly regarded *Legal Education Review* (LER) and the *Legal Education Digest* (LED), which is included in ALTA membership. The journal also appropriately reflects the prestige, maturity and development of ALTA as an organisation which now represents well over 1000 members.

Following the publication of our inaugural issue in 2008, the response to subsequent issues of JALTA continued to be very strong. This issue of JALTA includes 10 published articles out of 19 full submissions that we received. All submissions undergo a rigorous double-blind peer review before being published.

In closing, and most importantly, I need to extend my sincere thanks to a number of people whose collective efforts have made this journal possible. First, in addition to all members of the ALTA Executive, I would like to thank my Editorial Board colleagues for their counsel and support. Second, I must thank ALTA Interest Group Convenors and all referees who assisted us with the double-blind refereeing process. I would also like to offer my thanks to Trischa Mann, for all her efforts in proof-reading, Maureen Platt for her efforts in typesetting, and to CCH Australia Ltd for their generous sponsorship and continued support of the journal. Lastly, I need to record a special thanks to Katherine (‘Kat’) Poludniewski who is tireless in her work on all aspects dealing with JALTA and is always supremely organised and efficient. I can safely say that, without Kat’s contributions JALTA, would not be produced in a timely and professional manner. Well done, Kat!

I commend this issue of JALTA to all readers and ALTA looks forward to continuing to contribute to the legal profession through this journal.

Professor Dale Pinto  
Editor-in-Chief  
JALTA
GENDER DIVERSITY ON CORPORATE BOARDS

KATIE WATSON

ABSTRACT

Gender diversity on corporate boards is a popular topic both in academic and in business publications, but the focus is typically on ‘how’ rather than ‘why’. This paper argues that the motivation for seeking to increase the number of women on boards necessarily affects the means of achieving that goal. Indeed, some motivations may undermine one another. This paper argues that a clear rationale will positively affect the implementation of programs for change, and uses international examples as evidence that this is possible.

I INTRODUCTION

It is a truth universally acknowledged that a corporation in possession of a board of directors must be in want of a woman.1

Gender diversity is recognised as a pressing challenge for corporate governance. However, the current debate regarding the way to achieve gender diversity on boards is hampered by a lack of critical discussion about why such a goal is sought. Although reasons for gender diversity are frequently asserted, they are less frequently considered in the theoretical detail which would highlight the extent to which motivation affects implementation. This paper argues that in order to consider programs which may facilitate real change we must first give proper consideration to the question of why we seek gender diversity on corporate boards. The specific reason for pursuing gender diversity will inevitably affect the method of pursuit. This paper begins with an overview of the most commonly cited reasons in favour of gender diversity on corporate boards. The second part of this paper takes this analysis a step further, highlighting the relationship between motivation and ‘solution’ and demonstrating that the current practice of using many simultaneous and competing reasons is neither compelling nor productive. Finally, I consider some examples of how motivation affects policy at a national level and show how the link between theory and practice is evident in other jurisdictions.

II THE EXISTING DEBATE

Gender diversity on corporate boards is a popular topic in academic and business publications. There does not appear to be any express opposition to an increase in the number of women on corporate boards; nevertheless, the increase in numbers has been limited. In Australia, although the number of female directors in the top 200 companies has risen steadily, the percentage is currently just 18.6 per cent despite over a decade of significant attention. Statements of support are not translating into actual change. A recent Australian Human Resources Institute study found that although two-thirds of CEOs and senior executives supported gender equity,2

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* PhD Candidate, University of Newcastle.
1 With apologies to Jane Austen.
only 37 per cent of companies actually had gender equity initiatives in place for leadership development. Similarly, Broome, Conley and Krawiec found that most corporate directors profess to support gender diversity but, even in lengthy interviews, cannot give explanations or examples as to why they do so.

This paper argues that a key reason for the limited change is a failure to adequately address the relationship between motivation and choice of policy. Although the question of why there should be more women on boards is rarely debated in any serious way, various reasons are often listed as a preface to debate about potential action for change. The most frequently cited reasons may be broadly grouped into three categories: social justice arguments, functional arguments, and empirical arguments. Social justifications rest on assertions of the need for equality and are therefore quite separate in both nature and style compared with functional and empirical arguments, which may be loosely linked as business case arguments. Functional justifications use management and social research to consider how women may improve business performance. Empirical justifications are attempts to quantify a hypothesised link between increased female participation on boards and company profits. Although analysis of the specific arguments is also important, for the purposes of this article the arguments will be considered briefly and within these three notional groups.

Social justice is a broad underlying rationale which is often left unexplained. A simple comparison between the percentage of women in the workforce and the percentage of women on boards may be cited as evidence of a problem. At their best, social justice arguments are premised on the intrinsic value of women. For example, Peta Spender argues that women’s participation on boards is ‘a measure of democratic leadership because these corporations are critical actors in the public sphere and their directors influence public debate and access to resources.’ Spender therefore eschews any business case arguments as unnecessary and demeaning to women’s absolute right to economic equality. Similarly, Barbara Black asks,

Is it really necessary to make a business case to justify increased efforts towards board diversity? The number of women, including professional women … should put the onus on the business community to explain their failure to nominate more female candidates for board positions.

However, the argument that such imbalance is necessarily wrong for democratic, social, or other reasons is rarely explicated. Perhaps it is the lack of explicit statement which allows the incompatibility between social justice arguments and ‘business case’ arguments to go unnoticed. Perhaps the social justice argument does not carry the same ‘call to action’ as a business case. Whatever the explanation, there is a lack of advocacy focusing on social justice alone as sufficient motivation for action in relation to gender diversity on corporate boards.

Functional business case arguments can be separated from social justice arguments in that they deal with the instrumental value rather than the intrinsic value of women. As a subset of the overall ‘business case’ function, these arguments seek to suggest the manner in which women might benefit a corporate board. These reasons may be related to the nature of diversity per se, to the advantages of characteristics perceived to be female-specific, or to the representational role of women in power. Management and psychological research has demonstrated that diverse teams tend to make better decisions, so in many cases the argument in favour of women on boards is merely an argument for diversity of any kind. In this way, the same effect could be

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7 Ibid 28.
achieved through diversity of worldview,\textsuperscript{10} ethnicity\textsuperscript{11} or age.\textsuperscript{12} In some cases, the asserted functional advantages are related to the specific (perhaps imagined) nature of women. Women are argued to be intrinsically more risk averse,\textsuperscript{13} more likely to champion tough questions,\textsuperscript{14} more intensive in their monitoring style\textsuperscript{15} and more likely to be well prepared for board meetings.\textsuperscript{16} Women are claimed to develop more effective marketing strategies\textsuperscript{17} due to the fact that women make a majority of purchasing decisions.\textsuperscript{18} These ‘feminine characteristics’ are argued to be a reason to ensure more women reach board level positions. Additionally, women’s presence on boards may be intended to serve as a signal to employees, shareholders or stakeholders.\textsuperscript{19} However, the signal may not be sufficiently clear.\textsuperscript{20} Similarly, women on boards may help to attract and retain talented female employees at an individual firm level.\textsuperscript{21} At a macro or national level, low representation of female candidates at all levels is argued to be a ‘waste of talent’.\textsuperscript{22} For example, the Grattan Institute argues that a 6 per cent increase in female workforce participation would lead to a $25 billion increase in Australian GDP.\textsuperscript{23} Alone or in conjunction with other reasons, these functional motivations are typically outlined with limited awareness of the fact that such instrumental purposes undermine the very nature of equality and social justice.

From a practical perspective, empirical arguments may be the most effective encouragement for an individual firm to appoint more females to the board, as they suggest that female board members increase financial performance.\textsuperscript{24} The empirical business case is amorphous despite significant research and even more advocacy.\textsuperscript{25} However, attempts to find such evidence have proved inconclusive thus far. Empirical work has been used to argue that there is a positive

\begin{itemize}
  \item [16] Ibid.
  \item [18] Ibid.
  \item [24] This view assumes that decisions about gender diversity should devolve to firm level.
\end{itemize}
link, 26 a negative link, 27 no link, 28 or a context-specific link 29 between increased gender diversity and business outcomes. For example, international non-profit research organisation Catalyst reports that companies with more female board members have a 53 per cent higher return on equity, a 42 per cent higher return on sales and a 66 per cent higher return on invested capital. 30 Conversely, others purport to find a negative relationship between gender diversity and firm performance. 31 Daunfeldt and Rudholm point to a negative effect on return on total assets after a time lag of two years in Swedish companies, 32 while Bohren and Strom suggest that less gender diversity creates more value in Norway. 33 The search for empirical proof that women increase profit suffers from serious theoretical and practical limitations. Most studies which purport to show a positive link suffer from indistinct causality: large, well-performing firms tend to have better diversity programs, but can those diversity programs be credited with success, or are diversity programs a symptom of success? Despite many complex attempts, problems with isolating and measuring board performance statistically have not been fully addressed, and indeed may not be possible to address. 34 Another reason for the inconclusive results is the lack of a definite link between board behaviour and firm performance. This leaves the business case arguments in the difficult territory of trying to prove something which is not susceptible of proof. Ultimately, even if the ‘business case’ were capable of unequivocal proof and even if such proof were provided in great quantity, the result would only serve to indicate one way in which firm value could be increased. Firms would have to weigh this opportunity against other opportunities to increase firm value. As Donald Langevoort notes, ‘there are always close substitutes in the world of corporate governance’. 35 Women would thus, in the context of this argument, be competing in a marketplace of adding value. In this way, the instrumental view of women presented by the empirical business case seriously undermines claims of intrinsic value put forward by social justice arguments. The two arguments can therefore be considered incompatible as motivations for increasing gender diversity on corporate boards. To a lesser extent, the empirical claims differ from functional claims in that empirical claims privilege results whereas functional claims privilege process. Results and process may frequently be consistent, but when the success of a policy is measured, the outcome may vary depending on which approach is preferred.

III. THE RELATIONSHIP BETWEEN MOTIVATION AND IMPLEMENTATION

The arguments for gender diversity on corporate boards have been grouped into three categories for the purposes of this discussion, but when mobilised as a mixture, the mixed arguments are

29 Adams and Ferreira, above n 15, 3.
31 See, eg, Daunfeldt and Rudholm, above n 27, 20; Bohren and Strom, above n 27; Ahern and Dittmar, above n 27; Matsa and Miller, above n 21.
32 Daunfeldt and Rudholm, above n 27.
33 Bohren and Strom, above n 27.
often weaker than any single rationale. If the reasons stated are inconsistent, this weakens any prescription for change. This article argues that the motivation for seeking to increase the number of women on boards necessarily affects the means of achieving that goal. Current debate focuses on discussion of the various mechanisms for increasing the number of women on boards, such as quotas, targets, mentoring programs and other initiatives. However, without a coherent rationale it is difficult to determine which method is most appropriate. Where social justice is the strong focus, quotas may be appropriate because they place primacy on the representation of women on boards rather than on any potential financial effects of that representation. Conversely, where considerations relate to profit enhancement it may be that targets are sufficient, because businesses must be free to choose the best means of enhancing their profit. Similarly, in considering a mechanism for change it is necessary to determine whether that mechanism is business- or government-driven. The choice of mechanism also devolves from the basic rationale for seeking the goal in the first place. For example, if gender-balanced boards provide better understanding of consumers, then inter-business competition in the marketplace should naturally lead to an increase in women on boards, and there would be no reason for government to legislate on the issue. However, if the key rationale is social justice or competition at an international level, then government ought to play a more central role in driving change. Rationale also determines the measure of success. Adding women to boards to provide successful female role models does not necessarily require any particular gender balance; success may be achieved with one or two females on most boards. However, if full use of the available talent pool is the primary motivation, then success might be measured by reference to the gender balance of the workforce in that sector, and therefore differ from sector to sector. At present the debate about ways to increase the number of women on boards pays insufficient attention to the reasons for such a goal. If the motivation were clear, there would be implications for the implementation of that goal.

IV INTERNATIONAL EXAMPLES AND THE POTENTIAL FOR COHERENCE

A International Examples: Norway, Spain, UK

Australian debate is fluid on the issue of rationale and takes influences from a variety of sources. However, in some other countries we can see a single specific rationale developed in the national discourse, and we can then trace the way that rationale affects the implementation of programs for change. For example, Norway and Spain have both implemented a formal quota system for gender diversity on corporate boards. However, the difference between rationales in these two countries can be traced through the discourse of national debate to legislation, implementation and outcomes. The United Kingdom does not have a quota, and it opposes any suggestion that quotas be implemented through the European Union. Instead, a variety of business-led initiatives are beginning to have some success, which is in keeping with the firm-level business case rationale favoured by UK discourse. In each jurisdiction, the implementation of policy links to a single dominant rationale for action.

In Norway, there is a social context of concern for gender equity, but for the specific issue of gender diversity on corporate boards the primary rationale was a desire to make full use of the talent pool at a national level. The initial suggestion to implement quotas for non-government firms was initially made in October 1999 by the Minister for Children and Family Affairs, who proposed a change to the *Equal Status Act* 1978. The proposal incorporated amendments

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relating to equal pay and reporting of gender metrics. After public consultation and referral to a committee for legal consideration, the measure was determined to be best situated within the Companies Act. This decision was consistent with the rationale demonstrated in various statements and explanations by government representatives. For example one of the drafters of the relevant legislation explained that ‘many people also think that the reasoning behind these gender equality rules is gender equality, but in fact it isn’t, it’s a side effect ... the point is that you need to use all the best people.’

Angsvar Gabrielsson, the Minister who caused a storm by announcing the quota laws before they had been discussed by cabinet, explained, ‘I didn’t do it for feminist reasons’. Similarly, when addressing the Economic Commission for Europe, State Secretary for Norway Kjell Erik, demonstrated this motivation stating that ‘women of today are highly educated and we need their competence in all spheres and sector in the labour market.’

Quotas were introduced after initial voluntary targets went unmet. The quotas were implemented through corporations law, specifically the chapter devoted to ‘Company Management’. Although the issue was first raised as a gender equality issue it was quickly moved to company law as discourse developed to demonstrate the benefits to national productivity. The rationale of national productivity drives the use of company law and heavy sanctions.

Spain has also implemented a quota for women on corporate boards; however, unlike Norway it is apparent that social justice was the sole motivating factor for taking action on the issue of board diversity. Therefore, it is consistent to find that the quota is part of a larger gender equality act. The Spanish legislative requirement for corporate boards to appoint female directors formed part of an omnibus act containing old and new gender equity legislation, including parental leave provisions and workplace equality provisions. The preamble to the Organic Act 3/2007 of 22 March For Effective Equality Between Women And Men includes reference to the Spanish Constitutional right to equality and to various international treaties regarding principles of non-discrimination and subsumes the representation of women on corporate boards within the broader scope of corporate social responsibility.

The Spanish quota may be criticised for its lack of compliance mechanisms, but when considered as an equal opportunity aspiration it is, perhaps, less surprising that there are no harsher penalties for failure to meet the quota.

The UK has demonstrated opposition to quota legislation of either the Norwegian or the Spanish variety. In the UK, national discourse is centred on individual business efficacy rather than the national talent pool or social justice. For example, Baroness Bottomley of Nettlestone argued in Parliament that ‘We believe in voluntary principles, in persuasion, in best practice and a bit of naming and shaming. Our approach is a voluntary one wherever possible and quotas offend.’ As a result, the government does not envisage a central role for itself in this area. However, business has taken up the challenge quite impressively, using techniques such as mentoring, business-led targets and talent identification schemes, and there has been an increase in female directors from 12.5 per cent in 2011 to 20.7 per cent in 2014.

Even where government action is not evident, as in the UK example, there remains a clear relationship between rationale for action and chosen form of action in relation to women on boards.

38 Aud Slettemoen in Rosenblum, above n 36, 65.
41 Public Limited Liability Companies Act § 6-11a (Norway).
44 United Kingdom Parliamentary Debates, House of Lords, 10 January2013, 343 (Baroness Bottomley of Nettlestone).
In Australia, a variety of competing motivations are evident in relation to gender diversity on boards, and the focus of argument remains on implementation. However, in order to determine responsibility for change it is important to consider the rationale for seeking to increase the number of women on boards. Current discourses tend to include a political appetite for social justice (albeit not fully realised) and an economic appreciation of the potential business case (albeit not sufficient to warrant action). Several high-profile figures have expressed support for government action by way of board gender quotas.

Former Federal Sex Discrimination Commissioner Liz Broderick, Former Governor-General Quentin Bryce, and Treasurer Joe Hockey have all spoken in support of quotas. In an article for the Australian Financial Review Liz Broderick argued:

Getting more women onto boards … is not just about gender equity. It’s also about our desire to remain internationally competitive. No country, industry or organisation can afford to waste the skills of more than half its population.

Broderick’s focus on the national talent pool reflects that of the Norwegian government. While still Governor-General, Quentin Bryce commented that ‘the Australian way of affirmative action is setting goals and recognising discrimination and lack of opportunity and deciding to take action.’ Speaking on the ABC program Q & A, Joe Hockey, then shadow treasurer with responsibility for corporate governance issues, commented, ‘I just don’t understand how you can claim as a director of a company that all wisdom and knowledge lies in the hands of men only.’ These two comments display a concern regarding discrimination.

Similarly, the leader of the Australian Greens Party, Senator Christine Milne, supports the implementation of quotas as a means of overcoming discrimination. In March 2013 Milne moved that the Senate ‘calls on the Government to legislate to ensure ASX200 companies have a minimum of 40 per cent female board directors within the next 5 years.’ Only the eight members of the Australian Greens party voted in favour of the motion and only one senator sought to make a statement regarding their vote. Senator Michaelia Cash, of the Liberal National Party, made a short statement defending her party’s opposition to the motion. Her statement focused on the individual business case, and essentially argued that quotas undermine merit:

high-level appointments of women should recognise merit and excellence … the appointment of women to boards for reasons other than merit and excellence could be counterproductive and work against the long-term interests of women.

Similarly, when asked to comment on his colleague Joe Hockey’s view of quotas, the then-Leader of the Opposition, Tony Abbott, asserted that ‘if women are given the chance to show their abilities they will get places on their merits.’ The views of Cash and Abbott, which prioritise the functional business case at the level of the firm, appear to remain the majority
discourse. However, one concern is that there is limited scope for such discourse to occur and develop as it did in the UK after the Davies report, and in other countries by the introduction of legislation.

If we take the above discourses as potential motivations we may consider the implications of each rationale. For example, if equity were to be the primary motivating factor, then government is likely to be the primary means of change. The debate regarding which mechanism would be most suitable could then take place within the boundaries provided by the consideration that equity is the prioritised outcome. This focus provides much needed clarity to discussion. It is beyond the scope of this paper to discuss the appropriate legislative or other mechanisms to be employed in service of the aim of equity. However, the example of Spain may be relevant; there the government unilaterally set quotas and reinforced the importance with governmental incentives.

Alternatively, if the ‘business case’ is to be the primary motivator, the outcome is likely to be different. The business community claims an intention to act and asserts that government need not intervene.\(^{58}\) However, little real change is evident.\(^ {59}\) As discussed above, the empirical business case remains unconvincing. If, alternatively, the functional business case rhetoric is to be effective, implementation programs must focus on the specific functional effect sought. In this way programs such as the forced reporting of generic intentions to increase the number of women on boards would be not only insufficient but also irrelevant. The coherent response to functional arguments may be specific or fundamental. While specific responses would engage with the claimed functional advantages of women on boards, this may or may not lead to an acceptable increase in the overall number of women on boards. Indeed, we have seen engagement of this kind in various areas in Australia already,\(^ {60}\) some even advocate a more serious transformation of corporate law.\(^ {61}\) These examples of the different possibilities inherent in the social justice and business arguments demonstrate, in the specific Australian situation, the vast difference in coherent programmatic change which can be caused by a difference in rationale for change.

**V Conclusions**

Gender diversity has been theoretically accepted as a normative goal for corporate boards. However, the motivations for this goal are often inconsistent and uncertainty about purpose is limiting further developments. This paper has outlined and analysed the various proposed reasons for gender diversity on corporate boards, noting that many frequently combined reasons are actually inconsistent. The individual reasons and their potentially relevant implications were also discussed. Examples of coherent programs for action on the international stage have been provided as both narrative for this argument and as evidence of its effectiveness. Finally, the outcome of two potential rationales in the Australian context have been canvassed. The importance of logical and rhetorical coherence is important when serious changes are being proposed, and it is unlikely that widespread change will be achieved without such a focus on the choice of rationale.


\(^{60}\) See, eg, Australian Institute of Company Directors, *Board Diversity: Think Outside the Square* (Australian Institute of Company Directors, October 2013).

IS IT A NOT-FOR-PROFIT ORGANISATION OR A FOR-PROFIT ORGANISATION? THE CASE FOR A CIC STRUCTURE IN AUSTRALIA

KIM D WEINERT

ABSTRACT

Australia’s not-for-profit sector has fundamentally changed. The sector was once informally organised and unconstrained by the exigencies of commercial and government pressures; at its core there was a strong sense of affection. However, in recent times the sector has exploded to become first a highly organised, competitive space and subsequently a significant economic contributor. Participants in this sector are now de facto organisational structures which function and behave as an extension of the government or as a for-profit company. These changes in behaviour raise questions: are Australia’s traditional not-for-profit structures out-dated, and is there a need to introduce a hybrid form of organisation? The starting point of this article is the significant change observed in Australia’s not-for-profit sector. From here this article discusses the way these changes have made it an increasingly challenging task to clearly differentiate between traditional not-for-profit organisations, for-profit organisations and social enterprises. This challenge illuminates the complexity and scope of organisational behaviour that has blurred the sector’s boundaries. Addressing this issue of blurred boundaries, the United Kingdom has introduced the structure of a Community Interest Company (CIC). Drawing on the UK experience and the identified changes in Australia’s not-for-profit sector, this article argues that a new organisational structure such as a CIC is needed. Lastly, this article will identify the shortfalls inherent in a UK-style CIC structure within the Australian corporate framework, and suggests ways in which they could be overcome.

Key words: Not-for-profit organisations, social enterprise, hybrid structures, Community Interest Companies, CICs.

1 INTRODUCTION

Not-for-profit organisations have developed internal structures and activities that have welfare and free market dimensions. These developments are in reaction to the state resiling from its welfare responsibilities and the increasing trend of not-for-profit organisations deriving income from commercial activities. The need to undertake commercial activities arises from pressure to cross-subsidise the organisation’s mission related services.¹ Not-for-profit organisations

that carry on commercial activities invite potential legal and taxation consequences. Despite these risks, not-for-profits compete for profit margins and a place in the market, and altruism consequently takes a back seat. This change in behaviour affirms the need to find new ways to recognise that not-for-profits also have the ability to trade competitively in the marketplace.

However, acknowledging that not-for-profit organisations have mixed purposes can present problems from a trust perspective, as well as from within the regulatory and governance framework. This article will highlight the way Australia’s not-for-profit sector and its organisations — along with other common law jurisdictions — have changed, and how these changes now make it a challenging task to differentiate between a for-profit and a social enterprise. From here the article will aim to show that a new organisational structure is needed in Australia by examining the United Kingdom’s CIC. Lastly, this article will argue that Australia does need a new structure, such as a CIC, that will benefit not-for-profit organisations and social entrepreneurs and whether any identifiable shortcomings of this new structure can be overcome.

II Australia’s Changing Not-For-Profit Sector

The not-for-profit sector has made strong contributions both economically and to Australia’s social wellbeing. In Australia, the economic value of not-for-profit organisations is significant. According to recent data, not-for-profit organisations contribute $57,710m to Australia’s Gross Domestic Product and there are approximately 59,000 economically significant organisations. The net worth of assets held by not-for-profit organisations is $176B and the total income generated by not-for-profit organisations in Australia was estimated to be $107.5B for 2012–13. The main source of income was government (federal, state and local) followed by service provision ($57.87B). Government funding is generally directed towards community-based organisations that are involved in the provision of health services, residential aged care, disability services, etc. Outside these community-based organisations many other not-for-profits need to generate their own income through a diverse range of sources such as sales of goods and income from services, rent and investment income. This data shows that Australian not-for-profit organisations are building close working partnerships with government and need to undertake commercial activities to generate income and deliver much-needed services.

Through trading and ‘commercial adventurism’ these divergent activities have made it an increasingly challenging task to clearly differentiate between not-for-profits, public agencies and for-profit organisations. This problem illuminates the complexity of the not-for-profit...
organisation’s situation, which has blurred the sector’s boundaries.10 However, traditional theoretical frameworks point to various unique features and characteristics that define a not-for-profit organisation. For instance the structural operation definition,11 Hansmann’s ‘non-distributive constraint’ principle,12 and trustworthy theories13 all describe ways in which not-for-profits are different from other units.14 These early theories overlook the widespread challenges which not-for-profit organisations face today. The main challenge with which not-for-profits must deal with is how to meet the ever-increasing demand for their goods and services. In meeting these demands, not-for-profit organisations are finding opportunities to maximise trading opportunities combined with service delivery. Ben-Ner and Van Hoomissen acknowledge that this maximisation of utility and monetary returns is entrepreneurial.15 The phenomenon of social entrepreneurship over the past decade has also contributed to structural isomorphism.16 Di Maggio and Anheier questioned the coherence of not-for-profit organisations when they found that the differences between the for-profit and not-for-profit sectors is not due to distinct legal forms, but is rather a result of changes in key factors such as funding and clients, which override any distinguishable differences between the two sectors.17 Contributing to this problem of blurring of sectoral boundaries is the advent of ambiguous legal forms such as social enterprise. This mixture of features and functions has created difficulty in defining and understanding the essential nature of social enterprise.

The consensus among academics is that social enterprises are organisations or ventures which pursue financial success in the private marketplace in combination with a social purpose.18 This singular construct of social enterprise may also describe not-for-profit organisations, which balance commercial activities with their missions; this construct, can also describe a for-profit which pursues social goals. Further, it is claimed that social enterprises are organisations, which balance commercial activities with their missions; this construct, can also describe a for-profit which pursues social goals. Further, it is claimed that social enterprises are more diverse than not-for-profits and that they are not willing to be confined to one particular sector.19 This presents some difficulties in determining what prescribed legal form or legal characteristics constitute a social enterprise. Within Australia a social enterprise must chose an organisational structure that will be confined to one of the sectors. However, social enterprises consider themselves different from not-for-profits as they have profit-distribution attributes.

10 The blurring of sectoral boundaries has compromised the independence of the not-for-profit sector and it has been found that not-for-profit organisations are more concerned about their strategic positioning and financial security in the market. This change towards for-profit values is noted to be in direct conflict with an organisation’s core charitable activities and, further, diverts public resources to private gain. Estelle James, ‘Commercialism and the distributive constraint’ principle,’ (2003) 40(4) Society 29–39.
11 The five characteristics of the structural–operation definition are: (1) organised; (2) private; (3) self-governing; (4) non-disruptive of profit; and (5) non-compulsory or voluntary. See United Nations Handbook of National Accounting, Handbook on Non-Profit Institutions in the System of National Accounts (2003) 18.
13 Ibid, 835.
14 See also Salamon’s independency theory, which argues that regardless of government and market failures, nonprofits exist as a result of the voluntary action of people’s social obligation. See Lester Salamon and Helmut Anheier, ‘Social Origins of Civil Society: Explaining the Non-Profit Sector Cross-Nationally (Working Paper, Johns Hopkins University, 1996); Helmut Anheier, Nonprofit Organisations — Theory, Management, Policy (Routledge, 2005) 130.
19 Dennis Young and Jesse Lecy, above n 18, 2.
and different from for-profits as they ‘have the priority to benefit the community over profit making.’ In 2005 for organisations that did not want to be a charity, but wished to pursue altruistic activities. At the time of creation, the CIC structure was earmarked as an effective legal form for social enterprises. Specifically, the design of the CIC structure allows for people who would like to establish or conduct a business that trades with a social purpose, or for a community benefit. Common activities carried out by CICs are community medical practices, environment projects, childcare, arts and education projects. Like any other not-for-profit organisation, a CIC cannot be formed or used for the personal gain of an individual.

### III Hybrid Structures

Australia’s traditional organisational forms have shown over time that they inhibit not-for-profit organisations’ ability to access and raise capital. There is little doubt that it is time to consider a new organisational structure that can better support the commercial activities of not-for-profits and is suitable for social enterprise activities in Australia. Such consideration of a new organisation form at this point in time is somewhat unlikely, as the federal government has announced the abolition of the Australian Charities and Not-For-Profit Commission and the expressed the desirability of not-for-profits being self-managed. This policy agenda is a clog on any idea of a new structure, but a discussion should nevertheless take place.

The evolution of not-for-profits in the marketplace makes the legal concept of the public benefit and the concepts of altruism complicated. Creation of hybrid structures can address these complications. Known hybrid structures are the low-profit, limited liability company (L3C) found in the United States and the Charitable Incorporated Organisation (CIO) and the Community Interest Company (CIC) in the United Kingdom. The focus of this article is on the CIC, as it is a relatively new structure which appears to be more suitable for social enterprise as well as not-for-profit organisations.

### IV The CIC Structure

The CIC was created in 2005 for organisations that did not want to be a charity, but wished to pursue altruistic activities. At the time of creation, the CIC structure was earmarked as an effective legal form for social enterprises. Specifically, the design of the CIC structure allows for people who would like to establish or conduct a business that trades with a social purpose, or for a community benefit. Common activities carried out by CICs are community medical practices, environment projects, childcare, arts and education projects. Like any other not-for-profit organisation, a CIC cannot be formed or used for the personal gain of an individual.
individual or a group of people, such as investors — nor can it be formed to support political purposes. However, if the organisation has a charitable status, it may apply to registered as a CIC subsidiary company with Companies House. CICs’ members enjoy limited liability, and this structure can be put in place by incorporating a new company or converting an existing one. The forms a CIC may take are: a company limited by guarantee; a private company limited by shares; or a public company limited by shares.

Before granting company status, the CIC Regulator must be satisfied that the company has met the asset lock test and the community interest test, which is similar to the public benefit test for charities. There is an inter-relationship between the asset lock test and the community interest test. For a company to satisfy the community interest test, ‘a reasonable person might consider its activities are being carried on for the benefit of the community.’ The asset lock test ensures that the company’s assets generated from its activities (including any profits or surplus) are used for the benefit of the community. The company’s articles of association must state ‘the company shall not transfer any of its assets for full consideration (market value)’.

A CIC is permitted to pay dividends to shareholders, but this depends on the company’s article, which the company adopts from the Community Interest Company (Amendment) Regulations 2009 (UK). A CIC with share capital that adopts Schedule 2’s articles of association may pay dividends to an asset-locked body, and a dividend payment is only made with the consent of the Regulator. Alternatively, if a CIC with share capital has Schedule 3 as its articles of association, dividends may be paid to shareholders who are not asset-locked bodies. Any dividend payment to a private financial investor is subject to a dividend cap. However, a dividend cap does not apply to those paid to certain asset-locked bodies. The dividend cap is designed to achieve a balance that encourages people to invest and to ensure assets and profits are used for the benefit of the community.

Payment of a dividend to a private financial investor is subject to the dividend cap. The dividend cap has three elements:

1. The maximum dividend per share limits the amount of dividend that can be paid on any given share. The limit for shares issued between 1 July 2005 and 5 April 2010 is 5 per cent above the Bank of England base lending rate of the paid-up value of a share. The limit for shares issued on or after 6 April 2010 is 20 per cent of the paid-up value of a share.

2. The maximum aggregate dividend limits the amount of dividend declared in terms of the profits available for distribution, currently limited to 35 per cent.

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27 Ibid, 4.
29 A limited company registered with the Registrar of Companies for England and Wales, Northern Ireland or Scotland.
32 Ibid.
33 Companies (Audit and Investigations and Community Enterprise) Act 2004 (UK) c 17, s 35; Community Interest Company Regulator, above n 31. ‘Community’ means either the community or population as a whole, or a definable sector or group of people in the United Kingdom or elsewhere. Any group of individuals constitutes a community if they share a common characteristic that a reasonable person could distinguish from other members of the community, or a section of the community. Community Interest Company (Amendment) Regulations 2006 (UK) SI 2008/629, reg 5.
34 Community Interest Company Regulator, above n 31.
37 Community Interest Regulator, above n 31.
38 Ibid, 5–6. There are three elements to a dividend cap: (i) maximum share; (ii) aggregate; and (iii) a carried forward unused dividend. Community Interest Regulator, ‘Chapter 6, above n 31.
39 Ibid, [n.3].
3. The ability to carry forward unused dividend capacity from year to year is limited (currently to five years).

The dividend cap ensures that a paid dividend is proportionate to the amount invested and the CIC’s profits. The above elements were simplified in response to the main criticisms of the dividend cap being too complex and restrictive, which affected investors’ ability to make social investments. These and other criticisms are explored further below.

V THE UNITED KINGDOM EXPERIENCE

Albeit that the CIC structure has only been in existence for a relatively short time, since 2005, there has been increased understanding of this structure. Since the inception of the CIC their growth has continued, despite the United Kingdom facing very tough economic times. The CIC Regulator’s statistics note that as at June 2014 there are over 9,500 registered CICs. However, although the numbers are growing, many CICs are also dissolving. Between August 2005 and March 2012 the Regulator reports 1,626 dissolutions of CICs, or just over 20 per cent of those CICs registered in that period. The main reasons for dissolution identified by the Regulator were: lack of funding (25 per cent); have not traded since incorporation (20 per cent); no longer viable (15 per cent); and the organisation was not awarded the contract (.05 per cent). Most of these dissolutions come from the education and health industries. Even so, the CIC structure has been more successful in attracting a level of investment than traditional not-for-profit structures.

The most notable success of the CIC structure is found where a wholly owned trading subsidiary seeks capital injections from other sources outside the equity banking sectors. This arrangement is taken up by charities in the United Kingdom. CICs have been found to be restrictive in the rate of return on performance — but, conversely, the cap has proved to be an attraction for investors. Also attractive is the social investment tax relief which CICs provide. Where a CIC is established under Schedule 3, a dividend can be paid to equity investors; however, this feature, while it has been successful in attraction commercial investors, has not attracted philanthropic funders.

The special allocation of dividends from CICs creates an interplay between a particular private benefit (profit) and the public or community benefit, and this interplay generates the need for regulation. Where public and private benefits are mixed, this will impact on the trustworthiness of not-for-profit organisations, and raises the need for policing. The CIC Regulator has a ‘light touch’ approach to the regulation of CICs. The fundamental role of the CIC Regulator is concerned with registering CICs and providing support to a CIC. The members control the affairs of CICs, and it is suggested that members are to be active within the organisation to ensure that the company meets the community interest test. This relaxed style of regulation places a heavy burden on members and relies on the good faith of all involved. Notwithstanding this, the community interest test and the asset lock test have been designed as the mechanism to guard against unscrupulous behaviour by individuals.

40 Community Interest Regulator, ‘Chapter 6, above n 31.
44 Ibid.
45 Ibid.
46 Ibid.
48 Ibid.
However, it is the mechanism of the asset lock test which has been identified as a hindrance on the CIC’s ability to expand. This criticism stems largely from social entrepreneurs who want ‘sweat equity’ and the ability to secure equity or quasi-equity. Progressively, the CIC structure is showing that it has a heavy reliance on market revenue — or at least a desire to have avenues of funding from all markets — and, moreover, to have managerial freedom to access the equity market. This demand is a reminder that social enterprise has developed in a market context as well as a political context.

Policy frameworks have emerged, especially in the United States and Europe, which influence the effectiveness and viability of these hybrid structures. The US policy emphasises tax and expenditure, which shows a preference towards the private market place. In comparison with Europe, these forms of organisations are part of the effective direct government program, with the emphasis on a social purpose that will address social needs. These policy frameworks arise from different cultural and geographic contexts. How Australia will develop policy, and what that policy might emphasise, is yet to be seen.

VI DOES AUSTRALIA NEED A CIC STRUCTURE?

Little doubt remains of the need for a new structure, both for social enterprises and for enterprising not-for-profit organisations. When considering what this new structure might look like, our policy makers need to address a fundamental problem regarding the treatment of intersectoral boundaries. Not-for-profit organisations that have become driven by the profit motive should adopt or convert to this new hybrid structure — but then governments will need to subsidise not-for-profits so that they can effectively compete with for-profits. Alternatively, a stricter activities test would need to be introduced to strictly regulate any related benefit for the public. Further, creation of a hybrid organisation requires a decision as to the sector in which this new organisation should sit. Having a hybrid structure in the not-for-profit sector would compromise key characteristics which the sector strongly believes in, such as independence and non-profit distribution; it would also lead to more confusion.

Incorporating hybrid structures within the for-profit corporate sector would require legislative recognition of profit-making behaviour and permission for it to occur parallel with advancing social life. Such an explicit connection between market or capital behaviour and social needs gives clarity and would neutralise any identity crisis. Furthermore, a statutory test of ‘advancing social life’ would need to be introduced. Satisfying such a test would involve an organisation demonstrating, explicitly, how its social purpose and activities advance society. Looking at the way an organisation can ‘advance society’ requires an objective analysis of the activities performed by the organisation, and/or its use of assets, in a manner that would directly or indirectly advance or better society as a whole, or a section of society. The test would need to provide a clear means of determining what is an acceptable private benefit alongside a social purpose. This approach would avoid imposing the legal requirement of a charitable purpose on these new structures and at the same time protect the non-distribution constraint.

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49 ‘Sweat equity’ is the founder’s efforts in establishing the enterprise or venture, which is said to be unrewarded owing to the way the asset lock works. This means founders will only receive the value of their shares when they sell their shares upon exit from the organisation. Founders argue that their ‘sweat equity’ should be rewarded. Vibeka Mair, ‘CIC Association Recommends Changes to Dividend Cap’ on Civil Society, Civil Society Finance (14 February 2013) <http://www.civilsociety.co.uk/finance/news/content/14463/cic_association_recommends_removing_20_per_cent_cap_on_initial_investment>.

50 Ibid.

51 Above n 18, 12.

52 Ibid.

53 Ibid.

54 Above n 3, 534.

55 The tension between profit and advancing social life is not unique to enterprising non-profits. For-profits, today, are also expected to be a responsible corporate citizen as well as discharging their responsibilities to shareholders, advancing the company for a sustainable future and, further, not transgressing upon societal interests. See Simon Mortimore (ed), Company Directors — Duties, Liabilities and Remedies (Oxford University Press, 2nd ed, 2013); Doreen McBarnet, Aurora Vouclesescu and Tom Campbell (eds), The New Corporate Accountability: Corporate Social Responsibility and the Law (Cambridge University Press, 2009).
principle, which is very important to the not-for-profit sector, and in turn protect the sectors’ boundaries. The ‘advancement of social life’ test should be a strict test whereby an organisation demonstrates that its activities will address real social issues. This will not only address one of the main downfalls of social enterprise, but ensure that the founders have clear, definable goals that will deliver real and tangible benefits to society, not only for personal gain or other self-serving purposes.

Similar to the United Kingdom model, Australia’s hybrid organisation should cap or restrict the payment of a dividend. The threshold of this cap would need extensive consultation with social entrepreneurs, investors and not-for-profit organisations to establish a realistic level that these new organisations could sustain. Incorporated into the consultation process is whether the payment of dividends is connected to the organisation’s constitution. In the UK, Schedule 2 and 3 CICs restrict an organisation’s freedom as to when and to whom a dividend should or should not be paid. The Australian model may want to do away with these restrictions, which may cause some transparency concerns for not-for-profit organisations.

Another matter for consideration is whether Australia would impose an asset lock test, given the troubles associated with the asset lock test in the United Kingdom. The cautionary approach suggests an asset-lock style of test to ensure that no unscrupulous person is using assets for personal gain over the community. However, the question still remains whether the asset lock test really does provide a solid guarantee of preventing unscrupulous behaviour with the organisation’s assets. There is doubt. A strongly worded ‘advancement of social life’ test might ensure that all of the organisation’s assets are tangibly utilised in the interest and advancement of society, and thus eliminate the need for an asset lock test. Where an organisation uses assets in a contradictory way, the organisation and its directors should be penalised by way of a civil penalty.

A civil penalty would adequately deal with any instances where organisations, without intent, fail to confer benefits on society. The civil penalty to be imposed against the organisation and its directors should be designed to encourage good behaviour and practices within organisations. Where there are instances beyond mistakes, or an organisation is found to be in gross or continual breach of the social test, it would be open to the Regulator to strip the organisation of its status.

57 As conceived, this new organisational form has a degree of interaction with civil society, and it is therefore necessary for a model regulation to ensure that real social endeavours are both pursued and actually achieved. The ‘light approach’ in the United Kingdom is not ideal; strong controls will be needed, such as strong governance, reporting and disclosure mechanisms to Australian Securities Investment Commission, coupled with independent directors to curb powerful influences and problems of agency that may arise. The level of reporting always attracts criticism about the complexity of the process, its time-consuming nature, and unnecessary ‘red...
The solution is tiered financial reporting. These governance mechanisms will drive the organisation’s activities towards providing innovative solutions to social problems in a sustainable and transparent way.

