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FOREWORD

It is my great pleasure to welcome readers to the 2011 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 Centre for Legal Education’s 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 the 2009 and 2010 issues of JALTA continued to be very strong. For the 2009 issue, we received 34 submissions for consideration to be published, with 23 of those submissions ultimately being published. For the 2010 issue, we received 24 submissions, of which 13 were published. The 2011 issue of JALTA includes 13 published articles out of 19 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 Kaushalya Mataraaratchi for her exceptional work in proofreading, David Brennan for his 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 Nathalie (‘Nat’) 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 Nat’s contributions, JALTA would not be produced in a timely and professional manner. Well done, Nat!

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
COMMERCIAL LITIGATION FUNDING:
THE NEED TO IMPOSE REGULATIONS TO IMPROVE THE OUTCOME OF THE SHAREHOLDER CLASS ACTIONS

Lang Thai*

In the past few years, commercial litigation funders have been celebrating their successes in various shareholder class actions. The fact that litigation funders are not regulated by any specific law creates a minefield of problems, not only for plaintiffs in class actions, but also for defendants and the courts. The aim of this article is to explain why government intervention is necessary to regulate the litigation funding industry and litigation funders, in order to improve the outcome of class actions for shareholders. The article identifies some current problems associated with litigation funding and, in doing so, makes some suggestions for reform.

I. INTRODUCTION

The aim of this article is to call for government intervention to regulate the litigation funding industry and litigation funders. The central reason for this discussion is to improve the outcome of shareholder class actions.

A litigation funder is usually a corporate entity which agrees to assist a plaintiff to commence a court action by providing funds. In return, the funder expects to retain an agreed percentage of any compensation awarded by way of settlement or court order. Since 2006, it has been possible for plaintiffs to engage a commercial litigation funder to help fund their court actions.1 The High Court has even acknowledged that, in some cases, where plaintiffs have a legitimate claim but are unable to pursue a court action because of their impecunious position, they may call upon a litigation funder to assist.2 This may be the only way to ensure that their case would go to trial and that justice is served. However, the problem with litigation funding in Australia stems from the fact that the industry is largely unregulated and that funders are free to set their own terms and conditions in the funding agreement.

Class action procedure in Australia is also problematic. There are two main difficulties. The first is that Part IVA of the Federal Court of Australia Act 1976 (Cth) (FCAA) provides for a so-called ‘opt out’ class action procedure, without making clear what ‘opt out’ actually means. Section 33J provides a mechanism for members who are already in a class action to ‘opt out’ of the class action at a later stage if they so wish, by simply filing a notice to court of their intention, without needing to provide a reason for opting out. This is of concern, particularly since members who are already in the class action are free to come and go as they please and so the defendant has no way of estimating the size of liability it may incur. The second difficulty is when a class action is commercially funded by a litigation funder, which has been common practice since 2006. A funder generally requires the funded party to sign a litigation funding agreement (that is, to ‘opt in’ to the funding agreement). When this occurs, the ‘opt out’ mechanism referred to in s 33J has, arguably, become unworkable and ineffective.

The fact that a litigation funder is not regulated by any specific law creates a minefield of problems, not only for plaintiffs, but also for defendants and the courts. The aim of this article

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* Lecturer, School of Law, Deakin University, Melbourne, Australia; BSc, LLB (Mon), Grad Dip Ed (Melb), LLM (Mon). Barrister and Solicitor of the Supreme Court of Victoria and High Court of Australia.

1 In Campbells Cash and Carry v Fostif (2006) 229 CLR 386 (‘Campbells Cash and Carry’), for the first time in history, the High Court of Australia permitted a class action to be commercially funded by a litigation funder.

2 See Jeffery & Katauskas Pty Ltd v Rickard Constructions Pty Ltd (2009) 239 CLR 75 (‘Jeffery & Katauskas’).
is to explain why government intervention in the litigation funding industry is necessary to improve the outcome of the class actions for shareholders. The key point is to ensure there is a fairer outcome for shareholders. The article is divided into five parts. Part II provides an overview of how litigation funding works in Australia. Part III compares the two most recent appeal cases to understand why and how the courts have insisted that litigation funders must hold an Australian Financial Services Licence, and considers ASIC’s temporary exemption from requiring a licence and the government’s proposal on this. Part IV outlines Australia’s class action procedure, with discussion on why the procedure is unworkable when commercial litigation funding is involved. Part V highlights some of the current problems associated with litigation funding arrangements, and provides some suggestions for reform. Part VI concludes with a note that a whole new Act is necessary, rather than adding provisions into the current Corporations Act 2001 (Cth), for the regulation of litigation funders.

II. LITIGATION FUNDING IN AUSTRALIA

A. What is a Litigation Funding Agreement?

A litigation funding agreement is an agreement entered into between a litigation funder and a plaintiff or plaintiffs whereby the funder agrees to assist the plaintiff(s) to conduct a court action by providing funds. In return, the funder expects to retain an agreed percentage of any compensation awarded by way of settlement or court order. Generally, a funder would want to get involved in a court action only if the plaintiff has a legitimate claim against the defendant and there is a high probability of success — or a high probability that the defendant is likely to negotiate for a settlement at the earliest opportune time. Thus, the funder will normally and independently conduct its own investigation into the issue before making an offer to the plaintiffs to assist with funding their court action.

Depending on the terms of the funding agreement, as this can vary from case to case, litigation funding includes lawyers’ fees, disbursements, court fees, project management fees, investigation fees and may include security for costs. The funder’s sole purpose is to make a commercial gain from the litigation of others. Depending on how the funding agreement is phrased, the funder may or may not have any direct control over the court action.

It is not uncommon for a litigation funder to approach potential plaintiffs to make an offer to assist with funding litigation. Funders are unlikely to approach just one plaintiff; instead, funders tend to approach a large pool of plaintiffs to form a class action, since this will enable the funder to justify a larger claim against the defendant when there is a larger pool of persons with the same or related circumstances. This approach is also taken because the size of the compensation earned by the funder is likely to be proportional to the size of the pool of plaintiffs. Also, the funder is able to save time and money by acting for several plaintiffs who have similar interests.

3 IMF (Australia) Ltd, a litigation funder, may have published on its website that it would also provide security to meet a security for costs order in addition to the other associated costs, such as lawyers’ fees and project management and investigation fees. However, there are other litigation funders who have been reluctant to provide any security for costs and instead have agreed to provide finance up to a certain limit: see, eg, Jeffery & Katauskas (2009) 239 CLR 75.

4 Examples of cases where litigation funders have approached plaintiffs to fund their class actions are Campbells Cash and Carry v Fostif Pty Ltd (2006) 229 CLR 386 (‘Campbells Cash and Carry’); P Dawson Nominees Pty Ltd v Multiplex Limited and Multiplex Funds Management Limited [2007] FCA 1061 (‘Dawson Nominees’); Dorajay Pty Ltd v Aristocrat Leisure Ltd (2005) 147 FCR 394 (‘Dorajay’). Dorajay started in 2003 and settled in January 2009 after the 2006 High Court case in Campbells Cash and Carry. See also the most recent Centro Properties shareholder class action case, Australian Securities and Investments Commission v Healey (No.1) [2011] FCA 717, handed down by the Federal Court of Australia on 28 June 2011.
B. High Court Cases Approving Litigation Funding

There are two cases in which the High Court of Australia has approved funding by an external non-party funder, which are described briefly below. The approval was given for the same reason in both cases.

1. Campbells Cash and Carry v Fostif Pty Ltd

This was the first case where the High Court approved a commercially-funded class action. The case dealt with two central issues: (1) whether the class action procedures under part 8 of the Supreme Court Rules 1970 (NSW) (NSWSCR) had been followed correctly; and (2) whether the plaintiffs were permitted to engage a litigation funder to finance their class action for commercial gain.

A litigation funder, Firmstone Pty Ltd, independently conducted an investigation into a matter which related to the possible return of tobacco licence fees to retailers, which the retailers had paid but which the wholesalers had not passed on to the taxation office (because of certain overriding rules). The funder formed a view that the prospect of success in a class action would be high. It approached the tobacco retailers and offered to fund their class action, on the condition that they sign an agreement to allow the funder to brief and instruct a law firm and that the funder would be entitled to keep one third of any recovery earned from a successful outcome, whether such recovery was by way of settlement or court order.

The litigation funder signed up 2100 retailers, but only seven of these were chosen and named as plaintiffs in the summons to represent all other retailers in that class. Rule 13(1) under part 8 of the NSWSCR required ‘numerous persons’ to have the same interests before a class action could be brought; however, the rule did not specify the actual number of persons required. The litigation funder and the law firm believed that seven retailers would be sufficient to form a class action under the rule. They were of the view that the class action procedure under r 13(1) was the same as the class action procedure under the federal legislation which specifies ‘seven persons’ as the minimum number for bringing a class action. The class action commenced in 2003.

The wholesalers sought to have the class action terminated on the ground that the class action procedure contained in part 8 of the NSWSCR had not been followed, in that the requirement of ‘numerous persons’ under r 13(1) had not been fulfilled. The wholesalers also argued that the litigation funder was ‘trafficking in litigation’ when it approached the retailers for their authority to take control of the proceedings through the funding arrangement and this, they argued, constituted an abuse of process.

The trial court dismissed the retailers’ class action on the ground that the class action was an abuse of the court’s process. The New South Wales Court of Appeal reversed this decision and allowed the class action to continue.

On appeal by the wholesalers, the High Court, by a majority of 5:2, held that the class action procedure under part 8 of the NSWSCR had not been fulfilled. Only seven retailers had opted into the class action and this did not constitute ‘numerous persons’ under r 13(1), even though 2100 retailers had agreed to the litigation funding agreement. The High Court noted that the

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6 Rule 13(1) under part 8 of the Supreme Court Rules 1970 (NSW) states:

‘Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all except one or more of them’.
7 Federal Court of Australia Act 1976 (Cth) s 33C.
9 Campbells Cash & Carry (2006) 229 CLR 386, 421, 422 (Gummow, Hayne and Crennan JJ provided the joint judgment, with Callinan and Heydon JJ concurring; both Gleeson CJ and Kirby J provided dissenting views).
class action procedure in NSW had an ‘opt in’ mechanism and that this procedure was different to that set out in part IVA of the FCAA, which provides an ‘opt out’ approach. The High Court declined to say how many persons would be sufficient to pass the ‘numerous persons’ test for the purpose of bringing a class action under r 13(1) of the NSWSCR. In conclusion, the High Court dismissed the class action on the ground that there were insufficient retailers to form a class action under the NSW legislation.

On the issue of litigation funding, however, the majority of the High Court permitted the commercially-funded class action. The Court stated that the involvement of a litigation funder had provided the plaintiffs, who believed they had a legitimate claim against the defendants but who could not pursue their claims individually because of the high costs of doing so, an opportunity to get access to justice. A class action funded by a non-party funder had not contravened any public policy and the action did not constitute an abuse of the court’s process.

In support of litigation funding, Kirby J went further and said:

The individual claim may (as in the case of many tobacco retailers in these proceedings) be comparatively small and hardly worth the expense and trouble of suing. But the aggregate of the claims of those willing to proceed together, as proposed by a funder and organiser such as Firmstones, might be very large indeed. What is a theoretical possibility, as an individual action or series of actions, needs therefore to be converted into a practical case by the intervention of someone willing to undertake a test case, followed by others willing to organise litigants in a similar position, and under appropriate conditions, to recover their legal rights by helping them to act together.

Kirby J went on to explain how a litigation funder could help to ‘organise’ the plaintiffs into a court action:

By ‘organising’ persons into a legal action for the vindication of their legal rights, representative proceedings are not creating controversies that did not exist. Controversies pre-existed the proceedings, even if all those involved in them were unaware of, or unwilling earlier to pursue, their rights. A litigation funder, such as Firmstones, does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law.

Callinan and Heydon JJ jointly provided a strong dissent. Their Honours focussed on the litigation funder having abused the process of the court. By having a funder funding the class action, the plaintiffs had in fact assigned their class action over to the funder and this was contrary to public policy. They noted that an abuse of the court’s process could come from ‘very diverse circumstances’ and contravention of public policy was just one example. New South Wales Parliament had abolished the law of maintenance and champerty under the Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), but there was still an exception in that Act under s 6 on public policy grounds. Their Honours highlighted the key facts that constituted an abuse of process on the part of the funder:

- the litigation funder approached the retailers and encouraged them to sue, where they would not otherwise have done so;
- the litigation funder’s motive was to make a profit from the litigation of others;

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10 The ‘opt opt’ class action under part IVA of the Federal Court of Australia Act 1974 (Cth) will be discussed later in this article.
12 Ibid 434 (Gummow, Hayne and Crennan JJ, with whom Gleeson CJ agreed at 407).
13 Ibid 449 (Kirby J).
14 Ibid 468 (Kirby J).
15 Ibid 484–5.
16 Ibid 486.
17 Ibid 488–95.
• the commercial gains hoped for by the litigation funder were potentially enormous, since
  the funder had signed up 2100 retailers which meant that these retailers had to each give
  up an agreed portion of their compensation to the funder if the case was successful; and
• the litigation funder had control over the litigation when the retailers signed an authority
  to permit the funder to brief and instruct the lawyers.

2. Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd18

In this High Court case, a successful defendant sought to recover its costs awarded against the
impecunious plaintiff by claiming them from the litigation funder who had initially helped
the plaintiff to start the court action. The majority of the High Court again ruled that funding
litigation for commercial gain by a non-party, regardless of whether the non-party funder had
agreed to indemnify the impecunious plaintiff against adverse costs, did not amount to an abuse
of process and did not warrant a costs order against the funder.19 This is not a class action case,
but it goes to show the High Court’s continued support for commercially-funded court actions.

In this case, Rickard Construction Pty Ltd (Rickard Construction) needed finance to commence
a court action against Jeffery & Katauskas Pty Ltd (Jeffery & Katauskas) in relation to a failed
pavement construction. Both SST Consulting Pty Ltd and Charles Rickard (collectively, ‘the
litigation funder’) agreed to fund the court action up to a limit of $150,000, but no security for
the costs was required in the funding agreement.

The case commenced in September 2000. When Rickard Construction had used up the
litigation funding limit, the funder continued to provide funding until Rickard Construction
lost the case and an adverse costs order was awarded against it. Rickard Construction became
insolvent and was unable to pay the costs order.

Jeffery & Katauskas sought to recover the shortfall of $450,000 from the adverse costs
order by seeking an order for costs against the litigation funder on the ground that the funder
had committed an abuse of process under r 42.3(2) of the Uniform Civil Procedure Rules 2005
(NSW) (UCPR).

Rule 42.3(1) of the UCPR prohibits the court from making any order for costs against a
person who is not a party to the litigation. This prohibition is qualified by r 42.3(2)(c), which
provides that r 42.3(1) does not limit the power of the court to make an order for payment by a
person who has committed contempt of court or an abuse of process of the court.

The trial judge refused to make a costs order against the litigation funder. The NSW Court
of Appeal dismissed the appeal by Jeffery & Katauskas. On appeal to the High Court, the
majority held that the litigation funder, who funded the court action for a commercial gain but
who did not provide an indemnity for an adverse costs order made against the plaintiff, had
not committed an abuse of process. Therefore, an order for costs could not be made against the
litigation funder under r 42.3(2) of the UCPR.

(a) Majority Judgment by French CJ, Gummow, Hayne and Crennan JJ

The majority set out a general list of categories of abuse of process that would warrant a costs
order against a funder under r 42.3(2) of the UCPR, but stated that the list was not exhaustive.20
The present case did not fall squarely into any of the listed categories or into any general
public policy category of abuse of process. Rickard Construction’s court action might have been
‘seriously and unfairly burdensome, prejudicial or damaging’ to the defendant, but that action
was not conducted for an improper purpose.21 Further, the matter raised by Jeffery & Katauskas
was about the adverse costs order awarded against Rickard Construction — it was not about the

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19 Jeffery & Katauskas (2009) 239 CLR 75 (joint judgment of French CJ, Gummow, Hayne, and
  Crennan JJ).
21 Ibid 96.
actual conduct of the proceedings. There was thus no abuse of the court’s process on the part of the funder.

On the issue of whether the litigation funding arrangement was ‘unfair’ to the defendant, the majority of the High Court took an alternative view and held that, in a case where a litigation funder had funded a party’s litigation, it would be unfair to the litigation funder if it was compelled to meet an adverse costs order made against the funded party. In justifying why this would be unfair to the litigation funder, the majority provided some examples; such as, that it would be unfair ‘to shareholders who support a company’s claim, relatives who support an individual plaintiff’s claim and banks who extend overdraft accommodation to a corporate plaintiff’.

The implication of this decision is that litigation funders can fund a court action for a commercial gain without having to take on the responsibility of meeting any adverse costs order if the action fails. Given that the funder in this case was not a party to the litigation, the successful defendant in this case could not sue the funder to pay for any adverse costs awarded against the plaintiff. There was no agreement between the defendant and the funder and the funder was not a party to the litigation.

(b) Minority Judgment of Heydon J

Heydon J delivered a strong dissent, suggesting that the funding arrangement entered into between the plaintiff and the funder had caused enormous harm to the defendant who, although successful in the defence, was unable to recover any legal costs. His Honour stated his sympathy for the defendant as follows:

The compliance of defendants with these state commands, on pain of punishment for contempt, can bring many costs, including the need to pay lawyers a great deal of money. Hence, litigation is something capable of causing immense harm unless its use is properly controlled and unless those who institute it and prosecute it are subject to legitimate pressures generating a measure of discrimination. The liability of the plaintiff to pay the defendant’s costs if the plaintiff’s allegations against the defendant are rejected by the courts is one of the mechanisms for alleviating (though only partially) the harm which the plaintiff has caused the defendant by bringing litigation based on unfounded allegations. That liability is also one of the legitimate pressures generating a measure of discrimination in conducting that litigation.

Heydon J went on to express his strong criticism of the litigation funding arrangement. His Honour stated:

The funder’s ‘success fee’ was on one view more than double the sum advanced and on another more than treble that sum. If viewed as interests on a loan to support proceedings conducted with proper expedition, it would be extortionate to a degree, beyond the dreams of the greediest usurer. If charged by a lawyer, it would cause that lawyer to be barred from practice. It is an abuse of process, in several senses, for a non-party funder to fund the plaintiff’s prosecution of proceedings in which the funder has that kind of financial interest without giving a practically effective indemnity to the plaintiff against its liability to the defendant for costs in the event that the plaintiff loses. It is manifestly and grossly unfair and unjust to the defendant. It is seriously burdensome, prejudicial and damaging to the defendant. It is productive of serious and unjustified trouble and harassment: for it caused the defendant to be vexed by baseless proceedings without being indemnified against the costs of demonstrating their baselessness. It is ‘unjustifiably oppressive’ to the defendant. If the funder’s conduct in this case became an institutionalised practice in the administration of justice, it would be an institutionalised practice by which injustice is constantly and inevitably caused. An institutionalised practice of that kind would bring the administration of justice into disrepute.

22 Ibid 98.
23 Ibid 98.
24 Ibid 124.
25 Ibid 125.
III. LITIGATION FUNDERS REQUIRING AN AUSTRALIAN FINANCIAL SERVICES LICENCE

Despite the absence of legislative regulations on litigation funders, the courts have, since October 2009, insisted that litigation funders must have an Australian Financial Services Licence (AFS Licence) when providing funding to parties in litigation. Below is a discussion of two appeal cases that focus on why, and how, the courts have insisted on litigation funders having an AFS Licence. This part concludes with a brief comment on ASIC’s temporary exemption from the requirement that litigation funders hold an AFS Licence, and the government proposal in relation to this.

A. Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (2009)

Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (‘Brookfield Multiplex’)26 is the first case that deals with a litigation funding arrangement as a ‘managed investment scheme’ under chapter 7 of the Corporations Act 2001 (Cth) (CA). On 20 October 2009, the Full Federal Court found that a litigation funder who had provided funding to the plaintiffs in the class action was in breach of Chapter 7 of the CA for not having an AFS Licence.

Shareholders brought various class actions against Brookfield Multiplex Ltd for damages for their investment losses relating to the company’s alleged failures of disclosure in relation to its Wembley Stadium project. The class actions were funded by International Litigation Funding Partners Pte Ltd (ILF) for shareholders who had signed the funding agreements with ILF and the retainer agreements with Maurice Blackburn & Cashman (MBC law firm). Under those arrangements, ILF paid all disbursements and 75 per cent of legal fees charged by MBC (with the remaining 25 per cent payable only if the claims were successful). In return, ILF would receive a ‘commission’ of between 25 per cent and 40 per cent of any damages or settlement sum paid.

Brookfield Multiplex Ltd sued ILF on the ground that the funding arrangements provided to the shareholders were a form of a ‘managed investment scheme’, as described in chapter 7 of the CA, and that ILF was in breach of the CA because ILF was unlicensed when providing litigation funding to the shareholders.

The term ‘managed investment scheme’ is defined to have three key features: (1) it involves people contributing money or money’s worth to acquire an interest in a common enterprise; (2) the pooled funds are invested to produce financial benefits for scheme members; and (3) the members do not have day-to-day control over the operation of the scheme.27 A managed investment scheme that has more than 20 members or is promoted by a professional promoter must be registered with ASIC under chapter 7 of the CA. To qualify for registration, the scheme must be operated by a public company that holds an AFS Licence and the company must have a compliance plan as required under chapter 5C of the CA.

At first instance, Finkelstein J of the Federal Court held that the litigation funding arrangements did not fall into the meaning of a managed investment scheme under chapter 7 of the CA.28 On appeal, the Full Federal Court by a majority of 2:1 (Sundberg and Dowssett JJ, with Jacobson J dissenting) overturned the decision of the lower court and found that the litigation funding agreement and the solicitor retainer agreement constituted a ‘managed investment scheme’.

26 Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (2009) 180 FCR 11 (‘Brookfield Multiplex’)

27 Section 9 of the Corporations Act 2001 (Cth), quoted in Brookfield Multiplex (2009) 180 FCR 11, [123]. See also P Lipton and A Herzberg, Understanding Company Law (Thomson Lawbook, 14th ed, 2008) chh 19–20. Further discussion on ‘managed investment scheme’ is beyond the purpose of this article.

scheme’ requiring registration under the CA. Their Honours found that the litigation funding arrangements had all the characteristics of a ‘managed investment scheme’, in that the shareholders had contributed money’s worth as consideration to acquire interests in the scheme; those contributions had been pooled to produce financial or other benefits; and the shareholders did not have day-to-day control over the scheme. They concluded that the scheme as described in the case should have been registered at ASIC under s 601ED of the CA and that ILF must have an AFS Licence to operate that scheme.29

B. International Litigation Partners Pte Ltd v Chameleon Mining NL (2011)

International Litigation Partners Pte Ltd v Chameleon Mining NL (‘Chameleon Mining’)29 is the second, and latest, case dealing with a litigation funding agreement as a ‘financial product’ under chapter 7 of the CA. On 15 March 2011, the NSW Court of Appeal found that the litigation funding agreement was a ‘financial product’ and, as such, the litigation funder was required to hold an AFS Licence.

In this case, Chameleon Mining NL (Chameleon) entered into a litigation funding agreement with International Litigation Partners Pte Ltd (ILP), a Singapore litigation funding company, to fund Chameleon’s Federal Court proceedings against Murchison Metals Ltd (Murchison). In August 2010, Chameleon signed a term sheet for Cape Lambert Resources Ltd to take over the court proceedings. ILP saw this as termination of the litigation funding agreement and took the necessary steps to claim for the recovery of both the ‘funding fee’ — that is, the legal costs already paid out — and an additional fee for terminating the funding agreement early.

Chameleon argued that the litigation funding agreement was a form of ‘financial product’ under ss 925A and 925E of the CA, and that the litigation funder was required to have an AFS Licence when providing that product. Given that ILP did not have an AFS Licence, the funding agreement was unenforceable and Chameleon was entitled to rescind the funding agreement when it served a notice of rescission on ILP.

At first instance, Hammerschlag J of the NSW Supreme Court found that the funding agreement was not a financial product within the meaning of chapter 7 of the CA and that Chameleon could not rescind that funding agreement.

In the NSW Court of Appeal, after much analysis of what a ‘financial product’ meant in chapter 7, a majority of 2:1 (Giles JA and Young JA, with Hodgson JA dissenting) overturned the decision of the lower court and found that the litigation funding agreement was a ‘financial product’ and the litigation funder was therefore required to hold an AFS Licence. The funding agreement was an agreement under which Chameleon ‘managed financial risk’ as described in s 763A; namely, the risk that Chameleon would be required to pay adverse costs if it was unsuccessful in the funded proceedings. The Court of Appeal concluded that the failure on the part of the litigation funder to hold an AFS Licence or to be exempted from doing so by ASIC meant that the funding agreement was unenforceable and void ab initio. The funded party, Chameleon, was thus entitled to rescind, and did validly rescind, the agreement.

C. Similarities between Brookfield Multiplex and Chameleon Mining

There are similarities in the approach taken by the court in Chameleon Mining and Brookfield Multiplex. While, in Brookfield Multiplex in 2009, the court found that the funding agreement was a ‘managed investment scheme’, in Chameleon Mining in 2011, the court declared it to be

29 Brookfield Multiplex (2009) 180 FCR 11, [25], [64], [104] (Sundberg and Dowsett JJ). Chapter 5C of the Corporations Act 2001 (Cth) deals with managed investment schemes and the requirement of registration, while chapter 7 covers financial services laws and the requirement of an AFS Licence. Under ch 7 in s 766A, ‘financial service’ is defined to include registered managed investment scheme. Section 601ED requires managed investment scheme to be registered with ASIC.

30 International Litigation Partners Pte Ltd v Chameleon Mining NL (2011) 276 ALR 138 (‘Chameleon Mining’)
a ‘financial product’. Both ‘managed investment scheme’ and ‘financial product’ are concepts in the financial services provisions of chapter 7 of the CA; so, either way, the litigation funders were still required to hold an AFS Licence. Regardless of how a litigation funding arrangement is defined or described, the courts in subsequent proceedings may well insist that litigation funders have an AFS Licence when providing funding to parties.

The other interesting point to note is that chapter 7 of the CA does not provide a clear definition of ‘managed investment scheme’ or ‘financial product’. The courts in both Brookfield Multiplex and Chameleon Mining struggled to define those terms by referring to the multiple sections and cross-references in Chapter 7. After much discussion, the judges provided differing views. Given the conflicting judicial opinions, both between the first instance and appeal, and between the individual judges on appeal, it remains uncertain whether a different approach for dealing with litigation funding arrangements will be adopted in future cases.

D. ASIC’s Transitional Relief and the Government Proposal for Legislative Reforms
In response to the decision in Brookfield Multiplex, on 4 November 2009, ASIC issued an order to provide temporary transitional relief so that current funded court actions are exempt from the definition of ‘managed investment scheme’ under chapter 7 of the CA, and that funders, lawyers and their representatives involved in such actions are exempt from the requirement of holding an AFS Licence.31 The period for which these exemptions apply has been extended several times, most recently, on 29 June 2011, to 30 September 2011. In addition, and in response to the decision in Chameleon Mining, ASIC has also granted a temporary exemption for litigation funding arrangements that are otherwise characterised as a ‘financial product’ or an interest in a financial product under chapter 7.32 ASIC’s granting of temporary exemption is said to be necessary to minimise any disruption to currently funded court actions and to allow time for the federal government to implement the necessary reforms to regulate the litigation funding industry, and also to address the issues raised in the two cases.

On 4 May 2010, the federal government announced a plan to legislate to exempt funded class actions from the definition of ‘managed investment scheme’ under chapter 7, and to provide an appropriate means of minimising conflicts of interest in litigation funding arrangements.

On 27 July 2011, the federal government released an exposure draft of litigation funding regulations for public consultation.33 The proposed regulations clarify that funded class actions are to be exempt from ‘managed investment scheme’ under chapter 7 of the CA. The regulations also clarify that litigation funding arrangements are to be exempt from being classed as ‘financial products’ under chapter 7. The proposed exemptions, if made law, would mean that a litigation funder proposing to provide funding to a party in a court action would not be required to hold an AFS Licence. The draft proposal also provides a brief statement about managing potential conflicts of interest. It should be noted, however, that the Explanatory Commentary attached to the proposed regulations is only a little over one page; there appears to be no mechanism to manage potential conflicts of interest among the various people involved in funded class actions. The document containing the proposed regulations merely highlights the proposed exemptions, with numerous cross-references to the current chapter 7 of the CA.34

It is submitted that the government’s proposed regulations are unclear and lack depth. The litigation funding industry has the potential to affect a wide range of people — not only the funded parties, such as the plaintiff, but also the non-funded parties such as the defendant and

32 See ASIC, Variation of Class Order [CO 10/333], CO 11/555, 23 June 2011.
34 The proposed Corporations Amendment Regulations 2011 are 10 pages in length with numerous cross-references to the existing chapter 7 of the Corporations Act 2001 (Cth).
all other persons with an interest in the matter but who may have decided not to take part in the class action.35 It is submitted that a dedicated Act may be more suitable for regulating the conduct and activities of the litigation funders, as discussed in part V below.

IV. OUTLINE OF THE CLASS ACTION PROCEDURE IN AUSTRALIA

The class action procedure in Australia is governed under part IVA of the FCAA, which came into force in March 1992.36 The procedure is available for use in a range of settings; for example, in shareholder class actions.

Set out below is an outline of what a class action is in Australia, with an emphasis on the ‘opt out’ provision contained in s 33J of the FCAA.37 Because of the legalisation of litigation funding, an ‘opt out’ class action in Australia now appears to be more like an ‘opt in’ class action. This is because of the lack of clarity and definition in s 33J of the FCAA, combined with the lack of specific rules and principles governing the litigation funding industry.

A. What is a Class Action in Australia?

Section 33C of the FCAA defines a class action as follows:

[W]here:

(a) 7 or more persons have claims against the same person; and
(b) The claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
(c) The claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

In simple terms, a class action is possible in Australia only if there are at least seven persons having the same, similar or related claims against a defendant and one of those persons agrees to commence litigation and represent all other members in the same class (called the ‘group members’).

The Australian class action is different from the American class action. In America, for a person to become a member in the class action, they must expressly agree to join the class action and have their name included in the court documents. This is commonly known as an ‘opt in’ class action. Australia, however, has chosen not to adopt the American procedure; instead, Australia has an ‘opt out’ mechanism.38

35 An example of those other persons are the non-participating shareholders who have the option of joining the class action at a later stage as provided for under part IVA of the Federal Court of Australia Act 1974 (Cth), which sets out the class action procedure.
36 Victoria is the only state that has a model almost identical to the federal ‘opt out’ class action. This is provided in part 4A of the Supreme Court Act 1986 (Vic), which came into operation in January 2000.
37 For a detailed discussion of the class action procedure under part IVA of the FCAA and why it is becoming ineffective, see Lang Thai, ‘Is There a Need to Reform the Corporate Class Action Procedure in Australia?’ (2011) 8 Macquarie Journal of Business Law 134.
38 The Australian Law Reform Commission (ALRC) made a recommendation four years earlier in 1988 for an ‘opt in’ class action procedure, similar to the American counterpart, but the federal Parliament rejected that recommendation and introduced a class action with an ‘opt out’ mechanism instead, without any clear explanation: ALRC, Grouped Proceedings in the Federal Court, Report No 46 (1988). The theory that the Parliament had rejected the ALRC’s recommendation for an ‘opt in’ class action procedure was perhaps to prevent the floodgate effect as seen in the US class actions.
B. The ‘Opt-Out’ Mechanism is Ineffective and Obsolete

Section 33J is problematic, particularly when a class action is commercially funded by a litigation funder. Litigation funders generally require the funded parties to sign a litigation funding agreement (that is, to ‘opt in’ to the funding agreement), in which case the ‘opt out’ mechanism referred to in s 33J becomes ineffective and redundant. Section 33J is as follows:

(1) The Court must fix a date before which a group member may opt out of a representative proceeding.

(2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.

Essentially, s 33J provides that, if group members do not wish to have a decision binding on them in a class action, they can file a notice to court to opt out of the class action. The provision may sound simple, but it is difficult to apply in practice. There is nothing in part IVA of the FCAA that helps to explain what an ‘opt out’ class action actually means. Section 33J does not make it clear what the consequences are if a group member wishing to opt out of the class action has failed to file the court with a notice by the prescribed date.

A more serious problem relates to a gradual corrosion of the ‘opt out’ mechanism referred to in s 33J. Now that the High Court’s decision allows plaintiffs to engage a litigation funder, s 33J becomes problematic. When plaintiffs sign a litigation funding agreement, they are opting into the funding agreement. Given the nature of funding arrangements, which usually impose early termination fees on parties who withdraw from the agreement, they are, in effect, also opting into the class action. An ‘opt out’ class action under s 33J has now taken on the characteristics of an ‘opt in’ class action due to the liberalisation of the litigation funding industry and the absence of proper regulation.

There are numerous cases where an ‘opt out’ class action has seemed more like an ‘opt in’ class action. The statement of Finkelstein J in Dawson Nominees Pty Ltd v Multiplex Limited provides some rational explanation about why this is so:

The advantage of the retainer and the funding agreements to each group member is obvious. If it were not for those agreements and the class action procedure, the action would probably not have gotten off the ground. Individually, most group members would not have the financial strength to bring their opponents to court. For those that do the potential benefits of bringing an action would be outweighed by the quantum of the costs.

Putting aside the difference between ‘opt in’ and ‘opt out’, one would indeed accept the view that litigation funding is doing some good for the plaintiffs. However, the difficulty is not so much the litigation funding itself, but whether, by getting people to sign into — that is, opt into — the litigation funding agreement, it would make the whole process inconsistent with the opt out rules in part IVA of the FCAA, particularly s 33J. In other words, there are compelling arguments that litigation funding arrangements work on the basis of excluding some eligible group members from the class action, while the opt out class action procedure in Part IVA focuses on including all group members.

39 Federal Court of Australia Act 1976 (Cth) s 33ZB refers to judgment of the court as binding on all group members, except those who have chosen to opt out of the class action.
40 This may occur in a situation where, for example, a shareholder has filed for an oppression action based on a set of similar circumstances. An oppression action is a personal action covered under part 2F.1 of the Corporations Act 2001 (Cth).
42 See Dawson Nominees [2007] FCA 1061, [34] (Finkelstein J).
V. CURRENT PROBLEMS IN LITIGATION FUNDING AND SUGGESTIONS FOR REFORM

As discussed at part III above, the federal government released a draft proposal for litigation funding regulations on 27 July 2011. However, the proposal is impractical because there is no clear direction on how litigation funders are to be regulated. In fact, there are still many issues that have not been addressed in the proposal. The purpose of this part is to highlight those issues and to offer some suggestions for reform.

A. Plaintiffs Are Not Free to Negotiate Terms and Conditions with Litigation Funders

Litigation funders can currently set their own terms and conditions in funding agreements. It is not unusual for litigation funders to demand a high percentage of returned fees in the funding agreement. Some commentators have noted that the ‘agreed’ percentage of the revenues imposed by the litigation funder has been as high as 75 per cent. In Jeffery & Katauskas, a litigation funder was found to be unwilling to accept any adverse costs awarded against the plaintiff; however, the High Court held there was no abuse of process on the part of the litigation funder.

A lack of competition in the litigation funding industry is also a problem for plaintiffs, meaning that they are unable to negotiate freely on terms and conditions. There are currently six or seven main litigation funding companies in Australia which dominate about 95 per cent of all litigation funding. Only two of these funders are listed on the Australian Securities Exchange — IMF (Australia) Ltd and Hillcrest Litigation Services Ltd. Given the level of exposure these companies have in the litigation funding market, they can demand a high percentage of earnings from high-profile cases. For example, IMF (Australia) Ltd has stated that it will agree to fund a court action only if the claim is over $2 million.

B. Problem of Recovering Adverse Costs from Impecunious Plaintiffs and from their Funder

In Jeffery & Katauskas, the successful defendant was barred from pursuing its costs order against the litigation funder. In that case, the funder had agreed to fund the plaintiff to commence a court action, but it was reluctant to extend finance to cover costs awarded against the plaintiff. By a 4:1 majority, the High Court of Australia held that the funder had not done anything unlawful or against the public policy such as to constitute an abuse of process. The implication of the High Court decision is that it was up to the plaintiff and the funder to agree on the terms of their funding agreement. Since the funder was not a party to the litigation, the successful

43 Currently, there are no specific rules and principles governing the behaviour and conduct of litigation funders. Litigation funders are free to conduct their own business without constraints from any specific legislation (other than the common law contract principles and the general anti-misleading and deceptive conduct provisions under the Competition and Consumer Act 2010 (Cth), under s 1041H of the CA, and under s 12DA of the Australian Securities and Investment Commission Act 2001 (Cth)). The general consumer protection law may not be applicable against litigation funders because the plaintiff is not a ‘consumer’ as such, as both the funder and the plaintiff are often dealing in a commercial context.


45 Jeffery & Katauskas (2009) 239 CLR 75.

46 Jeffery & Katauskas (2009) 239 CLR 75.


49 Part III of this article provides a detailed discussion of this case.
defendant could not claim costs from it. Heydon J, who was in the minority, pointed out that the decision was seriously harsh and unfair to the successful defendant.50

C. The Floodgate Effect Seen in the Court Room

Since the legalisation of the litigation funding arrangement in 2006, and with the absence of specific rules and principles governing the industry, there are now numerous commercially-funded court actions. This ‘floodgate effect’ is partly attributable to litigation funders having too much freedom in setting terms and conditions in litigation funding agreements.

In order to control or minimise the problems mentioned so far, the government should legislate to provide that funders comply with certain basic requirements, which are not able to be excluded from the funding agreements. This approach could ensure greater fairness to both parties in litigation and that there is no abuse of the court’s processes. It would also reassure plaintiffs that their vulnerability is not to be exploited by the funder, and reassure defendants that their costs is to be recoverable if they are ultimately successful.

D. Confusion over the Terms ‘Opt In’ and ‘Opt Out’

In a commercially-funded class action, where the class action procedure under part IVA of the FCAA comes in contact with the so-called ‘law of litigation funding’, the consequence is the confusion over the terms ‘opt out’ and ‘opt in’. By signing a litigation funding agreement with a funder to fund a class action, the plaintiff and other group members are not only opting into the funding arrangement, but also opting into the class action. If group members later decide to ‘opt out’ of the funding agreement, the funder may impose an early termination fee under the funding agreement. Practically, the early termination fee may deter group members from opting out. For this reason, ‘opt out’ class actions have become more like ‘opt in’ class actions.

The confusion may be illustrated in two conflicting shareholder class action cases. On the one hand, Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* favoured a strict literal interpretation of the legislation. Stone J considered that the fact that Parliament had rejected the Australian Law Reform Commission’s recommendation for an ‘opt in’ approach in the class action procedure indicated that Parliament intended the Australian class action procedure to have an ‘opt out’ mechanism.51 In refusing to allow the commercially-funded class action to continue, her Honour concluded that the requirement that group members opt in to the proceeding through the funding agreement was ‘inconsistent with the terms and policy of Part IVA’ of the FCAA.52 A contrary view was expressed by Finkelstein J in *P Dawson Nominees Pty Ltd v Multiplex Ltd*.53 In allowing the shareholder class action to be commercially funded, Finkelstein J stated that, if it were not for the funding arrangement, ‘the [class] action would probably not have gotten off the ground’.54 His Honour noted that, although the shareholders had opted in to the funding agreement, there was nothing in part IVA of the FCAA preventing them from opting out of the class action at a later date.55

A further reason for confusion may be that, on the one hand, under s 33E, group members can join a class action whenever they like — there is no set date. On the other hand, under s 33J, group members can opt out of the class action by simply filing a notice to court to that effect, without needing to give any reason for doing so. In effect, group members can come and go freely in a class action.

The lack of clarity and definition of the term ‘opt out’ in Part IVA of the FCAA has also contributed to the confusion over the distinction between ‘opt out’ and ‘opt in’. It appears that

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50 Jeffery & Katauskas (2009) 239 CLR 75, 124
51 Dorajay Pty Ltd v Aristocrat Leisure Ltd (2005) 147 FCR 394, 429 (‘Dorajay’).
52 Ibid 431.
53 P Dawson Nominees Pty Ltd v Multiplex Ltd [2007] FCA 1061 (‘Dawson Nominees’).
54 Ibid [34].
55 Ibid [52].
an ‘opt out’ class action could become an ‘opt in’ class action through the influence of litigation funders.

E. Third Line Forcing

When plaintiffs and group members sign a litigation funding agreement to obtain funding for their class action, the funder may compel the plaintiffs to agree to engage or accept a law firm chosen by the funder. It is possible that a commercially-funded class action could constitute third line forcing if there is clear evidence that the funder is making a decision on the choice of law firm to act on the matter. Third line forcing is prohibited under s 47 of the Competition and Consumer Act 2010 (Cth).

Third line forcing takes away the element of fair competition. It removes the will of group members to shop around and negotiate with other law firms. Plaintiffs and group members in class action cases generally have no choice but to accept the terms presented to them. They are unlikely to succeed in challenging a litigation funder or a law firm if they are in desperate need of funding for their class action.

F. Benefits Go to the Litigation Funders and Law Firms

When a law firm takes on a commercially-funded class action, it is acting not only for the class plaintiff, but it may also be ‘acting’ for the litigation funder, as the funder pays all legal costs. On the one hand, the law firm receives instructions in the form of facts and evidence from the plaintiffs and other group members; on the other hand, however, the law firm provides the funder with progress reports. In effect, both the litigation funder and the class plaintiffs are clients of the law firm in some sense, which may raise problems of potential conflict of interest.56

G. Defendant under Pressure to Settle

It is not surprising to hear that only ‘very few cases [on class actions] have gone to full judgment’.57 In a commercially-funded class action, a defendant is more likely to be under pressure to settle out of court. One possible reason is that a litigation funder is unlikely to give up on a class action that it has chosen to take on to provide funding. There is a tendency for the litigation funder to press on with the class action until a satisfactory outcome is reached, when the funder is certain that it has made a profit.

H. Suggestions for Reform

As noted in part III above, the government proposes to simply amend chapter 7 of the CA58 by inserting a provision to exempt litigation funding arrangements from being termed as ‘managed investment scheme’ or ‘financial products’. This would exempt litigation funders and lawyers representing class plaintiffs and group members from having to obtain an AFS Licence. The proposal would also require litigation funders to put in place arrangements to manage conflicts of interest. However, many of the other important issues highlighted above appear to have

58 Chapter 7 of the CA is wholly about financial services and financial products and the provision of those services or products requires an AFS Licence from ASIC.
been overlooked.\textsuperscript{59} It is submitted that the current chapter 7 of the CA is already convoluted and difficult to understand with numerous cross-references within that chapter.\textsuperscript{60} The litigation funding industry is far too important for all the rules relating to it to be squeezed into the current chapter 7. The author suggests that a whole new Act may be far more suitable to regulate this important area, with provisions concentrating on the following:

- A requirement of ‘base floor’ terms to protect funded parties. Litigation funders should be subject to a clear regulatory framework, with the inclusion of the minimum base floor terms implied into the funding agreement; for example, the maximum ‘commission’ and ‘early termination fee’ permitted to be charged by the funder, and allowing a reasonable cooling off period for the funded party.

- Terms to protect a successful defendant’s interest. To protect defendants’ interests, and to prevent litigation funders from escaping liability for costs if the funded party loses, the defendant should be entitled to know in advance, with clarity, the type of funding structure that the funded party has with the litigation funder and whether there is any clause in the agreement dealing with potential adverse costs. A base floor term should be included in the legislation to allow a successful defendant to claim against the litigation funder for any adverse costs order made against the funded party.

- A clear management plan to avoid conflicts of interest. In avoiding potential conflict between a law firm and a litigation funder, and between a law firm and its clients, legislation should clarify the respective roles and responsibilities. For example, legislation should make it clear that the law firm is strictly prohibited from colluding with the litigation funder, and that the litigation funder cannot give instructions to the law firm without express consent from its clients. Currently, the government’s proposal is that litigation funders are required to provide a plan of how they manage potential conflicts of interest, without providing any guidance on how this is to be achieved. The proposal is impractical without any criteria by which to judge whether a conflict management plan is acceptable.

- That litigation funders be required to prove sufficient assets. Legislation should provide that litigation funders give assurances that they have sufficient assets to fund a court action, and that the action will remain funded for the duration. Such assurances should include that they have assets sufficient to meet any costs orders made against the funded party. This would ensure that a foreign litigation funding company has sufficient assets in Australia to satisfy all relevant costs and to minimise situations where the funded party may be stranded for lack of funding, or the successful defendant may not be able to recover costs. Legislation could include a security for costs clause as a requirement for entering into a litigation funding arrangement.

\textsuperscript{59} In the Explanatory Commentary to the exposure draft of the litigation funding regulations, it says in one part that ‘the Government supports class actions and litigation funders as they provide access to justice for a large number of consumers …’. It concludes that ‘the proposed Regulations would also provide exemptions from the licensing, conduct and disclosure requirements in that Chapter [that is, Chapter 7 of the CA].’ It is unclear as to why the government does not consider these requirements as an important part of the regulatory framework in the litigation funding industry.

\textsuperscript{60} In \textit{International Litigation Partners Pte Ltd v Chameleon Mining NL} [2011] NSWCA 50, [152]–[153], Young JA stated:

\textit{Chapter 7 of the Corporations Act 2001 (C’th) is drafted in most obscure and convoluted manner … I know our job is to make plain what is obscure and I know commercial lawyers are thought by the legislature to be so able to find loopholes that every possible eventuality must be thought of and covered. However, the main aim is to protect the investing public and the investing public gain little comfort from obscure legislation.}
VI. CONCLUSION

The litigation funding industry is still largely unregulated. This is a matter of major concern, not only for plaintiffs in funded actions, but also for defendants, the courts and the general community.

The federal government’s draft regulations do not address many important issues, such as those raised in the High Court decision in Jeffery & Katauskas. That decision opens up more opportunities for litigation funders to exercise their power on both plaintiffs and defendants, by using their legal entitlement to refuse to provide security for costs and to refuse to pay any adverse costs potentially awarded against the plaintiffs. The situation could become worse if the government does not regulate this industry now. It is hoped that the views presented in this article will help to put further pressure on the federal government to pass a new Act, wholly for the purpose of governing the litigation funders, and putting a regulatory framework into place. By simply adding provisions into the existing chapter 7 of the CA to exempt litigation funding arrangements from being a managed investment scheme or a financial product, and to waive the requirement of an AFS Licence, is not doing any good to either funded parties or defendants in the long term.
IMAGINING THE BODY CORPORATE: 
ALTERNATIVES TO THE ORTHODOX LEGAL CONCEPTION 
OF THE COMPANY

JONATHAN BARRETT* AND JOHN HORSEY**

Different disciplines conceive companies in different ways. In the orthodox legal view, the company is imagined as a full, rights-bearing person; although the many and varied ways in which the courts have ‘pierced the corporate veil’ indicate juridical tensions in this area. Ambivalence among lawmakers about the nature of companies is also indicated by human rights charters: unlike the New Zealand bill of rights, the more recent Australian Capital Territory and Victorian charters reserve human rights (and responsibilities) to individuals. In contrast to the orthodox legal conception, classical economics imagines the company as a simple conduit for optimising shareholders’ utility. Tax law tends to manifest a floating conception of the company, whereby it is treated in some areas as a person and in other areas as a mere conduit. This indicates that neither the orthodox legal nor classical economics approaches to the company have fully captured the imaginations of tax policymakers.

This article outlines different ways in which the company is imagined, and critically analyses the orthodox legal conception of the company in the light of these potentially competing conceptions. It is concluded that the occasional failure on the part of judges to imagine one-person companies and subsidiaries as separate legal persons is consistent with extra-legal theory and the general expectations of society. If the social advantages of the corporation and the imaginative plausibility of that model are not better established, the long-term future of certain forms of the company may be in doubt.

