



JOURNAL OF THE AUSTRALASIAN LAW TEACHERS ASSOCIATION

Volume 10



Journal of the Australasian
Law Teachers Association



Journal of the Australasian
Law Teachers Association

(2017) Volume 10

JALTA Editorial Board 2017

Chairperson: Professor Nick James (Bond University)
Deputy Chairperson, JALTA Editor in Chief: Professor Dale Pinto (Curtin University)
Immediate Past Chairperson: Professor Stephen Bottomley (Australian National University)
Secretary: Emeritus Professor David Barker AM (University of Technology, Sydney)
General Treasurer: Professor Nick James (Bond University)
Professor Jennifer Corrin (University of Queensland)
Professor Paul Fairall (Curtin University)
Professor Alberto Costi (Victoria University of Wellington)
Professor Melissa Castan (Monash University)
Associate Professor Natalie Skead (University of Western Australia)
Professor William McNeil (Southern Cross University) (co-opted)
Professor Melissa De Zwart (University of Adelaide) (co-opted)
Professor Alex Steel (University of New South Wales) (co-opted)

New Zealand Executive

Chairperson: Associate Professor Alexandra Sims (Auckland University)
Secretary: Dr John Hopkins (Canterbury University)
Treasurer: Mr Sascha Mueller (Canterbury University)
Executive Member: Dr Matthew Berkahn (Massey University)

Mrs Sarah Parker: Secretariat Coordinator, ALTA

Editorial Objectives and Submission of Manuscripts

The Journal of the Australasian Law Teachers Association (JALTA) is a double-blind refereed journal that publishes scholarly works on all aspects of law. JALTA satisfies the requirements to be regarded as peer reviewed as contained in current Higher Education Research Data Collection (HERDC) Specifications. JALTA also meets the description of a refereed journal as per current Department of Education, Employment and Workplace Relations (DEEWR) categories.

© 2017 Australasian Law Teachers Association: This Journal is copyright. Apart from any fair dealing for the purposes of private study, research, criticism or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission from the Editor-in-Chief.

Typeset by Stan Lamond

CONTENTS

Foreword	
<i>Dale Pinto</i>	iv
Reflections on Four Leading Early Australian Law Academics	
<i>David Barker</i>	1
Silver Jubilee Milestone 1992–2017: A Contribution to Australian Law Teaching the Coming-of-Age of the Centre of Legal Education and the Legal Education Digest	
<i>David Barker</i>	8
Expression, Exclusion, and Property Expectations: An Analysis of Graffiti Using Three New Zealand Artefacts	
<i>Jonathan Barrett</i>	16
Enhancing Student Learning and Engagement in the Juris Doctor Through the Rich Tapestry of Legal Story-Telling	
<i>Penny Carruthers, Kate Offer, Natalie Skead, Meredith Blake, Renae Barker, Ambelin Kwamullina, Jill Howieson and Tracey Atkins</i>	26
The Effect of Lecture Recordings on Lecture Attendance: Law Academics’ Misconceptions and Law Students’ Reality	
<i>Christina Do</i>	41
Socrates and Smartphones: Why the Future of Legal Education Must be Philosophy	
<i>Daniel Goldsworthy</i>	61
A Proposed Agenda for Reforming Skills-Based Paralegal Training to Enable Future Readiness	
<i>Annie Perumpoykail Gomez and Ankur Gupta</i>	68
Local Democracy and the Agency-Model of Local Governance	
<i>Sascha Mueller</i>	76
Meta Syllogistic Analysis of an Offence – Elemental and Elementary	
<i>Toby Nisbet and Kenneth Yin</i>	85

Continued overpage

CONTENTS (continued)

An International Experience for Law Students: Preparing, Planning and Pastoral Care <i>Lara Pratt</i>	96
Freedom of Speech: Do We Know What We are Talking About? <i>Bill Swannie</i>	110
Creating an Academic Community at a Regional Law School that Offers a Large Online Education Program <i>Megan Vine and Julia Werren</i>	117
Unpacking the Commissioner’s Remedial Power <i>Robin Woellner</i>	130
In Search of information – a Comparison of New Zealand and Australian Access Powers <i>Robin H Woellner and Andrew J Maples</i>	146
Challenging Decisions About Funding for University Researchers in Court <i>Mary Wyburn</i>	169
Overcoming Flaws in the Deductive Legal Process by Mastery of Syllogistic Logic – Elementary! <i>Kenneth Yin</i>	179
The Re-Killing (Perhaps) of the Donoghue Gastropod – and Some Suggestions to Tinker with the First-Year Legal Education Curriculum <i>Kenneth Yin</i>	189
Hypothetical Cases as a Pedagogical Tool in Contract Law Studies <i>Kenneth Yin and Jennifer Moore</i>	203

FOREWORD

It is my great pleasure to welcome readers to the 2017 issue of the *Journal of the Australasian Law Teachers Association* (JALTA) which is a special issue as it marks our 10th anniversary issue of this journal. It is amazing to think that 10 years has passed since the ALTA Executive put their faith in the idea that was floated and subsequently approved in 2008.

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.

Producing a journal like this requires the tireless efforts of a number of people whose collective efforts have made this journal possible. I would like to acknowledge some of the key contributors who have made this issue of JALTA 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 Magdalene D'Silva for her efforts in proofreading and to Stan Lamond for his efforts in typesetting. Lastly, I need to record a special thanks to Sarah Parker who has worked assiduously as the Secretariat Coordinator for ALTA and assumed responsibility for the completion of this journal. Since joining the ALTA family, Sarah has worked professionally and most efficiently on all aspects dealing with JALTA and I can safely say that without Sarah's hard work JALTA would not be produced in a timely and professional manner. Well done, Sarah and sincere thanks!

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

REFLECTIONS ON FOUR LEADING EARLY AUSTRALIAN LAW ACADEMICS

*David Barker*¹

ABSTRACT

This paper reflects on the lives and careers of Professors John Peden, William Moore, Dugald Gordon McDougall and Frank Beasley, who are four arguably leading early Australian law academics, who influenced the development of Australian legal education.

I INTRODUCTION

Anyone undertaking a historical review of Australian legal education would arguably be influenced by the individuals who shaped its early development and unfolding. The concept of legal education does not immediately give rise to a review of who might be considered the early icons of learning and teaching scholarship in law. Yet in their own ways, Professors John Peden, William Moore, Dugald Gordon McDougall and Frank Beasley, might be considered as epitomising what was expected of the early standard bearers of the Australian law academy, and illustrating the characteristics which justify their being considered as legends in their lifetimes. These four Australian law academics are known: for the way they developed their own law schools and, as was characterised by most law academics at the time, for remaining with their law schools for most of their careers. This paper discusses each Australian law professor's academic career and considers the legacy that their respective approaches have left for legal education in Australia.

II PROFESSOR JOHN PEDEN, DEAN, UNIVERSITY OF SYDNEY LAW SCHOOL

The first Australian law academic considered is Professor John Peden² who was appointed in 1910 as Dean and Challis Professor of Law at the University of Sydney, where he graduated with a BA with first class honours in 1892, and with first class honours in a Bachelor of Laws (LLB) with the University medal in 1898. Peden was a barrister with an extensive legal practice specialising in equity and probate law, who was originally appointed as a part-time lecturer at the Law School in 1902. Peden is different from his three other contemporaries because he was much more involved with affairs outside his Law School than they were, or in fact most other Australian law deans at the time. For example, Peden became a member of the NSW Legislative Council from 1907 to 1946, serving as its President from 1929 to 1946.

There was a gradual increase in Sydney law school enrolments under Peden's influence as Dean, although there was a reduction of 25 per cent during World War I which was more than compensated for by a trebling in numbers when that War ended. Interestingly, the Great Depression of the early 1930s seemed to have a relatively small impact on enrolments. This might have been because the Sydney Law School was the only law school in NSW then, and at that time, law students came from the comparatively wealthier groups of Australian society. Peden's own specialist subjects were constitutional law, property, conveyancing and private

1 AM, Emeritus Professor – AustLII, Faculty of Law, University of Technology Sydney.

2 Judy Mackinolty, 'Learned Practitioners 1910-1941' in John Mackinolty and Judy Mackinolty (eds), *Century Down Town: Sydney University Law School's First Hundred Years* (University of Sydney, 1991) 57, 57.

international law. Peden's teaching technique has been described as incorporating a 'slow and hesitant' form of speech, being couched in 'homely English' whilst he explained:

Constitutional law in a practical, business-like way, not ignoring theory, but stressing the everyday working of legislative and constitutional procedures. His students had to know works of Professor A.V. Dicey whose shadow, according to H.V. Evatt, always lurked behind Peden, but they had also to know the constitution of New South Wales and Australia and some British constitutional history, and appreciate how to temper philosophical propositions with practical common sense.³

Peden could be described as charismatic, and the lack of other tenured academics at the Sydney Law School at the time meant that he had little or no competition to being perceived as personifying an overwhelming influence over the Law School's character. This might be exemplified in an account of Peden's classes, by Judy Mackinolty, who said that he was not there 'to create pedants but learned practitioners.'⁴ However, Mackinolty was also opined that others would argue that the creation of 'competent legal technicians' would be a more accurate description of Peden's law school teaching style. Miss Hay, who was clerk to the Sydney Law School from 1919-53, expressed that Peden preferred to take students who had already completed two years of the University's Arts course, so he could turn out legal practitioners who were equipped to earn their 'bread and butter'.⁵ Peden has also been described as:

A towering figure in the university: legendary for his hard work, high standards, uncompromising rectitude and plain speaking, he was not always an easy colleague. He was a fellow of the senate (and active on many of its committees) in 1910-41, chairman of the professorial board in 1925-33, and as his old friend Sir Thomas Bavin remarked 'the man to whom everybody turned if there was a difficult problem to be solved, the man from whom everybody-even his strongest opponents-could expect a strong deal.'⁶

III PROFESSOR WILLIAM MOORE — DEAN, UNIVERSITY OF MELBOURNE LAW SCHOOL

At the University of Melbourne, William Moore was appointed Dean and Professor of Law in 1893 at the age of 25, and served as Dean for 34 years until his retirement in 1927.⁷ Moore had legal qualifications from the University of London and King's College, Cambridge University, and was called to the Bar (Middle Temple) in 1891.

Moore is perceivably unique in his approach to developing Australian legal education as he was the first law professor at the Melbourne Law School to visit law schools in the United States, and he pre-empted interest in North American legal education when he appeared before the Royal Commission into the University of Melbourne in 1902, where he said that: 'What we have to learn we have to learn from America'.⁸ An illustration of this outward looking attitude were his efforts to observe American legal education teaching methods when he travelled to the United States (US) in 1911.

3 John M. Ward, 'Peden, Sir John Beverley (1871-1946)', in Melanie Nolan (ed) *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, 1988) Vol 11, 1-2. <<http://adb.anu.edu.au/biography/peden-sir-john-beverley-8008/text13955>>.

4 Mackinolty, above n 2.

5 Ibid.

6 Ward, above n 3.

7 John Waugh, *First Principles: the Melbourne Law School 1857-2007* (Miegunyah Press, 2007) 58.

8 Ibid 80.

When Moore visited the law schools at Columbia University and Harvard University, he focused on the ‘case method’ which characterised much law teaching in the US then as it arguably still does now. Like his counterpart, Jethro Brown of Adelaide Law School, who had also made an earlier visit to the US in 1904 (when he was an academic at the University of Sydney), Moore realised that while the case method might be regarded as an effective teaching method in US law schools, the pre-conditions for its effectiveness - such as a large academic staff, graduate rather than under-graduate entry, casebooks and a substantial law library - were not available at the Melbourne Law School at the time. Although these factors might suggest an inability to replicate the then dominant US legal education approach in Australia, they could also be regarded as evidence that Moore was not complacent about how law should be taught in Australian law schools. In this respect, Moore saw an important role for the law school in Australia’s development, when he wrote in 1927 that:

It is inevitable that Dominion Courts should owe less to British Courts in the future than they have done in the past ... our courts are now accumulating a mass of case law ... we shall become more dependent on schools of law and on the literature of the law to keep the systems in harmony.⁹

Moore was concerned that legal education should reflect both moral and social values, and stressed linking the study of law with history and politics. Consequently, Moore’s jurisprudence course included political philosophy and historical themes in constitutional and legal history. His lectures were described by Sir Keith Hancock as: ‘[t]he best course that I have ever known at any of my many universities.’¹⁰ It was also acknowledged that ‘the themes were broad, the methods exact and the whole delivered with Moore’s sardonic wit and customary precision in speech.’¹¹

Moore also gave monthly addresses to the Melbourne Law School’s Student Society which were recorded in the student magazine *The Summons*, where he is said to have used his wide-ranging knowledge to trace the development of legal institutions, and give a rationale for their existence. Moore also advocated for reform of the existing law.¹² His two major publications reflected his interest in Constitutional Law: *The Constitution of the Commonwealth of Australia*¹³ was regarded as the first scholarly study of the subject, including a history of the Australian Federation movement and detailed examination of Australia’s Constitution. Moore’s second publication in 1906, was *The Act of State in Relation to English Law*.¹⁴

IV PROFESSOR DUGALD GORDON MCDUGALL – DEAN, UNIVERSITY OF TASMANIA LAW SCHOOL

Although originally appointed in 1900 as Dean of the University of Tasmania Law School on a three-year contract, Professor McDougall served for 32 years, eventually retiring in 1932.¹⁵ Like his predecessor Professor Jethro Brown, McDougall was originally appointed as Professor

9 Loretta Ray, Moore, Sir William Harrison (1867-1935) in Melanie Nolan (ed) *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, 1986 Vol 10, 1-2. <<http://adb.anj.edu.au/biography/moore-sir-william-harrison-7645>> accessed online 15 May 2017.

10 Ibid.

11 Ibid.

12 Ibid.

13 Michael Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, 2nd Ed 1997).

14 Michael Moore, *The Act of State in Relation to English Law* (John Murray, 1906).

15 Richard Davis, *100 years: A Centenary History of Law, University of Tasmania 1893-1993* (University of Tasmania, 1993) 12.

of Law and Modern History, but eventually persuaded the University to drop ‘History’ from his title in 1915.¹⁶

McDougall had an outstanding career that began at Trinity College at the University of Melbourne, where he gained a BA in 1888 and an MA in 1890.¹⁷ McDougall then studied at Balliol College, Oxford University as a Williams Exhibitioner, where he took first classes in classical moderations, jurisprudence and post-graduate studies, and was awarded an Oxford BA in 1892, and an MA and a BCL degree in 1902. McDougall was also called to the Bar at the Inner Temple (London) in 1892, and then returned to Melbourne in 1893 where he worked as a solicitor before admission to the Victorian Bar in 1895, to practise as a barrister until 1900. Moore also graduated with an LLB in 1894 and LLM in 1896, from the University of Melbourne, and was awarded an LLD in 1909.

Like the situation for other contemporary law schools at the time, the Tasmanian Law school was apparently chronically underfunded which caused McDougall to have a huge teaching load, which was not helped by the fact that in 1910, his wife was diagnosed with a mental illness, that gave him the sole concern of raising their six sons.¹⁸ Whilst having little time for research, in the early days of his deanship McDougall nevertheless wrote several history books including ‘*Self-governing Colonies*’ in 1905 and ‘*Commonwealth and States*’ in 1907.¹⁹

It is important to also note that at this time, a Law School Dean was principally responsible for teaching *all* the subjects in the law degree curriculum. This meant that McDougall had to teach a wide variety of at least ten subjects in his early years as Dean, including: International Law, Roman Law, Contracts, Commercial Law and Constitutional Law. However, the average class size was only two students.²⁰ Whilst to today’s law academics this size might appear preferable to larger classes, there was an arguably contrary challenge of spreading a wide amount of subject content across a very small number of students. McDougall also had to meet the University’s requirement that law students be taught in Launceston as well as at the University’s main campus in Hobart. This meant that McDougall needed to spend at least two but usually three days a fortnight teaching in Launceston, which was likely to have been taxing given the modes of transport that were available for long distances at the time. McDougall was also required to give 75 lectures in Launceston in 1908, to a class of six students; in 1909 it was 105 lectures to five students and in 1910 it was 40 lectures.

McDougall presided over a major change in the law degree’s structure in 1908, which involved law students studying a first year of arts subjects before commencing law subjects in the second year of their undergraduate programme. This change was similar to that already undertaken at the law schools of the University of Sydney and University of Melbourne. The change meant that students subsequently undertook the law subjects: Property One, Wrongs and Contract (in the second year), Property Two, Constitutional Law and Equity (third year) and Private International Law and Roman Law in the fourth year. A helpful outcome was that McDougall was no longer required to teach history in the Faculty.²¹ A resource challenge however was that McDougall’s office was also labelled as the ‘study’, so doubled as the students’ law library.

16 Ibid 13

17 Ian McDougall, Faculty of Law Alumni, ‘The McDougall Involvement with the University of Tasmania’ (2016) University of Tasmania, Faculty of Law, Stories 1.
<[http://www.utas.edu.au/lawalumn/stories/stories/the-mcdougall-involvement-with-.](http://www.utas.edu.au/lawalumn/stories/stories/the-mcdougall-involvement-with-)>

18 Ibid.

19 R.W.Baker, McDougall, Dugald Gordon (1867-1944) in Melanie Nolan (ed) *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, 1986 Vol 10, 1.
<<http://adb.anu.edu.au/biography/mcdougall-dugald-gordon-7344>>

20 Davis, above n 15, 14.

21 Ibid, 13.

Although McDougall was not physically affected by World War I, it required him to take on even more responsibilities at 47 years of age because he was one of the University's most senior professors. For example, in 1915 McDougall became President of the Board of Studies, and was elected by the Senate as a member of the University Council until 1922.

An assessment of McDougall's achievements as a legal educator, includes the fact that 112 LLB degrees were awarded during his Deanship, resulting in an average of three law graduates per year. Eight students were also awarded an LLM degree. In 1930, Arndell Lewis, the son of the then University of Tasmania Chancellor, was awarded the first Tasmanian LLD. Another significant achievement was Helen Dunbar's graduation in 1931, as the first woman in Tasmania to graduate with a LLB and to receive the James Backhouse Walker Prize, which was named after a former University of Tasmania Vice-Chancellor.

During his period as Dean, McDougall was supported by only one additional staff member, Phillip Griffiths, who was appointed to the Faculty in 1913 and stayed until 1930 when he became Tasmania's Solicitor General. Griffith's salary was £100 a year, compared to McDougall's salary of £500 a year. Note however, that staff salaries were reduced 'voluntarily' by 20 per cent during the Great Depression. Griffith was replaced by two part-time staff members when he resigned in 1930.

There was no doubt that the distress of: overwork, a challenging family situation and sole parenting responsibilities, combined to exact a heavy toll on McDougall personally, whose alcohol consumption also affected him to some extent in his later years. However, evidence from McDougall's students at the time was that despite all the distress he was under, it never affected the quality of his lectures. One of these students was Bruce Piggott, who apparently said that McDougall was a wonderful man and a brilliant scholar who was always up-to-date with his law.

McDougall suffered a serious accident in 1929 which left him partially paralysed temporarily. This gave McDougall the opportunity to retire in 1932 when he was 65 old, with the title of Emeritus Professor, a retiring allowance of £320 and a government grant of £100 a year.

V PROFESSOR FRANK BEASLEY – UNIVERSITY OF WESTERN AUSTRALIA LAW SCHOOL

The Faculty of Law's establishment at the University of Western Australia ('University') was very similar to the early situation at the University of Sydney, in that although a Law Faculty had been established earlier, it was not a teaching law school. This meant that law students in Western Australia had the choice of studying for a law degree, either in another state or overseas, or undertaking training as an articled clerk for five years whilst studying for the State Barristers Board examinations.

Although the University's Professorial Board had already decided in June 1920 that it would support the establishment of a Law Faculty with full teaching facilities, there were long-drawn out negotiations which seemed to characterise the creation of other Australian law schools. It was not until the beginning of 1928 that the formal opening of the University of Western Australia Law School took place, with the commencement of law teaching under the aegis of Professor Frank Beasley.²² Beasley graduated from Wadham College, Oxford University (BA in 1920), and the University of Sydney (LLB -1924), and was admitted to the New South Wales Bar in 1924. Professor Beasley was appointed from 17 applicants, and was to have a profound influence on the early development of the law school by serving as Head of the Law School and then continuing as a professor until his retirement in 1963.

²² Marion Dixon, *Looking Back: A Short History of the UWA Law School, 1927-1992* (University of Western Australia, 1992) 8.

In the early years, the law school was located with the rest of the University in Irwin Street, Perth. The buildings were not prepossessing and were nicknamed ‘Tin Pot Alley,’ but they did have the advantage which most law schools had at this time, in that their central location suited the law students, most of whom were articled clerks to law firms located nearby in the city.²³ There were approximately 18 law clerks and some other Arts degree students who were continuing on to the LLB degree. The lectures were arranged to take place from 9-10 o’clock in the mornings and 5-6 to o’clock in the evenings, which suited those students who were also employed as articled clerks.²⁴

Professor Beasley was the only full-time member of the academic staff and was supported by members of the local practising legal profession in a part-time capacity. A contemporary historical account of the law school states that: ‘It was regarded as something of an honour to be appointed a visiting lecturer to the Law School, and the paltriness of the remuneration did not discourage even the most distinguished of practitioners offering their services.’²⁵

Frank Beasley remained the only full-time academic staff member of the Law Faculty until World War II. This meant that when he returned to active service in the army at the beginning of that War the University suspended teaching in the Law School for 1942 and 1943 with Beasley returning in 1944 when he resumed teaching on his own, without outside lecturing assistance. When Beasley retired in 1964, he had served as Dean for 37 years and there was arguably no doubt that his retirement marked the end of an era for the University. A history of the University’s Law School describes Beasley and his influence as

an austere, sometimes severe, teacher with a passionate commitment to the ideals of scholarship, service and morality. His capacity for comment described as ‘forthright and incisive’ and at time ‘devastating and emotive’ did not always endear him to students or some colleagues in the University. But there was no denying that his energy, determination and dedication had brought to the Faculty of Law high standing among the law schools of Australia.²⁶

VI ICONS INFLUENTIAL IN AUSTRALIAN LEGAL EDUCATION – OR BEYOND TO THE LEGAL PROFESSION AND WIDER COMMUNITY?

Peden, Moore, McDougall and Beasley are all names which immediately spring to mind when discussing early Australian Legal Education. However, the extent of their influence very much reflects the nature of the law school which each headed. Inevitably, both Peden and Moore as Deans of law schools in the more heavily populated of the two major Australian States, were arguably in a position, if they chose, to exercise influence on the wider Australian community. It seems to say much for their natures that both Peden and Moore’s influence arguably did extend far beyond their respective law schools.

John Peden regarded law as embracing both public and academic life as one. As President of the NSW Legislative Council from 1929, Peden resisted all attempts by the NSW Premier John Lang, to abolish it. Peden accomplished this in 1929 by inserting a section 7A amendment into the *NSW Constitution Act 1902 (NSW)* which ensured that the NSW Legislative Council could not be abolished or have its powers altered, except after a referendum. This amendment was upheld as valid under the *Colonial Law Validity Act 1865* by both the High Court of Australia and the Privy Council.

Similarly, William Moore was influential for his expertise in Constitutional Law, involving himself in the work of the Federalists at the 1893 Corowa Convention, and the initial drafting

23 Ibid 9.

24 Ibid.

25 Ibid.

26 Ibid 20.

of the then proposed Australian Constitution. It has been said that by the end of the Australasian Federal Convention's first meeting at Adelaide in 1897, Moore was an acknowledged authority on the drafts and was 'used as a human reference library'²⁷ by convention members.

In comparison, Frank Beasley and Dugald McDougall were unable to exercise the same influence over their State's legal community as did Peden and Moore, arguably because of the limited wider community impact of their respective law schools. Beasley was actually always highly regarded nationally as a legal educator and this was recognised after his retirement from the University of Western Australia Law School, by the Foundation Dean of Monash University Law School, Professor Derham, who sought the Monash Professorial Board's approval for Beasley's appointment as a special lecturer involving the Monash law library. Derham recommended that Professor Beasley had contacts with: 'Every law library in the world' adding that: 'Few men knew more than [him] about the sources and the techniques of building up a collection of law books.'²⁸ Such was Beasley's reputation that the Monash Professorial Board accepted Derham's recommendation without question.

Although Dugald McDougall's influence as Dean was arguably less than his contemporaries, his influence ought to be viewed perhaps in light of Tasmania's isolated island regional nature and the small size of its legal profession during his tenure. Even after McDougall's retirement, his former students and those who were involved with governance of the law school and the University of Tasmania, continued to recognise his influence on the development of Tasmanian legal education. What has to perhaps also be recognised, is that all of the four early law academics discussed in this paper, were the forerunners in developing and enhancing legal education as a major university discipline in Australia, in a period in Australian legal education where there was a far greater interconnection between law schools and the practising legal profession.

27 Loretta Ray, above n 9.

28 Peter Balmford, 'The Foundation of Monash Law School' (1989) 15 *Monash University Law Review* 167.

SILVER JUBILEE MILESTONE 1992–2017: A CONTRIBUTION TO AUSTRALIAN LAW TEACHING THE COMING-OF-AGE OF THE CENTRE OF LEGAL EDUCATION AND THE LEGAL EDUCATION DIGEST

*David Barker**

I INTRODUCTION

This article is about the Silver Jubilee Milestone 1992-2017 for the Centre for Legal Education ('Centre') and the *Legal Education Digest* ('LED') in Australia. Any examination of the modern transformation of legal education in Australia would have to incorporate a reference to the influence on the process exercised by the Centre and its journal the LED. During its most active period, the Centre had a major influence on the legal communities' reactions to, and views of, contemporary legal education.¹ This paper traces the Centre's evolution and its progress over the relatively short period of two and half decades covering the period of its establishment in 1992 until 2017.

II ORIGINAL ESTABLISHMENT OF THE CENTRE

A Colloquium on Legal Education 1990

The Centre was established by the former Law Foundation of New South Wales, a predecessor body of the Law and Justice Foundation of New South Wales. Its establishment was the outcome of a Colloquium on Legal Education ('Colloquium') conducted by the Law Foundation in June 1990. The Colloquium's major goals were:

To examine the problems and challenges, within the existing education processes that relate to the transforming of law students into legal practitioners; to examine the range of programs, models and possibilities for providing ways of transforming law students into legal practitioners; and to produce, if possible, some consensus on solutions and ways forward.²

B A Proposal to the Law Foundation of New South Wales

Sometime after the Colloquium, in February 1991 a proposal was put to the Board of Governors of the Law Foundation that it establish a body which focused the Foundation's objectives for legal education. The proposed body was intended to be a permanent organisation which would carry forward the Colloquium's outcomes. It was proposed that the overall aim of the Centre would be to further legal education and improve its outcomes. This was seen at the time as taking up the Law Foundation's objects, and dealing with them in a permanent, outgoing and professional manner.³

* Emeritus Professor AM, Faculty of Law, University of Technology Sydney.

1 David Barker, *A History of Australian Legal Education*, (Federation Press, 2017) 22.

2 *The Centre for Legal Education: The First Three Years 1995* (Centre for Legal Education, 1995) 3.

3 *Ibid.*

C Law Foundation Resolution

The Law Foundation's Board of Governors considered the proposal and in February 1991 resolved:

That the Board agree in principle to support the establishment of the Centre for Legal Education, subject to clarification of the Foundation's income arrangements with the Law Society, the overall major projection commitments for the concept from the professional associations and the Chief Justice.⁴

The Board's set conditions were met and in March 1991 the Foundation Board resolved:

That the Board confirm its previous in principle support for the establishment of the Centre for Legal Education and adopt the proposed timetable for establishment, as amended, subject to formal endorsement of the project by the Law Society of New South Wales and an increase in the Law Foundation's income.⁵

Later in May 1991 the Board of Governors resolved:

That an allocation of \$250,000 as a part payment to cover the start-up costs of the Centre for Legal Education be authorised, and that the timing of the commencement of operations of the Centre be dependent upon the Foundation receiving an increased income in the next financial year sufficient to enable its full budget to be met.⁶

In February 1992, the Centre was established with the appointment of its first director, Christopher Roper⁷ which was to prove an inspired choice. Christopher Roper had already been the Executive Director of the Leo Cussen Institute Melbourne 1977-1982, and the Director of the College of Law Sydney 1982-1988, and was currently the Director of Education at an Australian law firm which then known as 'Stephen Jacques'. Christopher Roper was subsequently appointed an AM (Member of the Order of Australia) in 1999 for his contribution to continuing legal education in Australia.⁸

Among these early years, a cross-section of its more significant studies includes those relating to continuing legal education. Two of these, *Senior Solicitors and their Participation in Continuing Legal Education*⁹ and *Foundations for Continuing Legal Education*,¹⁰ were authored by Christopher Roper. Another one, *A Study of the Continuing Legal Education Needs of Beginning Solicitors*¹¹ which incorporates wide-ranging literature review of the topic, was authored by John Nelson.¹²

III THE FIRST SEVEN YEARS 1992–1999

In 1999, the Centre published a document titled 'The First Seven Years'.¹³ This document incorporated a review which chronicled an outstanding list of the Centre's achievements, which

4 Ibid.

5 Ibid.

6 Ibid 3-4.

7 Ibid.

8 *Who's Who 2015, Christopher Roper* (Crown Content, 2015) 1082.

9 Christopher Roper, *Senior Solicitors and their Participation in Continuing Legal Education* (Centre for Legal Education, 1993).

10 Christopher Roper, *Foundations for Continuing Legal Education* (Centre for Legal Education, 1999).

11 John Nelson, *A Study of the Continuing Legal Education* (Centre for Legal Education, 1993).

12 Ibid 11-46.

13 *The Centre for Legal Education: The First Seven Years 1999* (Centre for Legal Education, 1999).

arguably reflected credit on Christopher Roper as its director. The Centre was also supported by a strong Board of Management until 1996, when it was reconstituted by an Advisory Board which continued in operation, until the Centre was transferred to the University of Newcastle in 2000. Already in 1995, a Triennial Review of the Centre had said:

It is difficult to envisage the Centre being able to accomplish more in the three years of its existence than it has accomplished in a variety of legal education domains. It is already regarded as indispensable.

The 1999 Report sets out a long list of achievements which it would be difficult to replicate in this paper. However, a short summary of these accomplishments by the Centre up and until this time, is set out below:

- Under ‘Research and Policy Development’ it was claimed that the Centre had reviewed ‘Practical Legal Training’ in New South Wales and the cost of legal education in Australia;
- Advised the Legal Practitioners Admission Board;
- Assisted the New South Wales Law Society to develop a policy on legal education;
- Carried out a National Law students’ career intentions and career destinations study of Australian law graduates;
- Reviewed the Law Society’s Accredited Specialists’ Scheme;
- Evaluated the Australasian Law Teachers Association (‘ALTA’) Law Teaching Workshops; and
- Supported a study of the socio-demographic characteristics of first year law students.

It should be recognised that for most of these projects, this was the first time that any institution had considered there was a need for review, and that the concept of research into many of the outcomes, was an exemplification of this approach. This was an innovative development towards legal education, and its outcomes had a transformative effect on the long-term relationship between law schools and the legal profession, particularly with respect to ad hoc legal associations such as the admitting authorities and the Law Council.

With regard to information, the Centre had developed an impressive portfolio of legal publications which incorporated the: *Legal Education Digest*, *Australasian Legal Education Yearbook*, a wide variety of legal monographs, two major reports relating to the introduction of the *Uniform Admission Rules* and *The Lawyers Admission Handbook* (the latter intended as a quick reference guide to the mutual recognition regime in the various Australian jurisdictions), the *Lawasia Directory of Law Courses*, and *The Australasian Professional Legal Education Directory*.

The Centre had also developed its own website, which was arguably a major development in the 1990s. It should also be realised that this series of legal publications took account of a need by law academics and the legal profession for: information relating to both regulation and admission into the legal profession, the compilation of information outlining the variety of law programs, the range of law teachers, and those law schools available to provide the respective law teaching.

‘Support and Facilitation’ was the third designated activity of the Centre which covered a wide range of activities, the most prominent of which was the New South Wales Legal Education Conference that drew on a wide membership from New South Wales and the Australian Capital Territory. Members were: representatives of the legal professional bodies responsible for legal education, officers of the Attorney General’s Department, many Law Deans, the heads of practical training courses, providers of continuing legal education, and representatives of the Australian Law Students Association. The importance of these initiatives was that they brought together in a cohesive way, the principal participants in legal education in the State, who had not previously recognised the influence and connections which their respective institutions or departments had on the wider aspects of legal education.

The Conference met on a six-monthly basis with the primary purpose of exchanging information, and particularly, to focus on matters of current concern. It also served to brief participants on matters of interest, so as to develop a common base of knowledge amongst the principal players in legal education in the State. These Conferences were particularly influential. Up and until the foundation of Centre, there had been little or no forum for the consideration of legal education. In some ways, this need was articulated later by the Australian Law Reform Commission in ALRC 89 ‘Managing Justice’ when it said that:

There is need for an institution which can draw together the various strands of the legal community to facilitate effective intellectual interchange of discussion and research of issues of concern and nurture coalitions of interest.¹⁴

The Centre was also involved in various activities which included for example providing the secretariat for various organisations such as: the then Committee of Australian Law Deans (subsequently the Council of Australian Law Deans), the Standing Committee for Teaching Professional Responsibility, the Continuing Legal Education Association of Australia, and the administration of the ALTA Law Teaching Workshops. The latter had been launched in 1988 and was regarded as heralding a continuing encouragement to improve the quality of student teaching in the law, activities with which the Centre became increasingly involved.¹⁵

IV THE CENTRE’S MAIN TWO PUBLICATIONS:

THE LEGAL EDUCATION REVIEW AND THE LEGAL EDUCATION DIGEST

The Centre has been responsible for two major ongoing publications: the *Legal Education Review* (LER) and the LED. The influence of these two journals should not be underestimated. This is particularly the case with respect to the LER which, having been published on a regular basis until the present time, has become a highly regarded journal. It could also be argued that one of its best qualities has been the provision of comment, analysis and criticism of legal education.

A *The Legal Education Review (LER)*

The Legal Education Review was established in 1989 with the support of a grant from the then Law Foundation of New South Wales. It is a refereed journal whose objectives are described as ‘to encourage and disseminate research into legal education and to stimulate discussion, debate and experimentation on topics related to legal education.’¹⁶ The LER had always been under the control of ALTA, although for some time in its early years, its administration had been the responsibility of the Centre. Currently, the LER is managed by Bond University with Professor Nick James the Dean of the Law School, as Editor in Chief. It is published annually in electronic form.

B *The Legal Education Digest (LED)*

Since its inception, the LED has been a journal of the Centre, and was published originally, on a quarterly basis in both hard and electronic forms. The Foundation Editor was Dr John Nelson,¹⁷ and in 2000, an agreement was negotiated with the Association of American Law

14 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000). 154.

15 Ben Boer, ‘The Australasian Law Teaching Clinic: Its Past, Present and Future (1989)’ 1 *Legal Education Review* 145.

16 The Review Mission, *Legal Education Review* <<http://epublications.bond.edu.au/ler.edu.au>>.

17 John Nelson, ‘In this Issue’ (2000) 8(3) *Legal Education Digest* 1.

Schools ('AALS') whereby a copy of the LED would be distributed to each of its member law schools in return for financial support from the AALS. This Agreement was terminated in 2005 and resulted in the co-directors having to review the LED's future financial viability. A reluctant decision was made to request Dr John Nelson, who had been the salaried editor since its foundation in 1992, to relinquish his position and be replaced by the author as Editor, and Dr Michelle Sanson as Associate Editor, both on an honorary basis. This arrangement continued until the end of 2015 when Bridget Kennedy replaced Dr Michelle Sanson as Associate Editor. Also, the end of 2016 saw the termination of hard copy publications of the LED, with 2017 seeing the introduction of electronic copies of the Digest only, being restricted to circulation to ALTA Members.

V THE CENTRE MOVES TO THE UNIVERSITY OF NEWCASTLE LAW SCHOOL 2000

The Centre's move to the University of Newcastle was the outcome of a review, by the then NSW Law Foundation, of its financial resources. This had culminated in a decision to disestablish both the NSW Centre for Legal Justice and the NSW Centre for Legal Education.¹⁸ Although the Centre continued to function, there was concern with regard to the long term financial commitment to the Centre by the University of Newcastle. The problems involved were with regard to operating such a centre away from Sydney where most of its activities had been concentrated, and the additional difficulty which occurred when the Foundation Director Christopher Roper resigned at the end of 2001.¹⁹ Although the Centre continued under the Acting Director, Professor Ted Wright, Dean of Law at the University of Newcastle, a decision was made by the University that there was no long-term future for the Centre in Newcastle.

VI THE CENTRE'S TRANSFER TO THE UNIVERSITY OF TECHNOLOGY SYDNEY (UTS)

At a meeting of the Council of Australian Law Deans in 2002, Law Deans were invited for expressions of interest for the transfer of the Centre to their law schools. It was surprising that whilst the Australian Law Deans had been one of the principal beneficiaries of the outcomes of the Centre, particularly those in New South Wales, the only expression of interest to host it was made by the author on behalf of the UTS Law Faculty. Consequently, it was agreed that the Centre's transfer between the respective law schools would take place as soon as possible. Whilst most of the Centre's physical assets, such as the law library, archives and current files, were transferred to the Kuring-gai Campus of UTS at the beginning of 2003, the deed transferring the Centre's intellectual property, and thus effectively its control, was not executed until the 9th of May of that year.²⁰ There was no funds transfer to support the Centre's future administration, other than a sum of \$40,000 which had been held in a separate account on behalf of the *Legal Education Review*.

The author (who was then Dean of Law at the UTS) and Michael Adams, were appointed as the Centre's co-directors, taking responsibility for its administration on the basis that there could be no undertaking of financial support by the UTS, other than the provision of office services and office space. In the short term, the author and Professor Adams transferred their share of a 2002 University Team Teaching Award, to cover these initial costs.

18 Christopher Roper, 'Centre for Legal Education Moving to a New Home' [2000] (January) *Newsletter of Centre for Legal Education* 1.

19 Christopher Roper, 'From the Director' (2000) Vol 9 No 3 *Newsletter of Centre for Legal Education* 1.

20 'A Brief Look at Our History', (2008) *Newsletter of Centre for Legal Education* 3.

VII THE NSW LEGAL EDUCATION FORUM

In view of the fact that the author had completed his two terms as Dean of the UTS Law Faculty at the end of February 2005, the co-directors agreed that it would be appropriate to re-activate some of the Centre's functions. It was recognised that the Centre would need administrative support. The author therefore agreed to contribute part of his book royalties so that the Centre could pay for the employment of a research assistant, Rachel Moore, a final year law student at the University of New England, who would be available during her university vacations. This was supplemented in 2005 by a further sum from the author, who had carried out a review of the University of South Pacific Law program for which he received a small honorarium, which was also paid to the UTS to further subsidise the research assistant's funding.

The first priority was re-establishing the NSW Legal Education Conference. In view of the fact that there were no funds available, it was agreed that the new centre would be renamed 'Centre for Legal Education Forum' to reflect the different objectives of the forum in contrast to previous conferences.

A *The First Forum*

The first of these new forums took place during the morning of 1 February 2006 at the State Library of New South Wales, with financial sponsorship being provided by the Co-Op Bookshop. As well as the attendance of representatives from the various law schools in the state, there were also representatives from the College of Law, the Director of the Law Extension Committee, Roger Wescombe, Secretary of the Legal Profession Admission Board (LPAB), Geoff Mulherine, Director of the Law and Justice Foundation, and Professor Paul Moyle as the Chair of the ALTA Executive Committee. Besides the exchange of views between the law school representatives, Professor Moyle gave a review of the expansion of ALTA's activities, Professor Jill McKeough reported on her role as Convenor of the NSW Law Deans and as a member of the LPAB, with Geoff Mulherine giving an account of the Law and Justice Foundation. It was agreed by all attendees that the Forum had been a worthwhile exercise and should be repeated on a regular basis in the future.²¹

B *The Second Forum*

The Second Forum was held at the NSW Law Society of New South Wales on 22 June 2006, with sponsorship from Thompsons Book Publishers. Besides the usual exchange of views between NSW law schools, there was also a discussion panel involving Professor Carl Monk, Executive Director of the Association of American Law Schools (AALS) and John Dobson, a member of the NSW Law Society Council. Whilst both members of the panel gave an account of their responsibilities within their respective organisations, the main part of the discussion was concerned with the questions of: 'whether Australian Law Schools could learn from their North American counterparts?' and 'differing ways in which practising lawyers and the Judiciary were involved with United States Law Schools'.²² Carl Monk also gave an account of the establishment of the International Law Schools Association, an initiative of AALS.²³

21 'Centre for Legal Education Forum – The First Forum' (2008) *Newsletter of Centre for Legal Education* 4.

22 'Centre for Legal Education Forum – The Second Forum' (2008) *Newsletter of Centre for Legal Education* 5.

23 *Ibid.*

VIII THE CENTRE STRIVES TO SURVIVE

From 2000 onwards, the Centre had suffered from a chronic lack of funds. In 2007, an application had been made to the NSW Statutory Fund for \$54,460.00 to continue and expand the Centre's activities. The Statutory Fund outright refused to offer any financial support. This meant that the Centre was unable to undertake a projected survey of the activities, and funding of New South Wales Law Schools and other proposed activities of the Centre, such as further Legal Education Forums, were put on hold. However, due to the members of the Centre continuing their services on a pro-bono basis, it was possible to maintain the publication of the *Legal Education Digest* which also received some financial support from ALTA, in return for it being distributed to all its members free of charge.

IX TRANSFER OF THE CENTRE FROM THE UNIVERSITY OF TECHNOLOGY SYDNEY TO WESTERN SYDNEY UNIVERSITY

In 2011, the Centre received notice from the UTS Law School that it did not satisfy the new requirements of the University with regard to the status of University law centres.²⁴ The outcome of this notice from the University was that again, the Centre made arrangements to move, this time to Western Sydney University Law School where Professor Michael Adams, one of the Co-directors, was Dean of the Law School. This move, which took place in 2012, enabled the Centre to retain its law library of unique legal books, and also all its records and back copies of its publications and former hard copies of the LED. It was during this period that Christopher Roper became involved again with its activities, particularly with the development of a new Web Site. However, continued lack of funding persisted to prevent any extension of the activities which had been so successful in its first decade.

X A FINAL MOVE? PROJECTED MERGER WITH BOND UNIVERSITY LAW SCHOOL'S CENTRE FOR PROFESSIONAL LEGAL EDUCATION (CPLÉ)

Observers of the Centre's activities over the last two and a half decades, would gain the impression that its main activity was the involvement in a peripatetic exercise of moving its base from law school to law school! This would overlook the fact that throughout this period, the LED has continued to be published on a regular basis with each edition including at least 60 or more pages involving the précising of at least thirteen law articles, and the review of one or more legal education texts. There is also evidence that during the first week of each publication of the LED in electronic form, it attracts a readership of over 200 readers.

When Professor Michael Adams retired as Dean of the Western Sydney University Law School in June 2017, it was inevitable that without his influence, the Centre would need to review its future options which might even require a further move to a more appropriate law school. Fortunately, a meeting in March 2017 at CALD between Professor Michael Adams and Professor Nick James, the Dean of Bond University Law School, initiated negotiations which led to the proposal for the Centre's merger with the Bond University Law School's Centre for Professional Legal Education (CPLÉ).²⁵ As Bond University was already responsible for the publication of the *Legal Education Review*, this meant that there could also be an advantage for the future location of the publishing of both the LER and the LED being carried out at the same law school. Hopefully, there will also be additional synergies for the recognition of legal

24 Letter from Professor David Barker to Professor Jill McKeough, 16 April 2010 (David Barker's Personal Papers).

25 David Barker, 'Future Arrangements for Centre for Legal Education and Legal Education' (Agenda Item, Australasian Law Teachers Association Executive Meeting, 10 April 2017)

education arising from the combination of the activities of the CLE and CPLE. Certainly, the future combination of the staff of both centres could lead to a committed critical mass of law academics focused on the development of high quality research and outreach activities in legal education – at the very least creating a re-enactment of that tradition of enthusiasm, which had been the hallmark of the Centre since the early days of its formation.

XI REFLECTIONS ON THE ACHIEVEMENTS AND OUTCOMES OF THE CENTRE AND LED

Arguably it has to be recognised that when the Centre was first established in 1989, Australian legal education was largely unstructured with regard to the development of legal research and its effect on the ongoing development of the legal profession. Much of this was only touched on for the first time with the release of the Pearce Report in March 1987,²⁶ and the concurrent outcomes of the Dawkins Report with its abolition of the binary divide in tertiary education.²⁷ However, it was the foundation of the Centre under the leadership of Christopher Roper, that sought to develop and correct some of the inadequacies of Australian legal education which had been highlighted in the Pearce Report.²⁸ Part of this was due to Roper realising that at that time, there was government funding available to assist this development. This funding was not available before 1989, and by 2000, it had come to an end when the New South Wales Government had to fully utilise the Statutory Fund to finance the shortcomings which were becoming evident in the funding of legal aid in the State.

Nevertheless, what the Centre was able to do during its most prolific period in the first decade of its foundation, was to inject into all aspects of Australian legal education, the confidence that led to differences in the approach to the teaching of law, and the continuing improvement in the teaching methods within law programs. There was also the emphasis by the Centre on the development of legal research, with a focus on the systematic investigation of the effect of legal education on the provision of legal practitioners, the extension of practical legal training, the development of continuing legal education, and the ongoing examination of the changing patterns of law graduates with respect to career intentions and destinations.

This paper has endeavoured to highlight a view that the Centre was in the vanguard in developing many of the improvements which have taken place in Australian legal education, and that under Christopher Roper's leadership, it was responsible for injecting confidence into the manner by which this was subsequently undertaken by the wider legal academic community.

26 Barker, above n 1, 209.

27 Ibid 100.

28 Ibid 212.

EXPRESSION, EXCLUSION, AND PROPERTY EXPECTATIONS: AN ANALYSIS OF GRAFFITI USING THREE NEW ZEALAND ARTEFACTS

*Jonathan Barrett**

I INTRODUCTION

Graffiti is so ancient a practice, it may represent an inherent human urge for graphic expression.¹ Contemporary graffiti, however, is greatly derived from an African American, hip hop, cultural triad, along with break dancing and rap music.² Graffiti may be valorised by emphasising its overtly political manifestations. From Martin Luther's audacious nailing of his 95 theses, to a Wittenburg church door, to the courageous street artists of the Arab Spring,³ 'individual ideologues' have daubed messages on 'mortar, brick, steel, and glass ... whatever subsequent laws are constructed'.⁴ Graffiti writing is also and predominantly, a 'narcissistic' practice whereby taggers repeatedly write their tags in public places.⁵ Street art, commissioned or otherwise, includes remarkable examples of artistry.⁶ However, most graffiti is rudimentary and lacks any discernible aesthetic value. These 'rough, violent cries of the ignorant and impoverished'⁷ are most difficult to accommodate within a legal scheme. Laws typically draw a bright line between commissioned murals and graffiti vandalism.⁸ It might be convenient to further draw bright lines between political and narcissistic graffiti; between street art and graffiti vandalism, or between aesthetically valuable graffiti and aesthetically valueless graffiti. However the law is a blunt instrument for inscribing such fine distinctions.

Despite the typical absence of any overt ideological message in tagging, much contemporary graffiti writing can be considered 'political', inasmuch as it often makes a statement, however oblique or underdeveloped, about the writers' marginalisation in society. Indeed, for Ivor Miller, 'graffiti is central to a contemporary dialogue on issues of race and class'.⁹ Freedom of expression includes most offensive statements,¹⁰ as well as lofty utterances. Likewise, a discussion of graffiti and expression needs to engage with broadly despised tagging as much as popular and, indeed, commercially valuable uncommissioned urban art.¹¹

* Senior Lecturer, School of Accounting and Commercial Law, Victoria University of Wellington

1 See Roger Gastman and Caleb Neelon, *The History of American Graffiti* (Harper Design, 2011) 20.

2 See David G Lindsey and Robin A Kearns, 'The Writing's in the Wall: Graffiti, Territory and Urban Space in Auckland' (1994) 50(2) *New Zealand Geographer* 7, 8.

3 See, for example, Alastair Beach, 'Revolutionary Road: The Urban Showcase of Egypt's Uprising' *The Independent* (United Kingdom), 9 October 2012, 36.

4 Carlo McCormick in collaboration with Wooster Collective's Marc and Sarah Schiller; Ethel Seno (ed) *Trespass: A History of Uncommissioned Urban Art* (Taschen, 2010) 23 ('Trespass').

5 For a glossary of street art terms, see Alison Young, *Street Art World* (Reaktion Books, 2016) 194-7. Of particular note, a 'tag' is a stylised signature; a 'piece' (a contraction of masterpiece) is an accomplished mural; and 'buffing' is removing graffiti, for example, by painting over in a neutral colour.

6 See, generally, *Trespass*, above n 4.

7 Margo Thompson, *American Graffiti* (Parkstone International, 2012) backcover.

8 See *Crimes Act 1961* (NZ) s 269(2)(a).

9 Ivor L Miller, *Aerosol Kingdom: Subway Painters of New York City* (University Press of Mississippi, 2002) 14.

10 See, eg, *Morse v The Police* [2011] NZSC 45.

11 Banksy is the best-known, living graffiti artist but Jean-Michel Basquiat, Keith Haring and Kenny Scharf were embraced by commercial galleries far earlier: see Thompson, above n 7, 6.

This article is about exclusion, expression and property expectations. It is also concerned with control of the public space. Three artefacts from New Zealand are used to illustrate the difficult legal issues that arise from graffiti. First, a Hastings pie maker's prolific tagging is used to demonstrate how graffiti is typically perceived as a criminal scourge and a pernicious offence against property. The second example, an exhibition in an Auckland gallery, shows how street art, once included, attracts full property rights.¹² Third, Wellington's Ian Curtis memorial indicates how a section of the public may transform graffiti into a community mural, thereby investing it with de facto protection akin to that accorded to public artworks. The defenders of the Curtis memorial effectively determined what should be visible in part of the public space. Drawing distinctions between different kinds of property on the grounds of personhood, the article principally argues that we need to engage with exclusion, expression and property expectations in relation to graffiti; not to wage a futile 'war on graffiti vandalism'.¹³

II EXCLUDING OTHERS FROM PROPERTY

The nature of property rights is highly contested.¹⁴ Nevertheless, a recognised feature of ownership is the legally enforceable power to exclude (conversely, to include) others.¹⁵ In this section, three example artefacts are used to illustrate property issues in relation to graffiti. The first example shows how the power to exclude (include) informs the legal distinction between graffiti vandalism and street art. The second example, highlights the property rights that accrue to artists when they are included by a property owner. The last is an example of a property owner practically waiving their right to exclude. These examples inform a discussion about control of the public space.

A *The Prolific Tagger*

Between July 2009 and November 2010, Blair Kitchen, a 22-year-old pie maker,¹⁶ wrote more than 500 tags around Hastings, a provincial city in the Hawke's Bay region of New Zealand's North Island.¹⁷ His tag 'Kron', which he later changed to 'Dots' and 'Dotstone', was the most

12 A mural comprises four distinguishable forms of property: (1) the support (wall); (2) the medium (the spray paint) which becomes affixed to the support; (3) the physical mural; (4) the expression of the idea embodied in the mural (copyright). The paint applied to a wall is likely to become a fixture: see G W Hinde, *Hinde McMorland & Sim Land Law in New Zealand* (LexisNexis, 7th ed, Vol 1, 2004) 158-62.

13 See for example, Catrin Owen, 'Auckland Council claims it's winning war against graffiti' *Auckland Now* (online), 16 March 2016 <<http://www.stuff.co.nz/auckland/local-news/77937705/Auckland-Council-claims-its-winning-war-against-graffiti>>.

14 Compare AM Honoré, 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 107 discussion of natural property rights, and Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, on property as fraud.

15 See David L Callies and J David Breemer, 'The Right to Exclude Others from Private Property: A Fundamental Constitutional Right' (2000) 3(3) *Washington University Journal of Law & Policy* 39.

16 Kitchen's occupation is not irrelevant. Just as 'anything is art if it is found in an art gallery' (Stuart Culver, 'Whistler v. Ruskin: The Courts, the Public and Modern Art' in Richard Burt (ed), *Administration of Aesthetics: Censorship, Political Criticism, and the Public Sphere* (University of Minnesota Press, 1994) 149, 166), so anything outside the gallery might not be art. Pie makers may be expected to make pies, not art. On the institutional theory of art, see George Dickie, *Art and the Aesthetic, An Institutional Analysis* (Cornell University Press, 1974).

17 Marty Sharpe, 'Jail for "Changing Face of Hastings"' *The Dominion Post* (Wellington), 25 August 2011, A5.

prominent in the city during that period.¹⁸ In the Napier District Court,¹⁹ Mackintosh J convicted Kitchen on charges of intentional damage and sentenced him to 14 months imprisonment. In a victim impact statement, the mayor of Hastings, Lawrence Yule, said Kitchen's 'offensive scrawls' had 'changed the face of graffiti vandalism in our district' and refuted Kitchen's claim that he did graffiti 'for the art' on the grounds of 'the sheer number of mindless scribbles put on utilities boxes, council assets, private and commercial property'.²⁰ Hastings District Council buffed the tags at a cost of NZ\$200 each and sought reparation of NZ\$102,800. In the event, the court ordered reparation of NZ\$15,000 to be paid on a pro rata basis among affected property owners. In the face of the ostensibly severe sentence, Kitchen appealed to the High Court. There, Brewer J upheld the tariff and based on precedent,²¹ observed 'it might be considered lenient'.²²

Graffiti is generally presumed to decrease the value of property. Indeed, Doug Harvey argues 'unauthorized graffiti art is, at its root, a direct challenge to the central tenet of capitalism ... private property'.²³ But the proposition that graffiti is economically destructive, lacks nuance. Graffiti implies urbanity in the contemporary city; it provides a veneer of edginess that tourists expect.²⁴ Melbourne's Hosier Lane, for example, is the most photographed tourist attraction in the city.²⁵ Such a magnet has benefits for local businesses and the city (if not the often-homeless artists). As Alison Young observes, graffiti plays an important role in improving the market value of properties in popular inner-city suburbs, such as Fitzroy in Melbourne.²⁶ Generally, whereas 'street art can attract gentrification', Kim Dovey argues, 'tagging is linked to dereliction'.²⁷

B *Blockbuster*

Dick Frizzell is a successful pop-art artist.²⁸ With his son Otis Frizzell and collaborator Mike Weston,²⁹ he exhibited *Blockbuster* at the Saatchi & Saatchi Gallery in Auckland's fashionable Parnell district in 2012.³⁰ Had the artists painted the exterior walls of the gallery in precisely the same way as *Blockbuster*, but without commission or permission, the mural would have constituted graffiti vandalism. Auckland Council might have buffed it and the police prosecuted

18 Ibid.

19 Napier is 20 kilometres from Hastings.

20 Sharpe, above n 17, A5.

21 *Randell v Police* HC Napier CRI-2008-441-8, 5 March 2008, Asher J; *Horne v Police* HC Whangarei, CRI- 2008-488-75, 5 February 2009, Priestley J; *Martin v Police* HC Rotorua CRI-2010-470-13, 22 April 2010, Andrews J.

22 *Kitchen v Police* HC NAP CRI-2011-441-35 25 October 2011 (Brewer J) [6].

23 Doug Harvey, 'The Return of the Culture Wars' *The Nation* (online), 14 February 2011 <<https://www.thenation.com/article/return-culture-wars/>>.

24 Ben Eltham 'If Brisbane wants to be a 'new world city' it should stop persecuting artists and act like one' *The Guardian* (online), 3 February 2016 <<https://www.theguardian.com/artanddesign/2016/feb/03/if-brisbane-wants-to-be-a-new-world-city-it-should-stop-persecuting-artists-and-act-like-one>>.

25 'Graffiti in Melbourne's Hosier Lane' RNZ (8 February 2017) <<http://www.radionz.co.nz/national/programmes/ninetoon/audio/201832408/graffiti-in-melbourne's-hosier-lane>>

26 Young, above n 5, 11.

27 Kim Dovey, *Urban Design Thinking: A Conceptual Toolkit* (Bloomsbury Academic, London, 2016) 204.

28 See, generally, Dick Frizzell, *Dick Frizzell: The Painter* (Godwit, 2009).

29 For a biography of Otis Frizzell, see Denis Robinson, *New Zealand's Favourite Artists* (Saint Publishing, 2006) 36-37.

30 See *Blockbuster*, Saatchi & Saatchi Gallery (2012).

the artists.³¹ Once included, however, street art not only enjoys immunity from prosecution, it attracts comprehensive property rights, notably the full panoply of copyright and moral rights protections.³²

C *The Curtis Memorial*

On a council-owned retaining wall in Wallace Street, Mount Cook (an inner city Wellington suburb), a crudely painted memorial for Ian Curtis, the vocalist of the band Joy Division³³ who committed suicide in 1980, has survived in various forms for more than 35 years.³⁴ The simple memorial,³⁵ ‘Ian Curtis, 1956-1980, Walk in Silence’,³⁶ supplemented from time to time by a white cross, may bear comparison to the word art of Colin McCahon, one of New Zealand’s most celebrated artists.³⁷ In reality, however, the memorial is graffiti, no different in legal and aesthetic substance from the hundreds of tags and pieces around Mount Cook. Nevertheless, when Wellington Council buffed the wall in 2011, a public outcry ensued. The memorial was soon repainted and now enjoys effective immunity from council cleaning crews.³⁸ Like many local authorities, Wellington engages in a Sisyphean effort to buff tagging around the city. The Curtis memorial is a notable exception.

The commemorative mural is not officially approved public art, however by adopting a laissez faire approach towards it, Wellington Council staff effectively treat it as a community mural in a way comparable with New York’s eventual embrace of Keith Haring’s *Crack is Wack* (1986).³⁹ The degree of respect the Curtis memorial attracts is indicated, not only by the public response to its deletion, but also by its minimal defacement by taggers for more than three decades.⁴⁰

D *Control Over Public View*

Unlike transgressive artworks exhibited in a gallery – architecture, public art, advertising, and graffiti have captive audiences because they occupy the public space.⁴¹ Architecture and public

31 See, eg, ‘Revok Arrested at LAX For Graffiti Vandalism’ Huffington Post 25 April 2011 <http://www.huffingtonpost.com/2011/04/25/revok-arrested-at-lax-for_n_853474.html>.

32 See *Copyright Act 1994* (NZ), s 16 and part 4.

33 See, generally, Mike West, *Joy Division* (Babylon Books, 1984). Despite a reputation as a cult band, Joy Division were popular in New Zealand. See Man of Errors, ‘In New Zealand we like Joy Division’ 12 February 2012 <<https://manoferrors.wordpress.com/2012/02/12/in-new-zealand-we-like-joy-division/>>.

34 Brendan Manning, ‘Curtis Memorial Removed. But for How Long?’ *The Wellingtonian* (Wellington), 10 November 2011, 1.

35 The latest version, painted in February 2013 by local artists Maurice Bennett and Andrew Tamati Wright, is more developed and includes an image of Curtis’s face: see ‘Honouring a Dead Soul’, *The Dominion Post* (Wellington), 28 February 2013, A6.

36 A line from Joy Division, *Atmosphere* (Factory Records, 1980).

37 A cross and naive white lettering on pumice-like concrete might be compared with Colin McCahon, *Sacred* (1976), which may be viewed at <<http://www.mccahon.co.nz/cm001620>>.

38 At the time of the buffing, a Wellington Council spokesperson commented ‘[w]e won’t be surprised if the name pops up again’ and predicted that the graffiti cleaning crew ‘might turn a blind eye to it’. Quoted by Manning, above n 34, 1.

39 See, ‘Haring’, *nyarchive* <<http://nyarchive.wordpress.com/images/haring/>>.

40 Kelly Burns, ‘Killjoy Division Cleans Up Wall’ *The Dominion Post* (Wellington), 12 September 2009, A5. Although Bennett and Wright painted the latest version, they copied previous versions. It is, therefore, unlikely that any individual could successfully assert copyright in the Curtis memorial, given the number of anonymous people involved in its history.

41 Dovey, above n 27, 202.

art tend to be strictly regulated, but advertising and graffiti are not and may be offensive to different groups in society.⁴² For both graffiti and advertising, a pertinent question therefore relates to the extent to which an individual should be permitted to impinge upon the public view.⁴³ Mark Halsey and Alison Young describe the Nike company as ‘a corporate tagger’ whose billboards are ‘urban scrawl’ and ‘visual pollution’.⁴⁴ Indeed, billboards, trade signs and realtor’s advertisements constitute urban visual blight;⁴⁵ they impose on the public space in ways far more aesthetically offensive than skilled street art and, perhaps, even tagging.

When announcing an abstract mural for a prominent building in Hutt City, a Wellington dormitory city, David Bassett, the deputy mayor, described the 30-year-old commercial sign which was to be painted over as ‘commercial graffiti’.⁴⁶ Bassett’s allusion was significant because Hutt City has taken a strong line against graffiti. It successfully pursued a local Act of Parliament which permits council staff to enter private property to remove graffiti.⁴⁷ The council must give a property owner 10 days notice before taking action, but the situation is imaginable where a proprietor, who has given permission to graffiti artists to paint their wall, might fail to object timeously, and the graffiti will be buffed. This legislation potentially prioritises pleasing the public gaze over individual property rights.

Another instance when the aesthetic interests of the public might trump individual property rights, arises when a graffiti work, say a Banksy stencil, has significant cultural value.⁴⁸ Property owners could then be restricted in the ways they use their properties to preserve a piece they have neither commissioned nor otherwise permitted.⁴⁹

A further public space consideration is the locational appropriateness of graffiti. For Dovey, ‘graffiti becomes vandalism when it is ‘out of place’ – a contamination of place identity’.⁵⁰ Where street art has become an integral part of the broader culture, one finds it accepted as a construction rather than transgression of place identity.⁵¹ Indeed, in some urban contexts, we may expect graffiti. ‘Blank walls at street level contribute nothing to urban life; graffiti writing often brings them to life, it asserts the right of expression over the property owner’s right to blankness.’⁵²

42 Not everyone is offended by graffiti. For example, the Wellington Architecture Centre argues that graffiti ‘adds to the character of the city’ and ‘provides important community and political commentary and should be encouraged’: see Julie Jacobson, ‘Culture Clash over ‘Graffiti Art’ *The New Zealand Herald* (online), 17 June 2007 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10446173>.

43 See Terri Moreau and Derek H Alderman, ‘Graffiti Hurts and the Eradication of Alternative Landscape Expression’ (2011) 101(1) *Geographical Review* 106, 121.

44 Mark Halsey and Alison Young, ‘The Meanings of Graffiti and Municipal Administration’ (2002) 35(2) *Australian and New Zealand Journal of Criminology* 165, 180.

45 See BC Biermann, ‘Spatial Distributions of Power: Illegal Billboards as Graffiti in Los Angeles’ *BanBillboardBlight* <<http://banbillboardblight.org/wp-content/uploads/2010/01/Graffiti-billboards.pdf>>.

46 Eleanor Wenman, ‘Mural covering ‘commercial graffiti’ in Lower Hutt goes live’ *The Dominion Post* (online), 15 May 2017 <<http://www.stuff.co.nz/dominion-post/news/hutt-valley/92462647/mural-covering-commercial-graffiti-in-lower-hutt-goes-live>>.

47 See *Hutt City Council (Graffiti Removal) Act 2012* (NZ) s 6.

48 Debbie Cuthbertson, ‘Call for Melbourne’s two remaining Banksy stencils to be preserved at NGV’ *The Sydney Morning Herald* (online), 12 July 2016 <<http://www.smh.com.au/entertainment/art-and-design/melbourne-arts/call-for-melbournes-two-remaining-banksy-stencils-to-be-preserved-after-street-art-destroyed-by-construction-work-20160711-gq3edk.html>>.

49 Compare with heritage orders under *Resource Management Act 1991* (NZ) s 189.

50 Dovey, above n 27, 203.

51 *Ibid.*

52 *Ibid.*, 207-8.

The Curtis Memorial is contextually appropriate. Wellington's seismically-informed topography necessitates an abundance of paintable retaining walls. Wallace Street, which is the main route to a university campus and a liberal high school, starts with the mural *Herstory*, which includes images of the Mexican artist, Frida Kahlo, and Pippie Longstockings, the Swedish book character. From there, numerous works have been painted (and buffed). Using a benchmark of the gallery goer's sense of aesthetics, it is not always obvious which paintings are commissioned street art and which are graffiti vandalism.⁵³ In contrast, Kitchen, who honed his skills on the stanchions of a Hastings bridge (a council-sanctioned graffiti permit zone) took his tagging to what may be considered contextually inappropriate places.

III GRAFFITI AND PERSONHOOD

The three examples considered in Part II indicate that, in terms of graffiti policy and law, the rights of the wall owner are typically accorded paramount respect, as are those of the commissioned street artist.⁵⁴ Occasionally, the expectations of a section of the public are respected in relation to an illegal work. The graffiti artist is socially excluded, effectively denied legal rights in their works and yet may be commercially exploited; they are, in effect, 'outlaws'.⁵⁵ A different balance of rights and expectations is imaginable which pays greater attention to human expression and impact on the public space.

In *Kitchen*, Brewer J intimated different types of property when he noted that the accused's 'tagging affected *privately owned* property, *council owned* property, and *commercial* property'.⁵⁶ Criminal law typically pits proprietors against graffiti artists, but a more nuanced conception of property that distinguishes between, say, a person's home and a warehouse, is desirable. Georg Hegel's conception of property, particularly as it has been developed by Margaret Radin, may contribute to achieving this outcome. This part of the article loosely applies certain of Hegel's and Radin's ideas to graffiti.

A Property And Personhood

The crucial feature of property in the Hegelian view is putting 'my will in the thing',⁵⁷ for example, by marking an object. Gregory Alexander and Eduardo Peñalver observe: 'One way of understanding how marks on objects perform this function is to interpret a mark such as one's signature ... as publishing that claim for the rest of the world to see.'⁵⁸ Akin to Locke's applied labour theory of property,⁵⁹ in the Hegelian scheme, '[a]ction is needed to perfect the will's relation with the object and to externalize the will'.⁶⁰ For Liam Murphy and Thomas Nagel, the Hegelian conception of property may be characterised as an individual's 'right to possess

53 For images and a guide, see 'A Tour of Mt Cook Street Art' *Mt Cook Mobilised* (2010) <http://mtcookmobilised.pbworks.com/f/MCM_News_Feb10.pdf>.

54 See, for example, the withdrawal of Isabel Bau Madden and Peter Rosenstein, *Tattooed Walls* (University of Mississippi Press, 2006) after photographs of commissioned street art were reproduced without permission of the artists.

55 Compare with Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) [trans of: *Homo Sacer. Il potere sovrano e la vita nuda* (first published, 1995)]

56 *Kitchen* HC NAP CRI-2011-441-35 25 October 2011 (Brewer J) [2] (emphasis added).

57 GWF Hegel, *Philosophy of Mind* (W Wallace and AV Miller, Clarendon Press, 2007) [492] [trans of: *Phänomenologie des Geistes* (first published 1807)].

58 Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012) 63-4.

59 See John Locke, *Two Treatises of Government* (University of Chicago Press, first published 1690, 1990 ed) 129.

60 Alexander and Peñalver, above n 58, 64.

some minimum amount of property in order to express their freedom by enforcing their will on external objects'.⁶¹ Indeed, for Hegel, fundamental inequality arises from the lack of property.⁶²

Alan Ryan says '[t]he attractions of Hegel's development of a concept of property depend on our everyday feelings about our need to identify with and express ourselves in things that we make, control, and use.'⁶³ Ryan further observes, 'Hegel's concern is less with owners and non-owners than with the anchored and the non-anchored; because property is an anchor but not the only anchor.'⁶⁴

In sum, for Hegel, we need to exercise our will on things to express our personhood. This exercise of will typically requires/leads to property rights in those things, but it is a stake in the community, which property traditionally indicates, that really matters. It may be ventured that graffiti artists, in marking things, are effectively expressing an ownership claim (of course, the law does not recognise such property claims, except perhaps in copyright) but may be better seen as asserting their existence in the world, thereby making a political statement.

B *Personhood Property And Graffiti*

In the tradition of Hegel, Radin establishes a distinction between different types of property when she differentiates between 'property that is bound up with a person and property that is held purely instrumentally', categorising the former as 'personal' (personhood) property and the latter as 'fungible' property.⁶⁵ Items of personhood property are things we value and seek to keep because they help to fulfil our humanness; items of fungible property are readily replaceable with other similar things and may, for example, be adequately indemnified and their loss fully compensated with money. The locus classicus is the difference between one's wedding ring and a wedding ring in a jeweller's shop. Both rings have market value but, for the person who might wear their wedding ring for half a century, the market value of the thing is largely irrelevant. Indeed, another token of marriage with no market value might be equally important to her.

As Radin recognises, the fulfilment of personhood is not exclusively determined by property. Rather, property should be included within a project of identifying and valorising the contributory factors of personhood, including anchoring in the community. Personhood is, in part realised by, say, having a particular physical shelter that fellow community members recognise as a particular person's home.⁶⁶ Trespass against that thing is not tantamount to an assault against a person, but that thing and a particular person may be so closely connected, because it promotes their personhood in a fundamental way – that it is categorically different from, say, notional funds being 'phished' from someone's credit card account.

The extent of personhood property is necessarily limited, even for the person whose personality is exceptionally acquisitive.⁶⁷ One's pursuit of personhood must take into account others' personhood expectations. Furthermore, things capable of ownership must be balanced against other factors of personhood. Here, the freedom to express one's ideas and to receive

61 See Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2005) 45.

62 GWF Hegel, *Philosophy of Mind* (W Wallace and AV Miller, Clarendon Press, 2007) [49] [trans of: *Phänomenologie des Geistes* (first published 1807)].

63 Alan Ryan, *Property and Political Theory* (Blackwell, 1984) 131.

64 *Ibid*, 137.

65 Margaret Jane Radin, *Reinterpreting Property* (The University of Chicago Press, 1993) 37.

66 For arguments rejecting claims for 'the home as a psychologically special object deserving heightened protection' see Stephanie M Stern 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 *Michigan Law Review* 1093, 1144 See also Stephen J Schanbly, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45(2) *Stanford Law Review* 347.

67 Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 961.

the ideas of others, holds a place without parallel in modern Western thinking. Indeed, the right to express one's thoughts and to apprehend the expression of others' ideas is considered so essential to modern conceptions of personhood, to potentially render other rights secondary.⁶⁸ How might this idea apply to graffiti and others' personhood property expectations?

If a corporation owns a downtown parking lot, should its controllers expect the walls of the lot to be free from the self-expression of unpropertied taggers, who might generally be denied access to the factors of self-expression that contribute to their personhood?

Conversely, if taggers write on 'a grandmother's fence',⁶⁹ can this act be considered a defensible expression of their personhood, which must take into account the personhood of others? A grandmother's fence of say, her State house, may not constitute her 'property' in the same way as the stanchions of a bridge belongs to the government, but from a personhood perspective, it is implausible to consider both objects being tagged as equivalent.

For Peter Randell, the father of a youth sentenced to 28 days in jail for tagging, 'graffiti was a way young people could try to be noticed. Many come from broken families, and most of those families used to work at the '[freezing] works that were doing well until the works closed.'⁷⁰ This appears to be a sincere, empirical observation that is neither informed nor intermediated by sociological theory, but is consistent with it. Tony Jefferson observes how marginalised young men, 'lacking in status, and being further deprived of what little they possessed ... there remained only to self, the cultural extension of the self.'⁷¹ In Hegelian terms, these taggers are translating their innate human desire for freedom and self-expression on to an external sphere,⁷² thereby anchoring themselves in the world they live. Young men may use graffiti to construct masculinity,⁷³ claim power and establish independence from the institutions which define and often limit them as young people.⁷⁴ Many young men will simply outgrow tagging as they gain a greater stake in society; a few may become accomplished artists.⁷⁵

68 See, for example, *Brooker v Police* [2007] 3 NZLR 91 (SC), [285] per Thomas J.

69 The 'grandmother's fence' test is, for example, used in the Art-da-Facts course, run by Hutt City youth centres Vibe and Secret Level, to persuade taggers to pursue commissioned street art. See Paul Easton, 'Tagging the Taggers' *The Dominion Post* (Wellington), 19 May 2012, C3.

70 See 'Teen tagger locked up for 28 days' *The Dominion Post* (online), 16 April 2008 <<http://www.stuff.co.nz/national/368031>>

71 See Tony Jefferson, 'Cultural Responses to the Teds' in Stuart Hall and Tony Jefferson (eds) *Resistance through Rituals: Youth sub-culture in post-war Britain* (Unwin Hyman, 1976) 81. 82. Jefferson specifically had in mind 'Teds' ('Bodgies' were the Australasian equivalent) but his observations are equally relevant to contemporary marginalised youths.

72 Tyler Wilson, a tagger interviewed by Paul Easton, 'Tagging the Taggers' *The Dominion Post* (Wellington), 19 May 2012, C3, 'blames boredom for his time as a tagger'. Boredom may, of course, indicate marginalisation.

73 There are many highly accomplished female street artists and yarn bombers, but taggers are predominantly young men.

74 See, generally, Nancy Macdonald, *The Graffiti Subculture: Youth, Masculinity and Identity in London and New York* (Palgrave Macmillan, 2001).

75 With no obvious hint of irony, Ray Wallace, mayor of Hutt City says 'We need young people to reject tagging. It's not art, it's just scrawling. There are no Banksies in the Hutt.' See Easton, above n 72, C3. Banksy recalls 'I was 16 years old when I first trespassed onto some railway tracks and wrote the initials of the graffiti crew (of which I was the only member) on a wall.' See Banksy, [untitled] in *Trespass*, above n 4, 6.

IV POSSIBILITIES

Only rarely is graffiti in New Zealand obscene, racist, sexist, homophobic or a means of marking gang territory. Certainly, graffiti may, in the ‘broken windows’ theory of policing,⁷⁶ lead people to apprehend general lawlessness but graffiti writers appear to be quite focused in the laws they break,⁷⁷ and those do not include crimes of violence. Conversely, a young tagger in Auckland was killed by an outraged business owner.⁷⁸ How does the annoyance of graffiti become a motivation for manslaughter? More broadly, Young ponders, ‘why graffiti and street art presents such a challenge to the territorialisation of urban space into a zone of intolerance and exceptionality that has become so paramount to the self-definition of the contemporary city’.⁷⁹

In an orthodox view, it would be absurd to propose that graffiti should be decriminalised. Conversely, from a Hegelian perspective of property as a means of expressing personhood, it would be equally absurd to ignore the role graffiti plays in allowing many dispossessed young people to assert their being human. However audacious the proposition, we might see graffiti in terms of a general servitude over certain properties, such as downtown laneways, so that just as people might enjoy thoroughfare, they might also be able to paint.⁸⁰

Kurt Iveson says ‘engaging young people in a wider politics of urban aesthetics in which the graffiti ‘problem’ is redefined ... the more progressive legal graffiti programmes may enable a counter-discourse about graffiti to emerge in which *bad* graffiti is the problem to be addressed, not graffiti per se’.⁸¹ But who will decide what is ‘good’ and what is ‘bad’ graffiti?

In Hastings, ‘[t]he abutments of a large bridge on the outskirts of town have been set aside as a “legal” graffiti area’.⁸² Kitchen claimed that he graduated from this permitted space to other walls because the council buffed his works too soon. His self-exculpation is disingenuous. Ample evidence exists that graffiti artists, especially tag writers, have no expectation of permanence for their works. Graffiti permits typically create ‘a zone that becomes saturated with low-quality work that then spills beyond any boundaries that can be inscribed’.⁸³ Besides, illegality may provide a necessary exhilaration.⁸⁴ Hastings’s environment enhancement officer, Jacqui Davis, observes graffiti walls ‘don’t work simply because the [taggers] lose the buzz, and, once the buzz has gone, it just spreads’.⁸⁵ Likewise, Andrea Brighenti observes that tag

76 See Kim Ruscoe, ‘Emery jailed for killing tagger’ *Stuff* (online), 22 February 2009 <<http://www.stuff.co.nz/national/1399650/Emery-jailed-for-killing-tagger>>.

77 Paul Wilson and Patricia Healy, *Vandalism and Graffiti on State Rail* (Australian Institute of Criminology, Canberra, 1986) found no statistical connection between graffiti and personal safety – rather such connections were a matter of perception. Cited by Kurt Iveson, ‘Cities for angry young people? From exclusion and inclusion to engagement in urban policy’ in Brendan Gleeson and Neil Sipe, *Creating Child Friendly Cities: reinstating kids in the city* (Routledge, 2006) 49, 60-1.

78 See Kim Ruscoe, ‘Emery jailed for killing tagger’ *Stuff* (online), 22 February 2009 <<http://www.stuff.co.nz/national/1399650/Emery-jailed-for-killing-tagger>>.

79 Alison Young ‘Negotiated consent or zero tolerance? Responding to graffiti and street art in Melbourne’ (2010) 14 (1-2) *City* 99, 113.

80 See *ibid*, on Young’s model of negotiated tolerance which was rejected by Melbourne City Council.

81 Iveson, above n 77, 62.

82 Tony Wall, ‘To catch a tagger’ *Sunday Star Times* (online), 3 July 2011 <<http://www.stuff.co.nz/sunday-star-times/features/5220823/To-catch-a-tagger>>.

83 Dovey, above n 27, 206.

84 See James T Murray and Karla L Murray, *Broken Windows: Graffiti NYC* (Ginkgo Press, 2002) unpagged.

85 Tony Wall, ‘To catch a tagger’ *Sunday Star Times* (online), 3 July 2011 <<http://www.stuff.co.nz/sunday-star-times/features/5220823/To-catch-a-tagger>>.

writers see illegality as a defining characteristic of their practice.⁸⁶ Intransigence is evident both among property owners and taggers but the former have the law on their side.

V CONCLUSION

This article has used three artefacts to highlight the bluntness of the law in relation to graffiti. Two similar artefacts (Kitchen's tags and the Frizzells' blockbusters) receive disparate legal treatment because one has been included by a property owner and the other has not. The included works attract copyright and moral rights protections, whereas creating the excluded works led to a significant period of imprisonment. Between these poles, the lenience shown to the Curtis Memorial created a de facto public artwork. A crucial consideration arises from graffiti – who controls the public space? Should individual property owners have the unique right to decide the object of the public gaze, whether it is graffiti or advertising?

Urban designers such as Dovey, ask: '[i]s there some way to eliminate the relatively mindless tagging while keeping the street art?'⁸⁷ Experience of crafting and developing copyright law tells us that seeking to judge artistic quality is fraught with peril.⁸⁸ Besides, an approach of allowing aesthetically appealing street art (however that might be decided), but prohibiting tagging, overlooks the importance to personhood of marking things that Hegel established in his theory of property. A general right to tag property would be unthinkable, but, as Radin and others indicate, not all property is the same. While the grandmother's fence, an archetype of personhood property, should be safe from tagging, surely council utility boxes do not deserve the same level of protection from graffiti?

86 Andrea Mubi Brighenti, 'At the Wall: Graffiti Writers, Urban Territoriality, and the Public Domain' (2010) 13(3) *Space and Culture* 315, 318.

87 Dovey, above 27, 205.

88 See, generally, David Booton, 'Framing Pictures: Defining Art in UK Copyright Law' (2003) *Intellectual Property Quarterly* 38.

ENHANCING STUDENT LEARNING AND ENGAGEMENT IN THE JURIS DOCTOR THROUGH THE RICH TAPESTRY OF LEGAL STORY-TELLING

*Penny Carruthers, Kate Offer, Natalie Skead,
Meredith Blake, Renae Barker, Ambelin Kwamullina,
Jill Howieson and Tracey Atkins**

ABSTRACT

The human species thinks in metaphors and learns through stories.

MARY CATHERINE BATESON

The written hypothetical problem scenario is one of the most common methods for teaching and assessing in law. Whilst this device is considered to be an effective and appropriate teaching tool, it has limitations. In legal practice, it is rare for a problem to be presented entirely in written form. More usually the problem is presented verbally. Another common limitation of the written hypothetical is that hypothetical scenarios tend to focus on a single issue. A real-life legal problem may raise multiple legal issues.

This article examines the use of visual media in teaching the Juris Doctor ('JD') law degree at the University of Western Australia Law School ('UWA'). This paper particularly discusses a visual media project introduced at UWA in February 2017, which modified the use of hypothetical problems in law teaching. The project involved creating a filmed hypothetical scenario that was shown to law students in the first class of the foundational unit in the JD. The film raised a range of legal topics as well as moral, ethical and professional issues that may arise in legal practice. The film will continue to be used at UWA as the basis of problem-solving, role-plays, and case studies throughout the JD degree and will form the core around which legal education issues of: wellbeing, work-readiness and legal professionalism, will be developed. The film's arguable benefits are: enhanced law student engagement, critical thinking, legal problem-solving and communication. The film also aims to provide a more cohesive and integrated capstone learning experience for all JD students, and to build a learning community across JD year groups to promote a sense of belonging, connectedness and well-being. Significant benefits for staff include a reduced need to create different problem scenarios and, importantly, increased collaboration and sharing of ideas across JD teaching teams.