This framework is designed to provide managerial freedom to address the diverse range of social issues rather than simply providing business solutions to fix social problems. The ability to reinforce the central societal activity is important, not only from a branding perspective for the organisation but also because it reduces any perceived risks regarding the organisation’s conduct. Additionally, public trust and good will can be achieved if the organisation can clearly demonstrate that the activities it pursues are not for the sole benefit of its donor’s, founder’s or director’s values and interests. Accompanying good regulatory processes will also be the need for tax exemptions.

Again owing to the ‘societal’ nature of the organisation’s activities the new form of organisation should be afforded taxation and legislative support similar to that given to not-for-profit and public benevolent organisations. The extent of this support should be proportional to the degree of profit-making activity by the organisation. This proportional approach will also go some way to removing entry barriers, and will allow organisations to compete with for-profits — and to some extent with well-established, commercially active not-for-profits.

VII Conclusion

Australia’s not-for-profit sector and its organisations have needed to change in response to the shrinking of welfare by governments, and they are considered to be significant economic contributors. Contributing to this changed landscape are social entrepreneurs. These changes have blurred the sectoral boundaries that comprise the integrity of the not-for-profit sector, and organisational structures are now inhibiting not-for-profits’ access to capital to the extent that they are no longer fit for purpose. The proposal to address and overcome these issues is the creation of new hybrid structures. The United States and United Kingdom have taken the lead by creating new legal forms which give organisations the capacity to utilise the market — which, in turn, supports a social activity and allows a private benefit to be enjoyed. This public/private benefit requires good regulatory and governance practices to overcome agency problems. The proposed new direction requires statutory intervention that will fix the boundaries and strive to protect the underlying values that are important to the not-for-profit sector. Australia’s not-for-profit sector will lag further behind other common law jurisdictions should the discussion of how a hybrid organisation can best serve not-for-profit organisations and social entrepreneurs not be started.

59 See reporting obligations for incorporated associations: Associations Incorporated Act 1981 (Qld) ss 58, 58A–59; Associations Incorporated Act 2009 (NSW) s 56; Associations Incorporation Regulation 2010 (NSW) regs 7–9; Associations Incorporation Reform Act 2012 (Vic) ss 92, 95, 98–99; Associations Incorporation Reform Regulations 2012 (Vic) reg 15, Sch 1; Associations Act 2003 (NT) ss 47–48; Associations Regulations 2004 (NT) reg 11–13; Associations Incorporation Act 1983 (SA) 35; Incorporated Associations Regulations 2008 (SA) reg 4.

60 This article does not seek to comprehensively outline a taxation policy for the proposed new structure. However, it is suggested that the new structure be provided with the necessary taxation concessions (different from those afforded to not-for-profits and for-profits) to encourage this new structure to be taken up.

61 Above n 3, 535.

62 Above n 3, 532–535.
RE-IMAGINING LEGAL EDUCATION: MEDIATION
AND THE CONCEPT OF NEUTRALITY

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ABSTRACT

Mediation is a standard part of present-day legal practice as it is the most popular of alternative
dispute resolution (ADR) options used in courts. Mediation has a pivotal role to play in re-
imagining legal practice away from dependence on an adversarial frame of reference to a range
of collaborative problem-solving options. Neutrality is a contested core concept for the theory
and practice of mediation. Engaging with contested constructs of the meaning of neutrality is
a useful vehicle for law students to think critically about legal practice and their role within
it. It is a concept that introduces students to socio-legal theory and broadens their thinking
beyond a traditional legal methodology to a more self-reflective and critical standpoint. This
paper explores the work of Paul Ramsden, his theories of teaching and his concept of a ‘deep
approach to learning’, as a framework for teaching students about neutrality in mediation.

1 INTRODUCTION

Alternative Dispute Resolution (ADR) is a growing area of professional practice for lawyers in
Australia. The opportunity to refer clients to ADR options and for lawyers to practice in ADR
has grown significantly in the last 25 years. This changing landscape in dispute resolution has
prompted a number of law schools to incorporate a study of ADR as a component of existing
substantive courses, or to offer ADR as a stand-alone course of study. More recently academics
have recognised not only that new lawyers need to be cognisant of, understand, and incorporate
ADR in their practice, but also that aspects of ADR practice are shaping the professional identity
of the new generation of lawyers.

The most well recognised and commonly used form of ADR is mediation. In this paper we
examine one standard for the practice of mediation, an understanding of neutrality, as a vehicle
for exploring deep approaches to learning, and the teaching of a re-imagined professional
identity for lawyers — one that incorporates an understanding of, and practice in, ADR options,
particularly mediation. We have confined our discussion to neutrality in mediation in order to give close attention to the learning and teaching of this one standard for practice. In reality its examination would sit within a course of ADR study that would challenge and reframe the traditional adversarial and rational–analytical paradigm of legal professional practice.

The following discussion begins by introducing the role of ADR and mediation in re-imagining legal education and considering the education and training options currently available for mediation practice. We argue that there is a well-developed knowledge base for mediation practice, and we advocate for a greater acknowledgement and emphasis on theoretical foundations and issues in the teaching of mediation. To that end we explore the approach to teaching and learning advanced by Paul Ramsden, which sees good teaching as that which encourages a deep approach to learning. Finally we bring together Ramsden’s views as to the interrelationship of learning and teaching with our interest in the concept neutrality in mediation through a discussion of learning objectives and teaching strategies for a study of neutrality.

II Mediation And Re-imagining Legal Practice

The teaching of ADR, and in particular mediation, in the legal curriculum can have a part to play helping law students to understand a range of dispute resolution options in legal practice, readying them to play a non-adversarial role in mediation.6 Julie Macfarlane argues that legal education is pivotal for re-imagining conflict resolution and improving legal practice.7 A study by Tom Fisher, Judy Gutman and Erika Martens in Victoria points to the benefits of studying ADR, including mediation, in legal education.8 This research evidenced a shift in law students’ attitudes to legal practice through the experience of undertaking a first-year compulsory course in ADR. The majority of students in the study demonstrated a change from a largely adversarial approach to litigation to an approach that privileged collaborative problem solving.

Carrie Menkel-Meadow points to the importance of the inclusion of ADR in the legal curriculum not merely as an ‘add on’ but as an integration of a range of dispute resolution theory and skills in order to combat the adversarial culture of much of law teaching.9 Leonard Riskin and James Westbrook argue for integration in the first year of the law curriculum,10 and specifically suggest that ADR options be taught as part of substantive law subjects. In the United States, six universities were funded to trial the integration of ADR in various law courses by the incorporation of ADR into substantive law courses or the teaching of ADR as a stand-alone course. Subsequent evaluation of these initiatives found improved understanding of ADR in law students.11 More recently, writers in the area of ADR and legal education continue to advocate for an integrated approach to ADR as a first-year course in law programs.12 If an integrated approach is not taken, writers argue, law teachers risk marginalizing ADR and mediation and privileging litigation, because traditional legal education values the litigation frame when teaching law.13

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In Australia the 2012 the National Alternative Dispute Resolution Council (NADRAC) published a study into the teaching of ADR in law schools. This research indicated that ADR is taught in many law schools in Australia, although in some law schools it remains an elective. NADRAC argues that legal education is an important part of changing the culture of the legal profession. If law students understand the theory and practice of ADR they will be better prepared to advise their clients about the benefits of pursuing alternative options such as mediation. Mediation provides the opportunity for informal, flexible and speedy dispute resolution with the possibility of maintaining an ongoing relationship with the other party to a dispute. The council advocated for ADR to be more widely included in legal education. Learning about ADR is said to improve law students’ practice, and it may also positively affect their mental well-being. Jill Howieson’s research at the University of Western Australia showed that the interactive pedagogy of an ADR course contributed to student engagement with their studies and had a positive impact on their mental health. The teaching of ADR — the most popular option being mediation — is therefore growing in importance in the legal curriculum.

Mediation practitioners, whether lawyers or not, are required to meet a set of competencies articulated according to the National Mediator Accreditation System (NMAS), a system of voluntary accreditation of mediators introduced in 2008. The NMAS provides standards in relation to the education and training of mediators (Approval Standards) and ongoing practice standards for mediators (Practice Standards). In order to register as an accredited mediator, practitioners are required, inter alia, to undertake a course of training with a recognised mediator accreditation body (RMAB) of a minimum of 38 hours. Such training must include the participant in at least nine mediation simulations, and in three of these the participant must act as a mediator. The core competencies needed for accreditation are gained through this training and reflect the NMAS Practice Standards. These competencies are assessed in a ‘final skills assessment mediation simulation’ of at least 1.5 hours duration.

Understanding of the concept of neutrality in mediation is a core competency according to the NMAS Practice Standards. However, in the context of a course of 38 hours which must give each participant the opportunity for involvement in nine mediation role-plays, scope for consideration of the theoretical underpinnings of mediation is limited. Greater scope is possible in semester-long ADR courses offered within law programs. However, such courses may not satisfy the requirement of providing opportunities to participate in simulations needed to achieve accredited practitioner status. There are instances where a semester-long tertiary course in ADR is offered in conjunction with training from a RMAB. This combination is arguably ideal in offering an opportunity to engage with the ADR literature, and hence with issues of theory, as well as providing the experiential learning necessary for practice.

14 National Alternative Dispute Resolution Advisory Council (NADRAC), Teaching Alternative Dispute Resolution in Australian Law Schools (November 2012).
16 Ibid 4.
17 Ibid 8.
23 NMAS, Approval Standards, cl 5(2).
24 NMAS, Practice Standards, cl 7(3)(c)(iv).
25 One example is the partnership between Griffith Law School and the Dispute Resolution Centre of the Department of Justice, Brisbane.
The practice of mediation, like the practice of law, combines requisite knowledge, skills and ethics to demonstrate required competencies.\textsuperscript{26} The emphasis, in short courses in mediation, has been on acquiring the requisite skills and understanding the necessary ethical issues for practice. Hence neutrality appears in the NMAS Practice standards as an ethical competency.\textsuperscript{27} This emphasis on skills and ethics has developed historically from a commitment to understanding and practising mediation as a process of dispute resolution largely independent of the content of the dispute. However, while expertise in the content of disputes remains outside officially recognised requirements for practice, there is a well-developed and growing theoretical knowledge base for mediation. Some of that theory concerns theory about the skills needed to mediate and ethical principles for practice. In addition there is a body of explanation and critique about pivotal concepts in mediation such as power and self-determination. These include the concept of neutrality.

We argue here that the existing knowledge base of mediation practice justifies a clear acknowledgement and a stronger emphasis on a substantive component, on theory, both in short courses and in semester-long offerings. In relation to the concept of neutrality, we argue that neutrality is one of a number of key theoretical concepts (despite being, and even due to being, contested), which requires investigation and understanding by any student of mediation, and increasingly by any aspiring legal practitioner. Neutrality is a complex notion that has application (even if contested) beyond mediation, and it has relevance to issues of legal interpretation and application. It offers a useful vehicle for engagement in learning, critical thinking and contextualising the shifting landscape of legal practice. Issues for educators include: what we want students know about neutrality, how we teach about neutrality, and how we know that students have understood it and gained something from the experience of investigating it. To begin to address these issues we explore the work of Paul Ramsden, a scholar of the theory of learning and teaching, below.

### III A Deep Approach to Learning and Good Teaching

If lawyers as mediators, whether university educated or short-course trained, are to understand and respond to issues in mediation, they must fully appreciate theoretical issues underpinning practice including those relating to neutrality. It is our responsibility as educators to teach in such a way that effective learning — that is, learning that demonstrates an understanding of the relationship between theory and practice — is achieved. When considering the best way to teach we can consider what is already known in educational literature relating to teaching and learning.

The work of Paul Ramsden\textsuperscript{28} and his approach to teaching and learning in higher education can assist in the design of strategies for teaching theoretical constructs and their translation into practice. This is true of theoretical issues generally and of neutrality in mediation in particular. Many of Ramsden's insights are relevant to devising teaching and learning strategies not only in university courses in mediation but also in short-course training.

According to Ramsden, what we hope students will learn through tertiary education is the ability to think critically.\textsuperscript{29} In order to achieve this aim it becomes necessary to consider how students learn and to apply that knowledge to the design of teaching and learning strategies. One of the notable conceptual distinctions that Ramsden introduces in his work is the distinction between deep and surface approaches to learning.\textsuperscript{30}

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\textsuperscript{26} The traditional trilogy of knowledge, skills and ethics have been translated into the six threshold learning outcomes for undergraduate study in law; see <http://www.utas.edu.au/__data/assets/pdf_file/0007/456829/altc_standards_LAW.pdf>.

\textsuperscript{27} NMAS, Practice Standards, cl 7(3)(c)(iv).

\textsuperscript{28} Paul Ramsden, \textit{Learning To Teach in Higher Education}, (2nd ed, Routledge, London, 2003). A discussion of the various schools of thought dealing with the ways students learn is beyond the scope of this paper. For an overview of educational literature in the context of learning in law schools, see Marlene Le Brun and Richard Johnstone, \textit{The Quiet Revolution: Improving Student Learning in Law} (Law Book Company 1994), Ch 2.

\textsuperscript{29} Ibid.

\textsuperscript{30} Another approach that has been identified is an ‘achieving’ approach. Students assess what time and effort is required to achieve in a task and whether understanding or merely rote learning is required, see John Biggs, ‘Approaches to the Enhancement of Tertiary Teaching,’ (1989) 8 \textit{Higher Education Research and Development}, 7.
A student who employs a deep approach to a learning task approaches that task in a manner that promotes learning; he or she approaches the task (for instance the reading of an article) in such a way that understanding is promoted (i.e. the author’s intention in writing the article is ascertained). In contrast, a student who employs a surface approach to the same learning task will read the article in a manner that does not promote learning or understanding (i.e. concentrating on parts rather than meaning). A deep approach, as the name suggests, gives students the ability to better reflect on meaning and a surface approach means that the student merely skates along the surface of a learning task.

Each approach reflects the way students approach tasks they are set. A student who is utilising a deep approach is attempting to understand by focusing upon arguments and concepts, searching for meaning by making connections, identifying structure, and relating the concepts to the real world or to previous reading. They are actively approaching the task in such a way that learning, and hence understanding, is promoted. Those using a surface approach to learning see the learning task as an outside imposition, something they must complete. Though they may anxiously try to perform, they will find it difficult to extrapolate principles, be confused by examples, and confuse evidence with conclusions, and thus fail to draw out the overall meaning of a learning task. According to Ramsden:

Deep approaches generate high-quality, well structured, complex outcomes; they produce a sense of enjoyment in learning and commitment to the subject. Surface approaches lead at best to the ability to retain unrelated details, often for a short period. They are artificial, so are they ephemeral.

Associated with the ideas of deep and surface learning are two other concepts, holistic and atomistic approaches, as advanced by Ramsden. Deep and surface approaches refer to whether a student is searching for meaning while holistic and atomistic refer to the way a student approaches organising the learning task. A student who focuses on the parts of the task is described as approaching it in an atomistic fashion; where a student approaches the task as a whole, integrating the parts, the approach is described as holistic. These two distinctions in approach tend to occur together. A student will approach a task in a deep/holistic fashion or a surface/atomistic fashion.

Importantly, a student is not a deep or surface learner per se. Rather they approach a learning task with a deep or surface approach. The same student may in the same day, in the same subject, approach some tasks in a deep manner and some tasks in a surface manner. The exact descriptions of a deep as opposed to surface approach will also differ according to the task and the subject matter under study. Significantly, Ramsden acknowledges that as teachers, we cannot instruct students to adopt a deep approach to learning. Instead we can only encourage deep approaches by influencing the students’ experience of their educational environment.

According to Ramsden, whether students adopt surface or deep approaches to learning is a response to the educational environment in which they find themselves. Significantly, the approach chosen is a response to a student’s perceptions of that environment rather than a response to the environment itself. Therefore, while there are teaching contexts that will tend to encourage a deep approach to learning, there is no necessary correlation between a given strategy and intended outcome. Educators must contend with ‘the routine divergence between intention and actuality in university teaching’. Ramsden identifies a number of factors that he suggests will impact upon a student’s approach to learning; namely, a student’s interest, knowledge base and previous experience; assessment methods; students’ experience of teaching and teachers; and the effects of courses, departments and institutions.
Of particular interest for the teaching and learning of ADR, is the previous educational experience of a student. That previous educational experience will encompass the diversity and complexity of a student’s past exposure to learning. Furthermore, a student who has in the past practised mainly a surface approach to learning is likely to continue with this approach. For law students, or lawyers in undertaking short-course training in mediation, the tendency may have been to adopt surface and atomistic approaches to memorising legal principles and cases for examination purposes. Lawyers and law students may be particularly challenged to think critically about issues in mediation, such as neutrality. The legal methodology designed for solving legal problems is not easily translated to a consideration of broader theoretical issues, which are perhaps akin to the more marginal questions of policy in a legal curriculum. By contrast, other participants in mediation short-course or postgraduate training (and some combined undergraduate programs) may have been exposed to learning about social theory (as, for example, psychologists or social workers) and may have developed a deep approach to comprehending and critically analysing theoretical issues such as neutrality. Teaching law students and lawyers about neutrality in mediation will necessarily require the teacher to take account of the emphasis on legal methodology in legal education and the need to introduce and foster other ways of thinking about theoretical issues.

The other factors Ramsden identifies as having an impact upon learning include various aspects of teaching. Importantly, the central thrust of Ramsden’s thesis is that learning and teaching in higher education are interrelated; are two sides of the one coin. According to Ramsden, good teaching will discourage superficial approaches, and will encourage a high quality of engagement with the subject matter taught. Ramsden advances three theories of teaching; teaching as the transmission of knowledge or information; teaching as the management of student activity; and teaching as making learning possible. Good teaching is achieved principally by the third approach, in which students are helped ‘respectfully towards seeing the world in a different way’. According to the first theory, the focus is upon the teacher as the expert who imparts his/her knowledge of content and procedure to a passive recipient, the student. This theory places responsibility for learning solely upon the student; his/her capacity and willingness to learn and application to the task. According to the second theory, the focus is on the student as learner and the task of the teacher is to encourage and facilitate student activity as a vehicle for learning. Responsibility shifts to the teacher to develop and apply techniques to manage student learning. According to the third theory, teaching ‘is comprehended as a process of working cooperatively with learners to help them change their understanding. It is making student learning possible.’ Content and teaching technique remain important, according to this theory, but are framed by the understanding that knowledge is constituted by the student and that teaching technique aims to encourage learning by addressing students’ problems in understanding. Responsibility, according to this last theory, is jointly held. Yet at the same time it is acknowledged that learning occurs for the student, and that teaching encourages but does not directly cause that learning. Learning, according to Ramsden ‘is applying and modifying one’s own ideas; it is something that the student does, rather than something that is done to the student.’

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39 Le Brun and Johnstone above n 28, Ch 1.
40 A legal methodology is signalled by the (C)IRAC method of analysis: (Conclusion), Issue, Rule, Application, Conclusion.
41 Ramsden, above n 28, 110.
42 Ibid 84.
43 Ibid Ch 7.
44 Ibid 84.
46 Ibid 80.
Ramsden makes the point that students will rise to the expectations of their teachers. He argues that:

The most important thing to keep in mind is that students adapt to the requirements they perceive teachers to make of them. They usually try to please their lecturers. They do what they think will bring rewards in the systems they work in. All learners, all educational systems and at all levels, tend to act in the same way.\(^47\)

Importantly, then, the interaction between student and teacher has a particular character. It is the student who learns, and learning occurs according to the meaning constructed by the student from a variety of influences. The teacher cannot accurately predict whether a student will learn or what he/she will learn. But the teacher has an important role in creating an expectation of learning, and of learning of a particular quality — that of critical thinking.

Having articulated his theory of teaching as making learning possible, Ramsden applies that theory to questions of formulating and communicating learning goals; devising appropriate teaching strategies; designing assessment strategies; evaluating teaching; and the broader issue of accountability and development in higher education.\(^48\) For present purposes, we are interested in exploring learning goals and teaching strategies that facilitate a deep and critical understanding of neutrality in mediation — the project to which we now turn. As an extension of Ramsden’s thinking about teachers’ expectations of students’ learning, we argue in what follows that modelling deep approaches to learning is important in communicating those expectations.

IV UNDERSTANDING NEUTRALITY IN MEDIATION

As we have noted above, neutrality in mediation is one of a number of key concepts that we have argued are important in law student and mediation education and training. Here we advance one learning objective as pointing to what we want students to know about neutrality. That objective is: understanding neutrality in mediation as a contested concept.

This objective places neutrality within a broader context of socio-legal perspectives and within that, critical perspectives. As our examination of Ramsden’s thesis acknowledges, a deep approach to learning and good teaching is not independent of the content of what is taught. Therefore in what follows we flesh out the content of our objective by indicating what a deep and critical understanding would look like, and suggest approaches to encouraging that understanding that we might adopt as teaching strategies.

V LEARNING OBJECTIVE: UNDERSTANDING NEUTRALITY IN MEDIATION AS A CONTESTED CONCEPT

The neutrality of the mediator has been a foundational concept for mediation practice. Neutrality has functioned as a legitimising feature of mediation. It establishes mediation as a recognised and accepted form of dispute resolution within Western democratic processes.\(^49\) Boulle notes that mediator neutrality mirrors the ideology of judicial neutrality,\(^50\) while Astor describes neutrality as the theoretical cornerstone for the legitimacy of mediation.\(^51\)

\(^47\) Ibid 62.
\(^48\) Ibid, Part 2 Design for learning.
\(^50\) Boulle above n 49, 72.
\(^51\) Astor above n 49, 74.
Early definitions of mediation referred to the intervention of a neutral third party. Mediators were therefore defined as third-party neutrals. Newer definitions have replaced a reference to mediators as neutrals with a description of their role as ‘acceptable third parties’ or merely third parties, as in the NMAS definition. This change reflects a measure of uncertainty as to the meaning and application of the concept of neutrality in mediation, and differing views as to its continued relevance for mediation practice.

Scholars have drawn attention to the variety of meanings attributed to neutrality. Boulle proposes three distinctions useful in understanding neutrality’s complexity. He identifies neutrality as disinterestedness, independence and impartiality. Disinterestedness means that a mediator will be neutral in the sense of having no interest in the outcome of the mediation. Independence means that he or she will be neutral in the sense of having no prior relationship with the parties. Impartiality means that a mediator will conduct the process fairly, even-handedly and without bias towards either party. Boulle argues that neutrality as disinterestedness and independence are not absolute requirements, and that their existence depends upon context and circumstances. He argues that only neutrality as impartiality would normally be considered a defining feature of mediation.

Scholars have advanced different views as to the meanings of neutrality and impartiality and as to the relationship between these concepts. Astor treats these concepts as synonymous, while Moore distinguishes them. Moore defines impartiality as the attitude of the mediator as unbiased and lacking preference, and neutrality as the mediator’s behaviour towards, or relationship with, the parties. Douglas constructs impartiality and even-handedness as aspects of an overarching concept of neutrality, itself constructed as the limitation (rather than elimination) of mediator bias.

In Australia and since the year 2000 with the seminal work of Hilary Astor, neutrality has been widely critiqued in mediation theory. Critique has drawn upon earlier empirical research and experience of practice and questioned whether mediators could truly be neutral.

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53 Ibid 15.
54 According to these NMAS standards, mediation is described as ‘a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.’ NMAS, Approval Standards, above n 21, 4; NMAS, Practice Standards, above n 22, 5; see also Kathy Douglas, ‘National Mediator Accreditation System: In Search of an Inclusive Definition of Mediation’ (2006) 25(1) *The Arbitrator & Mediator* 1.
56 Boulle, above n 49, 73-4..
57 Ibid.
58 Ibid 73-77.
60 Moore, above n 52 53.
61 Ibid
62 Douglas, above n 55.
63 Astor, above n 49, ‘Rethinking Neutrality’ 145.
and whether, as a result, the process was being misrepresented to parties. Scholars have also employed social theory to locate their critique within critical theory and feminist standpoints, and from postmodern and post-structural perspectives.

Some scholars have taken the view that neutrality is at best a mere aspiration incapable of actuality, and ought to be abandoned. Alternative foundational principles have been argued to replace neutrality, including maximising party control, and an ethic of partiality, reflective practice and a framework for ethical decision making. Scholars have also argued for the application of principles of social justice, fairness and ethics to replace the requirement of neutrality.

There is now acknowledgement that mediators cannot be purely or absolutely neutral. At the same time, it is acknowledged that mediators continue to attribute meaning to the concept and employ it in practice. Furthermore, the NMAS Practice Standards require an understanding of neutrality and impartiality as competencies. As a result there have been attempts to make sense of neutrality by reconstructing it — creating theories about how it might be understood and applied in practice despite, and in the context of, ongoing critique. Bogdanoski advances a situated and contextualised understanding of neutrality, while Douglas reconstructs neutrality as a relational concept having meaning in relation to party self-determination mediated by a postmodern construction of power.

Neutrality is not only a central concept for mediation, it is considered more fundamentally central to the Western concept of law. Yet, the neutral application of law claimed by judges within our common law systems has been repeatedly challenged. Critical jurisprudence pointedly calls attention to the non-neutral, political processes inherent in the making of law, its interpretation and its implementation. Feminist methodology seeks to unearth the gender implications of superficially neutral legal standards. Hence, critique of neutrality as a dominant, accepted theme in liberal legal theory is mirrored by critique of neutrality in mediation.

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69 Astor above n 49 ‘Rethinking Neutrality’; Bagshaw above n 67; Mulcahy, above n 49.
70 Ibid.
71 Mulcahy, above n 49.
72 Astor, above n 49, ‘Mediator Neutrality: Making Sense of Theory and Practice’; Bagshaw, above n 67; Mulcahy, above n 49.
75 Douglas, above n 55.
77 NMAS Practice Standards, above n 4.
78 Bogdanoski, above n 68.
79 Douglas, above n 55.
81 Mulcahy, above n 49, 506–7.
VI LEARNING AND TEACHING STRATEGIES: A DEEP APPROACH

A superficial approach to teaching and understanding neutrality in mediation might refer to the requirements in the NMAS and describe neutrality according to one or two definitions, such as the need to avoid conflicts of interest and the need for mediators to avoid giving advice. A more comprehensive and thoughtful consideration would point the fact that neutrality is contested in mediation, examine the various ways in which the concept has been constructed, and introduce students to the ways in which scholars have attempted to make sense of neutrality — the theories about neutrality. An even more robust examination could consider neutrality in its relationship to other core concepts, such as power in mediation and self-determination of the parties, plus issues of cultural situatedness, and the development of other theoretical concepts aimed to deal with the limitations of neutrality, such as reflective and reflexive practice. Still more in-depth analysis would introduce students to parallel critiques of neutrality in both social and legal theory, and thereby introduce students to a broader critique of the neutrality and objectivity of the law, lawyers and judges.

How might teachers encourage a deep approach to this consideration of neutrality? We have argued for an emphasis on expectations and modelling for students. We would bring to the teaching task our own engagement with and critical approaches to the material. Importantly, we would present ourselves as learners employing a deep approach to learning. We would thereby model a deep approach to learning for students. We would communicate this expectation of a deep approach through our design of learning objectives, teaching strategies and assessment, therein communicating our expectation that students develop a critical standpoint and demonstrate critical thinking.

Assessment is a complex topic beyond the scope of this article.84 There are several options for teaching strategies. The traditional lecture format lends itself to an experience of teaching as the transmission of knowledge, but is not necessarily limited to that experience. Assigning journal articles for students to read, as well as making reference to cases and legislation, represents a necessary provision of resources. Yet too often students feel overwhelmed, undirected and even isolated by the amount of reading and comprehension of written material required.85

The use of active learning strategies, such as a fishbowl teaching strategy, can be an effective tool in ensuring deep learning. This approach can bring students together to critically discuss the content of written resources on neutrality.86 According to this technique, students can be asked to read material on neutrality set before class and then engage in a structured discussion about the relevant issues in class. In one approach to the use of a fishbowl technique, two circles of participants are created, an inner circle and an outer circle. Those in the inner circle are given the task of answering questions aimed to excite discussion about a chosen topic. Those on the outside are tasked with observing the dynamics of the discussion, both its content and the interactions of students involved. Students can be asked to switch roles either individually or collectively from one circle to the other. Participants are asked to keep a record of their discussion and observations, making them accountable and encouraging their investment in the process. This technique has an added advantage for canvassing issues of neutrality in mediation because it allows students to reflect upon their own and others apparent biases as revealed in the discussions.

The use of case studies that invite discussion and critical appraisal are also useful for large and small numbers of students studying neutrality in mediation.87 Case studies dealing with neutrality dilemmas in mediation can be introduced to students in lectures or tutorials and are often used in short courses where numbers are limited. Combining case studies with the fishbowl technique is an effective way to encourage students to apply theory to practice. The use of current issues in the media is another effective tool for contextualising material in such

85 Le Brun and Johnstone, above n 28, Ch 1.
86 Ibid 306.
a way as to demonstrate its relevance and broader application. Internet technologies make accessing media reports relatively simple in lectures and smaller classes and provide a more dynamic interaction than mere reliance on lecturing.

Simulations or role-plays are an integral feature of mediation education and training. Noam Ebner and Kimberlee Kovach note that role-plays are widely used in teaching ADR and are part of orthodox teaching practice. As referenced above, participation in simulations are required for accredited mediation training and central to assessment of the competencies needed for practice. Role-plays provide extremely fertile ground, not only for experiential learning as such, but also for the opportunity to reflect, during and after participating, on how to put theory into practice. Role-plays provide an effective opportunity for students to develop a critical standpoint by offering an experience of what works and what does not work, what makes sense and what simply does not. At the same time, taking on the role of another’s identity may be disrespectful in some cultures, and thus the audience of the role-play must be carefully considered.

VII Conclusion

In this paper we have pointed to the growing recognition of mediation as part of legal practice, necessitating progress toward the inclusion of ADR courses, including mediation, in legal education. We have considered the views of scholars who advocate for the inclusion of ADR education and practice in re-imagining the role of lawyers towards collaborative problem solving and away from an exclusive focus on litigation. We have pointed to the reality of ADR options in the changing legal landscape and to calls for this change to be reflected in legal education. We have pointed to evidence that such a change could contribute to the well-being of new lawyers.

Having acknowledged the place of mediation in a re-imagined legal practice, we examined the existing options for mediation education and training and their relationship to voluntary accreditation through the NMAS. We argued for a greater emphasis on the teaching and learning of theories and theoretical issues relevant to the practice of mediation, including that of neutrality. As a prerequisite to effectively incorporating more theory into mediation education, we explored the approach of Ramsden to learning and teaching in higher education.

We examined Ramsden’s distinction between deep and surface approaches to learning. We noted that the aim of higher education is essentially to provide opportunities for students to develop critical thinking. We explored Ramsden’s association between deep approaches to learning and the exercise of critical thinking. We outlined Ramsden’s theories of teaching and his thesis that learning and teaching are two sides of the one coin. We noted Ramsden’s argument that good teaching encourages deep approaches to learning and hence critical thinking, and his contention that there was no easy relationship between teaching intent and strategies and how students approach learning, or what they learn. We emphasised Ramsden’s assertion that students are guided by the expectations of their teachers and will endeavour to rise to those expectations.

We applied Ramsden’s thinking to the learning and teaching of neutrality in mediation. We articulated one learning objective for our project and considered a number of teaching strategies to achieve that objective. We examined what a deep approach to learning and good teaching would look like in our attempts to bring together our learning objective and selected teaching approaches. Central to our project is our argument that mediation education and training should include a consideration of theories advanced in the literature as part of its knowledge base. Also

pivotal to our project is an extension of Ramsden’s view as to the role of teachers’ expectations of students. We have argued that expectations can be communicated by modelling ourselves as learners who employ a deep approach to our own lifelong learning.
CHALLENGES FOR INTERNATIONAL ENVIRONMENTAL LAWYERS: CLIMATE CHANGE COMPLIANCE

LAURA HORN*

ABSTRACT

Modern lawyers face the challenge of how to provide, at international law, legal regulatory frameworks that can help to manage major global environmental problems in the future. The advent of climate change is one of the most pressing environmental threats to humankind and the Earth’s environment. Unfortunately, the current structure of international law has not developed as a system designed to deal with global environmental problems that affect all nations. The effects of climate change will adversely impact all countries, within their territorial jurisdiction as well as in the global environment beyond state jurisdiction. This paper discusses the development of the compliance and enforcement mechanisms under the Kyoto Protocol to the United Nations Framework Convention on Climate Change in order to determine the limitations of these mechanisms. The question posed is whether the compliance and enforcement mechanisms should undergo further reform before the next international agreement on climate change is negotiated in 2015. This paper also discusses whether new legal proposals could be useful to manage some of the consequences that are likely to occur as a result of the impacts of climate change.

I INTRODUCTION

The challenge for lawyers is how to provide, at international law, legal regulatory frameworks that can help to manage major global environmental threats in the future. Climate change is occurring and poses risks to humankind and the Earth’s environment. Unfortunately, the current system of international law has not developed as a legal system designed to deal with global environmental problems that affect all nations. The effects of climate change will adversely affect all countries, within their territorial jurisdiction as well as in the global environment beyond state jurisdiction. This paper will consider the development of the compliance and enforcement mechanisms under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) and the limitations of these mechanisms.

The objective of the United Nations Framework Convention on Climate Change (UNFCCC) is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.  

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This level is to be reached within time limits that ensure ecosystems can adjust, food production is assured, and economic development can continue in a sustainable way.\(^5\) Clearly, this goal is significant because without adequate enforcement of targets to reduce greenhouse gas (GHG) emissions, the objective in UNFCCC cannot be achieved. This paper also discusses whether recent legal proposals could be useful to manage some of the consequences that are likely to occur as a result of the impacts of climate change.

States that are parties to the UNFCCC agree to take climate change considerations into account in their policies and actions.\(^6\) There are general commitments in the UNFCCC for states to publish inventories about the sources of GHG emissions and their removal through sinks,\(^7\) and to take measures towards mitigation action.\(^8\) Parties to the Kyoto Protocol reaffirmed the general commitments they had agreed to in the UNFCCC.\(^9\) Developed country parties to the Protocol listed in Annex B of the Kyoto Protocol agreed to adopt targets to limit their GHG emissions.\(^10\) The limits on GHG emissions differ for each country under the Kyoto Protocol, and states may access mechanisms to assist with their emission reductions.\(^11\) The Kyoto Protocol sets out three mechanisms that may assist parties to comply with their targets to reduce GHG emissions. First, Joint Implementation applies to parties in Annex I of the UNFCCC. If Annex I countries have complied with their reporting obligations, they may agree with private-enterprise to invest in projects that produce emission reductions in another Annex I state.\(^12\) So, countries may take advantage of the cheaper costs of emission reductions in the country where the project is being carried out.

Secondly, the Clean Development Mechanism encourages developed countries that are in Annex I to the UNFCCC to engage in projects to limit their GHG emissions and to assist developing states to mitigate the effects of climate change.\(^13\) There must be genuine long-term benefits for mitigation as well as additional reductions to GHG emissions that would not occur if the project did not take place.\(^14\) Advantages for developing countries participating in the Clean Development Mechanism are potential funding assistance and access to any new technology used in the project. Thirdly, the Conference of the Parties to UNFCCC (COP) may develop the rules for emissions trading.\(^15\) Parties in Annex B of the Kyoto Protocol may use emissions trading to fulfill their commitments to meet targets on GHG reductions.\(^16\)

Parties to the UNFCCC and the Kyoto Protocol have obligations to report inventories of GHGs and to verify this information.\(^17\) The compliance and enforcement mechanisms were introduced to assist state parties to the Kyoto Protocol\(^18\) to comply with their obligations to monitor the accounting methods used by the parties to the Protocol. The objectives of the

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5 Ibid.
6 Ibid art 4(1)(f).
7 Ibid art 1(8), which defines ‘sink’ as ‘any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere.’
8 Ibid art 4(1)(a).
9 Kyoto Protocol preamble.
10 Ibid art 3.
11 Ibid Annex B.
12 Ibid art 6.
13 Ibid art 12.
14 Ibid art 12(5).
15 Ibid art 17.
16 Ibid art 17.
17 Ibid art 3.
18 Ibid art 18 ‘The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.’
Part Two: Action taken by the Conference of the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change

To achieve the goal of keeping global temperature increase below 2 °C relative to pre-industrial levels and maintain temperature change below 2 °C relative to pre-industrial levels, the Kyoto Protocol goes beyond the objectives of many other compliance procedures in international environmental law, and this is no doubt due to the seriousness of the implications for the international community if states fail to adhere to their commitments to mitigate GHG emissions.

First, this paper reviews the limitations of the operations of Compliance Committee and the law of state responsibility. Next, key concepts of international environmental law are discussed: the common concern of humankind; intragenerational equity; common but differentiated responsibilities; and intergenerational equity. The application of these concepts could influence the ways states address climate change negotiations. Finally, proposals for the development of new legal frameworks that could assist states to deal with the consequences of the impacts of climate change in the future are considered. This paper investigates the argument that the limitations of the existing international environmental law regime on climate change compliance presents a challenge for international lawyers but does not prevent them from exploring new legal avenues to try to address these problems.

Without additional efforts to reduce GHG emissions beyond those in place today, emissions growth is expected to persist driven by growth in global population and economic activities. Baseline scenarios, those without additional mitigation, result in global mean surface temperature increases in 2100 from 3.7 °C to 4.8 °C compared to pre-industrial levels.

If there are further delays in mitigation between now and 2030, it will be difficult to maintain a temperature change below 2 °C. If the temperature rises more than 2 °C above pre-industrial levels the consequences are likely to be severe — including species extinction, impacts on food production, limitations on human activities, and the potential to trigger tipping points that cause irreversible change to the Earth’s natural systems. The goal of enforcement in the Kyoto Protocol goes beyond the objectives of many other compliance procedures in international environmental law, and this is no doubt due to the seriousness of the implications for the international community if states fail to adhere to their commitments to mitigate GHG emissions.

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19 UNFCCC, Conference of the Parties serving as the Meeting of the parties to the Kyoto Protocol, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005 Addendum Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session, FCCC/KP/CMP/2005/8/Add.3 1st sess. (30 March 2006) 93, art 1 ‘The objective of these procedures and mechanisms is to facilitate, promote and enforce compliance with the commitments under the Protocol.’ (‘COP Report 2005’).
20 Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (8 December 2012) (not yet in force) art 3.
22 Ibid 13. ‘Delaying mitigation efforts beyond those in place today through 2030 is estimated to substantially increase the difficulty of the transition to low longer-term emissions levels and narrow the range of options consistent with maintaining temperature change below 2 °C relative to pre-industrial levels.’
23 WGIII Summary for Policy Makers’ above n 1, 14. ‘Increasing magnitudes of warming increase the likelihood of severe, pervasive, and irreversible impacts. Some risks of climate change are considerable at 1 or 2 °C above preindustrial levels ... Global climate change risks are high to very high with global mean temperature increase of 4 °C or more above preindustrial levels in all regions and the high confidence in their occurrence...and include severe and widespread impacts on food production, limits on human activities, and the combination of high temperature and humidity compromising normal human activities, including growing food or working outdoors in some areas for parts of the year (high confidence). The precise level of climate change sufficient to trigger tipping points (thresholds for abrupt and irreversible change) remain uncertain, but the risk associated with crossing multiple tipping points in the earth system or in interlinked human and natural systems increases with rising temperature (medium confidence).’
II COMPLIANCE AND ENFORCEMENT MECHANISMS

A Membership

The Compliance Committee has two branches, the Facilitative Branch and the Enforcement Branch. Membership of each is broadly based and includes representation from each of the five regional groups of the United Nations and from the small island states, two members from the Annex I parties and two members from non-Annex I parties. Members serve in their individual capacity (rather than as a representative of a state) and act in an independent and impartial way to avoid conflicts of interest. The aim behind these provisions is to ensure that members of these branches are not subject to political influence from their government and act in their independent capacity. Alternate members may serve in the place of members of the Compliance Committee, and these members should be competent in the field of climate change. Governance of these two branches could be improved by including more representation from environmental and civil society non-governmental organisations (NGOs) that have adopted codes of conduct and good governance principles. NGOs could make states more accountable and reduce the reliance upon state representatives. At this stage there is no avenue for NGOs to participate in climate change compliance and enforcement procedures. This failure to include the opportunity for NGOs and the public to report a state’s (or states’) lack of compliance with emissions reductions, results in a lost opportunity to promote more effective compliance.

B Facilitative and Enforcement Branches

A party to the Kyoto Protocol may report its own failure to comply with its commitments under the Kyoto Protocol. Alternatively, any party may report non-compliance of another party provided that there is information to support the allegation. The secretariat may submit to the Compliance Committee implementation issues raised in the reports of expert review teams as well as any written comments from the party concerned. The Compliance Committee may receive additional final reports from the expert review teams and undertakes an initial examination before it decides whether to take further action. So, the Compliance Committee may also commence action on the basis of the expert review teams’ reports that are received through the secretariat.