I. INTRODUCTION

‘A legal system can personify whatever being or objects it pleases.’1 ‘It can withhold legal personality from human beings, thus demoting them from “persons” to “things”; and it can extend legal personality to beings or objects other than human beings thus promoting them from “things” to “persons”.’2 Since this power to personify vests principally in the legislature,3 the modern company is a creature of statute.4 However, despite the common law having no conception of a trading corporation as a legal person,5 the courts are required to engage with

* Senior Lecturer, School of Business, Open Polytechnic, New Zealand.
** Senior Lecturer, Faculty of Business, Manukau Institute of Technology, New Zealand.
2 H R Hahlo and Ellison Kahn, The South African Legal System and Its Background (Juta, 1968) 103 (citations omitted).
3 Lord Hoffmann’s explanation of the company, given in Meridian Global Funds Management Asia Limited v Securities Commission [1995] 3 NZLR 7, 11 (PC) (‘Meridian’), refers to companies usually being created by statute. It is assumed that Lord Hoffman had the Royal Charter in mind as an alternative means of establishing a company.
4 Andrew Beck, ‘The Two Sides of the Corporate Veil’ in John H Farrar (ed), Contemporary Issues in Company Law (Commerce Clearing House, 1987) 69, 82 observes: ‘[a]lthough it has been said that the corporate veil is “statutorily drawn” there is in fact no conclusive explanation of this concept in the Act and it has been developed by judges’ (citations omitted).
5 Inherence or natural entity theory (that people enjoy a natural right to form companies, with positive law merely recording that right) may be dismissed as a Lockean fantasy. David Millon, ‘The Ambiguous Significance of Corporate Personhood’ (2001) 2(1) Stanford Agora: An Online Journal of Legal Perspectives 1, 10–11 provides an illuminating explanation of the political goals underlying inherence theory. There is no support in Blackstone for a common law right to incorporate.
the practical implications of separate legal existence. Not only have judges shown significant disunity on the issues that inevitably arise, they have on occasion indicated difficulty with the very idea of a company as a separate person from its controllers. It is submitted that such inconsistency in approach can be seen as a failure to imagine a company as a person. Benedict Anderson argues that, to survive, discrete, national political communities must be imagined as such by their constitutive populations. By analogy, it is submitted that companies must be generally imagined as persons, not merely declared to be such by legislation.

Different disciplines imagine and seek to explain phenomena in different ways. We may, for example, ask which system of thought most plausibly explains madness. Law, philosophy, theology and other disciplines may lay claim to madness, but it seems that, currently, the psychiatric branch of medicine is a particular manifestation of the power–knowledge complex. We may, for example, ask which system of thought most plausibly explains madness. Law, philosophy, theology and other disciplines may lay claim to madness, but it seems that, currently, the psychiatric branch of medicine is a particular manifestation of the power–knowledge complex. We may, for example, ask which system of thought most plausibly explains madness. Law, philosophy, theology and other disciplines may lay claim to madness, but it seems that, currently, the psychiatric branch of medicine is a particular manifestation of the power–knowledge complex. We may, for example, ask which system of thought most plausibly explains madness. Law, philosophy, theology and other disciplines may lay claim to madness, but it seems that, currently, the psychiatric branch of medicine is a particular manifestation of the power–knowledge complex.


7 L S Sealy, Cases and Materials in Company Law (Cambridge University Press, 1971) 58 observes that, in Salomon [1897] AC 22, the judges in the lower courts were ‘outstanding company lawyers of considerable experience’ and, in Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd [1916] 2 AC 307 (‘Daimler’), the Court of Appeal had been ‘greatly enlarged’, and yet the House of Lords disagreed with it.

8 The following decisions are particularly relevant to this article: Daimler [1916] 2 AC 307; Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492; DHN Food Distributors Ltd v London Borough of Tower Hamlets [1976] 3 All ER 462; R v Hammersmith and Fulham London Borough Council; Ex parte People Before Profit Ltd (1981) 80 LGR 322; Re Wiseline Corporation Ltd (2002) 16 PRNZ 347 (‘Re Wiseline’).


10 Every dominant imagining is an exercise of power. Thus, in Michel Foucault’s critique of madness, the psychiatric branch of medicine is a particular manifestation of the power–knowledge complex. See generally Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans, Random House, 1979) [trans of: Surveiller et Punir: Naissance de la Prison (first published 1975)]; Michel Foucault, History of Madness (Jean Khalfa and Jonathan Murphy trans, Routledge, 2005) [trans of: Histoire de la Folie à l’Age Classique (first published 1961)].


corporate personality. Given the dominance of the company as an organisational form in contemporary society, conceptions of the company derived from other systems of thought, notably economics, deserve consideration. This is especially the case since, outside the law, companies are not usually attributed legal personhood.

This article outlines different ways in which the body corporate is imagined and critically analyses the orthodox legal approach to the company in the light of these potentially competing conceptions. First, an orthodox legal conception of corporate personality is sketched. In contrast, judicial scepticism about separate legal personality, discernible in piercing of the corporate veil cases, is identified. Second, certain extra-legal conceptions of the company, including that of classical economics, are outlined. The aim here is to demonstrate that the orthodox legal imagining of the company is not universally accepted outside the law. Third, certain implications of companies being included or excluded from human rights charters are discussed. It is concluded that the occasional failure on the part of judges to imagine one-person companies and subsidiaries as separate legal persons is consistent with extra-legal theory and the general expectations of society. If the social advantages of the corporation and the imaginative plausibility of that model are not better established, the long-term future of certain forms of the company may be in doubt.

II. LEGAL IMAGININGS

A. Legal Personality in Historical Context

The idea of corporate personhood owes much to the liberal philosophies of the Enlightenment. According to positivist theory, which dominated early 19th century British jurisprudence, rights exist to the extent that the law, supported by social customs, secures them. Law is validated by the presence of particular legal structures and systems — not because of ideals of justice, democracy or the rule of law. Legal personality by right emerged at the time when Adam Smith’s Wealth of Nations was revolutionising economic thinking by expressing economic

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15 Constitution of the Republic of South Africa Act 1996 (South Africa) s 8(4) and New Zealand Bill of Rights Act 1990 (NZ) s 29 confer rights on juristic persons; whereas Human Rights Act 2004 (ACT) s 6 and Charter of Human Rights and Responsibilities Act 2006 (Vic) s 6(1) confer rights only on natural persons.


individualism as ‘the obvious and simple system of natural liberty’. These ideas were the foundational values for the industrial and capitalist revolutions. This period also witnessed the evolution of democracy, the rise of mercantilism and the market economy along with a focus on the individual, property rights, the private accumulation of capital, and its protection by the state through law. Material goals and ownership rights predominated in this arrangement, with the state an active participant in protecting property, promoting the private creation of wealth, and accessing its surplus through taxes to fund state institutions. Against this background, the legislature conferred corporate personality by registration — the validity of which was later confirmed in Salomon — and the corporation began its tenacious hold on legal legitimacy, both in company law and in the wider legislative domain.

The power of the legislature, in the positivist conception, to confer or withhold any rights to anyone or anything is consistent with a company being perceived as a discrete legal actor. It is, however, a far more straightforward matter to create a persona ficta by statutory provision than it is to practically incorporate that idea into the common law that has developed to regulate human interactions, interests and behaviour. As a contemporary commentator observed of Salomon: ‘[o]ur Legislature … delivered itself on the Companies Acts in its usual oracular style, leaving to the Courts the interpretation of its mystical utterances.’ But, if Parliament was vague in its expectations, so too have been the courts. Thus, Michael Whincop argues that the fundamental problem with Salomon is not the principle of separate legal entity, but the fact that the House of Lords gave no indication of: ‘what the courts should consider in applying the separate legal entity concept and the circumstances in which one should refuse to enforce contracts associated with the corporate structure’.

B. Judicial Engagement with the Company

1. Separate Legal Existence

John Farrar identifies the ‘heuristic inadequacy of the concept’ of separate legal personality and ‘how courts have attempted to deal with manifest injustices in its application, inevitably resulting from the lack of coherent principle and policy behind its adoption as orthodox legal doctrine’. There is no lack of controversy surrounding the doctrine, and there have been numerous efforts to give it theoretical cogency. The judicial and statutory preference is to characterise the


20 See Perry et al, above n 18, 257.

21 Ibid.

22 Joint Stock Companies Act 1844, 7 & 8 Vict, c 110; Joint Stock Companies Act 1856, 19 & 20 Vict, c 47, and emulated in the British colonies.


24 For example, Interpretation Act 1999 (NZ) s 29 definition of ‘person’ ‘includes a corporation sole, a body corporate’ but also ‘an unincorporated body’.

25 Note (1897) 13 Law Quarterly Review 6, cited by Farrar, ‘Frankenstein Incorporated or Fool’s Parliament?’, above n 16, 145. It lies beyond the scope of this article to analyse whether modern company legislation is closer to judicial thinking on corporations. The role of Law Commissions in performing the groundwork for changes in company legislation may lead to greater consensus; but, say, equitable conceptions of unconscionable behaviour in relation to minorities may be different from government goals of attracting direct foreign investment.


27 Farrar, ‘Frankenstein Incorporated or Fool’s Parliament?’, above n 16, 144.

company as a legal fiction. Thus, in *Northside Developments Pty Ltd v Registrar-General*, Brennan J observed that ‘[a] company, being a corporation, is a legal fiction. Its existence, capacities and activities are only such as the law attributes to it’. This view is consistent with the provisions of the *Companies Act 1993* (NZ) and the *Corporations Act 2001* (Cth), which deal with the creation of a new legal entity in the form of a registered company. However, this positivist approach to corporate personality reveals little about how judges imaginatively engage with the legal fiction. Problematising the issue further, if separate legal existence is a legal fiction, ‘[l]ike most legal fictions, it is artificial and has something of the absurd about it’.

Conceiving corporate personality, and when it may be disregarded in metaphorical terms, is a principal means of judicial engagement with these difficult issues. A ‘web or nexus of contracts’, ‘the veil of incorporation’, ‘cloak’ and ‘facade’, ‘shield’, ‘dummy’ and ‘alter ego’ are metaphors commonly employed in this area. Indeed, the doctrine of piercing the corporate veil is ‘enveloped in the mists of metaphor’. The use of metaphor is a common and a longstanding practice in English law. However, as Justice Cardozo observed, ‘metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it’. The corporate personality metaphor emphasises the external, rather than internal aspects of the corporate entity, and makes an individualist assumption about legal personality. This raises a number of issues about the logic and rationality of the device, particularly in relation to corporate groups.

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31 See, especially, *Companies Act 1993* (NZ) ss 14, 15; *Corporations Act 2001* (Cth) s 119.
32 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] 4 All ER 1029, 1038. In this case, the Court of Appeal was not referring to separate legal personality; nevertheless, the generalisation is pertinent.
37 See, eg, Roche, above n 14, 290.
38 Implying a ventriloquist analogy, in *S Berendsen Ltd v IRC* [1957] 2 All ER 612, the Court of Appeal held that where a subsidiary company is concerned it was permissible to ‘ask, since the company cannot speak, whose is the voice that you hear’.
39 See Bainbridge, above n 14, 485.
40 *Berkey v Third Avenue Rly Co*, 244 NY 84, 94 (1926), cited in Bainbridge, above n 14, 506.
41 See, eg, *Sir James Smith’s Case* (1691) Carth 217.
42 *Berkey v Third Avenue Rly Co*, 244 NY 84, 94 (1926), cited in John H Farrar, *Farrar’s Company Law* (Butterworths, 3rd ed, 1991) 72. Likewise, Gareth Morgan, *Images of Organization* (Sage, 2006) 13 observes: ‘[m]etaphor is often just regarded as a device for embellishing discourse but its significance is greater than this. For the use of the metaphor implies a way of thinking and a way of seeing that pervade how we understand our world generally … and always produces this kind of one-sided insight.’
2 Piercing the Corporate Veil

The Courts have developed different models for disregarding separate legal existence, ostensibly framed around a broad and pragmatic discretion. In Savill v Chase Holdings (Wellington) Ltd, Justice Tipping discussed then recent authorities in New Zealand and the United Kingdom dealing with the circumstances under which it might be legitimate for the Court to lift the corporate veil and deal with the true situation thus revealed. He concluded:

The essence of the matter in my view is that the Court should not lift the corporate veil unless a refusal to do so would, in the words of Richmond P, lead to a result so unsatisfactory as to warrant some departure from the normal rule. That normal rule is of course that each company involved in a transaction is a separate legal entity and also that a subsidiary is a legal entity separate from the company which holds in substance all its shares. … the fact that one company has complete control of another is not a sufficient reason on its own for the lifting of the veil and treating of the two as being the same legal entity.

However, in Chen v Butterfield, Justice Tipping emphasised justice over pragmatism, saying:

The corporate veil should be lifted only if in the particular context and circumstances its presence would create a substantial injustice which the Court simply cannot countenance.

An element of equity-based intervention is, then, evident in these decisions, together with pragmatism in the form of a discretion to pierce the veil. Certain commentators have identified courts taking a rigid view, sacrificing substance for form, adopting an overly formalistic approach; whereas others have identified an underlying coherence. Thus, Helen Anderson argues:

there is a unifying theme underlying the arguments in favour of veil-piercing. It is that some or all of the elements which are used to justify limited liability and the veil of incorporation are not present either because there is effective control of the operations of the company by the directors or the shareholders (leading to some action on the part of the company which is deemed unacceptable) or because there is an inability by the creditors to self-protect ex ante against the risk of loss. In these circumstances, the balance between the objective of shareholder wealth maximisation and the protection of those adversely affected by a corporation’s activities arguably tips back in favour of creditors.

Despite such attempts to give the disparate cases coherence, empirical studies show that judges apply the doctrine inconsistently. For example, in their analysis of intervention by the Australian courts, Ian Ramsay and David Noakes conclude that courts are more prepared to pierce the corporate veil of a proprietary company than a public company; piercing rates decline as the number of shareholders in companies increases; courts pierce the corporate veil less frequently when piercing is sought against a parent company than when piercing is sought against one or

45 Ibid 279. Tipping J continued:
It is neither possible and nor desirable to categorise the sorts of circumstances which might be regarded as leading to a result so unsatisfactory as to warrant some departure from the normal rule. In a contractual context when it is sought to lift the corporate veil against a party I would have thought that the qualifying circumstances should be confined to situations where there is some element of fraud or sharp practice in that party’s conduct or where it would otherwise be unconscionable if strict adherence to the principle of separate corporate entity were maintained.

46 Chen v Butterfield (1996) 7 NZCLC 261,086.
47 Ibid 261,092.
50 Ramsay and Noakes, above n 48, 260.
more individual shareholders; and courts pierce more frequently in a contract context than in a tort context.\textsuperscript{51} In short, Douglas Michael is persuasive when he argues that piercing the veil is ‘jurisprudence without substance’.\textsuperscript{52}

In traditional terms, divergence from legal orthodoxy is likely to be expressed as pragmatism or equity, but can also be seen in terms of imaginative disbelief. Thus, notwithstanding the statutory establishment of separate personality, in certain veil-piercing decisions, judges, it seems, have simply ceased to imagine the company as a discrete legal actor. \textit{Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd}\textsuperscript{53} is arguably the most notorious example of piercing the corporate veil. In that case, the House of Lords famously held that a company incorporated in the United Kingdom took the nationality of its German shareholders. It may be inferred that, in wartime, the socially unaccepted proposition of funds flowing to enemy shareholders was sufficient to suspend belief in separate legal personality. Although \textit{Ebrahimi v Westbourne Galleries Ltd}\textsuperscript{54} was decided on the grounds of justice and equity, Lord Wilberforce’s observation, on the path to finding the company to be akin to a partnership, that a certain decision ‘was a case where again the company was held to resemble a partnership’ is significant.\textsuperscript{55} It seems that their Lordships envisaged the arrangement, despite its legal form, as a partnership and, in doing so, failed to imagine it as a company. But, even if the express grounds for the decision were determinative, Stephen Bainbridge is plausible when he suggests: ‘[c]ourts likely have a vague, intuitive sense of what constitutes a fair outcome, but which they cannot easily articulate’.\textsuperscript{56} In \textit{DHN Food Distributors Ltd v London Borough of Tower Hamlets},\textsuperscript{57} Lord Goff observed that, in certain situations, ‘one is able to look at the realities of the situation and pierce the corporate veil’.\textsuperscript{58} Likewise, in \textit{R v Hammersmith and Fulham London Borough Council; Ex parte People Before Profit Ltd},\textsuperscript{59} ‘first principles’ were enough to convince Justice Comyn ‘that commonsense must prevail and one must look at the realities’.\textsuperscript{60} These ‘realities’ and ‘commonsense’ are, of course, how the particular judge perceives or imagines them.

This brief analysis indicates how judges imagine the body corporate. The ‘true’ company is envisaged as a widely-held corporation with a separation of ownership and control. This conception is wholly consistent with the idea of the corporation that developed in the 1930s.\textsuperscript{61} As David Millon observes:\textsuperscript{62}

operating on an unprecedented scale, the public owned corporation had becomes a complex, far-flung organization under the supervision of a cadre of professional managers. It no longer resembled the small, locally owned partnership. With the advent of this separation between ownership and control, rendering managers accountable to the shareholders became corporate law’s primary objective.

\textsuperscript{51} However, as Bainbridge, above n 14, 512, argues, as a rule, contract creditors ‘should not get relief’ through veil piercing.

\textsuperscript{52} Michael, above n 35, 41. Furthermore, as Meredith Dearborn, ‘Enterprise Liability: Reversing and Revitalizing Liability for Corporate Groups’ (2009) 97 California Law Review 195, 202 observes, piercing the veil has shortcomings from both normative and efficiency standpoints.

\textsuperscript{53} [1916] 2 AC 307 (HL).

\textsuperscript{54} [1972] 2 All ER 492.

\textsuperscript{55} Ibid 499 (emphasis added).

\textsuperscript{56} Bainbridge, above n 14, 515.

\textsuperscript{57} [1976] 3 All ER 462.

\textsuperscript{58} Ibid 468.

\textsuperscript{59} (1981) 80 LGR 322.

\textsuperscript{60} Ibid 333.


\textsuperscript{62} Millon, above n 5, 11.
In contrast, the single shareholder-director company, or the wholly owned subsidiary, being inconsistent with this concept of the corporation, will, it seems, always be vulnerable to judicial disbelief.

III. EXTRA-LEGAL CONCEPTIONS OF THE COMPANY

In the preceding part, it was argued that, notwithstanding the orthodox legal conception of the company as a legal actor separate from its members, there is considerable judicial disbelief in the idea of corporate personality. The complex and often confused doctrine of piercing the veil can be seen as a failure to maintain the company as a person in the imagination, and is equally problematic in terms of coherent principle. In this part, reference is made to ways in which the body corporate is imagined by other disciplines. The aim here is to highlight extra-legal challenges or disbelief in the concept of a company as a person.

A. Classical Economics

Economic theory tends not to recognise the corporation as an entity distinct from its members.63 In the dominant view, expressed by Daniel Fischel, the corporation ‘is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for mutual benefit’.64 And so, welfarist economic theory,65 arguably the hegemonic discourse of contemporary society,66 simply disbelieves the proposition of a company as an entity or economic actor separate from its constituent members. If, in the orthodox legal imagination, companies enjoy an independent jural existence — albeit one fraught with scepticism — for economists, they are a fiction which can be discounted. Economic and legal systems can exist without direct conflict — they may even hybridise — but, in certain areas, one is likely to prevail67 and usurp the other.68

Corporate income taxation provides examples of conflict, coexistence and hybridisation between legal and economic theories of the company. Three basic ways of taxing company profits can be identified: the classical, flow through and imputation methods. The classical method treats companies as legal persons wholly separate from their shareholders. Profits are taxed in the hands of the company and dividends are also fully taxed when distributed to

65 Welfarist economics is predicated on the assumption that individuals make independent, economically rational choices that maximise their utility. See G D Myles, Public Economics (Cambridge University Press, 1995) 4.
66 See Chantal Mouffe, On the Political (Routledge, 2005) 70.
67 On the clash of social systems, see generally Niklas Luhmann, Law as a Social System (Klaus A Ziegert trans, Oxford University Press, 2004) [trans of: Recht der Gesellschaft (first published 1993)].
shareholders. This system reflects a legal conception of the company as a discrete person. In contrast, companies may be treated as mere conduits so that profits and losses simply flow through to shareholders. This system reflects an economic conception of the company as a nexus of contracts so that dividends paid to shareholders are, in substance, indistinguishable from the profits shared between partners. In other words, the legal existence of the company is disbelieved for the purposes of taxing profits — but not for other purposes, such as reporting obligations. The imputation method, based on a hybrid system, compensates shareholders for economic double taxation by permitting dividends to carry an imputed tax credit for the benefit of the shareholder. This system may be said to respect legal personality; but, significantly, it allows claims for double taxation which are alien to the legal concept of the company.

The legal imagination generally informs income taxation, notably in that contractual obligations are normally respected. For example, when a one-person company borrows funds from its sole shareholder, the company is permitted to deduct interest charged. However, as noted, in the important area of taxation of dividends, the economic conception of the firm has assumed greater influence. Furthermore, under goods and services tax, the legal personality of a supplier may be ignored. Thus, groups of companies may be treated as a single taxable entity and, conversely, branches of a single company may register as different taxpayers. Here, it may be inferred that economics or accounting imaginings of the company have taken precedence, and the legal conception disbelieved.

B. Other Conceptions

Drawing on organisational theory, Michael Metzger and Dan Dalton argue that ‘corporations are not just fictions, aggregates, or contractual nexi. They are also real entities that produce real behavior … that has a real impact on the quality of the lives that all of us lead.’ However, asserting that a company is a real entity is not the same as accepting the orthodox legal conception of corporate personhood. A company is real inasmuch as the aggregate behavioural outcomes resulting from the existence of the organisation are greater than the sum of the individual behaviours. The organisation acts as a catalyst or magnifier of human behaviour. But the legal form of the organisation, and whether it has been conferred with legal personality, may be irrelevant. Positive law could have created a legal arrangement different from the modern


70 On the flow through taxation of limited liability companies (LLCs) in the United States, see, eg, Michael Spadaccini, Ultimate LLC Compliance Guide (Entrepreneur Press, 2011) 5. New Zealand has recently introduced the concept of ‘look-through companies’ for income tax purposes: Income Tax Act 2007 (NZ) pt HB.

71 See Meade, above n 69, 246. Australia and New Zealand operate imputation systems.


73 Financial arrangements, such as zero coupon bonds, tend to be taxed on the basis of their economic substance: see, eg, Income Tax Act 2007 (NZ) s CC 3. This approach also indicates the hegemony of economics over law in income taxation.

74 See Goods and Services Tax Act 1985 (NZ) s 55.

75 Ibid s 56.

76 Accounting may be said to imagine groups of related companies as a single entity: see Robert Kirk, International Financial Reporting Standards in Depth (Elsevier, 2005) 207 for when consolidated group accounts must be produced in terms of international financial reporting standards. This idea is recognised in company law: see, eg, Financial Reporting Act 1993 (NZ) s 13.

77 Metzger and Dalton, above n 64, 555.
company — say, a limited liability partnership with venture property held by a fiduciary. Nevertheless, such an arrangement, as an organisation of people, might have given rise to the same types of behaviour that critics condemn in corporations. This is because the offensive behaviour is attributable to the human collective, not the legal fiction of the corporation.

Groups within society may be attributed or take on an identity separate from their constituent members so that individual autonomy and responsibility become compromised, whatever the legal status of the organisation. Generally, people can become detached from the political community in which they are embedded when they give allegiance to a smaller, tighter social group; for example, a motorcycle gang. When assigned roles of authority, members of groups may behave unethically, even atrociously.

In psychological terms, corporations may be imagined as sociopaths. Sociopathy refers, in essence, to an individual’s inability to function as a member of human society. Since a company is not a human being, it might be no less illogical to accuse a company of sociopathy than it would be to accuse a shark that menaces bathers of the same. But, unlike a shark, a company is a human creation and an instrument for achieving human ends. And, this is, it seems, the real purport of arguments that the company is a sociopath — not to anthropomorphise the corporation, but to recognise that company controllers (sheltering behind the corporate veil) may behave in a sociopathic manner. Acting in a particular social group, these individuals may become abstracted from the greater society to which they belong and its norms. Otherwise law-abiding businesspersons have long been observed to adhere to their own group codes of behaviour. Geographical distance from home communities may lead to a greater divergence from accepted norms. Thus, Eugen Ehrlich noted a propensity to atrocity in European troops in their colonies. The poisoning by Union Carbide, an American-owned company, of the Indian city of Bhopal provides an example of comparable corporate malfeasance.

Since the company is the dominant form of business organisation, society is likely to feel antagonism towards apparently amoral corporations, rather than disbelief in legal personality. Nevertheless, a groundswell of antagonism towards companies may lead to popular calls to remove legal personality and curtail the scope of limited liability.

IV. Exclusion from Human Rights

The New Zealand Bill of Rights Act 1990 (NZ) (‘BORA’) s 29 provides:

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

79 See, eg, The Corporation (Directed by Mark Achbar and Jennifer Abbott, Big Picture Media Corporation, 2003).
In contrast, the *Human Rights Act 2004* (ACT) s 6 provides ‘[o]nly individuals have human rights’ and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(1) provides ‘[o]nly persons [individuals] have human rights’.

A discussion of corporate claims to human rights lies beyond the scope of this article, but it is critical to note that universal human rights are derived from ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’. 85 It is convenient for investors’ property interests to be collectively represented by a corporate vehicle, and it would be wrong to deny procedural justice to any litigant; but, since companies do not have human dignity,86 they should not be accorded rights that arise from being human.87

New Zealand’s Court of Appeal considered the issue of companies qualifying for human rights in *Re Wiseline Corporation Ltd*.88 The matter to be decided was whether a company was a person for the purposes of certain regulations which referred to ‘he or she’.89 On a general point of statutory interpretation, Justice McGrath held ‘unless the enactment provides otherwise or the context of the enactment requires a different interpretation … the starting point is that there is a presumption that bodies corporate are included whenever the word “person” is used in a statute’.90 While the immediate grammatical context of the regulation favoured a narrow interpretation,91 the broader context of the *Judicature Act 1908* (NZ),92 and ‘the important constitutional purpose of promoting access to justice’,93 led the court to conclude that ‘he or she’ should include the neuter gender.94

The *Wiseline* decision can be seen as a stark example of a superior court failing to imagine a company as a discrete legal actor. Justice McGrath observed that, if a broad meaning were placed on the term ‘person’:

That meaning would enable a trader who incorporates his or her business to have the same right to be eligible to seek dispensation under the regulations from the fees of the Court as someone who prefers sole trader status. To interpret ‘person’ to exclude a corporate litigant from applying would plainly impede the access to justice of a number of members of that class.95

Thus, the one-person company is simply envisaged as a convenient way for a sole proprietor to manage her business: the interests and identity of the two may be conflated. The company is not imagined as an entity with separation of ownership and control in the way envisaged by the *Companies Act 1993* (NZ), which does not distinguish between proprietary and public companies. This image fits the New Zealand corporate norm,96 but equality before the law surely

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88 *Court of Appeal Fees Regulations 2001* (NZ) reg 5, in relation to *Judicature Act 1908* (NZ) s 100A.
90 Ibid [16].
91 Ibid [17].
92 BORA s 27.
94 Ibid [20]. On the other hand, it might be argued that the privilege of limited liability conferred by the *Companies Act* is unfairly denied a person who chooses to trade as a sole proprietor.
requires all companies to be treated similarly. Without separate legislation for closely-held companies, courts can be expected to apply a unified conception of the company. However, while courts seem to have no difficulty in imagining widely-held companies as legal persons separate from their shareholders, one-person companies and corporate groups may present imaginative difficulties.

V. Conclusion

This article has argued that, despite the statutory conferral of full legal rights on the company, a significant degree of doubt and disbelief about separate corporate existence is evident in judicial thinking. Naturally, judges are reluctant to resist the apparent will of Parliament, and yet, from time to time, they do find ways to pierce the corporate veil. And, of course, the legislature itself may choose to sidestep corporate personality when it is inconvenient — such as, for tax purposes — or, indeed, overtly lift the corporate veil. Despite these examples of disregard for separate corporate existence, it is implausible to propose that the concept of the company faces immediate danger. The listed company is simply too important and useful to modern economies to abandon, and judges are highly unlikely to pierce the veil of Berle and Means-type corporations. But, at the extremities of corporate existence — one-person companies and under-capitalised subsidiaries in multiple-entity groups — both the judiciary and members of broader society may disbelieve separate legal existence.

Ideally, the legislature will recognise small and medium enterprises as incorporated partnerships, which they typically are in substance, or provide a simpler corporate form for them. This would bring legal fact in line with judicial imaginings of closely-held companies, and, indeed, the needs and expectations of entrepreneurs. The issue of under-capitalised subsidiaries, particularly within multinational groups, is more problematic. Incidents such as the Bhopal tragedy highlight the role of corporations within society and the legal protections their shareholders enjoy. In particular, it is pertinent to question whether the Anglo-American model, which not only holds shareholders’ presumed interests supreme but also shields them from voluntary and involuntary creditors, is justifiable or sustainable.

Outside the law, disciplines such as economics and organisational management look behind the corporate veil to shareholders and their interests, and directors’ and managers’ behaviour. The formulation of universal expectations for corporate behaviour is now on the agenda and, in a globalised and connected world, people can readily and widely share their experiences of corporations in their communities. In that context, maintaining the veil of incorporation

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98 See, eg, Companies Act 1993 (NZ) s 271 on pooling of group assets on liquidation.

99 See Ramsay and Noakes, above n 48, 260.

100 Cf the look-through companies regime under Income Tax Act 2007 (NZ) pt HB.

101 See, eg, the concept of the South African close corporation in H S Cilliers et al, Corporate Law (Butterworths, 2nd ed, 1992) 570.

102 See Farrar, ‘Frankenstein Incorporated or Fool’s Parliament?’, above n 16, 144 on the approach of Japanese corporation law, which ‘gives low priority to shareholders but high priority to social, employee and consumer interests’.


becomes an ever more challenging imaginative feat. Furthermore, the specific reservations of 
justiciable human rights to individuals in the Australian Capital Territory and Victorian bills 
of rights are a significant rebuttal of the assumption that the law should treat companies in the 
same way as natural persons. Richard Sennett urges us to ask ‘what value is the corporation to 
the community, how does it serve civic interests rather than just its own ledger of profit and 
loss?’105 If those questions cannot be answered in a positive way, the long-term viability of the 
company, in some of its forms at least, must be in doubt.

105 Richard Sennett, The Corrosion of Character: The Personal Consequences of Work in the New 
AN ACTIVE LEARNING SMORGASBORD FOR TEACHING EVIDENCE

*MOLLY TOWNES O’BRIEN*

Tell me, and I will forget. Show me, and I may remember. Involve me, and I will understand.

—Confucius

I. INTRODUCTION

Where I teach, Evidence is an upper-level compulsory course and classes are large. As I enter the classroom, I find myself facing a large lecture hall full of students, most of whom are convinced they will never be barristers and will never need to know the rules of evidence. Even those who think they might want to become a barrister someday are, by the time they take Evidence, in their fourth or fifth year of university study, acculturated to expect the lecturer to stand at the front of the room and talk. They expect to see PowerPoint slides or overhead projections that summarise what they will need to know for the final exam. They expect to listen passively, copy the text from the slides, and cram for the final exam. They have very low motivation to participate or engage.

Passive listening is a particularly ineffective way to learn evidence. Trying to learn evidence in a classroom can be like trying to learn to prepare a gourmet meal without ever tasting a dish or even going into the kitchen. Like high cuisine, the courtroom has its own language, ritual and history. The techniques used derive from 100s (maybe 1000s) of years of experience. Like treasured recipes, the rules of evidence and the traditions of court practice are embedded in a thick layer of historical practice. Both trial practice and cooking require skills that are unique to their context. You would not expect someone to learn to cook a soufflé by being told how to do it. Although recipe books are very helpful, you would never expect to become a chef without ever picking up a knife. Neither can students be expected to learn and understand arcane rules of evidence and procedure without learning how they operate in practice. Students need opportunities to ‘pick up a knife’ and put their understanding into action by engaging in the legal reasoning, making decisions and advocating positions.

Doling out information to passive students is also a particularly unenjoyable way to teach. It can be demoralising to face a room full of students who are there only because the subject

* Molly Townes O’Brien is an Associate Professor and Director of Teaching and Learning at the ANU College of Law, Australian National University.
1 Enrolments fluctuate between about 150 and 250 students.
2 Passive listening may, in fact, be a poor way to learn anything. The fact that active learning methods are more effective than passive ones is so well-known that it is no longer considered to be a topic for research: Roy Stuckey et al, Best Practices in Legal Education (Clinical Legal Education Association, 2007) 90.
4 There may be some legal educators who lecture just to hear themselves talk. In my experience, however, law teachers — like any tertiary teachers — are motivated by interactions with students that provide cues about student learning and that catalyse their own thinking: see James L Bess, ‘The Motivation to Teach’ (1977) 48(3) Journal of Higher Education 243, 252.
It can be even more disheartening if students stop coming to class and use the lecture slides and someone else’s notes to memorise what they ‘need to know’ for the final exam. Teaching to students who are prepared to learn only on a need-to-know basis can be soul-destroying. After all, we teach law because we are interested, curious and inspired; we enjoy ideas; and we want to inspire a new generation of lawyers.

The challenge of teaching evidence is to create an active learning environment that is inspiring to both the students and the teacher. The evidence teacher’s quest is to devise a set of experiences that provide students with the contextual background for understanding the material and multiple opportunities for students to engage, practice, build their legal skills, and to make the course memorable and worthwhile. This paper describes a few techniques that I have found effective in transforming the traditional law lecture into a more interactive experience. It also provides a few ideas for moving active learning beyond the classroom and onto the web. The techniques suggested here may not suit everyone’s teaching style or circumstances. I invite you to treat this paper as a smorgasbord of active learning ideas from which you may pick and choose.

II. A LARGE TABLE: OPTIONS FOR ACTIVE LEARNING

Information can be communicated in large amounts, and efficiently, in books and articles, computer downloads, and even in lectures. But information is not knowledge. Transforming information into operational knowledge (an internalised understanding) is an active and interactive process. It is an active process in that it requires students, at a minimum, to listen or read and understand. Students are more likely to understand and recall information if they have engaged in applying, extending, interrogating, analysing or using it to make decisions and solve problems. Learning is also interactive in that new information must be integrated into the student’s existing frameworks for understanding. Learning involves not only absorbing new information but also integrating and revising existing information and assumptions.

A. Starters: Mood Music

In spite of the advantages of active learning, students who have been acculturated to sit and listen often put up resistance to classroom activities which require them to do more. They may feel embarrassment or social pressure not to speak, and so will be reluctant to volunteer to answer a question. They may feel annoyed at class questions and discussion groups because they want to hear the ‘right’ answer, not the answer their peers provide. Student resistance is something to plan for — or plan around — when creating an active learning classroom.

‘Music has long been considered an efficient and effective means for triggering moods and communicating nonverbally.’ In a law school classroom, music can change students’

5 ‘A teacher’s passion for both teaching and the subject is a critical factor in student motivation’: Stuckey et al, above n 2, 92.
7 The term, ‘active learning’, is usually taken to require more than merely listening and taking notes. Activities such as talking, writing, reading, reflecting and evaluating help students to organise, integrate and remember what they have learned: Paul L Caron and Rafael Gely, ‘Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning’ (2004) 54 Journal of Legal Education 551, 552–3.
8 David A Kolb, Experiential Learning: Experience as the Source of Learning and Development (Prentice Hall, 1984) 27.
expectations and set the stage for a more active learning environment. As students walk into the lecture theatre, set down their books and plug in their laptops, I use a class theme song to announce a different classroom ethos. Students who are accustomed to a stiff, non-interactive academic lecture know immediately that this class will be different.

The choice of song will have an impact on the mood created. Bruner’s review of the research on music and mood suggests that the key, tempo, pitch and kind of harmony will have an impact on the mood that the music creates. Music in a major key with a slow tempo, flowing rhythm and consonant harmony at a soft volume might create a serene mood, for example. I usually choose an upbeat, danceable song to create an informal and lively lecture-hall dynamic. When the song ends, the energy of the song carries on. The atmosphere in the room is relaxed and upbeat. I feel energised and ready to teach. The students pick up some of my enthusiasm. We are ready to go.

The theme song for each lecture usually has a title or repeating lyric that I will return to at some point in the lecture. It is important to find songs that connect to the material — however tangentially — and to explain the connection to the class. For example, in a lecture on evidentiary privileges, I use Sonny Boy Williamson’s ‘Keep It to Yourself’ — with its repeating lyric, ‘Please, baby, keep our business to yourself’ — which I connect with the rules relating to waiver of privilege. (That is, if you don’t ‘keep our business to yourself’, you will waive a claim to privilege!) In another class, the opening lyrics of the theme song, Heard It through the Grapevine, ‘I guess you wonder how I knew ’bout your plans to make me blue,’ establish a perfect platform for discussing the central problems of hearsay evidence. How reliable is the singer’s information if he ‘heard it through the grapevine’? The connection between the song lyrics and the legal issues discussed in class makes a memorable ‘hook’ for the class.

Theme songs can also be used as a springboard for legal analysis. A class on admissions uses Jimi Hendrix’s version of Hey Joe with its memorable dialogue lyrics:

Hey Joe, I said where you goin’ with that gun in your hand?
You know I’m goin’ downtown to shoot my old lady,
cause I found her messing round with another man.

The song creates a vivid image that is a good basis for hypothetical questions. For example, if Joe is on trial for murder, who would be called as a witness to tell the jury about this conversation? Is Joe’s statement admissible if the questioner who testifies is a friend of Joe’s? What if the questioner is a police officer? What if Joe has been water-boarded for six hours before the question is asked? What if Fred — not Joe — is on trial for murder? Is the statement admissible then?

Theme songs can present another kind of opportunity for students to participate. Because most of my musical vocabulary was acquired before my students were born, I often ask students to contribute their ideas for theme songs for upcoming classes. Some students bring back song ideas throughout the semester. I ask these students to make the connection between the lyrics and the law. Students often find connections I would not have thought of, extending my thinking


11 Bruner, above n 9, 100.
12 Sonny Boy Williamson II, Keep it to Yourself (unknown date). A video recording of Sonny Boy performing the song at a slow speed is available at <http://www.youtube.com/watch?v=O0rRvfwrrGe>.
13 Norman Whitfield and Barrett Strong, I Heard it through the Grapevine (1966).
14 In course evaluations, students consistently comment favourably about the use of theme songs to aid memory. One student wrote, for example, ‘[t]he theme songs were brilliant, relevant and fun. They make it easier to remember parts of the Evidence Act’.
about the law. They also expand my music collection. But, more importantly, the student who contributes theme songs has been thinking about the class and making connections between lyrics and law. That student has extended his or her thinking about evidence beyond study time — thinking about evidence has become fun. For me, that is a major teaching victory.

Theme songs contribute to my own enjoyment of the class, provide memory cues for students, and — perhaps most importantly — remove some of the discomfort of being in a large lecture hall. By filling the room with sound, rhythm and energy, the theme song changes the atmosphere and communicates my excitement about the subject.

B. Meat and Potatoes: Using Slides to Promote Engagement

Legal scholars have recently begun to point out the risks of using PowerPoint slides in the law classroom.16 When slides are used to summarise or convey the same information that the speaker ‘delivers’ in a lecture format, the slides may encourage passive listening and disengagement. It has been argued that ‘PowerPoint slides lull students into a pedagogical stupor’.17 The problem, however, is not in the technology. The problem is in the way the technology is used. The challenge is to use slides and images in ways that promote rather than stifle engagement.

Slide presentations are a visual medium. Limiting slide presentations to words (or words with a few standard graphics in the background as illustrated by Figure 1)18 ignores the vast potential of visual impact on learning. Images can be powerful learning tools. Images can provide context, help tell stories, or even inject a note of humour into a lecture.19 They can also be very useful in generating interest, which, in my view, is a prerequisite to active learning. If class time is dull, students may swallow the course like a dose of castor oil. They may be able to hold enough information in their short-term memories to be able to pass the final exam, but when they walk out of the exam, they will begin to forget all they have ‘learned’. Interested and engaged students become motivated to study, engage and remember.

Using Google image searches, it is now fairly simple to find and embed multiple, high-impact images into classroom slide presentations.20 Pictures of the litigants or disputed items of evidence add a note of reality to discussion of evidence cases. With a photograph of the murder scene on the screen, the story of the case comes alive. Images of the faces of the real-life victims, witnesses or evidence from an assigned case can be powerful motivators to learn and remember. Students are more likely to incorporate the rule of a particular case into their operational knowledge and be able to analogise its facts to future problems if they have understood and remembered the story of the case.21

Images can also be used to make the facts of a case more concrete or vivid — even when the images are not taken from the case itself. For example, in a civil litigation lecture, the topic was dismissal and court delays. The tort case being studied had endured from 1966 until 1982. I could not locate any images of the actual parties who were involved in the case.

References:

16 See, eg, Caron and Gely, above n 7, 554.
17 Ibid.
20 To avoid potential copyright and plagiarism problems, be sure to keep a record of the URL where the image was published. In an academic presentation, reference should be made to the source of the image, either by printing the URL on the slide or by adding a list of image references at the end of the presentation.
21 Beate et al, above n 6, 282–3.
I did, however, find photographs of the band, The Who, taken in 1966 and 1982. The changes in clothing and hairstyles and the fatigued look on the faces of the band members in 1982 gave the class a quick laugh, but a vigorous discussion ensued (Figure 1). Quite a few of the students in the class knew the band and its music. A student immediately pointed out that one member of the band had died and been replaced in the interim between the two pictures. This connection to the student’s pre-existing knowledge drew the class into a discussion of the kinds of difficulties faced by the parties and the courts when litigation goes on for many years. The images made the delay and its problems concrete.

Images are also an excellent vehicle for presenting practical and contextual material. They capture student interest and permit students to envision how the rule actually works. The slide below (Figure 2) was used in the discussion of the opinion rule. 22 Is it possible to describe this scene without expressing any opinion? Can a witness to this scene testify: ‘The boat was going really fast. Deg was trying to hang on’? Discussion of this slide helps students understand the reasons for the lay opinion exception to the rule.

Practical context can also be presented in visual form. Court procedures can be illustrated in flow charts, maps and graphics.

C. Using Slides to Promote Participation

Being able to articulate a legal argument is an important legal skill. It is also important to the learning process. As students articulate an argument, their reasoning is focused and they are ‘forced to evaluate the validity and robustness’ of their reasoning. 23 Thus, it is essential to give students multiple opportunities to try out their ability to articulate concepts and arguments. But students in a large lecture are often reluctant to volunteer an answer to a question posed orally. The pressure of articulating difficult concepts in public can operate to inhibit participation, engagement and learning.

23 Caron and Gely, above n 7, 553.
I use slide presentations to pose questions in class in a way that facilitates student participation without invoking the kind of social pressure that inhibits students from answering. I sometimes pose a question and ask students to answer in a short free-write. Other times I ask students to raise their hands to answer a multiple choice question en masse.

An introductory slide with a pre-test is a good way to give students a sneak peek at what they can expect from the class (Figure 3). This kind of pre-test is not used for assessment, but rather to pique interest in the subject to be discussed that day; to engage students actively in answering; and to provide students with prompt formative feedback about how well they understand the material.

Games are another good way to generate participation and discussion. The most extensive use I make of slide quizzes is during trivia-style contests. I divide the class into teams of five students each to answer multiple-choice questions. The questions require the students to read and interpret the rules of evidence in class, to discuss them with their peers, and to come up with what they think is the best answer. Teams record their answers on a sheet that is then exchanged with another team at the end of each round. Each team scores the answer sheet of another team as the best or ‘correct’ answers are discussed. The answers to several of the questions are arguable — and I leave plenty of room for argument. As the game progresses, students seem to forget that they are in a law lecture. Instead of listening with their heads down, they interject to defend their team’s answers. They articulate legal concepts; they offer arguments in support of their views. The game has changed the social dynamic and made arguing a point more acceptable and fun.

The time spent in class ‘playing’ trivia games is valuable learning time. Students frequently comment in their course evaluations about the value of the multiple choice questions and quizzes. For example:

The hearsay quiz was valuable … it made the most of complex material.

The pop quiz was extremely helpful for cementing hearsay into my brain!

The multiple choice questions [on slides in class] were good for illustrating particular points.

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24 In the process of writing for two or three minutes, students not only have an opportunity to clarify their thoughts, but also become more invested in their views. In the ensuing discussion of the question, students are thus more willing to challenge views offered by other students.

25 Where the technology is available, ‘clickers’ or CPS units can allow students to answer anonymously and see how their response compares to the majority response: see Caron and Gely, above n 7, 560–3.
The games, questions and slides do not, by themselves, ‘cement’ the difficult evidentiary concepts into the students’ brains. Instead, the slides facilitate the kind of engagement that transforms information into usable (and memorable) knowledge.

Finally, slides can be used to pose simple but important questions. One of the questions I frequently pose in a slide is, ‘Why is that important?’ or ‘Why do we care about this rule?’ These questions push students to reflect on and have their own answers about the significance of the material. I find that, when pushed, students often come up with keen insights about why a seemingly arcane or obscure rule makes a real difference to real people. Understanding why and how a rule matters is a powerful motivator for study. My energy, enthusiasm, images, stories and even games may not be sufficient to sustain student interest and engagement. I was reminded of this some years ago when a student wrote in a course evaluation: ‘[s]he makes the course material more interesting than it really is’. After I finished laughing, I realised that I had not succeeded in helping this student to find his own reasons to be interested in evidence law. I realised that students need to be asked to think deeply about the course material and find their own motivation to study.

D. Fancy Dishes: Video for Context and Dynamics

To provide context and convey the dynamic nature of courtroom interactions, some law teachers assign students to visit a courtroom. In some situations, ‘[w]itnessing litigation in action is an ideal way for students to develop a sense of “how it all works” in practice.’26 There are, however, a number of potential drawbacks to sending students into the courtroom. When students arrive at court, the case they hoped to see in trial may have settled; the trial might proceed for several hours without raising an evidentiary issue; or the barristers involved may not exemplify good practice. Even worse, with no opportunity to ask questions, students may walk away from their courtroom experience with little or no understanding of what they watched.

Video can provide a ‘substitute experience’27 that may actually be superior to a courtroom experience. When teaching in the US, I had many video clips that I could draw on from movies, television dramas or Court TV to illustrate court procedures. Because cameras are not permitted in Australian courtrooms, comparable videos applicable to the Australian court system did not exist.28 Working with colleagues and practising lawyers, we filmed a video that presents evidence problems as they might arise in an Australian courtroom (Figure 5). It provides the students with an accurate context and provides a platform for skills teaching.

26 Jacqueline Horan and Michelle Taylor-Sands, ‘Bringing the Court and Mediation Room into the Classroom’ (2008) 18 Legal Education Review 197.
28 The ABC has recently produced a five-part documentary series, On Trial, which was filmed in the courtroom. It may contain scenes which could be used for discussing evidentiary rulings. Episodes may be available to download from <http://www.abc.net.au/tv/documentaries/>. Thanks to James Booth for bringing the documentary series to my attention.
Before they see any of the trial video, students receive a fictional case file that develops the evidence. The documents in the case file include witness interviews, photographs, phone records and expert reports relating to a fictional murder case. The evidentiary material in the file is ambiguous and contains numerous items that might not be admissible in court. The case file begins with a fictional indictment of David Douglass for the murder of Barry Clemson. The evidence in the file shows that Douglass admits that he shot Clemson in the chest as Clemson attempted to climb through a first floor window at the back of the residence. Douglass contends, however, that the shooting was purely accidental. He contends that his gun went off accidentally as he fell backwards in surprise and fear when Clemson appeared at the window. The prosecution contends that Douglass was sitting in his study, waiting for Clemson to appear, and intentionally shot and killed him.

The video presents 34, two- to three-minute segments of witness examination. Each segment presents an evidentiary question arising from a different rule. The evidence being presented may or may not be admissible. Objections or questions are raised at the end of each segment, but the application of legal rules is carefully left out. The judge in the case generally does not make a ruling. This allows an opportunity for the students to engage with the material. Students read the rules, apply legal reasoning, exercise judgment, and the class discusses what the appropriate ruling might be.

Portions of the case file that are not explored in the video segments can be elaborated during tutorials. Having seen a realistic witness examination in the video helps the students to have the confidence they need to role-play witness examinations during tutorials. These role-playing exercises give students an opportunity to engage in the kind of strategic decision-making and argumentation that they would use in court. In this way, the video experience not only provides the context for an understanding of the courtroom dynamics, but also presents the opportunity for students to build their skills by making arguments and decisions after the video is turned off.

E. Food for the Road: Active Learning beyond the Classroom — Onto the Web and into the Moot Court

Active student engagement with contextualised and dynamic material need not end when the lecture is over or the tutorial is finished. One of the advantages of the trial video segments is that they can be posted to the course website along with questions, quizzes or commentary. Students can view the video clips again, take a quiz, or post commentary or questions about the issues raised.