I INTRODUCTION

It is perhaps true that legal practice, as we know it, might be 'on the line'. From declining law graduate employment rates, to digital disruption, to the globalisation of legal practice – 'change, in all its chaotic grandeur, is in the air'.¹ Inevitably, these changes will require a new emphasis in the way law schools teach law. However, teachers of law are no strangers to change. The Australian law degree and the outcomes which are required of our law graduates have constantly evolved. One particular learning outcome 'communication and collaboration', is now formally

* All authors are members of the UWA Law School, Faculty of Arts, Business, Law and Education, The University of Western Australia.

1 Australasian Law Teachers Association 2017 Annual Conference
<http://www.aomevents.com/alta2017/Call_for_Papers>.

endorsed as one of the six ‘threshold learning outcomes’ (TLO) identified by the Learning and Teaching Academic Standards project.²

There is no doubt that communication is a fundamental and essential legal skill. Frequently, the way communication is taught and assessed in law schools is via the written hypothetical problem scenario. As Saunders and Levine note, using written hypothetical scenarios as the basis for teaching problem-solving in law is an appropriate and very effective tool in facilitating students’ ability to think critically and analytically, and to improve their written and oral communication skills.³ Further, as noted by Angela Burton, ‘storytelling suffuses the work of lawyers ... the law is only meaningful in relation to some situation of factual circumstance’.⁴

Despite the effectiveness of written problem-solving exercises, they have limitations. In legal practice, it is rare for a problem to be presented entirely in written form. More usually, the facts and evidence of a problem are presented verbally face-to-face, and through other forms of audio and visual media such as CCTV footage and phone conversations. Another common limitation of the written hypothetical, is that the scenarios tend to focus on a single issue. A real-life legal problem may be multi-faceted, raising a wide range of legal issues.

This article examines the use of visual media in teaching the JD law degree at UWA. The paper particularly discusses a visual media project introduced at UWA in February 2017, which modified the use of hypothetical problems in law teaching. The project involved creating a filmed hypothetical fact scenario that was shown to students in the first class of the foundational unit in the JD. The legal storytelling film raised a range of legal topics as well as moral, ethical and professional issues that may arise in legal practice, and it will continue to be used as the basis of problem-solving, role-plays, and case studies throughout the JD degree. The legal story telling film will also form the core around which Australian legal education issues of wellbeing, work-readiness and legal professionalism, will be developed. The film’s benefits are to enhance student engagement, critical thinking, legal problem-solving and communication. The film also aims to provide a more cohesive and integrated capstone learning experience for all JD students and to build a learning community across year groups to promote a sense of belonging, connectedness and well-being. Significant staff benefits from the use of the legal storytelling film include a reduced need to create different problem scenarios and, importantly, increased collaboration and sharing of ideas across JD teaching teams. This article also discusses the use of another visual media teaching resource, ‘Caseflix’, which was also introduced into core teaching in UWA’s JD.

-
- 2 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, December 2010) <<http://www.cald.asn.au/media/uploads/KiftetalLTASStandardsStatement2010%20TLOs%20LLB.pdf>>. Council of Australian Law Deans, *Juris Doctor Threshold Learning Outcomes* (March 2012) <[http://www.cald.asn.au/assets/lists/ALSSC%20Resources/JD%20TLOs%20\(March%202012\)%20Andrew%20Kenyon.pdf](http://www.cald.asn.au/assets/lists/ALSSC%20Resources/JD%20TLOs%20(March%202012)%20Andrew%20Kenyon.pdf)>.
 - 3 Kurt M Saunders and Linda Levine, ‘Learning to Think Like a Lawyer’ (1994-1995) 29 *University of Southern Florida Law Review* 121, 133-135.
 - 4 Angela Olivia Burton, ‘Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligence Paradigm into the Clinical Setting’ (2004) 11(15) *Clinical Law Review* 15, 34.

II BACKGROUND

A Australian Legal Education

Australian law school teaching tended to focus on ‘the transmission of knowledge about legal rules and doctrine to students who adopt a largely passive role’.⁵ However, by 2003, Johnstone and Vignaendra commented that:

Most law schools in the mid-1980’s ... were concerned with teaching legal rules ... and there was very little attention to the teaching of legal ethics, legal theory, or generic or legal skills ...the situation has radically changed and many law schools ... have embraced the teaching of legal ethics and legal skills ...⁶

No doubt, one of the catalysts for this changed emphasis in legal education was the Australian Law Reform Commission’s (ALRC) 2000 ‘Managing Justice’ report which recommended that ‘law schools should make explicit the nature and extent of their skills development programs ... and how they examine these skills’.⁷ Shortly after the release of the ‘Managing Justice’ report, Australian law schools began to focus on law graduate attributes beyond just the content and knowledge prescribed by the ‘Priestley 11’.⁸ In 2009, the process of identifying and defining academic standards and learning outcomes in discipline areas, including law, was tackled formally at a national level by the Australian Government funded Learning and Teaching Academic Standards (‘LTAS’) project.⁹ The LTAS project identified six ‘threshold learning outcomes’ (TLOs) for Australian graduates in the Bachelor of Laws (LLB) and Juris Doctor (JD) degrees. The Council of Australian Law Deans subsequently endorsed the LLB and JD TLOs in November 2010 and March 2012 respectively. The six TLOs prescribed for the LLB and JD are broadly: knowledge (TLO 1); ethics and professional responsibility (TLO 2); thinking skills (TLO 3); research skills (TLO 4); communication and collaboration (TLO 5); and self-management (TLO 6).¹⁰

The Law Associate Deans Network was established in 2010, renamed the Legal Education Associate Deans Network (‘LEAD’) in 2013, to promote collaborative research-based

-
- 5 Des Butler, ‘Second Life Machinima Enhancing the Learning of Law: Lessons from Successful Endeavours (2012) *Australasian Journal of Educational Technology* 383.
 - 6 R Johnstone and S Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee (AUTC)* (2003). <http://www.cald.asn.au/docs/autc_2003_johnstone-vignaendra.pdf>.
 - 7 Australian Law Reform Commission (ALRC), *Managing justice: A review of the federal civil justice system* Report 89, 2000, [2.80] <<https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC89.pdf>>.
 - 8 The ‘Priestley 11’ is the list of prescribed areas of legal knowledge identified by the Law Council of Australia that a student must cover to be admitted to legal practice see; Law Admissions Consultative Committee, Model Admissions Rules 2015 <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/212390818_8_LACC_Model_Admission_Rules_2015.pdf>.
 - 9 Australian Learning and Teaching Council and Council of Australian Law Deans, ‘Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment’ (Project Final Report, 2009). <http://www.cald.asn.au/docs/altc_lawreport.pdf>. For a general discussion of the changed emphasis from the traditional knowledge approach to the embedding of teaching learning outcomes in law degrees in Australia, see; Natalie Skead, Sarah Murray and Penny Carruthers, ‘Taking up the Challenge: Embedding, Mapping and Maintaining Threshold Learning Outcomes in the Transition to the JD – the UWA Experience’ (2013) 47(2) *The Law Teacher* 130, 135.
 - 10 Kift et al, above n 2, 3-4. <[http://www.cald.asn.au/assets/lists/ALSSC%20Resources/JD%20TLOs%20\(March%202012\)%20Andrew%20Kenyon.pdf](http://www.cald.asn.au/assets/lists/ALSSC%20Resources/JD%20TLOs%20(March%202012)%20Andrew%20Kenyon.pdf)>.

approaches to teaching and learning in Australian legal education.¹¹ In an effort to ensure good curriculum design within the TLOs, the LEAD Network produced 10 ‘Good Practice Guides’ described by Project Leader Kate Galloway, as a foundation resource ‘not just for TLO implementation strategies, but also in terms of essential features of comprehensive legal education that continue to represent a challenge in curriculum design – such as critical thinking and communication skills.’¹²

Since the introduction and endorsement of the TLOs, there has been a myriad of challenges facing the Australian legal education sector: from the embedding of statutory interpretation into the law degree curriculum,¹³ to law student wellbeing,¹⁴ the professional development of sessional law teachers¹⁵ to Indigenous cultural competency.¹⁶ An emerging area of significant challenge for current and future legal education in Australia is the impact of disruptive technologies on the practice of law and how law is taught:

While the full impact of technology on legal practice is yet to be realised, there is no doubt that significant change is afoot and its momentum is building, both in relation to what the profession does and how the profession does it. The legal profession is at a ‘tipping’ point.

As the changes, both current and impending, begin to take their effect on legal practice, it is incumbent on legal educators to think about how best to equip graduates for a future in law. We must think about the skills future lawyers will need, what we teach and how we teach it, to ensure that relevant professional skills development is embedded into our academic programs.¹⁷

-
- 11 The network is comprised of the Associate Deans (Teaching and Learning) (or equivalent) of Australian Law Schools. Information regarding the LEAD network may be found at <<http://www.lawteachnetwork.org/index.html>>.
- 12 Kate Galloway, ‘Networking supports legal education’ *Campus Review* 28 May 2012.
- 13 Jeffrey Barnes, Jacinta Dharmananda, Jeffrey Goldsworthy and Alex Steel, *The Council of Australian Law Deans: Good Practice Guide to Teaching Statutory Interpretation*, June 2015 <<http://www.cald.asn.au/assets/lists/Resources/GPGSI-June15.pdf>>.
- 14 See, eg, Norm Kelk, Georgina Luscombe, Sharon Medlow And Ian Hickie, *Courting The Blues: Attitudes Towards Depression in Australian Law Students and Legal Practitioners* (2009) Sydney: Brain & Mind Research Institute of the University of Sydney; Wendy Larcombe and Katherine Fethers, ‘Schooling the blues? An investigation of factors associated with psychological distress among law students’ (2013) 36(2) *University of New South Wales Law Journal* 390; Wendy Larcombe, Sue Finch and Rachel Sore, ‘Who’s distressed? Not only law students: Psychological distress levels in university students across diverse fields of study’ (2015) 37(2) *Sydney Law Review* 243; Natalie Skead and Shane L Rogers ‘Stress, anxiety and depression in law students: How student behaviours affect student wellbeing’ (2014) 40(2) *Monash Law Review* 564; Rachael Field, James Duffy and Anna Huggins, ‘Supporting transition to law school and student well-being: The role of professional legal identity’ (2013) 4(2) *The International Journal of the First Year in Higher Education* 15, <<http://dx.doi.org/10.5204/intjfyhe.v4i2167>>.
- 15 See, eg, <<https://smartlawteacher.org>>.
- 16 See, eg, <<http://www.icclap.edu.au>>.
- 17 Kate Galloway, Kate Offer and Natalie Skead, ‘Disrupting Legal Education’ *Brief*, November 2017, 10. It is beyond the scope of this article to explore the use and impact of digital learning technologies in Australian Law Schools. However, see Stephen Colbran and Anthony Gilding, ‘E-Learning in Australian Law Schools’ (2013) 23(1) *Legal Education Review* 201, for a discussion of the results of a survey of Australian law schools revealing the widespread adoption of blended learning approaches. See also Melissa Castan and Kate Galloway, ‘Extending public law: Digital engagement, education and academic identity’ (2015) 25(2) *Legal Education Review* 331, 332 at footnote eight, for a detailed list of journal articles dealing with the integration of online technologies in legal education.

B *The Juris Doctor ('JD') at UWA*

In 2012, UWA commenced a broad-based restructure of its courses so as better to prepare graduates 'for the challenges of a changing world'. Under this new structure, the undergraduate Bachelor of Laws degree is no longer offered at UWA and from 2013, law at UWA can only be studied at a postgraduate Masters level, as a three-year professional JD law degree. This transition from an undergraduate to a postgraduate professional law course allows the Law School, in teaching the JD, to focus on equipping students with the more advanced professional legal skills expected of law graduates.

Following consultation with students and staff, the UWA Law School further restructured its JD in 2017. A new foundational unit, Foundations of Law and Lawyering (FLL), was introduced and delivered as a blended intensive/semester-based unit. The unit was taught intensively in the first two weeks of the first semester of the first year, with unit tutorials continuing fortnightly through the semester's remaining weeks at which time students also picked up the remaining substantive core first semester, first year units of: Criminal law, Contract and Property.

This restructure was designed to address the concern that, without pre-learning of foundational legal concepts, JD students were not adequately prepared to undertake the substantive first semester first year core units. Delivering the foundational unit as an intensive unit at the start of the new JD helped to establish a robust theoretical and skills-based scaffold, which enabled our students to tackle the substantive core units that follow, with more confidence. Aside from this benefit, the restructured course provided an opportunity to embed the issues of: wellbeing, professionalism, critical thinking and diversity training, into the JD from the outset. A social and pragmatic objective associated with the unit was to assist in building a stronger sense of cohort, and to establish effective and healthy study techniques and strategies in the first weeks of the course.

As noted in the Introduction, the legal story-telling film raises a range of legal topics as well as moral, ethical and professional issues that may arise in legal practice. The film's potential benefits are to enhance student engagement, critical thinking, legal problem-solving and communication. The JD TLO's that stand to be advanced by the legal story-telling project, include: TLO 1, knowledge;¹⁸ TLO 2, ethics and professional responsibility;¹⁹ TLO 3 thinking skills;²⁰ and, of particular relevance for the purposes of the legal storytelling project, TLO 5, communication and collaboration.

18 The legal story-telling film will advance TLO 1 Knowledge, which requires the demonstration of an understanding of a complex body of knowledge that includes '(b) The broader contexts within which legal issues arise; and (c) The principles and values of justice and of ethical practice in lawyers' roles'.

19 TLO 2 provides that 'Graduates of the Juris Doctor will demonstrate: (a) An advanced and integrated understanding of approaches to ethical decision making; (b) An ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts; (c) An ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community; and (d) A developing ability to exercise professional judgment.

20 TLO3 provides that 'Graduates of the Juris Doctor will be able to: (a) Identify and articulate complex legal issues; (b) Apply legal reasoning and research to generate appropriate jurisprudential and practical responses to legal issues; (c) Engage in critical analysis and make reasoned and appropriate choices amongst alternatives ...'

III THEORETICAL CONTEXTS²¹A *Communication Skills In Law*

Communication is one of the most important legal skills for law graduates, and particularly for law graduates who intend to work as practising lawyers. A lawyer's work involves, among other things: oral and written communication including taking clients' instructions; giving clients legal advice; negotiating contracts and settlements; and presenting arguments and submissions in court and in other dispute resolution fora.²² The ability to communicate clearly and effectively is central to how well a lawyer performs their role. Accordingly, it is not surprising that the LTAS project identified communication as an essential learning outcome for all Australian law graduates, and incorporated it into the TLOs for the JD as follows:²³

TLO 5: Communication and collaboration:

Graduates of the Juris Doctor will be able to:

- (a) Communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences; and
- (b) Collaborate effectively.

Typically, communication in law is broken down into written and oral communication.²⁴ The literature which emphasises the integration of communication skills into law courses, has tended to focus on written,²⁵ rather than oral,²⁶ communication skills. To the extent the literature deals with oral communication skills, the discussion is limited to the development of students' unilateral oral communication skills; that is, their ability to present and develop their arguments through speaking. But, genuine oral communication is 'binary'²⁷ in nature; it is

-
- 21 Parts of the discussion in this section are drawn from Natalie Skead and Kate Offer, 'Learning Law through a Lens – Using visual media to support student learning and skills development in law' (2016) 41 *AltLJ* 186; and Natalie Skead, 'Uncle Jack, Jaycee and the equitable doctrine of estoppel: using Second Life to support the development of advanced oral communication skills in law students' (2016) 50 *The Law Teacher* 230.
 - 22 Rowena Cantley-Smith, 'Put Down Your Pen': The Role of Oral Assessment in Undergraduate Law Studies' (2006) 13 *James Cook University Law Review* 30.
 - 23 Kift et al, above n2, 10; CALD, Juris Doctor TLO above n2, 4
 - 24 Sharon Wesley, 'Good Practice Guide (Bachelor of Laws): Communication (Threshold Learning Outcome 5)' (Research Report, Australian Learning and Teaching Council, 2011) <<http://www.lawteachnetwork.org/resources/gpg-communication.pdf>>; Nikolas James and Rachael Field *The New Lawyer* (John Wiley & Sons Australia, Ltd, 2013) 317.
 - 25 Dean Bell and Penelope Pether, 'Re/writing Skills Training in Law Schools – Legal Literacy Revisited' (1998) *Legal Education Review* 113; Samantha Hardy, 'Improving Law Students' Written Skills' (2005) unpublished paper for University of Tasmania EDGE program; Tonya Kowalski, 'Toward a Pedagogy for Teaching Legal Writing in Law School Clinics' (2010) 17 *Clinical Law Review* 285; Bryan A Garner, *Legal Writing in Plain English: A Text With Exercises* (University of Chicago Press, 2001); Justin Gleeson & Ruth Higgins (eds), *Rediscovering Rhetoric, Law Language and the Practice of Persuasion* (The Federation Press, 2008); Mark P Painter, *The Legal Write: 40 Rules for the Art of Legal Writing* (Casemaker Print Publishing and Jarndyce & Jarndyce Press Cincinnati, 3rd ed, 2005).
 - 26 James C McCroskey, *An Introduction to Rhetorical Communication* (Prentice-Hall, 4th ed, 1982); Jane Summers and Brett Smith, *Communication Skills Handbook* (John Wiley & Sons, 2006); Stephen E Lucas, *The Art of Public Speaking* (McGraw-Hill, 10th ed, 2008); Adrienne Hancock and Matthew Stone, 'Public Speaking Attitudes: Does Curriculum Make a Difference' (2010) 24(3) *Journal of Voice* 302; Matthew McKay, Martha Davis and Patrick Fanning, *Messages* (New Harbinger, 3rd ed, 2009).
 - 27 Skead and Offer, above n 21, 187.

a shared experience, involving two or more persons sharing information, ideas and feelings.²⁸ *Listening* and *non-verbal* communication are equally important components of effective and meaningful communication.²⁹ As Skead and Offer note:³⁰

[E]ffective communication is an exercise in aural and visual multi-tasking and requires the identification and interpretation of the explicit and implicit messages embedded in the ‘larger-than-life communication’ of both the sender and the receiver. The implicit messages are transmitted visually, vocally and verbally, through, for example, fluency, tone, pitch, body language, facial expression and eye contact. Receiving these implicit messages requires deep listening.

Although there are some units in law courses that develop this binary aspect of communication, for example Dispute Resolution, Negotiation and Mediation and clinical legal education programmes,³¹ overall there seems to be little focus on the development of these critical deep listening skills in some law curricula in Australia.

B *Hypothetical Problem-Solving Exercises*

Typically, analytical and thinking skills in law are developed and assessed through written problem-solving exercises. The exercises may require students to ‘identify and articulate the legal issues, present an argument, represent a player in the scenario and/or provide legal advice’.³² Although problem-solving exercises are appropriate and effective tools for the development of thinking and analytical skills, they are not perfect. In practice, a legal problem is rarely delivered as a neat and concise written summary of all material facts in a particular field of law – invariably the facts are messy, oftentimes irrelevant, encompassing multiple fields of law and communicated orally or through other audio and visual media. The written hypothetical does not, therefore, assist students to develop the broad-based communication skills³³ that are essential in providing appropriate and proper legal advice and legal services.³⁴ These broader skills encompass ‘careful critical and active listening to the problem; asking clarifying questions to establish the true complexity of the facts; summarising and synthesising what is said; and communicating empathy’.³⁵ In addition, the ability to ‘analyse and interpret non-verbal language

28 Joseph A Bolarinwa and Doreen Y Olorunfemi, ‘Organizational Communication for Organizational Climate and Quality Service in Academic Libraries’ (2009) *e Journal: Library Philosophy and Practice*, <<http://www.webpages.uidaho.edu/~mbolin/bolarinwa-olorunfemi.htm>>; Sandra Hybels, & H.R. Weaver, *Communicate effectively* (McGraw-Hill, 6th ed, 2001).

29 Gary Slapper and David Kelly, *The English Legal System* (Routledge Taylor & Francis Group, 14th ed, 2013) 72; Jojappa Chowder, ‘The Nonverbal Dimensions of Presentation’ (2013) 1(4) *Research Journal of English Language and Literature* 1; Peter Andersen, *Nonverbal Communication: Forms and Functions* (Waveland Press, 2nd ed, 2007); Janine Driver, *You Say More Than You Think* (Crown Publishers, 2010); Loretta Malandro, *Nonverbal Communication* (Newbery Award Records, 1989), 8.

30 Skead and Offer, above n 21, 187.

31 Joanne Martin and Bryant Garth, ‘Clinical Education as a Bridge between Law School and Practice: Mitigating the Misery’ (1994) 1 *Clinical Law Review* 443; Debra Poggrund Stark, ‘See Jane Graduate. Why can’t Jane Negotiate a Business Transaction?’ (1999) 73(2) *St John’s Law Review* 477.

32 Skead and Offer, above n 21, 188.

33 Jaqueline Horan and Michelle Taylor-Sands, ‘Bringing the court and mediation room into the classroom’ (2008) 18 *Legal Education Review* 197.

34 James and Field, above n 24, 325.

35 Nadja Alexander, Jill Howieson and Kenneth Fox, *Negotiation: Strategy Style Skill* (LexisNexis Butterworths 3rd ed, 2015) 118-23.

such as facial expressions, eye contact, posture, body language, silent responses and gestures³⁶ are all essential in interpreting fully the client's instructions.³⁷

Developing these broader communication skills in students is 'difficult, arguably even impossible, to achieve using only written hypothetical problems.'³⁸ In order to develop the more expansive communication skills of 'interpreting and understanding the personal, social, cultural and legal dimensions'³⁹ of a client's instructions, requires a realistic representation of a legal scenario; that is, it requires simulation.⁴⁰ The benefits of simulation provide enhanced law student engagement and reflection,⁴¹ and, as noted by Skead and Offer, 'by imitating real life, simulation can provide a multi-layered opportunity for law students to learn through a transformative process of understanding "reality" during which their perceptions of the world, people and the law evolve.'⁴² The Legal Storytelling and Caseflix projects discussed in this article, were developed to achieve a number of outcomes. Perhaps most significant of these was to foster the critical listening, viewing and questioning skills required for the development of expansive communication skills, while at the same time engaging with the other relevant TLOs of knowledge, thinking and ethics and professional responsibility.

IV THE FILMS – AN OVERVIEW

A Legal Storytelling Film

The team's initial plan was to create the scenario in animated form. We considered a number of different options, including: GoAnimate, Second Life and MovieStorm. However, as noted by Ambelin Kwaymullina, the School's Indigenous Advisor and author of the script, it was apparent that there were potential limitations with animated platforms, most notably that this format did not necessarily provide for the representation of a fully diverse range of characters, from a multiplicity of ethnic backgrounds. In addition, digital avatars are not able to fully replicate the complexity and subtlety of the gestures and expressions of human faces and bodies, resulting in potential reinforcement of gender and other stereotyping. As a result, the team decided that it was preferable for the scenario to be filmed, thereby allowing us to use student actors to introduce a more realistic representation of characters and bring a wider and uniquely diverse group of people to the project. In this context, it is worth noting that the team had the advantage of having a script writer who is a legal academic, a published fiction writer, and an expert commentator on issues relating to diversity and representation in narrative. Among the issues considered by the team – and that will form the subject of a broader conversation at UWA Law School going forward – are the perils of stories (hypotheticals) that either fail to reflect human diversity or offer only tokenistic or stereotypical representation.

The film's script raised a wide array of legal issues in areas such as Criminal Law, Torts, Property and Administrative Law, in an accessible and entertaining format. This scenario involved an idealistic young lawyer, Jessica Justice, who is sought out by a hypothetical client, Ms Lily Lane, to assist her in dealing with numerous problems she was facing. Those issues included: noxious smoke being pumped out from a nearby factory and interfering with the air

36 Skead, above n 21, 236.

37 James and Field above n 24, 325.

38 Skead and Offer, above n 21, 188.

39 Skead, above n 21, 237.

40 Skead and Offer, above n 21, 188.

41 Caroline Strevens and Roger Welch, 'Simulation and the Learning of Law: Constructing and Using an Online Transactional Assessment in Employment Law' in Caroline Strevens, Richard Grimes and Edward Phillips (eds), *Legal Education: Simulation in theory and Practice* (Routledge, 2016).

42 Skead and Offer, above n 21, 188.

quality around her property, a government fine she received after making an unauthorised public speech in the mall that was critical of the *Cat Act* as well as a variety of problems she had with her neighbour, Ms Rosy Parker, involving interference with water access and the construction of a mine that potentially ran under Ms Lane’s land. Additionally, Ms Parker had accused Ms Lane of theft of a cat that Ms Lane insisted she won fairly in a competition. Finally, when speaking with the government official who arrived to tell Ms Lane about the outcome of her appeal against the fine, Ms Parker accidentally struck him and is accused of assault. The scenario also showed Jessica Justice navigating some professional issues of her own.

The scenario was filmed in and around the Law School at UWA. Law students played the main roles, with a number of staff members making short cameo appearances. The students came from a variety of backgrounds.⁴³



Figure 1: One of the concluding scenes from the legal story-telling film

B *Caseflix*

In addition to the legal storytelling film, teaching staff had also been integrating Caseflix into some of the first-year core JD units. Caseflix is a subscription-based resource that provides short animated videos representing the facts from seminal cases in a range of prescribed areas of knowledge. Many of the cases used in our courses are particularly well-suited to the visual presentation of facts, and the use of Caseflix provides another opportunity to engage law students by introducing storytelling and visual media into the classroom.⁴⁴

43 A short extract of the film is available here <<https://youtu.be/pNROUw-goVE>>. The extract depicts a collision in a street scene and raises a number of issues in the Criminal Law area dealing with assault. This scene is discussed further below.

44 The Caseflix website includes a pilot film of the seminal English Contract case *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; [1892] EWCA Civ 1, see <<https://www.caseflix.com.au/>>.

V IMPLEMENTATION OF FILMS IN JD TEACHING

A Legal Storytelling Film

1 FOUNDATIONS OF LAW AND LAWYERING

In 2017, Foundations of Law and Lawyering (FLL) was taught intensively in the first two weeks of the first semester to our JD students. The legal storytelling film was shown to law students on the first day of the intensive with the aims of: introducing students to the film in preparation for use in the core units that were to follow; introducing students to the idea that legal issues do not arise in discrete and neat silos but rather that they can be interwoven, overlapping and messy; and also, to assess the cohorts' pre-knowledge of law and legal issues.

The film was used as part of a two-stage activity on the first day of the intensive. In stage one, students watched the film with no introduction or explanation. They then watched the film a second time, after which students formed groups of six to eight. Within these groups, students were given 20 minutes to identify the legal issues that arose in the film, using plain, non-legal language. Each student recorded the legal issues identified by the group on a separate worksheet, which were collected at the end of the exercise. At the end of this phase, the lecturers facilitated a brief discussion of the legal issues identified by the students.

In stage two, sheets of paper containing the UWA Handbook description of each JD core unit along with a photograph of the unit coordinator were placed on the walls around the classroom. The worksheets from stage one were distributed to students randomly. The lecturers worked through each of the core units (starting with first year first semester units and ending with the second semester third year units) asking students if any of the legal issues identified on the worksheet they had been given, aligned with that core unit. If an issue on the worksheet aligned with a core unit, students placed a note identifying that issue on or near the relevant sheet of paper (see Figure 2 below).



Figure 2: Outcome of stage two of use of Legal Storytelling film in Foundations of law and Lawyering

2 CRIMINAL LAW

As noted, from the outset it was the project team's intention for the Legal Storytelling film to be used as the basis for: problem-solving, role-plays, case studies and assessments throughout the degree. The Legal Storytelling film was also developed incrementally and tailored for use in all the core units of the JD degree, gradually incorporating different elements of substantive law as well as a range of moral, ethical, professional and personal challenges that commonly arise in legal practice.

Reflecting this intention, following the intensive delivery of FLL in the first two weeks of semester, the film was used in teaching a particular topic in Criminal Law. The topic for the week was non-sexual offences against the person, several of which revolved around the two types of common assault under the *Criminal Code 1913* (WA).

Prior to the class, law students were required to do pre-reading and work through a worksheet exploring the limits of legal consent to assault. The film was then shown to a class of 90-100 students. Working in groups, students were asked to identify the possible criminal offences in the film. The students focused quickly on three particular hypothetical scenarios; the first was a collision between Jessica Justice and two professional women, the second was Ms Lane striking Mr Bland, and the third was Sam Shark touching Jessica Justice. The first scenario in particular, was the focus of a series of questions which permitted the students to engage with the question of whether contact in the course of ordinary daily life can constitute the first form of common assault under the *Criminal Code 1913* (WA), and if not, why not.

Robust discussion followed. Two students noted that the collision appeared to be accidental, thereby questioning whether there was the necessary mental element for the offence. A number of other students concluded that the collision appeared to be the result of reckless conduct, and discussion ensued on whether this was sufficient to constitute the necessary mental element for common assault. Another legal issue was whether the depicted hypothetical scene allowed for the second type of common assault; that which is based on a threat of force or attempted application of force, although this was quickly dismissed. Our law students recognised that the potential common assaults in both scenarios one and two, concerned the first type of common assault, and therefore, it was not relevant that the victim did not anticipate the contact.

The discussion then turned to whether there was evidence that the 'victims' consented to the application of force in the first scenario, as lack of consent is a legal element of common assault under the *Criminal Code 1913* (WA). One student pointed to evidence of the facial expressions and reactions of the victims, indicating that they did not consent to this. However another student disagreed, pointing out that people who walk on pavements in a central business district do so anticipating that there may be unwanted contact with others, and therefore that consent was implied, despite the purported victim's reaction. This idea sparked another line of discussion between students, on the possibility of there being a legal defence to what might be a prima facie common assault. The legal defence of 'accidental event' was considered but dismissed, on the basis that the contact in the hypothetical scenario was clearly reasonably foreseeable because Jessica Justice's flustered search for her new client was evident in the portrayal of her character in the film. However the defence of accidental event was then raised as a possible defence in the second scenario, based on Ms Lane's clear reaction of shock when she realised she had struck Mr Bland.

B *Caseflix*

In addition to the legal storytelling film, teachers in first year core units used the Caseflix resources in lectures in those units. The video for *Victoria Park Racing and Recreation Grounds Company Limited v Taylor* (1937) 58 CLR 479 was shown in a two hour Property Law lecture as a preface to discussing the High Court's decision on the concept of property and whether there

is property in a spectacle. After watching the film, students were asked to work in small groups to identify the legal issues that were raised by the case, and how a court may resolve those issues. In Contract, the video representing the facts in *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1, was used in a two hour lecture covering the fundamental principles of offer and acceptance.

In the second semester of 2017, teachers in Torts and Land Law also had the opportunity to show Caseflix videos to their students. In Torts, two Caseflix videos were used; one related the facts of *Road Traffic Authority of NSW v Dederer* (2007) 324 CLR 330, in a class on the tortious element of breach of duty of care, and the other related the facts of *Rogers v Whitaker* (1992) 175 CLR 479 in a class that outlined the necessary condition test in causation. The Caseflix videos that were shown to the Land Law class were: *Gibbs v Messer* [1891] AC 248, and *Breskvar v Wall* (1971) 126 CLR 376. These cases address fundamental issues in the Australian Torrens system of land title registration.

VI EVALUATION OF RESOURCES

A *Teacher Reflections*

1 LEGAL STORYTELLING FILM

Teachers in both FLL and Criminal Law gave positive feedback about the effectiveness of the Legal Storytelling film in supporting law students' learning. In FLL, although it was only the first day of their JD studies, students were able to identify a significant number of legal issues raised in the film. The issues identified tended to cluster around a few key incidents in the film relating to areas of law that are reasonably well understood by the general public. In particular, all students easily identified: the assault on Mr Bland, the property issues relating to the mine and river, the potential environmental tort, and the infringement of the right to freedom of speech. Many of these topics are covered in both high school politics and law courses, and in undergraduate law majors, and so it was perhaps unsurprising that our students were able to identify these issues easily.

It was very pleasing that a few students also identified some of the legal ethics and professional conduct issues embedded in the film. For instance, both the suggestion that Jessica Justice should act against the interests of her client in her own career interests and the potential sexual harassment of Jessica Justice by Mr Shark, were identified by a number of students. It is hoped that highlighting these issues to the whole cohort so early in the JD journey, will make students more alive to, and reflective of, these critical aspects of law and conduct as they progress through the degree and into legal practice.

Very few students could identify some of the more advanced legal issues which are typically covered in later year subjects in a law degree, such as the review of administrative decisions and action, and the legal status of corporate entities. As a teaching and learning tool, the film and associated activities gave an engaging and fun visual way to introduce law students to the process of identifying and categorising legal issues. The importance of humour in the classroom should also not be understated. As noted recently:⁴⁵

The judicious use of appropriate, relevant and inclusive humour can help create a friendly, unthreatening learning environment, which can in turn increase student engagement and participation. In addition, and perhaps more importantly, the literature also suggests that humour can have a significant positive impact on students' retention of material.

45 Kate Offer, Natalie Skead & Angelyn Seen "‘You must be joking’: the role of humour in the law classroom" (2017) *The Law Teacher*, 1, 1-2. <<http://dx.doi.org/10.1080/03069400.2017.1379182>>.

The mood in the class room during the activities was very positive with students laughing at various points in the film. Students appeared to appreciate the visual and kinetic elements of the activity.

At a macro-level, the film was used as a ‘reverse capstone’ or ‘footing’ to alert incoming law students to the fact that law cannot and should not be viewed in silos, but rather, that to fully understand the nuances and complexity of law, one has to approach it holistically. At a micro-level, showing the film in Criminal Law allowed students to contextualise their legal knowledge and to relate two particular scenes to the current study topic. It also enabled students to identify and interpret non-verbal communication, such as facial expressions and body language, to assess the nature of the bodily interference which occurred, and in particular, the issue of consent – a factual determination, based on all the available evidence. The visual medium facilitated consideration of the way in which legal consent may be satisfied – through express words, but also through an implied sense of agreement based on common knowledge of the realities of everyday interaction, as depicted in the city street setting. The students’ experience in Criminal Law is an excellent illustration of the ‘multi-layered opportunity’ for learning through a ‘transformative process of understanding “reality” during which [students’] perceptions of the world, people and the law evolve’.⁴⁶

2 CASEFLIX

The teachers in Contract, Property, Torts and Land Law who used the Caseflix resources, reported that using the short videos in their lecture gave a welcome break from the traditional lecture delivery format. Students found the video amusing and the group discussion that followed was animated and lively.

B *Law Student Feedback*

1 LEGAL STORYTELLING FILM

Student feedback on the legal storytelling film was obtained through an anonymous online survey for which ethics approval was obtained. All students enrolled in Criminal Law were invited to complete the survey (n=138). The survey was open for one week and 45 responses were received, representing a 32 per cent response rate.

(a) Survey Items and Results

Seventy-one per cent of students who responded to the survey, answered ‘strongly agree’ or ‘agree’ that the film helped them to identify the legal relationships between the characters in the film. By contrast, 95 per cent of survey respondents either strongly agreed or agreed that written problem-solving exercises helped them to identify legal relationships. Similarly, 76 per cent of survey respondents agreed or strongly agreed that the film helped them to identify legal issues, while 100 per cent of student respondents reported that written problem-solving exercises helped them to identify legal issues.

While slightly fewer student respondents (65 per cent) agreed or strongly agreed that the film helped them identify ethical and moral issues that might arise in law, this figure was only marginally lower than the 69 per cent of student respondents who agreed or strongly agreed with this statement in relation to written problem-solving exercises. Although this survey was conducted in relation to the Criminal law unit, this result is supported by the fact that in the FLL exercise, only a few students identified the ethical and professional conduct issues arising in the film.

⁴⁶ Skead and Offer, above n 21, 188.

2 CASEFLIX

Student feedback on the use of the Caseflix resources in Property and Contract lectures was obtained through a question included in the voluntary and anonymous online Student Perception of Teaching (SPoT) surveys undertaken in each of the units at the end of the semester. The question asked: ‘The animated film for [*case name*] helped to visualise and remember the facts of the case’.

In the Property SPoT there were 45 student responses representing a response rate of 35 per cent. Of those students who responded, 71 per cent agreed or strongly agreed with the question asked. In the Contract unit, at the time of writing this article, there were seven responses representing a response rate of only five per cent, all of whom agreed or strongly agreed with the question asked.

C Analysis

In terms of legal teaching and learning, the results show that the legal storytelling film complements the traditional legal teaching method of written problem-solving exercises well. While it is not surprising that students reported that the traditional method of written problem-solving exercises supported their learning to a greater degree, it was pleasing that the majority of those students who responded to the survey, reported that the film assisted them to identify legal relationships and issues.

An important survey result is that the film assisted student respondents, to identify the ethical and moral issues to the same level as the written exercises did. This result could stem from an ability to see the ‘law in action’ through the characters in the film, and assist the more complex ethical and moral issues to be recognised through the various forms of non-verbal communication. This is significant given that students should be considering these issues from the very beginning of their law degree.

Overall, the survey results show that the film added variety to legal teaching, as did the Caseflix resources, and at the same time deepened student learning in the fundamental aspects of: law and lawyering, legal ethics and professionalism. In this regard, it is interesting to reflect on a recent article by Paula Baron and Lilian Corbin, who discussed the development of professionalism in law students by applying ‘communities of practice’ to challenge orthodox legal education. A number of Baron and Corbin’s recommendations would arguably be advanced by the legal storytelling project discussed in this article. Baron and Corbin’s recommendations are expressed in the form of ‘we could ...’, that is, as legal educators ‘we could’ act in certain ways so as to assist in the development of legal professionalism. Recommendations relevant to our project are that ‘we could’: overtly welcome students to the legal profession; take a clearer stand on professional expectations; place greater emphasis on collaborative learning and peer review; work to humanise and contextualise the study of law; more overtly address emotional intelligence competencies; incorporate more learning about the trend to ‘new lawyering’; and encourage more fluidity in the boundaries between law school and the practice of law.⁴⁷

VII CONCLUSION

In Brandon Sanderson’s 2010 novel, *The Way of Kings*, the character Hoid says to the soldier Kaladin that ‘the purpose of a storyteller is not to tell you how to think, but to give you questions

47 Paula Baron and Lilian Corbin, ‘Thinking like a lawyer/acting like a professional: communities of practice as a means of challenging orthodox legal education’ 46 (2012) *The Law Teacher* 100, 111-115.

to think upon.’⁴⁸ In creating the legal storytelling film for students, the authors consider that we achieved our aim of providing many and varied questions for our law students to ‘think upon’ as well as identify, discuss and apply. If the practice of law is ‘on the line’ then it is incumbent on us as legal educators to future-proof our law graduates with a range of professional skills. The authors believe that our project is just one important example of the ways in which law teachers can not only improve law student engagement by providing a well-organised and integrated foundational and capstone experience, but also encourage the development of vital skills, such as critical thinking, problem-solving and communication that law graduates increasingly need, to navigate the modern legal profession. Our new lawyers will not only be great advocates but also deep thinkers who are thinking not only of the next case, but also of the next great question.

48 Brandon Sanderson *The Way of Kings* (New York, Tor Books, 2011) available here <<http://thestorytelleragency.com/goodreads/50-best-quotes-for-storytelling>>

THE EFFECT OF LECTURE RECORDINGS ON LECTURE ATTENDANCE: LAW ACADEMICS' MISCONCEPTIONS AND LAW STUDENTS' REALITY

*Christina Do**

ABSTRACT

An issue experienced globally in the higher education sector is the reported decline in student attendance at lectures over the course of a study period. In 2017, a small-scale pilot project was conducted at the Curtin Law School ('CLS') to explore what, if any effect, the availability of lecture recordings has on student attendance at lectures in the discipline of Law.

The project involved asking CLS law academics and students, to complete a questionnaire about their opinions on the use of face-to-face lectures and lecture recordings, respectively. By researching the perspectives of law academics and law students, misalignments were identified between law academics' perceptions of why lecture attendance by students is declining, and students' actual learning needs and preferences. This paper outlines and critically analyses the data collected from the project and highlights the key misalignments identified — particularly a *misconception* by law academics that the availability of lecture recordings is the leading cause of declining rates of student attendance at lectures.

This paper then offers learning and teaching strategies that law academics could use to encourage students to attend their lectures, and enhance students' university learning and teaching experience.

I INTRODUCTION

Lectures remain the most common method of transmitting information to students in tertiary education around the world.¹ The lecturing tradition can be traced back to medieval times.² Historically, lectures have been the standard teaching method and the primary learning venue in university settings. At lectures, law academics tend to 'dictate' and present information on a subject matter in which they are regarded to be an expert, and students are expected to listen and take notes. Although there is debate as to whether lectures are the most advantageous method of

* LLM, LLB, BCom, GradDipLegPrac, GradCertHE, Lecturer, Curtin Law School, Curtin University, Perth, Australia. The author would like to thank the Curtin Law School academic staff and students who participated in and contributed to the project. In particular, the author wishes to acknowledge the work of her Research Assistant, Jessica Border, in collating the data and assisting in the preparation of this paper.

1 See generally, Donald Bligh, *What's the Use of Lectures?* (D A & B Bligh, 1972) 3; Helen Edwards, Brenda Smith and Graham Webb (eds), *Lecturing: Case studies, experience and practice* (Routledge Falmer, 2012) 1; Bruce Charlton, Sam Marsh and Nick Gurski, 'Are lectures the best way to teach students?', *The Guardian* (online), 31 March 2015 <<https://www.theguardian.com/higher-education-network/2015/mar/31/are-lectures-the-best-way-to-teach-students>>.

2 See, eg, George Brown and Madeleine Atkins, *Effective Teaching in Higher Education* (Routledge, 1988) 7; Paul Ramsden, *Learning to Teach in Higher Education* (Routledge, 2nd ed, 2003) 147.

teaching,³ lecturing remains the leading teaching format in higher education.⁴ The distillation of the advantages and disadvantages of university lectures is beyond the scope of this paper. The primary focus of this paper is on the impact that lecture recordings has on lecture attendance and how law academics can motivate students to attend lectures, not the effectiveness of lectures generally. However, aspects of the debate over the use of lectures are considered when explaining the factors that influence the decision why students do or do not attend lectures.

Despite lectures being the main teaching method in higher education, student non-attendance at lectures appears to be a universal challenge for lecturers that transcends all: disciplines, universities, and countries. This decline is evidenced by the body of international literature on this subject,⁵ which shows that there generally tends to be a steady decline in lecture attendance over the course of a study period.⁶ The decline in student attendance at lectures suggests that students today do not seem to perceive value in lectures as a learning method.⁷

With technological advancements, university lectures are now recorded and made available for students to access afterwards at their convenience, through online learning portals. Lecture recordings are becoming increasingly popular and more widespread, to the point where online access to lecture recordings are required by university management and in turn expected by university students, regardless of their mode of study.⁸ There are mixed feelings amongst academic lecturers regarding the provision of online lecture recordings as some consider that

-
- 3 See, eg, Thomas Davies, Vonda Cotton and Leon Korte, 'Student Usage And Perceptions Of The Value Of Recorded Lectures In A Traditional Face-To-Face (F2F) Class' (2016) 13(3) *Journal of College Teaching & Learning* 85; Bassou El Mansour and Davison Mupinga, 'Students' positive and negative experiences in hybrid and online classes' (2007) 41(1) *College Student Journal* 242; Jeffrey Young, 'Hybrid' teaching seeks to end the divide between traditional and online instructions' (2002) 48(28) *Chronicle of Higher Education* 33; Belinda Tynan and Stephen Colbran, 'Podcasting, student learning and expectations' (Paper presented at the 23rd Annual Conference of the Australasian Society for Computers in Learning and Tertiary Education Conference: Who's learning? Whose technology? Sydney, 3–6 December 2006) 825 <http://www.ascilite.org/conferences/sydney06/proceeding/pdf_papers/p132.pdf>.
 - 4 Helen Larkin, 'But they won't come to lectures ...' The impact of audio recorded lectures on student experience and attendance' (2010) 26(2) *Australasian Journal of Educational Technology* 238, 239.
 - 5 See, eg, Therese Leufer and Joanne Cleary-Holdforth, 'Reflection on the Experience of Mandating Lecture Attendance in One School of Nursing in The Republic of Ireland' (2010) 2(1) *All Ireland Journal of Teaching and Learning in Higher Education* 16.1, 16.2. This article provides an outline of the international literature concerning student non-attendance at lectures.
 - 6 *Ibid.*
 - 7 Peter Massingham and Tony Herrington, 'Does Attendance Matter? An Examination of Student Attitudes, Participation, Performance and Attendance' (2006) 3(2) *Journal of University Teaching and Learning Practice* 82, 84.
 - 8 Kathy Buxton et al, 'Recorded lectures: Looking to the future' (Paper presented at the 23rd Annual Conference of the Australasian Society for Computers in Learning and Tertiary Education Conference: Who's learning? Whose technology? Sydney, 3–6 December 2006) 101 <http://www.ascilite.org/conferences/sydney06/proceeding/pdf_papers/p118.pdf>.

lecture recordings are a disincentive for students to attend lectures in person,⁹ because students perceive no *value* in physically attending the lecture when they can access the information online at a later time. There is no conclusive evidence that the availability of lecture recordings is causing the decline in lecture attendance.¹⁰ In fact, there is a body of academic research which suggests that the availability of lecture recordings does *not* lead to a *significant* drop in lecture attendance,¹¹ but does have a *slight* adverse effect. It is mainly other factors, such as: illness, employment and logistics which are causing the decline in lecture attendance.¹²

To determine the ‘significance’ that lecture recordings might have on student learning and engagement within the discipline of Law, a small-scale pilot project was conducted at Curtin Law School (‘CLS’) between January and June 2017 (‘project’). The project sought to explore the perceived impact of the availability of lecture recordings on student attendance and learning. This paper analyses quantitative and qualitative responses collated from the questionnaire.

The study’s results arguably support the view that the availability of lecture recordings is a contributory factor as to why students do not attend lectures, but consistent with prior academic literature, it is *not* a leading factor – despite law academics’ perception that it is. This paper highlights a number of misalignments between academic perceptions and student learning practices and preferences regarding the availability of recorded lectures. In light of the misalignments identified from the project’s results, this paper then offers potential learning and teaching strategies that law academics can use to encourage student attendance at their lectures and, in turn, enhance students’ university learning and teaching experiences.

Whilst there have been extensive studies exploring this issue,¹³ including a large scale Australian Learning and Teaching Council funded project in 2008,¹⁴ there have only been a

-
- 9 See, eg, Vanessa Gysbers et al, ‘Why do Students Still Bother Coming to Lectures, When Everything is Available Online?’ (2011) 19(2) *International Journal of Innovation in Science and Mathematics Education* 20, 21; Brian von Konsky, Jim Ivins and Susan Gribble, ‘Lecture attendance and web base lecture technologies: A comparison of student perceptions and usage patterns’ (2009) 25(4) *Australian Journal of Education Technology* 581, 582; Andrew Williams, Elisa Birch and Phil Hancock, ‘The impact of online lecture recordings on student performance’ (2012) 28(2) *Australian Journal of Educational Technology* 199, 200; John Tarrant, ‘Recorded Lectures: An Opportunity for Improved Teaching and Learning’ (2013) 3(1) *ERGO: The Journal of the Education Research Group of Adelaide* 37; Larkin, above n 4, 243.
- 10 Tarrant, above n 9.
- 11 See, eg, Arun Karnad, *Student use of recorded lectures: a report reviewing recent research into the use of lecture capture technology in higher education, and its impact on teaching methods and attendance* (25 June 2013) London School of Economics and Political Science <<http://eprints.lse.ac.uk/50929/>>; Jon-Paul Marchand, Marion Pearson and Simon Albon, ‘Student and faculty member perspectives on lecture capture in pharmacy education’ (2014) 78(4) *American Journal of Pharmaceutical Education* 74; von Konsky, Ivins and Gribble, above n 9; Gysbers et al, above n 9; Tarrant, above n 9.
- 12 See, eg, Pierre Gorissen, Jan van Bruggen and Wim Jochems, ‘Students and Recorded Lectures: Survey on Current Use and Demands for Higher Education’ (2012) 20 *Research in Learning Technology* 297.
- 13 See eg, Lillian Corbin, Kylie Burns and April Chrzanowski, ‘If you teach it, will they come? Law students, class attendance and student engagement’ (2010) 20 *Legal Education Review* 13. This article provides a detailed summary of the most commonly cited journal articles discussing student non-attendance at lectures.
- 14 Maree Gosper et al, *The Impact of Web-Based Lecture Technologies on Current and Future Practices in Learning and Teaching* (April 2008) Office of Learning and Teaching <<http://www.olt.gov.au/resource-impact-webbased-lecture-technologies-macquarie-2008>>.

handful of projects investigating it within the discipline of Law.¹⁵ Furthermore, the majority of those studies focused on students' perspectives, asking how, why and when students attend face-to-face lectures and use lecture recordings. In addition to highlighting how law students use lecture recordings, the CLS project also sought to understand law academics' perceptions of students' motives and use of face-to-face lectures and lecture recordings. By exploring declining rates of lecture attendance from the perspectives of law academics and their students, misalignments between perceptions were identified. This will hopefully help to ensure that law academics can better understand their students' learning needs, preferences and motives and thus facilitate their learning by traditional lectures or other teaching formats.

II THE PROJECT

A Background

The CLS project aimed to explore the perceived impact of recorded lectures on law school lecture attendance rates, from the perspectives of law academics and their students. In particular, the project was concerned with whether the availability of lecture recordings is the *leading* factor that influences law students not to attend lectures. Furthermore, the investigation sought to better understand students' motivations for attending face-to-face lectures and/or listening to lecture recordings online. By having a better understanding of student learning approaches and preferences, law academics can adjust their teaching approaches to better facilitate and maximise student learning.

This was approved by Curtin University's Human Research Ethics Office (approval number: HRE2017-0104). Participants' consent was obtained when they ticked a box at the top of the questionnaire which confirmed their voluntary consent to take part.

B Participants: Law Academics And Students

CLS law academics and law students, enrolled in the following units (listed below), were asked to complete an anonymous questionnaire (the details of which are explained in the next section):

- Legal Foundations (LAWS1005) — first year core unit;
- Property Law Principles (LAWS2000) — second year core unit;
- Competition Law and Policy (LAWS3004) — penultimate/final year elective unit; and
- Occupational Health and Safety Law (LAWS3015) — penultimate/final year elective unit.

The weekly tuition pattern for all four units was the same, each having a traditional lecture and interactive tutorial. Lectures were recorded and tutorials were not. Three of the four Unit Coordinators for the above units recorded their lectures and made them available through the university's online learning management system immediately after the lecture. Although the Property Law Principles Unit Coordinator recorded their lectures, the lecture recordings were released in two intervals – during the tuition free break at the middle and at the end of the study period. Note that lecture and tutorial attendance was not a mandatory requirement of students in any of the four units surveyed by this CLS project.

The questionnaire was administered in the above units to ensure that the opinions and perceptions of law students at different stages of their studies were obtained and represented in

15 See, eg, Sharon Mascher and Natalie Skead, 'On the record: The Trials and Tribulations of Lecture Recording in Law' (2011) 35 *University of Western Australia Law Review* 407; Jane Bahnson and Lucie Olejnikova, 'Are Recorded Lectures Better than Live Lectures for Teaching Students Legal Research?' (2017) 109(2) *Law Library Journal* 187; Corbin, Burns and Chrzanowski, above n 13.

the results. The four units had minimal student enrolment overlap.¹⁶ However, to try to reduce the risk of questionnaires being completed by the same students repeatedly, students were asked to not complete the questionnaire if they had already done so in another unit.

Only permanent CLS law academics were asked to participate in the project. CLS sessional law academics were not included in the project as majority of sessional law academics are not involved in the delivery of lectures.

A total of 27 law academics and 181 law students voluntarily participated in the CLS project by completing the questionnaire. Table 1 below depicts the number of permanent CLS law academics, the number of academic participants, and the response rate.

Table 1: Response rate of CLS academic staff participants

PARTICIPANTS	NUMBER OF PERMANENT STAFF	NUMBER OF STAFF RESPONSES	RESPONSE RATE
CLS academic staff	33	27	81.8%

Table 2 below then shows the number of students enrolled in each unit, the number of students who completed the survey in each unit, and the response rate.

Table 2: Response rate of CLS student participants

UNIT	NUMBER OF STUDENTS ENROLLED	NUMBER OF STUDENT RESPONSES	RESPONSE RATE
Legal Foundations (LAWS1005)	125	98	78.4%
Property Principles (LAWS2000)	95	63	66.3%
Competition Law and Policy (LAWS3004)	17	7	41.2%
Occupational Health and Safety Law (LAWS3015)	18	13	72.2%
Total	255	181	70.9%

C Methodology: Questionnaire

Two questionnaires were created and administered to the law academic and student participants. One questionnaire aimed to better understand students' reasons for attending or not attending face-to-face lectures in person, and/or using lecture recordings. A slightly different questionnaire was given to academic participants to identify their perceptions of their students' motives for attending face-to-face lectures and/or using lecture recordings. Both questionnaires contained three sections of questions as follows:

1. General information;
2. Lecture attendance; and
3. Lecture recordings.

¹⁶ Seven students were enrolled in both Competition Law and Policy (LAWS3004) and Occupational Health and Safety Law (LAWS3015) during the study period in which the questionnaire was administered. There were no overlaps in the other units.

The questionnaires contained open and close-ended questions, the latter required participants to select one response from a list of options.

Both questionnaires were administered to participants as a one-off hard copy. The rationale for administering the questionnaire in hardcopy was so participants completed the questionnaire immediately. This approach was the easiest for participants as they were not required to use electronic devices to access the internet. Consequently, a greater response rate was arguably achieved.

Questionnaires were administered to students enrolled in the four units, at the start of a tutorial towards the end of the study period. A tutorial was chosen instead of a lecture, to gain access to the broadest sample of students including those who did not attend lectures (assuming that some students who did not attend lectures, did attend tutorials). Questionnaires were administered to CLS law academics at the start of a School Meeting, at around the same time of the teaching period. The questionnaires asked law academics and students for their personal observations and experiences of face-to-face lectures and recorded lecturers.

D Results

The project’s results show participants’ perceptions based on their personal observations and experiences of face-to-face lectures in contrast to recorded lectures. The purpose of the project was to highlight how academic staff perceive students’ motives for attending and not attending lectures, and how lecture recordings are used; in contrast to the students’ perceptions of their motivations and learning approaches.

1 LAW ACADEMICS’ PERCEPTIONS OF THE IMPACT OF THE AVAILABILITY OF LECTURE RECORDINGS

CLS law academics who completed the questionnaire were asked, on average, how many students attend their lecture at the start and end of a study period. The results indicate that there is a significant decline in lecture attendance from the beginning to the end of a study period with 85.19 per cent of CLS law academics reporting that on average ‘all’ or a ‘majority’ of students attend their lectures at the start of the study period. However, in contrast, only 14.81 per cent of CLS law academics reported that ‘all’ or ‘majority’ of students attend their lectures by the end of the study period. This data is reflected in Table 3.

Table 3: CLS academic staff response to student attendance at lectures at the start and end of a study period

	START OF THE STUDY PERIOD		END OF THE STUDY PERIOD	
	RESPONSES	PERCENTAGE	RESPONSES	PERCENTAGE
All	2	7.41%	1	3.70%
Majority	21	77.78%	3	11.11%
Half	2	7.41%	8	29.63%
Less than half	2	7.41%	15	55.56%

The questionnaire administered to CLS law academics contained a question specifically for those who taught before recorded lectures were introduced, asking them what effect they perceived lecture recordings have had on student attendance at their lectures — as these law academics would be in the best position to comment on the *perceived* impact that lecture recording has had on student attendance. Of the 27 law academics who completed the questionnaire,

15 taught before lecture recordings were introduced at universities generally. Table 4 below shows the distribution of the law academics' responses when they were asked, what impact they perceived the availability of lecture recordings had had on student lecture attendance.

Table 4: Responses of CLS academic staff who taught before lecture recordings were introduced, on the perceived effect of recorded lectures on student lecture attendance

	RESPONSES	PERCENTAGE
Increase	0	0
No effect	0	0
Decrease	14	93.33%
Unable to judge	1	6.66%

Almost all the CLS law academics who taught before lecture recordings were introduced, perceive that the availability of online lecture recordings has caused a decline in student attendance at face-to-face lectures. These survey results arguably confirm that the significant gradual decline in student attendance at lectures is a live issue within the discipline of Law, and that some law academics perceive this decline to be attributable to the availability of online recorded lectures.

2 FACTORS THAT INFLUENCE STUDENTS' DECISION NOT TO ATTEND LECTURES

The questionnaires asked both academics and students what they consider to be the top three contributing factors that influence students not to attend lectures. The questionnaire offered a set list of factors, and participants were asked to select the top three contributing factors of their choice. The list of factors were formulated based on the reasons students often cite informally for not attending lectures. Table 5 outlines the responses to this question.

Table 5: Top three perceived contributing factors that influence students not to attend law lectures

FACTORS THAT INFLUENCE STUDENT NOT TO ATTEND LECTURES	ACADEMIC RESPONSES		STUDENT RESPONSES	
	RESPONSES	PERCENTAGE	RESPONSES	PERCENTAGE
Assessment deadlines	16	19.75%	91	16.76%
Availability of lecture recordings and preference to utilise them	22	27.16%	57	10.5%
Conflicting academic timetable	1	1.23%	8	1.47%
Difficulty concentrating in lectures	0	0%	32	5.89%
Family commitments	0	0%	18	3.31%
Illness	1	1.23%	42	7.73%
Little engagement/involvement in lectures	1	1.23%	23	4.24%
Lecturer's approachability and teaching style	0	0%	23	4.24%
No apparent benefit	4	4.94%	13	2.39%
Size of the lecture	0	0%	2	0.37%
Time of the lecture	6	7.41%	56	10.31%
Transport issues, e.g. long distance to travel to university or parking	8	9.88%	62	11.42%
Work commitments or clerkships	21	25.93%	64	11.79%
Other	1	1.23%	11	2.03%
Did not answer or incomplete answer (includes those who only indicated one or two factors)	0	0%	41	7.55%

Most CLS law academics think that the top three contributing factors that influence students not to attend lectures, are:

1. Availability of lecture recordings and preference to utilise them (27.16 per cent);
2. Work commitments or clerkships (25.93 per cent); and
3. Assessment deadlines (19.75 per cent).

In contrast, most students perceived the top three contributing factors that influence them not to attend lectures, to be:

1. Assessment deadlines (16.76 per cent);
2. Work commitments or clerkships (11.79 per cent); and
3. Transport issues, such as long distance to travel to university or parking (11.42 per cent).

The 'availability of lecture recordings and preference to utilise them' factor, was the fourth most popular contributing factor that students identified as influencing their decision not to attend law lectures (10.5 per cent). Note that there was only a slight statistical variance between the second, third and fourth most popular factors identified by the students, namely 1.29 per cent. This result arguably demonstrates that although the 'availability of lecture recordings and preference to utilise them' is not the leading factor that influences students' decision not to attend lectures, it is still a contributory factor. This outcome is relatively consistent with the results from other similar projects which have investigated the impact of lecture recordings on lecture attendance.¹⁷

¹⁷ Gorissen, Bruggen and Jochems, above n 12.

The statistical significance of the most popular factor indicated by law students, that is ‘assessment deadlines’ (16.76 per cent – 4.97 per cent difference from the second most popular factor), suggests that students generally prioritise assessment deadlines over lecture attendance. This result is not surprising if lecture attendance is not compulsory or graded, as assessment performance forms a direct part of students’ final grade in each unit.

What is interesting about these results, is that in direct contrast to academics’ perceptions – the availability of recorded lectures was *not* a top three contributory factor in the students’ decision not to attend face-to-face lectures. This is the first notable misalignment between academics’ perceptions and students’ learning preferences and motivations.

3 FACTORS THAT INFLUENCE STUDENTS ‘TO’ ATTEND LECTURES

Whilst it is important to understand the factors that influence students not to attend lectures, it is equally important to understand the factors that promote attendance. By understanding the factors that motivate students to attend lectures, law academics can formulate informed learning and teaching strategies to encourage students’ lecture attendance. Similar to the previous question, participants were asked to indicate the top three contributing factors from a list of factors that influence students to attend lectures. The list of factors were formulated based on the reasons students often cite informally for attending lectures. The results of which are listed below in Table 6.

Table 6: Top three contributing factors that influence students to attend lectures

FACTORS THAT INFLUENCE STUDENT TO ATTEND LECTURES	ACADEMIC RESPONSES		STUDENT RESPONSES	
	RESPONSES	PERCENTAGE	RESPONSES	PERCENTAGE
Acquiring knowledge	9	11.11%	87	48.07%
Already on campus	15	18.52%	54	29.83%
Attendance is assessed or mandatory	6	7.41%	21	11.6%
Assessment/examination guidance	9	11.11%	49	27.07%
Conducive learning environment	1	1.23%	43	23.76%
Contact with lecturer and peers	13	16.05%	34	18.78%
Engaging lecturer	7	8.64%	55	30.39%
General enjoyment	1	1.23%	6	3.31%
Opportunity to seek clarification	4	4.94%	24	13.26%
Quicker to listen to the lecture in real time	7	8.64%	41	22.65%
Risk of the lecture not recording	7	8.64%	63	34.81%
University experience	1	1.23%	8	4.42%
Visual aids	0	0%	6	3.31%
Other	1	1.23%	7	3.87%
Did not answer or incomplete answer (includes those who only indicated one or two factors)	0	0%	46	25.41%

The data shows that most academic staff perceive the top three contributing factors influencing students to attend lectures, are:

1. Students already being on campus (18.52 per cent);
2. Contact with lecturer and peers (16.05 per cent); and
3. Acquiring knowledge (11.11 per cent) and assessment/examination guidance (11.11 per cent).

In contrast, students identified the following as the top three contributing factors that influence them to attend lectures:

1. Acquiring knowledge (48.07 per cent);
2. Risk of the lecture not recording (34.81 per cent); and
3. Engaging lecturer (30.39 per cent).

Both law academics and students identified ‘acquiring knowledge’ as one of the top three contributing factors that influence students to attend lectures, which is consistent with the intended purpose of lectures.¹⁸ In this sense, there is some alignment between the academic staff and students’ perceptions. However, the other contributing factors identified by academic staff and students were not consistent.

The two leading factors that the students identified as influencing them to attend lectures appear to be related. As indicated in the student data, the leading factor influencing students to attend lectures is to ‘acquire knowledge’. If the primary avenue for students to acquire knowledge is through a lecture, it is not surprising that the ‘risk of the lecture not recording’ is an incentive for students to attend as the concern that they may miss out on vital information is sufficiently motivating.

It must also be noted that the ‘risk of the lecture not recording’ is a significant factor for students to attend lectures (second most popular factor identified), which is consistent to the finding that the ‘availability of the lecture recordings’ is a contributory factor that influences non-attendance at lectures (fourth most popular factor identified).

4 FACTORS THAT INFLUENCE STUDENTS TO UTILISE LECTURE RECORDINGS

Whilst the availability of lecture recordings only has a contributory impact on lecture attendance—rather than being the leading impact—there is no doubt that students do utilise lecture recordings. In the student questionnaire, students were asked whether they utilise lecture recordings if they are made available. Of the students who participated in the project, 50.83 per cent indicated that they ‘always’ use lecture recordings made available to them, 27.07 per cent indicated ‘generally’ and 16.02 per cent indicated ‘sometimes’. This data indicates that a substantial proportion of students (93.92 per cent) do utilise lecture recordings, regardless of whether they attend the lecture in person.

Although a majority of students do utilise lecture recordings if they are made available, when students were asked if they learn better from attending lectures, or watching/listening to the lecture recordings, their responses were mixed. The data suggests only a slight preference to learn through lecture recordings over attending lectures, with 40.88 per cent stating they learn better through the use of lecture recordings. By comparison, 35.36 per cent stated a preference to learn by attending lectures, and 20.99 per cent found no difference between learning through lecture attendance and listening to or watching the lecture recording.

18 Bligh, above n 1, 7.

Table 7: CLS student response to whether they learn better from attending lecture or listening/watching lecture recordings

	RESPONSES	PERCENTAGE
Lecture attendance	64	35.36%
Lecture recordings	74	40.88%
No difference	38	20.99%
Did not answer or did not answer properly	5	2.76%

Given that most students use lecture recordings, it is important to understand why they do. Both academics and students were asked to indicate the top three contributing factors that they consider, influence students to use lecture recordings. The questionnaire specified a list of factors and participants were asked to select what they perceive to be the top three contributing factors. The list of factors were formulated based on the reasons students often cite informally for utilising lecture recordings. Table 8 below outlines participants’ responses.

Table 8: Top three contributing factors that influence students to use lecture recordings

FACTORS THAT INFLUENCE STUDENT TO UTILISE LECTURE RECORDINGS	ACADEMIC STAFF RESPONSES		STUDENT RESPONSES	
	RESPONSES	PERCENTAGE	RESPONSES	PERCENTAGE
Ability to control the speed of the lecture	8	9.88%	76	14%
Assessment/examination revision	16	19.75%	68	12.52%
Did not attend the lectures	27	33.33%	76	14%
Easier to process information than in a lecture	1	1.23%	30	5.52%
Option to stop/start/rewind the lecture	12	14.81%	89	16.39%
Reviewing notes	1	1.23%	30	5.52%
Revisiting difficult concepts	6	7.41%	97	17.86%
Tutorial preparation	1	1.23%	5	0.92%
Watch or listen to the lecture again	5	6.17%	25	4.6%
Other	4	4.94%	4	0.74%
Did not answer or incomplete answer (includes those who only indicated one or two factors)	0	0%	43	7.92%

Most academics thought the top three contributing factors influencing students to use lecture recordings, were:

1. Students not attending the lectures (33.33 per cent);
2. Assessment/examination revision (19.75 per cent); and
3. Option to stop/start/rewind the lecture (14.81 per cent).

In contrast, students identified the below top three contributing factors as influencing their decision to use lecture recordings:

1. Revisiting difficult concepts (17.86 per cent);
2. Option to stop/start/rewind the lecture (16.39 per cent); and
3. Ability to control the speed of the lecture (14 per cent) and did not attend the lectures (14 per cent).

Given responses examined earlier in the paper, it is unsurprising that academics predominantly perceive that students use lecture recordings mostly because they do not attend face-to-face lectures in person. This perception is arguably an assumption that is consistent with law academics' view that the decline in lecture attendance over a study period is attributable to the availability of lecture recordings. However, the students' responses indicate that most law academics' perceptions and assumptions about their students, are incorrect, as the most common reason for students using lecture recordings is to 'revisit difficult concepts'. This is the second notable misalignment between academics' perceptions and assumptions about their students' choices and motivations – and the same students' *actual* learning motivations and choices in practice.

The CLS project data also tends to suggest that many students are not necessarily using lecture recordings to replace lecture attendance, but rather as a revision tool, to revisit what was delivered in face-to-face lectures. If this interpretation of the CLS project data is correct, it is consistent with the research results reported in the research literature regarding students' use of lecture recordings in other disciplines.¹⁹

5 ACADEMICS' PERCEPTIONS OF THE BENEFITS OF ATTENDING FACE-TO-FACE LECTURES

The results of the academic staff questionnaire suggest that law academics are generally of the opinion that lectures are a valuable learning resource, and that attendance at lectures is beneficial to students. The qualitative comments from the study indicate that law academics believe that by being physically present at lectures, students are exposed to a more conducive learning environment and are likely to be more engaged with the course content, the lecturer, and their peers. Furthermore, the law academics perceived that regular attendance at lectures positively influences students' academic performance and general well-being. The following are representative examples of comments provided in the questionnaire by academic staff:

'Students will be more engaged in person and will stay on top of materials. In my experience, students who listen online have the tendency to fall behind the unit timetable.'

'Students who are engaged and present in class perform better academically. In-class discussion with the lecturer and peers help students consider the implications of the law and its application to diverse scenarios. Also, if students attend class they are better able to keep up with the volume of learning. Mental health is a big issue and attending class/interacting with peers and lecturers makes students feel less isolated.'

'Communication in real life is more engaging and effective for the student. For the lecturer, the job of communicating concepts in a way that students understand is easier when the lecturer can see and hear the students during the lecture, therefore students get a better lecture.'

19 See, eg, Julie McElory and Yvette Blount, 'You, me and iLecture' (Paper presented at the 23rd Annual Conference of the Australasian Society for Computers in Learning and Tertiary Education Conference: Who's learning? Whose technology?, Sydney, 3–6 December 2006) 554 <http://www.ascilite.org/conferences/sydney06/proceeding/pdf_papers/p87.pdf>; Sheila Scutter et al, 'How do students use podcasts to support learning?' (2010) 26(6) *Australasian Journal of Education Technology* 717, 185; Andrea Chester et al, 'Podcasting in Education: Student Attitudes, Behaviour and Self-Efficacy' (2011) 14(2) *Educational Technology & Society* 236, 242; Janine Tarr et al 'Challenges for this place or any place: student preferences for lecture 'places' in a blended learning environment' (Paper presented at the 38th HERDSA Annual International Conference, Melbourne, 6–9 July 2015) 447 <<http://herdsa.org.au/publications/conference-proceedings/research-and-development-higher-education-learning-life-and-38>>; von Konsky, Ivins and Gribble, above n 9, 587. The study conducted by von Konsky, Ivina and Gribble found that passing students were more likely to utilise lecture recordings to supplement face-to-face lectures than failing students.

There appears to be a perception amongst the CLS academic staff that students who attend lectures are likely to be more engaged and abreast of the unit materials, and as a result perform better academically. Whilst there is a body of academic literature that supports this position,²⁰ there is an equivalent body of academic literature suggesting that student attendance at lectures has little or no correlation to student performance and grades.²¹ Whilst all these studies vary in nature and scope, the results of each study demonstrate that there is no conclusive evidence to suggest that there is a positive link between lecture attendance and academic performance.²² Therefore, law academics who hold this perception must objectively assess if this perception is a true and accurate account of reality in light of the mixed literature – especially, when making decisions with respect to mandatory lecture attendance and whether to record and release lecture recordings.

6 SUMMARY OF RESULTS

The results of the project indicate two noticeable misalignments between law academics and students' perceptions, namely:

1. A misalignment between the perceptions of what factors influence students not to attend lectures; and
2. A misalignment between the perceptions of what factors influence students to utilise lecture recordings.

If student non-attendance at face-to-face lectures is considered to be a problem for law academics and students, law academics need to understand their students' learning preferences and motives, so they can respond to the problem with effective strategies.

III SUGGESTED STRATEGIES FOR LECTURE ATTENDANCE

Massingham and Herrington asserted:

The reality is that the majority of students will attend lectures only if they perceive 'value' in them. Value perceptions are based largely on the teaching process and the lecturer's competence. This thinking is not new.²³

Although this statement was made over ten years ago, Massingham and Herrington's sentiments arguably maintain relevance. It could be further argued that university students regularly engage in cost-benefit analysis — they weigh up attending a lecture against other competing commitments.²⁴ If students do not perceive there to be 'value' in attending lectures, they will (quite rightly) not go.

Law academics who seek to maintain or increase student attendance at lectures perhaps need to be clear about why they want students to attend, and then employ learning and teaching

20 See, eg, Elchanan Cohn and Eric Johnson, 'Class Attendance and Performance in Principles of Economics' (2006) 14(2) *Education Economics* 211, 222; Williams, Birch and Hancock, above n 9, 210.

21 See, eg, Sally Hunter and J Tetley, 'Lectures. Why Don't Students Attend? Why Do Students Attend?' (Paper presented at the HERDSA Conference: Cornerstones – What do we value in higher education?, Melbourne, 12–15 July 1999); Joan Rogers, 'Encouraging Tutorial Attendance at University Did Not Improve Performance' (2002) 41(3) *Australian Economic Papers* 255, 16.

22 See, eg, Karen St. Clair, 'A Case Against Compulsory Class Attendance Policies in Higher Education' (1999) 23 *Innovative Higher Education* 171, 175; von Kinsky, Ivins and Gribble, above n 9, 591; Leufer and Cleary-Holdforth, above n 5, 18.7–18.8; Tarrant, above n 9, 39.

23 Massingham and Herrington, above 7, 84.

24 Corbin, Burns and Chrzanowski, above n 7, 13.

strategies that add genuine value to their lectures. Common strategies that might add value to lectures can be grouped into these two broad categories:

1. Strategies to ‘force’ student attendance; and
2. Strategies to ‘encourage’ student attendance.

A Strategies That ‘Force’ Students to Attend Lectures

A quick solution to increase student attendance at lectures is to simply impose a mandatory attendance policy that requires students to attend a prescribed number of lectures to pass the unit. In these circumstances, students would perceive that the value in attending lectures is to ensure they pass the unit. Adopting a mandatory attendance policy will likely ensure consistent student attendance at lectures throughout the course of the study period.

A similar strategy to a mandatory attendance policy is to give grades for lecture attendance. This approach incentivises students to attend lectures, as their attendance — and in some cases, active participation — is rewarded by marks that count towards their final unit grade. Under this strategy, students will likely see value in attending lectures as they, in many cases, will earn some marks for merely showing up. This approach assumes that students will attend lectures to increase their grades.

Although imposing a mandatory attendance policy or giving grades for lecture attendance is a quick solution, it has serious consequences and valid criticisms. For example, both approaches would cause significant administrative burdens to students and law academics — recording and monitoring student attendance and absences at lectures would be incredibly onerous, especially for large units.²⁵ Furthermore, giving grades for attendance may have the unintended effect of inflating grades,²⁶ with neither approach necessarily enhancing students’ learning and knowledge.

Another approach to ‘force’ student attendance at lectures is for law academics to not record their lectures and/or not release lecture recordings to students, so the fall back option of a lecture recording is removed for students who do not attend the lecture. In these circumstances, the perceived value in attending the lecture would be to acquire information about the lecturer’s views on the unit, as there will be few alternative means of acquiring the information — other than, perhaps, recourse to available readings, tutorials and communication with peers.

The student data obtained from the CLS project suggests that a policy of not releasing lecture recordings may be an effective strategy in compelling student attendance at lectures; but it is unclear whether this would necessarily be effective in enhancing students’ learning, if the lectures do not have inherent value. As previously discussed, the top contributing factor that motivates students to attend lectures is to ‘acquire knowledge’ (48.07 per cent) and the second is the ‘risk of the lecture not recording’ (34.81 per cent) (See Table 6). Therefore, by not releasing the lecture recordings, academic staff effectively force students to attend the lectures as there is no other means of obtaining details of the lecturer’s views on the content that was covered.

However, the approach of not making lecture recordings available fails to consider the body of academic literature that highlights the benefits and opportunities that arise from the provision of lecture recordings.²⁷ It is widely accepted that all students learn differently; whilst a lecture is a conducive learning environment for some, for others it is not. A benefit of lecture recordings is flexibility, as students can access lecture recordings and learn at a time, pace and place, that is

25 Leufer and Cleary-Holdforth, above n 5, 18.8–18.9.

26 Ibid 18.9.

27 See, eg, Oliver McGarr, ‘A review of podcasting in higher education: Its influence on the traditional lecture’ (2009) 25(3) *Australasian Journal of Education Technology* 309, 311–313; see generally, Gosper et al, above n 14; von Konsky, Ivins and Gribble, above n 9, 581.

suitable for them.²⁸ It must also be noted that, given the students' responses to the CLS project questionnaires, strategies that 'force' students to attend lectures do not consider the rise of 'non-traditional students'²⁹ in Australian tertiary education (who are mature age, working and/or are parents) who need flexible learning arrangements. An increasing number of students today are juggling work commitments, family responsibilities, and are living further distances from the university campus in which they are enrolled.³⁰ In addition to studying, the 21st century university student now manages competing commitments, and this is also true of law students. Due to the escalating competitiveness of the Australian legal job market,³¹ which has been analogised to Suzanne Collins' 'The Hunger Games',³² law students are trying to do more to bolster their curriculum vitae to secure a graduate lawyer position to enter the legal profession. Therefore, Australian law students today juggle: study, work, extra curricula activities and clerkships, amongst any other personal endeavours and responsibilities. This difficult balancing act was particularly evident from student responses to the questionnaires in which a number of students indicated a need for the flexibility of lecture recordings, so they can study while simultaneously meeting other multiple commitments — many of which are done to purportedly enhance their future legal career prospects. Student responses included for example:

'I think tertiary education must accommodate for the busy schedule of its students – especially in a course like law because often students must find time to work, volunteer somewhere, attend classes, prepare for classes & complete assessments.'

'In this generation where students also undertake employment and have other activities going on in life, [lecture recordings] reduces the stress of learning.'

'Some people in final years have clerkship work commitments, a lot of people live very far away and some lecturers lecture too fast and you need to watch on a lower speed/pause it.'

Nursing academics, Leufer and Cleary-Holdforth, explored the impacts of enforcing a mandatory attendance policy within their department, and suggested that due consideration needs to be given to the motives and rationale for enacting such a policy prior to its

28 See eg, Larkin, above n 4; Tarr et al, above n 19, 447.

29 National Center for Education Statistics, *Nontraditional Undergraduates: Definitions and Data*, U.S. Department of Education <<https://nces.ed.gov/pubs/web/97578e.asp>>. The term 'non-traditional student' is an American term used to describe 'adult students who often have family and work responsibilities as well as other life circumstances that can interfere with successful completion of educational objectives' at higher education level.

30 Australian Bureau of Statistics, *Hitting the books: Characteristics of higher education students* (25 July 2013) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20July+2013>>. For example, the Australian Bureau of Statistics found that many students enrolled in higher education worked either part time or full time, either due to financial circumstances or for the purposes of gaining work experience.

31 Leanne Mezrani, *It is the worst time in living history to be a law graduate* (27 August 2013) Lawyers Weekly <<https://www.lawyersweekly.com.au/news/14603-it-is-the-worst-time-in-living-history-to-be-a-law>>; Linda Giorgio, 'Worst time in living history to be a WA law graduate' *The Australian* (online) 24 April 2015 <<http://www.theaustralian.com.au/business/legal-affairs/worst-time-in-living-history-to-be-a-wa-law-graduate/news-story/ad23ff47347d6903cc447371cfe1da82>>; Andrew Trounson, 'Grim jobs outlook for new graduates' *The Australian* (online) 24 July 2015 <<http://www.theaustralian.com.au/higher-education/grim-jobs-outlook-for-new-graduates/news-story/3d6a774ebb995dc9ba3f178c721d50d5>>.

32 Misa Han, 'Law students get ready for Hunger Games-style clerkship season' *The Australian Financial Review* (online) 4 August 2016 <<http://www.afr.com/news/law-students-get-ready-for-hunger-gamesstyle-clerkship-season-20160728-gqg6yb>>.

incorporation.³³ Given that there is conflicting literature concerning the ‘perceived’ link between student attendance at lectures and academic performance, Leufer and Clearly-Holdforth caution academics to objectively question their rationale for forcing student attendance at their lectures, prior to taking such measures.³⁴

Although strategies to force lecture attendance may be effective in achieving the desired outcome of a high rate of attendance numbers, they do not necessarily encourage students to learn, engage and gain ‘knowledge’. Furthermore, law academics must also consider the unintended effects that these strategies may have on student attrition. Forcing student attendance may even cause students to resent academics (and resent learning), as indicated by the following student response to a question that asked how they felt when lecture recordings are not made available immediately after the lecture, or at all:

‘Negative – I feel like this is a lecturer taking away my opportunity to choose the way I learn just so they can feel good about themselves having a full lecture room.’

The proverb, ‘you can lead a horse to water, but you can’t make him drink’ is apt — any law academic can compel students to attend their lectures, but only well-equipped and strategic law academics can arguably facilitate students’ learning opportunities, in the form of engaging lectures that support students’ own responsibility and efforts, to learn effectively.

B *Strategies To ‘Encourage’ Student Attendance At Lectures*

The alternative strategy offered in this paper, is to ‘encourage’ student attendance at lectures, by adopting student-centred learning and teaching approaches that actively seek to engage students, whilst leaving the choice of whether or not to attend in person, with students. The facilitation of an engaging learning environment would arguably incentivise attendance, if students perceive there to be some value by attending that might not necessarily be gained through later listening to lecture recordings. The academic literature tends to support an approach that student attendance at lectures should be encouraged through engagement.³⁵

The student data obtained from the CLS project found that the third top contributing factor that motivates students to attend lectures is an ‘engaging lecturer’ (30.39 per cent) (See Table 6). The students’ responses did not explain what constitutes an ‘engaging lecturer’ as this part of the questionnaire was a closed question that did not permit or invite students to elaborate on their answer. A speculative analysis is that students might have been referring to the teaching resources used by the academic to engage students in lectures, or to an academic’s lecture presentation style and demeanour. Despite the lack of data, the author agrees with other academics’ opinions that to engage students, an academic must consider creating engaging learning environments.³⁶

The primary purpose of a lecture is to convey knowledge and information to students.³⁷ Therefore, due focus needs to be placed on both the lecture content and the lecturer’s delivery style. Whilst it is critical that all the relevant content is transmitted to students, consideration should also be given to the way in which it is delivered.

Although it is presumed that all law academics have a basic technical ability to deliver lectures in their respective areas of expertise, good lecturing regardless of discipline, is not

33 Leufer and Cleary-Holdforth, above n 5, 16.2.

34 Ibid.

35 See generally, Steven Gump, ‘Guess Who’s (Not) Coming to Class: Student Attitudes as Indicators of Attendance’ (2006) 32 *Educational Studies* 39, 45; Corbin, Burns and Chrzanowski, above n 13, 42; Tarrant, above n 9, 38. Gump states that it is important for students to be encouraged to develop positive attitudes towards lecture attendance as early in their studies as possible.