The non-complying party is entitled to be represented before the Facilitative or the Enforcement Branch of the Compliance Committee but cannot be present during the consideration of the decision by the branch. Each branch may base its decision upon reports of the expert review teams; information from the party concerned and the party that submitted the issue about implementation; and reports from the Conference of the Parties (COP) and subsidiary bodies, as well as from the other branch under UNFCCC. Importantly, intergovernmental
organisations and NGOs may provide factual and technical information, even representatives of these organisations may attend to meetings (except when they are held in private) and can access the findings of the Compliance Committee because these are provided to the public.

Even though the involvement of NGOs mentioned above is indicative of a movement towards a common concern pattern (to protect the interests of the global community), the responsibility for triggering the action of the Compliance Committee primarily rests upon states. If the Compliance Committee is given the power to take action based upon reports from NGOs or the public about non-compliance, this would provide more opportunities to indicate non-compliance. There is a precedent for public reporting about compliance in The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters which permits the public to notify non-compliance.

The issue of submissions was raised by the submission for South Africa as chairperson of the Group of 77 and China concerning compliance of fifteen Annex I Parties to the Kyoto Protocol. However, as the three-quarters majority for the proposals was not reached, no decision was made by the Facilitative Branch about whether to proceed or not. Clearly, a change in procedures could be adopted in the future, so that interested institutions, groups of states and NGOs could make submissions to the Compliance Committee about states’ failure to comply and these submissions should automatically trigger an investigation by the Compliance Committee. This change is also likely to encourage states to comply with their commitments to reduce GHG emissions because of the damage to the reputation of their governments due to adverse publicity about their failure to adhere to the targets that they have agreed to.

C Consequences

The aim of the ‘soft’ consequences applied by the Facilitative Branch for failure to comply is to provide incentives for compliance. There are more serious consequences if the Enforcement Branch determines that an Annex I party does not comply. In the event that an Annex I party fails to meet its commitments, the Enforcement Branch may make a declaration of non-compliance and develop a plan. The party will prepare a plan to indicate the measures that will be taken to remedy the situation. In addition, the Enforcement Branch can impose any of the following consequences:

- Deduction from the concerned party’s assigned amount from the second commitment period of 1.3 times the amount in tonnes of excess emissions;
- Development of a compliance action plan; and
- Suspension of eligibility for transfers under article 17 of the Kyoto Protocol, concerning emissions trading.

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39 Ibid art VIII [4].
40 Ibid art IX [2].
41 Ibid art VIII [7].
47 Loibl, above n 24, 435.
48 COP Report 2005, above n 19, art XV [1].
49 Ibid art XV [3].
50 Ibid art XV [5].
51 Ibid art XV [5].
One of the reasons that the two branches of the Compliance Committee have power to make decisions is the need for quick determinations when a party is in non-compliance. If an Annex I party is ineligible for one of the mechanisms, speedy decisions enable these mechanisms to function appropriately.52 However, an appeal against a decision may lead to delay, and the concerned party may appeal to the COP against a determination of the Enforcement Branch.53 In the future, it would be appropriate to consider whether an appeal procedure should be available to parties. If there is no appeal process this would minimise delays.

The Enforcement Branch has considered questions about implementation concerning a number of countries that may have failed to adhere to their commitments, and most of these questions have eventually been resolved.54 Even though the Compliance Committee is attempting to ensure that parties adhere to their commitments under the Kyoto Protocol, there are three important limitations to the operations of this Compliance Committee. First, the Compliance Committee can only raise questions about implementation with countries that are parties to the Kyoto Protocol; states that refuse to ratify the Kyoto Protocol are not subject to the compliance procedures. As climate change affects the whole planet, effective action to mitigate GHGs should be taken by all countries.55

Secondly, even if a state has agreed to be subject to the Kyoto Protocol, it may withdraw at a later date and so avoid the consequences of failing to comply with the commitments it has accepted. An example is the withdrawal by Canada from the Kyoto Protocol. In 2008, Canada had been subject to a question of implementation from the Compliance Committee concerning its national registry to track holdings of GHG credits because it was required to have a registry that met the appropriate technical standards.56 The Compliance Committee decided not to proceed after the hearing, at which it was pointed out that Canada had later established a national registry that met the requirements of the Protocol.57 However, in 2012 Canada decided to withdraw from the Kyoto Protocol,58 and the consequence is that Canada does not have to meet targets to reduce GHGs.59 This withdrawal will affect mitigation action by other countries, as overall mitigation targets may not be achieved. Unfortunately, this action undermines the ability of states to reach agreed targets and could delay mitigation action, which can seriously impact options to develop successful preventative action on climate change in the future.60

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52 Loibl, above n 24, 436.
53 COP Report 2005, above n 19, art XI [I].
55 WGIII Summary for Policy Makers’ above n 21, 5 ‘Effective mitigation will not be achieved if individual agents advance their own interests independently. Climate change has the characteristics of a collective action problem at the global scale, because most greenhouse gases (GHGs) accumulate over time and mix globally, and emissions by any agent (e.g., individual, community, company, country) affect other agents’ <http://report.mitigation2014.org/spm/ipcc_wg3_art5_summary-for-policymakers_approved.pdf>.
58 United Nations Framework Convention on Climate Change Status of Ratification of the Kyoto Protocol <http://unfccc.int/kyoto_protocol/background/items/6603.php> ‘In accordance with article 27 (1) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Government of Canada notified the Secretary-General of the United Nations that it had decided to withdraw from the Kyoto Protocol. The action will become effective for Canada on 15 December 2012 in accordance with article 27 (2).’
59 Compliance Committee CC/EB/24/2014/2 7 April 2014 10. ‘The branch requested the secretariat to prepare a background paper on Canada’s withdrawal from the Kyoto Protocol and its effects on Canada’s reporting obligations under the Kyoto Protocol. It agreed to consider this matter at its next meeting, with a view to determining whether it would bring the matter to the attention of the plenary.’
60 See WGIII Summary for Policy Makers above n 1, 28. ‘Prospects for climate-resilient pathways for sustainable development are related fundamentally to what the world accomplishes with climate-change mitigation (high confidence). Since mitigation reduces the rate as well as the magnitude of warming, it also increases the time available for adaptation to a particular level of climate change, potentially by several decades. Delaying mitigation actions may reduce options for climate-resilient pathways in the future.’
Thirdly, the compliance procedures do not empower the Compliance Committee to conduct investigations into claims for compensation for those countries (with low GHG emissions) that suffer adverse impacts as a result of climate change.61 States choosing to take legal action may seek to rely upon the law of state responsibility. However, as is discussed in the next section, there are limitations to these actions.

III LAW OF STATE RESPONSIBILITY

The relationship between compliance procedures and treaty obligations is often not clear. Gerhard Loibl discusses two problems. First, compliance procedures may ‘soften’ legal obligations of parties to comply with their commitments under treaty.62 The issue is whether environmental treaty obligations may be undermined by compliance procedures. According to Gerhard Loibl, compliance procedures are adopted to promote compliance with environmental commitments and to make sure that parties are able to meet their commitments in the future.63 Generally, compliance procedures do not specifically deal with past violations of legal obligations under treaty and can be considered separately.

Secondly, the law of state responsibility as set out in the International Law Commissions ‘Responsibility for States of Internationally Wrongful Acts 2001’ indicates that states have an obligation to make reparation if they commit an internationally wrongful action.64 Gerhard Loibl points out that as compliance procedures do not deal with the implications of past conduct, they do not generally impact on the law of state responsibility.65 However, as the Enforcement Branch of the Compliance Committee under the Kyoto Protocol deals with the implications of Annex I parties that fail to meet their obligations, this branch is concerned with the consequences of past conduct. So, if the party has to make up 1.3 tonnes in the second commitment period, this could be seen as a compensation for the earlier breach.66 A similar problem occurs when countermeasures are taken by the Compliance Committee if a state is excluded from the flexibility mechanisms under the Kyoto Protocol until the state is in compliance.67 Gerhard Loibl considers that discussion about the relationship between these consequences and the law of state responsibility should take place68 to clarify the legal position.

The application of state responsibility in the context of climate change continues to be uncertain. A responsible state can be viewed as owing obligations to the international community, but there are difficulties establishing a breach of obligations and proving that a particular state has caused damage to the atmosphere.69 David Ong indicates that the issue has not been tested due to the difficulties of determining the legal liability for the damaging impacts of climate change.70 There are also a number of complexities such as the problem of how to prove that the GHGs that cause the damage to a low-lying state have been emitted from a particular state or states.71 The relationship between the compliance system and the law of state responsibility should be explained.72 Even when clarified, the law of state responsibility may not be very

62 Loibl, above n 24, 437.
63 Ibid.
65 Loibl, above n 24, 437.
66 Ibid 438.
67 Kyoto Protocol arts 6 (Joint Implementation), 12 (Clean Development Mechanism), 17 (Emissions Trading).
68 Loibl, above n 24, 438.
69 International Law Commission above n 64, art 33: ‘The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.’
71 Ibid 453.
72 Loibl, above n 24, 438.
helpful when dealing with complex environmental problems like climate change. In fact, the issue of state responsibility and liability for environmental damage as a result of climate change is one of the greatest impediments to moving forward on climate change negotiations. Gerhard Loibl considers that the traditional dispute resolution process has a different focus from compliance procedures. These dispute resolution approaches developed at international law in order to deal with the situation where damage had been caused to one state as a result of the actions of another state. Clearly, the dispute resolution approach based upon state responsibility would not be able to protect the environment from irreversible damage caused by climate change (such as extinction of species or inundation by sea water of low-lying coastal regions and islands). Tanzi and Pitea argue that the outcomes from compliance procedures are different from those of traditional dispute resolution at international law. The compliance institution representing the common interests of states can facilitate or enforce regulatory actions within the regime provided for under the convention. So, a compliance regime lacks the bilateral structure of traditional dispute resolution.

In any event, taking action before the International Court of Justice may not be available if states that are high emitters of GHGs have not accepted the jurisdiction of this court. If judicial proceedings are brought, the focus is on whether the past actions were in breach of the convention or protocol and whether any remedy is available. The development of compliance procedures is more appropriate, because these procedures adopt a preventative approach to dealing with the threat of climate change.

The focus should be on prevention rather than seeking compensation after the damage to the environment has occurred, because the damage may be irreversible after climate change impacts occur. The impacts of climate change are likely to result in increased storms and extreme weather, inundation of low-lying areas due to sea level rise, changes to habitats and species extinction. The consequences for humans are also severe; there are likely be large numbers of displaced people, loss of life, impacts on human health, less access to food and changes to economic activities. So the anticipatory approach in the UNFCCC and the Kyoto Protocol is preferable, because the focus is on preventative action through the adoption of the precautionary principle. The UNFCCC sets out the preventative action that states can take to mitigate GHG emissions and promotes adaptation action. However, the problem of addressing the threat of climate change is a complex one, requiring states to introduce effective regulation for private actors across a range of economic activities to promote mitigation of GHGs.

It would also be difficult to determine the responsibility of any one state for the specific amount of damage that they themselves have contributed to climate change. In view of the

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73 Ong, above n 70, 453.
75 Ong, above n 70, 453.
77 Tanzi and Pitea, above n 32, 579.
78 Ibid.
79 Ibid.
80 Loibl, above n 24, 439.
81 Ong, above n 70, 454.
82 WGII Summary for Policy Makers, above n 1, 6.
83 Ibid 17.
84 Ibid 4.
85 Ibid 19.
86 Ibid.
87 Ibid 13.
88 Ibid 20.
89 UNFCCC art 3(3); Ong, above n 70, 451.
90 UNFCCC arts 4, 10.
91 Brunnée, above n 74, 48.
92 See Ong, above n 70, 454.
complexities associated with attributing responsibility to a specific state (or states) for causing damage due to their failure to mitigate GHG emissions, climate change treaty negotiations could consider a new approach to state responsibility through obligations to provide compensation for damage (if damage is inevitable) as a result of the impacts of climate change. State responsibilities to the international community are also evident from the application of the concepts of international environmental law. The common concern of humankind and the related concepts of intragenerational equity and intergenerational equity showing that states have a responsibility to protect the interests of present and future generations are discussed in the following sections. As a result of the recognition of these state responsibilities, new proposals for legal frameworks are emerging to assist states to manage the threat of climate change.

IV COMMON CONCERN OF HUMANKIND

The ‘change in the Earth’s climate and its adverse effects are a common concern of humankind.’\(^{93}\) The common concern of humankind dictates that states have a responsibility to deal with global environmental problems such as climate change and that the obligations for states to take action to address climate change set out in the *UNFCCC* and the *Kyoto Protocol* are for the benefit of the international community.\(^{94}\) Jutta Brunnée points out that treaty regimes permit the development of new rules for the protection of the common concern.\(^{95}\) The focus of collective concern is on treaty making rather than customary law, particularly in the area of climate change.\(^{96}\) The collective concern applies to the rules developed for compliance in multilateral environmental conventions, and these rules emerged because the dispute resolution processes are not suitable for gaining effective compliance.\(^{97}\) Indeed, the effectiveness of the compliance mechanisms rests upon the capacity of these mechanisms to serve the common concern of the parties and the obligations they have agreed to in the *UNFCCC*.\(^{98}\)

Provisions in international environmental conventions, the *UNFCCC* and *United Nations Convention on Biological Diversity*\(^{99}\) (Biological Diversity Convention) indicate changes to the traditional concept of sovereignty and a movement towards state cooperation to find solutions to these global environmental problems. The traditional concept of ‘sovereignty’ over land territory enables states to control the activities and natural resources within their territorial jurisdiction.\(^{100}\) The Biological Diversity Convention applies to activities within state jurisdiction concerning conservation and sustainable use and so, restricts the application of state sovereignty.\(^{101}\) Similarly, the responsibilities of states to the international community are set out in the *UNFCCC*, concerning state obligations to address mitigation of GHGs and adaptation to climate change and these provisions place restrictions on the way the sovereignty of states is exercised.\(^{102}\)

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93 *UNFCCC* preamble.
95 Brunnée, above n 42, 572. ‘Of course, it is an open question whether effective protection of collective interests could be mounted on the basis of customary environmental law and the rules of state responsibility, especially since the latter are so rarely invoked. It is all the more important, then, that treaty regimes provide practical options for the protection of common interests. It is also safe to predict that they will remain the primary venues for ‘collective concern’ law making … But treaty regimes have at least the potential to turn pragmatic cooperation into genuine normative communities. While by no means perfect, treaty regimes therefore offer promising settings in which to mediate between ‘individual state interest’ and ‘the global concerns of humanity as a whole.’
96 Ibid.
97 Tanzi and Pitea, above n 32, 571.
98 Ibid 572.
100 See Hirne, Boyle and Redgwell, above n 94, 190.
101 Ibid 621.
102 Ibid 130.
Another approach to managing the adverse impacts of climate change is to focus on the implications of developing principles of international environmental law that are related to the common concern of humankind. The temporal aspect of the common concern of humankind takes into account the implications of environmental problems that will affect the interests of present and future generations. The temporal dimension is reflected in the concepts of intragenerational equity, common but differentiated responsibility, and intergenerational equity. These are discussed in the following sections. The application of these concepts by the parties to the UNFCCC has the potential to influence the outcomes of negotiations about the future climate change compliance system.

V Intrigenerational Equity

The impacts of climate change are affecting present generations and are likely to affect the lives of future generations. The provisions in the UNFCCC include the principles of intragenerational equity and intergenerational equity to guide the parties when they are seeking to achieve the objective of this convention. ‘Intragenerational equity’ concerns equity issues occurring within a generation and relates to the concept of ‘equitable sharing of burdens.’ This concept essentially raises the question of how each country shall contribute to the achievement of the protection of the environment. In the context of climate change, the application of the sharing of burdens or ‘common but differentiated responsibilities’ anticipates that some states will need to contribute more than others and that developed countries will have to provide leadership when addressing the adverse effects of climate change.

A clear distinction has been drawn under the Kyoto Protocol between the obligations for developed and developing countries. The mitigation obligations for developed countries (included in Annex I to UNFCCC) are monitored. The role of the Enforcement Branch is to ensure the targets for GHG reduction are met by developed countries. The Facilitative Branch applies both to developed and to developing countries, and it can provide financial or technical assistance to developing countries, taking into account the common but differentiated responsibilities concept and the particular circumstances of the issue. Indeed, the common but differentiated responsibilities and respective capabilities concept can be considered as part of the approach by the Facilitative Branch; for example, in a particular case it may be possible to take into account the lack of capacity of a developing country to implement mitigation.

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103 ‘Note from the UNEP Secretariat to the Meeting’ in David Attard (ed), The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues (UNEP, 1991) 37.

104 Report of the Secretary-General, Recent Proposals in Intergenerational Solidarity and the Needs of Future Generations, UNGAOR, 68th sess, Agenda Item 19, UN Doc A/68/8, 5 August 2013 (‘Recent Proposals in Intergenerational Solidarity’) [14]. ‘In the case of some global environmental problems, the consequences of our present actions would not appear before decades, if not hundreds of years. For instance, certain very high risk impacts of climate change would not likely fall on our children or grandchildren; they would impact people born perhaps five or ten or twenty generations hence.’

105 UNFCCC art 3(1).

106 UNFCCC art 3(1).


108 UNFCCC art 3(1).


110 UNFCCC art 3(1).


measures. The operation of the common but differentiated responsibilities concept and the degree to which assistance is provided to developing countries could influence the negotiations to develop an improved compliance regime on climate change during 2015.

VI COMMON BUT DIFFERENTIATED RESPONSIBILITIES

A Implications of Common but Differentiated Responsibilities in the UNFCCC

There continues to be some disagreement among parties to the UNFCCC about the meaning of the concept of ‘common but differentiated responsibilities’, and this disagreement has consequences for the compliance regime under UNFCCC. As the participation of developing parties in the convention depends upon the fulfilment of responsibilities by developed parties to the UNFCCC, all parties, taking into account their common but differentiated responsibilities, shall publish national inventories of GHG emissions. This information is to be communicated to the COP including the measures taken to carry out the obligations in the UNFCCC and other relevant information for calculating GHG emission trends. As there are differing interpretations of the term ‘common but differentiated responsibilities’, and the meaning of this concept is not clearly set out in the UNFCCC, it is difficult to determine the extent that developing country compliance can be enabled through financial and technical assistance.

Developing country parties can be encouraged to comply with GHG mitigation actions through the provision of assistance from developed countries in accordance with the application of the common but differentiated responsibilities concept. The degree to which developing countries will meet their obligations under the UNFCCC depends upon developed countries implementing their commitments to provide financial assistance and transfer of technology. In addition, there is recognition in the UNFCCC that social and economic development and elimination of poverty are of primary importance to these countries. Governments of developing countries may have difficulty meeting their development priorities, and so require financial and technical assistance to manage their information reporting requirements to the COP. However, it is unlikely that the articles concerning assistance for developing countries in the UNFCCC could be used as compliance provisions because these provisions are worded generally in discretionary terms that are not amenable to compliance assessment.

The Cancun Agreements increase the reporting requirements for developing country parties. Non-Annex I parties are to submit national reports to the Conference of the Parties, generally, every four years as well as biennial updated reports. The Subsidiary Body for

114 Ibid 62.
115 Brunnée, above n 74, 49.
116 UNFCCC art 4(1).
117 UNFCCC art 12(1).
118 Brunnée, above n 74, 49.
119 UNFCCC art 4(7) ‘The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.’
120 Ibid.
121 UNFCCC arts 4(3), 4(4), 4(5).
122 Rajamani, above n 111, 393.
123 UNFCCC, Conference of the Parties, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010 Addendum Part Two: Action taken by the Conference of the Parties at its sixteenth session FCCC/CP/2010/7/Add.1 16th sess (15 March 2011).
124 Ibid 60(j)(b)(c).
Implementation will conduct ‘international consultation and analysis’ of these biennial reports in conjunction with expert review teams to increase transparency of actions taken to mitigate GHGs. International and domestic mitigation actions will be assessed and confirmed. This process of international consultation and analysis could be intended to be a compliance procedure for the next climate change international agreement. One commentator, Lavanya Rajamani, raises the possibility that the summary report may not only be prepared to provide information but could also be used to place pressure on countries to adhere to mitigation actions through, possibly, the use of trade sanctions.

The incorporation of comprehensive information collecting and reporting requirements by parties also improves the capacity for compliance with multilateral environmental agreements. Jutta Brunnée points out that these reporting requirements assist states to understand the extent of the environmental threat and how joint action can help to alleviate the threat, leading states to acknowledge that cooperative action and compliance leads to beneficial outcomes for all. So, the improved reporting requirements set out in the Cancun Agreements can help to develop a culture of compliance, however, the undertaking of obligations on the part of developing country parties to the UNFCCC to provide information ultimately depends upon the fulfilment of commitments by the developed country parties to provide assistance.

There is evidence to show that developed countries are providing more assistance to developing countries: in addition to the Global Environment Facility and existing arrangements, three new institutions have been established to provide financial and technological assistance to developing countries. These three new institutions, established by the COP, are the Warsaw International Mechanism for Loss and Damage (Warsaw International Mechanism), the Green Climate Fund, and the Technology Mechanism and are discussed in the following sections.

**B The Warsaw International Mechanism**

The Warsaw International Mechanism will organise approaches to address losses resulting from the impacts of climate change in developing countries which are vulnerable to these impacts. The three functions of the Mechanism are:

- Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts …
- Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders …
- Enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change …

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125 Ibid [63].
126 Ibid.
127 Ibid [61],[62].
128 Ibid.
129 Rajamani, above n 111, 382.
130 Ibid.
131 Brunnée, above n 74, 45.
132 Rajamani, above n 111, 386.
133 UNFCCC, Conference of the Parties, Report of the Conference of the Parties on its Report on its nineteenth session, held in Warsaw from 11 to 23 November 2013 Addendum Part two: Action taken by the Conference of the Parties at its nineteenth session FCCC/CP/2013/Add.1 19th sess 6 (‘COP Report 2013’).
134 Ibid 6 [5a].
135 Ibid 7 [5b].
136 Ibid 7 [5c].
The Green Climate Fund has been established to assist developing countries to reduce their GHG emissions and to adapt to the impacts of climate change. The funds will be divided between mitigation and adaptation activities. The interests of developing countries that are particularly vulnerable to the impacts of climate change will be taken into account when the funds are distributed.

The other issue that is being addressed at the international level is the necessity to raise large amounts of money to finance these and other initiatives. The proposal is that developed countries will raise long-term climate finance of US $100 billion per year by 2020. These funds will assist the implementation of financing and transfer of technology commitments under the UNFCCC. The funding will also provide clear financial support to developing countries to improve their implementation of the UNFCCC. There may be implications for compliance if this funding is not adequately addressed, and it is possible that some enforcement of financial obligations could be considered as part of a new or improved climate change compliance regime.

In order to overcome some of the problems about the implementation of technology transfer, the Technology Mechanism has been established with a view to increasing the rate of technology transfer to developing countries. This mechanism is comprised of two bodies, the Technology Executive Committee (TEC) and the Climate Technology Centre and Network (CTCN). The aim of the CTCN is to give practical assistance is to support developing countries, at their request, by providing technological assistance and facilitating technology projects for mitigation and adaptation and by encouraging the adoption of low emission and climate resilient strategies.

These initiatives are positive steps towards providing more effective assistance to developing countries but given the large numbers of people likely to become displaced by the impacts of climate change and the potential for irreversible damage to the environment, more detailed legal proposals will need to be introduced in the future. The following section discusses whether the interests of future generations can be addressed through legal mechanisms because members of these generations are likely to be seriously impacted as a result of the adverse effects of climate change.

'Intergenerational equity' can be understood as safeguarding the interests of future generations to ensure that they will receive a similar quality of life to that of the present generation and if possible, a better one. During the last two decades there have been many examples of attempts to include intergenerational equity in laws and policies including at national and international levels. It is also possible that the rights of the elements of the environment.
could be safeguarded by guardians.\textsuperscript{149} The Report of the Secretary-General ‘Intergenerational Solidarity and the Needs of Future Generations’ (Report of the Secretary-General) considered that a High Commissioner could represent future generations at the international level, or a special envoy could carry out this role.\textsuperscript{150} Other options proposed in this report included that the high-level political forum could address the interests of future generations as a recurring agenda item (within the sustainable development framework), or that the Secretary-General could endorse the interests of future generations within the UN institutional system.\textsuperscript{151} These proposals indicate attempts to introduce a legal framework to support the interests of future generations at international law.

One means of extending the principles of intergenerational equity and intragenerational equity further (in the context of climate change) is to consider an innovative approach to state responsibility in the context of the global environmental problem of climate change. More research could be carried out in this area.\textsuperscript{152} An effective regime for damage and loss caused by climate change should be established\textsuperscript{153} to provide justice for present and future generations. It may be preferable to consider state reparation in a new way where states with high GHG emissions are responsible for providing compensation to low-emitting countries that suffer damage as a result of the impacts of climate change. If high GHG-emitting states can be deemed responsible, perhaps some aid and compensation could be considered as due reparation to other low-emitting states that are adversely affected by the impacts of climate change without any need to prove that the high-emitting states are at fault. In effect, this system could be a method of no fault compensation. This type of approach may be particularly useful to assist the present and future generations of people who will become displaced as a result of the impacts of climate change, as some climate change warming is inevitable, and a system of reparation would draw attention to the social injustice of their plight. If a more comprehensive regime for compensation is established, it could also encourage states to adhere to their mitigation commitments because of their responsibilities to the international community. Alternatively, a financial penalty could be imposed on countries that failed to adhere to their mitigation obligations. This penalty could be particularly appropriate for repeat offences. These fines could be placed in a fund that could assist mitigation and adaptation assistance for developing countries.\textsuperscript{154} The following section discusses some of the other potential reforms that could be introduced to protect the interests of present and future generations.

\section*{VIII Possible Developments in the Future}

First, this section discusses two possible developments that could improve compliance through the expansion of existing processes available in the provisions the UNFCCC that have not yet been fully utilised by the parties to the UNFCCC. Lavanya Rajamani proposes that the development of a multilateral consultative process\textsuperscript{155} could promote compliance — or, alternatively, the review and assessment provisions in the UNFCCC\textsuperscript{156} could be expanded upon to encourage more effective compliance by all states. Secondly, this section considers four possible options for reform that could help to protect the interests of present and future generations from the adverse impacts of climate change.

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\textsuperscript{149} Christopher Stone, ‘Safeguarding Future Generations’ in Emmanuel Agius et al, Future Generations and International Law (Earthscan, 1998) 65, 66. ‘One might consider (as I have proposed) a group of guardians, one for each of several natural objects — for example, a legal spokesperson for marine mammals, another for Antarctic fauna, perhaps others for various cultural artefacts such as the Sphinx.’

\textsuperscript{150} Recent Proposals in Intergenerational Solidarity, above n 104, [63], [65].

\textsuperscript{151} Ibid [66], [67].

\textsuperscript{152} Brown Weiss, above n 146, 114. ‘The practical implications of measures to implement intergenerational equity are important topics for analysis and research. How do we reach consensus on the essential interests of future generations? How can we translate the principle of intergenerational equity into legal rights and obligations and develop effective measures to carry them out?’


\textsuperscript{154} Doelle, Brunnée and Rajamani, above n 46, 442.

\textsuperscript{155} Rajamani, above n 111, 387.

\textsuperscript{156} Ibid 386.
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A Multilateral Consultative Process

The provisions of the *UNFCCC* allow for the development of a multilateral consultative process that could promote compliance.\(^{157}\) This process could assist with developing country party compliance, as the Enforcement Branch is primarily concerned with developed country compliance with agreed targets set out in the provisions of the *Kyoto Protocol*.\(^{158}\) It is likely that the ongoing negotiations for a new international agreement will focus on increasing reporting requirements by all parties to the *UNFCCC* as well as the adoption of new targets by developed states and mitigation actions by developing states.\(^{159}\) If this is the likely course of the new agreement, a multilateral consultative process could facilitate compliance outcomes based upon states achieving outcomes, rather than relying on the approach of the Enforcement Branch to determine consequences for states.\(^{160}\) However, a facilitative process may not lead to the results necessary to mitigate GHGs on a global basis, particularly if there are no consequences for states if they fail to meet their mitigation objectives.

B Review and Assessment Provisions

It may be possible to use the existing provisions in the *UNFCCC* for review and assessment to provide an accurate overview of compliance with the provisions in the *UNFCCC* in a more effective manner than at present.\(^{161}\) The COP regularly reviews the implementation of the *UNFCCC* and examines the obligations of the parties to the convention.\(^{162}\) The Subsidiary Body for Implementation (SBI) considers the information communicated by the parties in their national reports to the COP (concerning the inventory of emissions and implementation actions in compliance with the provisions in the *UNFCCC*)\(^{163}\) to help the COP carry out the review of implementation of the convention.\(^{164}\) Further, (as noted earlier) the Cancun Agreements have increased the requirements for states to provide information.\(^{165}\) So, the SBI has additional responsibilities including the consideration of the national communications and updates from developing countries as well as the conduct of the international consultation and analysis procedures that should lead to a complete overview of compliance.\(^{166}\) At present, these functions do not permit requests for an increase in the obligations of parties to the *UNFCCC* or for the enhancement of compliance for developing countries.\(^{167}\) However, it may be possible to expand these procedures to improve compliance in the future by permitting these adjustments.

C General Comments

There continues to be some uncertainty about whether the Compliance Committee and the two branches, Enforcement and Facilitative, will continue to carry out their roles after the time period for the *Kyoto Protocol* has expired. If the Compliance Committee ceases to carry out its functions and there is no similar replacement, the compliance system for GHG mitigation would be ineffectual.\(^{168}\) The two abovementioned suggestions, the multilateral consultative process and review and assessment are based upon increasing reliance on provisions in the

\(^{157}\) *UNFCCC* art 13 ‘The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention.’

\(^{158}\) *Kyoto Protocol* Annex B. See Rajamani, above n 111, 388.

\(^{159}\) Rajamani, above n 111, 388.

\(^{160}\) Ibid 388.

\(^{161}\) Ibid 386.

\(^{162}\) *UNFCCC* art 7(2).

\(^{163}\) See *UNFCCC* arts 10(2) and 12.

\(^{164}\) *UNFCCC* art 10(1)

\(^{165}\) *UNFCCC*, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010 Addendum Part Two: Action taken by the Conference of the Parties at its sixteenth session FCCC/CP/2010/7/Add.1 16th sess, (15 March 2001).

\(^{166}\) See Rajamani, above n 111, 387.

\(^{167}\) Ibid 387.

\(^{168}\) See Brunnée, above n 74, 53.
UNFCCC and may not be as effective as the Compliance Committee because there are no consequences for states that fail to adhere to their obligations. So, future mechanisms could be developed to enhance compliance for developed and developing countries and this issue should be addressed in the next international agreement.

Generally, the results of the practice of the Enforcement Branch have been constructive because that branch can impose sanctions, unlike other compliance systems in environmental treaties.\(^{169}\) Clearly, the Compliance Committee has had a degree of success at resolving non-compliance,\(^{170}\) apart from the problem of the withdrawal of ratification from the Kyoto Protocol by Canada.\(^{171}\) So, it would be preferable to continue with a similar strengthened system when the next international agreement is negotiated. A measurement, reporting and verification system is stronger if it has legal consequences for non-compliance.\(^{172}\) Discussions at the international level about compliance indicate that parties are likely to negotiate a new compliance system and there is an expectation that the 2015 agreement will include ‘a robust compliance mechanism which includes appropriate consequences for non-compliance’.\(^{173}\) The problems for negotiators will be how to address new obligations for developed countries to provide financial and technical assistance and the inclusion of developing country responsibilities.\(^{174}\) The issues facing negotiators will also involve questions about the application of the common but differentiated responsibilities concept, who will be able to trigger the compliance proceedings; how to verify and enforce compliance; what are appropriate consequences for non-compliance; and how to build an effective compliance regime.\(^{175}\)

The effectiveness of the compliance system in the Kyoto Protocol depends upon cooperation from the party (that is having difficulty complying) to contribute positively in procedures to remedy the situation.\(^{176}\) In any event, the difficulty that occurs when a party withdraws from its international obligations in the Kyoto Protocol and takes advantage of the actions of other states reducing their GHG emissions could be addressed by limiting the ability of states to withdraw from the next international agreement.

The problem with a state advancing its own interests and deliberately avoiding its international obligations to reduce GHG emissions is that this undermines global efforts to achieve effective mitigation of GHGs.\(^{177}\) The common concern of humankind concept indicates that all states should cooperate to deal with the threat of climate change so, the focus should be on incentives for states to participate in the next international agreements on climate change.\(^{178}\) One example is making the future ability of states to participate in an emissions trading scheme (that would operate at the international level) conditional upon the states ratifying the next

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169 Mehling, above n 76, 204.
171 See ibid 99.
172 Meinhard Doelle, ‘Experience with the Facilitative and Enforcement Branches of the Kyoto Compliance System’ in Jutta Brunnée, Meinhard Doelle and Lavanya Rajamani (eds), Promoting Compliance in an Evolving Climate Regime (Cambridge University Press, 2012) 102,146.
173 UNFCCC Ad Hoc Working Group in the Durban Platform for Enhanced Action ADP.2012.6 Informal Summary of the roundtable under workstream 1 ADP 1, part 2 Doha, Qatar, November−December 2012 Note by the Co-Chairs (7 February 2013) [33].
174 Doelle, Brunnée and Rajamani, above n 46, 447–8.
175 Ibid 438.
176 Tanzi and Pitea, above n 32, 569–70.
177 IPCC, WG III Summary for Policy Makers’ above n 21, 5 ‘Effective mitigation will not be achieved if individual agents advance their own interests independently. Climate change has the characteristics of a collective action problem at the global scale, because most greenhouse gases (GHGs) accumulate over time and mix globally, and emissions by any agent (e.g., individual, community, company, country) affect other agents. International cooperation is therefore required to effectively mitigate GHG emissions and address other climate change issues.’
178 Jacob Werksman and Kirk Herbertson, ‘The Aftermath of Copenhagen: Does International Law Have a Role to Play in the Global Response to Climate Change?’ (2010) Maryland Journal of International Law 109, 140 ‘There are indications that a post-2012 climate change regime will support performance-based financial mechanisms and carbon markets that could reward countries that are willing to make specific undertakings.’
international agreement. If some states refuse to ratify the next agreement and take action to mitigate GHGs, it may be possible, perhaps through a General Assembly resolution, for states to note that free rider states may be liable for additional compensation to those countries which are adversely impacted as a result of this failure to cooperate.

D Other Options

There are four possible future legal developments that could assist to protect the interests of present and future generations against the adverse impacts of climate change. These are the development of a global carbon tax, the establishment of a trust fund, insurance proposals, and the appointment of a representative for future generations at the international level.

First, a world-wide carbon tax such as a fee on coal and oil production could be developed. Unfortunately, this global carbon tax initiative has not received support from many countries. If agreed to, a global carbon tax would take a long time to negotiate and even more time for the revenues to be sent to the United Nations to distribute.\textsuperscript{179}

Secondly, the establishment of a trust fund could compensate future generations that experience damage as a result of extreme events occurring due to the impacts of climate change. The trust fund is well suited to this arrangement because finances will need to be contributed from many different states, and this money may be spent in locations distant from the source of the funds and could be allocated for the benefit of generations who do not yet exist.\textsuperscript{180} Edith Brown Weiss suggested that a trust fund could be financed by establishing a user’s fee for activities which impose costs on future generations. In the context of climate change, this fee could be a tax on coal and oil use.\textsuperscript{181} However, this collection of fees could pose similar problems to those raised about the global carbon tax suggestion.

Thirdly, parties to the \textit{UNFCCC} are considering insurance options to assist developing country parties when they are affected by the adverse effects of climate change.\textsuperscript{182} Some of the benefits of insurance are: it provides financing to enable recovery from risk events; the risk is spread; and incentives to reduce risk can be incorporated into the plan of insurance. The Munich Climate Insurance Initiative (MCII) has proposed submissions on how best to develop insurance assistance particularly for extreme weather events occurring as a result of climate change as insurance will not be suitable for slow onsets.\textsuperscript{183} One of the proposals is that an international (or regional) convention could cover insurance for loss or damage as a result of the impacts of climate change.\textsuperscript{184} The functions of a climate change insurance convention would include assessments of loss or damage for extreme weather events, provision of climate risk insurance (including finance mechanisms) as well as policy coherence and transfer of risk tools.\textsuperscript{185}

Fourthly, the Report of the Secretary-General proposed the appointment of a High Commissioner for future generations and suggests that the following functions could apply to this position:

- The High Commissioner could act as an advocate for intergenerational solidarity through interactions with the Member States and other stakeholders as well as across the United Nations entities and specialized agencies.


\textsuperscript{182} \textit{UNFCCC} art 4(8).


\textsuperscript{184} Ibid 22.

\textsuperscript{185} Ibid 23.
Such an office could undertake research and foster expertise on policy practices to enhance intergenerational solidarity in the context of sustainable development on the international, regional and national and sub-national level and disseminate this expertise as deemed appropriate.

The office could, on request from the United Nations or any of its entities, specialized agencies, or affiliated organizations, offer advice on implementation of existing intergovernmental commitments to enhance the rights and address the needs of future generations.

The office could, upon request, also offer its support and advice, including to individual Member States on best practices and policy measures to enhance intergenerational solidarity.186

These four proposals demonstrate that lawyers are seeking to provide new legal frameworks to address complex problems associated with the threat of climate change. There are, however, some difficulties with these proposals. A global trust fund may assist future generations to have funds to remediate environmental damage, but there are limits to the advantages of a fund of money. If the temperature increases caused by climate change lead to a breach of environmental tipping points and irreversible environmental damage, remediation would not be possible, and the international focus should be on prevention of this damage from occurring in the first place. Edith Brown Weiss argues that the trust is an appropriate legal device to protect the environment for future generations where the trustee is the present generation which is also partly a beneficiary of the trust.187 The common concern of humankind concept emphasises the responsibility of states to protect the atmosphere and is linked in the temporal dimension to the protection of the interests of future generations, so, this concept can be viewed as incorporating the mechanism of trust.188 In the context of climate change, the trust could protect the atmosphere on behalf of present and future generations (the beneficiaries). Clearly, governments of states have duties to take international agreed action to protect the atmosphere from the threat of climate change for the benefit of future generations. Indeed, humankind has a responsibility to protect the environment for the future, and this is fundamental to sustainable development.189 The application of the trust in this way adopts a precautionary and preventative approach to climate change protection.

In addition to the appointment of a High Commissioner for future generations, an independent representative could be appointed as a climate change commissioner to protect the interests of future generations from the adverse impacts of climate change. The office of a climate change commissioner for future generations could be established to deal specifically with the complex issues raised by climate change that will impact future generations.190 The climate change commissioner could promote development of climate change adaptation and mitigation policy for the benefit of future generations and encourage action to be taken in accordance with these policies by governments as well as non-state actors including business and NGOs.191 One of the best approaches would be to link the role of the climate change commissioner to a new compliance system where the climate change commissioner could require an investigation from an international climate change compliance institution into any failure by states to comply with mitigation, adaptation and reporting obligations. Alternatively, if the traditional method of international dispute resolution is relied upon in the future, the climate change commissioner could be granted legal standing to act on behalf of future generations to bring legal action in the International Court of Justice or in international environmental arbitration. Indeed, if a climate change commissioner could draw international attention to the serious impacts on

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186 Recent Proposals in Intergenerational Solidarity, above n 104, [63].
189 Birnie, Boyle and Redgwell, above n 94, 121.
190 Brown Weiss above n 146, 112.
191 Ibid.
future generations as a result of the effects of climate change, states may be more likely to engage in joint action to prevent these adverse impacts and develop a culture of compliance.

The development of an appropriate insurance option at the international level has merit and could assist developing countries particularly those at risk of increased storm damage. Some small island developing nations are presently not able to obtain insurance because of increasing costs of premiums and the limited scope of these insurance policies. However, the development of insurance is unlikely to assist with slow onset impacts of climate change such as the rise of sea levels and flooding of coastal areas. These are more serious concerns, as in the case of total inundation of small island communities, the questions remain about whether additional funding could possibly compensate for loss of sovereignty or loss of culture. Possibly, other innovative approaches that protect cultural identity and maintain habitats could assist.

**IX Conclusion**

The international legal system is not well suited to addressing global environmental problems, and the challenge for lawyers is how to provide legal regulatory frameworks at international law that can help to manage major threats such as climate change. Clearly, this challenge is being met by proposals for change and development of new institutions. Three legal mechanisms — Joint Implementation, the Clean Development Mechanism and emissions trading — are examples of legal frameworks that have been developed to assist states to deal with the threat of climate change. More recent advances are evident from the establishment of the Warsaw International Mechanism, the Green Climate Fund and the Technology Mechanism.

Given that some temperature rise (and the effects) will in any event occur, the development of new mechanisms can help to protect the interests of present future generations against the adverse consequences resulting from climate change. The proposals for a global tax (or a trust fund), an international convention on insurance and the appointment of an international representative to protect the interests of future generations could ameliorate some of these adverse consequences. These proposals can also assist negotiations among states to as they develop innovative legal frameworks and progress towards a new treaty on climate change. More recent advances are evident from the establishment of the Warsaw International Mechanism, the Green Climate Fund and the Technology Mechanism.