For students who have lived their entire lives in an internet connected world, a website provides a familiar forum for learning. Web-based learning opportunities can be blended with class time (face-to-face) to extend learning. A wide variety of kinds of resources can be posted on a website to cater for different student learning styles. Using web-based materials empowers students to be self-directed in their learning. They may pay more attention to the materials that are more interesting or difficult for them; or they may take time to revise or re-listen to material that they did not understand in class. Web-based questions or quizzes can be configured to give students prompt feedback about their learning. A course website can also enable collaborative or group work. For example, using a web-based forum, students may follow up on course-related questions, find study partners or collaborate on a course assignment.

One of the most successful uses of the web in my class has been in helping to set up and run a mid-term assessment exercise. In this exercise, students choose either (1) to write a fairly lengthy submission to the court on an evidentiary issue; or (2) to make a very short written submission and appear to argue the issue orally in a moot court exercise. Typically, students

30 Manuela Paechter and Brigitte Maier, ‘On Line or Face to Face? Students’ Experiences and Preferences in E-Learning’ (2010) 13(4) The Internet and Higher Education 292.
have written papers before and are fairly confident in their ability to succeed at option (1). They may be less confident, however, in their ability to argue an issue in court and may therefore hesitate to choose option (2). The web-based administration of the moot arguments helps to overcome this confidence gap. It also facilitates collaboration and reduces the administrative burden of organising the court schedule.

Oral arguments are done in teams, with two students appearing for the prosecution and two for the defendant. Using an online program, students are able to find a teammate and collaborate effectively, even if their on-campus schedules do not allow much face-to-face meeting time. They are also able to sign up for a court appearance at a time that suits them and change their appearance time to other available times, until the appearance schedule fills up. Although the exercise is not a competition, students are often concerned about which team they will face during the court appearance. Using the web program, they can see who their ‘opponents’ will be. They can (actually, they are required to) exchange their written submissions with the opposing team. In this way, they find out what arguments will be presented by the other side and are able to prepare well in advance. This gives the students a sense of confidence and control about the moot court process and encourages them to participate. And there are sound educational reasons for them to participate. Students who prepare to stand in court and orally answer questions about a legal issue must actively engage with and integrate the material in a way that allows them to speak about it fluently. For some students, that requires a depth of understanding that is not achieved in writing.31

I have argued elsewhere that the law school curriculum over-emphasises adversarialism and competition.32 An evidence law course is, however, an appropriate place for students to learn the skills necessary to present an argument in an adversarial context. In presenting the moot exercise, I emphasise that the goal is for each team (working collaboratively) to put together and present a well-grounded legal argument for their client. The goal of the exercise is not to ‘beat’ the other team. Nevertheless, if this were a real case, one side would win and one side would lose on each issue. After the argument, students often want to know who won. That is fair — they have worked hard and have treated the moot exercise as if it were a real case. To provide perspective on the exercise, it is important to take time to explain what the court ruling on each issue might be and to identify excellent arguments that might not carry the day. Students need feedback on their efforts. They also need to learn that, although the trial process is adversarial, it is not a competition. When appearing in court, the lawyer’s responsibility is not to ‘win’ but to put forward the best available legal arguments. In doing so, the advocate may lose some cases, but will build an invaluable asset — a reputation for intelligence and integrity.

III. CONCLUSION

Active, engaged students learn more. Classes full of active, engaged students are more enjoyable to teach. There is no single best way to engage students, just as there is no best menu for a feast. How you choose the right combination of sweet, salty and savoury dishes will depend on many factors. How many guests will there be? What do they like? What ingredients are available? What can be prepared in the time remaining before the guests arrive?

The goal of this paper has been to share ideas for putting an active learning feast on the table — a feast suitable for a large group of students in a compulsory course. Theme songs animate the classroom; high-impact images improve students’ ability to recall doctrinal information and to relate it to their experience; and quiz games, question slides and video give students

31 For a fuller discussion of other benefits of mooting and the advantages of using technology to improve the mooting experience, see Jennifer Yule, Judith McNamara and Mark Thomas, ‘Moot and Technology: To What Extent Does Using Technology Improve the Mooting Experience for Students?’ (2010) 20 Legal Education Review 137.
the opportunity to ‘pick up a knife’ and engage in in-class legal decision-making to build their legal skills. Beyond the classroom, students can use the web to advance active learning and to collaborate with their colleagues. These methods may all work together to create an active learning experience that provides context for understanding and motivation for advanced study. Otherwise, a few of these methods may be incorporated into another teaching scheme. I have found that each additional technique, each active learning dish, reaches a few more students. I keep adding more dishes to the smorgasbord, because I have found that when students are actively engaged, teaching evidence can be terrific fun.
I. INTRODUCTION

In August 2009 Brian and Natalia Burns were found guilty (separate jury trials) of the manslaughter of David Hay. The prosecution’s case against both defendants was based on two allegations. First, they caused the death of the deceased by an unlawful and dangerous act, that being the administration of methadone by injection to the deceased. Alternatively, they were liable for manslaughter by gross criminal negligence.\(^1\) The NSW Court of Criminal Appeal (NSWCCA) on 1 April 2011 dismissed Natalie Burn’s appeal against her conviction.\(^2\)

At the beginning of February 2010, charges of murder and manslaughter were laid against Dr Suresh Nair.\(^3\) In December 2010, Dr Nair pleaded guilty to the manslaughter of Suellen Zaupa who died following the consumption of cocaine which Dr Nair had supplied during sex sessions at his residence. In return for this plea, the prosecution dropped its charge of murder in relation to Ms Zaupa as well as a further manslaughter charge involving the death of another victim, Victoria McIntyre.\(^4\) On 26 August 2011, Dr Nair received a non-parole period of five years and three months for the manslaughter and cocaine supply convictions:

> The court had heard that Nair had done nothing to help Ms Zaupa as she lay dying from a cocaine overdose, which he had given her. He failed to call an ambulance or take her to hospital.\(^5\)

Then, on 18 February 2010, a 22 year-old woman was charged with the manslaughter of ex-Socceroo, Ian Gray. The basis of the charge was that the accused supplied Gray with heroin and that he died in the presence of the accused as a result of a heroin overdose:

> Papers at Central Local Court allege Sherryn Davis caused the death of Ian Gray ‘in circumstances amounting to manslaughter, to wit, an unlawful and dangerous act’.\(^6\)

On 15 September 2010, however, the manslaughter charge was withdrawn:

> At Sydney’s Central Local Court last week, prosecutors withdrew a charge of manslaughter and a second charge of administering or attempting to administer a prohibited drug to Gray.\(^7\)

The reporting of the above cases also occurred around the same time as the Dianne Brimble case which received enormous coverage in the media. In 2002 Ms Brimble died from an overdose

\(^{\ast}\) Senior Lecturer, Law Faculty, University of Technology, Sydney.

of GHB, the drugs being supplied by Mark Wilhelm during a P&O cruise (the Brimble case). The unsavoury facts of this case are well-known, Wilhelm having had sex with Ms Brimble prior to her overdosing, her naked body being found on the floor of Wilhelm’s cabin. It was not until 2009, however, that the trial of Wilhelm commenced, the prosecution proceeding with a preferred charge of negligent manslaughter (unlawful and dangerous act manslaughter in the alternative). On 12 October the prosecution dropped the negligent manslaughter charge due to its inability to prove both a duty of care and causation, thereafter proceeding on the alternative manslaughter charge and the drug supply charge. One week later, Wilhelm’s trial was aborted due to the jury being unable to reach a verdict in one of the two charges laid. A retrial on both charges was set down for April 2010. On 21 April, however, the prosecution dropped the charge of manslaughter and accepted a plea of guilty to the supply of a small quantity of GHB.

In commenting on these developments, Howie J, the original trial judge, stated that Wilhelm was responsible for Ms Brimble’s death only in a moral or technical way and that he doubted that he was criminally responsible.8

All of these cases raise significant legal issues regarding the liability of a drug supplier for the death of a person who dies as a result of the self-administration of those drugs. In NSW, however, there would appear to be only one other self-administration drug case prior to those identified above, this being the unreported 1999 District Court case, Quoc Cao9. In addition, there is also relevant obiter from McLean10 in 1981. As for other Australian jurisdictions, the only other relevant reported case is the Queensland case of Stott & Van Embden11.

For many this lack of case law may seem surprising given the number of drug overdose deaths each year in Australia. In NSW in 2006, for example, there were 132 opiate-related deaths in those aged 15–44 years, 54 deaths associated with benzodiazepines and 28 deaths associated with psychostimulants. Psychostimulants include cocaine and amphetamines (e.g. GHB).12 Given this number of deaths, it would not be unreasonable to presume that some of the individuals who supplied the drugs to any of these victims, or who assisted the victims with the consumption of these drugs in some other way, did so in circumstances that could have, potentially, given rise to manslaughter charges. In addition, it would not be unreasonable to presume that such individuals were known to the police.

Charges and convictions for manslaughter have been more common where defendants have actually administered (mostly by injection) drugs to the victims, but even these are rare. This article however, only briefly considers this type of manslaughter, its focus being on drug supply and self-administration.

Not only is there a scarcity of cases, a search of Australian law journals discloses only two legal analyses of this area, these being two law student works.13 This is in stark contrast to the United Kingdom (UK) where the law has received much greater consideration. The recent cases (notably all from NSW) now provide an excellent opportunity to undertake a comprehensive analysis of the charge of manslaughter as a viable mechanism for the prosecution of a drug supplier for the death of a person who dies as a result of the self-administration of those drugs.

In Australia, only a very small number of drug suppliers have been charged with and convicted of the manslaughter of those who have consumed the drugs that they have supplied. At common law, this has been in the form of unlawful and dangerous act manslaughter or negligent manslaughter. In terms of Australian Code jurisdictions there are similarities in terms of negligent manslaughter but differences when it comes to unlawful and dangerous act manslaughter. This is considered later, but in Code states, such as Queensland, charges have raised similar issues, most notably causation.

In NSW two drug related offences have formed the basis for unlawful and dangerous act manslaughter charges; aiding and abetting self-administration by the victim and administering prohibited drugs to a victim (usually by injection). The Brimble case appears to suggest an expanded approach but the outcome in the case casts considerable doubt on this. In this regard, Howie, J’s decision to allow Wilhelm to withdraw a guilty plea to s39 Crimes Act 1900 (NSW) is significant. Following what was a somewhat strange plea bargain which saw Wilhelm offer a plea of guilty to a charge under s39 in return for the dropping of the manslaughter charge, Howie J not only allowed the defence to withdraw the plea but stated that he would not have allowed it in any event. The basis of the charge would have been that Wilhelm ‘caused’ Diane Brimble to take the drugs. As Howie J noted:

I pointed out to the Crown that there were a number of cases which tended to suggest, at least to me, that what was required for the Crown to prove was that the accused stood in a position of authority or control over Ms Brimble so that he could, in effect, overbore her will and therefore cause her to take the drug. I had a good idea of what the evidence was, having been the trial judge, and I had difficulty in seeing, on the evidence that was at the trial of the accused, how it could be said that he had any authority or position of control over Ms Brimble whereby he could, in effect, cause her to take the drug.

A. Aiding and Abetting Self-Administration

*Cao* appears to be not only the sole NSW case involving such a charge, but the only case Australia wide. The legal basis for Cao’s charge was that his supplying of the victim with a syringe made him a secondary party to the victim’s self-administration of heroin, and, thereafter, a principle to the manslaughter of the victim. Self-administration is a summary offence under s12, *Drug Misuse and Trafficking Act 1985* (NSW) and s19 makes a person who aids, abets,
counsels, procures, solicits or incites the commission of such an offence also liable for that offence.\textsuperscript{20}

In his analysis of \textit{Cao}, Schimmel notes the relevance of obiter in \textit{McLean}.

Roden J (with whom Nagle CJ at CL and Fisher JK agreed) suggested that where death occurs as a result of the administration of heroin, a person may be guilty in three circumstances: first, if the accused ... injected the deceased; second, if the accused is ‘present intentionally assisting or encouraging that act (principal in the second degree)’; or third, ‘if not present he [sic] had counselled or assisted the act (accessory before the fact).’\textsuperscript{21}

Leaving aside any legal arguments as to whether \textit{Cao} aided, abetted counselled, procured, solicited or incited the victim’s self-administration of heroin, sections 12(1) and 19 of the \textit{Drug Misuse and Trafficking Act 1985} (NSW) render unlawful the acts of anyone who does. But would such acts be unlawful and dangerous so as to cause the victim’s death resulting from self-administration? In \textit{Cao}, Schimmel notes Ford ADCJ’s (the trial judge) early doubts as to whether the accused’s acts were initially dangerous:

\textquote{It is rather doubtful that it could be relied upon as a dangerous act on the part of the accused, merely in supplying a needle which the deceased then chose to use himself for the purpose of injecting himself with heroin.}\textsuperscript{22}

In directing the jury, however, Ford ADCJ had seemingly shifted from the dangerousness of \textit{Cao}’s act of supplying the syringe to the perceived dangerousness of the victim injecting himself with heroin. Schimmel rightly questions whether self-administration of heroin is dangerous and accordingly ‘carrying with it an appreciable risk of serious injury.’\textsuperscript{23} Statistically, the vast majority of heroin self-administration does not lead to serious injury, but this is all relevant to the act of the deceased.\textsuperscript{24} The legal question in \textit{Cao} should have been was his supplying of the syringe unlawful and ‘carrying with it an appreciable risk of serious injury’ and, as such, a cause of the victim’s death? It is argued here that the answer must be no. Apart from Ford ADCJ’s earlier doubts on this very point, the English case of \textit{Dalby} supports this position. In \textit{Dalby}, the accused was charged with unlawful and dangerous act manslaughter based purely on his supplying the victim with a controlled drug, the victim thereafter injecting himself with the drugs. Waller J read the judgment of the court stating that:

\textquote{The difficulty in the present case is that the act of supplying a controlled drug was not an act which caused direct harm. It was an act which made it possible, or even likely, that harm would occur subsequently, particularly if the drug was supplied to somebody who was on drugs. In all the reported cases, the physical act has been one which inevitably would subject the other person to the risk of some harm from the act itself. In this case, the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous.}\textsuperscript{25}

As such, the act of supplying the drugs, or supplying a syringe as in \textit{Cao}, seems neither dangerous nor a legal cause of death. What causes the harm, and is accordingly dangerous, is the victim’s use of those drugs in a particular form and quantity.

\textsuperscript{20} \textit{Drug Misuse and Trafficking Act 1985} (NSW) s12(1): ‘A person who administers or attempts to administer a prohibited drug to himself or herself is guilty of an offence.’ \textit{Drug Misuse and Trafficking Act 1985} (NSW) s19: ‘A person who aids, abets, counsels, procures, solicits or incites the commission of an offence under this Division is guilty of an offence and liable to the same punishment, pecuniary penalties and forfeiture as the person would be if the person had committed the first-mentioned offence.’

\textsuperscript{21} \textit{McLean} (1981) 5 A Crim R 36, 41 as cited in Schimmel, above n 9, 136.

\textsuperscript{22} As quoted in Schimmel, above n 9, 137.

\textsuperscript{23} Schimmel, above n 9, 141.

\textsuperscript{24} Schimmel, above n 9, 142.

\textsuperscript{25} \textit{R v Dalby} [1982] 1 All ER 916, 919 (‘Dalby’).
DRUG SUPPLY, SELF ADMINISTRATION AND MANSLAUGHTER

This legal position is further supported by the Victorian Supreme Court’s decision in Demirian.26 In this case Demirian conspired with the victim to build a bomb. The bomb, however, exploded prematurely when the victim was setting the triggering device, killing the victim instantly. As a result, Demirian was charged and convicted of conspiracy to cause an explosion and murder. In allowing his appeal against the murder conviction and recording an acquittal, the Court also stated that there was no basis for liability for manslaughter:

Demirian could not be guilty of manslaughter as an accessory unless Levonian as principal offender committed a crime by killing himself. Levonian did not commit a crime by unintentionally killing himself as there has never been a crime of self-manslaughter.27

This does not mean that aiding and abetting a drug offence can never form the basis for a charge of unlawful and dangerous act manslaughter. In Lamb, the NSWCCA considered an appeal against a sentence for manslaughter arising from a situation where the appellant and her co-defendant were charged with unlawful and dangerous act manslaughter following the injection of the victim with morphine by the co-defendant.28 The co-defendant was charged and convicted (having plead guilty) as a principal in the first degree. Lamb was convicted as a principal in the second degree in that she assisted in the administration of the drugs to the victim.29

B. Administering Drugs

Lamb confirms the basis for unlawful and dangerous act manslaughter where the accused injects (or otherwise administers) the victim with dangerous drugs. As such Lamb follows the position taken in the UK in Cato.30 In Cato, the accused and the victim injected each other with prohibited drugs over a number of hours. Both suffered serious complications as a result, but while the accused was apparently saved by some basic first aid administered by a house mate, the victim did not likewise respond and died from respiratory failure. Cato was charged and convicted of manslaughter arising from an unlawful and dangerous act, namely s23, Offences Against the Person Act, 1861 (24 & 25 Vict c 100).31 In dismissing his appeal, the Court of Appeal determined that Cato was clearly guilty under s23, that this was unlawful and dangerous and that it had caused the victims death.

The Court firmly rejected the appellant’s submission that the administration could not be viewed as malicious due to the circumstances and as such s23 could not be proven:

[e] ver since Cato it has been clear that if it is the supplier who administers the fatal drug to the victim (usually by injection), a manslaughter conviction inexorably follows.32

This is the settled position in NSW, but in the Australian Capital Territory (ACT) case of Lagan, Higgins J, in a trial by judge alone, appeared to depart from Cato in holding that:

… it is apparent that, in the present case the intent shown by the evidence, was not to injure or to cause any pain or annoyance to Ms Earl. In fact, the only conclusion that can sensibly be drawn

27 Ibid at 126.
28 R v Tanya Lamb (1997) (Unreported, New South Wales Court of Criminal Appeal, (Glesson CJ, Mason P and Dowd J), (3 April 1997) (‘Lamb’).
29 Ibid.
31 Offences Against the Person Act 1861 (24 & 25 Vict c 100) s23 states:
  Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable... to be kept in penal servitude for any term not exceeding ten years.
from the evidence was that the administration of the heroin was intended to relieve Ms Earl’s feelings of depression, to dull her awareness of emotional pain. That is, to ‘help’ not harm her.\textsuperscript{33}

1. Queensland

The Queensland case, \textit{Stott & Van Embden}, appears to be the only case outside of NSW which deals with the liability of a drug supplier for the death of a person who subsequently self-administers those drugs.\textsuperscript{34} In \textit{Stott & Van Embden} the defendants were originally tried for murder and in the alternative manslaughter. As to manslaughter, the prosecution alleged that the defendants had caused the victim’s death by either i) injecting him directly or ii) handing him a syringe of heroin which he then self-administered. The jury found the defendants guilty of manslaughter. The basis for the defendants’ liability under the first approach was negligent manslaughter. As to the second alternative, it was noted that s291 of the \textit{Criminal Code Act 1891} (Qld) states: ‘It is unlawful to kill any person unless such killing is authorised or justified or excused by law.’

The prosecution’s case was that the accused’s unlawfully killed the victim when one of them prepared and handed to the victim a syringe of heroin which the victim then self-administered. As this was not ‘authorised or justified or excused by law’ then liability was established. Duke questions this conclusion and raises doubts as to the court’s approach to causation.\textsuperscript{35} On the basis of the second alternative, the facts were that a 27 year-old male, with a history of drug use, was given a syringe containing heroin by one of the defendants. In the absence of any evidence suggesting force, deception or mistaken belief, this informed adult victim then freely and voluntarily injected himself with the drugs. Looking at the individual judgements, McPherson JA concluded that there was nothing wrong with the trial judges direction that if the second factual basis for manslaughter was to be taken then the defendants would not be responsible for the death of the victim only if it was an accident, that is that the person supplying the drugs would not have reasonably foreseen the victim’s death as a possible outcome.\textsuperscript{36}

Atkinson J concurs but briefly, at least, considers the issue of causation:

\[32\] At common law, mere supply would not itself be sufficient to constitute the \textit{actus reus} of the offence of manslaughter because it is not an act which itself causes direct harm. Section 293 of the \textit{Criminal Code}, however, provides the following definition of ‘killing’:

‘... any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.’

So, under the \textit{Code}, a person is taken to have killed another if he or she causes the other’s death, whether directly or indirectly.\textsuperscript{37}

While acknowledging the difference between causation in Code jurisdictions to that taken by the common law, Duke contends that the difference is not that great so as to justify such a significant departure. He notes that:

If what Atkinson J says is correct and a causal nexus can be established, the word ‘indirect’ would not only be seen as being responsible for incarcerating a number of drug dealers who find themselves entangled in cases of fatal self-administration, but for also bypassing the very foundation upon which the criminal law is based — individual autonomy and free will. Such a situation seems implausible.\textsuperscript{38}


\textsuperscript{34} \textit{Stott & Van Embden} [2001] QCA 313.

\textsuperscript{35} Duke, above n 13.

\textsuperscript{36} \textit{Stott & Van Embden} [2001] QCA 313, [22].

\textsuperscript{37} Ibid [32].

\textsuperscript{38} Duke, above n 13, 21.
Indeed, if this is good law, even just in Queensland (and other Code jurisdictions with similar provisions\textsuperscript{39}), then it is arguable that there should be many more prosecutions in self-administration cases, regardless of the difficulties in identifying the person(s) who supplied the drugs.

C. Self-Administration and Causation

\textit{Stott \& Van Embden} must also now be considered in light of the House of Lords decision in \textit{Kennedy No.2}, even though this case is only strictly relevant to the common law.\textsuperscript{40} In \textit{Kennedy No.2}, the accused prepared a syringe of heroin and handed it to the victim who immediately injected himself. After a prolonged process of appeal, the certified question before the House of Lords was:

\begin{quote}
[w]hen is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?\textsuperscript{41}
\end{quote}

The Court noted at the outset that:

\begin{quote}
The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, and also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.\textsuperscript{42}
\end{quote}

In his analysis, Duke refers to the contrasting positions taken by Heaton and Williams concerning causation in self-administration manslaughter cases.\textsuperscript{43} While Heaton considers that the best approach is to see the victim as comparable to a third party who intervenes and thus breaks the chain of causation, Williams sees merit in an adapted approach based on the natural consequences test. Duke notes that the House of Lords in \textit{Kennedy No.2}, shows some preference for the third party approach but fails to clearly resolve the issue by undertaking any thorough examination ‘of how cases of fatal self-administration fit into the wider law of causation.’\textsuperscript{44}

Duke is right about the need to more thoroughly resolve the issue of causation particularly when the Court’s position on self-administration is hardly the essence of clarity, but the House of Lords response to the certified question before it was very concise.

The answer to the certified question is: ‘In the case of a fully-informed and responsible adult, never.’\textsuperscript{45}

Further to this, the House of Lords confirmed that \textit{Dalby} is clear authority that:

\begin{quote}
…where the charge of manslaughter is based on an unlawful and dangerous act, it must be an act directed at the victim and likely to cause immediate injury, however slight.\textsuperscript{46}
\end{quote}

\textsuperscript{39} See, eg, s270 \textit{Criminal Code Act 1913} (WA).

\textsuperscript{40} \textit{R v Kennedy (No. 2)} [2007] 4 All ER 1083 (‘Kennedy (No. 2)’).

\textsuperscript{41} Ibid [2].

\textsuperscript{42} Ibid [14].


\textsuperscript{44} Ibid 18.

\textsuperscript{45} \textit{Kennedy (No. 2)} [2007] 4 All ER 1083, [25].

\textsuperscript{46} \textit{Dalby} [1982] 1 All ER 916, 919.
In the case of ‘a fully-informed and responsible adult’, therefore, the supplying of the drugs is
not an operating and substantial cause of the victim’s death. Further, and in accordance with
Royall, nor can it be said that death was a natural consequence of the accused’s conduct, or that
it was reasonably forseeable.47 What remains unanswered is the legal position if a victim was
not fully-informed, was not an adult, or there were other factors affecting the free-will of the
victim. In such circumstances, it would appear arguable that self-administration by the victim
may not necessarily break the chain of causation and if it can then be established that what the
accused did was operating and substantial, a natural consequence or reasonably forseeable, then
causation could be established.

This is not to say that liability will never arise in drug supply and self-administration
cases, but it is arguable that the better approach is negligent manslaughter, assuming that the
circumstances give rise to such a charge.

D. Negligent Manslaughter

The first approach to the defendants’ liability for manslaughter in Stott & Van Embden was
based on the submission that one of the defendants had injected the victim with what was
described as a large/strong dose of heroin.48 In this regard, the jury was directed to consider
negligent manslaughter under s 289 Criminal Code Act 1891 (Qld).49

While this is clearly different to the common law where this would be dealt with by way of
an unlawful and dangerous act, the case is significant as the only other reported Australian case
of negligent manslaughter involving those who have supplied drugs.50 In Stott & Van Embden,
no complaint was made with regard to the direction on the first approach to manslaughter. The
defendants had in their charge a dangerous thing, that being a syringe containing a large, strong
dose of heroin. In injecting the victim they had failed in their duty of care to avoid danger and
had ‘caused any consequences which result to the life or health of any person by reason of any
omission to perform that duty.’ As to the degree of fault required, ‘his Honour summed up on
criminal negligence in accordance with the decision in Callaghan v The Queen.’51

This latter direction is significant, Callaghan stating that, for the purposes of Australian
Code jurisdictions, courts should follow the common law as to gross/criminal negligence.52 At
common law, Nydam states that gross/criminal negligence is proven where an accused breaches
his/her duty of care ‘in circumstances which involved such a great falling short of the standard
of care which a reasonable man would have exercised and which involved such a high risk
that death or grievous bodily harm would follow that the doing of the act merited criminal
punishment.’53 The difference between s 289 Criminal Code Act 1891 (Qld), above, and the
common law (as applied in NSW) is that the latter requires the initial identification and proof of
a legally recognised duty of care.

Very recently, in Burns, the NSWCCA considered an appeal against a conviction for
manslaughter resulting from the death of a victim who had consumed methadone supplied by the

47 Royall v R (1991) 172 CLR 278 (‘Royall’).
49 Duty of persons in charge of dangerous things:
   It is the duty of every person who has in the person’s charge or under the person’s control anything,
   whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence
   of care or precaution in its use or management, the life, safety, or health, of any person may be
   endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the
   person is held to have caused any consequences which result to the life or health of any person by
   reason of any omission to perform that duty.
   NSWCCA 56.
51 Stott & Van Embden [2001] QCA 313, [17].
52 Callaghan v R (1952) 85 CLR 115 (‘Callaghan’).
appellant and her partner. The case is somewhat complicated by the fact that the prosecution’s case was based on both unlawful and dangerous act manslaughter and negligent manslaughter, the basis for the unlawful and dangerous act charge being that there was evidence that the appellant and her partner had actually administered the drugs to the deceased. The charge of negligent manslaughter was based on the allegation that the appellant and her partner both owed the victim a duty of care which they breached by failing to provide reasonable assistance to the victim when he became ill as a result of consuming the methadone they had supplied. In addition, their failure to assist caused the victim’s death.

On appeal it was argued that:

Ground 1: His Honour erred in refusing to remove the charge of manslaughter by gross criminal negligence from the consideration of the jury.

Ground 2: His Honour erred in directing the jury that there was a duty of care owed by a supplier of drugs towards the drug recipient.

In dismissing the appeal, the Court held that a duty arose in the circumstances of a voluntary assumption of care in circumstances of a helpless person. Further to this, the Court also recognised that a duty arose from the fact that by supplying the drug the appellant created a danger to the deceased and that any person who deliberately puts another in danger has a legal duty to take steps to remove that danger. In this regard, the Court cited with approval the recent English case of Evans ultimately concluding that the trial judge’s directions were in line with that case and therefore correctly reflected the law.

In her analysis of Evans, Williams similarly identifies the above two approaches to the duty of care question. In Evans, Carly Townsend died of a heroin overdose at her mother’s home. ‘Her mother, Andrea Townsend and her half-sister, Gemma Evans, were charged with manslaughter by gross negligence in that they failed to render aid when it was clear that Carly had overdosed on heroin.’ While Andrea Townsend’s duty arose from her maternal relationship to Carly, Evans’s duty arose due to her being Carly’s half-sister and that it was she who had obtained the drugs from a supplier and then handed them on to Carly.

The appeal by Evans against her conviction was dismissed but Williams highlights a number of problems with the Court of Appeal’s judgment, including causation. Williams rightly notes that the House of Lords in Kennedy stated that:

This appeal is concerned only with unlawful act manslaughter and nothing in this opinion should be understood as applying to manslaughter caused by gross negligence.

But this does not avoid the extent to which the voluntary acts of the ‘fully-informed and responsible adult’ user break the chain of causation initially created by the existence of a duty of care. This may not have been an issue in Evans due to the age (16 years) of the victim, but Williams contends that this is not so much of a problem in cases of negligent manslaughter.

54 Natalia Burns v R [2011] NSWCCA 56 (‘Burns’).
55 Ibid [89].
56 Ibid [97] and [98].
57 Ibid [105].
61 Ibid 637–41.
62 R v Kennedy (No. 2) [2007] 4 All ER 1083, [6].
in any event. Omerod and Fortson suggest that in such situations, ‘[s]ince V’s acts would be completed, the causation question could be circumvented’. 63

Ormerod had also commented that:

the argument that the victim’s act breaks the chain of causation may be less compelling in the context of gross negligence. In unlawful act manslaughter cases based on s.23, V’s voluntary self-administration precludes the prosecution establishing this element of the s.23 offence. In gross negligence, it might be argued that the whole of D’s course of conduct is in issue and that as such there is no break in the chain of causation. 64

The whole of an accused’s course of conduct in circumstances, such as those in Evans, comprises the creation of danger through the supply of the drugs leading to a duty to remedy this danger by immediately seeking medical assistance following the victim’s overdose. In this regard, a failure to seek such timely medical assistance is a cause of the victim’s death and the victim’s self-administration, while contributing to the death, does not break this chain of causation.

This does not mean that causation will never be an issue in negligent manslaughter cases involving the supply of drugs. In the recent NSW case of Justins, the accused supplied her partner with Nembutal, the victim subsequently consuming the drug and dying as a result. 65

At trial, Justins was found not guilty of murder but guilty of negligent manslaughter. The basis for her conviction was that the deceased had severe Alzheimer’s disease and as a result lacked the capacity to make an informed decision about committing suicide. 66 As such, Justins owed the deceased a duty of care to determine that the deceased had a capacity to understand. On appeal, the NSWCCA held that there had not only been a misdirection as to the meaning of an ‘informed decision’, but that it was unlikely that a failure to enquire could constitute the conduct that caused the death. 67

III. CONCLUSION

It would appear to be settled law in Australia that an accused commits manslaughter where he/she administers drugs to another and this person dies as a result of the administration of the drugs. In addition a person could aid and abet another in such administration and accordingly be liable for manslaughter as a secondary party. 68 In Cao, however, it was held that someone can aid and abet a victim’s self-administration and that this can then be seen as an unlawful and dangerous act for the purposes of manslaughter. 69 This paper has argued that this is legally wrong. It is not only questionable whether aiding and abetting self-administration amounts to an unlawful and dangerous act, but such aiding and abetting self-administration through the supplying of drugs (or the means to use those drugs) does not cause the death of a victim who has ‘freely and voluntarily self-administered’ the drugs. 70

Again citing Dalby:


66 Ibid [1].

67 Ibid [110].


70 Kennedy (No. 2) [2007] 4 All ER 1083. Due to the fact that there is there is no offence of self-administration in the UK, it might be arguable that the courts could have come to a different conclusion had there been such an offence. In light of the emphatic ruling by the House of Lords in Kennedy (No. 2) [2007] 4 All ER 1083, however, this appears now to be irrelevant.
...where the charge of manslaughter is based on an unlawful and dangerous act, it must be an act directed at the victim and likely to cause immediate injury, however slight.  

As such, in Australia (at common law at least) and the UK, there is apparent consensus that the mere supply of dangerous drugs can never ground a charge of manslaughter. Given the similarity in facts between *Kennedy* and *Stott & Van Embden* there must also now be some doubt as to the second grounds for manslaughter in this Queensland case.

The problem of causation arising from a charge of manslaughter by unlawful and dangerous act, however, ‘may be less compelling’ where the charge is negligent manslaughter. *Stott & Van Embden* is an important case but it is a Code case where liability for negligent manslaughter was based on the defendants administering drugs to the victim, not self-administration. The recent English case of *Evans* and NSW case of *Burns* now provide the basis for the approach to negligent manslaughter that would be taken at common law in Australia. This is not to say that liability is easily established. First, it must be established that an accused had a duty by way of a voluntary assumption of care in circumstances of a helpless person. Alternatively, or as well, that a duty arose from the fact that by supplying the drug the appellant created a danger to the deceased and that any person who deliberately puts another in danger has a legal duty to take steps to remove that danger. Such a duty is not necessarily easily established. *Wilhelm* is proof of this.

It must then be proven that a breach of such a duty caused the victims death:

in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

The leading NSW case of *Taktak* would suggest that this may also be difficult to prove.

In Australia, establishing the liability for manslaughter of a drug supplier where the victim self-administers the drugs is accordingly problematic to say the least. The rarity of charges, let alone convictions, is testament to this. What the cases to date tell us is that liability will only arise in specific circumstances such as those arising in *Burns*. This includes that the accused is present at the time of the self-administration and the subsequent, resultant life-threatening condition of the victim, this in turn reinforcing the existence of a legal duty of care. In the case of Dr Suresh Nair, for example, one of the prostitutes who was present at the time of the death of the victim stated that she and the victim ‘used a rolled-up $50 to snort numerous lines of cocaine, supplied by Nair, which she described as “strong .... it was close to pure”’.

She later noticed her colleague shaking uncontrollably but when she told Nair something was wrong he said she just needed to sleep and gave her a sedative. “I’m a doctor, trust me, she will get better,” she said Nair told her. But the witness said blood and saliva came out of Ms Domingues-Zaupa’s mouth and she turned purple.

Accordingly, and at common law at least, negligent manslaughter stands as the most appropriate means of prosecuting drug suppliers where those who self-administer the drugs...

71 Dalby [1982] 1 All ER 916, 919.
72 *Kennedy (No. 2)* [2007] 4 All ER 1083.
73 *Stott & Van Embden* [2001] QCA 313.
74 Barsby and Omerod, above n 57.
75 *Evans (Gemma)* [2009] EWCA Crim 650.
76 *Burn* [2011] NSWCCA 56.
79 R v Taktak (1988) 14 NSWLR 226 (‘Taktak’).
80 *Burns* [2011] NSWCCA 56.
81 Ibid.
82 Ibid.
83 Ibid.
supplied die as a result. Wilhelm, however, demonstrates the limitations of such charges. Assuming that the Australian criminal justice system has an interest in prosecuting drug suppliers for offences in such circumstances (in addition to the obvious offences of drug supply), then questions arise as to whether any alternative approaches currently exist under Australian law or whether consideration should be given to enacting new offences. A thorough analysis of this would extend the scope of this paper too far but certain possibilities are worth mentioning. Both Victoria (s22 Crimes Act 1958 (Vic)) and South Australia (s29(1) Criminal Law Consolidation Act 1935 (SA)), for example, have what could be called ‘endangerment’ offences. These offences appear, at least, to avoid problems with causation, but, having said this, both require proof of subjective states of mind. In addition, a major question is whether supplying drugs is conduct ‘that places or may place another person in danger of death’ or ‘is likely to endanger the life of another’? On the face of it, at least, such offences appear to be a possible means of prosecution.

85 Crimes Act 1958 (Vic) s22:
A person who, without lawful excuse, recklessly engages in conduct that places or may place another person in danger of death is guilty of an indictable offence. Penalty: Level 5 imprisonment (10 years maximum).
See also s23.
86 Criminal Law Consolidation Act 1935 (SA) s 29(1) states:
Where a person, without lawful excuse, does an act or makes an omission—
(a) knowing that the act or omission is likely to endanger the life of another; and
(b) intending to endanger the life of another or being recklessly indifferent as to whether the life of another is endangered, that person is guilty of an offence.
Maximum penalty:
(a) for a basic offence—imprisonment for 15 years;
(b) for an aggravated offence—imprisonment for 18 years.
See also ss29(2) and (3).
87 Crimes Act 1958 (Vic) s22.
88 Crimes Act 1958 (Vic) s 29(1).
89 There are no specific cases relevant to these provisions, but as to the notion of endangerment, see Gedeon v Commissioner of the New South Wales Crime Commission [2008] HCA 43.
DEFENCES IN MEDICAL NEGLIGENCE:
TO WHAT EXTENT HAS TORT LAW REFORM IN AUSTRALIA LIMITED THE LIABILITY OF HEALTH PROFESSIONALS?

Jennifer Yule*

I. INTRODUCTION

On the 10th anniversary of the beginning of the insurance crisis and a period of significant torts law reforms, it is appropriate to take this opportunity to consider to what extent civil liability legislation (in various jurisdictions) has limited the liability of health professionals in Australia. Prior to the last decade, legislation on civil liability was usually used to extend liability, rather than to limit it. Tort law reform has now resulted in legislation being passed by all Australian jurisdictions, implementing some recommendations contained in the Ipp Report as well as other reforms that were not included in the recommendations.

The review of the law of negligence was in response to a perceived crisis in liability insurance; in particular, medical indemnity insurance. This perceived crisis resulted from several factors, including the collapse of HIH, the destruction of the World Trade Centre, the provisional liquidation of Australia’s largest medical defence organisation (United Medical Protection), and the subsequent substantial increases in medical indemnity insurance. The objective of the review was to restrict and limit liability in negligence actions.

This article will consider and reflect upon the extent to which those reforms have affected the liability of health professionals in medical negligence actions. It is not within the scope of this article to consider the elements of the negligence action: duty of care, breach and damage. Rather, this article will consider the areas of defences and assessment of damages: contributory negligence, voluntary assumption of risk, good Samaritans, the peer acceptance defence, apologies and statutory limits on damages.

It will be argued in this article that the courts have generally interpreted the civil liability reforms as being consistent with the common law. However, the liability of health professionals has been limited by the civil liability legislation through the use of thresholds, caps and presumptions in the assessment of damages and apportioning liability between the parties rather than by the application of defences. Therefore, this paper will first consider defences and then statutory limits.

II. DEFENCES

There are a number of possible defences to a negligence action, including contributory negligence and voluntary assumption of the risk. There are also specific defences in medical negligence like the peer acceptance defence. Other topics included in this section include the Good Samaritan defence and apologies.

* Lecturer, School of Law, Queensland University of Technology
3 Skene and Luntz, above n 1, 346.
4 See terms of reference of the Ipp Report, above n 2, ix; Des Butler, Tina Cockburn and Jennifer Yule, ‘Medical Negligence’ in Ben White, Fiona McDonald and Lindy Willmott (eds), Health Law in Australia (Thomson Reuters, 2010) 212.
A. Contributory Negligence

A common defence to an action in negligence is contributory negligence. Contributory negligence was once a complete defence to an action in negligence; however, since the introduction of apportionment legislation, liability can now be apportioned and damages reduced. The Ipp Report recognised that at common law the courts were applying a lower standard of care and made the recommendation that emphasis must be made to the fact that contributory negligence had to be measured against an objective standard (the standard being the same as in establishing negligence against the defendant). The civil liability legislation has introduced a number of sections to further this aim. Presumptions and mandatory reductions for contributory negligence have attempted to reduce the liability of defendants. It is now possible for damages to be reduced by 100 per cent for contributory negligence. Legislation now also expressly provides that the standard of care for contributory negligence is the same as for negligence.

There is an argument about whether the standard of care owed by the defendant and the plaintiff should be the same or a different standard. The common law has treated the standard differently because the failure by a defendant puts others at risk, whereas the failure by the plaintiff impacts on only them. However, the civil liability legislation states that they are the same. This idea has also found support from Callinan and Heydon JJ in Vairy, where it was stated that the plaintiff’s contributory negligence involves a breach of one’s duty to society not to become a burden on it by exposing oneself to risk where, at 483, their Honours said:

The ‘duty’ to take reasonable care for his own safety that a plaintiff has is not simply a nakedly self-interested one, but one of enlightened self-interest which should not disregard the burden, by way of social security and other obligations that a civilised and democratic society will assume towards him if he is injured. In short, the duty that he owes is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realised.

This statement was supported by Ipp JA in CBH v Edwards, where his Honour noted the equivalence between the civil liability legislation and Callinan and Heydon JJ in Vairy. Given this, the Court did not accept that the plaintiff’s contributory negligence was less serious than the defendant’s breach of duty of care.

Prior to the recent civil liability reforms, apportionment legislation did not permit a court to find a plaintiff was 100 per cent contributorily negligent. However, the situation is now different under new civil liability legislation, where 100 per cent apportionment is possible. In Adams by her next friend O’Grady v State of New South Wales, the Court held that it was ‘entitled to come to a view that the contributory negligence should be assessed at 100 per cent of the cause of the injury’. But this has not happened in medical negligence cases and, considering the expert knowledge involved, it is difficult to imagine such a case.

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5 Williams v Commissioner for Road Transport (1933) 50 CLR 258.
6 Civil Law (Wrongs) Act 2002 (ACT) s 102; Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 9(1); Law Reform (Miscellaneous Provisions) Act 1956 (NT) s 16(1); Law Reform Act 1995 (Qld) s 10(1); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) s 7; Wrongs Act 1954 (Tas) s 4(1); Wrongs Act 1958 (Vic) s 26(1); Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (WA) s 4(1).
7 Vairy v Wyong Shire Council (2005) 223 CLR 422.
8 Ibid 483.
9 Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380, [68]–[69].
10 Ibid [71].
12 Civil Law (Wrongs) Act 2002 (ACT) s 47; Civil Liability Act 2002 (NSW) s 5S; Civil Liability Act 2003 (Qld) s 24; Wrongs Act 1954 (Tas) s 4(1); Wrongs Act 1958 (Vic) s 63.
14 Ibid [132]. See also Zilio v Lane [2009] NSWDC 226.
All jurisdictions, except for the Australian Capital Territory and the Northern Territory, have sections in their civil liability legislation dealing with contributory negligence, which have been held to be reflective of the common law — that is, the standard of care is the same as for negligence. The standard is different when the plaintiff is a child. Once contributory negligence is proven, the appropriate apportionment needs to be considered to determine what is ‘just and equitable’ in accordance with the legislation. This is subjective and based on findings of fact:

No doubt the making of the apportionment which the legislation requires involves a comparison of culpability of both parties ie, the degree to which each has departed from what is reasonable, but that is not the only element to be considered. Regards must be had to the relative importance of the acts of the parties in causing damage and it is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subject to comparative examination.

There are mandatory reductions for intoxication but it would seem unlikely that intoxication would be relevant in medical negligence cases. The mandatory presumption can be rebutted by establishing that the intoxication did not contribute to the breach of duty.

Since the High Court decision in Rogers v Whitaker, courts have been prepared to focus on the conduct of the patient. However, cases involving successful claims of contributory negligence are rare. There are some scenarios when contributory negligence can arise and be raised in medical negligence cases. One is when the patient does not return to see the doctor when requested or the patient does not adequately inform the doctor of the nature of their symptoms. In such a situation, damages may be reduced by 20 per cent, depending on the facts of the case. There is a theme in the cases of an idea of ‘shared responsibility’ between the health professional and the patient and that there are rights and responsibilities as a ‘consumer of medical services’. Other scenarios include the patient failing to keep appointments with the doctor (in one case, liability was reduced by 50 per cent), and the patient failing to advise the staff at a fertility clinic that only one, not two, embryos should be transferred (where the liability

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15 Civil Liability Act 2002 (NSW) s 5R; Civil Liability Act 2003 (Qld) s 23; Civil Liability Act 1936 (SA) s 5K; Civil Liability Act 2002 (Tas) s 23; Wrongs Act 1958 (Vic) s 44; Civil Liability Act 2002 (WA) s 5K.
16 Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380, [67]–[70].
17 Civil Liability Act 2002 (NSW) s 5R; Civil Liability Act 2003 (Qld) s 23; Civil Liability Act 1936 (SA) s 44; Civil Liability Act 2002 (Tas) s 23; Wrongs Act 1958 (Vic) s 62; Civil Liability Act 2002 (WA) s 5K.
18 Doubleday v Kelly [2005] NSWCA 151, [26].
20 Civil Law (Wrongs) Act 2002 (ACT) s 95; Civil Liability Act 2002 (NSW) ss 48–50; Personal Injuries (Liabilities and Damages) Act 2003 (NT) ss 14–17; Civil Liability Act 2003 (Qld) ss 46, 47; Civil Liability Act 1936 (SA) ss 46, 48; Civil Liability Act 2002 (Tas) ss 4A, 7; Wrongs Act 1958 (Vic) s 14G; Civil Liability Act 2002 (WA) s 5L.
21 (1992) 175 CLR 479.
26 Harper, above n 22, 16.
27 Young v Central Australian Aboriginal Congress Inc [2008] NTSC 47.
was reduced by 35 per cent). There are many examples where allegations of contributory negligence have not been successful in medical negligence cases. There were few examples in medical negligence cases where contributory negligence was successful before the civil liability reforms and there are still few successful cases since the introduction of the reforms. So it can be suggested that introducing the same standard for both the plaintiff and the defendant in the civil liability legislation has not resulted in an increase in the success of the defence of contributory negligence. However, more data would be needed to further that argument.

B. Voluntary Assumption of Risk

Volenti non fit injuria (‘no injury is done to one who voluntarily consents’) is a complete defence to an action in negligence. If a plaintiff, with full knowledge, voluntarily accepts the risk of injury, he or she will not recover any damages. The defendant needs to prove not only that the plaintiff accepted the risk of injury but also accepted that if injury should happen, the plaintiff would accept the legal risk. Voluntary assumption of risk has traditionally been a difficult defence to prove especially since the introduction of the apportionment legislation. However, the Queensland Court of Appeal recently upheld a plea of the defence, stating that ‘while the defence of volenti may be a highly endangered species, it is not yet extinct’. As a result of the civil liability legislation, the utility of the defence has been strengthened by introducing a presumption that the plaintiff is aware of obvious risks. The Ipp Report indicated that the intention was ‘to encourage greater use by the courts of the defence of assumption of risk’. As a result of the recommendations, most civil liability legislation, excluding the Australian Capital Territory and the Northern Territory, provides for a presumption that the plaintiff was actually aware of the risk if it was an obvious one. The plaintiff has to prove, on the balance of probabilities, that he or she was not aware of an obvious risk. This reverses the onus of proof and makes volenti easier to use in the following way:

The effect of these provisions is that a plaintiff is rebuttably presumed to be aware of a risk where the risk would have been obvious to a reasonable person in the position of the plaintiff. A plaintiff cannot rebut the presumption by claiming that even though he or she was aware of the general risk of harm, he or she was not aware of all its possible manifestations, including the one that eventuated.

In terms of the wording of the sections relating to obvious risk, there are some variations. Tasmania is the only jurisdiction where medical practitioners are under no duty to warn of obvious risk. Other jurisdictions have provisions that make an exception to the protection afforded by the provisions relating to no duty to warn of obvious risks where the defendant is

31 Madden and McIlwraith, above n 23, 290.
32 Rootes v Shelton (1967) 116 CLR 383.
35 The Ipp Report, above n 2, 129.
36 Civil Liability Act 2002 (NSW) ss 5F, 5G; Civil Liability Act 2003 (Qld) ss 13, 14; Civil Liability Act 1936 (SA) ss 36, 37; Civil Liability Act 2002 (Tas) ss 15, 16; Wrongs Act 1958 (Vic) ss 53, 54; Civil Liability Act 2002 (WA) ss 5F, 5N.
37 Carey v Lake Macquarie City Council [2007] NSWC 4, [90] (McClellan CJ).
38 Civil Liability Act 2002 (Tas) s 17.
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a professional who has been asked for advice. But the sections exclude professional services that carry the risk of injury or death. Queensland and Tasmania have a specific provision relating to the duty of a doctor to warn of risk. The section sets out the common law duty to warn which includes their proactive and reactive duty. The proactive duty to warn means that the doctor has to give the patient sufficient information to make an informed decision about whether to accept treatment, taking into consideration all the material risks associated with the treatment. The reactive duty to inform means the doctor needs to give the patient all the information they need to make an informed decision about whether to agree to treatment based on the patient’s requirements.

In many jurisdictions, there is no liability for the materialisation of an inherent risk (a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill). For example, there would be no liability for the inherent risks involved in a medical procedure. But this does not affect the duty to warn of the risks.