36 Ibid.

37 Bligh, above n 1, 7.

always an easy skill to master.³⁸ As indicated by Ramsden, Higher Education Learning and Teaching consultant, ‘few lecturers do it well, many just do it passably, and quite a lot do it badly indeed’.³⁹ Ramsden’s comments are echoed by Teuta Hoxha, an English Literature university student at King’s College London, in her online blog post for *The Guardian*, she claimed that bad lecturing was the reason for her not attending lectures:

I found my lectures disappointing when I started university ... I had expected too much from lectures, and too little was delivered. ... I expected enthusiastic speakers whose hunger for Chaucer could be seen in their uncontrollably moving hands. Instead, lecturers read off their notes, blazing through piles of information in the most monotone and disengaging voice.⁴⁰

There are no set universal characteristics that guarantee an engaging lecturer, as lecturing is very much an individual process that varies according to the regulatory duties of the discipline and the degree, as well as the preferences and personalities of the academic, and their students.⁴¹ Common traits that are often cited as examples of teaching excellence in lectures are: student engagement and interaction, structure, and a passionate and enthusiastic lecturer.⁴²

Education law academics, Su and Wood, suggest that there is ‘an elusive aspect to great teaching, which is felt and experienced as much as seen’.⁴³ By engaging with students and creating a sense of teacher immediacy,⁴⁴ students are more likely to attend lectures. The term ‘immediacy’, in a behavioural communication context, refers to ‘the extent to which communication behaviors enhance closeness to and nonverbal interaction with another’.⁴⁵ Extending this to a teaching context, ‘teacher immediacy’ refers to the communication behaviours used by the teacher to reduce the perceived distance between the teacher and students. By reducing the perceived distance and barriers between law academics and students, law academics are able to positively influence and shape students enthusiasm and commitment to learning.⁴⁶ Teacher immediacy can be achieved by the following non-exhaustive list of techniques: using students’ names, eye contact, positive facial expressions, vocal variety, inclusive language, approachable body language, and posture.⁴⁷ By creating a sense of immediacy and connectedness in the lecture

38 See, eg, Eamon Murphy, ‘Has the mass lecture still got a place in university teaching?’ (Paper presented at 7th Annual Teaching and Learning Forum, Perth, 4–5 February 1998) <<https://clt.curtin.edu.au/events/conferences/tlf/tlf1998/murphy-a.html>>.

39 Ramsden, above n 2, 155.

40 Teuta Hoxha, ‘Is missing lectures harming my studies?’ *The Guardian* (online) 11 December 2015 <<https://www.theguardian.com/education/2015/dec/11/is-missing-lectures-harming-my-studies>>.

41 Murphy, above n 38.

42 Andrea Revell and Emma Wainwright, ‘What Makes Lectures ‘Unmissable’? Insights into Teaching Excellence and Active Learning’ (2009) 33(2) *Journal of Geography in Higher Education* 209, 214–18.

43 Feng Su and Margaret Wood, ‘What makes a good university lecturer? Students’ perceptions of teaching excellence’ (2012) 4(2) *Journal of Applied Research in Higher Education* 142, 151.

44 See especially Albert Mehrabian, *Silent messages* (Wadsworth, 1971). The concept of ‘teacher immediacy’ has been credited to Professor Albert Mehrabian based on his research and publications on the importance of verbal and nonverbal messages in establishing psychological closeness, i.e. ‘immediacy’, and reducing distance between communicators.

45 Albert Mehrabian, ‘Methods & Designs: Some referents and measures of nonverbal behavior’ (1969) 1(6) *Behavior Research Methods & Instrumentation* 203, 203.

46 Lanette Pogue and Kimo Ahyun, ‘The Effect of Teacher Nonverbal Immediacy and Credibility on Student Motivation and Affective Learning’ (2006) 55(3) *Communication Education* 331, 334; Sarah Nixon, Philip Vickerman and Carol Maynard, ‘Teacher immediacy: reflections on a peer review of teaching scheme’ (2010) 34(4) *Journal of Further and Higher Education* 491, 492.

47 Nixon, Vickerman and Maynard, above n 46, 492–94. Nixon, Vickerman and Maynard provide a comprehensive overview of the academic literature discussing immediacy behaviours in teaching.

theatre, students may be more likely to actively engage in the lecture and contribute, if a lecturer permits student questions and participation.

The other student data collected from the project indicated that the top two contributing factors influencing students to use lecture recording is to ‘revisit difficult concepts’ and the ‘option to stop/start/rewind the lecture’ (See Table 8). Although law academics cannot necessarily replicate these factors in lectures, law academics that establish effective ‘teacher immediacy’ may help students to be more comfortable to ask an academic to stop, clarify, or revisit unclear legal concepts during a lecture. Establishing ‘immediacy’ in law lectures arguably adds value to attend lectures, as students might perceive a lecture as an opportunity to interact and build a relationship with the academic and their peers directly in person — which might not be achieved as easily by listening to an electronic lecture recording later.

A common criticism of lectures is that it is a passive learning environment where students are not actively engaged or involved.⁴⁸ There is much academic literature on learning and teaching strategies to make lectures more interactive, so students are active participants in their learning process.⁴⁹ The most recent teaching initiatives and research focus heavily on technological developments. Examples include the use of response devices and mobile polling applications,⁵⁰ teaching in highly technological collaborative learning spaces,⁵¹ and the incorporation of social media in teaching approaches.⁵² The incorporation of these teaching initiatives purportedly serves two purposes. Firstly, it actively involves students in the lecture, and secondly, it helps to retain the students’ focus and concentration, as some research shows that students tend to lose concentration after a relatively short period of time.⁵³

By incorporating learning and teaching exercises and tools in lectures to constantly engage students, an academic arguably adds value for the students who attend the lecture in person, which may be missed by students who only access the lecture recording online. Whilst teaching resources and tools can facilitate student engagement in lectures, the academic — and their ability to convey complex information — remains pivotal to the success of engagement. As noted earlier, what constitutes an engaging lecturer is subjective for each student. The same arguably applies to technological tools and techniques which may not engage all students.

48 See, eg, M Keyes and R Johnstone, ‘Changing legal education: Rhetoric, reality and prospects for the future’ (2004) 26(4) *Sydney Law Review* 537, 546; Des Butler, ‘Second Life machinima enhancing the learning of law: Lessons from successful endeavours’ (2012) 28(3) *Australasian Journal of Educational Technology* 383, 383.

49 See, eg, Revell and Wainwright, above n 42.

50 See, eg, Robin Kay and Ann LeSage, ‘Examining the Benefits and Challenge of Using Audience Response Systems: A review of the Literature’ (2009) 53(3) *Computers & Education* 819; Shawn Keough, ‘Clickers in the Classroom: A Review and a Replication’ (2012) 36(6) *Journal of Management Education* 821; Lorena Blasco-Arcas et al, ‘Using clickers in class: The role of interactivity, active collaborative learning and engagement in learning performance’ (2013) 62 *Computers & Education* 102.

51 See, eg, Beverley Oliver and Peter Nikolettatos, ‘Building engaging physical and virtual learning spaces: a case study of a collaborative approach’ (Paper presented at the 26th Annual Ascilite International Conference: Same places, difference spaces, Auckland, 6–9 December 2009) 720 <<http://www.ascilite.org/conferences/auckland09/procs/oliver.pdf>>.

52 See, eg, Alex Boxsell, ‘Law schools told to leap into social media learning’ *The Australian Financial Review* (online) 31 May 2013 <<http://www.afr.com/technology/law-schools-told-to-leap-into-social-media-learning-20130530-jhq1j>>.

53 See, eg, Karen Wilson, and James Korn, ‘Attention During Lectures: Beyond Ten Minutes’ (2007) 34(2) *Teaching of Psychology* 85. This article states that studies indicate that students’ attention in lectures declines within the first 10 to 15 minutes of the start of the lecture.

Legal education in Australia has undergone considerable change due to globalisation and technological advancements.⁵⁴ In these circumstances, learning and teaching approaches and student preferences may undoubtedly evolve with technology. Therefore, on-going research is needed on what constitutes ‘good lecturing’ in the present technological age, in order to ensure that law academics keep students’ learning preferences at the forefront of curriculum development and delivery, in conjunction with regulatory requirements for degree content.⁵⁵

Although there are no agreed characteristics of good lecturing, what is widely accepted is that planning and delivering a good lecture involves great time and effort as it is technically a one-off performance delivered yearly or per study period.⁵⁶ Unfortunately, many law academics, like their students, are dealing with increasing competing pressures: large teaching loads, high research and publication targets, and heavy administrative responsibilities. For many law academics, investing hours on planning and reflecting on lecture content and delivery is not feasible or incentivised, especially at institutions that have strict academic workload models with prescriptive teaching allocations.

IV CONCLUSION

The results from the CLS 2017 pilot project, highlight fundamental misalignments between the perceptions of law academics and the perceptions of their students, about how and why lecture recordings are used. Most noticeably, and consistently with the body of literature across other disciplines, the pilot study identifies that the availability of lecture recordings is *not* the leading factor influencing students’ decision to not attend lectures.⁵⁷

Ultimately, it is contended that, although the availability of lecture recordings is a contributory factor for students not attending lectures, the associated benefits of making lecture recordings available outweigh the perceived negative consequences. Furthermore, as the 21st century Australian law student juggles multiple competing commitments due to the overly competitive legal job market,⁵⁸ law students need a degree of flexibility with respect to their studies to accommodate their other commitments.

Furthermore, law students must perceive that there is ‘value’ in attending law lectures, otherwise they will not go. If an academic sets lectures as a tuition activity for the units they teach, it is arguably also their responsibility to use learning and teaching strategies that add value to their lectures.

54 Stephen Colbran and Anthony Gilding, ‘E-Learning in Australian Law Schools’ (2013) 23(1) *Legal Education Review* 201, 213.

55 In order to gain admission into legal practice in Australia, applicants must demonstrate working knowledge of the 11 substantive areas of law, colloquially referred to as the ‘Priestley 11’. The Priestley 11 was incorporated into the Model Admission Rules and has been generally adopted by all Australian States and Territory Admitting Authorities: Law Admissions Consultative Committee, *Model Admission Rules 2015* (December 2016) <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/212390818_8_LACC_Model_Admission_Rules_2015.pdf>; *Legal Profession Act 2006* (ACT) s 21; *Court Procedures Rules 2006* (ACT), r 3605; *Legal Profession Uniform Admission Rules 2015* (NSW) s 17; *Legal Profession Uniform Law Application Act 2014* (NSW) s 4; *Legal Profession Admission Rule* (NT) reg 4; *Legal Profession Act 2006* (NT) s 29; *Legal Profession Act 2007* (Qld) s 30; *Supreme Court (Admission) Rules 2004* (Qld) r 6; *Legal Practitioners Act 1981* (SA) s 15; *Rules of the Legal Practitioners Education and Admission Council 2004* (SA) r 2; *Legal Profession Act 2007* (Tas); *Legal Profession Uniform Law Application Act 2014* (Vic) s 4; *Legal Profession Act 2008* (WA) s 21; *Legal Profession (Admission) Rules 2009* (WA) ss 5-6.

56 Charlton, Marsh and Gurski, above n 1.

57 See, eg, Gorissen, van Bruggen and Jochems, above n 12.

58 See, eg, Mezrani above n 31; Giorgio, above n 31; Trounson, above 31.

While using strategies that ‘force’ law students to attend lectures may compel attendance and appear to improve attendance rates, it would put significant pressure on academics and lectures that would not necessarily improve actual student engagement, learning and outcomes. This paper thus contends that law academics should instead adopt strategies that ‘encourage’ student attendance. By incorporating learning and teaching techniques that directly engage students who attend lectures in person, an academic arguably adds value for those students which is not as accessible for those who do not attend and only listen to lecture recordings online. By encouraging student attendance through direct engagement and freewill choice, law academics are more likely to facilitate engaging learning environments and opportunities for deep learning.

SOCRATES AND SMARTPHONES: WHY THE FUTURE OF LEGAL EDUCATION MUST BE PHILOSOPHY

*Daniel Goldsworthy**

I INTRODUCTION

We are at a Grotian moment in history as the convergence of new social, economic and technological forces are fundamentally altering societies on a global scale, posing inescapable challenges for the legal profession and legal education. Technological growth and development, the global ubiquity of smart phones, and the subsequent automation of many jobs, is changing how human beings interact with and relate to the very notion of work.¹

The law is not immune from automation, and there will be a need to support and manage this transition. In the short term, many legal roles that nevertheless involve repetitive processes, will become increasingly automated by smart and self-learning algorithms.² In the long term, the role and value of the human being to the legal process will become drastically recast and redefined.³

The irreducible human value to the legal profession is to be found in the distinction made between what can be reproduced artificially (intelligence) and consequently automated, and what cannot (consciousness).⁴ At this juncture, where a multiplicity of outcomes may be derived through artificially intelligent processes, consideration must then be given to the reasons for preferring one coherent, logical and 'intelligent' outcome over another. It is this contemplation that will remain the domain of human reason and consciousness. As a consequence, the future for human beings in the legal profession will come more and more to be characterised by roles and responsibilities innately requiring the exercise of human consciousness (as distinct from intelligence). This article contends that these future human roles in the legal profession will be grounded in philosophy and, given the residual roles that human lawyers will come to play, that a deep training in philosophy will be imperative for future lawyers.

II THE KNOWLEDGE ECONOMY IN AN AGE OF EXPONENTIAL GROWTH

The law is at once both informed and shaped by the societal forces it seeks to regulate. Given that laws are enforceable rules which seek to guide and moderate individual and collective human behaviour, legislatures must consider how new and emerging forces shape human behaviours.

During the latter part of the twentieth century, the global shift towards a 'knowledge economy' resulted in the production of knowledge being valued over the production of goods.⁵ This resulted in an economy where growth is dependent on the quantity, quality, and accessibility of

* Daniel Goldsworthy, Lecturer, Victoria Law School, Victoria University.

1 Roman Batko and Anna Szopa, *Strategic Imperatives and Core Competencies in the Era of Robotics and Artificial Intelligence* (IGI Global, 1st ed, 2016).

2 Cynthia Estlund, 'What Should We Do After Work? Automation and Employment Law' (2017) *New York University School of Law, Public Law Research Paper No. 17-28* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007972>.

3 Jeremy Rifkin, *The Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons, and the Eclipse of Capitalism* (Palgrave MacMillan, 1st ed, 2014).

4 Yuval Noah Harari, *Homo Deus: A Brief History of Tomorrow* (Vintage Publishing, 1st ed, 2016).

5 Alan Burton-Jones, *Knowledge Capitalism: Business, Work, and Learning in the New Economy* (Oxford University Press, 1st ed, 1999); Paul Adler, 'Market, Hierarchy, and Trust: The Knowledge Economy and the Future of Capitalism' (2001) 12(2) *Organization Science* 215.

information available, rather than the means of production.⁶ The convergence of the knowledge economy with the exponential technological growth of recent decades, is directly challenging the fundamental tenets upon which capitalism is predicated – supply and demand.⁷ At the centre of any capitalist system based on this ‘invisible hand’ of supply and demand, is one precondition – the scarcity of finite goods and resources.⁸

What happens when this precondition is removed, and the supply of ‘knowledge’ in a knowledge economy becomes abundant? This fundamentally alters capitalist economies and affects all knowledge disciplines. The legal academy must consider this impact in a society where knowledge is now infinitely replicable with no loss of quality through technology. Mason posits that such a scenario is incompatible with current capitalist market economies.⁹ It is a world of abundance in a system that relies on scarcity.¹⁰ Rifkin further considers these ideas, and contemplates the implications of near-zero or zero marginal cost for the reproduction of knowledge through technology.¹¹ The concept of marginal cost is a term used to refer to the increase in total production costs resulting from producing one additional unit of the original product.¹² Zero marginal cost describes a situation where an additional unit can be produced without any increase in the total cost of production, such that the product can be infinitely reproduced with no diminution in quality or to the ability of others to consume it simultaneously.¹³ Take the example of a recorded lecture, uploaded to a learning management system, and its subsequent download. Once a lecture is produced and recorded, there is no additional ‘cost’ associated with the number of times it can be downloaded or streamed as no further or additional cost arises from its reproduction.

More efficient technologies that accelerate productivity can now do so to the point where the marginal cost of production approaches zero. In this situation, goods and services become ‘price-less’ and potentially free.¹⁴ This, Rifkin contends, is rendering the market exchange economy obsolete.¹⁵ In the tertiary sector, one example is the emergence of Massive Open Online Courses (MOOCs) which leverage the exponential development of technologies and the internet, to reproduce a product that is infinitely replicable at near-zero marginal cost.

Diamandis and Kotler propose that there is an exponential chain reaction to such technological progression in circumstances where knowledge becomes infinitely replicable, which begins where digitisation is possible.¹⁶ Digitisation presupposes that where something that can be represented by ones and zeros – that is, digitised – it can be spread at the speed of light, or at least the speed of the Internet.¹⁷ Given that cultural progress is cumulative and ideas are taken and built upon by others, this digitisation allows humans to share, exchange and facilitate ideas in a way that hitherto has been impossible.¹⁸ To reconcile this zero-sum marginal cost

6 Adler, above n 5, 216-217.

7 Samuel Bowles, Richard Edwards and Frank Roosevelt, *Understanding Capitalism: Competition Command and Change* (Oxford University Press, 3rd ed, 2005).

8 Ibid.

9 Paul Mason, *Postcapitalism: A Guide to our Future* (Penguin Random House UK, 1st ed, 2015).

10 Ibid.

11 Rifkin, above n 3.

12 Henning Schwardt, *The Path to A Modern Economics: Dealing with the Complexity of Economic Systems* (Springer International Publishing, 1st ed, 2017).

13 Mason, above n 9.

14 Rifkin, above n 3.

15 Ibid.

16 Peter Diamandis and Steven Kotler, *Bold: How to Go Big, Create Wealth and Impact the World* (Simon & Schuster, 1st ed, 2015).

17 Ibid 8-9.

18 Ibid.

knowledge economy with the fundamental tenets of capitalism such as supply, demand and scarcity, a re-imagining of the human role in the production of knowledge is imperative.¹⁹ The law, as a knowledge discipline, is inescapably subject to these forces.

III CONTENT AND CURATION: KNOWLEDGE IN THE DIGITAL REVOLUTION

Notwithstanding the forces of digitisation and zero marginal cost, the assumption remains that human beings are still integral to the creation of content. As technology continues to progress, what happens when the mode of production and content development, the very capital of a knowledge economy, is transferred from human beings to computers that are able to exercise artificial intelligence? Kelly postulates that:

Over the next century, scholars and fans, aided by computational algorithms, will knit together the books of the world into a single networked literature. A reader will be able to generate a social graph of an idea, or a timeline of a concept, or a networked map of influence for any notion in the library. We'll come to understand that no work, no idea, stands alone, but that all good, true and beautiful things are networks, ecosystems of intertwined parts, related entities and similar works.²⁰

This process of digitising and uploading the world's literature began in 1971, with the commencement of Project Gutenberg.²¹ Named for Johannes Gutenberg, the introduction of his mechanical movable type printing to Europe in the fifteenth century ushered in the Printing Revolution, widely regarded as the most important invention of the second millennium.²² It spawned an era of mass communication which permanently altered the structure of society.²³ The advent of the internet and the subsequent Digital Revolution promise to do the same. Reflecting on the early printing press and medieval manuscripts, Gopnik contends that 'our minds were altered less by books than by index slips.'²⁴ In the same way for the Digital Revolution, networked arrangement of knowledge through artificial intelligence and algorithms will arguably not only render intrinsically valuable information in and of itself, but also its curation. How knowledge and content is curated will arguably further moderate human interaction with knowledge itself.

Following from the Gutenberg Project, it is readily conceivable that technology will enable all law texts, articles, statutes, cases and commentaries to be digitised and networked into a single literature. Thereafter, legal resources will be subjected to computational algorithms that synthesise, arrange, curate and catalogue legal information into patterns and networks never before possible. Through the digitisation of books and the advent of E-books and E-readers such as Kindle, it is possible to, with a reader's permission, share 'highlights.... with other readers, and...read theirs'.²⁵ Kelly further posits:

We can even filter the most popular highlights of all readers, and in this manner begin to read a book in a new way. I can also read the highlights of a particular friend, scholar or critic. This

19 Rifkin, above n 3.

20 Kevin Kelly, *What Books Will Become* (15 April 2011) The Technium <<http://kk.org/thetechnium/what-books-will/>>.

21 Project Gutenberg <<https://www.gutenberg.org/>>.

22 Elizabeth Einstein, *The Printing Press as an Agent of Change* (Cambridge University Press, 1st ed, 1979).

23 Lucien Febvre and Henri-Jean Martin, *The Coming of the Book: The Impact of Printing 1450–1800* (Verso Books, 3rd ed, 2010).

24 Adam Gopnik, 'The Information: How the Internet Gets Inside Us' (2011) *The New Yorker* (14 & 21 February 2011) <<http://www.newyorker.com/magazine/2011/02/14/the-information>>.

25 Kevin Kelly, *The Inevitable: Understanding the 12 Technological Forces that will Shape our Future* (Random House USA Inc, 1st ed, 2016) 94.

gives a larger audience access to the precious marginalia of another author's close reading of a book...a boon that previously only rare-book collectors witnessed.²⁶

It is through this technological enabling, that consumers are rendered prosumers,²⁷ who inadvertently or even unknowingly contribute to designing, customising and producing products for their own needs.²⁸ Digital devices and publications are able to constantly collect data on users while they are reading books. As Harari states of Amazon's Kindle, it

can monitor which parts of a book you read quickly, and which slow; on which page you took a break, and on which sentence you abandoned the book, never to pick it up again. If Kindle was to be upgraded with face recognition software and biometric sensors, it would know how each sentence influenced your heart rate and blood pressure. It would know what made you laugh, what made you sad, what made you angry. Soon, books will read you while you are reading them.²⁹

So what will the value of legal education be where knowledge is digitised and infinitely replicable, ubiquitous and accessible to everyone? Furthermore, what happens when the knowledge or information itself becomes self-arranging and networked through artificial intelligence and algorithms? In such a future, the continued role of the human being in the legal academy is to be realised in the distinction between intelligence and consciousness.

IV I THINK THEREFORE I AM AUTOMATED: DECOUPLING INTELLIGENCE FROM CONSCIOUSNESS

At this point, it is necessary to consider the continued value of the human being where artificial intelligence continues to exponentially advance.³⁰ Furthermore, it is essential to consider the difference between intelligence and consciousness, and the decoupling of intelligence *from* consciousness.³¹ To appreciate the importance of this distinction when considering automation, Harari powerfully demonstrates its significance as a current historical juncture:

Until today, high intelligence always went hand in hand with a developed consciousness. Only conscious beings could perform tasks that required a lot of intelligence, such as playing chess, driving cars, diagnosing diseases or identifying terrorists. However, we are now developing new types of non-conscious intelligence that can perform such tasks far better than humans. For all these tasks are based on pattern recognition, and non-conscious algorithms may soon excel human consciousness in recognising patterns.³²

It is only by decoupling intelligence from consciousness that we can situate and begin to make sense of artificial intelligence and comprehend the sorts of roles that are, and will continue to be, subject to automation. Perhaps more importantly, a decoupling of intelligence from consciousness, will allow us to contemplate what human roles will not be automated. For the legal profession, many legal roles that contain repetitive processes, or as Harari has put it 'non-conscious intelligence', will arguably become increasingly automated by smart and self-

26 Ibid.

27 George Ritzer and Nathan Jurgensen, 'Production, Consumption and Prosumption: The Nature of Capitalism

in the Age of the Digital Prosumer' (2010) 10(1) *Journal of Consumer Culture* 13.

28 Alvin Toffler, *The Third Wave* (Future Shock, 1st ed, 1980).

29 Harari, above n 4.

30 Ritzer and Jurgensen, above n 27.

31 Harari, above n 4.

32 Ibid 311.

learning algorithms. The law is not immune from advances in artificial intelligence, and there will be a need to support and manage this transition.

One contemporary theory of human consciousness is that it evolved to help us learn through the extraction of relevant information from our surroundings, and the subsequent organisation of this information into meaningful patterns.³³ Organising by ‘chunking’ this information is key, as it allows human beings to compress and maximise data through sensory input and to make sense of salient information.³⁴ If artificial intelligence can seemingly arrange and chunk this information for us, it will then be for human beings to justify their preference for one networked arrangement of information over others.

V THE FUTURE OF THE LEGAL ACADEMY: DWORKIN’S SEAMLESS (WORLD WIDE) WEB

In 1986, prior to the proliferation of the internet, legal theorist Ronald Dworkin proposed that the law could be viewed as a ‘seamless web’ capable of yielding one right answer to any legal problem.³⁵ To navigate this seamless web of complexity, Dworkin envisaged the idealised conception of such an individual who would be capable of undertaking this task, the fictitious Justice Hercules.³⁶ Hercules, he contended, was a judge of ‘superhuman skill, learning, patience and acumen’³⁷ and was expected to be able to ‘construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory principles as well’.³⁸ Hercules was encouraged to be ‘wide ranging and imaginative in his search for coherence with fundamental principles’³⁹ and to treat the law as if it were a comprehensive whole.

It has been stated that Dworkin, in fact, did, ‘...not expect us, save in our imagination, to believe that he [Hercules] inhabits an actual bench. He is a useful *idea* because he sets a standard by which real judges might measure their performance.’⁴⁰ But almost thirty years since conceiving of omniscient Justice Hercules, it now seems that the ability to construct such an abstract scheme may no longer simply be an idea, but reality. Artificial intelligence, through algorithmic pattern recognition, will be able to gather and reveal this seamless web of ‘institutional coherence’ and render it navigable. The result will be the ability to leverage the collective knowledge of great legal minds across countries, continents and generations – both living and passed. How one does, or *should* navigate this vast web of networked legal information resembles the considerations accorded to interpreting big data and the philosophy of data analytics.⁴¹

Consequently, it will arguably become the role of the lawyers, judges and academics to deconstruct and reconstruct theories of law and justice where the artificial intelligence allows for more than one cogent, logical outcome. It will be at this intersection that the value of the human being to the legal process, in contrast with non-human artificial intelligence, will

33 Daniel Bor, *The Ravenous Brain: How the New Science of Consciousness Explains our Insatiable Search for Meaning* (Basic Books, 1st ed, 2012).

34 *Ibid.*

35 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1st ed, 1978).

36 *Ibid.*

37 *Ibid* 105.

38 *Ibid* 116-117.

39 Ronald Dworkin, *Law’s Empire* (Bloomsbury Publishing PLC, 1st ed, 2003) 220.

40 Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press, 4th ed, 2015) 141 (emphasis in original).

41 Vincenzo Morabito, *Big Data and Analytics: Strategic and Organisational Impacts* (Springer International Publishing, 1st ed, 2016).

continue and be further amplified. To compellingly and convincingly argue why one coherent, logically sound outcome should be preferred over another is the province of philosophy.

VI A PRIESTLEY VOCATION: THE FUTURE OF LEGAL EDUCATION IN AUSTRALIA AND BEYOND

Governed by exponential technological advancements, the future role of the human being in the legal academy will continue to be defined by what roles they can reasonably and valuably perform. For this reason, the skills required and valued by judges, lawyers and their clients, will arguably come to change in an acute way for many centuries to come. As a knowledge discipline subject to regulatory oversight, legal education in Australia must deliver the ‘Priestley 11’ subject areas, named for Justice Lancelot John Priestley, former Chair of the Law Admissions Consultative Committee (LACC) in 1992.⁴² Demonstrating competency across these areas constitutes the minimum standard required by law students seeking admission to legal practice in Australia, and have remained unchanged for a quarter century. At that stage, the Internet was still in its embryonic stages, Google was six years from being created, and iPhones were fifteen years away. Much has changed since the Priestly 11 set the mandatory requirements for legal education in Australia, with the current legal landscape being shaped less by committees and more by social and technological forces. This fundamental shift in the legal landscape will necessitate a transformation of the higher education sector, not only in form (delivery) but also in substance (pedagogy).

Foreshadowing the need for change and development in legal education, the Council of Australian Law Deans (CALD) released a report in 2015 recognising statutory interpretation as a discrete area of law critically important to the practice of law.⁴³ The report notes that, ‘...from a doctrinal perspective, statutory interpretation refers to the body of law governing the determination of the legal meaning and the effect of legislation.’⁴⁴ The Council further posits that this ‘...requires students not only to develop a mastery of the body of law, but also awareness across and within a range of explanatory contexts.’⁴⁵ This move toward a greater focus on statutory interpretation recognises the need for prospective lawyers to engage with the ‘meaning and effect’ of the law. It is an implicit recognition of the need to balance competing meanings, which is ultimately the province of legal philosophy.

In 2016, Irish president Michael D. Higgins affirmed the importance of philosophy when he suggested that its teaching ‘is one of the most powerful tools we have at our disposal to empower children into acting as free and responsible subjects in an ever more complex, interconnected, and uncertain world.’⁴⁶ We are seeing the increase in human obsolescence proportional to the rise in automation,⁴⁷ and in a world where technical expertise is becoming increasingly narrow and

42 See for example: *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Act 2007* (Qld); *Legal Profession Act 2007* (Tas); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 2008* (WA); *Northern Territory of Australia Legal Profession Act 2006* (NT); *Legal Profession Act 2006* (ACT).

43 Council of Australian Law Deans, *Good Practice Guide to Teaching Statutory Interpretation* (June 2015) <<http://www.cald.asn.au/assets/lists/resources/gpgsi-june15.pdf>>. 7.

44 Ibid 7.

45 Ibid 10.

46 Charlotte Blease, ‘Philosophy Can Teach Children What Google Can’t’, *The Guardian* (online), 9 January 2017 <<https://www.theguardian.com/commentisfree/2017/jan/09/philosophy-teach-children-schools-ireland>>.

47 David Autor, ‘Why are there still so many Jobs? The History and Future of Workplace Automation’ (2015) 29(3) *Journal of Economic Perspectives* 7.

specialised, the skills and confidence to traverse disciplines will become ever more important.⁴⁸ The law is not immune from this fundamental shift in the human experience. In a knowledge economy with zero marginal cost of reproduction, the continued value of the human being is recognised only through making a distinction between intelligence and consciousness.⁴⁹

Universities, as bastions of legal knowledge for centuries, must meaningfully adapt to technologies that may render current pedagogical models outdated at best, or obsolete at worst. This changing landscape will necessitate legal education that recognises the significance of the distinction between intelligence and consciousness, wherein the irreducible value of the human being to knowledge disciplines is to be realised. As such, this article contends that in a world of increasing automation, human value in the law will find expression in traditional areas of justice and fairness, right and wrong. These areas will return to play an ever more prominent role where technological automation will liberate lawyers from the tedium of many process-driven tasks that currently occupy their time, energy and resources.

VII CONCLUSION

Technology has the potential to free us from tedious and mundane work, to enable the pursuit of leisure and more meaningful and productive activities. In fact, the etymology of the Greek word for leisure and philosophy, *skhole*, is the root word for the English word ‘school’.⁵⁰ How law schools identify and incorporate more meaningful and productive activities into legal curricula will continue to be influenced by social forces and the growth of exponential technologies. As the Guttenberg printing press ushered in the Printing Revolution and was the most important invention of the second millennium, so too the internet and Digital Revolution will radically transform and permanently alter our societal structures in unforeseen ways well into the third millennium.

This article contends that the exponential growth of technologies in the context of a zero marginal cost knowledge economy will both fundamentally change the way human beings relate to work, but also the ways in which human beings will be able to meaningfully contribute to knowledge disciplines such as the law, into the future. Furthermore, this article posits that the rise of artificial intelligence and subsequent human obsolescence, necessitates an understanding of the nuanced distinction between intelligence and consciousness. It is only through apprehending this distinction that we recognise the irreducible and continuing role human beings will come to play in such disciplines. For the legal academy, this role will be through philosophy.

48 Blease, above n 46.

49 Harari, above n 4.

50 Johan Bouwer and Marco van Leeuwen, *Philosophy of Leisure: Foundations of the Good Life* (Routledge, 1st ed, 2017) 230.

A PROPOSED AGENDA FOR REFORMING SKILLS-BASED PARALEGAL TRAINING TO ENABLE FUTURE READINESS

Annie Perumpoykail Gomez and Ankur Gupta***

I INTRODUCTION

‘Disruptive’ is an apt way to describe the impact of technological innovation on the legal profession and the delivery of legal services. There is arguably little debate over whether disruptive technology can and will impact the legal profession.¹ The debate is more about the extent, speed and repercussions of disruptive technology on the legal profession. For the purposes of this paper the ‘legal profession’ covers job roles as diverse as practising lawyers, in-house counsel and legal support professionals such as paralegals. This paper addresses the implications of technological change for paralegal training.

Notably, computer technology applications promise to transform the delivery of legal services by boosting productivity to replace humans in routine tasks which become partially or fully assigned to non-human agents, thereby displacing junior lawyers and paralegals. Key technological advances include software applications tailored for a wide variety of legal work in areas as diverse as patents, bankruptcy and contracts. For example, some applications, powered by data analytics technology, can parse through volumes of documents to collect valuable information, a process that would normally require many hours of human labour. Some examples are:

- the COIN application developed and used by banking giant JPMorgan² for contract reviews; and
- ‘Technology-assisted review’ (TAR) with natural language and machine learning techniques utilised in relation to gigantic data sets of e-discovery.³

The ultimate effect of such labour-saving advances is arguably to narrow the gap between producer and consumer, by reducing the number of human intermediaries involved in the production of legal work. For example, the availability of do-it-yourself applications allows clients to bypass lawyers for basic legal services, such as customisation of contract templates, legal registration and even simple court processes.⁴ Increasingly, clients are expecting legal service providers to avail themselves of these applications and to pass down the resulting

* LLM (London), LLB (Hons.) (NUS), Senior Lecturer (Law), School of Business, Temasek Polytechnic, Singapore.

** LLM (NUS), BA.LLB (Hons) (NLIU), Lecturer (Law), School of Business, Temasek Polytechnic, Singapore.

1 Deloitte, *Developing legal talent: Stepping into the future law firm* (12 April 2017) <<https://www2.deloitte.com/uk/en/pages/audit/articles/developing-legal-talent.html>>

2 Hugh Son, ‘JPMorgan Software Does in Seconds What Took Lawyers 360,000 Hours’ (*Bloomberg*, 13 April 2017) <<https://www.bloomberg.com/news/articles/2017-02-28/jpmorgan-marshals-an-army-of-developers-to-automate-high-finance>>. The software developed and used by JPMorgan known as known as Contract Intelligence (COIN).

3 Michael Mills, ‘Artificial Intelligence in Law: The State of Play 2016’, *Thomson Reuters* (12 April 2017) <<https://www.neotalogic.com/wp-content/uploads/2016/04/Artificial-Intelligence-in-Law-The-State-of-Play-2016.pdf>>.

4 Justice Lee Seiu Kin, ‘Transformative impact of technology on the legal profession’ (Speech delivered at ‘Changing with The Times: A Roundtable Discussion on the Future of the Profession of Law’, Singapore Academy of Law, 3 November 2016).

cost savings to them. Likewise, the proliferation of ‘do-it-yourself’ platforms for basic legal documentation, means that many small law firms may find their basic work diminishing.⁵

There are two key implications of such technological changes for training paralegals. First, it appears that paralegal training ought now to focus on those skills that cannot be outsourced to non-human agents. This suggests that the legal profession should view this era of technological disruption as an opportunity to reform legal services delivery and notably, to focus on up-skilling paralegals, so they can perform skilled work that cannot be automated.

Second, legal professionals will arguably need to be open to the possibility of traditional roles being recast. A survey conducted by the National Association for Law Placement (NALP), an association of legal career professionals giving career development advice, tried to identify and describe emerging legal job roles.⁶ Collectively labelled as ‘NALP Survey Job Titles’, the sampling of legal job roles included: Legal Risk Manager, Document Review Manager, Legal Management Consultant and Legal Project Director. These roles do not involve actual legal practice but are now increasingly located inside law firm and corporate settings. An example cited in the NALP survey is that of the transformed role of the ‘Legal Knowledge Manager’ as advertised by law firm Fenwick & West.⁷ This role oversees document automation, a task which might traditionally have been seen to belong in an Information Technology professional’s domain. With the emergence of hybrid roles, the legal profession arguably must examine how it should adapt to meet these challenges. A good part of the solution may lie in revising how legal training is conducted.

The issue for legal training providers is whether they will be active agents of change to meet the challenges, or whether they adopt a ‘wait-and-see’ attitude. As the authors of this paper train paralegals, we advocate the former approach, bearing in mind the challenges posed.

II OUTLINE

This exploratory paper proposes an agenda for reforming skills-based paralegal education. Paralegals play a vital role in the provision of legal support services. Currently, the literature on paralegal training is limited, and there is little discussion on how disruptive technology may affect paralegals’ role in the legal profession. We suggest paralegals can assume an increasingly important role in the law firm of tomorrow, if they are equipped with what we consider to be the right skills and mind-set. To achieve this goal, it will arguably be necessary to:

- (1) identify ‘evergreen’ (translatable) skills which will remain relevant;
- (2) recognize and teach new skills in light of revised job profiles; and
- (3) analyse the opportunities and roadblocks in transforming paralegal training.

This paper evaluates the skills in which paralegals are currently trained, and proposes training practice reforms to bolster paralegals’ employability, in light of technological advancements. This paper also discusses potential roadblocks to implementing these reforms.

III THE EVOLVING ROLE OF THE PARALEGAL

Paralegal work profiles may differ based on their employment context. This section focuses on paralegals in law firms, because the majority of the authors’ law graduates are employed there. The tasks which paralegals carry out are generally of an administrative nature. The most

5 Ibid.

6 National Association for Law Placement, *Report of the Emerging Legal Jobs Work Group* (August 2015) <https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_joint_cle/1_2015EmergingLegalJobsFinalReport.authcheckdam.pdf>.

7 Ibid 5.

common tasks are: word processing, research, proofreading, data entry, drafting agreements and filing court documents. In some cases, paralegal tasks include client interviews and general office management. Several of these tasks are now being automated through the use of the following:

- (a) DragonDictate for word processing;
- (b) ROSS for research, Gradeproof for proofreading; and
- (c) LawConnect for data entry and LEAP legal software for filing and document drafting.⁸

Studies indicate that there is a high probability of technological innovation displacing the paralegal.⁹ Software applications such as legal search databases, document management and practice management tools, have been shaping legal practice and complementing human labour and intellect, for some time. However, the integration of technology and legal service delivery is rapidly transforming, as software applications move into the domain of higher order, unstructured thinking tasks¹⁰. Consequently, employers of paralegals must arguably reflect on how to redeploy rather than terminate their paralegals, to support their business in new ways. While this transition can be regarded as a human resource challenge, it is also an opportunity to shift competent paralegals from ‘routine’ tasks towards higher-level legal tasks that are capable of generating revenue at a lower cost, or in new legal service delivery areas. The key issue, as the authors see it, is how to redesign paralegal training to give paralegals the requisite skills to perform higher-level tasks and deliver legal services in novel ways. To this end, the next section examines the three points set out in Part II above.

A Identifying ‘Evergreen’ (Translatable) Skills for Employability

Temasek Polytechnic (TP) launched the first paralegal training program in Singapore in 1993. Their rationale was to fill a lacuna for well-trained legal support in the legal profession. The curriculum’s design was broad-based, encompassing the teaching of technical and non-technical skills.

Technical skills involve: legal research, application of the law and basic office management. Non-technical skills include: communication skills, problem solving, self-directed learning, collaborative work and conflict management. The teaching methodology includes:

- (a) the use of traditional methods and Problem Based Learning (PBL) for substantive law;
- (b) the employment of Real Environment Active Learning (‘REAL’) for procedural law; and
- (c) conducting ‘on-site’ tutorials (which are subject based) and internships to expose law students to nuances of the working world.

The core subject ‘Leadership: Essential Attributes & Practice’ (‘LEAP’), cultivates the attitudes, skills and knowledge which are arguably needed to function in society. Through these teaching methods, we focus on building the process skills depicted in Diagram 1 in Appendix A at the end of this paper. The skills depicted in Diagram 1 have proven to be resilient over time, as evidenced arguably by the authors’ law graduates’ employability rates, and the feedback

8 Chris Stock, ‘Automation and machine learning: an opportunity to up-skill support staff’ (*Forbes*, 10 April 2017) <<https://www.forbes.com/sites/forbestechcouncil/2017/04/10/automation-and-machine-learning-an-opportunity-to-upskill-support-staff/#1097acd06b09>>.

9 Dana Remus and Frank Levy, ‘Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law’ (12 April 2017) <<https://ssrn.com/abstract=2701092>> .

10 Eric Koh, ‘Legal Technology: Robots the Latest Threat to Associates And the Billable Hours via Law360’, (*LexisNexis*, 12 April 2017).<https://www.lextalk.com/b/lextalk_blog/archive/2016/07/25/legal-technology-robots-the-latest-threat-to-associates-and-the-billable-hour-via-law360.aspx>. See also, Mills, above n 3.

received from legal profession employers. In the authors' view, the Diagram 1 skills are 'evergreen' (translatable) and will remain relevant even in the evolving technological landscape, and therefore beneficial to law students by positioning them to face perceived challenges ahead. However, nothing remains static, least of all the skills required for jobs of the future. Thus, having identified the 'evergreen (translatable) skills' that paralegals ought to possess, the next section examines the skills which are currently not associated with paralegal training, but may still merit consideration given the expected transformation of the legal profession and the paralegal role.

B Recognising and Teaching New Skills in Light of Paralegal Job Profiles of the Future

The authors' principal objective in identifying new paralegal skills, is to propose a new paralegal training roadmap that is based on a workplace model in which graduate paralegals work in multi-disciplinary teams, across different functional areas within a modern legal service provider (Human Resources, Information Technology, Marketing and Legal). The roadmap's rationale is not to create a paralegal with multiple specialisations, but rather, to ensure that graduate paralegals have broad-based knowledge and skills which are needed to function effectively in the legal sector of the future. The impending transformation of paralegal job roles and the skills with which they ought to be equipped, can be better understood when broken down contextually as set out in Diagram 2 in Appendix B at the end of this paper, which the next section discusses.

1 CHANGE MANAGEMENT

As routine low-level legal tasks become increasingly automated, law firms will arguably need to manage the transition to 'smart' offices. Paralegals with good 'change management' skills will be well positioned to oversee this transition and to undertake higher-level legal work, thereby contributing meaningfully to the range of legal services the law firm offers.

The authors foresee a tripartite workplace model in which lawyers oversee the core legal work within a law firm, while basic legal tasks are automated, and paralegals undertake the 'heavy lifting' within the firm in terms of: data analysis, project management, conflict resolution, and the application of trans-disciplinary thinking across job functions. Paralegals are likely to be integral to change management and the adoption of new technologies, and may also play a critical role in developing workplace flexibility and innovation in legal services delivery. As such, the paralegal will arguably need skills to locate and analyse data which may be essential for making business decisions.

Paralegals will also require relevant 'Project Management' skills including good organisation skills and some capacity for 'activity grouping.' This requires the separation of each project into specific tasks, with a view to assigning these tasks to the right person, thus enhancing workplace efficiency and minimising conflict within an office. As the practice of law involves navigating disciplines as diverse as business, technology, psychology and interpersonal relations, 'Trans-disciplinary Thinking' would also be essential. This involves understanding concepts across varied disciplines to guide decisions in managing change.

2 SKILLS RELEVANT TO HARNESSING TECHNOLOGY AT THE WORKPLACE

The legal profession is increasingly using technology to mine existing datasets and undertake sophisticated data analyses to make predictions. Appropriately applied, such analyses can provide valuable information about litigation trends and court case outcomes, as well information about legal services demand and client preferences.¹¹ Lawyers may be able to leverage upon these trends to better serve client needs.

¹¹ Ibid.

Paralegals are ideally placed to undertake such analyses, if appropriate training is given. In particular, paralegals will arguably need to acquire relevant data management and quantitative analysis skills, to access or manage sophisticated datasets, and identify relationships and linkages within a dataset. Paralegals may be expected to make sense of such data by deconstructing and visually representing insights from appropriate analyses.¹² We refer to this skill as ‘Sense Making’.

Paralegals are arguably also well situated to implement on-going change management within a law firm because of their day to day involvement with workflows. For example, paralegals can often identify areas of work that can be outsourced or automated. In addition, application of ‘Computational Thinking’ will be useful to break down workflow processes and present them in a way that a computer can understand.¹³ Computational Thinking will be especially relevant in planning for automation that is identifying which processes are ripe for automation, and laying out the workflow for application developers to code.

‘Quantitative and Statistical Literacy’ skills are relevant to undertake cost-benefit analyses in technology deployment. This may involve scrutinising the financial aspects of technology investment such as: an investment return, costs savings, impact on the business’ bottom line, and evaluating vendor quotes.

3 BUSINESS DEVELOPMENT

Paralegals who are also managers, may have an important role in ‘Business Development’ by assisting with the law firm’s marketing strategy. The term ‘marketing’ arguably applies to all activities that produce: legal work and ultimately, lawyers’ fees.¹⁴

Paralegals can be trained to contribute to a firm’s marketing efforts through digital platforms and creating online awareness. In addition, to gain familiarity with online marketing tools, paralegals of the future may also need to have problem-solving and communication skills¹⁵ that are suitable for an ever-evolving legal services market. The ‘Project Management’ and ‘Data Analysis’ detailed above, would also be clearly applicable to marketing activities. A critical component of ‘Business Development’ might include horizon scanning for business development activities, and gaining insights into a client’s industry.¹⁶

These are areas where a paralegal with relevant ‘Quantitative and Statistical Literacy’ skills and analytical prowess,¹⁷ would be potentially well-positioned to assist in marketing the firm. Business development tasks also require paralegals to collaborate with technical experts from diverse areas outside law, such as: artists, programmers, professional marketers. Such interaction can be best done by applying ‘Trans-disciplinary Thinking’, as discussed above. Given the global marketplace for experts and the fast-paced, online world of today, many such collaborations may occur by virtual means. As such, the ability to engage in ‘Virtual Collaboration’ is potentially advantageous.

12 SkillsFutureSG, ‘*Skills Framework Referencing for Curricula. Workshop for the Polytechnics. Generic Skills & Competencies*’ (October 2016). <http://www.skillsfuture.sg/docs/SkillsFramework/ST/overview_of_generis_skills_and_competencies.pdf>.

13 British Broadcasting Corporation, ‘Introduction to Computational Thinking’ <<http://www.bbc.co.uk/education/guides/zp92mp3/revision>>.

14 Gary Munneke, ‘Legal Skills for a Transforming Profession’ (2001) 22 *Pace Law Review* 105, 144.

15 Stock, above n 8.

16 Ibid.

17 Catrina Denvir, ‘The rise of the multi-disciplinary lawyers: A challenge for legal education’, *Legal Futures* (26 May 2017) <<http://www.legalfutures.co.uk/blog/rise-multi-disciplinary-lawyer-challenge-legal-education>>.

C Roadblocks and Opportunities for Training Paralegals

Having discussed some of the skills that are arguably relevant to equip paralegals to be future ready, this paper now discusses some of the challenges for reforming paralegal training. The authors consider that reforming paralegal training promises to be a challenging and exciting exercise involving multiple stakeholders. To navigate any uncertainties, stakeholders arguably ought to proactively recognise the challenges, and identify possible opportunities to overcome them. Some possible challenges that the authors foresee, are:

- (a) the legal profession being slow to accept that technology is disrupting the manner in which legal services are delivered and consumed;
- (b) legal educators resisting the redesign of current training methods to include technology enabled learning;
- (c) legal profession educators being reluctant to adapt and prepare for change through continuing professional development;
- (d) the legal profession maintaining a conservative attitude towards the creation of new jobs, and the renovation of old roles to exploit opportunities provided by on-going technological innovation; and
- (e) students and other learners struggling with new teaching approaches.

This paper's discussion focuses on the challenges faced by legal educators. These challenges should not be underestimated. For example, law educators may need to train students in skills that they themselves may not well understand. They may also need to up-skill and reskill themselves, or at least re-orient themselves to be increasingly effective in imparting skills based training and assessing the mastery of skills, as opposed to a more traditional focus on assessing the mastery of content.

Institutional support in terms of study leave and training budgets, will be paramount in equipping and retooling legal educators. Educational institutions will need to build on links with industry players to get skills-based training into the classrooms, and to give students further exposure to evolving workplace environments, as such experiences will be critical to ensuring that training remains relevant. Many 'traditional' legal educators continue to resist the idea of departing from teaching law, to teach new skills¹⁸. The idea that legal professionals must now be equipped with skills that are viewed to be outside or at the periphery of legal education, may be unpalatable to such traditionalists.

However, it is arguably not just legal educators or institutions that need to adapt. Law students and other learners must also adapt to teaching approaches that are less teacher centred and increasingly self-directed and technology driven. Nonetheless, despite all these challenges, the authors remain confident that the technological and vocational changes we are now seeing, present many opportunities that can be leveraged upon – if the appropriate skills and mindset are present in the legal workplace.

In the Singapore context, times have changed. In the past, the Singapore Government and private sector players were often poorly prepared to operate in environments characterised by technology disruption and systemic change.¹⁹ Now, the Singapore Government strongly encourages businesses and education institutions to adopt an open attitude to raise efficiency on the back of technological innovation.

18 Catrina Denvir, 'The rise of the multi-disciplinary lawyers: A challenge for legal education' *Legal Futures* (26 May 2017) <<http://www.legalfutures.co.uk/blog/rise-multi-disciplinary-lawyer-challenge-legal-education>>.

19 Ho Khai Leong, *Shared Responsibilities, Unshared Power: The politics of Policy-Making in Singapore* (Eastern University Press, 2000).

Notably, the Committee for the Future Economy (CFE) is encouraging the adoption of technology within the legal sector to assist with routine legal work, allowing legal practitioners to move into higher value work.²⁰ Clearly, the Government is cognisant of the reality that legal professionals must be future ready, and that this goal can best be achieved by infusing legal training with multi-disciplinary skills, especially those which have technological expertise.²¹

To facilitate the adoption of the Singapore Government's recommendations, it is arguable that other legal education institutions should adopt multi-faceted legal training approaches. This may result in diluting or abolishing strict boundaries between disciplines (and notably between the discipline of law and other fields) when it comes to professional training programs on offer. In the authors' Polytechnic, steps are being taken to facilitate greater inter departmental/faculty cross teaching. 'Train the Trainer' programs are being rolled out to better prepare educators to adapt to technology enabled and skills based training. This should help legal educators to find that training the paralegal of the future is less challenging.

III CONCLUSION

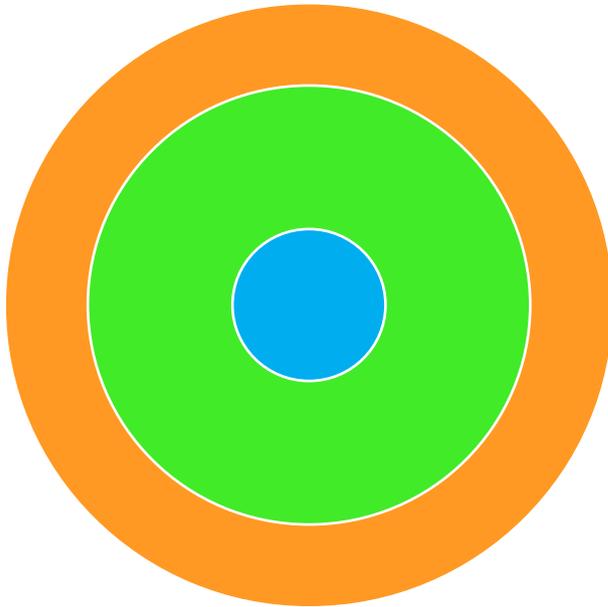
Technological change necessitates reviewing the human agent role in legal services provision. With the transformation of paralegal roles, an attitudinal change is arguably important for all stakeholders. It is also important to focus on developing intra and interpersonal competencies. Attributes such as: leadership, empathy and other-centeredness, will continue to play a vital role in paralegals' holistic development. The legal profession and legal educators must potentially factor these generic skills into their paralegal training. In curriculum re-design, skills taught through subjects like LEAP and community outreach activities, should also be equal to the skills discussed earlier.

20 Committee for Future Economy, *Report of the Working Group on Legal and Accounting Services* (2017) <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/Seminar/CFE-Report%20of%20the%20Working%20Group%20on%20Legal%20and%20Accounting%20Services-Apr2017.pdf>>.

21 Committee for Future Economy, above n 20.

APPENDIX A

Diagram 1



PBL (SUBSTANTIVE) REAL (PROCEDURAL LAW)

- How to approach a problem
- How to look for information
- Asking relevant questions
- Communicating effectively
- Ability to learn independantly
- Giving and seeking feedback
- Time management – Observing deadlines
- Navigating ambiguity

ONSITE TUTORIALS

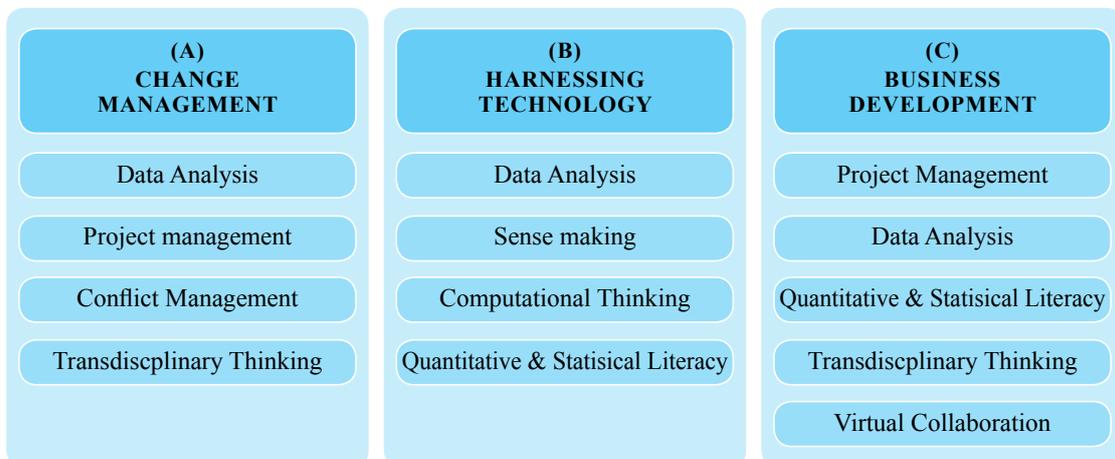
- Creative thinking
- Synthesising information
- Information and communication technology – use tech to access info, create products and solve problems

INTERNSHIPS

- Adaptability
- Managing expectations
- Commitment
- Holistic thinking
- Navigating interpersonal & intercultural vagaries
- Leadership

APPENDIX B

Diagram 2



LOCAL DEMOCRACY AND THE AGENCY-MODEL OF LOCAL GOVERNANCE

*Sascha Mueller**

I INTRODUCTION

Local governance is an integral part of most modern states. Its role is generally to implement central government policy on a local level, to provide and manage local infrastructure such as roads, waste management and water supply, and to conduct government business on a narrower day-to-day basis.¹

The extent to which local government has discretion when fulfilling these duties, depends its relationship with central government. Countries with a unitary government structure and which follow the Westminster System, such as the United Kingdom and New Zealand, tend to follow the so-called agency-model of local governance: local government is regarded as an agent of central government and thus has little discretion to act beyond the direction given by central government.

This model bears the danger of being detrimental to both local governance and democracy. A tightly controlled local council may overzealously enforce central government's will to avoid its attention. It may thus become overly bureaucratic, to the detriment of its efficiency. A council on a tight leash will also diminish trust in local democracy. If local councillors are not free to represent their electorate, local elections are meaningless, and citizens become disengaged from local politics.

This danger is illustrated in the events surrounding the Canterbury regional council in the late 2000s. After accusations that it managed its water resources inefficiently, Parliament ousted the elected councillors and replaced them with commissioners, even though matters had been improving for years. This paper will assess the effects the agency-model has on local governance and democracy.

II THE AGENCY-MODEL OF LOCAL GOVERNANCE

Local government is a necessity within the constitutional structure of modern states.² Central government is removed in terms of distance and duties from the needs and desires of the local population. It is usually more convenient and efficient to provide local services and decision-making on local level. As such, the *Local Government Act 2002* (NZ) ('LGA') states that the core services to be provided by local government are: network infrastructure, public transport, waste management, avoidance or mitigation of natural hazards, and recreational facilities and community amenities.³

The logistical difficulty for central government to govern over local matters was particularly obvious in the 19th century and early 20th century, when lack of long-distance transportation and communication made central administration of local infrastructure unfeasible. During that time,

* Sascha Mueller is a senior lecturer in law at the University of Canterbury in Christchurch, New Zealand.

1 Geoffrey Palmer, Andrew S. Butler and Tom Scott, *A constitution for Aotearoa New Zealand* (Victoria University Press, 2016) 188.

2 Ibid.

3 *Local Government Act 2002* (NZ) s 11A.

local government was regarded as a quasi-autonomous political body, making decisions within its sphere of competency independently.⁴

However, the general trend for governments has long been to centralise their powers.⁵ The consequence of centralised power is loss of independence for local governments.⁶ The more power central government holds, the less likely it is to allow local government discretion when it comes to local decision making. This form of central-local government relationship is often referred to as the *agency-model*.⁷ It is characterised by the idea that all power is inherent in a central government and merely delegated to other political bodies at a central government's discretion. Central government can therefore expand or limit the decision-making powers of local government as it chooses and interacts with local government in a form of command-follow relationship, rather than a cooperative one.⁸ Consequently, powers that are extended to local government are generally strictly prescribed.⁹

But the agency-model of governance has been criticised for oversimplifying the central-local government relationship.¹⁰ It does not recognise that while local government may ultimately be subordinate to central government, it nonetheless holds significant resources and wields substantial law-making and regulatory powers within its sphere of competency.¹¹ As local government can freely make decisions within certain areas, it can still be regarded as broadly independent; as long as these areas of discretion coincide with the overall duties of local government, it does not matter that local government discretion is restricted elsewhere. Local government can act autonomously within the areas that matter.

In New Zealand, local government powers used to be strictly prescribed by the *Local Government Act 1974* (NZ). That Act provided that any public services provided by local government were done so 'on behalf of central government.'¹² New Zealand has thus traditionally closely followed the agency-model.¹³ However, the LGA 2002 did away with the set of prescriptions regarding local government powers, and replaced it by a so-called *power of general competence*. It extends 'full capacity' to local government to conduct its business as long as it acts within the general principles of the LGA.¹⁴ This is particularly meaningful in light of local authorities' broad bylaw-making powers. New Zealand local authorities may make bylaws relating to protecting the public from nuisance, and promoting and protecting public health, particularly in the context of waste and water management.¹⁵ The power of general competence combined with extensive bylaw-making powers appear to grant local government a

-
- 4 Tony King and Trust Hamlyn, *Does the United Kingdom still have a constitution?* (Sweet & Maxwell, 2001) 27.
- 5 David Held, *Models of democracy* (Stanford University Press, 3rd ed, 2006), 83, 84.
- 6 M Loughlin, "The demise of local government" in Vernon Bogdanor, *The British constitution in the twentieth century* (Oxford University Press, 2003).
- 7 Stephen Bailey and Mark Elliott, 'Taking Local Government Seriously: Democracy, Autonomy and the Constitution' (2009) 68(2) *Cambridge Law Journal* 436, 440.
- 8 *Ibid.*, 441.
- 9 Carol Harlow and Richard Rawlings, *Law and administration* (Cambridge University Press, 3rd ed, 2009), 84.
- 10 Palmer, Butler and Scott, above n 1, 188
- 11 Bailey and Elliott, above n 6, 440; some scholars refer to this situation as a "power-dependence" model, see for example David Wilson & Chris Game *Local Government in the United Kingdom* (Basingstoke, 4th ed, 2006) 186-187.
- 12 *Local Government Act 1974* (NZ) s 37K.
- 13 Palmer, Butler and Scott, above n 1, 189; this is likely due to the similarity of New Zealand's constitutional structure to that of the United Kingdom, which has also traditionally followed the agency-model, see Harlow and Rawlings, above n 9, 84.
- 14 *Local Government Act 2012* (NZ) ss 14, 21(2).
- 15 *Local Government Act 2012* (NZ) Part 8.

high level of discretion and could be regarded as a significant step towards true local autonomy.¹⁶ In reality, the autonomy of local authorities in New Zealand remains severely limited due to two factors: the first is its ability to raise funds, and the second is the power of central government to interfere with local government business.

Until 2012, central government could intervene in local government affairs in New Zealand if: a local council lacked a quorum and was thus unable to act, if the council requested central government help, or if the council refused to perform its statutory duties and thus endangered good local government or public health and safety.¹⁷ Commissioners had been appointed by central government on few occasions, usually on the request by the local authority.¹⁸ Since December 2012, the LGA was amended to allow central government even broader powers of intervention as it can now intervene as soon as the Minister believes that a problem exists. ‘Problem’ is defined in the LGA as: any circumstances that detract from a council’s ability to give effect to the purpose of local government, a persistent failure to perform its functions, and a failure to demonstrate prudent management of its finances, among other things.¹⁹ The reference to finances is particularly relevant, as local government has very limited ability to raise funds, and often operates within limited financial means.²⁰ The powers of intervention in case of a perceived problem range from simple information gathering, to directing the council to act in specific ways. Ultimately, central government can relieve elected councillors from their duties and replace them with appointed commissioners.²¹

In terms of finances, the main income of local authorities come from local rates, a form of land tax.²² Local authorities can impose fees on the services it supplies; however, these may only compensate for the costs incurred by providing the service.²³ Apart from investment revenue, local government has no other means to raise funds. If local authorities want to implement large and innovative projects or policies, they are often reliant on central government grants and subsidies.²⁴ This creates a dependence on central government when planning for the development of new local assets; if central government contributes to the cost of the development, it has a justification to control the development.²⁵ Overall, central government controls both local government’s responsibilities regarding its local population as well as its ability to raise funds to finance these responsibilities. This means that local authorities often have to operate within a very strict budget.²⁶ Consequently, as s 256 LGA includes mismanagement of finances as a reason for central government to intervene, it is unlikely that a local authority will embark independently on a larger or innovative project. It has therefore been suggested that, in New Zealand, local government is nothing more than central government’s agent, or a ‘subordinate service delivery arm.’²⁷

16 Geoffrey Palmer as cited in: Prue Taylor, ‘Who Has the Power? Challenging Traditional State Authority to Regulate GMOs in New Zealand’ (2006) 8(3) *Environmental Law Review* 175, 180.

17 *Local Government Act 2012* (NZ) ss 255, 256 (1 October 2012).

18 See, eg, *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612.

19 *Local Government Act 2012* (NZ) s 256.

20 Harlow and Rawlings, above n 9, 85; Graham Bush, ‘A Battle Won – or just Begun?’ (2003) *New Zealand Local Government* 32, 32; Palmer, Butler and Scott, above n 1, 189.

21 *Local Government Act 2012* (NZ) Part 10.

22 See *Local Government (Rating) Act 2002* (NZ).

23 *Local Government Act 2012* (NZ) s 150.

24 ‘Local government finance and expenditure’ (2015) *Local Government New Zealand* <www.lgnz.co.nz> (10 November 2017).

25 Bailey and Elliott, above n 7, at 442

26 Palmer, Butler and Scott, above n 1, at 189.

27 Taylor, above n 16, 179.

Although the LGA allows local councils vast discretion by way of their power of general competence, local government in New Zealand nevertheless acts more as an agent than an autonomous entity. This spectre of central government intervention can inhibit independent decision-making at a local government level. This is particularly true in light of the fact that the New Zealand Parliament has legislated twice for the replacement of an entire elected local authority within 10 years.²⁸ True independence requires a guaranteed freedom of outside coercion, be it through direct intervention or financial direction.

The reason that Parliament as one democratically elected governmental body can have complete control over local government, which is also democratically elected, is New Zealand's strict adherence to the principle of parliamentary sovereignty. Unlike legislatures in many other constitutional systems, New Zealand's parliament has no legislative superior and is thus not bound by any statute that organises and delineates the powers of New Zealand's constitutional organs.²⁹ It could be argued that Parliament should only legislate within the scope of the rule of law, and that democracy and the rule of law are intrinsically linked.³⁰ However, as Parliament itself is democratically elected, it arguably acts within the rule of law when passing any legislation concerning local government as long as it follows democratic processes, the proper legislative process.

Therefore, the agency-model is still a useful descriptor when assessing the status of local government in relation to central government. It may be a simplified view on central-local government relationship, but it accurately expresses the power imbalance between the two government levels. The limited ability to raise funds, the ease by which central government can intervene in an invasive manner, and the ultimate power Parliament holds over local government mean that any independently acting council is in a precarious position.

III THE VALUE OF LOCAL DEMOCRACY AND THE IMPORTANCE OF AUTONOMY

Yet, just because Parliament *can* go as far as suspending local democracy and granting central government wide powers to interfere locally, does not mean that it *should* legislate to do so. Central government's ability to replace elected councillors on a mere suggestion of a problem has an obvious impact on local democracy. It does not just rob the local population of their voice in local decision-making, it also diminishes local government's authority and undermines people's trust in local democracy generally. This is arguably true not just for the directly affected local people, but also for the people of other regions, because the example of central government interference illustrates the possibility that it could happen in their region, too. As such, central government interventions adversely affect the democratic health of the entire country.

IV LOCAL DEMOCRACY

Democracy requires citizens to self-govern, to take part in the decision-making process that determines society's rules and policies, and to implement them.³¹ In a representative democracy, the people's ability to self-govern is delegated to representative leaders, as the involvement of every citizen in large-scale societies is unfeasible. These representatives are elected by way

28 See *Local Government (Rodney District Council) Amendment Act 2000* (NZ); and *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* (NZ).

29 Mark Elliott, 'Interpretative Bills of Rights and the Mystery of the Unwritten Constitution' (2011) *New Zealand Law Review* 591; see also Tom Bingham *The Rule of Law* (Penguin Books, 2011), 161.

30 Bingham, above n 29, 66-67;

31 Jack Lively, *Democracy* (Blackwell, 1975), 30.

of democratic processes, to ensure that they truly represent their electorate and to hold them accountable for their decisions.³²

Local democracy furthers accountability by facilitating pluralism and diversity among representatives. John Stuart Mill was concerned that despite these democratic processes, government tended to attract a certain group of people.³³ This could result in a lack of diversity in government and a lack of choice between representatives. As only some people are interested in governing, the rest of the population would become less and less informed, and would eventually be unable to critically evaluate the actions of government. The result would be a progressively centralised government, in which minority groups had little chance to be heard.

Madison, who shared Mill's concerns, believed that the solution was to create diversity by decentralising government.³⁴ If governance is split and devolved to states or regions, more people are involved in the decision-making process, making it less likely that any particular interest group can gain disproportionate power. For this reason, local democracy is a vital part of overall democratic health. It distributes decision-making power across a wider range of representatives by creating more diversity.

Local democracy can also be beneficial to citizen engagement. As local governments make decisions that impact on the region more directly than many central government decisions, the local population is more likely to be aware of these decisions and of the representatives who make them. This means that a vote in local elections has a more tangible effect than a vote in general elections, as voters potentially have a better idea of how the council's decisions affect them. If a voter can feel the impact of the vote more directly, they are likely to be more interested in local politics. This way, local democracy support people's political self-development.³⁵

V LOCAL AUTONOMY

Local democracy will only be beneficial if local government can act independently. A council represents the will of the local population, but only if it has the power to make decisions at its own discretion. Otherwise, votes cast in local elections have little meaning, as the elected representatives are not free to act on behalf of their electors. In other words, the extent to which local government can act autonomously is a measure of democratic health.

Individual autonomy enables people to be self-determining: to be able to act free from any outside coercive force.³⁶ Autonomy is a necessary part of self-governance; someone who makes decisions based on coercion is not in control of their own governance. Because the political autonomy of individuals has been delegated to representatives in modern democracies, their ability to self-govern has been reduced to casting a vote. In order to preserve their autonomy, the democratic institutions created through the electoral process must themselves be autonomous.³⁷

While this is clearly the case for Parliament, it must also be the case for local government. It could even be argued that it is as important that local government is autonomous, if not even more so. Democratic institutions preserve individual political autonomy only to an extent. The further the representatives are removed from their electors, the less political autonomy is maintained. When central government makes decisions that affect only a specific region, the decision is not made solely by representatives of that region. Such decisions may therefore

32 Held, above n 5, 75.

33 Ibid 83, 84.

34 James Madison, 'Federalist Paper No. 10' in Alexander Hamilton et al (eds), *The Federalist papers* (Palgrave Macmillan, 2009) 49-54.

35 Held, above n 5, 79; John Adler, 'Efficiency, autonomy and local government' (2001) 4(3) *Journal of Local Government Law* 61, 64.

36 Held, above n 5, 263.

37 Adler, above n 35, 63.

potentially be imposed on that region against the will of the local population. For that reason, an autonomous, and democratically elected local council ensures political self-determination of individuals better than central government when it comes to local decision-making.³⁸

VI DEMOCRACY AND AUTONOMY UNDER THE AGENCY-MODEL

A central government that perceives local government in terms of the agency-model is likely to be very directive, and local government powers will be strictly prescribed. This results in a lack of local autonomy and means that the local people enjoy less direct representation.

The agency-model may also have other harmful impacts on local government. It may, for example, cause a negative feedback loop that is detrimental to local government efficiency.³⁹ The primary reasons for central government intervention are first, that local government is not acting in the interest of central government in terms of policy development and/or implementation, and second, that local government is not acting efficiently enough.⁴⁰ To avoid intervention based on the former reason, local government is likely to try and do its best to stay within its narrowly prescribed competencies. That may lead it to become overly bureaucratic and risk-averse, as any show of independence may draw central government's attention.⁴¹

Moreover, central intervention based on these reasons undermines local government's authority. The lack of ability to act independently impacts on citizen engagement, as citizens come to regard local government as impotent and therefore unimportant.⁴² That can lead to the situation where in the eyes of the electorate, any short-coming with local government is blamed on central government, as with direct control of local government comes a shift of responsibility to central government. This, in turn, may cause central government to decide to further tighten the reigns on local government, so as to fix the short-comings which caused the electorate's complaints. But stripping local government of further independence only cements the public's perception that responsibility for local government lies with central government – and the vicious circle is complete.⁴³ Overall, the less strictly the agency-model is applied to local government, the more democratic the system is and the more efficient local government can act.

VII ENVIRONMENT CANTERBURY – A CASE STUDY

The events surrounding the passage of the *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* (NZ) ('ECan Act') illustrate the deficiencies of the agency-model. In New Zealand, local government is divided into territorial and regional authorities, each of which has its own set of competencies.⁴⁴ Environment Canterbury is the regional authority for the Canterbury region. Among other things, it is responsible for the management of the region's water resources. Canterbury produces a significant part of New Zealand's renewable energy by way of hydroelectricity. It is also an important agricultural region that relies heavily on Canterbury's vast fresh water reserves. These reserves account for

38 Command Paper (UK) "Communities in control: real people, real power" (9 July 2008) Cm 7427, 13.

39 Bailey and Elliott, above n 7, 450.

40 Ibid 454.

41 Palmer, Butler and Scott, above n 1, 189.

42 Bruce Hayward et al, *The 2006 Local Elections and Electoral Pilot schemes* British Market Research Bureau <www.electoralcommission.org.uk> (10 November 2017), 17.

43 Bailey and Elliott, above n 7, 451.

44 *Local Government Act 2002* (NZ) s 21.

more than two thirds of New Zealand's fresh water.⁴⁵ Consequently, water management is of high importance to the region.

A survey of all local authorities in 2008 revealed that Environment Canterbury was severely underperforming in terms of processing resource consent applications, particularly when those related to water.⁴⁶ It processed only 29 per cent of resource consent applications within the statutory time limits set by the *Resource Management Act 1991* (NZ) ('RMA'), which was by far the worst record of all local authorities in New Zealand.⁴⁷ Environment Canterbury also had not developed and implemented a regional water plan. While the RMA does not require a regional authority to devise such a plan, the importance of Canterbury's water resources both to the region and to New Zealand as a whole, made such a plan highly desirable. Moreover, the lack of such a plan was believed to be a contributing factor to the slow response time to resource consent applications.⁴⁸

After local mayors voiced their concerns regarding Environment Canterbury to the Ministry of the Environment, the Minister ordered a review into the performance of the council. The resulting report (Creech Report) found that Environment Canterbury's inefficiency was the result of institutional breakdown, mainly caused by a council which it described as dysfunctional.⁴⁹ The council was split evenly along ideological lines, between environmental and economic interests. As neither side was seen to be interested to compromise, there was concern that the Council was unable to make difficult decisions. The Creech Report therefore recommended that the only way to improve Environment Canterbury's inefficiency swiftly, would be to relieve the Council of its water management responsibilities and transfer them to a central government department.⁵⁰

The reason for the Council's slow response time to resource consent applications was likely primarily due to the number of resource consent applications it had to process. Consent applications had almost doubled in the previous years, due to a booming dairy industry and an unprecedented growth in urban development.⁵¹ Environment Canterbury was not sufficiently resourced to deal with this sudden rise in consent applications, which led to delays processing the applications. However, by the time the ECan Act was introduced in Parliament, Environment Canterbury had increased its consent processing staff and increased its rate of applications processed within the time limits to over 70 per cent.⁵²

Regarding the water plan, the Creech Report noted that a plan had been in the early stages of development for some years, but that it was still a long way from being completed.⁵³ The lack of progress was put down to the fact that the Council had bad relationships with the stakeholders and other public bodies of the Canterbury region, and that its internal ideological differences made it difficult to compromise on contentious matters.

However, while relationships between the Council and stakeholders were not always easy, according to independent research, both residents and industry representatives had a generally

45 Wyatt Creech et al, *Investigation of the performance of Environment Canterbury under the Resource Management Act & Local Government Act* (CR84, 2010) I-II, 5; Dairy NZ, *New Zealand Dairy Statistics 2014-15* <www.dairynz.co.nz> 13.

46 Ministry for the Environment, *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (ME 937, 2007), Appendix 4.

47 Ibid Appendix 4.

48 Creech et al, above n 45, 5.

49 Ibid 8, 9.

50 Ibid III.

51 Ibid 27.

52 Ibid 30; Environment Canterbury, *Annual Report 2009/2010* (R10/112, 2010), 70.

53 Creech et al, above n 45, 6.

positive attitude towards Environment Canterbury.⁵⁴ Moreover, by 2010, Environment Canterbury had, in cooperation with the Canterbury Mayoral forum and the territorial councils, developed a water strategy. Unlike a formal water plan, this strategy stood outside the RMA process and relied on a collaborative approach to water management, rather than the adversarial approach of the RMA. Research by Holley and Gunningham showed that this kind of collaborative approach had been highly successful.⁵⁵ All parties involved believed that this strategy could be developed into a more formal water plan in the future.⁵⁶ The Council passed the resolution to adopt the water strategy by a vote of 10:2, showing that it could move past its internal ideological differences.⁵⁷

It appears thus that Environment Canterbury had been operating somewhat ineffectively and inefficiently. But by the time the Creech Report was published, matters had substantially improved, and further improvement was likely. In any case, by 2010 Environment Canterbury was not the worst performing regional council anymore, which made the necessity of central government intervention doubtful.

Nevertheless, in March 2010 the New Zealand Parliament passed the ECan Act with the purpose of dealing with the perceived problems surrounding Environment Canterbury. The Act had a range of significant constitutional effects, but the most democratically harmful was the replacement of all Environment Canterbury councillors with government-appointed commissioners.⁵⁸ The government's reason for taking such drastic measures were similar to the ones put forward by the Creech Report.⁵⁹ However, the government based their reasoning mainly on the data from the time when Environment Canterbury's performance was worst, and ignored the improvements that had happened since. This was pointed out repeatedly by the opposition during the debates.⁶⁰

This event illustrates the harmful effects the agency model has on local governance and democracy. Rather than having to cooperate with local government to achieve the best possible outcome for the population, central government can simply impose its will, with little regard to the mid- to long-term effects of such an intervention. Even though Environment Canterbury was processing 92 per cent of applications in time by 2011,⁶¹ it is arguable that only in November 2016 was local democracy partially restored, when seven of thirteen councillors were elected during local government elections.⁶²

The adverse effects of the ECan Act are likely to be wide-ranging. The ousting of councillors will undermine voters' confidence that their local votes matter. Also, Local councils may be more timid and less innovative, because Environment Canterbury's innovative approach to water management was over-ridden by central government.

54 Cameron Holley and Neil Gunningham, 'Natural resources, new governance and legal regulation: when does collaboration work?' (2011) 24(3) *New Zealand Universities Law Review* 309, 321; Environment Canterbury, *Annual Report 2006/2007* (R08/57, 2008); Canterbury, *Annual Report 2009/2010*, above n 52.

55 Holley and Gunningham, above n 54, 321.

56 Creech et al, above n 45, 19.

57 Ibid 50.

58 *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* (NZ) s 9.

59 (30 March 2010) 661 New Zealand Parliamentary Debates 9927 (Nick Smith).

60 See eg (24 March 2010) 661 New Zealand Parliamentary Debates 9767 (Kennedy Graham); (30 March 2010) 661 New Zealand Parliamentary Debates 9930.

61 Ministry for the Environment, *Resource Management Act: Two-yearly Survey of Local Authorities 2010/2011* (ME 1069, 2011) Appendix 5.

62 *Environment Canterbury (Transitional Governance Arrangements) Act 2016* (NZ); the remaining six councillors are still appointed by central government.

Instead of intervening in the adversarial manner that the New Zealand Parliament chose, as a central government it could have supported Environment Canterbury. The ideological split in the Council was a sign of democracy in action, not a problem to be fixed. With more resources to deal with the influx of resource consent applications, Environment Canterbury could have processed (and did process) more applications in time.⁶³ And the collaborative approach of the water strategy could have been supported and potentially used as a template for resource management reform. However, that is not how a principal interacts with their agent. If the agent does not act strictly within the expectations of the principal, the principal will impose their will on the agent, as happened in this situation.

VIII CONCLUSION

The agency model of local governance is a sign of a political system in which power is highly centralised and focused within a central government body. This body wields full control and is unlikely to tolerate actions by other political bodies that may undermine its control. In such a system, local government cannot act independently. It must follow the will of central government, as it is seen as little more than an extension of central government.

This model comes at the detriment of local democracy. Even if local elections exist, their relevance is minute. An elected councillor who has to act within strict prescriptions may as well be an appointed bureaucrat. Consequently, citizens disengage from local politics, which in turn concentrates power even more in central government.

A model of local governance that facilitates and furthers local democracy is the so-called partnership model.⁶⁴ Under this model, central government creates broad policy with the input of local authorities. The authorities then have wide discretion when implementing these policies. This ensures that central government can create policy beneficial to the whole country, but that such policy will not be unduly detrimental to the regions.

For the partnership model to work, local government needs a strong constitutional basis. If its existence and competencies are not protected, central government can impose its will on local government at any point. To this end, the association of local councils in New Zealand has suggested that local government should be more specifically constitutionally recognised; or, at least, that the LGA be entrenched.⁶⁵ Palmer and Butlers even go so far as to challenge the concept of parliamentary sovereignty altogether with their proposed Constitution for Aotearoa New Zealand which among other things, would guarantee the existence of local government, its autonomy within its legally defined areas of competence, and its democratically elected representatives.⁶⁶ In lieu of broad constitutional changes, Bailey and Elliot suggest that a formal memorandum of understanding between central and local government as to their relationship and competencies could mitigate some of the adverse effects of the agency-model.⁶⁷

The events surrounding Environment Canterbury and the subsequent increase of powers of intervention in the LGA, showcase the dangers inherent in the agency-model. If left unchecked, central government tends to increase rather than decrease its power, to the detriment of local government and democracy.

63 In fact, during the times that Environment Canterbury processed few applications, its staff had asked to be exempted from some of the RMA's restrictions so that they could act more efficiently. The ECan Act extended exactly those powers to the appointed commissioners. Central government could have extended these powers to Environment Canterbury earlier, allowing it to act more efficiently without central intervention; see Creech et al, above n 45, 9, 10.

64 Harlow and Rawlings, above n 9, 84.

65 Taylor, above n 16, 181; see also Palmer, Butler and Scott, above n 1, 73.

66 Palmer and Butlers, above n 1, 73 (Art 110).

67 Bailey and Elliott, above n 7, 470, 471.

META SYLLOGISTIC ANALYSIS OF AN OFFENCE – ELEMENTAL AND ELEMENTARY

Toby Nisbet and Kenneth Yin***

ABSTRACT

I-R-A-C, which is an acronym for ‘issue-rule-application-conclusion’ is the formulaic problem-solving template that is commonly taught to Australian law students. This paper suggests that criminal law should be taught to law students by presenting all offences and defences in their constituent elements, with each element corresponding to an issue, which is the “I” in the I-R-A-C acronym. A criminal offence can thus be presented as a meta-syllogism in which each element of the offence comprises a mini-syllogism or ‘mini’ I-R-A-C.¹

The risk of law students falling into error can be minimised by the use of I-R-A-C, provided certain conditions are met. Each element must attract its own internal analysis. The reasons which underlie the interaction between the elements as constituting a meta-syllogism need, to be understood. Law students can still fall into error, but it is submitted those errors are more apparent, and law students are therefore easier to teach, if the I-R-A-C method is used.