The authenticity and effectiveness of any compliance system adopted in the future will depend upon the ability of the system to meet the outcomes expected by states through the recognition that climate change and its adverse effects are the common concern of humankind. It may be necessary to consider innovative approaches such as the establishment of the office of climate change commissioner for future generations. Overall, much depends upon the ability of states to cooperate and develop an effective climate change compliance regime in the next international treaty. Indeed, the response to the threat of climate change requires committed action by states to reduce GHG emissions urgently and unfortunately, there is at present, no method of ensuring that all states will meet these commitments in the future.

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192 UNFCCC, Subsidiary Body for Implementation thirty-seventh session (26 November- 1 December 2012) Report on the regional expert meetings on a range of approaches to address loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events Note by the Secretariat FCCC/SBI/2012/29 37th sess. (19 November 2012) [42]

193 Ibid [27].

194 COP Report 2013, above n 133, 4 [2]. ‘Decides, in the context of its determination to adopt a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties at its twenty-first session (December 2015) and for it to come into effect and be implemented from 2020.’
‘HIRING A NASHVILLE SENSATION’: USING NARRATIVE LEARNING TO DEVELOP THE PROBLEM SOLVING SKILLS OF CONTRACT LAW STUDENTS

MICHELLE BACKSTROM AND DONNA COOPER

ABSTRACT

This article discusses the design of interactive online activities that introduce problem solving skills to first year law students. They are structured around the narrative framework of ‘Ruby’s Music Festival’, where a young business entrepreneur encounters various issues when organising a music festival, and students use a generic problem solving method to provide legal solutions. These online activities offer students the opportunity to obtain early formative feedback on their legal problem solving abilities prior to undertaking a later summative assessment task. The design of the activities around the Ruby narrative framework and the benefits of providing students with early formative feedback will be discussed.

I INTRODUCTION

In practice, lawyers are required to use problem solving skills in the context of a narrative, storytelling framework. Their clients relate factual scenarios and problems they have encountered, and legal practitioners are required to identify the relevant issues and provide appropriate legal advice. Effective problem solving is an identified threshold learning outcome for Australian undergraduate Bachelor of Laws1 and Juris Doctor2 students, captured under ‘Thinking Skills’, which include the ability to identify and articulate legal issues and apply legal reasoning and research to generate appropriate responses to legal issues.

In the Queensland University of Technology (‘QUT’)3 Law School, a generic model of legal problem solving known by the acronym ‘ISAAC ISAACS’4 is used. Students develop their problem solving skills as they progress through their law degree as this generic model is

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1 ‘Thinking Skills’ is Threshold Learning Outcome (‘TLO’) 3 for the LLB. See Sally Kift, Mark Israel and Rachael Field, Australian Learning and Teaching Council, Learning and Teaching Academic Standards Project, Bachelor of Laws, Learning and Teaching Academic Standards Statement December 2010. This learning outcome also includes the ability to (c) engage in critical analysis and make a reasoned choice amongst alternatives and (d) think creatively in approaching legal issues and generating appropriate responses <http://www.lawteachnetwork.org/tlo.html>.


3 QUT is located in Brisbane, Australia <www.qut.edu.au>. All Australian undergraduate students are required to develop the threshold learning outcomes for their particular discipline, Discipline Standards Australia <http://disciplinestandards.pbworks.com/w/page/52657697/FrontPage>.

4 An acronym developed by John Pyke, Lecturer, QUT, and referring to Australian Chief Justice and Governor-General Sir Isaac Isaacs. See John Pyke Constitutional Law, (Palgrave MacMillan, 2013), xxxiii–xxxiv.
embedded across a number of units including Contracts A. In Contracts A, online activities linked to the narrative framework of ‘Ruby’s Music Festival’ (‘the Ruby activities’) are used to support the teaching of this problem solving model. Students view a number of scenarios involving the challenges that Ruby, a young business entrepreneur, encounters when organising a music festival. They are then guided through the process of providing appropriate legal advice to Ruby using the model.

A narrative learning framework was used as it provides students with a story, setting and characters, and the various legal issues that arise engage them in thinking critically about possible solutions. During the online activities students are given formative feedback on their understanding of this problem solving method. This feedback is designed to enhance their understanding of the model and the standards they will be required to achieve on a later summative assessment task, the final central exam.

In this article we will discuss the design of the activities used in the unit Contracts A around the Ruby activities. We will highlight the benefits to our students of engaging in this narrative framework when learning how to apply the problem solving method. We will explain the advantages to students of receiving early formative feedback on their learning through these online activities. Finally, we will report on a recent formal evaluation that provides us with student insights into whether the Ruby activities have been successful in assisting to develop their legal problem solving skills.

II The Unit: Contracts A

The unit in question, Contracts A, aims to provide students with an understanding of how to resolve contract law issues. It also affords a basis for study in later units which involve the application of contract law principles, such as Real Property and Commercial Law. It is currently a first year, first semester unit for many students undertaking the QUT law degree.

The relevant learning outcomes of the Contracts A unit are to:

- apply and analyse the law of contract relating to the formation of contracts, equitable estoppel, privity, formalities and content of contracts to real world problems to demonstrate knowledge and understanding; (GC1, GC2)
- recognise and define possible contractual issues and related ethical dilemmas in real world-type problems; (GC1, GC2, GC6).

These learning outcomes link to the following graduate capabilities:

- GC1. Discipline Knowledge;
- GC2. Problem Solving, Reasoning and Research;
- GC3. Effective Communication.

The student cohort consists overwhelmingly of domestic law students, and material is delivered via an integrated blended learning program that combines face-to-face and online

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5 The importance of consistency in relation to the method used is considered in Kristy Richardson, Jennifer Butler and Eric Holm, ‘Teaching Law to Non-law Students: The Use of Problem Solving Models in Legal Teaching’ (2009) 6(2) Studies in Learning, Evaluation Innovation and Development 29, 40.
7 And the subsequent unit Contracts B.
8 Note that ‘aims’ are, ‘statements of general educational intent, seen from the student’s point of view’: Paul Ramsden, Learning to Teach in Higher Education (RoutledgeFalmer, 2nd ed, 2003) 126.
9 Queensland University of Technology, Unit Outline, LWB136 Contracts A which also sets out the content, teaching and learning approaches and assessment, <https://www.student.qut.edu.au/studying/units/unit?code=LWB136&id=unit=51215>.
10 Ibid. These learning objectives are, ‘specific and concrete statements of what students are expected to learn’: Ramsden, above n 8.
11 In Semester 1, 2014 599 599 students were enrolled in LWB136 Contracts A. Of these, 528 were internal students. Fourteen were international students.
learning. Students have a comprehensive workbook that takes them through the readings and unit content. They then listen to video podcasts that assist with their understanding of the law and attend weekly tutorials to learn how to apply contract law principles to real-world situations. Students then engage with the online Ruby activities to learn how to apply the generic problem solving model in a contract law framework and with online quizzes to test their understanding of this model and unit concepts. These activities provide students with the opportunity to self-assess their understanding of how to apply contract law to problem scenarios and to reflect on their performance. One of the goals of this varied approach to the learning and teaching activities is to assist students to evolve into independent learners.

Three pieces of assessment in the unit aim to test whether students have achieved the designated learning outcomes in relation to problem solving. They are:

- For internal (on-campus) students, participation in a tutorial held each week and for distance students, a written problem solving exercise. This assessment item is weighted at 15 per cent;
- A 20 per cent online quiz which tests knowledge of theory, case law, including some short case scenarios; and
- The final written examination weighted at 55 per cent; it is an open-book exam, the focus of which is to test contract law knowledge and problem solving skills.

In the next section we will focus on the Ruby activities in more detail, first the way in which students are generally introduced to legal problem solving and then how we use these activities to teach problem solving in the context of specific areas of contract law.

III THE RUBY ACTIVITIES AND THE PROBLEM SOLVING MODEL

For many years the acronym ‘ISAAC ISAACS’ has been used in the QUT Law School to describe a generic legal problem solving model used consistently across our undergraduate degree. This model requires students to approach a case study based on a real-world scenario by working through a structured series of steps. These are that, after familiarising themselves with the facts, students identify the legal issues that arise, state the relevant law, cite the legal authorities, apply the law to each separate issue and finally reach a conclusion by providing legal advice to the client.

In Contracts A, students are introduced to this problem solving method in their first tutorial via the first of the Ruby activities. Ruby was seeking to organise the ‘best music festival ever’ and encountered a number of legal dilemmas while dealing with her staff and performers.

15 Ramsden, above n 8, 184–5.
16 Students also complete online negotiation activities which relate to graduate capability four being an understanding of negotiating theory and practice when negotiating a contract in a real world context.
17 An acronym developed by John Pyke, Lecturer, QUT and referring to Australian Sir Isaac Isaacs. See Pyke, above n 4.
19 This method is similar to the IRAC method explained in Catriona Cook et al, Laying Down the Law (LexisNexis Butterworths, 8th ed, 2012) 391–7. See also Patrick Keyzer, Legal Problem Solving (LexisNexis Butterworths, 2nd ed, 2003). For a discussion of legal problem solving and an overview of the literature on similar approaches see Liddle, above n 18, 55–7.
These are portrayed in a series of music videos that are made available via YouTube. It was thought that the use of digital media would promote student-centred learning by engaging our students in real-world legal problems.

Students watch the music video, *Ruby and the Travel Smartcard*, which introduces the story and characters. Ruby travels to the site of the festival on a train and has a problem using her travel card. This creates the first legal issue for students to deal with in ascertaining whether Ruby has breached the relevant legislation. After viewing the video, students engage with a series of PowerPoint slides that guide them step by step through the ISAAC ISAACS problem solving method. At each step they are able to compare their attempt with a model response. The process is broken down into very small parts so that it is manageable for new law students, who are kept on track from the beginning of the process through to its conclusion. At the end, students combine their answers to prepare their legal advice to Ruby and can compare it to the model advice.

The PowerPoint slides are available on the online teaching website and an example slide explaining the ISAAC ISAACS method is set out in Figure 1.

![Figure 1: the PowerPoint slide describing the problem solving method](image.png)

In the Week 3 tutorial the Ruby activities are used to teach students how to approach problem solving in the area of ‘intention to create legal relations’. Students watch the music video, *Hiring a Nashville Sensation*, which introduces Ruby’s brother Axel, who is a burgeoning country music star in the United States. Axel agrees (through his agent) to return home as the headline act for his sister’s music festival. Ruby enters into an agreement with Axel for him to perform, but he subsequently reneges on this arrangement.

When working through the problem solving steps, students are asked to identify the relevant legal issues that arise from the scenario. They can then compare their answers to the slides. For example the slide in Figure 2 asks whether Ruby has a claim for breach of contract.

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20 The link to YouTube is made available via the PowerPoint slides on the online teaching website. While video is a ‘linear presentational medium’ it was used with PowerPoint to produce a more flexible tool. For a discussion of the use of video in teaching see Diana Laurillard, *Rethinking University Thinking: A Conversational Framework for Effective Use of Educational Technologies* (Routledge Farmer, 2nd ed, 2002) 103–4.


23 Laurillard, above n 20, 114.

24 The introductory activity is described in Michelle Backstrom and Donna Cooper, ‘Ruby’s Music Festival: Developing Problem Solving Skills Using Online Scenarios and Creating Opportunities to Feed Forward’ (2013) 47(3) *The Law Teacher: The International Journal of Legal Education* 300.
A hint can be uncovered telling students to consider the elements of a binding simple contract. The focus here is on whether there is an intention to create a legal relationship. Students are asked to state the relevant law and again compare it to the model answer. They then access slides that provide the law relating to intention to create a contract. One slide is set out at Figure 3:

Figure 2: A PowerPoint slide identifying the relevant legal issue

Figure 3: One of the PowerPoint slides which includes a statement of the law of ‘intention to create legal relations’
In the course of the process Contracts A students are required to apply the law to the facts to ascertain whether Axel and Ruby have a binding contract. Students must then decide whether Ruby has a claim for breach of contract. After they have made an attempt at their advice, a sample response is provided as set out in Figure 4.

Figure 4: This is the first page of the sample answer provided to students which is made available to students when they click on the icon next to, ‘sample answer’

A summary slide is then available that reminds students how they established whether Ruby had a binding contract with Axel and whether she could take legal action against him for failing to perform. It is illustrated at Figure 5.

Figure 5: The summary slide used by students to solidify the process of applying the law to the facts and deciding whether there has been a breach of contract
The reflection at the conclusion of the activity has remained the same in all the Ruby scenarios we have developed. It uses prompt questions, like those designed in the ALTC Threshold Concepts and Variations Theory Project problem solving exercise, to facilitate this. An example is included at Figure 6.

![Figure 6: The PowerPoint slide assisting students to reflect on their understanding of how to apply the problem solving method](image)

The Ruby activities we have discussed allow students to engage with a real-world legal scenario via narrative frameworks. We will now discuss the benefits of the use of narrative learning in the context of this activity.

IV NARRATIVE LEARNING

Narrative learning falls under the broader heading of constructivist learning theory, which focuses on the active role of the learner when seeking to understand new concepts and acquire new skills. It conceptualises learning as construction of meaning based on experience. That is, establishing connections between the story and the concepts that learners are seeking to understand, thus ensuring that the learning experience is more accessible.

Historically, narrative learning has been a familiar part of teaching students how to problem solve in legal education. It has commonly been used in the context of written problem scenarios that students analyse in tutorials. However, as Butler has highlighted, ‘these scenarios are generally relatively light in detail and disconnected from one another’. The Ruby activities provide students with more engaging and imaginative online environments, using music videos to draw them into the plots and settings. Compared with working through tutorial problems, the learning is more active ‘by immersing learners in a captivating world populated by intriguing

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25 The first generic activity we developed used variation theory and was modelled on the problem solving exercise in the Australian Learning and Teaching Council, Threshold Concepts and Variations Theory Project. For further information on the project, see Gerlese Akerlind, Jo McKenzie and Mandy Lupton, A Threshold Concepts Focus to Curriculum Design: Supporting Student Learning Through Application of Variation Theory (Australian Learning and Teaching Council, 2011) and the website <www.thresholdvariation.edu.au> and Backstrom and Cooper above n 24. This activity developed for Contracts students and the activity dealing with negligence used by Torts students, give rise to more complex legal questions and do not use variation theory.


27 Clark and Rossiter, above n 6.

28 Clark and Rossiter, above n 6.

29 And in the use of Question and Answer books.

30 Butler, above n 13, 391.
characters’ and has been shown to be an effective way of facilitating student understanding and encouraging deep learning.31

As a number of different Ruby scenarios are used in Contracts A and in another unit, Torts A,32 they also offer students a continuing narrative, which can provide episodic memories as they recall how they applied the problem solving method in particular fact situations.33 The nature of the narrative has been shown to provide engaging worlds in which students can become more actively involved in problem solving.34 Ruby’s stories provide more “open perceptual, emotional and motivational opportunities for learning’.35 They facilitate an authentic learning environment and allow learners to examine the problem ‘from a variety of theoretical and practical perspectives’.36 The music videos also cater for different learning styles and, in particular, for students who learn through visualising ideas and concepts.37

In the QUT Law School, the use of stories to introduce concepts to students has already been successfully included in the Contracts A and Contracts B units to introduce students to negotiation skills. The basic principles of interest-based negotiation38 are taught through the use of an interactive activity, ‘Air Gondwana’, which has been demonstrated to promote student engagement and motivation.39

The Ruby activities also afford students the opportunity to receive formative feedback on their learning by comparing their work to the model answers. At the end of the activities students can partake of interactive quizzes that provide them with early feedback on their understanding of the problem solving process.

V FORMATIVE FEEDBACK

Formative feedback has been described as enabling ‘a learner to adapt and close a gap between their current understanding or attainment and a further stage or level’.40 It has also been defined as information that can improve performance and accelerate learning.41 In the Ruby activities, such as Ruby and the Travel Smartcard, students are introduced to the problem solving method both in class and via the online activities. They can also access these activities via the online teaching website to practise working through the ISAAC steps in their own time, in a safe ‘low stakes’ environment in preparation for their final exam, being a ‘high stakes’ outcome.42

Feedback is also considered to be formative if it clarifies students’ understanding of what they need to achieve to be successful in a given assessment task.43 As our students work through the online activities they are asked to set out what legal advice may be appropriate in the

32 Where a disco ball falls on a festival patron and they are injured, creating legal issues in relation to negligence.
34 Bradford W. Mott et al, above n 31.
35 Rowe, McQuiggan and Lester, above n 33.
40 Daly et al, above n 14 , 622; Nicol and Macfarlane-Dick, above n 14.
41 Nicol and Macfarlane-Dick, above n 14.
42 Ibid; Daly et al, above n 14, 621.
43 Nicol and Macfarlane-Dick, above n 14, 205. Daly et al, above n 14.
various fact scenarios. They can then compare their proposed advice with the model answers. This provides our students with exemplars of good performance and an ‘objective standard against which they can compare their work.’ Students are also supplied with criteria sheets that clearly explain what the standards are to achieve various levels of results. The three criteria are: knowledge and understanding of relevant legal issues, problem solving and reasoning, and formal writing skills.

The Ruby activities and subsequent online quizzes also afford students the opportunity to self-assess their understanding of the generic method and unit concepts and reflect on their performance. Nicol and Macfarlane-Dick have stated that good quality feedback is, ‘information that helps students troubleshoot their own performance and self-correct.’ The automated responses provided to students in automated quizzes help students to measure their understanding of the ISAAC method and understand how they can improve their ability to work through the steps and apply the law to the facts.

It has been suggested that, ‘if external feedback is to help scaffold the development of student self-regulation, it must be understood, internalised and ultimately used by the student to make evaluative judgments about their own learning outcomes.’ The online activities were supported by various in-class activities. Students were introduced to the introductory problem solving activity, Ruby and the Travel Smartcard in the first tutorial. They were then taken through the Hiring a Nashville Sensation activity by their tutors in Week 3 and could learn how to apply the law they had just covered in class to the scenario they were given.

The Ruby activities also comply with Diana Laurillard’s model for the successful learning of law, which she has divided into five phases:

1. become familiar with the key ideas and information in each area of the law and know how these ideas and information are organised and structured;
2. accurately relate the language of the law to its underlying meaning;
3. act on simulated but realistic situations on the basis of what they know about the law, theories of the law and the practice of law;
4. use feedback to modify their understanding and adjust their actions; and
5. reflect on actions and feedback in relation to the structured ideas in a given area of law.

It has been suggested that this model can be applied to learning both knowledge and skills. The Ruby activities demonstrate the application of these five phases as they provide instruction in the legal problem solving method and show students how to apply this model to real-world scenarios. They also provide students with feedback on their understanding of the problem solving steps, and enable them to reflect on their performance and on how the legal advice they have proposed compares with best practice exemplars.

VI Student Evaluation

In semester one of 2014 a survey of internal students in Contracts A was conducted to gauge student opinion as to the effectiveness of the Ruby activities. The survey was conducted in the
final tutorial of the semester. Questions were aimed at ascertaining whether the online activities had assisted students to learn the generic problem solving method, and whether they thought it had worked well in the online format. Surveys were conducted by paper-based instruments administered in tutorials. They comprised statements that students were asked to respond to on a five-point Likert scale (where 5 represented ‘strongly agree’ and 1 represented ‘strongly disagree’). One hundred and eighty nine internal students agreed to undertake the survey at the conclusion of the last tutorial for the semester. The number of respondents may have been impacted by the timing of the survey.

A total of 62 per cent of respondents agreed or strongly agreed that the Ruby resource helped them to learn how to problem-solve in legal scenarios, 32 per cent gave a neutral response and only 4 per cent disagreed or strongly disagreed. In relation to whether the resource had helped students to learn how to identify legal issues, 66 per cent agreed or strongly agreed, 28 per cent were neutral and 4 per cent disagreed or strongly disagreed. Sixty percent of respondents thought that the resource helped them learn to apply the relevant law to the facts of the scenario, 34 per cent were neutral, with 4 per cent disagreeing or strongly disagreeing with this statement.

As to whether the sample answers helped students to understand what legal advice was appropriate in different scenarios, 62 per cent of respondents either agreed or strongly agreed, 32 per cent were neutral and only 2 per cent either disagreed or strongly disagreed. A majority of students (69 per cent) either agreed or strongly agreed that the Ruby activities worked well in the online format and 78 per cent of students agreed or strongly agreed that they found the Ruby resource easy to use. Although in this evaluation there is obviously a proportion of students who have reported a degree of ambivalence towards the Ruby activities, 67 per cent strongly agreed or agreed that they would be happy to work through more scenarios in other subjects using the same approach as the Ruby resource, 20 per cent were neutral and only 5 per cent disagreed.

VII REFLECTIONS

The student evaluation revealed that the majority of students who participated in the survey reported that the activities developed under the Ruby banner have helped them to learn the generic problem solving method, identify the legal issues in scenarios and apply the appropriate law. A number gave neutral responses to the questions. We are unsure at this stage why this is the case and will revise our evaluation questions and provide some opportunities for students to make written comments to see if we can determine why these students responded in an ambivalent manner. We will also survey students at an earlier stage of the semester, so that we can achieve a higher response rate, and just after they have used the Ruby activities, so they can clearly recall them.

The initial development of the music videos and online quizzes required a significant investment of staff time — and, in the case of the videos, substantial financial resources. However, we are now in a position to develop further activities, designed around these same scenarios, relatively easily. In contrast, the prompt question and answer activities embedded in the PowerPoint software is simple to use and alter. As the creation process is clear, and we have precedents available which we can adapt, it will not involve significant staff time and financial resources to develop more PowerPoint activities for use with the existing music videos. Given that the majority of students have found the activities enhance their learning of problem solving — an essential skill for lawyers — we will also consider adding to the collection of PowerPoint Ruby activities in the future and to use this learning framework in other units.

VII CONCLUSION

Our discussion highlights the benefits to our students of being introduced to legal problem solving within the framework of narrative learning. It enabled them to become immersed in imaginative and stimulating learning environments in which they could follow Ruby through the trials and tribulations of organising the music festival. As they follow the individual stories, students can appreciate how contractual law issues arise in real world scenarios. This then
motivates them to engage in legal problem solving so they can provide Ruby with appropriate legal advice. Having the opportunity to work through these online activities, both in class and in their own time, enabled learners to practise and develop their problem solving skills in preparation for their final exam. The formative feedback allowed them to measure their understanding in a safe and non-threatening environment. The Ruby activities were also used in class, where students could engage in interactive discussions and clarify their understanding of how to apply the model in practice.

It should be noted that the development of the Ruby activities, particularly the video vignettes, involved considerable staff time and financial investment, so the design and implementation of such a project should not be embarked upon lightly. Fortunately, the music videos are now a resource that can provide us with many varied opportunities for discussion of a range of legal issues. As a majority of our Contract A students have indicated they would be happy to work through similar activities in other subjects, they can also be adapted for use in other areas of the law.

In the future we plan to refine the way in which our students engage with the Ruby activities. Although a majority of students indicated that the Ruby resources assisted their learning, a proportion reported ambivalence about their experience. Future student evaluations, performed at an earlier stage of semester, will hopefully reveal the underlying reasons for this indecision. We will then be in a position to enhance the way in which our students interact with Ruby’s Music Festival.
SESSIONAL ACADEMIC SUCCESS: THE QUT LAW SCHOOL EXPERIENCE

RACHEL HEWS, JENNIFER YULE AND JUSTINE VAN WINDEN*

I Introduction

The literature tells us that across the university sector, both in Australia and overseas, approximately half of face-to-face teaching is undertaken by sessional academics. Sessional academics are defined as ‘teachers, including any higher education instructors, not in tenured or permanent positions, and employed on an hourly or honorary basis.’ Sessional academics are an important part of the provision of legal education in higher education, and many institutions rely to a large extent on their sessional academics to deliver the teaching program, especially in the first year. This is particularly relevant to law schools, as many sessional academics are legal practitioners rather than higher degree research students; as a cohort their needs may be different from those of sessional academics in other schools. Therefore it is important for both the staff and the student experience, as well as for attainment of learning outcomes, that consideration be given to the professional development and training of sessional academics.

The links between teaching quality, student outcomes and a large casualised academic workforce are unexplored in the Australian context, although the recent American literature gives grounds for concern. This is not to suggest that casual academics are poor-quality teachers; rather, their conditions of employment appear to provide little basis for professional development and career advancement, and much cause for concern.

The Queensland University of Technology (QUT) has more than 2000 sessional academics; in 2014 there are approximately 75 sessional academics in the Law School, teaching over 50 per cent of the undergraduate tutorials. It is important to professionally develop, train and support sessional academics to build confidence, improve retention rates and maximise teaching success. This will ensure the best possible learning environment for students and attainment of learning outcomes. The QUT Law School has been a participant in a university

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2 Marina Harvey, ‘Setting the Standards’, above n 1, 1.
3 Jill Cowley, above n 1, 41.
5 Robin May, Glenda Strachan and David Peetz, above n 1, 20.
7 Jill Cowley, above n 1, 28.
pilot providing opportunities through the Sessional Academic Success (SAS) program for academic development, support and a sense of belonging for sessional academics.\(^8\)

Over the last decade, government-funded projects have been investigating and publishing reports about the contribution of sessional academics to higher education, and highlighting issues such as recognition, enhancement, development, leadership and standards.\(^9\) Reductions in government funding in conjunction with the increase in higher education participation—a result of government policy which has also resulted in an increase of socio-economic diversity amongst students—has only been made possible by sessional academics bearing the teaching burden.\(^10\) The increased number of sessional academics, as well as the increased percentage of undergraduate tutorials being taken by sessional academics,\(^11\) has resulted in concern about the quality of the student learning environment.\(^12\) With the establishment of the Tertiary Education Quality Standards Agency (TEQSA), the government has demonstrated that assuring the quality of higher education is a priority. TEQSA has also identified that the ‘significantly high proportion of casual staff increases the risk of these staff not being appropriately supported and resourced to provide a continuity of support for students and is therefore a key risk in the higher education sector.\(^13\)

These projects have identified a number of gaps emerging in the support for sessional academics in the higher education sector:\(^14\)

- Induction of sessional academics;
- Ongoing management and supervision of sessional academics;
- Moderation of assessment results;
- Professional development of sessional academics in an environment where sessional academics are generally not paid for attending sessions;
- Sessional academics continuing to feel undervalued; and
- Changes in the higher education sector—for example, flexible delivery, new technology, and Massive Online Open Courses.

This article will explain the SAS program which has been piloted in the QUT Law School and the initial outcomes, as well as report on the results of surveys and focus groups. The article will conclude with an analysis of the program, reflect on program challenges, and consider the effect of the program in relation to sessional academics, students and the Law School as a whole.

**II The Program — Sessional Academic Success**

The SAS program was developed in early 2013, as an initiative of the Learning and Teaching Unit, to complement the existing QUT Academic Development Program\(^15\) for sessional academics.
It was coordinated by the (then) Associate Director, Academic: Sessional Development.\textsuperscript{16} The program was carried out by the Law School Sessional Academic Success School Facilitator\textsuperscript{17} and two Sessional Academic Success Advisors (SASAs).\textsuperscript{18} The role of SAS School Facilitator involved providing support, advice, championing and facilitation in the School, and was nominated by the Assistant Dean for Learning and Teaching.\textsuperscript{19} The SAS School Facilitator, in consultation with the Associate Director, Academic: Sessional Development, selected the SASAs after a call for expressions of interest in the position. The selection criteria included experience and expertise, demonstrated support of peers, evidenced teaching innovation and initiative, and willingness to learn, develop leadership capacity, experiment and document outcomes. The project was not intended to duplicate or replace existing support structures, such as those provided by unit coordinators, schools and faculties, but to supplement them.

\section*{A Purpose of SAS}

The intention of the SAS program was ‘to enhance the capacity of students, sessional academics and the broader community of academics’\textsuperscript{20} by facilitating ‘contextual, timely, needs-based support for QUT’s sessional academics’.\textsuperscript{21} In particular, the role of the SASAs was to mentor and advise sessional staff, build upon local academic development and initiate community building with a view to creating or improving a ‘sense of belonging’. It was proposed that this be achieved through: welcomes and check-ins; face-to-face advice; online support; development of resources and guides; sessional-to-sessional training; peer feedback and mentoring; and community-building activities. The longer-term aim of the pilot was to evaluate approaches to building a sustainable, distributed model for supporting sessional staff at QUT. It also provided an opportunity for SASAs to develop leadership skills.

\section*{B SASA Training}

SASAs were trained and supported to ensure they were equipped to identify School-specific needs, address those needs and then undertake the necessary reporting. In particular, training included sessions designed to identify which sessional inquiries were within the scope of the program and establish avenues for referrals where inquiries were outside its scope, and to build upon existing interpersonal skills to ensure sessional inquiries were dealt with appropriately. Early in the pilot the School Facilitator and SASAs participated in a workshop led by the (then) Associate Director, Academic: Sessional Development. The workshop introduced the School Project Plan Workbook (‘the workbook’).\textsuperscript{22} The workbook was divided into 11 steps, including needs analysis (step 3), defining objectives/evaluating (step 7), targeted communication (step 10) and evaluating success (step 11). The School Facilitator and SASAs completed the workbook to identify the parameters of the program. The team considered the core principles of communication following the guidelines provided in the workshop and determined that the needs analysis would take the form of an informal introductory email with open-ended questions relating to the needs of sessional academics. In turn, the needs analysis formed the basis of the implementation plan. The SASAs were otherwise supported by comprehensive project documentation including the ‘QUT Sessional Academic Success Advisor’s Guiding Principles, Advice and Question Guidebook’, and periodic meetings.

\begin{thebibliography}{99}
\bibitem{16} Professor Jillian Hamilton is now the Director, Student Success and Retention, Chancellery, QUT.
\bibitem{17} Jennifer Yule, Director, Undergraduate Programs, Faculty of Law, QUT.
\bibitem{18} Justine van Winden and Rachel Hews, Sessional Academics, Faculty of Law, QUT.
\bibitem{19} Jillian Hamilton, Michelle Fox and Mitchell McEwan, above n 8, 8.
\bibitem{20} Sessional Academic Success School Facilitator — Description of Role.
\bibitem{21} Jillian Hamilton, Michelle Fox and Mitchell McEwan, above n 8, 8.
\bibitem{22} Sessional Academic Success Pilot, 2013, School Project Plan Workbook, Prof Jillian Hamilton, Associate Director, Academic: Sessional Development, Learning and Teaching Unit, Chancellery.
\end{thebibliography}
C Needs Analysis by Email Survey

The email survey was undertaken to identify needs specifically relating to: support as a sessional academic; academic development (both development that engages teachers in learning and curriculum that engages students in learning); and community building (sense of belonging). Sessional academics were asked to provide responses to five questions, all of which required a written response. Questions were kept deliberately open to avoid pre-empting responses by, for example, providing multiple choice or pre-determined selections. The questions asked were:

1. What were your primary needs as a new sessional academic in the School of Law?
2. What are your primary needs as an ongoing sessional academic in the School of Law?
3. What key problems (if any) have you encountered?
4. Is there anything specific you would like the SASAs to do?
5. Would you be interested in taking part in a focus group with the SASAs to assist in identifying the needs of Sessional Academics?

The SASAs received 19 responses to this survey, which represented a quarter of the sessional academic cohort. Although this number is quite small, the recurring issues identified within the responses were consistent, suggesting those who did not reply may also relate to the same experiences and issues. One of the most significant issues raised by many respondents was the need for more training on teaching techniques and student engagement. Beyond training, the main needs identified included: difficulties accessing information and resources; orientation for new sessional academics; availability of mentors; and information on pathways to full-time employment. There were also a number of key problems encountered by sessional academics including feeling a sense of isolation, the amount of marking required, access to buildings, and receiving contracts and pay in a timely manner. This broad range of identified needs provided a meaningful starting place for the SASA initiatives.

D SASA Initiatives

The SASA initiatives ranged from very minor, such as distributing chocolates mid-semester, to more significant initiatives such as holding sessional academic functions and the creation of an online ‘Go-To’ guide. The most significant initiatives are outlined below. The outcomes and effectiveness of each initiative are discussed later in this article.

1 Sessional academic end of semester function
At the end of Semester 2, 2013, the SASAs held a sessional academic end of semester function. This was a catered social event that included introductory games to ‘get-to-know’ others, an overview of the SAS program and a mini-professional development session on personal evaluation strategies. There were 20 attendees, representing about a quarter of the sessional cohort.

2 Attendance at orientation
During Semester 1, 2014, a SASA attended the Faculty of Law orientation for new staff which is offered before the commencement of first semester each year. The inclusion of SASAs in the pre-existing orientation session enabled sessional academics to gain a full appreciation of the SAS services and support available to them. All new sessional academics were invited to the orientation, and payment was provided. Twelve attended.

3 The Broadcast
An early initiative was the inclusion of a SASA section in the Broadcast: a Law School internal electronic newsletter distributed to staff throughout the year. Sessional academics were not previously included as recipients of the newsletter, and their inclusion was a simple but powerful means of connecting them to existing communication channels. The SASA section
of the Broadcast provided timely information to sessional academics on matters relating to frequently asked questions such as marking, information technology and administration of contracts. This publication is distributed to all sessional academics by email.

4 Welcome back for sessional academics
At the commencement of Semester 1, 2014, the SASA team organised an informal welcome back evening and invited both permanent and sessional staff to attend. In addition to the social aspects of the evening, the SASAs delivered a professional development session on implementing a tailored teacher survey. There were 19 attendees, representing about a quarter of the sessional academic cohort.

5 Sessional Teaching and Reflection Showcase (STARS)
In Semester 1, 2014, as part of the SASA program, the QUT Learning and Teaching Unit introduced the Sessional Teaching and Reflection Showcase (STARS). STARS was designed to celebrate and recognise excellence in teaching, and to showcase good teaching practice initiatives developed and used by sessional academics. The showcase was to include three-minute Pecha Kucha23 presentations which might encompass: innovation within the framework of the sessional teaching context; ways of engaging students in learning; effective approaches to communication and teaching practice; and/or inspiration of peers/colleagues. Two Law School sessional academics were shortlisted for the showcase and competed in the grand final as two of 13 grand finalists from five faculties.24

6 Law School Retreat
In December 2013, SASAs presented at the Law School Retreat (attended by all Law School staff). The presentation was aimed both at providing feedback to, and seeking feedback from, members of the School. As a result of feedback from sessional academics and permanent staff, the SASAs developed a sessional academic checklist to be used by unit coordinators in consultation with sessional staff at the beginning of each semester. The checklist contained information for new sessional academics about the commitment required and about the way to mark assignments and exams, and sought to address issues raised in the focus group by including the issues as points of discussion in the checklist.

7 Online ‘Go-To’ guide for sessional academics
Using feedback both from sessional academics and from members of the Law School, the SASAs developed a Frequently Asked Questions or ‘Go-To’ guide, which has been added to the Faculty of Law intranet. This was in response to recurring issues or difficulties raised by sessional academics. The ‘Go-To’ guide, which can be accessed by the entire faculty, provides a centralised hub of sessional staff information in a way that complements (but does not duplicate) existing support.

8 Email, phone and face-to-face support
The most fundamental level of support provided by SASAs was by phone, email or face-to-face, in response to requests by sessional academics, both new and experienced. Issues raised ranged from clarification of contracts and pay to other more significant issues that affect teaching and learning. SASAs responded to between 40 and 50 requests for individual support.

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23 Pecha Kucha presentations are a type of PowerPoint presentation designed to make presentations concise by forcing the presenter to move from slide-to-slide at set intervals. Traditionally, the presentation took the form of 20 PowerPoint slides set to auto-advance every 20 seconds; the entire presentation would take 6 minutes and 40 seconds. See: Debi West, ‘Presenting Pecha Kucha’ (2011) 110(8) School Arts 8.
24 Faculties represented in the STARS Grand Final included: Science and Engineering; Creative Industries; Health; Business; and Law.
Posters, chocolates, bookmarks and a ‘check-in’ letter

When the SAS program commenced, the SASAs prepared a number of posters which included photos, contact details and services provided, and these were positioned in locations most likely to be seen by sessional academics. They also identified the SASA motto: ‘If we can’t help you, we’ll find out who can’. Mid-semester, as a gesture of ‘fun’ support, SASAs placed an envelope containing a SASA bookmark (again with photos, contact details and services provided), a short letter checking on the progress of the semester, and a Freddo Frog in the pigeon hole of every sessional academic.

Evaluation of Initiatives

The SASA initiatives appear to have been an effective starting point for meeting the needs of sessional academics, although the effectiveness of the SASAs communication strategy (developed as part of the workshop) is an area requiring further development. Functions such as those held at the beginning or end of semester provided an opportunity for community building and for sessional academics to engage in professional development through evaluating their teaching. SASA attendance at the Faculty of Law orientation session was also well received by sessional academics. Those who attended appreciated the opportunity to meet a peer and ‘put a face to the name’ of the SASAs. Throughout Semester 1, 2014, sessional academics who attended orientation used the services of the SASAs more frequently than those who did not attend. They were also more inclined to stop for a ‘social chat’ with the SASAs, and this built upon the sense of community.

The STARS event provided a different type of outcome, with its success relating more to professional development and the opportunity to be noticed. In terms of professional development, the teaching and learning initiatives presented in the Pecha Kuchas were innovative and thought-provoking. They included teaching techniques and ideas for student engagement which was particularly relevant for sessional academics who had indicated they would like further training in that area. Also, the skills of participants improved significantly through each stage of the process, especially from the semi-final to the grand final. Participant development included learning about and understanding the Pecha Kucha style and becoming increasingly competent at delivering such a unique presentation. The Law School participants’ PowerPoint skills also benefited greatly through the training provided as part of the STARS program. Extensive feedback was provided by the STARS coordinator, who has a creative industries background, and this cross-faculty advice provided lessons not normally covered in legal training. Further, the opportunity to be noticed or become known cannot be underestimated in a large academic environment. The grand final was attended by two Deputy Vice Chancellors (Academic and Learning and Teaching) as well as a number of Heads of School, Directors and other senior faculty staff. Exposure in these circumstances was especially valuable for those sessionals who, as indicated in the email survey, wanted more information on pathways to full-time employment. In the Law School, the Head of School has invited the participants to deliver a Pecha Kucha at a School meeting later this year. The final benefit of STARS was the opportunity for interfaculty collegiality and exchange of expertise.

Connecting sessional academics to the Broadcast has been a simple but significant outcome of the SAS program. Not only does this connection enhance the sense of community for sessional academics, it also provides them with knowledge about Law School events, policies and other significant matters, allowing them to better serve the needs of students. The online ‘Go-To’ guide is an invaluable resource and the fact it is enduring means its effectiveness will be long-term. The ability to update the guide regularly makes it an invaluable tool for the broad dissemination of information to sessional academics in the faculty, not just the School. It is also useful for unit coordinators to assist staff in their unit or as a further reference point which they can make available to members of their team.

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25 Pecha Kucha presentations are a type of PowerPoint presentation designed to make presentations concise by forcing the presenter to move from slide-to-slide at set intervals. Traditionally, the presentation took the form of 20 PowerPoint slides set to auto-advance every 20 seconds; the entire presentation would take 6 minutes and 40 seconds. See: Debi West, ‘Presenting Pecha Kucha’ (2011) 110(8) School Arts 8.
The individual benefits of email, phone and face-to-face support for sessional academics is substantial. Anecdotal feedback suggests sessional academics feel embarrassed to ask ‘silly’ questions and fear their credibility (or career prospects) may be compromised if they appear ignorant. The SASAs provide a source of information that is neutral and unrelated to any particular sessional role, thereby allowing sessional academics to circumvent these challenges.

Finally, the distribution of a ‘feel-good’ letter, bookmark and chocolate is not something commonly associated with an academic program. It provided sessional academics with a reminder that the Law School acknowledges their contribution, even if few people see them as they travel to and from campus between other work or family commitments. While undertaken as an aside, this initiative was clearly valued by sessional academics and therefore worthwhile.

### III Surveys and Focus Group Findings

As part of the project, the SASAs sought feedback from both sessional academics and permanent staff to determine the impact of initiatives in addressing the identified needs. Contacting sessional academics can be challenging, as in most cases they have primary employment external to the university. As a result, online methods were considered the approach most likely to reach the greatest number of sessional academics, and this was the basis for the use of a preliminary email questionnaire and a later online survey. The SASAs also held a small focus group with sessional academics and a subsequent focus group with permanent staff.