The reversal of the onus of proof through the obvious risk sections has attempted to extend the scope of the defence of voluntary assumption of risk. The plaintiff has to prove that they were aware of the risk. However, in relation to health professionals, this defence of volenti does not really apply because consent to medical treatment does not amount to an assumption of the risk. Even in the situation where a patient is told by a doctor that they are inexperienced, the appropriate argument would be about the relevant standard of care and not about the defence of volenti.

C. The Peer Acceptance Defence

After Rogers v Whitaker where the High Court held that it is ultimately for the court to decide the appropriate standard of care in medical negligence cases, health professionals were concerned about an increase in their liability in negligence. The peer acceptance defence has been introduced and enacted by legislation in response to a recommendation in the Ipp Report. The Ipp Report recommended that the Bolam test be re-introduced with modifications with regards to medical treatment. Under the Bolam test, a doctor would not be liable in negligence as long as the doctor acted in accordance with a practice accepted at the time as proper practice by a responsible body of medical opinion. The recommendation says ‘[a] medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational’. It has been held that, by consideration of the language in the sections,
this is a defence and not an integer of breach and so must be specifically pleaded by the defendant.50

There are differences in the language used in the peer acceptance defence in the different jurisdictions. One difference is in terms of who is covered by the defence. Some jurisdictions use the term ‘professionals’ (which has been held to include chiropractic treatment).52 Western Australia provides a definition for health professional.53 All jurisdictions use the terms ‘widely accepted’, ‘peer’ and ‘competent’.54 Queensland and Victoria also include the terms ‘significant number’ and ‘respected’.55 In terms of what is meant by widely accepted and competent, Madden and McIlwraith comment that this arguably gives rise to a test within a test.56 The meaning of ‘widely accepted in Australia’ was considered in Vella v Permanent Mortgages Pty Ltd.57 There can be conflicting expert evidence58 and an expert can be someone who is materially interested in the proceedings.59

There are exceptions to the widely accepted defence, depending on the precise wording in the legislation in the particular jurisdiction, including where it is irrational, unreasonable or by Wednesbury unreasonableness (so unreasonable that no reasonable health professional in the health professional’s position could have acted or omitted to do something in accordance with that practice).53

The defence must be pleaded, and possibly the section specifically referred to, if a defendant wishes to rely on it at trial.64 There have been cases where the peer acceptance defence would have been successful but was not necessary because the plaintiff was not able to establish the elements of the negligence action. For example, in Melchior v Sydney Adventist Hospital Ltd the court found that while a duty of care was owed the content of the duty of care did not include administering the drug as pleaded by the plaintiff. Therefore, there was no breach or causation; however, if there had been an otherwise successful negligence action it would have failed because of the peer acceptance defence.65

It is important to note that the peer acceptance defence applies only to treatment and not advice.

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50 Sydney South West Area Health Service v MD [2009] NSWCA 343, [23], [29]–[31] (Hodgson JA), [51] (Allsop P).
51 Civil Liability Act 2002 (NSW) s 5O; Civil Liability Act 2003 (Qld) s 22; Civil Liability Act 1936 (SA) s 41; Civil Liability Act 2002 (Tas) s 22; Wrongs Act 1958 (Vic) s 59.
53 Civil Liability Act 2003 (WA) s 5PA.
54 Civil Liability Act 2002 (NSW) s 5O; Civil Liability Act 2003 (Qld) s 22; Civil Liability Act 1936 (SA) s 41; Civil Liability Act 2002 (Tas) s 22; Wrongs Act 1958 (Vic) s 59; Civil Liability Act 2003 (WA) s 5PB.
55 Civil Liability Act 2003 (Qld) s 22; Wrongs Act 1958 (Vic) s 59.
56 Madden and McIlwraith, above n 23, 130.
57 Vella v Permanent Mortgages Pty Ltd [2008] NSWSC 505.
58 Dobler v Halverson [2007] NSWCA 335, [103]–[104].
60 Civil Liability Act 2002 (NSW) s 5O(2); Civil Liability Act 2003 (Qld) s 22(2); Civil Liability Act 1936 (SA) s 41(2); Civil Liability Act 2002 (Tas), 22(2).
61 Wrongs Act 1958 (Vic) s 59(2).
63 Civil Liability Act 2003 (WA) s 5PB(4).
64 Sydney South West Area Health Service v MD [2009] NSWCA 343, [23], [29]–[31] (Hodgson JA), [51] (Allsop P).
65 Melchior v Sydney Adventist Hospital Ltd [2008] NSWSC 1282.
Good Samaritans are people who give assistance to others in an emergency. There is a strongly held view among health professionals that they have a chance of being sued if they provide assistance in an emergency. This concern, however, has not resulted in cases being heard by the courts. Indeed, there is protection for good Samaritans even though the Ipp Report recommended against such protection. The Ipp Report declined to recommend a specific section limiting the liability of good Samaritans. However, the civil liability legislation in all jurisdictions has addressed the issue of liability of people who assist in an emergency.

Generally, the protection in the legislation is for someone who offers assistance in a medical emergency with no expectation of being paid and the person acts in good faith. In some jurisdictions, there is also protection for medical practitioners. Further, in some jurisdictions like Victoria and Tasmania, the protection extends to anyone who provides advice on how to treat an injured person. For example, in New South Wales, a person who provides assistance, in good faith and without expectation of payment or reward, is protected in an emergency when someone has suffered injuries or appears to have suffered injuries. Other jurisdictions, such as Queensland, have created protection for persons performing duties for entities to enhance public safety, if it is in an emergency and the assistance is provided in good faith, but have no specific provision for good Samaritans like in New South Wales. There are also specific protections for health professionals giving assistance in an emergency. For example, medical practitioners and nurses are protected in Queensland as well as ambulance officers in New South Wales and Queensland.

There is no protection for health professionals who render assistance in an emergency from civil liability in certain circumstances. In South Australia and Western Australia, recklessness is not protected. In Queensland, gross negligence is not protected and the services must be performed without expectation of fee or reward. In all jurisdictions except Victoria, a good

67 Skene and Luntz, above n 1, 347.
69 The Ipp Report, above n 2, [7.24].
70 Civil Law (Wrongs) Act 2002 (ACT) s 5; Civil Liability Act 2002 (NSW) ss 56–7; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 8; Civil Liability Act 2003 (Qld) ss 26–7; Civil Liability Act 1936 (SA) s 74; Civil Liability Act 2002 (Tas) ss 35A–35C; Civil Liability Act 2002 (WA) ss 5AB, 5AD; Wrongs Act 1958 (Vic) s 31B.
71 Civil Law (Wrongs) Act 2002 (ACT) s 5; Civil Liability Act 2002 (NSW) ss 55–8; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 8; Law Reform Act 1995 (Qld) ss 15–6; Civil Liability Act 1936 (SA) s 74; Civil Liability Act 2002 (Tas) ss 35A–35C; Civil Liability Act 2002 (WA) ss 5AB, 5AD; Wrongs Act 1958 (Vic) s 31A-31D.
72 Civil Law (Wrongs) Act 2002 (ACT) s 5; Civil Liability Act 2002 (NSW) ss 55–8; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 8; Law Reform Act 1995 (Qld) ss 15–16; Civil Liability Act 1936 (SA) s 74; Civil Liability Act 2002 (Tas) ss 35A–35C; Civil Liability Act 2002 (WA) ss 5AB, 5AD; Wrongs Act 1958 (Vic) ss 31A–31D.
73 Civil Liability Act 2002 (NSW) s 57.
74 Civil Liability Act 2003 (Qld) s 26. See also Civil Law (Wrongs) Act 2002 (ACT), ch 2, pt 2.1; Civil Liability Act 2002 (NSW), pt 8; Personal Injuries (Liabilities and Damages) Act 2003 (NT), pt 2, Div 1; Civil Liability Act 1936 (SA), pt 9, Div 11; Civil Liability Act 2002 (WA), pt 1D; Wrongs Act 1958 (Vic), pt VIA.
75 Law Reform Act 1995 (Qld) s 16.
76 Health Services Act 1997 (NSW) s 67; Ambulance Service Act 1991 (Qld) ss 38, 39.
77 Civil Liability Act 1936 (SA) s 74; Civil Liability Act 2002 (WA), pt 1D.
78 Law Reform Act 1995 (Qld) s 16.
Samaritan is not protected if significantly impaired by alcohol or drugs. In New South Wales, there is no protection if the person either intentionally or negligently caused the initial injuries. In New South Wales and Tasmania, there is no protection if the person claims to have training they do not have.

Another aspect to the issue of the civil liability of good Samaritans is the question whether a health professional will be sued if they do not assist someone in an emergency. The answer is that there is no duty to rescue in Australia. Of course, a doctor is subject to a professional code of practice. However, one case which causes conflict with this general proposition is *Lowns v Woods*, where a doctor was held liable even though the plaintiff was not his patient. It could be argued that, since the case was decided by the Court in the era when the proximity test was used, and the courts now use the multi-factorial approach, the case could be distinguished on that basis.

There have been no significant claims against health professionals for assisting in medical emergencies both before and after the changes in civil liability legislation.

E. Apologies

Legislation encourages apologies to be made, and thereby reduce the number of actions commenced, by providing that they are made with no admission of legal liability. The Ipp Report did not make recommendations about apologies. However, apologies are becoming increasingly important in medical negligence cases, especially in the area of the disclosure of adverse medical events. All jurisdictions in Australia have legislation which encourages apologies or the reducing or waiving of fees payable for the service by making such actions not an admission of liability. There are differences in the legislation in terms of how an apology is defined and whether it is deemed not to be an admission of liability, or not admissible as an admission of liability. The objective of the legislation is to reduce litigation. Many plaintiffs want ‘recognition of their injury, an explanation and an apology’. The theory is that fewer patients sue doctors if the doctors have apologised, and if apologies are not an admission of liability then more doctors will make apologies.

Recent amendments in Queensland in September 2010 have extended apology protections to include implied admission of fault. In addition to the existing sections dealing with ‘expression of regret’, Queensland now has sections covering an apology. Apology is defined as ‘an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, whether or not it admits or implies an admission of fault in relation to that matter’. A separate issue is the appropriate standard of care in all the circumstances of the case: see *Imbree v McNeilly* (2008) 236 CLR 510.

79 *Civil Law (Wrongs) Act 2002* (ACT) s 8; *Civil Liability Act 2002* (NSW) s 58(2); *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 8; *Civil Liability Act 1936* (SA) s 74(4); *Civil Liability Act 2002* (Tas) s 35C; *Civil Liability Act 2002* (WA) s 5AE.

80 *Civil Liability Act 2002* (NSW) s 58.

81 *Civil Liability Act 2002* (NSW) s 58(3); *Civil Liability Act 2002* (Tas), 35C.

82 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

83 *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 77.


85 A separate issue is the appropriate standard of care in all the circumstances of the case: see *Imbree v McNeilly* (2008) 236 CLR 510.

86 Eburn, above n 66, 17.

87 *Civil Law (Wrongs) Act 2002* (ACT), pt 2.3; *Civil Liability Act 2002* (NSW), pt 10; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), pt 2; *Div 2; Civil Liability Act 2003* (Qld), ch 4, pt 1; *Civil Liability Act 1936* (SA) s 75; *Civil Liability Act 2002* (Tas) ss 6A–7; *Wrongs Act 1958* (Vic) ss 14I, 14J; *Civil Liability Act 2002* (WA) ss 5AF–5AH.


89 Skene and Luntz, above n 1, 362.


91 *Civil Liability Act 2003* (Qld) ss 72A–72D.
to the matter.92 An apology ‘does not constitute an express or implied admission of fault or liability by the person in relation to the matter.’93 These amendments make Queensland similar to the other jurisdictions.

Considering the extent to which the tort law reforms have limited the liability of health professionals, before the civil liability legislation was enacted in various jurisdictions, expressions of regret and apologies could be used as evidence of an admission of fault, whereas now they are not admissible. However, just because an apology is made does not necessarily mean there will be liability found. The apology forms part of the evidence used to establish the elements of an action.94 Therefore, making apologies not an admission of liability does not necessarily have a significant impact once a matter goes to court. For health professionals, the utility of an apology is in the period before proceedings are instituted. However, it has been argued that apologies actually have the effect of alerting patients to the possibility of litigation.95

III. STATUTORY LIMITS

When a negligence action has been successfully proved by a plaintiff, the court awards compensatory damages. The purpose of compensatory damages is to put the plaintiff back in the position they would have been but for the negligence of the defendant. The assessment of damages was governed by common law principles with the court exercising its discretion in determining the quantum of the damages. As a result of the tort law reform, there are now statutory limits placed on the recovery of damages including the use of thresholds and caps. The purpose of the statutory limits is to limit the amount and extent of liability and to thereby make it less attractive for plaintiffs to commence proceedings. There are also statutory prohibitions in terms of exemplary damages.

A. Thresholds

One of the largest components of damages awarded is for gratuitous care. The Ipp Report recommended that there should be a threshold on this head of damages.96 Many jurisdictions have imposed a threshold for the awarding of damages under this head.97 However, once the threshold has been reached, an award can be made even if the services afterwards are less than the threshold amount.98 The Australian Capital Territory does not have a threshold for gratuitous care.99 Tasmania has abolished the right to damages for gratuitous care.100

For claims for personal injuries under the head of non-economic loss, plaintiffs must now reach a threshold before an amount will be awarded under this head of damages. Included in non-economic loss is pain and suffering, loss of amenities of life, loss of enjoyment of life and, in some jurisdictions, disfigurement.101 The Ipp Report recommended the threshold be set at

92 Civil Liability Act 2003 (Qld) ss 72C.
93 Civil Liability Act 2003 (Qld) ss 72D.
96 The Ipp Report, above n 2, Recommendation 51.
97 Civil Law (Wrongs) Act 2002 (ACT) s 100; Civil Liability Act 2002 (NSW) s 15; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 23; Civil Liability Act 2003 (Qld) s 59; Civil Liability Act 1936 (SA) s 58; Wrongs Act 1938 (Vic) s 28IA; Civil Liability Act 2003 (WA) s 12.
99 Civil Law (Wrongs) Act 2002 (ACT) s 100.
100 Common Law (Miscellaneous Actions) Act 1986 (Tas) s 5.
101 Civil Law (Wrongs) Act 2002 (ACT) s 99; Civil Liability Act 2002 (NSW) s 3; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 3; Civil Liability Act 2003 (Qld) s 51; Civil Liability Act 1936 (SA) s 3A; Wrongs Act 1938 (Vic) ss 28C, 28LB; Civil Liability Act 2003 (WA) s 9.
15 per cent of a most extreme case and this has been adopted in New South Wales. Other jurisdictions have adopted different approaches. For example, Victoria requires a ‘significant injury’ which, in most cases, means 5 per cent degree of impairment for personal injury and 10 per cent for mental harm. Queensland does not have a threshold but has a sliding scale. South Australia has a sliding scale and a threshold of significant impairment. Tasmania and Western Australia have an indexed threshold. Northern Territory has a 5 per cent impairment threshold. The Australian Capital Territory has no threshold.

B. Caps

The Ipp Report recommended a cap of $250,000 on damages for non-economic loss. Queensland adopted this cap but, in 2010, made amendments so the cap is now indexed if the injury arose from 1 July 2010. In the other jurisdictions, except in the Australian Capital Territory, there is a cap for non-pecuniary general damages which is either indexed or higher than recommended.

The Ipp Report also recommended that loss of earning capacity be capped to twice the average weekly earnings. In all jurisdictions, there are caps for the loss of earning capacity which restrict the amount that may be awarded. Most jurisdictions have capped the loss of earning capacity to three times the average weekly earnings. In South Australia, there is a prescribed limit.

The Ipp Report also recommended that all awards for future loss be discounted by 3 per cent. Most jurisdictions have adopted a rate of 5 per cent. Tasmania and Western Australia have higher rates. The Australian Capital Territory has continued with the common law.

C. Exemplary Damages

Exemplary damages can be awarded at common law to punish and deter certain behaviour by defendants. This category of damages is usually awarded in circumstances where the defendant displayed some conscious wrongdoing, demonstrating that the rights of the plaintiff have been disregarded by the defendant. An example in a medical negligence case where exemplary

102 The Ipp Report, above n 2, Recommendation 47.
103 Civil Liability Act 2002 (NSW) s 16(1).
104 Wrongs Act 1958 (Vic) ss 28LB–28LI.
105 Civil Liability Act 2003 (Qld) s 62, sch 6A.
106 Civil Liability Act 1936 (SA) s 52.
107 Civil Liability Act 2002 (Tas) s 27; Civil Liability Act 2003 (WA) ss 9–10.
108 Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 27(2).
110 Civil Liability Act 2003 (Qld) s 62, sch 6A.
111 Civil Liability Act 2002 (NSW) s 16(2); Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 27; Civil Liability Act 2003 (Qld) s 62; Civil Liability Act 1935 (SA) s 52; Civil Liability Act 2002 (Tas) ss 27–28; Wrongs Act 1958 (Vic) s 28G; Civil Liability Act 2003 (WA) s 10. Section 99 of the Civil Law (Wrongs) Act 2002 (ACT) allows reference to prior cases.
112 The Ipp Report, above n 2, Recommendation 49.
113 Civil Law (Wrongs) Act 2002 (ACT) s 38; Civil Liability Act 2002 (NSW) s 12; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 20; Civil Liability Act 2003 (Qld) s 54; Civil Liability Act 2002 (Tas) s 26; Wrongs Act 1958 (Vic) s 28F; Civil Liability Act 2003 (WA) s 11.
114 Civil Liability Act 1935 (SA) s 54.
115 The Ipp Report, above n 2, Recommendation 53.
116 Civil Liability Act 2002 (NSW) s 14; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 22; Civil Liability Act 2003 (Qld) s 57; Civil Liability Act 1935 (SA) s 57; Wrongs Act 1958 (Vic) s 28I.
117 Common Law (Miscellaneous Actions) Act 1986 (Tas) s 4; Law Reform (Miscellaneous Provisions) Act 1941 (WA) s 5.
Defences in Medical Negligence

Damages has been awarded is the Canadian case of Shoebridge v Thomas,118 where a surgeon left an abdominal roll in the patient’s upper abdomen and took steps to conceal the mistake from the patient for two months. Exemplary damages of $20,000 were awarded in that case.

In response to a recommendation in the Ipp Report,119 New South Wales, the Northern Territory and Queensland have abolished the awarding of exemplary damages with some exceptions.120 This has, therefore, limited the liability of health professionals in those jurisdictions.

IV. Conclusion

A pattern can be seen to emerge from the various defences and statutory limits: legislation has been passed with the purpose of limiting liability, but the interpretation adopted by the courts has resulted in the same effect for actions in negligence as under the common law. This result is understandable, considering the objectives of the Ipp Report were to re-state the law of negligence and to limit liability. It could be argued that, by 2001, the High Court was already moving towards ‘a greater orientation towards the defendant’.121 With the decision of Sullivan v Moody,122 the High Court was already beginning to interpret the law of negligence in a more restrictive manner by rejecting the proximity test and instead moving to a multi-factorial approach which considered the relevant factors in the circumstances of the case which included control and vulnerability, coherency of the law and policy arguments. Therefore, it could be argued that the defences have not really changed. However, what has changed since 2001 are the statutory limits on the amount of compensation.

While it is right to say that the civil liability reforms have impacted on the liability of health professionals, it is not because of the successful use of defences, but rather the use of statutory limits like thresholds and caps which limit the assessment of damages. This has had the impact of reducing the quantum of damages awarded by the courts.

There have been some changes to medical negligence but, generally, courts have interpreted the tort law reforms in compliance with common law where there is any ambiguity. In relation to defences, while on the surface the legislation appears to place limits on the liability of health professionals, in practice it appears to have not made much difference to the outcome of whether there is a negligence action. The greatest impact has been on the quantum of damages. Therefore, the result is that health professionals are held liable for negligence but the damages are reduced because of statutory limits like thresholds and caps.

119 The Ipp Report, above n 2, Recommendation 60.
120 Civil Liability Act 2002 (NSW) s 21; Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 19; Civil Liability Act 2003 (Qld) s 52.
MIXING IT UP:
EXPERIENCES WITH THE COMBINED USE OF TECHNOLOGY
AND OTHER METHODS TO ENHANCE LEARNING

Feona Sayles* AND Ina Te Wiata**

I. Introduction
In colloquial terms, the phrase ‘to mix it up’ means to engage in some form of confrontation or battle. In a real sense, this describes the process of engaging different methods of teaching undertaken while researching this paper — it has been a battle to establish an effective learning environment for business students undertaking a business law course. In 2007, the process included introducing the use of technology to enhance students’ learning experiences. Between 2007 and 2011, the use of these technological tools has increased so that these tools now form a major part of the learning process for both off- and on-campus students.

This paper discusses ongoing research that has been conducted with students in a second-year commercial law course by the academic teaching the course (the teacher). The course is one of several business law courses offered by the School of Accountancy at Massey University. The students in the course are predominantly business students undertaking either a Bachelor of Business Studies or a Bachelor of Accountancy degree. This article considers some of the reasons why particular tools and strategies were chosen; the ways in which the tools and strategies used interact with face-to-face sessions; and the strengths and limitations of each (from the perspective of both students and the teacher). Results related to retention rates and grade point averages (GPAs) are also considered, which suggest that the overall teaching and learning experience has improved. A key reason for this improvement may be because different strategies, including the use of technology in teaching practice, have been incorporated.

The ongoing and reflective nature of the research described in this article means that it will never be entirely finished, so this article is merely a commentary on what the research has shown so far in terms of the effect of the use of technology. The research has essentially been a tool to inform and give insight to the teacher as to the ways to improve her practice. But this commentary may also be a valuable record for other teachers who are making their own investigations into the use of technology in teaching.

II. Teacher Research
The methodology employed in this research is that of educational action research, also known as ‘teacher research’. Teacher research can be described as a context-driven inquiry that places participants as the ‘knowledge holders’ and the ‘knowledge seekers’.¹ The methodology looks to introduce change as a result of a purposeful investigation within the researched environment and also involves a re-evaluation of the ways in which this change has succeeded in resolving issues that were identified by the participants.

Teacher research is subject to some debate and criticism due to differing views as to what constitutes knowledge and research in the realm of teaching and learning. One view is that education research should be the domain of the distanced academic who researches on teaching

* Lecturer, Massey University, Palmerston North, New Zealand.
** Senior Lecturer, University of Newcastle, NSW, Australia.
and adheres to established epistemology and methodology to establish ‘formal knowledge’ about teaching and learning. This view is challenged by the teacher research movement, which holds that knowledge about teaching and learning cannot be fully attained unless it embraces the voice of those who are ‘living the experience’ — that is, the teachers and students. The teacher research view also holds that research about teaching and learning does not observe a rigid adherence to formal methods of data collection.\(^3\) Knowledge can be created through descriptions of spontaneous events and the interpretations of those events by the observer.

The most prominent way in which these two views come into conflict concerns the value and use of teacher research. Formal academic views suggest that many teacher research projects provide only a practical, context-specific form of knowledge that is unsuitable for dissemination to a wider audience because it cannot be generalised. The teacher research view maintains that knowledge generated by teacher research projects may be ‘local’ knowledge, but that publication of ‘how teachers theorize and interpret their work’\(^4\) can be useful to the broader teaching community. This knowledge may enable teachers to recognise situations similar to their own and allow comparison or questioning of the interpretations given against their own interpretations and those of other theories.\(^5\) In Elliot’s view, efforts to resolve these conflicts has led to a situation where:

> educational action research, originally conceived as a practical philosophy, has been distorted by the methodological discourse of the social sciences and sucked into the battle between the qualitative and quantitative paradigms. This has meant that published accounts of action research have tended to be dominated by descriptions of, and justifications for, the method of research as opposed to the representation and discussion of the understandings and insights it has generated.\(^6\)

This does not mean that a published account of action research should be completely devoid of information on how the researcher obtained his or her interpretations. For example, information on the ways in which the researcher attempted to overcome internal validity issues (such as the use of different perspectives) can be useful to the reader to ascertain whether the publication represents an ‘honest voice’. This paper therefore provides a brief account of why this particular methodology was chosen and the methods used in the research. However, the main focus is on the actual experiences and the reflections and interpretations of those experiences.

There were several reasons for this choice of research methodology. One of the main reasons was that this form of applied research has been closely linked to reflective practice,\(^7\) which is the approach to teaching used by the teacher undertaking the research. The teacher adopted this model of teaching after a decision to move from a transmission model of teaching to a student-focused model. After some frustration and reflection (aided by reference to relevant

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4 Cochrane-Smith and Lytle, above n 3, 31.
6 Elliot, above n 1, 37.
literature on teaching), the teacher came to an understanding that teaching is more than just adopting a ‘set model’ and using it regardless of the context in which learning takes place. In her situation, the teaching environment required a mix of transmission and student-focused models. Reflective practice allowed her to ascertain the strengths of the different models and the most effective ways that these models could be incorporated into her particular learning environment on a continuing basis. The use of this teaching model by the teacher meant that a methodology that embraces evaluating, implementing and re-evaluating strategies through robust internal reflection was highly desirable as it allowed her to use methods which were already incorporated into her teaching practice.

The main source of data for this research has been the teacher’s observations. These have been recorded in personal teaching journals and notes since 2004. These entries contain descriptions of the events, and primary assessment of those events in light of information from two other sources — student perceptions and relevant literature. These reflections have formed the basis for implementing changes to the teaching methods used. This process has been continually repeated to assess the impact of any changes and to produce further lines of inquiry. Throughout this article, direct reference will be made to the teacher’s observations, the student feedback, as well as the reflections and changes made. The process of reviewing literature is not expressly stated, but is incorporated through the inclusion of some of the literature consulted in the process of discussing the observations and feedback.

Student perceptions, referred to in this paper as ‘student feedback’ or ‘student comments’, have been obtained through university-administered teaching evaluation surveys for the course, teacher administered surveys, and teacher–student dialogue. The university-administered teaching evaluations are distributed to on- and off-campus students in a hard-copy format. The survey asks a series of closed questions on different areas of teaching for a particular course. The closed questions require students to respond on a scale indicating their satisfaction or dissatisfaction for different areas. The surveys also allow for student comments. These comments are provided to the teacher in raw form without alteration. These surveys have been conducted for the course each year from 2004 to 2010.

The teacher-administered surveys were conducted in 2005 and 2011. The 2005 survey was administered only to the on-campus students. This survey consisted of closed and open questions that asked students to evaluate which topics taught were the ‘hardest’ and the reason why students found them difficult. The first 2011 survey was administered to both the on- and off-campus students and asked both open and closed questions about student experiences with a variety of teaching tools. The second 2011 survey was conducted only with off-campus students. It asked for students’ preferences as to study materials being available in electronic or hard-copy form.

Both the university and teacher-administered surveys were anonymous and students could choose whether they wished to participate. Demographic information was not asked in the university-administered surveys or in the 2005 teacher-administered survey. The response rate for the on-campus university-administered surveys and the 2005 teacher-administered survey was, on average, 52 per cent. The response rate for the off-campus surveys was much lower.

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with an average of 15 per cent (although the second 2011 survey had a response rate of 30 per cent).

The informal teacher–student dialogue took place through one-on-one and group discussions, emails, telephone conversations, and online discussion postings and comments. In some of these situations, comments provided by students were recorded in the teacher’s journal. While it would have been ideal if these journal entries were always made within a short period of time after the encounter, they were often written many hours or days after the event. For email dialogue, however, the teacher has been able to refer to verbatim comments and statements.

The primary type of data that has been used to guide teacher reflection and implement strategies for change has been qualitative data. The main reason for using qualitative data is that it has added to the observation experience of the teacher in a more meaningful way than statistical data. As Crawford and Cornett have commented:9

Teaching and learning are very complex acts, ones that cannot (and should not) always be controlled. Complex actions and interwoven relationships cannot always be well-represented by a number, score, or set of statistics.

Both forms of student feedback (formal surveys and informal dialogue) have provided different avenues for the teacher to consider when making her reflections and evaluations. The feedback provided by students has also aided the process of inquiry by giving comments and information about new areas to explore.

The teacher journals and student feedback have been coded into three main themes, and a number of sub-themes. Some themes have remained constant over the research period, while others have changed from year to year. The three main themes were assessment, content and engagement with the content. It is the third theme that is the subject of this article.

The teacher compared the student feedback to teacher observations to detect similarity and differences between the teacher’s and students’ perceptions of student engagement with the content for a particular year. These comparisons, and the questions raised by them, were discussed with colleagues, and formed a basis of enquiry to find relevant literature that addressed the issues raised.

III. INITIAL DECISION-MAKING PROCESS

An early observation (in 2004–06) made by the teacher that indicated there may be issues with the learning environment occurred when assessing student assignments and exams. It was noted that students generally performed well when explaining legal rules but many students had difficulties when applying these rules to fact scenarios. Student feedback in 2004–06 contained some comments that the course was difficult as there was too much material to memorise. The teacher reflected that the inability to apply information to new situations could in some situations be a result of ‘surface learning’, where students focus on tasks such as memorising and recall for the purposes of specific assessments rather than using other levels of thought, such as reflection and analysis of the topics.10 The problem with surface learning is that ‘remembering’ does not always mean ‘understanding’ the information, hence there can be difficulties in applying the information to new situations. This means that students engaging in surface learning may have success in assessments that are geared towards the ability to recall facts or figures, but struggle in demonstrating how those facts relate to one another.11

This idea was also supported by the fact that the predominant teaching model being used was the transmission model of teaching, where students are generally expected to remember the

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10 Biggs, above n 8, 14.
11 Ibid 15.
information provided and repeat it back on request. This indicated that a change in teaching style could result in a change in student learning approaches to the course. However, it was also recognised that a change to the teaching model may not succeed with all students as there are some who do not wish to go beyond the surface in particular topics. In these situations, no amount of encouragement or alteration of teaching style may shift these students. 

It was decided that a change to the teaching model should incorporate an active learning approach. In this approach, learning is a result of students engaging in activities designed to increase their understanding, while the teacher’s role is to facilitate student exploration of knowledge. The activities may include dialogue with the teacher or other students, or it may be self-testing activities. The students are not viewed as passive participants in the learning process and the teacher is viewed not as the ‘sage on the stage’, but instead as the ‘guide on the side’.

Student feedback from pre-2007 cohorts confirmed the need to move towards a more active means of teaching, since it suggested that many of the students may have experienced difficulties with ‘distance’. This was not just geographical distance but also transactional distance. Transactional distance has been described as ‘a psychological and communications gap, a space of potential misunderstanding between the inputs of instructor and those of the learner’. While this distance is increased when there is physical distance, it can also occur when teacher and students engage in face-to-face learning. The ability to reduce transactional distance can depend on the extent to which students and teachers interact in dynamic dialogue and the degree of flexibility within a program to adjust to student needs.

The teacher considered that incorporating active learning could enhance ‘dynamic dialogue’. However, a further review of relevant literature also suggested that, while this form of learning has a greater potential to increase deep learning, it is not the sole means to this end. The success of some activities can depend wholly on the existing knowledge base of the student as suggested by Brookefield, who commented that the idea of cutting down lecturing as it ‘induces passivity in students and kills critical thinking’ may not always be a good idea —students still need grounding in the subject. A lack of grounding, or base knowledge, can impact on the ability of the students to respond to learning challenges, such as developing their own critical analysis of a topic. If the student does not perceive that they have sufficient foundation knowledge, they will not be keen to explore ‘unknown’ territory. It was decided that giving students ‘grounding’ meant relaying the base knowledge in a variety of ways (written and oral), since students receive and interpret information differently.

The teacher’s reflections led to a twofold strategy to address the aim of enhancing the learning experience and student engagement with the content. The objectives were to:

- increase student success by using a variety of learning tools that cater for differences in learning styles and student abilities; and
- encourage active learning by providing opportunities for interaction among both on- and off-campus students.

Under this approach, the role of the teacher is to ‘accurately present content and help learners accurately reproduce that same content’: Ramsden, above n 8, 40, 109–19.

Biggs, above n 8, 16 acknowledges that there are limits and that ‘even under the best teaching some students will maintain a surface approach’.

Ramsden, above n 8, 113.

As Dinham explains, ‘students can even learn actively during a lecture if we plan the lecture to include advance study outlines, mock quiz questions, pauses, demonstrations, opportunities for synthesis, and “one minute papers”’: Dinham, above n 8, 301.

Braskamp, above n 8, 20.

Michael Moore, ‘Distance Education Theory’ (1991) 5(3) American Journal of Distance Education 1, 1.

Ibid.

Brookfield, above n 8, 4.
To achieve these aims, the teacher investigated a number of different teaching options, including the use of technology. The technological tools and strategies chosen included using MP3 files of recorded lectures, ‘personal response systems’ (PRS), and ‘Connect’, which is an online meeting room.

The 2007 student feedback suggested that some of the technology tools used had helped to enhance the learning process. The use of Connect sessions in which the law was verbally explained and discussed with students in real time (which were also recorded) had assisted off-campus students to feel less isolated and understand concepts. However, the feedback was not all positive — 2007 on-campus students who had used the PRS had commented that they felt it was not beneficial due to disruptions caused by the teacher and students being unfamiliar with the technology.

The teacher experiences and student feedback were evaluated to achieve the stated objectives. As part of this evaluation, the teacher discussed the matter with colleagues and also referred to the University statement on blended learning. This statement included the observation that:

Blended learning is not about doing away with face-to-face teaching or merely combining new digital technologies with conventional forms of learning. Rather, it involves purposeful decisions about learning design and fundamentally rethinking papers and programmes to take advantage of new forms of learner engagement through the removal of time, place and situational barriers.

The teacher reflected on the use of the tools and observed that, with the on-campus students, the new technology could have been viewed as an addition to conventional teaching in many places rather than as an integrated part of the learning process. The lack of an explanation as to how the technology was intended to aid the learning process could have contributed to student dissatisfaction. As a result of the teacher reflections, it was considered that greater familiarity with the technology was needed to succeed. It was difficult for students to trust the use of the technology when the teacher had difficulties making it work. The teacher also needed to overcome student anxiety with the new technology by explaining how the tools fitted into the students’ overall learning experience. However, as discussed in the following part, explanations and familiarity with the tools did not resolve all issues — there continues to be mixed reactions from students as to whether these methods of teaching do fully accommodate the students’ learning preferences.

20 The forms of technology selected after discussion with computer technicians within the School of Accountancy. These technicians were able to provide advice as to several alternatives that could fit the teaching requirement for the course. Reference was also made to case studies from other universities, such as Matt Bower and Debbie Richards, ‘The Impact of Virtual Classroom Laboratories in CSE’ (2005) 37(1) Proceedings of the 36th SIGCSE Technical Symposium on Computer Science Education 292.

21 The technology chosen provided a mix of ways in which the students could interact during the course. It allowed for teacher–learner interaction and also learner–learner interaction — both of which were important to help build a community of learning. On the importance of having a sense of community and interaction for off-campus students, see Stacey Ludwig-Hardman and Joanna C Dunlap, ‘Learner Support Services for Online Students: Scaffolding for Success’ (2003) 4(1) International Review of Research in Open and Distance Learning <http://www.irrodl.org/content/v4.1/dunlap.html>; Maylene Y Damoense, ‘Online Learning: Implications for Effective Learning for Higher Education in South Africa’ (2003) 19(1) Australian Journal of Educational Technology 25.


IV. CONTINUED EXPERIENCES WITH MIXED METHODS OF TEACHING

In this part, four tools employed in teaching the business law course will be discussed. Each of these tools have been used since 2007 to varying degrees. In this time, the teacher has made a number of observations about their effectiveness. The learning tools provided to students are a mix of resources. Some resources provide new information to students, designed to give them a grounding in the various topics in the course. The resources include written materials and verbal explanations through ‘Presenter’, which is a program that allows audio to be added to PowerPoint presentations. Other resources allow students to gain new experiences and to discuss and apply new knowledge in specific contexts through interaction with the teacher and/or other students. These resources include PRS, which enables all students in an on-campus class to provide responses to questions or statements through handheld units; Connect, which is an online meeting room used to discuss problem questions with off-campus students; and activities such as role play, which allow on-campus students to experience situations related to certain areas of law. Some of these resources are technology-based, while others are traditional face-to-face resources.

A. Presenter

Presenter is an Adobe add-on that allows audio files, videos and quizzes to be inserted into a PowerPoint presentation. Students view each PowerPoint slide and hear the associated commentary. The presentation can be viewed either by letting the program move on to each slide automatically or students can select particular slides that they wish to view and listen to. Students can also pause, rewind or fast-forward a slide commentary. The teacher used this tool to provide base knowledge (lectures) on topics in the course.

The use of Presenter was increased following positive feedback from off-campus students in 2007, because it allowed them to listen to verbal explanations of the topics. One such comment by a student was:

I think that I may have struggled with some of the concepts had they not been verbally explained to me. It’s one thing reading it but another being explained in plain speak.

By 2010, all topics in the paper had a Presenter lecture for off-campus students to access. In 2011, as a result of on-campus student feedback24 and teacher reflection on the results of using Presenter with off-campus students, it was decided to use Presenter lectures with on-campus students. The Presenter lectures were not given to on-campus students as an addition to traditional face-to-face lectures — Presenter took the place of those lectures. The reason for this decision was to allow students more time to engage in active learning opportunities, such as discussion and working together to solve problem-based questions. Both the teacher and the students wanted to increase active learning opportunities but, because of time constraints, this increase would have meant reducing lecture content, which would have lessened the opportunities for students to gain grounding in the topics. Using Presenter lectures to provide base content in a traditional lecture style on the different topics could give students the grounding needed to engage in active learning sessions. Since these Presenter lectures were accessed by students outside of class time,25 the existing class time could be used for active learning opportunities without the need for increased face-to-face sessions.

24 Students from 2004–10 had commented that they would like more opportunities to work on problem questions, discussion and quizzes.

25 Students are expected to dedicate 12 hours a week to their study. Before 2011, students had three hours of class (face-to-face) time in which they had traditional lectures with some interactive learning. In 2011, students had two hours of class time, which was dedicated to interactive learning. This gave the students 10 hours per week in which to listen to the lectures and read the weekly readings.
Student feedback from off-campus students between 2007–11 and on-campus students in 2011 on the use of Presenter highlighted some common themes. Students commented that Presenter enhanced their learning by allowing them to listen to the lectures more than once. This appears to have been especially beneficial for students for whom English is a second language. On-campus students enjoyed the flexibility of being able to listen to the lectures when and where they wanted when preparing for face-to-face sessions, as the following comment from the 2011 survey demonstrates:

The recordings were great … You can study at home and then have more time for workshops/ tutorials at school that help you applied [sic] what you have learnt …

A major technical limitation for the Presenter lectures was that they could be made available only online via a web link. These files can be saved as PDF files, but often they are very large which makes uploading and downloading difficult. This meant that students needed internet access to retrieve and listen to the files. It also placed restrictions on where the verbal explanations could be heard. This difficulty is illustrated in following statements made by students:

One problem was that I could not upload them to my mp3 player, which did not allow me to listen to them any time I want, such as listening to them in the car …

I didn’t have internet access at home so it required me to come to uni [sic] to listen to them. When the lectures were 3 hours I did not listen to the whole of the lecture …

A lack of internet access was not the only difficulty. Off-campus students commented in the second 2011 survey that, after spending all day in front of a computer at work, they welcomed opportunities to study away from a computer. These comments were made in relation to whether the students would prefer study materials such as the course ‘study guide’ (which is a type of course textbook written by the teacher) as hard copy or as an electronic book, not in relation to Presenter. However, the comments emphasised that students enjoyed having a variety of methods to assist study, so they are relevant to the limitation problems identified with Presenter. To overcome the problem of Presenter lectures being available only online, it is intended in future to upload the MP3 audio files (which are smaller and so can be more easily uploaded or downloaded) to the course website, along with the PowerPoint files and the Presenter web link. This will enable students to listen to the lectures in a variety of environments.

The aim of Presenter was to provide on-campus students with base knowledge that they could use to engage in active learning situations — it was never intended as a ‘stand-alone’ method of teaching. It was therefore concerning that a number of on-campus students (approximately 40 per cent) did not attend the face-to-face sessions regularly. The access difficulties mentioned by students may have contributed to the rate of non-attendance as the students may have felt they were not prepared. Another contributing factor could be the learning styles of students and their attitudes and concepts of learning. In this situation, it is possible that some students wished to engage in this course as passive learners so did not feel that the face-to-face active learning sessions would enhance their own learning. In the context of online learning, a preference for passive learning has often resulted in students being reluctant to use technology which is interactive, as Akerlind and Trevitt have stated:

For example, in a study of students in a language course, it was found that passive learners were less likely to use the online version of a course which had interactive options; Judith Poole, ‘E-Learning and Learning Styles: Students’ Reactions to Web-Based Language and Style at Blackpool and Fylde College’ (2006) 15(3) Language and Literature 307. Prior learning experience in which technology has been used can also influence student attitudes towards the use of technology: see Matti Haverila and Reza Barkhi, ‘The Influence of Experience, Ability and Interest on E-Learning Effectiveness’ (2009) 1 European Journal of Open, Distance and E-Learning. <http://www.eurodl.org/materials/contrib/2009/Haverila_Barkhi.pdf>.
The reality is that most students’ educational experiences in school rooms and lecture theatres have supported the more passive conceptions. This sets up the unfortunate situation in which students whose main educational experiences have been as a passive recipient of information may suddenly be introduced to computer based courses providing for them unexpected opportunities for active, self-directed learning for which they are largely unprepared.27

In the course, the ‘passive teaching’ was via the Presenter lectures. This meant that, for the students who wanted to engage in passive learning, the computer-based aspect of the subject fulfilled their learning needs rather than face-to-face delivery. Even though students were given the online and face-to-face sessions as part of an integrated package of learning, prior learning experiences and learning styles generated from those experiences may have strongly influenced some students to choose the learning tools that had the most value for them. It could, therefore, be of benefit to ascertain the preferred learning styles of the students and their attitudes towards technology at the start of the course to see whether there may be a conflict with the teaching styles used. If such issues are identified, students would need to be given assistance to move from a passive mode to a more active one.

Another factor related to student learning styles is that on-campus students may have been used to lower levels of self-directed learning. With traditional on-campus learning, students are told when and where they have to attend lectures and workshops — they often have little or no experience of self-managing their learning.28 With the Presenter lectures, students had to make their own decisions about how and when they listened. If students did not manage their time appropriately, they may have found that they had not covered the material in time for the face-to-face sessions. This problem may also have been increased by the fact that the Presenter lectures could be accessed at any time during the course. Some students may have concentrated on other more immediate tasks and left the Presenter lectures until a later date. This issue will be the subject of future exploration. At this stage, it is only a question raised by the teacher and one that other teacher researchers may wish to investigate.

There are two considerations that tend to support the idea that on-campus students may have had difficulty with self-directed learning. The first consideration is the way in which students accessed the Presenter lectures. Student usage of the Presenter lectures showed that, for on-campus students, a small group would regularly access the files during the week; a larger group would ‘cram’ by viewing the lectures just prior to face-to-face sessions; while another (small) group did not access the files until much later. In comparison, a much larger proportion of off-campus students accessed the lectures regularly, rather than ‘cramming’. It is possible that, because off-campus students may have traditionally had to have higher levels of self-management for their learning, this is reflected in a more disciplined approach to the management of their study time. Again, this is an area which requires further research.29

The second consideration to support the theory that lower levels of self-management contributed to the levels of self-directed learning comes from teacher observations made during one face-to-face session in which the students showed a very high level of preparation. These students had been told in advance the specific areas of the Presenter lecture to which they would need to listen in the preparation session. It appeared that, when some students were given

29 There does appear to be several different views as to self-directed learning in distance learners and also other learners, so this is an area where the teacher is researching a number of sources to gain an understanding. For an example of some of the differences in perspectives, see Elizabeth Murphy and Maria A Rodriguez-Manzanares, ‘Learner Centredness in High School Distance Learning: Teachers’ Perspectives and Research Validated Principles’ (2009) 25(5) Australasian Journal of Educational Technology 597; Ludwig-Hardman and Dunlap, above n 21, 1–15.
more precise direction about the portions of the Presenter, lecture to which they should listen for each session, they were better able to prepare — essentially, when the study was lecturer-directed rather than self-directed.

Although it is desirable to move students towards more self-directed learning, in this situation, it could be that ‘the evolution was too abrupt’ and that ‘the sudden influx of freedom coupled with a lack of guidance and support’ led to some students being unable to cope.30 To overcome this, it would be preferable to work on gradually building self-directed learning skills by providing more precise information on how to manage their time initially, but then introducing activities to allow students to obtain skills so that they can manage their own learning program.31

B. Personal Response System (PRS)

This system has been used in some topics taught from 2007–10. In 2011, the use of the system was increased to all topics taught. The intention, when using this system during face-to-face sessions held on campus, was to encourage increased student participation in discussion sessions and to provide a means to check on student understanding of the concepts they had studied. The PRS works via hand-held control pads that link to a receiver. Students input their responses to multiple-choice or true/false questions or statements on the pad and send the answer to the receiver. These answers are collated by the software which displays a graph of the overall responses. The questions are incorporated into a PowerPoint file, so can be used as part of a full presentation or can be set up as a separate session.

The PRS provides a greater opportunity for student interaction compared to traditional face-to-face means of interacting, since the responses are anonymous (when the graph is shown, neither the students nor the lecturer are able to identify who has given each response). This anonymity assists in obtaining the views of less confident students who may not respond in a traditional manner (show of hands) for fear of giving an incorrect response. In the 2011 student feedback, this aspect was particularly noted by students with comments such as:

It is better using the clickers then [sic] putting up your hand as it allows you to commit to an answer without the risk of answering wrong out loud …

Using clickers was an amazing way to answer without any hesitation of being wrong …

As a larger number of students respond to questions posed via the PRS systems (the teacher observed that in each session there was approximately a 95 per cent response rate), this allows the teacher to better gauge the overall understanding of the class in respect of certain topics.

The system can help to engage students in discussions on why they hold a particular view (or gave a particular answer). The overall results displayed allow them to see that they are not alone in holding that view, encouraging them to speak with greater confidence. An important observation about building student confidence for PRS sessions is that students must have time to assess the material that is the subject of the session. In 2011, on-campus students were struggling with PRS sessions and were reluctant to share reasons for their answers — even when they had a correct answer. When the PRS session was moved to later in the week (allowing


31 As stated by Arnold: ‘path to online autonomy is determined by guidance provision as well as the availability of opportunities for freedom’: Lydia Arnold, ‘Understanding and Promoting Autonomy in UK Online Higher Education’ (2006) 3(67) International Journal of Instructional Technology and Distance Learning 33, 40.
more time to study the materials), there were a greater number of correct answers and students were more willing to come forward with discussion about their answers. This reinforces the idea that students need sufficient grounding in a topic to respond successfully to the challenges involved with active learning.

System capability is another consideration before choosing PRS. This can include whether the questions have to be set in advance, or if they can be added in during a face-to-face session. The current PRS must be set up in advance, so it does not allow for opportunities that may arise during sessions to pose additional questions through the control pads. Instead, any additional questions must be posed in a more traditional way. Another concern with the current system is that students are only able to answer from a preset range of options — there is no facility for students to input text. This limits both the range of answers and the degree of dialogue. This limitation may be desirable in a larger class where a high volume of text/open answers may be difficult to correlate quickly. However with the class sizes in the on-campus course managing increased student interaction via the systems is feasible, so there is a need to investigate ways to overcome this limitation.

The manner in which the PRS is likely to be used is another factor to consider when choosing a system. If the teacher wishes to use the PRS to create discussion about the results and why student chose an answer, it is suggested to use a system that allows for polling without the need to assign a ‘correct’ answer to the answer the question posed. This is suggested as a result of observations made by the teacher that, even if a majority of students enter an incorrect answer, they are often still reluctant to discuss their answer if it is labelled as ‘wrong’. By removing the label, students can discuss their answers more freely and the lecturer can guide the students towards a correct answer rather than forcing them to the answer (assuming the questions have a right/wrong aspect).

As a result of these concerns, the teacher has assessed a number of different options and is now looking at an alternative system that allows a greater number of activities to be implemented easily during a session to allow greater flexibility in how the students interact.