I INTRODUCTION

I-R-A-C is the formulaic problem-solving template taught to law students. It has been noted elsewhere that I-R-A-C is the legal expression of Aristotelian syllogistic logic.² This article examines the ways in which a fine understanding of I-R-A-C as an expression of logic, can help law students avoid error in criminal law problem solving. It further explores the way it helps law lecturers identify areas where law students need help. This article is thus necessarily focused on legal problem solving, and does not consider matters that are more likely to arise in essay style questions, such as whether provocation has a role to play in modern society. The samples and comments on teaching and learning are based on the authors’ experience in delivering criminal law for 8 years (Nisbet) and in delivering legal logic for the same period (Yin). Readers are invited to consider whether the proposed methodology will provide the benefits for their particular law student cohorts. This article does not say that this is the only way to teach criminal law – but, on the other hand, colleagues may find that they intuitively

* Lecturer in law, School of Business and Law, Edith Cowan University. Toby was a solicitor working at Northern Suburbs Community Legal Centre (Inc) which serves the community in the northern suburbs of Perth. Toby ceased legal practice in 2010.

** Lecturer in Law, School of Business and Law, Edith Cowan University. Ken practised as a Solicitor from 1984 until 1996 and then as a Barrister at Francis Burt Chambers, Perth, and retired from all legal practice in 2013.

1 James Boland, ‘Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club’ (2006) 18(3) *St Thomas Law Review* 711, 724, where by parity of reasoning, Professor James Boland used the analogy of a case in tort. See also Kenneth Yin and Annibeth Desierto, *Legal Problem Solving and Syllogistic Analysis* (LexisNexis Butterworths, 2016) 119 and 133.

2 Yin & Desierto, above n 1, 6.

gravitate towards the end results envisaged by the method, albeit without adopting the formal pedagogical aspects of it.³

This article is written from the perspective of the Griffith Code,⁴ and uses code based examples. However, the method's utility is not confined to criminal code jurisdictions, as there are arguably more similarities than differences between the Griffith code and the common law,⁵ and in any event, the criminal law in Australia is predicated upon criminal offences and defences, with each having its own discrete set of elements.⁶

In criminal law, offences and defences consist of various elements which together form a suite of issues that must be resolved step by step. In Part I of the paper, we introduce this meta-syllogistic method, together with its pedagogical underpinnings. Part II illustrates the workings of the meta-syllogistic method in the criminal law context, including a discussion of the errors that are committed by law students. These errors can be identified and then remedied by the presentation of criminal law doctrine within a proper syllogistic framework.

I PEDAGOGICAL UNDERPINNINGS

A IRAC Is For Legal Issues Only

First year law students are taught early in legal studies that I-R-A-C is the formulaic problem-solving template to use to answer legal problems. This is not unique to criminal law, but criminal law, with the distinct deconstruction of its curriculum into the teaching of offences and defences, serves as a particularly unambiguous demonstration of the I-R-A-C template which is thus a very useful pedagogical tool for its teaching.

Not every question can properly be characterised as an I-R-A-C 'issue'. As a preliminary stride towards a dedicated understanding of the I-R-A-C template, we suggest that an explanation be proffered early in the semester as to what an I-R-A-C issue *is* and *is not*. An I-R-A-C 'issue' is the *legal* question or issue to be addressed,⁷ not *any* issue or question. If one tried to explain what this means in the context of a first-year criminal law problem, the questions: *Did she have a knife in her hand? Did Peter strangle John and if so when?* do *not* have the character of I-R-A-C-issues and therefore should not be labelled or treated as such. These 'questions' cannot be resolved within any I-R-A-C template because they do not represent legal issues. Rather, they are facts which might be relied on in the 'Application' part of the answer to resolve legal the issues, than the elements of criminal offences.

3 Alternative approaches include problem based learning, see Brianna Chesser 'A Problem Based Learning Curriculum and the Teaching of Criminal Law' (2016) 9 *Journal of the Australasian Law Teachers Association* 27; and approaching certain problems visually and conceptually, see Kelley Burton, Thomas Crofts and Stella Tarrant, *Principles of Criminal Law in Queensland and Western Australia* (Thomson Reuters, 2nd ed, 2016) 123, but compare with the sample answer provided at 130. Other approaches include essentially using this methodology but as part of a larger immersion program, see Taking Hints from Hogwarts: UOW's First Year Law Immersion Program' (2013) 6 *Journal of the Australasian Law Teachers Association* 127, 135.

4 Western Australia's *The Criminal Code* and Queensland's *Criminal Code*.

5 Stella Tarrant, 'Building bridges in Australian criminal law: codification and the common law' (2013) 39 *Monash University Law Review* 838. Toby Nisbet, 'The Mental Elements of Assault in Western Australia' (2005) 38 *The University of Western Australia Law Review* 46.

6 *R v Mullen* (1938) 59 CLR 124, 128-129 (Latham CJ) ('*Mullen*'), contrasted against the muddling of proof of offences and disproof of defences in *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey L.C.) ('*Woolmington*').

7 As explained by Professor Nedzel: Nadia Nedzel, *Legal Reasoning, Research and Writing for International Graduate Students* (Wolters Kluwer, 3rd ed, 2012) 69. See also Yin & Desierto, above n 1, 120.

Having determined what an issue is *not*, it is more straightforward to explain to law students the types of legal issues which *are* I-R-A-C-issues. Examples include: *Did Peta commit murder? Did John assault Peter? Did Jill steal Patrick's watch?* These are actually meta-issues (or 'meta-syllogisms'), which are the vessels that contain the sub-issues to be resolved. The murder example would break down into, for example: (1) *Did Peta cause Abraham's death?* (2) *Did Peta intend to cause Abraham's death?* The concept of meta-syllogism is developed further below.

Armed with the fundamental definition of an 'issue' (as a legal question which is resolved in the template of their syllogism/I-R-A-C) law students will arguably now readily see that, thus characterised, these questions will require them to: synthesise the applicable legal principles which would be relevant to that issue thus identified (such as causation), and then apply them to the problem (the 'A' in the acronym), and finally reach a conclusion (the 'C' in the acronym).

The next section discusses the more fundamental types of rule structures that law students would encounter in criminal law which is conventionally taught in a fairly formulaic sequence, with criminal offences and defences being covered in discrete blocs. The I-R-A-C 'meta-issue' is usually readily understood as being a question of whether some criminal offence was committed, or whether a particular defence is available.

B Tests, Step-Analysis and Factor Analysis

1 TESTS

Criminal law lecturers would be familiar with the idea that a criminal offence or defence comprise various requisite 'elements'.⁸ The expression 'elements' itself, actually bears a meaning akin to a term of art for those familiar with syllogistic reasoning. Professor Linda Edwards for example, explains that a 'test' is a rule which comprises conditions, and which identifies elements 'and requires that each be satisfied'.⁹

2 STEP-ANALYSIS

Another rule structure, which is similar to the 'test' above, is known as 'step' analysis. Professor James Gardner describes 'step analysis' as one where the court or statute 'sets out authoritatively a definite series of analytic steps a court must take in order to reach a correct result. In other words the court or statute says first, do this; next do this; finally, do this...'¹⁰

Professor Gardner then explains that step analysis is 'closely related to the test'.¹¹ Step analysis has obvious similarities to the 'test', in the sense that if each 'step' is not satisfied, then the rule as a whole is not satisfied.¹² An almost perfect lay illustration of step analysis is in the way a run is scored in baseball.¹³ The player does not get to the literal second base without getting to first base first. Thus understood and analysed, each such element, or 'step,' is analysed within its own micro-syllogism or mini-I-R-A-C, which collectively comprise Professor Boland's meta-syllogism.¹⁴

8 *Woolmington*, citing *R v Davies* 29 Times LR 350, uses the term 'ingredients' which can be taken to be synonymous with 'elements'; the use of the term was approved on the point of whether they were 'elements' of offences (disregarding defences) in *Mullen*, 128 (Latham CJ), 134 (Starke J), 136 (Dixon J). McTiernan J took a slightly different and less relevant approach for our purposes. On 'elements' of defences, see, eg, *Parker v The Queen* 111 CLR 610, 639 (Taylor and Owen JJ) which adopted a meaning which aligns with the one presently being advanced in our paper.

9 Linda Edwards, *Legal Writing Process, Analysis and Organisation* (Wolters Kluwer, 6th ed, 2014) 17. See also Yin and Desierto, above n 1, 133.

10 James Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis, 2nd ed, 2007) 45.

11 *Ibid.*

12 *Ibid.* Yin and Desierto, above n 1, 148.

13 This is the example used in Yin and Desierto, above n 1, 149.

14 Boland, above n 1, 724.

3 FACTOR ANALYSIS

Intuitively at least, students typically have less of a difficulty with the ‘test’ or ‘step’ analysis; often they struggle more with the treatment of the components *within* that test or element (or step). They sometimes display a lack of understanding if the various components *within* that test or step, should themselves comprise a yet further mini-element, or something else. Teaching factor analysis within a syllogistic framework, can help law students to achieve greater clarity.

Professor James Gardner describes a ‘flexible’ rule structure as the type of rule which attracts ‘factors analysis’, saying that you

can almost always extract a factor analysis from judicial opinion ... [T]he things a court discusses in its opinion, whatever they might be, are by definition the aspects of the case that the court thinks are important. It follows that you can always generate some sort of factor-analysis simply by listing the things that the court chose to discuss.¹⁵

The author’s experience in teaching first-year law students is that misunderstanding the difference between the ‘test’ and ‘factor analysis’ causes them to struggle. A particular and frequently encountered difficulty, is the predisposition of law students to treat a factor as though it is an element or step attracting its own mini-syllogistic analysis – whereas, properly analysed, each factor should simply be a matter which is taken into account as one of a number of other factors within a larger mini-syllogism, which itself would be part of the ultimate meta-syllogism that would need to be satisfied if the offence or defence, is to be made out.

To illustrate the point, we explore the question of whether someone who raises their hand, would satisfy the requirement of a criminal assault that the perpetrator ‘threatened’ to apply force. A law student who is unfamiliar with the nuances of factors analysis, might argue:

Rule: The raising of a hand¹⁶ can satisfy the requirements of a ‘threat’ to apply force – *Hall v Fonceca*.

Application: John raised his hand in Peter’s face.¹⁷

It is incorrect to disaggregate the aspect of *the raising of a hand* for separate treatment as though it was a separate rule. The fundamental legal proposition, namely that the raising of a hand *can* satisfy the requirement of a threat, in the sense of showing the possibility that it might so satisfy that requirement, is at least right and underpins the fact that, in order for the rule in *Hall v Fonceca* to be correctly addressed, the entirety of all the other considerations (to use the term neutrally) would need to be explored also. Since the existence of a threat can only be inferred by an analysis of a combination of actions and attitude,¹⁸ it would be a significant error to try to quarantine one relevant consideration that is regarded as significant, namely whether the very raising of the hand alone might satisfy the requirements of a ‘threat’. The corollary is that it is not an ‘element’ of the offence, and cannot be treated in the same fashion as though it was by attracting its own mini-syllogistic vessel.

If some knowledge is assumed, the law student may likely explore the other factors which may constitute this element, as explained in *Fonceca* itself, namely that the inference of a ‘threat’ might be made from a combination of actions and attitude. The primary point here is that damage is already done by the attempt to disaggregate from the whole of the discussion, and to treat it as a stand-alone ‘element’ (whether the raising of a hand might constitute a threat), and

15 Gardner, above n 10, 47.

16 A Western Australian commentator might, additionally, be aware that, separately, there is a requirement that the threat be by way of bodily gesture. We discuss this element separately.

17 The prefatory words ‘rule’ and ‘application’ are adopted simply to demonstrate the I-R-A-C foundation of the answer. The flaws in the answer are just as evident without.

18 *Hall v Fonceca* [1983] WAR 309, 314 (‘Fonceca’).

that this damage would already have been caused by a lack of familiarity with the fundamental syllogistic template of the rule structure of the relevant offence, rather than its doctrinal content.

4 CONCLUSION

The fundamental point in this paper is that insisting law students take a strict approach to meta-syllogistic analysis of offences and defences in criminal law, is the clearest way of ensuring that they have a clear understanding of the requirements of the legal doctrine itself. Furthermore, scrupulously teaching the elements of a criminal offence as comprising a series of ‘tests,’ and deconstructing the content of these ‘tests’ into mini-tests or factors as the case actually requires, effectively encourages law students to take a syllogistic and meta-syllogistic approach to problem solving. We suggest that a syllogistic and meta-syllogistic approach helps to minimise the incidence of significant errors.

II I-R-A-C AND THE STUDY OF CRIMINAL LAW

A Introduction

Several logical errors, although not unique to criminal law, find expression in the following specific fallacies which are specific to criminal law: conflating or merging the analysis of several elements of an offence; becoming confused between choices of types of an offence; missing elements of offences because of an incomplete focus on their significance; missing elements because of a premature consideration of defences; and conflating offences with defences.

The adoption of a syllogistic approach enables each element, separately, and as part of the composite whole (namely the meta-syllogism of the offence), to be developed coherently and rigorously. A series of vignettes below show IRAC in a criminal law context, beginning with two law student exam style responses to the first vignette. The next section analyses the two sample answers (and further samples along the way) to illustrate the errors that a proper IRAC step-analysis can help to avoid. The answers and vignette are not real life examples but nonetheless represent a typical law exam scenario and typical law student responses to it. The poor answer is not unique but in the authors’ experiences, relatively rare. Consider the following hypothetical facts:

Facts

Jim has just caught his best friend John in bed with his [Jim’s] girlfriend, Judy. Jim yells at John “You creep. You’re f...king my girlfriend!” Jim then yells incoherently. John, who is quite nimble, gets up and makes a dash for freedom out the window. He gets out and is running down the street. Unfortunately for John, Jim is quite nimble too, and is faster. Jim also exits via the window and chases John down the street. John however is the bigger and stronger of the two. A short while later, John turns and raises his fist as if to punch Jim. Jim flinches before punching John between the eyes. John punches Jim back, breaking Jim’s jaw. Discuss the possible offences and defences for John and Jim above.

The following sample law student answers address two ways in which they might address the issues/elements in what is known as ‘threatening gesture’ assault:

SAMPLE ANSWER #1 (POOR):

Because John has raised his hand in a threatening manner (*Hall v Fonceca*) he obviously intends to make Jim scared, although apprehension does not equate to fear in the victim (*Brady v Schatzel*). So John could hit Jim and he meant to and Jim was not consenting (he was only chasing John because he’d caught him with his girlfriend) so this is a Threatening Gesture Assault. Offence made out. Penalty: 18 months imprisonment.

SAMPLE ANSWER #2 (GOOD):

(For the sake of brevity, the ‘good’ answer only addresses two legal elements).

Issue: Did John threaten to apply force to Jim?

Rule: The whole factual context needs to be considered to determine if any given bodily gesture is threatening. In *Tuberville v Savage* the placing of a hand upon a sword was held not to be ‘threatening’ because of the accompanying words ‘Were it not assize time’. In *Hall v Fonceca*, Fonceca was, ‘by a combination of actions and attitude’ threatening Hall when he raised his hand. They had been involved in a heated argument in a Hockey Club and there had been some degree of antagonism between them. Context adds colour to the gesture.

Application: The context here is one of defensiveness and antagonism. Jim was chasing John down the street, in obvious anger – Jim had caught John sleeping with his girlfriend. John was likely scared of being hit and his apprehension of being hit forms part of the combination of actions and attitude within the meaning of *Hall v Fonceca*. It provides context to what John does next. Then, John raised a fist. A fist is threatening in and of itself, and the facts are somewhat different from the situation in *Tuberville* to alleviate that threat. On the contrary, when considered in the totality of the circumstances, there would be every indication that the raising of the fist was antagonistic or at least defensive, and threatening.

Conclusion: The element of a ‘threat’ to apply force is satisfied.

Issue: Did John’s act comprise a bodily act or gesture?”

Rule: Raising a hand can be a bodily act or gesture (*Hall v Fonceca*). Putting a hand on a sword hilt is also a bodily act or gesture (*Tuberville*).

Application: Here John raised his fist. That is part of his body. It is a bodily act.

Conclusion: The requirement of a bodily act or gesture is satisfied.

These sample answers demonstrate how a syllogistic analysis can help prevent doctrinally significant flaws and improve answers by helping law students to: not conflate elements, ask the right question instead of begging the question, conclude at the right time, not omit elements and not consider defences prematurely.

B *Exposition of doctrinally specific flaws and strengths*

1 INTRODUCTION

The doctrinal content for the resolution of the above vignette is based on the law of ‘Threatening Gesture Assault’, (or simply ‘assault’ at common law) which was deliberately selected due to the multiplicity of its elements, namely:¹⁹

1. Threatened application of force from one person to another;
2. By bodily act or gesture;
3. Actual or apparent ability to effect purpose; and
4. Without that other person’s consent.²⁰

Even without training either in syllogistic logic or criminal law, we suggest that the reader should be able to discern that sample answer #2 is ‘better’ simply by virtue of its improved organisation. An understanding of syllogistic logic combined with some understanding of the

19 Western Australia’s *The Criminal Code* s222. For an analysis of how s222 breaks down into three forms of assault, and some useful short-hand descriptors, see Nisbet, above n 5.

20 To that list we can add a further issue, analogous to an element (and which is an element at common law): with intent to create apprehension in the victim. See Nisbet, above n 5, 54.

doctrinal content of the answer highlights the errors that can be avoided and the strength that can be garnered, by reference to the vignette above.

2 *Conflating Elements*

The pivotal fact in the vignette is that John turns and raises his fist as if to punch Jim. Among other logical missteps, however, the student in the first sample has conflated the elements of the need for a bodily act or gesture, with the element that the gesture be threatening. Mere words or actions cannot constitute an assault.²¹ This can matter in cases where there is simply a threat over the phone or by email, for example. Thus, rigour requires that the two be separated and addressed as two separate elements in IRAC analysis.

When the ‘poor’ answer is compared to the ‘good’ one, the reason why the poor answer is indeed ‘poor’ becomes even more evident: by failing strictly to separate the treatment of the various elements, the examiner cannot tell which element is being addressed, leading to their inability to discern: firstly, if the law student is aware what these elements are, and secondly, if the logical links between the law and its application leading to the inference that the element (or step) are satisfied or otherwise.

In the second answer we see much greater clarity of thought. A raising of a fist could readily be assumed to be threatening, but there are cases where it might not be. These were addressed and dealt with explicitly. The second issue comprised in the physical act of raising the fist was dealt with very succinctly. This is appropriate given the matter is straightforward. However, treating it separately and in IRAC form is a sure way to avoid the errors in the first example – and, at the same time, to ensure that it was indeed both addressed and shown to have been so addressed.

An understanding of syllogistic logic, and of the underlying ‘test’ structure or of ‘step analysis’, provides a ready explanation for these difficulties. That is not to say that an appreciation of I-R-A-C or of syllogistic logic will necessarily eliminate the errors, as a strong understanding of the doctrinal content is yet required. But presenting the doctrine within the framework of syllogistic logic compels law students to confront the various rule structures in their stark mini-syllogistic framework. Law students are thus presented with a platform from which the real work can begin, with a view to creating better answers.

This argument is reinforced with further illustrations using the same vignette, but with a focus on Jim’s punching the victim, John, between the eyes. Prima facie, there is an obvious Force Assault, or battery at common law, as Jim *punches John between the eyes*. The Force Assault is obvious, and its elements appear simple enough. And yet it is not uncommon for law students to move between the forms of assault and confuse the analysis, by insidiously weaving into their analyses, irrelevant elements of other forms of assault. The following sample answer demonstrates that whilst mistakes of this nature can be made, expressing it in its proper syllogistic form at least enables the law teacher to identify the problem quickly.

SAMPLE ANSWER #3:

Offence: Common assault s313

Issue: Application of force

Rule: s222

Application: [repetition of s222 in full but simply with reference to the actors]

Conclusion: Jim applied force to John.

21 Western Australia’s *The Criminal Code* s222. Other elements such as a bodily act or gesture must also be present.

Issue: Lack of consent

Rule: s222, s223.

Application: If there's a lack of consent then it's an assault.

Conclusion: John did not consent to being assaulted because no one consents to that.

Issue: Threatening gesture

Rule: there must be bodily act that is threatening

Application: To punch John Jim must have first raised his fist and moved that fist toward John.

Conclusion: Element met. Assault offence made out.

A consideration of actual application of force places the analysis firmly in the realm of Force Assault. The third 'issue' thus, quite plainly, has no place in the analysis.²² No supportable conclusion concerning the 'issue' of Force Assault can be derived. Analysed in this stark syllogistic form, the error is apparent. Immanuel Kant famously observed that '[f]allacious and misleading arguments are most easily detected if set out in correct syllogistic form.'²³

It is possible that if the law student was taught criminal law within the strict framework of syllogistic logic and appreciated that each 'element' of the offence *must* find expression in the formulaic 'test' or 'step' within the syllogism template, then they would be less likely to commit the error. They would *still* need to know the doctrinal content of the criminal offence to give a supportable answer. An understanding of syllogistic logic or IRAC, is not claimed to be a panacea for law student problems, but it does give them a foundation on which their understanding of doctrine can be developed, and eventually provide a template to accurately express their answer.

3 *Begging The Question*

Begging the question may be explained as circular reasoning 'where the inference takes several steps'.²⁴ In sample answer #3, the author has at least accurately identified the issue/element. However, they have gone on simply to recite the relevant provision in the application, in the guise of the minor premise. No supportable process of *deduction* has in truth taken place: the 'answer' simply begs the question.

This is admittedly not an error which is peculiar to the study of criminal law, but it appears to be prevalent in law student answers. The authors' experiences are based in a jurisdiction where legal elements of a criminal offence are often comprehensively defined in statute. Perhaps this is why law students are sometimes predisposed toward a mere restatement of the whole statutory definition – without any indication of authentic analysis.

Sample answer #3 presents a montage of errors that are different in nature, but emanate from the same syllogistic flaw of not recognising the relevant elements of the offence, here Force Assault. The 'Rule' in truth does not provide any *relevant* major premise, but rather authority for a rule which might be relevant but it is not, since as discussed earlier, 'threatening gesture' is not an element of Force Assault in the first place. Without more, the 'application' simply misses the point.

22 The definition of assault in Western Australia's *The Criminal Code* s222 can usefully be deconstructed into three forms of assault. Force Assault is akin to battery at common law. See Nisbet, above n 5, 50-51.

23 <<http://www.wordsandquotes.com/quote/fallacious-and-misleading-arguments-are-most-easi-emmanuel-kant-6189>>. See also Yin and Desierto, above n 1, 5.

24 Ruggero Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*, (National Institute for Trial Advocacy, 3rd ed, 1997) 46.

4 *Not Begging The Question – Asking The Right Question*

The following is an illustration of an improved answer, which is cognisant of the doctrine and the syllogistic template of the answer (again, addressing each element/step sequentially and in somewhat abbreviated form).

Sample answer #4:

Issue 1: Did Jim apply force?

Rule: Striking another is an application of force: s222.

Application: Jim punched John. This is clearly a strike.

Conclusion: Element met.

Issue 2: Did John consent to being struck?

Rule: Consent in the codes is a question of fact. People can consent to violence, including high levels of violence: *Lergesner v Carroll*. Determining the degree of violence consented to is difficult, and will usually be implied. However difficult it may be to determine, the facts of each case will demonstrate the point at which the violence consented to was surpassed. So in Raabe, the victim entered the fray. The assailant, Raabe, was holding a fence paling. The assailant was holding the fence paling when the victim approached him, in the context of an ongoing fight. The victim here clearly consented to being struck with the fence paling.

Application: Here John didn't enter the fray so much as create it by pretending to hit Jim, and making Jim baulk. Thus John might be said to have consented to the assault. However, it all started with Jim chasing John. John was actively trying to get away. He turned and arguably showed some restraint. On this analysis, John did not create the fray, but Jim did. Consent is not always easy to determine, but on these facts, tentatively, it seems there was no consent.

Conclusion: John did not consent to being struck. Consent was absent to his being struck.

Overall Conclusion on offence: All the elements of common assault are satisfied and Jim assaulted John.

In this answer, the law student has properly understood the elements and the rules. The rules on consent may vary across jurisdictions, but the reader will nonetheless be readily able to see how the law student has logically applied them to the facts. Indeed, a difference in law throws the benefits of an IRAC structure into sharper relief. Each component of the analysis is clear, making it far easier for a reader to follow the reasoning.

The content of a well-structured answer will also demonstrate starkly, the recognition of the areas of authentic controversy. It is evident that *consent* is a hotly contested issue, but the question of the application of force appears to be relatively uncontroversial – and the recognition of these is readily disclosed by the relative attention paid to each.

On the other hand, although relatively uncontroversial, the question of the application of force cannot be omitted, as it remains an integral element of the offence. The presentation of the argument within the template of the syllogism, with the clear recognition of the various elements of an offence as constituting the issues to be addressed within the vessel of a meta-syllogism, empowers law students to keep their eye on the ball, namely the need to ensure that all the constituent elements of a relevant offence are satisfied. The IRAC structure, properly followed as meta-syllogism, ensured consent was not missed as a critically important issue. After a complete analysis, a final conclusion on the offence can be drawn, but not before.

We earlier introduced 'step' analysis, which we explained as being very similar to the 'test'. By varying the facts slightly, the similarity and dissimilarities between the two become starkly evident. Say, for example, there is a hotly contested question of fact, with the prosecution's

arguing that Jim, by whatever means, did strike John, and the defence arguing that the parties had a heated argument and that Jim at worst, raised his voice and his fist but did not strike John. Assuming for the sake of argument that the defendant's version could confidently be accepted as accurate, then a good understanding of 'step' analysis will mean that whatever other offence Jim *might* have committed, he did not *apply force*. In this scenario, by understanding the nuances both of the syllogistic form and the doctrinal content of the offence, we realise we cannot get to the figurative second base.

5 *Step-Analysis – Concluding At The Right Time*

Sample answer #4 further serves to illustrate the usefulness of the template by using an example which the first-year criminal law lecturer will likely be familiar with. Without understanding how the offence of an 'assault' needs to be deconstructed into its fundamental elemental form, a law student might quite illogically comment on the fact of consent to the 'assault', rather than to a 'strike'. This would be inappropriate as the absence of consent is but a step/test to be determined before an inference can be expressed as to the fact of 'assault' – and it is only when the absence of consent is established that the fact of assault is satisfied.

6 *Omitting Elements*

We now focus on a related aspect of syllogistic analysis, but sufficiently distinct to deserve its own dedicated analysis, namely of an answer which omits elements of an offence. Entirely consistent with its syllogistic meaning, an element of an offence would be readily understood by a teacher of criminal law to be one of the mandatory components which must be established for an offence to be committed. The defence bears no burden with respect to elements. Rather, the prosecution must prove all the elements beyond reasonable doubt.²⁵ Thus, missing an element represents a critical failing. Analysing answer #1 in response to the Jim, Judy and John vignette above, the law student's answer conflates the elements of the need for a bodily act or gesture, with the element that the gesture be threatening. By doing this, the law student's answer effectively misses both elements by failing to show the logical links that connect the requirements of each element and their application to the facts.

*R v BBD*²⁶ presents a particularly stark real life manifestation of this error. In *BBD*, grandparents were babysitting their grandchildren who were aged nine and half years old and seven years old. The grandfather taught the boys how to use the forklift. The grandmother had been suffering from a debilitating bout of the flu. The grandfather left the grandmother to supervise the boys on her own. The grandmother had a bout of diarrhoea and had to duck inside the house to go to the toilet. When she went back outside, the forklift had tipped over. Tragically, the seven year old boy was trapped underneath the forklift and suffered terrible injuries. The grandmother was charged with unlawfully causing grievous bodily harm. The legal issue presented at trial, was criminal negligence. The forklift was a dangerous thing and the grandmother was assumed to be in charge of it. The grandmother (harshly, in the authors' view) was found guilty at first instance. On appeal, the conviction was quashed and an acquittal entered. The following comment in the judgment was obiter, but it is particularly telling for the purposes of this article. Justice MacKenzie noted that there is a

risk in assuming uncritically that a dangerous thing is in the charge of or under the control of a person merely because the person is in a position of authority to direct the person in actual physical possession to desist from using the thing in a particular way, or at all.²⁷

²⁵ *Mullen*, 128-129.

²⁶ *R v BBD* [2007] 1 Qd R 478 ('*BBD*').

²⁷ *BBD*, 483.

His Honour was alluding to the fact that counsel had omitted specifically to address the question of whether the grandmother was in charge of the forklift. The omission could have been a fatal hiatus in the analysis. The likelihood of this error would have been significantly diminished if counsel had been at least more cognisant of the fact that the ultimate satisfaction of the issue of whether an offence had been committed, demanded in turn the satisfaction of each of its elements, including the question of whether the grandmother was ‘in charge’ of the forklift. The adoption of a strictly meta-syllogistic approach to teaching criminal law, with the deconstruction of every offence into its constituent elements, arguably promotes rigour and caution, and reduces the chance of mistakes of precisely this nature.

7 *Prematurely Considering Defences*

A very common manifestation of the failure to adopt a meta-syllogistic approach and thereby deal with each element of an offence sequentially, is to adopt a defence prematurely before the elements of an offence (for which the prosecution has the burden of proof), have been analysed exhaustively. From a criminal law teacher’s perspective, law students frequently jump to consider self-defence prematurely and gloss over the issue of consent. Consent is a crucial issue in most factual situations in criminal law where self-defence might likewise be raised.

Referring to the vignette above and the answers detailing Force Assault (battery), sample answer #2 prevents any possibility of error. For law students, arguing the defendant’s position in a balanced way, places due context around consent, and means they have no doubt that their answer addresses all elements of the offence before moving onto explore any relevant *defences*.

Another common example, likely familiar to first year criminal law lecturers, arises in the context of stealing offences, which have an element of intent to permanently deprive the owner of the property.²⁸ The defence of mistake, requires there to be a positive mistake, meaning that an accused must have taken the time to form an actual view of the state of things. Inadvertence or even due diligence is not sufficient.²⁹ In a scenario where a person might have ‘bought’ a drink, but walks away forgetting to pay, it is the element of intent that should be the focus.³⁰ Mistake operates imperfectly and is quite unnecessary in this context; yet it is often addressed prematurely. So too with drug offences and possession, possession imports the element of knowledge which must be proved first.³¹ If it cannot be proved, there is no need for mistake.

III CONCLUSION

Meta-syllogistic expression exposes flaws in analysis and promotes law student learning. The exposed flaws make it easier for law teachers to reach law students in their doctrinal area, including criminal law. Meta-syllogistic expression is synonymous with IRAC, and step-analysis or the syllogistic ‘test’. In criminal law, the elements of the offence, and matters analogous to elements, form the issues. The rules contain the detail of the element, taken from cases and legislation. Some difficult questions can arise in practice about the content of the rule, but at law student level it is clear that more detail in the rule prevents the appearance of undesirable flaws in reasoning. Whilst IRAC has flow on benefits to good analysis, its primary benefit is in the criminal law context, and coupled with step-analysis, it can help to minimise the risk of: missing issues, conflating elements of offences with other elements of offences or defences, confusion between types of offences, and provides the background skills necessary to inform law students of the difficult choices which they may face later in their careers.

28 *The Criminal Code Act, (WA)* s371(2)(a).

29 *G J Coles v Goldsworthy* [1985] WAR 183,187.

30 See also *Woolmington*, 481, and the muddle therein between intent and accident.

31 *Criminal Code Act*, above n 28, s 371.

AN INTERNATIONAL EXPERIENCE FOR LAW STUDENTS: PREPARING, PLANNING AND PASTORAL CARE

*Lara Pratt**

I INTRODUCTION: SOCIAL-JUSTICE FOCUSED INTERNATIONALISATION

In January 2017, the Fremantle School of Law at the University of Notre Dame Australia (the Law School) ran their first international experiential elective Unit.¹ This Unit involved 16 law student ('student') participants and two academic supervisors, and was created as an initiative to improve the internationalisation of the curriculum in a manner compatible with the Law School's mission of providing legal education which emphasises 'commitment to social justice, professional ethics and community service as the very foundation of the practice of law'.² The Unit focused on giving law students the opportunity to engage with individuals and organisations in Phnom Penh, Cambodia, which are directly involved in law and justice. Over a two-week period, the students and academic supervisors visited Cambodian courts and Non-Governmental Organisations ('NGOs') with the second week involving an externship³ with a Cambodian legal-service provider.

The benefits of internationalising the curricula of Australian law degrees have been well documented.⁴ It is becoming increasingly agreed that 'Law schools cannot stand still holding on to academic tradition and mindsets while being outpaced by global events that have significant implications for the development of law and legal services.'⁵ Although 'internationalisation' remains an imprecise concept,⁶ a law-centred and student-centred approach to internationalisation must include adapting a law school's curricula so that students engage with legal issues beyond Australia.⁷ There is no single way to achieve this. Australian Law Schools have created

* BA/LLB (Hons) (Macq), PhD (Macq), Grad Cert Uni. Teaching (UNDA). Senior Lecturer and Assistant Dean at the School of Law, University of Notre Dame Australia (Fremantle Campus)

1 The Law School has previously participated in international moot competitions for which students could gain academic credit. This Unit was run as "Law in Context" and, in future will be "Law in Context (International)".

2 School of Law, *University of Notre Dame Australia*. <<http://www.nd.edu.au/fremantle/schools/law/objects.shtml>>

3 The term 'externship' is preferred to 'internship' as the experience is wholly supervised by Law School staff and is offered as a formalised (albeit elective) part of the study program.

4 See eg, Vai Io Lo, 'Before Competition and Beyond Complacency - the Internationalisation of Legal Education in Australia' (2012) 22(1-2) *Legal Education Review* 3; John A. Barrett Jr., 'International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students' (1997) 31(3) *The International Lawyer* 845.

5 Duncan Bentley and Joan Squelch, 'Internationalising the Australian law curriculum for enhanced global legal practice' (Final Report, Office of Learning and Teaching, Curtin University, 2012), 21-45.

6 Ibid.

7 Michael Coper, 'Law Schools and Legal Education: What is Really Important? (Legal Education for a Global Community, Australasian Law Teachers Association Conference 2012, University of Sydney Law School; ANU College of Law Research Paper No. 12-34), 4.

opportunities to engage with the global legal community directly⁸ – including: short term ‘classroom’ experiences in foreign jurisdictions,⁹ individual students gaining academic credit for interning with an international NGO combined with University support and assessment,¹⁰ and long term study abroad experiences where students spend one to two semesters participating in ordinary University life overseas.¹¹ However, a 2012 Report approved by the Council of Australia Law Deans does provide some guidance for law degree curriculum reform.¹² The Law School’s creation of a short-term experiential Unit was intended to combine elements of the *Aggregation Approach* (‘separate “internationalised” or “transnational” subjects/units’)¹³ with the *Immersion Approach* (‘studying in different jurisdictions’).¹⁴

A two week¹⁵ experience can only meet the goals of the Immersion Approach to a limited degree. The Immersion Approach aims to give students a ‘high level of international competence, expertise and experience, which may allow law graduates to practise in multiple jurisdictions.’¹⁶ The Cambodia immersion experience seeks to gain the benefits of international immersion, while deferring to the practical realities of students’ actual circumstances; committing to a full semester overseas is financially burdensome and can require the deferment of other degree requirements, thus potentially delaying completion of the degree. However, exposing students to law in a foreign culture that is regarded economically as a ‘developing country’ in which the tragedy of genocide is a feature of its not-so-distant past, and where marginalised groups

8 For a summary of Australian University’s various international options as at 2012, see for example, Vai Io Lo, ‘Before Competition and Beyond Complacency - the Internationalisation of Legal Education in Australia’ (2012) 22(1) *Legal Education Review* 3, 8-12; for a broader comment regarding US Law Schools see for example, Janes R Maxeiner, ‘Learning from others: sustaining the internationalization and globalization of U.S. law school curriculums’ (2008) 35(1) *Fordham International Law Journal* 32, 34; John A. Barrett Jr., ‘International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students’ (1997) 31(3) *The International Lawyer* 845.

9 International classroom experiences tend to include traditional face-to-face teaching combined with visits to sites and organisations of relevance to the area of law being studied. See, eg, Murdoch University’s ‘International Human Rights Program’ <<http://www.murdoch.edu.au/School-of-Law/International-Programs/International-Human-Rights-Law-Program/>>; Curtin University’s ‘Ghent European Summer Law Program’ <<http://business.curtin.edu.au/schools-and-departments/law/current-students/ghent-summer-program/>>; Flinders University recently ran ‘Indonesia’s Law and Legal System: an Introduction’ <<https://www.flinders.edu.au/webapps/stusys/index.cfm/topic/main?topic=LLAW3274&year=2018>> .

10 See, eg, Macquarie University’s PACE program <<http://www.handbook.mq.edu.au/2017/Units/UGUnit/LAWS452>>; Adelaide University allows students to undertake international internships for credit as part of their ‘Human Rights Internship Programme’ <<https://www.adelaide.edu.au/course-outlines/105081/1/summer/>>.

11 Many Australian Universities offer these types of experiences. The Law School at the University of Notre Dame Australia, for example, has partnerships with the Catholic University of Lyon (France) and Maynooth University (See eg. <<https://nd.edu.au/future-students/study-abroad-students/outbound/destinations-europe>>

12 Bentley and Squelch, above n 5, which is summarised and disseminated by the Council of Australian Law Deans (CALD) <<http://curriculum.cald.asn.au/internationalising-the-australian-law-curriculum/>>.

13 Bentley and Squelch above n 5, 71.

14 Ibid.

15 The 2018 Immersion will run for two and half weeks.

16 Bentley and Squelch above n 5, 73.

face significant hurdles to accessing basic legal services,¹⁷ or where there remain significant institutional barriers to genuinely achieving justice,¹⁸ - opens the door to students becoming 'global citizens'.¹⁹

Visiting Cambodia also supports the view that it is important for Australian education to engage with our neighbours in the Asia-Pacific region.²⁰ Australia is developing increasingly close ties with our Asian neighbours; the Australia - ASEAN relationship for example, demonstrates the perceived importance of Australian maintaining trade and foreign aid ties, with Asia. The Department of Foreign Affairs and Trade ('DFAT') identifies institutional and individual human relationships within Asia, as a key aim of its New Colombo Plan ('NCP'). This paper acknowledges the Law School's immense gratitude to DFAT for giving 16 NCP Short Term Mobility financial grants to support our students' trip to Cambodia.²¹

Accordingly, this paper sets out three key areas which were given attention when planning the Cambodia Unit. Part I explains how the Unit was designed and the preparatory materials given to students. Part II explains the process that was used to select students to participate in the Unit, and the selection criteria that was and was not, prioritised in the selection process. Part III explains the steps taken to ensure pastoral care for students: to support interpersonal relationships and to prepare them to face potentially emotionally confronting experiences in Phnom Penh Cambodia. The conclusion Part IV explains lessons learned overall about creating an international immersion of this kind.

II EXPERIENTIAL LAW UNIT DESIGN: ACCOMMODATING THE UNEXPECTED

This Experiential Unit's creation posed particular challenges for teaching law in a non-traditional law school classroom setting where an Australian law teacher usually has a high degree of control over a Unit's content and learning activities. Furthermore, whilst the legal rules and problems covered in a traditional Australian law degree Unit tend to focus on presenting a particular body of law in a coherent and structured way, the Law School's Experiential Unit *did not lend itself to this type of learning experience*.

As Mitchell et al explain, by replacing a traditional law classroom setting with an experiential unit, students can '[see] what lawyers do on a day-to-day basis, and experiencing first-hand some of the challenges and decisions that are an inevitable part of a professional role, students

17 Challenges that marginalised groups have in accessing justice in Cambodia have been extensively researched See, eg, Siena Anstis, 'Access to Justice in Cambodia: The Experience of Grassroots Networks in Land Rights Issues' (Legal Working Paper Series on Legal Empowerment for Sustainable Development, Centre for International Sustainable Development Law, 2012) <<http://cisdl.org/public/docs/Antis.pdf>>; Velibor Popovic and Claudia Melim-McLeod, 'Access to Justice in Cambodia' (Project Assessment Report, UNDP, May 2009) <https://info.undp.org/docs/pdc/Documents/KHM/00042256_Final%20Evaluation%20Report%202009.pdf>

18 See, eg, Katherine Bricknell, 'Clouding the Judgment of Domestic Violence Law: Victim Blaming by Institutional Stakeholders in Cambodia' (2017) 32(9) *Journal of Interpersonal Violence*

19 Jan M. Smits, 'European legal education, or: how to prepare students for global citizenship?' (2011) *Legal Education Digest* 19; William I. Brustein, 'The Global Campus: Challenges and Opportunities for Higher Education in North America' (2007) 11(3/4) *Journal of Studies in International Education* 382, 382.

20 David T Hill, 'An Asian Century Education: Why students need equal access to overseas study', *The Conversation* (17 June 2013) <<https://theconversation.com/an-asian-century-education-why-students-need-equal-access-to-overseas-study-15145>>; Simon Marginson, 'Asian Century White Paper sets tricky targets for Universities' *The Conversation* (29 October 2012) <<https://theconversation.com/asian-century-white-paper-sets-tricky-targets-for-universities-10365>>.

21 New Colombo Plan, *Department of Foreign Affairs and Trade* <<http://dfat.gov.au/people/new-colombo-plan/mobility-program/pages/mobility-program.aspx>>

gain a rich insight into the skills required to perform such roles and also the responsibilities they entail.²² Work Integrated Learning (WIL) is widely accepted as benefiting students by allowing them to link theory (in the classroom), with the legal practice (in the real world) of law.²³ The particular legal issues explored during a WIL placement, are determined by the needs of the workplace.²⁴ Students' experiences 'can vary from brief participant observation in a court, law office, administrative agency or government office, to actual client representation at trial or appellate level, for a full semester or longer, working full time or part time'.²⁵ These types of work-based legal practice experiences have the potential to enrich student experiences, but inevitably pose pedagogical challenges for legal academics assessing students' actual achievement in units where external parties (the host legal workplace) controls the content and activities presented to students.²⁶

During the Unit's first week, students did not engage in hands-on legal practice work experience, and instead visited several NGOs to observe their work, and have the opportunity to ask questions and learn directly from those who are advocating for justice in Cambodia. The Unit's second week allowed students to engage in more substantive legal tasks for NGOs, including undertaking legal research and interviewing clients. However before arriving in Cambodia, little information was given to students as to exactly what experiences they were likely to have. Unpredictability is a necessary feature of experiential units, and Unit planning is further complicated when legal topics that students may be asked to address, range from domestic tax law to the procedure of hybrid tribunals prosecuting international crimes.

To best foster a diversity of legal practice experience, the Unit's learning outcomes ('ULOs') were necessarily broad, focusing on students: developing more sophisticated understanding of the challenges of 'law in practice' rather than 'law in the classroom'; improving their decision-making and judgment skills; improving their 'lawyering skills'; gaining a practical understanding of ethical challenges facing practitioners and reflecting on the nature of law and legal practice. The next section considers the assessment structure (participation and reflection) and preparatory readings for the Unit, where the specific content and activities were unpredictable.

A Assessment

The assessment's first part was participation. Ideally, NGO supervisors would be involved in students' assessment. However, this was not practical as requesting a formal assessment from the NGOs would impose an unwarranted burden on these already overworked non-profit agencies. Instead, the two academic supervisors who accompanied the students to Cambodia, graded participation. Students were marked based on: the way in which they engaged in the various NGO workshops, the questions they posed (and answers they offered) to the Court officials

22 Andrew Mitchell, Bruce Oswald, Tania Voon and Wendy Larcombe, 'Education in the Field: A Case Study of Experiential Learning in International Law' (2011) (1-2)21 *Legal Education Review* 69, 72.

23 For a review of the literature in this area see, eg, Judith McNamara, 'A Collaborative Model for Learning and Assessment of Legal Placements' (Paper presented at the Conference on Collaborative Education and Work Integrated Learning, Vancouver, Canada, 23–26 June 2009) <<http://www.waceinc.org/papers/vancouver/Australia/McNamara.pdf>>.

24 See, eg, Kelley Burton, 'A Criterion-referenced Assessment Rubric on Reflective Practice Designed with Clinical Legal Education in Mind' (2015) 8 *Journal of the Australasian Law Teachers Association* 3, 4-5.

25 Kathy Mack, 'Bringing Clinical Learning into a Conventional Classroom' (1993) 4(1) *Legal Education Review* 89 <<http://www.austlii.edu.au/au/journals/LegEdRev/1993/4.html>>

26 Wendy Larcombe, 'Can Assessment Policies Play a Role in Promoting Student Engagement in Law?' (2009) 2 *Journal of the Australasian Law Teachers Association* 197, 201.

after viewing court proceedings, their professionalism and quality of work when participating in client meetings, and the quality of the research they undertook as directed by the NGOs. For the latter, research topics included: the incoming NGO law in Cambodia, and the treatment of women in Cambodian labour law as well as funding opportunities for legal service providers.²⁷

Students tended to already have experience with class participation assessments in the traditional classroom setting. As students were selected based on their perceived enthusiasm for social justice and international legal issues, this component, unsurprisingly, did not require significant explanation to students.²⁸ Although the academic staff had pre-prepared some questions to facilitate discussion,²⁹ the robust discussion and debate naturally occurred without the need for prompting.

The more challenging component of the assessment involved the reflective journal. Students were required to complete five or six journal entries of 500 words each, based on a rate of an entry every two to three days, while they were in Cambodia. ‘Reflection’ is perceived by some, to be fundamental to successful ‘work integrated learning’.³⁰ At a basic level, students need to report their thoughts on their Unit experiences.³¹ However, to perform well, students’ journals needed to outline the legal skills they considered they had learned and discuss their personal development.³² The students were advised that their journal should ultimately address what their experience in Cambodia taught them about the core law and justice challenges facing the Cambodian people.³³ Students were also given suggested questions to address for particular activities such as: what ethical issues arose in the placement, and whether there were barriers to the realisation of justice for marginalised groups. However, the questions posed were merely indicative, and students were told clearly that they did not need to try to fit their experiences into answering the questions in order to succeed in the task. Rather, the suggested questions were aimed at prompting students to expressly identify whether, and if so how, they had met the ULOs (such as identifying the particular tasks they undertook and/or considering how the ethical rules governing the Cambodian practitioners compared to the ethical rules for Australian lawyers).

The journal’s ultimate purpose was to ask students to ‘reflect’ on whether, and if so how, participating in this Unit did or did not help them to gain a better understanding of ‘law’. Reflection as a form of assessment in this context is particularly relevant where students are placed in unexpected or uncomfortable situations,³⁴ and are given value-laden questions about the content and effect of applying particular legal rules. Students must then consider their ‘role’ in the legal process, and be open to acknowledging that they may not always have the ‘right’ answer about how to approach any particular problem. Rogers suggests that the ‘[ultimate intent] of reflection is to integrate the understanding gained into one’s experience in order to enable better choices or actions in the future as well to enhance one’s overall effectiveness.’³⁵

27 These were topics that students at one NGO were asked to research as part of their externship.

28 Alex Steel, Julian Laurens, Anna Huggins, ‘Class Participation as a Learning and Assessment Strategy in Law: Facilitating Students’ Engagement, Skills Development and Deep Learning’ (2013) 36(1) *University of New South Wales Law Journal* 30.

29 *Ibid*, 53.

30 McNamara, above n 23.

31 The first level of Ryan’s 4 levels of reflection. See Mary Ryan, ‘The pedagogical balancing act: teaching reflection in higher education’ (2013) 18(2) *Teaching in Higher Education* 144, 147.

32 Tied to the second level of Ryan’s 4 levels of reflection. *Ibid*.

33 Tied to the third level of Ryan’s 4 levels of reflection. *Ibid*.

34 Russell R. Rogers, ‘Reflection in Higher Education: A Concept Analysis’ (2001) 26(1) *Innovative Higher Education* 37, 50.

35 *Ibid*, 41.

Ideally, a reflective assessment would involve some post-Cambodia component once students have returned to Australia when they have had time to process their overseas experience without the pressure of next day activities and travel stress.³⁶ Administrative deadlines meant that students could be given limited time only to revisit their initial impressions in hindsight as part of their formal assessment. Despite the pass/fail grading of the Unit, the students were given extensive assessment feedback on their journals, and all were encouraged (although not required) to participate in an informal, non-assessed de-brief session, approximately one month after returning to Australia to share their Cambodia experience with the Law School staff. Most students drew on their reflective journals when they contributed to a written overview of their Cambodia experience for the Law School's website.³⁷

B *Preparatory Materials*

The literature consistently suggests that encouraging student-directed choice is an effective way to encourage them to take ownership of their studies.³⁸ The two main reasons that students resist engagement with their studies can be summarised as: students being time-poor, and perceiving tasks as not adding value to the unit experience.³⁹ The Law School's Cambodia Unit risked emphasising both of these reasons for students to disengage with their studies due to the unpredictable nature of the NGO tasks, and the Unit's two-week period (with activities scheduled for 12 hours from 7:30am to 7:30pm on some days). This meant that imposing a mandatory reading burden on students would be counter-productive to the Unit's purpose by emphasising reading/theory over experience/practice. The readings risked being irrelevant to the specific legal issues that the NGOs presented to students. Simultaneously, students were required to complete assessment tasks, and the two academic supervisors wanted to prepare students as much as possible, both for the experiences that they were likely to face, and so that they could succeed meeting the criteria of their assessments.

Drawing on the NGOs' known expertise and the set assessment criteria, the reading list was distributed to students approximately two months before departure. The readings were divided into three categories: History and Culture, Legal Issues and Reflective Practice. Students could choose from several options within each category and were given a brief indication of the purpose or context of each reading, as well as guidance about the complexity and length of each reading. This was intended to help students to make informed choices about where best to devote their attention.

The History and Culture category listed readings on Cambodian history and politics. Cambodia's legal system was decimated by the Pol Pot led Khmer Rouge, followed by the Vietnamese-led regime in the 1980s which re-introduced some legal institutions. However, Cambodia's current legal system has largely developed since the 1991 Paris Peace Accords.⁴⁰ Many of the justice issues that the academic staff anticipated the students would face in

36 Kelley Burton and Judith McNamara, 'Assessing Reflection Skills in Law Using Criterion' (2009) 19(1) *Legal Education Review* 171 <<http://www.austlii.edu.au/au/journals/LegEdRev/2009/8.html>>; Ryan, above n 31.

37 Fremantle Law School's Inaugural International Immersion – Phnom Penh 2017, University of Notre Dame Australia <<http://www.nd.edu.au/fremantle/schools/law/events/cambodia-2017>>

38 John Biggs & Catherine Tang, *Teaching for Quality Learning at University* (McGraw, 2011), 138-150; 174-178.

39 Liesel Spencer, 'Reading Law: Motivating Digital Natives to 'Do the Readings'' (2013) 21(1) *Legal Education Review* 177, 186; see also Anne MacDuff & Lynn Du Moulin, 'New Challenges in Legal Education: Developing an Appropriate Response to the issue of Student Workload' 18 *Legal Education* 179.

40 Catherine Morris, 'Justice Inverted' in Katherine Bricknell & Simon Springer (eds), *The Handbook of Contemporary Cambodia* (Routledge, 2016).

Cambodia, were directly or indirectly linked to the legacy left by the war and genocide of the Pol Pot era. Therefore, while students might find the hardships faced by Cambodians emotionally confronting, or may be frustrated by the barriers that the NGOs faced in achieving justice for their clients, the readings were intended to put the law and legal system in a historic and political context.⁴¹ Students were asked to choose from a selection of memoirs by survivors of the Khmer Rouge regime⁴² and researched commentaries.⁴³

This reading category attracted the greatest discussion among the students. The students independently sought and shared complementary materials, including fictional accounts⁴⁴ and podcasts on Cambodian culture.⁴⁵ Students visited the Tuol Sleng Genocide Museum (former S-21 Prison) and the Cheung Ek Killing Fields on their first day in Cambodia, and also met survivors of the Khmer Rouge atrocities. Written copies of survivor testimonies⁴⁶ were purchased by some students and shared with the group and academic supervisors; they will likely be included on future reading lists.

Creating the second readings category was more problematic because only some areas of law were certain to be covered during the trip, but many of these topics were guaranteed only inasmuch as students would be undertaking a brief visit to a particular NGO or court. Consequently, providing content-based materials in advance of the trip risked being unhelpful, or helpful only for one part-day activity.

The lack of predictable content is a recognised problem in experiential units,⁴⁷ which was exacerbated by the potentially diverse topics to be addressed. Rather than leave students with no direction, students were asked to engage with one or two readings on *particular* topics they were likely to encounter, such as: the Khmer Rouge Tribunal⁴⁸, access to justice,⁴⁹ land rights,⁵⁰ and child protection.⁵¹ These issues focused on social justice and the ethical issues tied to the legal issues. Although this approach meant that not all students had completed a specific topic-based reading for each visit to an NGO or Court, it appeared to have a ‘democratising effect’ because students were in a better position to ask questions of NGO and Court staff, and lead

41 Relating to Ryan’s 4 levels of reflection. See Ryan, above n 31.

42 Luong Ung, *First they Killed My Father* (Harper, 2006); Dith Pran, (author), DePaul, Kim (ed), *Children of Cambodia’s Killing Fields: Memoirs by Survivors* (Yale, 1999)

43 Philip Short, *Pol Pot: Anatomy of a Nightmare* (John McRae, 2005); Henry Kamm, *Cambodia: Report from a Stricken Land* (Arcade, 1998).

44 Patricia McCormick, *Never Fall Down* (Balzer & Bay, 2012)

45 *The Songwriter*, 360 Documentaries (ABC, 28 December 2014). <<http://www.abc.net.au/radionational/programs/360/the-songwriter/5905132>>

46 Huy Vannak, *Bou Meng: A Survivor from Khmer Rouge Prison S-21* (DC-Cam, 2010); Chum Mey, *Survivor: The triumph of an ordinary man in the Khmer Rouge Genocide* (Translation by Sim Sorya and Kimsroy Sokvisal) (DC-Cam, 2012).

47 Burton, above n 24.

48 Pdraig McAuliffe, ‘The Limits of Co-operation and Judicial Independence: Resolving the Question of ‘How Low Do You Go?’ in the Khmer Rouge Trials’ Bicephalous Prosecution’, (2010) 29(2) *University of Tasmania Law Review* 110; Lucy Keller, ‘Cambodia Conflicts (Kampuchea)’ (June 2013) *Max Planck Encyclopaedia of Public International Law*; Paul Wilson, ‘Observations of the Cambodian Trial of ‘Duch’’ (2011) 22(3) *Current Issues in Criminal Justice* 473.

49 Christoph Sperfeldt, Oeung Jeudy, Daniel Hong, ‘Legal Aid Services in Cambodia’ (Report of a Survey among Legal Aid Providers, Cambodian Human Rights Action Committee, November 2010).

50 Suyheang Kry, ‘The Boeung Kak Development Project: For Whom and For What’ (2014) 3 *Cambodia Law and Policy Journal* 1; ‘Boeung Kak Lake’, *Cambodian League for the Promotion and Defence of Human Rights*, <http://www.licadho-cambodia.org/tag/boeung_kak_lake>.

51 Melissa Curley, ‘Combating Child Sex Tourism in South-east Asia: Law Enforcement Cooperation and Civil Society Partnerships’ (2014) 14(2) *Journal of Law and Society* 283.

discussion depending on the topics on which they had focused in their readings – thus giving them all a chance to participate. Additionally, students were encouraged to use their readings to inform their reflective journal entries, and each of the readings related to *at least* one experience that students could include in their journals.

While the readings assisted participation in the first week of visits, they had limited overall assistance for the week-long externship experience. The NGOs with which students spent a week, were more likely to provide students with their own relevant materials after arrival in Cambodia, or they requested students to research specific legal topics that had not been specified in advance. Consequently, some students were unlikely to have gained much substantive overall benefit from undertaking this category of readings.

The final readings category was intended to direct students for the assessment by including readings on the purported benefits of reflective practice⁵² and clinical legal education.⁵³ As has already been addressed, students were likely to already be open to self-reflection, but it was essential that students who may not have engaged in formalised university assessed reflection, were guided towards the intended educational purposes of the reflective process, and to understand how to succeed in achieving the Unit's desired outcomes.⁵⁴

The readings appear to have been, by and large, effective in achieving the outcome of giving students diverse options; they will be maintained when the Unit runs again, as will the three categories of reading (background, law-specific and assessment-related). However, a greater emphasis will be given to the contextual and background readings, which appeared to be more useful in encouraging understanding and empathy with the Cambodian experience. Although students will still be encouraged to choose different topic-based readings, more advice will be given to students in future, about the potential role that the readings have in their overall experience so that they can make more informed decisions about preparation.

III SELECTION PROCESS: SOCIAL JUSTICE VS ACADEMIC ACHIEVEMENT

The Law School received approximately double the number of applications than there were available student places in the Unit. The applications were very impressive and selecting participants was a difficult process. The selection process was designed to mirror an internship application process. Students were asked to give their curriculum vitae and a cover-letter that explained their suitability for participation. All applicants were then interviewed by a two-person panel (the Unit Coordinator and another senior staff member). Applicants were also needed to provide at least one referee from the Law School (who was not the Unit Coordinator). The aim was to ensure that the application process was as robust, fair and transparent as possible.⁵⁵

The process resulted in the selection of student participants of excellent calibre who consistently impressed the academic staff during the trip with their: level of displayed professionalism, the thoughtful questions posed to NGO staff, and occasionally, questions they chose not to ask, as well as the ways in which they supported each other in challenging situations.

52 Les A. McCrimmon, 'Mandating a Culture of Service: Pro Bono in the Law School Curriculum' (2003-2004) 14(1) *Legal Education Review* 53; Ross Hyams, 'On Teaching Students to 'act like a lawyer': What sort of Lawyer?' (2008) *Journal of Clinical Legal Education* 21.

53 Anna Copeland, 'Clinical Legal Education within a Community Legal Centre Context', (2003) 10(3) *Murdoch University Electronic Journal of Law* 25.

54 Ross Hyams, 'Assessing Insight: Grading Reflective Journals In Clinical Legal Education' (2010) *James Cook University Law Review* 25; Ryan, above n 31; McNamara above n 23.

55 The NGOs that students were embedding with for the second week, were given the students' CVs and had an ultimate veto on whether they would accept the student. However, this did not prove a problem.

It was decided early on, that students' prior academic grades would not be a primary consideration in their eligibility to participate, but would be considered as a distinguishing factor when deciding between applications which otherwise offered strong responses to the three key considerations which are discussed further below. The core reason for this was that while grades are important, evidence increasingly suggests that they are only one part of the 'whole picture' of what employers are looking for in an Australian Bachelor of Laws graduate.⁵⁶ Certainly, high academic grades should be an indication of a students' legal academic prowess and can lead to inferences about their dedication to their studies and ability to undertake various forms of legal problem-solving tasks. However, academic marks themselves do not necessarily say much about the student as an individual, or their ability to succeed in an atypical learning environment where assessment is based not on structured problem solving, but on self-reflection.⁵⁷ Ranking applications on the basis of prior academic grades may have been an 'easy' answer to the selection process, but arguably not the 'best' answer.

Across the cover letter, interview and referee, the selection process considerations fell into three main categories. Students needed to:

1. Demonstrate that the experiential unit would contribute to their personal, professional and/or academic development;
2. Be resilient and willing to be self-reflective about experiences and actions; and
3. Demonstrate that they would be reliable ambassadors for the Law School specifically, and for the University generally.

To determine the first criteria, students were asked to explain their motivation for applying for the Unit and why they would be a good candidate to participate. Diverse responses were received, and students who demonstrated an existing commitment to the Unit's purposes were selected as most likely to excel in the Unit's criteria. Students who demonstrated that they had: undertaken prior studies in relevant units (in law or other disciplines), had participated in extra-curricular learning in international or social-justice-related fields, or had undertaken work or community service within relevant fields, demonstrated that this Unit was not merely an 'also ran' activity during their law degree and that their participation in the Unit was part of a broader commitment to 'global citizenship'.⁵⁸

In light of the Unit's heavy reliance on reflective assessment, as well as the two-week period 'close quarters' experience,⁵⁹ students needed to be prepared to self-examine their own preconceptions and behaviours. The literature consistently claims that reflective assessments are not effective unless participants are genuinely open to the process.⁶⁰ Hyams suggests that

56 'Do High Distinctions Matter', *Sydney Morning Herald* (online), 14 August 2014, <<http://www.smh.com.au/small-business/the-venture/do-high-distinctions-matter-20140812-3dlfd.html>> Fran Molloy, 'Top 10 Things employers look for in University Graduates', *Sydney Morning Herald* (online) 15 January 2015, <<http://www.smh.com.au/national/tertiary-education/top-10-things-employers-look-for-in-university-graduates-20150112-12mb73.html>>; Marianna Papadakis, 'Law grad has a 'perfect resume' but can't get a job' *Australian Financial Review* (online) 14 April 2016, <<http://www.afr.com/business/legal/top-law-graduates-pinning-hopes-outside-major-firms-20160318-gnlvun#ixzz4jYlheTY>>

57 Mitchell et al, above n 22, 91; Ruth Callaghan, 'Employers want graduates with more than just good marks', *Australian Financial Review* (online), 16 February 2015, <<http://www.afr.com/news/policy/education/employers-want-graduates-with-more-than-just-good-marks-20150212-13d15h#ixzz4jZGSfoG>>.

58 Mitchell et al, above n 22, 91.

59 As part of the pastoral care and risk management plans, even during their unsupervised time, students committed to not go out alone during the two week period with a preference for groups of three or more.

60 Hyams, above n 54.

‘many...will initially resist the requirements of a formal reflective process’⁶¹ so there is an onus on supervisors to facilitate an environment that is conducive to honest and open journaling.⁶² A semester-long unit might give supervisors the time to help students overcome initial reticence or preconceptions, for example by creating formative activities where the students receive early feedback and the opportunity to adjust their practice following from reflection. However, the Unit’s limited time frame did not lend itself to such formative activities. Without the possibility of such preparatory activities, it was predicted that students who could not demonstrate a pre-existing willingness to self-reflect and self-criticise in a formal environment, were more likely to struggle to participate in the Unit effectively.

To determine students’ resilience and willingness to participate in the reflective process, students were asked about stressful experiences, examples of conflict-resolution, and how they respond in a situation where there is no single ‘right’ answer to a problem, and they have no supervisor immediately on hand to assist them. It was predicted that students who identified their role in the cause and resolution of a conflict, and who looked for what the interviewers considered to be reasonable solutions to problems, were most likely to meet the criteria best.

Finally, student reliability and suitability for representing the Law School was considered. Unlike a traditional classroom environment where students take responsibility for their own attendance/non-attendance, and bear the risk of any consequences for non-attendance, students who proved to be unreliable or who did not demonstrate a dedication to each visit and activity, would reflect negatively on the cohort as a whole. Consequently, the interview and referee process were intended to select students who had a good track record of reliable attendance, and had demonstrated engagement in group and class activities.⁶³

The Law School’s referee involvement meant the selection process considered a more independent assessment of applicants’ engagement with their law studies, other than self-stated answers and academic transcript results. This was possible due to the Law School’s small size and lack of ‘online’ enrolments, meaning that all students, including those in the early stage of their law degree, had at least one or two staff members with a relatively close understanding of their performance. Referees were asked for their opinion about: a student’s engagement with their classmates, their perception of the student’s reliability in classes and assessments, and their view on a student’s ability to take initiative. The core purpose of the questions was to gain the referees’ insight into how suitable the students were to participate in the experiential Unit.

The selection process achieved the desired result of having what we considered to be an excellent cohort of passionate, reliable students for the Experiential Unit. However, because the quality of applications was so high, as previously stated, we interviewed approximately 30 students with a panel of two people, for a total of 16 available places. Given this could have been a ‘one-off’ experience, interviewing all applicants meant that they all had the opportunity to demonstrate the extent to which they met the selection criteria via multiple forms of communication (for example to address any deficits in their cover letter, by expanding their answers in the verbal interview). The selection process also had the benefit of a wider range of staff in the Unit’s preparation. This was intended to foster a sense of ‘Law School’ ownership of the trip, and the staff engagement in the fundraising activity and post-return debrief would suggest that this had some success. However, this was a labour-intensive process so as a concession to that burden, a more rigorous pre-interview selection process will be adopted in future.

61 Ibid, 27.

62 Ibid, 28.

63 It should be noted that although this was part of the selection process design before applications were received, in practice it did not serve to distinguish between excellent applicants. Reliability as a criteria for selection, remains an important inclusion in the selection process, because it cannot be guaranteed that every cohort of applications for such a trip will be of as high a calibre.

IV PASTORAL CARE AND PREPARATION

There were two parts to students' preparation before departure to Cambodia.⁶⁴ Firstly, practical information was given to students about: general travel requirements (visas, acquiring local SIM cards and so forth), health requirements/vaccinations,⁶⁵ cultural awareness, dress codes, and safety precautions.⁶⁶ Much of this information was given by an agency that specialises in academic travel that the Law School contracted to arrange the logistics of the trip,⁶⁷ with staff giving additional advice such as providing a detailed Risk Management Plan in conjunction with the University's Risk and Compliance Office.

Secondly, activities were arranged to prepare students for the Unit's potential 'culture shock'. Taking a group of 16 students abroad opens the door to a plethora of possible 'risks' not found in a domestic classroom setting.⁶⁸ These risks range from personality disputes when living in close quarters, to needing to adapt to unexpected changes to schedules or activities, and extend to the safety risks associated with site visits, or the health risks of travelling in a developing country (including the potential of living in close quarters with a roommate who falls ill). Students also had free-time, and thus would need to navigate the busy roads, public transport and eating establishments in Cambodia.

The rigorous selection process was intended to ensure that participating students were mature and responsible individuals, and thus were likely to be able to respond appropriately to situations that may arise. The Law School predicted that the Unit's smooth running depended on participating students viewing themselves as responsible not only for themselves, but also for each other.⁶⁹ However, an unintended consequence of the selection process was that students selected to participate, represented the full spectrum of cohorts ranging from second year through to fifth year students. Consequently, despite the relatively small Fremantle Law School community, the selected students did not necessarily know each other. Pre-departure preparations, therefore sought to foster a sense of community among the selected students, so that they might be comfortable facing the experience 'together'.

In particular, opportunities were created to support students to prepare for the potentially emotionally stressful experiences of: visiting sites related to genocide, and being exposed to some of Cambodia's most disadvantaged groups. Opportunities were also created to foster a sense of community among participants, so they were comfortable to share their perspectives of their experiences, with the academic supervisors and other students on the trip.

The experience of visiting various sites and organisations in Cambodia was *intended* to put students in potentially emotionally challenging situations and encourage them to empathise, but also to ask ethical questions about the nature of such tourist/educational experiences.⁷⁰ That being the case, as extensive research into the mental health outcomes facing Australian law students⁷¹ suggests, it is not merely appropriate but as Field & Kift claim, it is 'an ethical

64 Additional pastoral support was provided while in Cambodia, however that falls outside the scope of this paper which focuses only on the Unit's preparatory stages.

65 See, eg, 'Cambodia' *Centres for Disease Control* <<https://wwwnc.cdc.gov/travel/destinations/traveler/none/cambodia>>

66 Smartraveller, <<http://smartraveller.gov.au/Countries/asia/south-east/Pages/cambodia.aspx>>.

67 Antipodeans (formerly Antipodeans Abroad).

68 Mitchell et al, above n 22, 93.

69 Ibid, 93.

70 See, eg John J Lennon, 'Dark tourism sites: visualization, evidence and visitation' (2017) *Worldwide hospitality and tourism themes* 216; Colette Copeland, 'Madness and Mayhem: The Aesthetics of Dark Tourism' (2011) 39 *Afterimage* 43.

71 See Rachael Field and Sally Kift, 'Addressing the high levels of psychological distress in law students through intentional assessment and feedback design in the first-year law curriculum', (2010) 1(1) *International Journal of the First Year in Higher Education* 65, 67-8

responsibility of legal educators to work to ameliorate ...distress, to create positive learning experiences for our students and to *do no harm* through legal education.⁷² Further, it was only by giving students the tools to process the potentially more emotionally challenging experiences of the trip, that they could be expected to undertake their reflective assessment meaningfully.

As discussed in Part I, students were given reading materials that specifically addressed Cambodia's genocidal history to introduce the confronting subject matter before arriving in Cambodia. Students were also given readings that discussed the form and purpose of reflective assessment. Arguably however, asking students to read a few assessment directed articles is hardly providing pastoral support to students and, without some form of additional pre-departure engagement, there was no way to determine the extent to which students absorbed the readings' messages.

Two compulsory pre-departure sessions were run by the contracted agency, giving students practical advice to manage their expectations about the types of direct experiences with the NGOs. In addition, the Law School ran two non-compulsory activities which were attended well by student participants and the wider Law School community. An all-day fundraising activity (a BBQ at a local hardware store) was run with proceeds used to offset miscellaneous student costs while in Cambodia, and participating students were invited to a guest presentation from a former student who had recently returned from six months in Phnom Penh.

International travel, including in a student-context, is expensive.⁷³ In deciding to run the Unit, the Law School knew that participation could be cost-prohibitive for some students. It was not until relatively close to departure that the DFAT NCP grants were announced and preparation and commitments needed to be made to NGOs before knowing about the outcome of the NCP application. Consequently, students were required to commit to their participation and begin to make payments before NCP funding was confirmed. The Law School's intent was to make the trip available to the widest range of students by being transparent about all the costs and, gave them just over six months of time, to finance their participation.

In addition, the Law School offered to support students (both individually and collectively) in fundraising activities. The student cohort collectively decided to undertake a single 'high yield' activity – an all day barbecue, with the funds being used to offset in-country costs and ensure that no student was excluded from any opportunity in Cambodia. Allowing students to participate in decision making both about how to raise funds, and how to spend the funds, arguably raised students' ownership over some of the financial decisions relating to the Unit. In addition, Law School staff who were not otherwise involved in the Unit, volunteered their time to assist with the Saturday activity, demonstrating institutional support for the Unit and alleviating some of the atypical teaching load burden from the Unit Coordinator.⁷⁴

The guest presentation gave students the opportunity to hear a first-hand experience of law and justice engagement in Cambodia. This was also part of the pastoral care commitment to prepare students for the positive achievements and outcomes occurring in Cambodia, tempered by a realistic assessment of the challenges of 'justice' in a developing country. The guest presentation had a significant impact as it received positive feedback from students and, perhaps more tellingly, it was the preparation activity most frequently referenced by students while in Cambodia – by for example, comparing their observations of particular sites with those made by the presenter. While these references were informal (inasmuch as they were

72 Ibid.

73 Mitchell et al, above n 22.

74 Proctor has pointed to internationalisation strategies of Universities relying on this active engagement by the faculty requiring this shift in overall staff approach to internationalization initiatives. See, eg, Douglas Proctor, 'Faculty and International Engagement: Has Internationalization Changed Academic Work?' (2015) (83) *International Higher Education* 15, 17.

in conversation rather than referenced written assessments), they demonstrated the practical impact of the presentation. Moreover, rather than being presented by an academic staff member, someone who could be viewed as a student peer shifted the presentation of the information from academic discourse, to a potentially more relatable experience. The presentation was potentially an example of a reasoned and thoughtful reflection on the pros and cons of an overseas legal experience, thus giving students a framework to use for their reflective assessments.⁷⁵

Also, our guest speaker gave practical advice about cultural mores and personal safety in Cambodia. Although most of this information was contained in the formal pre-departure training, the guest speaker's personal experiences and practical advice appeared to be well received by students, and when in Cambodia it was the guest speaker's informal lessons that students seemed to expressly mention when reminding each other of precautions to take. Having access to former students who are willing to share similar overseas education experiences, is one way to support students' preparation for an international unit of this kind. To this end, students who participated in the 2017 Cambodia trip were asked for, and provided, examples and advice derived from their experiences for the next student cohort attending the immersion in 2018.

V CONCLUSIONS

This paper has set out the considerations that went into creating an international experiential unit 'from scratch' at an Australian Law School that had not previously offered many international student opportunities. As Mitchell et al explained, in designing an international experiential unit 'many additional tasks are borne by the academic teaching staff administering the courses — tasks that are on top of the "normal" teaching workload, or are difficult to account for in standard workload formulas.'⁷⁶ While many of these tasks fall outside the ordinary tasks of academic teaching staff (such as organising accommodation and facilitating NGO contact), this paper has focused on the design and preparation of the academic content of the unit, which also requires consideration beyond an 'ordinary' unit.

There are several key lessons that can be taken away from the experience of planning this unit. Firstly, in designing the unit assessment and preparatory materials, focus must arguably shift away from legal content and students' prior academic marks. The core task of the academic supervisor preparing a unit of this kind is to facilitate students' opportunities to learn from the diverse experiences that may arise when overseas. While provision of materials will necessarily vary, offering students options and encouraging them to make passion/interest-based decisions about their readings, is intended to facilitate robust discussion among the participants. However, if they are to achieve their purpose, students should also be informed about the usefulness and role of those preparatory materials.

Secondly, careful selection of passionate students who are open to unpredicted experiences, would appear to be helpful in facilitating active engagement with the various NGO visits with little need for prompting from staff – whatever the particular legal topic may be. Arguably, offering the opportunity to students who are already demonstrating an openness to the self-reflection process, was also helpful given the limited time frames in which to develop this

⁷⁵ Rogers, above n 34, 53.

⁷⁶ Mitchell et al, above n 22.

skill.⁷⁷ Thirdly, pre-departure activities that focus on building a peer support network amongst students can potentially be used to introduce them to the reflection process, whilst planning for the Unit's potentially confronting aspects.

Finally, although the burden of preparation inevitably and appropriately falls to the Unit Coordinator and other staff participating in the Unit directly, involving the wider Law School staff in pre-departure activities, arguably had significant benefits because they were involved in: interviewing student applicants, fundraising and guest lectures, and this seemed to improve the quality of each of these activities, and facilitate an overall sense of a supportive community surrounding the Unit – thus promoting an environment in which honest self-reflection is more likely to occur.

The creation of an international experiential unit was a rewarding experience, albeit one which placed a high burden on the University staff involved. The students involved took full advantage of the opportunity offered.⁷⁸ The academic staff function was to open the door for students to engage with the international legal community: it will ultimately be up to those students to learn from their experiences and to continue developing themselves as 'global citizens.'

77 An argument could be made that students who have not demonstrated self-reflection, or who had demonstrated a reticence to self-reflect would get the most out of an experience such as the Cambodia Unit. However, in light of the existing challenges facing Australian students in Cambodia – the potential culture shock, unpredictability of activities and health risks– combined with the two week time frame, overcoming a reticence for self-reflection would require significant support structures not compatible with the trip's already rigorous activities. Conceivably, this hurdle to participation could be overcome by including reflective practice early in the law degree so that a willingness to engage in reflective practice is an already developed skill by the time students apply for an immersion experience. Exploring this argument is beyond this paper's scope.

78 Fremantle Law School's Inaugural International Immersion – Phnom Penh 2017, *University of Notre Dame*, <<http://www.nd.edu.au/fremantle/schools/law/events/cambodia-2017>>.

FREEDOM OF SPEECH: DO WE KNOW WHAT WE ARE TALKING ABOUT?

*Bill Swannie**

I ABSTRACT

Laws regulating racial vilification, such as those in Part IIA of the *Racial Discrimination Act 1975* (Cth) (RDA), are often attacked on the ground that they limit ‘freedom of speech’. Rarely, however, do those who criticise such laws clearly define what they mean by ‘freedom of speech’. Nor do they explain why this freedom is more important than protecting vulnerable minorities from the serious harms of racist hate speech. This article examines the underlying purposes for racial vilification laws, and also the philosophical basis for freedom of speech. Ultimately, it concludes that racial vilification laws are in fact supported by arguments commonly made in favour of freedom of speech.

II INTRODUCTION

Racial vilification laws, such as those in the RDA,¹ are often said to be contrary to ‘freedom of speech’.² Rarely, however, do critics of these laws articulate exactly what they mean by freedom of speech, or why it is important. This article examines three arguments commonly made in support of free speech. These can be described as arguments based on democracy, personal and interpersonal arguments, and arguments based on the value of inquiry. This article also examines the important purposes served by racial vilification laws, and particularly, the nature of the harms caused by racist hate speech³ – the harms which these laws seek to minimise or prevent. This article argues that, when the scope and nature of freedom of speech, and the purposes of racial vilification laws are both properly understood, it is evident that such laws are not inconsistent with freedom of speech, but that they are in fact justified and necessary in a modern multicultural democracy such as Australia.

* Bill Swannie is an Academic at the School of Law, Victoria University, Melbourne. Bill is currently completing a Master of Philosophy degree in the area of racial vilification and freedom of speech. Bill worked previously as a solicitor in the community legal sector and his research interests include human rights law, social justice issues, public law and international law. Bill is currently Chair of the Human Rights section at the Law Institute of Victoria. Email: Bill.Swannie@vu.edu.au

1 See s 18C of the RDA, which renders certain racially vilifying conduct to be ‘unlawful’. See also s 18 D of the RDA, which exempts certain conduct from s 18C. As will be explained, this article takes a philosophical approach to the issues of free speech and hate speech laws. It therefore does not examine the jurisprudence around the Australian provisions in the form of the RDA.

2 The term ‘freedom of speech’ comes from the text of the First Amendment to the United States Constitution. Internationally, the more common term is ‘freedom of expression’. No distinction is made between these concepts in this article. For the sake of brevity, ‘freedom of speech’ is referred to in this article simply as ‘free speech’.

3 The term ‘hate speech’ is commonly used in the United States to refer to what are known as vilification laws in other countries: see Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012). This article focuses on *racial* vilification, although many jurisdictions also regulate vilification on other grounds.

III THE PURPOSE AND NATURE OF RACIAL VILIFICATION LAWS

Most democratic countries, including Australia, have laws regulating racial vilification. The particular standard of conduct captured by such laws varies from jurisdiction to jurisdiction,⁴ reflecting local concerns and conditions regarding this particular type of hate speech.⁵ The particular methods used to enforce these standards also varies, with a combination of civil provisions and criminal sanctions being a common approach. Rather than examining the specific terms of a particular legislative framework, this article will instead outline the general nature and purpose of racial vilification laws. This broader approach enables proper consideration of the most powerful arguments made against such laws – that they are contrary to ‘freedom of speech’.⁶

In general terms, racial vilification laws regulate conduct which encourages or promotes certain attitudes or feelings towards a person or group of people, based on the person or group’s race, colour or ethnic origin.⁷ The promotion of ‘hatred’ is one standard used; however, the type or intensity of the attitudes or feelings that must be promoted to attract legal regulatory sanctions, varies considerably between jurisdictions.

The purposes of racial vilification laws are directly linked to the harms which such laws seek to prevent. As will be outlined later in this article, racial vilification can cause serious and enduring psychological harm to the individuals and groups that it targets.⁸ It also promotes racist attitudes in the community, which can lead to acts of discrimination, prejudice and violence against people of certain races.⁹ In this way, racial vilification undermines the tolerance and acceptance of racial and ethnic diversity which underlies a democratic, multicultural society.¹⁰ Although freedom of speech is often presented as an important individual right, racial vilification laws also promote core liberal values; they protect the dignity or equal standing of all members of society, and, in particular, members of vulnerable minorities.¹¹

IV FREEDOM OF SPEECH: CONTESTED AND AMBIGUOUS

Although freedom of speech is often invoked against racial vilification laws,¹² it is in fact a ‘highly contested’ concept in several significant respects.¹³ In particular, the existence and scope of exceptions to the principle, are hotly debated. More fundamentally, however, there is disagreement on whether free speech is merely a restriction on government action, or whether it is also a justification for certain positive action by government. Traditionally, free speech was

-
- 4 See Sandra Coliver (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (Article 19, International Centre Against Censorship, Human Rights Centre, University of Essex, 1992) for a survey of such laws.
 - 5 See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology Sydney, 2002) 14-5, 22, as to the need for racial vilification laws to reflect local concerns and conditions.
 - 6 A philosophical approach to the analysis of free speech issues is commonly adopted in the relevant literature: see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).
 - 7 See Coliver, above n 4.
 - 8 Richard Delgado and Jean Stefancic, ‘Four Observations about Hate Speech’ (2009) 44 *Wake Forest Law Review* 353.
 - 9 McNamara, above n 5, 22-3.
 - 10 Ibid, 18-20.
 - 11 Waldron, above n 3.
 - 12 Freedom of speech is also invoked against other laws, such as sedition laws, and laws restricting access to pornography: see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2005).
 - 13 Owen Fiss, *The Irony of Free Speech* (Harvard University Press, 1996).

regarded as merely a restriction on state power.¹⁴ This is based on the classic liberal assumption that individual freedoms are maximised by limiting state power over the actions of individuals. However, in modern societies, the harms caused by private speakers may be more serious than the dangers of a powerful state. Therefore, the state may have a legitimate role in regulating harmful conduct, such as racially vilifying speech.¹⁵ This article will now examine three types of arguments commonly made in favour of free speech, to determine whether racial vilification laws are in fact contrary to these arguments.