#### A Email Survey

The initial email sent to sessional academics in August 2013 was designed to inform the needs analysis process, and the findings of that survey were discussed earlier in this article. In addition to identifying the key needs of sessional academics, the email survey also provided some early and valuable feedback on the SASAs and the SAS program. It included comments such as: ‘I am very pleased that there are now Sessional Academic Success Advisors. It is great to know that there is someone I can come to as a first point of call’; 26 ‘I believe that the Sessional Academic Success Advisors will be an invaluable aid ... They have already done much for me. I believe the SASA to be a very worthwhile initiative’; 27 and ‘I think the project is a great initiative as it can be very daunting taking on teaching at a Tertiary level for the first time’. 28

#### B Sessional Academic Online Survey

At the end of Semester 2, 2013 the SASA team distributed an online survey to assess the effectiveness of its early initiatives. Questions were designed to obtain both quantitative and qualitative data. Twelve responses were received. This represented about 23 per cent of the sessional academic cohort. Questions and responses are presented in Appendix 1. Of the 12 respondents to the survey, five attended the sessional academic end of semester function. All attendees responded positively to the material provided at the event, with 100 per cent finding it very or somewhat helpful in their role as a sessional academic; one respondent noted that ‘It all was helpful.’ Attendees collectively agreed that the SAS program overview and introductory games were the most helpful segments of the evening. In relation to training, all (except for one respondent who did not comment) attendees agreed they would definitely or very likely set up their own personal evaluation strategy as a result of the mini-professional development session. From the results of the evaluation it is apparent that attendees engaged with the training and were keen to implement it as part of their own teaching practice. Feedback provided on the Broadcast was mostly positive, revealing that over 72 per cent of respondents

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26 Email response dated 6 August 2013, in response to SASA email distributed on 3 August 2013 (used with permission of email author).
27 Email response dated 11 August 2013, in response to SASA email distributed on 3 August 2013 (used with permission of email author).
28 Email response dated 12 August 2013, in response to SASA email distributed on 3 August 2013 (used with permission of email author).
read (or sometimes read) the publication, with over 88 per cent finding it very or somewhat helpful. However, one respondent noted that they had ‘never heard of it’.

When asked whether the SAS program was meeting the sessional academics’ needs in relation to training, support and advice, results were mixed. Slightly more than 50 per cent were satisfied in all three areas, but percentages ranged between 31 and 42 per cent for those who responded neutrally or negatively. In particular, 25 per cent (that is, 3 of the 12 respondents) were dissatisfied in all three areas of training, support and advice. In relation to training, at least, it was felt this dissatisfaction rate was consistent with, and reinforced, feedback from the email survey which suggested more training is needed. When asked which types of training sessional academics would like in future, the majority identified teaching techniques and student engagement as most preferred. These have provided the basis for the development of future professional development workshops for sessional academics in the Law School. As discussed earlier, the Freddo Frog initiative was met with a positive response. A surprising discovery was that some sessional academics did not realise they had a pigeon hole. Three respondents who did not respond to this question may have fallen into this category. Further information regarding pigeon holes was subsequently distributed to sessional academics. Of all respondents, just over half had felt some increased sense of belonging, while almost half had not yet felt a change.

C Sessional Academic Focus Group

In November 2013 the SASAs held a focus group with six sessional academics (representing about 8 per cent of the cohort). The aim of the session was to provide feedback on the initiatives and also to seek ideas on the types of information or messages sessional academics wanted the SASAs to relay to permanent staff at the Law School Retreat. The responses comprised both positive messages and constructive ideas for improving the sessional experience. Sessional academics at the focus group were particularly positive about having an opportunity to provide and discuss their ideas and concerns. Many felt they had not previously had a forum in which this could be done in a purposeful way. All concerns raised were shared with permanent staff at the Law School Retreat and have been directed to the relevant unit coordinators, human resources personnel, and Law School management to be addressed. The main areas raised were:

• Importance of open channels of communication with unit coordinators;
• Timely provision of course material to allow time for preparation;
• Clear understanding of expectations;
• Feedback on teaching and marking performance;
• Early contact for future work appointments;
• Lack of communication from full-time staff about staff entitlements;
• Payment for only one team meeting per semester;
• Sense of isolation;
• Sessional academics enjoy the work;
• Concerns about future work and budget cuts — lack of information for sessional academics on this subject; and
• Sense of giving back to the Law School or profession.

D Permanent Staff Focus Group

Presenting at the Law School Retreat allowed the SASAs to serve as a conduit between sessional and permanent academic staff, and provided a unique forum for the transfer of information and ideas. Communication channels are critical to any employer–employee relationship, particularly for sessional academics, who are often isolated. To have those channels opened up in a positive environment where time was specifically set aside for broad discussion resulted in a significant and purposeful exchange of information. The main result was that permanent staff provided comprehensive feedback on the sessional academic checklist. By engaging with
the development of the document, permanent staff committed to some degree of ownership and authority over the document and its future use.

E Analysis of Surveys and Focus Groups

A consideration of the findings of the needs analysis survey, follow-up survey and focus groups demonstrates a number of advantages that can be derived from a peer-to-peer program such as the SAS program. Many approaches to supporting sessional academics are created using a ‘top-down’ approach and are often related to reporting, education quality and standards. This approach is obviously critical to the appropriate functioning and demonstration of accountability of any university. However, the SAS program took the opposite approach, and could be described as a distributed-leadership approach. It was developed by, implemented by and relied upon by sessional academics and their peers. The program was targeted at the needs identified by sessional academics themselves, and was unrelated to the broader quality and standards requirements of the School or faculty. In taking ideas to the Law School Retreat, sessional academics were able to influence upwards and engage those above in the development of the sessional academic checklist. In this way, the program was able to achieve benefits for sessional academics that are different from those achieved by a ‘top-down’ approach.

The SAS program can be likened to mentor schemes conducted with staff, but again this program offered something different. Mentor schemes generally include the fostering of a professional relationship between a senior faculty member and a junior faculty member, where the senior person tends to be the teacher and the junior person the student. In this instance, the program was offered by level-equivalent sessional academics (peers) to other sessional academics. SASAs were facilitators, not teachers, and sessional academics were part of the program, not students. Thus, the benefit of this program includes the targeted nature of its approach to sessional academics, by sessional academics. It has filled gaps in areas of sessional academia which have not been filled by existing support services. In particular, the program has resulted in some improvement in professional development of sessional academics, and for those involved, a greater uptake, for example, of creating personal evaluation strategies.

The social aspects of this program were key to improving a sense of belonging for sessional academics. Interfaculty and intra-faculty collegiality has been fostered by the simple fact of sessional academics now knowing a greater number of other sessional academics. The sharing of experiences flows automatically through conversations that follow these introductions, and these are of benefit both to teaching practice and to the learning experience for students.

IV Reflecting On Program Challenges

The key challenge of the SAS initiative related to the low number of sessional academics engaging with the program. Attendance at events was generally around 25 per cent of the sessional cohort, and response to surveys and focus groups ranged from 8 per cent to 25 per cent. While initial findings support the continuation of the SAS program, greater sessional engagement would provide stronger results. It is thought that these challenges arose primarily due to the large numbers of sessional academics working remotely from the university. Simple problems such as sessional academics not checking university email addresses (or not setting a forwarding email address for university emails) may have caused a communication problem. Further, attending on-campus events when not otherwise attending campus on a given day is often time-consuming and difficult.

During events, SASAs sought general feedback from attendees aimed at identifying how attendance rates might be improved. In response to the feedback received, the Law School intends to trial payment of sessional academics to participate in professional development training. Payment will be provided for attendance at face-to-face training, as well as for the completion of three online modules. This will provide some indication as to whether payment

29 Marina Harvey, ‘Setting the Standards’, above n 1, 3.
30 Jillian Hamilton, Michelle Fox and Mitchell McEwan, above n 8, 11.
31 Mary Heath et al, above n 9.
is a motivating factor for sessional academics to attend training. It will also provide some feedback on response rates for face-to-face training versus online modules.

Further consideration is also required in terms of marketing strategies, timing of events and ensuring the content of events is of sufficient value to sessional academics to warrant their participation. It is accepted that sessional academics may have difficulty attending campus for face-to-face training, given that many work full-time in law firms. Again, in response to feedback, the Law School is currently considering trialling a lunch-time professional development session for sessional academics at a city law firm, rather than on-campus, to improve accessibility to training. The SASA team is also considering hosting a face-to-face event which is simultaneously available by webinar, to determine whether this improves accessibility and engagement. Some of these challenges will also be overcome with time, as sessional academics become more aware of the program and what is on offer. Word-of-mouth is a powerful approach, and as those who are receiving the benefit of the program continue to share this with others, it is hoped larger numbers of sessional academics will avail themselves of the SASA services and the benefits of the SAS program.

A number of other strategies are being developed to address issues identified during the SAS program. Thirty percent of survey participants have not read the Broadcast, meaning they may not be privy to timely information regarding their sessional employment and teaching role. Further research is needed to determine the reasons for this result, particularly whether the issue is one of access, lack of perceived benefit, lack of time, or some other reason. Feedback also needs to be obtained regarding the online ‘Go-To’ guide for sessional academics, and efforts are being made to arrange electronic statistical capture to identify the number of times the document is viewed. Further surveying may also assist in understanding the benefit or otherwise of this initiative.

The survey results of most concern are those regarding dissatisfaction with training, support and advice, and those indicating that 45 per cent of respondents felt no increase in their sense of belonging as sessional academics in the Law School last year. Further surveying or interviewing of sessional academics is required to consider the basis for these feelings and to determine whether there are means of addressing these at a Law School level.

**V Conclusion**

From the evaluation and analysis of the program it can be demonstrated that there have been benefits for sessional academics, students and the Law School as a whole. The initial benefit to the Law School was in identifying how many sessional academics were employed by the Law School, who they were, and how best to communicate with them. This was then followed by identifying leaders among the sessional academics for the purpose of selecting the SASAs.

The surveys and focus groups provided a better understanding of the needs of sessional academics so they could be addressed. One of the major benefits of the program has been meeting those needs through provision of support and better communication. The focus group with permanent staff had the effect of providing feedback to, as well as gathering comments from, the permanent staff about the sessional academic experience.

Not all feedback from the sessional academics was positive, and it became clear that sessional academics wanted more opportunity to participate in professional development, particularly teaching techniques and student engagement, and considered it would be appropriate for them to be paid for attending such sessions. As a result of this feedback, the SAS program intends to offer paid professional development to attend both face-to-face and online sessions. It will be interesting to see whether more sessional academics attend professional development sessions when payment is offered.

Of the initiatives explored, the outcomes which suggest long-term benefit for sessional academics in the future include the sessional academic checklist for unit coordinators and receiving the Law School newsletter, as well as having access to the Frequently Asked Questions ‘Go-To’ page on the Faculty of Law intranet. There are also benefits for existing sessional staff from the individual support and functions. These have improved the sense of belonging and assisted sessional academics to feel part of the Law School and valued as members of
staff. Sessional academics have stated that they appreciate the opportunity to meet with other sessional academics as well as permanent staff. Arguably one of the most important benefits is the provision of professional development opportunities to sessional academics. Examples include personal evaluation strategies and training. It is through the professional development of sessional academics that students also benefit from the program.

The program has been beneficial for permanent as well as sessional staff. The Law School has been recognised at the university level as undertaking good practices with sessional academics, including the process of appointing sessional academics, understanding who they are, the leadership of the SASAs and the feedback from sessional academics about the support provided by the SASAs. The Law School will continue to build on what has been achieved so far, particularly with regard to communication and access to professional development opportunities. This will assist the Law School to improve the experience of staff and students.
### Appendix 1: Sessional Academic Online Survey Results

#### Q1 Was the material provided at the School of Law Sessional Academic End of Semester Function helpful in your role as a Sessional Academic?

<table>
<thead>
<tr>
<th>Response</th>
<th>% of respondents</th>
<th>No. of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very helpful</td>
<td>25%</td>
<td>3</td>
</tr>
<tr>
<td>Somewhat helpful</td>
<td>16.67%</td>
<td>2</td>
</tr>
<tr>
<td>Not helpful</td>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td>I did not attend</td>
<td>58.33%</td>
<td>7</td>
</tr>
</tbody>
</table>

#### Q2 What part of the presentation was most helpful?

<table>
<thead>
<tr>
<th>Response</th>
<th>% of respondents</th>
<th>No. of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction/Get to know you activities</td>
<td>25%</td>
<td>3</td>
</tr>
<tr>
<td>Presentation of SSA Program</td>
<td>33.33%</td>
<td>4</td>
</tr>
<tr>
<td>Mini-PD developing your personal evaluation strategy</td>
<td>16.67%</td>
<td>2</td>
</tr>
<tr>
<td>Gift bag</td>
<td>8.33%</td>
<td>1</td>
</tr>
<tr>
<td>I did not attend</td>
<td>58.33%</td>
<td>7</td>
</tr>
</tbody>
</table>

#### Q3 Following the MINI-PD at the School of Law Sessional Academic End of Semester Function, do you now intend to set up your own personal evaluation strategy?

<table>
<thead>
<tr>
<th>Response</th>
<th>% of respondents</th>
<th>No. of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitely</td>
<td>18.18%</td>
<td>3</td>
</tr>
<tr>
<td>Very likely</td>
<td>18.18%</td>
<td>2</td>
</tr>
<tr>
<td>Possibly</td>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td>Unlikely</td>
<td>0%</td>
<td>0</td>
</tr>
<tr>
<td>I did not attend</td>
<td>63.64%</td>
<td>7</td>
</tr>
</tbody>
</table>

#### Q4 Do you read the Friday Broadcast?

<table>
<thead>
<tr>
<th>Response</th>
<th>% of respondents</th>
<th>No. of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>54.55%</td>
<td>6</td>
</tr>
<tr>
<td>Sometimes</td>
<td>18.18%</td>
<td>2</td>
</tr>
<tr>
<td>No</td>
<td>27.27%</td>
<td>3</td>
</tr>
</tbody>
</table>

#### Q5 How helpful do you find the content of the Friday Broadcast?

<table>
<thead>
<tr>
<th>Response</th>
<th>% of respondents</th>
<th>No. of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very helpful</td>
<td>33.3%</td>
<td>3</td>
</tr>
<tr>
<td>Somewhat helpful</td>
<td>55.56%</td>
<td>5</td>
</tr>
<tr>
<td>Not helpful</td>
<td>11.11%</td>
<td>1</td>
</tr>
</tbody>
</table>
Q6 Overall, are you satisfied with the training, support and advice provided to you as a Sessional Academic?

<table>
<thead>
<tr>
<th></th>
<th>Very satisfied</th>
<th>Somewhat dissatisfied</th>
<th>Neither satisfied or dissatisfied</th>
<th>Dissatisfied</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Training</td>
<td>41.67% (5)</td>
<td>16.67% (2)</td>
<td>16.67% (2)</td>
<td>25% (3)</td>
<td>12</td>
</tr>
<tr>
<td>Support</td>
<td>33.33% (4)</td>
<td>25% (3)</td>
<td>16.67% (2)</td>
<td>25% (3)</td>
<td>12</td>
</tr>
<tr>
<td>Advice</td>
<td>33.33% (4)</td>
<td>33.33% (4)</td>
<td>8.33% (1)</td>
<td>25% (3)</td>
<td>12</td>
</tr>
</tbody>
</table>

Q7 What were your first thoughts when you received your Freddo Frog and bookmark in your pigeon hole?
- Chocolate! I love Rachel and Justine!
- Much needed — there is a God!
- I didn’t — I don’t have a pigeon hole.
- This was a positive first step.
- Which student has set me up.
- Live at the Sunshine Coast so have not gone in.
- Received nothing.
- Cool — chocolate!
- I don’t have a pigeon hole. (Sad face).

Q8 In Semester 2, 2013 have you felt any increase in your sense of belonging as a Sessional Academic in the School of Law?

<table>
<thead>
<tr>
<th>Response</th>
<th>% of respondents</th>
<th>No. of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>45.45%</td>
<td>5</td>
</tr>
<tr>
<td>Somewhat</td>
<td>9.09%</td>
<td>1</td>
</tr>
<tr>
<td>No</td>
<td>45.45%</td>
<td>5</td>
</tr>
</tbody>
</table>

Q9 If you were to undertake academic development in your role as a Sessional Academic, what types of training would be most useful to you? (please select all relevant choices).

<table>
<thead>
<tr>
<th>Response</th>
<th>% of respondents</th>
<th>No. of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Student engagement</td>
<td>58.33%</td>
<td>7</td>
</tr>
<tr>
<td>Teaching techniques</td>
<td>75%</td>
<td>9</td>
</tr>
<tr>
<td>Reframe (personal evaluation strategy, pulse, insight etc)</td>
<td>41.67%</td>
<td>5</td>
</tr>
<tr>
<td>Using classroom technology</td>
<td>33.33%</td>
<td>4</td>
</tr>
<tr>
<td>Academic writing and publication</td>
<td>16.67%</td>
<td>2</td>
</tr>
<tr>
<td>Career development</td>
<td>50%</td>
<td>6</td>
</tr>
</tbody>
</table>
THE PEARCE REPORT — DOES IT STILL INFLUENCE AUSTRALIAN LEGAL EDUCATION?

DAVID BARKER, AM*

I INTRODUCTION

Although the Pearce Report1 was released as long ago as March 1987 it still has a major influence on the ongoing development of Australian legal education. This does not necessarily mean that it is a solely benign influence. In their Preface to the report Learning Outcomes and Curriculum Development in Law, published in 2002,2 the authors stated: ‘A program of thorough and authoritative assessments of the work of higher education institutions measured against objectives which are acceptable in academic and social terms.’ Additionally, the Background to the Review states: ‘It is intended that each discipline assessment will be undertaken by a small committee of people pre-eminent in their fields, who will act independently of the Commission and furnish advice to the Commission.’6

Charles Sampford and Sophie Blencowe put the Report into context by stating that it was issued at a time that coincided with the introduction of the Dawkins Reforms for the higher education section.7 In stating that ‘Australian legal education changed mightily’8 in the years that followed both these events they believed that some of the changes were: ‘Due in part to Pearce; many of them were in spite of Pearce; and many were driven by the Labor Government’s reforms and institutional response to them.’9

The Report was commissioned in 1985 and submitted in 1987. The members of the Committee who were appointed were: Professor Dennis Pearce, Professor of Law, The Australian National University (Convenor); the late Dame Enid Campbell, then the Sir Isaac Isaacs Professor of Law, Monash University; and Professor Don Harding, Professor of Law at the University of New South Wales.10

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* Professor Emeritus, University of Technology, Sydney and PhD candidate, Macquarie University.
2 Richard Johnstone and Sumitra Vignaedra, Outcomes and Curriculum Development in Law, A Report Commissioned by the Australian Universities Teaching Committee (2003).
3 Ibid, Preface.
4 Interview with Dennis Pearce (ANU, Canberra, 2 October 2013).
5 Pearce, above n 1, li.
6 Ibid.
8 Ibid.
9 Ibid.
10 Pearce, above n 1.
II CONTENTS OF THE REPORT

The Report is a weighty document consisting of four volumes. Volume 1 includes 48 recommendations to the CTEC, and 64 principal suggestions to law schools. This first volume focuses on the principal matters with which law schools are involved such as the aims and issues of law schools and legal education, teaching and its evaluation, graduate studies, teaching law to non-law students and continuing legal education.

Volume 2 is concerned with some of the more variable aspects of law schools such as research and publications, services to the community, enrolments in law courses and access to law studies. It also deals with resources including law academics and the quality of legal education, together with law school accommodation and equipment.

In Volume 3 the Committee focused on the practical matters with which law schools were concerned such as administration, law libraries, practical legal training and relationships between various legal education institutions such as the then Australasian Universities Law Schools Association (AULSA), now the Australasian Law Teachers Association (ALTA); meetings of Law School Heads (the forerunner of the Council of Australian Law Deans (CALD); Australasian Law Students Association (ALSA); and the Australian Professional Legal Education Conference (APLEC), the organisation representing practical legal training providers.

Volume 4 is wholly devoted to a survey of recent Australian law graduates. This was carried out by a private organisation, MSJ Keys Young Planners Pty Limited, and as the Tertiary Education Commission was unable to finance the study because of budgetary constraints during the 1985−86 financial year, the Committee obtained alternative funding from the Law Foundation of New South Wales and the Victoria Law Foundation.

The terms of reference for the Pearce Committee’s review are set out in Volume 1. However they are succinctly summarised by Judith Lancaster in her monograph as:

.Include[ing] assessment of the quality and economic efficiency of each institution providing legal education; the suitability and feasibility of the aims set and followed; the nature and quality of both undergraduate and postgraduate courses; the standards of teaching and research; staff contributions to law reform, the work of government, the profession, and the community’s welfare; the effectiveness of resource utilisation and the extent of unnecessary duplication; current deficiencies; the community requirement for graduates, and selection and admission processes of law schools.

There is no doubt that the Pearce Report was a major undertaking for the three members of the Review Committee. It took a major commitment of their professional lives from the time the Report was commissioned in 1985 until its publication in March 1987.

III THE NATURE OF THE REPORT

The questions which could be posed are, first, why there had to be a Pearce Report in the first place, and if so, whether the approach adopted by the members of the Pearce Committee was appropriate in the circumstances. It is difficult to establish whether there was an underlying methodology regarding the approach followed by the Committee during the course of what was an exhausting process during the three years between the commencement of their inquiry in 1985 and the publication of their Report in 1987. Near the end of this paper there is an explanation that the problem of funding forthcoming for the qualitative studies to be completed.

11 Ibid.
12 Ibid Vol 1.
14 Ibid Vol 3.
16 Ibid 1.
17 Ibid Vol 1 ii
These were necessary to support their findings with regard to the need for substantial financing of law schools if the necessary high standard of research and teaching could be developed in order to maintain appropriate standards to compete against their counterparts in legal education internationally, particularly in the United States and the United Kingdom.

It could be argued that the Pearce Report encapsulates a conventional approach by the Committee as it carried out its enquiries, although this is not say that it was either inappropriate or unsuccessful, given the particular circumstances of the 1980s. It would be acceptable to state the belief that the Pearce Report was principally concerned with an extended analysis of what could be described as the ‘lived experience’ of legal academics endeavouring to develop an academic and intellectual culture for legal education within the Australian universities experience.

The author of this paper is well aware that for most law academics the Pearce Report was published at least a decade before they commenced their career as law teachers, so that for the majority of them it is undiscovered history. This means that, like most issues of legal history, it needed to be recounted in narrative form, but more than this it had to incorporate analysis and description. It also needed to involve the essential themes which were developed in the Pearce Report and which involved the culture of law schools and their participants, both staff and students, as well as the essential components of this culture, particularly regarding teaching and research.

Evaluation of the Report is aided by the fact that in 1988 John Dawkins, the then Commonwealth Minister for Education, Employment and Training, sought advice from the National Board of Employment, Education and Training (NBEET) for advice for both the development of a: ‘Plan for future discipline reviews … and arrangements for follow-up.’ This led to the establishment of a working party, which concluded in 1990 with a recommendation: ‘Studies to report on the implementation of recommendations arising from discipline reviews be carried out under the Evaluations and Investigations Program about three to five years after the completion of each review.’ A major outcome of this recommendation was the commissioning in 1992 by the Department of Employment, Education and Training of an impact study to evaluate the effects, efficiency and effectiveness of the 1987 Pearce discipline review. The study was conducted by Simon Marginson and Craig McInnis, assisted by Alison Morris, all from the Centre for Study of Higher Education, University of Melbourne.

Further assistance is afforded by the publication in 1997 of a report, *Australian Legal Education a Decade after the Pearce Report,* and a summary of the effect of the Pearce Report by Samford and Blencowe.

Most commentators would agree with the statement that the Pearce Report was: ‘the most comprehensive and significant investigation undertaken of Australian legal education.’ This statement is supported by the well-known legal commentator David Weisbrot: ‘It is nevertheless true that the Pearce Report is the first important review, and comprehensive compilation of data on, Australian legal education, and will be the point of departure for all debate on legal education for some time.’

One of the most important factors of the Pearce Report, noted by McInnis and Marginson and other commentators, was that it set ‘three standards (or goals) which many law schools did not meet.’ The most important of these three standards was attention to the ‘Theoretical and crucial dimensions of legal education’, alternatively described as ‘Generation of critical
reflection on course content and the role of skills teaching.\textsuperscript{27} The other two standards related to encouragement of small-group teaching with a student to staff ratio of 15:1, with half of such a ratio for skills teaching and a library collection of 100,000 volumes or volume equivalents.

In a document as far-reaching as the Pearce Report it is important to be selective as to a consideration of those matters which are directly relevant to the development of legal education in Australia. There were aspects of the Report which also caught the attention of educational and legal commentators in the media such as the recommended closure of the Macquarie Law School (discussed in Part IV below) and the expectation that there should be no more law schools established in the immediate future following on from publication of the Report.

Most matters of primary relevance to Australian legal education in 1987 are contained in Volume 1 of the Report. Obviously its contents had a profound effect on all those involved with teaching law in the tertiary sector, apart from being of major interest to the general legal community. A measure of its influence may be judged from reading a paper presented at the LawAsia Downunder Conference in 2005 by high-profile law academic and commentator Sally Kift.\textsuperscript{28} In this paper Professor Kift caught the mood of the approach by Pearce. She canvassed the changes in legal education which had taken place from Pearce in 1987 until the Conference in 2005 – and, in particular, the way legal education had responded to the various sectional pressures that had impacted upon it since Pearce. Sally Kift’s description of her own experiences as a law student a decade after Pearce is illustrative of how she was: ‘[c]ompletely disengaged from and uncritical about (what I now know to be) the traditional model of legal education delivery.’\textsuperscript{29} She went on to explain that her experience was much as it had been captured by the Pearce Report. This included ‘[l]ong, two hour lectures … on dry discrete, doctrinal subject areas’, ‘[o]ne hour tutorials where, if you kept your head down and avoided eye-contact, you also avoided any attempt (if there was one) at interactivity or engagement between yourself and the tutor.’\textsuperscript{30} and ‘[v]ery little guidance about course and/or subject structure was provided – you got what you got (and were grateful for it) and most of it, possibly together with something that had never been mentioned) would be on the end of year 100% closed book exam.’\textsuperscript{31}

The question of teaching practices covered in Volume 1 is relevant to the legal educator, past and present. Kift saw her role as a student at that time as a ‘[s]tudent –receptor’\textsuperscript{32} able to ‘absorb and to report back accurately’\textsuperscript{33} in the exam so that the: ‘Traditional legal education model has been preoccupied with the study of narrow legal rules.’\textsuperscript{34} As she recognises, ‘Many of my teaching colleagues had similar undergraduate experiences and it is problematic that most uncritically replicate the learning experiences that they had when students.’\textsuperscript{35}

In Volume 1 the Pearce Report was willing to explore the challenges which have been highlighted by Sally Kift and other commentators. In the words of the Report:

\textit{It sometimes seems to be suggested that there are only 2 methods of teaching adopted in Australian law schools and that they are mutually exclusive and mutually opposed to one another. They are labelled the expository or straight lecture method and the case, discussion or socratic method.}\textsuperscript{36}

The Report goes on to describe these forms of teaching both objectively and in some detail, although the Pearce Committee preference was clearly against the expository method and in favour of casebook, discussion, or Socratic teaching, or its later development into the problem method. However, it has never been recognised in any of the subsequent reports or papers that

\textsuperscript{27} See McInnis, above n 19, 242.

\textsuperscript{28} Sally Kift, ‘For Better or For Worse?: 21st Century Legal Education’ (Paper presented at the Educating New Entrants to the Legal Profession (Session 16.4), LawAsia Downunder 2005 Conference, Gold Coast, Queensland, 24 March 2005).

\textsuperscript{29} Ibid 6.

\textsuperscript{30} Ibid.

\textsuperscript{31} Ibid.

\textsuperscript{32} Ibid.

\textsuperscript{33} Ibid.

\textsuperscript{34} Ibid.

\textsuperscript{35} Ibid 7.

\textsuperscript{36} Pearce above n 1, 155.
the Pearce Report was remarkably open-minded as to the teaching style adopted in Australian law schools. Although it might not be the conventional approach to current teaching methods, the statement in the Report that ‘[t]eachers have tended to use the method with which they feel most comfortable and which they think is best suited to the subject matter with which they are dealing’\(^37\) recognises the realities of the teaching situation evident in Australian law schools at that time. This view is supported by the subsequent recognition that ‘[n]ot all teachers are able to use the same techniques effectively; not all material is best dealt with in the same way; but above all we think there is considerable advantage in students being exposed to a variety of teaching methods.’\(^38\) It is important to acknowledge that these statements were made subject to the caveat as to what the Report might ‘have to say later about review of individual teacher’s performance and resources available.’\(^39\)

Another aspect of teaching law considered in Volume 1 of the Pearce Report and noted by McInnis and Marginson in their Report is the identification of the following trends in legal education curriculum and teaching: ‘The growth of the combined degree; the introduction of elective subjects; the use of small group teaching; attempts to introduce skills training; the provision of coursework higher degrees; and specialised focus in teaching and research.’\(^40\) There was concern as to the quality of such research within this context, although an outstanding exception to this criticism, Professor Julius Stone, is quoted: ‘Phenomena such as these were most unusual. The bulk of legal scholarship was firmly located in Austinian positivism, stressing above all the identification and analysis of black-letter rules.’\(^41\)

Volume 2 is principally concerned with research and publications, and McInnis and Marginson emphasised the difficulties it faced with regard to the distinction particular to legal research ‘as between legal research carried out by lawyers in assisting clients, and academic research in law.’\(^42\) This required ‘[d]istinguishing between doctrinal research or legal scholarship which started from law as a given field of knowledge (law as the subject) [and] non-doctrinal research which had its starting point outside law and looked at the social, economic, political or cultural implications of legal practices (law as the object).’\(^43\) Within the Pearce Report both Chesterman and Weisbrot draw attention to the fact that ‘Both the recent Report on Australian Law Schools and the submission of the law school deans to the writers of that Report refer to the predominance of doctrinal, black-letter research in Australian law schools, and the submission contains a plea for more theoretical and reform-oriented research.’\(^44\)

IV THE MACQUARIE LAW SCHOOL ISSUE

Of greatest interest to those who have taken notice of the influence of the Pearce Report on the future of Australian legal education are the two principal recommendations which appear in Volume 3. These relate to the problems which had given rise to crisis in governance of the Macquarie Law School and a statement concerning the need for any future law schools within Australia.

Of these two, it would be problems involving the Macquarie Law School which would be remembered in respect of the Report. As was reported in Volume 3: ‘The disputes that have racked Macquarie law school for some years now are of public notoriety. They have been pursued not only within the law school but also in the University and in the media.’\(^45\) McInnis and Marginson were more forthright in their view of the approach adopted by Pearce, stating that in their opinion: ‘The Pearce Report appeared careless of the interests of Macquarie University, of its law school and, most importantly, of the law school’s students and graduates.'

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37 Ibid 156.
38 Ibid 157.
39 Ibid.
40 McInnis above n 19.
42 McInnis above n 19, 181.
43 Ibid.
44 Chesterman above n 41, 723.
45 Pearce above n 2, 944.
It played the game tough. The impression was left that the Pearce Committee was out to get Macquarie.46

Judith Lancaster agreed: ‘By far the most controversial of the Committee’s finding was its recommendation to phase-out or reconstitute Macquarie University Law School.’47 She went on to claim that: ‘Because the recommendation is at odds with the Committee’s expert evidence, it provides a good example of the limitations of the corporatist mode.’48

Although it could be argued that the divisions within the Macquarie Law School were based upon ideological divisions focused on those at the Law School who were proponents of the Critical Studies Movement as compared with those who supported a more traditional approach towards law teaching, Pearce reported that such divisions were more deep-rooted. As the Report stated: ‘This division is, unfortunately, not only ideologically based nor is it founded only on differences of view as to the appropriate basis for legal education … There are fundamental incompatibilities of personality in the law school.’49 It went on to state: ‘These are not differences of opinion [that] can lead to a stimulating, dynamic atmosphere in a university environment.’50 The Report noted that in contrast to such an intellectual approach, ‘We are told, obscene remarks are made to proponents of difference views at school meeting; when staff members are visited after school meetings and an explanation demanded as to why they voted a certain way, and, as we understand, at least one complaint of a threat of assault has been made, intellectual debate has gone and factionalism has replaced it.’51

Naturally, a different perspective is given in the official history of the Macquarie Law School, which reports: ‘Pearce’s Committee believed that the School should be closed, phased out or divided due to the irreconcilable differences. There was a fire burning and the Pearce Report threw a huge bucket of petrol on it and made it much worse.’52

Professor Kercher, now Professor Emeritus at the Law School, recalled:

There was a lot of exaggeration in the press too. Eventually it broke into two factions and in the middle sat the majority of staff who watched the bombs fly overhead. Most of us ducked and tried to avoid the flak and got on with teaching and research.53

The authors of the Macquarie Law School history take an equally sanguine view and state that: ‘The irreconcilable differences were reconciled, or at least a truce was in place by the late eighties. The school survived the battering of the press and weathered the storm.’54

The problems encountered by the Law School are also fully covered in the official history of Macquarie University1964–1989 under the heading ‘The Law School and its Troubles’.55 Again the description contains such extremities of language as ‘[a] small and determined group of staff, alienated by what they perceived to be their lack of power over decision-making in the university [who] were threatening to destabilise its structures’.56

Similarly, an incident regarding a breach of confidentiality in quoting from referee reports at a School of Law Meeting is described thus:

Such incidents are traceable not to the pathological activities of a rump (or even a majority group) in the Law School, but are the direct and inevitable – and clearly justifiable – result of a comprehensive set of paternalistic and authoritarian attitudes and practices of governance in this university.57

46 McInnis above n 19, 103.
47 Lancaster above n 18, 52.
48 Ibid.
49 Pearce above n 1, 945.
50 Ibid.
51 Ibid.
52 Rosalind Croucher and Jennifer Sheeden, Retro – 30 years of Macquarie Law 1975–2005 (Division of Law, Macquarie University, 2005) 76.
53 Ibid.
54 Ibid.
56 Ibid 279.
57 Ibid 283.
However, there was a suggestion that the internal problems within the Law School highlighted by Pearce might have had a more serious effect on the future of Macquarie University, which at the height of the Dawkins Reforms was endeavouring to extend its influence by amalgamating with Colleges of Advanced Education in New South Wales. With respect to these proposed mergers the University was concerned about the attitude of the New South Wales Minister of Education, Terry Metherell—who, rumour had it, would not approve any mergers for Macquarie. With respect to this approach the history states that: ‘A very long and frank talk with Ron Parry, Director of the Higher Education Office, confirmed the impression. How far, it was asked, was the minister’s mind affected by the problems of the Law School?’

Despite this unpromising report from the Pearce Committee that the Law School should be phased out, it did survive; but it has to be noted that the Pearce Report stated: ‘Macquarie graduates were the only group who indicated in any number (23 per cent of respondents) that they thought the law school that they attended disadvantaged them in finding work.’

To sustain a balanced view of the reaction of Macquarie law students within the graduate survey incorporated into Volume 4 of the Report, it should be noted that Judith Lancaster maintains:

The Committee’s emphasis on the finding that 41% of Macquarie graduates believed that the course they were offered lacked legal substance, rather than on the overall result which placed Macquarie among the top three law schools in Australia is attributable to the Committee’s view of Macquarie Law School as having an overall stamp or character representing an express rejection of professional training as a sole objective of legal education.

Among the alternative remedies canvassed within the Pearce Report was the division of the Law School on the basis that: ‘Those who are not ideologically prepared to pull together on the provision of such courses should be transferred to another school which can offer courses as set out in para 22.69.’ This referred to BA and BEc programmes, which incorporated a wide range of law courses beyond the normal business law subjects. Although this recommendation had been rejected by a Macquarie University Review Committee appointed in 1978 to resolve the difficulties within the Law School, it was eventually accepted as a remedy and introduced in 2000 by the University.

The other recommendation for which Pearce is still remembered is the statement that: ‘We do not think that there will be the need for a new law school, except perhaps in Queensland.’

This quite innocuous remark is another one with which the Pearce Report is most often associated. However what transpired very soon after the publication of the Report was that contrary to this statement there took place (in this author’s words) ‘An Avalanche of Law Schools’. In defence of the statement in Pearce, the article in question draws attention to the fact that a number of circumstances arose which could never have been anticipated by the members of the Pearce Committee. The principal circumstance was that contemporaneously with the publication of the Pearce Report, John Dawkins, the Federal Minister for Employment, Education and Training, introduced legislation that abolished the binary system which had been established by the Martin Report. He replaced it with the merger and amalgamation of the 19 universities and 69 Colleges of Education in Australia to create a new single system of 36 universities by 1994. It is arguable that these Dawkins Reforms created an expansion of universities and university law schools which realised the expectation of more students wishing to study law.

Contrary opinions were stated in the Australian Law Reform Commission Report No. 89, such as one view that the expansion of legal education in Australia ‘could be attributed to the dynamic changes which had come about in the legal profession, such as national admission and

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58 Ibid 296.
59 Pearce above n 1, 946.
60 Lancaster above n 18, 58.
61 Pearce above n 1, 998.
practice, globalisation, the application of competition policy, emergence of multi-disciplinary partnerships and the influence of new information and communication technologies.\(^{63}\)

This could be contrasted with an opposing view, also stated in the same Report, that:

Law faculties were attractive propositions for universities bringing prestige, professional links and excellent students at a modest cost as compared to the professional programs such as medicine, dentistry and engineering.\(^{64}\)

Where does this leave the Pearce Report, when considering its place in the history of Australian legal education?

There can be no contradiction that at its time it was regarded as a major influence throughout Australian legal education – not only as incorporating a comprehensive survey of legal education in 1987 but also because of its wide-ranging review of Australian law schools and its analysis of the many aspects of teaching and learning practised by them at this time.

What is often overlooked is that the Report made 48 Recommendations to the Commonwealth Tertiary Education Committee (CTEC) and a further 64 Principal Suggestions to the law schools.\(^{65}\) Most of the recommendations concern the provision of additional resources to individual law schools, including administrative support, adequate library facilities, and the allocation of more funding. The suggestions relate to matters of interest to all law schools, and to legal education in general, such a curriculum, teaching and learning and research.\(^{66}\) An examination of these recommendations and suggestions reveals that many were far-sighted and subsequently adopted by the law schools concerned or the wider legal education community.

Apart from these reforms recommended by the Pearce Report, there were less-significant changes which emanated from the Report but were just as effective in the long term. These have been considered by Charles Sampford and Sophie Blencowe. Some of their further comments on Pearce are also echoed in the publication on the long-standing outcomes of Pearce by McInnis and Marginson. The focus of these comments is on what has been described as ‘traditional’ legal education, such as the pre-occupation of many law teachers at that time with rule-orientation, legal reasoning and curriculum coverage, which were signalled by Pearce. In this regard Sampleford and Blencowe were of the view that the Pearce Report:

Raised the standing of second-wave law schools, giving them greater self-confidence and encouraging third-wave schools to follow their example in approaches to teaching and the profession.\(^{67}\)

In doing this they believed it:

Provided an example of how a well thought-out combination of ideas and resources might allow a new law school to lead its peers.\(^{68}\)

Sampford and Blencowe also considered that the Pearce Report:

Stimulated improvement in the first-wave laws schools. Pearce forced most of these law schools to take co-ordinated action to improve the quality of their teaching and to seek more university resources. This provided much needed support for those within first-wave law schools who had been advocating for change.\(^{69}\)

(First-wave law schools were the original law schools, established before the Second World War; one was located in each state capital city. Second-wave law schools were those established from 1960 to 1987, while third-wave law schools were established after 1988.)


\(^{64}\) Ibid 118 [2.15].

\(^{65}\) Pearce above n.1, lxvii.

\(^{66}\) Ibid.

\(^{67}\) Ibid above n.23, 6.

\(^{68}\) Ibid.

\(^{69}\) Ibid.
In addition to these specific comments on particular law schools, Samford and Blencowe also considered that the Pearce Report:

Led to what McInnis and Marginson call the creation of a data base – in providing masses of previously unavailable information and created the conditions for further information gathering and scholarly debate on legal education in Australia.70

They also believed that:

Pearce encouraged a ‘culture of continuous self-improvement’ in which law schools examined their aims, their performance and looked to how they might improve themselves. This prepared law schools for the post Dawkins environment and left them ‘in charge of the process of change’. While doubting whether any faculty (or anyone) could be said to be in charge of the process of change at any time over the last decade, characterised by massive funding cuts to the tertiary education sector, Australian law schools clearly coped better because of the Pearce Report’s standards and recommendations.71

These commentators emphasise some of the more intangible benefits which flowed from the Pearce Report to legal education generally, in that it encouraged greater co-operation between the law schools, especially through the then Committee (now Council) of Australian Law Deans leading to the development of law as an academic discipline.72

It is clear, however that Committee was hampered by a lack of resources in carrying out its terms of reference – the lack of a formal secretariat, only sufficient funds for the employment of one research assistant, and insufficient funding to cover the cost incurred by the respective law schools in providing secretarial support for the three members of the Committee.73

However, what was of major concern was, as stated by the Committee, the considerable difficulties caused by: ‘The slowness, and in some cases the reluctance, of some institutions to supply information to the Committee.’ However, this was compounded by the Vice-Chancellors originally not only objecting to the Deans of and Heads of Law Schools providing information sought in a questionnaire by the Committee but also to an additional one addressed to the Vice-Chancellors themselves. In fact, the Vice-Chancellors had originally issued an embargo on provision of this information, and it was only lifted in respect of the Deans and Heads of Law after negotiations between the Australian Vice-Chancellors Committee and the Committee. However, it was significant, as was stated in the Report, that:

The Information sought from the Vice-Chancellors themselves which related to the comparative financial position of the law schools within the universities was not supplied. In the result, significant comparisons between the allocation of funds to law schools and to other part of the universities have not been able to be made.74

One can only conjecture as to what might have happened if this information had been forthcoming at the time. It might have resulted in an earlier resolution of the chronic underfunding of legal education which persisted in Australia until comparatively recently, when full-fee paying postgraduate professional qualifying programmes such as the JD have resulted in a far more realistic funding of law degree programmes and law schools generally.