C. Connect

Connect is an online meeting room in which students and the teacher can participate in ‘real time’ meetings. The program used is Adobe Acrobat Connect Professional. Connect was used in 2007–09 to have tutorial sessions with off-campus students. From 2010–2011, there have been tutorial sessions on all topic areas and it has been used to provide step-by-step guidance on how to find legal resources. The meeting room contains different ‘pods’ for discussion and for sharing resources, such as a computer screen, videos and PowerPoint. The two main objectives in using this tool were to allow off-campus students opportunities to engage in active learning and to help build a sense of community with their learning. Student feedback indicates that the use of Connect appears to be successful in doing this as illustrated by the comment:

The technology used makes me feel like I am not doing it alone and as I am from (a small New Zealand town) with two small children and wasn’t able to go to the contact course, I found the tutorials priceless …

The Connect program can allow the teacher to use audio and also a webcam to communicate with the students. The students respond either with audio or by using text pods to type in answers, questions and comments. The teacher’s choice has been to have student communication by typing rather than voice as it was felt that, in situations where there were large numbers of

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32 The system is called ‘WordWall’ see: Visual Education, WordWall (2011) <http://wordwall.co.uk/>.
33 There were no students present for this ‘meeting’, but ‘Connect’ was used in preference for ‘Presenter’, since it allows the sharing of a computer screen with students. By using ‘share computer’, the teacher was able to show the step-by-step process on the computer as to how to find different materials.
34 The name of the town has been removed to preserve student anonymity.
students, granting voice-audio rights may lead to some anarchy if discussions were not carefully controlled. Also, if some students do not have the ability to communicate by audio, this could lead to the typing students being ‘silenced’ by students with audio.

Regardless of which method of communication is used, Connect can present challenges to both student and teacher. When students have audio rights, they will usually have to ‘raise their hand’ and wait to speak so there is not the same flow of conversation that occurs in face-to-face teaching. Also, the teacher must be vigilant to ensure that each speaker is given equal opportunity so that the conversation does not end up being ‘controlled’ by a small group of students. Students who communicate by typing can input questions or comments whenever they wish, which does allow more student freedom as to when they want to communicate — but expertise on a keyboard may be a limiting factor for some students.

An important aspect of the use of Connect is the loss of non-verbal communication. Smith observed that:

> whether teachers are talking or not, they are always communicating. Their movements, gestures, tones of voice, dress and other artifacts, and even their ages and physiques are continuously communicating something to the students. In like manner, students are continuously communicating with their teachers.\(^35\)

In a face-to-face session, a student may use a number of physical gestures to show their lack of understanding about information being relayed to them. This provides the teacher with clues that further information, or a different way of explaining the information, is required. With Connect, unless communication involves the use of visual aids such as webcams, most of these non-verbal clues may be missing. This means that teachers must use other strategies to ascertain whether or not their intended message is being understood by students; for example, the teacher may need to ask probing questions such as ‘did this help to clarify that area?’

If teachers are aware of the communication challenges, and are able to adapt their teaching style to the Connect environment, this tool can be a very effective means of promoting active learning for off-campus students.

### D. Role Play

The aim of the role play was to introduce main ideas and concepts that relate to a particular area of law before students were informed of the specific legal rules that relate to that area of law. Role play has been used in on-campus classes from 2009–11. The use of role play was, in part, inspired by Wiggins and McTighe, who have suggested teaching by a process which begins with ‘questions designed to suggest inquires that require key content’ rather than ‘starting with definitions, laws, and an array of facts’.\(^36\) In using this process of ‘discovery’, students are encouraged to think of what influences the creation of laws.

The role play also served the purpose of providing students with a personal experience that they could later use to associate with the specific legal rules. Often on-campus students have had no personal experience of the situations to which certain areas of law relate and, consequently, topics related to these areas have been perceived as more ‘difficult’ than others, such as consumer law, where the students have had some personal experience. The ability to link existing knowledge to new knowledge is an important part of the learning process since students are better able to process new information when it can be related to existing knowledge.\(^37\) The use of role play can therefore enhance students’ abilities to make connections between their experiences and new knowledge of the legal rules that impact on that experience.

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To illustrate how this has been accomplished, one role play that has been used relates to the area of agency law. Students are put into groups of three and are given a situation with which they have some familiarity (such as asking for an extension on an assignment). One student will have a role of ‘agent’; the other students will act as ‘principal’ and a ‘third party’. The scenario will involve the ‘agent’ being placed in a position of having to go beyond their express instruction when discussing an agreement with the ‘third party’. After the ‘agent’ has gone back to their ‘principal’ and told the principal what they have agreed/not agreed, the entire class engages in discussion about their experience as an agent, principal or third party. This discussion has generally raised issues such as how the ‘principal’ felt when the ‘agent’ made an agreement they did not want, how the ‘third party’ would feel if the ‘principal’ did not honour the agreement, and what things the ‘principal’ may have done to make the ‘agent’ or the ‘third party’ think the agreement would be acceptable. This discussion can open the path to students understanding why certain legal rules have been developed when agents are used, and it gives them a practical experience to which they can relate when finding out about these rules.

V. RESULTS FROM THE USE OF MIXED METHODS

In 2007, when the mix of technology with other traditional methods was first implemented, the teacher could make only a one-year comparison between students. Since then, the teacher has been able to build on student results for off-campus students to gain a better picture of the influence that technological and other changes have made on certain areas.

Figure 1: Off-Campus Students

Before Using Mixed Methods

<table>
<thead>
<tr>
<th>Year of study</th>
<th>Number of passes/ Number graded</th>
<th>Per cent of students not completing the course</th>
<th>Grade point average ( ^{38} )</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>88.84 per cent</td>
<td>30 per cent</td>
<td>2.04</td>
</tr>
<tr>
<td>2005</td>
<td>89.47 per cent</td>
<td>38 per cent</td>
<td>2.00</td>
</tr>
<tr>
<td>2006</td>
<td>78.26 per cent</td>
<td>31 per cent</td>
<td>2.02</td>
</tr>
</tbody>
</table>

After Using Mixed Methods

<table>
<thead>
<tr>
<th>Year of study</th>
<th>Number of passes/ Number graded</th>
<th>Per cent of students not completing the course</th>
<th>Grade point average</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>92.50 per cent</td>
<td>22 per cent</td>
<td>3.09</td>
</tr>
<tr>
<td>2008</td>
<td>93.06 per cent</td>
<td>28 per cent</td>
<td>2.72</td>
</tr>
<tr>
<td>2009</td>
<td>91.21 per cent</td>
<td>16 per cent</td>
<td>3.05</td>
</tr>
<tr>
<td>2010</td>
<td>93.55 per cent</td>
<td>24 per cent</td>
<td>3.20</td>
</tr>
</tbody>
</table>

\( ^{38} \) Each letter grade is assigned a grade point value, on a 0 to 9 scale, with fail grades assigned a point value of 0, and A+ grades a point value of 9. The results here have only minor adjustments to the initial grades achieved by the students. These adjustments have been made when a student achieved on the border-line of another grade. Over the years shown, this adjustment has been used, on average, only for less than 0.2 per cent of students each year.
As can be seen in figure 1, in the years prior to introducing tools such as Presenter and Connect, the pass rate was generally in the 80 per cent to 90 per cent range; the number of students not completing was in the 30 per cent to 40 per cent range; and the GPA was around 2. In the four years following the introduction of the technology, all of these measures have been consistently higher. The effect on student retention rates is especially noteworthy, and could indicate some success in reducing the effects of distance, which can lead to feelings of isolation and low retention rates. There are other factors that have occurred since 2007 which may also contribute to these results. These include the use of a ‘free choice’ assignment,39 and also the introduction of students being allowed to bring a one page sheet with writing on both sides into the final exam.40

Figure 2: On-Campus Students

Before Using Mixed Methods

<table>
<thead>
<tr>
<th>Year of study</th>
<th>Number of passes/number graded</th>
<th>Per cent of students not completing the course</th>
<th>Grade point average</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>85.29 per cent</td>
<td>12 per cent</td>
<td>2.74</td>
</tr>
<tr>
<td>2006</td>
<td>80 per cent</td>
<td>8 per cent</td>
<td>2.67</td>
</tr>
<tr>
<td>2006</td>
<td>82.05 per cent</td>
<td>9 per cent</td>
<td>2.95</td>
</tr>
</tbody>
</table>

After Using Mixed Methods

<table>
<thead>
<tr>
<th>Year of study</th>
<th>Number of passes/number graded</th>
<th>Per cent of students not completing the course</th>
<th>Grade point average</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>84.78 per cent</td>
<td>4 per cent</td>
<td>3.3</td>
</tr>
<tr>
<td>2008</td>
<td>93.75 per cent</td>
<td>8 per cent</td>
<td>4.12</td>
</tr>
<tr>
<td>2009</td>
<td>85.71 per cent</td>
<td>2 per cent</td>
<td>3.44</td>
</tr>
</tbody>
</table>

With the on-campus students, the main forms of technology used until 2011 were PRS and access to some recorded Connect tutorials that had been done with off-campus students. The on-campus students also engaged in role play from 2007 onwards and also had the a free choice assignment. In 2011, the students had all base content delivered through Presenter, rather than face-to-face lectures. The results for these students are mixed; however, there does appear to be some improvement in retention rates, pass rates and GPA.

Factors such as the ratio of male to female students has remained constant (in both on- and off-campus courses); however, there was a substantial decrease in international students from 2006 until 2011 in the on-campus course. While there is a danger in using factors such as these

39 The use of such assignments can assist to promote student autonomy, which in turn leads to enhanced student motivation and responsibility for learning: see Arnold, above n 31; Deborah Stipek and John Weisz, ‘Perceived Personal Control and Academic Achievement’ (1981) 51 Review of Educational Research 101.

40 Bruinsma noted that high levels of anxiety can decrease motivation and the ability of students to perform; allowing an extra resource into an exam may help decrease exam anxiety: Marjon Bruinsma, ‘Motivation, Cognitive Processing and Achievement in Higher Education’ (2004) 414 Learning and Instruction 549.
to stereotype learner achievements — since stereotyping by age, gender or race\textsuperscript{41} can lead to assumptions and patterns of teaching that are not suited to the particular group of students\textsuperscript{42} — this may also have played a role in the on-campus figures.

It is of some concern that the pass rate in 2011 is lower than in 2010 and the GPA lower in 2011 than the previous four years, since 2011 represented a much higher use of mixed methods. However, these results may in part be due to student abilities — there have been a series of ‘up and down’ results since 2007. It may also be due to the factors that have been previously discussed in relation to student learning styles and self-directed learning. What is of note is that, in 2011, students who regularly attended the face-to-face sessions on average performed better than students who did not attend. While this could suggest that it is a mix of learning opportunities (passive and active) that fully enhances student success, it must also be acknowledged that these students may have had higher levels of self-management or compatible learning styles which would account for success in this learning environment. It also appears that students for whom English is a second language performed better in 2011 compared previous years. The 2011 feedback from these students suggests that the ability to have the Presenter lectures was beneficial for them, since they were able to listen and re-listen to the content. This may mean that the use of tools such as Presenter to impart base content may produce improved results for such students.

VI. Conclusion

The efforts to ‘mix it up’ were aimed at enhancing learning through the use of a variety of learning tools that would recognise different learning styles, increase active learning opportunities and therefore reduce the gap between learner, other learners and the teacher. In many ways, these goals have been accomplished. Student feedback has generally been positive from off-campus students that the use of mixed methods created a sense of community and enhanced their learning experience. This feedback is, in part, supported by a constant demonstration of improved passing rates, retention and GPAs.

The experience with on-campus students has demonstrated a greater need to ensure that the teaching style that is used is complementary to learner abilities. While there have been some improvements in success rates, further development of the teaching program is needed to increase these. In particular, a greater recognition of prior learning experience and preferred learning styles is needed to allow an understanding of when strategies may be needed to move students towards active learning styles and acquire self-management skills.

The success rate of the 2011 on-campus students has raised some concern over the use of mixed methods for these students. In an initial assessment of these results, it may be easy to

\textsuperscript{41} There is particular danger in unsupported stereotypes or stereotype that can be discredited; for example, Niles found that the stereotype of Asian students being rote learners did not hold up in the study that was conducted in an Australian university — although there were some differences in learning strategies and motivation between cultures: Sushila Niles, ‘Cultural Differences in Learning Motivation and Learning Strategies: A Comparison of Overseas and Australian Students at an Australian University’ (1995) 19(3) International Journal of Intercultural Relationships 369.

\textsuperscript{42} While these studies can be valuable in providing general statistical information as to what type of person is more likely to achieve or not achieve, they give real guidance only when they are combined with other aspects of research that can help to explain why variables such as age or gender did make a difference. For example, Frantz and Wilson found that men were more likely to achieve success in a legal course. This was credited to the fact that such courses tend to be more computational than verbal. In essence, it was claimed that ‘students appear to perceive the material to be more of a numeric puzzle to be solved rather than a literature to be synthesized’. Therefore, these finding may not be applicable in situations where the course is not viewed in this way or where both male and female students share the ability and inclination towards computational styles: see Paul Frantz and Alex Wilson, ‘Student Performance in the Legal Environment Course: Determinants and Comparisons’ (2004) 21(2) Journal of Legal Studies Education 225, 230.
‘blame’ the students for not having self-management skills, or it may be easy to ‘blame’ the teacher for not realising this and introducing a new style of teaching too quickly rather than in gradual stages. However, successful education should not be about blame — it should be about challenges. Challenges are situations in which we may not always have the right means ‘on hand’ to achieve success; instead they are situations that can be conquered eventually through reflection and adapting our thinking and resources to overcome the barriers to success. This comment encompasses the view of what teacher research is about — it is a process of weaving through the complex nature of teaching, where challenges are met through reflection and implementation of change through that reflection. The purpose for publishing this research is to inform teachers about the progress to date and to, perhaps, illuminate issues they may be dealing with. It is hoped that sharing these experiences of how an individual teacher has met challenges can benefit all of those in the legal teaching community.
Online teaching and e-learning has significantly altered the face of tertiary education. New technologies have facilitated this transition, presenting both opportunities and challenges to academics where they find themselves teaching in ‘virtual’ classrooms. This article examines one such online teaching and e-learning environment which has been developed for students studying the unit, ‘Taxation Law’, at an Australian university. Technologies intersect and modify the nature, processes and practices of teaching and learning from the traditional face-to-face classroom, to the classroom that is conducted wholly online. This article also notes some negative effects on academic autonomy and the increased demand for educators in such environments to be flexible and ‘tech-savvy’.

I. INTRODUCTION

Online teaching and e-learning has significantly altered the face of tertiary education. New technologies have facilitated the transition, presenting both opportunities and challenges to academics who now find themselves teaching in ‘virtual’ classrooms. This article examines how the use of technologies intersect and modify the ‘nature, processes and practices of teaching and learning’, from the traditional classroom where lectures are delivered face-to-face, to the classroom that is conducted wholly online. This examination is undertaken by reference to specific pedagogic practices employed in the online teaching and e-learning environment that the lecturer has developed for students studying the unit, ‘Taxation Law’, which forms part of a postgraduate accounting certificate course at an Australian university.

This article provides a detailed analysis of the online teaching and e-learning environment for Taxation Law according to the ‘community of inquiry’ model espoused by Garrison, Anderson and Archer. That model has three elements — cognitive presence, social presence and teaching presence. Garrison and Anderson argue that ‘successful e-learning depends on the ability of the educator to create learning environments that motivate students and facilitate meaningful and worthwhile learning activities and outcomes.’ The lecturer drew upon entrenched pedagogical practices previously applied in the face-to-face teaching environment and developed them to suit online teaching and e-learning. The pedagogical approach taken in the online teaching and e-learning environment for Taxation Law is based upon the constructivist theory of learning, where the lecturer acknowledges that her students have a degree of prior knowledge and expectations —this guides her to explore new knowledge and provide a linkage between the two. In this environment, the lecturer is a facilitator in a student-centred, self-initiated learning...
environment. The technologies that facilitate ‘Computer-Mediated Communications’ (CMC) allow the wholly online teaching and e-learning environment to be flexible and accessible, while addressing students’ prior learning experiences, personal circumstances, lifestyles and preferences. The online teaching and e-learning environment also allows students to engage with each other and with their lecturer ‘irrespective of distance, time, and work or family commitments’.

Nevertheless, it is also acknowledged that the lecturer’s reliance on technologies as teaching tools places additional demands on her professional development, since she must be ‘flexible … [and] tech-savvy’. This development is needed so that she can provide regular and consistent orientation, support materials and effective and regular communications to students in the online teaching and e-learning environment. The lecturer also finds that teaching in such an environment places her academic autonomy at risk of being undermined to a degree. As Hativa and Goodyear state, academics ‘must countenance new teaching methods, modes and technologies and, more importantly, changed teaching roles, conceptions and practice’.

A. Background

This case study focuses on the postgraduate unit, Taxation Law, which forms part of a graduate certificate delivered by the lecturer’s university in conjunction with a major accredited accounting body in Australia. The unit is taught in a wholly online environment via the university’s online learning management system, ‘Deakin Studies Online’ (DSO). The majority of the unit’s students are already employed and work full-time for accounting firms located in various parts of Australia and even overseas.

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7 Saltmarsh and Sutherland-Smith, above n 2, 18.
9 Saltmarsh and Sutherland-Smith, above n 2, 18.
10 N Hativa and P Goodyear (eds), Lecturer Thinking, Beliefs and Knowledge in Higher Education (Kluwer Academic, 2002) 2.
11 An examination of the cohort of students for 2011 for Taxation Law, demonstrates that 70 per cent are located in Victoria and New South Wales, 29 per cent from ACT, Western Australia, Queensland, Tasmania and 1 per cent from overseas. The marketing material for the certificate of which the unit Taxation Law forms a part of, notes the following: The Graduate Certificate of Chartered Accounting Foundations (GCCAF) has been developed to meet the requirements of the Institute of Chartered Accountants in Australia. It is designed for individuals who hold a non-accounting bachelor’s degree and wish to pursue a career in chartered accounting … Upon successful completion of this course, non-accounting graduates will have acquired basic grounding in six core knowledge areas which will allow them to enter The Institute of Chartered Accountants GradDipCA (the Chartered Accountants Program). To be eligible to enrol in the GradDipCA, applicants need to be employed by an Institute-approved employer in Australia, Singapore or Malaysia; be working in a relevant accounting role; and have a Chartered Accountant mentor.

II. CRITICAL ANALYSIS AND DISCUSSION OF PEDAGOGICAL APPROACHES IN THE ONLINE TEACHING AND E-LEARNING ENVIRONMENT FOR ‘TAXATION LAW’

A. The ‘Community of Inquiry’

This part critically evaluates the teaching approach taken in the online teaching and e-learning environment developed for Taxation Law, and how effective this has been in encouraging student engagement in their own learning. An examination of how the ‘conditions of the education transaction’ have changed between the face-to-face teaching and learning environment and that which takes place online is undertaken. That examination is made by referring to the ‘community of inquiry’ model, which can be used to ‘explain how to best study and ultimately facilitate higher order learning in computer mediated … environments’. Arguably, students of Taxation Law find themselves in an environment which is conducive to encouraging critical and creative inputs and reflections in their learning; that is, in a ‘community of inquiry’. Such an inquiry is very relevant for e-learning, especially in the higher education sector, where students can, with the support of computer technologies, engage with each other; reflect on discussion threads in online discussion areas; participate in ‘live’ tutorial exercises and revision sessions; access self-assessment progressive and reflective learning exercises; and have unlimited access to written teaching materials and relevant data available on the internet. All the while, students enhance their own learning through the online interfaces made available to them.

There are three key elements present in a ‘community of inquiry’: cognitive presence, social presence and teaching presence. Diagram 1 illustrates the relationship between all three elements.

Diagram 1

- Garrison and Anderson, above n 1, 27.
- Ibid 23.
- M Lipman, *Thinking in Education* (Cambridge University Press, 1991) 15. Lipman comments that a community of inquiry is where:
  
  Students listen to one another with respect, build on one another’s ideas, challenge one another to supply reasons for otherwise unsupported opinions, assist each other in drawing inferences from what has been said, and seek to identify one another’s assumptions. A community of inquiry attempts to follow the inquiry where it leads rather than being penned in by the boundary lines of existing disciplines.
- Garrison and Anderson, above n 1, 27. ‘Such a community of inquiry is a requisite for higher-order learning and the core element in the e-learning conceptual framework’.
- Garrison and Anderson, above n 1, 24.
- Reproduced from Garrison and Anderson, above n 1, 28.
While all three elements of a community of inquiry are important in measuring students’ overall ‘educational experience’, this article places a major focus on the element of teaching presence, because its ‘central focus is to increase social presence and student learning’.19 This focus reflects the overall goals and desired outcomes for the unit Taxation Law.

1. Cognitive Presence

The first element, cognitive presence, addresses intent and actual learning outcomes; that is, the extent to which learners can ‘construct and confirm meaning through sustained reflection and discourse’.20 In this respect, the lecturer for Taxation Law uses software such as the eLive program21 to facilitate interaction with students in ‘live’ time over the internet. This occurs on a weekly basis in evening tutorial online classes, as well as in workshop revision sessions at the end of each teaching period. Discussion boards provided via DSO are also used for daily interactions in which the lecturer and her students can discuss relevant topics and reflect on topics already covered (using message threads). In addition, students are given reflective tasks so they can self-monitor their progress towards achieving their learning outcomes. For example, non-assessable self-assessment tasks (in multiple-choice question and answer form), available after the completion of each teaching module, allow students of Taxation Law to gauge their learning and understanding of the materials progressively and reflectively throughout the teaching period.

2. Social Presence

Social presence is also a key element of the ‘community of inquiry’ model. It is defined as ‘the ability of participants to project themselves socially and emotionally as “real” people, through the medium of the communication being used.’22 Here ‘co-presence’ is relevant, where students ‘sense that they are close enough to be perceived in whatever they are doing, including their experiencing of others, and close enough to be perceived in this sensing of being perceived.’23 Co-presence is a form of human interaction where students are ‘accessible, available and subject to one another’.24 Co-presence reflects each ‘individual’s subjective experience of being together with other people. Such experiences are directly influenced by interface characteristics.25 With regard to the ‘educational transaction’, co-presence is apparent in both face-to-face and online teaching and e-learning environments. As Zhao notes, ‘the face-to-face situation undoubtedly generates the most vivid sense of copresence.’26 However, it is arguable that, in the online teaching and e-learning environment, ‘high levels of embodiment or “media richness” tend to enhance the feeling of “social presence”, which culminates in a fully immersive environment’.27 Swan adds that technology-based teaching and e-learning, or CMC, can be just as personal, if not more so, than non technology-mediated communications.28

20 Garrison and Anderson, above n 1, 28.
21 Elluminate Live! (eLive) is a synchronous communications tool used over the internet that can facilitate communication and collaboration between staff and students. The eLive program allows an online educator to: talk online in real time, chat via text online as well as being able to share videos, presentations and applications. See Deakin University, Institute of Teaching and Learning, eLive <http://www.deakin.edu.au/itl/assets/resources/dso/guides/qg-elive-new-features.pdf>.
22 Garrison and Anderson above n 1, 28–9.
24 Ibid.
26 Ibid.
27 Ibid.
28 Swan, above n 6.
LEGAL EDUCATION IN THE ONLINE TEACHING AND E-LEARNING ENVIRONMENT

(a) Traditional Approach

Interestingly, an examination of the online teaching and e-learning environment for Taxation Law illustrates that the teaching approach draws, somewhat, on the traditional face-to-face learning and teaching classroom of the past. While it may be true that the lecturer for Taxation Law is no longer confined to the corridors of her university or the lecture theatre, she has nonetheless relied on the model of co-presence in the teaching and learning strategies employed. As Oliver points out, a traditional learning approach in the online environment:

Typically takes the form of a narrative where learners are led through a learning sequence by a well-choreographed story which seeks to impart knowledge in much the same way as lecturers impart knowledge in lectures and classrooms.29

Saltmarsh and Sutherland-Smith comment that the concern about damage to pedagogical relationships underpins this approach. In particular, when examining the online teaching and e-learning environment for Taxation Law, it is apparent that there has been a dependence upon entrenched face-to-face pedagogic practices developed by the lecturer over many years as an educator. The reliance on a co-presence approach by the lecturer for Taxation Law is not unlike the approach of other educators teaching in similar online teaching and e-learning environments. Saltmarsh and Sutherland-Smith comment that ‘the online learning environment should ideally stimulate existing classroom practices and replicate pedagogic relationships according to the face-to-face models of teaching and learning’.30 The lecturer for Taxation Law maintains an approach of ‘creation and maintenance of normative classroom environments and activities’.31 It is argued that, in this way, teaching remains intelligible to both the lecturer and the students and also ‘encourage[s] … pedagogic engagement’.32

(b) Computer-Mediated Communications

The lecturer for Taxation Law has further developed her teaching approach in the online teaching and e-learning environment to incorporate CMC. In the design and planning of the unit, Taxation Law, the lecturer has noted that many students are Generation Y.33 Agreeing with Williams, the lecturer views this group as those who ‘have grown up in an environment awash with technology, [and] where the everyday use of technology in the business and social environment’34 is commonplace. Arguably, this can also transcend into the educational sector. Taking into account the familiarity and reliance that this group places on technology in their

30 Saltmarsh and Sutherland-Smith above n 2, 21.
31 Ibid.
32 Ibid.
33 An examination of the ages of the student cohort for Taxation Law in 2011 indicates that 72 per cent of students were born between the years 1982 and 1990. See also Mark McCrindle, Understanding Generation Y (2001) Australian Leadership Foundation <http://www.learningtolearn.sa.edu.au/Colleagues/files/links/UnderstandingGenY.pdf>, in which he notes that Generation Y people encompass those born in the years 1982–2000. He also notes that:
‘the current economic, social, and political conditions which we all live under actually further divide the generations. The same conditions act upon people of different ages in different ways. Take text messaging on mobile phones as an example: the technology is available to all, however, 74% of messages are sent by Generation Ys.’
day-to-day communications and interactions, the lecturer has adopted various technological teaching tools in the online teaching and e-learning environment. McCrindle states:

Whether we are involved in educating youth, or in a leadership role, a quality outcome is dependent on our understanding of them. Once we have a foundational grasp of their characteristics, communication styles, and social attitudes, we will be well equipped to effectively impact this enormous and emerging generation.\footnote{McCrindle, above n 33, 6.}

It is here that technology-based teaching and learning, or CMC, allows for the integration of various communications and accessibility to teaching materials in the online teaching and e-learning environment. In the early 1990s, CMC was generally text-based. It has been argued that a reliance on text-based communications has positively:

Alter[ed] the ‘flow and structure’ of higher-order teaching and learning, as compared to the more familiar environment of speech-based communication … [where it] would have an advantage to support collaborative, constructivist approaches to learning.\footnote{Garrison and Anderson, above n 1, 26.}

While students and teachers in an online teaching and e-learning environment cannot be present in a physical sense, it can be argued that such an environment does nevertheless facilitate and even enhance interactions between them. For example, when posting messages in online discussion areas, students are able to carefully and deliberately choose what subject matter they wish to present. It is argued that this type of communication can actually allow students to be more inclined to engage with other students and their lecturer. It has been suggested that this is because “writing intensifies the sense of self and fosters more conscious interaction between persons”.\footnote{W J Ong, \textit{Orality and Literacy: The Technologizing of the Word} (Methuen, 1982) 179.}

In more recent times, this view has been enhanced further by using other technologies as teaching tools in the online teaching and e-learning environment which not only emulate face-to-face interactions to a significant degree, but also further enhance communications. In particular, in Taxation Law, students take part in weekly interactive ‘live’ tutorial and revision discussions over the internet using the \textit{eLive} software, which emulates the speech-based communications of the face-to-face lecture. By using written threaded messages through DSO and also the ‘live’ online classes, the lecturer and her students are engaging socially and emotionally as ‘real’ people in the online environment.

3. 

\textit{Teaching Presence}

Teaching presence is the third element of the ‘community of inquiry’ model and is described as ‘the design, facilitation, and direction of cognitive and social processes for the purpose of realising meaningful and educationally worthwhile learning outcomes.’\footnote{Garrison and Anderson, above n 1, 29.} As an educator in the online environment, the lecturer for Taxation Law recognises that ‘teaching online involves a different skills set’.\footnote{R N Pallof and K Pratt, \textit{Building Learning Communities in Cyberspace} (Jossey-Bass, 1999).} She understands that to be an effective online teacher she must ‘take on the role as a facilitator of learning rather than an instructor who conveys information through directed instruction.’\footnote{Lowenthal and Parscal, above n 19, 3.} This requires a balancing act to ensure that the lecturer is sufficiently present as a ‘guide on the side’.\footnote{Ibid.}

Teaching presence for Taxation Law initially presents itself in the design of the unit itself. It is here that the lecturer constructs the learning activities for her students, so that they can actively engage and interact with each other and with her. During the next 11 weeks of the unit, the lecturer acts as a facilitator in the discussions being conducted in the online teaching and
e-learning space for the unit, ‘provide[ng] direct instruction when required’. She recognises, as noted by Lowenthal and Parscal, that ‘[t]he central focus of teaching presence is to increase social presence and student learning’.43

(a) Instructional Design

When the lecturer first began teaching the Taxation Law unit wholly online in 2007, she intuitively understood from her own learning experiences (both formal and informal)44 that, despite her compelling inclination to rely predominately on entrenched face-to-face teaching and learning approaches of the past, teaching in an online environment was not the same as face-to-face teaching. Significant inefficiencies can emerge when trying to implement traditional teaching and learning approaches for the online environment. For example, simply presenting lectures and PowerPoint presentations (in written form), fails to take into account the sense of isolation that students can and do feel when studying online. She also recognised that such an approach failed to recognise that ‘learning is cognitive and in a constant state of growth and evolution, where learners are active constructors of knowledge, and bring with them their own needs and experiences to the learning situation.’45 Indeed, this is apparent of those students studying Taxation Law, all postgraduate students, with different career backgrounds and diverse levels of prior learning. Coaldrake and Stedman have also seen a shift in their teaching approaches away from simply transmitters of information to facilitators of student learning:

Many academics will have to confront the reality that the task of the academic lecturer, traditionally encapsulated in the designation of lecturer, is shifting from the transmission of information towards the management and facilitation of student learning.46

In the instructional design of the teaching environment for Taxation Law, the lecturer has adopted a constructivist approach to students’ learning. Constructivist principles posit that ‘social interactions are seen to play a critical role in the process of learning and cognition [where learning is viewed as the] construction of meaning rather than the memorisation of facts.’47 This approach asserts that students learn material best when it is just beyond their range of existing experience, by using interaction with their lecturer, thereby making discourse and co-operative learning essential.48 Learning activities in technology-based environments, therefore, play a fundamental role in determining learning outcomes. As a result, the lecturer for Taxation Law has explicitly and implicitly designed a social environment using the university-provided online learning management system, DSO, where learning activities facilitate interactions between students and the lecturer. Here, the lecturer for Taxation Law has developed and delivered,

43 Lowenthal and Parscal, above n 19, 5.
44 See Organisation for Economic Co-operation and Development (OECD), Recognition of Non-Formal and Informal Learning (2010) <http://www.oecd.org/document/25/0,3343, en_2649_39263238_37136921_1_1_1_1,00.html>; Lifelong learning, both formal and informal, has been an issue addressed by the education division of OECD which notes:

Policy-makers in many OECD countries, and beyond, are … trying to develop strategies to use all the skills, knowledge and competences — wherever they come from — individuals may have at a time when countries are striving to reap the benefits of economic growth, global competitiveness and population development.

among other things, the following: overviews of the course materials; audio-video lectures on each topic within the unit; instructional guides on problem solving; open ended tutorial questions which lead to critical thinking discussion questions; progressive self-assessment multiple-choice tests; and revision sessions conducted online in ‘live’ time.

(b) Teaching

Teaching in Taxation Law involves the following activities: posting introductions together with a ‘welcome note’ at the beginning of the teaching period which outline student expectations and staff availability during the teaching period; contributing to discussions on the Blackboard discussion board on a daily basis and posting summaries of these discussions at the end of each week; initiating discussion threads by making daily announcements that she is available online at specified times; sharing personal experiences with regard to the course materials; addressing students by name in discussion postings; and interacting with students in ‘live’ time during weekly online tutorial classes and revision sessions using the eLive software.

During the teaching period, the lecturer adjusts existing teaching strategies and adopts and delivers new ones. Not all students will engage in learning, despite the lecturer’s endeavours to create a welcoming, informative and interactive online teaching and e-learning environment. To encourage student engagement, Oliver suggests a number of guidelines to help promote and improve the design of online environments ‘that go beyond the traditional systems design approaches and into quite creative realms’.

These include:

1. choose meaningful contexts for the learning;
2. choose the learning activities ahead of the content;
3. choose open-ended, ill-structured tasks;
4. make resources plentiful;
5. provide supports for the learning, and
6. use authentic assessment activities.

The lecturer for Taxation Law considers that she addresses Oliver’s first guideline, ‘choose meaningful contexts for the learning’, adequately. Currently, students have access to a teaching and e-learning environment provided via the university’s online learning management system, DSO, which provides a number of structural supports for their learning. These include the ‘welcome note’ (discussed above); a discussion board for threaded messages; a unit guide, which sets out the unit’s objectives and related graduate attributes; a topic guide; weekly Camtasia audio-video PowerPoint presentations; eLive weekly tutorial and workshop revision sessions; self-assessment progressive multiple-choice tests; links to websites, including of Austlii (legislation and cases) and the Australian Tax Office; and a number of other support materials, including flow-charts and guides created by the lecturer on each topic.

The lecturer for Taxation Law also considers that she addresses Oliver’s second guideline to a degree. This guideline suggests that the lecturer choose ‘the learning activity ahead of the content’. In 2010, for the first time, self-assessment non-assessable multiple choice tests were introduced in Taxation Law. These progressive tests are selectively released after each topic area of the unit is covered in the audio lectures and PowerPoints.

49 Oliver, above n 29, 21.
50 Ibid 21-25.
51 Ibid 20.
52 See TechSmith, Camtasia Studio (2011) <http://www.techsmith.com/camtasia/>. Camtasia is a screen-video capture technology tool, which can allow for an audio-visual presentation to be delivered over the internet.
55 Oliver, above n 29, 23.
Oliver’s third guideline suggests that the lecturer choose ‘open-ended and ill-structured tasks’.56 This too has been addressed by the lecturer in her teaching approach for Taxation Law. The eLive weekly tutorials (discussed above) are interactive tutorials in which the lecturer guides students through the exercises, and makes it clear that she is more interested in the process of students coming to an answer than the answer itself. To this end, before the tutorial classes, the lecturer provides students with guides on how to answer tutorial problems step-by-step. Students are encouraged to use these guides to help them through various tutorial exercises. A number of tutorial exercises replicate ‘real-life’ taxation problem scenarios in order to make them ‘authentic’ and to add interest. This approach also addresses Oliver’s sixth guideline — that is, to ‘use authentic assessment activities’.57 The tutorials are designed to equip students with analytical and creative skills which they can use to resolve other tax problems they may be faced with in the future. Indeed, such skills arguably improve ‘the students’ learning experiences so that they become committed to their own learning … [In this way they] … become more inclined to actively participate in lifelong learning opportunities after graduation.’58

In considering Oliver’s fourth guideline, ‘make resources plentiful’,59 the lecturer for Taxation Law finds some deficiencies apparent in her teaching approach to date. To further develop the online teaching and e-learning environment for Taxation Law, improvements are required in order to make the resources provided to students not only plentiful but also easily accessible. Currently, the DSO site for the Taxation Law unit can become overloaded with information, which is problematic for those students coming to the unit later in the trimester. To address this, the lecturer recognises the need to make the DSO site for Taxation Law more inviting and easier to navigate. In 2011, the lecturer aims to develop the DSO site further by creating weekly folders and sub-folders where relevant materials are to be posted.

The lecturer finds that she addresses Oliver’s fifth guideline, ‘provision of support for the learning’.60 As discussed above, weekly eLive tutorials are conducted. These tutorials are timetabled at the same time each week (7pm, Tuesday night, AEST, to accommodate the majority of students who work full-time). In this way, students are supported in their learning by interacting with their lecturer and other students ‘live’ at times which accommodate their lifestyles and work commitments. Nevertheless, the lecturer for Taxation Law also acknowledges that, to enable students to further ‘explore and inquire and to derive their own meaning’,61 further improvement in the teaching environment can be made by providing links to articles and other resources on the unit’s DSO site.

(c) Student Learning

Students in the online teaching and e-learning environment for Taxation Law can engage in their own learning by: contributing to discussion threads on a daily basis; asking open-ended questions that lead to critical discussion during the ‘live’ weekly tutorial classes and revision sessions; asking for direction in analysing outcomes of self-assessment task; and, overall, having conversations within the learning activities. In this way, students can generate ideas or problem solutions with freedom, while reflecting and drawing on their different knowledge bases and prior experiences. The eLive software provides a tool to effectively enable such interactions. For example, in the eLive tutorials, students are able to bring to the ‘live’ online classes not only the new knowledge they have acquired in their learning and understanding of the unit’s materials, but also the knowledge which they already possess in relation to business dealings and general

56 Oliver, above n 29, 23.
57 Ibid.
59 Oliver, above n 29, 23.
60 Chalmers, above n 59.
61 Oliver, above n 29, 23.
knowledge. For example, when considering the application of anti-tax avoidance legislation, students were asked to draw upon the news media, recent case law and the legislation itself. The lecturer was able to facilitate development, understanding and meaning within the tutorial as a learning task. In this way, students in the tutorial sessions are able to reflect upon their own learning, the course materials and interact in real time with their lecturer while sharing opinions with other students. These eLive sessions are a facilitative way to bridge the online distance gap between all players in this teaching and learning environment.

III. THE ONLINE TEACHING AND E-LEARNING ENVIRONMENT: DEMANDS AND OPPORTUNITIES FOR EDUCATORS

A. Academic Autonomy

Academic autonomy serves the public interest in a number of ways. As Newston and Polster note:

[The public rely on] academic commentary in news reports, … on independent public policy analysis and scrutiny of political and powerful corporate actors. [In addition,] academic knowledge is increasingly being directed towards developing marketable products … therefore it is vital that the public has access to adequate and un-compromised assessments … the public needs to understand how infringements on autonomous academic judgement concretely endanger their own interests.63

It is important, therefore, to maintain a sense of academic autonomy in order to best serve the public interest. When examining academic teaching in an online environment, there are a number of ways that academic autonomy may be compromised. Factors such as: exceptional demands on educators’ availability in online environments; negative impacts on engagement in free-flowing academic conversations; and even limitations placed on educators’ abilities to influence the curricula and subject matter of units taught, especially from external sources, can have an effect on academic autonomy, among other things. Indeed, the exceptional demands made of the lecturer’s time by students in Taxation Law are an matter of concern. When comparing the online teaching and e-learning environments with the traditional face-to-face teaching and learning classrooms, McShane comments that ‘Information Communication Technologies’ (ICT) remove physical barriers, where ‘teaching students is no longer simply restricted to the classrooms, offices and corridors of the university’.64 McShane also notes that increased time demands are placed upon educators teaching in online environments.65 For example, in the face-to-face teaching and learning environments, lecturers are generally available for student enquiries during lecture times, by appointment, or during student consultation times. These time barriers for interaction with lecturers are not so apparent in the online teaching and e-learning environment. Indeed, constant demands can be placed upon lecturers in the online environment to be available day and night. Indeed, in Taxation Law, the lecturer has experienced demands made by students for her to be available online at all hours where ‘it effectively places … [her] permanently “on call”’.66 As Hoffman states, these demands ‘necessitate different time management routines to facilitate up-front planning, and ongoing teaching and communication with students’.67

62 Income Tax Assessment Act 1936 (Cth) pt IVA.
65 Ibid.
66 Newson and Polster, above n 64, 64.
In response to these issues, it has been necessary to set availability boundaries for students, using the ‘welcome note’, which is posted onto the unit’s DSO site at the beginning of each teaching period. It is noted, however, that some difficulties remain, since the lecturer for Taxation Law continually finds herself drawn to respond to queries outside of ordinary teaching hours. She is not alone here: McShane notes that other academics teaching in the online environment struggle to keep to their own set boundaries for interaction with students — some even find themselves ‘interacting with students online on weeknights, over weekends and while overseas’.  

On reflection, the lecturer for Taxation Law recognises some of the rationales which underpin her behaviour. There are unavoidable managerial drivers underpinning ‘good teaching’ practices within the lecturer’s own university, where a lecturer’s performance is measured, among other things, by student evaluations which are used as performance indicators at the end of each teaching period. The lecturer for Taxation Law has come to accept the use of such indicators ‘as a legitimate means of “proving” … [her] worth’ as an effective educator, despite noting that such indicators ‘introduce external and limited criteria into the evaluation of [her] academic work’. The lecturer for Taxation Law is therefore conscious of the need to maintain and improve her teaching performance as measured by these student evaluations. This has a significant impact on the lecturer’s ability to maintain the boundaries which she sets for students. It also has an effect on how she addresses certain teaching approaches. For example, performance criteria five, ‘[t]he teaching staff gave me helpful feedback’, has affected the way in which the lecturer for Taxation Law interacts with her students. She finds herself drawn to her role as an information provider, rather than being a facilitator in her students’ learning. The lecturer recognises that a fine balancing act needs to be undertaken so that she does not enter into the realms of over-servicing her students, and thus affecting their ability to contribute to their own learning.  

In addition, the lecturer for Taxation Law considers that teaching in an online environment has had an impact on her ability to fully engage in free-flowing discussions with her students. This also affects her academic autonomy. No longer is there the comfort of a lectern to stand behind, as in the face-to-face classroom, nor the enjoyment of ‘spontaneity and freedom afforded … in face-to-face lectures’. McShane notes that, as an online educator, there is also a relative lack of the privacy which is afforded to those who teach solely in a face-to-face environment. With respect to Taxation Law, the lecturer is well aware that students will and do scrutinise the online materials and written comments which are posted on the unit’s discussion boards on DSO, and she also understands that her online teaching and e-learning environment for Taxation Law can be scrutinised by others such as administrators and managers. In turn, she finds herself engaged in a careful and deliberate approach in her responses to student enquiries, both in written form and in the ‘live’ oral conversations (which are recorded and made available on DSO), conducted in tutorial discussions and the workshop revision sessions using the eLive software program.  

The lecturer agrees with Bashir that there is the sensation of some loss of control over what and how to teach in the online environment, where the loss of privacy can limit spontaneity and free discussion to some degree. Bashir also notes that this loss of control can produce feelings of ‘lessened respect, prestige and authority and a changed professional self-concept on the part of 

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68 McShane, above n 65, 2.  
69 Newson and Polster, above 64, 70.  
70 Ibid.  

72 McShane, above n 65.  
73 Ibid.  
The lecturer for Taxation Law self-analyses how teaching in an online environment impacts on her as an academic teaching law. No longer does she relish in the free-flowing discussions which occurred spontaneously in her face-to-face lectures of the past, for fear that her online written discussions and available audio recordings may be held up for future scrutiny.

The lecturer’s academic autonomy is also affected by the relationship between her university and the accredited accounting body for which the graduate certificate is offered (Taxation Law is one of the eight compulsory units of the graduate certificate). This accounting body generates funding for the lecturer’s university and, as a consequence, the content of her unit is significantly influenced by this body. For example, there are constraints on what can be provided to students; in particular, in developing the curricula, the timing of delivery of teaching and also the format of assessment for the unit. The lecturer’s decision-making power is limited, because ‘this new form of university–industry partnership … [is] managed by central administration offices [thus] by-passing collegial structures’.

Such influences are unavoidable and, indeed, have an impact on the lecturer’s academic autonomy.

### B. The Effect on Collegial Interactions and Communications

Interaction with colleagues may decrease when teaching in the online environment. Not only can students learning in an online environment feel isolated, but so too can the educators who teach them. To maintain a sense of autonomy and self-worth as an academic, there is a need to analyse the intelligibility of the teaching self which is ‘situated within the discursive and social norms and maintained by/in dialogue with others who teach’. It is here that the lecturer for Taxation Law recognises that further self-analysis needs to be undertaken, and further discourse, with others teaching in online environments. Notably, the lecturer’s university does support collaboration and interaction with her peers, through the university-wide Institute of Teaching and Learning; for example, through what is known as ‘contemporary online teaching cases’. Through this Institute, the lecturer for Taxation Law can interact with other academics also teaching in the online environment, and is able to share experiences, ideas and feelings with them.

### C. The Requirement to be ‘Tech-Savvy’

Technologies as teaching tools require educators using them to be ‘tech-savvy’. What are the enabling factors that have an impact on the development of ‘tech-savvy’ teachers who are able to effectively and efficiently address student learning in the online environment? In answer to this question, it is argued that teaching institutions such as universities must:

In order to meet national technology standards and accreditation expectations … provide [to educators teaching in the online environment] access to equipment, resources, and experienced personnel on campus and in the field. The experienced personnel include higher education faculty, co-operating teachers, training personnel, and support technicians on campus and in [online] classrooms.

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75 Ibid 43.
76 Newson and Polster, above n 64, 59.
77 Saltmarsh and Sutherland-Smith, above n 2, 19.
78 Deakin University, Institute of Teaching and Learning, Contemporary Online Teaching Cases <http://www.deakin.edu.au/itl/teach-learn/cases/files/approaches/independant.htm>.
It is also important that the educational institution ‘shapes the professional development of [educators] … in ways that encourage appropriate and ethical integration of technology into teaching and learning.’

1. The Lecturer and the University’s Commitment to Flexible Learning

During the planning and design stage of her unit, Taxation Law, the lecturer becomes very conscious of her own abilities to deal with the technologies available to her, and how she can use them effectively and efficiently to ensure that students engage with her as the lecturer and with other students. As Saltmarsh and Sutherland-Smith note, there are many subjective demands placed upon educators in the e-learning environment, where ‘lecturers are simultaneously positioned as learners of new technologies, as demonstrators of idealised (online and face-to-face) classroom practice, and as managers of new forms of pedagogic relationships’. The teaching approach for the unit Taxation Law draws upon the lecturer’s own experiences with technology, including informal and formal learning. The lecturer also agrees with Kenway’s observations that she is indeed driven by the ‘allure of technology’s economic promise and by the fear of being squeezed out of an increasingly competitive global market place’. It is this disposition, as well as managerial drivers within the lecturer’s own university and the higher education sector, which also affect the lecturer’s commitment to being a ‘flexible … [and] tech-savvy academic’, so that she can provide an effective teaching and learning environment for her students and also continue to be successful in her academic career.

In line with Duvall’s observations, the lecturer for Taxation Law has embraced the opportunity for empowerment in her career as an academic. She has recognised that her own goal — to be an effective and committed teacher — actually enhances her own objectives for career advancement and also those of the university; that is, to be viewed as a quality teaching institution. Consistent with her university’s desire to be a leader in flexible education, the lecturer for Taxation Law has been able to effectively engage with students in a flexible teaching environment using the university’s online learning management system, DSO. This has been possible because of her university’s commitment to helping her and all educators within her institution to understand the relationships between the components of teaching and learning. This support comes from the university’s Institute of Teaching and Learning. This institution-wide commitment to teaching and learning ensures that educators are well-equipped with the tools required to teach in both the face-to-face and the online environments.

All educators at the lecturer’s university are encouraged to use the university-provided online learning management system, DSO, to facilitate their teaching and to communicate with their students in the online environment. In doing so, they have available to them the web portal discussion areas, a facility to integrate self-learning activities such as multiple choice questions, direct links to resources including direct library access as well as areas where they can post

80 bids.
81 Saltmarsh and Sutherland-Smith, above n 2, 21.
82 OECD, above n 44.
83 J Kenway et al, Haunting the Knowledge Economy (Routledge, 2006) 38.
85 Saltmarsh and Sutherland-Smith, above n 2, 21.
87 Deakin University, Annual Report 2010, above n 85.
PowerPoint presentations, audio-visual lectures and other support materials such as flow-charts, help guides and lecture summaries. Students can directly access these materials in either the IT labs provided on campus, by remote computers, wirelessly on campus, or from other areas over the internet.

In order to further develop their teaching approaches in the online environment, the university’s Institute of Teaching and Learning provides to all educators in the university an online teaching and learning facility. This facility provides educators with support and learning activities, where they can access:

- Modules [they] can complete online, at [their] … own pace. The modules use realistic scenarios within Blackboard and guide [them] … through the steps for each task … Modules include *Introduction to DSO* and *Group work.*

In addition, workshops are conducted periodically for educators who want to enhance their understanding of the technologies available to them which, in turn, can enhance their teaching in the online environment. Information technology workshops in *eLive* technologies and media wiki, are two such examples.

In addition to the above integrated technologies support resources, the university also provides exemplars of excellent teaching strategies and good practice from educators already teaching in the online environment in order to encourage other teachers. For example, the lecturer for Taxation Law has been recognised by her university for conducting online:

- A site that integrates multiple modes of interaction … [where] … [t]his online learning environment offers interesting and diverse ways of structuring personalised learning. The online experience can give the student a sense of control over the pace, sequence and form of the instruction and it can allow for more variation in experience than may be available in face-to-face environments.