V POLITICAL ARGUMENTS FOR FREE SPEECH

Particularly in the American context, arguments have been made that free speech is essential to democracy or ‘self-government’. Free speech, meaning the absence of government restrictions on the dissemination and discussion of ideas and information by members of the public, is essential to voting and the notion that ultimate political power resides in the people, not their government.¹⁶

Although these arguments are often used to criticise racial vilification laws, on closer analysis, they may in fact justify regulation of certain types of speech. For example, if free speech is said to promote citizens’ ability to make ‘informed’ voting decisions,¹⁷ then it must be recognised that the actions of private individuals can also interfere with informed decision-making. State regulation may therefore be justified, in order to prevent certain voices from ‘drowning out’ others.¹⁸ This is particularly important if one accepts that free speech exists primarily for the benefit of the public,¹⁹ rather than for the benefit of individual speakers. Also, state regulation may be necessary to ensure that no one is effectively ‘silenced’, or excluded from participating in public debate.²⁰ Victims of racially vilifying speech are often too afraid to participate in public discussion of issues. Also, because vilifying speech denigrates their worth, the views of these people ‘lack authority’ in the eyes of other members of society.²¹

Contemporary opponents of racial vilification laws regard the coercive power of the state as the primary threat to individual liberty, particularly when the ‘censorship’ of particular speech is seen as the expression of majority opinion. Ronald Dworkin has popularised the view that racial vilification laws illegitimately silence individuals who are in fact protesting against race-based policies, such as affirmative action or anti-discrimination laws.²² In this way, Dworkin characterises *all* forms of racial vilification as contributions to political debate, which (he argues) cannot be suppressed in a democratic system of government. Undeniably, a main purpose of free speech is to ensure that government is responsive and accountable to the public.²³ However, not every vilifying statement can be regarded as a legitimate political contribution. Racial vilification laws are focused primarily on extreme forms of abuse.²⁴ As mentioned above, racially vilifying

14 Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Aldershot Ashgate, 2000) 39-44.

15 Fiss, above n 13.

16 Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (The Law Exchange Ltd, 1948).

17 Ibid 25.

18 Fiss, above n 13, 17.

19 Meiklejohn argued that free speech exists so that every individual can receive and consider all information and opinions: see Meiklejohn, above n 16, 63, 77. This is a listener-oriented approach, rather than a speaker-oriented approach to free speech.

20 Fiss, above n 13, 15, 83.

21 Ibid 16.

22 Ronald Dworkin, Foreword, in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, 2009).

23 See Barendt, above n 12.

24 Waldron, above n 3, 194.

statements can effectively exclude individuals and entire groups from public debate and from influencing political decision-making on issues which impact on their daily lives. Therefore, arguments based on democratic legitimacy may in fact justify state regulation of such speech.

VI PERSONAL ARGUMENTS FOR FREE SPEECH

A second set of arguments for free speech focus on the *personal* benefits of speech and communication. John Stuart Mill presented an early and powerful version of these arguments in his work *On Liberty*. Mill argued that the process of expressing ideas and opinions, and being exposed to the widest possible range of ideas and opinions, promotes the full development of an individual's personality.²⁵ Mill particularly focused on the interests of the general public in being able to receive ideas and opinions without restriction. He argued that restrictions on speech were not merely a 'private injury' to the speaker, but were contrary to the public interest in receiving the widest range of views on any given topic.²⁶

Specifically, Mill argued that individuals develop to their full potential by exposure to the opinions of 'wise...individuals',²⁷ such as Socrates, Galileo and Christ. By being exposed to 'the best men [sic] and the noblest doctrines',²⁸ ordinary individuals would themselves develop fully. Importantly, Mill did not argue for unrestricted speech on all matters. Because of his emphasis on human development, Mill was particularly concerned that discussion of the 'highest subjects',²⁹ the 'greatest questions'³⁰ and 'large and important'³¹ issues, not be restricted. Mill was not so much arguing for unrestricted speech, as he was seeking to prevent ignorance, mediocrity, and slavish acceptance of official dogma and 'received opinion'.³² Mill's arguments were based on a particular historical narrative; he pointed to several instances where the wisest people – to whom society *should* listen – were persecuted, and their views suppressed, to the great detriment of society.³³ Mill emphasised the important role of critics of 'received opinion', who publicly challenge orthodox views and conventional modes of thought.³⁴ Mill thus drew a strong connection between individuals with dissenting views, and the benefit to society of not silencing these views. It should also be noted that Mill was not concerned exclusively (or even primarily) with the effect of laws and other forms of formal regulation on speech; he argued that public opinion 'is as efficacious as law' in silencing dissenting voices.³⁵ In fact, Mill emphasised the negative effects of social stigma on an individual's ability to communicate, and he argued strongly for public toleration of those with 'unconventional' views.

Mill drew a strong contrast between the situation of the lone dissenter, who was 'fearless', 'unconventional' and 'courageous', and the ordinary public, which consisted of 'many foolish individuals'.³⁶ He argued that members of the public, due to their fear and ignorance, were often

25 John Stuart Mill, *On Liberty*, in Alan Ryan (ed), *Mill: Texts, Commentaries* (W W Norton, revised ed, 1997) 43. Katharine Gelber also emphasises the developmental importance of speech and communication: see Katharine Gelber, *Speaking Back: The Free Speech versus Hate Speech Debate* (John Benjamins Publishing Company, 2002).

26 Ibid, 53.

27 Ibid, 59.

28 Ibid.

29 Ibid, 66.

30 Ibid, 67.

31 Ibid.

32 Ibid, 79.

33 Ibid, 62-3.

34 Ibid, 59.

35 Ibid, 65

36 Ibid, 56.

and easily driven to persecute the few wise individuals, and that ‘truth would lose something by their silence’.³⁷ The relationship between ordinary members of the public, on the one hand, and gifted individuals, on the other, was one of the main pillars of Mill’s conception of free speech.

In emphasising the benefits of free speech, Mill barely acknowledged the harms which speech can cause. Mill seemed to assume that the only or main harm, was the *restriction* of speech (whether by laws, or by public opinion), which he described negatively as ‘censoring’ or ‘suppression’. In his writing, Mill referred repeatedly to speech as ‘opinions’; this emphasised the positive role of speech in the dissemination of ideas. However, proper recognition of the harms caused by certain speech acts, is central to proper consideration of the merits of regulating racial vilification.³⁸

Contemporary opponents of racial vilification laws base their arguments on concepts such as human dignity and the importance of preserving individual autonomy. Thomas Scanlon, for example, argues that individuals must be treated as ‘sovereign in deciding what to believe and in weighing competing reasons for action’.³⁹ He regards it as an interference with a person’s autonomy for the state to determine which ideas and information are dangerous, or even false. These judgements, he argues, should be made by individuals, rather than by the state.⁴⁰ Thomas Nagel also argues that the state must ‘trust’ individuals to make up their own minds – and that racial vilification laws do not do this.⁴¹

The arguments presented by Scanlon and Nagel are persuasive, insofar as they affirm that individual autonomy and dignity are important human values. However, a person’s ability to make decisions regarding their own life can be limited by factors other than by state regulation. As will be outlined shortly, racially vilifying speech may limit the choices and opportunities available to the people at whom it is directed. Preserving the dignity and the autonomy of the victims of hate speech, may justify state regulation of such speech.

VII CONSIDERING THE HARMS OF HATE SPEECH

The serious and long-lasting harms caused by hate speech have been documented by prominent critical race theorist Richard Delgado. Delgado argues that hate speech can cause immediate and long-lasting psychological and physical harm to its individual victims.⁴² He emphasises that racial insults concern an ‘unchangeable personal characteristic’, and one which is central to the person’s identity and sense of worth.⁴³ He argues that the effect of individual incidents of hate speech must be viewed in light of the ‘entire history of discrimination and violence’ experienced by that particular group.⁴⁴ Delgado emphasises that the victims of hate speech are often the ‘least powerful’ and most vulnerable members of society.⁴⁵ Often, this is due to the historical treatment of the particular racial group including, for example, slavery, segregation, genocide and other forms of oppressive and dehumanising treatment.⁴⁶ Delgado argues that speech by which particular races are ‘demonised, marginalised, stereotyped, reviled and excluded’ often

37 Ibid, 78.

38 Waldron, above n 3.

39 Thomas Scanlon, ‘A Theory of Freedom of Expression (1972) 2 *Philosophy and Public Affairs* 204. See Sarah Sorial, ‘Free Speech, Autonomy and the Marketplace of Ideas’ (2010) 42 (2) *Journal of Value Inquiry* 167, for a critique of Scanlon’s arguments.

40 Ibid, 217-8.

41 Thomas Nagel, ‘Personal Rights and Public Space’, (1995) 24 (2) *Philosophy and Public Affairs*.

42 Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Westview Press, 2004), 12.

43 Ibid, 5, 16.

44 Ibid, 16.

45 Ibid, 35, 39.

46 Ibid, 23, 39, 50, 176.

lays the groundwork for other forms of dehumanising treatment. Racial vilification stigmatises entire groups of people, and it reinforces and normalises their inferior status.⁴⁷ Such speech is used by dominant groups to maintain power and control over members of less powerful groups. On a personal level, hate speech causes individual victims to suffer stress and anxiety, and to perform poorly in, and to avoid, situations, such as school, university, or the workplace, where they are likely to experience further abuse.⁴⁸

VIII FREE SPEECH AND THE VALUE OF INQUIRY

A final set of arguments for free speech concern the importance of preserving an open ‘marketplace of ideas’.⁴⁹ According to these arguments, ideas and opinions must compete with each other and be ‘tested’ by public debate and discussion. A major thrust of this argument is that the state must remain ‘neutral’ in relation to public debates, by not favouring or suppressing any idea or opinion.⁵⁰ On this view, any regulation of speech potentially jeopardises state neutrality and risks ‘distorting’ debates from the course they would otherwise take.

John Stuart Mill championed the concept of a marketplace of ideas, particularly in *On Liberty*.⁵¹ Public competition between ideas was the means, according to Mill, by which individuals could reach their full intellectual and moral potential. Mill’s arguments were based on *laissez faire* economic principles, which emphasise the benefits of ‘free’ (or unregulated) competition in a marketplace. According to these theories, unregulated competition results in the best outcomes for all involved. On the other hand, government intervention in the marketplace is said to result in inefficiencies and artificial ‘distortions’. Mill’s arguments were based on methods of scientific inquiry which were emerging at the time of his writing. Mill was extremely sceptical of ‘received opinion’ (or currently dominant ideas), and he argued that all ideas should be continually tested, to see whether they are justified by logical reasoning and empirical evidence. He argued that moral and intellectual progress was achieved, at an individual and a societal level, by open discussion and debate. Mill argued that false ideas were exposed and rejected through discussion, rather than through persecuting people who express ‘dissenting’ or ‘unpopular’ views.⁵² As mentioned above, Mill referred to progressive thinkers, such as Socrates, Galileo and Christ, who were persecuted for their unorthodox views.⁵³ Mill highlighted the dangers of powerful institutions, such as (in the time when he was writing) the established church, which persecuted individuals whose ideas and opinions challenged its authority.

Although Mill’s arguments have wide popular appeal, they have a number of flaws. The economic principles on which Mill’s ‘marketplace of ideas’ is based have long been rejected in developed democracies. Governments regularly intervene in the economic marketplace, in order, for example, to protect consumers from deceptive marketing and other abuses of market power. Due to the common occurrence of ‘market failures’, the state often intervenes in order to protect the interests of vulnerable parties.⁵⁴

47 Ibid, 221.

48 Ibid, 14-6, 112.

49 The ‘marketplace of ideas’ analogy is usually attributed to Justice Holmes, and particularly his dissent in *Abrams v United States* 250 U.S. 616 (1919).

50 Waldron, above n 3.

51 Mill, above n 25.

52 Ibid.

53 Ibid.

54 Paul Brietze, ‘How and Why the Marketplace of Ideas Fails’ (1997) 31 (3) *Valparaiso University Law Review* 951, 961.

Mill also assumed that citizens can and will decide rationally and logically as between various publically available ideas and opinions. However, in modern society, a small number of powerful and self-interested voices often dominates debate on particular topics.⁵⁵ The existence of entrenched inequality in society means that the harms of unregulated competition are likely to be suffered by members of society who are already disadvantaged and marginalised.⁵⁶ Unregulated competition will therefore compound their disadvantaged status. In these circumstances, the state may legitimately intervene – as it does in the economic market – in order to protect vulnerable members of society, such as racial minorities. Also, the utility of ongoing debate on certain topics is open to question. In relation to racial vilification, for example, the state has a legitimate interest in restricting the promotion of the view that certain races are superior to others. Scientifically speaking, this debate is over: there is no evidence supporting theories of racial superiority or inferiority.⁵⁷ Furthermore, the harms caused by promoting such views, including the serious harms to individuals and to social cohesion in a multicultural society, justify restricting such speech.

IX CONCLUSION

This article argues that free speech protects and promotes a range of important values and interests. First, it promotes political values, such as facilitating the formation of informed opinions and full participation in public decision-making, which are necessary for democratic self-government. Second, it promotes personal values, such as enabling self-expression and the full development of the human personality. Finally, free speech promotes the value of inquiry, which facilitates individual and social progress. Each of these arguments justify certain restrictions on government regulation of speech. However, each of these arguments also supports regulation of certain speech acts, in some circumstances.

Some scholars argue that free speech is an absolute right with no exceptions.⁵⁸ However, many forms of speech, such as defamatory speech, seditious speech and verbal sexual harassment, are currently regulated, and, in many cases, this regulation is uncontroversial.⁵⁹ The more accepted position is that speech can be regulated when it causes harm to other people.⁶⁰ It is sometimes stated that the harms caused by hate speech are trivial and merely ‘upset feelings’. However, as this article has shown, the harms caused by racial vilification, particularly to its direct victims, are serious and long-lasting. These harms are socially and politically significant, because the victims of hate speech are often highly disadvantaged and marginalised members of society.

In light of the clear recognition of the harms of hate speech, the arguments commonly made *against* regulation of such speech lose much of their force. In fact, these arguments may support regulation of racial vilification. This is because allowing racially vilifying speech is contrary to enabling all citizens to fully participate in political discussion and decision-making, as it prevents the full development of an individual’s personality, and because it does not contribute to forms of inquiry which promote social progress.

55 Stanley Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ (1984) 1 *Duke Law Journal* 1.

56 *Ibid.*

57 Waldron, above n 3.

58 C Edwin Baker, ‘Harm, Liberty and Free Speech’ (1996-7) 70 *California Law Review* 979.

59 See Barendt, above n 12.

60 See Mill, above n 25.

CREATING AN ACADEMIC COMMUNITY AT A REGIONAL LAW SCHOOL THAT OFFERS A LARGE ONLINE EDUCATION PROGRAM

Megan Vine and Julia Werren***

ABSTRACT

Social media use has arguably become a fundamental part of modern day western society. People engage with social media for many reasons, including a desire to connect with an online community. Increasingly, businesses and education institutions are also starting to use social media for various purposes. Like most other universities, and to a lesser extent faculties and schools within Universities, the School of Law at the University of New England ('UNE') has started using social media to improve UNE's brand awareness and aid the UNE's marketing efforts. The overall rationale for building a social media presence was to generate a sense of community for UNE students, the majority of whom are studying online.

In order to evaluate the marketing effectiveness of the UNE School of Law's social media in raising brand awareness, the UNE School of Law team developed a survey instrument that was advertised via Facebook, Twitter, Moodle and email, and received more than 70 responses. The survey's results are discussed and critically evaluated in this article and indicate that UNE students, alumni and other interested parties, do feel more a part of the UNE School of Law community as a result of social media efforts.

To gain a clearer idea of how the UNE's social media presence has impacted on the UNE School of Law, it will be necessary to repeat a similar survey at a later date. Presently, the original survey indicates how social media has developed at the UNE School of Law since it was launched.

I INTRODUCTION

Subconsciously, from the outset of our journey, the underlying philosophy of the UNE School of Law was to create a UNE School of Law online community. Community building can be difficult to achieve at a university where more than 80 per cent of its students are studying from a distance off campus, and online. Studying online in these circumstances can leave university students to feel isolated without a community. There are also fewer opportunities for the lecturers at the UNE School of Law to meet their students directly in a face to face environment. Due to these realities, the UNE School of Law aimed to counteract these arguably negative aspects of online learning, by developing a strong social media presence.

Kyeonj-Ju Seo notes that the advent of social media has significantly changed the 'landscape of distance education.'¹ That is, the learning environment can be extended beyond both the classroom and any online resources that a university officially sets up.² Social media platforms such as Facebook are used by universities to 'improve student integration into academic

* Megan Vine LLB/LP (Hons)/BA (Flinders), LLM (Syd).

** Julia Werren, BA, LLB (UNE), MHIth&MedLaw (Melb), Senior Lecturer, Faculty of Law, University of New England.

1 Kay Kyeonj-Ju Seo, 'Empowering Learning Communities With Social Media' (2016) 30 *American Journal of Distance Education* 1,1.

2 Ibid.

culture.³ The ability of a wide range of students to learn and interact via social media platforms also allows students to become content creators in their own right, by allowing them to change and amend information to suit their individual learning styles.⁴

The use of social media at a school or faculty level also can have other positive ramifications. These are increasing brand awareness and recognition, which helps to complement more centralised marketing strategies. Given these benefits, in 2014 the UNE School of Law chose to enter the world of social media. A Community Moodle page was also established to broadcast events and news exclusively to law students and provide exposure to those students not using social media. Instead of being used in specific units, we focused on using social media as a general informational tool.

Anecdotally, these efforts were seen to be successful, and students and academics expressed that they felt more connected to the UNE School of Law. It was decided however, that formal data was needed to measure the success of these efforts. We chose to create a survey instrument to better gauge the level of success of our initiatives. Human ethics committee approval was sought and gained at the University of New England before the survey was distributed.⁵ Interestingly, our anecdotal thoughts that interested parties did feel more of a part of the UNE School of Law as a result of our social media initiatives, were reaffirmed in the survey results. We also gained valuable feedback on how to improve our social media presence.

II THE CONTEXT?

In 2014, staff of the School of Law at the University of New England joined together to discuss what steps to take to market the school via social media. Understandably, many academics had concerns about entering into the social media space. These concerns included: how to handle public criticism, and managing the extra workload of social media. Most academics agreed that as we are a predominantly online law school, it was very important to have a presence in the fast growing social media world. The authors of this article committed to fostering a social media presence within the school. Neither of the authors had any formal training in social media and collaborated to create a Facebook page, and a Twitter account. Another staff member generated a Moodle based community page. This article will primarily focus on the UNE School of Law's Facebook page efforts.

During the first few months of the UNE School of Law's Facebook page, the level of participation and interaction was very low. For several months, there were less than 50 'likes' on the page, but over time we built up our engagement and page 'likes'. We now have a large audience (2526 'likes' at the times of writing) who engage readily with our stories. The people who 'like' our page include: UNE School of Law students, alumni, and academics from other universities, members of the legal profession, high school teachers and other interested community members.

When we first started our social media efforts, we had no budget to create online advertisements or boost posts. This was a problem as many of our posts got lost in Facebook as they were not engaging, interesting or personal enough to gain anyone's attention. We have since been granted a small budget that can be used for these purposes. This has been a very successful strategy for the UNE School of Law.

When we started our social media journey at the UNE School of Law, we did not have a plan and had not thought about how we were going to feed this 'beast' we had created. We started

3 Marta Cuesta, Monica Eklund, Ingegerd Rydin and Ann-Katrin Witt, 'Using Facebook as a Co-learning Community in Higher Education' (2016) 41 *Learning, Media and Technology* 55, 55.

4 Kyeong-Ju Seo, above n 1, 1.

5 Approval No HE16-288, Valid to 28/11/2017.

sending emails out to staff members asking them to tell us anything that they were doing or had done in the past that could be shared on our Facebook page. We also approached UNE School of Law alumni to ask them for interviews and write stories about them. Luckily, a number of alumna agreed to our request which really helped to get the Facebook page up and running.

III THE IMPORTANCE AND PROLIFERATION OF SOCIAL MEDIA?

Times are changing dramatically in our society. The use of technology and the emergence of digital natives have impacted on our universities considerably.⁶ A 2013 survey found that 55 per cent of university lecturers use social media in a professional context.⁷ In the same study, 41 per cent of those surveyed used social media in their teaching.⁸ This is understandable as many current university students are known as ‘digital natives’. Digital natives are people who have never known a world without the internet.⁹ Digital natives spend a great deal of their time exploring and interacting with digital technology.¹⁰ In 2008, people born into an internet world spent more than eight hours a day engaging with digital technology.¹¹ The figures were even higher in 2015, averaging at 12 hours of digital interaction per day.¹²

Since social media arrived in our lives after 2004 it has gone from strength to strength. As an example, Facebook now has 1.65 billion monthly active users around the world.¹³ Recent data indicates that 89 per cent of 18-20 year olds, and 82 per cent of people in the 30-49 year old age bracket, use Facebook. Interestingly, it is not just young people who use social media channels such as Facebook. In the 50-64 year old age group, 65 per cent use Facebook and in the 65 years + age group, 49 per cent of people use the same social media channel.¹⁴ In total, close to 40 per cent of the human population are said to use social media regularly.¹⁵

Increasingly, social media is being used as a marketing tool by businesses, including universities. Arguably, the interaction which people have on social media with businesses, makes consumers see a brand as more trustworthy.¹⁶ A strong social media presence may be a very important avenue of reinforcing the brand of a university.¹⁷ If a business creates a strong social media community, this can increase trust and loyalty.¹⁸ Having a high level of loyalty may provide ‘positive word of mouth about the university.’¹⁹ Having a vibrant social media brand also helps to pique the interest of prospective students.²⁰ Arguably, a significant social media

6 Raziye Nevzat, Yilmaz Amca, Cem Tanova and Hasan Amca, ‘Role of Social Media Community in Strengthening Trust and loyalty for a University’ (2016) 65 *Computers in Human Behaviour* 550, 550.

7 Min Liu, Emily McKelroy, Jina Kand, Jason Harron and Sa Liu 1, ‘Examining the Us of Facebook and twitter as an Additional Social Space in a MOOC’ (2016) 30 *American Journal of Distance Education* 13,14.

8 Ibid.

9 Nevzat et al, above n 6, 550.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid, 553.

14 Ibid, 554.

15 Min Liu, above n 7,13.

16 Mohammad Reza Habibi, Michael Laroche n Marie-Odile Richard, ‘The roles of brand community and community engagement in building brand trust on social media’ (2014) 37 *Computers in Human Behaviour* 152, 156.

17 Nevzat et al, above n 6, 550.

18 Habibi et al, above n 16, 159.

19 Nevzat et al, above n 6, 550.

20 Ibid, 551.

presence may reduce student attrition and maintain relationships with people after they have graduated.²¹ The informal and friendly nature of social media may also ‘promote more openness among participants.’²²

IV PROBLEMS WITH SOCIAL MEDIA

As previously discussed, the use of social media in the university context has many advantages. It is fair to say there are potential risks and problems associated with universities engaging in social media. In terms of workload, managing successful and engaging social media sites is time consuming and constant in nature.²³ In addition, it has been our experience that you need people with a particular skill-set to manage social media accounts. For example, it is necessary to have a team who have proficiency in terms of storytelling, whether it be through the medium of video or the written word. In addition, it is advantageous to have people who can write in an emotional and engaging way. A functional understanding of the different social media platforms is also fundamental.

Social media is still regarded ‘with understandable suspicion by many lecturers.’²⁴ The use of social media can evoke ‘privacy, security and ethical concerns at both the pedagogical and learning and teaching policy levels.’²⁵ Burns and Corbin note there are several issues relating to the importance of maintaining professionalism when using social media.²⁶ Two of the main risks are reputational damage for lawyers, as well as undermining the public confidence in the legal profession.²⁷ One of the main concerns with the UNE School of Law was the potential for students to post defamatory material relating to staff, students or others. Clearly, this can be an issue and it can be ‘multiplied when outsiders respond to student material posted on social media sites.’²⁸ In addition, it is necessary to be cognisant of copyright considerations to avoid any breaches of intellectual property.²⁹ For example, any images must have a ‘common licence’ attached to them. Social media managers also need to be aware of plagiarism rules and principles. Even though there is currently a dearth of law in this area, over the coming decade there will no doubt be further common law cases which will examine issues such as the ‘vicarious liability of lecturers or their institutions.’³⁰ From our experience, many of these problems can be managed by making sure the team is aware of these considerations. It is also fundamental that social media sites are continually checked, so that any issues can be dealt with quickly.

V SOCIAL MEDIA IN LEGAL EDUCATION

Law schools have been facing a variety of challenges in recent years, such as the increasing number of law schools entering the market and a perceived glut of law graduates. In fact, Michelle Pistone has described the situation facing law schools as a ‘tsunami’ or a ‘perfect

21 Ibid.

22 Cuesta et al, above n 3, 59.

23 George Callaghan and Ian Fribbance, ‘The use of Facebook to Build a Community for Distance Learning Students: A Case Study from the Open University’ (2017) 31 *Open Learning: The Journal of Open, Distance and e-Learning* 260, 262.

24 Catherine Lumby, Nicole Anderson and Sky Hugman, ‘Apres Le Deluge: social media in learning and teaching’ (2014) 20 *The Journal of International Communication* 119, 122.

25 Ibid, 122.

26 Kylie Burns and Lillian Corbin, ‘E-Professionalism: The Global Reach of the Lawyer’s Duty to Use Social Media Ethically’ (2016) *Journal of the Professional Lawyer* 153, 161.

27 Ibid 171.

28 Lumby, above n 24.

29 Lumby, above n 24.

30 Lumby, above n 24.

storm.³¹ One way that universities may be able to react to these challenges is by getting involved with new educational and social mediums. Many of our law students are digital natives, which means they have not known a time without the internet. Millennials are more likely to receive their news from facebook or blogs, as opposed to newspaper and television.³² Developing an engaging and effective social media presence allows students to interact with ideas at any time, outside allocated classes.³³

Engaging with social media also allows academics to share their knowledge with both the general community and with their students.³⁴ Therefore, using social media tools can help academics broadcast their research whilst supporting the university's marketing efforts. It is also clear that the reach of research ideas will be considerably higher when documented via social media.³⁵

VI COMMUNITY OF PRACTICE AND INQUIRY

The importance of creating a community of practice has been spoken about extensively in educational literature. For example, Lave and Wenger argue that 'learners inevitably participate in communities of practice and that the mastery of knowledge requires newcomers to move towards full participation on the sociocultural practices of a community.'³⁶ In other words, for people to fully engage in education, 'communities of practice' need to evolve. In addition, communities of practice permeate our lives during both our work and leisure time.³⁷ As people use social media in all facets of their lives, it is an easy way to allow groups to develop these communities of practice which are important to people.³⁸

Allowing students to 'investigate the problems and engage in inquiry for themselves'³⁹ is an approach which has been praised in the educational literature. For example, in a recent study by Akyol and Garrison, their research showed there was a significant connection between the 'collaborative development of cognitive presence in online discussions and students' perception of cognitive presence are associated with high perception of learning and actual learning outcomes in terms of grades.⁴⁰ Therefore, incorporating social media into a field of academic study, clearly has added benefits in terms of achieving educational theorist's goals, whilst also possibly assisting students increase their overall results.

31 Michelle Pistone 'Law Schools and Technology: Where We Are and Where We Are Heading' (2015) 64, *Journal of Legal Education* 586, 586.

32 Ibid, 591.

33 Ibid, 594.

34 Kate Galloway, Kristoffer Greaves and Melissa Castan, 'Gatecrashing the Research Paradigm: Effective Integration of Online Technologies in Maximising Research Impact and Engagement in Legal education' (2013) 6 *Journal of the Australasian Law Teachers Association* 83, 83.

35 Ibid, 88.

36 Jean Lave and Etienne Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press, 1991) 33

37 MK Smith, 'Communities of Practice' *The Encyclopaedia of Informal Education* (2003) <www.infed.org/biblio/communities_of_practice.htm>.

38 Ibid

39 Matthew Lipman, *Thinking in Education* (Cambridge University Press, 1991) 15.

40 Zehra Akyol et al, 'A Response to the Review of the Community of Inquiry Framework' (2009) 23 *Journal of Distance Education* 123, 124.

VII OUR STORIES AND CONTENT

One of the other interesting things about creating stories for social media is that sometimes the stories that you expect to go well, do not go well, and sometimes the stories you do expect to gain traction, fail. For example, many of the posts that we published about well-respected academics being invited speakers at high end academic conferences, were not given much attention on social media, whereas a video or photo of a native animal such as a koala or a kangaroo, would gain significant attention. The other thing that we found was that posts about our past and current students, were very popular. In fact, one post that surprised the authors with its popularity was one relating to an older alumnus who was working in a voluntary part time job. Even though this particular alumnus was not ‘successful’ according to some people’s definitions, his story clearly resonated with a lot of people.

At the UNE School of Law, we create many human interest stories where we aim to celebrate people who are connected with the UNE School of Law. Some examples of these stories include staff profiles, student profiles and alumni profiles. For these profiles, we interview the subject and then write a story based around their lives. Some of the questions which may be asked include why they decided to study law (if applicable), what was/is their favourite law subject, and what do they hope to do with their law degree? We also ask more personal questions such as what the subject’s interests are. Within each of these stories we focus on the personal stories of the people who are highlighted in the Facebook post. For example, for our staff profiles we discuss their individual stories and what they love about the law. We find this approach resonates more effectively with our audience as we are creating real and authentic stories of the individuals involved in the UNE School of Law.

In addition to human interest stories we post about events, job opportunities and information relating to current legal issues. We are also working towards highlighting the research of our academic staff members. We also create humorous and relevant posts such as ‘Friday Fun Fact’ which document an interesting, yet humourous, aspect of the law. One example of a Friday Fun Fact is as follows:

‘Friday Fun Fact!’

If you’re going to do your law readings in the fridge make sure you can open the door from the inside. That seems to be the take away message from s 58B(1) of the *Summary Offences Act 1953* (SA) which states: “A person must not sell or hire, or offer or expose for sale or hire, a refrigerator, ice chest or icebox having in it a compartment of a capacity of 42.5 litres or more unless that compartment is so constructed or equipped that every door or lid can be opened easily from the inside of the compartment when any lock or catch that can be operated from the outside of the compartment is fastened.” The maximum fine is \$750.’

Posts such as these, arguably humanise both the School of Law and the law in general. The other way we attempt to humanise the School of Law is by identifying the importance of nostalgia and emotion within our posts.

VIII THE IMPORTANCE OF NOSTALGIA AND EMOTION

Evoking nostalgia and emotion is an arguably excellent way to gain attention via social media. One post which triggered both a sense of nostalgia and emotion, was the following:

In order to make property law more palatable and interesting for students Dr Kip Werren incorporates food fantasies into his lectures. Kip took on this tradition as a tribute to the late Dr Peter Hemphill who was one of the original lecturers at the UNE School of Law. Many alumni will remember Peter’s food fantasies which students could draw upon when contract law became too complicated or boring. It looks like these ‘food fantasies’ are also helping our current

students with their exams. You see, a couple of Kip’s property law students have emailed saying ‘we have given ourselves a final food fantasy to get through the next week... we are planning to go to Neville’s straight after the property law exam finishes for their new ‘Holy Cheeze. This burger boasts a house made crumbled American cheddar cheese patty, double grass-fed beef, double Coby Jack cheese, bacon, classic Nev’s sauce, Jalapenos and onion relish. This is all served with a side of crinkle cut chips. We are sure it will be, as you say, absolutely delicious!

This post reached an audience of 5411 people and attracted comments from alumni, such as:

One of my most memorable lectures for me was with Dr Hemphill and his food fantasy recipe for “human thigh bone”. It was a hilarious introduction into a case on cannibalism and contracts void for public policy. His engaging lectures were probably the reason I went on to practice commercial law. A huge loss to UNE community.

The popular takeaway business also shared our post which meant that it reached different viewers to the UNE School of Law’s audience. Posts such as these promote a high level of engagement as: they are unexpected on a Facebook page showcasing a law school, it is relatable to a large audience and it incorporates a powerful dose of nostalgia which evokes emotion. All of these factors lead to attention and engagement on our pages. This is important as engagement is ‘perhaps the Holy Grail of social media.’⁴¹

IX INITIAL SURVEY

In order to determine the effectiveness of the UNE School of Law’s social media efforts, we chose to examine if, and to what extent, these social media tools and online platforms can create an additional sense of community, and identify a baseline level of engagement against which to compare future results. A mixed methods approach was employed to collect a combination of qualitative and quantitative data with a survey used to collect demographic data and ask both Likert-scale and open-ended questions. Both the Facebook and Twitter feed history were analysed to determine the numbers and type of posts that had been shared, in order to compare these against the survey data.

As a rural university law school with 80 per cent of our students studying online, we were interested to see whether we could improve our students’ sense of community through the use of social media and other online communication platforms. Furthermore, we wanted data on what sorts of posts and information was of most relevance, not only to current students, but also to other university members, alumni and the wider legal community. The results discussed below are in respect of an initial survey designed to provide a base comparison point. While the page had already been operating for a year at the start of the survey process, we wanted to see what improvements could be made, and if they were implemented, would students respond to them. The results from the initial survey will be used to inform any necessary changes to the content of the Facebook page. A subsequent survey will be used to gauge whether these changes have had any effect on engagement. Only the initial survey is discussed below.

X METHOD

A Participants

Potential participants for the study included all students currently enrolled in a Law course at the University of New England and those students, alumni, academics and members of the public who like or follow the Facebook page and Twitter account.

41 Habibi et al, above n 16, 156.

B Data Collection And Analysis

This study employed a mixed-methods approach with both quantitative and qualitative data. The primary data source was survey responses to a mix of multiple-choice, yes/no, Likert-scale and open-ended questions. A study of posts made and materials available on the School of Law Facebook page, a School of Law Twitter feed, and a School of Law Community Site Moodle page, was also made to supplement these results. The survey was offered via all the online communication platforms. While coincidental recruitment of those in a dependent relationship with the researchers was necessary, as law students were those most likely to be involved in the online social media community of the School of Law, ethics concerns were addressed by ensuring all responses to the survey were anonymous and participation was voluntary. Some background demographic information was collected to provide a better understanding of the users of the platforms, however this information could not be used to determine whether a participant was from a particular unit.

C Study Survey

The survey sought to find out what participants' perceptions were of the current online communication platforms, which platforms were used most, what content was most popular and what participants wished to see more of. The survey consisted of 27 questions. The first part consisted of five questions to collect participant demographics including, age, gender, broad geographic location and association with UNE. Where a participant identified as a student, we further asked whether they were enrolled as an internal or external student. The second part of the survey contained six multiple-choice questions with the option for participants to provide their own free text response. These questions were designed to collect quantitative data on which communication platforms were being accessed, how often and what content on each of these was of most benefit/interest. The fourth part of the survey consisted of a series of yes/no, likert-scale and open-ended questions, to assess what content students wished to see more or less of, and to understand and gain a base understanding of whether the current platforms were contributing to developing a vibrant community, enhancing student experiences and increasing feeling of connectedness.

The quantitative data was analysed descriptively in order to present the survey results. However, due to low participation rates, this data is not necessarily representative. The qualitative data, comprising open-ended responses by participants, was analysed using NVivo. These responses were coded by one researcher while a second researcher checked these codes and modified them as necessary. These codes were used to identify themes in the responses. To enhance the reliability of these results, the content of online communication platform posts were analysed in order to supplement the researcher's interpretations.

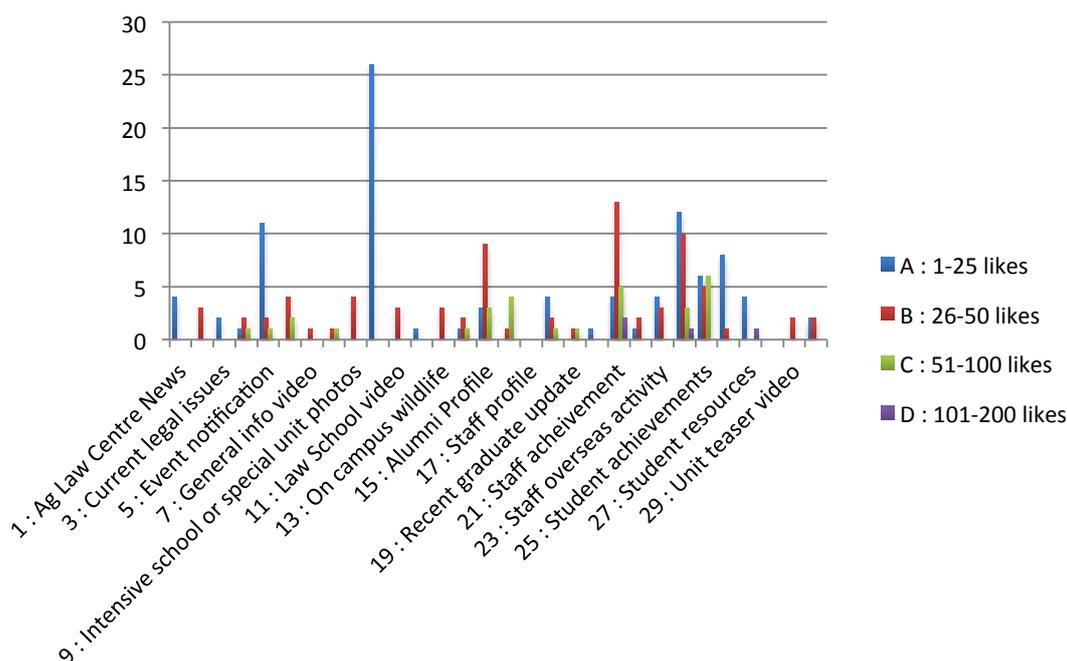
D The Study's Limitations

Although this study incorporated multiple data sources, it is limited in that only the responses from those who completed the voluntary survey were included. This study provided a snapshot of how social media tools can be used at a School level by an online and on-campus university. Because this study was focused on online communication platforms that were designed to speak to those interested in law at UNE, rather than involved in specific subjects, generalisations should only be drawn for those that share similar structures. Furthermore, we were limited in our analysis by the use of NVivo for Mac. Certain content analysis tools were unavailable in the Mac version of the software such as cluster analysis. Future research will address these limitations by ensuring the data is initially loaded onto and coded, using the Windows edition of this software.

E Facebook Page, Twitter Feed And The UNE School of Law Community Site

The Facebook posts were analysed by looking at the posts in the six months preceding the survey. The content of each post was coded to identify the theme of the post and how this corresponded to the survey questions. The posts were also coded based on the number of ‘likes’ to help identify any patterns in those posts which performed well and enable these to be compared to the survey results. As Twitter posts were re-posts of Facebook, it was not deemed necessary to code those responses.

This chart below depicts a comparison of the Facebook posts:



The vertical axis represents the frequency of posts which have been published in this area. The number of ‘likes’ which each type of story has generated, is also represented in the chart. Note that this graph is not necessarily representative of the popularity of posts. For some of the posts, the UNE School of Law may have had fewer followers than it did for others, due to the growth in followers over a period of time. As evidenced from the above chart, the UNE School of Law’s audience is particularly interested in stories about staff and students of the School.

The School of Law Community Moodle site was a new initiative commenced in 2014, and is available to enrolled law students only. Content on this site is limited to: Head of School Communications; Specific School Communications, Skills Resources, Guides and Policy documents, and links to professional organisations.

F Results

We received 71 complete responses. Our largest response age group was 35-44 year olds (28 per cent) followed by 20 per cent of responses coming from 45-54 year olds. The group of 25-34 year olds constituted 18 per cent of respondents and 55-64 year olds 15 per cent of the responses. The groups of 18-24 year olds and 65-74 year olds, had the lowest participants with 14 per cent and four per cent respectively. More females than males participated in the survey as 42 per cent of males and 58 per cent of females completed the survey. Most of the participants were located in the New England area (32 per cent) or in regional Australia (26 per cent). Eighteen

per cent of participants were located in the Sydney metropolitan area, and three per cent were located overseas. As expected, most of our participants were UNE School of Law students (76 per cent). Eleven per cent were academics at UNE and seven per cent were alumni of the UNE School of Law. In addition, three per cent of participants were interested community members and another three per cent were students of another UNE School. One per cent of participants were high school students.

Of the current UNE students who completed our survey, 15 per cent were on campus students and 62 per cent were external students. In terms of which platforms these students accessed, 66 per cent said they regularly access the Community Moodle site and 69 per cent accessed the Facebook page. Thirteen per cent said they regularly accessed Twitter, whilst another 13 per cent said they did not access any of the platforms. Students noted they saw our content a couple of times a week (38 per cent), once a week (18 per cent), once a day (15 per cent), once a month (13 per cent) and other (one per cent).

This cohort of students found the following content most interesting and/or beneficial:

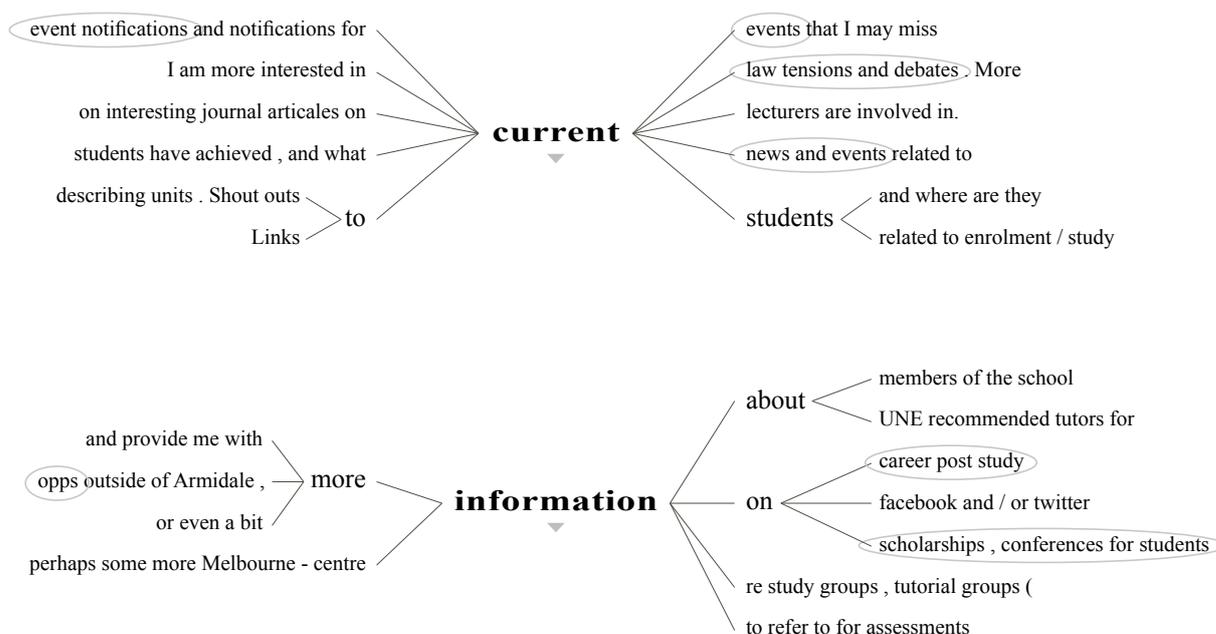
WHAT CONTENT DO PARTICIPANTS FIND MOST INTERESTING/BENEFICIAL?	PERCENTAGE
Discussion of Current Legal Issues	42 per cent
Event notifications	42 per cent
UNE School of Law Staff Achievements	35 per cent
SOL Student Achievements	31 per cent
Photos from student events or intensive schools	31 per cent
Job Opportunities	31 per cent
Information about staff research publications	28 per cent
Staff Profiles	27 per cent
Alumni Profiles	24 per cent
Current student profiles	18 per cent

In terms of the qualitative results, respondents noted ‘Alumni/staff/student profiles are awesome.’ Another noted that they liked the ‘Information about members of the School of Law alumni’ the best. Others said that they found information about ‘Guest lecturer(s), staff papers and job opportunities’ informative. Thirty-seven per cent of respondents stated they attended events as a result of seeing the events advertised on the online platforms. Sixty-three per cent of the respondents said they saw these events advertised on Facebook, and 40 per cent said they did not know about these events before the online platforms were created.

Respondents noted they would like to see more student focused content in terms of events, talks and profiles. Another said that they would appreciate ‘more study tips, stories linking to course content to assist off campus students.’ One respondent wanted to be provided with ‘Ways to connect with other people nearby.’ In terms of what the respondents would like to see less of, one said they would like to see less ‘On campus info. Remote learners cannot connect to this and it clutters up the space.’ Others noted that they wanted to see less content relating to ‘Job(s) further study etc’, ‘alumni profiles’ and ‘updates that are not relevant to the law school such as social events-they belong on another site.’

When coding the open-ended questions regarding what content students wished to see more of, word frequency queries were run in order to identify recurring themes. Once generic words such as ‘law’ and ‘school’ were removed from the search, more specific words could be identified.

For example, both ‘current’ and ‘information’ were identified as part of this process. We found these results were visualised most successfully with the use of word trees. This allowed easy identification of recurring themes and phrases that surrounded the words of interest. An analysis of the below word trees identified a recurring interest in legal news, events and opportunities for students. Once these themes were identified we were able to use this information when planning future content for the social media pages.



G Discussion

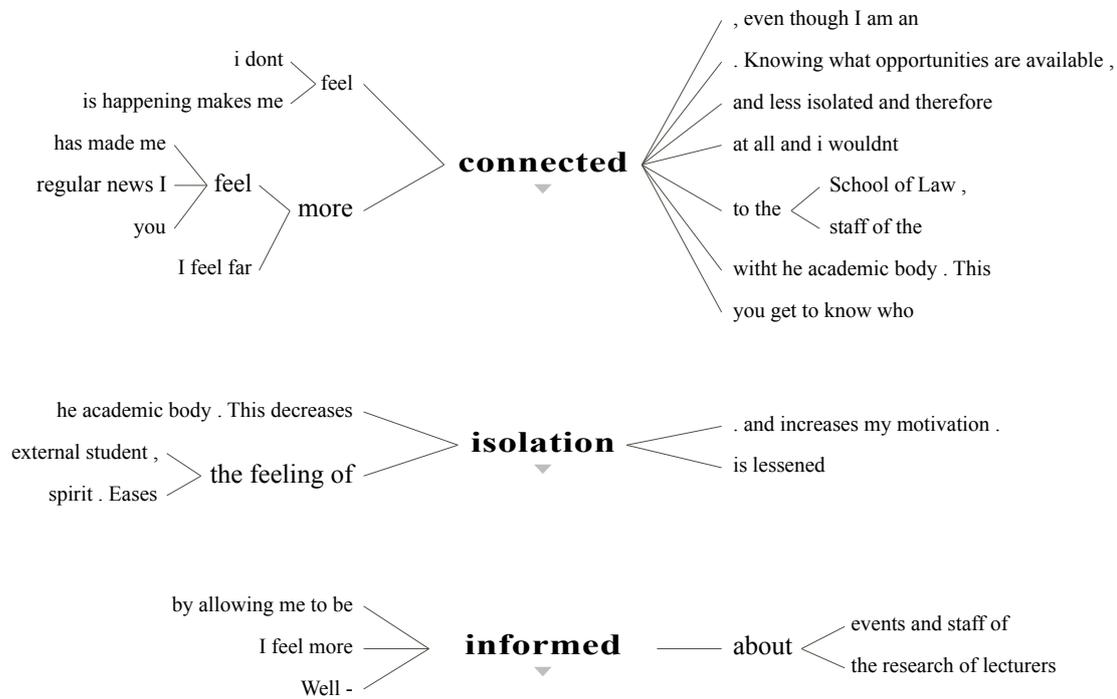
As we anticipated, most students said they felt more connected to the UNE School of Law as a result of the introduction of the online communication platforms. Twenty-seven per cent said they felt much more connected, 18 per cent moderately more, and 15 per cent slightly more. Twenty-one per cent expressed the same level of connectedness with three per cent feeling moderately less and one per cent much less. Students noted ‘I feel more connected and less isolated and therefore more likely to achieve my goals and not miss out on great opportunities.’ Another said that ‘Facebook and other communications make me feel that I am part of a wide community’ and ‘helps remind off campus students that we are all linked.’ Yet another said that ‘the provision of ANY additional avenue of communication – in particular, interactive – is of significant value to external students, studying online.’

The other heartening statistic was in response to the question ‘Do your interactions with the UNE School of Law via the online communication platforms make you feel part of a vibrant community?’ Sixty-six per cent thought that it did (26 per cent said ‘definitely yes’ and 40 per cent said ‘probably yes’). Fourteen per cent were ambivalent (‘might or might not’), 20 per cent did not think it did, 17 per cent said ‘probably not’ and three per cent said ‘definitely not.’

In terms of whether or not the UNE School of Law platforms enhanced respondents’ university experience, many indicated that it had. Twenty-one per cent said the online platforms had definitely enhanced their university experience and 54 per cent said they had probably enhanced their university experience. Twelve per cent were ambivalent (‘might or might not’), only eight per cent said ‘probably not and four per cent said ‘definitely not’ about whether the online platforms enhanced their university experience.

The relatively small number of responses we received from our survey indicate what we anecdotally surmised. That is, students felt more connected to the UNE School of Law as a result of our social media initiatives. The survey responses reaffirmed existing literature which notes that social media platforms like Facebook, have only had a small amount of ‘success as a formal part of learning.’⁴² On the contrary however, there is evidence to suggest that platforms such as Facebook, have a ‘positive contribution to make in creating more active learning communities.’⁴³

The following word trees visualise the responses received from participants where they used the words ‘connected’, ‘isolation’ or ‘informed’. Analysis of these responses again identified opportunities for improvements in the content we provide. As with the word trees presented above, the surrounding words again identified that it is information about news, events and opportunities which has contributed to enhancing student experiences. This qualitative data also supports the findings from the quantitative responses listed in the table above.



XI CONCLUSION

The initial survey we conducted indicates that respondents generally feel more connected to the UNE School of Law as a result of our online platforms. It needs to be emphasised that social media is but one part of a wider strategy that has been implemented in the UNE School of Law to create a more cohesive community. The UNE School of Law has undertaken community building activities away from online platforms. For example, we have organised community events where we invited members of the legal and education communities to build relationships in the wider community. In addition, we became actively involved with high schools in the region to build relationships with teachers and high school students. We have also used the information collected from the initial survey to change the content of social media posts, particularly via

42 Callaghan and Fribbance, above n 23, 262.

43 Ibid.

Facebook. We have increased our focus on events, news and opportunities, and ensured they cover both on and off campus interests. Whether these changes have had the desired impact will be tested by future research.

Overall, we worked very hard to create a positive, friendly and informative environment both in our online and in person interactions. It is clear that we have a long way to go in order to create a strong and cohesive community within the UNE School of Law. We have however, built a strong social platform which will be built on in the coming years.

UNPACKING THE COMMISSIONER'S REMEDIAL POWER

*Robin Woellner**

I INTRODUCTION

Schedule 1 of the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017* (Cth), inserts a new Division 370 in Part 5-10 in the *Taxation Administration Act 1953* (Cth) ('TAA'), which provides the Commissioner of Taxation with a *discretionary* power to make legislative instruments modifying the *operation* of a tax or superannuation provision in specified circumstances ('Remedial Power'). The aim of Division 370 of the TAA is to enable the Commissioner to overcome unintended consequences in the operation of taxation laws, and ensure that the laws operate in accordance with their intended purpose or object. While Division 370 is quite short (and unusually so for modern tax legislation), it contains a number of interesting provisions.

Under Division 370 of the TAA, the Commissioner is only able to modify the operation of a provision where (to paraphrase):

- the modification is 'not inconsistent' (rather than *consistent*) with the provision's 'intended purpose or object'. This test is objective, but it could be expected that the Commissioner and taxpayers might well have a different view of what the provision's intended purpose or object is, and what modification would be needed to make it 'not inconsistent' with that purpose;
- the *Commissioner considers* the modification to be '*reasonable*', having regard to the intended purpose or object of the provision, and whether taxpayer compliance costs would be *disproportionate* without the modification; and
- a specified public servant advises the Commissioner that the impact of the modification on the Commonwealth budget '*would be negligible*'.

The test contains a number of vague terms (such as 'reasonable', 'disproportionate' and 'negligible') on which the views of the Australian Taxation Officer ('ATO') and taxpayers, might be expected to differ on occasions. A modification can be general, or apply only to a specified class or to specified circumstances, but will not apply if the modification would produce a less favourable result for the affected taxpayer.

The wide scope of the power delegated to the Commissioner has raised some concerns in relation to possible inconsistencies with the rule of law and the separation of powers doctrine – though the draftsman inserted a number of safeguards in an attempt to assuage such concerns. In the end, it may be a question of whether the advantages outweigh the disadvantages, and the end is seen to justify the means. The modest aim of this Paper is to outline the basic elements of the Remedial Power and to raise some issues which might emerge from an exercise of the Remedial Power.

II BACKGROUND – THE PROBLEM AND PROPOSED SOLUTION

From time to time – and unfortunately with more frequency, as tax law becomes increasingly complex – taxpayers complain that they have been caught by the unintended consequences of a piece of tax legislation, and are being treated unfairly¹. Examples include²:

- taxpayers affected by natural disasters who receive assistance or compensation but are unable to access Capital Gains Tax “(CGT)” rollover relief;³
- companies unable to satisfy the continuity of ownership test for carry-forward of losses where they have large numbers of small shareholdings⁴;
- unpaid present entitlements under Division 7A of the *Income Tax Assessment Act 1936* (Cth) (“ITAA36”); and
- taxpayers who accidentally exceed the cap on superannuation contributions.

Such unintended consequences are undesirable, not least because they ‘create uncertainty by delivering tax outcomes that do not make sense in their context’⁵. However, all too often in the past, the ATO has given the unpalatable but technically accurate response that while they can see the problem and the resulting unfairness, the ATO cannot change the wording of the legislation, and indeed is charged with the application and enforcement of the legislation as written⁶. As the Australian specialist tax advisory firm Greenwoods & Herbert Smith Freehills has observed:

We have seen too many instances where it is accepted that the text of the income tax legislation has miscarried, but the ATO regards itself as unable to interpret and administer the provision in a way that produces an outcome it acknowledges would be sensible.⁷

Certainly, on occasions, a purposive interpretation of the legislative provision, the application of s 15AA of the *Acts Interpretation Act 1901* (Cth), or the exercise of the Commissioner’s general power of administration under s 8 ITAA36 and s 3A of the TAA, may enable the ATO (if it is so inclined), to apply legislation in a manner more consistent with the apparent intent and objectives of that legislation.

However, on other occasions, these aids will not suffice to resolve the problem.⁸ For example, the ATO has indicated that even a purposive interpretation of the words in s 272-5 of the ITAA36 (dealing with loss carry forward by fixed trusts) could not achieve an interpretation ‘aligned with industry expectations’⁹.

-
- 1 Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017 (hereafter the ‘EM’), para [1.90].
 - 2 Nassim Khadem, ‘Tax Commissioner gains new powers to deal with “unintended outcomes” in tax and super laws’ *Canberra Times* 1 May 2015 <<http://local.images.canberratimes.com.au/business/the-economy/tax-commissioner-gains-new-powers-to-deal-with-unintended-outcomes-in-tax-and-super-laws-20150501-1mxoxx.html>>.
 - 3 EM [1.108].
 - 4 EM [1.109].
 - 5 EM [1.99].
 - 6 As the EM [1.99] notes, ‘the Commissioner cannot resolve unintended tax outcomes by giving effect to the purpose or intention of a provision, where such an approach would extend beyond the words of the ‘provision’.
 - 7 Submission to Tom Reid, Law Design Practice, The Treasury, 7 January 2016, 1
 - 8 EM paras [1.99], [1.142]; T Cardan, ‘New remedial power for the Commissioner will benefit taxpayers’, <[http://www.wolterskluwercentral.com.au/tax/income-tax/new-remedia\[-power-commissioner-will-benefit-taxpayers/>](http://www.wolterskluwercentral.com.au/tax/income-tax/new-remedia[-power-commissioner-will-benefit-taxpayers/>) .
 - 9 Though in that case, the Commissioner was able to deal with the situation by exercise of the discretion in s 272-5(3) of Sched 2F *ITAA36*.

Alternatively, it may sometimes be possible to have Parliament amend the law to overcome a problem. However, Parliamentary time is limited¹⁰, and amendment is a lengthy, resource intensive¹¹ and uncertain process¹². In the meantime, the delay may cause considerable uncertainty for affected taxpayers, and a form of ‘Russian Roulette’ if taxpayers have to “bet” on whether amendments will be made in time (or at all)¹³ to protect their transactions, with the prospect of additional tax and penalties if they get it wrong¹⁴.

What was needed to alleviate these problems was a process that would enable the ATO to remedy minor problems (relatively) quickly¹⁵ and easily, thus reducing uncertainty, risk and compliance costs for taxpayers and the consequential need for taxpayers to seek clarification on issues¹⁶, which in turn would reduce regulatory costs for the ATO and government.¹⁷ With the aim of achieving these improvements, in 2016 Australia’s Federal Government introduced the Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016 – which subsequently became law in February 2017¹⁸. Schedule 1 of the new Division 370 gives the Commissioner of Taxation a *discretionary* statutory power (‘Remedial Power’) to modify the *operation* (but not the text) of a taxation law by legislative instrument, to enable the law to be administered so as to remedy a particular unintended consequence of that law¹⁹. The Remedial Power

is intended to increase certainty in the administration of taxation laws by reducing the regulatory burden on entities that arise from unforeseen or unintended consequences in the application of taxation laws which cannot otherwise be addressed ... [and] also ensures the Commissioner can administer the law consistently with its intended purpose or object. It is anticipated that this power will reduce the time it takes to give effect to some minor legislative corrections. It may

10 [EM [1.138] – as is the Parliamentary draftsman’s time: EM [1.103]-[1.104].

11 EM [1.98].

12 See EM [1.98], [1.100]-[1.105], [1.111]

13 Cf the EM [1.21],[1.91], [1.100]-[1.101]. The ATO has tried to alleviate the problem by providing administrative protection from penalties in certain circumstances – though this is limited: EM [1.105],

14 EM [1.110]

15 The EM estimates that the process of introducing a Remedial Power modification might take some 6-9 months to complete, as compared to “up to and sometimes more than” 2 years for legislative amendment: EM [1.104], [1.150].

16 EM [1.150].

17 The EM suggests that had the Remedial Power been applied to the examples the EM cites, “The saving on administrative and parliamentary resources, while difficult to quantify, would be significant”: [1.152],[1.166].

18 The Bill was passed by the Senate on 9 February 2017, assented to on 28 February, and is now the *Tax and Superannuation Laws Amendment (2016 Measures No.2) Act 2017* (Cth) (Act No.15). Useful background to the remedial power (including earlier discussions of Recommendation 24 in the Tax Design Review Panel Report *Better Tax Design and Implementation* (2008) and the Treasury paper on ‘An “Extra-Statutory Concession” Power for the Commissioner of Taxation’ (17 July 2009), as well as a consideration of possible alternatives is contained in the ‘Regulation Impact Statement’. See also Nicole Wilson-Rogers ‘A Proposed Statutory Remedial Power for the Commissioner of Taxation – A Henry VIII Clause to benefit taxpayers?’ (2016) 45 *Australian Tax Review* 253.

19 The Tax Objection characterised the remedial power as ‘not unlike the scope the High Court afforded to courts in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] 147 CLR 297; ‘A new statutory remedial power for the Commissioner of Taxation’ 7 April 2016, 1 <<http://thetaxobjection.com/new-statutory-general-discretion-commissioner-taxation-proposed-div-370-remedial-power/>>. See also Tamara Cardan, ‘New remedial power for the Commissioner will benefit taxpayers’ (4 October 2016) <<http://www.wolterskluwercentral.com.au/tax/income-tax/new-remedial-power-commissioner-will-benefit-taxpayers/>>.

also, where appropriate, allow for some minor technical corrections to be addressed ... where, due to their relatively low priority, this may not otherwise occur.²⁰

The Commissioner can either introduce a modification of his own motion, or else (probably more commonly) act in response to a request by an affected party,²¹ and a modification will apply generally, unless it states that it only applies to a specified class of entities or specified circumstances.²² The Commissioner cannot use the Remedial Power to modify the operation of a taxation law for a single entity.²³

To help the Commissioner determine, among other things, when it is appropriate to exercise the Remedial Power, an expert panel is to be created (the issue of adequate consultation is discussed below).

Australia is not the only jurisdiction to have grappled with such issues. New Zealand faced a similar issue in 2016, when its government was considering a means by which their Commissioner of Inland Revenue ('IR') could achieve 'greater administrative flexibility in limited circumstances'²⁴. New Zealand considered the implications of developing a Remedial Power along the Australian lines, but rejected this approach²⁵, preferring to expand their IR's discretionary 'care and management' powers in ss 6 and 6A of their *Tax Administration Act 1994* (NZ) to cover a range of specified areas²⁶.

III COSTS IMPOSED BY THE EXERCISE OF THE REMEDIAL POWER

A Practical And Political Costs

While the Remedial Power has obvious benefits, it imposes a range of costs on various parties, ranging from 'adjustment' costs for taxpayer and their advisers as they endeavour to understand the Remedial Power process and the implications for them of any particular modifications (because the modification of existing complex provisions will mean that taxpayers and advisers will have to grapple with the interaction of the two sets of provisions²⁷), to the costs to all parties of community consultation and input²⁸.

The ATO plans to reduce at least some of these costs by 'building familiarity' with the operation of the Remedial Power through online and physical, communication and consultation.²⁹

20 EM to the Bill [1.22]. An example of a putative legislative instrument under the Remedial Power is set out at pages 34-39 of the EM to the Bill.

21 For example, the Association of Superannuation Funds of Australia applied on 10 May 2017, for exercise of the Remedial Power in relation to transitional Capital Gains Tax relief for unsegregated funds: see Fiona Galbraith (Director, Policy, The Association of Superannuation Funds of Australia), 'Letter to Australian Taxation Office Assistant Commissioner Jason Lucchese', 10 May 2017. The Institute's submission incorporates the ATO's pro-forma application form.

22 Sec 370-5(3).

23 EM [1.54]; note [1.55].

24 Inland Revenue Ta Tari Taake New Zealand Tax Policy, 'Chapter 6 – Role of the commissioner and design of a new Tax Administration Act', 2016 <<http://taxpolicy.ird.govt.nz/publications/2016-dd-mts-7-tax-administration/chapter-6>>.

25 Ibid 5 on the basis that the Australian approach was 'shaped by the relevant context' including difficulty in passing legislation because of the Australian parliamentary structure, which did not apply in NZ.

26 Including minor or transitory legislative anomalies, areas where a statutory rule is difficult to formulate, long-standing practices accepted by both IR and taxpayers, and cases of 'unfairness at the margins': above, n 25, 2-3.

27 EM [1.157].

28 EM [1.154]-[1.156]; see also [1.159].

29 EM [1.158].

There will also be costs to government in: overseeing the introduction of a modification, monitoring its ongoing operation and relevance, and tracking and preparing for its ‘sun-setting’³⁰. There may also be a *political* cost related to implementation of the Remedial Power in that the ATO ‘would no longer be able to justify decisions that give rise to unjust tax outcomes on grounds that [it] has no relevant discretionary power under the ITAA36 beyond the limits of the general power of administration’.³¹ The ATO (and thus ultimately the government) will therefore in future, be under greater pressure to explain why it has decided (or not decided) to exercise the Remedial Power in a particular case.

B *The Scope Of The Remedial Power*

Under the Taxation Administration Act 1953 (Cth) And Constraints

References to legislation in the following segments of this Paper are to the *Taxation Administration Act 1953* (Cth) (‘TAA’) unless otherwise stated.

1 THE SCOPE OF THE REMEDIAL POWER

The Remedial Power is exercisable in relation to any ‘taxation law’, and applies to any Act for the whole or part of which the Commissioner has general administration³². This would include income tax (including under the *Capital Gains Tax Act 1985* (Cth) (‘CGT 1985’)), superannuation, the *Goods and Services Tax Act 2000* (Cth) (‘GST 2000’), the *Fringe Benefits Tax Assessment Act 1985* (Cth) (‘FBT’), the *Tax Agents Services Act 2009* (Cth) (‘TASA’), and excise taxes, among others.

Where the Commissioner shares the general administration of a law with another government agency, it is expected that the Commissioner will consult with the other agency before making a decision about whether or not to exercise the Remedial Power.³³ Giving an administrator such broad quasi or delegated legislative power³⁴ is a significant step, which might raise potential constitutional³⁵ and other concerns – and some commentators have been critical of such clauses³⁶. However, the approach is not new as the Commissioner has long had power to make regulations under s 266 of the ITAA 1936³⁷ and provisions such as ss 655A, 741, and 992B of the *Corporations Act 2001* (Cth),³⁸ give the Australian Securities Investment Commission

30 The EM suggests that such costs would be ‘far less significant than those associated with making changes to the primary law’: EM [1.167]. This seems plausible, but it will be interesting to monitor.

31 The Tax Objection, above n 19, 2.

32 Sec 370-5(1) of the *Tax and Superannuation Laws Amendment (2016 Measures No 2) Act*, applying the definition of a “taxation law” in s 995-1(1) ITAA97.

33 EM, [1.25].

34 The EM itself characterises the power as “legislative”: para [1.19].

35 Nicole Wilson-Rogers, ‘The constitutional validity of a statutory remedial power for the Commissioner of Taxation’ (2015) *Australian Taxation Review* 44, 242-262.

36 See for example Robin Speed, President of the Rule of Law Institute of Australia, ‘Submission to Mr Tom Reid’, Law Design Practice, The Treasury, 8 January 2016; Fiona Galbraith, Director, Policy, The Association of Superannuation Funds of Australia, submission to Jason Lucchese, Assistant Commissioner, ATO, 10 May 2017.

37 See, eg, s 24AV ITAA36

38 Such provisions are commonly described as ‘Henry VIII’ clauses, so called because of that monarch’s penchant for using similar powers to override laws made by Parliament – see for example Wilson-Rogers above n 18, 14-18. The other examples cited above n 13, 21-24. See also Stephen Argument ‘Henry VIII clauses Fact sheet’, paper prepared for the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT (November 2011); Rule of Law Institute of Australia, (Draft) “Henry VIII clauses & the rule of law”.

(‘ASIC’) similar powers which have survived High Court scrutiny³⁹. For example, ss 926A(1)-(4) of the *Corporations Act 2001* (Cth) state in essence, that the ASIC may:

- exempt a person or financial product or class of persons/products from all or specified provisions to which the section applies;
- declare that relevant provisions apply as if specified provisions were omitted, modified or varied as specified in a declaration; and
- apply an exemption unconditionally or subject to specified conditions⁴⁰.

These provisions confer on the ASIC a very broad power to change the legislation’s operation in a particular context. The ASIC typically describes its use of the power along the following lines:

[W]e use our discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit, or where we can facilitate business or cut red tape without harming other stakeholders⁴¹.

The ASIC Commissioner’s remedial power was clearly modelled on such provisions, so that given the confirmed constitutional validity of the ASIC powers, the tax Remedial Power seems unlikely to offend constitutional principles⁴².

2 CONSTRAINTS ON THE EXERCISE OF THE REMEDIAL POWER

Not surprisingly, exercise of the very broad taxation Remedial Power is subject to a number of constraints, namely:

- (a) *The Remedial Power is discretionary, limited to minor technical corrections, and is a measure of last resort*

Clearly, the power is intended to be used only as a last resort, and infrequently – the EM indicated that the Commissioner would be expected to use the Remedial Power no more than 10 times per annum,⁴³ and only to remedy minor issues – it cannot be used, for example, to alter the purpose or object of a law. The power is *discretionary*, and the Commissioner cannot be forced to exercise the power unless there are extraordinary circumstances. However, there will no doubt be very different views on whether it is appropriate for the Commissioner to exercise their discretion in a particular case, and on what terms. Similarly, the questions of when a technical correction is ‘minor’, where the boundary lies and what are the criteria, are an amorphous issue

39 *Capital Duplicators Pty Ltd v Australian Capital Territory (No. 1)* (1992) 177 CLR 248.

40 See ASIC Report 411 ‘Overview of decisions on relief applications’ (February to May 2014)(Sept 2014) 4. Provisions such as s 926A (1) and (2) of the *Corporations Act 2001* (Cth) differ from the tax Remedial Power in that they can be exercised for a particular entity and are limited in terms of the law which can be modified to provisions to which the section applies.

41 Significantly, ASIC Report 506 ‘Overview of decisions on relief applications (April to September 2016)’ (December 2016) 4, observed that [t]he purpose of the report is to improve the level of transparency and the quality of information available about decisions we make when we are asked to exercise ASIC’s discretionary powers to grant relief from provisions of the Corporations Act and the National Credit Act’.

42 See Nicole Wilson-Rogers, above n 38.

43 EM [1.152]. Compare Cardan, above n 8 and see also Wilson-Rogers above n 18, 24-25 who speculates that the greatest difficulty in applying the remedial power may be in demonstrating the inconsistency between the underlying policy and the way the law is being applied, given that identifying the policy underlying legislation is ‘notoriously problematic’. Wilson-Rogers, above n 18, 24 and below n 75.

on which opinions can be expected to differ on occasion. Unfortunately, the Act and EM do not provide any guidance on this point.

(b) *The Power can only be exercised where the modification proposed would not be inconsistent with the intended purpose or object of the law: s 370-5(1)(a) Tax Administration Act 1953 (Cth) ('TAA')*

Under s 370-10(a)-(c) of the TAA, in ascertaining the intended purpose of a provision, the Commissioner *must* examine (to paraphrase):

- Any documents that may be considered pursuant to s 15AB(2) of the *Acts Interpretation Act 1901* (Cth)⁴⁴ – but for the purpose of ascertaining the intended *purpose* of the legislation, not the *meaning* of a provision;
- Any other material that would assist in determining the intended purpose, ‘whether or not that material forms part of the provision in question’. This would include for example, government announcements and releases, as well as the ‘full legislative history’ of the provision from its inception;⁴⁵ and,
- *may* give consideration to the text of a relevant provision, though the text need not be given ‘primacy’ in that process.

The test for inconsistency with the provision’s object or purpose is objective, and ultimately a court would have to decide the issue if an exercise of the Remedial Power were challenged, for example by competitors who could establish standing,⁴⁶ but did not fall within the modification and were therefore disadvantaged. While the power is very broad, if a modification were found by a court to be in fact inconsistent with a provision’s object or purpose, the modification would be pro tanto beyond power, and therefore invalid.

It is important to note that the ‘intended purpose or object’ of a provision for Remedial Power purposes may well be different to what would be determined as the provision’s ‘purpose or object’ through the application of statutory interpretation principles seeking to determine the meaning of that provision⁴⁷. Thus s 370-10(c) of the TAA specifically states that in ascertaining the intended purpose or object of a provision ‘primacy is not required to be given to the text of the provision’. That is:

While the material considered may include the text of the relevant provisions, the focus is on ascertaining the intended purpose or object of the provision (when considered in its broader

44 Or s 15AB(2) as applied by s 13 of the *Legislation Act 2003* (Cth). Section 15AB(2) sets out a list of the extrinsic material that may be considered in interpreting a provision, and includes materials such as the Explanatory Memorandum of a Bill, and Second Reading speech, committee and Royal Commission reports, among others.

45 EM [1.35]

46 Exploration of this issue is beyond the scope of this Paper, but see, eg, Queensland Public Interest Clearing House Incorporated, ‘Standing in Public Interest Cases’ (Monograph, July 2005); Joshua D Wilson and Michael McKitterick, ‘Locus Standi in Australia – A Review of the Principal Authorities and Where It Is all Going’, (Paper presented to the 2010 Conference of the Civil Justice Research Group, The University of Melbourne); Kathleen M Mack, ‘Standing to Sue Under Federal Administrative Law’ [1986] 16 *Federal Law Review* 319.

47 EM [1.30].

context), and, unlike in statutory interpretation, does not require weight to be given to the text of the provision. [Schedule 1, item 3, note to paragraph 370-10(c)].⁴⁸

Significantly, the test for application of the statutory Remedial Power is whether the proposed modification would ‘not be inconsistent with’ the intended purpose or object of the law. This test is broader than a test of whether a modification would be ‘consistent with’ that purpose,⁴⁹ and is intended to cover circumstances where it is ‘reasonably clear’ that the circumstances which have arisen were not foreseen or contemplated at the time the law was passed, and ‘it may reasonably be ascertained that had those circumstances been considered when the law was drafted, the law would have been drafted differently’.⁵⁰ While this test rolls off the tongue, it may prove elusive to apply in practice. If Parliament had not foreseen the particular eventuality, any speculation as to whether it might have altered the drafting if it had been informed about the issue, is fraught with uncertainty.⁵¹

(c) *The Commissioner must also consider the modification to be reasonable, having regard to specified factors: s 370-5(1)(b) TAA*

The factors which the Commissioner is required by s 370-5(1)(b) of the TAA, to take into account are (to paraphrase):

- (i) The intended purpose or object⁵² of the relevant provision; and also
- (ii) Whether taxpayers’ costs of complying with the provision are ‘disproportionate’ to achieving the provision’s intended purpose or object⁵³.

These factors raise a number of difficult issues. In relation to (i) above, examination of background materials and the text of a provision (above), may provide an insight into a provision’s general object, but not yield a clear statement of a provision’s precise intended purpose in a particular context.

In relation to factor (ii) above, the question of whether costs imposed are ‘disproportionate’ is also likely to raise difficult questions in some cases. Dictionary definitions are not particularly helpful. The Australian Macquarie Dictionary defines ‘disproportionate’ simply as ‘not proportionate; out of proportion, as in size, number etc’, and then defines ‘proportionate’ as ‘1. proportioned; being in due proportion; proportional ...’, and ‘proportion’ as ‘1. Comparative relation between things or magnitudes as to size, quantity, number etc; ratio ... 2. Proper relation between things or parts ... 7. symmetry; harmony; balanced relationship ...’.⁵⁴

The Explanatory Memorandum to the Act is silent on the intended scope of ‘disproportionate’ and does not offer any insights or examples to clarify the application of that term in the context

48 EM [1.31]. See also the Note to sub-sec 370-10(c), which states that ‘Ascertaining an intended purpose or object for the purposes of paragraph 370-5(1)(a) or subparagraph 370-5(b)(i) is not necessarily the same as ascertaining a purpose or object for the purposes of interpreting a provision of an Act’. Similarly, the EM at [1.33] states that ‘While the material considered may include the text of the relevant provisions, primacy, or a greater weight, need not be given to the text of the provisions in ascertaining intended purpose or object’.

49 EM [1.27].

50 EM [1.28].

51 Cf Wilson-Rogers, above n 18, 26.

52 As noted above n 18, Wilson-Rogers speculates that the greatest difficulty in applying the remedial power may be in demonstrating the inconsistency between the underlying policy and the way the law is being applied, given that identifying the underlying policy is ‘notoriously problematic’: Wilson-Rogers, above n 18, 24-25 and below n 75.

53 The EM [1.38] observes that in some cases, one factor may be more relevant than the others.

54 *Australian Macquarie Dictionary*, Macquarie Library Pty Ltd, 1981, 528, 1382 respectively.

of the Remedial Power. This leaves the meaning of ‘disproportionate’ disturbingly vague – and an issue on which reasonable minds may differ.

While the ATO will hopefully publish advice on its interpretation of s 370-5(1)(b) of the TAA, and courts will no doubt establish its boundaries in due course, there will still be considerable scope for disagreement on whether in any particular case, the compliance costs involved will be substantial enough to be ‘disproportionate’, and lively debates are to be expected. In addition to these prescribed statutory factors, the EM suggests that because the Remedial Power is discretionary – although the TAA ‘does not prescribe other matters the Commissioner may take into account’⁵⁵ in deciding whether it is ‘reasonable’ to exercise the Remedial Power – the Commissioner may also choose to take into account a range of other matters including⁵⁶:

- The extent to which the modification is favourable to entities⁵⁷;
- Whether a modification would lead to asymmetrical outcomes;⁵⁸
- The extent to which the modification has an adverse direct effect on the tax rights, obligations and liability of many third parties⁵⁹;
- The impact on any current judicial interpretation of the relevant law⁶⁰; and
- Whether the proposed modification reflects systemic issues which would be more appropriately addressed through legislative amendment by Parliament⁶¹.

Despite the EM and the experience with the Australian Prudential Regulation Authority (‘APRA’) and ASIC, a disgruntled taxpayer might seek to raise the argument that because s 370-5(1)(b) of the TAA specifies the two factors to be taken into account in determining whether a modification would be reasonable (and does not refer to relevant factors as *including* these factors; nor does it include the usual ‘any other relevant’ factors terminology), the Commissioner may be limited to considering these two factors.

The EM contains examples of situations where it is said that it would be reasonable to apply the Remedial Power.⁶² However, the examples given are clear cases – future problems will probably lie closer to the boundaries, and may not lend themselves to such easy analysis. It is worth noting also that if the Commissioner were to decide that an exercise of the power was (or was not) ‘reasonable,’ where the facts were such that no reasonable person could have reached that conclusion, the Commissioner’s exercise of the power might be open to challenge⁶³.

55 EM [1.39]

56 EM [1.39]

57 EM [1.40], citing paras [1.56]-[1.64] – for example, if a proposed modification would not be favourable to any entities, it would have no application, and it would therefore not be reasonable to use the Remedial Power in that situation: EM [1.40].

58 EM [1.41], citing the EM [1.56]-[1.64] – it might not be reasonable to make a modification which would lead to asymmetrical outcomes (which would be handled in other ways, either by declining to exercise the power, or by attaching conditions to the application of the modification – see the partnership Example 1.7 (EM [1.66]).

59 EM [1.42]

60 EM [1.43]

61 EM [1.43] – similarly where eg where there are different views on how an issue should be resolved: EM [1.44].

62 For example, Example 1.2 (EM [1.36] – credits for life insurance companies in respect of certain assets held on behalf of policy holders); Example 1.3 (EM [1.36] – denial of loss carry forward to widely held companies with large numbers of small shareholdings where a new holding company is interposed); and Example 1.4 (EM [1.36] – correction of error in wording of FBT in-house residual fringe benefit provision).

63 See e.g. s 5(1)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

(d) *Advice that the budgetary impact will be negligible: s 370-5(1)(c)*

Prior to exercising the Remedial Power, the Commissioner must be advised by ‘any of’ the Secretary of the Department of Treasury or the Department of Finance (or an authorised employee of either department) that any impact of the modification on the Commonwealth budget would be ‘negligible’. Again, the terms involved are vague. The Australian Macquarie Dictionary defines ‘negligible’ as ‘that may be neglected or disregarded; very little’.⁶⁴ In addition, the boundary line may not be easy to discern and will vary from case to case – an amount that might be ‘negligible’ when dealing with modifications involving millions of dollars, may be very significant when smaller amounts are in issue. No doubt, reasonable minds will differ on where the boundary lies between negligible and non-negligible budgetary impacts in a particular context. The wording of s 370-5(c) also raises the question of what happens if – however unlikely this may be – one of the nominated persons advises the Commissioner that the budgetary impact will be minimal, but another (for example, from a different Department) advises that the impact will be substantial or non-negligible.

(e) *Public Consultation*

Under s 17(1)(a),(b) of the *Legislation Act 2003* (Cth), before exercising the power to make a legislative instrument, the Commissioner must be satisfied that he has undertaken any consultation that *he considers* ‘appropriate’⁶⁵ and which is ‘reasonably practicable’⁶⁶. This may include consultation with the Commissioner’s expert Technical Advisory Group⁶⁷. The vague terminology of s 17(1)(b) of the *Legislation Act 2003* (Cth) would give the Minister considerable lee-way to determine what he or she ‘considered’ to be appropriate and ‘reasonably practicable’, and such a determination might be difficult to challenge effectively. Moreover, there is the usual provision in s 19 of the *Legislation Act 2003* (Cth), stating that a failure to consult adequately, or at all, ‘does not affect the validity or enforceability’ of the legislative instrument.

This provision is analogous to s 175 ITAA36 which has been held to insulate decisions against challenge in all but the most extreme circumstances (for example, ‘conscious maladministration’.⁶⁸)

Specific safeguards:

In addition to the statutory prerequisites above, there are also a number of specific safeguards incorporated in the legislation, designed primarily to ensure that the remedial power is exercised properly and that its use is monitored:

(i) MINISTERIAL REVIEW

Under Schedule 1⁶⁹, the Minister can seek a written report reviewing the operation of the Remedial Power provisions within three to five years of the provisions commencing, and must table the report before each House of Parliament within 15 sitting days of receiving it⁷⁰. The power to seek such a report appears to be discretionary rather than mandatory, and presumably, the Minister in the exercise of their discretion, could choose not to seek a report. Even where the

64 Australian Macquarie Dictionary above n 54, 1162.

65 Taking into account the factors listed in s 17(2) and (3) of the *Legislation Act 2003* (Cth),

66 Sec 17 *Legislation Act 2003* (Cth) – the EM at [1.49] also suggests that the Commissioner will consult with a technical advisory group comprising private sector experts, the Department of the Treasury and the ATO, and would also consult any other government agency which jointly administers a particular law (for example, APRA in relation to superannuation laws), and inform the Board of Taxation.

67 Cardan, above n 8, 2-3.

68 *FCT v Futuris Corporation Ltd* (2008) 237 CLR 146.

69 Sched 1, item 4, sub-item (1),(2).

70 Sched 1, item 4, sub-items 1 to 3.

Minister seeks a report, presumably they can stipulate which aspects of the Remedial Power's performance should be 'reviewed'.

(ii) NO ADVERSE IMPACT

A fundamental design feature of the Remedial Power provisions is that a modification will only apply to an entity where it would produce a more favourable result than the pre-existing situation. Under s 370-5(4), an entity must treat a modification as not applying to it and any other entity if the modification would produce a less favourable result for the first entity than the prior law.