70 Ibid.
71 Ibid.
72 Ibid.
73 Pearce above n 1 lxa.
74 Ibid.
V Conclusion: The Legacy

If there had to be a concluding statement as the ongoing effectiveness of the Pearce Report approximately two and half decades after it was published, then this could be left to the Report itself, which stated:

It considers that institutions that are supported by public moneys are accountable to the public for that expenditure. However, this does not mean that there should be uniformity between institutions. The Committee has been most anxious in the Report to avoid any suggestion that there is one form of legal education with which all law schools must comply … there is no agreement among commentators on the form of legal education and it has in fact changed markedly over the years. Nonetheless the Committee thinks that there are some minimum levels that have to be met if the degree awarded is to be recognised as a professional law degree and it has indicated where it thinks law schools fall short of this standard.75

75 Ibid lxi.
THE RECOGNITION OF INDIGENOUS AUSTRALIANS IN THE TEACHING OF FEDERAL CONSTITUTIONAL LAW

MELISSA CASTAN*  

I INTRODUCTION

It seems axiomatic that all law students would study constitutional law; not only because it is a requirement of the ‘Priestly 11’, but because the Commonwealth Constitution and its interpretation by the High Court of Australia represent the primary law of the nation, providing the formal structure to our system of government and laws. Yet Australia’s federal constitutional framework has remained conspicuously silent on the proper recognition and rights of its first peoples, and sometimes the teaching of constitutional law compounds this omission. The absence of Indigenous participation in the formation of the federal constitutional system tells us much about the framers’ vision of what the distinctive new nation was to be, and who was expected to participate in the political, legal and constitutional structures and institutions of Australia. Indeed, W E H Stanner’s characterisation of the ‘Great Australian Silence’ of Australian’s history in his 1968 Boyer Lectures is an apt description of the constitutional and political landscape of the twentieth (and indeed some of the twenty-first) century. But the ‘Great Australian Silence’ should not be perpetuated by those of us teaching law students.

This article argues that any teaching and examination of Australian constitutional law should take account of all of those who constitute the nation, including of course, the recognition of Indigenous people within our federal and State Constitutions. While the ‘Priestly 11’ do not themselves explicitly require the teaching of broader social, contextual or critical approaches towards teaching constitutional law, the Threshold Learning Outcomes (‘TLOs’) do anticipate that legal education should move beyond ‘the rules’ and examine relevant legal contexts. In terms of faculty learning objectives of constitutional law, addressing Indigenous constitutional issues naturally meets the aims of teaching students how to ‘analyse and critically evaluate the current state of federal and Victorian constitutional law and practice’, ‘discuss the desirability of reform’ and ‘analyse and critically evaluate judgments of the High Court and other Australian courts in constitutional cases’, among other objectives. It also assists in development a range...
of desirable graduate attributes such as skills of critical analysis, analysis and evaluation, cultural awareness and global awareness. A number of landmark High Court cases concern the rights of Indigenous Australians; this paper examines some of the cases, topics and issues concerning Indigenous Australians which might readily fit into the curriculum in undergraduate or postgraduate studies of Federal Constitutional Law. Topics which can be used both to address a range of TLOs and to engage student awareness and understanding of Indigenous issues are considered in turn; the acquisition of sovereignty and reception of British law in Part II, then the issues arising out of Federation, and the development of an Australian Constitution, including the race power, and the ‘just terms’ provision as they stand today in parts III and IV. Matters of constitutional reform and the recognition of Indigenous rights are then considered in Part V. Part VI concludes that the teaching of Australian constitutional law should no longer reflect the denial of Indigenous history and law that typifies the Constitution itself.

II SOVEREIGNTY MATTERS

Studies of constitutional law often begin with an evaluation of the reception of British law, the Australian Courts Act 1828 (Cth), and the basis of British acquisition of sovereignty. Absent any treaties, or participation in the formation of the Commonwealth Constitution, the Indigenous people of Australia have never ceded sovereignty to the United Kingdom. Although Captain Cook was instructed to take possession of the territory ‘with the consent of the natives’, such consent was neither asked for, nor given, and he claimed possession of the east coast for King George III in 1770. Governor Phillip’s instructions to establish a settlement at Botany Bay in 1788 provided no obligation that the rights of the Indigenous people be upheld (only that he ‘conciliate their affections’) and proceeded on the assumption that the territory was theirs to claim; thus it became the sovereign domain of the British Crown. On the basis of the assumption of terra nullius and the purported discovery of ‘uninhabited’ lands, English law blanketed the continent; no Indigenous laws were recognised, no pre-settlement sovereign rights were accepted.

While the landmark case of Mabo v Queensland (No 2) is often taught to law students regarding native title and the development of the common law, it is also a case that deals with the acquisition of sovereignty. Brennan J explained the acquisition of the Australian Colony:

In a settled colony in inhabited territory, the law of England was not merely the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally. Thus the theory which underpins the application of English law to the Colony of New South Wales is that English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England including the common law became the law of the Colony (so far as it was locally applicable) as though New South Wales were ‘an uninhabited country … discovered and planted by English subjects’. The common law thus became the common law of all subjects within the Colony who were equally entitled to

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8 John Batman signed two documents with Victorian Koories in 1835, although Governor Burke did not accept them as binding on the colonial authorities. See generally Alistair Campbell, John Batman and the Aborigines (Melbourne, 1987); Bain Attwood with Helen Doyle, Possession: Batman’s treaty and the matter of history (2009).
10 See Bain Attwood Telling the Truth about Aboriginal History (2005); Peter Russel, Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism (2005).
11 Mabo v Queensland (No 2) (1992) 175 CLR 1 (Mabo No 2).
13 Mabo No 2, 36.
the law’s protection as subjects of the Crown. As the subjects of a conquered territory and of a ceded territory became British subjects, a fortiori the subjects of a settled territory must have acquired that status. Its introduction to New South Wales was confirmed by s 24 of the Australian Courts Act 1828 (Imp) (56) 9 Geo IV c 83.

The perception that there was no applicable legal system or sovereign ruser over the territory of Australia prior to European settlement was purportedly validated by Anglo-Australian common law a century prior to Mabo (No 2), in Cooper v Stuart (1889),14 where the Privy Council found (obiter) that New South Wales was, at settlement, a territory ‘practically unoccupied, without settled inhabitants or settled law’. An inflated concept of terra nullius, grounded on a weak precedent, became the framework on which Australia’s constitutional law was constructed.15

Justice Brennan considered the International Court of Justice’s rejection of the legitimacy of the expanded theory of terra nullius in the Advisory Opinion on Western Sahara,16 and concluded:17

If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be ‘so low in the scale of social organization’ that it is ‘idle to impute to such people some shadow of the rights known to our law’ in re Southern Rhodesia (1919) AC, at 233-234 can hardly be retained. … If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country … Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

Thus the High Court majority in Mabo (No 2) rejected the fiction that the territory was unoccupied, and acknowledged that the Indigenous people of Australia had a pre-existing legal system; accordingly they had certain rights under that system which remained in force until modified by the new sovereign. This analysis underpins our common law’s recognition of a limited form of Indigenous property law known as ‘native title’.18

For students of constitutional law, the ambiguity over whether the Colony was settled or conquered remains. In Mabo (No 2) the plaintiffs had accepted that the Murray Islands ‘were settled by the British rather than conquered or ceded’;19 this was a compromise position adopted by the parties, who were seeking to argue the issue of property title, rather than the larger issue of where sovereignty rested. But the outcome of the case seems to contain an internal contradiction; the Court rejected the British version of terra nullius and found that Indigenous property laws survived the acquisition of the territory, yet it also affirmed that sovereignty was acquired by ‘settlement’, a consequence of which is that no Indigenous laws would survive.20

The sovereignty issue is a fundamental issue underlying any discussion of the acquisition of political and legal power over the Australian territory, thus it underpins Australian constitutional law. While students might have fairly assumed the partial recognition of Indigenous law in

14 Cooper v Stuart (1889) 14 App Cas 286, 291.
17 Brennan J in Mabo No 2, 41–2.
19 Mabo (No 2) (1992) 175 CLR 1, 182 (Toohey J).
Mabo (No 2) paved the way for a reconsideration of the sovereignty issues, Mason CJ, sitting alone, twice has dismissed any possibility of such an argument.21 The then Chief Justice’s strong statements in these post-Mabo cases suggested that any acknowledgment of independent (or coexisting) sovereignty of Indigenous Australians is not likely to be argued successfully before the Australian High Court.22 Rather, political processes might be the source of some level of recognition for the self-determination and sovereign rights which are applicable to Indigenous people. The discussion of this issue of the difference between the role of the court and the role of the political and parliamentary processes addresses an important learning objective in the study of constitutional law.

III FEDERATION, THE CONSTITUTION AND INDIGENOUS EXCLUSION

Our constitutional law classes might point to Federation in 1901 as having been established by democratic processes, and might expressly note that the Preamble refers to the people of the various States having ‘agreed to unite in one indissoluble Federal Commonwealth … under the Constitution’, yet it is also important to acknowledge that not all of ‘the people’ were entitled to vote on the formation of the Federation, nor were they considered to be a part of it.

Class discussion of the assumptions and concerns of the constitutional founders illustrates the issues that arise when the Constitution is interpreted in light of the ‘founders’ intentions’ or ‘originalist’ analysis.23 In the late 1800s Indigenous people were perceived to be a ‘dying race’, and no reliable count of their population was kept,24 so the drafters did not turn much attention to them; they were considered insignificant, particularly for purposes of calculating public expenditures.24 The discussion of these attitudes and assumptions makes for a clear link to analysis of the ‘race’ power, discussed below.

At Federation, there were only two references to the Indigenous people in the Constitution (a third reference, to ‘race’ is found in s 25, discussed below). First, section 51(xxvi) provided that the Commonwealth had power to make laws with respect to:

- the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws. [emphasis added]

This ‘race’ power was intended to empower the Commonwealth Parliament to make laws about racial minorities, such as the Melanesian field labourers (known as ‘kanakas’) and the Chinese working largely on the goldfields. The States were cautious with the powers they were granting to the Commonwealth, and only handed over those subject matters that were seemingly of federal interest; Indigenous people were not considered to be of probable federal concern.26 Thus, the States reserved legislative power over the Indigenous people within their territories.27

The second provision, s 127, stated:

In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

This clause related to two aspects of population recording; first, the funding arrangements whereby the Commonwealth guaranteed certain government funds on the basis of State population counts, and second, the constitutional status of Indigenous people. The discussion of these attitudes and assumptions makes for a clear link to analysis of the ‘race’ power, discussed below.

23 See further Joseph and Castan, above n 7, Chapter 1.
27 The Commonwealth could exercise power over Aboriginal people in the Territories under s 122 of the Constitution.
populations, and second, the distribution of federal parliamentary constituencies between States, which is proportionate to each State’s population under s 24. Section 127 thus seemed based on the assumption that some Indigenous people were so inferior that they were not to expect the same level of government expenditure or political participatory rights as non-Indigenous Australians.  

In addition, s 25 reads:

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Section 25, paradoxically, was designed to discourage States from discriminating against people on the grounds of race with regard to the right to vote; any such discrimination would result in a reduction in that State’s parliamentary representation in the federal Parliament under s 24. Even so, students will readily observe that the section seems to anticipate the exclusion of an ethnic group from the franchise, which suggests that s 25 is now out of place.

Although, contrary to some assumptions, the Constitution did not explicitly exclude Indigenous people from being citizens or voting, nor specify lower levels of government expenditure or social services, it did not safeguard Indigenous people from such discrimination by unreliable State legislatures. Those constitutional provisions that did focus upon Indigenous Australians suggested that they were not to be counted as Australians.

Can legal educators assume that their students know that for most of the twentieth century many Indigenous people could not vote, receive social welfare entitlements, move freely from place to place, choose their place of residence, own property, receive wages earned, or even bring up their own children — that they were explicitly denied fundamental human rights most other Australians took for granted? Would our law students understand these not only as events of the past, but also as laws and rules having contemporary ramifications? We might assume they acquired such knowledge from studies at school, or from exposure to the issues in the media, or possibly some personal recollection of the debate over the Apology in 2008. However, students may not always understand that these deprivations of civil and political rights were not always due to racially specific legislation; sometimes it was a matter of the way legislation was administered by State governments as well as the failure by all governments to significantly redress the historical and continuing harms perpetuated by ingrained prejudice against Indigenous Australians.

Professor Davis explains that

[the reality for Indigenous Australians is that Australia’s public institutions have failed to accommodate difference and in some cases, as seen in native title law, have distorted and limited the practice of Indigenous culture and religion. This has been referred to in some literature as the psychological terra nullius, or the racism of Australia’s public institutions.]

28 Sawer, above n 24, 25ff. Note he suggests that although there was no set definition of ‘aboriginal natives’ it was probably confined to those described as ‘full bloods’ and did not include Torres Strait Islanders, at 26.


30 See generally Chesterman and Galligan, above n 25, Chapter 6, on the history of the Indigenous franchise.

31 See generally ibid; Human Rights and Equal Opportunity Commission (HREOC), Bringing them Home, National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997); Quentin Beresford and Paul Omaji, Our State of Mind: Racial Planning and the Stolen Generation (1998) and Rabbit Proof Fence (Directed by Philip Noyce, 2002) or Doris Pilkington-Nugi Garimara, Follow the Rabbit-Proof Fence (University of Queensland Press, 1996). Students might benefit from considering the arguments and outcome in Kruger v Commonwealth (1997) 190 CLR 1 (discussed below), which well illustrates how susceptible Indigenous people were to the purported benevolence of State governments, and the lack of protection against such practices at the federal political and constitutional level.


While racism is generally understood by students in a social context, in the constitutional context we might further discuss the meanings of ‘institutional racism’ or the ‘terra nullius’ of our public institutions.\(^{34}\)

In light of current debates on the constitutional recognition of Indigenous Australians by way of a referendum, students could be provided with an opportunity discuss the myths, meanings and intentions of the referendum of 1967; at that time it was hoped that the federal government would undertake the necessary consistent responsibility for resolving the dismal disadvantage still endured by Indigenous Australians.\(^{35}\) That referendum came to assume a potent symbolic mythology; that it would have the potential to effect deep-seated change for Indigenous Australians,\(^{36}\) displacing discriminatory State laws, and allowing access to the necessary financial resources. Kirby J depicted the state of affairs at the 1967 referendum in his (dissenting) judgment in *Kartinyeri v Commonwealth* (1998):\(^{37}\)

the leaders of all of the major Australian political parties issued statements supporting the amendment to par (xxvi) and the repeal of s 127. The Prime Minister (Mr Holt), in his statement said that it was not acceptable to the Australian people that the national Parliament ‘should not have power to make special laws for the people of the Aboriginal race, where that is in their best interests’. For the Federal Opposition, Mr Whitlam stated that the then provisions of the Constitution were ‘discriminatory’. He pointed out the need to assist Aboriginal communities in the realms of housing, education and health, and stated that the Commonwealth must ‘accept that responsibility on behalf of Aboriginals’. It was also vital, he argued, to remove the excuse ‘for Australia’s failure to adopt many international conventions affecting the welfare of Aborigines’. … There was not the slightest hint whatsoever in any of the substantial referendum materials placed before this Court that what was proposed to the Australian electors was an amendment to the Constitution to empower the Parliament to enact laws detrimental to, or discriminatory against, the people of any race, still less the people of the Aboriginal race.

The referendum was put on 27 May 1967. It was overwhelmingly approved. In the history of Australian constitutional referenda, no other such vote has come close to the unique political and popular consensus demonstrated in the 1967 referendum on Aborigines.

The constraints in formal amendment (through s 128) to the Commonwealth Constitution are often discussed in the study of constitutional law, so it is worth noting that the 1967 referendum result was the strongest endorsement of a constitutional amendment in Australia’s history.\(^{38}\) Despite the clear intent of voters to secure wide-ranging, constructive effects, such as ‘equal rights’ for Indigenous people, the constitutional impact of the 1967 referendum was more mundane, authorising the Commonwealth to pass ‘special laws’ for Indigenous people, but not requiring the Commonwealth to pass such laws. The States still retained concurrent power over Indigenous people. The deletion of s 127 provided that Indigenous people could be ‘reckoned’ in the national census, but no explicit reference to what we might consider ‘citizenship’ or civil and political rights was included. This referendum is significant for those studying constitutional law as it demonstrates that referenda can be successfully employed to alter the Constitution, and it epitomizes an important symbolic shift in the general electorate’s acknowledgment of the often-deprived circumstances of many Indigenous people. But it is equally important to observe that despite strong political mandate for reform, there was no prompt action by the Commonwealth government, and very little reform of Commonwealth or State laws or their administration as an immediate consequence.

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IV LAWS FOR THE 'ABORIGINAL RACE'

Interpretation of the scope and meaning of Commonwealth heads of power makes up a considerable part of any constitutional law curriculum. Typically, constitutional law units will focus on the external affairs power (s 51(xxix)), the corporations power (s 51(xx)), the taxation power (s 51(ii)) and the grants power (s 96). There are aspects of all the heads of power that may support legislation regarding Indigenous Australians, but the most relevant is of course the ‘race’ power, s 51 (xxvi), and particularly the post-1967 version. There is enduring debate over the scope of the Commonwealth’s power under s 51(xxvi) today.39 There are few cases on the scope of the race power, and none clearly resolve the issue over whether the amended s 51(xxvi) allows for Commonwealth laws which discriminate against Indigenous Australians.41 This makes it an interesting vehicle for an investigation of the different interpretive techniques or styles of constitutional reasoning in the High Court. The tension between ‘originalist’ and ‘literalist’ approaches is brought out clearly for students by the Justices in the race power cases.42

An issue of enduring judicial divergence is whether the Commonwealth has plenary power over the people of any race, so as to make laws for those people, whether those laws are entirely, or partially beneficial, or detrimental? Or is the race power restricted, permitting only laws which benefit the people of the particular race, and excluding detrimental laws from the ambit of s 51(xxvi)? Limitations to Parliament’s race power may be construed from the requirement within the placitum that ‘special’ laws for ‘the people of any race’ be necessary, and from consideration of the underlying benevolent intentions of the electorate in 1967 (at least with regard to laws affecting Indigenous Australians).43 The main case of interest is Kartinyeri v Commonwealth (1998).44 The Commonwealth Parliament passed the Hindmarsh Island Bridge Act 1997 (Cth) (the Bridge Act), exempting the Hindmarsh Bridge project from the usual ministerial approval processes, effectively allowing a disputed construction project to proceed. The consequence of the Act was to remove the construction site from the probable protection of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (the Heritage Protection Act), thus ensuring the construction would take place despite any consequent harm to Indigenous cultural heritage within the area. The challenge was to the validity of the Bridge Act.45

For discussion of those tensions see Joseph and Castan, above n 7, Chapter 14, 546 and French on Kartinyeri in Lee and Winterton, above n 39, 205–6.

In Koowarta v Bjelke-Petersen (1982) 153 CLR 168 it was held that the Racial Discrimination Act 1975 which applied to protect people of all races from discrimination, was not a “special law” for the people of any one race, and was therefore not enacted under s 51(xxvi); see Gibbs CJ at 187 and Stephen J at 207. The law was however validly enacted under the external affairs power, s 51(xxix).

Kartinyeri above n 37. The background to this case is intricate, but illustrative of the complex intersection of culture, politics, and use of the legal process to resolve disputes. See for example Joseph and Castan pp533-534, and for a different approach, see Diane Bell, Ngarrindjeri Wurrwarrin: A world that is, was, and will be (Spinifex 2014).

40 An unusual feature of this discussion is the exploration of the concept of ‘race’ — it is difficult to find any objective benchmark (whether it be scientific or legal) of what constitutes a “race” today (although it might have seemed perfectly apparent to the drafters of the Constitution). See the discussion in Justin Malbon, ‘The Race Power Under the Australian Constitution: Altered Meanings’ (1999) Sydney Law Review 80, esp 81–5.
41 In Commonwealth v Tasmania (1983) 158 CLR 1 (‘Tasmanian Dam Case’), a number of Justices addressed the issue regarding the scope of s 51(xxvi) in obiter dicta. Murphy, Brennan, and Deane JJ indicated that the power could only support the enactment of laws which benefited a particular race, while Gibbs CJ indicated that the race power was plenary, and could therefore support beneficial and detrimental laws. In Western Australia v Commonwealth ((1995) 183 CLR 373 (‘Native Title Act Case’) all of the Justices agreed that the Native Title Act 1993 (Cth) had been validly enacted under s 51(xxvi). They also found that the Act was for the benefit of Indigenous Australians. When compared to the pre-existing common law, the Act clarified the rights of native title holders, and provided protection against future inconsistent State laws. As the Court found that the law was in fact beneficial for Indigenous Australians, there was no need to consider whether s 51(xxvi) authorised the enactment of detrimental laws. The majority (Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ) did indicate however (at 460) that, whilst it was for the Parliament to essentially decide whether a special law for a race was ‘necessary’, the Court may retain supervisory jurisdiction over the question of ‘necessity’ in order to guard against ‘manifest abuse’ of the power.
42 For discussion of those tensions see Joseph and Castan, above n 7, Chapter 14, 546 and French on Kartinyeri in Lee and Winterton, above n 39, 205–6.
43
Act, and its substantive provision, s 4. The female plaintiffs were of the Ngarrindjeri people, and they claimed that their cultural heritage was threatened by the construction of the bridge. The question before the High Court was whether the 
Bridge Act was validly enacted pursuant to s 51(xxvi) of the Constitution.

In order to illustrate the manner in which arguments are put before the High Court, and the virtue of exploring numerous lines of argument, it is worth encouraging students to examine the different submissions made to the Court. Counsel for the plaintiffs argued first that s 51(xxvi) did not authorise laws that distinguished or discriminated between members of a racial group; the Act here did differentiate within a racial group (Indigenous Australians) as the Act’s detriment affected only one Indigenous group, the Ngarrindjeri. Secondly, it was submitted that any law enacted under s 51(xxvi) had to be for the benefit or advancement of people of any race, and not to their detriment. The Bridge Act was detrimental because it removed rights the plaintiffs would usually enjoy under the (clearly beneficial) Heritage Protection Act. Alternatively, it was argued that s 51(xxvi) could not authorise laws that were disadvantageous to Indigenous Australians, in view of the benevolence associated with the 1967 constitutional alteration (i.e., the revised drafters’ intentions). We can ask students at this point which submissions they think would be effective, and why they find those submissions were convincing; it is interesting that five of the six sitting Justices rejected the challenge, all diverging in their reasoning.

Students will have to apply high-level skills of critical analysis, and evaluation in order to distil the ratio on the race power, as there was no majority evident on that crucial issue. Three Justices (Brennan CJ and McHugh J, with Gaudron J agreeing on this point) found the Bridge Act was a partial repeal of the Heritage Protection Act, as its effect was to in part reduce the scope of the 1984 Act. As the Heritage Protection Act was indisputably a law validly enacted under s 51(xxvi), the same head of power could support its whole or partial repeal (thus illustrating the principle that what Parliament can enact, it can repeal, in whole or in part).

Brennan CJ and McHugh J stated (at 356):

Once the true scope of the legislative powers conferred by s 51 are perceived, it is clear that the power which supports a valid Act supports an Act repealing it.

This decision meant that these three Justices did not need to consider the scope of s 51(xxvi); Gaudron J still did deliver obiter views on that issue.

Gummow and Hayne JJ, also in the majority, did not accept the ‘repeal’ argument, but did find the law validly enacted under s 51(xxvi). Kirby J did not agree that the Bridge Act was a simple repeal of the Heritage Protection Act, and found it invalid. Thus, Gaudron, Gummow, Kirby, and Hayne JJ all considered the scope of s 51(xxvi). These Justices all discarded the first argument put by the plaintiff, that s 51(xxvi) cannot authorise laws which distinguish or discriminate between members of a racial group, holding that s 51(xxvi) supports laws with respect to a sub-group of a particular race.

The four Justices however divided on whether s 51(xxvi) only authorises laws for the benefit of the people of a race or, in the alternative, for the benefit of the people of the Aboriginal race. Gummow and Hayne JJ suggested that the power could be used to impose a disadvantage on Aboriginal people, while Gaudron and Kirby JJ disagreed with them. It is worth delving into some of the detail of their reasoning in order to illustrate the different approaches to constitutional interpretation.

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45 Only six Justices sat, as Callinan J excused himself, having given advice as a QC to the government on the validity of the Hindmarsh Island Bridge Bill 1997. Kirby J wrote a dissenting judgment.


48 Students might note that Gummow and Hayne JJ found that only laws that expressly repeal certain provisions of a prior Act can be presumed valid on the basis of the “repeal” argument. The Bridge Act did not show a textual repeal, and therefore needed to be independently characterised under s 51(xxvi).

49 The different perspectives of the Justices are examined in detailed in Joseph and Castan above n 7, 546 and French above n 39, 199–204.
The details of the differences between these Justices would be suitable for an exercise to demonstrate how constitutional interpretation can lead to a diminution of rights, and the tendency of the High Court to adopt quite divergent interpretive approaches to constitutional issues. For example a class could be divided into groups representing the plaintiffs, the respondent and the different Justices, and present to the class or each other on each perspective. Notably Kirby J in dissent found the law to be beyond the scope of the race power because it was detrimental to Indigenous people by reference to their race. He said (at 417):

The purpose of the race power in the Australian Constitution, as I read it, is therefore quite different from that urged for the Commonwealth. It permits special laws for people on the grounds of their race. But not so as adversely and detrimentally to discriminate against such people on that ground.

Kirby J also referred to the proper place of human rights standards drawn from comparative or international law in assisting the resolution of constitutional ambiguities. Students of constitutional law might be invited to consider whether the ambiguity within s 51(xxvi) should be resolved in favour of protecting rather than diminishing rights, as Kirby J advocated. It also raises interesting questions on the role of international law in constitutional interpretation. However, this case offered no clear majority on those issues.

In earlier cases, such as Mabo (No 2), and Kruger v Commonwealth (1997), the High Court had considered the possibility of contemporary racially discriminatory laws being acceptable, and decided they were not. But those were not cases that invoked the scope the race power. Students might consider their own assessment of the role of the High Court regarding protection of Indigenous legal rights when they reflect on Kartinyeri; when the validity of a modern law having detrimental impact and clearly based on distinctions of race was raised, the High Court failed to interpret the races power in the Constitution so as to protect Indigenous people from overt racial discrimination.

Notably, in his final judgment prior to his retirement (in Wurridjal v Commonwealth (2009) 237 CLR 309, discussed below), Kirby J expressed his palpable frustration at the position adopted by the High Court in Kartinyeri, and the treatment of Indigenous people by the Court in general:

History, and not only ancient history, teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements by reference to that criterion [citing Kartinyeri]. The history of Australian law, including earlier decisions of this Court, stands as a warning about how such matters should be decided. Even great judges of the past were not immune from error in such cases. Wrongs to people of a particular race have also occurred in other courts and legal systems. In his dissenting opinion in Falbo v United States, Murphy J observed, in famous words, that the 'law knows no finer hour' than when it protects individuals from selective discrimination and persecution. This Court should be especially hesitant before declining effective access to the courts to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny.

Kirby J promoted this approach to constitutional interpretation throughout his tenure on the bench, see Newcrest Mining (WA) v Commonwealth (1997) 190 CLR 513, 657 ff, and for the contrary view, see McHugh J in Al-Kateb v Godwin (2004) 219 CLR 562, 578.

Here it would be useful to draw upon the conclusions offered by French, above n 39, 204–5.


See also the discussion in Jennifer Clarke, Patrick Keyzer and James Stellios, Hanks’ Australian Constitutional Law: Materials and Commentary (8th ed, 2009), 271–9.

Justice Kirby’s frustration appears to be as a result of the decision of the majority to reject ‘the claimants’ challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them upon the basis of their race and does so in a ruling on a demurrer’ Wurridjal (2009) 237 CLR 309, 394–5. Kirby’s criticism was met with a terse rebuke by Chief Justice French at 337. The High Court also overturned the old case of Teori Tau v Commonwealth (1969) 119 CLR 564 and found that the just terms requirement of s 51 (xxxi) applies to s 122 of the Constitution.
Students of constitutional law might wonder why there has not been a case unambiguously addressing the scope of the races power since *Kartinyeri*. The *Native Title Amendment Act 1998* (Cth) diminished native title property rights when compared to other people’s property rights (thus acting to the detriment of Indigenous people), and that Act is unlikely to be characterised as a partial repeal (as opposed to an amendment) of the *Native Title Act 1993* (Cth).55 The *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth) abolished the Aboriginal and Torres Strait Islander Commission, to the detriment of Indigenous peoples’ political participation rights.56 A challenge to either of these Acts would oblige the courts to finally resolve the scope of s 51(xxvi), but no decision regarding the constitutional validity of either Act has emerged.57

Another head of power that is particularly relevant to the consideration of Indigenous people in the Australian Constitution is the ‘just terms’ requirement for Commonwealth acquisitions of property, found in s 51 (xxxi). This section has two aspects, it confers power on the Commonwealth to acquire property for certain purposes, and it limits the Commonwealth’s acquisition power by requiring that such property can only be acquired on ‘just terms’.58 The jurisprudence on this area of constitutional law is complex, and somewhat unstable, in that predicting the outcome of disputes that come before the High Court is not a certainty.59 Indigenous claimants have invoked this section to resist Commonwealth dealings with traditional country, asserting that there has been an ‘acquisition’ and thus a requirement for ‘just terms’.60 Students could be encouraged to consider the application of this requirement in the context of the *Northern Territory National Emergency Response Act 2007*. This aspect of the so-called ‘Intervention’ came under constitutional challenge in the *Wurridjal* case, in particular whether the legislation satisfied the ‘just terms’ part of s 51 (xxxi) of the Constitution.61 The case deals with complex provisions of the *Emergency Response Act* and its relationship with Northern Territory Land rights laws. The *Emergency Response Act* granted a five-year statutory lease to the Commonwealth over property previously granted in fee simple to Aboriginal Land Trusts under the *Land Rights Act*, and also abolished a system of access by permit operating on Aboriginal Land Trust land. The majority found these measures amounted to ‘acquisitions of property’ under s 51 (xxxi), and also found that ‘just terms’ were provided for those acquisitions. The Court also overturned the old case of *Teori Tau v Commonwealth*62 and found that the just terms requirement of s51 (xxxi) applies to s 122 of the Constitution.63 Students might be invited to discuss the outcome of this case, and their understandings of what the ‘just’ aspect of just terms requires, both in their own minds, and within the jurisprudence of the High Court.64

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55 See, for speculation regarding the constitutional validity of the *Native Title Amendment Act 1998* (Cth), Johnston and Edelman, above n 46, 47–8.
56 For further details see Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009), Chapter 13.
57 The scope of s 51 (xxvi) did not arise in *Wurridjal v Commonwealth* (2009) 237 CLR 309, which was concerned with the scope of s 51 (xxxi) and s 122. The High Court will not deliver ‘Advisory Opinions’; its role (as per s 76 of the Constitution) as a court of dispute resolution was confirmed in *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257.
58 See Joseph and Castan above n 7, 426 ff.
59 Ibid 450.
60 See for instance *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495.
63 As noted above (n 54), *Wurridjal* was unusual as it was decided in a ‘demurrer’, an old legal pleading where the defendant (here the Commonwealth) challenges the ‘legal sufficiency’ of the claim or cause of action. A demurrer is not a challenge to the ultimate merits of a case or claims, as the facts expressly or impliedly asserted in the statement of claim might be taken as admitted for purposes of demurrer. It presents an interesting opportunity to discuss this aspect of High Court procedure (see High Court Rules 2004 No. 304, r 27.07). Interestingly, *Mabo v Queensland* (No 1) (1988) 166 CLR 186 was fought on a demurrer. See Bryan Keon-Cohen *The Mabo Litigation: A Personal and Procedural Account* [2000] 24 Melbourne University Law Review 893.
64 For instance see Dixon J in *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290, and Deane J in *Commonwealth v Tasmania* (1983) 158 CLR 1, 291.
V CONSTITUTIONAL REFORM, RIGHTS AND RECONCILIATION

On opening the 42\textsuperscript{nd} federal Parliament on 13 February 2008, Prime Minister Rudd made a formal apology to the stolen generations — an acknowledgment that was long past due and widely acclaimed.\textsuperscript{65} As with the 1967 referendum, those studying constitutional law might consider whether or not aspirations arising from the Apology far outweigh the reality of what the federal government could or would do in the short term or medium term. The Apology did not seek to directly address any of the constitutional or legislative deficiencies identified in this chapter.\textsuperscript{66}

Our Constitution currently fails to safeguard the basic human rights standards that our law students might (wrongly) assume are recognised and enforced. The federal Constitution expresses protection for few fundamental rights and freedoms, and even those that are expressed offer fairly weak protection because of the limited scope given to those sections by the High Court.\textsuperscript{67} The consequences of the absence of a constitutional bill of rights manifested in the capacity of the Parliament to enact the Northern Territory National Emergency Response Act 2007 (Cth), which was explicitly contrary to the Racial Discrimination Act 1975 (Cth).\textsuperscript{68} Wurradjal, discussed earlier, gives a clear example of the limitations of the express ‘just terms’ requirement in the Constitution. An earlier example of the lack of rights protection arose in Kruger’s case.\textsuperscript{69} The plaintiffs contested the constitutional validity of a Northern Territory Ordinance (enacted under s 122 of the Commonwealth Constitution) that had empowered authorities to remove Indigenous children from their parents, as well as the compulsory detention of Indigenous people on reserves on alleged ‘welfare’ grounds. The plaintiffs submitted that the Ordinance violated a number of express and implied constitutional rights: namely freedom from arbitrary detention,\textsuperscript{70} rights of equality, freedom of religion (s 116), freedom of movement and association and freedom from genocide, however all of these claims failed.\textsuperscript{71}

Constitutional law students, and others, might find it interesting to consider the High Court’s finding regarding genocide in Kruger’s case. The plaintiffs alleged that the law amounted to genocide by authorising the compulsory transfer of the children of one racial group to the people of another racial group. Such transfer of children is identified as genocide under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 when it is carried out with the intention of destroying, in whole or in part, the targeted racial group. The Human Rights and Equal Opportunity Commission had previously asserted that the ‘removals policy’ was genocidal, in the Bringing Them Home report.\textsuperscript{72} In spite of this, the High Court found that the Northern Territory Ordinance had not allowed removals for genocidal purposes, merely for ‘welfare’ purposes. The Justices’ interpretation of the Ordinance meant that they did not have to decide whether the Constitution in fact prohibits genocide, because they decided the removals were for the ‘welfare’ of the children. Nevertheless three Justices considered the matter; one justice, found that the Constitution impliedly prohibits genocide (Gaudron J), while two Justices found that the Constitution did not prohibit genocide (Dawson and Gummow JJ).

\textsuperscript{65} See ‘Australia, House of Representatives, Parliamentary Debates (Hansard), 13 February 2008, 167–73 (the Hon K M Rudd MP, Prime Minister). Notably the apology and acknowledgement made by the Hon B Nelson, Leader of the Opposition, was not met with the same acclaim, and is rarely referenced.

\textsuperscript{66} Students might note that Kirby J considered the Apology not ‘legally irrelevant’; see Northern Territory of Australia v Arnhem Land Aboriginal Land Trust (2008) 236 CLR 24, 70.

\textsuperscript{67} Joseph and Castan, above n 7, Chapter 12.


\textsuperscript{69} Kruger v Commonwealth (the Stolen Generation case) (1997) 190 CLR 1.

\textsuperscript{70} This submission was also an argument regarding separation of Commonwealth judicial power.


\textsuperscript{72} HREOC, above n 31.
If this latter view is correct, then our federal Constitution fails to protect one of the most basic human rights, and a long recognised international law standard.73

In teaching about constitutional reform, Indigenous issues may provide a useful case study for prospective developments, particularly given the current debates surrounding recognition of Indigenous Australians.74 The very real prospects of constitutional recognition of Indigenous Australians, and the best form of words to address such reform is one of the few opportunities teachers have to discuss a contemporaneous referendum. Formal constitutional reform through the use of s 128 has proven to be an arduous, and often unsuccessful endeavour, but we should resist the temptation to teach our law students that a difficult argument is not worth attempting. Common suggestions from students (and many others) for the modernisation and reform of our Constitution revolve around alterations to reflect the reality of prior Indigenous ownership and first discovery of Australia, as well as recognition of rights of equality, non-discrimination and difference.75 The recommendations of the Prime Ministers Expert Panel,76 and discussion of the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth) are excellent starting points. Students might consider the ramifications of altering section 51(xxvi) to authorise the Commonwealth to make special laws only for the benefit of any race, and the impact or utility of a section making it unlawful to adversely discriminate on the basis of race with regard to the right to vote (to replace s 25).77 Specific constitutional protection of Indigenous rights, like that adopted by Canada, is often raised as a possibility.78 Students might have the opportunity to explore whether the inclusion of specific Indigenous rights would be appropriate, or even possible, and whether they would strengthen the validity and integrity of our constitutional system.79

There remain strong arguments for the Preamble to include acknowledgment of the first occupancy and ‘ownership’ (and yes, sovereignty) of Australia by Indigenous peoples; even the recognition of ongoing rights arising out of that status as Australia’s first peoples might have a place in the Preamble.80 The issue of how to amend the Preamble, (as part of the covering clauses) should be explored, and this raises discussion of the Australia Act 1989 (UK and Cth). Many students would not recall the failed referendum on alteration of the Preamble to the Constitution, in 1999, and they could consider how the political and social context impacts on any referendum’s success. Students might explore the idea of whether the referendum process itself may have wider impacts in Australia, much as the 1967 referendum result and the national Apology each generated broad shift in national attitudes.81 There may also be other paths to alter

74 Discussion papers and other materials on this debate can be found at http://recognise.org. Students could adopt various roles and present submissions on desired reform proposals, for example ranging from the minimalist change to the Preamble, to extensive recognition of Indigenous rights through new constitutional clauses. Such a learning activity would engage students in higher order analysis, critical thinking and communication of the constitutional impact of the different positions. It also would assist in development of greater understanding of social justice and cultural awareness, these are key graduate attributes.
75 Further matters of substantive economic and social inequality, such as standards of health, education, housing and employment still must be addressed, and programs to meet these needs are still of course critical. Melissa Castan, ‘Reconciliation, Law, and the Constitution’, in Michelle Grattan (ed), Reconciliation (Bookman Press, Melbourne, 2000), 202, 206; Mick Gooda, Social Justice and Native Title Report 2014 (2014).
76 Prime Minister’s Expert Panel The report of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2012).
78 Section 35(1) of the Constitution Act 1982 (Canada) recognises and affirms ‘the existing aboriginal and treaty rights of the aboriginal peoples of Canada’.
79 This would also raise the opportunity to discuss the role and impact of the United Nations General Assembly Declaration on the Rights of Indigenous Peoples, adopted in 2007, which Australia endorsed in 2009. (A/RES/61/295).
80 The Victorian Constitution was altered in 2004 to acknowledge the absence of Aboriginal participation in the creation of that instrument, and to recognise Victoria’s Aboriginal people as the original custodians of territory. See Constitution Act 1975 (Vic), s 1A. The Queensland Constitution was similarly altered in 2010 to include a Preamble which honours ‘the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community’.
81 See Melissa Castan, above n 73, 206.
the Constitution, including amendment of the Referendum (Machinery Provisions) Act 1984 (Cth), and development of consensus building mechanisms such as plebiscites, conventions and concomitant law reform. The discussion of the recognition of Indigenous people in States’ Constitutions and their Preambles, and analysis of the impact and efficacy of such recognition can be explored.

In addition to constitutional amendments, students often ask about a ‘treaty’, or negotiated settlement agreement, which could recognise the distinct rights of Australian Indigenous people, and set in place national standards. Like amendment to the Constitution, such an agreement is only realistic if there is widespread community momentum in favour on embarking on the process; if that is evident, then, such an agreement should be enshrined in the Constitution (in a section akin to s 105A on state agreements), or at the minimum in federal and State statutes.