In this manner, other educators can arguably find themselves encouraged to access the tools and supports available to them so that their teaching practices in the online environment can be further enhanced. Thus, educators are encouraged to use technology to support ‘a student-centered instructional methodology’. The lecturer for Taxation Law has come to recognise that her university is committed to ‘long-term support of technology for faculty and students’ and that the development of her unit indeed depends on the incorporation of technology as a teaching tool.

**IV. Formal Evaluation of Teaching Approaches**

By formally evaluating the teaching strategies employed for the ‘Taxation Law’ unit, the lecturer is able to gather evidence which forms the basis for making any changes to the program. The lecturer is also able to provide some insights to others who may wish to approach teaching and learning in a wholly online unit.

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91 Ibid.


93 Cunningham, above n 80.

94 Ibid.
The lecturer has to date predominately relied on summative evaluation by focusing on past performance, as measured by student evaluations, together with student and peer feedback to measure her teaching success in this online environment. With regard to student feedback, in the 2010 year, academics from the Faculty of Business and Law of the lecturer’s university were required to achieve at least 3.5/5 for the Student Evaluation of Teaching Units (SETU) score for ‘satisfaction with teaching’. The outcomes for the lecturer of Taxation Law show that this requirement has been exceeded. Table 1 indicates that the average SETU score from 2007–2010 for teaching Taxation Law is 4.32/5, which can arguably connote that successful teaching practices have been adopted.

Table 1: Student Evaluation of Teaching Units

<table>
<thead>
<tr>
<th>Unit Code</th>
<th>Unit Name</th>
<th>Teaching Period</th>
<th>SETU (satisfaction with teaching)</th>
</tr>
</thead>
<tbody>
<tr>
<td>MLC731/712</td>
<td>Taxation Law</td>
<td>T2 2007</td>
<td>4.33/5</td>
</tr>
<tr>
<td>MLC731/712</td>
<td>Taxation Law</td>
<td>T3 2007</td>
<td>4.14/5</td>
</tr>
<tr>
<td>MLC712</td>
<td>Taxation Law</td>
<td>T2 2008</td>
<td>4.44/5</td>
</tr>
<tr>
<td>MLC712</td>
<td>Taxation Law</td>
<td>T3 2008</td>
<td>4.46/5</td>
</tr>
<tr>
<td>MLC712</td>
<td>Taxation Law</td>
<td>T2 2009</td>
<td>4.15/5</td>
</tr>
<tr>
<td>MLC712</td>
<td>Taxation Law</td>
<td>T2 2010</td>
<td>4.39/5</td>
</tr>
<tr>
<td>MLC712</td>
<td>Taxation Law</td>
<td>T3 2010</td>
<td>4.50/5</td>
</tr>
</tbody>
</table>

Reflection on unsolicited student feedback also supports successful teaching approaches made in the unit Taxation Law:

[The lecturer] … has always been clear and understandable. Her feedback has been great with all students on DSO and she encouraged interaction on a weekly basis with the tutorials. I found the MC tests great for self-monitoring of [my own academic] progress.

Peer review is another important tool that can be used to gauge teaching performance. In 2009, the lecturer for Taxation Law received a Faculty of Business and Law Teaching Exemplar Award, in recognition of the teaching methodologies adopted by her in the online environment for the Taxation Law unit. The director of the Graduate Certificate, of which the Taxation Law unit forms a part, also comments:

Of the many pedagogical approaches … [the lecturer] uses in her teaching, most impressive is her use of technologies on [the university-provided online learning management system DSO for the unit]. For example, integrating e-Live software, and Camtasia has successfully engaged [the lecturers] students, allowing her to give real-time feedback and guidance in the substantive areas of the course. [The lecturer’s] motivation in setting up these multiple modes of interaction

95 See Deakin University, Institute of Teaching and Learning, Conventional Wisdom on Evaluation, where it is noted that: ‘ Summative evaluation is generally carried out at the end of a period of teaching and has a judgemental focus, though it can also be formative in the sense that it recommends action for improvement for the next teaching period’.

96 On file with the author. The Deakin University SETU is a university-wide survey which gives all students the opportunity to give feedback on their experience of the units they study: Deakin University, Unit Evaluation: Public Results Reports <http://www.deakin.edu.au/unit-eval/results/general.php>.


98 On file with the author.

99 Ibid.

online is driven by the imperative of student engagement. It is remarkable that [the lecturer], who may herself admit to not being particularly ‘tech-savvy’, has so successfully adapted her teaching style to suit [the university’s] flexible delivery agenda.101

It is here, too, that success in addressing the maintenance of standards for the legal and accounting profession, has also been recognised. For example, the Head of School for Accounting, Economics and Finance at the lecturer’s university comments:

[The lecturer] … has been extremely proactive in developing and refining the syllabus content and learning materials for both these units. This has required careful thought and skill to get the right level, given the specific needs of this cohort of accounting students, and we in the School of AEF have relied exclusively on [the lecturer’s] judgement. The fact that [the lecturer] excelled in both the course development and delivery is borne out not only in the excellent feedback she has and continues to receive from students, but also in that graduates from this program outperform their fellow students in the Taxation module of their subsequent professional program conducted by The Institute of Chartered Accountants in Australia.102

While formative evaluation has not to date been undertaken, it is also nevertheless an important consideration. Through this, she will be able to further focus on the strengths and weaknesses of the teaching methodology and pedagogical approach taken to date and also how she can improve and develop them for the future. In late 2011, the lecturer aims to adopt the following formative evaluation strategies to gain further insight into the effectiveness of the online teaching environment that she has developed for the Taxation Law unit:

- An informal questionnaire posted onto DSO (week 6):
  1. to gauge student satisfaction with the way that materials are delivered as well as the content of those materials including the tutorial problems provided to date and the progressive non-assessable multiple choice tests;
  2. to gauge satisfaction with DSO responses to date; and
  3. to gauge satisfaction with the software programs used (eLive, Camtasia and the unit’s discussion board) to deliver study materials.
- Note the number of participants attending the weekly eLive discussion sessions on a weekly basis.
- Conduct an analysis of student access to the unit’s site on a weekly basis (who is online and who is not, and for what periods).

Both forms of evaluation are important. Any lecturer in any teaching environment cannot rely solely on summative evaluation at the end of a teaching period. It is important that they are aware as soon as possible of whether or not any new strategies being employed are being received favourably and whether students are engaging effectively in their learning within the teaching environment that is being provided to them. The content, assessment, delivery methods, student support and overall educational effectiveness are all important elements103 that must be subject to effective overall evaluation so that teaching and learning processes can be improved.

101 Peter Richardson, Director Graduate Certificate of Chartered Accounting Foundations (GCCAF) 2007–2010 (March 2010). See also Deakin University, School of Accounting, Economics and Finance, Graduate Certificate of Chartered Accounting Foundations (2011) <http://www.deakin.edu.au/buslaw/aef/course/gccaf.php>: The Graduate Certificate of Chartered Accounting Foundations (GCCAF) has been developed to meet the requirements of the Institute of Chartered Accountants in Australia (ICAA). The course is designed for individuals who hold a non-accounting bachelor degree and who wish to pursue a career in chartered accounting. The course is a pathway to the ICAA’s Chartered Accountants Program.

102 Barry Cooper, Head of School, School of Accounting, Economics and Finance, Deakin University (April 2011).

103 Deakin University, Institute of Teaching and Learning, above n 96.
Online teaching and e-learning has significantly altered the face of tertiary education. The introduction of new technologies has facilitated this transition, presenting the lecturer for Taxation Law, as an educator in the online environment, with both opportunities and challenges. A critical analysis of the teaching and pedagogical approach undertaken by the lecturer for Taxation Law is made by initially referring to the ‘community of inquiry’ method, as espoused by Garrison and Anderson. According to this model, cognitive presence, social presence and teaching presence are examined with respect to the approaches taken in the planning, design and delivery of the unit. An examination of cognitive presence indicates that students of Taxation Law do ‘construct and confirm meaning through sustained reflection’ by participating in teaching and learning activities provided by the lecturer in the online teaching and e-learning environment on DSO. Students are encouraged to reflect on discussions, and to participate in revision classes conducted in ‘live’ time at the end of each teaching period. In examining social presence, it is found that students and the lecturer for Taxation Law can interact as ‘real’ people in the online environment. A sense of co-presence is evident, where the technologies available allow both students and the lecturer to be close enough both socially and emotionally. Today, CMC encompasses both written and also oral forms, thus emulating face-to-face teaching and learning approaches of the past.

Nevertheless, teaching presence highlights that to be an effective educator in the online environment, an educator must not just be a provider of information but must facilitate students’ learning. In the instructional design of the unit Taxation Law, the lecturer has relied on a constructivist approach to learning where her students are recognised as having a degree of prior knowledge and expectations. The lecturer for Taxation Law has been able, through the use of various technologies, to act as a facilitator in student-centred, self-initiated learning by providing to students regular orientations, support materials and regular communication between lecturer and students, and between students. Indeed, the technologies employed in the teaching of the Taxation Law unit address the issue of connection and allow students to engage with each other and with their lecturer ‘irrespective of distance, time, and work or family commitments’. Critical evaluation of pedagogic approaches taken in the online teaching and e-learning environments for the ‘Taxation Law’ unit is continuously being undertaken, in order to ensure that students are able to effectively engage in their own learning and ‘thus become more inclined to actively participate in lifelong learning opportunities after graduation’.

It is concluded that the online teaching and e-learning environment has undoubtedly increased the demands on educators to be ‘flexible … [and] tech-savvy’. For the lecturer of the unit Taxation Law, this has involved a significant learning curve, drawing upon both her informal and formal learning and continuing professional development. She is required to be familiar with the technology tools available to her, so that that she may ‘intersect and modify the nature, processes and practices of learning and teaching’ in order to encourage students to actively participate in their own learning in this flexible teaching and learning environment. Nevertheless it is also recognised by the lecturer for Taxation Law that, as an online teacher, she senses a decrease in social interaction with colleagues and that her academic autonomy or freedom is compromised to a degree. These issues need further attention in order not to compromise the quality of teaching provided and the levels of student engagement in their learning in today’s online teaching and e-learning classrooms.

104 Garrison and Anderson, above n 1, 27.
105 Ibid 28.
106 Saltmarsh and Sutherland-Smith, above n 2, 18.
107 Chalmers, above n 59.
108 Saltmarsh and Sutherland-Smith, above n 2, 18.
109 OECD, above n 44.
110 Saltmarsh and Sutherland-Smith above n 2, 15.
Feedback on student performance, whether in the classroom or on written assignments, enables them to reflect on their understandings and restructure their thinking in order to develop more powerful ideas and capabilities. Research has identified a number of broad principles of good feedback practice. These include the provision of feedback that facilitates the development of reflection in learning; helps clarify what good performance is in terms of goals, criteria and expected standards; provides opportunities to close the gap between current and desired performance; delivers high quality information to students about their learning; and encourages positive motivational beliefs and self-esteem. However, high staff–student ratios and time pressures often result in a gulf between this ideal and reality. Whilst greater use of criteria-referenced assessment has enabled an improvement in the extent of feedback being provided to students, this measure alone does not go far enough to satisfy the requirements of good feedback practice.

Technology offers an effective and efficient means by which personalised feedback may be provided to students. This paper presents the findings of a trial of the use of the freely available Audacity program to provide individual feedback via MP3 recordings to final year Media Law students at the Queensland University of Technology on their written assignments. The trial has yielded wide acclaim by students as an effective means of explaining the exact reasons why they received the marks they were awarded, the things they did well and the areas needing improvement. It also showed that good feedback practice can be achieved without the burden of an increase in staff workload.

I. INTRODUCTION

In a much-cited study, John Hattie conducted a comprehensive review of 87 meta-analyses of studies on what makes a difference to student achievement finding that the most powerful single influence was feedback. Feedback enables students to reflect on their understandings and restructure their thinking in order to develop more powerful ideas and capabilities. It facilitates the development of self-assessment or reflection in learning, can deliver information to students about their learning and encourage positive motivational beliefs and self-esteem.

The archetype of personalised feedback on written assessment may be seen as that afforded at Oxford or Cambridge University where the student wrote an essay a week and read it out to his or her tutor in a one-to-one tutorial, who then gave immediate and detailed oral feedback on the students’ understanding as shown in the essay. For many Oxbridge students, this was almost the only form of teaching that they experienced: for them, teaching meant the giving of feedback on their essays.

However, in most if not all Australian universities the realities of high staff–student ratios and time pressures make this form of assessment and feedback an unattainable dream. Instead, in...
the modern higher education system, ‘assessment sometimes appears to be, at one and the same
time, enormously expensive, disliked by both students and teachers, and largely ineffective in
supporting learning’.4

Even where the academic makes the effort to provide detailed feedback, studies of what
students do with that feedback offer little encouragement. Feedback is frequently not read at all5
or not properly understood by students even if they do read it.6 As Wotjas remarked:

Some students threw away the feedback if they disliked the grade, while others seemed
concerned only with the final result and did not collect the marked work.7

Further, as Gibbs and Simpson noted:

A grade is likely to be perceived by the student as indicating their personal ability or worth as a
person as it is usually ‘norm-referenced’ and tells you, primarily, where you stand in relation to
others. A poor grade may damage a student’s ‘self-efficacy’, or sense of ability to be effective.8

Sadler summarised the general recommendations that had been made in the literature about the
desirable properties of feedback as including the following:

1. complimenting students on the strengths of their works;
2. telling them (gently) about deficiencies, where they occurred, and their nature;
3. telling students what would have improved their submitted productions;
4. pointing them to what could be done next time they complete a related type of response; and
5. throughout aims to be constructive and supportive.9

Sadler made further observations concerning the lot of modern academics in attempting to meet
these objectives:

For most teachers, providing feedback with these characteristics is labour intensive and
cognitively demanding. They give careful thought to exactness in wording, because the feedback
will later stand as a discrete communication that can be accessed multiple times. The volume
of feedback for a particular work depends partly on the extent to which the work is deemed
salvageable. For those that do seem salvageable, the teacher may provide considerable detail.
For high quality work, there may not be much to be said, and for pathologically poor work, it may
be difficult for the teacher to know where to begin. Furthermore, because the communication
is asynchronous, the teacher has to anticipate how the student is likely to react to both the
content and tone of the feedback, and this calls for a significant affective outlay on the teacher’s
part. Notwithstanding the limited effect feedback often seems to have, conscientious teachers
continue to invest heavily in providing it to their students.10

By contrast, less conscientious teachers may be inclined to spend little time on the marking
exercise, perhaps venturing no further than the occasional tick or cross or scant comment, such as
‘good work’. Further, whilst greater use of criterion-referenced assessment (CRA) has enabled
an improvement in the extent of feedback being provided to students, the completion of a CRA

4 Dai Hounsell, ‘Essay Writing and the Quality of Feedback’ in J Richardson, M Eysenck and D
Warren-Piper (eds), Student Learning: Research in Education and Cognitive Psychology (Open
University Press, 1987).
5 Mary Lea and Brian Street, ‘Student Writing in Higher Education: An Academic Literacies
6 Olga Wotjas, ‘Feedback? No, Just Give us the Answers’ Times Higher Education Supplement
(London), 25 September 1998; see also Christopher Winter and Vanessa Dye, ‘An Investigation
into the Reasons Why Students Do Not Collect Marked Assignments’ [2004] University of
Wolverhampton Learning and Teaching Projects 2003–2004 133.
7 Gibbs and Simpson, above n 3, 11.
9 Ibid.
10 Ibid.
grid alone is not an adequate substitute for personalised feedback. Similarly, generic feedback on an exercise can reduce the extent of ownership which students take over the feedback they receive, even where that generic feedback is detailed. Each student is still an individual person and ought to be treated as such.\textsuperscript{11}

What is needed is a methodology for providing feedback that has the desirable properties discerned by Sadler but which is achievable by modern academics juggling the demands of high staff–student ratios and competing time pressures.

II. THE PERSONALISED MP3 FEEDBACK PROCESS

Technology offers an effective and efficient means by which personalised feedback may be provided to students.\textsuperscript{12} In 2010, the 112 final-year students studying the elective, Media Law, at the Queensland University of Technology were required as part of their assessment to complete a 2000-word written assignment in groups of two or three. Distance external students were given the option of either submitting assignments on their own or as part of a group. Groups were formed using the collaboration tools provided by the unit’s Blackboard website. In lieu of written comments, feedback on most of these assignments was provided by way of a CRA sheet and oral comments recorded in MP3 format using free \textit{Audacity} software.\textsuperscript{13} To facilitate a comparison between this methodology and traditional written feedback in terms of workload from an academic’s perspective, a control group of assignments received written comments in lieu of MP3 feedback.

\textit{Audacity} offers both basic recording features, of the kind that most academics will readily recognise such as record, pause and stop buttons. It also enables more advanced functions such as audio mixing. Audio may be recorded (or ‘exported’) in either wav or MP3 formats; although the latter, being a proprietary format, requires a plug-in. This can be easily downloaded from a separate website, which is linked to the \textit{Audacity} download site.

In each case, the marking process involved reading the hard copy assignment and making only minimal markings on the pages (such as circling words or placing lines or squiggles besides passages), followed by completion of a CRA sheet. Comments and feedback were then recorded, expanding and explaining the minimal markings on the pages. These observations were also linked to the completed CRA sheet. The recording was then saved to the marker’s hard drive under the joint surnames of the students involved.

Once this process was completed for all assignments, a generic email message was composed. Using the email facility in the unit’s Blackboard website, the generic email message was copy and pasted, personally addressed and sent to each student with the personalised MP3 feedback as an attachment.

Reading the assignments in the control group, making written comments and completing the CRA sheet took on average 22:26 minutes. By comparison, the average time for reading the assignments in the survey group, completing the CRA sheet and recording the MP3 feedback was 18 minutes. The average length of the MP3 feedback was 7:20 minutes. Emailing the MP3 files via the unit’s Blackboard site took on average 90 seconds, making a total of 19:30 minutes for the MP3 feedback methodology.

III. STUDENT RESPONSE

Part of the generic email message asked those students who received MP3 feedback to follow a link to an online survey instrument. This survey comprised both questions using a 6-point Likert


\textsuperscript{12} For a similar study see Tom Lunt and John Curran, ‘‘Are You Listening Please?’ The Advantages of Electronic Audio Feedback Compared to Written Feedback’ (2010) 35(7) Assessment and Evaluation in Higher Education 759.

\textsuperscript{13} \textit{Audacity} is available for download from <http://audacity.sourceforge.net/>.
scale (5 representing ‘Strongly Agree’, 1 representing ‘Strongly Disagree’, and 0 representing ‘Not Applicable’) and open-ended questions. There were 38 responses to the survey, representing a 61 per cent response rate for those students who received MP3 feedback.

Students were first asked to address two preliminary points concerning their use of the MP3 feedback. First, students were asked to respond to the statement: ‘I experienced no technical problems in playing the MP3 feedback file.’ Student responses were as follows:

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Neither agree or disagree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>Not applicable</th>
<th>Not answered</th>
</tr>
</thead>
<tbody>
<tr>
<td>87%</td>
<td>5%</td>
<td>0%</td>
<td>0%</td>
<td>2.6%</td>
<td>2.6%</td>
<td>2.6%</td>
</tr>
</tbody>
</table>

A total of 92 per cent of respondents had no difficulty receiving and listening to the feedback provided by MP3 file.

Students were also asked to advise how many times they had listened to the MP3 feedback. They answered as follows:

<table>
<thead>
<tr>
<th>Never</th>
<th>Once</th>
<th>Twice</th>
<th>Three times</th>
<th>More than three times</th>
<th>Unanswered</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>50%</td>
<td>44.7%</td>
<td>5.3%</td>
<td>9%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Half the students listen to the MP3 feedback more than once, while the other half only listened to it only one time.

Next, students were asked a series of questions regarding their perceptions of MP3 recordings and their value as a means of providing feedback on written assessment.

First, they were asked to respond to the statement: ‘A recorded MP3 feedback file was an effective way to receive feedback on my written work.’ Students responded as follows:

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Neither agree or disagree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>Not applicable</th>
<th>Not answered</th>
</tr>
</thead>
<tbody>
<tr>
<td>65.8%</td>
<td>34.2%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

One hundred per cent of respondents considered MP3 recording to be an effective way of receiving feedback on their work.

Students were also asked to respond to the statement: ‘The MP3 feedback helped me to understand the mark I received for my work.’ They replied thus:

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Neither agree or disagree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>Not applicable</th>
<th>Not answered</th>
</tr>
</thead>
<tbody>
<tr>
<td>76.4%</td>
<td>23.6%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Again, all respondents thought that the MP3 feedback helped them to understand why they got the mark that they were given.

Students were then asked to compare this method of receiving feedback to traditional methods by responding to the question: ‘A recorded MP3 feedback file was a more effective way to receive feedback on my written work than written comments.’ Their responses were as follows:

<table>
<thead>
<tr>
<th>Strongly agree</th>
<th>Agree</th>
<th>Neither agree or disagree</th>
<th>Disagree</th>
<th>Strongly disagree</th>
<th>Not applicable</th>
<th>Not answered</th>
</tr>
</thead>
<tbody>
<tr>
<td>71.3%</td>
<td>23.6%</td>
<td>5%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

A total of 95 per cent of the students preferred MP3 recordings over written comments as a more effective means of receiving feedback.
Students’ disappointment with the feedback they had received in the past was reflected in the following comments:

I have been hugely disappointed in other subjects when I receive a low or average mark and there is no feedback on the assignment other than a tick or a cross.

Written comments are often very short, can appear cryptic and often seem to just point out things that are wrong without helping to understand why they are wrong.

Even where the academic goes to some lengths to provide detailed comments, these efforts may be thwarted if students are unable to understand the writing:

I usually have trouble deciphering others handwriting or what their corrections mean.

Such disappointment may in turn breed bad habits:

I usually never bother to pick up my assignment.

I often find myself submitting an assignment then purposefully forgetting about it.

By contrast, students were more inclined to take notice of feedback provided in an MP3 recording:

This is a very effective method of delivering feedback. Personally, I do not usually collect assignments that I have submitted — meaning that I never really get the feedback. In contrast, I listened to this feedback with a copy of the assignment in front of me — and it was very helpful.

Students appreciated the detailed critique of their work that an academic is able to provide via an MP3 recording:

Sometimes with assignments I’m at a loss as to why exactly I did well or badly and it was really nice to have my specific assignment looked at in detail.

This is a great initiative, and is the most comprehensive assignment feedback I have received ...

It was really good to get an explicit explanation of the things we did well, and the areas that required substantial improvement.

This in turn led to a better understanding of the subject material:

The audio feedback did help to understand the areas that need further work and will certainly assist the learning process.

It is more effective for me given that I usually have trouble deciphering others handwriting or what their corrections mean. When listened to in conjunction to the corrections marked on the hard copy then it provides for a well rounded understanding of what was done well and what wasn’t in regards to the assignment.

The MP3 feedback was for some a near substitute for an Oxbridge style one-on-one tutorial:

I think this is fantastic!!! By far the best feedback I have received so far in my degree ... It really gave us back what we normally miss out on — which is the opportunity to ask the marker one-on-one where we went wrong.

Almost as good as having a face to face discussion about the mark.

I’ve never gone to question my mark on an assignment before so I felt that this gave me a better/ fuller understanding of why the marks were given in different areas. It was almost like a mini consultation.

For some, the personalised nature of the feedback also made for a closer connection with the faculty, particularly for those studying at a distance and without the benefit of regular face to face contact with staff:
I loved it! As an external, it was great — it felt more personal and gave a greater connection to the uni (particularly when feedback on some assignments is non-existent except for the mark).

IV. REFLECTIONS AND DIRECTIONS

It would seem self-evident that an academic can speak faster than he or she can type or write. This may especially be the case for those academics who by virtue of their discipline may be comfortable expressing their thoughts in words, such as law or medicine. That translates to an ability to provide more substantial feedback in the same amount of time. Email, including that forming part of the group/collaborate tool in a learning management system like Blackboard, enables the audio file to be quickly and efficiently delivered to the student, who not only is spared the challenge of deciphering the academic’s handwriting but also has the advantage of hearing the way the words are spoken:

I found the MP3 feedback very helpful as it allows us as students to really find out what the marker thinks of our work as we can hear his tone of voice.

However, while audio feedback adds a dimension that is more personal and rich in terms of tone, it can also seem more real and potentially upsetting. It is important to remain constructive and supportive, taking care both in terms of the choice of words and the way in which they are expressed. As Race recognised, words with ‘final language’ implications such as ‘weak’ or ‘poor’ may cause irretrievable breakdown between the academic and student. Indeed, even positive words such as ‘excellent’ have the potential to cause problems when feedback on the next piece of work only attracts a comment that it was ‘very good’ because it may prompt the question why it was not excellent again. Instead, it is better to praise exactly what was considered very good or excellent in more detail, rather than taking a short cut of merely using the adjectives. The importance of the words used and the way that they are spoken was recognised by a number of students. One commented:

Although I think MP3 is a great way of receiving feedback, I think you should be careful in your approach because it is difficult for people to ‘hear’ exactly what you thought of their work which they spent a lot of time on. It is especially difficult when students don’t really have the avenue to respond in their own defence.

Another expressed a similar view:

Although it is really beneficial it is also quite difficult to receive oral feedback when it is not complimentary. So receiving feedback via MP3 is probably going to be difficult for those people, like myself, who have obviously made errors in their assessment. This is not criticism of the method in which feedback is given but is a suggestion in the way that the actual content is delivered such that there should be awareness as to the impact that particular negative comments will have on a person who has made errors.

However, sometimes ‘tough love’ is both warranted and appreciated. The student who received the 11:55 minute MP3 feedback made the following comments:

I would just like to say thank you. I only got 9/20, the lowest mark I have ever received on an assignment. While I was going red with embarrassment listening to the comments on the tape, it was exactly what I needed. Despite trying very hard throughout my degree, I have always been a pass average student. The MP3 file showed me clearly where and why I went wrong. I am in the second last semester of my degree, I only wish this was brought in sooner and I struggle to get a job due to my 4.5 GPA (sic). This is certainly not due to effort, I always try my butt off, but I have obviously went about answering assignments and exams incorrectly and as an external I felt a little isolated. So while it hurt my pride, the cold hard facts, from the bottom of my heart thank you, because I appreciate greatly the direction.

14 Race, above n 11.
The audio files can also be replayed to aid comprehension. Students often face interpretive challenges when trying to capitalise on written feedback. For example, if an academic writes the comment ‘this does not follow logically from what goes before’, a student who lacks the tacit knowledge necessary to identify that aspect of their work to which the feedback refers may not appreciate the problem with the logic and as a consequence take no action to address the failure in future work. A proper explanation of why the logic does not follow may require a paragraph of explanation which the academic may not be able to afford the time to compose nor see as necessary.15 By comparison, audio feedback affords the academic the opportunity to provide a more detailed explanation of the comment that enables the student to make the necessary connections to properly understand the point being made.

A number of practical lessons may be derived from the experience of providing personalised MP3 feedback to the Media Law students. Audacity is an easy-to-use program but first-time users may find it worthwhile to first experiment until they became comfortable with the software. This includes the steps needed to delete any unwanted disruptions in the recording. Naturally, a good quality microphone and a quiet environment where the academic will not be disturbed by telephones or other distractions are recommended.

If email is to be used as a means of delivery there may be an issue concerning the maximum size of the audio file as an attachment. The Audacity default bit rate is 128 bits per second (bps). At this rate one minute of audio will be approximately 1 MB in size. The bit rate can be changed by opening ‘Preferences’ in the program’s ‘Edit’ menu, and then under the ‘File Format’ tab changing the bit rate to 32 bps without greatly sacrificing sound quality (see Figure 1). This would reduce the size of a one minute recording to about 235 KB. This enables the average size of the recordings to be kept to about 6–7 MB, which should be within common maximum sizes for email attachments.

Figure 1: Changing the Audacity bit rate

15 Sadler, above n 9, 539.
Audio files not only facilitate the provision of more detailed explanations of where students are in error, but also where students have done well. The expanded opportunity to both compliment good work and to seek to inspire improvement can make the marking process a satisfying one for the academic. While MP3 feedback can be personalised by addressing students by name, the audio files may include some common elements. For example, in the Media Law trial, the audio typically included words to the following effect:

Let’s go through your assignment together to see why I gave the mark that I gave you ...

The main parts of the assignment you should have considered were ...

and ended with a similar summary of important points to bear in mind for the coming exam such as:

Always be careful to identify distinct imputations and be specific in the meanings that you assign to them.

Remember that the public interest defence in s 30 is very important for a media defendant.

While it was initially thought that such common passages could be recorded in advance and added to each audio file, as it transpired it was much quicker to simply recite the words anew in each recording.

There are two sides to feedback being manageable. From academic’s perspective, designing and delivering feedback can be an exercise that can consume a vast amount of time. But also from the point of view of students, too much feedback can result in an obfuscation of the message, making it difficult to sort out the important feedback from the routine feedback and reducing their opportunity to benefit from the feedback that they need most. In the Media Law trial, there was no necessary correlation between the length of the recording and the size of the mark awarded. For example, the longest audio file was 11:55 minutes long and was for an assignment that was awarded 9 out of 20. By contrast, the second longest recording, which was 11:28 minutes long, was for an assignment which received 19 out of 20, the equal highest mark. The other mark of 19 out of 20 was for an assignment that attracted feedback that was 4:30 minutes long, the second shortest of the recordings. The important consideration is for the feedback to be as detailed and meaningful as possible. As one student commented:

I think the length was good ... my concern would be if it was rolled out across subjects with more students the temptation would be to make the recordings even shorter.

V. CONCLUSION

The traditional approach of providing written feedback on written assignments can be an inefficient and ineffective exercise. It can consume a large amount of an academic’s time and, no matter how detailed, may not even be read by students who may have been disappointed by the extent or quality of feedback on past assignments. Even where a student takes an interest in the feedback that has been provided there may be difficulties properly understanding the nuances of the written words and making the connections necessary for an improvement in their performance.

By contrast, providing personalised MP3 feedback using the freely available and free-to-use Audacity program is capable of achieving the goals of effective feedback identified in the literature. It allows feedback to be personally directed, complimenting students on the strength of their work while explaining any deficiencies. It enables academics to identify in detail what would have improved their submitted work and what needs to be done next time. It allows the academic to be constructive and supportive, not only by the words used but by the way they are

16 Race, above n 11.
spoken. And since most academics speak faster than they write or type, it can achieve those ends in no more time than traditional approaches.

The trial of providing personalised MP3 feedback on written assignments in Media Law received strong endorsement from those students who received feedback in that form. Although the sample of students involved was comparatively small, a number of valuable lessons were learnt. Students appreciated the personal nature of the feedback, which some likened to a one-on-one consultation. They were able to make connections that improved their understanding. They were also able to obtain a clear understanding of exactly why they received the mark they were awarded and what they needed to do to improve their performance. The success of the trial led the author to expand the use of MP3 feedback to giving feedback on higher degree research.

The following comments by a doctoral candidate capture the attractions of this approach:

The MP3 recording is better feedback for drafts because it retains the nuances of the lecturer’s meanings where written comments cannot. I found the feedback to my thesis chapters much more helpful in this format. When I read written comments from my supervisors, I supply a range of meanings according to my temperament, the time of day, my self esteem and so on. When I listen to the audio feedback, I get more of Professor Butler’s meanings and few misunderstandings of my own making.

Technology has transformed, and is transforming, legal education and higher education in the 21st century. Providing comments by MP3 audio file is a further step in this evolution that is capable of delivering personalised and detailed feedback in a more effective and efficient manner than possible through traditional written comments.
MOOTING IN AN UNDERGRADUATE TAX PROGRAM

Keith Kendall*

I. INTRODUCTION

Teaching law is often a difficult task. Particularly in a modern university environment, with students faced with a myriad of distractions as well as compounding obligations, maintaining student interest in subject material even for a 12- or 13-week semester can be a daunting task.

Teaching tax law as part of a LLB program presents a special set of challenges. For whatever reason, students often approach their first lectures in this discipline with a special trepidation. Whether it is due to the strong emphasis on technical legal content, the interdisciplinary nature of the subject or the perception that one needs a business background to understand the material (where roughly three-quarters of students do not have a background in business studies), the initial concern is there. This raises the very real prospect that students will be lost early on in the semester, leading potentially to high withdrawal rates and/or poor performance in the assessment — both scenarios which undermine the appeal of the subject to future cohorts and the instructor’s enthusiasm for teaching in the discipline.

The challenge confronting all law lecturers, but one that is particularly acute for those teaching tax law, is to maintain student interest in the discipline. One means by which this is achieved in the tax courses conducted in the School of Law at La Trobe University is through the use of a variety of assessment modes. An emphasis is placed on assessments that require students either to develop or extend skills that are rarely exercised in other subjects within the LLB program.

This paper describes and places within the pedagogical literature one form of assessment used in these courses, specifically a moot exercise. This was first used in 2004 and has been used in the subsequent seven iterations of that particular subject (eight in all). As such, this paper serves two purposes. The first is to provide information that other legal academics may use in designing assessment for their own courses. The outcomes identified and techniques used are not necessarily peculiar to teaching tax law — this really is only the specific application. The second is to provide the author with the opportunity to reflect on eight years’ worth of experience, collating the experiences in a logical format and considering opportunities to improve the student learning experience for future cohorts through developing this assessment. This exercise is in line with the recommendations recognised as required for the continuous improvement of teaching.¹

The remainder of this article is set out as follows. Part II provides a brief overview of the relevant pedagogical literature. Part III provides a description of the moot assessment used in the tax law course at La Trobe University. Part IV discusses some of the experiences and outcomes arising from the use of the moot assessment in light of the literature reviewed in part II.

II. OBJECTIVES FOR TEACHING IN A HIGHER EDUCATION SETTING

Teaching in a higher learning environment may pursue various combinations of particular goals. The following four objectives are those aimed for in the tax course conducted at La Trobe University. The theory underpinning these objectives as legitimate aims for teaching in a higher learning setting is drawn primarily from Biggs and Tang’s research, which represents

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* Senior Lecturer, School of Law, La Trobe University.
the most comprehensive presentation of pedagogical theory for the modern higher learning environment.2

As is noted at appropriate points in the discussion in this section, these objectives are interrelated. Promoting one will often assist in promoting at least one other. Such interactions may be seen more clearly when applied to the specific form of assessment that is the focus of this paper in the discussion in part IV.

A. Problem-Based Learning and Experiential Learning

Problem-based learning and experiential learning are related approaches to learning in a higher education setting in that they both rely on the student’s personal experience for learning to be effective. Biggs and Tang describe problem-based learning as ‘the way people learn in real life’.3 Essentially, students are faced with a problem and, armed with no or little specific knowledge of the material necessary for resolving the problem, attempt to construct a solution. Winsor explains problem-based learning in the following terms:

this form of LEARNING (as distinct from TEACHING) is based on your tackling a problem, or series of problems, without prior instruction. The idea is to get you to indulge in what is described as ‘discovery learning’ by using your own initiative, but guided and assisted (rather than lectured or taught) by your instructor.4

This is very similar to Wolski’s definition of experiential learning, adopted from Grimes, which is summarised as ‘doing, reflecting, applying and evaluating’.5 Wolski then goes on to expand on this brief definition using Kolb’s four-stage loop of experiential learning, in which the student engages in a concrete experience; reflects on that experience; positions the newly acquired knowledge within their abstract understanding of the discipline; and then actively experiments with this understanding in novel situations, leading back to concrete experience.6

The experience that the student derives from being confronted with unfamiliar problems and being required to form solutions with minimal guidance allows students to develop both skills and understanding of the subject matter.7 This understanding is the hallmark of deep learning described in the next subsection that is the primary goal of teaching in a higher education environment. Further, the responsibility placed on the student for their own learning and making connections (leading to the deep learning just mentioned) is consistent with Biggs and Tang’s ‘Theory Y’ approach to student learning, described below.

B. Deep versus Surface Learning

One of the problems that has been identified with many tax law courses, particularly in the United States (although there is no reason to expect that the situation is any different in other common law jurisdictions) is that students are merely trained how to spot issues requiring resolution on a client scenario.8 Such an approach does little to excite students about the intricacies of tax law,
which lead to the significant real-world implications that may engender the sort of enthusiasm that legal academics seek to instill in their classes.

The ultimate prize in designing a higher education program is positioning students to engage in deep learning, rather than the more superficial surface learning approach.\(^9\) The latter is the situation in which the student merely memorises information sufficient to regurgitate in an assessment environment and achieve a desired grade (usually a pass or middling grade for students consciously adopting this approach). Rote learning is a typical technique adopted by students pursuing a surface learning approach.

Deep learning, by contrast, describes the situation where the student engages wholeheartedly with the material, identifying connections and recognising implications that may not have been made explicit in class or in the assigned reading materials. Students are genuinely able to understand complex concepts and this understanding is demonstrable through the application of the knowledge obtained.

### C. Formative versus Summative Assessment

One of the areas that tends to get a significant amount of attention in the pedagogical literature is the distinction between formative and summative assessment. The basic distinction is the purpose for which the assessment is undertaken. Summative assessment is final in nature and is used to determine the student’s performance in the subject: ‘[i]ts purpose is to see how well students have learned what they were supposed to have learned’.\(^{10}\)

Formative assessment, on the other hand, has feedback as its primary purpose.\(^{11}\) Biggs and Tang identify this feedback element as one of the most powerful aspects of effective teaching.\(^{12}\) A critical element for assessment to qualify as formative is the opportunity for students to be able to act upon the feedback to improve their final grade. As such, an assessment task does not qualify as formative merely because feedback is provided with the grade. The student needs to have the opportunity to act on that feedback to improve their overall grade.

An important element of formative assessment is that students feel comfortable in exploring novel ideas.\(^{13}\) This is achieved best where students are not faced with a penalty for failing or making mistakes and, especially so, where students can admit to mistakes.\(^{14}\) It is through this exploration and learning from mistakes that the abstract understanding associated with deep learning may be achieved. Consequently, typical means of formative assessment are tasks which either are not directly assessed, but are undertaken for feedback purposes only, or carry only a nominal weight towards the final grade (for example, 5 per cent). Of course, providing effective feedback is necessary for this approach to learning to work, but can be difficult to implement in practice, not only due to resource constraints, but also because of the significant chance of misinterpretation.\(^{15}\)

### D. Theory Y Learning

Drawing on organisational management theory, Biggs and Tang draw a contrast between what they term ‘Theory X’ and ‘Theory Y’ approaches to teaching.\(^{16}\) Theory X teaching is perhaps the more traditional style of university instruction, in which the lecturer provides learning

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9 Biggs and Tang, above n 1, 22–5 provide a comprehensive description of the distinction between deep learning and surface learning.
10 Ibid 164.
11 Ibid 163.
12 Ibid 97.
13 Ibid.
14 Ibid.
16 Biggs and Tang, above n 1, 37–9.
opportunities in a strictly controlled environment, where the student’s learning experience is
directed by the instructor. This is typical of the usual problem and answer style of assessment
in most university law subjects.

Theory Y teaching, by contrast, places much more control over the learning experience in
the students’ hands. Removing the strict parameters characteristic of Theory X approaches
places the responsibility for learning on the student. This may take the form of choosing the
particular question to be addressed in assessment. A full Theory Y approach would allow the
student to choose the area without restriction, in contrast with the approach sometimes adopted
where students choose from a range of preset questions. Placing such responsibility on students
for their own learning fosters the deep learning objective, as students are more likely to engage
with the material where they have selected their own direction. Student engagement strengthens
the prospect of achieving the understanding that is the desired outcome of higher learning
instruction.

The use of formative assessment, particularly in a group environment, can be linked to a
Theory Y approach where students provide each other with feedback. Where students are given
responsibility for providing feedback to their peers, the students engage in higher cognitive
processes, engendering the level of understanding sought to achieve the deeper learning
outcomes.17

1. Design of the Moot Exercise

The moot represents one option available for students undertaking a first income tax law course
in the LLB program.18 The alternative that students may choose is a more traditional client
advice problem scenario. This aspect of the course’s assessment is worth 40 per cent of the
student’s final mark (the remaining 60 per cent coming from the final exam). Most students
undertaking this course do not have a business background (generally defined as undertaking
business studies either before or concurrently with their LLB program), with the implication
that they are unfamiliar with basic business concepts generally, and have had no exposure
to substantive knowledge of taxation specifically, before commencing this subject. The vast
majority are domestic students whose first language is English and are in their third to fifth year
of law studies.19 Most students would not have had much, if any, prior mooting experience, with
only one other subject in the LLB curriculum incorporating an assessed moot (this subject may
be undertaken before, concurrently with or subsequent to Income Tax Law).20

17 See James Oldham et al, ‘Formative Assessment for Progress Tests of Applied Medical
Knowledge’ in Steve Frankland (ed), Enhancing Teaching and Learning through Assessment
(Springer, 2007) 32, 34.
18 The subject for which this is available is ‘LAW3ITL Income Tax Law’.
19 La Trobe Law has a proportionately large cohort of graduate-entry LLB students, that is, students
who have already obtained a bachelor-level qualification in another discipline. The graduate-entry
LLB program is three years full-time and, as such, some of this cohort may attempt this subject in
their second year. However, these students would have completed a similar number of law subjects
in their first year compared with a third-year undergraduate LLB student (who would normally
have spent the majority of their previous years completing non-law subjects as part of a double-
dergree program). Consequently, the considerations raised here in respect of student experience
apply equally to these second-year LLB students.
20 Some students have had significant mooting experience through participation in the extension
mooting competitions coordinated by the La Trobe Law Students Association. However, such
students are in a distinct minority, since there is no compulsion to participate in these competitions.
These demographics are important influences on the moot’s design as implemented in Income Tax Law. Lynch identifies three salient features common to moots derived from their original function as the means of training for admission to the Inns of Court in medieval England:21

• students assume the role of advocates before a simulated bench …;
• students argue points of law before the bench, which arise from a hypothetical scenario they have been supplied with;
• students are expected to be able to answer questions from the bench relating to the arguments presented or any other relevant law that the students may not have considered.

Within this model, there is significant scope for variation. For example, Lynch surveyed the use of moots in three Queensland law schools,22 which all differed on several key aspects.23 Bentley discusses, in detail, the moot used as part of the assessment in a tax law subject (undertaken by both LLB and non-LLB students as part of a common cohort) at Bond University in the mid-1990s,24 which differs from the constitutional law moots that Lynch describes at the University of Western Sydney.25 Elements of moot design which may vary include: the requirement and subsequent emphasis of any written submissions required before oral arguments; the forum in which the moot is set; the degree of formality during oral arguments; whether the moot is compulsory or optional as a form of assessment; and the allocation of marks among participants. As explained in the remainder of this part, deliberate decisions have been made in respect of these and other design features for the moot as used in Income Tax Law.26

As previously noted, the moot is an optional form of assessment, with students being able to choose to prepare a more traditional client advice form of problem instead. Students generally self-select27 into groups of four, dividing themselves into pairs, with one pair representing the Commissioner of Taxation and the other the taxpayer.28 Students are encouraged to work in their groups of four, developing and testing arguments against each other during the preparation stage.29

Problems deal with only income issues (including capital gains tax) and have been drawn from one of three sources to date:

21 Andrew Lynch, ‘Why Do We Moot? Exploring the Role of Mooting in Legal Education’ (1996) 7 Legal Education Review 67, 70. This may be contrasted with Wolski’s more expansive list of ‘usual’ features that modern moots exhibit: Wolski, above n 5, 43–4.
22 Griffith University, Queensland University of Technology and the University of Queensland.
23 Lynch, ‘Why Do We Moot?’, above n 21.
26 Feedback received over the moot’s design during the eight years that it has been used has been overwhelmingly positive. The design described here has been left unchanged over this period of time, with the one exception that the moot was compulsory in the first year (2004). This was made optional in 2005 to allow for the situation where an odd number of students have enrolled in the subject (24 enrolled in 2004).
27 Students are paired with assistance from the lecturer only where they have been unable to find a partner themselves. The self-selection is an important element in the justification for the approach to marking discussed below.
28 In rare circumstances, students have been permitted to undertake the moot in groups of two rather than four and then moot against each other as individuals. This is permitted only where the lecturer is confident that the students in question have demonstrated the ability to perform to a high level and, therefore, will not be disadvantaged by the absence of a partner. The time limits discussed below apply in the same fashion and the right of reply feature is facilitated by each moorer speaking twice.
29 Notwithstanding the comments in above n 27, where students are unable to form a group of four (such as an odd number of students enrolled in the subject or insufficient students being willing to do the moot), those students are required to do the written assignment.
• client problems, on which the lecturer had to advise during his years in professional practice, or which a former colleague has provided details;
• a case that is not mentioned in the subject’s assigned reading materials (which may or may not be on appeal at the time of the moot);
• a practical issue that is the subject of controversy at the time of the moot (such as a contentious draft Tax Ruling).

Most moot problems are drawn from the first two sources to facilitate the emphasis on the practical aspects of this subject. Specifically, students are informed that the basic fact pattern that they are researching have been the subject of actual advice at some point, rather than a hypothetical situation. While problems drawn from the third source are strictly hypothetical, the practical element is still able to be emphasised as the nature of the issues at hand are in dispute within the profession at the time of the moot. Of course, students in a particular year are not told from which category the problem with which they are confronted is drawn.

A potential problem that may be predicted with respect to the second source is that students identify the source case and then rely on this as ‘the’ authority on which the moot problem is to be decided. To date, this has not occurred. Despite some students using the source case in their arguments, no student to date has ever relied upon this case as the decisive point. Rather, the case is presented as only part of an overall argument (note that while all students in this group clearly recognise the relevance of the particular case, not all recognise it as the source case for the moot problem).

Related to this concern is the choice of forum in which the oral arguments are set. The intention is to allow students maximum freedom in preparing and presenting their arguments. To this end, students are not given any prior history in terms of arguments that have been made, but told to assume that they may raise any and all arguments they think may be relevant. In some situations, this is achieved easily by situating the moot hearing within the Administrative Appeals Tribunal. This, though, gives rise to the prospect that students may present an authority as binding and inappropriately base their entire argument around that single case (which, while possibly correct in practice, would not demonstrate a sufficient breadth of understanding necessary to achieve a high grade in the task). An alternative that has been adopted to avoid this possibility is to situate the hearing in the High Court. Even if students discover a High Court authority on point, they are still required to argue the merits of the authority due to the High Court not being bound by any authority (the distinction between a single judge and the Full Court is glossed over, but it is made clear to students that this is the reason for positioning the hearing in that forum).

The moot itself is divided into two parts: a written submission and oral arguments. Written submissions are due approximately two weeks prior to oral arguments at the same time for all mooters. The written submission takes no particular form, is limited to 1500 words and is designed merely to have a written record of the mooters’ intended arguments at the time of preparation. Little weight is placed on the written submission in terms of the contribution made to the final grade and, as such, substantively represents a hurdle requirement for the exercise. Given the little weight placed on this element and the relatively long lead time of two weeks between turning in the written submission and presentation of oral arguments, students are permitted to revise and add or remove arguments, conditional on keeping their opponents fully informed of such changes.

Oral arguments are all scheduled for the same week (the same week in which the alternative written assignments are due). Groups are assigned one hour time slots, with each pair allocated 20 minutes in which to make their oral arguments and respond to questions from the bench.

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30 All actual problems have had identifying features removed and are usually simplified to some extent.
31 For example, Bentley states that students must provide their written submissions the day before the oral arguments in the moots conducted at Bond University: Bentley, above n 24, 115.
Pairs are free to allocate their 20 minutes between them as they see fit, subject to the constraint that each individual must speak for at least five minutes. The additional 20 minutes in the hour allows for some flexibility in speakers going (slightly) overtime and to provide feedback at the end of the moot.

Oral arguments are conducted with a minimum of formality in a deliberate attempt to ensure that students are as comfortable as possible. The intention behind this design decision is to allow students to concentrate on mastering their understanding of the relevant substantive law, not spending time familiarising themselves with procedural matters. This also recognises that the majority of students have not mooted before and, as well as encouraging students to focus on substantive legal matters, is meant to allow students to approach the moot as a less intimidating exercise.