In this context, a result will be 'favourable' if the entity's tax liability is reduced, or compliance costs are reduced, or where 'overall, taking into account changes in liabilities and compliance costs, the modification is favourable'. For example, where the tax liability is increased only slightly, but compliance costs are significantly reduced.⁷¹

The choice of a rule that a modification will not apply where it produces an unfavourable result, rather than a rule that the modification would apply only where it produces a favourable result, was made deliberately to ensure that it covered neutral outcomes⁷². Consistent with the self-assessment system, it is for the entity affected to self-assess whether it must treat a modification as not applying to it (or other entities), because the modification is less favourable to it. Where an entity 'is required to treat a modification as not applying ... the Commissioner must also treat the modification' as not applying to the entity⁷³.

The modification will also apply to other entities for whom the modification produces a not less favourable outcome⁷⁴. That is, the 'adverse impact' test is applied separately to each entity, and the fact that there is no adverse impact on Entity A will be irrelevant when testing whether it has an adverse impact on (and therefore does not apply to) Entity B. As the EM observes, in classic draftsman style:

[I]f one entity (the first entity) applied a modification because it was favourable to it, but a second entity would have a less favourable result because of the first entity applying the modification, then the second entity would treat the modification as not having been applied to itself or the first entity. This would be the case even though the first entity had in fact applied the modification (because it was favourable for the first entity). Requiring the second entity to treat the modification as not applying ensures that the second entity is not adversely affected by the first entity's application of the modification.⁷⁵

Thus, for example⁷⁶, in relation to GST, if a supply is a taxable supply, the supplier "S" (generally) will be liable to pay GST on that supply, but the acquirer "A" may be entitled to an input tax credit for the GST paid. However, if a modification by the ATO to the operation of the relevant provision treated the supply as not being a taxable supply, this would produce a more favourable result for S, but a less favourable result for A if they can no longer claim an input tax credit in respect of the acquisition. In these circumstances, applying the adverse impact test separately to each entity, S would be able to apply the modification, but A could treat the modification as not applying to it (and S).⁷⁷

71 EM [1.57]

72 EM [1.60].

73 EM [1.58]-[1.59].

74 EM [1.59].

75 EM, [1.61].

76 The example given in EM [1.62]-[1.64]

77 Thus, the use of 'an *application rule* as opposed to a 'favourable only' limitation would prevent a modification from being found invalid because the modification would be less favourable to one entity in a class': EM [1.125].

(iii) MODIFICATION MAY BE LIMITED

The Commissioner may choose to impose a condition/s on a modification. For example, the modification might be stated only to apply in specified circumstances or to specified groups (or sub-groups) of taxpayers.⁷⁸ As noted earlier, the ability for the Commissioner to limit an exercise of the Remedial Power may on occasions create the *appearance* of favouring some taxpayers over others, and there is some weight in the suggestion by the Institute for the Rule of Law⁷⁹ that all modifications should be general.

(iv) COURT ORDERS

The Act expressly provides that a modification will not apply where it would affect a right or liability of an entity under a court order such as a judgment, conviction or sentence made before the commencement of the determination.⁸⁰ This exception was included with the specific aim of ensuring that the Remedial Power did not offend the separation of powers doctrine.

(v) ANNUAL REPORTING

As an ‘ex post facto’ safeguard, the Act requires the Commissioner to include in each Annual Commissioner’s Report ‘information’ on the exercise of the Remedial Power⁸¹. This at least ensures that some relevant information is put into the public domain, though the scope of the required information is not specified. It would have been preferable to specify the minimum topics which the report is required to canvas, perhaps bolstered by a standard overarching clause requiring that the report also address ‘all other relevant matters relating to the exercise of the power’.

(vi) REGISTRATION

The legislative instrument making the modification must be registered on the Federal Register of Legislation to be enforceable.⁸² While a useful formality, in practical terms, this is unlikely to provide much protection.

(vii) REVIEW, REPEAL OR AMENDMENT

The Commissioner can review a modification where circumstances or legislative provisions change, and can by issuing an appropriate legislative instrument, repeal or amend a Remedial Power instrument: s 370-15(1)-(3). This is a useful provision, which will enable the Commissioner to monitor developments and adapt published modifications to take account of changed circumstances.

As the sunset date for a particular legislative instrument draws near, presumably the Commissioner will review the operation of that instrument to see whether it is still required⁸³. Where it is felt that the modification is still required after the statutory 10 year period, the Commissioner can exercise the Remedial Power again and in effect ‘remake’ the instrument -subject to satisfying the same statutory requirements.

78 Section 370-5(3)(b). See the examples given in the EM at paras [1.66], [1.67].

79 See the submission by Robin Speed, (President) on behalf of the Rule of Law Institute of Australia, to Mr Tom Reid, Law Design Practice, The Treasury, 8 January 2016, 2-3.

80 Sub-sec 370-5(5).

81 Subsection 3B (1AA)(e) *TAA* .

82 Ss 15H(1), 15K(1) *Legislation Act 2003* (Cth).

83 *Legislation Act 2003* (Cth) ss 38, 42; EM [1.72]-[1.74]. This will also provide an opportunity consider whether changes should be made to the tax legislation.

(viii) PARLIAMENTARY SCRUTINY AND DISALLOWANCE

A legislative instrument made under the Remedial Power does not take effect until after the expiry of the ‘disallowance period’ – either House of Parliament⁸⁴ can bring a notice of motion to disallow that legislative instrument within 15 sitting days after the legislative instrument is tabled in that House.⁸⁵

This is a useful provision, which means that both Houses of Parliament will have a guaranteed period within which – in theory at least – they can review the modification, seek input from expert or affected persons, and reach an informed view on whether the modification should be disallowed. The disallowance period of 14 days, while delaying the operation of the instrument, is unlikely in the ordinary case, to be significant, given the time that the creation and introduction of such instruments is likely to take.⁸⁶ There may however, prove to be an issue as to how much priority members of Parliament will give to a careful review of such instruments, given limited time, the range of competing issues to which they need to attend, and the higher (political) priority these other issues may carry.

(ix) AUTOMATIC SUN-SETTING

Under s 50(1) of the *Legislation Act 2003* (Cth), a legislative instrument made under the Remedial Power, automatically ‘expires’ on the first April 1 or October 1, falling on or after the tenth anniversary of registration of the instrument. However, the Attorney-General has a limited power under s 51 to ‘defer’ the expiry of a legislative instrument for a period.

The policy decision to give such instruments a finite life and require effectively an ‘opt-in’ approach to extend their currency, is sensible and should prevent the accretion of obsolete provisions which has bedevilled the income tax legislation. It will also mean that – hopefully – careful consideration will be given to the need for renewal of particular modifications, rather than the Commissioner simply ‘rolling over’ existing notifications automatically.

(x) TRANSPARENT GOVERNANCE PROCESSES

The EM indicates that appropriate processes would be introduced to counter any ‘sensitivities around perceptions of an unelected official making the law’⁸⁷. In common with other areas discussed above, these measures are not spelled out in the Act or EM, and precisely how ‘appropriate’ and useful such processes are, will have to await evaluation of their operation in practice.

Cumulatively, these safeguards provide useful protections against misuse of the Remedial Power, though the fact that the application of the Power depends upon the interpretation of a number of vague and malleable criteria, is perhaps unfortunate, and may reduce their effectiveness as safeguards.

IV CONCERNS ABOUT THE REMEDIAL POWER

The Remedial Power provides a number of benefits, including increasing flexibility, and should enable anomalous outcomes to be corrected without impinging significantly on scarce Parliamentary time. It should also help to reduce the complexity of legislation and arguably

84 The Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee of Regulations and Ordinances.

85 Sec 370-20 of the *TAA*, with s 42 *Legislation Act 2003* (Cth).

86 See above n 15. The EM at [1.22] states that it ‘is anticipated that [the Remedial Power] will reduce the time it takes to give effect to some minor legislative corrections ... [and] may also, where appropriate, allow or some minor technical corrections to be addressed ... where, due to their relatively low priority, this may not otherwise occur’.

87 EM [1.168].

improve the transparency of the law.⁸⁸ However, the TAA delegates considerable authority to the Commissioner (though the EM describes the proposed Remedial Power as ‘not a broad delegation of power allowing the Commissioner to legislate at large’).⁸⁹ The Government argues that the combination of the limited scope of the Remedial Power, together with the ‘clear legislative limitations [and] ... parliamentary oversight and scrutiny’ will help to ensure the power does not offend the separation of powers doctrine,⁹⁰ properly relates to taxation, and cannot be exercised arbitrarily.⁹¹ Nevertheless, the EM does note that:

There could be the risk of adverse public perception that the Commissioner, being an unelected official, has the power to change taxation laws. Such a perception may undermine confidence in the taxation system. Another risk could be public perception that lobby groups influence issues which are considered ...⁹²

These are real concerns. Not surprisingly, therefore, despite the numerous safeguards built into exercise of the remedial power, there have been a variety of concerns expressed in relation to the scope of the power. The Rule of Law Institute of Australia, for example, was concerned that the Commissioner’s power to limit the application of a determination to a specified class of entities or specified circumstances, undermines the principle that laws are to be applied equally and fairly, not capriciously or arbitrarily.⁹³ The Institute’s concern was that this ‘deviates from the equal application of laws, and raises the possibility of the ... Remedial Power being exercised in a preferential or discriminatory manner’ because any modification of the law which is favourable to one taxpayer may disadvantage those who are subject to the ‘unmodified’ law.⁹⁴ The Institute therefore recommended that all modifications apply generally, that is, to all relevant taxpayers.

The Institute’s concern seems to have some justification – it was only a few years ago that the ATO ruling system was improperly manipulated by a senior ATO staff member to the advantage of particular taxpayers. Presumably, the Remedial Power process will be more public, and if ATO staff used the power intentionally to unfairly advantage one taxpayer/sector, that exercise could be more easily monitored and perhaps challenged by affected persons.⁹⁵

Nevertheless, the Institute had suggested that:

The reporting mechanisms for the Remedial Power need to be strengthened, to maintain transparency and accountability and ensure that the exercise of the power is open to informed public scrutiny.⁹⁶

The Institute therefore recommended that the Commissioner be required to include in their annual report on the use of the Remedial Power: information on what issue arose with the original provision which required the Remedial Power’s use, what steps were taken to resolve that issue before resort was had to the Remedial Power, what public consultation was undertaken, and why the Commissioner considered that the determination made was reasonable.

88 Other benefits are suggested by Wilson-Rogers, above n 18, 34-43.

89 EM [1.127].

90 Compare Wilson-Rogers, above n 18.

91 EM, [1.127]-[1.129].

92 EM [1.198]

93 Covering letter, submission to the Treasury, 8 January 2016.

94 The Rule of Law Institute of Australia, Submission to the Treasury, 8 January 2016.

95 Above n 45.

96 Above n 85.

Clearly, as noted earlier, s 3B(1AA)(e) of the TAA requires that the Commissioner ‘set out information’ on any exercise of the Remedial Power in the Commissioner’s Annual Reports⁹⁷. However, the section does not specify the required scope and depth of such ‘information’, and it will be interesting to see if the ATO publishes all the information sought by the Institute.

In a similar vein to the Institute, Wilson-Rogers argued⁹⁸ that giving such broad quasi-legislative power to the unelected Commissioner and thus to the executive, creates a number of potential risks, including:

(i) *Impact On The Rule Of Law And The Separation Of Powers Doctrine*⁹⁹.

This concern reflects the view that ‘[b]road discretions represent the antithesis of the rule of law’¹⁰⁰, and the fear that ‘[e]xcessive delegation of legislative power to the executive defeats the purpose of the separation of powers doctrine and may threaten the rule of law by allowing the executive branch to subject the law to its capricious will’.¹⁰¹

On the other hand, in the context of the Remedial Power provisions, there is the requirement that all exercises of this Power must be brought promptly before Parliament, are subject to disallowance within 15 sitting days, and do not begin to operate until after the expiry of the disallowance period. This should mean that Parliament retains ultimate control and oversight of the process – subject to the concern expressed above, that competing political pressures may result in such matters being accorded a low priority.

(ii) *The Potential For Abuse*

The protections (above) built into the Remedial Power process might be thought to provide sufficient protection against abuse. However, giving what is effectively legislative power to a non-elected individual is not without risk, because it raises the potential for discriminatory application of the power (as occurred with the abuse of the ATO private rulings system some years ago by a senior ATO officer) and more recently, with leaking of confidential information about criminal investigations¹⁰². No doubt, those indirectly disadvantaged by the exercise (for example, because others are given a benefit denied to them) might seek legal redress where possible,¹⁰³ or alert their parliamentary members and business bodies, to the problem

97 Section 3B (1AA)(e) of the *Taxation Administration Act* 1953 (Cth), as amended, provides that the Commissioner must, in the Annual report to Parliament, among other things, ‘set out information on the exercise during the year of the Commissioner’s powers under Subdivision 370-A in Schedule 1 (Commissioner’s remedial power).’

98 Wilson-Rogers above n 18, 6-12.

99 See Wilson-Rogers, above n 18, 6, 18-43.

100 Wilson-Rogers, above n 18, 19.

101 At one extreme, this approach of broad delegations to bureaucrats has been described as ‘the new Despotism’, and some fear that it may (eventually) ‘subordinate Parliament ... evade the courts, and ... render the will or the caprice, of the Executive unfettered and supreme’: Lord Hewart of Bury, *The New Despotism*, quoted by Wilson-Rogers above, n 18), 21. While overstated in the context of the Remedial Power, the essence of the view has some force. See also Suri Ratnapala, Thomas John, Vanitha Karean and Cornelia Koch, *Australian Constitutional Law: Commentary and Cases* (Oxford University Press, 2007) 43. Compare the observation of Denise Meyerson, quoted by Wilson-Rogers, above n 18, 21: ‘if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it’.

102 ‘Tax fraud scandal: ATO chaos as deputy Michael Cranston charged’, *The Australian*, May 19, 2017.

103 See above n 50.

(however much use that might actually prove to be). This is an aspect that would need to be carefully monitored.

(iii) *Possible Increased Uncertainty*

Increased uncertainty might result from the need to refer to two pieces of legislation (one of which is highly discretionary) instead of one, in order to determine the meaning of the ‘modified’ provision. However, in a landscape currently inhabited by ATO Public and Private rulings, determinations, Law Administration Practice Statements (“LAPS”), Law Companion Guidelines (“LCG”), Practical Compliance Guidelines (“PCG), guidelines and the like, the addition of one more layer is unlikely to be a major problem.

V CONCLUSION

In an ideal world, a body of examples of the exercise of the Remedial Power would develop reasonably quickly, which would enable its operation and any concerns emerging from its operation, to be evaluated in a more informed way. However, given the direction that the Remedial Power is to be exercised ‘infrequently’, we may have to wait patiently while a body of jurisprudence develops. At the time of writing, the Remedial Power has been exercised on only one occasion¹⁰⁴.

In the meantime, we can conclude that conceptually, the Commissioner’s statutory Remedial Power is rather like the Curate’s egg – good and bad in parts. On the one hand, the Remedial Power offers some very positive benefits as it provides a speedier solution to an important problem – taxpayers being treated unfairly because legislative provisions on occasions do not achieve their intended purpose. It also enables scarce Parliamentary time to be devoted to broader macro-level issues, and it contains a number of procedural requirements and safeguards which represent genuine attempts to ensure that the provisions operate fairly and are not manipulated improperly.

On the other hand, there are some worrying aspects: the Remedial Power locates significant *discretionary* quasi-legislative power in an unelected bureaucrat, creating tensions with the principles of the Rule of Law and Separation of Powers doctrine – fundamental principles of our democratic system. The Remedial Power also opens up the *potential* for abuse. Hopefully, the constraints and safeguards in the process will minimise this risk, though as the private rulings imbroglio (above) and more recent events¹⁰⁵ show, this cannot be dismissed as a possibility.

Potentially, the Remedial Power seems likely to offer more benefits than problems, and as time passes, the meaning of vague terms such as ‘disproportionate’ and ‘negligible’ will – hopefully become clearer in this context, and the operation of the regime will thus become more certain and predictable. However, it is far too early to reach a conclusion on the Remedial Power, and it will be interesting to look back in a year’s time or so, to evaluate how well it has operated in practice, and whether some of the concerns expressed above, have heightened or abated.

104 As at 30 October 2017, the Remedial Power has been exercised on only one occasion: Taxation Administration (Remedial Power – Foreign Resident Capital Gains Withholding) Determination 2017 (F2017L00992).

105 ‘Tax fraud scandal: ATO chaos as deputy Michael Cranston charged’, *The Australian* (Australia), 19 May 2017. <<http://www.theaustralian.com.au/national-affairs/treasury/tax-fraud-scandal-ato-chaos-as-deputy-michael-cranston-charged/news-story/44cb4097db4b69679a0e83d3ed4b91bd>>.

IN SEARCH OF INFORMATION – A COMPARISON OF NEW ZEALAND AND AUSTRALIAN ACCESS POWERS

Robin H Woellner and Andrew J Maples***

ABSTRACT

The effective operation of any tax regime depends ultimately upon the revenue authority being able to obtain timely and reliable information about a taxpayer's relevant activities (both domestically and increasingly, offshore). The most detailed substantive provisions, whether they be income tax, GST or other regimes, are of little use unless the authorities can obtain the information needed to establish (or at least approximate) a taxpayer's liability.

At the same time, the increased threat to confidentiality posed by new technologies utilised by revenue authorities, means it is even more important to ensure that such access powers provide adequate safeguards for taxpayers. The proximity of Australia and New Zealand (NZ), both geographically and otherwise, make it interesting and useful to compare the way they have approached a common issue – obtaining crucial information from sometimes reluctant taxpayers. The powers available to Australian and New Zealand tax officers to seek out and directly access information, share a number of similarities – in part because New Zealand incorporated some features of the former Australian access power (s 263 *Income Tax Assessment Act 1936*) into its own access provision in s 16 of the *Tax Administration Act 1994* (NZ) ('TAA NZ'), supplemented by ss 16B and 16C of the TAA NZ. However, there are also some interesting and significant differences.

This paper explores and analyses these similarities and differences, highlighting areas where elements from one system or the other, could be adopted across the Tasman (or more widely), to improve the operation and coherence of access powers.

I INTRODUCTION

Access to reliable and timely information (both domestic and, increasingly, offshore), is a crucial element in any revenue authority's arsenal, if it is to accurately determine the correct amount to be assessed to, and collected from a particular taxpayer or group of taxpayers. Predictably therefore, revenue authorities have historically made determined efforts to obtain relevant information, while equally predictably, taxpayers in response sometimes make ingenious and determined efforts to block access to such information – both in and out of the courts.

It is therefore both interesting and informative to compare and contrast the powers given to authorities in different countries, in order to evaluate these powers and determine whether anything can be learned from the different legislative frameworks. Given Australia and NZ's close proximity to each other, both geographically and otherwise, it is useful to examine the comparative investigative powers of access available to their respective revenue authorities and identify particular aspects of one country's access powers which might usefully be adopted or refined by the other, to improve their own provisions. Accordingly, a multiple unit case

* Adjunct Professor, James Cook University and Australian School of Business, UNSW

** Associate Professor, UC Business School, University of Canterbury.

study approach has been adopted¹ to compare the powers available to the Australian Tax Office (ATO) and NZ Inland Revenue (IR) to access information held in Australia and NZ, respectively. While this article does not consider the access powers of jurisdictions beyond Australia and NZ, reference is made at appropriate points to Canada's approach, acknowledging that other alternative approaches may be more effective than the respective approaches in NZ and Australia on these issues (and worthy of further consideration).

II THE LEGISLATION: THE NEW ZEALAND POWERS – SECTION 16 TAX ADMINISTRATION ACT 1994 (NZ) ('TAA NZ')

The NZ Commissioner of Inland Revenue (NZ Commissioner) has a wide range of statutory powers at their disposal to request information from taxpayers, including accessing premises (s 16 TAA NZ) and copying and/or retaining information for evidential purposes (see ss 16B and 16C² of the TAA NZ which is examined in more detail in Section IV of this paper). Thus, s 16(1) of the TAA NZ provides that (to paraphrase), notwithstanding anything in any other Act, the NZ Commissioner, or any authorised officer, shall, at all times, have full and free access to all lands, buildings, and places, and to all documents, whether in the custody or under the control of a public officer or a body corporate, or any other person 'whatever':³

- for the purpose of inspecting any documents and any property, process, or matter which the *Commissioner or officer considers necessary or relevant* for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or:
- for the purpose of carrying out any other function lawfully conferred on the Commissioner, or which the *Commissioner considers likely* to provide any information otherwise required for the purposes of any of those Acts or any of those functions (emphasis added),

and may, without fee or reward, make extracts from or copies of any such documents. In addition, ss16(2)(a) and (b) of the TAA NZ require that the occupier of land, or a building or place, that is entered or proposed to be entered by the NZ Commissioner, or by an authorised officer, must:

- provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under that section; and
- answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the Commissioner or the officer, in writing, or by statutory declaration.

1 See further John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd ed, Sage, Thousand Oaks, 2003), Margaret McKerchar *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Pyrmont, 2010) and Robert K Yin *Case Study Research: Design and Methods* (Sage, Thousand Oaks, 5th ed, 2014).

2 In addition to ss 16B and 16C TAA NZ, IR officers can also remove other documents under section 123 of the *Search and Surveillance Act 2012* (NZ) ('SSA 2012'), which relates to the seizure of items in plain view. The SSA 2012 sets out rules (and safeguards) as to how powers of police (and certain powers of non-police agencies, such as by the NZ Commissioner), are to be exercised. For example, the NZ Commissioner's powers under search warrants in ss 16(4) and 16C(2) of the TAA NZ from 1 October 2013. For a discussion of the SSA 2012 see Mike Lennard "Search and Surveillance in the context of Tax Administration" (2013) 19 *New Zealand Journal of Taxation Law and Policy* 11, 20-25, 25 who observes that in the context of IR searches, the SSA 2012 largely 'codifies existing practice and law.'

3 Referred to in the TAA NZ as 'warrantless searches'.

IR officers can use reasonable force to access premises, including the use of a locksmith to gain entry, if the occupiers are not present or refuse entry.⁴ However, IR officers may only enter a ‘private dwelling’, where they (and any accompanying person) obtain either the consent of an occupier, or a warrant issued by an “issuing officer”.⁵

Section 16(2A) of the TAA NZ provides that an officer entering premises can be accompanied by a person they consider ‘necessary’ for the effective exercise of powers under s 16 – such as computer forensic experts, or police officers.⁶ There are a number of specific offences relating to search powers in the TAA NZ, including obstruction⁷ and knowingly not providing information when required to under a tax law⁸. In addition, the *Search and Surveillance Act 2012* (NZ), as well as offences under the *Crimes Act 1961* (NZ), may also apply. In summary, subject to some specific restrictions on access to private dwellings, the powers under ss 16, 16B and 16C of the TAA NZ, essentially guarantee the NZ Commissioner unrestricted access to all properties and documents. Indeed, Keating observes that the ‘standing search power [in s 16] is perhaps the widest enjoyed by any Government agency.’⁹

III THE AUSTRALIAN POWERS – SECTION 353–15 TAXATION ADMINISTRATION ACT 1953 (CTH) (‘TAA CTH’)

Section 353-15(1) of the TAA CTH provides that:

For the purposes of a taxation law, the Commissioner, or an individual authorised by the Commissioner for the purpose of this section:

- a. May at all reasonable times enter and remain on any land, premises or place, and
- b. is entitled to full and free access at all reasonable times to any documents, goods *or other property*; and
- c. may inspect, examine, make copies of or take extracts from, any documents; and
- d. may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.¹⁰

4 SSA 2012, Subpart 4 (ss 110(c), 113(2)(b)) and 131(3); Inland Revenue, ‘Operational Statement OS 13/01: The Commissioner of Inland Revenue’s Search Powers’ *Tax Information Bulletin* Vol 25:8, 2, at [46], [47]. (hereafter referred to as ‘OS 13/01’).

5 Under s 16(7) of the TAA NZ, an ‘issuing officer’ has the same meaning as in SSA 2012 s 3, that is “(a) a Judge; (b) a person, such as a Justice of the Peace, Community Magistrate, Registrar, or Deputy Registrar, who is for the time being authorised to act as an issuing officer under s 108 [SSA 2012]”. SSA 2012 s 108(1) in turn provides that “The Attorney-General may authorise any [of the above persons] or other person to act as an issuing officer for a term, not exceeding 3 years ...”.

6 Where Police are called to assist IR officers, any constable can exercise any power ordinarily exercisable by them: SSA 2012 s 113(3).

7 TAA NZ s 143H. Obstruction carries a maximum fine for the first offence of \$25,000, and \$50,000 for every subsequent offence.

8 TAA 1994 (NZ) Section 143(1)(b). Failure to provide information when required to carries maximum fines of \$4,000, \$8,000 and \$12,000 (NZD) respectively for first, second and subsequent offences.

9 Mark Keating *Tax Disputes in New Zealand A Practical Guide* (CCH New Zealand Ltd, Auckland, 2012), [309]. See also Geoff Clews and Ele Duncan, ‘Audits and disputes: The myths, the realities and the lessons to be learnt’ (New Zealand Law Society Tax Conference, Auckland, 2016) 15.

10 Emphasis added.

The section provides the ATO's formal authority for field audits¹¹ and gives the ATO a very broad power. As French J observed in *Citibank Ltd v FC of T*¹² (*Citibank*) in relation to the predecessor to s 353-15 (formerly s 263 of the *Income Tax Assessment Act 1936* (Cth))¹³ (ITAA):

The words 'shall have full and free access' have been said to confer a right which is unrestricted except by the requirement that it be exercised in good faith for the purposes of the Act ... The concept of 'full access' prima facie conveys that the availability of entry or examination extends to all parts of the relevant place or building and to the whole of the relevant ... documents and other papers. 'Free' conveys an absence of physical obstruction ... [and subject to questions of] legal professional privilege, it is clear that the rights conferred by s 263 are wide and not readily amenable to implied restrictions ... [and] its application is not limited by the usual curial constraints against fishing expeditions ... Nor is the right of access confined to records relating to the income of the person in whose possession they are ... and ... it will override contractual duties of confidence of the kind that arise between banker and customer and solicitor and client.¹⁴

However, under s 353-15(2), an authorised person is not entitled to enter or remain on any land, premises or place, if after having been requested by the occupier to produce proof of his or her authority, they do not produce an authority in writing signed by the Commissioner of Taxation (Aust. Commissioner) stating that they are authorised to exercise powers under the section.¹⁵ Where access cannot otherwise be obtained, an Australian investigator will be justified in using such force against the property as may reasonably be necessary and appropriate, to obtain access to relevant items, for example by forcing open doors or boxes.¹⁶ Under TAA CTH ss 353-15(3), an occupier who fails to provide all reasonable facilities and assistance for the effective exercise of ss 353-15 powers, is guilty of a criminal offence of strict liability,¹⁷ carrying a maximum fine of \$6,300 (AUD).¹⁸ It is also an offence under Division 149 of the *Criminal Code Act 1995* (Cth) to obstruct, hinder, intimidate or resist a Commonwealth official in the performance of their functions,¹⁹ with a maximum penalty of two years imprisonment.

-
- 11 Robin H Woellner, 'Section 263 Powers of Access—Why Settle for Second-best?' (2005) 20(3) *Australian Tax Forum* 365; Robin H Woellner, 'ATO Access Powers—Another Lost Opportunity', (2015) 8 (1 & 2) *Journal of Australasian Law Teachers Association* 119.
- 12 *FC of T v Citibank Ltd* 89 ATC 4268.
- 13 The Explanatory Memorandum to the *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth) stated in respect of the introduction of TAA CTH ss 353-15 that: "The amendments... do not alter the intended operation of the provisions as they apply to the administration and operation of the taxation law. The amended TAA 1953 provisions are merely a rewrite and consolidation of the provisions being repealed".
- 14 *Citibank*, above n 12, at , 4286–7; though there are limits: *FCT v Darling* [2014] Fam CAFC 59; cf *International Litigation Partners Pte Ltd v FCT* [2014] FCA 671. The ATO's audit practice is outlined in its 'Taxpayers' Charter—Fair Use of our Access and Information Gathering Powers' (30 June 2010): <www.ato.gov.au/General/Your-rights/In-detail/Taxpayers--charter---fair-use-of-our-access-and-information-gathering-powers>
- 15 See *Citibank*, above n 12, at 4287.
- 16 *Kerrison v FC of T* 86 ATC 4103; cf *Lawson (No 2)* 83 ATC 4156, 4162; ATO, 'Our Approach to Information Gathering' (2013), 34-35.
- 17 As defined in s 6.1 of the *Criminal Code Act 1995* (Cth).
- 18 30 penalty units: see the ATO, above n 16, 30.
- 19 It has been said that in appropriate circumstances, actions such as: physical resistance, locking a room and hiding the key, untruthful answers to relevant questions and spurious claims to legal professional privilege (or perhaps, repeatedly and unreasonably seeking explanations of the reasons why access was regarded as necessary or relevant), could amount to obstruction: *O'Reilly & Ors v Commrs of the State Bank of Victoria & Ors* 83 ATC 4156, 4163-4.

IV COMPARING THE NEW ZEALAND AND AUSTRALIAN ACCESS POWERS

As Table 1 below indicates, the NZ and Australian provisions share a number of similarities, though there are also some significant differences.

Table 1: An overview of the access powers compared

ELEMENTS	NEW ZEALAND	AUSTRALIA
1. Policy aim	Collect the highest amount of tax practicable	Collect the correct amount of tax
2. Scope of access power	Full and free access to all lands, buildings, places, and documents	Enter any land, premises or place and have full and free access to all documents, goods and other property
3. Advance notice required	No	No
4. Permitted times	At all times	All reasonable times
5. Preconditions for use	Officer considers it necessary or relevant	Use for a proper purpose
6. Key element of “occupier”	Yes	Yes
7. Requirement to show authority	Proactive: Before initial entry (and subsequently if reasonably required)	Reactive: If requested by occupier
8. Co-operation required	Reasonable assistance and facilities and answer “proper questions”	All reasonable facilities and assistance
9. Access to private dwelling	By consent or warrant	Limited only by “proper purpose”
10. Remove and copy materials	Yes	No statutory power
11. Retain documents for inspection	Yes	No statutory power
12. Main defences	<i>Statutory</i> <ul style="list-style-type: none"> • Legal professional privilege • Tax advice documents 	<i>Common Law and administrative</i> <ul style="list-style-type: none"> • Legal professional privilege • Accountants concession • Corporate board tax risk documents

Extrapolating from Table 1 above, it seems that in Elements 1 to 4 and 6 to 8, the two systems share broadly similar approaches (as discussed in Part V below) while Elements 5 and 9 to 12, reflect different approaches adopted in the two jurisdictions (and are considered in Part V below). To some extent, the categorisation in Table 1 is subjective, and an argument could be made that some Elements could be placed in either category.

V ELEMENTS REFLECTING A SIMILAR APPROACH IN NEW ZEALAND AND AUSTRALIA

A *Element One: The Policy Aim Underpinning the Revenue Authorities' Duty to Collect Tax*

The NZ Commissioner has a statutory duty to 'collect over time the highest amount of net revenue from taxpayers that is practicable within the law'.²⁰ As written, this responsibility differs to that applying to the ATO in Australia, which is under a duty to collect the 'correct amount' of tax. However, the difference in wording does not seem to reflect a substantive difference between the two jurisdictions. For example, in the NZ case of *Fairbrother v C of IR*,²¹ Young J noted that based on s 6A of the TAA NZ, 'there is now no scope for an argument based on an *absolute* obligation to collect the right amount of tax.'²² Thus NZ IR are entitled, for example, to enter into compromise settlements.

B *Element Two: The Scope of the Powers of Access*

1 NEW ZEALAND

The terms 'lands, buildings and places' in s 16 of the TAA NZ are expansive, and ensure a wide reach for the NZ Commissioner's powers. The NZ IR's view is that all areas and objects at a location accessed pursuant to s 16(1) of the TAA NZ, are available for full and free access by the NZ Commissioner. Thus, the term 'document'²³ is defined in broad terms to mean:²⁴

- (a) a thing that is used to hold, in or on the thing and in any form, items of information;
- (b) an item of information held in or on a thing referred to in paragraph (a); or
- (c) a device associated with a thing referred to in paragraph (a) and required for the expression, in any form, of an item of information held in or on the thing.

The definition extends to 'electronic storage devices e.g. computer hard drives, memory cards, memory sticks, mobile phones, MP3 players, or any other devices that have the function of storing data electronically.'²⁵ Overall therefore, the current definition of 'document' 'clearly includes all forms of information storage.'²⁶

2 *Australia*

The terms of ss 353-15 of the TAA CTH, which empowers an authorised officer to enter any 'land, premises or place' and the entitlement to access any 'documents, goods or other property' are obviously intended to provide an extremely broad power, though the terms are as yet untested in this context. The analogous wording of the former s 263 ('land, buildings, places ... documents and other papers') was given a very broad interpretation by French J in *Citibank*

20 TAA NZ s 6A (3).

21 *Fairbrother v C of IR* (2000) 19 NZTC 15,548.

22 *Ibid*, 15,555 (emphasis added).

23 The term 'document' replaced the term 'books or documents' in 2011.

24 TAA NZ s 3.

25 G Tubb 'Commissioner of Inland Revenue's powers of search and seizure' (Paper presented at NZLS Tax Conference, Auckland, 1 September 2011) 220. See also, Venning J in *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore* (2009) 24 NZTC 23,252, [29] ('*Avowal NZHC*'), and the NZ Court of Appeal decision *Avowal Administrative Attorneys Limited v District Court at North Shore* (2010) 24 NZTC 24,252, [66], [69] ('*Avowal NZCA*').

26 Tubb above n 25, 221.

and the current wording appears likely to support an equally broad approach. While the NZ and Australian provisions are expressed in somewhat different terms, they are both expansive in scope, extending access to all modes of information storage (including electronic storage).

C Element Three: Is There an Obligation to Provide Advance Notice of an Access Visit?

In both jurisdictions, the respective access powers can be exercised without prior warning –this power is seen as ‘[i]nherent in s 16 (and its accompanying provisions)’²⁷ and TAA CTH s 353-15²⁸ respectively. The powers can also be exercised without first attempting to use alternative methods of obtaining information.²⁹

The approach of the revenue authorities does, however, differ. As a matter of practice, advance notice of the intention to seek access, is normally given by the ATO³⁰ except in cases where, for example:

- the person has a history of uncooperative behaviour; or
- the ATO fears that if a person receives advance warning, they may destroy records or otherwise attempt to frustrate the investigation.³¹

By contrast, anecdotally it seems that the NZ IR does not generally give advance notice of an intention to access premises under s 16.

D Element Four: The Permitted Time for Exercise of the Access Powers

In Australia, ss 353-15(1)(a) and (b) of the TAA CTH specifically limit the time for exercise of the power of access to ‘all reasonable times’ and apply a test of whether access is required ‘for the purposes of the section’ (objective test). By contrast, under the TAA NZ s 16, the NZ Commissioner ‘shall at all times have full and free access’ to the specified items, and the IR Operational Statement ‘OS 13/01’ observes that ‘[a]ccess will be undertaken at a time the CIR considers will balance causing minimal disruption to the occupier with the purpose of the search and the operational needs of the investigation.’³² This wording applies a subjective test. On the basis of OS 13/01, the NZ IR could seek access to business premises at a time that could be quite disruptive to the occupier but deemed necessary in light of the ‘operational needs of the investigation.’ While the power has been held to be subject to an implied reasonableness requirement,³³ in the interests of certainty³⁴ and consistency,³⁵ the authors recommend incorporating an express ‘reasonableness’ requirement into s 16 TAA NZ.

27 Ibid 233.

28 ATO, above n 16, at 29.

29 See eg, *Tauber v CIR* (2011) 25 NZTC 20-071, at [38]; OS 13/01, above n 4, at [32], ATO, above n 16, at 27.

30 ATO, above n 16, at 29.

31 Ibid 32–3. In 2013–14, the ATO used formal access powers with notice on 36 occasions, none without notice and two as ‘immediate’ shifts from informal to formal access: Commissioner of Taxation, *Annual Report 2013–14*, 136 (Appendix 10).

32 OS 13/01, above n 4, [60] (emphasis added).

33 *Avowal* (NZCA), above n 25, at [21] – [23].

34 On the basis that many businesses in NZ ‘are run from home ... it is imperative for the law to stipulate a time range for when premises may be accessed’: Sharon Cohen, ‘The Commissioner’s Powers to Access Information: A Licence to Fish’ (Master of Business thesis, Auckland University of Technology, 2010) 19.

35 Ibid 19. Cohen observes that ‘[a]ccess provisions in most New Zealand Acts refer to the term “at all reasonable times” or “any reasonable time.”’

Issues will of course arise as to what are ‘reasonable hours’ in particular instances, given that this will depend on the context in which an officer seeks to use the access power. For example, times which are reasonable when seeking access to a night-club may not be reasonable when seeking access to a private dwelling or doctor’s surgery. However this is unlikely to cause significant problems.

E *Element Six: The Fuzzy Concept of ‘Occupier’*

Both ss 353-15(3)(d) of the TAA CTH and s 16(2) of the TAA NZ, assign a central role to the concept of an ‘occupier’, requiring the ‘occupier’ of property accessed under those provisions to provide the relevant officer with ‘all reasonable facilities and assistance’ (and in the case of s NZ, 16(2) of the TAA NZ also ‘answer all proper questions’). In addition, in Australia an ‘occupier’ is the only person who can require an ATO auditor to show their authority under s 353-15(2) of the TAA CTH. Similarly in NZ, access to a private dwelling can only be made with the consent of the occupier (or pursuant to a warrant) under s 16(3) of the TAA NZ, while the removal and retention of documents under s 16C of the TAA NZ also requires the consent of an occupier (or a warrant).

A potential problem in applying these provisions is that the term ‘occupier’ is an inherently vague concept, and is not defined in either the TAA CTH³⁶ or the TAA NZ. At common law, the term has been said to be

inherently a term of no fixed denotation, with its precise meaning varying depending upon the context... [and having] a range of widely varying meanings, at times requiring legal possession but at other times requiring nothing more than ephemeral physical presence as when we speak of a person ‘occupying’ a church pew or a park bench.³⁷

The issue is potentially significant, because if ‘occupier’ is interpreted broadly in s 353-15 to include employees and other non-owners, this will tend to make the requirement to provide all reasonable facilities and assistance more effective. The converse is equally true.³⁸ Interestingly, the NZ IR has stated that without reference to supporting authority, the term ‘occupier’ has a wide meaning for the purposes of ss 16 and 16C of the TAA NZ,³⁹ and ‘includes all persons entitled to be on the premises, including employees, tenants and family members, and is not restricted to the owner or lease holder. This may or may not include the taxpayer under investigation.’⁴⁰

Ironically, NZ officials rejected calls for the word ‘occupier’ to be defined in (the then proposed) s 16(2) in the Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill, on the basis that ‘defining the term is unnecessary. This amendment to s 16 [incorporating the term “occupier”] is based on the equivalent Australian legislation, in which the word “occupier” is not defined, and this has not been a problem in practice.’⁴¹

36 Though it is now used in several Commonwealth Acts.

37 Viscount Cave in *Madrasa Anjuman Islamia of Kholwad v Johannesburg Municipal Council*, [1922] 1 AC 500, 504 – quoted with approval by Brennan J in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 267. See also *Bethune v Heffernan*; *Heelan v Hayward* [1986] VR 417, 420-2 (Nathan J).

38 Woellner, above n 11 (*Journal of the Australasian Teachers Association*). While in most (non-contentious) circumstances, information is freely provided to ATO auditors without the need to call upon the statutory access/information powers, this is not necessarily so in contentious situations.

39 OS 13/01, above n 4, at [27].

40 Ibid [27].

41 Inland Revenue Department and the Treasury Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill – Officials’ Report to the Finance and Expenditure Committee on Submissions on the Bill Volume 1, 97.

While use of the word ‘occupier’ in the Australian or NZ provisions may not have created problems to date, it seems unwise to leave such a key but vague term in the legislation undefined, and it may only be a matter of time before the scope of the term is tested. For example, in relation to the obligation to answer questions (under s 16(2)(b) of the TAA NZ), NZ tax barrister Geoff Clews cautions that:⁴²

[D]espite IR’s routine questioning of employees on business premises which are visited ... it is doubtful that such questioning is compulsory... and advisors are able to suggest that questions to employees who do not meet the standard of being an occupier can be declined [and in addition] ... It is not at all clear that the occupier (in NZ) includes all and every person who happens to be on the premises at the time of the action by IR. The context of s 16 suggests that the occupier has to be someone who has authority to consent to another being present on premises....⁴³

Any uncertainty as to the meaning of the key term ‘occupier’ could be removed by the simple device of incorporating into s 353-15, a provision along the lines of s 231.1(1)(d) of Canada’s *Income Tax Act*, (R.S.C., 1985, c. 1 (5th Supp.)), which provides that an authorised person may, at all reasonable times⁴⁴

require the owner or manager of the property or business *and any other person on the premises or place* to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.⁴⁵

It seems preferable to clearly include such persons within the scope of the access power, provided they are given adequate protection in relation to information or materials of which they are unaware, by for example, limiting the obligation to co-operate ‘to the extent the person is capable of complying with the request.’⁴⁶

F *Element Seven: Requirement That The Officer Show Their Authority*

The requirements of officer(s) exercising the respective search powers are not substantively different between the two jurisdictions in this respect (with the exception of the access to private dwellings – see Element 9). Section 353-15(2) provides that an Australian investigator is not entitled to enter or remain on any land, premises or place if they do not produce an appropriate authority in writing when asked by an occupier for proof of authority. However, the section does not require the officer to produce their authority unless and until an occupier requests it – that is, it is only a *reactive* obligation in Australia.

By contrast, in NZ when access to premises is made pursuant to a judicial warrant, s 131 SSA 2012 requires the NZ IR officer in charge of a search, amongst other matters, to *proactively* provide proof of their identity to the occupier before entering a place (and again subsequently – *reactively* – when reasonably required).⁴⁷ Thus overall there is no real difference between the two jurisdictions on this element. However, in policy terms the NZ approach which places greater emphasis on the officer in charge demonstrating their authority to access premises, seems preferable from a taxpayer’s perspective.

42 Clews and Duncan, above n 9, 16.

43 Ibid 15-16.

44 Woellner, above n 11 (*Journal of the Australasian Law Teachers Association*) (emphasis added).

45 Woellner, above n 11 (*Journal of Australasian Law Teachers Association*) (emphasis added).

46 Cf ss 8C and 8D of the *Taxation Administration Act 1953* (Cth); Woellner, above n 11 (*Journal of Australasian Law Teachers Association*).

47 OS 13/01, above n 4, [49]-[56]; Tubb, above n 25, 234.

G Element Eight: The Obligation To Co-operate With Revenue Officer

1 NEW ZEALAND

In addition to requiring the occupier to provide reasonable assistance and facilities, ss 16(2) (a) and 16(2)(b) of the TAA NZ specifically require that a person ‘answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the NZ Commissioner or the officer, in writing, or by statutory declaration’.⁴⁸

The NZ Commissioner’s practice is to normally require oral answers to such questions during the search.⁴⁹ If an occupier refuses to answer a proper question, or leaves without answering it, this could give rise to a prosecution for obstruction.⁵⁰

The phrase ‘proper questions’ includes basic questions such as a person’s name, address and occupation⁵¹, and can also ‘include dual purpose questions (where discussion about documents, property, processes or other matters contained on the premises can overlap with the substantive investigation).’⁵² Interestingly, in 1998 the NZ Committee of Tax Experts, in noting that (former) s 263 ITAA 1936 did not include a specific requirement to answer questions, concluded that such a requirement would be:

redundant [in NZ], because the Commissioner must be given all reasonable assistance, and has other information-gathering powers. Answering questions orally would generally come within the ambit of the requirement to give the investigator all reasonable assistance. ... [while] reasonable assistance would extend to answering questions on the precise location of an item.⁵³

However, ‘investigative questions’ are excluded from TAA NZ s 16(2)(b) as the focus of this section is to ‘facilitate the effective exercise of the access power’,⁵⁴ that is to enable the NZ Commissioner to access and inspect any property, process, matter or documents. The NZ IR characterises ‘investigative questions ... (as) ... questions directed at obtaining evidence of offending or of the taking of the underlying tax position.’⁵⁵ Such questions can be put to an occupier separately in a subsequent voluntary interview or an inquiry before a District Court Judge (s 18) or by the NZ Commissioner (s 19).⁵⁶

The authors understand that the powers to require responses in writing or by statutory declaration, are rarely exercised, although for example, under s 16(2)(b) of the TAA NZ, an occupier could be requested to write out a long or complex password. A statutory declaration may be sought on occasion where, for example, NZ IR officials seek access to an electronic device but believe that they only have ‘one-shot’ at opening the device, that is, if the wrong password is entered all data will be permanently erased.

Paragraph (a) (‘all reasonable ... assistance’) would extend to a request for a password to be recorded in writing, but arguably not to a request by the NZ IR for the provision of information

48 Section 130 of the SSA 2012 also imposes additional obligations on occupiers to provide access or other information that is reasonable and necessary to allow IR to access data in computer systems or other data storage devices or internet sites.

49 Clews and Duncan, above n 9, 14.

50 TAA NZ s 143H.

51 OS 13/01, above n 4, [81].

52 Ibid [27]. For a discussion of the phrase see OS 13/01, above n 4, at [78] – [94]; see also Clews and Duncan, above n 9.

53 Committee of Experts on Tax Compliance, *Tax Compliance: A Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance*, (December 1998), 180-181.

54 Keating, above n 9, 54.

55 OS 13/01, above n 4, [81].

56 Ibid [81]. In the event that the taxpayer refuses to participate in a voluntary interview, the NZ Commissioner may, for example, require the person to attend and give evidence before the NZ Commissioner and produce documents held by the taxpayer: TAA NZ s 19.

in a statutory declaration. However, there is a somewhat similar power under s 17(5) of the TAA NZ, by which the NZ Commissioner can require information furnished under that section, to be verified by statutory declaration; a failure to do so is a criminal offence.⁵⁷ It might be argued therefore, that s 16(2)(b) of the TAA NZ is redundant and could be repealed.

2 *Australia*

Sub-section 353-15(3) of the TAA CTH requires an ‘occupier’ of property to which an ATO officer seeks access, to provide that officer with ‘all reasonable facilities and assistance’ for the ‘effective exercise of powers’ under the section. This would include such actions as indicating (verbally or by other means) the location of documents or other relevant items, opening locked storage facilities or giving the means to do so, and providing adequate lighting and power, working space and facilities such as photocopying.⁵⁸

Reasonable assistance would also include answering relevant questions so that ironically, TAA CTH s 353-15 would seem to be wider than the specific provisions of TAA NZ s 16. Accordingly, under TAA CTH s 353-15, an occupier can be required to help effectuate an investigator’s access to relevant data stored on computer or other electronic storage systems, for example, by operating the computer so as to display the information on screen, copy it onto a disc, or produce a hard-copy printout. Alternatively, the ATO officer is authorised to access the material directly.⁵⁹ However, TAA CTH s 353-15 does not oblige a person to provide assistance on matters unrelated to the effective exercise of the access power, for example, questions about a taxpayer’s general affairs.⁶⁰ Thus overall there is no real difference between the two jurisdictions on this element.

VI ELEMENTS REFLECTING A DIFFERENCE IN APPROACH IN NEW ZEALAND AND AUSTRALIA

A Element Five: The Preconditions for Exercise of the Access Powers

1 NEW ZEALAND

TAA NZ Section 16(1) provides that the NZ Commissioner is entitled at all times, to full and free access to all places and documents for the purpose of inspecting them where this is considered ‘necessary or relevant’ for the purpose of collecting any tax. The NZ IR interprets the phrase ‘necessary or relevant’ to mean what is ‘pertinent’ in the NZ Commissioner’s opinion,⁶¹ and includes documents ‘[l]ikely to provide any information required for the purposes of any of the Inland Revenue Acts or the [NZ] Commissioner’s functions.’⁶² IR has stated that s 16 (and by implication ss 16B and 16C TAA 1994 (NZ)) will be used ‘where, *in the Commissioner’s opinion*, there is a risk or history of non-compliance and/or a lack of cooperation, it is likely that documents may be at risk or that the case involves revenue offending (tax crimes, including fraud and evasion) (emphasis added).’⁶³

57 TAA NZ s 143(1)(b).

58 See ATO, above n 16, at 30; *Binetter v DFC of T (No 1)* 2012 ATC 20-331, 13811–13 (per Robertson J).

59 ATO, above n 16, at 46-48: see s 25A *Acts Interpretation Act 1901* (Cth).

60 *FC of T v Warner* [2015] FCA 659, [26] (Perry J); ATO, above n 16, 30, 32.

61 OS 13/01, above n 4, [27].

62 *Ibid* [27] (emphasis added).

63 *Ibid* [31] (emphasis added).

Accordingly, in practice, NZ s 16 has proven to be a very broad power, particularly as the requirement that access be judged ‘necessary or relevant’ by the NZ IR is a low threshold,⁶⁴ and is ‘not an onerous test’.⁶⁵ Thus, in *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore*⁶⁶, the Court of Appeal agreed with the High Court’s⁶⁷ view that section 16 only requires the most preliminary review for relevance.⁶⁸ A reasonable attempt to identify relevant material by either a preliminary scan of the documents or keyword search in the case of computer files, is therefore sufficient.⁶⁹ The requirement for a relevance search will be waived where the information is encrypted – in which case the NZ Commissioner can presume that the information is necessary or relevant.⁷⁰ In practice, the ‘necessary or relevant’ test in TAA NZ s 16 offers limited protection to taxpayers,⁷¹ although it is at least subject to a general reasonableness requirement. Clews (Barrister) and Duncan (IR) have recently suggested that: ‘the use of those powers is not as liberal as some commentators may suggest. It is a considered decision that involves a number of factors and is not made lightly...’⁷²

2 AUSTRALIA

The TAA CTH s 353-15 access power must be exercised bona fide for a ‘proper purpose’.⁷³ However within these constraints, the power is limited only by the express words of the section itself, and accordingly authorises ‘random’ audits,⁷⁴ a ‘roving enquiry’ or a ‘fishing expedition.’⁷⁵ The contrast between the fundamentally objective approach in the Australian section and the (qualified) subjective approach in NZ, is interesting. It would seem likely that situations which would not be found within the ‘proper purpose’ of the Australian legislation might still be deemed (reasonably) necessary by the NZ revenue authority. Accordingly, from the perspective of taxpayers generally, the more restrictive ‘proper purpose’ approach of TAA CTH s 353-15 seems more appropriate in policy terms, than the weaker protection afforded by the ‘necessary or relevant’ threshold of TAA NZ s 16.

64 It is not clear ‘whether either of the words takes precedence over the other’ Cohen, above n 34, 43.

65 See for example *Avowal Administrative Attorneys Limited & Ors v District Court at North Shore* (2007) 23 NZTC 21,610 at [16] (Baragwanath J), by Casey J in *Schwass and Robertson v Mackay* (1983) 6 NZTC 61,641. Despite this low threshold, taxpayers and their advisers have on rare occasions successfully invoked the protection of the ‘necessary or relevant’ test, for example *Green & Anor v Housden* (1993) 15 NZTC 10,053.

66 *Avowal* (NZCA), above n 25.

67 *Avowal* (NZHC), above n 25, [89], [92].

68 *Avowal* (NZCA), above n 25, [23], [32], [33], [45].

69 Keating, above n 9, [309].

70 This is the approach followed by the High Court in *Tauber*, above n 29.

71 Lennard, in the context of warrantless searches and the *New Zealand Bill of Rights Act 1990* (NZBORA 1990), argues that: “at least as far as the justification for a search and/or seizure is concerned, the application of the NZBORA 1990 seems limited, however, to circumstances in which a relevance check is not undertaken or is not satisfied. In circumstances in which a relevance check cannot be undertaken (because the taxpayer claims privilege or the computer drive is encrypted), the NZBORA will not render a search unreasonable.” Lennard, above n 2, 15.

72 Clews and Duncan, above n 9, 15. Duncan outlines the various factors including NZ IR internal approvals, and the significant resource requirements for a s 16 visit (including Digital forensics expertise), *ibid*.

73 *FC of T v Warner* [2015] FCA 659, [60], [70] (Perry J) (*Warner*); *FCT v Desalination Technology Pty Ltd* 2015 ATC 20-515, [27]; ATO, above n 16, 28–9.

74 *Industrial Equity Ltd v DFC of T* 90 ATC 5008, 5013–5, so long as the auditor is attempting to ascertain the taxpayer’s taxable income.

75 *Ibid* 5015; *Hart v DFC of T* 2005 ATC 5022; *Warner*, above n 73, 17,330.

B *Element Nine: Access To Private Dwellings*

It is the power to access private dwellings that reflects the most significant difference between the NZ and Australian positions. In particular, unlike the Australian provision, the TAA NZ expressly differentiates between access to private dwellings and other premises.

1 NEW ZEALAND

The NZ Commissioner's general power of entry under TAA NZ s 16(1) is limited by s 16(3), which provides that tax officers cannot enter any 'private dwelling' except with the consent of an occupier or pursuant to a warrant issued by an issuing officer who is satisfied that the exercise by the NZ Commissioner or an authorised officer, of their functions under s 16, requires physical access to the private dwelling (TAA NZ s 16(4)).

The term 'private dwelling' is broadly defined in TAA NZ s 16(7)⁷⁶ to mean 'any building or part of a building occupied as residential accommodation (including any garage, shed, and other building used in connection therewith) and includes any business premises that are or are within a private dwelling.'⁷⁷

TAA NZ s 16(6) provides that (unless consent for access to a 'private dwelling' has been given), a NZ revenue officer must 'produce' their s 16(4) warrant of authority and evidence of identity 'on first entering' a private dwelling and 'whenever subsequently reasonably required to do so'. While the section does not specify to whom the authority must be produced, the SSA 2012 states that the warrant and identity documents have to be shown to the occupier of the dwelling.⁷⁸ The steps that will be followed by NZ IR when entering private premises – including when entry is effected for example by the use of a locksmith where the occupier is not present,⁷⁹ are outlined in OS 13/01.⁸⁰

Acknowledging the intrusive nature of such searches, NZ IR has indicated that when accessing a private dwelling, 'officers will take the particular domestic circumstances into account to minimise as far as practicable the impact of the search.'⁸¹ NZ IR practice is to apply for warrants to access private dwellings.⁸² This 'provides occupiers with judicial oversight'⁸³ of the process, though the actual level of judicial oversight of warrant applications is relatively low.

Section TAA NZ 16(3) can produce some unusual results: for example, *In re Commissioner of Inland Revenue (application for a search warrant)*⁸⁴ the court held that a prison cell constituted 'residential accommodation' for the purposes of the definition of a 'private dwelling' and therefore a warrant was required to search it.⁸⁵ The fact that different rules apply in NZ to private dwellings means that there is the potential for 'demarcation' disputes, for example where premises have a mixed use. Thus Tubb has indicated that the NZ IR will apply for a warrant 'to search a private dwelling located on business premises (for example, a home with a dairy

76 TAA NZ s 16(7)

77 Section 33 *Interpretation Act 1999* (NZ).

78 Section 131(1)(b) SSA 2012 (NZ). Section 132 SSA 2012 (NZ) sets out identification and notice requirements for remote access searches.

79 Tubb, above n 25, 235, OS 13/01, above n 4, [47].

80 See for example OS 13/01, above n 4, at [49] – [59] in relation to the process adopted by NZ IR officers where the occupier is not present during the search.

81 Tubb, above n 25, 235.

82 OS 13/01, above n 4, [38].

83 *Ibid.*

84 *In re Commissioner of Inland Revenue (application for a search warrant)* (2005) 22 NZTC 19,123 (DC).

85 *Ibid* [8].

annexed to the front of the premises).⁸⁶ In the event that during a search the area to which access is sought is found to contain a private dwelling for which no access warrant has been sought, NZ IR will either seek the occupier's consent to enter the dwelling or apply for a warrant.⁸⁷

2 AUSTRALIA

In striking contrast to the NZ position, the Australian s 353-15 does not differentiate between access to private dwellings and other premises. Instead, the section permits an authorised officer to enter and remain on any 'land, premises or place'. However, as a matter of practice, where the ATO is 'contemplating access to a private residence, [it] will first consider whether there are alternative ways of obtaining the documents and evidence.'⁸⁸

As noted above, in contrast to the NZ requirement in s 16(3) to proactively produce a warrant on entering private premises and subsequently when required, the Australian equivalent provisions are reactive, with no obligation to produce an authority until requested by an occupier: see Element 7 above. In policy terms, the NZ approach seems preferable from a taxpayer's perspective.

(a) 'Private Dwellings' – Is There A Need For Special Rules?

A sound argument can be made that in policy terms, private dwellings are different to other premises⁸⁹ Indeed, the NZ Court of Appeal in *Tauber v C of IR* acknowledged that entering a private dwelling was 'contrary to the long-established principle that individuals are entitled to a high expectation of privacy in relation to residential property.'⁹⁰ Due to the special place traditionally given to the home in the Australian (and NZ) psyche and the intrusive nature of the exercise of the access powers,⁹¹ the authors believe there are sound arguments for the incorporation of special rules for access to private dwellings into the Australian statute.

This raises the question of whether Australia should follow the NZ approach, or look beyond it, which in turn will depend in part on how effective the NZ protection has proven to be. Conceptually, the independent judicial scrutiny required by the NZ warrant procedure should provide an appropriate level of protection for private dwellings. In fact however, as discussed below, it is at best, a limited protection. Indeed Keating observes that despite the intrusive nature of the s 16 power:⁹² 'the [NZ] courts have been willing to put few restrictions on the Commissioner's right to access private dwellings' and an access warrant under s 16(4) appears to be viewed differently by the judiciary as compared to search warrants obtained by other law enforcement agencies.⁹³

Indeed Lennard concluded in respect of s 16(4), that 'The decision to grant a warrant is subject only to a broad "reasonably necessary in all the circumstances" threshold ... [and] that threshold

86 Tubb, above n 25, 234.

87 OS 13/01, above n 4, [38].

88 ATO, above n 16, 29.

89 See Woellner, above n 11, 375.

90 *Tauber v C of IR* [2012] NZCA 411, (2012) 25 NZTC 20-143 at [35] citing *R v Williams* [2007] NZCA52, [2007] 3 NZLR 207, [113] and which in turn cited *R v McManamy* (2002) 19 CRNZ 669 (CA).

91 Woellner, above n 11, 377.

92 Keating, above n 9, [310].

93 *Ibid* [310]. In support of this proposition Keating [at 309] cites *Davis v CIR* (2004) 21 NZTC 18,675, *R v Hewitt* (2005) 22 NZTC 19,309 (DC) and the NZ Court of Appeal in *Avowal* who stated: 'The access and inspection power under s 16(1) is expressed in broad terms... The circumstances in which tax investigations occur differ from criminal investigations and the Commissioner's powers under s 16 are necessarily broad given the complexity that is often inherent in tax investigations. We see no need to read down the plain words of s 16.' *Avowal* (NZCA), above n 25, [22].

is low'.⁹⁴ For example in *Tauber v CIR*,⁹⁵ the taxpayer brought an application for judicial review challenging the lawfulness of search warrants obtained by the NZ Commissioner under s 16(4) authorising access to the homes of several taxpayers. NZ IR had also obtained warrants under s 16C(2) authorising the removal of certain books and documents from those premises.

Before the NZ High Court, the taxpayer unsuccessfully argued that the access warrants were too widely drawn and lacking in specificity.⁹⁶ While the NZ High Court acknowledged that the NZ Commissioner had a duty to provide full and accurate information when applying for an access warrant, it also stated that the issuing officer is not required to 'second-guess or review the decision of the NZ Commissioner to invoke [her] powers to obtain information under s 16'.⁹⁷ Rather, in determining whether to issue an access warrant, the judicial officer must simply consider whether the exercise of the NZ Commissioner's functions under s 16 requires access to a private dwelling.⁹⁸

The NZ Court of Appeal in *Tauber* affirmed 'that s 21 requires s 16(4) [power to issue a warrant is] to be read subject to an overall test of reasonableness',⁹⁹ and stated the correct interpretation of s 16(4) as:

A judicial officer who ... is satisfied [**in all the circumstances**] that the exercise by the Commissioner or an authorised officer of his or her functions under this section [**reasonably**] requires physical access to a private dwelling may issue to the Commissioner or an authorised officer a warrant to enter that private dwelling (emphasis added).¹⁰⁰

In the NZ Court of Appeal, Stevens J rejected the NZ IR's argument that the standard would be met if 'the search will further the Commissioner's investigations in some non-negligible way',¹⁰¹ on the basis that this interpretation of TAA NZ s 16(4) was inconsistent with the s 21 NZBORA 1990 protection against unreasonable search and seizure, and contrary to the high expectation of privacy in respect of residential property.¹⁰²

However, the NZ Court of Appeal also rejected the taxpayers' argument that a search of a private dwelling will not be reasonable unless the NZ Commissioner has exhausted all other available options under the TAA NZ,¹⁰³ as such an approach 'would be inconsistent with the scheme of the Act, which does not establish a "hierarchy" of investigatory powers'.¹⁰⁴ Stevens J went on to provide a non-exhaustive¹⁰⁵ list of circumstances that would be relevant in determining what was reasonably required 'in all the circumstances' when an issuing officer processes a warrant application under TAA NZ s 16(4). These circumstances could include:¹⁰⁶

- (a) the Commissioner's 'tax interest'; that is, the nature of the investigation;¹⁰⁷
- (b) what, if any, steps to obtain information have already been taken and with what results;
- (c) why the Commissioner considers it is appropriate to use s 16 powers;

94 Lennard, above n 2, 26.

95 *Tauber*, above n 29.

96 *Ibid* [29].

97 *Ibid* [43].

98 *Ibid*.

99 *Tauber*, above n 90 [30].

100 *Ibid* [34] (emphasis in original).

101 *Ibid* [33].

102 *Ibid* [35].

103 *Ibid* [31], [40].

104 *Ibid* [40].

105 *Ibid* [39].

106 *Ibid*.

107 The taxpayers in *Tauber* were being investigated by IR for income suppression, wrongful claims for deductions and tax avoidance.

- (d) the proposed search locations;
- (e) why relevant information is likely to be found in those locations;
- (f) the nature of the information likely to be found;
- (g) why other mechanisms are not suitable; and
- (h) whether there is any element of urgency.

(b) Should Australia Follow the NZ Model and Adopt a Similar/Improved System to ‘Protect’ Occupiers of ‘Private Dwellings’?

It is clear from the discussion above that the NZ courts have in practice placed few effective restrictions on the NZ Commissioner’s right to access private dwellings. The protection afforded to taxpayers is therefore comparatively limited, and if there is a genuine desire to provide effective protection for private dwellings in NZ, this issue needs to be revisited by policymakers. If Australia were to consider introducing special rules to provide greater protection where access to private dwellings is sought by the ATO, it could follow the NZ approach, but would need to address the current problems identified above in relation to the TAA NZ s 16(4) procedure.

(c) Would The Canadian Approach to the Access of a ‘Dwelling-House’ Provide a Better Model?

Alternatively, Australia (and perhaps also NZ) could usefully look to the practice of other jurisdictions such as Canada, where the equivalent treatment more adequately reflects ‘the higher expectation of privacy taxpayers have with regards to their territorial privacy.’¹⁰⁸ For example, to enter a Canadian taxpayer’s ‘dwelling-house’¹⁰⁹ to conduct an audit or inspection, the Income Tax Act RSC 1985 c 1 (5th Supp) (ITA RSC 1985)¹¹⁰ – not only requires the Minister of Finance to either obtain the occupant’s consent¹¹¹ or obtain a search warrant,¹¹² but also under s 231, requires the application for a warrant to satisfy a judge that (to paraphrase):

- there are reasonable grounds that the information being sought is in the dwelling-house;
- entry is necessary in order to enforce or administer the ITA RSC 1985; and
- entry has been, or there are reasonable grounds to believe that entry will be, refused.¹¹³

If the judge considering the warrant application is not satisfied that entry to the dwelling-house is necessary for the administration or enforcement of the ITA RSC 1985, they may alternatively:

- (a) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and
- (b) make such other order as is appropriate in the circumstances to carry out the purposes of this Act,

to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.¹¹⁴

These additional requirements reflect ‘the fact that courts have continuously held that the search of a person’s residence is the greatest intrusion by the State after “a violation of bodily

108 Robert Hawkswood, *Tax Information Exchange and the Erosion of Taxpayer Privacy Rights* (Master of Laws Thesis, The University of British Columbia, July 2014) 57.

109 The term is defined in s 231 Income Tax Act RSC 1985 c 1 (5th Supp) (‘ITA’).

110 Section 231.1(1) ITA RSC 1985.

111 Section 231.1(2) ITA RSC 1985.

112 Section 231.1(3) ITA RSC 1985.

113 Section 231.1 (3)(a)-(c) ITA RSC 1985 (emphasis added).

114 Section 231.1(3)(d)-(e) ITA RSC 1985.

integrity,”¹¹⁵ and would seem to provide greater protection for taxpayers, while still providing the revenue authorities with adequate powers¹¹⁶.

C Element 10: The Power To Remove And Copy Documents For Inspection

1 NEW ZEALAND

Since 2003, the NZ legislation has contained an explicit power to remove and copy any documents¹¹⁷ found. This power was inserted following concerns over¹¹⁸

the risk of documents being altered or destroyed ... despite the availability of inspection. The value of an audit is compromised if Inland Revenue cannot independently verify the taxpayer’s tax liability...¹¹⁹

Specifically, s 16B permits the NZ Commissioner or an officer of the department authorised by the NZ Commissioner, to remove documents accessed under section 16 in order to copy them.¹²⁰ No warrant or consent is required to remove documents under this section, though the IR has indicated that as a matter of practice, it will not remove materials if it is practicable to make copies on the premises.¹²¹

However, officers cannot simply remove documents en masse without any preliminary review. The High Court in *Avowal*¹²² held that prior to the removal of any documents, there must be an inspection, “[b]ut there is no need at that stage for detailed examination.”¹²³ This view was endorsed by the Court of Appeal in *Avowal* which noted that s 16B, as with s 16(1), is subject to the over-arching requirement of reasonableness found in s 21 NZBORA 1990.

The NZ IR has advised that as a matter of practice, they will perform a relevance search before removing documents (except where it is not possible to review the document before removal – e.g. in the case of an encrypted hard drive),¹²⁴ and will also seek to ‘manage the conditions and

115 See Chris Sprysak ‘Life after *Jarvis* – Just How Much Help Must You ‘Voluntarily’ Give The Canadian Revenue Agency’ (2006) 43 (3) *Alberta Law Review* 713, 716, who cites *Baron v Canada*, 1199311 S C R 416, 449-50 as support for his statement.

116 Ranjana Gupta, ‘Rights against Unreasonable Search and Seizure in Tax: Canadian and New Zealand Approaches Compared’ (2013) 13 *New Zealand Journal of Taxation Law and Policy* 222, 233.

117 As noted above, the definition of a “document” is broad, and extends to items such as computer equipment. The SSA 2012 also imposes additional obligations on occupiers to provide access or other information that is reasonable and necessary to allow IR officers to access data in computer systems, other data storage devices or internet sites. See SSA 2012 s 130.

118 Inland Revenue Department, Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill – *Commentary on the Bill* (Wellington, May 2002), 37.

119 Ibid 98. In response to submissions opposing the introduction of s 16B, Officials noted that: “Although penalty provisions could apply if documents are destroyed, the application of a penalty does not result in the relevant information being obtained by the department.”: Inland Revenue Department and the Treasury, Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Bill – *Officials’ Report to the Finance and Expenditure Committee on Submissions on the Bill Volume 1* (Wellington, November 2002), 98. Officials expected that the exercise of the provision would be “limited to those situation where it was necessary to prevent the Commissioner’s legitimate investigations being hindered” – rather, IR would continue to requisition documents under s 17.

120 Certified copies of the documents are admissible as evidence in court as if they were the original: s TAA NZ s 16B(3)

121 Officials Report, above n 119, 90.

122 *Avowal*, above n 65.

123 Ibid [29].

124 Tubb, above n 25, 230 refers to the Court of Appeal in *Avowal* (NZCA), above n 25.

access so as to preserve the integrity of the information and taxpayer confidentiality.¹²⁵ If the NZ IR determines that documents removed for copying under section 16B will be required to be held for a full and complete inspection, it will either seek the occupier's consent, or obtain a warrant under s 16C(2).¹²⁶ This is discussed below. Items removed under TAA NZ s 16B cannot be retained indefinitely, but must be returned 'as soon as practicable',¹²⁷ 'which would seem to mean once the [NZ] Commissioner has had sufficient time to complete his inspection'¹²⁸ or 'within a relatively short timeframe.'¹²⁹ The 'owner'¹³⁰ of a document which has been removed is entitled to inspect and obtain a copy of it at the premises to which it is removed, either at the time the document is removed from the premises, or at reasonable times subsequently.¹³¹

2 AUSTRALIA

There is no comparable provision to TAA NZ s 16B (or s 16C which is discussed below) in the Australian legislation, and the ATO has no power to remove materials from a person's premises without their consent. However, where the ATO suspects that a criminal breach has occurred, such as a serious offence or fraud, it can ask the Australian Federal Police to obtain and execute a search warrant under s 3C of the *Crimes Act* (Cth)¹³², which will authorise seizure of specified materials¹³³ (invariably with 'assistance' from ATO officers).

Overall, the lack of an equivalent to s 16B (and s 16C) in the Australian legislation is a potentially significant restriction on the exercise of the ATO's access powers in those infrequent but crucial situations where the ATO fears that materials or information may be tampered with or destroyed unless seized. On this basis, Australia should consider adopting provisions along the lines of the NZ sections. As a general comment it is worth noting that many of the NZ additions to sections and new sections are the result of defects found in the prior legislation when tested in the courts.

D Element 11: The Power Remove and Retain Documents Indefinitely for Full Inspection

1 NEW ZEALAND

Section 16C of the NZ legislation authorises the NZ IR to remove and retain documents (including electronic documents) "for so long as is necessary for a full and complete inspection".¹³⁴ However, apart from the phrase being defined as including¹³⁵ 'use as evidence in court proceedings',¹³⁶

125 Ibid.

126 OS 13/01, above n 4, [119]

127 TAA NZ Section 16B(2).

128 Keating, above n 9, [309].

129 *Tauber*, above n 90, [16].

130 The term 'owner' is not defined in the Act – but see for example, OS 13/01, above n 4, [112].

131 Section 16B(4) TAA 1994.

132 ATO, above n 16, 35.

133 Ibid. The alleged or suspected offences which may cause the ATO to seek a search warrant include 'offences against the Crimes (Taxation Offences) Act 1980, major fraud or conspiracies to defraud the Commonwealth in respect of tax revenue – for example, under the Criminal Code Act 1995, serious breaches, such as fraudulent record keeping under section 8T of the TAA or identity fraud under section 8U of the TAA.

134 TAA NZ Section 16C(1). Also see Keating, above n 9, 232.

135 Section 3(1) TAA 1994 (NZ).

136 But excluding "removal to make copies under s 16B".

there is little explanation of what constitutes a ‘full and complete inspection’.¹³⁷ Because the section is used where it is considered necessary to preserve information ‘for detailed inspection or evidentiary purposes’,¹³⁸ there is no explicit time limit for the retention of such documents¹³⁹ – unlike s 16B. The NZ IR can only remove and retain items for inspection where it obtains either the consent of ‘an’ occupier, or a warrant issued under s 16C(2) where the issuing officer is satisfied that the exercise by an authorised officer of their functions ‘may require removing documents from a place and retaining them for a full and complete inspection’. This involves a similar process to that applying to a search warrant under s 16(3) authorising access to a private dwelling (discussed above),¹⁴⁰ or in relation to inspection prior to removal of a document and the right to request copies of a document seized under s 16B.¹⁴¹

In addition to ss 16-16C, s 17 of the TAA NZ authorises the NZ Commissioner to request that information be furnished and documents be produced for inspection and (pursuant to subsection (3)) to remove and retain such documents for so long as necessary to allow a full and complete inspection.¹⁴² Despite the existence of s 17, s 16C was seen as necessary because there was seen to be a risk that a person might refuse to provide the requested document or may even destroy it because:¹⁴³

Although it is an offence to fail to provide information to the Commissioner when required to do so by a tax law, there are situations when a person may choose that option. Thus a person may prefer to face a monetary penalty for not complying with a request under section 17 rather than be prosecuted for a more serious offence such as fraud or tax evasion based on the documents requested.¹⁴⁴

137 Hon Peter Dunne, *Taxation (Annual Rates, Savings Investment, and Miscellaneous Provisions) Bill; Commentary on the Bill* (Wellington, May 2006), 50 (‘Commentary’). In the absence of a statutory definition, presumably the ordinary and natural meaning of these words will apply, a view supported by Tubb, above n 25, 221: ‘Inspect’ is defined in the Oxford English Dictionary as: ‘To look into; to view closely and critically; to examine (something) with a view to find out its character or condition; now spec. to investigate or oversee officially.’ The Commentary states that ‘[t]he right to perform forensic tests and other actions [is included] within the ordinary meaning of the word “inspection”: Commentary, *ibid* 50.

138 Keating, above n 9, 309.

139 *Ibid*. This view supported by Tubb, above n 25, at 232 who cites as an example: ‘where finger prints are to be taken and analysed from a fraudulent Goods and Services (“GST”) return for a prosecution.’

140 In response to concerns over the potential abuse by the IR of proposed s 16C, *The Taxation (Annual Rates, Savings Investment, and Miscellaneous Provisions) Bill* was amended to require the NZ Commissioner to seek a warrant from a judicial officer before the exercise of the power: Inland Revenue and the Treasury, *The Officials Report to the Finance and Expenditure Committee on Submissions on the Bill (Volume 1)*, (16 October 2006) at 38. Whether this additional ‘safeguard’ is necessary is debatable as arguably this requirement is implied from the basic TAA NZ s 16 power.

141 Tubb, above n 25, 232.

142 TAA NZ s 17(3)

143 Peter Dunne, above n 137, 51.

144 Persons may choose not to provide information on request and thereby obstruct an IR officer in carrying out their duties as the only penalty for obstruction is monetary, i.e. a fine not exceeding \$25,000 for the first conviction, and for any subsequent offence, a fine not exceeding \$50,000 (s 143H TAA 1994 (NZ)), and perhaps an increase in a shortfall penalty (s 141K TAA 1994 (NZ)). Unlike the position in Australia, the penalty for obstruction in NZ does not include a term of imprisonment. However, where the failure to provide information is done knowingly and with the intention to commit evasion or a similar offence, a taxpayer could be liable for a fine up to \$50,000, or imprisonment for up to five years, or both.

Moreover,¹⁴⁵ having original documents satisfies the ‘best evidence’ rule by which courts may view an original document more favourably than a copy.¹⁴⁶ It may also be necessary to conduct a forensic examination of an original document, for example to determine who has created the document, or whether the information contained in the document has been altered. From a practical perspective, the NZ Commissioner will generally seek a warrant for the removal of documents under section TAA NZ 16C in order to reduce the amount of time that NZ IR staff will need to be present at taxpayers’ premises, and to provide a clearer opportunity for affected persons to claim the protection of legal privilege and the non-disclosure right.¹⁴⁷

2 AUSTRALIA

There is no statutory power under TAA CTH s 353-15 for an ATO auditor to seize or remove and retain materials from a person’s premises¹⁴⁸ (beyond the taking of samples and the like).¹⁴⁹ In practice, ATO auditors will usually seek permission to take materials back to the ATO office if they feel this is needed, and historically, taxpayers and others have *generally* granted consent. However, auditors have indicated that (as in NZ) there are times – albeit infrequent, when they believe it is necessary to seize material immediately. For example, in order to prevent materials of documents being destroyed or altered. In such situations, the consequences of not being able to take possession of documents immediately¹⁵⁰ can be serious. TAA NZ sections 16B and 16C provide a useful model for Australia to adopt to deal with these issues, though it would be desirable to clarify the aspects discussed above (such as the meaning of ‘full and complete inspection’).

E Element 12: Taxpayer Defences: Blocking Access

1 NEW ZEALAND

Under the *statutory* protections in TAA (NZ), a person can refuse to permit access where (to paraphrase):

- (i) communications are subject to legal professional privilege under s 20(1) TAA (NZ); or
- (ii) tax advice is provided by for example, an accountant, under s 20B TAA NZ to the extent that a document is a ‘tax advice document’ as defined, and the taxpayer or a tax adviser makes a claim as such under TAA NZ s 20D.¹⁵¹

145 Peter Dunne, above n 137, 51.

146 See OS 13/01, above n 4, [145] which cites as an example ‘marks on the original document may be illegible on the copy.’

147 Ibid, [40], [131]. See Inland Revenue, ‘Standard Practice Statement 10/02: Imaging of electronic storage Media’ *Tax Information Bulletin* (2010) Vol 22:7, 54, for more information on the NZ Commissioner’s practices when imaging electronic storage media.

148 *JMA Accounting Pty Ltd v Carmody* 2004 ATC 4916, 4919; RH Woellner, ‘Another ATO “Raid” Goes Wrong’, *Tax Week* (CCH, 2004) Issue 47, 996.

149 See for example *JMA Accounting Pty Ltd & Anor v Carmody & Ors* 2004 ATC 4916, 4919.

150 Where the auditors cannot make other arrangements.

151 There is also a sub-category of legal professional privilege called litigation privilege, which protects documents created for the dominant purpose of upcoming litigation. NZ IR states ‘In practice, ... Inland Revenue regards the section 20 privilege as extending to litigation privilege where New Zealand lawyers (as defined by the Lawyers and Conveyancers Act 2006) are involved.’ OS 13/01, above n 4, [127].

2 AUSTRALIA

In contrast to NZ, in Australia there are no *statutory* provisions which are similar to TAA CTH s 20 dealing with defences to the access powers. However, Australia has analogous (though not identical) *common law* and administrative defences, including:

- (i) common law legal professional privilege is available as a defence to protect legitimate confidential communications between a person and their legal adviser from disclosure under TAA CTH s 353-15;¹⁵²
- (ii) the ATO currently also applies a non-statutory ‘accountants’ concession’¹⁵³, for ‘restricted source’¹⁵⁴ and ‘non-source’¹⁵⁵ communications between independent external¹⁵⁶ tax advisers and their clients prepared *solely* for the purpose of advising a client on matters associated with taxation;¹⁵⁷ as well as
- (iii) a concession for certain corporate board tax compliance risk papers.

Of these defences, legal professional privilege has, with some exceptions, proven to be quite robust¹⁵⁸. By contrast, the accountants’ concession ‘is a fragile protection’¹⁵⁹ because it is merely an administrative concession by the ATO and does not have statutory force. Indeed, in the view of some members of the accounting profession, ‘the ATO takes too liberal a view of when ‘exceptional circumstances’ exist justifying the ATO in withdrawing the protection and accessing confidential taxation advice.’¹⁶⁰

There have been calls for greater protection of tax advice provided by non-lawyers in Australia.¹⁶¹ New Zealand’s mixed experience with the non-disclosure right (which is somewhat different to the administrative ‘accountants concession’ applying in Australia), which has been in place for over a decade, could be instructive for policymakers considering the adoption of an independent statutory protection for tax advice provided by non-lawyers.¹⁶² While the

152 *Donoghue v FCT* 2015 ATC 20-494, paras 133–40 (Logan J); *FC of T v Citibank Ltd* 89 ATC 4268, 4274–7 (Bowen CJ and Fisher J); *FC of T v Coombes (No 2)* 99 ATC 4634, paras 32–4 (Sundberg, Merkel and Kenny JJ); Australian Law Reform Commission (ALRC), *A Review of Legal Professional Privilege and Federal Investigatory Bodies* (21 December 2007), para 160; *JMA Accounting Pty Ltd & Entrepreneur Services Pty Ltd v Carmody* 2004 ATC 4916, 4919–20 (Spender, Madgwick and Finkelstein JJ); ATO, above n 16, 36–40.

153 See Australian Taxation ‘Guidelines to accessing professional accounting advisers’ papers’ <<http://www.ato.gov.au/general/guidelines-to-accessing-professional-accounting-advisers-papers/>> [2.1],[7].

154 *Ibid*, [2.2].

155 *Ibid*, [2.3]

156 *Ibid*, “1. Introduction”, [2.2].

157 *Ibid*, [2.2], [2.3].

158 See for example *12 Year Juice Foods of Australia Pty Ltd v Commr of Taxation* [2015] FCA 741; *Gaynor v Chief of the Defence Force (No 2)* [2015] FCA 817; *Kirkman v DP World Melbourne Ltd* [2016] FWC 605; *Cth of Australia v Sanofi (formerly Sanofi-Aventis) v Commr of Taxation* [2017] FCA 711.

159 Robin H Woellner and Andrew J Maples, “The Politics of Tax: rethinking the basis for an independent accountants’ tax advice privilege” (2015) 44 *Australian Tax Review* 120, 120.

160 *Ibid*.

161 Australian Law Reform Commission, above n 152. For a comparison of the separate statutory protection advocated by the ALRC and the approach adopted in the United States (extending legal professional privilege to non-lawyers) see Robin H Woellner and Andrew J Maples, above n 159, 120.