VI CONCLUSION

The Constitution and laws of Australia still reflect the denial of Indigenous identity, presence, laws, and rights. Past examples include so-called protection laws associated with policies of dispossession, assimilation and child removals, and laws that denied basic civil and political rights, such as voting, political participation, citizenship and freedom of movement and association. Current examples include laws regarding the administration of criminal justice or welfare that ostensibly appear neutral yet are applied in a manner that disclose ingrained racism. There is no reason for the teaching of Australian constitutional law to reflect the same denial. The recognition of the role that the Anglo-Australian constitutional, legal and political system have played in the discrimination and dispossession of Indigenous Australians is as essential now as it was in 1901, 1967 or 2000. Explicit incorporation of these issues into the constitutional law curriculum for law students is an essential aspect of redressing the omissions inherent in our Constitution.

82 As suggested by George Williams in ‘Thawing the Frozen Continent’ 2008 (19) Griffith Review 35.
83 See above n 80.
84 Some treaty proposals can be found in documents such as G Clarke, ‘From Here to a Treaty’, Hyllus Maris Lecture, Latrobe University, September 2000; Marcia Langton ‘A Treaty between our Nations’, Inaugural Professorial Lecture, University of Melbourne, November 2000); Patrick Dodson, Wentworth Lecture, 12 May 2000, Canberra.
85 Legal issues regarding a treaty are explored at length in the book by Sean Brennan, Larissa Behrendt, Lisa Strelein, and George Williams, Treaty (Federation Press, 2005).
86 Castan, above n 75, 209; Davis above n 33.
RE-IMAGINING PRACTICAL LEGAL TRAINING PRACTITIONERS — SOLDIERS FOR ‘VOCATIONALISM’, OR DOUBLE AGENTS?

KRISTOFFER GREAVES*

ABSTRACT

I adopt a constructivist approach in order to study Australian PLT practitioners’ engagement with scholarship of teaching and learning (SoTL) in institutional practical legal training (PLT). Drawing on Bourdieu’s ‘reflexive sociology’ and Certeau’s ‘heterological science’, I argue PLT is enclosed by discursive operations that constrain PLT practitioners’ engagement with SoTL. I contend SoTL could address a knowledge gap in practice research in law and legal education. I propose to re-imagine PLT teaching work by conceptualising it as an emergent professional trajectory, engaged in practice research, teaching and learning. By considering ways in which structures are inscribed into legal education practice, and conversely, whether practice can modify such structures, I re-imagine PLT practitioners as double agents or resistance fighters, enriching legal education through SoTL as practice research.

I INTRODUCTION

I study Australian PLT practitioners’ engagement with SoTL in institutional PLT. In doing so, I adopt a constructivist approach, with qualitative methodologies, conceptualising PLT practitioner engagement with SoTL as practice. I draw on Bourdieu’s ‘reflexive sociology’ and de Certeau’s ‘heterological science’. Australian legal education history frames PLT’s enclosure via judicial, professional, and academic discursive operation, and James has nominated PLT as a ‘strategy’ of ‘vocationalist’ discursive operations. I argue that PLT’s enclosure constrains SoTL as practice research in PLT, and that marginalising SoTL impedes PLT practitioners’ agency in teaching and learning work. I propose to re-imagine PLT practice as an emergent professional trajectory.

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There is little literature specifically studying PLT practitioners’ engagement with SoTL, save for Maxwell and Pastellas’ report of interviews with nine PLT practitioners in 2004. Here, I discuss extra-individual and individual dimensions of PLT practitioners’ engagement with SoTL, involving Australian legal education history, sociological studies of lawyers, and interviews with Australian PLT practitioners. Considering ways in which social structures are inscribed into legal education practice, and conversely, whether practice influences those structures, I imagine PLT practitioners as more than soldiers enrolled in a *vocationalist* strategy.

I re-imagine PLT practitioners as *double agents* engaged in practice research, enriching understandings of legal education and practice through SoTL.

In Part II I explain why SoTL is important. I explain my ‘reflexive-dialectical’ approach, involving ‘individualist’ and ‘non-individualist’ accounts, drawing on Bourdieu’s ‘sociological tools’ and Certeau’s ‘heterological science’. In Part III I explore historical materials to frame extra-individual dimensions, in which PLT is enclosed as *vocationalist, non-academic, and critique-free*. I turn to individual dimensions in Part IV, drawing on interviews with PLT practitioners. I discuss professional trajectories to PLT, and interviewees’ dispositions regarding lawyer and teacher thinking. In Part V, I re-imagine PLT practitioners as *double agents* operating between dominant structures.

**II Extra-Individual and Individual Dimensions of ‘Practice’**

**A Why Scholarship of Teaching and Learning?**

Why should SoTL be part of PLT practitioner practice? I offer ten reasons:

1. Discover how ‘learning is made possible’;
2. Raise ‘the status of teaching’;
3. Support practitioners ‘to teach more knowledgeably’;
4. Enable assessment of ‘quality of teaching’;
5. Improve learning experiences of lawyers-to-be;
6. Professionalism — conceptualise PLT practitioners’ dual professionalism as lawyer and educator;
7. Pragmatism — contemplate PLT as ‘transparent’ to external scrutiny and evaluation;
8. Policy — recognise existing policies of both legal and higher education regulators. Participate in policy-making.

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12 Ibid, 523-4.
13 Ibid.
14 Ibid.
16 Ibid.
17 Ibid.
Recognise the legislative purpose of mandatory PLT to improve protection of lawyers’ clients and the administration of justice, and promote quality legal services.\textsuperscript{18}

Self-actualisation of PLT practitioners - using SoTL to do PLT better, rewarding efforts, improving work satisfaction through a sense of doing work one is ‘fitted for’.\textsuperscript{19}

Discovering how learning is made possible, and how to teach more knowledgeably, involves engagement with manifold aspects of teaching and learning. How teaching and learning works is an area subject to a plethora of theories approaching the subject in highly abstract and scientific ways. An appreciation of their ontologies, epistemologies, and methodologies helps to navigate and critically engage with them in making choices about how to enable learning. This can involve identifying the learning objectives, teaching and learning methods, methods for assessment and evaluation. Giving an account of these for external scrutiny helps to make connections between theories, methods, and outcomes, assess the quality of teaching, and provides information to practitioners to teach more knowledgeably. Giving an account provides opportunities for learners to comment on their learning experiences, and to compare those insights with others derived from SoTL. Further, exposing SoTL to external scrutiny not only provides opportunities for comment and critique, but also can make positive contributions to perceptions of the status of teaching and PLT, by demonstrating the thoughtful, informed and methodical approach undertaken in teaching and learning work. In this study, several interviewees commented that teaching-only PLT work was not accorded support, status, and prestige connected to academic legal research, and that SoTL work was similarly lacking in status. Recognising this work as part of the dual professionalism of PLT practitioners as lawyers and educators involves practitioners conceptualising their practice as encompassing SoTL activities, and PLT providers providing support and resources to them. From a pragmatic perspective, given the costs associated with PLT, together with PLT’s regulation by the admission bodies and higher education statutory requirements, it is reasonable to expect external evaluation of teaching and learning practices in PLT. In that context, it is prudent to engage with SoTL on a consistent basis to produce knowledge about the effectiveness of teaching and learning practices in PLT, in readiness for the review of existing policy and formulation of new policies concerning legal education. In that context, it useful to recall that the purposes of the Legal Profession Acts that mandate PLT as an eligibility requirement for admission to the profession underscore the aim to protect lawyers’ clients and the administration of justice, and to improve legal services and the learning experiences of lawyers-to-be. Lastly, but certainly not least, I contend that PLT practitioners’ personal satisfaction with their teaching and learning work is partly contingent on succeeding as teachers in informed, professional and visible ways.

\textbf{B A Reflexive-Dialectical Approach}

My approach is constructivist, focusing on how knowledge is constructed through perceptions of the external world.\textsuperscript{20} I adopt a ‘reflexive-dialectical’ construction,\textsuperscript{21} involving ‘individualist’ and ‘extra-individualist’ accounts,\textsuperscript{22} focused on ‘subjective-objective’ and ‘individual-social’ relations and connections.\textsuperscript{23} I accept Kemmis’ proposition that ‘practice has extra-individual features’, without reference to which practice, or changes in practice, cannot be understood.\textsuperscript{24} I incorporate practice as ‘professional, theoretical or scientific knowledge’; ‘professional craft

\textsuperscript{18} For example Legal Profession Act 2004 (Vic) s 2.3.2.
\textsuperscript{22} Theodore R Schatzki, Karin Knorr Cetina and Eike Von Savigny (eds), The Practice Turn in Contemporary Theory (Routledge, 2001).
\textsuperscript{23} Kemmis, above n 21.
\textsuperscript{24} Ibid.
knowledge, or knowing how to do something’; and ‘personal knowledge about the self as a person and in relation with others’.25

C Bourdieu’s Thinking Tools

In working with individual and extra-individual dimensions of practice I draw on ‘thinking tools’ described by Pierre Bourdieu.26 These tools include field, habitus, capitals, symbolic power and doxa. In Bourdieu’s nomenclature, a ‘field’ is a ‘locus of struggles’, in which individual or organisational agents strive to acquire (or monopolise) certain capitals to maintain or improve their position.27 Capitals include economic capital, ‘social capital’ and ‘cultural capital’.28 Social capital identifies accumulated ‘actual or potential resources’ connected to a ‘durable network’ of institutionalised relations of ‘mutual acquaintance and recognition’, e.g. Private school alumni, exclusive social clubs, professional memberships.29 Cultural capital might be ‘embodied’, ‘objectified’, or ‘institutionalised’.30 Dispositions of the mind and body (e.g. thinking and acting like a lawyer, years of professional experience), are ‘embodied’ cultural capital.31 Cultural artefacts such as artworks, books, law reports and statutes are ‘objective’ cultural capital.32 Academic and professional qualifications are examples of ‘institutionalised’ cultural capital.33 In academia, cultural artefacts such as publications in peer-reviewed journals or books might be more valuable that professional practice experience, whereas the reverse might be true in some areas of professional practice. The valorisation of specific items of capital endows them with degrees of ‘symbolic power’, or prestige, by which those in the field structure their reality and identify dominant individuals or organisations.34 Decisions regarding the appointment of a chief justice, for example, might be conceptualised in terms of social and cultural capital, and symbolic power. Habitus involves dispositions unconsciously and collectively inculcated within field agents by an ‘education system’,35 involving ‘primary’ and ‘secondary’ pedagogies.36 Primary pedagogies involve inculcation of dispositions (eg values, norms, tastes, dialects) through family and community; secondary pedagogies involve institutional education and social structures (eg the law, the legal profession and academia).37 Doxa is that which emerges when the discursive operations of field, habitus, capitals and symbolic power pass from ‘explicit’ beliefs that define ‘what ought to happen’ (orthodoxy) to the unconscious ‘immediate agreement elicited by what is self-evident … a normalcy in which realisation of the norm is so complete that the norm itself, as coercion, simply ceases to exist’38 Practice, as conceptualised by Bourdieu, is a product of habitus, capital and field.39

30 Ibid.
31 Ibid.
32 Ibid.
33 Ibid.
34 Ibid.
37 Ibid.
38 Ibid.
These are useful ‘thinking tools’ for studying the individual and extra-individual dimensions of practice.40

D Certeau’s ‘Heterological Science’

Bourdieu’s tools, in my opinion, give insufficient attention to notions of agency and alterity, although Bourdieu did concede:

The dominated, in any social universe, can always exert a certain force, inasmuch as to belong to a field means by definition that one is capable of producing effects in it (if only to elicit reactions of exclusion on the part of those who occupy the dominant positions), thus of putting certain forces into motion.41

Michel de Certeau (Certeau), however, framed a heterological science which explicitly interrogates alterity in everyday practice.42 Certeau’s approach is to ‘make explicit’ the modus operandi of ‘dominated’ individuals, in which ‘creative practices’ comprise a ‘poetics’ of resistance against domination (de Certeau 1984, p. 156).43 Certeau also allied structures with pedagogy, ‘all institutions are pedagogical, and pedagogical discourse is always institutional’.44 In Certeau’s framework, structures adopt overlapping ‘strategies’ to assume dominance45 (eg historiography, specialisation, nomination, universality, and colonization).46 Through historiography, structures normalise some practices, and other alterity, by ‘objectifying and organising representations’.47 ‘Specialisation’ of disciplines facilitates their distribution among dominant institutions, which ‘insure’ disciplines against ‘accidents’ of alterity.48 ‘Nomination’ involves identification of that which is ‘noble’ or ‘rotten’.49 Institutions assume control of admission procedures, disciplinary processes and sanctions, ‘to produce acceptance’ of a discourse, and initiate subjects into the ‘reality’ of practices.50 ‘Nomination’ or ‘naming’ identifies, colonises, censors, and confines alterity.51 For Certeau, dominant strategies are covertly challenged by tactical alterity. Possibly, ‘walking the city’ is the most famous and concrete of Certeau’s examples of alterity, in which Certeau describes ‘birds-eye’ and ‘kerb-side’ views of pedestrian practices,52 circumventing gridded pavements, taking shortcuts, secret routes, desire paths, ‘indirect’ or ‘errant’ trajectories obeying their own logic’.53 Certeau’s approach admits a multi-vocal, multi-perspectival, conception of alterity in practice, involving ‘Brownian movements’ of ‘inertia’,54 ‘appropriations’, ‘mentalities’, ‘deviations’, ‘nuances’, and ‘microinventions’.55 Certeau’s approach involves studying a discipline, its discursive operations, and the relation between them, in the context of specific times, subject matter, and place.56

41 Wacquant, above n26, 36.
42 Michel de Certeau, The Practice of Everyday Life (Steven Rendall trans, University of California Press, 1984); Michel De Certeau, Heterologies: Discourse on the Other (Brian Massumi trans, University of Minnesota Press, 1986).
43 Certeau (1984), ibid, xi-xii, 156.
44 Certeau, Heterologies, ibid.
45 Certeau, Practice, above n 42.
46 Certeau, Heterologies, above n 42.
47 Ibid.
48 Ibid.
49 Ibid.
50 Ibid.
51 Ibid.
52 Certeau, Practice, above n 42.
53 Ibid.
54 Ibid.
56 Certeau, Practice, above n 42.
I treat the nomination of PLT as a vocationalist strategy as an instant of enclosure, which obscures struggles that marginalise agency, alterity, multi-vocality, and multi-perspectivity in PLT practice. This enclosure constrains, but fails to repress, PLT practitioners’ struggles to carve out alternate emergent trajectories in legal practice.

III Extra-Individual Dimensions: PLT and Legal Education ‘History’

A PLT in Australian Legal Education History

Institutional PLT emerged in Australia during the 1970s. Within the context of a profession descended from centuries-old English common law tradition, it is but a baby. In this part, I sketch PLT’s place in Australian legal education history, and argue the struggles of dominant players — the judiciary, profession, and academia — combine to enclose PLT as vocationalist, critique-free and non-academic.

English common law was received into Australia, embodied at first in English ‘settlers’ and later, by statute. Reception, largely uncritical, includes legal doctrine such as stare decisis and reliance on precedent. At first, the education and admission of lawyers remained centred in England, Ireland or Wales, restricting the profession to a monied minority. When training commenced in Australia, it was undertaken under articled clerkships supervised by qualified practitioners, for which clerks paid their supervisor a fee. Later, it was possible to combine a law degree with a reduced period of apprenticeship. By the 1950s, law schools were established in several jurisdictions, and the ‘academic lawyer’ emerged as a professional trajectory. The 1960s witnessed the rise of critical approaches to law. The Martin Report criticised deficiencies in the articled clerkship system, and the Trew Report’s survey of NSW articled clerks supported those criticisms. The Ormrod Report and McDowell Report were instrumental in conceptualising legal education as three stages: academic/intellectual, pre-admission institutional PLT with work experience, and post-admission continuing legal education. The ‘compartmentalisation’ of legal education was adopted literally by regulators,

65 Chesterman and Weisbrot, above n 60.
66 Ibid.
67 Martin Report, above n 64.
71 Ormrod Committee, above n 69, [185].
who resisted integrated approaches to legal education and PLT. From the 1970s, non-university and university-based PLT courses were established in most jurisdictions.

The introduction of academic legal education was not smooth sailing. Early law schools struggled for acceptance and resources, such as teaching venues and faculty. Acceptance of the LLB as qualification for admission was subject to protracted judicial and political negotiations. The judiciary managed assessment procedures for academic qualifications for many years. An underlying preference, manifest in judicial and professional statements, was for apprenticeship through articulated clerkships, for example:

[Y]oung men gain in morale by feeling that they are not still just pupils who after further tedious years will some day be lawyers, but that already they are in the lower ranks of their guild; that they are doing something, not merely learning to do something; that by attendance in court, and by seeing particular matters through in the office, they are participating in the working of the law; that, in the medieaval sense of the word, it is already their mystery.

Innovations, or deviancy, in academic curriculum prompted clashes between academia and judiciary (eg Adelaide University Law School and South Australian Supreme Court judges in 1973; the NSW Admission Board and University of NSW Law School in 1983 (‘retribution for [a] mildly critical thrust’); and teachers’ participation in ‘law reform activities’). In 1987, the Pearce Committee pondered whether Macquarie University Law School’s law course was ‘too deviant or too short on “hard law” to meet admission requirements. Feelings about intellectualisation and critical thinking in legal education were at times acrimonious:

In the whole of Australia … there are only one or two academic teachers of any real value … There are, to be sure, multitudes of academic homunculi who scribble and prattle relentlessly about such non-subjects as criminology, bail, poverty, consumerism, computers and racism. These may be dismissed from calculation: they possess neither practical skills nor legal learning.

B Enclosure of PLT

Arguably, given professional and judicial discomfort with intellectualism and critique, expectations for PLT were that it would be practical, vocational, instil professionalism in trainees, and produce entry-level lawyers ready for work. Pearce observed that PLT teaching was done by members of the profession, and this was ‘probably the most significant’ factor ‘in maintaining real links between the courses and the profession’. Compartmentalising PLT out of the academic domain might draw fire away from law schools with academic,
non-vocational, preferences. Some law schools’ decision to integrate PLT with the academic degree was described as, ‘clearly a market-driven development’. The Johnstone Report quoted one ‘senior law academic’ as characterising a ‘skills focus’ in law school as:

We’ve acceded absolutely. We’ve tugged the forelock to the profession, and I think this is another reason for actually dumbing down what’s happening with the law schools now …

The Johnstone Report commented that ‘some law schools clearly did not believe PLT was within their domain’, quoting one ‘Law Dean’: ‘We don’t see it [PLT] as part of our role. It wasn’t historically and we don’t need to move into it’. Nickolas James has written extensively on ‘vocationalism’ as a discursive operation in legal education, involving:

[The] set of statements about legal education produced by law schools, law teachers and legal scholars which prioritised the teaching of legal skills and emphasised the importance of employability as an objective of legal education.

James describes PLT and clinical legal education is a ‘vocationalist strategy’, ‘an explicit effort to train students as future employees … exercised expressly to accord with the perceived needs of employers’. I contend that nomination of PLT as a vocationalist strategy operates as enclosure, marginalising alternative accounts involving agency and alterity. I acknowledge that James adopts Foucault’s theory of power relations focused on panoptic extra-individual dimensions, and I offer an alternative multi-vocal and multi-perspectival conception of PLT involving both extra-individual and individual dimensions.

I draw on Bourdieu to help conceptualise the extra-individual dimensions of PLT. The judiciary, profession, and academy are allied by shared interests in preserving PLT as vocational, non-academic, and critique-free. They are organisational players in a juridical field, operating to maintain or improve positions. The judiciary, proximate to power, protects its jurisdiction to determine disputes and to control its officers. The profession, proximate to commerce, guards its autonomy, its right to represent disputants, and to counsel business and commercial activity. The academy, as intellectual gatekeeper, safeguards its recently acquired authority to inculcate intellectual prerequisites for admission. These operations underscore what is self-evidently worth knowing and doing, the field’s doxa.

What place is there for SoTL in this? Why is this a question? I contend that knowledge about learning professional skills invites critique of practice for currency, effectiveness, improvement, and confronting doxa. PLT’s effectiveness has implications for protection of clients, administration of justice, and the quality of legal work. In 1987, the Pearce Committee observed:

[A tendency] to emphasise the mastery of practice as an aim in itself without looking to the reasons why certain practices are followed and asking what might be better practice in the given circumstances …

86 Richard Johnstone and Sumitra Vignaendra ‘Learning Outcomes And Curriculum Development In Law — A report commissioned by the Australian Universities Teaching Committee (AUTC)’ (Australian Universities Teaching Committee 2003) (Johnstone Report). 87 Ibid. 88 Ibid. 89 James, above n 4; see also his ‘Good Law Teacher: The Propagation of Pedagogicalism in Australian Legal Education’ (2004) 27 UNSW Law Journal 147; ‘Why has vocationalism propagated so successfully within Australian law schools’ (2004) 6 University of Notre Dame Australian Law Review 41; ‘Liberal legal education: the gap between rhetoric and reality’ (2004) 1(2) University of New England Law Journal 163; ‘The Marginalisation of Radical Discourses in Australian Legal Education’ (2006) 16 Legal Education Review 55; and ‘“How dare you tell me how to teach!”: Resistance to educationalism within Australian law schools’ (2013) 36(3) University of New South Wales Law Journal 779. 90 James, above n 4. 91 Ibid. 92 Ibid. 93 Critique could emanate from practitioners, academics and PLT practitioners who engage with SoTL or other forms of scholarship around practical legal training. For example, such critique could focus on professional practices, teaching and learning professional practices, and regulation and policy concerning PLT. 94 I conceptualise this as including social justice and equal opportunity. 95 Pearce Report, above n 81 (emphasis added).
Any practical understanding of the work of a solicitor, even at its most basic, cannot be seen in terms of an objective never-changing body of knowledge. It is based on subjective values and standards and any statement of aims and objectives should make this clear... it points out the human element in practical training.96

Enclosure of PLT marginalises opportunities for practice research around professional practice, and teaching and learning practice. Are PLT practitioners condemned to ‘soldier on’, reproducing practices, preparing entry-level lawyers for professional consumption? Perhaps not — in Part D I draw on interviews with PLT practitioners to explore individual dimensions of PLT practice and their collective singularities around teaching and learning in PLT.

IV INDIVIDUAL DIMENSIONS: PLT PRACTITIONER TRAJECTORIES AND DISPOSITIONS

A Interviews with PLT Practitioners

To explore individual dimensions of PLT practice, I recorded semi-structured interviews with thirty-six PLT practitioners in Australia (‘the interviewees’).97 Invitations to participate were emailed to one hundred potential participants identified from PLT provider websites. Additional invitations were posted on social media (LinkedIn and Twitter). Most of the thirty-six participants responded to the emailed invitations. The interviewees were located in six jurisdictions and affiliated with fourteen PLT courses (Figure 1).

![Figure 1: Interviewees by Location and Affiliation](image)

The PLT courses are de-identified in Figure 1 because anonymity was a condition of participant consent, to encourage interviewees to speak freely. Duration of the interviews was usually 60–90 minutes and they were largely conducted face-to-face, although Skype and telephone were used for some. Recordings were transcribed and analysed using NVivo10 computer-aided qualitative data analysis software, and emergent and explicit coding techniques.98 In this

96 Ibid.
97 Ethics approval obtained before interviews: Deakin University Human Research Ethics Committee, Certificate 2013–083.
qualitative research, the aim is to collect data that provides multi-vocal and multi-perspectival insights, with less emphasis on quantitative concepts such as sample size, response rate, and statistical significance. Some statistical methods are used, however, to generate lines of inquiry and to aid description of insights.

The interviews involved a semi-structured approach. The structure of the overall format included initial open-ended questions, intermediate questions, and ending questions.\(^\text{99}\) Semi-structured interviews, however, do not require detailed interview schedules, and can involve ‘an incomplete script’, an interviewer might prepare some questions but there is ‘a need for improvisation’.\(^\text{100}\) Questions should be framed to be ‘sufficiently general to cover a wide range of experiences as well as narrow enough to elicit and explore the participant’s specific experience’.\(^\text{101}\) Interviewees were asked about family connections to the legal profession and their parents’ educational background. They were asked about how they came to be working in PLT. They responded to questions such as, ‘Is thinking like a lawyer different to thinking like a teacher?’ ‘Are you attracted to teaching work? Why?’ Interviewees discussed their interest and capabilities regarding SoTL activities, and symbolic supports and resources their organisation supplied for SoTL.

### B Trajectories, Family and Education

Previous socio-economic studies of Australian lawyers and law students indicate they are more likely than the general population to have familial connections to the legal profession, to attend high-status private secondary schools, and have tertiary-educated parents with professional or managerial occupations.\(^\text{102}\) These studies found that between 32 per cent and 54 per cent of participants had familial connections to lawyers. Between 35 per cent and 47 per cent of participants had university-educated parents. In my study, of thirty-three PLT practitioners who disclosed information about their parents, approximately 6 per cent had familial connections to lawyers, and 66 per cent were the first family member to join the legal profession. Less than 29 per cent had university-educated parents; nearly half (47 per cent) were a first university-educated family member.

Bourdieu argues that family and educational background, and social connections, are social and cultural capital\(^\text{103}\) on which individuals draw to take up and hold positions in a field. As primary and secondary pedagogies, family and education inculcate dispositions within individuals as embodied capital, supply institutional capital through educational qualifications, and durable social networks as social capital, supporting individuals’ professional trajectories.\(^\text{104}\) Consistent with this, Weisbrot observed: ‘some young lawyers come to the profession with the personal and clan contacts, self-confidence, financial safety net and private sector orientation necessary to get on’ in their careers.\(^\text{105}\) Tomasic found a ‘significant correlation’ between lawyers’ first and last employment position, with ‘limited options available’ after the first position — suggesting the first employment position tended to define the practice area (eg property, litigation, government) in which lawyers worked throughout their career.\(^\text{106}\) He also identified certain practice areas,
‘client types’, and practice ‘cultures’ that tend to cluster together. Lawyers involved in certain types of legal work were more likely to adopt one or the other ‘value orientation’. Those value orientations: ‘cynical realism’, ‘laissez-faire’, and ‘Gemeinschaft’, emphasise commercialism, professional autonomy, and protection of professional community. Overseas scholars made similar findings regarding social stratification and trajectories in the profession (eg Jewel and Kay and Hagan). Given Tomasic’s findings about ‘consistently clear’ patterns of educational and family backgrounds of lawyers within certain practice areas, and the interviewees’ profiles, PLT practitioners in PLT practice might represent an emergent trajectory, further challenging ‘the frequently articulated myth of a homogenous legal profession’.

C Interviewees’ Attributes

The interviewees were a diverse group. There were near-equal affiliations to university-based and non-university-based PLT providers. The proportion of females to males was 1.4:1. Post-admission practice experience (PAE) ranged from 0–30+ years (median = 20 years). Median PLT teaching experience was 8 years, with a range of 2–30+ years. Interviewees were in clinical practitioner, lecturer, senior lecturer, and leadership roles. The majority of interviewees indicated an interest in pursuing scholarly activity connected with their teaching work, with about half of these self-assessing as capable of doing so (several were interested in research training). The majority of interviewees indicated their employer gave symbolic support for SoTL, however interviewees overwhelmingly identified time as insufficiently allocated to SoTL, followed by funding, then personnet (assistance and advice). Few interviewees were resistant or ambivalent about engaging with SoTL.

107 Ibid.
108 Ibid.
109 Ibid.
112 Roman Tomasic, Social Organisation, above n 102.
113 Ibid.
114 For example, the Leo Cussen Institute and the College of Law Australia and New Zealand are non-university PLT providers, whereas the Australian National University, Bond University, Newcastle University, Queensland University of Technology, and the University of Technology, Sydney, offer PLT extensions to their law degree courses. Arguably, university-based providers operate within an academic research culture under higher education regulation and funding arrangements, whereas non-university-based providers do not. For example, Chapter 2 of the Higher Education Standards Framework (Threshold Standards) 2011 made under subsection 58(1) Tertiary Education Quality and Standards Agency Act 2011 (Cth) distinguishes ‘Australian University’ from other higher education providers. A ‘university’ ‘self-accredits and delivers undergraduate and postgraduate courses of study that meet the Qualification Standards across a range of broad fields of study (including Masters Degrees (Research) and Doctoral Degrees (Research) in at least three of the broad fields of study it offers) … is authorised for at least the last five years to self-accredit at least 85 per cent of its total courses of study, including Masters Degrees (Research) and Doctoral Degrees (Research) in at least three of the broad fields of study … undertakes research that leads to the creation of new knowledge and original creative endeavour at least in those broad fields of study in which Masters Degrees (Research) and Doctoral Degrees (Research) are offered.’
115 Maxwell and Pastellas, above n 5.
116 Anecdotally, different PLT providers value PAE differently. Some value lengthy PAE as creditable evidence of ‘know-how’. Others value less PAE, preferring practitioners with memories of entry-level experiences and empathy for students’ experiences. In the context of Bourdieu’s theories about reproduction in culture, education and society, lengthy PAE might be construed as signifying entrenched dispositions.
117 There was a mix of ‘old hands’ with insider knowledge about PLT history and regulation, and newcomers in the formative stages of PLT practice.
118 Some ‘clinical practitioners’ reported being expressly discouraged from engaging in research. Some practitioners described themselves as ‘academics’, but most did not. Almost all interviewees identified as lawyers first, regardless of their teaching role.
D) Interviewees’ Trajectories to PLT Practice

In context of trajectories, I asked interviewees how they came to PLT practice. Figure 2 displays a cluster analysis of responses of word similarity between themes. Theme names are indicative paraphrases of interviewee statements. Themes with the highest correlation coefficient are paired and themes with lower correlation coefficients appear further apart. Themes with the highest number of correlations appear to the right of the figure and those with lower correlations appear towards the left of the figure.

**Figure 2: Cluster Analysis — Trajectory To PLT Practice Themes**

The cluster with most sources includes themes of leaving legal practice to work in PLT for *family or lifestyle reasons*, started as a *casual* teacher, being expressly *attracted to teaching or mentoring*, or being *suggested by a colleague or friend*. These themes often overlapped (eg A friend suggested teaching because, ‘you like teaching / you’d like that / you’d be good at that’). The connection between *family/lifestyle reasons* and *started as a casual* was linked to comments by practitioners with young families seeking flexible arrangements. This is consistent with Pastellas and Maxwell’s observations in 2004. Interviewees attracted to teaching clustered closer to *avoiding academia* than *seeking a transition to academia*. Three interviewees were *unhappy in practice*, citing an ethical crisis (‘I had to get out’), office culture issues, or inability to detach from a specific practice area (‘I was stuck with doing …’). Anecdotally, PLT practitioners are sometimes described as *refugees from practice*, but I contend that this is overly simplistic. For example, being *attracted to teaching or mentoring* was much more prevalent than *unhappy in practice*. An attraction to teaching (not academia), and lifestyle considerations, were most prevalent in interviewees’ trajectories to PLT. Arguably, the monothematic *refugee from practice* trope obscures complex forces in play.

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119 Figure 2 represents a cluster analysis using Jaccard’s coefficient: Paul Jaccard, ‘The Distribution of the Flora in the Alpine Zone’ (1912) 11(2) New Phytologist 37. See also QSR NVivo, How are Cluster Analysis Diagrams Generated <http://help-nv10.qsrinternational.com/desktop/deep_concepts/how_are_cluster_analysis_diagrams_generated_.htm>.

120 Maxwell and Pastellas, above n 115.

121 A small number of interviewees (5) maintained part-time professional practice.
Interviewees’ Attraction to Teaching

Interviewees were prompted to discuss their attraction to teaching. Figure 3 displays themes clustered by similarity:

Figure 3: Cluster Analysis — Attraction To Teaching Themes

Here, themes clustered to two parent branches. The uppermost parent discloses intrinsic/subjective themes (feel, love, liked, enjoyed). The other parent includes extrinsic/objectifying themes (teaching was/is, PLT [is] more ...). Generally, interviewees used affective terms in describing attraction to teaching before, or discovered after, starting PLT practice. Further, interviewees distinguished affect from rationalism in responding to another question: Is thinking like a lawyer different to thinking like a teacher?

Is Thinking Like a Lawyer Different from Thinking Like a Teacher?

Much legal education literature worries at teaching law students how to think like a lawyer.122 Thinking like a teacher seems under-represented. Searching Google Scholar for the phrase, thinking like a lawyer elicited more than 2,900 references and 80 relevantly titled articles in English. By comparison, a phrase search for thinking like a teacher elicited just over 300 references, with eight relevantly titled articles (Figure 4).123


123 Searches performed 21 May 2014.
Figure 4: Screenshots — Google Scholar Search Results

In examining ‘thinking styles’ and law student well-being, O’Brien et al observed:

There has been a great deal of discussion about what it means to think like a lawyer. For some, thinking like a lawyer requires a ‘complex understanding of the moral dimensions of experience’. To others, it is the ‘ability to think precisely, to analyse coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of law’. Welch Wegner describes the concept as aggregating ‘the process of reasoning, the nature of the law, and the role of lawyers’. It has been described as a ‘crucial focal point of professional identity’.124

Here, lawyerly professional identity is linked to a thinking style involving complexity, morality, precision, coldness, detachment, manipulation, mechanism, and rationality. Such qualities are associated with potential detriments in lawyers’ and law students’ well-being.125

Lowenstein and Brill observe many ‘have written about learning to think … like a lawyer’, but there is ‘some debate about a similar purpose in educating teachers’.126 Lowenstein and Brill conceptualise thinking like a teacher as involving reflective practice, envisaging classrooms as ‘places for thinking’, ‘knowing students … curriculum … the purpose of education’, with critical reflection ‘as a foundation for trust’.127 It is a ‘democratic trust between teachers and students’, necessary for an ‘emotional climate’ in which change, and the risk of failure, is valued.128

These conceptualisations of thinking like a lawyer and thinking like a teacher are different. Did interviewees conceptualise these thinking styles in similar ways? Of all questions asked during interviews, Is thinking like a lawyer different to thinking like a teacher? gave interviewees most pause. Responses were often preceded by a long pause and/or an exclamation (eg ‘Oh! What a difficult/interesting/strange question!’). For simplicity, I group responses as Yes (it is

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127 Ibid.

128 Ibid.
different), No (it is not, or should not, be different), and Yes & No (there are similarities and differences). Figures 5–8 visualise cluster analyses of the responses.

Figure 5: Cluster Analysis — Lawyer and Teacher Thinking IS Different

Figure 5 (Yes cluster) shows teaching is emotional, empathetic and teaching is facilitative, interactive were prevalent themes, followed by lawyering is intellectual and techno-rationalist. Several interviewees indicated both thinking styles involved critical thinking. This clustered close to teaching involves introspection, reflection, and teaching involves more freedom (than lawyering). While both thinking styles involved critical thinking, teacher thinking clustered to theoretical, freedom, introspection and reflection, whereas lawyer thinking is strict, rule-based, consistent with the literature cited above. Some themes clustered around Yes & No responses (Figure 6):

Figure 6: Cluster Analysis — Similarities and Differences in Thinking
Similarities and differences included communication skills, and client-centred and student-centred approaches to practice. Discussions about PLT teaching as close to practice alluded to the importance of thinking like a lawyer, and challenges in synthesising thinking styles. I contend this challenge relates to the dual professionalism of PLT practitioners as lawyers and educators. Interviewees identified lawyer thinking as adversarial, and some identified teaching successes as more personally satisfying than lawyering successes. The Yes and Yes & No clusters shared correlations with other themes (Figure 7):

Although these themes were less prevalent, they warrant attention. Interviewees who described being mentored in teaching skills clustered to teaching is a different skill and knowledge to lawyering and teaching uses different thinking tools. One interviewee’s account of developing understanding about teaching, ‘You don’t know what you don’t know’, recalled the much-cited ‘Dunning-Kruger effect’. One cluster of themes, lawyering is commercially focused, PLT requires ability to think like a lawyer, and lawyering and PLT teaching are intertwined, recalls the double professionalism mentioned above, and evoke a pragmatic approach to bridging professional practice and PLT teaching work. The theme, teaching involves personality, implies that lawyering does not! The least prevalent concepts clustered to the No theme (Figure 8):

Figure 8: Cluster Analysis — Lawyer and Teacher Thinking Is NOT Different

Two interviewees expressly stated that there was no difference in thinking style, or ‘ought not to be’. One focused on risk, and the other on teaching is natural, easy. Risk arose from the interviewee’s concern about students’ readiness for real life, and seemed to pervade the interviewee’s thinking. The other interviewee contended that teaching is natural, one has ‘either got it or not’, and theory of teaching was ‘useless’. Conceptually, the two interviewees adopted a purely experiential, practice is the pedagogy, approach.

Many interviewees identified distinct differences between thinking like a lawyer and thinking like a teacher. Challenges facing interviewees included knowledge gaps about teaching and learning, and ways to synthesise thinking styles in PLT practice. Shared themes emerged from interviewees’ responses. There were, however, multi-vocal and multi-perspectival qualities in this dimension, resistant to a monothematic nominalisation of PLT.

V Conclusions: Soldiers, Double Agents and SOTL

I have argued that nomination of PLT as a vocationalist strategy operates to enclose PLT as a non-academic and critique-free field. I identified historical struggles between dominant players — judicial, professional, and academic — with an interest in maintaining this enclosure. I’ve adopted soldiers and double agents as metaphors to dramatise a point argued here about heteronomy and autonomy in PLT. If PLT is a vocationalist strategy, then arguably PLT practitioners are soldiers deployed to achieve strategic aims: ‘training students … for perceived needs of employers’.130 It is a strategy to which an industrialised approach to legal education might be, or is, adopted.131 Certainly some interviewees spoke of ‘top-down’, ‘bottom-up’ pressures in which PLT practitioners feel pressure from the top (PLT practitioners’ and students’ employers) and the bottom (students) to expedite PLT to increase completion rates and to avoid prolonging PLT so students are available to work as quickly as possible.

However, the enclosure of PLT by its nomination as a vocationalist strategy does not completely succeed, partly because PLT practitioners operate with double-agency. This double-agency is resident in individuals forging a still-emergent trajectory as PLT practitioner, embodying a dual professionalism as lawyer and educator, striving to synthesise thinking like a lawyer and thinking like a teacher. From a sociological perspective, preliminary indications are that PLT practitioners might share a collective habitus, drawing on dispositions inculcated via familial, educational, and professional backgrounds that diverge from others. For many, their dispositions gravitated them towards teaching. Many interviewees were the first lawyer in their family — indeed the first university-educated member. The challenges faced to succeed in what has long been regarded as an elite profession implies intellectual resilience and

130 James, above n 4.
131 Otto Peters, ‘Distance education and industrial production: a comparative interpretation in outline’ in D Stewart, D Keegan and B Holmberg (eds), Distance Education: International Perspectives (Croom Helm, 1983) 95.
resourcefulness. Resourcefulness underlies a clever tactical turn — the move to PLT practice exploits embodied cultural capital in being a lawyer, amplifying the symbolic power of taken for granted professional skills, by transfer to PLT practice. The cost of transfer is loss of status when PLT is treated as low status in comparison with other practice areas such as academic research, professional areas such as litigation or business law, or the Bar.\(^{132}\) The cost appears to be offset by the opportunity to have a personality, be facilitative, interactive, and empathetic, and to enjoy teaching successes. Overwhelmingly, interviewees cared about their students, and their PLT practice.

Teaching success connects double-agency in other ways. Some interviewees appropriated PLT towards facilitating social justice, diversity, and equality of opportunity in the legal profession. They described instances of autonomy, diverting attention and resources to students needing extra support. In this context, SoTL was connected to notions of social justice, with interviewees’ interest in SoTL heightened by teaching and learning problems that pro forma approaches failed to resolve. Those instances motivated individuals to learn more about how learning is made possible and sometimes confronting the doxa.

Many interviewees were interested to engage with SoTL, but need support to do so, particularly training to improve teaching knowledge and research capabilities and resources such as time, funding, and personnel. Several described questions or problems they would pursue given opportunity and support. Some described a double bind in which PLT teaching was perceived to be low status. SoTL could raise the status of PLT, but interviewees perceived SoTL lacks support and status too. To counter this, we could re-imagine PLT practice as a teaching-research space of discovery and synthesis.\(^{133}\) In that space, and with support, PLT double agents can synthesise, through practice research, intellectual domains of rigour, know-what, and external validity, with vocational domains of relevance, know-how and internal validity.\(^{134}\) Imagine PLT as more than a vocationalist strategy aimed at satisfying employers. Re-imagine PLT practitioners as canny double agents operating in a multi-vocal, multi-perspectival field of practice, engaged in SoTL, scrutinising professional practice, and teaching and learning in practice.

It is not usual to apply the statistical concept of limitations to qualitative research; however, it is acknowledged that this is a relatively small study and that a more extensive study would provide opportunities to tease out further insights and to explore their nuances more thoroughly. This article does highlight how using sociological and theoretical theories to study individual and extra-individual dimensions of PLT practitioners’ engagement with SoTL not only problematises the notion of PLT as a vocationalist strategy, but generates manifold potential lines of inquiry concerning PLT practitioners and teaching and learning in PLT.