To this end, formalities are dispensed with as far as is possible. For example, rather than the School’s moot court, oral arguments take place in an empty tutorial room. All participants remain seated while making their addresses. Formal business attire and court address (‘your Honour’, ‘my learned friend’, etc) are not required, although students are permitted to be formal in these respects if they prefer (this is sometimes the case for experienced mooters who have been trained in these moot formalities). This approach recognises that not all students have the same preferences and is consistent with the philosophy of following procedure with which students are most comfortable and, therefore, most relaxed and can concentrate on their substantive legal arguments.

Unlike some moots, pairs in the Income Tax Law moot alternate in their presentations rather than the first pair completing their submission followed by their opponents. For example, if groups A and B (comprising students AA and BB) were mooting against each other, the order of proceedings would be A-B-A-B (rather than A-A-B-B as in many other moots). No final right of reply is afforded to the first individual presenter.

This design feature affords an additional opportunity to assess the students’ substantive tax knowledge. As well as demonstrating their understanding of the relevant law through responding to questions from the bench, students are given additional opportunities to show their knowledge by presenting counterarguments to their opponent’s points. This is done especially well when the opponent’s point has been raised in response to a question from the bench (that is, both the argument and the counterargument were unprepared), demonstrating a more thorough understanding of the material since the response is provided under pressure and without the ability to prepare comprehensively. This opportunity is created by the order in which mooters speak.

The individual members of each pair receive the same mark. While this does raise the prospect of complaints of free-riding (which has not happened to date), this danger is mitigated by students self-selecting their partners. Having chosen to work with a particular individual, it is difficult for a student to complain about the efforts of their partner as this will reflect on their own judgment. The purpose of this design feature, though, is to avoid other dangers associated with attempting to assess work where much relative effort is unobservable. For example, a substantial amount of the effort that goes into a solid oral argument is the research performed in crafting the arguments presented. However, the relative contributions of the partners to the joint effort in this regard cannot be entirely determined by the observable quality of the oral arguments presented.

32 The bench for the moot comprises solely of the lecturer.
33 Even for the rare situations in which pairings have been arranged, no complaints have occurred. Consistent with the design theme of making students responsible for their own learning experience, trust is placed in the students to allocate tasks within their group effectively. No specific data has been collected regarding any free-riding or similar behaviour, although students are given open-ended questions in the standard teaching surveys conducted at the end of semester, providing the opportunity to give feedback on any negative experiences. To date, there have been no negative comments relating to the group structures and the responsibility placed on the students as described.
presentations. Additionally, if one partner speaks for longer than is planned, thereby reducing their partner’s time allocation of the 20 minute presentation time, the fact that both members of the pair receive the same mark removes the prospect that the partner denied expected presentation time will be penalised. Further, any incentives for partners not to co-operate with each other (for example, by withholding a strong argument for their own presentation to boost their own relative performance) is removed, since benefiting one individual benefits the pair.

III. ANALYSIS AND CRITIQUE

Mooting in general is capable of satisfying the requirements of effective teaching identified in part II above. Lynch provides a comprehensive case for mooting as a means of implementing problem-based learning and providing experiential learning.34 In the case of the Income Tax Law moot described in the previous part, while not a pure form of problem-based learning — as students have been given a grounding in the broad issues raised by the moot problem in lectures — to score well, students realise that they must go beyond the material covered in class. This is prompted by the need, first, to construct novel arguments to demonstrate a prima facie superior understanding of the concepts and relevant authorities and, second, to anticipate questions from the bench. In this way, students are confronted with a situation in which they must acquire new knowledge on their own terms in order to solve that problem.

Lynch notes that, as there is not a correct answer to a moot problem per se, mooting represents a form of assessment in which the process by which a solution is constructed takes on an increased importance relative to the solution that is actually produced:35

moots are a good example of a piece of assessment in legal education where the importance of the process applied in responding to the problem is at least equal to, if not more than, the emphasis on the actual solution reached. Mooters are not marked solely upon the accuracy of the law they argue in the moot court. Many of the arguments heard in moots are rather desperate, and the assessing academic knows this … The true test is to see how students use the authorities that do exist in support of their argument, how they organise this material both individually and as a team, how they research the problem, and how they present it and respond to questions from the Bench. Certainly, students are marked on their understanding of the law, but by the nature of the exercise, they cannot all reach the correct solution. The final answer to the problem posed by the case really plays a very minor role in both their learning experience and also the assessment of their work.

This passage accurately captures the approach taken in assessing the Income Tax Law moot and, as such, establishes this moot as a solid example of problem-based and experiential learning.

Lynch also describes moots as ‘a perfect example of assessment in law which involves high degrees of cognition and metacognition’,36 being the hallmarks of a deep learning experience. The nature of mooting requires students to achieve this level of understanding. While some surface learning techniques may allow students to form an argument on first principles, this will get them only as far as producing a viable written submission, which, as noted, does not contribute significantly to their final mark for the task. Surface learning is insufficient preparation, in particular, for responding to questions from the bench. The prospect of being questioned requires students to obtain their own understanding from the available authorities. Lynch states that:

it is impossible to moot successfully without interpreting and abstracting meaning from the vast amounts of case and statute law … relevant to the moot problem. Moots involve memorisation and the retention of knowledge, but first mooters must construct that knowledge from the materials they will discover through their research.37

34 Lynch, ‘Why Do We Moot?’, above n 21, 78–81.
36 Ibid 76.
37 Ibid 77.
Lynch confirms that students perceive moots as tasks in which they must acquire a proper understanding of the material to be graded well; information memorisation would be insufficient.\(^{38}\) Bentley comments in a similar vein, stating that the opportunity to question students’ arguments represents the primary pedagogical advantage over written assignments and ensuring that they obtain a ‘real understanding of the tax law’.\(^{39}\)

The major challenge, as with most assessment tasks, is in providing students with formative feedback without placing an undue demand on the limited teaching resources available.\(^ {40}\) While Wolski appears to suggest that the only manner in which formative feedback can be provided is through iterations of the task,\(^ {41}\) this is an unnecessarily limited view of formative feedback. Any type of feedback that the student receives at a time when they have an opportunity to act on that information to improve their grade can qualify as formative. This is provided for in the dialogue between mooters and the bench during oral argument, which is made up primarily of questions from the bench, but does involve some commentary (for example, the appropriateness of some cases to the dispute at hand). Student responses to such feedback — in other words, how effectively they can immediately incorporate this feedback into their presentations — influences their grade for the task.

It is also a design intent that students will receive peer formative feedback during the preparation phase. As mooters are encouraged to prepare in their groups of four (and not separately as pairs), the intention is that they will each test out arguments against each other beforehand without time constraints to identify the most appropriate material to present during their limited opportunity in oral arguments.\(^ {42}\)

This last element represents one of the primary means by which the Income Tax Law moot fits within Biggs and Tang’s Theory Y model of learning. It is through this preparation stage that students are forced to take responsibility for their own learning. In this case, not only are they taking the initiative regarding their own position, but they contribute to their peers’ learning as well.

Finally, many of the design features identified in Part III above address some of the concerns that Wolski raises in respect of the manner in which mooting is traditionally undertaken in law schools.\(^ {43}\) The lack of formality is adopted in the Income Tax Law moot to avoid students from finding the moot overwhelming, which Wolski identifies as one such problem.\(^ {44}\) Wolski’s criticism of an overemphasis on appellate mooting\(^ {45}\) is met by the justification presented earlier that this resolves any potential problems around students believing that they have identified

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38 Ibid 96.
39 Bentley, above n 24, 114. Bentley also states that ‘[d]ialogue between the judge and counsel provides the opportunity for instructors to assess higher level skills of analysis and evaluation rather than lower level skills such as recall of knowledge’: at 117.
40 Wolski identifies the already perceived high demands on instructor time as a prime reason for reluctance to use moots as a form of assessment: Wolski, above n 5, 65. One concern that other academics have raised in private discussions is that the time taken to assess moots generally — that is, not just in respect of providing formative feedback — will be greater than that required for written assignments. Given the design of the moot in this subject — specifically, one hour allocated for an assessment task involving four students — individual written assignments need to be assessed in less than 15 minutes each before the moot, which represents a significant demand on instructor time. The time taken to mark assessments will depend, to an extent, on the design of the relevant assessment task, particularly the complexity of marking. In any event, the experience with this subject has been fortunate in that enrolments have been relatively low (cohorts have been roughly 50 in most years, with no more than 70 in any one year), meaning that any additional demands have been minimised.
41 Ibid 65–6.
42 See also Lynch, ‘Why Do We Moot?’, above n 21, 81.
43 Wolski, above n 5, 53–60.
44 Ibid 54.
a conclusive binding precedent. The concern that this leads to a focus on legal issues to the exclusion of facts is dealt with by not providing the case’s procedural history and instructing students that any and all lines of argument are open. Any students who attempt to argue law in isolation from the facts provided are brought back on track through appropriate questions from the bench (which acts as a form of formative feedback that the student is taking an inappropriate approach in their presentation). Focusing on facts in this fashion avoids any over-reliance on policy arguments.46

In summary, the moot as a form of assessment in the Income Tax Law course at La Trobe University has proved to be quite successful, with students typically reporting that they enjoyed the experience and that they generally learnt more than they believe they would have with a more standard written assignment. These reported experiences are consistent with the intended learning outcomes of the exercise explained in part II above and provide the basis for describing this assessment as successful. The literature demonstrates that mooting is not subject specific (only one paper reviewed dealt with mooting in a tax context)47 and, as such, elements of the model described here may be adopted and adapted to suit other subjects in LLB programs.

46 See ibid 57–8 for an explanation of this concern with traditional mooting.
47 Bentley, above n 24.
REFRESHED IN THE TROPICS:
DEVELOPING CURRICULUM USING A THEMATIC LENS

Kate Galloway*

Distinctiveness in higher education drives the development of university branding as well as informing curriculum development. The School of Law at James Cook University (JCU) is presently involved in a ‘curriculum refresh’, based on developing its LLB in terms of JCU’s own claim to distinctiveness as the University for the Tropics. The challenge of developing a ‘tropical’ identity for a professionally-accredited degree has so far involved a two-stage process. First, the project sought to establish the particular claims to distinctiveness of other LLB programs in Australia through a review of selected law school websites. The websites’ presentations of the law school’s focus were analysed according to the perceived nature of approaches to curriculum, thus linking the ‘product’ presentation on the web with philosophical approaches to curriculum design. This offered an insight into the diversity of approaches to teaching law in Australia. The second phase has involved analysing the idea of the tropics to establish a means of conceptualising the university’s distinctiveness agenda in a way that would resonate with stakeholders. The focus on this aspect of the project has involved developing a ‘thematic lens’ that would lend itself to informing curriculum design in a sustainable way. Using the case study of the JCU LLB refresh, this paper explores the possibilities for invigorating curriculum through a focus on philosophical and thematic underpinnings.

I. INTRODUCTION

Since 2009, JCU has been undertaking a university-wide refresh of its curricula, supported by a grant from the Australian Government, Department of Education, Employment and Workplace Relations.1 While the refresh was framed around a number of curricular elements,2 the underlying rationale was enhancing the university’s distinctive role as Australia’s university for the tropics. As lawyers, it is perhaps of interest that, unlike most other Australian universities, our role as the university for the tropics is embedded in s 5 of the James Cook University Act 1997 (Qld), which identifies our functions as (amongst other things):

(b) to provide facilities for study and research generally and, in particular, in subjects of special importance to the people of the tropics; and

(c) to encourage study and research generally and, in particular, in subjects of special importance to the people of the tropics; …

* Senior Lecturer, School of Law, James Cook University, Cairns. The research for this paper was undertaken during the author’s appointment as faculty curriculum scholar as part of the JCU Curriculum Refresh Project, ‘Australia’s University for the Tropics’, funded by the Australian Government Department of Education, Employment and Workplace Relations through its Diversity and Structural Adjustment Fund and by James Cook University.

1 ‘Australia’s University for the Tropics’, funded by the Australian Government Department of Education, Employment and Workplace Relations through its Diversity and Structural Adjustment Fund and by James Cook University.

2 Teaching research nexus; reviewed assessment practices; work integrated learning; sustainability; external reference groups; access pathways for equity groups; first year; flexibility; innovative technologies to support student learning; Aboriginal and Torres Strait Islander knowledge, perspectives and experience; graduate attributes; internationalisation. See James Cook University, Curriculum Refresh (8 November 2010) <http://www.jcu.edu.au/curriculumrefresh/about/index.htm>.
While, in many disciplines at JCU, law included, this ‘statutory’ tropical focus had perhaps been underplayed or ignored, the current university-wide refresh requires academic staff to articulate how they would legitimately address the university’s charter. Regardless of a statutory mandate for curricular focus, all contemporary universities operate within a strategic planning framework and will be required to align their degrees with the university’s vision and mission. In this respect, the JCU project is no different.

The School of Law project is funded from the University-wide project, and revolves around finding a distinctive identity within these curricular elements and the tropical focus in particular. This has provided the opportunity for the JCU LLB to develop a distinct identity amongst LLBs nationally, that is reflected throughout a deliberately-designed curriculum through a ‘thematic lens’ of tropicality. Taking such a theme as a foundation for a law curriculum differs significantly from the approach of many different developments within Australian (and other common law) law degrees, over the past three or so decades, that have focused on integrating a more contextual and critical approach to law, and the introduction of a more skills-based curriculum. Likewise, it differs from contemporary issues facing Australian tertiary education curricula including globalisation or internationalisation, integrating Aboriginal and Torres Strait Islander perspectives and knowledge and sustainability education, and the issue particular to the law — student mental health.

These themes and issues, the adoption of discipline standards for law, the new quality standards regime, increasing competition and the findings of the Bradley Report together represent the contemporary higher education landscape within which a small regional law school is expected to compete. Distinctiveness, at the foundation of the JCU curriculum refresh,

3 Ibid.
8 Norm Kelk et al, Courting the Blues: Attitudes towards Depression in Australian Law Students and Lawyers (Brain and Mind Research Institute, 2009); Massimiliano Tani and Prue Vines, ‘Law Students’ Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?’ (2009) 19 Legal Education Review 3.
9 Sally Kift, Mark Israel and Rachael Field, Learning and Teaching Academic Standards Project: Bachelor of Laws: Learning and Teaching Academic Standards Statement (Australian Learning and Teaching Council, 2010).
represents the interface between government policy, market objectives and curriculum design — the creation of a marketable ‘product’ that fulfills a policy of universal higher education and quality standards, while representing best practice in curriculum design.12 The challenge lies, therefore, in meeting these diverse contemporary imperatives in a cohesive way.

This paper examines how the JCU LLB has met this challenge. First, it provides an overview of the LLB landscape in Australia before clarifying an understanding of ‘curriculum’ based on recent literature. The next part analyses a selection of LLB websites to identify how curriculum may look distinctive based on a broad ideological approach, to identify where the JCU LLB may find its point of distinction. Finally, in terms of this point of distinction, this paper identifies how the tropical theme might relevantly inform curriculum in the context of a discipline that is not usually associated with the tropics. It will tell the story of how JCU is working with the idea of the tropics in developing a distinctive cohesive, relevant, contemporary — and compliant — law degree.

II. THE LLB LANDSCAPE IN AUSTRALIA

The evolution of Australian LLBs is well-described by others in the literature.13 In spite of the introduction of critical thinking and contextual approaches to law, contemporary developments in teaching and learning, and the evolution of approaches to teaching law, the law degree remains largely content-based.14 This is arguably a product of the ‘Priestley 11’15 which prescribe subject areas and content. It could not be argued, however, that the law curriculum is any more dictated by its accrediting body than other professional disciplines16 and, to this extent, there should be nothing to obstruct the development of innovative and distinctive curricula. The possibility for a distinctive law curriculum and the means by which this is achieved seems to depend on one’s perspective. For example, nearly a decade ago, Johnstone and Vignaendra identified a variety of ways in which Australian law schools perceive their distinguishing features.17

In terms of distinctiveness, Johnstone and Vignaendra cited Australian law schools’ responses to finding a ‘niche’ or being distinctive. While some sought to ‘develop their own particular vision of legal education’, others described ‘a long-sustained approach to legal education’.18 Importantly, one school said that it was:

not just positioning and distinguishing, it is all pedagogically driven … We are not just inventing diversities. I think that it’s fair to say that there is a serious scholarly basis which underlies what we are doing.19

In their study, Johnstone and Vignaendra noted that, ‘for most schools, the concern is with distinguishing themselves within their local (city or state) market, rather than nationally’.20 In today’s arguably even more global marketplace (even for law degrees and law graduates),21 differentiation takes a different form and universities are being put not just on the national but the international stage. In an increasingly market-driven higher education environment, distinctiveness becomes important for survival. It is suggested that differentiation based simply

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13 Parker and Goldsmith, above n 4; James, above n 4; Thornton, above n 4; Davis, above n 4; Kift, above n 4.
14 Davis, above n 4.
15 In Queensland, this is contained in Supreme Court Admission Rules 2004 (Qld), Attachment 1.
16 Such as medicine, dentistry, education, etc.
18 Ibid 32.
19 Ibid 31–2.
20 Ibid 31.
21 Kift, above n 4, 4.
on marketing is not sufficient if we seek to provide a program with intellectual integrity. Any claims about curriculum in a marketing sense must therefore result from a deliberately-designed program. It is likewise suggested that differentiation is entirely possible within the accredited LLB curriculum and that, unlike some may suspect, a law degree and standards imposed upon it do not constrain a law school or its students to a singular national curriculum.

This of course prompts the question — what do we mean by ‘curriculum’ in legal education?

III. MEANING OF CURRICULUM

Owen Hicks, in 2007, provided a comprehensive overview of the state of the concept of ‘curriculum’ in Australian higher education in which he identified ‘the dearth of writing on the subject’. Hicks surveyed internet sites of Australian universities, only to find one institution that had provided a clearly stated definition. In all other cases, he reports an impression that it is ‘something partial, used atomistically, in a limited and assumed way, usually attached to some other issue.’

Hicks provides a cogent argument about the need to understand the ‘unifying potential of curriculum, defined broadly.’ Relevantly here, he identifies how this approach can ‘re-position or re-shape disciplines and discipline based courses’ — the very intent of the JCU curriculum refresh. In particular, the genesis of the LLB refresh project lay in the observation that while academic staff may ‘cover’ the graduate attributes and curricular foci — internationalisation, Aboriginal and Torres Strait Islander perspectives, etc — there was no systematic approach to the design of a unified ‘program’ that brought together not just content or an approach to teaching, but the diverse elements of contemporary teaching and learning practice and ‘key issues in higher education’.

Importantly also, the idea of a ‘program’ implies something bigger than the directly assessed subject or unit — what has been described as a ‘broad’ curriculum. In Hicks’ paper, this reflects the ‘how’ — the nature and quality of the learning opportunities provided, which on a curriculum-focused student learning model, would ‘integrate into other aspects of the development and delivery of the learning opportunity’. Importantly also, it recognises the need for a more holistic approach to the design of curriculum — something that could be referred to as a ‘thematic lens’ or an:

interdisciplinary approach to instruction. This approach focuses on one concept, and seeks to define and describe that concept through a variety of perspectives and fields of study. The benefits of the thematic lens approach to learning are both the ability to look deeper into a single topic, and to gain a broad, cross-disciplinary understanding of said topic.

While there appears to be little in the literature, this approach to curriculum design draws on the work of Erickson. Erickson uses the context of academic standards in US schools to explore

23 Ibid 4.
24 Ibid 1.
25 Ibid 1.
26 Ibid 1.
28 Hicks, above n 22, figure 4.
30 H Lynn Erickson, Concept-Based Curriculum and Instruction: Teaching beyond the Facts (Sage, 2002).
the use of concepts — or a thematic lens — in curriculum design. She observes that the pressure of meeting academic standards is high but that there is a tendency to interpret ‘raising standards’ as ‘learning more content’, but that ‘the standards and newer assessments assume that students will demonstrate complex thinking, deeper understanding and sophisticated performance.’

Erickson could be describing the move towards discipline standards in the Australian tertiary context and on this basis, her proposed solution to meeting national standards provides inspiration for the means by which the LLB might evolve from the traditional focus on content while incorporating elements of contemporary curriculum design.

Of particular resonance is Erickson’s description of the structure of knowledge and traditional curriculum in terms of facts and topics as lower order thinking skills — content. Acknowledging that these are important, she illustrates that above these sit concepts and theory as higher order analytical skills or approaches.

![Figure 1](image)

The lower order skills, involving learning content (or in Erickson’s terms, ‘facts’) are known to be a feature of law school curricula world wide. Arguably, this focus on content rather than context limits students’ experience of law as a holistic mechanism. Using a thematic lens seeks to remedy this traditional approach to the law curriculum that segregates the discipline into silos of ‘knowledge’.

Embracing a wider definition of curriculum is likely to be necessary to respond to the new regulatory framework. The recent TEQSA Discussion Paper for example suggests that teaching standards ‘include curriculum design, the quality of teaching, (and) student learning support …’ In addition the increasing complexity and layers of reporting (accreditation, graduate

31 Ibid 2.
32 Ibid xi.
33 Ibid 4–5.
34 Ibid 5 (adapted).
35 Ibid.
36 Davis, above n 4, 3–4.
attributes, standards to name a few) will require us to think of curriculum in a more complex way.

Understanding curriculum in this wide and more conceptually cohesive sense facilitates the JCU refresh of the LLB, making it possible for curriculum to embody a number of themes, a number of processes and a number of ways of learning. This was the foundation for exploring other Australian LLB programs to identify how JCU might express its own distinctiveness in the national market, within the curriculum refresh framework.

IV. ANALYSIS OF OTHER LLB CURRICULA

In assessing the way in which the JCU curriculum could be distinctive, the first part of the LLB refresh looked at the approaches to the LLB curriculum taken by a number of other Australian law schools. The project was interested in exploring how other law schools represented their degrees to the public in terms of the JCU refresh themes. For this reason, this part of the project relied on the external manifestation of law school websites as one means by which to gauge an institution’s view of itself.

Initially a desktop review of Australian law school websites identified the extent to which law schools appeared to embody the curriculum refresh key themes. These law schools were narrowed down to those that represented their degrees in terms of the highest number of the JCU refresh themes. Those that were ultimately selected also delivered an LLB in a context more aligned with that of JCU (by size, demographic of cohort, resource base and location). A similar, though more detailed, approach was taken by Johnstone and Vignaendra.

A review of Deans’ welcomes and course overviews located on the selected law schools’ websites revealed that each LLB was represented in terms of a particular focus. While each law school could claim a different focus, there appeared to be four primary approaches taken: emphasis on discipline focus; practical skills; service to community; and external cohort. While not stated explicitly by the institutions involved, the different types of ‘distinctiveness’ that seemed to be represented by law schools on their websites aligns somewhat with different ideological approaches to curriculum design:

a) scholar academic (discipline based);

b) social efficiency (practical skills);

c) learner centred (external cohort); and

d) social reconstruction (service to community).

These different categories are loose, and they overlap. However reviewing the websites of different law schools by reference to these approaches highlights particular emphases in their approach to their LLBs. For the JCU refresh, these approaches provide a useful point of reference for curriculum design, and give clues about how the curriculum might be developed from one of these particular standpoints.

The discipline focus took a number of different forms. Deakin University for example has deliberately positioned itself as a commercial degree, supported also with practical skills. In this case, the practical skills align with the commercial focus (while also representing a

38 James Cook University, above n 2.
39 The schools ultimately included in the website survey include: QUT, Griffith University, University of Southern Queensland, Southern Cross University, University of New England, Newcastle University, Deakin University, Flinders University, Murdoch University and Charles Darwin University.
40 Johnstone and Vignaendra, above n 17.
second category of approach).\textsuperscript{42} In contrast, Murdoch University takes a thematic approach of internationalisation both within elective subjects but also in facilitating international links and opportunity for student travel.\textsuperscript{43} Charles Darwin University focuses on ‘issues of special significance to the Northern Territory, including Aboriginal legal issues and South East Asian law’.\textsuperscript{44}

Griffith University takes the discipline focus in a different direction again, vertically embedding ‘ethics, legal theory, Indigenous issues, and internationalisation’.\textsuperscript{45} This aspect of the Griffith LLB will inevitably overlap with the community service focus.

As with discipline focus, practical skills likewise was represented as a broader, more overarching course attribute, or a more particular one — depending on the school. Of the schools surveyed, Queensland University of Technology (‘QUT’) probably has the most identifiable and embedded branded approach to practical skills development. Having branded itself the ‘university for the real world’,\textsuperscript{46} the entire curriculum is designed with ‘real world practice’ embedded within it. The most striking point of distinctiveness in these terms, is the requirement that every student has the opportunity to participate in a work integrated learning subject.\textsuperscript{47} Legal skills however are also included throughout the curriculum, taught by ‘real-world academics’.

Deakin University provides a slightly more particular approach, aligned with its discipline focus on commercial law:\textsuperscript{48} ‘Law students will emerge from Deakin with a broad technical competency, a specialisation in commercial law and an appreciation of how the law operates in practice’ and students are required to complete 30 days in legal practice to ‘enrich’ their legal education.

Many of the law school sites surveyed represent their external offerings as distinctive — often through university branding rather than the school itself. Southern Cross University has promoted itself as a quality provider of distance education. Likewise, Universities of Southern Queensland and New England cater specifically for external students.\textsuperscript{49}

Service to community is reflected in terms of a social justice agenda and ethical persona. Griffith (where ‘social justice is hard wired into [their] values’\textsuperscript{50}) and Southern Cross Universities (where the School of Law and Justice aims to ‘enhance the cultural, social, economic and intellectual development’ of the region\textsuperscript{41}) could be regarded as having the strongest focus on this idea, and Charles Darwin University’s focus on issues of relevance to the Northern Territory,
including Indigenous legal issues, may likewise be seen to represent distinctiveness in terms of service to community. Griffith University also aims to ‘nurture students that are passionate, idealistic, and committed to critical thinking. We also want our students to respect diversity, to value tolerance for different ideas and ways of understanding and to, above all, respect justice.’

Reflecting the basis for selection of the law schools reviewed, these four approaches to curriculum are reflected in the web presence of each law school in terms of the JC refresh themes. For example Griffith and Southern Cross Universities are focused on serving community and so ethics and social justice, through JCU’s focus on Indigenous perspectives and pathways, are embedded within their degrees. For schools that see their location as central to serving community, there is a focus on JCU’s curricular elements of external delivery and flexibility.

The project team had some considerable discussion about where any ‘gap’ might lie, in terms of JCU’s curriculum priorities. It was observed that in the websites surveyed, there was little if any mention of ‘sustainability’ within the curriculum. Accordingly, it seemed that there was scope to interpret this theme in a way that would provide a thematic focus for curriculum that was distinctive amongst the offerings of the surveyed institutions.

Consequently, the proposed outcome of the next phase of the project is to adopt and embed ‘sustainability’ in all awards offered in the School to provide it with both distinctiveness but also the potential to represent the tropics within the curriculum. This phase of the project is occurring now. This prompts the question, however, of how this might feed in to the overarching focus of the tropics. This would require representing JCU’s unique tropical focus through the conceptual device of sustainability. To do so requires an appreciation of what the tropics might mean within our discipline, and a framework for a thematic lens in curriculum.

### V. Tropical Law?

It is highly unlikely that any lawyer, even those who have practised or do practise in the tropics, would find any meaning in ‘tropical law’. The common understanding of the tropics focuses primarily on a location between the Tropics of Capricorn and Cancer — a location that does not represent any particular jurisdiction known to the law. To find such a meaning, a review of literature in the field of cultural geography reveals a variety of much broader and richer meanings of the tropics.

In the same way that the ‘north-south divide’ is no longer truly representative of a location literally north and south of the equator, so too can the tropics be untethered from its literal geographical location. Arnold for example identifies tropicality as a ‘discursive representation of the tropics’ and that it embraces a ‘variety of cultural tropes’. Livingstone builds on this to point out that ‘tropicality … is as much a conceptual as a physical space’. The notion of the tropics as a ‘geography of the mind’ is a useful starting point for developing a ‘thematic lens’ to inform a distinctive curriculum.

Starting at Erickson’s highest conceptual level of ‘theory’ is the tropics. As a concept, the tropics has a deep cultural underpinning grounded in European notions of self. From the time of the ancient Greeks, the climate of the tropics was perceived as hostile and its peoples exotic. This theme continued and informed the voyages of discovery and approaches to the new world. The tropics was simultaneously fecund and diverse, as well as degenerate, depraved, abnormal, abnormal,

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53 James Cook University, above n 2.
56 Erickson, above n 33.
foreboding, dangerous, deceptive and pestilent.57 It was a place of immorality where the white man (sic) would slip into indolence and sexual proclivity — a place to be tamed and controlled. This perception of the tropics informed the science and medicine of Victorian times and existed into the 20th century, including in the seminal geographical work of Pierre Gourou in 1947.58

All this recognises that the tropics is so much more than a place. Indeed geographers and climate scientists disagree about its definition in scientific terms — the tropics might be defined based on average temperature, rainfall, soil type, astronomical location — the list goes on. On some reckonings, Townsville itself would be excluded from a tropical location.

The tropics of the mind is perhaps most influenced by Orientalism and Edward Said’s thinking about the discourse surrounding things oriental as a European positioning and creation of something that did not actually exist other than within the European mind. Like ““darkest Africa”, the “Orient” and the “Pacific world”59 the ‘geographical imaginary of the tropics [is] an interpretive frame, constructed, enacted and disciplined in the process of European expansion into the tropical world’.60 As JCU deepens its understanding of its identity as the university for the tropics, this traditional imagery needs to be challenged and re-imagined in a positive sense.

And this is where the tropics takes on meaning as a conceptual lens for our curriculum — for the tropics is not only a literal place, but is also an idea that still encompasses exclusion and exploitation and ‘otherness’ in terms of a European hegemony. For JCU to become the university for the tropics involves engaging in teaching (and research) that seeks to counter this historical approach through a focus on countering the negative space of the idea, focusing instead on sustainability and representation of peoples of the tropics in their own terms.

In terms of the LLB, this means teaching and researching critically — challenging traditional parameters of colonialism and empire and focussing on models of sustainability in governance; economy and finance; community development; and the environment. The tropics viewed in this sense has potential to bring together diversity of experience and expertise of the law school’s academic staff and its subject program through a common narrative of the experience and vision of those from within the tropics, rather than that of those outside around the key organising principles of governance, economy, community and environment.

In terms of governance, public law subjects — foundations of law, administrative law, constitutional law — would focus on sustainability through the concept of civil society, legitimacy of governance and systemic sustainability as the drivers of the selection of readings, of class activities and of assessment.

For private law — contract, torts, land law — likewise, sustainability of relationships and the balance between public and private, free market and social responsibility are tested through an understanding of the elements of contract, torts and the regulatory system of land ownership.

Social justice — sustainability of community — can be built in to existing foundation subjects but also be represented in, for example, critical approaches to criminal law as well as elective subjects such as human rights.

In each case, the ‘content’ of a subject need not be changed. There is no suggestion of ‘fitting more in’ or ‘losing’ content. Nor is the aim of this conceptualisation is not to pigeonhole any particular subject within a rigid framework. Rather, it offers a conceptual or thematic underpinning from which each academic can make an informed and deliberate curriculum

design decision in terms of their particular interest within their area. In doing so, the underlying conceptual basis affords a means by which each subject in the LLB interrelates with each other.

This wider view also affords an approach to knowledge and intellectual endeavour — one that reflects inclusiveness and rejects exploitation. In the first sense, Aboriginal and Torres Strait Islander knowledge should be represented in curriculum. In the latter sense, intellectual endeavour represents the coming together of the known and the imagined.

VI. CONCLUSION

The distinctiveness agenda has been challenging for a professionally accredited degree. Observing and engaging in discussion with other law schools has in one sense affirmed our own practice without necessarily highlighting how we could do things differently. Overlaying a theoretical framework (Schiro’s) atop practical representations and descriptions of our (JCU) curricular dimensions assists in giving meaning to the distinctiveness agenda and highlighting the differences. But bringing in Erickson’s conceptual or thematic lens as a means of infusing a sense of overall purpose to the curriculum not only brings the elements of the law together, but also provides the opportunity for a depth of thinking and skills development that lends itself to the contemporary focus on a much broader education for our students.

Taking the thematic lens of the tropics in a conceptual rather than a literal (geographical) sense can provide a number of concepts through which to filter the LLB curriculum. Through an overarching statement of what the tropics means for the LLB, concepts that form the foundation of the curriculum refresh project can then emerge to provide a rich environment within which the content of each subject is presented. Rather than learning the elements of each subject through cases or legislation, their exceptions and evolution in a decontextualised environment, a focus on say sustainability — a key concern for the tropical world — can guide teaching and therefore learning.

In looking to the history of peoples of the tropical world, ‘us’ and ‘them’, othering, stereotyping, devaluing of culture of indigenous peoples provides a context for exploring the sustainability of legal systems and of celebrating previously devalued ways of knowing such as indigenous ways of knowing, and the treatment of peoples by the law.

Our students report experiencing an atomistic degree where there is a lack of connection from one subject to the next. Through focus on a thematic lens, we have the opportunity to provide a meaning and context — a narrative and sense of place — that underpin learning and afford the opportunity for a connectedness with learning and the bigger picture of the law.

What this highlights is the importance of a considered and philosophical approach to curriculum development, advancing alignment of curricula in an authentic way. While this has the happy outcome of satisfying strategic direction, it likewise provides an exciting, legitimate and consistent focus for curriculum development.
WALKING THE WALK: USING STUDENT–FACULTY DIALOGUE TO CHANGE AN ADVERSARIAL CURRICULUM

MOLLY TOWNES O’BRIEN

I. INTRODUCTION

The law school curriculum has come under fire for being overly adversarial,1 hierarchical,2 patriarchal,3 distressing4 and dull.5 Internal critiques of the legal curriculum take their place alongside external pressures for change from both legal practice and higher education sectors, which are undergoing rapid and transformative changes under the pressures of globalisation, competition and developments in information technology.6 In this climate, law school curricular reform has become a hot topic across Australia and around the world. Concerns about law student wellbeing, in particular, are generating momentum for genuine change.7

Scores of journal articles, theses and books have been written critiquing the legal curriculum and suggesting a wide variety of curricular changes to address the shortcomings. Many legal educators have engaged in thoughtful analysis and explication of what needs to be changed in the law school curriculum.8 Few, however, have focused on how to gain consensus for any particular change or begin to implement it.9 The ‘how to’ aspect of legal curricular reform is

* Associate Professor at ANU College of Law, Australian National University.
2 Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic against the State (New York University Press, 2004), which critiques the hierarchical nature of legal education.
4 Norm Kelk, Sharon Medlow and Ian Hickie, ‘Distress and Depression among Australian Law Students: Incidence, Attitudes and the Role of Universities’ (2010) 32 Sydney Law Review 113, which discusses research showing that law students experience higher levels of psychological distress than their peers.
5 Annan Boag et al, Breaking the Frozen Sea: The Case for Reforming Legal Education at the Australian National University (ANU Law School Reform Committee, 2010) iii-iv <www.lawschoolreform.com>, which raises various critiques of the law curriculum, including that it is irrelevant and not engaging.
7 See Law Student Wellbeing: An Educational Imperative? (2011) 21(2) Legal Education Review (forthcoming), a volume which is entirely devoted to issues relating to law student wellbeing.
generally only revealed by implication. For example, Elena Kagan’s description of the much-heralded 2006 reform of the Harvard Law School curriculum describes the content of the reform and leaves the decision-making and implementation process largely to the imagination.10 Similarly, in his article titled, ‘The Law School Curriculum: The Process of Reform’, John Weistart maps out trends in curriculum reform and discusses constraints on reform (such as cost), but never actually broaches the subject of how law schools actually accomplish change.11

Nevertheless, the difficulty of implementing sustained reform in law schools is widely acknowledged. Law school culture has been described as ‘so powerful and robust that it has fought off almost every major reform effort.’12 In their critique of law school’s culture of competition and conformity, professors Sturm and Guinier suggest that, in order to address deeply-embedded practices, law school reformers need to ‘invite all of legal education’s constituencies’ — including ‘students, faculty, alumni, lawyers, legislators and judges’ — into the legal educational reform project ‘from the very beginning and throughout the process’.13 Genuine law school reform, they argue, requires cultural change which may be accomplished and sustained only with the support of all affected.14

Gaining and sustaining the support of all law school constituencies for any particular program of reform is no mean feat. Academics are notoriously independent and resistant to change; leading them is frequently compared to herding cats.15 Similarly, the interests and needs of legal practitioners, legal and non-legal employers, and students are diverse and sometimes conflicting. Further, the questions relating to what future lawyers will need to know and how best to teach them are value-laden questions whose answers will differ based on the mission, history and ambitions of the institution and its students. The question of how to effectively engage all of the law school’s constituencies into the process does not have an obvious answer. Law faculties are familiar with the idea of consulting the profession about the legal curriculum.16 They are also familiar with conducting surveys of alumni and, perhaps, focus groups with employers and judges.17 These consultative processes are undoubtedly helpful in providing information for decision-makers and in building support for particular reforms. Consultative processes frequently fall short, however, as they fail to change the views of the various constituencies, resolve conflict or build consensus.

This paper does not propose to resolve the question of how best to choose and implement curricular reform. Instead, it draws on the recent experience of a student–faculty dialogue retreat focused on student wellbeing and curricular reform, and suggests that student-faculty dialogue contributes positively both to curricular reform efforts and to general student wellbeing.

14 Ibid.
15 See, eg, Geoff Carrett and Graeme Davies, Herding Cats: Being Advice to Aspiring Academics and Research Leaders (Triarchy Press, 2010).
II. A DIALOGUE PROCESS

In 2009 a study by the Brain Mind Research Institute (BMRI) concluded that law students suffer from higher levels of depression than their peers.\(^{18}\) The study presented a powerful indictment of legal education: law study is creating measurable psychological harm; it needs to change. At the ANU College of Law, where we had already implemented a first-year mentoring program and where counselling was readily available in the University Counselling Centre, we wondered whether it was possible that our law students might not exhibit the level of psychological symptoms of distress shown in the BMRI study. But if our students were distressed, what would be the best institutional response?

In 2009–10, Kath Hall, Stephen Tang and I surveyed students at the ANU College of Law on various measures of wellbeing.\(^{19}\) We also looked at data relating to student thinking styles and motivations for attending law school. Our results were consistent with a growing body of research indicating that legal education may have a negative impact on law students’ wellbeing beginning in the first year of law study.\(^{20}\) These results challenged us and moved us to begin thinking deeply about the reform process.

A. The Need for a Deliberative Process

Many law students want to be involved in law school reform — and, in fact, are clamouring for a voice in curricular decision-making through established student organisations\(^ {21}\) and through ad hoc organisations that make use of the internet to share their ideas about reform.\(^ {22}\) The usual methods of consulting with these organisations — holding a focus group, conducting surveys, or allowing one or two student representatives to speak at curriculum committee meetings — are important and can give students a voice; but they are not without problems. Students do not necessarily agree on what reforms are needed.\(^ {23}\) They may not have enough information to make good choices. The representative process of law student societies may provide greater voice to some students and leave others feeling left out. Further, even after student views have been canvassed, law faculties may not take law student views seriously.\(^ {24}\) Law faculties and law school administrators are the traditional decision-makers in legal education. Collectively, law faculties have vast expertise in law, legal practice and curriculum reform. It makes sense that the views and values of the faculty should be given great weight. On the other hand, a reform process that is imposed on students by the faculty may reproduce some of the aspects of

\(^{18}\) Norm Kelk et al, Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners (Brain & Mind Research Institute, 2009) 12.

\(^{19}\) Our work was generously supported by a Vice-Chancellor’s Teaching Enhancement grant and by the Dean of the ANU College of Law.


\(^{21}\) The Australian Law Student Association provides a network for law student associations across Australia: see <http://www.alsa.net.au/>.

\(^{22}\) One such group, Law School Reform, has a website at <http://lawschoolreform.com/>.


\(^{24}\) I make these observations based on 17 years of teaching at six different law schools in two countries. I should note that student views are taken quite seriously at the ANU College of Law, where I currently teach.
legal education that are the targets of contemporary critique — by stifling creativity, reducing
students’ feelings of self-efficacy, and reinforcing a culture of conformity.25

Legal scholars seeking to build a model for an effective remedial process in public disputes
in the US have suggested that deliberative processes, multilateral decision-making, consensus-
building processes and community dialogue hold promise resolving for multi-constituent reform
issues.26 Similarly, recent research by political scientists demonstrates the potential of deliberative
forums for reaching consensus and for providing better policy outcomes.27 In their review of
empirical data relating to new environmental regulations, for example, Freeman and Langbein
found that consensus-building processes yielded better rules.28 The higher quality results of
face-to-face deliberation may be attributable, in part, to superior information production, and to
the ability of the participants to educate each other, to pool knowledge and to share expertise.29
Deliberative processes hold promise not only for generating better reform decisions, but also for
creating and sustaining support for those decisions.30 The reform process itself may also model
some of the reforms that are needed in legal education, bringing greater transparency about
legal educational goals and sense of self-efficacy to students — thus decreasing their sense of
anxiety and distress.

In light of the findings of our research — that students experienced increased symptoms
of psychological distress as early as the first year of law study — we sought a process that
would allow us to examine the law student experience and explore the ways that the pedagogy,
substance and context of legal education impact a student’s self concept, development of
professional identity, and wellbeing. More importantly, however, we hoped to design a process
to provide an opportunity for students and faculty to collaborate and to articulate ideas for
curricular reform. Ultimately, we chose a dialogue methodology.

A ‘dialogue’ is not a fixed, specific process. Instead, dialogue is a flexible format for
deliberation and discussion that can be adapted in a variety of ways to provide an integrative
understanding of real-world problems and/or to provide a process for finding and implementing
solutions. Dialogue is well-suited to situations where it is important to synthesise knowledge
from a variety of sources or disciplines and build a comprehensive understanding of a complex
problem.31 It is also adaptable to provide a collaborative platform for multi-constituent problem-
solving or conflict resolution.32

Patricia Romney explains:

Dialogue is focused conversation, engaged in intentionally with the goal of increasing
understanding, addressing problems, and questioning thoughts or actions. It engages the heart
as well as the mind. It is different from ordinary, everyday conversation, in that dialogue has a
focus and a purpose. Dialogue is different from debate, which offers two points of view with the
goal of proving the legitimacy or correctness of one of the viewpoints over the other. Dialogue,

25 Sturm and Guinier, above n 13.
26 Michael A Rebell and Robert L Hughes, ‘Schools, Communities, and the Courts: A Dialogic
Approach to Education Reform’ (1996) 14 Yale Law and Policy Review 99, 113–19; Susan P Sturm,
27 John S Dryzek and Avizer Tucker, ‘Deliberative Innovation to Different Effect: Consensus
Conferences in Denmark, France, and the United States’ (2008) 68 Public Administration Review
864; Simon Niemeyer and John S Dryzek, ‘The Ends of Deliberation: Metaconsensus and
28 Jody Freeman and Laura Langbein, ‘Regulatory Negotiation and the Legitimacy Benefit’ (2001) 31
Environmental Law Review 10 811.
30 Freeman and Langbein, above n 28, 10 814.
31 David McDonald, Gabriele Banmer and Peter Deane, Research Integration Using Dialogue
32 Geoffrey Cowan and Amelia Arsenault, ‘Moving from Monologue to Dialogue to Collaboration:
The Three Layers of Public Diplomacy’ (2008) 616 The ANNALS of the American Academy of
Political and Social Science 10.
unlike debate or even discussion, is as interested in the relationship(s) between the participants as it is in the topic or theme being explored. Ultimately, real dialogue presupposes an openness to modify deeply held convictions.33

Niemeyer and Drysek explain further that ‘authentic deliberative engagement requires an open mind in a spirit of reciprocity.’34 Although it may not yield perfect consensus or ‘the right’ policy choice, it results in a kind of inter-subjective rationality that ‘can legitimately claim superiority to the extent that individuals have taken into account all the relevant considerations’.35

We considered a dialogue process to be particularly appropriate for several reasons. Because of the sensitivity of the topic, we wanted to create a forum that would not only shed light on the wellbeing of law students generally, but also contribute in a positive way to the wellbeing of the participating students and faculty. A dialogue has the potential to build relationships, to empower students, and to create a platform for further student–faculty interaction. Dialogue can also allow participants to express their experience through stories,36 and empower them to become the authors of new stories.37 We also chose dialogue as a buffer against the adversarial and ‘debate’-style discussions that are stereotypical of law school discourse.38 Dialogue was chosen to model a different way of relating and communicating, allowing participants to embrace new ideas and acknowledge differences of opinions without having to be ‘right’.

B. Observations from the Dialogue

We held a two-night, one-day faculty–student dialogue retreat at the ANU’s Kioloa Coastal Campus, a 348-hectare field station extending from the high-tide mark into bushland on the southeast coast. We had 18 students and 10 faculty participants, who engaged in a multi-session process that involved story-telling, re-imagining legal education, brainstorming reform and sharing ideas. The process also involved sharing meals and social times. The results of the dialogue retreat, including specific ideas for curriculum reform that were generated there, are reported at length elsewhere.39 In this section, I seek to illuminate why and how a dialogue process is likely to lead to meaningful curricular change. I argue that, because dialogue has the potential to reveal the hidden curriculum, to address matters that are not easy to talk about, and to build relationships, it helps both faculty and students develop an improved understanding of the need for reform and generates support for the reforms proposed.

1. Revealing the Hidden Curriculum

What students learn is not limited by what teachers intend to teach. The hidden curriculum is informed not only by the choice of course material (what is taught and not taught), but also by the pedagogy, materials and context of the class.40 Teachers are often unaware of the subtext...
of their classes — and may, in fact, deny that there is any subtext when they are confronted. Nevertheless, it may be the subtext of the curriculum rather than what we intend to teach that is at the core of student distress.

In dialogue with students, the subtext of teaching can become explicit in a way that it would not in a curriculum committee meeting or in a regular office consultation between a student and faculty member. In one dialogue session, for example, participants (both students and faculty members) were asked to describe the impact that law study had on them, their personalities and their thinking styles. Participants took time in small groups to think about the impact of what they had learned. When they returned, one student remarked, ‘[l]aw school teaches that we should be able to answer any question in 20 minutes’. The student then explained that he had learned that he should appear confident and be superficial in his analysis of legal issues because he never had more than a few minutes to analyse a question on an exam. Faculty members in the group objected, saying that they did want students to take time to engage in in-depth analysis. They had to acknowledge, however, that the traditional exam format favours quick analysis over in-depth treatment of issues. This opened the door for discussion of the pressures and constraints of legal teaching that often result in assessment through a timed, in-class exam.

In this kind of discussion, the hidden curriculum of law classes can be revealed. In dialogue, faculty members who generally focus on the content of their instruction, may hear about the full variety of factors that shape student learning. Many of these factors involve faculty choices, such as the format of assessment tasks, the amount of time that is devoted to collaborative projects, or the kind of feedback that is returned to students. As faculty members hear about the unanticipated and undesirable consequences of their choices, the need for reform becomes clear. They are converted to the cause of reform.

In dialogue, students can gain insight in a similar way into their teachers’ unrealised goals. Informed of the pressures and constraints that led their teachers to make certain pedagogical choices, students’ suggestions for reform become more reasonable and informed. Students and faculty members can then re-focus the reform discussion based on a more explicit understanding of the values, goals and constraints on both sides. This understanding provides better information to support reform ideas and greater motivation for faculty members to change practices that are not producing the learning outcomes they hope for.

2. Understanding and Addressing Issues That Are Not Easy to Talk About

The dialogue revealed sources of student distress and provided more information than a typical curriculum reform survey. In dialogue, participants were willing to reveal their perception that law school lowered their self-opinion and sense of efficacy. They attributed their greater sense of insecurity to a number of factors, including being away from home, being part of a cohort of high-achievers, lacking guidance, receiving negative feedback, and competing in a perceived adversarial context that made it more difficult for them to relate to other students.

Open, emotional discussions have the potential not only to generate understanding and empathy among the participants but also to serve a therapeutic function as well. Students who are able to articulate their feelings and participate in a discussion about how law school has changed their thinking are engaging in a metacognitive process. Metacognition (that is, learning about or reflecting on one’s own mental processes) may have an important role to play in psychological wellbeing. For instance, a person’s tendency to avoid thoughts and feelings is a common feature in psychopathology. On the other hand, a person’s ability to reflect on, narrate and make sense of her or his thoughts, feelings and experiences is associated with wellbeing and psychological

Further, when students are listened to, taken seriously, and responded to, their own sense of value and efficacy is enhanced.