162 See further Andrew J Maples, ‘The non-disclosure right in New Zealand – Lessons for Australia?’ (2008) 1 *The Journal of the Australasian Law Teachers Association* 351; Andrew J Maples and Robin H Woellner, “Privilege for Accountants’ Tax Advice in Australia – Brave New World, or House of Straw?” (2010) 25 *Australian Tax Forum* 143.

non-disclosure right has only been subject to minor legislative amendment and clarification in two cases,¹⁶³ as a separate statutory right it is more limited than legal professional privilege. Compliance with the legislative provisions is essential. The courts have made it clear that nothing will be implied that is not found in the express wording of the legislation and have adopted a narrow interpretation of the right.¹⁶⁴

Given the ‘fragile protection’ of the Australian ‘accountants concession’, there would be merit in Australia considering the NZ experience (and lessons) – or the Australian Law Reform Commission proposals¹⁶⁵ (which broadly follow the NZ model) as a possible approach. However, there seems no appetite in Australia presently to make such a change, and given the various Australian governments’ apparent unwillingness to introduce statutory reform in the 10 years since the ALRC Report – despite regular claims of problems with the administration of the policy – a rush to introduce protective legislation in the near future seems most unlikely.

Like the accountants’ concession, the Australian corporate board exception¹⁶⁶ is a non-statutory administrative concession under which the ATO will not ordinarily seek access to advice created by suitably qualified in-house or external advisors¹⁶⁷ where that advice relates to tax compliance risk. However, the protection is

confined to the information in a document that has been created by advisors for the sole purpose of providing advice or opinion to a corporate board (including properly constituted sub-committees) relating to a major transaction, arrangement, corporate system or process:

- on the likelihood and impact of the tax compliance risk;
- as to whether the ATO or an administrative or judicial decision-making authority may take a contrary view or position to that of the taxpayer on the tax compliance issue, or
- on courses of action to effectively manage the tax compliance risk¹⁶⁸.

Moreover, the ATO may seek access to tax risk advice where there are ‘exceptional circumstances’ (as judged by the ATO) – including: unco-operative taxpayers or those with a history of serious non-compliance or aggressive tax positions; situations where adequate information cannot be established from other documents/enquires; or the ATO has reasonable grounds to believe that an anti-avoidance provision may apply.¹⁶⁹

The Australian corporate board concession is limited and relatively untested, but is likely to exhibit similar ‘issues’ and problems as the accountants’ concession. There is, semble, no NZ equivalent, and while it would be preferable for NZ to introduce statutory protection (in order to avoid the issues outlined in relation to the accountants’ concession above), if NZ shows a similar reluctance to legislate on this issue, it might be tactically wiser to advocate for an Australian-style administrative concession, with the hope of expansion into a statutory protection in the future.

163 *Blakeley v CIR* (2008) 23 NZTC 21,865 and *ANZ National Bank Ltd v CIR (No 2)* (2008) 23 NZTC 21,918.

164 See for example *Blakeley v CIR* (2008) 23 NZTC 21,865, [13] where Rodney Hansen J stated that: ‘The statutory protection created for tax advice documents is accordingly significantly narrower than the scope of legal professional privilege both as to the information protected from disclosure and the conditions attaching to its application. ... there is no reason why the statute should be construed as if it were an extension to legal professional privilege with the constraints that entails. Sections 20B–20G provide taxpayers with a new but strictly circumscribed right to resist the exercise by the Commissioner of wide ranging information gathering powers. It should be construed on orthodox principles.’

165 Australian Law Reform Commission, above n 152.

166 See *Practice Statement Law Administration PS LA 2004/14* updated on 12 November 2015.

167 *Ibid* [3C]

168 *Ibid* [3D], [3E]-[3K].

169 *Ibid*, [3L], [3M]-[3P].

VII CONCLUSION

Access powers are a crucial part of a revenue authority's armoury and therefore need to be robust and workable – but fair. This review of the investigative access powers of the ATO and NZ IR highlights a number of similarities, while also identifying a number of differences of varying significance between the access powers of the ATO and NZ IR, and identified at various points, possible improvements to each set of powers as the case may be.

Overall, it seems fair to conclude that each set of access powers is basically operating effectively, but could be substantially improved by adopting the suggestions made in this article. Three potential improvements to the NZ access powers are recommended in this paper. First, limiting IR access to premises and property to 'all reasonable times'. Second, repealing the arguably redundant requirement for occupiers to answer all 'proper questions' relating to the exercise of the NZ Commissioner's powers. Finally, replacing the subjective 'necessary or relevant' threshold with the more restrictive 'proper purpose' approach to the exercise of the access powers adopted in Australia.

In Australia, policymakers considering special access rules for private dwellings could introduce a specific warrant-based protection modelled on NZ's approach but would need to address the issues noted above to have an effective protection, or alternatively, could look to other jurisdictions. In addition, the NZ powers to seize or remove and to retain materials indefinitely without taxpayers' consent, provide a useful model for Australia to consider. Policymakers in Australia looking to provide greater protection for tax advice provided by non-lawyers could, among the possible approaches, consider the separate statutory regime adopted in NZ. The need to define the term 'occupier' or otherwise clarify the scope of the ATO's and NZ IR's access powers, remains an issue for both jurisdictions.

The authors also note that the powers should be periodically reviewed (and amended as necessary) for two reasons. First, increasingly sophisticated data collection (and analysis) technologies utilised by revenue authorities, have the potential to significantly interfere with taxpayers' rights to privacy; and legislative protections for taxpayers, including those relating to access of information, need to recognise this. Second, on the other hand, globalisation coupled with constantly evolving new technologies means that sophisticated taxpayers have ever-expanding new ways to hide their income information, and revenue authority powers need to be reviewed regularly to ensure that they remain effective.

Two limitations are noted in the Introduction of this paper. First, it does not analyse and compare the access powers of jurisdictions beyond Australia and NZ. Second, the paper focuses on the processes of the ATO and NZ IR accessing information held in Australia and NZ respectively, rather than offshore. Both limitations are areas for future research.

CHALLENGING DECISIONS ABOUT FUNDING FOR UNIVERSITY RESEARCHERS IN COURT

*Mary Wyburn**

I INTRODUCTION

The university research environment is more complex now than it has ever been. Not only has the subject matter of university research become more complicated, but the manner in which modern research is conducted is also more complex. While research has typically involved individuals working as part of a team, modern research problems are more frequently being addressed by multi-disciplinary teams and often with team members located in different countries.¹ University researchers also find themselves in a more complex funding environment. Universities compete fiercely for the funding of their research endeavours in a situation where research costs are increasing. The number of applications for grants from the main Federal government research funding bodies, the Australian Research Council (ARC) and the National Health and Medical Research Council (NHMRC) is high and still growing but the ‘success rates are low and declining ... funding is largely unchanged.’² University reputations are at stake when data on ‘success and failure rates’³ in the various schemes operated by these funding bodies, is published on their websites.

Researchers, their universities and their commercial partners, invest significant time and effort in preparing a detailed case in support of each funding application. This can be a major distraction from the research undertaking itself, and failure to obtain appropriate funding means this effort has been wasted.⁴ However, this is not the only lost investment of researcher time and effort. The application processes of the major grant funding bodies rely on the contribution of researchers in the peer reviewing of the applications.⁵ So the increase in applications also results in increasing demands made on university researchers who appraise the applications, both for scientific merit, and the appropriate level of funding, in light of the competing applications and the research funds available.

* BA UNSW LLB(Hons) (Sydney) LLM (Lond), Senior Lecturer, University of Sydney Business School.

1 Jason Borenstein and Adil Shamoo, ‘Rethinking Authorship in the Era of Collaborative Research’ (2005) 22(5) *Accountability in Research Policies and Quality Assurance* 267-283; Blaise Cronin, ‘Hyperauthorship: A Postmodern Perversion or Evidence of a Structural Shift in Scholarly Communication Practices?’ (2001) 52(7) *Journal of the American Society of Information Science and Technology* 558-569; K. Brad Wray, ‘Scientific Authorship in the Age of Collaborative Research’ (2006) 37(3) *Studies in History and Philosophy of Science* 505-514.

2 Ian Watt, ‘Review of Research Policy and Funding Arrangements’ (Report, Australian Government Department of Education and Training, 4 December 2015) 44-45. The NHMRC responded to the problem by announcing a restructuring of its research grant framework: Greg Hunt, ‘Medical Research Reforms to Improve our Future Health’ (Media Release, 25 May 2017) <<http://www.greghunt.com.au/Home/LatestNews/tabid/133/ID/4266/Medical-research-reforms-to-improve-our-future-health.aspx>>; Anne Kelso, ‘A Fresh Approach to Research Funding’, *The Australian* (Australia), 31 May 2017, 32.

3 Watt, above n 2, 45.

4 Fiona Wood, V. Lynn Meek and G Harman ‘The Research Grant Application Process. Learning from Failure?’ (1992) 24 (1) *Higher Education* 1-23, 11.

5 Watt, above n 2, 44

A more complicated research environment is attracting an increasing range of legal issues. This paper examines two cases illustrating this trend and explores the implications for researchers, universities and the main government research funding organisations supporting university research activities. It contributes to the literature on the increasing involvement of universities and their staff in legal disputes,⁶ by extending the discussion to the further context of legal disputes about university research funding.

II DISPUTING ELIGIBILITY FOR A RESEARCH GRANT

In the first case, a university researcher ('G') who was a biomedical scientist, challenged a decision about his eligibility to apply for a research fellowship from the ARC. The ARC is a Commonwealth agency operating under the *Australian Research Council Act 2001* (Cth) (ARC Act).⁷ It is responsible for making recommendations in relation to the ARC Act's government-financed research programmes, administering the financial assistance provided under the ARC Act and advising the relevant Minister in relation to research matters.⁸ The ARC administers the National Competitive Grants Programme, a scheme that provided funding of \$906.2 million for new grants awarded in 2016-17.⁹

In 2009, G was unsuccessful when he applied under the ARC Future Fellowship ('FF') scheme. G was then associated with the University of Tasmania and the FF application was made through that university. The following year, G, now at the University of Western Australia, applied again under the FF scheme but failed to gain a fellowship. In 2012, G approached the Federal Court seeking judicial review of the ARC's decisions to reject his FF applications. The matter was referred to a registrar for mediation¹⁰ and ultimately settled. A deed of settlement was entered into between G and the Commonwealth in December 2012, after which G discontinued his review action in the Federal Court.¹¹

In February 2013, now with the University of Canberra, G applied under the FF scheme for a third time. Ordinarily, under the scheme funding rules, G would have been ineligible to apply. Under s 53(1)(d) of the ARC Act, a funding proposal must not be approved by the Minister for Education and Training under s 51(1), or recommended by the chief executive officer (CEO) of the ARC to the Minister for approval under s 52(1), unless among other matters, the eligibility criteria in the scheme funding rules are satisfied. Scheme funding rules are prepared by the ARC under s 59 of the ARC Act and approved by the Minister under s 60. According to the scheme rules for 2013, G would have been ineligible to apply because he had submitted two earlier applications in the funding rounds between 2009 and 2013 (Clause 9.1.2 of the Funding Rules). However, under the terms of the 2012 Deed of Settlement, the ARC gave an undertaking that any application for FF funding in which G was named as chief investigator, would not be regarded as invalid on the ground that G had 'reached or exceeded the maximum

6 Astor Hilary, 'Improving Dispute Resolution in Australian Universities: Options for the Future' (2005) 27(1) *Journal of Higher Education Policy and Management* 49-65; Astor Hilary, 'Australian Universities in Court: Causes, Costs and Consequences of Increasing Litigation' (2008) 19(3) *Australian Dispute Resolution Journal* 156-169; Kamvounias Patty and Varnham Sally, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals' (2010) 34 (1) *Melbourne University Law Review* 140-180.

7 It was originally established under the *Employment, Education and Training Act 1988* (Cth): Australian National Audit Office, *The Australian Research Council's Management of Research Grants*, Audit Report No 38, 2005-06, 29.

8 *Australian Research Council Act 2001* (Cth) s 3.

9 Australian Research Council, *Annual Report 2016-17*, 23.

10 *Ghanem v Australian Research Council (No 2)* [2015] FCA 434 [64].

11 *Ghanem v Australian Research Council* [2014] FCAFC 132 [2].

number of applications'.¹² In November 2013, G was notified that his 2013 FF application was unsuccessful. In that year, only one in every six of the 1,236 applications received funding.¹³ G's proposal was ranked 442 out of the 500 applications that fell within the scope of the Physical, Mathematical and Information Sciences and Engineering selection panel.¹⁴

In December 2013, G requested a statement of reasons from the ARC as to why his application had been unsuccessful. The request was made under s 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act').¹⁵ The ARC provided G with a statement of reasons in January 2014.

G then applied to the Federal Court under s 5(1) of the ADJR Act, for judicial review of the decisions of the ARC and the Minister in relation to his 2013 FF application. G appeared in person in the court proceedings. He argued that the procedures required under the ARC Act had not been followed because: under the rules G was ineligible to apply, the decision made was an 'improper exercise of the power' conferred by the ARC Act, there was an error of law, there was no material to justify the decision, the decision was 'otherwise contrary to law,' and it was made in bad faith.¹⁶ G claimed the recommendation by the ARC's CEO to the Minister about the funding of G's proposal, was not in the proper form because it did not include a statement of reasons as is required under s 52(3)(d) of the ARC Act, and the Commonwealth Grant Guidelines. In relation to the claim of bad faith, G asserted that he had withdrawn his 2012 application to the Federal Court 'in good faith' and on the basis his 2013 FF application would be treated fairly, but he alleged that two of the assessors of his 2013 application deliberately reduced their scores so that his application was bound to be unsuccessful.¹⁷ Among the remedies G sought was for the assessment of his 2013 proposal to be reconsidered, or for it to be reconsidered as part of the then current 2014 FF funding round.

The Minister and the ARC responded to G's application by seeking an order for summary judgment.¹⁸ They argued there was 'no reasonable prospect'¹⁹ of G's claims succeeding. The application for summary dismissal was successful at first instance in the Federal Court. Justice Foster accepted the respondents' arguments that if G was not eligible for FF funding, his case was frivolous and bound to fail because 'no meaningful relief' could be granted, and if G was eligible, G's first claim failed.²⁰ The Federal Court found there was no evidence to support G's allegation that a professor, with whom he had been in dispute while at the University of Tasmania, had interfered in the application process in such a way that two assessors scored his proposal so it was bound to fail. The Federal Court considered that the reasons given in the Minister's Briefing Note from the ARC, complied with the legislative requirement that a statement of reasons set out why the proposal is or is not recommended by the ARC for approval of the Minister. The Federal Court's view was that there was no real prospect that the remedies sought by G would be granted (inclusion in the 2014 funding round), or be useful (an order setting aside the 2013 decision of the Minister).²¹

G once again appealed, this time to the Full Federal Court, and he was successful in part.²² The Full Federal Court found that G's claims, although inadequately pleaded, could have been

12 Ibid.

13 *Ghanem v Australian Research Council* [2014] FCA 473 [37].

14 Ibid [37], [40].

15 Ibid [19].

16 Ibid [3].

17 Ibid [6].

18 *Federal Court Act 1976* (Cth), s 31A and *Federal Court Rules 2011* (Cth), r 26.01.

19 *Ghanem v Australian Research Council* [2014] FCA 473 [50].

20 Ibid [59] – [60].

21 Ibid [74] – [76].

22 *Ghanem v Australian Research Council* [2014] FCAFC 132.

construed as a claim that not only was the decision to refuse FF funding invalid, but G's FF application was also invalid and if so, it was null and void. Should G's FF application be found to be invalid, there was a potential remedy available. If the 2015 FF funding rules (not yet determined at the time of the appeal) were equivalent to the 2013 rules in relation to ineligibility, because of two previous applications in the relevant period, the invalidity of the 2013 application would mean that G was free to apply in 2015.²³ In the Federal Court's view, summary dismissal under s 31A of the *Federal Court of Australia Act 1976* (Cth) should not occur where there are inadequate pleadings unless they disclose 'there is no reasonable cause of action.'²⁴ In the circumstances, it was not appropriate for the Federal Court to grant summary dismissal of G's claims. The Appeal Court accepted that G's actions in challenging the validity of his 2013 FF application were 'opportunistic,' especially when at the same time he was arguing the ARC should have recommended the research proposal to the Minister. However the Appeal Court also considered that opportunism 'is no necessary bar to success in litigation.'²⁵ The Appeal Court rejected G's other claims as the judge at first instance had carefully considered the issues, and there were no grounds for doubting the correctness of that decision.

G was granted leave to amend his pleadings to include the claim that his 2013 FF application was invalid, and the matter was returned to the Federal Court. However G's amended claims were ultimately rejected. The Federal Court found that a FF proposal not fulfilling the eligibility criteria under the legislative scheme established by the ARC Act, including the funding rules made under the Act, was not void but merely ineligible and therefore could not be approved by the Minister.²⁶ The Federal Court agreed with the Minister's argument and the ARC that clause 9.2.3 of the 2013 funding rules gave the ARC's CEO a discretionary power to decide whether or not a proposal that does not meet the eligibility criteria, should nevertheless be recommended to the Minister.²⁷ The ARC's CEO could also recommend against the funding of G's non-compliant proposal. It was also open to the Minister to decide not to approve G's funding proposal. The Federal Court added that it was 'not disposed' to grant relief 'in any event' where the applicant had sought to 'take advantage of the type of technicality raised by [G] in the present case in circumstances where he has so clearly waived or acquiesced in his [2013] funding proposal going forward.'²⁸ The Federal Court was of the view that even if its findings were wrong, without any evidence that G had developed an FF proposal to submit in the 2015 funding round, and that the University of Canberra (the university to receive and administer the funds to be used by G for his research) would support the application, there was no 'proper foundation' for the grant of relief.²⁹ G's claims were dismissed with costs.

III DISPUTING SUSPENSION OF RESEARCH FUNDING

The second case concerned a researcher ('E') challenging the suspension of his funding by the NHMRC after an allegation of misconduct was brought against him at his university. The NHMRC, originally established in 1936, now operates under the *National Health and Medical Research Council Act 1992* (Cth) ('NHMRC Act').³⁰ Its role is to:

23 Ibid [16].

24 Ibid [19].

25 Ibid [18].

26 *Ghanem v Australian Research Council (No 2)* [2015] FCA 434 [80].

27 Ibid [85].

28 Ibid [90].

29 *Ghanem v Australian Research Council (No 2)* [2015] FCA 434 [92] – [93].

30 Australian National Audit Office, *Administration of Grants by the National Health and Medical Research Council*, Audit Report No 7, 2009-10, 41

... pursue activities designed to ... raise the standard of individual and public health throughout Australia ... foster the development of consistent health standards between the various States and Territories ... medical research and training and public health research and training throughout Australia ... and consideration of ethical issues relating to health.³¹

The NHMRC administers the Medical Research Endowment Account used to fund ‘priority driven, strategic research and researcher initiated research.’³² In 2016-17, the NHMRC approved new research grants worth \$809.9 million.³³

At the time of the legal proceedings, E was a neuroscientist employed by the University of Queensland. On 11 December 2001 E was granted the RD Wright Fellowship, a Career Development Award (CDA) funded by the NHMRC. The award gave funding of \$400,000 over five years (2002-2006), with \$80,000 paid each year.³⁴ The next day, the Commonwealth entered into a Deed of Agreement with the university in respect of research funding, including that to be used in E’s CDA. The NHMRC grant was made to the university rather than to E directly, but it was to be used to fund research to be undertaken by E.

Unfortunately, several disputes arose between E and the university. These included disputes about his level of remuneration, the reimbursement of expenses and the removal of equipment from the university campus.³⁵ The two parties commenced legal proceedings against one another.³⁶ In August 2006, just over four months prior to the end of the term of E’s CDA, the university suspended E without pay while it investigated allegations of misconduct/serious misconduct made against him. The allegations concerned the ‘unauthorised removal of equipment’ from the university campus in May 2006 and E’s absence from the campus since that time.³⁷ The university notified the NHMRC about these matters on 28 August. On 7 September 2006 the NHMRC advised the university that it had decided to suspend further payment under the CDA in accordance with the terms of the Deed of Agreement, pending the outcome of the misconduct investigation. The suspension of the CDA by the NHMRC meant the final payment of \$22,500 was not made to the university.³⁸

The university terminated E’s employment in May 2007.³⁹ The NHMRC wrote to the university seeking information about the outcome of the misconduct investigation.⁴⁰ It was notified by the university on 30 March 2011 that E’s conduct had been found to constitute misconduct and serious misconduct and that his employment contract had been terminated.⁴¹

E initiated proceedings against the NHMRC and the Commonwealth and in this and the subsequent proceedings, he appeared in person. Some initial confusion was caused by a change to the NHMRC’s legal status. From 1 July 2006 the NHMRC was no longer a statutory corporation. It became an administrative agency of the Commonwealth.⁴² This meant the NHMRC no longer had a legal personality separate from the Commonwealth. E then commenced proceedings against the NHMRC and the Commonwealth in the High Court in September 2011 alleging

31 *National Health and Medical Research Council Act 1992* (Cth) s 3.

32 Watt above n 2, chapter 3.

33 National Health and Medical Research Council, *Annual Report 2016-2017*, p 8.

34 *Elston v Commonwealth of Australia* [2013] FCA 108 [20].

35 *Elston v Commonwealth of Australia* (2014) 222 FCR 429, 432.

36 *Ibid.*

37 *Ibid* 432.

38 *Ibid* 443.

39 *Ibid* 433.

40 *Ibid.* The National Health and Medical Research Council wrote to the University of Queensland on two occasions seeking information about the outcome of the investigation: *Ibid* 443.

41 *Ibid* 433.

42 *National Health and Medical Research Council Amendment Act 2006* (Cth).

‘breach of contract, breach of a duty of care and defamation.’⁴³ He sought damages for lost ‘personnel’ and ‘research’ support, as well as salary and superannuation contributions, and for defamation arising from the suspension of the CDA. In response, the Commonwealth sought various orders, including transfer of the matter to the Federal Court.

In March 2012 the High Court ordered the matter be remitted to the Federal Court.⁴⁴ The Commonwealth applied to strike out E’s pleadings or alternatively it sought summary judgment in its favour. The Federal Court ordered the striking out of the NHMRC as the second respondent, because it was an agency of the Commonwealth and as now constituted was ‘not a body capable of being sued in its own right.’⁴⁵ E argued the suspension by the NHMRC of the CDA funding constituted a breach of the 2001 Deed of Agreement between the Commonwealth and the university. The Federal Court ordered the striking out of this claim. As E was not a party to the Deed of Agreement, he could not sue on it. However, the Federal Court indicated that E could bring a claim if he was able to establish that he was a third party beneficiary of promises made in the Deed of Agreement and therefore fell within s 55 of the *Property Law Act 1974* (Qld).⁴⁶ The Federal Court’s view was that the NHMRC had contractual power under the Deed of Agreement to suspend payment of the award. An argument might be brought that the NHMRC was not lawfully exercising that power, for instance there might be evidence it made its decision without giving E an opportunity to be heard, and that opportunity might be established as a contractual obligation; but E did not plead these arguments.⁴⁷

The claim based on a breach of a duty of care owed by the NMHRC to E, was also struck out because E’s pleadings had failed to give details of the existence of the duty and the circumstances of the alleged breach. The Court considered an argument might be brought that a duty of care existed based on the objects of the relevant legislation, and the framework under which an applicant such as E applied for the award and was named in the grant documents; but E did not plead these arguments.⁴⁸ E’s defamation claim was also found not to have been sufficiently pleaded so it was struck out.⁴⁹ Despite the considerable failings in his pleadings, the Court granted E leave to file and serve an amended statement of claim.

E sought leave to appeal the decision to strike out the pleadings, to the Full Federal Court. His main argument was that the NHMRC should not have been removed as a respondent in the proceedings. Greenwood J dismissed E’s application. He found no error had been made by the Court in relation to its finding that the NHMRC, as an agency of the Commonwealth, did not have independent legal personality and was not capable of being sued.⁵⁰ E filed amended statements of claim in March and April 2013. In response, the Commonwealth once again applied for orders striking out the pleadings and for summary judgment. Logan J in the Federal Court made orders striking out both amended statements of claim, but he also took the unusual step of ordering that pleadings be dispensed with and the matter go to trial, on these four issues:

- (a) Was the contract made by deed on 12 December 2001 between the respondent, the Commonwealth of Australia, and the University of Queensland (the Contract) a contract which, for the purposes of section 55 of the *Property Law Act 1974* (Qld), was a contract for the benefit of a third party, namely the applicant?

43 *Elston v Commonwealth of Australia* (2014) 222 FCR 429, 433.

44 *Elston v Commonwealth of Australia* [2012] HCA Trans 076.

45 *Elston v Commonwealth of Australia* [2013] FCA 108 [10].

46 *Ibid* [34].

47 *Ibid* [37].

48 *Ibid* [41].

49 *Ibid* [43] – [44].

50 *Elston v Commonwealth of Australia* (2013) 212 FCR 77.

- (b) In any event, even if the Contract was not one of that kind, was the respondent obliged to afford the applicant natural justice to the extent of affording him an opportunity to be heard prior to exercising its power of suspension of the award found in clause 14 of the Contract?
- (c) If the respondent was so obliged, did the respondent afford natural justice to the applicant prior to making its suspension decision on 7 September 2006?
- (d) If it did not, what damages flow from any such failure?⁵¹

When the parties came before Justice Rangiah in the Federal Court, E's claims were dismissed. In relation to the first issue, the Commonwealth decided not to dispute E's entitlement to enforce an obligation under s 55 of the *Property Law Act 1974* (Qld) but it argued there was in fact no contractual promise by the university to observe natural justice in relation to E. The second issue was whether the NHMRC owed E an obligation of natural justice so that he must be given an opportunity to be heard before a decision was made on suspension of the CDA, the obligation arising either under the NHMRC Act or as an implied term of the Deed of Agreement. The first question the Federal Court addressed was whether the NHMRC Act conferred a statutory power to award funds such that in its exercise, the NHMRC was obliged under the principle in *Annetts v McCann* (1990) 170 CLR 596 ('Annetts'), to observe natural justice for persons whose rights or interests would be prejudiced, for example as here by suspension of the payments. The answer to the question was no. The Federal Court found the power to suspend the CDA payments arose not under the NHMRC Act but under the Deed of Agreement, and so the principle in *Annetts* did not apply.⁵² Another reason the principle did not apply was because the damage to the rights or interests that occurs from the exercise of the statutory power, must be direct, and this was not the case here. The damage to E's reputation and financial interests was not a direct result of the suspension of payments by the NHMRC.⁵³ E's further contention, that the suspension of the CDA resulted in his subsequent applications for funding to the NHMRC being rejected, was dismissed as there was insufficient evidence to establish the claim.⁵⁴

The Federal Court went on to say if it was wrong in its view on the issue, it would still have refused relief under s 39B of the *Judiciary Act 1903* (Cth) and s 16(1) of the ADJR Act, on discretionary grounds because even if E had been given an opportunity to be heard, the result would not have changed. The university had decided E would not be paid during the investigation and it was not providing E with facilities for his research, so there was no reason for the NHMRC to continue making payments to the university. Any court orders setting aside the NHMRC decision to suspend payments and giving E an opportunity to be heard would be futile (*Stead v State Government Insurance Commission* (1986) 161 CLR 141).⁵⁵ The Federal Court also rejected E's argument there was an implied term in the Deed of Agreement requiring the Commonwealth to give E an opportunity to be heard, before it exercised its power to suspend the award.⁵⁶

In light of the Federal Court's findings in relation the first two issues, the final two issues did not need to be addressed. However, the Federal Court commented on the question of damages. In the Federal Court's view, the loss or damages alleged by E, that is: loss of salary, failure to obtain other research grants, and family breakdown with its resultant legal and other expenses, were not caused by the NHMRC's exercise of power to suspend the CDA payments.⁵⁷ The

51 The decision of Logan J (on 9 September 2013) is unreported but the orders are outlined in the subsequent Federal Court decision of *Elston v Commonwealth of Australia* (2014) 222 FCR 429, 433.

52 Ibid 437.

53 Ibid 438.

54 Ibid 439.

55 Ibid 441.

56 Ibid 442.

57 Ibid 443.

Federal Court indicated that had E been successful in establishing a breach of a contractual obligation, it would have been prepared to grant nominal damages only.⁵⁸

E appealed the decision to the Full Federal Court. The Commonwealth then applied for security for its costs of the appeal (\$20,000) and for a stay of the appeal until security was given, and in default, a stay or the dismissal of the appeal. The Commonwealth alleged that E was impecunious and there was a risk he would be unable to meet any costs orders that might be made against him on the appeal. E's own evidence indicated he had been unable to find a salaried position since the suspension of the CDA funds.⁵⁹ Other relevant issues discussed by the Full Federal Court included problems with E's pleadings. Katzmann J ordered security for costs of \$17,250 with leave given to the Commonwealth to apply for more security should this amount prove 'inadequate.'⁶⁰ The appeal was stayed until the security was provided.

E next applied to the High Court for special leave to appeal the decision ordering security of costs. The application was at first deemed abandoned under the High Court Rules dealing with the filing of a written case and other documents by an unrepresented litigant.⁶¹ However, in December 2014, E was successful in having the application reinstated. There were questions about whether defamation remained a 'live issue' even though it was not included by Logan J in the four matters to be determined, and whether defamation was considered by the Federal Court when it made the order for security of costs.⁶² E was directed to file further submissions on the issue of defamation. In April 2015 the High Court refused the application for special leave to appeal the order for security of costs. The further draft notice of appeal filed by E did not comply with the previous order of the High Court, the original Court hearing the application for security of costs had dealt with the matter of the defamation claim, and the application did not raise any principle for the High Court to determine.⁶³

IV LESSONS FROM LEGAL DISPUTES?

A number of implications can be drawn from these legal disputes for the various stakeholders in this area. The individual researchers in each case were unrepresented in complex court proceedings brought against Federal government agencies. While the courts will seek to ensure an unrepresented litigant is treated fairly, such a party can raise significant issues for a court and for the other legally-represented party. In both cases there were problems with the pleadings filed by the researchers. The inadequacy of the pleadings gave the other party a basis on which to bring an early application to strike out the claims and seek judgment in their favour. In both cases, courts were prepared, at least initially, to reject the application for summary dismissal and allow the researcher to amend their pleadings. The need to amend the pleadings created yet further difficulties, despite the fact that on some occasions it was apparent the court was doing its best to outline in a general fashion, the form the amendments should take. In E's case, the court went so far as to dispense with the pleadings and frame the issues in dispute between the parties. However this course of action itself created problems on appeal because E claimed the framing of the issues had omitted one of the grounds he had argued. Yet further difficulties with inadequate pleadings occurred when the unrepresented researcher sought to appeal court decisions and new pleadings needed to be lodged.

58 Ibid.

59 *Elston v Commonwealth of Australia* [2014] FCA 704 [28], [61].

60 Ibid [79]. The court applied the considerations for the exercise of the court's discretion under s 56 *Federal Court Act 1976* (Cth) as summarised in *Dye v Commonwealth Securities Ltd* [2012] FCA 992. It was persuaded there was a 'substantial risk' Elston would not be able to satisfy an order for costs in the appeal: *ibid* [61].

61 *High Court Rules 2004* (Cth) r 41.10.4.1.

62 *Elston v Commonwealth of Australia* [2015] HCA Trans 297.

63 *Elston v Commonwealth of Australia* [2015] HCASL 52.

By questioning the decisions of grant funding bodies, the researchers in the two cases were assuming significant personal risk. G was concerned such action could adversely affect his prospects in obtaining future funding, and his academic career prospects more generally. It was not only the relationship with the grant funding organisation that was potentially put at risk. Also of concern to G were his relationships with other researchers who might become aware of the dispute. The sensitivities in this context were recognised by the grant funding body in that case. The evidence indicated the ARC had taken ‘steps to ensure that knowledge of the 2012 proceedings’ between the G and the ARC was ‘strictly confined.’⁶⁴

The personal risks assumed by a researcher in these circumstances go beyond their professional reputation and future research career. There will inevitably be a heavy personal toll resulting from the considerable time and financial resources that must be invested to engage in court proceedings. In E’s case there was a claim of significant adverse effects on his family relationships. Personal finances may also be strained. Any litigation attracts the risk of adverse costs orders being made against the applicant and this would be a significant concern for a self-represented applicant facing respondents represented by solicitors and counsel. An order for security of costs appears to have discouraged E’s appeal to the Full Federal Court.

The applicants were not the only researchers affected by the court proceedings. Questions raised about the conduct, funding and governance of university research inevitably involves examining the actions of other research academics who have taken part in the review of grant applications. Many of these academics will be experts in the same field as that of the applicant or in closely intersecting fields. Some may have a personal relationship with the applicant. In the first case, claims were made that researchers involved in the assessment of G’s grant proposal had acted improperly, but there was insufficient evidence to establish those claims.

Although the universities were not directly involved in the two court proceedings, the cases raise a number of issues for universities generally, as they discussed matters relating to the administration of the grants by the universities. In the second case, one such matter was a consideration of the consequences for the grant when the university suspended and then terminated the researcher’s employment. There was also mention of the role of university staff as selection panel members in the grant application process.

There are a number of implications for the main government grant funding bodies arising from these cases. They both involved a number of court proceedings over a considerable period. The grant funding bodies would have been required to invest considerable staff time in dealing with these matters. In the two disputes the grant funding bodies were represented by solicitors and counsel and they faced self-represented applicants. Early applications were made questioning the adequacy of the applicants’ pleadings. However as discussed above, at the early stages of the litigation, the courts tended to provide the applicants with an opportunity to amend the pleadings rather than to dismiss the applications.

While not at the forefront of the court proceedings in the two cases, there are several issues forming the background to the disputes that have the potential to become more significant in future matters. One of these is the reliance by the grant funding bodies on university researchers (as well as researchers from industry and public sector research organisations) to provide peer review of the grant applications.⁶⁵ The NHMRC *Annual Report 2010-11* notes that the *Australian Code for the Responsible Conduct of Research* and the deeds of agreement made between it and the research institutions such as universities, ‘place clear expectations on researchers to make

64 *Ghanem v Australian Research Council* [2014] FCA 473 [36].

65 Australian National Audit Office, *Australian Research Council’s Management of Research Grants*, Audit Report No 38, 2005-06, 37; Australian National Audit Office, *Administration of Grants by the National Health and Medical Research Council*, Audit Report No 7, 2009-10, 16, 51.

themselves available for participation in the peer review of grants.⁶⁶ In the first case, an unsuccessful grant applicant was questioning the bona fides of two grant assessors in the scoring of his proposal and there was an allegation that another university academic had interfered with these assessments. No evidence was found to establish these allegations and so the claims were dismissed.

Where grant funding bodies rely on peer review, there is potential for the opinions and comments of peer reviewers to be a matter considered in litigation brought by unsuccessful grant applicants. The risk of disclosure of the opinions and comments of peer reviewers of grant applications, has the potential to discourage researcher participation in reviews or at least lead the researchers to temper their peer review. The evidence in the first case indicated that under the FF 2013 funding rules, the applicant (in fact the university proposing to administer the funds) was provided with all external assessors' comments and given the opportunity to submit a rejoinder that was then to be considered 'alongside the assessors' comments and scores.'⁶⁷ The names of the particular assessors were not revealed in this process. However, in cases where specialists in a research field are few, there is potential for a reviewer to be identifiable, even without their name being revealed directly.

Another issue relevant to grant funding bodies highlighted in the second case is that the key relationship is between the grant funding body and the university rather than between the grant funding body and the individual researcher. The Australian National Audit Office in its report on the ARC's management of research grants referred to this as 'a decentralised model of grants management.'⁶⁸ The same is true for the NHMRC. For both funding bodies there is potential for confusion to be generated when disputes arise within this three cornered arrangement (grant funding body, university and researcher).

The need for timely and accurate communication between the three stakeholders in this arrangement is obvious. The evidence in the second case revealed administrative errors made by the NHMRC and these were relied upon by the researcher to support his legal arguments. One mistake was made in an internal NHMRC communication. An email referred to the allegations against E then being investigated by the university, as involving 'possible scientific misconduct' rather than 'misconduct/serious misconduct.' E claimed his reputation had been damaged by the suspension of payments by the NHMRC based on this incorrect interpretation of the nature of the allegations against him.⁶⁹ There were also problems caused by the NHMRC incorrectly characterising the allegations as research misconduct, in correspondence between the NHMRC and E. E claimed his financial interests had been prejudiced because the NHMRC's incorrect interpretation of the allegations would have led it to refuse to recommend future grant applications made by him.⁷⁰ Both claims were ultimately rejected by the courts.

V CONCLUSION

It is difficult to anticipate the effect of these complex court proceedings on the university research community and the likelihood that similar applications will be brought in the future. The applicants appear to be individuals with considerable determination and persistence, bearing in mind the lengthy legal processes engaged in and the risks to their professional and personal lives that bringing court proceedings entailed. In light of the growing complexity of the modern university research environment, it appears likely that similar conflicts and legal disputes will arise more frequently in the future.

66 National Health and Medical Research Council, *Annual Report 2010-11*, 237.

67 *Ghanem v Australian Research Council* [2014] FCA 473 [20].

68 Australian National Audit Office, *The Australian Research Council's Management of Research Grants*, Audit Report No 38, 2005-06, 18.

69 *Elston v Commonwealth of Australia* (2014) 222 FCR 429, 437-8.

70 *Ibid* 439.

OVERCOMING FLAWS IN THE DEDUCTIVE LEGAL PROCESS BY MASTERY OF SYLLOGISTIC LOGIC – ELEMENTARY!

*Kenneth Yin**

ABSTRACT

Law students must show the logical connections which link the relevant legal principles and the facts of their question whenever they answer problem questions. The most suitable context to express these links is the minor premise of a syllogism, or within their ‘application’ (the ‘A’ in the I-R-A-C acronym). When law students fail to demonstrate these logical links, the outcome might be the fallacy of a non sequitur or an argument which begs the question. A fundamental understanding of syllogistic logic, and in particular the alignment of the major and minor premises of a syllogism, will arguably help to eradicate these fallacies.

I INTRODUCTION

Logical errors committed by first-year law students can often be explained by their inability to understand fundamental syllogistic logic. These errors can largely be overcome by a fundamental understanding of syllogistic logic. This paper explores these arguments in two parts. The first part, titled ‘Understanding Deduction and Syllogistic Logic,’ explains the essential character of deduction and of syllogistic logic. This part introduces the fundamental scheme of the syllogism and its form, and explores the idea that for the purposes of legal analysis in first year legal studies, it is enough to know that for a syllogism to reach a logical conclusion, both its major and minor premises must be true.¹

The second part, titled ‘The Fallacies of Non Sequitur and Begging the Question’ explores the fallacies of *non sequitur* and begging the question. Two reasons for selecting these fallacies are that law students seem to commit them frequently,² and that they demonstrate how an incomplete understanding of syllogistic logic can cause errors. The author suggests that law students with an understanding of syllogistic logic, including that of the basic scheme of the syllogism, will recognise and overcome these potential fallacies.

II UNDERSTANDING DEDUCTION AND SYLLOGISTIC LOGIC

The Merriam-Webster dictionary defines ‘syllogism’ as:

A deductive *scheme* of a formal argument consisting of a major and a minor premise and a conclusion (as in ‘every virtue is laudable; kindness is a virtue; *therefore* kindness is laudable’) ... deductive reasoning.³

* Lecturer in Law, School of Business and Law, Edith Cowan University. Ken was a Solicitor until 1996 and then a Barrister at Francis Burt Chambers, Perth, and retired from legal practice altogether in 2013.

1 Kenneth Yin and Anibeth Desierto, *Legal problem-solving and syllogistic analysis: a guide for foundation law students*, (LexisNexis NSW, 2016).

2 Judge Ruggero J Aldisert described the fallacy of *non sequitur* as ‘the best known fallacy in the law’ in Ruggero J Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*, (National Institute for Trial ‘ Advocacy, USA, 3rd ed, 1997) 11–28. See also Yin and Desierto, above n 1, 38.

3 Merriam-Webster dictionary
<<https://www.Merriam-Webster.com/dictionary/syllogism> > (emphasis added).

‘Deductive reasoning’ at its most literal therefore embraces syllogistic logic and vice versa. Leaving aside purely semantic or literal definitions, we added emphasis to ‘*scheme*’ to underline the fact that a syllogism has a specific framework, and ‘*therefore*’ to stress the idea that a syllogistic conclusion arises as the logical outcome of both its major and minor premises.⁴

Sherlock Holmes famously ‘deduced’ solutions to crimes. The title of this paper is an allusion to him and, since Sherlock-speak will be generally familiar to most readers,⁵ a convenient entrée to our primary discussion might be to ask what Holmes himself meant by it. Indeed, so notorious is the idea of Sherlockian deduction that *Merriam-Webster* provides its own dedicated definition of it as though it were a term of art, namely:⁶

Holmes himself refers to his method of reasoning as *deduction*,⁷ and the word appears many times in the original stories (as does the verb *deduce*). A related word is *induction*, which means ‘inference of a generalized conclusion from particular instances.’ Holmes probably inferred the general from the specific as often as he inferred the specific from the general, but *induction* is never used in the stories. Unsurprisingly, given the relationship between logic and math, both words also have mathematical meanings.

Professor Anita Schnee, whose views are diametrically contrary to the idea of Sherlockian ‘deduction’ but appear to be consistent with *Merriam-Webster’s* definition above, explained induction and deduction respectively, as ‘[i]nduction *creates and evolves* rules; deduction *applies* them.’⁸ Consistent with Professor Schnee’s explanation of induction, Professor James Gardner usefully explains the ‘grounding’ of a major premise, as the process of ‘supporting’ a major premise to allow a target audience to understand why its premises are true.⁹ To illustrate the process of ‘grounding’ and explain when it is necessary to ground the premises of a major premise, Professor Gardner uses the famous ‘Socrates syllogism’ namely: ‘Major Premise: All men are mortal. Minor Premise: Socrates is a man. Conclusion: Therefore Socrates is mortal.’¹⁰

Professor Gardner explained that as most people understand the meanings of ‘man’ and ‘mortality’, one would not usually need to ground the major premise of the Socrates syllogism. If however there is an argument on which response is required for the question of mortality, Professor Gardner would have arguably referred to a hypothetical medical expert who might say that in accordance with medical science, no person ever lived more than 120 years or so.¹¹ Sir Arthur Conan Doyle’s¹² view had thus arguably misunderstood ‘deduction’ because, contrary to its meaning, his discernment of it embraced the mental processes of both induction and deduction, which were conflated within Sherlock-speak. For the law student, the outcome of a similar failure to understand the movement between these two distinctly different mental processes might result in the logical flaws discussed below.

4 Bradley Clary and Pamela Lysaght, *Successful Legal Analysis and Writing: The Fundamentals* (West/Thomson Reuters 3rd ed, US, 2010) 82.; Yin and Desierto, above n 1, 7.

5 Perhaps this might be attributed in part to the influence of pop culture:
<<http://www.bestofneworleans.com/thelatest/archives/2016/12/30/sherlock-returns-with-a-new-season-on-pbs-starting-sunday>>.

6 <<https://www.Merriam-Webster.com/words-at-play/10-sherlock-holmes-words/deduction>>.

7 Merriam-Webster dictionary, above n 6 (emphasis in original).

8 Anita Schnee, ‘Legal Reasoning: “Obviously”’ (1997) 3 *Legal Writing: The Journal of the Legal Writing Institute* 105, 117 (emphasis added). See also Yin and Desierto, above n 1, 11.

9 James A Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis US, 2007) 28.

10 Gardner, above n 9, 4.

11 Gardner, above n 9, 132. See also Yin and Desierto, above n 1, 64.

12 Merriam-Webster dictionary, above n 6.

I-R-A-C is the acronym for Issue-Rule-Application-Conclusion. Law students just starting legal studies, will likely have *some* familiarity with I-R-A-C, since it is the formulaic legal problem solving template usually taught early in first year law.¹³ The idea that I-R-A-C has a syllogistic core, with the ‘R’ (for ‘Rule’) corresponding with the major premise, and the ‘A’ (for ‘Application’) with the minor premise, is frequently expressed in American legal pedagogy.¹⁴ Professor Anita Schnee for example said that I-R-A-C was virtually a syllogism, describing I-R-A-C as ‘[a]nother way of saying “the deductive syllogistic process”’.¹⁵

Professor Schnee’s definitions of induction and deduction referred to earlier¹⁶ are particularly useful for a discussion of syllogistic logic and I-R-A-C because they explain that induction is the mental exercise invoked in the creation of the ‘Rule’ (or major premise), and deduction in the creation of the ‘Application’ (or minor premise). Her definitions also thereby incorporate an explanation of the relationship or movement between a Rule and its Application within the context of the I-R-A-C template.¹⁷

There are many websites dedicated to exploring syllogistic fallacies.¹⁸ The need for law students to understand syllogistic fallacies, is however, more limited than someone studying logic for logic’s own sake, because an understanding of syllogistic logic, including its fallacies, is only a means to the end of practically achieving a closer understanding of legal analysis. Professor James Boland explained this clearly:¹⁹

Legal writing professors should not attempt to plumb the depths of all forms of syllogistic reasoning and their fallacious pitfalls, but merely give students an adequate foundation on which they can build so as to eventually achieve a higher level of logical thinking and argument.

Professor Boland also noted that:²⁰

At this level (for first year students) it is enough for students to know that in order for a syllogism to reach a logical and correct conclusion, both the major and minor premise must be true.

Professor James Gardner explained that the adversarial system gives rise to a ‘convenient sorting mechanism’ that ‘takes the party’s alignment and the relevant legal principles and converts them into the party’s positions in the case’.²¹ The fact that an advocate presents legal argument not in the abstract but in the context of their case, then means they do not have to explore every combination of possibilities arising from every conceivable permutation of fact and law. As Professor Gardner explained, ‘the number of syllogisms for use in any given case is limited’ since each syllogism does not arise in a vacuum, but only in the context of a specific case in which specific parties seek specific judicial relief.²²

13 See, eg, Catriona Cook et al, *Laying Down the Law*, (LexisNexis Butterworths, 9th ed 2014) 550.

This is the foundation-skills text which is prescribed in the unit I teach, *Legal Process*.

14 See, eg, Nadia E Nedzel, *Legal Reasoning, Research and Writing for International Graduate Students*, (Wolters Kluwer, 3rd ed, 2012) 70; Schnee, above n 8, 106; and James M Boland, ‘Legal Writing Programs and Professionalism: Legal Writing Professors can join the Academic Club’ (2006) 18(3) *St Thomas Law Review* 711, 721 – 724.

15 Schnee, above n 8, 106.

16 Schnee, above n 8.

17 See also Yin and Desierto, above n 1, 6.

18 <<http://www.literarydevices.com/syllogism/>>; <<http://www.skepticsfieldguide.net/2008/10/syllogistic-sophisms.html>>; <<http://www.fallacyfiles.org/syllfall.html>>.

19 Boland, above n 14, 721; see also Yin and Desierto, above n 1, 37 and Gardner, above n 9, 11.

20 Boland, above n 14, 721; see also Yin and Desierto, above n 1, 11.

21 Gardner, above n 9, 13; see also Yin and Desierto, above n 1, 55.

22 Gardner, above n 9, 11.

A law student is in the same position as Professor Gardner's advocate in the obvious sense that when directed to answer a problem solving exercise, they actually are not even at liberty to create an answer that addresses an infinite number of hypothetical possibilities but *must* confine their analysis to the problem and issue presented. Questions do sometimes arise early in the semester on whether the law is really as categorical as Professor Boland seems to suggest when he said that 'it is enough for students to know that in order for a syllogism to reach a logical and correct conclusion, both the major and minor premises must be true'.²³ It is arguably true that the outcome of a legal argument is in reality less certain than the certainty apparently contemplated by Professor Boland's comment, as recognised by Professor James Gardner who in his own syllogism-based work, stated that '[t]here is far more play in the joints of the law than the fiction of legal determinacy would have us believe'.²⁴

Nevertheless, we should not lose sight of the fact that Professor Boland had directed his earlier comment to first year law students, just as this paper is directed to first year law lecturers. Boland said that knowledge of syllogistic logic would give first year students the foundation to achieve higher levels of thinking at more sophisticated levels,²⁵ and the author agrees with him. Subsequently, at more advanced stages of their studies, law students arguably need to engage in the process of legal problem solving at a higher level of doctrinal knowledge and to display a more sophisticated application of legal skills, but at no stage is it necessary for them to explore the infinite depths of syllogistic logic, because as explained by Professor Gardner, the nature of adversarial advocacy in our legal system would not demand it.²⁶

Professor Boland's argument that for first year law students it is enough to know that in order for a syllogism to reach a logical and correct conclusion, both the major and minor premises must be true, assumes that first year students need to have an understanding of how the major and minor premises of a syllogism are created in the first place – in particular, that the major premise is the syllogistic vessel within which the process of induction, or rule evolution, is expressed, and that the minor premise is where the process of deduction, or the application of that rule, is performed.²⁷

If one wants to use the I-R-A-C acronym, these are in turn the respective 'Rule' and 'Application' of the acronym. We recount that the scheme of the syllogism comprises its major premise and minor premise.²⁸ These form part of the definition of the syllogism template itself. Professor Nadia Nedzel stressed the inviolability of the requirement that the major and minor premises, (or 'Rule' and 'Application' respectively if one uses the vocabulary of the I-R-A-C acronym) be kept entirely separate, when she said:

Mixing rule and application, like failure to fully explain, also confuses the reader. The client's situation should not be discussed or even referenced in the rule section, because it distracts the reader from a clear analysis and comprehension of the applicable law.²⁹

The idea that putting an argument in its syllogistic form might assist in revealing its fallacies finds support in Immanuel Kant's famous quote: 'Fallacious and misleading arguments are most easily detected if set out in correct syllogistic form'.³⁰ Kant's quote lends some pedagogical support to one of the fundamental themes in our paper, namely that familiarising one with the

23 Boland, above n 20; see also Yin and Desierto, above n 1, 11.

24 Gardner, above n 9, 25.

25 Boland, above n 19.

26 Gardner, above nn 21 and 22.

27 Schnee, above n 8.

28 Merriam-Webster dictionary, above n 3.

29 Nedzel, above n 14, 88; see also Yin and Desierto, above n 1, 54.

30 <<http://izquotes.com/quote/358477>>.

fundamental template or scheme of the syllogism is an essential milestone in achieving an understanding of fundamental syllogistic logic itself.³¹

The next Part explores the fallacies of *non sequitur* and *begging the question*, and discusses practical ways to circumvent them. The exercises outlined apply nothing more than a fundamental understanding of syllogistic reasoning, that the author suggests is an adequate foundation on which to recognise and overcome the fallacies.

III THE FALLACIES OF NON SEQUITUR AND BEGGING THE QUESTION

A working definition of a ‘fallacy’ is by Judge Aldisert: ‘In ordinary usage, then, ‘fallacy’ can be used to describe a false or erroneous idea. But in the law, as in logic, the term has a more specific meaning; *it refers to the logical form or content of a syllogism.*³² Consistent with Judge Aldisert’s definition, ‘fallacy,’ at least in its application to legal analysis, arguably has a narrower meaning than in everyday use, as its parameters are confined to *sylogistic* fallacies, rather than false or erroneous ideas generally. Judge Aldisert’s definition is thus particularly apt as it suggests that the study of legal fallacies should overlap with a study of syllogistic errors or falsities since the first is in substance, a definition of the second. Judge Aldisert’s definition thus arguably gives significant pedagogical validation to this paper’s discussion of syllogistic reasoning as a *practical* means to assist law students achieve a closer understanding of legal analysis. Furthermore, it is unnecessary to argue about the actual classification of the fallacy in any particular instance. Judge Aldisert said that:

Although there is often agreement as to the existence of a fallacious argument, the method of labelling or characterising them is up for grabs. Each logician seems to have his or her own method of classification.³³

Each example below is advanced as a convenient representation of a particular fallacy, whilst recognising that another logician might have a different view as to its precise pedagogical classification. This relatively utilitarian approach is in turn, arguably consistent with Professor Boland’s argument that for first-year law students it is broadly enough for them to know that both the major and minor premises of a syllogism must be true for a syllogism to reach a logical and correct conclusion.³⁴ The logical corollaries of Professor Boland’s argument are that if the major and premises could *not* yield a true and correct conclusion, then the ‘syllogism’ would be flawed.

The next section explains what is meant by *non sequitur* and what a flawed syllogism is, and the underlying reason for the flaw, by applying the fundamental principles of syllogistic logic described here. Numerous definitions of *non sequitur* exist in standard dictionaries,³⁵ including the following in *Merriam-Webster*: ‘An inference that does not follow from the premises.’³⁶ Apart from its stark simplicity, *Merriam-Webster*’s definition is particularly appropriate for this paper’s discussion purposes because it aligns well with Professor Boland’s advice that: for a syllogism to reach a logical and correct conclusion, both the major and minor premise must be true,³⁷ and the idea that the syllogistic ‘conclusion’ is the ‘therefore’.³⁸

31 See the first paragraph of this paper’s introduction.

32 Aldisert, above n 2, 9-1 (emphasis added).

33 Aldisert, above n 2, 9-4

34 Boland, above n 14, 721; see also Yin and Desierto, above n 1, 6.

35 See, eg, <[https://en.wikipedia.org/wiki/Non_sequitur_\(logic\)](https://en.wikipedia.org/wiki/Non_sequitur_(logic))>; <<https://www.vocabulary.com/dictionary/non%20sequitur>>.

36 See Merriam-Webster Dictionary <<http://www.merriam-webster.com/dictionary/non%20sequitur>>.

37 Boland, above n 20.

38 Merriam-Webster dictionary, above n 3.

Given the definition's simplicity, one might think that it *should* be easy to spot a *non sequitur*. Thus if one propounds an argument where the major and minor premises do not align then without more, the argument by definition is a *non sequitur*. Although the process sounds circuitous, it is important to realise that to understand this, the respective arguments need to be presented at the outset in the framework (namely the *scheme*³⁹ of a syllogism). The obverse is that one must be equipped with a prior understanding of syllogistic logic to understand this.

This exercises below examine flawed 'syllogisms'. Incidentally, the description of these as 'syllogisms' at all is itself only a convenient shorthand to describe something which is in a general syllogistic *form* since it is at least open to argument that if the major and minor premises do not align to yield a supportable conclusion, the argument might not have the character of an authentic 'syllogism'.⁴⁰ Immanuel Kant's prescience is noted here when he said that 'fallacious and misleading arguments are most easily detected if set out in correct syllogistic *form*.'⁴¹

Exercise 1

All fast cars are red.

Janice has a red car.

Janice's car is fast.

The flaw in the argument is, or should be readily apparent; it is a *non sequitur* because the 'conclusion' does not flow from the premises. Or, to say virtually the same thing, the conclusion cannot be characterised as the syllogistic 'therefore' which arises from the preceding two premises. Kant's famous observation that fallacious and misleading arguments are most easily detected if set out in correct syllogistic form can be tested here by trying to express the argument in something other than its 'correct syllogistic form'. Noting that a definitive ingredient of a syllogism is that it must have a major and minor premise, this can be achieved by abandoning the fundamental syllogistic form of the original flawed answer and 'mushing' all three paragraphs. If we do so, the result might be either or both (or neither) of the below:

Janice has a fast car because it is red.

We know that Janice's car is red because it is fast.

In neither example can the reader arguably follow the analytic path. The respective conclusions that Janice has a fast car which is red or that we know Janice's car is red because it is fast, seem to draw upon some implied major premise that all red cars are fast, or that all fast cars are red, but in the form expressed, the reader cannot really tell which, if either, analytic path was taken. The way these are expressed is actually starkly reminiscent of the Sir Arthur Conan Doyle's error of conflating the mental processes of both induction and deduction within Sherlock-speak.⁴² The error then becomes evident in the failure to express the argument in its correct syllogistic form which is arguably, a virtually a tautologous statement, since a syllogism by definition needs to contain a major premise which expresses the inductive process, and a major premise, which expresses the process of deduction.⁴³ By putting the argument in its syllogistic form, an author is at least compelled to confront the path of 'logic' which leads to that conclusion.

The next part of the exercise invokes an understanding of fundamental syllogistic reasoning to explain *why* the reasoning is logically flawed. Consistent with this paper's core arguments,

39 Merriam-Webster dictionary, above n 3. Note the explanation for emphasising 'scheme' in that definition.

40 Ibid.

41 Kant, above n 30.

42 Merriam-Webster dictionary, above n 6.

43 This is a central theme in this paper, but see especially Schnee, above nn 8, 15 & 16.

the following discussion is prefaced by saying that such an understanding is both adequate and sufficient to explain those logical flaws. Returning to the original flawed example, the major premise is a rule created from ‘fast cars’ and not ‘red cars’. On the other hand, if the minor premise was ‘Janice’s car is fast’, then the ‘conclusion’ that ‘Janice’s car is red’ would be supportable syllogistically.⁴⁴ To understand the reason why the syllogism is flawed and the conclusion unsupported, a reader need apply only their knowledge of fundamental syllogistic logic, namely that the process of induction which finds expression in the major premise is that of rule creation, whereas deduction, which applies the rule, is contained in the minor premise.⁴⁵ The minor premise does not here apply the major premise, and no supportable *sylogistic* conclusion can be derived; or, what is saying precisely the same thing, as syllogistic reasoning and deduction are essentially synonymous,⁴⁶ that no legitimate process of deduction has been performed.

An example based on authentic legal principles can test the above logic. Consider the principle in the following statement: ‘In order to succeed in an action in unconscionability, the plaintiff must have been under a special disadvantage or disability.’⁴⁷ Now read the following passage:

Ronald did not tell Phillipa that the computer that he was trying to persuade her to buy had features that were utterly worthless to her and that despite its exorbitant price, she would have had no use for such a computer, which was for the purposes of industrial stocktaking and would have been useless to a person like Phillipa.

Ronald acted unconscionably and Phillipa is entitled to relief.

If our analysis traverses the same analytic path as Janice’s car, it should be readily apparent that the above argument betrays an inability on the part of its author, to organise the premises in their correct syllogistic ‘scheme’. The outcome is that a supportable conclusion cannot be achieved. To illustrate how a response might be presented in its correct syllogistic form, take the answer one analytic step further, staying for now with the idea that the question is whether Ronald acted unconscionably. Australian law students and law teachers who are familiar with the principles of unconscionability in *Amadio Commercial Bank of Australia Ltd v Amadio (1983)*⁴⁸ which is a module in first year contract law studies, would know that its essential elements as explained by Deane J: ‘A is under a special disadvantage or disability; B had knowledge of A’s disadvantage; B proceeds to exploit that disadvantage unconscientiously in order to obtain A’s consent to the transaction.’⁴⁹ There are thus three essential elements of unconscionability prescribed in *Amadio*: the fact of a special disadvantage, knowledge of it on the part of the other, and the exploitation of that disadvantage.

One does not discuss the second and third elements unless the requirement of a special disadvantage (the first element) is satisfied first. In turn, consistent with the formulaic syllogistic

44 Note the more detailed discussion at Yin and Desierto, above n 1, 40.

45 See Schnee, above n 8; Yin and Desierto, above n 1, 40.

46 Merriam-Webster dictionary, above n 3.

47 Based on *Commercial Bank of Australia Ltd v Amadio (1983)* 151 CLR 447.

48 *Commercial Bank of Australia Ltd v Amadio (1983)* 151 CLR 447 per Deane J at p 474. These elements were usefully paraphrased and summarised in *Gooley Radan and Vickovich*, 3rd ed, page 371 and the passage in that text has been reproduced above. JV Gooley, Peter Radan and Ilija Vickovic, *Principles of Australian Contract Law: Cases and Materials* (LexisNexis, 3rd ed, 2015), 371.

49 *Commercial Bank of Australia Ltd v Amadio (1983)* 151 CLR 447 per Deane J. These were usefully paraphrased and summarised in *Gooley Radan and Vickovich*, 3rd ed, page 371 and the passage in that text has been reproduced above. JV Gooley, Peter Radan and Ilija Vickovic, *Principles of Australian Contract Law: Cases and Materials* (LexisNexis, 3rd ed, 2015), 371.

form, to achieve a supportable conclusion (the ‘therefore’⁵⁰) concerning the first element of ‘special disadvantage’, one must create a minor premise to address that element. Assuming that the facts in the question would support it, the following draft answer is part of a syllogism (or I-R-A-C), to address the issue of whether Philippa did suffer from a special disadvantage, set out in its correct syllogistic form:

Draft Answer

Major Premise: The first element of unconscionability is that the innocent party would need to be under a special disadvantage – *Commercial Bank of Australia Ltd. v Amadio*.⁵¹ The definition of a ‘special disadvantage’ is that it is a characteristic which seriously affects the ability of the innocent party to make a judgment as to his/her best interests, and that a mere inequality of bargaining power is insufficient.⁵² The characteristic in *Amadio* which amounted to a special disadvantage was a lack of language skills on the part of the *Amadios*, who were the elderly parents of the debtor who had sought their agreement to guarantee his debts, such that they did not understand the nature of the transaction, which was a complicated security document. It was held there that this characteristic seriously affected the *Amadios*’ ability to make a judgement in their best interests.

Minor Premise: Philippa is ‘computer illiterate’. She did not suffer a language disability as did the parents in *Amadio* but it is arguable that she satisfies the requirements of a ‘special disadvantage’. The fact that she had no knowledge of technological matters is relevant. Her computer-illiteracy is in this sense essentially analogous to the language difficulties suffered by the parents in *Amadio*. Analogously with the complicated security documents in *Amadio*, the present case involves the purchase of what was described as an ultra-modern computer with features that were particularly sophisticated and modern, and being sold at an exorbitant price....

Conclusion: Philippa likely had a special disadvantage.

The author of the original answer had wrongly referred in their ‘minor premise’ to the fact that Ronald did not tell Philippa that the subject computer was, despite its exorbitant price, of no use to her. There is no logical link between this fact and the rule in the major premise. This resulted in a classic *non sequitur* such that the ultimate answer could not be logically supported. The ‘correct’ answer is not legally complete (its content goes no further than to illustrate the fundamental syllogistic requirement that the minor premise must apply the rule (law) set out in the major premise) but is now at least expressed in its correct syllogistic form. On the assumption that the author possessed an adequate understanding of the principles of unconscionability contained in *Amadio*, they would have been able to recognise the initial flaw and to reconstruct the answer in its correct syllogistic form if they understood the rudiments of syllogistic logic.

The paper now addresses the fallacy of *begging the question*. There are virtually countless definitions of the fallacy of *begging the question*, to the extent that Judge Ruggero Aldisert described the fallacy, tongue in cheek as a ‘rascal’ with many names.⁵³ From these definitions, the following one, reproduced from an everyday resource, has been selected for our discussion as it usefully covers the field for the purposes of teaching legal analysis to first year law students:

50 Merriam-Webster dictionary, above n 3.

51 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 per Deane J at 474.

52 *Ibid.*

53 For example, arguing in a circle, circular reasoning, putting the bunny in the hat, failing to prove the original proposition, using the original premise as proof of itself; see Aldisert, above n 2, 11-30. See also Yin and Desierto, above n 1, 46.

A form of circular reasoning in which a conclusion is derived from premises that presuppose the conclusion. Normally, the point of good reasoning is to start out at one place and end up somewhere new, namely having reached the goal of increasing the degree of reasonable belief in the conclusion. The point is to make progress, but in cases of begging the question there is no progress.⁵⁴

With this explanation in mind, consider the following draft responses which, save for some minor editing, are reproduced from the answers of the author's own law students over a few years:

Sample Law Student Answer

Stealing is defined as taking something intending to deprive the other of ownership. Peter took Paul's shirt from his line and it was established that Peter intended to deprive Paul of it. Peter stole Paul's shirt.

And: Another Sample Law Student Answer

A fixture is something affixed to the land with the result that property in the fixture passes with the land itself: *Uniqema*.⁵⁵ *The air conditioning was a fixture. The result was that property in the fixture passed with the land. The property in the air conditioning passed when property in the land passed.*⁵⁶

When examples similar to the above were presented for discussion by the author to law students, a few law students suggested brazenly, that the errors were so obvious that they themselves would be unlikely to commit them. That being so, the next phase of the exercise could be particularly revealing as it might disclose whether or not those law students did in truth get to the core of understanding the nature of syllogistic logic – despite their claims. At this point, a law lecturer might direct their class to discuss whether it is possible to salvage the answers by creating from them an answer in its correct syllogistic form. In trying to 'save', say, the 'fixture' example above, you can expect some students to advocate a slight tweaking of the minor premise so that it would now read as follows (this response was reproduced from a montage of actual law student responses in the author's foundation law classes over the years):

The air conditioning was affixed to the ground and was thus a fixture.

The vicious circle of *begging the question* was not broken; the answer merely expanded its radius. The argument in its tweaked variant continues to beg the very question of what it means for something to be 'affixed to the ground', and why it is said that the air-conditioning was such. The valiant but misconceived effort to overcome the fallacy by fiddling with the minor premise, arguably emphasises its definitive characteristic, namely that re-expressing the same point in a different way will not advance the analytic journey but perpetuates the same flaw. The 'correct' answer is that, limited to the information above, the answer cannot be improved.

As with *non sequitur*, we apply our fundamental understanding of syllogistic logic and then express the answer within the framework-scheme of the syllogism. We recall that *induction* is the way a rule has *evolved*, whilst the process of *deduction* requires showing how the rule is *applied*.⁵⁷ The major premise (or rule) therefore needs to contain not merely some bland definition of a 'fixture' (as in the present answer), but include the relevant propositions which go to its *evolution*, namely the discussion in case law that affected the question of whether

54 The Internet Encyclopaedia of Philosophy, a Peer Reviewed Internet Resource. <<http://www.iep.utm.edu/fallacy>>.

55 *Commissioner of State Revenue v Uniqema Pty Ltd* (2004) 9 VR 523.

56 Kenneth Yin and Anibeth Desierto *Legal problem-solving and syllogistic analysis: a guide for foundation law students*, (LexisNexis NSW. 2016) online supplementary materials.

57 Gardner, above n 9.

something was or was not a fixture, and also the basis upon which the object of discussion in the case law was found to be, or not to be, a fixture. Or using Professor Gardner's description, to 'ground' (literally, in this case) the major premise.⁵⁸

Setting out the major premise this way would then enable the comparison of similarities or differences between the facts in the question on the one hand, and the facts and propositions contained in the major premise, on the other hand. These arguments would be expressed within the minor premise of the syllogism (or the 'application', namely the 'A' in the I-R-A-C acronym).

The analytic journey can now advance, and the fallacy would thereby have been overcome. Having achieved this, the conclusion as to whether or not the air conditioner was or was not a fixture, can be said to be the legitimate outcome of both premises. By following this analytic path, the law student should see that achieving this outcome simply requires them to apply fundamental syllogistic logic, thus bringing us full circle to the start of this paper.

IV CONCLUSION

The formal definitions of the various fallacies are not essential, and are a handy focal point for the discussion. To define the fallacies, one only needs to look them up in any relatively sophisticated dictionary as demonstrated in this paper.⁵⁹ This process, if divorced from a discussion of the underlying causes of fallacies, would not help law students to achieve the intended learning outcome of overcoming fallacies in real-life legal problem solving. The author thus suggests that the way to avoid syllogistic fallacies is by understanding syllogistic logic itself, and knowing fundamentally how to express syllogistic reasoning in the framework or scheme⁶⁰ of the syllogism.

58 Ibid.

59 Merriam-Webster dictionary, above n 36; The Internet Encyclopaedia of Philosophy, above n 54.

60 Merriam-Webster dictionary, above n 3.

THE RE-KILLING (PERHAPS) OF THE DONOGHUE GASTROPOD – AND SOME SUGGESTIONS TO TINKER WITH THE FIRST-YEAR LEGAL EDUCATION CURRICULUM

Kenneth Yin¹

ABSTRACT

The doctrine of *stare decisis* is a feature of our common law system. If students cannot identify the *ratio decidendi* ('*ratio*') which is a definitive ingredient of *stare decisis*, they may have problems in understanding how precedent is created and applied in legal problem solving. Even if they do understand how a precedent is created by the courts, this knowledge will not necessarily assist them in applying it in legal problem solving.

This paper proposes that these difficulties can be mitigated in three ways. The first, by students' being taught the fundamental ingredients only of *stare decisis* at the start of the teaching semester. The second way, by explaining that where the identification of the *ratio* of a case is in dispute, that the appropriate template to use is the major premise of the syllogism template or in the 'Rule, namely the 'R', in the I-R-A-C acronym. The third way is that a more advanced lesson on the nuances of *ratio* extraction, be deferred until the middle of the teaching semester.

I INTRODUCTION

This paper discusses the challenges faced by first-year law students in understanding the complications inherent in recognising and *applying*, precedent in legal problem-solving. The emphasis on applying precedent, is to draw attention to the nuance in this paper, namely that its focus is not on the purely doctrinal aspects of *stare decisis*, but rather on the practical aspects of applying precedent in legal problem-solving. Murphy J said in a celebrated speech:²

I move to the doctrine of precedent, and that's a favourite doctrine of mine. I have managed to apply it at least once every year since I've been on the bench. The doctrine of precedent is one that whenever faced with a decision, you always follow what the last person did who was faced with the same decision. It is a doctrine eminently suitable for a nation overwhelmingly populated by sheep.

Murphy J's comments were tongue in cheek. To the contrary, Kirby J explained that:

The doctrine of precedent has been referred to as 'the hallmark of the common law'.³ It has been called 'the cornerstone of a common law judicial system' that is 'woven into the essential fabric of each common law country's constitutional ethos'⁴ Its significance in day-to-day legal practice may have declined with the rise in the quantity and pervasiveness of statute law. *However, it*

-
- 1 Lecturer in Law, School of Business and Law, Edith Cowan University. Ken practised law as a solicitor from 1984 until 1996 and then as a Barrister at Francis Burt Chambers, Perth, before retiring from all legal practice in 2013.
 - 2 L K Murphy, 'The Responsibility of Judges', Opening Address for the First National Conference of Labor Lawyers, 29 June 1979 in G Evans (ed) *Law, Politics and the Labor Movement* (Melbourne: Legal Service Bulletin, 1980) 5.
 - 3 The Hon. Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 93.
 - 4 B.V. Harris, 'Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle' (2002) 118 *Law Quarterly Review* 408, 412.

still lies at the heart of the Australian legal system and the way Australian lawyers approach the resolution of many legal problems.⁵

Kirby J's proposition that the doctrine of precedent remains at 'the heart of the Australian legal system and the way Australian lawyers approach the resolution of many legal problems,'⁶ underlies the fact that the study of the doctrine of precedent necessarily remains *de rigueur* in foundational legal units.⁷ The next logical step in our journey here therefore would be to direct our attention to the way in which the process for the search for the *ratio* of a case is conducted. Not all the perspectives or methods discussed below will be held uniformly or adopted by Australian first-year law lecturers. An insight into these perspectives has been obtained both by an examination of numerous standard Australian first year texts, as well as anecdotally, that is to say, from informal discussion and sharing experiences. This hopefully will result at least in a relatively utilitarian approach. In that light, one convenient starting point is to discuss the extent to which those authors have presented the practical aspects of the search for precedent, and explore the extent to which the process of the search for precedent itself divulges, at a more subliminal level, the conceptual difficulties associated with the doctrine.

Lecturers in the common law tradition know that the *ratio* of a case is its binding part. A popular if not relatively ubiquitous exercise to help first-year law students to recognise the *ratio* in a case, is to draw their attention to a selected case and direct them to identify its *ratio*; this usually happens early in their semester.

Without covering the field, a survey of at least some of the more eminent texts reveals that this is an arguably ubiquitous approach. For instance, in *Laying Down the Law*,⁸ a popular first year text, the authors give an extract from *Cohen v Sellar*⁹ and direct the reader (amongst other things) to extract the passages 'which could be argued to be *rationes decidendi* or *obiter dicta*.¹⁰ *Connecting with Law*¹¹ contains broadly similar exercises, including an interesting variation based on a fictional case of someone claiming an indemnity under an insurance policy.¹² *The New Lawyer*¹³ likewise contains such an exercise, where the reader is directed to consider, appropriately enough given the title of this paper, *Donoghue v Stevenson*¹⁴ ('*Donoghue*') and to answer several questions including the following: 'focusing on Lord Atkin's decision, what was the *ratio decidendi*?'¹⁵

Donoghue has proven to be a popular vehicle historically, for the *ratio* extraction exercise, and also a convenient case to explore the various nuances and complications associated with that

5 Michael Kirby, 'Precedent: Report on Australia' (Paper presented to the International Academy of Comparative Law Conference, Utrecht, the Netherlands, 17 July 2006).

<http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul06.pdf>.

6 Ibid.

7 A cursory examination through, say, three major Australian texts arguably bears this out. See generally Catriona Cook et al, *Laying Down the Law*, (LexisNexis Butterworths, 9th ed 2014) Chapter Six. Also see generally, Michelle Sanson and Thalia Anthony, *Connecting With Law*, (Oxford University Press, 3rd ed, 2014) Chapter 10, and Nickolas James and Rachael Field, *The New Lawyer* (John Wiley and Sons, 2013) 222.

8 Cook et al, above n 7.

9 *Cohen v Sellar* [1926] 1 KB 536

10 Cook et al, above n 7, 145.

11 Sanson and Anthony, above n 7.

12 Ibid 419.

13 James and Field, above n 7, 222.

14 *Donoghue v Stevenson* [1932] AC 562.

15 James and Field, above n 7, 236.

process.¹⁶ The selection of *Donoghue* is likely driven by the fact that it is the type of case which encourages a discussion of *rationes* at varying levels of generality, ranging at a comparatively low level of generality to being a case of a supply of a bottle of ginger beer in an opaque container to an ultimate consumer who was not a purchaser – to a comparatively high level of generality, as being a case involving *any* product manufactured for consumption when there is no opportunity for intermediate inspection (these points being made by the authors of *Laying Down the Law*¹⁷).

This poses useful challenges for our first-year law student to overcome, and to become more familiar with the nuances of the identification of *ratio*. Separately, *Donoghue* was a seminal case in the development of the modern tort of negligence and its eminence adds strength to its choice as a handy case with which first-year law students are to become familiar. These challenges in identifying the *ratio* of *Donoghue*, are usefully explained by the authors of *Laying Down the Law* as follows:

At the lowest level of abstraction the decision would be binding on later courts only in cases with precisely the same facts. On that basis, it would not be binding in a later case where the drink was Coca Cola. But in terms of the legal rule, why should there be a distinction between ginger beer and Coca Cola? What is an appropriate level of generality at which the *ratio* should be stated? That question is not easy to answer. *The actual statements of law in the case under consideration will not necessarily be decisive*. Sometimes the court will make a number of different statements at different levels of generality. In such cases the *ratio* is worked out over time.¹⁸

Professor Richard Krever's following explanation similarly discusses the difficulties brought about by the fact that the *ratio* of a case cannot be decisively determined by an analysis of the judicial pronouncements in it, and additionally, Professor Krever introduces the idea that the very exercise of doing so might actually be sterile:

The *ratio decidendi* is the actual rule of law stated in the holding of a decision, a rule that will be binding on future courts. An *obiter dictum* on the other hand is a judicial pronouncement on the law that is not integral to the holding itself. While it may be considered by a later court an *obiter dictum* will not establish a rule of law that must be followed by any court. *Although this distinction is for the most part merely a legal myth, it is carefully retained by lawyers who utilise it to formulate legal argument*.¹⁹

The authors of *Laying Down the Law* make the very same point, albeit less pungently than Professor Krever, saying that the court will only give its 'full consideration' on the point of whether a statement is a ruling on a point of law (*ratio*) rather than a statement of a rule of law (*obiter*) when that matter is in contention, requiring the court to make a ruling with the benefit of the argument of counsel.²⁰ The orthodox *ratio* identification exercise, contained in the Australian texts referred to earlier, does serve the crucial purpose of teaching students how to identify the parts of the case which contain the actual basis for the decision, and which parts are

16 I vividly recall that *Donoghue* was the case selected for the *ratio* identification exercise that I was directed to undertake in the first year of my own undergraduate law studies in 1980!

17 Cook et al, above n 7, 141; very similarly, see the treatment at Sanson and Anthony, above n 7, 285.

18 Cook et al, above n 7, 141 (emphasis added). Similarly see Sanson and Anthony, above n 7, 417: The court in the case itself would merely have stated its decision based on the case at hand, but the scope and generality of the *ratio* is worked out in the ensuing cases where the *ratio* is sought to be applied.

19 Richard Krever, *Mastering Law Studies and Law Exam Techniques* (LexisNexis, Australia, 2014) 15 (emphasis added).

20 Cook et al, above n 7, 139.

remarks made in passing; these are of course just the respective *ratio* and *obiter dicta* expressed in everyday language.

The exercise by its nature however, necessarily confines the identification of the respective rationes and *obiter dicta* within the microcosm of the case being analysed. So, notwithstanding the successful completion of this exercise, the law student is still confronted with the complication that the actual statements of law in the case under consideration, will not necessarily be decisive²¹ once they are required to determine the broader application of those statements.

The study of *stare decisis* thus becomes potentially a pedagogical blind alley for our first-year law student, who has to grapple with the respective ideas on the one hand, that the *ratio* of the case which they have identified through this exercise, is the ground for its decision; and on the other hand, that that statement might not be regarded as a decisive statement of the law, and that the scope of the *ratio* of the case is worked out over time. All this is being presented to law students at a time they would not yet have a solid understanding of jurisprudence.

A law lecturer who is confronted by the need to explain these difficulties might be tempted to direct their students towards more sophisticated explanations of *stare decisis*. Professor Russell Hinchy attempts to provide such an explanation in his text *The Australian Legal System: History, Institutions and Method*²² where he discusses various theories of precedent, including Professor Neil McCormack's hypothesis that:

The theory of precedent and his (Professor McCormack's) subsequent model of *ratio decidendi* must form part of a coherent system of 'a complex interplay between considerations of principle, consequentialist arguments, and disputable points of interpretation of established legal rules'.²³

Professor Hinchy said also:

Not everyone of course is in agreement as to the meaning and use of the concept of *ratio decidendi*. For example, in the opinion of Julius Stone, the concept of *ratio decidendi* is 'illusory' and 'indeterminate'.²⁴

Professor Hinchy's observations concerning the 'complexity' of the interplay between considerations of principle and disputable points of interpretation, by those very descriptions, provide support for at least one premise of this paper, namely that the mastery of the doctrine would at best pose significant difficulties for our Australian novice law student. Without arriving at a final view as to whether a workable definition of *ratio decidendi* can eventually be achieved, its description as being illusory and indeterminate at least underpins our suggestion that a novice law student might find the doctrine difficult to master.

Professor Hinchy's book is a fairly advanced work directed to a more senior law student, and likely to be of more interest to someone with an interest in jurisprudence than a first year law student. It will be useful then, to explore the views of other commentators, particularly those writing for foundational law students. *Learning Legal Rules*²⁵ is such a work in which its authors posit the question: 'So, how do I spot the ratio' and suggest, amongst other things, that 'this is a matter of skill and interpretation built on experience' akin to asking a number of movie goers

21 Cook et al, above n 7, 141.

22 Russell Hinchy, *The Australian Legal System: History, Institutions and Method*, (Lawbook Co, 2nd ed, 2015).

23 Hinchy, above n 22, 238, in part citing Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1995) 156.

24 Hinchy, above n 22 citing J. Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications Pty Ltd, 1964) 267 – 74.

25 James A. Holland & Julian Webb, *Learning Legal Rules: A Student's Guide to Legal Method and Reasoning*, (Oxford University Press 7th ed 2010).

or readers of a book, to ask what the book or film was all about.²⁶ The authors refer to various articles and books ‘eg MacCormick (1987); Montrose (1957); and Goodhart (1957)’²⁷ and make the following telling observations:

However, our experience is that at the outset of legal studies, such in-depth analysis tends to produce confusion rather than comfort.²⁸

The authors in the same paragraph further posit, in the same vein:

We are in some agreement with Twining and Miers that the intricacies of the debate (how do I spot the ratio) can (at least with regard to students beginning their legal studies) be a ‘*long and rather sterile*’ one.²⁹

The author agrees entirely with the authors of *Holland and Webb*. Professor John Farrar’s *Legal Reasoning*³⁰ is another foundational legal studies text which contains useful comments concerning his views on the presentation of the study of *ratio* for first year law students. Professor Farrar prefaces his discussion of *ratio decidendi* by explaining its historical evolution. That passage at its conclusion, implicitly concedes the absence of an authoritative definition of *ratio*:

Some jurists have thought that in the absence of an *authoritative* definition, (the emphasis is reproduced) perhaps the solution is to establish a technique of identifying a *ratio* in any particular case rather on the basis of ‘I may not be able to define an elephant but I know one when I see one’.³¹

Professor Farrar notes in this regard as follows:

It (the concept of *ratio decidendi*) is more easily intelligible in terms of a technique or process of abstraction and generalization which assumes its importance in later cases.³²

Tellingly, Professor Farrar did not offer a more sophisticated conceptual explanation of *ratio* whose treatment of *ratio* differed from Professor Hinchy’s, who included in his analysis a discussion of various sophisticated theories of precedent. The difference in treatment can likely be explained by the fact that Professor Hinchy was writing for a more sophisticated reader, whilst Professor Farrar’s likely audience was a first year law student. Professor Farrar’s treatment, contrary to Professor Hinchy’s, was to rationalise the concept of *ratio* by describing it as a technique, rather than focus on its jurisprudential underpinnings, and to explain that its importance would then be determined by its treatment in subsequent cases.

Keeping in mind that Professor Farrar’s book was written with the first-year law student in mind, and that our own intended audience comprises first-year law lecturers, this paper agrees with Professor Farrar’s approach. Farrar’s treatment of *ratio* at least attempts to explain its evolution in a case, including the process by which its parameters are determined by subsequent cases, in a manner likely to be intelligible to a first-year law student, and without drawing excessively on the doctrine’s theoretical and jurisprudential underpinnings.