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\(^{132}\) As mentioned previously, the Johnstone Report quoted legal academics’ descriptions of PLT as ‘dumbing down’ legal education. In the present study, some university-based interviewees described how teaching-only PLT practitioners did not enjoy prestige and advancements accruing to doctrinal or discipline-specific researchers (one interviewee described academics’ perceptions of PLT practitioners as ‘mavericks’). Bibliometric analysis (the author, doctoral thesis, forthcoming) of Australian legal education literature concerning PLT demonstrates that it lacks visibility and influence due to low citation counts and the lack of rankings for legal education journals.


\(^{134}\) Stokes (1997) above n 133.
SATISFYING THE TAXPAYER’S BURDEN OF PROOF
IN CHALLENGING A DEFAULT ASSESSMENT — THE
MODERN LABOURS OF SISYPHUS?

ROBIN WOELLNER* AND JULIE ZETLER**

ABSTRACT

It is well established that pursuant to Taxation Administration Act 1953 (Cth) ss 14ZZK(b)(i) and 14ZZO(b)(i), a taxpayer seeking to challenge an ATO income tax assessment before the AAT or Federal Court respectively bears the burden of proving that the ATO’s assessment is excessive and also of proving ‘what the assessment should have been’.

While this task may be approached in various ways, depending on the circumstances, it is clear that it requires the taxpayer to do more than merely show that the ATO made an error in the assessment process. The taxpayer must establish positively the alteration which needs to be made to render the assessment correct and show that this correct amount is less than the amount assessed.

Under the ‘normal’ assessment pursuant to under s 166 ITAA 36, where the taxpayer has lodged a return and the assessment is based upon that return, the ATO will generally proceed by determining the taxpayer’s assessable income and subtracting allowable deduction and other amounts in order to determine the taxpayer’s taxable income.

However, where the taxpayer has not lodged a satisfactory return, the ATO may make a ‘default’ assessment under s 167 ITAA 36. This section provides that if ‘any person makes default in furnishing a return; or … the Commissioner is not satisfied with the return furnished … [then] the Commissioner may make an assessment of the amount upon which in his or her judgement income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of section 166’.

As s 167 default assessment therefore does not involve calculation of the taxpayer’s assessable income and allowable deductions, but rather an estimation of the taxpayer’s ‘taxable income’ based on asset betterment, T account, industry benchmarks or other bases which will almost inevitably not be precisely correct in any particular case.

Nevertheless, the taxpayer’s task is still to demonstrate that the assessment is excessive, and to satisfy this burden of proof, the case-law makes it clear that the taxpayer must avoid the ‘fatal flaw’ of merely demonstrating that the ATO may have made an error in the assessment process, and must instead establish positively what their taxable income was, and demonstrate that this amount was less than the amount assessed by the ATO.

Given the clarity and simplicity of the principles involved, it is puzzling that taxpayers continue to attempt merely to challenge elements of the ATO’s calculations — a ‘fatal flaw’ which condemns them to almost certain failure.

The lessons from the past are crystal clear, and a recent series of decisions in Gashi, Rigoli and Mulherin demonstrate that taxpayers and their advisers ignore these lessons at their peril. As has been said, those who do not learn from history are doomed to repeat it.

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I INTRODUCTION

Where a taxpayer seeks to challenge a default assessment in the AAT or Federal Court, ss 142ZK(b)(i) and 142ZO(b)(i) of the Taxation Administration Act 1953 (Cth) effectively reverse the burden of proof and impose on the taxpayer the burden of proving that the Commissioner’s assessment is excessive, and what the assessment should have been. The rationale for this reversal of the burden of proof is generally said to be that ‘the facts in relation to [the taxpayer’s] income are peculiarly within the knowledge of the taxpayer’.

It is well established that in order to satisfy this burden, it is not sufficient for a taxpayer merely to show that the ATO has made a mistake in the process of its assessment — the taxpayer must establish definitively what their taxable income was, and show that this is less than the amount assessed by the ATO.

These are not conceptually complex or ambiguous provisions; their requirements are clear and are supported by equally clear guidelines in court decisions. Yet, despite their clarity, taxpayers in a series of recent cases appear to have ignored or disregarded these clear guidelines, and embarked on the very approach that the courts have identified as doomed to failure.

Given the direct and indirect monetary and other costs of Federal Court litigation, this is puzzling, to say the least.

This article discusses the process of making a default assessment, and explores three recent decisions to identify the common error made by the taxpayers in those cases, and the steps the courts identified which would have avoided the ‘fatal flaw’.

II BACKGROUND

Where the taxpayer has lodged an income tax return for the relevant period, the ATO will generally make a ‘normal’ assessment under s 166 ITAA 36, based on the information in the return (and other available information) and will proceed (in essence) by determining the taxpayer’s assessable income and subtracting allowable deductions and other amounts in order to derive the taxpayer’s taxable income and tax payable. This means that the assessment and supporting documents will contain details of assessable income and allowable deductions which the taxpayer can focus on in structuring their objection and subsequent challenge.

However, the position is quite different where the ATO makes a default assessment — for example because the taxpayer fails to lodge a return, the ATO is not satisfied with a return lodged, or the ATO believes that a person who has not lodged a return has derived taxable income. In this case, s 167 of the ITAA 1936 provides that ‘the Commissioner may make an assessment of the amount upon which in his or her judgement income tax ought to be levied, [and] that amount shall be the taxable income of that person for the purpose of section 166’ (emphasis added).

While similar principles apply to ‘ordinary’ assessments, the different procedure under s 167 and the more ‘opaque’ nature of a default assessment, make a significant difference to the taxpayer’s task of satisfying the burden of proof.
To provide a background to discussion of the taxpayer’s task in meeting the burden of proof under s 167, it is useful to look at the circumstances where and the process by which the ATO makes a default assessment under s 167.

A Making a default assessment

The ATO policy in relation to default assessments is spelt out in PS LA 2007/24 and the ATO’s Default Assessment Guide. As noted, the process involved in making a default assessment is quite different from that of a ‘normal’ assessment under s 166. Under s 167, the ATO makes ‘a direct judgement as to the amount of taxable income without first ascertaining assessable income less allowable deductions’.

In making this estimate, the ATO may rely on ‘any basis that is reasonable and takes into account [the taxpayer’s] particular circumstances’. Normally, the ATO will begin by seeking information either formally or informally from the taxpayer. If sufficient information is not available from the taxpayer, information may be sought from third-party sources ‘in order to provide a reasonable basis for determining taxable income’. The ATO will then make an assessment based on the information available.

Techniques which the ATO employs as the basis for a default assessment include the use of externally obtained information, indirect audit methodologies (such as the ‘T account’ or ‘asset betterment’ methods), statistical information from sources such as corporate databases or the ABS, or extrapolation from prior years’ returns.

In recent times, the ATO has also used small industry benchmarks in appropriate cases, with significant deviations from the relevant industry’s benchmarks being used by the ATO both as a factor in selecting a business for audit, and subsequently in generating a default assessment.
assessment. The industry benchmarks reflect the ‘normal’ range within which businesses in over 100 industries usually operate.

While correct ‘on average’, industry benchmarks will almost inevitably be inaccurate in any specific case — as with the other methods of estimation.

In order to give the taxpayer an opportunity to put forward an alternative basis of calculation or to rebut the assumptions on which the ATO assessment is based, the ATO will generally issue a ‘default assessment warning letter’ advising the taxpayer or their agent in advance of the ATO’s intention to issue a default assessment, the basis upon which it is proposed to levy tax, and the date by which any overdue return needs to be lodged to avoid the issue of a default assessment.

However, a default assessment may be issued without prior notice where, for example, the ATO perceives a risk that the taxpayer if warned may flee the jurisdiction, dissipate their assets, or move funds outside Australia.

B Penalties and prosecution

The ATO will automatically apply an administrative penalty of 75 per cent of the tax-related liability when it issues a default assessment, and this penalty may be increased by 20 per cent, for example for taxpayers who have a history of non-compliance (giving a total of 90 per cent).

Penalties are therefore potentially severe, and one might expect that a taxpayer would take great care to maximise their chances of avoiding them. Surprisingly, as will be seen, this is not always the case.

To add to the taxpayer’s problems, the issue of a s 167 default assessment does not alter the fact that the taxpayer has failed to lodge a required return, and they may still be prosecuted for this failure.

III MAKING A S 167 DEFAULT ASSESSMENT: ‘A GUESS TO SOME EXTENT’

Given the nature of a s 167 default assessment, the courts have long recognised that such assessments are unlikely to be precisely correct. Indeed, in Trautwein v FC of T, Latham CJ pointed out that:

> In the absence of some record in the minds or books of the taxpayer, it would often be quite impossible to make a correct assessment. The assessment would necessarily be a guess to some extent, and almost certainly inaccurate in fact.

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22 The ATO groups the industries under the categories of Building and construction trade services; Education, training, recreation and support services; Food services; Health care and personal services; Manufacturing; Professional, scientific and technical services; Retail trade; Transport, postal and warehousing; and Other services: CPA website, above n 21; ATO website, above n 21.

23 For example, cost of items such as goods sold, labour, rent and GST-free sales compared to turnover, and motor vehicle expenses to turnover.

24 Groch, above n 21, 360.


26 For example, where a non-resident proposes to sell their only Australian asset) or an urgent need arises for other purposes: PS LA 2007/24, above n 6, [18]–[19].


28 PS LA 2007/24, above n 6 [79]–[80].

29 (1936) 56 CLR 63, 87 (Latham CJ) — quoted in part with approval in (among others) Gashi, above n 27, [55] (Hennett, Edmonds and Gordon JJ); see also Ex Parte Briggs, above n 1, 4293 (Sheppard J).

30 Trautwein, above n 3, 87 (Latham CJ); quoted in Ex Parte Briggs, above n 1, by Sheppard J at 4293, who observed that a valid s 167 assessment ‘may go close to guesswork’. Similarly, in FC of T v Dalco (1996) HCA 3 [6]; 168 CLR 614, 616; 90 ALR 341; 20 ATR 1370; 90 ATC 4088, 4090 Brennan J observed that the amount determined under s 167 ‘may not in truth be the taxpayer’s taxable income for a particular year and it may not be so regarded by the Commissioner … but for the purposes of s 166, that amount is the taxpayer’s taxable income for the year … unless it is shown on appeal … [to be] wrong’.
Satisfying the Taxpayer’s Burden of Proof

As a result, the courts have been prepared to give the ATO considerable leeway in making a s 167 assessment, particularly where the taxpayer has made it difficult for the ATO to assess them accurately. However, while the courts have been prepared to give the ATO considerable latitude in making default assessments under s 167, it is clear that such an assessment must be based on a genuine attempt to determine the taxpayer’s taxable income. That is, the assessment must be based on some reasonable or rational grounds and cannot be simply a guess or estimate made on ‘no intelligible basis’, or by ‘plucking figures from the air’ at random: Re DCT (WA); Ex Parte Briggs.

Even so, a default assessment is a powerful weapon, and it may have a ‘flushing out’ effect in that it may yield an incorrect result of the taxpayer’s actual taxable income [which] will place the burden on the taxpayer to show that the assessment is excessive (footnotes omitted).

A Satisfying the burden of proof — the taxpayer as a modern-day Sisyphus?

The burden of proof imposed on the taxpayer by ss 14ZZK or 14ZZO may be discharged in various ways, depending on the circumstances, and it is for the taxpayer to decide how it will approach this task in any particular circumstances.

While the courts have given clear guidelines on what is required, in practice ss 14ZZO(a) and 14ZZK(a) impose a heavy burden on taxpayers seeking to challenge a default assessment.

In particular, the courts have regularly pointed out that the fact that taxpayer may be able to show that the ATO made a mistake in the assessment process does not of itself prove that the assessment is excessive or satisfy the taxpayer’s burden of proof. Indeed, unless the parties agree to confine the review to specified matters, demonstrating errors in the ATO’s method of calculation or characterisation may simply create a ‘vacuum’ in which the ATO’s assessment is known to be wrong, but there is no evidence of what the taxpayer’s correct taxable income is. Thus, in PNGR v Commissioner of Taxation 2013 AATA 942, McCabe SM pointed out that where a taxpayers fails to establish what the assessment should have been (ie what their true taxable income was), then even if the tribunal accepted that the amended assessments were excessive, it would be left ‘uncertain as to the correct amounts that should be assessed’, so that the applicants would fail to discharge the burden of proof. Indeed, if a taxpayer could succeed in establishing that the default assessment was excessive, it would be left ‘uncertain as to the correct amounts that should be assessed’, so that the assessment is excessive (footnotes omitted).

31 Ex Parte Briggs, above n 1, 4294 (Sheppard J).
32 In that case, by refusing to lodge returns in defiance of court orders, and failing to co-operate in an interview held under s 26A ITAA 1936. Sheppard J described the taxpayer’s conduct as ‘a deliberate course of defying the tax laws and the tax authorities of this country’: 87 ATC, 4285. The difficulties the ATO may face in such circumstances are outlined in Ex Parte Briggs, above n 1, 4283–8.
33 Ex Parte Briggs, above n 1, 4294 (Sheppard J).
34 PS LA 2007/24, above n 6, [55]; ie it must not be colourable or made for an improper purpose: S Barkoczy, ‘The Nature of an Income Tax Assessment’, Journal of Australian Taxation (Jan/Feb 1999), 36, 43–4 cites Re Pezzano, ex parte DFC of T 89 ATC 4259 (Beaumont J), Briggs, above n 1, 4295 (Sheppard J), and Scanlan v FC of T 89 ATC 4129, 4141, where Wilcox J observed that ‘The fact that a person making a judgement as to given facts recognises the possibility, even the strong possibility, of error does not mean that the judgement loses its quality as such. If the judgement represents the best assessment which the decision-maker can make, on the materials and available, it remains a judgement, however vulnerable it may be to attack when further facts emerge.’
35 Trautwein, above n 3; PS LA 2007/24, [55], [64].
36 Ibid 87–8 (Latham CJ); Ex Parte Briggs, above n 1, 4294 (Sheppard J).
37 Barkoczy, above n 34. In Ex Parte Briggs, above n 1, Sheppard J, 4295.
38 According to Greek mythology, for crimes against the Gods, Sisyphus was condemned to eternally roll a huge stone up a hill, only to have it roll back down as it neared the top. See Merriam-Webster, Sisyphus 2014 <http://www.merriam-webster.com/dictionary/sisyphus>
39 FC of T v Dalco 168 CLR 614, 616; [1990] HCA 3, [14]; 90 ATC 4088, 4093 (Brennan J)., above n 27,[63] (Hennett, Edmonds and Gordon JJ).
40 See Woellner, Barkoczy, Murphy, Evans and Pinto Australian Taxation Law (24th edn), CCH Aust Ltd, 1752–3.
41 As occurred in Moigard and Commissioner of Taxation [2014] AATA 342; cf Mulherin v FC of T 2013 ATC ¶20-423 — considered below.

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simply because there was no evidence positively identifying the correct tax position, that would mean that the burden of proving the existence of that element lay on the Commissioner’, which would improperly invert the statutory burden of proof.43

Accordingly, as Latham CJ indicated in Trautwein, the taxpayer must show not only that the assessment is incorrect, but also what correction needs to be made to make it correct, or more nearly correct.44

The taxpayer’s task is made more difficult because the courts and tribunals have interpreted ss 14ZZK (b)(i) and 14ZZO(b)(i) to mean that (among other things):

- there is no obligation on the ATO to do anything to ‘defend’ its assessment,45 or to lead any evidence or positively prove that the assessments were correctly made.46 Even if the ATO attempts to prove a positive case but fails, the taxpayer will still not succeed unless they satisfy the burden of proof;47
- the Commissioner is entitled to rely upon any deficiency in the taxpayer’s proof of the excessiveness of the amount assessed in seeking to uphold the assessment;48
- the burden will not be discharged where the tribunal is not satisfied as to the facts of the case;49 and
- there is no presumption that the taxpayer’s financial records are correct or that the events they purport to record actually occurred.50

B The practical difficulty in challenging a default assessment — the labours of Sisyphus

The broad nature of the ATO’s s 167 power and the ‘embedded assumptions’ (above) which operate in favour of the ATO in a dispute over a default assessment, create ‘real and significant obstacles’ for a taxpayer endeavouring to discharge the statutory burden of proof under s 14ZZK(b)(i) or 14 ZZO(b)(i).51

Thus, in McCormack v Commissioner of Taxation, Gibbs J noted that such sections impose on the taxpayer the obligation of proving the facts necessary to make out their case.52 This requires a taxpayer to positively establish their actual taxable income and thus show that the amount on which they have been assessed under s 167 exceeds their actual substantive liability.53

43 McCormack v FC of T 1979 ATC 4111, 4128 (Stephen J); cf Gashi, above n 27; [66] (Bennett, Edmonds and Gordon JJ).
44 Trautwein, above n 3, 87–88, (Latham CJ); cf Wheelwright, above n 1, 234. Indeed, this is spelled out expressly in the wording of ss 14ZZKand 14ZZO — see above.
45 Vadasz v FC of T 2006 ATC 2384; Pyke v FC of T 2007 ATC 2564; cf George v FC of T (1952) 86 CLR 185, 189–90.
46 FC of T v Dalco (1990) 168 CLR 614 at 623; [1990] HCA 3, [14]; 90 ATC 4088 at 4093 (Brennan J) — citing Gauci v FC of T (1975) 135 CLR 81 at 89 (Mason J), and in turn cited by the Full Federal Court in Gauci v FC of T (1975) 135 CLR 81 at 89 (Mason J), and in turn cited by the Full Federal Court in Gauci v FC of T, above n 27, [61] (Bennett, Edmonds and Gordon JJ); Ex Parte Briggs above n1, 87 ATC at 4282–3; Wheelwright, above n 1, 234–5; Groch above n 21, 359.
47 Wheelwright, above n 1, 235
48 Gashi, above n 27; [61]; citing Dalco, above n 46, CLR 624; HCA [15]; ATC 4095 (Brennan J); Wheelwright, above n 1, 235.
49 The Trustees of the Bontoc Superannuation Fund v FC of T 2006 ATC 2317, 2318–9; Case 13/2006 ATC 182, 186.
50 Saffron v FC of T 19 ATC 4049, 4050; Cooper v FC of T 2010 ATC ¶10-130.
51 Groch, above n 21, 359.
52 McCormack v Commissioner of Taxation (1979) 143 CLR 284, 301 (Gibbs J) — in that case, the taxpayer was required to prove affirmatively that the relevant property was not acquired for the purpose of profit-making by sale; cf Dalco, above n 46, CLR 621-623; HCA [16] (Brennan J), [17] (Toole J); ATC 4091-4; Addoug v Commissioner of Taxation [2010] AATA 79 [6] (MD Allen SM); Gashi, above n 27 [61].
53 Dalco above n 46, CLR 623-625; HCA [12] (Brennan J); [17], [20], (Toole J); ATC 4092; Trautwein above n 3, 88 — cited in Gashi, above n 27 [63]; FC of T v Rigoli, above n 42; Groch above n 21, 358.
To do this, the taxpayer must produce evidence which on the balance of probabilities proves all the factual elements essential to the correct operation of the law. It has been said that this means that the taxpayer must ‘explain away all other possible sources of income … leave no uncertainty as to their affairs’ and ‘exclude by their proof all sources of income except those which they admit’. If the taxpayer is not able to establish positively all the elements necessary to the correct application of the law, the taxpayer will ‘almost inevitably’ fail.

The task of Sisyphus was hopeless — no matter how many times he strove to push the stone to the top of the hill, it would always roll back to the bottom. By comparison, a taxpayer seeking to satisfy the statutory burden of proof in relation to a default assessment is not in as hopeless a position as Sisyphus, the odds are certainly stacked heavily in the ATO’s favour.

However, the courts have provided useful guidelines to help taxpayers in their task. For example in Ma, Burchett J observed that:

if a taxpayer denies any undisclosed income, provides acceptable evidence of how he spends his time, and demonstrates a reasonable explanation for any appearance of the possession of assets, he will generally discharge his burden of proof unless some positive reason is shown why he is to be disbelieved …

Nevertheless, as noted, in trying to discharge the onus in relation to a default assessment, the taxpayer faces particular difficulties, because a default assessment may contain no ‘discrete’ figures of putative income or deductions for the taxpayer to focus on. Instead there may be merely a net taxable amount, reflecting the auditor’s judgement and an asset betterment calculation or other method of estimation.

In such cases, if taxpayers are to successfully challenge a default assessment, while they and their advisers may usefully attack errors in the ATO’s process or calculations, they must always bear in mind that attacking the ATO case is unlikely to achieve success by itself. The ultimate task is always to prove on the balance of probabilities that the taxpayer’s taxable income was less than the figure estimated by the ATO.

A long line of cases illustrate very clearly that failing to focus on the key task of proving the amount of the taxpayer’s actual taxable income (the ‘fatal flaw’) inevitably results in the taxpayer failing to discharge the burden of proof. For example, in Baini v FC of T the ATO used industry benchmarks to create a default assessment served on a taxi operator. The taxpayer argued that his taxis were old and inefficient, so that the industry benchmark allowed for expenses was too low in his particular case. However, the taxpayer failed to produce positive evidence of vehicle mileages, servicing records, fuel expenses and the like, and the AAT accordingly held that the taxpayer had failed to satisfy the burden of showing that the assessment was excessive.

As noted above, a taxpayer’s position will be easier if the ATO is prepared to agree to limit the dispute in a case to a defined set of issues, so that demonstrating that the ATO has made an error in determining one or more of those agreed issues will necessarily lead — in those limited circumstances — to the conclusion that the assessment is excessive.

Thus, in Moignard and Commissioner of Taxation the relevant issue was confined to the question of whether the ATO was correct to include a sum of $480,476 in the taxpayer’s assessable income for a particular year of income. RW Dunne (SM) decided that the taxpayer had discharged the s 14ZZK(b)(i) burden of proving that the amended assessment was excessive because there was evidence that the sum was not assessable income of the taxpayer personally.

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54 Nixon v FC of T 79 ATC 4377, 4381 (Hunt J).
55 Groch, above n 21.
56 Ibid 358.
57 Ibid 359, citing George, above n 45. This may require that the taxpayer provide positive proof e.g. of the origin and non-income nature of disputed amounts deposited into the taxpayer’s account: ibid 360 — or that disputed amounts actually were loans and not of an income nature.
58 Ibid 358.
59 Ma v FC of T (1992) 37 FCR 225, 230 (Burchett J); cf George v FC of T, above n 45.
60 2012 ATC ¶10-259.
61 Above n 60, [159]-[164] (SA Forgie DP).
under s 97 of the 1936 TAA for that year, but was instead properly assessable to the applicant as trustee of the Wine Logistics Trust.63

However, in the absence of such an agreement, the taxpayer must go beyond merely pointing to errors in the ATO assessment process, and must establish the actual amount of their taxable income for the relevant period.

Unfortunately, recent cases suggest that some taxpayers have still not absorbed that lesson.

IV ‘THOSE WHO CANNOT REMEMBER HISTORY ARE CONDEMNED TO REPEAT IT’64 — THE ONGOING IMPACT OF THE ‘FATAL FLAW’

An observer might be forgiven for thinking that, given the numerous warnings that the courts and tribunals have issued about the need to focus on proving the taxpayer’s actual taxable income, taxpayers and their advisers would be alert to this problem and would ensure that they addressed the key issue directly and fully.

This is not a case of complex or convoluted provisions whose meaning is obscure or contested — the principles are clear and unambiguous, and have been repeated many times.

Unfortunately, the decisions in Gashi, Rigoli and Mulherin suggest that the lessons of the past have not always been fully absorbed, and that the ‘fatal flaw’ continues to undermine efforts by taxpayers to discharge the burden of proof in relation to a default assessment.

A Gashi v FC of T

In Gashi v FC of T,65 so far as relevant, the husband and wife taxpayers had failed to lodge various income tax returns. The Commissioner audited the taxpayers, and subsequently issued default assessments (calculated using the ‘asset betterment’ method) under s 167. In each case, the Commissioner also imposed administrative penalties of 75 per cent with a 20 per cent uplift factor for several years under s 284–220 (1) (a) TAA.

Both taxpayers challenged the default assessments. Mr Gashi sought to discharge the burden of proof by leading evidence as to his sources of employment income, part-time work as a toolmaker salesman, and an inheritance from his mother’s estate in Kosovo, as well as explaining certain overseas transfers made in the names of other persons.

Mrs Gashi argued that throughout the relevant periods she had not been involved in her husband’s business dealings, and that her taxable income consisted only of social welfare receipts, rent and interest as well as income from two properties and a Luxembourg bank account containing an inheritance from her grandmother.

On appeal, the Full Federal Court (Bennett, Edmonds and Gordon JJ) reiterated the basic principles applying to the burden of proof under s 14ZZO(b)(i) and held that, so far as the asset betterment default assessments were concerned:

1 The Commissioner was not required to prove the nature of the income received by the taxpayer.66 It is ‘no part of the duty of the Commissioner to establish affirmatively what judgement [he] formed [under s 167], much less the grounds of it, and even less still the truth of the facts affording the grounds’: George v Federal Commissioner of Taxation (1952) 86 CLR 183 at 204.67

63 [2014] AATA 342, [89]–[90] (Dunne SM). Similarly, in Mulherin v FC of T (below) the Full Federal Court suggested that if the taxpayer could have agreed with the Commissioner to confine the issue of the amounts on which the assessments depended to the income of the (conduit) Foundation in each of the income years, the taxpayer might have been able to discharge the burden by proving the actual income of the Foundation in each of the contested years: 2013 ATC ¶20-423, [45] (Edmonds, Griffith and Pagone JJ).
64 George Santayana, (1905) Reason in Common Sense (volume 1 of The Life of Reason), 284.
65 ‘Gashi v FC of T’[2013] FCAFC 30 (14 March 2013); 2013 ATC ¶20-377 — special leave to appeal to the High Court was refused on 16 August 2013: [2013] HCA Trans 181.
66 Ibid [61], [63], [67].
67 Ibid [55].
The only question was whether Mr Gashi had discharged the burden under s 14ZZO(b)(i) of proving that the assessments in issue were excessive.

2 The s 167 power of assessment is ‘necessarily different’ from that under s 166.68 Under s 167, the ‘normal’ process of calculating taxable income as assessable income minus deductions is not possible (in whole or part) because the taxpayer has either failed to lodge a return, or the Commissioner is not satisfied with the return lodged, and instead tax is imposed on the amount which in the Commissioner’s judgement ‘income tax ought to be levied’.69

3 The asset betterment method of is a legitimate basis for determining the s 167 taxable amount for the purposes of a default assessment70 — notwithstanding that the resulting assessment will necessarily be a ‘guess to some extent’ and ‘almost certainly inaccurate in fact’.71

4 The ultimate question in such cases is whether the amount of each assessment was excessive, with the burden being on the taxpayer to prove this. Accordingly:

A taxpayer who seeks to establish that a s 167 assessment based on the asset betterment method of calculation is excessive must positively prove his or her ‘actual taxable income’ and, in doing so, show that the amount of money for which tax is levied by the assessment exceeds the actual substantive liability of the taxpayer: Dalco at 623–5 and Trautwein at 88. The taxpayer must show that [any] unexplained accumulated wealth was from non-income sources …

[That is, a taxpayer challenging a s167 assessment] must account for any unexplained increase in assets, explain the source/s of those assets, and then identify whether those sources are taxable.75

Put another way, if the disclosed ‘actual’ taxable income does not explain the increase in assets, then the taxpayer is unlikely to have discharged the burden of establishing the assessment is excessive. And, of course, that unexplained increase in assets cannot be viewed in isolation — it must also take into account the expenditure during that period … Consistent with that view, even if a taxpayer was able to prove that an item in the asset betterment statement was wrong or should not have been included, but did not adequately explain the source or sources for the otherwise unexplained increase in wealth, the taxpayer would not discharge the burden under s 14ZZO of the TAA.74

5 Accordingly, Mr Gashi’s grounds were ‘misconceived’: he had committed the fatal flaw of basing his case purely on an (ultimately unsuccessful) attempt to prove that certain items listed in the Asset Betterment Statement were wrongly calculated or should not have been included. However, as the Court pointed out,75 even if Mr Gashi had been successful in proving his submissions, this would not have discharged the burden of proof, because to successfully challenge the s 167 assessment:

Mr Gashi was required to demonstrate the unexplained accumulated wealth in each of the relevant years was from non-income sources. Mr Gashi did not show the source or sources of funds from which he acquired the increase in assets in each of the relevant years. In fact, he did not attempt to do so… [The Full Court noted that the trial judge had commented that] A striking thing about Mr Gashi’s evidence is that it was not calculated to disclose the level of his income in any of the years in question, nor even to disclose particular transactions from which the generation of income should be inferred …76

Mr Gashi therefore failed to discharge the burden under s 14ZZO of the TAA …77

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68 Ibid [53] — indeed, the s166 assessment process has ‘no resemblance or analogy to’ that under s167: Ibid [56].
70 Ibid [56].
71 Applying Trautwein, above n 3, 87.
72 Gashi, above n 65, [63].
73 Ibid [65].
74 Ibid [65]–[66].
75 Ibid [67].
76 Full Court, 2013 ATC at [28] — Jessup J at first instance had concluded that he had ‘no alternative’ but to find that Mr Gashi had fallen ‘well short’ of discharging the burden of proof: 2012 ATC ¶20-325, [40].
77 Gashi above n 65, [67].
6 The Full Court also concluded that Mrs Gashi had failed to discharge the burden of proof. The evidence put forward on her behalf consisted of oral evidence given by Mrs Gashi and a report prepared by a chartered accountant based on a number of assumptions (including, significantly, ‘that her sources of income are known (being rental, interest and government payments’), which challenged elements of the ATO asset betterment statement.

Unsurprisingly, the Court held that this evidence was insufficient to discharge the burden of proof because the accountant’s report did not identify and prove Mrs Gashi’s actual sources of income. Instead, the report simply assumed, based on the instructions given by the taxpayers to the accountant, that Mrs Gashi’s sources of income were known and consisted (only) of rent, interest and government payments.

In addition, the accountant did not provide an explanation of the source or sources for the unexplained increase in Mrs Gashi’s assets over the relevant years, nor did the report identify whether those sources were taxable.

The Full Court’s comments on these points are instructive:

[76] … the question posed by [the accountant in his report] was whether Mrs Gashi’s disclosed level of income was sufficient to fund the increase in assets from year to year … For the purposes of s 14ZZO of the TAA in the context of an assessment issued under s 167 … that question was irrelevant. The relevant question was: what … were the sources, for the yearly increase in her net assets, and were those sources taxable? … [The accountant] made a finding that it was ‘unsafe to assume that the assets owned by [Mrs] Gashi were paid for by her husband. That finding, again unexplained, simply begs the question — if Mrs Gashi’s assets were not paid for by her husband, what was the source of funding and was that funding taxable?

[77] Indeed, Mrs Gashi did not seek to address the unexplained increase in her wealth in each of the relevant years. She gave no evidence of what activity (income producing or otherwise) was being carried on by her or, if carried on not by her, how she funded the unexplained yearly increase in her assets having made allowance for her annual expenditure and other disclosed sources of income.”

Significantly, the Court pointed out that Mrs Gashi was not entitled to ‘pick and choose’ which part or parts of her increased wealth set out in the asset betterment statement she would seek to explain. For example, Mrs Gashi did not attempt to explain the large deposits into an account she held jointly with her husband or the source of funding for the significant assets in her own name; however, she did produce evidence about the source of the deposit into the Luxembourg bank account. The Court pointed out that if Mrs Gashi wished to dispute the asset betterment calculations, s 14ZZO required that she positively establish her case in relation to the whole of the unexplained increase in her wealth in each of the relevant years. The fact that she chose not to do so meant that her attempt to discharge the burden of proof was bound to fail.

The case is a classic example of the fatal flaw. Both taxpayers had committed the same basic error of attempting to debate some elements of the ATO assessment without focusing on the key issue of proving definitively that the assessment was excessive — thus answering the crucial question of what the taxpayer’s actual taxable income was, and whether that was less than the amount assessed.

An observer might have thought that a taxpayer and their advisers subsequently seeking to challenge a default assessment would have taken very careful note of the principles and clear guidelines provided by the Full Federal Court in Gashi, and would have ensured strict compliance with them. Surprisingly then, the same error was repeated shortly afterwards in Rigoli.

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78 Ibid [75]–[77].
79 Ibid [75]–[78] (Bennett, Edmonds and Gordon JJ).
80 Ibid. The latter evidence had been rejected by the trial judge.
81 Ibid [77]–[79] (Bennett, Edmonds and Gordon JJ).
B FC of T v Rigoli

In FC of T v Rigoli, the Commissioner issued default assessments under s 167 to ‘Little Joe’ Rigoli following audits of the taxpayer’s affairs. The ATO based its assessments not on asset betterment calculations, but on a ‘complex analysis which had been undertaken [by the ATO] in an attempt to estimate receipts, payments and allowable depreciation for each of the years in dispute’ — with much of this information ‘based upon professional judgements and estimates rather than upon financial data since Mr Rigoli did not keep records’.

At the commencement of the AAT hearing, Rigoli had ‘conceded’ that he did not challenge the amounts identified by the Commissioner as income, but rather was claiming that he was entitled to additional deductions by way of depreciation on various items.

The AAT had accepted this ‘concession’ and proceeded to determine whether Mr Rigoli’s claim for depreciation expenses should be allowed and if so, whether ‘in those circumstances’, Mr Rigoli had satisfied the burden of proof.

On appeal, Pagone J held that the AAT had approached the matter in the wrong way because it had misunderstood the nature of a s 167 assessment. A default assessment is a ‘fundamentally different’ creature to a normal s 166 assessment, because the very nature of a s 167 assessment means that the subject matter or focus of a challenge to the assessment must be not on the individual elements of assessable income and deductions, but rather on ‘the amount’ upon which in the ATO’s judgement, tax ought to be levied.

Pagone J noted that instead of focusing on this issue, Mr Rigoli had simply sought to show that the amount judged by the Commissioner to be the taxable income had failed to make appropriate allowances for depreciation — that is, the taxpayer was merely attempting to show that the ATO had made an error in determining the correct amount of deductions allowable to the taxpayer.

As Pagone J pointed out:

It is clear … that the combined effect of s 167 and the legal burden of proof falling upon the taxpayer is that for a taxpayer to succeed in establishing the excessiveness of an assessment under s 167 (absent agreement between the Commissioner and taxpayer concerning the conduct of the proceedings) … the taxpayer [must] establish not that the amount assessed by the Commissioner under s 167 … was wrong but, rather, what the actual amount was. How that may be achieved will no doubt vary from case to case, but it cannot be done as the Tribunal proceeded, namely, by assuming that what was in contention in the proceeding before the Tribunal was only part of the Commissioner’s assessment …

On appeal, the Full Federal Court strongly endorsed the thrust of these comments, observing that the Rigolis’ attempt to discharge the onus of proof by identifying some errors in the Commissioner’s assessment … is the very picking and choosing which the authorities make clear is impermissible. The taxpayer’s choice is to pay tax according to the Commissioner’s assessment under s 167 or to establish, as a matter of evidence, what was ‘the amount upon which … income tax ought to be levied’. An intermediate course, which involves elements of the Commissioner’s calculations and facts which the taxpayer chooses to lead in evidence, is not an available option.

The case is another example of the simple and unambiguously clear proposition that the task for the taxpayer who is objecting to a s 167 assessment is not to prove that the ATO made a mistake, but rather to prove on the balance of probabilities the correct amount upon which tax should be levied.

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In the circumstances, Pagone J was untroubled to hold that the Rigolis had failed to discharge the burden of proof, and their appeals therefore failed.

Once again, a bemused observer might have expected that in light of the clear reiteration of the warnings and guidelines, subsequent taxpayers and their advisers would heed these warnings and focus on the relevant issue, to avoid wasting valuable time and money on a lost cause.

It was surprising, therefore, that when the issue arose again in Mulherin v FC of T, the taxpayer yet again made the same mistake — albeit in a different form — as their predecessors.

C Mulherin v FC of T

The decision in Mulherin v FC of T followed the same well-trodden (but apparently not well understood) path as its two immediate predecessors.

In Mulherin, the taxpayer was born in Australia, but practised medicine in Hong Kong for many years before retiring and returning to Australia in the early 1990s. While in Hong Kong, the taxpayer had established a complex system of trusts and companies to manage his financial affairs. As part of these arrangements, the taxpayer set up the San Simeon Foundation, which was a resident trust estate of which the taxpayer was the sole primary beneficiary, with an account at the LGT Bank in Lichtenstein. In 2007 the taxpayer left Australia to live in Singapore.

The taxpayer did not lodge any Australian tax returns for the income years 2004−2007, but did lodge returns for the income years 1999−2003, disclosing a modest income but no amounts attributable to the investments with the LGT Bank or income from the Foundation. Subsequently, an employee stole electronic copies of records from the LGT Bank, and provided the ATO with compact discs containing financial and other information relating to Australian residents, including the taxpayer’s Foundation. These records showed that the Foundation’s account balance had increased from US$3.792 million to US$5.974 million over the two year period 1999−2001 (an increase of around 51 per cent).

Using this information, the ATO applied the average annual increase rate in the Foundation’s funds (about 25 per cent) to assess Mulherin on ‘additional taxable income’ of around $26 million over the period 1999−2007, plus administrative penalties at 75 per cent for intentional disregard, plus an uplift factor of 25 per cent, giving a total of some $11.3 million in penalties.

The taxpayer argued that he was not presently entitled to the income of the Foundation, but did not appear to give evidence — his request to give evidence by video link from Singapore was rejected several times by the AAT.

In Mulherin, the taxpayer’s argument was somewhat different — the taxpayer argued that the AAT had made an error of law in concluding that Mulherin had not discharged the burden of proof by showing that the Foundation’s income was ‘probably’ less than the amount assessed, without proving a precise figure.

However, in light of prior authority, this was a ‘brave’ argument, which was peremptorily rejected. The Full Court (Edmonds, Griffiths and Pagone JJ) underlined yet again, in relation to the requirements for challenging a default assessment, that it was not enough for the taxpayer merely to show error in the Commissioner’s assessment; instead

the taxpayer must positively prove his or her ‘actual taxable income’ and, in doing so, must show that the amount of money for which tax is levied by the assessment exceeds the actual

89 Mulherin v FC of T 2013 ATC ¶20-423 (Edmonds, Griffiths and Pagone JJ).
90 Cf Denlay & Anor v FC of T 2011 ATC ¶20-260.
91 On the basis that Mulherin was presently entitled to the income from the Foundation.
92 Mulherin, above n 91, [21]; cf s 284-220 TAA 1953 (Cth).
93 Ibid [23]; cf [50]–[54].
94 Ibid [41]–[42] (Edmonds, Griffiths and Pagone JJ), citing Dalco, above n 39 and Gashi, above n 65.
substantive liability of the taxpayer ... Unless he does so, the taxpayer has not discharged the burden of proving the assessment is excessive.\textsuperscript{95}

By failing to do so, the taxpayer had again failed to avoid the fatal flaw.

V CONCLUSION

The combined impact of the inherent nature of a default assessment and the burden of proof in tax litigation mean that the taxpayer — like Sisyphus — faces an uphill struggle to achieve success, and must focus carefully on the key requirements for a successful challenge.

However, unlike Sisyphus, a taxpayer does have a realistic chance to achieve success, provided they learn from the experiences of prior taxpayers and follow the guidelines mapped out by the courts in a series of cases.

The simple rule made unambiguously clear by a long line of decisions is that to successfully challenge a default assessment, the taxpayer must demonstrate definitively what their actual taxable income and liability is, and then show that this amount is less than the amount assessed by the ATO.

As noted at the outset, these are not conceptually difficult provisions. The rules are simple, starkly clear, and consistently applied by the courts; yet taxpayers and their advisers seem not to have absorbed the lessons of the past, and continue to pursue a line of attack long identified by the courts as doomed to failure.

The decisions in \textit{Gashi}, \textit{Rigoli} and \textit{Mulherin} are merely the latest in a line of cases that illustrate the fate of taxpayers who commit the ‘fatal flaw’ of failing to focus on the essential issue in challenging a s 167 default assessment.

The puzzling question is why taxpayers and their advisers continue to ignore the clear lessons of the past — particularly given the significant amounts of tax and penalties at risk. It seems unlikely that professional advisers would be unaware of reported Federal Court decisions setting out stark and unambiguous warnings against the ‘fatal flaw’ approach, and providing equally clear guidelines on how to effectively challenge default assessments.

In that light, it is hard to see why a taxpayer or adviser would choose to incur the considerable expense of an AAT or Federal Court hearing while pursuing a line of argument that is doomed to failure from the outset.

Whatever the reason, the recent decisions considered above represent sad illustrations of the truism that those who cannot remember history are condemned to repeat it.\textsuperscript{96}

Hopefully, future taxpayers will not make the same error.

\textsuperscript{95} Ibid [42] citing \textit{Dalco}, above n 39, and \textit{Gashi}, above n 65. The Court indicated that this principle applied regardless of whether or not the s 167 assessment was based on an asset betterment basis of calculation or some other method: \textit{Mulherin}, above n 91 [44].

\textsuperscript{96} George Santayana, above n 64.