3. Building Mutual Understanding and Respect

In addition to producing ideas for reform, the dialogue led to better relationships among participants. During the final session, one student remarked about the faculty members who participated, ‘I used to see you as robots who just showed up and lectured. It’s nice to know you as people.’ Another student wrote this comment following the retreat:

I feel now that, even if none of the ideas we discussed eventuate, I have nevertheless benefited enormously from the experience. I have renewed appreciation for the efforts put in by teachers, and I now feel I can approach staff and understand better what goes on in the law school, so the weekend has had significant benefit for my own education if nothing else.

III. Conclusion

Across Australia, law school curriculum reform is increasingly seen as an imperative. The problems to be addressed, however, are not the kind that can be resolved by merely adding a new course or changing the approach to a few subjects. Instead, thorough, insightful and meaningful change that reaches not only the official curriculum but also the hidden curriculum and the culture of the law school is required. But cultural change is slow, and it may be difficult to implement a process that can generate meaningful change. As professors Sturm and Guinier point out:

Law school culture is largely taken for granted; indeed, it is invisible unless explicitly confronted and contested. Yet, it mediates and shapes the meaning of every programmatic innovation.43

A dialogue process, involving both students and faculty, has the potential to generate faculty support for, and understanding of, the need for changes in the stated and unstated curriculum. It also holds promise for generating better ideas for specific reforms. Finally, and perhaps most importantly, it is an empowering process for students who engage in it.

If we hope to provide an education for lifelong learners who have ‘robust intellectual capacities beyond mere technical knowledge and narrow vocational training’, it is not enough to ‘talk the talk’ of student engagement. We need to ‘walk the walk’ by creating reform processes that model the values that underlie our educational goals. If we want students who participate, who engage in thoughtful deliberation and who collaborate, we need to encourage those qualities through our own approaches to pedagogy and our work towards reform. It is not enough to say that we will listen to students and consult with them; the reform processes we choose should actively engage, empower and contribute to student wellbeing.

43 Sturm and Guinier, above n 13, 549–50.
44 Kift, above n 6, 1.
TEACHING PLAGIARISM:
LAW STUDENTS REALLY ARE THAT SPECIAL

ANITA STUHMCKE

This paper examines the current narrative of plagiarism and citation style in Australia and argues against using citation style guides as both a cure for plagiarism and as a means to determine the act of plagiarism. The paper suggests that legal education should not promote a narrative of citation where citation style and warnings as to the penalties which will be applied in cases of plagiarism take priority over communicating to students an understanding of the processes and benefits of proper and scholarly attribution of sources.

I. INTRODUCTION

The growing body of Australian and New Zealand literature which discusses plagiarism within the discipline of law focuses upon legal practice. That is, discussion generally examines the impact of findings of plagiarism against legal practitioners;1 the impact of findings against law students — specifically the impact of disclosure of plagiarism upon the ability of a student to be admitted to legal practice;2 whether students who plagiarise should be admitted to legal practice;3 the framing of definitions of plagiarism as an objective or a subject test by universities;4 and the jurisdictional issues of university disciplinary proceedings.5 Within this literature, more nuanced and wide-ranging issues are also discussed, including: the reluctance of courts to be involved in academic decision-making;6 identification and recommendations for the challenges faced by tertiary institutions in this area;7 and differences in plagiarism standards between universities and legal practice.8

This focus in legal writing upon legal practice, courts, university disciplinary bodies and standards of plagiarism should not be surprising for — as Robert Cover points out in his well-thumbed article on nomos and narrative — law is ‘a world in which we live’.9 An inescapable truth is, therefore, that much of our focus as legal academics, lawyers and judges is upon ‘the rules’ and the identification of ‘correct’ and ‘incorrect’ behaviour. It follows that, as guardians

* Professor in Law, University of Technology Sydney. I would like to thank the anonymous referees for their input into this paper.
6 Cumming, above n 4, 97.
7 Freckelton, above n 1, 645.
8 Corbin and Carter, above n 3, 53.
of the legal tradition, we are inclined to fervently embrace both rules of citation and penalties for plagiarism. Within the narrative of law, such rules and penalties inform and give meaning to notions of integrity, esteem and good character which are essential to the legal profession and arguably form the basis of creating a university qualified-quality law graduate. These prescriptions around legal scholarship become, according to Cover’s thesis, part of the normative universe of the world of law which we ‘create and maintain’.10

While I agree with the aims and standards of rules of citation and the application of penalties to law students who infringe university rules, this paper is more concerned with exploring Cover’s warning that ‘we ought to stop circumscribing the nomos; we ought to invite new worlds’.11 As this paper explains, within the context of rising student plagiarism; proposed national legal practice admission rules; increasing judicial decisions concerning the fitness of law students who have plagiarised to be admitted to legal practice; and the rise of a national legal citation style guide, I believe it is timely for us as legal educators to invite in new worlds and ways of teaching plagiarism. The old way of doing things does not seem to be working.

Educating students as to how to avoid plagiarism must necessarily involve thinking deeply about what we desire a student to learn about ‘plagiarism’, attribution and citation. Our current narrative, which seems simply to posit plagiarism as something to avoid, reduces our ability to create a narrative whereby we can impart to students the value of good scholarship and the intrinsic learning that will take place from appreciating and acknowledging sources.

To explore how the current narrative operates and what we can do to change it, this paper is divided into two parts. The first part examines the current narrative context within which rules of legal plagiarism are framed and understood. The second part explores how the legal academic may invite in new worlds to recontextualise the narrative of plagiarism and to teach the topic of plagiarism effectively.

II. UNDERSTANDING THE NORMATIVE UNIVERSE OF LAW SCHOOL PLAGIARISM

Due to the nature of the discipline of law, the form and style of legal writing is unique. This is not intended to imply that all is well in legal scholarly writing. As Rodell, in a now famous article on the nature of the law review, states, ‘there are two things wrong with legal writing. One is its style. The other is its content’.12

That noted, traditional research and scholarly writing in law has been largely limited to doctrinal research;13 meaning that law academics, and thus their students, traditionally write so as to compare, contrast and analyse existing materials. Much legal writing is thus content-driven and is often rich with attribution to cases, statutes, secondary sources of law and a wide variety of other sources of writing and media which facilitate analysis of relationships between rules. The essence of law and the craft and skill of legal practice is precision and wordcraft, so legal writing must also be accurate. As Alan King states (on an Ed Sullivan retrospective):14

10 Ibid.
11 Cover, above n 9.
The other day my house caught fire. My lawyer said, ‘Shouldn’t be a problem. What kind of coverage do you have?’ I said, ‘Fire and theft.’ The lawyer frowned. ‘Uh oh. Wrong kind. Should be fire OR theft.’

This joke reveals important aspects of the skills of law: accuracy, analysis and an awareness and understanding of a wider environment against which statements will be judged and agreements weighed. In legal writing, these skills are used extensively. To promote accuracy, an essential component of the doctrinal nature of legal research and writing is correct citation of sources. Accurate reference to legal authority, such as cases and statutes, is critical both for legal scholarship and the practical day-to-day operation of courts and law-making bodies such as Parliament.

The understanding that legal writing is a particular style of expression which is both dense and simultaneously highly accurate provides one lens through which to view the rules of citation. In other words, doctrinal writing and accuracy in using legal authority creates and sustains narratives around legal citation. In line with Cover’s expectation that law is a world unto itself law, as a discipline, it has developed its own systems and standards of citation. Law is not alone in this practice: citation is of interest to any academic discipline. Ensuring proper attribution is, after all, the fundamental tenet of avoiding plagiarism and good academic writing.

In law, the most famous exemplar of a guide to correct legal citation is the American Bluebook. Now in its 19th edition, the Bluebook is the generally-accepted citation guide which applies to the discipline of law across the United States. It is a joint endeavour by the Columbia Law Review, the Harvard Law Review, the University of Pennsylvania Law Review and The Yale Law Journal. The fact that it is a joint endeavour of many law schools promotes the Bluebook as a singular, highly-esteem standard across the US. The Bluebook symbolises the global legal fixation on citation. This fixation is growing. For example, in Australia, there is an increase in the citation of authority in judgments. In the High Court in 1920, there were six citations per judgment; in 1980, the figure was 10.6; and in 1996, it was 43.9. There are other signs which give rise to the issue of citation as a discourse unto itself, such as a growing number of studies devoted to analysis of in-court citation.

Indicative of this assertion has veracity is the inevitable production of, and now almost near-universal prescription of, an Australian version of the Bluebook — the Australian Guide to Legal Citation (AGLC), now in its third edition. Professor Hilary Charlesworth states, in the ‘Foreword’ to the current edition:

the third edition expands and updates earlier versions of the Guide. Now legal scholars have a stern but reliable guide to the vexing issue of the use of ellipses in quotations, or the citation of parties’ submissions in court cases. The distinction between em- and en-dashes is helpfully explicating.


[the longstanding use of footnotes is a distinct feature of decisions of the High Court of Australia. They are still not used in the authorised reports of other courts of final jurisdiction in English speaking nations of the Commonwealth … The increased number and greater content of citations is almost certainly influenced by the use of footnotes because they are a device that permits authors to include parenthetic and additional references that might not be included if ‘in text’ referencing was used.
Later, Professor Charlesworth observes that ‘citation practices are akin to musical scales — technical exercises that ground scholarly sonatas.’

There is, of course, nothing inherently wrong with the rules and conventions which surround legal citation. Indeed, conventions have a long history; for example, in England there was a convention that no living author could be cited in court judgments. And referencing is a necessary exercise. Indeed, as Rodell somewhat cheekily states, ‘every legal writer is presumed to be a liar until he proves himself otherwise with a flock of footnotes’. Citation performs the important function of both avoiding plagiarism and ensuring correct attribution. In the discipline of law, citation has its own normative universe, created and sustained by a narrative which promotes attributes such as accuracy, consistency, uniformity and inflexibility. The ‘flock of footnotes’, as Rodell refers to them, must be correctly and uniformly presented according to an accepted legal style guide.

At first blush, the application of a style guide as to accurate citation seems harmless enough — especially as many of us may secretly aspire to write ‘scholarly sonatas’. Arguably, however, harm may arise when law students are expected to produce such scholarly sonatas — both in terms of citation style as well as referencing quality and content. I, for one, admit to being guilty of this desire and can justify my expectation on the grounds of good scholarship and academic practice. However, if our expectations of accurate citation style are too high, we may put our students in peril. As the Macquarie Law School currently states on its website, ‘you can lose marks or even worse, be accused of plagiarism because of sloppy and incorrect citation.’

A brief survey of statements made by universities which offer law reveals the extremely thin ‘blue’ line between poor application of citation rules by students and subsequent allegations of plagiarism. For example, the Australian Catholic University warns that plagiarism can occur if you ‘lack familiarity with the conventions of referencing’; at the University of New England, ‘poor or sloppy referencing will cost you marks, but this is not the worst thing that can happen’; at the University of New South Wales, ‘inaccurate references or — worse still — no references at all can be regarded as plagiarism’; at the University of Western Sydney, ‘strategies that will ensure that you are not inadvertently or accidentally plagiarising include … excellent referencing in footnotes and bibliographies, indicating your control of the research material’; and the La Trobe University Law Faculty states that:

Instances of inadequate referencing will, moreover, usually appear to the reader as no different to plagiarism, and so you run the risk of an allegation of plagiarism even if your inadequate referencing was genuinely unintentional. Even if your marker is satisfied that your inadequate referencing was not intentional, you will still lose significant marks, and possibly fail the assessment in question. So take care to ensure that you are aware of the requirements concerning referencing and check your work for any instances of inadequate referencing …

It cannot, however, be claimed that this approach is uniform. There are institutions which offer law that do not adhere to the view that inadequate referencing and poor use of citation styles may lead to allegations of plagiarism. For example, Central Queensland University (CQU) states:28

Plagiarism means intentionally passing off the work of another as your own work, or knowingly providing a copy of your work, or a draft of it, to another student to enable that student to reproduce it in part or in whole as their own work but does not include poor or inadequate referencing.

Of course, the application of this rule, as stated by CQU, to a student’s work will be difficult to apply in practice. As le Masurier observes:

The task of determining deceitful intent is simple when the student has lifted an entire article from The Korea Times or Allure magazine. But trying to determine whether students have major conceptual difficulties understanding plagiarism and what constitutes ‘original’ work, whether they simply misunderstand how to attribute sources or the craft of paraphrasing, whether they really did ‘intend to deceive’ is difficult. Even more so when language becomes a barrier rather than a conduit to communication. The problem is that the differences between negligent and dishonest get lost in translation when there appears to be a basic conceptual gap between the word and its meaning in practice. I found this critical distinction one that was almost impossible to make.29

This observation of le Masurier as to the blurred distinction between intentional and unintentional plagiarism is disturbing, particularly given the impact that an allegation/finding of plagiarism may have upon a student’s academic and professional career. For example, as the Hon Clifford J stated in the New Zealand High Court in Bell v Victoria University of Wellington [2010] NZHC 2200 (8 December 2010) at [159]:

I think a finding of intentional plagiarism is more serious in terms of culpability, than a finding of objective, but unintentional, plagiarism. The finding of intentional plagiarism involves — in effect — a finding of an intention to deceive.

Given that poor citation skills may lead to an allegation of unintentional and/or intentional plagiarism — and thereby mean that a law student may be refused admission to practise law — I hope I may be forgiven for raising the question as to whether citation style guides actually miss the point.30 Posner, a highly regarded US judge, in his criticism of the Bluebook, states that ‘my judicial and academic writings received their share of criticism, but no one to my knowledge has criticized them for citation form. The reason is that readers are not interested in citation form. Unless the form is outlandish it is invisible.’31 In other words, the aim of citation in scholarly work is not merely to avoid plagiarism; rather, it is to improve the value of the writing to the reader and, perhaps just as importantly, to the writer. In this sense, the form or the style that a citation takes should never override the purpose that the citation is intended to perform — to provide a correct attribution and to add value to the scholarly nature of the work for the reader and the writer, and for the wider discipline of law. It follows that we should not create a narrative of citation where style becomes more important than communicating to students an understanding of the processes of proper and scholarly attribution of sources.

30 As the author of a legal referencing style guide (Legal Referencing (LexisNexis, 4th ed, forthcoming)) I feel entitled to raise this question.
Reflecting upon how the discipline of law constructs a narrative around attribution of sources is imperative for two reasons. Firstly, we need to be aware of our own participation in creating a narrative of uniformity, accuracy and inflexibility in legal citation style. While there is nothing wrong with such requirements per se, and they are desirable attributes in legal writing, the danger is that this may mean that citation style is viewed as both the answer to plagiarism and as a means to determine the act of plagiarism. In other words, within such a narrative, correct citation is a goal unto itself. This narrative is pervasive. Two clear examples of this are firstly, as Posner notes, the *Bluebook* has suffered from ‘hypertrophy’ which he says refers to ‘a class of disease in which an organ grows to an abnormal size because of the cells that constitute it’. He points out that the *Bluebook* in its 16th edition was 255 pages long and, now, in its 19th edition is 511 pages long. A similar form of ‘hypertrophy’ has afflicted our own *Bluebook*. The AGLC in its first edition was 158 pages and, now, in its third edition is 332 pages. The second example is the change over a 10-year period in the forewords to the AGLC. The foreword to the first edition of the AGLC in 1998 refers to Posner’s article and states that ‘this Guide is not, and does not pretend to be a guide to legal style any more than it is a guide to substantive law. The Guide is concerned with how sources may be identified.’ By the time we reach the third edition, published in 2010, the reference to Posner has been removed and instead reference is made to Lynne Truss with the statement:

> sticklers unite! Like the printers of St Petersburg, the authors of this Guide take the conventions of language and research seriously. May this compendium repay their hard work by encouraging precision in prose and clarity in citation.

Secondly, we need to reflect upon our law school practices given that the existing literature (almost unanimously) observes that there is an increase in student plagiarism. This is occurring for a variety of reasons, as the website of Deakin University states:

The temptations for students to plagiarise and collude have increased in recent years:

- The Internet has made it easy to copy and paste text, images, programming, etc, published on the Web — and also to buy custom-written essays (e.g. [http://www.oppapers.com/](http://www.oppapers.com/)).
- Many students need to work to support themselves, pay rent and pay fees, leaving less time for sound research.
- More and more group work assignments are being set, without good management strategies to control unauthorised collusion.

These explanations clearly apply to law. For example, in *Re Humzey-Hancock* [2007] QSC 34, the applicant who had been denied admission to practise law had, as a law student, allegedly plagiarised in *International Trade Law*, an assignment which was submitted on 10 October 2005. By this time, the applicant was working four days a week for a firm of accountants but he was nevertheless undertaking the course of a full-time student. The subject *International Trade Law* was conducted by the University as a so-called ‘intensive’ course, over three weekends in October 2005. In addition to his work demands, the applicant also

32 Ibid.
33 Justice Hayne, Foreword, *Australian Guide to Legal Citation* (University of Melbourne, 1998), vii.
35 Charlesworth, above n 18.
had distractions because of events within his family. He says that in consequence he prepared this assignment ‘hurriedly and without the proper care and attention for which was required.’ He says that this explains his failures to give proper attribution to his sources.\textsuperscript{38}

Of course the list from Deakin University is not exhaustive, there are many explanations given for the increase in plagiarism, such as increased internationalisation and the consequent changing nature of the student body and a more lenient view towards plagiarism and collusion by a younger student cohort.\textsuperscript{39}

While there may be many sound explanations for a rise in plagiarism and many good reasons for constructing a narrative around style guides and plagiarism this arguably does not remove our obligation as legal educators to improve and self-reflect for, as le Masurier posits, ‘if our students plagiarise, then what is it about our teaching or the context in which we now teach, that allows, perhaps even encourages, this to happen?’\textsuperscript{40} Of course, good teaching practice will never prevent those who set out to abuse the system from plagiarising. Nor can we change most of the factors attributed to the rise in plagiarism, such as the prevalence of the internet or students being time poor. However, the point of this paper is to suggest that we do more than communicate to the student body the prescribed citation style our law school adopts while making them aware of the terrifying penalties for plagiarism. Indeed, the cases of plagiarism in Australia where law students have sought admission to practice\textsuperscript{41} support the need for deeper consideration of educative practices in this area. In each case, where law students have challenged the refusal of their relevant admission board to admit them to legal practice, correct citation style would not have impacted on the original allegation of plagiarism by the university.\textsuperscript{42} Accurate citation would not have prevented the allegation of plagiarism in any one of these three cases. In Law Society of Tasmania v Richardson [2003] TASSC 9; Re OG [2007] VSC 197 and Re Humzy-Hancock [2007] QSC 34, the accusations of plagiarism involved ‘collusion’ with another student (therefore correct attribution or citation of that student’s work would not have saved the integrity of the work submitted). Similarly, in Re Liveri [2006] QCA 152, the allegation of plagiarism concerned the extent of the material taken (rather than the failure to cite the material correctly).\textsuperscript{43} The fact that correct citation to reference sources would not have saved any of these students from an allegation of plagiarism adds weight to the view that the role of legal education must extend beyond communicating to students prescriptive citation style and harsh penalties.

**IV. HOW THEN TO ENCOURAGE STUDENTS TO REFERENCE WELL?**

A study by Neville of 201 undergraduate and postgraduate students in the United Kingdom found that 75 per cent made ‘critical comments about referencing’ that ranged from a serious dislike of referencing to time management issues to disliking the detail that referencing requires.\textsuperscript{44} One of

\textsuperscript{38} Re Humzy-Hancock [2007] QSC 34, [15].


\textsuperscript{40} Ibid.

\textsuperscript{41} In some cases, there is no specific detail given, such as in *Kunhi v University of New England* [2008] NSWADT 333 — where we know little more than that there was a finding of unintentional plagiarism on a thesis.


\textsuperscript{43} In the judicial decision, the general conduct and honesty of the student was also a factor. This paper does not attempt to deal with the important issue as to whether we can teach law students to be generally honest — my thanks to an anonymous reviewer for this point.

the 75 per cent stated that ‘in all honesty I seriously dislike referencing. It is far too troublesome for simply putting forth a point’. The study by Neville is alarming as it reflects not only a widespread serious dislike of an essential academic practice but also an inability of students to appreciate why they are referencing. This indicates failure by universities to impart to students any respect for the practice or a sense of the delight and confidence that attribution may bring. While applying words like ‘delight’ and ‘confidence’ to referencing may seem inappropriate, these descriptors are precisely those used by individuals who show appreciation of the process. For example, one of the 25 per cent of students who was positive about referencing stated that ‘referencing is essential and learning to do it boosts confidence, not just in writing but also and primarily in arguing ideas. It is a way of putting my point forward’ and, as stated in the preface to the third edition of the AGLC:

Until I worked on the Melbourne University Law Review as a student in the 1970s, I was oblivious to the delights, agonies and obsessions of editorial style and citation methods. That experience imparted enduring respect for well-tempered punctuation as well as accurate and judicious footnoting.

These comments support the benefits in the teaching of referencing as part of a wider message about good scholarship. In a study of business students by Ellis, Freeman and Bell, four categories in which students understood referencing were identified — ‘two being related to higher level conceptions of learning such as reflection and reasoning; and two which were comparatively poorer in conceptualisation’. The study found an important indicator of students belonging to the higher learning approach to be their engaging with referencing in a scholarly way. Indeed Ellis, Freeman and Bell state that ‘the results indicate that cohesive conceptions of referencing seem to be related to deep approaches to referencing.’ Students must be motivated to see past referencing as an annoyance and then, ultimately (and at the risk of sounding like a preaching plagiarism Pollyanna) students must gain inspiration for their discipline and their own scholarship through referencing.

Legal educators must recognise the critical role they perform in teaching good referencing. As Wade states, ‘excellent teachers are characterized by sophisticated knowledge of their areas of specialty (coupled with humility on the limits of knowledge), a love of people, enthusiasm for their subject, organized thought and speech, and a self-deprecating sense of humour.’ Whether one agrees with Wade’s characteristics of a good teacher, the point made is important — for, if we, as educators, do not find referencing an area of interest how can we expect to pass good practice on to our students? Enthusiasm for, and knowledge of, referencing must begin with the legal educator, who may employ a range of methods to engage students and thereby encourage them to reference well.

This article does not cover all the techniques which may be employed to encourage good writing. While critical, the skills students use to write are just one aspect of good referencing. Rather, this article suggests motivation for good referencing may come not only through the acquisition of citation skills but also through students being encouraged to see law as ‘their’

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45 Ibid.
46 Ibid.
47 Charlesworth, above n 18.
49 Ibid 89.
50 Ibid 96.
discipline. This point is often assumed by those already within the field of legal study. The term ‘within’ is used here deliberately, as students entering law must go through a transition or, perhaps, transformation. A law student moves from seeing the discipline of law as a point of external engagement to experiencing themselves as a student of law within a field of study which they individually may both contribute to and draw from. In this context, the greatest opportunity that the study of law offers is, as White observes, ‘not that one can learn to manipulate forms, but that one can find a voice of one’s own, as a lawyer and as a mind; not a bureaucratic voice, but a real voice’. If students are able to accept that they have a ‘real’ voice within a ‘real’ discipline, it may follow that their individual maintenance of the referencing rules of the discipline will improve.

In this sense, being part of the discipline of law invigorates student empowerment. Once a student views themselves as part of a community of legal writers, exchanging ideas about a topic, the importance of recognising the ideas of others who have helped them to develop their own ideas becomes more apparent. Through good referencing, students will view their legal writing as contributing to the range and depth of Australian legal scholarship. In this sense, the ‘obligation’ to reference as an external imposition forced on them by a lecturer will transform into an internal desire. Our aim as legal educators should be to change students’ view of referencing as merely a mechanistic chore, or as one student commented: ‘a damn nuisance’.

Within this panaromic (and, perhaps) utopian vision of what referencing will come to mean for law students — that students will enjoy referencing, have discipline loyalty, be motivated and love citation style — it must not be forgotten that a fixation with footnotes and references may also operate as ‘a potential barrier to engagement, enjoyment and progression and to the development of an authentic authorial voice’. For this reason, the legal educator must be wary of excessive emphasis on citation style with the subsequent danger of seeming to create a ‘secret language’ of legal citation which may be exclusionary and alienating to the law student.

The looming difficulty for the future of Australian legal education will therefore be to manage the overwhelming prevalence of uniform citation style guide ‘rules’ with the promotion of good referencing. The two are not the same; neither are they exclusionary. However, finding the balance between the two is a task that law teachers must — for the sake of the law student — engage in actively. We cannot unquestioningly accept that the existence of a widely-applied Australian citation style guide necessarily means that its rules should be enforced to the extent that they render law students subject to significant and possibly life long career punishment.

V. CONCLUSION

Robert Cover wrote of nomos and narrative — of inhabiting a nomos, or normative universe, where prescriptions exist because of the narratives that locate them and give them meaning. Within this context, the title to this paper — ‘Teaching Plagiarism’ — is intentional. While confronting, ‘Teaching Plagiarism’ reflects what I believe is the current dominant narrative of correct citation style and plagiarism avoidance: we teach students firstly, how to steal information from other sources in order secondly, to give them a style guide which needs to be

52 Note that evidence to support this thesis is not widespread or conclusive: see John Sanders, ‘Hooray for Harvard? The Fetish of Footnotes Revisited’ (2010) 12 Widening Participation and Lifelong Learning 48, 49.
54 I am grateful to an anonymous referee for this point.
55 Sanders, above n 52.
56 Ibid.
58 Cover, above n 9.
applied correctly so that thirdly, they do not do so. Put simply, we teach students that ‘it is not plagiarism to copy, but rather it is plagiarism to copy and not to attribute.’

This paper argues that this approach is necessary but that it may never be sufficient. Le Clerq writes that:

The problem of plagiarism in American law schools is reaching a crisis point as two national trends race toward a collision: while the law schools refuse to admit that their old methods for dealing with plagiarism are outdated and ineffective, the courts show increasing willingness to review academic disciplinary hearings and reverse their findings on due process grounds.

This statement clearly applies in the Australian context. There are an increasing number of Australian legal cases dealing with law student plagiarism and admission to practice. While Australian law schools have not refused to admit that their ‘old methods for dealing with plagiarism are outdated and ineffective’ there is nonetheless a general lack of debate and discussion around fresh ways of educating students in the joys of legal referencing.

It is suggested that we empower the law student to engage with referencing. We impart to them the knowledge that plagiarism is not simply a crime worthy of punishment but rather is part of a wider narrative of good legal community scholarship. In short, the narrative of plagiarism and the prescription of style guides must be reframed around a discourse of plagiarism which is both positive and meaningful. As McCabe states, ‘if we have the courage to set our sights higher, and strive to achieve the goals of a liberal education, the challenge is much greater than simply a focus on reducing cheating’. Law students are special — a proposed national profession will require a national approach to the construction of plagiarism and citation — and we, as legal educators, can enhance the referencing experience of law students. At the very minimum, we can encourage students to think about how referencing may help them be a confident participant in developing the future of the discipline of law.

59 Bell v Victoria University of Wellington [2010] NZHC 2200 (8 December 2010), [150] (Clifford J).
61 Ibid.
62 The creation of a national profession includes the suggestion that a national legal profession take into account academic misconduct in the decision as to whether an applicant may practise law: Legal Profession National Rules (r 1.2.2) and Legal Profession National Law (consultation drafts available at Attorney-General’s Department, National Legal Profession Reform (9 September 2011) <http://www.ag.gov.au/legalprofession>.
63 A national study has shown this to be largely uniform: Teaching and Learning Centre, Murdoch University, Audit of Academic Integrity and Plagiarism Issues in Australia and New Zealand (2005) <http://www.tlc.murdoch.edu.au/project/acode/> found that: ‘the findings were largely uniform — almost every institution recognized that there was a need to educate students better about academic integrity, but they also recognized a need to make detection and disciplinary procedures more efficient and transparent.’
I. INTRODUCTION AND CONTEXT

The formal concept of traditional curriculum theory is relatively new, developing principally in the second half of the 20th century; although, despite this, it has had a significant impact upon the planning and teaching of all law units, including revenue or taxation units. There appears to be an endless continuum of models for the design and implementation of a curriculum. However, the emphasis of this article is on providing a synthesis of the ideas in order to approach the questions of the difficulties associated with using each of the different methodologies and which may be the most appropriate method of delivery for the teaching of taxation law. Specific reference is made to the offerings of units at the University of Western Sydney (UWS) to illustrate these points.

II. DEFINING A CURRICULUM

The formal notion of what constitutes a curriculum is problematic. Depending upon the context, the meaning of the term, ‘curriculum’, can vary quite considerably.1 Despite this variation, the curriculum is an essential part of delivering information to learners effectively and efficiently.2 Learning can take place in a number of different formats. Academic literature refers to these different formats as ‘models of curriculum’. As Brady states, ‘[a] model of curriculum development is … a convenient way of showing the relationship between…essential curriculum development.’3 What should be clear therefore is that, models of curriculum are simply different ways of making sure that education takes place in a structured and meaningful fashion, or at least a fashion where, arguably, arbitrary labels are attached to the different processes and functional stages associated with education.

III. MODELS OF CURRICULUM

A. Introduction and Background

It is possible to provide a seemingly endless continuum of models for the design and implementation of a curriculum. However, the emphasis of this article is on providing a synthesis of these ideas in order to assess the impact of different models on taxation law units.

Although a considerable volume of literature exists on the subject, curriculum models have largely been divided by academics to fit into one of four groups, these being the rational–objective, cyclical, dynamic–interaction and process models. These models can be classified according to a continuum which ranges from the extreme of the rational–objective model to very flexible dynamic–interaction models. The table below (table 1) identifies some of the more

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1 See especially Terence Lovat and David Smith, Curriculum: Action on Reflection Revisited (Social Science Press, 3rd ed, 1993) i–ii, who in their introduction give a good analysis of the different ways that a curriculum can be viewed by people in different contexts.

2 See especially the discussion given to the importance of the curriculum against non-regulated learning systems outlined in Murray Print, Curriculum Development and Design (Allen and Unwin, 2nd ed, 1993) 1–10.

popular curriculum writers and theorists who have been associated with the development of the four different models identified here.5

Table 1: Sources of the different models of curriculum

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<tr>
<td>Tyler5</td>
<td>Wheeler6</td>
<td>Walker7</td>
<td>Stenhouse8</td>
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<td>Taba9</td>
<td>Nicholls10</td>
<td>Skilbeck11</td>
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It is Print’s view that the rational–objective models present a sequential, logical and rigid way of interpreting the curriculum; whereas, at the other end of the continuum, dynamic–interaction models view the curriculum development process(es) in a much more flexible way.12 The cyclical models tend to fall somewhere in between the extremes of the rational–objective and dynamic–interactive models. The process models appear to exist in a category by themselves. Historically, academic curriculum writers have preferred to use the cyclical or rational–objective models, while teachers, perhaps preferring the flexibility, have tended to prefer the dynamic–interaction model.13

Different models are preferred for different reasons; although all of the models have as their primary purpose the delivery of educational content – the knowledge, skills and understanding required by the subject area.

B. The Rational–Objective Model

The rational–objective model, as espoused by Tyler and Taba (to name but a few of its advocates), emphasises the rigid and logical sequence of the development of a curriculum.14 These elements are set out in a chronological form, from which deviation is impossible. For to deviate from this basis would be akin to changing the whole nature of the model and thus it is likely that the deviation would result in the new variation being placed into one of the other three classifications of curriculum models. To change something from a fixed basis would suggest that a more dynamic–interaction, thus more flexible, option was being pursued.

These rational/-objective models have at their core a distinctly regimented series of processes which necessitate them occurring in a logical and sequential fashion. Taba’s rational–objective model of curriculum involves a detailed and lengthy seven-step plan:

4 Table taken from a synthesis of ideas presented in Print, above n 2, 63–4.
5 See especially Ralph Winfred Tyler, Basic Principles of Curriculum and Instruction (The University of Chicago Press, 1949).
7 See especially Decker Walker and Jonas Soltis, Curriculum and Aims (Teachers College Press, 1986).
8 See especially Lawrence Stenhouse, School Based Curriculum Development (Heinemann, 1975); Lawrence Stenhouse, An Introduction to Curriculum Research and Development (Heinemann, 1978).
12 Print, above n 2, 63.
13 Ibid 60.
14 Laurie Brady, Curriculum Development (Prentice Hall, 5th ed, 1995) 75.
Step 1: Diagnosis of need.
Step 2: Formulation of objectives.
Step 3: Selection of content.
Step 4: Organisation of content.
Step 5: Selection of learning experiences.
Step 6: Organisation of learning experiences.
Step 7: Determination of what to evaluate and ways and means of doing it.\textsuperscript{15}

Theoretically, once the objectives have been determined, it is possible to design and develop appropriate learning experiences to achieve these objectives.

There is some criticism of this model for not allowing for the often unpredictable or fluid nature of teaching.\textsuperscript{16} It also appears that this model would pose the most difficulty, since curricula prepared using it must be redeveloped whenever content is changed and updated, even slightly. This is a major problem — to suggest to a curriculum designer that even a slight change in the information to be presented, as can often occur because of the dynamic nature of the law, must result in a complete redevelopment of the curriculum is not realistic or sustainable.

C. The Dynamic–Interaction Model

The dynamic–interaction model lies towards the furthest extreme on the continuum away from the rational–objective model, and was developed after it. Proponents of the dynamic–interaction model are highly critical of all other models on the basis that they do not reflect the practical reality of developing curricula in an educational environment.\textsuperscript{17} Proponents of this model argue that curriculum development does not and never will follow a sequential pattern, so that a more malleable approach is not just desirable but fundamental.

One of the main proponents of this model is Walker.\textsuperscript{18} His model consists of three parts:

(1) the platform;
(2) the deliberation phase; and
(3) the curriculum design phase.

The most immediate and obvious difference from the rational–objective model is that the dynamic–interaction model lacks a focus on objectives. Some have argued that, by negating the obsession with writing objectives, Walker’s model allows curriculum developers to be far more creative.\textsuperscript{19} The contrary view is that curriculum developers using Walker’s model could potentially lose sight of what they were aiming to achieve more easily than those using the rational–objective model, which requires a clear statement of objectives.

Primarily writing in the 1980s, Skilbeck is another of the main proponents of this model. The model Skilbeck outlines is slightly more complex than that of Walker, but is essentially very similar. The primary difference associated with Skilbeck is his inclusion of objectives in his stages of developing a curriculum.

Skilbeck’s five-stage model is:

(1) analyse the situation;
(2) define objectives;
(3) design the teaching–learning program;
(4) interpret and implement the program; and
(5) assess and evaluate.

\textsuperscript{15} Taba, above n 9, 12.
\textsuperscript{16} See especially Stenhouse, \textit{An Introduction to Curriculum Research and Development}, above n 8, 75.
\textsuperscript{17} Print, above n 2, 74, where Print argues that dynamic models denounce cyclical and rational models on the basis that they ‘do not reflect the reality of curriculum development in educational organisations’.
\textsuperscript{18} Walker and Soltis, above n 7.
\textsuperscript{19} Print, above n 2, 78.
Skilbeck recognised the impact of including objectives in his model: ‘the very word objectives invites controversy, in curriculum planning development and evaluation’.

D. The Cyclical Model

The cyclical models fall into the middle of the curriculum model spectrum. Cyclical models appear to view the curriculum process as a continuing activity, rather than the static process which the rational–objective models tend to promote. This may be especially important given the dynamic nature of law. Print suggests that their value may have been underestimated by many scholars.

Typically, Wheeler and Nicholls are associated with this model. However, Wheeler’s view of this model has been criticised as it seems to be too closely aligned with the rational–objective models. Wheeler’s version of the cyclical model consists of five logically-sequenced phases:

1. Selection of aims, goals and objectives.
2. Selection of learning experiences to help achieve these aims, goals and objectives.
3. Selection of content through which certain types of experience may be offered.
4. Organisation and integration of learning experiences and content with respect to the teaching–learning process.
5. Evaluation of each phase and the attainment of goals.

However, it is the Nicholls model of curriculum development that is often taken to be more representative of the cyclical approach. The Nicholls model proposed a five-point plan of development:

1. Situation analysis.
2. Selection of objectives.
3. Selection and organisation of content.
4. Selection and organisation of methods.
5. Evaluation.

By adopting this type of model, with a fixed situational analysis as a starting point, the whole curriculum design process is stifled by the initial baseline data upon which objectives had to be formulated. Again, this does not allow for the dynamic nature of the law, which changes relatively rapidly and continually.

E. The Process Model

The process model is quite unlike any of the other curriculum development models discussed above. On the continuum of models, it is positioned after the dynamic–interaction model; although some commentators have suggested that it cannot be placed on the continuum at all, since it has very disparate and diverse ideals from the other models. The process model is more recent, and is less conservative, than the other models of curriculum.

Some suggest that the process model has developed as a reaction to a perception of curriculum designs by people who work constantly with curriculum contents, rather than those who simply deal with it in isolation and thus have little understanding of the complexities and intricacies

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21 Print, above n 2, 64.
22 See especially Wheeler, above n 6.
23 See especially Nicholls, above n 10.
24 Wheeler, above n 6, 30–1.
26 Skilbeck, above n 11, 23.
27 Lovat and Smith, above n 1, 118.
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of delivering information to real people in real situations. Skilbeck states that this model has developed as a reaction to the prescriptive nature of the other models, particularly the rational–objective models, and this model therefore belongs to a group he calls ‘alternative models’.29

The model’s principal proponent is Stenhouse.30 Stenhouse had proposed this model because he did not believe that any of the other models, which tended to focus on the need to formulate and achieve objectives, took into account the realities of the traditional classroom or learning environments.31 That is, the other models tended not to recognise that the classroom — or any learning environment — is an artificial and nonpareil environment, which exists in a rarefied atmosphere and has special dynamics of which only educators are aware.

The process model appears less structured than any of the others which have been examined. The major components of Stenhouse’s model are:

(1) content;
(2) methods; and
(3) evaluation.

The model has no initial statement of objectives. It appears to be centred on the view that education is concerned with certain processes of intellectual or cognitive development. Thus, what is crucial to this process in not the learning of a vast body of knowledge but rather the processes of development that are prompted.32

The model is based on the premise:

that to have been educated is to have been helped to develop certain intellectual capacities rather than to have acquired factual knowledge or to have had one’s behaviour modified in certain ways.33

So it is as far removed from any type of indoctrinal-based curriculum as is possible.

Initially, it might seem that the objectives seem to be encompassed by the content, but this is something that Stenhouse has strenuously rejected.34 He categorically states that objectives are to play no part in the development of the curriculum. Instead, curricula ‘can — and should — be constructed … by selecting suitable content to exemplify the structure, content and criteria of the forms of knowledge’.35

The model seems almost to view the individual in an existentialist manner; that is, as a person who can control their own destiny to be able to learn what is appropriate for them. The model has been widely criticised on this basis by traditional curriculum theorists.36

Stenhouse himself seemed to recognise that the model may not be very successful in situations where what is to be learned is information and skills. But he contended that it would be most effective in those areas of the curriculum which have a focus on knowledge and understanding;37 however, it may be problematic to argue that these two concepts are so disparate or have no connection at all.

It must be recognised that there are severe limitations in assessing what has been learned under the auspices of the process model. It is obvious, on comparison with the three other

29 Skilbeck, above n 11, 221.
30 Stenhouse, School Based Curriculum Development, above n 8.
31 Indeed, the ‘process’ model is the antithesis of the rational–objective model.
33 Ibid.
34 Lovat and Smith, above n 1, 119.
35 Skilbeck, above n 11, 221. Skilbeck also uses the fact that objects are to play no part in the design of the curriculum as a basis for severe criticism of Stenhouse’s model: at 200–4.
categories of models discussed above, that evaluation is conspicuously difficult, given the lack of identified objectives. Although the strength of this model is its focus on the different learning experiences that individual participants may encounter.

Stenhouse claimed that evaluation should not take into account pre-specified objectives.\(^{38}\) One may well ask the question, ‘what then is to be assessed or evaluated?’ It is quite possible, depending on the content, that each person involved in a program will have learned something different from the shared experience which is delivered by the curriculum, although this will be virtually impossible to assess.

Some of the things that participants of a program have learned may have been what was initially intended, but what of the other things? And how can we assess anything that they have learned if we did not originally have any objective criteria to base this assessment upon? These are the types of questions which traditional curriculum theorists have asked of this model — and the model cannot provide answers to them.

It may be possible to assess the effectiveness of a curriculum developed using the process model only from observing the reactions of individuals to the material (content) which they have been presented with. But is this effective evaluation and assessment? If a formal normative or summative type of assessment is required, then it could be argued that this model would be ineffectual.

**IV. IMPLICATIONS**

In the context of teaching taxation law, being aware of and using a recognised theoretical model of curriculum will add integrity, stability, reliability, authenticity and consistency to the learning activities that are undertaken by students. The choice of which curriculum model, or which variation of a particular curriculum model, to choose to implement the material for the taxation law unit is critical. If an inappropriate model is chosen, the implementation of the content will necessarily suffer.

Two facts specific to taxation law units should be taken into account when deciding the most appropriate model of curriculum development to adopt. Firstly, taxation law, like some other areas of the law, is quite dynamic. Secondly, it is delivered in educational settings in which there are expectations — both internally and externally — to be met of achieving a certain level of proficiency.\(^{39}\)

**V. DISCUSSION OF TAX LAW AS IT RELATES TO THE DIFFERENT THEORETICAL MODELS OF CURRICULUM**

Taxation law is usually a required subject in business–commerce degrees and, in most universities, it is an optional unit in law degrees. At the University of Western Sydney, taxation law is a compulsory subject in both the business–commerce degree and the law degree. This means that there are different student cohorts to which an institution has to teach the fundamental elements of the tax system. Both streams of students will be required to study similar material for the purposes of professional accreditation by external taxation bodies, such as the Tax Agents Board. This is particularly the case where law students have combined their law degree with a business–commerce degree.

The external accreditation boards require the educational institution to cover certain areas of taxation law. These areas cover the concept of income; the scope of allowable deductions; the principles of capital gains, the principles relating to business entities (companies, trusts and partnerships); and the foundational concepts of fringe benefits tax and goods and services tax. These content areas need to be covered in any taxation law course that will lead to professional accreditation. The content in these areas can change significantly, and regularly, which poses


challenges for the designer of a curriculum base, if the curriculum model being used demands that, when content changes, the whole curriculum needs to be changed.

If there is no need for professional accreditation, the course designers can adopt a very flexible approach to the curriculum, covering whatever topics they consider relevant to their students. These topics could include, as a key framework, the politics and theories of taxation law.

From a curriculum point of view, the teaching of taxation law is driven to a large extent by whether or not there is an external expectation as to the level of proficiency that will be achieved in core areas of taxation law. This, by itself, will influence the type of curriculum that can be implemented by the educational institution.

From the perspective of the taxation law curriculum at the University of Western Sydney, the areas that need to be covered provide little scope for flexibility. There is therefore little scope for the dynamic–interaction or process models of curriculum theory. On the other hand, either the rational–objective or cyclical models would be suitable. However, this may not always be the case, as the frequent changes in the content of taxation law may not be able to be accommodated within the curriculum framework. For instance, the current government proposals for the taxation of trust income may structurally and fundamentally alter the manner in which trusts are considered as an entity for tax purposes, with the flow-on effect to other areas of taxation law, such as dividend distributions and capital gains. Fundamental questions as to who will pay tax on such assessable income amounts may well be fundamentally altered in the near future.

As to which model may be the most appropriate, it is necessary to examine more carefully the way in which the content in taxation law is actually taught, within the framework of the seemingly rigid requirements of the external professional accreditation process. The external bodies require that certain topics be taught but do not prescribe the manner of doing so, or the depth of knowledge to be achieved. So, on the surface, it would seem appropriate to use the rational–objective model of curriculum development and provide a sequential, logical and rigid way of interpreting the curriculum. However, when the content changes, as it often and radically does in taxation law, then the curriculum would need to be redeveloped over and over again. This causes immense problems for the curriculum designer of a taxation course, regardless of which curriculum model is being utilised; although this is especially so if the rational–objective model is used.

However, it is also clear that some underlying principles of taxation law do not structurally change and that the basics of income, deductions, capital gains, fringe benefits tax and goods and services tax can be taught in a consistent manner from year to year. Where the content does change, there is a need to revisit those underlying areas and adopt the revamped content material. This can present a dilemma for the curriculum designer. Therefore, the rational–objective model, which is the hallmark of the syllabuses of most tax courses, is problematic due to the very nature of the underlying principles of taxation law.

A good example of this relates to the change announced in the May 2011 federal budget in relation to the calculation process of fringe benefits tax where a motor vehicle has been provided as part of an employment contract. The statutory method of calculating the taxable benefit of the company car has not changed, but the relevant statutory fraction has changed. So, instead of the relevant statutory fraction relating directly to the number of kilometres travelled, there is now a set flat statutory fraction of 20 per cent for all company cars. The underlying principle has not altered, just the calculation methodology.

On this basis, the cyclical model is a far more applicable curriculum model. This becomes clearer when one considers that the underlying principles of tax do in fact build upon themselves. There is a logical development from one stage to the next in coming to grips with the underlying principles of taxation law. For instance, in dealing with the concepts of income, this includes income from personal exertion and a subset of that topic is income from employment. Students need to understand the principles relating to income from employment before they are able to see why a fringe benefit provided to an employee, such as a company car, is actually taxed to
the employer and not the employee. Accordingly, it is important that a student covers the topic of income from employment before dealing with the topic of fringe benefits tax, which requires an employment relationship to exist.

Another area that lends itself to the cyclical model is the taxation of capital gains. The system has been in place since September 1985 and there has been very little structural change. The changes that have occurred relate specifically to the calculation methodology of the capital gain, not to the structure and triggering of a capital gains event. For instance, the method of calculating a net capital gain has shifted from an indexation base framework to a discount factor framework (up to 50 per cent for individuals) since September 1999. Such changes can be absorbed into the teaching of capital gains more easily when the underlying capital gains tax principles have not altered.

Students still need to see the rationale for the introduction of the capital gains tax regime, which has at its foundation the fact that capital receipts are not assessable as ordinary income under s 6–5 of the *Income Tax Assessment Act 1997* (Cth) — a topic ordinarily taught to students in the earlier part of the course. The result of this non-recognition was that capital receipts were escaping the tax net. The government decided to plug this leak by introducing a comprehensive capital tax gains regime. Students then see the development of the law in a logical manner.

**VI. DISCUSSION OF THE ADVANTAGES AND DISADVANTAGES OF USING EACH OF THE DIFFERENT MODELS**

Applying each of the curriculum models to the teaching of taxation law, the following emerges.

The elements of the rational–objective model are set out in chronological form and deviation is very difficult. A curriculum developed under this model needs to be redeveloped continuously as the content changes. As seen above, the content of taxation law does change on a regular basis and this would mean that the rational–objective model would require a revamping. This does not seem to have any advantages when considering the teaching of taxation law.

Under the cyclical model, the curriculum process is a continuing activity, rather than a static model. This model seems to be the most suitable for the teaching of taxation law, where there is a need to cover certain content as prescribed by an external organisation, such as an accreditation body. The curriculum itself will be driven by the required topics of the accreditation body but there will still be some flexibility in the manner and order in which the topics will be taught to ensure students are able to see the development of taxation law. This is particularly the case as our taxation system has expanded its tax base over the years.

The dynamic–interaction model does not seem to fit within the teaching of taxation law from a professional accreditation perspective. Where there is a need to follow an external accredited body, there must be a need to focus on objectives and this would discount the dynamic–interaction model. This model would seem to be useful and relevant only where the teaching of taxation law is not driven by external bodies and there is flexibility available for the teacher in the learning environment. Only then would there be a need to set out for students a broad range of objectives for the course.

Because there is no initial statement of objectives, the process model would not seem suitable for the teaching of taxation law. Taxation law is a complex area of the law and if there were no objectives then there is little structure and there is the danger that the learning process may fail for the student. It may be that the student finishes the course on this model with little understanding of the underlying principles of taxation law.

**VII. CONCLUSIONS AND RECOMMENDATIONS**

Designers of taxation law courses are presented with an often confusing and overwhelming myriad of choices when presented with the different existing theoretical models of curriculum.
Nevertheless, the choice of which curriculum model to use is a very important one. It should be relatively clear that if an inappropriate model or at least not the most appropriate model is chosen the result in implementing content can be impacted.

This paper has presented a synthesis of the different theoretical models of curriculum and their relevance to teaching taxation law units. A number of relevant factors exist when determining which model of curriculum a designer of a course should use. In particular, these factors include the dynamic nature of taxation law, the need for a formal statement of objectives, the need for assessment and the need to be accountable both internally and externally for the course. We have concluded by indicating that the cyclical model of curriculum offers the greatest scope for use in taxation law subjects as, importantly, it views the curriculum process as a continuing activity.