In Part III below, this paper offers suggestions to ‘tinker with’ the curriculum and digresses briefly to suggest that teaching *ratio* should be offered as a two-tiered exercise, with two discrete learning outcomes; the first being to identify the *ratio* in any particular case, and the second is to

26 Ibid 185.

27 Ibid 186, the passage itself does not contain the citation to those works and is reproduced verbatim.

28 Ibid.

29 Ibid (emphasis added). The reference to *Twining and Miers* is reproduced from the source, verbatim. The authors there do not in that passage or earlier, furnish a more formal citation.

30 John H Farrar, *Legal Reasoning*, (Lawbook Co 2010).

31 Ibid 107.

32 Ibid 110.

teach students how judges in a common law system actually ‘conduct the process of abstraction and generalisation’³³ and thus ultimately delineate the parameters of *ratio*. These suggestions are arguably congruent with Professor Farrar’s conceptualisation of *ratio*.

Another point of potential complication, at least to a first-year law student, is that a well-considered judgement on point should ‘stand in authority somewhere between a *ratio decidendi* and an *obiter dictum*.’³⁴ As the authors of *Laying Down the Law* point out, ‘authoritative *obiter*’ describes judicial pronouncements which because of the tribunal’s eminence and the fact there is no binding case on point, should be accorded great respect.³⁵

Professor Farrar, in discussing the parameters respectively of *ratio decidendi* and *obiter dictum*, in a reprise of his comments concerning the indeterminacy of *ratio*, said:

Clearly the whole conception of *obiter dictum*, involving the negation of *ratio decidendi*, is affected by the fuzziness of *ratio*.³⁶

In exploring the significance of *ratio decidendi* versus *obiter dictum*, the authors of *Laying Down the Law* explored the relative authoritativeness (to use as neutral an expression as possible) of each approach. Professor Farrar approached the question differently, by exploring the idea that conceptualising *obiter dictum* is affected by the ‘fuzziness’ of *ratio*. The authors thus approached the question from dissimilar pedagogical viewpoints, but each argument nevertheless underpins a central proposition in this paper, namely that the idea of identifying the *ratio decidendi* of a case – and concomitantly, any *obiter dictum*, since the concept of *obiter dictum* involves the negation of *ratio decidendi*³⁷ – is difficult for a novice law student to master.

Finally, the doctrine of *stare decisis* includes the core idea that each court is bound by decisions of courts higher in its hierarchy, and that a decision of a court in a different hierarchy may yet be persuasive but not necessarily binding.³⁸ These propositions are simple to state in the abstract, but the complexity of the Australian court hierarchy makes it difficult to explain their practical application to a first-year law student.³⁹

Notwithstanding that the doctrine of precedent underpins our common law system and that the binding nature of *ratio decidendi* is central to it, its peripatetic nature and the imprecision in identifying *ratio* together, mean that the exercise of *ratio* identification may in truth be a somewhat inauthentic exercise, at least for a first-year law student.

The challenge for legal educators is to find a system that will lead law students to an understanding, not just of identifying the principle (loosely speaking – the avoidance of the expression *ratio* is deliberate) of a case, including the delineation of its parameters, but also the manner in which it is applied. This is not a one off exercise, as this skill is developed throughout legal studies and beyond. This paper suggests that the vehicle of the major premise of an Aristotelian syllogism, or the rule in I-R-A-C (the ‘R’ in the acronym), be adopted as the vehicle for such a method, and this paper now discusses how that might be achieved.

33 Ibid, to reproduce Professor Farrar’s own language.

34 *Nowicka v Superannuation Complaints Tribunal* [2008] FCA 939, [21]. *Hedley Byrne & Co Ltd. Heller & Partners Ltd.* [1964] AC 465 was a particularly celebrated instance of this approach, with the most significant portions of the case, where the law of negligent misrepresentation was discussed, being, strictly, *obiter dicta*.

35 See, eg, Cook et al, above n 7, 148.

36 Farrar, above n 30, 112.

37 Farrar, above n 30.

38 Cook et al, above n 7, 135.

39 One commentator said: ‘Australia’s Legal System is quite complicated and difficult to explain’: Koli Pro Akpet, ‘The Australian Legal System: The Legal Profession and the Judiciary’ (2011) *Ankara Bar Review* 71.

II AN ENTRÉE INTO SYLLOGISTIC REASONING

This section introduces the idea that the major premise of an Aristotelian⁴⁰ syllogism is the figurative vessel within which students should arguably explore the evolution of an applicable legal rule, including the question of whether that rule can be characterised as *ratio decidendi* or *obiter dictum*, or something else. A ‘syllogism’ is a statement of logical relationship which has three parts, namely: the major premise, usually a broad statement of general applicability; the minor premise, usually a narrower statement of particular applicability related in some way to the major premise; and the conclusion, which is the logical consequence of the major and minor premises.⁴¹

I-R-A-C, which is an acronym for ‘issue-rule-application-conclusion’, is commonly taught in Australian law schools usually in first-year,⁴² and in England.⁴³ In America, the adoption of the I-R-A-C format was said to have been developed for the strategic purpose of assisting disadvantaged students to sit their Bar exams.⁴⁴ An often quoted concept in American legal pedagogy is that the syllogistic major premise corresponds with the Rule (the ‘R’ in the I-R-A-C acronym).⁴⁵

Whilst the ‘Application’ (the ‘A’ in the I-R-A-C acronym) can be complicated to create, we focus here on the development of the R (‘Rule’) such that, for the purposes of this paper, as far as the Application is concerned, the reader does not need to go beyond an appreciation of the fact the ‘Application’ is the place in the I-R-A-C vessel where one applies the rule of law. The essence of syllogistic legal problem-solving is that the need for syllogistic analysis comes about solely when an issue exists. Professor James Gardner, in his seminal text in which he used the template of syllogistic logic to explain effective advocacy, said:

[T]he choices available to an advocate are quite constrained, and the number of syllogisms suitable for use in any given case is limited. Unlike a philosopher, a legal advocate does not deal with open-ended questions ... the need to make a legal argument never arises in a vacuum; it arises only in the context of a specific case in which specific parties seek specific judicial relief...⁴⁶

The idea that the application of syllogistic logic only arises in context, is implicit also in Professor James Boland’s explanation that induction is the process of synthesising a legal rule

40 The reference to Aristotle is a nod to the fact that his theory of the syllogism is regarded as having a major influence on Western thought: see, eg, Stanford University, Centre for the Study of Language and Information, *Aristotle’s Logic* (17 February 2017) <<https://plato.stanford.edu/entries/aristotle-logic/>>

41 James A Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis US, 2007) 4.

42 See, eg, Cook et al, above n 7, 550.

43 See, eg, Chris Turner, Jo Boylan-Kemp and Jacqueline Martin, *Unlocking Legal Learning* (Taylor and Francis UK, 2012) 143.

44 See, eg, P Gabel, ‘HIRAC – Heading, Issue, Rule, Application, Conclusion’ in Kathy Laster, *Law as Culture* (Federation Press, 2nd ed, Sydney NSW, 2001) 194; Bradley Clary and Pamela Lysaght, *Successful Legal Analysis and Writing: The Fundamentals* (West/Thomson Reuters 3rd ed, US, 2010) 84.

45 See, eg, Clary and Lysaght, above n 44, 82. This is the central idea in James M Boland, ‘Legal Writing Programs and Professionalism: Legal Writing Professors can join the Academic Club’ (2006) 18(3) *St Thomas Law Rev* 711. For an Australian perspective, see Chapters One and Two in K Yin and A Desierto *Legal problem-solving and syllogistic analysis: a guide for foundation law students*, (LexisNexis NSW, 2016).

46 Gardner, above n 41, 11. See also Yin and Desierto, above n 45, 12.

based on the issue presented.⁴⁷ The existence of the issue thus dictates the rule's evolution. Professor Anita Schnee's following explanation of the process of the creation of a legal rule, is particularly useful for our discussion:

The inductive enquiry encompasses rule *development and choice*, and the principles and policies that contribute to development of law.⁴⁸

Also:

Induction is needed where there is no rule or when there is *a choice between rules*.⁴⁹

Consistent with the idea explored by Professor Gardner above,⁵⁰ the need then, to deal with a legal question, arises only when there is legal argument at all – the tautology is deliberate. In the specific case of identifying *ratio*, it is thus only where some controversy (issue) arises over the identification of the *ratio*, that the question of its identification becomes relevant at all. The first proposition is axiomatic when juxtaposed with the second, and the juxtaposition again, is deliberate as it reflects the essence of syllogistic reasoning, and more broadly, of our common law adversarial system itself.

This means that where there is a significant contest as to the choice of rule, such as when one needs to justify the ultimate selection of one proposition as being the *ratio decidendi* of a case from various alternative propositions, then this contest takes place within the major premise of the syllogism (or the Rule within the I-R-A-C vessel). Depending on the sophistication of the controversy, one *might* in the process need to go into some detail as to the reasons for adopting a specific rule.⁵¹ Professor James Boland said:

New law students can only absorb the basic tenets of the syllogism.⁵²

Boland also suggested that instruction in syllogistic reasoning should be provided to them as it would give students an adequate foundation on which they can build so as to eventually achieve a higher level of logical thinking and argument.⁵³

This paper agrees with Professor Boland and therefore suggests that first-year law students should be given instruction in basic syllogistic reasoning. This would provide them with both an adequate doctrinal foundation for the development of more sophisticated analysis, as well as the legal skill required to construct sophisticated legal arguments subsequently. After all this, this paper suggests that a fairly utilitarian approach be adopted, both to the teaching of syllogistic logic, as well as to the doctrine of *stare decisis* discussed below in the next section.

III TINKERING WITH THE CURRICULUM

Given the lack of uniformity of views as to its scope (and taken to its limits, that *ratio* is an 'illusory' concept, if Professor Stone's view was to find support),⁵⁴ this paper suggests that, rather than try to give an authoritative definition of *ratio* to first-year law students, yet accepting that a fundamental appreciation of the doctrine is required – that law students should arguably focus on two discrete outcomes: first, to identify the *ratio* of any particular case,⁵⁵ and second,

47 Boland, above n 45, 723 (emphasis added).

48 Anita Schnee, 'Legal Reasoning: "Obviously"' (1997) 3 *Legal Writing: The Journal of the Legal Writing Institute* 105, 106 (emphasis added).

49 Ibid 117 (emphasis added).

50 Gardner, above n 41.

51 Clary and Lysaght, above n 44, 87.

52 Boland, above n 45, 721.

53 Ibid.

54 Hinchy, above n 24.

55 This is a nod to Professor Farrar, who made this point at above n 31.

to understand the technique or process of abstraction and generalisation which assumes the importance of *ratio* in later cases.⁵⁶

Recapping on a point in Part II above, that identification of *ratio* in a case only arises in the context of some controversy between the parties where *ratio*'s identification is in question, this paper recounts the idea explored by the authors of *Laying Down the Law*, that the distinction between *ratio* and *obiter dictum* comes to the forefront of detailed analysis, requiring 'full consideration' when identification or characterisation of a legal proposition as being *ratio* or *obiter dictum*, is the subject of legal argument.⁵⁷ The corollary of this proposition is that, unless the characterisation of a legal proposition as being *ratio* or *obiter* as the case may be, is actually an issue in contention between the parties, then it would be unlikely that the court would even embark on a discussion of whether that legal proposition was *ratio* or *obiter dictum*. Professor Krever noted in this regard that:

There are not many cases (relatively speaking) where the judge explicitly states that part of the reasons for judgement is *obiter*.⁵⁸

By parity of reasoning, neither is the law student generally required to do so, nor concomitantly is he or she required to characterise any particular part of a judgment as *ratio* or *obiter* as the case may be. There probably is limited empirical evidence only to support Professor Krever's observation, but it is suggested that most law lecturers with some years of lecturing experience would have read a significant number of cases over time and would agree with him.

Consistent with the essence of syllogistic legal problem solving introduced earlier, namely that the need for analysis only arises when an issue arises,⁵⁹ that distinction becomes really significant only when there is a contest as to whether a proposition in case law should, in truth, be characterised as *ratio* or *obiter dictum*. For example, only such a contest might arise in the context of a legal problem where one of several protagonists would be arguing as part of its case that the 'rule' should not be binding, as it is 'merely *obiter dictum*' with their opponent arguing to the contrary.

When such a contest does arise, then consistent with formulaic syllogistic reasoning, the major premise (or 'Rule' in the I-R-A-C acronym) is the place in the syllogism vessel to explore these arguments, as the resolution of this contest would be relevant to the 'choice of the rule'.⁶⁰ The logical extension of this point is that unless the characterisation of a principle as being *ratio* or *obiter* actually has some impact on the validity of some legal contest, it adds an unnecessary complication for the first-year student to have to identify them respectively as *ratio* (or *obiter dicta*), nor to appreciate the finer jurisprudential points associated with the evolution of *ratio* in abstract.

That abruptly brings us to two of the suggestions advanced in this paper. The first is that first-year law students be provided with instruction early in the semester on the fundamentals only of the doctrine of *stare decisis*, and covering only the difference between *ratio* and *obiter* within the microcosm of the *ratio* identification exercise described above.⁶¹ The second is that early in the semester, law students be given fundamental instruction on syllogistic reasoning. Such instruction would necessarily incorporate the idea that any contest concerning the identification of the appropriate legal principle in the dispute, including the question of whether that principle was in truth *ratio decidendi* or *obiter dictum*, be performed within the

56 This is, again, consistent with the argument advanced by Professor Farrar above n 32.

57 Cook et al, above n 20.

58 Krever, above n 19, 64.

59 Gardner, above n 46; Boland, above n 47.

60 Schnee, above n 49.

61 Cook et al, above n 7; Sanson and Anthony, above n 7; James and Field, above n 13.

major premise of the syllogism vessel, or the Rule in the I-R-A-C vessel, this being at the core of syllogistic logic itself.

For a practical demonstration of how this method might be applied in legal problem solving, this paper identifies an authentic example in first year legal studies where a point in contention was the identification of the *ratio* of a case. There is an appropriate illustration in *Learning Legal Rules*⁶² which analyses the case of *Grant v Australian Knitting Mills*⁶³ in which the scope of the *ratio* of *Donoghue*⁶⁴ was in issue. The facts in *Grant* were that the plaintiff bought underwear which was contaminated by sulphites. This defect was hidden and could not have been detected by reasonable inspection. The plaintiff contracted dermatitis from the underwear and one question⁶⁵ was whether the *Donoghue* principle was limited to the supply of food and drink. *Australian Knitting Mills* argued that the principle in *Donoghue* was indeed restricted in this way, saying that Lord Atkin's famous principle in *Donoghue*, that a manufacturer owes a duty of care to the ultimate consumer when their product is supplied in the form it was intended for the ultimate consumer, and with no reasonable prospect of intermediate inspection, was at its widest, limited in its application to the supply of food and drink. On this point, the authors of *Learning Legal Rules* summarised the findings of the Privy Council in *Donoghue* as follows:

The Privy Council stated that their understanding of *Donoghue v Stevenson* was that the principle in that case could be applied only where a defect is hidden and unknown to a consumer; in *Grant* the chemical in the underpants represented a latent (and therefore hidden) defect equivalent to the snail in the opaque bottle.⁶⁶

The next step in teaching the method of using the major premise (or Rule) as the vessel to present the argument concerning the parameters of *ratio*, is to create a problem question where law students are compelled to confront the question of the scope of Lord Atkin's *ratio* in *Donoghue*. To demonstrate this method, consider the below hypothetical facts of an exercise:

HYPOTHETICAL LAW SCHOOL QUESTION FACTS

Victor has bought a car called a Zoomer. Due to the position of its fuel tank, Zoomers are prone to catch fire even if involved in a minor collision.⁶⁷ Sure enough, following a minor collision, *Victor's* Zoomer caught fire, thereby causing him to suffer significant injury. Assume that for all practical purposes the positioning of the car's fuel tank resulted from a manufacturing defect, and that it was not something that could have been detected by any reasonable inspection.

Assume that law students are directed to address whether the *ratio* of *Donoghue* is wide enough to apply to these facts, and that they need to only consider Lord Atkin's judgment in *Donoghue*. After also reading *Grant*, law students' answers may look like the below:

HYPOTHETICAL LAW STUDENT ANSWER

Lord Atkin held in *Donoghue v Stevenson* that a manufacturer of goods owes a duty of reasonable care independent of contract to avoid acts or omissions likely to injure its neighbours. 'Neighbours' are those who are so closely and directly affected by one's act that they ought reasonably to have them in contemplation as being so affected when directing their mind to their own acts or omissions.

62 Holland & Webb, above n 25, 183.

63 *Grant v Australian Knitting Mills* [1936] AC 85.

64 *Donoghue v Stevenson* [1932] AC 562.

65 Amongst others – including the argument that the plaintiff ought to have washed the garments before wearing them.

66 Holland & Webb, above n 25, 184.

67 These facts are loosely reminiscent of the famous Ford Pinto case.

<https://en.wikipedia.org/wiki/Ford_Pinto>.

So, if the manufacturer intends their goods to reach the consumer in the same form in which they left their factory, without immediate inspection knowing that without taking reasonable care in their manufacture a consumer could be injured, the manufacturer owes the consumer a duty to take reasonable care in their manufacture of their goods. This was the case when Mrs. Donoghue drank the contents of a sealed, opaque bottle of ginger beer which contained the remnants of a dead snail that caused her to suffer gastro enteritis.

The Privy Council in *Grant v Australian Knitting Mills* considered the question of the scope of the *ratio* of *Donoghue v Stevenson*. The plaintiff in the former case bought underwear that was contaminated with sulphites. This was considered to be a hidden defect that could not have been detected by reasonable inspection. It was argued that the contamination was analogous to the snail in the opaque bottle in *Donoghue*. The Privy Council held that the principle in *Donoghue* was not restricted to the supply of food or drink and could be extended to the plaintiff's underwear.

Consistent with syllogistic analysis, this Rule shows the development of the applicable legal principle clearly, and that it is not simply a cut and pasted version of the law. The Rule has been synthesised to confront the 'issue' presented⁶⁸ namely the specific situation of Victor's Zoomer. The law student's answer recognises the relevant facts in case law which might align, at least arguably, with the facts of their case and identified the Rule to address those facts.

In this case, the question's hypothetical facts arguably align with the facts of the case law: that Victor bought an item manufactured by another which contained some defect which he could not have detected reasonably. These facts align with the facts of Mrs. Donoghue's opaque ginger beer bottle in *Donoghue* and the undetectable sulphite contamination in *Grant*.

The author's entire argument concerning the evolution of the applicable legal principle, is contained in the major premise (or rule). This is consistent with the formulaic syllogistic template. In so doing, they have confronted the arguments which arise in their question, namely whether the *ratio* in *Donoghue* should apply to the situation of a car whose petrol tank was concealed – but have not gone beyond. This dispute would not require them to provide a narrative on the scope of the *ratio* of *Donoghue* in the abstract, nor of *Grant*.

This approach emphasises a primary characteristic of syllogistic problem-solving, namely that the evolution of the relevant rule only takes place in context rather than in abstract. Having been provided with the relevant doctrinal knowledge of the case law, and of the fundamental nature of *stare decisis*, law students should then arguably be capable of producing such an answer, and the author's own experience suggests this is achievable.

In discussing the minor premise, assuming for the sake of argument that the major premise (Rule) is more or less complete, and this admittedly requires the reader to suspend disbelief given that the facts are covered by more recent case law and legislation, then drafting the minor premise or Application is a comparatively straightforward exercise. The more obvious direction of the analysis, given the arguments in *Grant* that the principle in *Donoghue* should at least extend to a case of contaminated apparel, would be one that leads to the conclusion that the principles of *Donoghue* should likewise apply to the present case such that the manufacturer is liable. For the sake of the exercise, to demonstrate that a properly articulated Rule might enable the law student to give a contrary answer within a range of supportable responses, below is a sample response which might be less obvious:

HYPOTHETICAL ALTERNATIVE LAW STUDENT ANSWER

Although the Privy Council in *Grant* accepted that the principles in *Donoghue* should extend to the manufacturer of contaminated apparel, *Grant* was a case of an item for use on the human body. It could thus be argued that a car is somewhat different from an item for human physical

68 Boland, above n 47.

consumption, such as Mrs. Donoghue's ginger beer, or an item of clothing such as the plaintiff's underwear in *Grant*. Ultimately, a more convincing argument is that the principles in *Donoghue* ought not to apply to the present facts, so that the manufacturer of Victor's Zoomer does not owe him a tortious duty of care.

This alternative argument is not necessarily likely to succeed at a real trial (the author's view is that it would not), but it demonstrates that having articulated the major premise or Rule coherently, the law student demonstrates the necessarily analytical tools to develop a cogent and legitimate argument. This displays the use of the syllogistic form to synthesise a rule where there is a contest between two protagonists concerning the parameters of *ratio*. Our second suggestion above (that early in the semester, students be instructed on syllogistic reasoning), is not restricted to situations of contest between differing views on the scope of *ratio*. Rather, instructing law students on syllogistic logic arguably gives them an adequate foundation on which to build so as to eventually achieve a higher level of logical thinking and argument.⁶⁹

This Part concludes by illustrating the broader use of the syllogistic major premise (or Rule) as the template, to synthesise a rule to resolve the question of which of two competing rules should apply to any given situation. The illustration below is selected from an area of law that is familiar to first year law students, namely, the principles relating to part performance of a contract.

HYPOTHETICAL FACTS OF A LAW SCHOOL PROBLEM ON CONTRACT PART PERFORMANCE

Evan owns a house. Evan enters into an oral agreement with Norman to rent his house to Norman for the monthly rent of \$500.00. Norman actually pays rent for a few months but does not move in, intending to do so at a more convenient time. Evan wants to sell his house and needs to grant vacant possession of it, and wants to take the position that his oral agreement with Norman is not enforceable. Disregarding any custom or practice of real estate that might affect the matter, the question is whether Norman can seek specific performance of the oral lease agreement.

The legal issue between the parties is whether Norman satisfies the requirements of part performance to be entitled to an order for specific performance of his oral agreement with Evan, which concerns a lease. A lease is a disposition of an interest in land, and the parties' oral agreement would be unenforceable as there is no record of it in writing to satisfy the *Statute of Frauds*.⁷⁰ The particular question that arises is whether Norman's payment of rent satisfies the test of 'referability' which is one of the legal requirements of part performance. Norman would like to move in one day, and would also likely want to argue that he has satisfied the requirements of part performance, because he would not have paid rent to Evan unless he thought he had an enforceable agreement to rent Evan's house. On the other hand, Evan wants to be in a position to grant vacant possession so he can sell the house, so he would likely argue that Norman's payment of rent of itself, does not amount to part performance.

Assuming that the law has been set out more or less accurately, the hypothetical answer below clearly shows how the rule (major premise) has been synthesised from the applicable legal principles:

Rule: It was held in *McBride v Sandland*⁷¹ that an act must be unequivocally and in its own nature referable to a contract in the general nature of the agreement sought to be enforced in order to satisfy the test of part performance. *McBride* was an Australian case.

69 See Boland, above n 53.

70 In the author's home jurisdiction of Western Australia, this is the *Statute of Frauds* (1677) s 4, which applies here by virtue the *Law Reform Statute of Frauds Act 1962* (WA). There are equivalent or similar provisions throughout Australia. See, eg, *The Conveyancing Act 1919* (NSW) s 54A.

71 *McBride v Sandland* (1918) 25 CLR 69.

On the other hand, it was stated in *Steadman v Steadman*⁷² that it need only be proved that it was more probable than not that the acts relied on, were done in reliance on the fact of a contract for the test of part performance to be satisfied. *Steadman* is an English case. The *Steadman* test has not explicitly been disapproved in Australia, but the strong balance of Australian authority is to prefer the test that, to constitute part performance, the acts in question must be unequivocally and in their own nature, referable to a contract of the general nature of the alleged oral agreement: see for example *Lighting By Design (Aust) Pty. Ltd. v Cannington Nominees Pty. Ltd.*⁷³ Adopting this test, the payment of money alone has not been considered to be such an act, but payment of money if combined with other acts may allow a court to find that part performance is satisfied – *Ciaverelli v Pollimeni*.⁷⁴

This hypothetical answer can arguably be produced by a law student armed with a limited inventory of legal-technical skills. An answer like this requires limited understanding of the doctrine of *stare decisis*, and syllogistic logic would have been essential but also adequate. Together, they underline the reasons why the author advanced the two ideas earlier of giving law students fundamental instruction on the doctrine of *stare decisis*, and that law students also be taught the fundamentals of syllogistic reasoning, early in the semester.

The third suggestion offered in this paper is that a more advanced yet still limited lesson on the doctrine of *stare decisis*, be delivered later in the semester. The fact that Australian law students are studying law in the common law tradition, necessitates their having a more detailed understanding of *stare decisis* than is contained in the preliminary *ratio* versus *obiter* exercise.⁷⁵ On the other hand, Professor Krever's pungent remark is pertinent here, that the distinction between *ratio* and *obiter dictum* might yet be for the most part, a 'legal myth'⁷⁶ such as to negate the suggestion of the usefulness of such an exercise. The author thus suggests a utilitarian approach, with instruction occurring in say the sixth or seventh week of a 13 week semester.⁷⁷

A useful exercise is contained in the English text *Unlocking Legal Learning*⁷⁸ whose author posits a number of fictional cases to be considered sequentially. In the first case,⁷⁹ the plaintiff's dog dies from eating yew leaves from the neighbour's tree; in the second case,⁸⁰ the plaintiff's pet rabbit dies as a result of being accidentally shot by the neighbour, the bullet passing through a hole in the fence. Amongst other things, law student readers of this text are directed to explore what the judge in the second case *Bunny*, considered to be the *ratio* of the earlier case *Berry*, and also what they regard to be the *ratio* of *Bunny*. The exercise thus usefully helps students to replicate the mental processes of a judicial consideration of *ratio*, and acquaint them with knowledge of how *ratio* might be 'worked out over time'.⁸¹ This approach may give an adequate grounding for law students to develop and refine during their legal studies. Further refinements on the theory or evolution of *ratio*, such as covered in Professor Hinchy's work,⁸² are more appropriately covered in units such as jurisprudence, or else lessons that can be learnt in more advanced units, rather than being the subject of dedicated instruction in first-year law.

72 *Steadman v Steadman* [1976] AC 536.

73 *Lighting By Design (Aust) Pty. Ltd. v Cannington Nominees Pty. Ltd.* (2008) 35 WAR 520.

74 *Ciaverelli v Pollimeni* [2008] NSW 234.

75 Cook et al, above n 8; Sanson and Anthony, above n 11; James and Field, above n 15.

76 Krever, above n 19.

77 I deliver this lesson in week seven of the semester.

78 Turner et al, above n 43.

79 Ibid 109 '*Berry v Branch*'.

80 Ibid 112 '*Bunny v Browning*'.

81 Cook et al, above n 18.

82 Hinchy, above nn 23 and 24.

CONCLUSION

The fault-line between *ratio* and *obiter dicta* is either indistinct, or is for the most part insignificant, but a fundamental understanding of *stare decisis* is necessary as a bare minimum, for law students in the common law tradition. The gastropod in this paper's title might be recognised as a nod to the dead snail in Mrs. Donoghue's famous ginger beer bottle, and as an allusion to the fact that *Donoghue v Stevenson* has historically often been the case of choice for the ubiquitous *ratio* identification exercise in first-year law. Whilst this exercise remains essential, the author suggests that its parameters and limitations be recognised.

HYPOTHETICAL CASES AS A PEDAGOGICAL TOOL IN CONTRACT LAW STUDIES

*Kenneth Yin and Jennifer Moore**

ABSTRACT

The pedagogy that underpins the method of teaching from cases is eponymously known as ‘the case-method’ (or ‘case-analysis’). First year law units, including contract law, are commonly taught by the case-method in Australia.

The case-method potentially causes difficulties because of first year law students’ inability to harmonise the principles invoked in discrete topics of study as a coherent body of doctrine, and then to appraise their application to the facts of their legal problem. These difficulties are particularly conspicuous in contract law because topics in contract are taught in a customised sequence which invoke principles which first year law students find very difficult to assemble as a coherent whole.

We suggest that bespoke hypothetical judgments, specifically drafted to attract the analysis of doctrine studied in different lessons where recurring difficulties have been encountered, be adopted as a supplement to case-analysis. This method can be readily integrated within the contract law curriculum.

I INTRODUCTION

There are two central themes in this paper. The first theme is that the case-method is a logical way to teach fundamental legal doctrine yet is, at the same time, an inherently deficient method to teach its mastery as a coherent body of principle in contract law.¹ The second theme is that it might be a beneficial adjunct to the case method for the lecturer to create hypothetical cases, based on authentic legal doctrine, to address the deficiency of the case-method in teaching fundamental doctrine in contract law. A ‘hypothetical case’ for the purposes of our analysis, is a bespoke creation to confront such difficulties already identified by the lecturer beforehand. Our model comprises a fundamental judgement upon which we engraft ‘alternative’ scenarios for the students to consider, using the ‘comments’ function on a conventional ‘Word’ program, and finally, a commentary at the foot of the document addressing the legal issues enlivened by those alternative scenarios.

* Kenneth Yin is Lecturer in Law, School of Business and Law, Edith Cowan University, formerly a Solicitor until 1996 and then a Barrister at Francis Burt Chambers. Ken retired from legal practice in 2013. Jennifer is the Law Librarian, Edith Cowan University. Jennifer has been at Edith Cowan University since 2011 during which time she has fostered opportunities to collaborate with members of faculty and the wider university community. Engaging in collaborative research and teaching-learning pedagogy provides a greater appreciation of faculty requirements, and an avenue to enhance the intellectual role of the academic librarian; this work is an example of such collaboration.

1 It is not suggested that these comments are *not* relevant to other law units but that these shortcomings are less conspicuous than in contract law. So, in say, criminal law, modules are less interdependent. For example, offences are taught as discrete elements. By comparison, modules in first year contract law tend to be more interdependent and form part of the building blocks of an indivisible whole of the topic ‘contract formation’. This short discussion is as much as this paper can conveniently cover of the situation with other law units.

In the next section below, we explore selected pedagogical aspects of legal education, especially the nuances of using the case-method in teaching contract law. The section thereafter is about *Hypothetical Cases: a Beneficial Variation to the Orthodoxy of Teaching and Learning Contract Law?* This is divided into three sub-parts: in the first, we identify the pedagogy which underpins the hypothetical case. In the second, we describe the practical steps to create a bespoke hypothetical case. In the third, we offer some suggestions as to the time and place for the application of our method. The end of the paper contains Appendices which contain a selection of hypothetical cases.

II TEACHING CONTRACT LAW

A *The 'Case Method' or 'Case Analysis' Generally*

This paper is posited on the basis that law is learnt from cases, and so this requires us to explore carefully what it means to 'learn law from cases' in the first place. Although we nowadays have clinical courses for law students and most of us supplement law lessons with other material, the predominant mode of teaching law, especially in introductory classes, is case-analysis, a point which Professor Molly Townes O'Brien noted.² Professor Townes O'Brien described appellate decisions as: 'the meat and potatoes of legal education'.³ First year law lecturers would likely agree. Whilst many lecturers do use other material, in particular lecture summaries and texts, most would still regard court decisions to be the staple diet (Professor Townes O'Brien's figurative 'meat and potatoes') of legal education.

The method of learning law from cases is historically attributed to Professor Columbus Langdell, dean of Harvard Law School in the 1870s, who believed that law should be studied as a science and that the process of dissecting a case was a scientific method similar to dissecting a mouse in a laboratory. Discussion via his 'case-method' by Socratic dialogue involved the student in this process and was an integral ingredient of it.⁴ A specifically intended outcome of Langdellian case-analysis was that students should learn to 'harmonise' the outcomes of various cases. Professor Kuan-Chun Chang summarised and described this process and its objectives thus:

[G]uided by the instructor, students learn how to disassemble a decision and analyse its component parts. Students also learn to relate one case to another, to harmonise the outcomes of *seemingly inconsistent cases so that they are made to stand together*.⁵

Professor Chang further elaborated that:

A student must also learn to brief a case, to recognise what the important facts are, what the court decided and why. [I]n addition, the case-method facilitates students' skills to synthesise cases, fitting several together to explain what the law is. All these techniques are the foundations of becoming a lawyer.⁶

2 Bethany Rubin Henderson 'Asking the Lost Question: What is the Purpose of Law School' (2003) 53 *Journal of Legal Education* 48, cited in Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37 (1) *Monash University Law Review* 43, 48.

3 O'Brien, above n 2.

4 Adapted substantially from Myron Moskovitz, 'Beyond the Case Method: It's Time to Teach with Problems' (1992) 42 *Journal of Legal Education* 241, 243; see also the introduction to Kuan-Chun Chang, 'The Teaching of Law in The United States: Studies on the Case and Socratic Methods in Comparison with Traditional Taiwanese Pedagogy' (2009) 4(2) *National Taiwan University Law Review* 1.

5 Chang, above n 4, 7 (emphasis added).

6 Chang, above n 4 citing Suzanne E Rowe, 'The Brick: Teaching Legal Analysis through the Case Method' (1998) 7 *Perspectives: Teaching Legal Research and Writing* 21 (emphasis added).

*B Particular Shortcomings of the Case-Method
in its Application to Teaching Contract Law*

Subsequently, the failure of Langdellian case-analysis to achieve the specifically intended outcome of teaching students to synthesise cases so as to harmonise their outcomes, became an oft-quoted criticism of the method. Professor Byron Moskowitz here said as follows:

Under the case-method, students were not only to derive the holdings from the cases but were critically to appraise the application of the legal principles involved, both to the given situation and to *other possible variant situations*. But we realise now that much of this theory of the case-method *has not in practice been realised*.⁷

Not all Australian law lecturers teach Socratically. The first author personally does so, but not all colleagues, even in the first author's own corridor, do. Nonetheless, as noted by Professor Townes O'Brien earlier, 'case-analysis' or 'the case-method', namely learning law from a study of cases, remains the figurative 'meat and potatoes' of legal education.⁸ In analysing the benefits or otherwise of learning the law from cases, we thus need to quarantine the effects of Socratic dialogue from any discourse, of the shortcomings of case-analysis, given that Socratic dialogue was an integral component of Langdellian case-analysis.⁹ This paper thus next discusses the pedagogy that underpins the idea of 'learning the law from cases' in that more restricted sense.

Professor Kuan-Chun Chang said that the 'main focus' of the case-method was on 'original sources of the law and on the methods of case-analysis and legal reasoning in case law.'¹⁰ Professor Chang noted also that Professor Langdell had himself rationalised his method on the basis that the development of doctrine should be traced via the cases through which it evolved, and so the only way of mastering doctrine was by studying the cases in which it had evolved.¹¹ Further, that only a 'small portion' of cases reported were useful and necessary for the purposes of analysis, and so these would be the ones selected for study.¹²

Professor Scott Anderson provided the following broadly similar rationalisation of why one should learn the law from cases:

The casebook method focuses on cases – judges' written interpretations of the legal authorities they used to decide concrete legal disputes. By reading these cases, the law student is shepherded into the fold of legal reasoners. The lesson is: as judges think, so you must think also. Law students learn to reason by ferreting out the rationales lurking within these cases.¹³

In exploring the idea that learning the law from cases was unsuited to an understanding of the application of the legal principles involved to 'other possible variant situations',¹⁴ it is helpful in turn to digress to discuss cursorily some rudimentary aspects of judicial decision writing. Professor James Raymond of the University of Alabama suggests that judges should: 'begin their judgments with a story, that is, tell who did what to whom.'¹⁵ Given that judgments,

7 Moskowitz, above n 4, 245, quoting verbatim from the *Report of the Committee on Teaching and Examination Methods, Handbook of the Association of American Law Schools*, 85, 87 – 88 (emphasis added).

8 O'Brien, above n 2.

9 Chang, above n 4.

10 Chang, above n 4, 12.

11 Ibid.

12 Ibid.

13 Scott A Anderson 'A Novel Teaching Practice: Using Nonlegal Fiction to Instil Legal Values' 21 (2012) *Perspectives: Teaching Legal Research and Writing*, 28 (emphasis added).

14 Moskowitz, above n 4, 245, quoting verbatim from the *Report of the Committee on Teaching and Examination Methods, Handbook of the Association of American Law Schools*, 85, 87 – 88.

15 Professor James C Raymond 'The Architecture of Argument' (2004) 7 *The Judicial Review* 39, 50.

at least of superior courts, are intended to be available to the public, it makes sense for the reader to know what the underlying facts of the judgment were all about.

This being so, the obvious difficulty for our first-year student is that the court's discussion of doctrine would necessarily be confined to those principles which would be enlivened by the 'story' told by the judge. That restriction would mean that the discussion would provide limited guidance as to the application of those principles to situations which factually are at variance from that story, at least for a novice law student. This would arguably perhaps or inevitably result in one of the shortcomings said to arise from learning the law from cases, namely that the case-method presented a 'limited and inaccurate view of the law', and that it is thereby 'ill equipped' to teach students to deal with situations which are at variance from the facts in the case law.¹⁶

A related point is that it is the treatment of case law as being the primary source of doctrine for the purposes of legal education, rather than the Socratic examination of those cases, which is the case-method's primary failing. Professor Moskowitz opined that Langdellian case-analysis did turn out better lawyers, but this was because of 'interaction with a Socratic teacher' rather than learning law from cases as such, and that the case-method was 'ill equipped' to teach students to solve legal problems, and that it was 'not primarily designed to improve lawyering skills.'¹⁷ He explained that this was because the problems that lawyers had to resolve had not been deconstructed into the 'short, coherent narratives' contained in cases.¹⁸ Professor Chang similarly noted that by confining the study of cases to those which were considered to be 'fundamental' to the doctrine under consideration, the student would only perceive a 'limited and inaccurate view of the law'.¹⁹

The good Socratic teacher might thus, by a study of cases regarded as 'fundamental' to the doctrine under consideration, succeed in guiding students towards a relatively deep understanding of the principles *within* the module then being covered, and students might thereby learn how to harmonise those principles as a coherent body *within* that module. But even such a skilled Socratic teacher would likely struggle to teach students to harmonise the legal principles in the cases being studied in the module then being covered, with principles which are contained in cases *outside* that module.

The student could as a result, experience difficulty in identifying the rule of law which is properly applicable to facts which are at variance from the facts in the 'story' in the case-law. Thus analysed, it is the very pedagogy which underpins the selection of the cases for study, namely that they should be limited to those regarded as 'fundamental'²⁰ to a study of the module then being covered, which has itself caused or contributed to this shortcoming. The first author's experience in teaching contract law suggests that this shortcoming is particularly acute in contract law, because it is the contract law curriculum which has itself exacerbated it.

Experiences of teaching contract law indicates that the failure to *appraise the application of the legal principles involved, both to the given situation and to other possible variant situations*²¹ typically becomes more perceptible when students are confronted with a problem that requires them to consider the application of principles taught within discrete topics of study, and to isolate from them the principle(s) which they consider applicable to their problem. Consistent with case-methodology, cases selected for study are confined to the ones considered

16 Chang above n 4, 17 citing Russell L. Weaver, 'Langdell's Legacy: Living with The Case Method' (1991) 36 *Villanova Law Review* 517.

17 Moskowitz, above n 4, 244.

18 Ibid 245.

19 Chang, above n 4, 17.

20 Ibid.

21 Moskowitz, above n 4.

to be ‘fundamental’ to the doctrine under consideration so that students would only perceive a *limited and inaccurate view of the law*.²²

Let us explore this alleged shortcoming more deeply via a lesson which typically takes place close to the start of the semester, namely ‘contract formation’: Chapter 4 of *Gooley, Radan and Vickovich, Principles of Australian Contract Law*²³ is titled *The Fact of Agreement*. In that chapter, *Offer*²⁴ and *Acceptance*²⁵ are discretely covered, and *consideration* is addressed as a discrete topic in chapter six. Chapter three of *Cheshire and Fifoot*²⁶ is similarly structured, and is divided into: *Agreement – Offer and Acceptance*. *Consideration* is likewise subsequently addressed.²⁷ The order of treatment in *Carter – Contract Law in Australia*²⁸ is broadly similar.²⁹

The sequence is logical. Acceptance must correspond with the offer³⁰ so that, until offer is understood, the concept of acceptance is meaningless. In turn, consideration must be ‘bargained for’³¹ so that without an understanding of ‘bargain’, the study of consideration is sterile. A problem question involving the creation of an agreement by offer and acceptance could attract scrutiny of the following principles: first, that a promise to keep an offer open is not binding unless supported by consideration;³² second, that an offer if accepted whilst open becomes binding upon acceptance;³³ third, that an offer can be withdrawn at any time before acceptance;³⁴ and fourth, that acceptance of an offer is effective only when communicated.³⁵ The inability to harmonise these principles as a coherent whole and appraise their application to a problem, potentially causes confusion which is often expressed in the following puzzled enquiries:³⁶

If the offer can be withdrawn at any time, then how does that fit in with the fact that if it is accepted whilst the offer is open, a binding contract is formed? Why is it that a promise to keep an offer open must be supported by consideration, yet if it is accepted whilst it is open, a binding contract is formed?

The first hypothetical judgment in this paper’s Appendix (*Shonky Pty. Ltd. v John Smith*), was created specifically to confront this particular confusion. Once the law lecturer is conscious of these types of difficulties, it is quite easy to find more examples in lessons in first year contract; to illustrate the ease of this exercise, we will explore another example.³⁷ The principles

22 Chang, above n 4, 17 (emphasis added).

23 J Gooley, P Radan & I Vickovich, *Principles of Australian Contract Law* (LexisNexis Australia, 3rd ed, 2014). This is the prescribed text in my own contract unit.

24 Ibid [4.9].

25 Ibid [4.74].

26 See generally, N C Seddon, RA Bigwood and MP Ellinghaus, *Cheshire and Fifoot Law of Contract* (LexisNexis Australia, 10th ed, 2012), Chapter Six.

27 Ibid.

28 JW Carter, *Contract Law In Australia* (LexisNexis Australia, 6th ed, 2013).

29 Ibid, Chapter Three, ‘Formation of Contract’ generally; ‘Offer’ [3-07]; ‘Acceptance’ [3-18]; Chapter Six ‘Consideration.’

30 *Turner, Kempson & Co Pty Ltd v Camm* [1922] VLR 498. This is a ‘standard’ case and one likely to be studied by the student; see eg Gooley, Radan and Vickovich above n 23, 63.

31 See eg *R v Clarke* (1927) 40 CLR 227; *Australian Woollen Mills Pty Ltd v Commonwealth* (1953) 92 CLR 424, which is another standard case.

32 *Dickinson v Dodds* (1876) 2 ChD 463.

33 *Household Fire and Accident Insurance Co v Grant* (1879) LR 4 ExD 216.

34 *Routledge v Grant* (1828) 130 ER 920.

35 *Tinn v Hoffman* (1873) 29 LT 271.

36 These are actually minimally modified and paraphrased from authentic student responses.

37 These are just a few examples. Once you are looking out for these issues, you should find it quite easy to create your own cases, with a bit of imagination. Please email the author for more illustrations.

are fairly fundamental and would be known to a contract lecturer, so we hope that the somewhat incomplete treatment will nevertheless suffice to enable the reader to follow the reasoning. Consider the following facts:

Adam has lost his dog. He attaches ‘flyers’ to lamp posts in his locality, offering a reward of \$25 for anyone who finds his dog and brings it back to his home (and the flyer contains a detailed description of his dog and address). Janice sees the flyer. Janice, as it happens, is an acquaintance. Additionally, she happens to know Adam’s dog and has seen it at a local park. She therefore telephones Adam and advises ‘I know where your dog is. If you pay me \$500.00 I promise to go and look for your dog and bring it back’. Adam agrees. Is Janice bound to ‘go and look for’ Adam’s dog and bring it back?

The following is a relatively unretouched answer from a student in week two³⁸ of the first semester of law:

No, Janice is not bound to look for Adam’s dog. This is because Adam’s offer led to a unilateral contract – see *Carlill*.³⁹ Applying the principles of a unilateral contract in *Carlill*, if Janice finds Adam’s dog, Adam is bound to pay her the reward. But she is not bound to go and look for Adam’s dog.

The answer is incorrect; as a result of studying ‘offer’ and ‘acceptance’ as discrete modules, a first-year student might commit the error of conflating the respective principles applicable to the creation of a bilateral contract, with executory obligations on the one hand, with the principles applicable to a unilateral contract on the other hand. This would explain the flawed response that as a result of applying the famous principles in *Carlill v Carbolic Smoke Ball Co*,⁴⁰ Adam’s offer could have led to a unilateral contract. If so, then consistent with the principles in *Carlill*, Janice would not have been bound to do anything, but Adam would have been bound to pay the reward if she found his dog.

The likely explanation is that *Carlill* was transported to the forefront of the student’s mind, as the question involved a ‘reward’ of some sort, as did *Carlill*. The student likely performed a piecemeal application of the principles in *Carlill* and thereby failed to harmonise the principles relating to an *offer* as a coherent whole, and to appraise the application of those principles to the problem. The correct answer is that Janice accepted Adam’s offer. At that stage, a bilateral executory contract came into existence, as her promise to look for Adam’s dog was supported by consideration, namely Adam’s promise to pay her the reward. Leaving aside the complications concerning enforcement and damages and whether specific performance would be available, and based only on first principles of contract law, Janice is contractually bound to look for Adam’s dog.

II HYPOTHETICAL CASES: A BENEFICIAL VARIATION TO THE ORTHODOXY OF TEACHING AND LEARNING CONTRACT LAW?

A *The Pedagogy of the Hypothetical Case*

The discussion of the pedagogy here is intended to provide us with practical guidance for the creation of our model of the hypothetical case as covered in the next part of this paper. From the first author’s personal experience, the use of hypothetical cases is uncommon, a fact which

38 This is consistent with the conventional program of study, with *offer* and *acceptance* typically covered in the first two weeks.

39 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

40 *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

Professor Scott Burnham of Montana School of Law also noted.⁴¹ Unsurprisingly then, there is a limited amount of literature on the topic. Professor Burnham suggested that an author should cut and paste parts of real opinions, then rewrite and embellish those parts with language that serves the author's educational objectives.⁴² Professor Burnham also said:

As the authors of one casebook lament, 'judges rarely write opinions with the needs of law students uppermost in their minds ... some professors have remedied this problem by constructing hypothetical cases complete with hypothetical judgments for instructional purposes... Of course, our hypothetical is usually a variation on the facts of an actual case. *How much more efficient the process is when the judges say exactly what we want them to say for the purposes of analysis and synthesis.*'⁴³

Professor Burnham's commentary serves as a useful launchpad in the search for the pedagogical underpinnings of our model. 'Synthesise', by definition, means *to combine so as to form a new, complex product*.⁴⁴ Our model was designed to assist students assemble a coherent body of applicable principle from the content of case law. This process literally is synonymous with 'synthesis' and our model thus shares this same fundamental objective as Professor Burnham's. Professor Burnham's suggestion to cut and paste from a real judgement and embellish those portions to make more efficient the process of analysis and synthesis,⁴⁵ points to the fact that his particular model, was likely created with the aim of simplifying the process of extracting the essence of doctrine from case law.⁴⁶

This paper has already introduced the idea that knowing how to extract legal principles from a case is an essential lawyering skill.⁴⁷ Professor Moskowitz, though a staunch proponent of problem-based learning,⁴⁸ nevertheless accepted that *case-analysis is part and parcel of the problem method*.⁴⁹ The authors respectfully agrees with Professor Moskowitz. Our model is thus dissimilar to Professor Burnham's because, although ours does refer to the content of doctrine, it is not *nuanced* toward providing an *explanation* of doctrine. Rather, our model was created to provide a template to analyse discrete principles to demonstrate how to construct a coherent body of principles from them, and to assist with the appraisal of their application to the facts of the problem. Our model is not designed to simplify the process of case-analysis but contemplates – in fact demands, that we apply it. A preliminary understanding, at least of doctrine, gained by case-analysis, is thus needed, before the student can follow the reasoning in our model.

In the continuing search for our model's pedagogy, the authors consider if our model should be classified as problem-based learning. 'Problem-based learning' ('PBL') is characterised

41 Scott J Burnham 'The Hypothetical Case in the Classroom' (1987) *Journal of Legal Education* 405. He was talking about using the method to teach *doctrine*, since using hypothetical cases to teach *skills* is very common. Consider M. Sanson & T. Anthony, *Connecting with Law* (Oxford University Press, 3rd ed, 2014) uses a hypothetical case involving an insurer to teach ratio and obiter dicta, and another called Lottie v Lottie to teach how to write a case-note. C. Turner and J. Boylan-Kemp, *Unlocking Legal Learning*, (Hodder Education, United Kingdom, 3rd ed, 2012) uses hypothetical cases to teach stare decisis. K. Laster, *Law as Culture* (Federation Press, 2nd ed, 2001) discusses Regina v Ojibway, a well-known fictional case, to illustrate the absurdity of legal logic.

42 Burnham, above n 41, 408.

43 Burnham, above n 41, 405 (emphasis added).

44 Sourced from *The Free Dictionary* <www.thefreedictionary.com/synthesize>.

45 Burnham, above n 41.

46 Or, to use an awful, hackneyed colloquialism, to *dumb it down*. I have inserted it in footnotes – and reluctantly as I loathe the expression, but people seem to understand it well!

47 Above nn 10, 13 and 14.

48 As evident from the title of his work – Moskowitz, above n 4.

49 Moskowitz, above n 4, 262.

by the presentation of a problem as the start of the learning process and the organisation of learning processes in response to those problems.⁵⁰ Some primary characteristics of PBL are the presentation of a problem as a simulation of a real-life problem,⁵¹ and to support the development of abstract thinking and critical thinking.⁵²

Our model cannot be characterised as PBL, as the information in it is presented entirely within the text of the fictional judgement, and thus would not invoke a process of abstract or independent thinking. The ‘alternative’ scenarios in the ‘comments’ loosely do create ‘problems’. In our model, students will however continue to learn the content of basic doctrine via the case method. Our model is designed to be adopted only *after* the content of fundamental doctrine has been introduced, and further, does not have the characteristics of abstract or critical thinking which characterises PBL, as the resolution of the hypothetical problems that they raise require the application of clearly defined doctrine from several stark choices. Our model accordingly does not have the characteristics of PBL.

Since the word ‘hypothetical’ does appear within the name of our model, this paper now turns to the pedagogy of the hypothetical to explore if it shares its pedagogy, which Professor George Raitt described as follows:

The most common method of teaching that I have used in training law graduates in-house is the hypothetical case study. More effective than simple problem-solving, it involves *identifying options and both creating and evaluating choices*.⁵³

The choices of the applicable doctrine in our model are: not ‘open’, do not ‘test the indeterminacy’ of legal analysis, and do not require the reader to ‘create and evaluate choices’.⁵⁴ They are starkly expressed statements of principle and require the student to select the rule that is applicable to their problem. Knowledge of doctrine is needed, but the process does not invoke the creation and evaluation of choices, as the choices are set out at the outset.

One of the alleged shortcomings of Langdellian case-analysis was its failure to achieve its intended outcome of enabling students to ‘harmonise the outcomes of seemingly inconsistent cases so that they are made to stand together.’⁵⁵ The ‘alternatives’ in our model represent a specific attempt to overcome that shortcoming. It however does not do so via the same pedagogies as the various problem-solving methods, or the hypothetical.

Ultimately, the pedagogy of our model can best be described as being an adjunct to case-analysis, as it supplements but does not displace case-analysis. Professor Chang, whose useful work has been cited in some detail earlier,⁵⁶ would likely regard our model as being a pedagogy ‘influenced’ by the case-method⁵⁷ and we respectfully adopt his description.

50 C E Eng ‘*Problem-based learning – educational tool or philosophy*’ University of Newcastle, Australia <<http://www.tp.edu.sg>> citing D Boud, *Problem-Based Learning in Education for the Professions* (HERDSA, 1985).

51 D Boud & G Feletti, *The Challenge of Problem Based Learning* (Kogan) Page Ltd, 2nd ed, 1997, p 2.

52 J. Mackinnon, ‘Problem-based Learning and New Zealand Legal Education’ [2006] 3 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2006/issue3/mackinnon3.html>> (emphasis added).

53 George Raitt, ‘Preparing Law Students for Legal Practice: Or how I learned to stop worrying and embrace uncertainty’ (2012) 37 (4) *Alternative Law Journal* 264, 267 (emphasis added).

54 Ibid.

55 Chang, above n 4.

56 Ibid.

57 Ibid.

B *The Practical Steps Explained*

Since our model is created for the specific objective of helping first-year law students overcome difficulties which have arisen because of their inability to recognise and apply contractual principles covered in separate topics of study, the first substantive step is to actually identify such difficulties. This paper refers to the illustrations above which have tried to show what this means.⁵⁸

Having done so, one needs to give some thought to the physical anatomy of the fictional judgement. Professor James Raymond of Alabama University suggests there is a ‘seven step recipe’ in writing a judgment.⁵⁹ Whilst perfection in judgment writing is not the intended outcome of our model, there are three steps in Professor Raymond’s recipe which should usefully be adopted for our purposes:

- First identify the issues.⁶⁰ This informs the reader of what our ‘judge’ is directing his or her mind to.
- Second, prepare an analysis which identifies the ‘flaw in the losing party’s position’. There is actually a dedicated acronym for this type of analysis, namely ‘FLOPP’!⁶¹ A FLOPP analysis enables the reader to work out why a particular argument was rejected which is nothing more than an inherent aspect of the process by which the reader would ultimately appraise the application of principle to the problem.
- Third, set out a ‘conclusion’. This is critical because the model to be useful obviously must identify the ‘winning’ argument.

We also suggest that our hypothetical case be written in language that *approximates* judicial language – accepting that judges do express themselves differently. The justification for doing so is found in the rationale that underpins the casebook method, namely that students should thereby be ‘shepherded into the fold of legal reasoners’ and that ‘as judges think, so you must think also.’⁶²

If adroitly drafted in the sense of approximating the language and technique that an authentic judicial officer might have applied, our hypothetical judgment *should*, like the real judgments on which they are based, demonstrate just how judges go about the process of applying the law (and policy) to the facts before them.⁶³ The student then comes closer to an understanding of the application of the doctrine. This is an acknowledgement of the justification for learning law from cases in the first place, namely that the student should thereby become ‘shepherded into the fold of legal reasoners’.⁶⁴

Next, we consider the creation of the ‘alternative’ factual situations in the ‘comments’. Recapping that these were created to invite a legal consideration of alternative facts, and are designed to overcome a recognised shortcoming of the case-method of being ill-equipped to train students to apply doctrine to fact scenarios which vary from facts in case-law.⁶⁵ To create these alternative scenarios, it is suggested to dabble with the facts in the original scenario, rather like the way one chooses one’s adventure using a technique popular in contemporary fiction!⁶⁶

58 See the cases the subject of Appendices A, B and C.

59 J C Raymond “The Architecture of Argument” (2004) 7 *The Judicial Review* 39, 42.

60 Ibid.

61 Ibid 44.

62 Anderson, above n 13.

63 Brenda Midson ‘Teaching Causation in Criminal Law: Learning to Think Like Policy Analysts’ 20 *Legal Education Review* 109.

64 Anderson, above n 13.

65 Ibid.

66 Source <https://en.wikipedia.org/wiki/Choose_Your_Own_Adventure>.

Finally, our model incorporates a ‘commentary’, containing suggested resolutions to the questions posed in the ‘alternative’ scenarios. This is an integral aspect of the reinforcement of the learning cycle; in our model, the authors suggest that the document incorporating the entirety of the judgment ‘alternative’ scenarios and associated commentary, be made available to students before class for in-class Socratic discussion in the lecture (not tute). The next part discusses the reasons for this suggestion.

C *The Pedagogical Home of the Method – Where and How?*

The authors suggest that in-class Socratic discussion is the most appropriate time and place for the model to be discussed. The process of conducting in-class Socratic discussion of the hypothetical case essentially brings our model full circle to the original Langdellian model of case-analysis with which it shares its pedagogical underpinnings, including the idea that interaction with a Socratic teacher should ‘turn out better lawyers’.⁶⁷

The template of our model, in its present incarnation at least, is nuanced towards this mode of delivery. Attention in this regard is drawn to the fact that the ‘alternative’ scenarios and the commentary to them, do not contain the full doctrinally complete explanations to the problems posed. This is because consistent with the pedagogy which underpins our model, it is not intended to *replace* case analysis nor to simplify that process, but rather to assist students harmonise the principles associated with discrete modules, so as to facilitate their understanding as a *coherent* body.⁶⁸

The authors also suggest that the fact that the ‘commentary’ to the ‘alternative’ scenarios is already given to the students before class, should not detract from the usefulness of the subsequent in-class Socratic discussion of the same. The commentaries in our own examples, as will be noted from the examples in the Appendix, were drafted in fairly general and loose terms. Consistent with the underpinnings of the method, including in particular the assumption that students would beforehand have at least familiarised themselves with the broad doctrinal content of the applicable principles, expressing the ‘alternatives’ and their associated commentary in this more rudimentary way, would continue to pose a challenge even to those students who have at least familiarised themselves with the associated doctrine, such that Socratic discussion of their content should reinforce their ability to harmonise the associated principles as a coherent whole.

The idea is that the method be offered for in-class Socratic discussion is admittedly nuanced towards the first author’s own teaching methods (the first author teaches Socratically). This paper suggests briefly, that the model can nevertheless quite readily be adapted to other modes of delivery, although the means by which this can be achieved cannot be conveniently explored in an article this size. Simply as food for thought, for the benefit of colleagues who do not teach Socratically, a variation of the method might be to offer the fundamental template, inclusive of the ‘alternative’ scenarios, but *sans* the associated commentary – and to direct the students to provide responses to the ‘alternative’ scenarios as an exercise and thereafter to provide the associated commentary as a sample answer. A more comprehensive answer, than the fairly succinct content of our own model, might be needed if this method is adopted, to give the students adequate guidance, as Socratic discussion of the alternative scenarios would not have taken place in this model.

III CONCLUSION

PBL cannot easily be engrafted within the parameters of the extant legal studies curriculum, as noted by Professor Paul Maharg, whose online blog refers in some detail, to the efforts by

67 Moskowitz, above n 4, 244.

68 This is the central theme in Part II 1A above, generally.

his team at the Australian National University, to implement a problem-based JD.⁶⁹ Professor Maharg said:

It's been a huge team effort over a number of years (to implement the program) and that these efforts were made necessary amongst other things by having to: [d]esign the arcs of problem narratives...whilst attending to the regulatory demands of Priestley, the CALD guidelines and much else.⁷⁰

Empirical evidence is presently absent to support the claim that the methods described here will in truth lead to enhanced learning outcomes, and presently at least, the authors cannot point to any such evidence. It is likely that the reason for the absence of such evidence is the very paucity of its use, a point already noted by Professor Burnham.⁷¹

Our argument that the method will enhance the achievement of learning outcomes in contract law is presently posited on two propositions: *first*, our own knowledge of the difficulties that first-year law students frequently confront as a result of the organisation of the contract law curriculum, and *second*, the expectation that a competent contract law lecturer, with more or less the same experience and familiarity with the curriculum as the authors, will likely recognise the same difficulties that we did, and appreciate that the creation of a bespoke hypothetical case might assist their resolution. Whilst first year law students will differ in their levels of experience and legal knowledge, our argument is posited on the expectation that, by and large, the Australian contract law curriculum is relatively ubiquitous, and that Australian first year contract students will likely face common difficulties.

Finally, regarding the time and effort that it might take to create a typical hypothetical case, the authors noted the time that it took to create Appendix C (*Hoon v Speedy*), which was around three hours. The time taken to create the other examples was not noted, but reconstructing events as best as possible, it probably took a little less time, perhaps closer to two hours for each as *Hoon* covered more areas of controversy. That said, the physical process of drafting the case itself was never the most challenging part of the exercise. Rather, the challenge is in actually identifying the troublesome modules of study where the lecturer feels students might be assisted by the creation of a bespoke hypothetical case.

In turn, the process of identifying these areas of difficulty essentially takes place over a period of years, and is a function both of a lecturer's experience, as well as the responses of their students over that time. The nature of the exercise is that it cannot readily be quantified in terms of a discrete apportionment of time or effort. It is hoped that an opportunity will arise to conduct a more formal evaluation of the method, perhaps as early as next semester 2018 – and if such an opportunity does arise, the outcomes of this evaluation will certainly be shared. Some hypothetical cases have already been prepared with a view to road-testing them in the next semester for this purpose.

APPENDIX A

Shonky Pty. Ltd. v John Smith – [2016] Timbuktu Law Reports 300.

JUDGE NERVY

Shonky Pty. Ltd., the plaintiff in this action, is in the business of selling computers. *Shonky* sold a quantity of computers to the defendant, John Smith, for the sum of \$20,000.00. The defendant – let's call him 'John' – at the urging of his wife, Mary, declined to pay the invoiced amount,

69 Paul Maharg, 'Our online PBL JD at ANU College of Law: A Personal History' (31 May 2016) <<http://paulmaharg.com/2016/05/31/our-online-pbl-jd-at-anu-college-of-law-a-personal-history/>>.

70 Ibid.

71 Burnham, above n 41, 405.

alleging defects in workmanship and negligence. John and Shonky and their solicitors attended a mediation shortly before the scheduled trial. Mary did not attend.

The mediation lasted a day. Mentally and physically exhausted, John offered to settle the action on the basis of a payment of \$18,000.00, being a paltry \$2,000.00 less than Shonky's entire claim of \$20,000.00. *Shonky* did not then accept, but hoping to 'squeeze' a bit more out of John, went through the motions of 'reluctantly considering their position'. John ultimately agreed to keep his offer open for 10 days whilst *Shonky* considered it. The mediation terminated then.

Mary was very unhappy when related these events by John and felt that he had been 'railroaded' by *Shonky*. She urged John to instruct his solicitors to immediately withdraw his offer to pay \$18,000.00 and to advise *Shonky's* solicitors as such. The following crucial telephone conversation took place the next day between John's and *Shonky's* solicitors, who simply for convenience are referenced by their respective clients' names:

John: "Good morning, *Shonky*, listen, the offer we made yesterday is withdrawn."

Shonky: "Are you nuts? Where did you get your law degree from? Woolies? That dopey client of yours was going to keep his offer open for 10 days. There are 9 days to go. I will put you out of your suspense. I've taken instructions. Your client's offer to pay mine \$18,000.00 is accepted. As far as we're concerned, we've got a deal."

The fundamental issue is whether a binding contract came into existence. The competing propositions are: for *John*, that his offer was withdrawn prior to acceptance; for *Shonky*, that acceptance took place whilst John's offer was open with the result that there is a binding contract that John was to pay \$18,000.00 to *Shonky*. The relevant legal principles are:

- A promise to keep an offer open is not binding unless supported by consideration – *Dickinson v Dodds* (1876) 2 ChD 463;
- An offer, if accepted whilst it remains open becomes binding upon acceptance: *Household Fire and Accident Insurance (Ltd.) v Grant* (1879) LR 4 ExD 216;
- An offer can be withdrawn at any time before it is accepted; *Routledge v Grant* (1828) 130 ER 920; and
- Acceptance of an offer is effective only when communicated: *Tinn v Hoffman* (1873) 29 LT 271.

Here, the facts are that John's promise to keep his offer open for 10 days was gratuitous. *Shonky* actually did not suggest that John's promise was supported by consideration, but argued simply that John had promised to keep it open for ten days, and that it was accepted during that time, so that, consistent with the principles in *Household*, a binding contract came into existence.

Shonky's argument is incorrect. John's offer was withdrawn before acceptance, and as the promise to keep it open was not supported by consideration, no agreement could come about by *Shonky's* purported acceptance. Consistent with the principles in *Tinn*, acceptance could only have been effective when communicated, and here, *Shonky's* purported communication took place only when John's offer had already been withdrawn. Judgment should be entered for the defendant.

Comment

Alternative 1: consistent with *Dickinson*, the result of John's agreement to *Shonky's* suggestion that he should be given an iPad if he promised to keep his offer open for 10 days is that the promise to keep the offer open is now supported by consideration. John cannot now withdraw the offer and a binding contract would be formed by *Shonky's* acceptance.

Alternative 2: In this instance, the offer has not in fact *been* withdrawn, although in the absence of consideration to support the promise to keep the offer open, John *could* have withdrawn the offer. *Shonky* however, beat him to the draw, albeit by the proverbial split second – literally – with the result that a binding contract resulted.

APPENDIX B

The following principles are again de rigueur in early contract law studies, and part of classic contract theory.

First, one of several definitions of ‘consideration’ is that it is a right or profit accruing to the promisor, or a forbearance, loss or detriment suffered by the promisee.⁷² Second, the payment of part of a debt or to promise to do so, does not amount to good consideration to support a promise to discharge the whole debt.⁷³ Third, the right to litigate is regarded as something of value.⁷⁴ First year law students not infrequently get the wrong end of the stick by simply confusing the roles respectively of the promisor and promisee, which would then lead to confusion as to the identification of the party which would need to support the promise of the other by furnishing consideration, as a result of which a totally incoherent answer might result.

An experienced practitioner is unlikely to have difficulty; therein lies part of the problem; the first-year student, confused, and frustrated by their inability to understand fundamental concepts, might just discontinue their studies before much longer. The difficulties are easier explained by illustration, as appears in the following hypothetical case which has been created to identify and confront these difficulties. The scenario involves one party ‘settling’ a claim with another and the principles are so trite that the very fact that students could even be confused might surprise some lecturers. But this does happen.

You will see that our fictional judge there has to confront the difficulty caused by the fact that one of the parties (*Slipshod*) has quite erroneously (and irrationally) put their argument on the basis that the other (*Gullible*) cannot resist its claim because the other has promised to pay a lesser sum and that the promise to pay a lesser sum cannot be good consideration to support a promise to pay the whole debt. Putting ourselves in the shoes of our novice first year student, they have failed to understand that it is not *Gullible* who is trying to compel *Slipshod* to keep its promise to accept a smaller sum to discharge the whole of the debt. Rather, it is *Slipshod* who is trying to compel *Gullible* to pay a sum of money and therefore it is *Slipshod* who would need to show that the promise to pay that sum is supported by consideration.

Slipshod v Gullible – [2015] Blackstump Law Reports 201.

JUDGE SHAKY

Daniel *Slipshod*, the plaintiff in this action, who we will call ‘*Slipshod*’, is an accountant. The defendant, Victor *Gullible*, is, or rather was, his client (the relationship ceased not long after the events in question). We will call him ‘*Gullible*’.

Slipshod claims that he was engaged to prepare *Gullible*’s 2016 tax returns, for which he rendered an account of \$10,000.00. There was evidence given at trial, which I accept, that *Slipshod* did not lift a proverbial finger to prepare *Gullible*’s tax returns, and did no more than to take instructions from him. The evidence suggested that *Slipshod* had simply forgotten to prepare *Gullible*’s tax returns. Nevertheless, *Slipshod* belligerently and persistently harassed *Gullible* for payment.

⁷² *Balfour v Balfour* [1919] 2 KB 571.

⁷³ *Pinnel’s Case* (1602) 77 ER 237.

⁷⁴ *Wigan v Edwards* (1973) 1 ALR 497.

The crucial events arise from a brief meeting in which Slipshod claimed that *Look, I can take you to court, but just to save us both the trouble, if you pay me \$8,500.00 we will call it quits. All I need to do is produce my invoice and you will lose if we go to court.*

Gullible protested that *why should I pay you anything for doing nothing* but his protests fell on deaf ears. Rather foolishly, as he himself candidly conceded, *Gullible* agreed to pay *Slipshod* the sum of \$8,500.00. Somewhat belatedly, although perhaps better late than never, *Gullible* sought legal advice, and as a consequence of such advice, has now declined to pay *Slipshod* the sum of \$8,500.00 or any part of it.

The contentions of the parties can be starkly put: *Slipshod* contends that *Gullible* owes him the sum of \$10,000.00 but remains prepared to accept \$8,500.00. He contends that as *Gullible* is 'indebted' to him in the amount of \$10,000.00 the promise to pay less does not discharge the obligation to pay the full \$10,000.00 but nonetheless is prepared 'as I am a generous soul, and I want to let bygones be bygones' to accept the sum of \$8,500.00 in lieu of the invoiced sum of \$10,000.00.

Slipshod accordingly sues for the sum of \$8,500.00 and argues that *Gullible* cannot resist the payment of the same as the promise to reduce the claim is unsupported by consideration on his (*Slipshod's*) part. *Gullible* contends that *Slipshod* never did any work, and obviously knew full well he did not do any work, and consequently that *Slipshod* never had the right to recover the sum of \$10,000.00 or any part of it. He argues that as a consequence he is not bound to pay the sum of \$8,500.00 or any sum and would resist any action to recover that, or any sum at all.

First, I will set out the propositions of law, which are fundamental indeed, but a misunderstanding of them has now led to much fruitless waste of everyone's time, particularly mine.

Consideration can be some right or profit accruing to the promisor, or a forbearance, loss or detriment suffered by the promisee – *Balfour v Balfour* [1919] 2 KB 571. The payment of part of a debt or to promise to do so, does not amount to good consideration to support a promise to discharge the whole debt, that being the primary contention advanced by *Slipshod*. The proposition is both trite and fundamental – see *Pinnel's Case* (1602) 77 ER 237, a classic case in contract. Finally the right to litigate is regarded as something of value. Thus, if A 'settles' an action on the basis that A agrees not to sue B if B pays A some money, less than the amount allegedly 'owed' by B, A provides consideration to support the promise to pay him those monies provided that A ever had a genuine belief that he would succeed at the end of the day against B in the first place – *Wigan v Edwards* (1973) 1 ALR 497.

Slipshod's argument simply starts off with the wrong end of the proverbial stick. The point in contention, unlike *Pinnel*, is that the fact of the debt is the very thing which the parties have put in contention. It is not a *Pinnel*-type case, where the fact of the debt is not in dispute but where the promisee has done nor more than pay, or promise to pay, part of that debt, and whereby he then seeks to enforce a promise on the part of the creditor to discharge the whole of the debt.

In this case, *Gullible* does not seek to argue that *Slipshod* is obliged to accept the sum of \$8,500.00 such that the entirety of the debt is discharged. *Pinnel* was a case in which the promisee was seeking to enforce a promise to discharge a debt because of his (the promisee's) promise to pay a lesser sum, or the payment of that sum. *Gullible's* position is not the same – rather *Gullible* is trying to argue that he is not bound to pay the \$8,500.00. This being so, *Pinnel* is of no relevance at all.

There is another way of putting this argument, namely that the true characterisation of the dispute is that, as it is *Slipshod* who seeks to recover the sum of \$8,500.00, he is in truth the promisee of the obligation to pay it. The question then becomes whether the promise to pay the sum of \$8,500.00 is enforceable.

The facts are that *Slipshod* did not work on *Gullible*'s tax returns, did not believe he did any work, and it could not be said that he believed that he could ever succeed at the end of the day if he had sought to recover the alleged debt.

Slipshod thus never gave up anything of value within the meaning of the definition of consideration as set out in *Balfour*. More specifically, he did not give up a right to litigate, there being none that he enjoyed, within the meaning of *Wigan*. Rather, his entire cause of action is based on a total misconception of *Pinnel*.

I find that *Gullible*'s promise to pay the sum of \$8,500 is unsupported by consideration with the result that *Gullible* is not obliged to pay *Slipshod* that sum or any part thereof. *Slipshod* may well wish to take his chances at trial to sue to recover payment for the work that he says he did, but given my judgment, he would be brave to do so.

Comment

Alternative 1: This puts the boot on the other foot and invokes a straightforward application of *Pinnel*'s case. Unlike the primary scenario, there is here an acknowledged debt. The debtor (*Gullible*) is the promisee who seeks to enforce a promise by the creditor to discharge the whole of the debt by the promise of the payment of a lesser amount. He cannot do so as the promise to discharge the whole of the debt is unsupported by consideration.

Alternative 2: Here, again, turn your mind initially to the question of the identification of the promisee and the promisor. *Who is trying to enforce a promise, and what promise?* *Gullible* does not really have a defence and does owe the money to *Slipshod*. From here, you should be able to determine that it is *Gullible* who is trying to hold *Slipshod* to a promise to accept less than what is due. That would make *Gullible* the promisee (because the promise to is). 'I, *Slipshod* will discharge the debt you owe me if you pay me \$1,500 a month for the next four months.' In turn, you need to address the question of whether by accepting a smaller amount and thus avoiding the trouble and expense of getting any monies at all if *Gullible* went bankrupt, *Slipshod* did obtain a 'practical benefit' within the meaning of cases like *Williams v Roffey*, or *Wolfe v Permanent Custodians*.⁷⁵

Alternative 3: Again, who is the promisee? Can you see now that the person who is trying to hold the other to the promise, is *Gullible* who is trying to hold *Slipshod* to a promise to accept a smaller sum of money. *Gullible* therefore needs to show that in foregoing a bona fide defence, he has provided consideration to support a promise to accept a smaller sum. To answer the question fully, you need to consider the principles in cases like *Nissho Iwai v Shrian Oscar*⁷⁶ and *McDermott v Black*.⁷⁷ Once you have identified the promisee as *Gullible*, the remainder of the analysis should fall into place. The question of whether *Gullible* can resist a claim for the full amount would depend on whether *Slipshod*'s promise to reduce the debt is supported by consideration, which itself will turn on whether *Gullible* had a genuine belief in the bona fides of his own defence.

APPENDIX C

It is *de rigueur* in early contract law studies for students to cover offer, acceptance, counter-offer.⁷⁸ This fictional case and the 'alternatives' to it test carefully test students' understanding of each of

⁷⁵ *Williams v Roffey Brothers & Nicholls (Contractors) Ltd* [1991] 1 QB 1; *Wolfe v Permanent Custodians Ltd* [2013] VSCA 331. These cases are likewise *de rigueur* in first year contract and will be typically covered early in the semester.

⁷⁶ *Nissho Iwai Australia Ltd v Shrian Oskar* (1984) WAR 53.

⁷⁷ *McDermott v Black* (1940) 63 CLR 161.

⁷⁸ Above nn 34 – 40,

these concepts and the fine distinctions between them. Once again, the experienced practitioner unlike the first year law student will likely have no real difficulty; the misunderstanding noted in the fictional case concerning *Financings v Stimson* [1962] 3 All ER 386 for example is a particularly remarkable illustration of an error a novice law student would commit, but not an experienced practitioner. The error of confusing the roles of the parties who might be entitled to rely on its principles happens quite frequently and the discussion based on *Financings* in the case replicates authentic arguments which students have put in class.

Hoon v Speedy [2014] – Timbuktu Law Reports 201

JUDGE ASSIDUOUS

It is alleged that it was a term of a contract between the plaintiff and defendant that the plaintiff would sell to the defendant a car whose air-conditioning worked. The resolution of this case demands a careful analysis of a conversation between the two, which is recounted in full as follows:

The plaintiff: *Are you thinking of selling your car?*

The defendant: *Yep, you thinking of buying?*

The plaintiff: *How much do you want?*

The defendant: *You can have it for \$5,000.00.*

The plaintiff: *Sounds good. I will buy it if the air-conditioning works.*

The defendant: *For goodness sake, which car doesn't have working air-conditioning these days?*

As it turned out, the defendant's car did have air-conditioning – but it did not work.

The first question arising from this conversation is whether the defendant's statement that *you can have it for \$5,000.00* was an 'offer'.

Whilst there are numerous acceptable definitions of an 'offer', we will adopt the following simple one, namely that an 'offer' is a statement of a manifestation of an intention to be bound if acceptance was forthcoming within the time open for acceptance – *Dysart Timbers v Nielsen* [2009] 3 NZLR 160.

The defendant's statement probably does have the character of an offer within the meaning of the *Dysart* definition. There is no suggestion of any ambiguity in its making. The defendant thus likely made an offer to sell his car for \$5,000.00.

The next question logically is whether the plaintiff accepted that offer; the resolution of this question in turn requires an examination of his responsive words *Sounds good. I will buy it if the air-conditioning works*. An acceptance needs to be unequivocal, correspond with the offer and leave nothing to be negotiated – *Turner Kempson & Co Pty. Ltd. v Camm* [1922] VLR. If however the words were in fact unequivocal, those words would not cease to have the quality of an acceptance if (say) the words of acceptance happened to include also words of request – *Dunlop v Higgins* (1848) 9 ER 805. Finally, a purported acceptance, coupled with the imposition of condition has the character of a counter-offer – *Turner Kempson*. A counter-offer is an implied rejection of an offer – *Hyde v Wrench* (1840) 49 ER 132.

In the present case the plaintiff clearly did not accept the defendant's offer. Rather the tenor of his words is that he was imposing a condition on any purported 'acceptance', namely that the air-conditioning worked. The imperative tenor of his words *I will buy it if the air-conditioning works* would not be consistent with the proposition that they were words of unequivocal acceptance, but which also included words of request. The plaintiff thus made a counter-offer, and consistent with *Hyde*, it amounted to an implied rejection of the defendant's offer.

We now turn to the defendant's response: *For goodness sake, which car doesn't have working air-conditioning these days?* The defendant contends that by those words he did no more than make a derisory observation concerning the fact that cars these days were invariably sold with air-conditioning and that he did not mean thereby to be accepting any offer or counter-offer.

We repeat the same legal principles as stated in our discussion of the plaintiff's first response above, and add, further, the proposition that an acceptance requires there to be a *consensus ad idem*, namely the communication of intention as it would be communicated and understood by the other – *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 All ER 34.

We are confident that the tenor of the defendant's words were unequivocal. They were conveyed in layperson's language and were colloquial but conveyed the positive intention to accept the plaintiff's counter-offer. The clear purport of the words – notwithstanding anything that the defendant might have actually intended – was that they would have been understood by the plaintiff as an acceptance of his counter-offer.

In the end result, then, the plaintiff and defendant made a binding contract whereby the plaintiff would buy the defendant's car, and it was a term of that contract that the car would have working air-conditioning. That *should* bring us to the end of the matter, but the defendant in the course of argument also raised a novel point which will now be addressed: the defendant contends that a condition attached to the plaintiff's offer to buy his car, namely that it would have working air-conditioning, and that as it did not, the condition lapsed with the result that he (the defendant) was not bound to sell his car at all.

The defendant insists that his argument is supported by principles contained in *Financings v Stimson* [1962] 3 All ER 386, in which it was stated as follows: an offer might be subject to a condition that a state of affairs would remain unchanged until acceptance. In that case, the relevant offer to purchase a car was said to have been subject to an implied condition that the car would remain unchanged, which lapsed when the car was significantly damaged in the interim.

With respect to the defendant, *Financings* is of no relevance whatever; one surmises that the fact that the subject matter was there a car, as it is here, might have brought the case to the forefront of the mind of the defendant or their solicitor. For a start, the relevant offer in *Financing* was to *buy* a car on the basis that it would remain unchanged until the offer was accepted. In the present case, the defendant is the *seller* who made no relevant 'offer' to sell a car on the basis that the air-conditioning worked! The true characterisation of the transaction here is that the plaintiff and defendant had simply made a contract for the plaintiff to buy the defendant's car on terms that its air-conditioning worked. Thereby analysed, the present case invokes the question of whether an offer (or counter-offer) was made at all, and if so, on what terms – and not, whether an offer was made on some condition and if that condition then lapsed.

Comment

Alternative 1: A useful case that you should have read in last week's lesson is *Harvey v Facey* [1893] AC 552. There, the court made the point that an offer is to be distinguished from a mere provision of information in which case the supposed offeror makes no offer to sell, on the basis of the information provided. In such a case, the mere provision of information as to the price would not be an offer by definition, as there is no promise made to sell at that price. By parity of reasoning if the defendant had said *I won't sell it for anything less than \$5,000.00*. then we might have some argument that no offer was made. The facts in the original scenario thus are significantly different from *Harvey*. The words *you can have it for etc* are significant as they very likely indicate a manifestation of intention to be bound rather than a *mere* indication of the price at which the defendant would be prepared to sell; now hopefully you can see how you need to be very careful in examining the precise words that the parties said in your question.

Alternative 2: Why *might* it make any difference if the subject matter was more complicated?

Your attention is drawn to *Pattison v Mann* (1975) 13 SASR 34 where Bray CJ talked about the fact that the absence of reference to matters which one would normally expect to be the subject of negotiations is a strong indication that no concluded agreement has been reached by purported acceptance of such a statement. If the car indeed was overseas and had to be shipped to Australia, one might expect that there would have been some discussion over who would be responsible for organising its shipment and its cost and for attending to any formalities required etc. etc. The absence of any such discussion might in this case be an indication that no offer was made to sell the car.

Alternative 3: You have already covered the point that an offer needs to be unequivocal. The vague words here just do not have the ring of unequivocalness but were somewhat vague at best. On the basis of this alternative, it is unlikely that there was any acceptance – not that any counter-offer was made – simply that in the end result, there was no acceptance.

Alternative 4: Ask yourselves – *what is the difference between this alternative and the fundamental scenario?* The difference is that in this alternative, an argument could be made that this was simply a case of an acceptance coupled with a request. *Dunlop v Higgins* (1848) 9 ER 805 contained a discussion of such a case and you need to be conscious of the differences between that type of case, and where there was a full-blown counter-offer which is the subject of the original scenario.

Alternative 5: On the basis of this response, the question that you ask yourself is if there was, in truth, a *consensus ad idem* (meeting of the minds). The defendant would have a significantly stronger argument based on these facts that he did, in truth, do no more than offer a view on the custom these days that cars were invariably sold with working air-conditioning, rather than accept the plaintiff's counter-offer to buy his car with working air-conditioning.